THE DEVIL'S DICTIONARY OF CRIMINAL PROCEDURE

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ABSTRACT

Ambrose Bierce's *Devil's Dictionary* cynically redefined words, including some general legal terms, to better reflect reality. For example, Bierce redefined "precedent" as "a previous decision, rule or practice which . . . has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases."

While Bierce's dictionary is entertaining, "beneath the humor and the bitterness of his work lay a sophisticated understanding of the shortcomings" of our legal system. And in addition to being insightful, this satirical style of writing can serve as a valuable teaching tool, particularly for aspiring criminal defense lawyers.

With that educational goal in mind, I present this Article, the *Devil's Dictionary of Criminal Procedure*. Instead of being "struck numb" by unexpected prosecutorial misconduct and judicial ignorance of the law, aspiring defense lawyers must anticipate and brace for the lawless chaos that awaits them in the courthouse. "Since it is invariably unfamiliarity that makes a thing more formidable than it really is," a serious study of this *Devil's Dictionary of Criminal Procedure* "will ensure that no form of adversity finds you a complete beginner."

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I. AMBROSE BIERCE: THE DEVIL'S DISCIPLE

Ambrose Bierce was an American journalist, short-story author, and satirist who wrote primarily in the late 1800s.[1] He was a fierce critic of the American legal system and, in particular, of the judiciary.[2] Bierce's utter disdain for both is nicely captured in this anecdote:

Upon learning that a San Francisco woman had filed suit against the city

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1. *See* THE AMBROSE BIERCE PROJECT: RESOURCES: AMBROSE BIERCE TIMELINE, http://www.ambrosebierce.org/resources.html (last visited Jan. 23, 2025).

2. *See* J. Gordon Hylton, *The Devil's Disciple and the Learned Profession: Ambrose Bierce and the Practice of Law in Gilded Age America*, 23 CONN. L. REV. 705, 709–10 (1991) (quoting two of Bierce's most entertaining fables, titled "Judge and Plaintiff" and "A Defective Petition").

> for injuries suffered when she fell into an open sewer, Bierce is said to have remarked, "It is surprising that the lady should have consented to go into Court; we should suppose that one adventure in a cesspool would suffice."[3]

While Bierce wrote with wit and cynicism, "beneath the humor and the bitterness of his work lay a sophisticated understanding of the shortcomings of the late nineteenth-century bench and bar."[4] And that sophistication is certainly reflected in his best-known work, the *Devil's Dictionary*, in which he redefined numerous words, including some general legal terms, to better reflect reality.[5] For example, the experienced criminal defense lawyer will appreciate Bierce's keen insight in this *Devil's Dictionary* entry:

> PRECEDENT, n. In Law, a previous decision, rule, or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases. As there are precedents for everything, he has only to ignore those that make against his interest and accentuate those in the line of his desire. Invention of the precedent elevates the trial-at-law from the low estate of a fortuitous ordeal to the noble attitude of a dirigible arbitrament.[6]

This Article is my attempt to write a similar dictionary, but specifically for criminal procedure. I hope this short Article will serve two purposes. First, in attempting to replicate Bierce's wit when expressing my genuine cynicism, I hope to provide some entertainment for my fellow criminal defense lawyers—this, in itself, has value.[7] Second, and far more importantly, I aim to provide a serious educational resource for law students, new lawyers, and even experienced lawyers who are new to the practice of criminal defense.

In theory, just as the practice of medicine is based on human anatomy, the practice of criminal law is supposedly based on the statutes, court decisions, and other rules that comprise the body of law known as criminal procedure. But in reality, would-be defense lawyers with merely a legal education and no experience in the trenches of criminal practice simply have no idea of the lawlessness that awaits them.

When stepping into the courthouse to do battle, the new criminal defense lawyer will face a harsh and shocking reality. Many prosecutors will

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3. *Id.* at 706 (citing Matthew O'Brien, *Ambrose Bierce*, *in* 11 DICTIONARY OF LITERARY BIOGRAPHY: AMERICAN HUMORISTS, 1800-1950, at 40–41 (1982)).

4. *Id.* at 707.

5. *See* Ambrose Bierce, *The Devil's Dictionary*, THE COLLECTED WORKS OF AMBROSE BIERCE (1911), http://www.ambrosebierce.org/dictionary.htm.

6. *Id.*

7. *See* David P. Bryden, *The Devil's Casebook*, 3 CONST. COMMENT. 313, 315 (1986) ("Truth to tell, the best aphorisms are the garlicky, cynical ones. If you like garlic, you don't care whether it improves your circulation.").

blatantly cheat.[8] "Bad judges may lack even slight command of the law. They . . . misunderstand fundamental rights, rule prematurely, and generally display egregious ignorance of the rules that supposedly govern their decisions."[9] And worst of all, "many jurists cannot resist playing the prosecutor-in-chief."[10]

Rather than being caught off guard and rendered ineffective by the lawless chaos of the courthouse, aspiring defense lawyers are much better served by the Stoic practice espoused by the philosopher Seneca: "If you want a [lawyer] to keep his head when the crisis comes you must give him some training before it comes."[11] More specifically, "we should be anticipating not merely all that commonly happens but all that is conceivably capable of happening, if we do not want to be overwhelmed and struck numb by rare events as if they were unprecedented ones . . ."[12]

Toward that end, this dictionary of criminal procedure terms, including its use of extensive footnotes to explain and substantiate its cynical entries,[13] will educate and prepare the dedicated reader for the cold reality that lurks in the courtroom. In other words, "since it is invariably unfamiliarity that makes a thing more formidable than it really is," a serious study of this *Devil's Dictionary of Criminal Procedure* "will ensure that no form of adversity finds you a complete beginner."[14]

II. DICTIONARY ENTRIES

ACQUITTAL, **n.** A jury's finding of "not guilty" after a trial. An acquittal is recognized by everyone except the judge and prosecutor, both of whom remain in a post-verdict state of denial. The judge may use the acquittal as evidence of guilt when sentencing the defendant for other charges,[15] and the prosecutor may use the acquittal as evidence of guilt

8. *See generally* Mary Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 314 (2015) (discussing the frequency and severity of prosecutorial misconduct at trial); Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 335 (2007).

9. Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 440 (2004).

10. Michael D. Cicchini, *Combating Judicial Misconduct: A Stoic Approach*, 67 BUFF. L. REV. 1259, 1292 (2019). For numerous examples of this prosecutor-in-chief phenomenon, see *id.* at 1292–96.

11. SENECA, LETTERS FROM A STOIC 67 (Penguin Books 2004).

12. *Id.* at 179. For a more thorough discussion of the Stoic practice of law, see Cicchini, *supra* note 10, at 1270–79.

13. *See* Kenneth H. Ryesky, *Devil's Dictionary of Taxation*, 6 HOUS. BUS. & TAX L.J. 54, 55 (2005) (a tax-law version of the *Devil's Dictionary*, "with legal citations to support its assertions, has great potential to help judges, lawyers, law students and others better appreciate and understand taxation."). For another Biercean tribute, but without the footnotes, see Robert J. Morris, *The New (Legal) Devil's Dictionary*, 6 J. CONTEMP. L. 231 (1979).

14. SENECA, *supra* note 11, at 198.

15. *See* State v. Hole, 2024-Ohio-1811 (Ct. App. 2024) ("[I]t is settled law that a sentencing judge can take into account facts relating to other charges, even charges that have been dismissed or which resulted in an acquittal.") (citing United States v. Watts, 519 U.S. 148 (1997)); *see also* Brenna Nouray, *Quit Using Acquittals: The Unconstitutionality and Immorality of Acquitted-Conduct Sentencing*, 51 PEPP. L. REV. 821, 821 (2024); Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 1 (2016).

when prosecuting the defendant in future cases.[16]

BAIL, n. An arbitrary dollar amount the defendant must pay in order to be released from jail while awaiting trial.[17] When a defendant is unable to pay, the prosecutor may bribe the defendant by offering immediate release to probation in exchange for a guilty plea.[18] An in-custody defendant who resists the bribe and insists on going to trial may end up effectively serving their sentence before, or even without, a conviction.

***BATSON* RULE, n.** A rule that allows the prosecutor to strike a Black juror as long as the prosecutor claims to do so not because of the juror's skin color, but instead for a race-neutral reason such as the juror's hair or facial hair,[19] age,[20] religious beliefs,[21] or occupation.[22] The prosecutor may also strike a Black juror if the prosecutor desires to have only "average, typical, born-and-bred" locals on the jury.[23] Some trial judges may even accept the prosecutor's admission that they struck the juror for being "a Black man with no kids and no family" as an acceptable, race-neutral explanation.[24]

BOND CONDITIONS, n. Unnecessary, non-monetary conditions of release imposed on the defendant,[25] the violation of which results in additional charges (called bail- or bond-jumping charges), which the prosecutor will offer to dismiss in exchange for the defendant's guilty plea to the original, underlying charges that led to the imposition of the bond conditions in the first place.[26]

BURDENS OF PROOF, n. The various levels of confidence the government must instill in the fact finder to prevail at a hearing or trial. These include being convinced by the preponderance of the evidence, by clear

16. *See* Dowling v. United States, 493 U.S. 342, 348, 352–54 (1990) (holding that estoppel, double jeopardy, and due process do not prohibit the state's use of evidence against a defendant "simply because it relates to alleged criminal conduct for which a defendant has been acquitted."). *But see*, Commonwealth v. Dorazio, 37 N.E.3d 566, 566 (Mass. 2015) (rejecting *Dowling* because it "offends the principles of the presumption of innocence, the significance of being treated 'legally innocent' . . . and notions of fairness and finality.").

17. *See* Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 879 (2022).

18. *See* Samuel Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 253–54 (2018) ("[D]efendants accept a plea if it 'entails a lower cost than going to trial,' and pretrial detention makes trial look far more costly to the average defendant.").

19. *See, e.g.*, Purkett v. Elem, 514 U.S. 765, 766 (1995).

20. *See, e.g.*, DeBerry v. Portuondo, 403 F.3d 57, 69 (2nd Cir. 2005) (prosecutor claiming juror was too young); Boyde v. Brown, 404 F.3d 1159, 1170 (9th Cir. 2005) (prosecutor claiming juror was too grandmotherly).

21. *See, e.g.*, United States v. DeJesus, 347 F.3d 500, 508 (3rd Cir. 2003).

22. *See, e.g.*, United States v. Meza-Gonzales, 394 F.3d 587, 594 (8th Cir. 2005).

23. United States. v. Spriggs, 102 F.3d 1245, 1254 (D.C. Cir. 1996).

24. Walker v. Girdich, 410 F.3d 120, 121–22 (2nd Cir. 2005).

25. *See* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 148 (2021) ("Judges impose conditions of release in a near rote fashion—some utilizing a checklist—often with little or no evidence that the condition is necessary to avoid the risk or risks that fuel them.").

26. *See* Amy Johnson, *The Use of Wisconsin's Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619, 622–23 (2018) ("[T]he purpose for charging bail jumping may be to create leverage against defendants to force them to plead to their original charges rather than for punishing them for violating their bond conditions.").

and convincing evidence, or beyond a reasonable doubt. Despite their glamorization in jurisprudential lore, these artificial distinctions are essentially meaningless.[27]

CAUTIONARY INSTRUCTION, n. An instruction telling the jury not to use highly inflammatory evidence, such as details of the defendant's prior conviction, to conclude that the defendant is a bad person or has a negative character trait.[28] A cautionary instruction is about as effective as "throw[ing] a skunk into the jury box" and "instruct[ing] the jury not to smell it."[29]

CHARGE-STACKING, v. Made possible by the legislature's obsession with creating "overlapping, largely duplicative" criminal statutes, charge-stacking is the prosecutorial practice of charging a defendant with multiple counts for a single incident or even a single act.[30] This practice gives the prosecutor the necessary leverage to coerce a guilty plea in exchange for the dismissal of some duplicative charges,[31] thereby ensuring a conviction without having to do any actual work.

CLOSING ARGUMENT, n. For the defense lawyer, a chance to summarize the evidence and argue to the jury that the state failed to prove guilt beyond a reasonable doubt. For the prosecutor, a chance to disparage defense counsel,[32] inflame the jury's passions,[33] shift the burden of proof to the defense,[34] or otherwise infringe on the defendant's rights.[35]

CO-CONSPIRATORS, n. *See* JUDGE and PROSECUTOR.[36]

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27. *See* Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 VILLANOVA L. REV. 1, 2 (2019) ("As in earlier studies, we found that mock jurors' verdicts were not influenced by the different burden of proof instructions . . . .").

28. *See* Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other Acts Evidence*, 70 FLA. L. REV. 347, 355–56 (2018) (quoting and discussing cautionary instructions from several different jurisdictions).

29. Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

30. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313 (2018) ("[T]he prosecutor can inflate the quantity of charges the defendant faces, by piling on overlapping, largely duplicative offenses . . . .").

31. *See* Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1121 (2005) ("Redundant charging can skew plea bargaining . . . . Most obviously, multiple charges intimidate defendants.").

32. *See, e.g.*, State v. Mayo, 734 N.W.2d 115, 121 (Wis. 2007) (prosecutor arguing that "defense counsel's job is to get his client off the hook. That's his only job here, not to see justice is done but to see that his client is acquitted."); *see also* Candice D. Tobin, *Prosecutorial Misconduct During Closing Argument: Florida Case Law*, 22 NOVA L. REV. 485, 494–95 (1997) (cataloguing a variety of personal attacks on counsel).

33. *See, e.g.*, United States v. Doe, 903 F.2d 16, 24 (D.C. Cir. 1990) (prosecutor arguing that "Jamaicans are coming in, they're taking over the retail sale of crack . . . people just like [the defendant].").

34. *See, e.g.*, Adams v. State, 566 S.W.2d 387 (Ark. 1978) (prosecutor asking the jury, rhetorically, "How many witnesses did the defense put on for your consideration?").

35. *See* Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 895–913 (2018) (cataloguing improper prosecutorial arguments).

36. One form of a prosecutor-judge conspiracy is when the prosecutor induces the defendant to plead in exchange for a sentence recommendation that the prosecutor knows the judge will exceed, thus leaving the defendant without the benefit of the plea bargain. As one appellate court admitted,

CONFRONTATION, THE RIGHT OF, n. Usually synonymous with cross-examination and arising when the prosecutor attempts to use hearsay at trial, the existence of this right depends on whether the proffered hearsay is "testimonial" in nature.[37] This will be determined by a judge who has free range to attach any weight to any given factor in a multi-factor balancing test, thus permitting a judge to easily conclude that the hearsay is non-testimonial and, therefore, admissible without cross-examination by the defense.[38]

CRIMINAL COMPLAINT, n. A pleading "evincing miserable draftsmanship and confusing syntax,"[39] which the prosecutor's assistant creates by "cutting and pasting . . . multiple levels of untested hearsay into a single document."[40] Judges accept the complaint as gospel truth and use it to justify a high cash bail and restrictive bond conditions.[41] Judges are so enthralled with the complaint that they may even use it as a substitute for the preliminary hearing.[42]

***DAUBERT* STANDARD, n.** A test to determine the admissibility at trial of an expert witness's testimony.[43] Paradoxically, although it is only a single rule, its application produces two divergent results: the near automatic admission of the prosecutor's expert witness and the near automatic exclusion of the defense's expert witness[44]—even for the same type of expert.[45]

DEFENSE, THE RIGHT TO PRESENT, n. The constitutional right of a defendant to present evidence of innocence at trial.[46] The likelihood that a judge will allow a defendant to actually exercise this right is inversely related to the strength of the evidence the defense seeks to present to the

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such collusion "could destroy the sense of an independent judiciary and create the impression that the court and the prosecutor *are working in conjunction* to deprive defendants of valuable rights." Commonwealth v. White, 787 A.2d 1088, 1093 (Pa. Super. Ct. 2001) (emphasis added).

37. Crawford v. Washington, 541 U.S. 36, 62 (2004).

38. *See* Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1308–10 (2011) (discussing the malleable, multi-factor balancing test).

39. State ex rel. Cullen v. Ceci, 173 N.W.2d 175, 180 (Wis. 1970).

40. Michael D. Cicchini, *The Preliminary-Hearing Swindle: A Crime Against Procedure*, 58 LOY. L.A. L. REV. __, Part II (forthcoming 2025).

41. *See, e.g.*, WIS. STAT. § 969.01 (4) (2021-22) ("considerations in setting conditions of release" include "the nature, number and gravity of the offenses and the potential penalty the defendant faces").

42. *See* Cicchini, *supra* note 40, at Part IV.A.

43. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).

44. *See* Michael D. Cicchini, *The* Daubert *Double Standard*, 2021 MICH. ST. L. REV. 705, 707 (2021) (discussing how in cases that have been appealed in Wisconsin's first decade of the *Daubert* standard, "prosecutors have amassed an undefeated 134–0 record" across all levels of the court system). Nearly as bad, in another study cataloging appellate court decisions, the government amassed "[a]n appellate court record of 105–16 or 114–7, depending on how one defines a defense victory." *Id*. at 714 (internal punctuation and citations omitted).

45. *See id.* at 723 ("Three categories of expert testimony—blood alcohol levels, child interview protocols, and firearms—have passed *Daubert* for the state but failed *Daubert* for the defense.").

46. Holmes v. South Carolina, 547 U.S. 319, 331 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986).

jury.[47]

DUE PROCESS, n. Akin to human anatomy in the practice of medicine or Generally Accepted Accounting Principles (GAAP) in the practice of accounting, due process is a collection of rules and procedures that ensures fairness to the defendant and provides a basic framework for the practice of criminal law.[48] Unlike human anatomy and GAAP, however, these rules and procedures are strictly optional; the prosecutor may violate them and the judge may disregard them at will,[49] thus calling into question the legitimacy of criminal law as a profession.

EXTORTION, n. *See* PLEA BARGAIN.[50]

HARMLESS ERROR DOCTRINE, n. A tactic by which the appellate court "assum[es] without deciding" that the trial judge erred and then concludes that such an error, had it occurred, would have been "harmless," thus allowing the appellate court to affirm the defendant's conviction.[51] This doctrine also serves as a valuable teaching tool: it teaches trial court judges "what they can get away with, not what they ought to do."[52]

HEARSAY, THE RULE AGAINST, n. A rule which, on its face, prohibits the introduction at trial of certain out-of-court statements, regardless of

47. *See, e.g.*, State v. Koepp, 2012 WI App 73, ¶¶ 1–6 (prohibiting a third-party guilt defense even though another male's DNA, and not the defendant's DNA, was found on all three of the murder weapons); *see also* Brett C. Powell, Comment, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1051 (2001) (arguing that, in the context of the wrong-person defense, "the more significant the defense's evidence, the more courts would be compelled to exclude it.").

48. See *Due Process*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/due_process (last updated Oct. 2022).

49. For one example of the lofty principle of due process, *see* Dunn v. United States, 442 U.S. 100, 106 (1979) ("Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."). For the corresponding reality, see Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 506–09 (2020) (explaining how defendants must stand trial for crimes that were never alleged in the criminal complaint or even at the preliminary hearing, thus violating clearly-worded statues and obliterating the concepts of due process and notice).

50. When plea bargaining, prosecutors may also threaten to *add* charges unless the defendant agrees to plead to a charge or charges in the existing criminal complaint. *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 378–79 (1982); Bordenkircher v. Hayes, 424 U.S. 357, 365 (1978). This is the very definition of criminal extortion in some states, but prosecutors make an exception for their own threats, of course. *See, e.g.*, WIS. STAT. § 943.30 ("Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime or offense . . . with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class H felony.").

51. *See, e.g.*, State v. Stamps, 688 N.W.2d 784, ¶ 5 (Wis. Ct. App. 2004) (unpublished) ("assuming without deciding" that an error occurred, and then finding that it would have been "harmless," thus denying the defendant's appeal).

52. Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411, 1415 (2021). To substantiate this author's claim, I can report that, when trying a case in which the prosecutor had failed to turn over key evidence, the prosecutor urged the trial judge to intentionally commit error and allow the evidence because the appellate court would later deem it to be harmless. I argued that the trial judge's job was to follow the law, not to intentionally violate it for the prosecutor's benefit with the hope that the appellate court would later overlook it. I lost that argument.

which party attempts to introduce the evidence.[53] In practice, the judge will irrationally apply the rule to exclude the defendant's evidence of innocence[54] and will dramatically relax or even ignore the rule to permit admission of the prosecutor's evidence.[55]

IMPARTIAL JUROR, n. A juror who is employed by, works at, and receives a paycheck from the prosecutor's office that actually prosecuted the case on which the juror served.[56]

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) HEARING, n. A post-conviction hearing in which the defendant, through post-conviction counsel, seeks a new trial by blaming the defense lawyer for not properly monitoring the prosecutor's cheating[57] or not sufficiently educating the trial judge in basic procedural law.[58] At the IAC hearing, prosecutors and judges are absolved of their sins, and the "[e]rrors of all parties to a criminal trial become attributable to defense counsel."[59]

JUDGE, n. An exalted decision-maker who wears a flowing robe and issues rulings while seated in "an elevated position" in the courtroom.[60] Litigants are frequently seen "bowing and scraping" before judges,[61] while using titles of nobility to address them.[62] Despite such reverence, judges "may lack even slight command of the law" and "display egregious ignorance of the rules that supposedly govern their decisions."[63] Some judges

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53. FED. R. EVID. 801 & 802.

54. *See, e.g.*, United States v. Leonard-Allen, 739 F.3d 948, 952–55 (7th Cir. 2013) (concluding that the trial court erroneously excluded, on hearsay grounds, the defense of lack of knowledge and intent in a fraud case); State v. Prineas, 809 N.W.2d 68, 70 (Wis. Ct. App. 2011) (determining that the trial court erroneously excluded, on hearsay grounds, the defense that the sexual contact was consensual).

55. *See* Hugh M. Mundy, *Course Correction: A Proposal to Limit the Admissibility and Use of "Course of Investigation" Testimony in Criminal Trials*, 2022 CRIM. JUST. L. REV. 135, 138 (2022) (explaining how this backdoor for the admission of hearsay "is reserved only for prosecutors and police officers.").

56. *See* State v. Smith, 716 N.W.2d 482, 484 (Wis. 2006) (holding that the juror "was not objectively biased" in that employment scenario, "as a reasonable person in [her] position could be impartial.").

57. *See, e.g.*, Jordan v. Hepp, 831 F.3d 837, 848 (7th Cir. 2016) (blaming defense counsel for "fail[ing] to object to any of the prosecutor's improper statements," thus branding the defense lawyer deficient while allowing the prosecutor to skate free).

58. *See, e.g.*, Harris v. Thompson, 698 F.3d 609, 644 (7th Cir. 2012) (blaming defense counsel "for the failure to correct the judge's mistake," thus branding the defense lawyer, but not the judge, as deficient).

59. Jon M. Woodruff, Note, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 IOWA L. REV. 1811, 1835 (2017); *see also* Michael D. Cicchini, *Constraining* Strickland, 7 TEX. A&M L. REV. 351, 357 (2020) ("[C]ourts now routinely . . . shift blame to defense counsel for prosecutorial and even judicial misconduct . . . .").

60. Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253, 254 (2017).

61. *Id.*

62. *See* Benjamin Beaton, *Judging Titles*, 29 HARV. J. L. & PUB. POL'Y PER CURIAM 1, 4 (2022) ("Your Honor is a term of nobility that English judges apparently borrowed from French hereditary aristocrats . . . .").

63. Miller, *supra* note 9, at 439–40.

will also take on the companion role of "prosecutor-in-chief" in the courtroom.[64]

JURY INSTRUCTIONS, n. A set of overly verbose, near incomprehensible instructions that the judge reads to the jury.[65] Jury instructions will sometimes put jurors to sleep, will usually be ignored, and will rarely be understood.[66] In order to preserve convictions and avoid retrials, however, appellate courts will pretend that jurors heard, understood, and followed the muddy instructions to the letter.[67]

JURY TAX, n. Akin to an excise tax used to deter the consumption of undesirable products such as cigarettes, the jury tax takes the form of a stiffer sentence for defendants who resist accepting a plea bargain, demand a jury trial, and are convicted of one or more counts.[68] The threat of the jury tax has been highly effective in deterring the use of the jury trial, which has all but been erased from the criminal-law landscape and replaced with the more efficient, assembly-line system of plea bargains.[69]

JURY TRIAL, n. A rare, but serious ordeal in which twelve strangers of unknown backgrounds, beliefs, and biases decide the defendant's fate, often after the prosecutor and judge have suppressed the defendant's evidence of innocence or completely foreclosed any meaningful defense.[70] From the defendant's perspective, consenting to a jury trial is the equivalent of taking "a plunge from an unknown height."[71]

JURY WAIVER, n. A decision to forego a jury trial in favor of a bench trial. This decision is so personal and fundamental that it is left solely to

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64. For examples of judges prosecuting from the judicial throne, *see* Cicchini, *supra* note 10, at 1292–96.

65. *See* Charles M. Cork III, *A Better Orientation for Jury Instructions*, 54 MERCER L. REV. 1, 7 (2002) ("From the perspective of the end user, the juror, jury instructions are often either incomprehensible or misleading at several levels.").

66. *See id.* at 1 ("Research in the past thirty years confirms what judges and lawyers already knew: jurors often do not understand jury instructions . . . .").

67. *See, e.g.*, Samia v. United States, 599 U.S. 635, 646 (2023) (discussing the presumption that jurors "follow the trial judge's instructions"); State v. Shillcutt, 341 N.W.2d 716, 721 (Wis. Ct. App. 1983) (Once a cautionary jury instruction "is properly given by the court, prejudice to a defendant is presumed erased from the jury's mind."); State v. Wright, 719 N.W.2d 910, 918 (Minn. 2006) ("[A]ny potential prejudice was mitigated by the limiting instruction given to the jury.").

68. *See The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How To Save It*, NAT'L ASSOC. CRIM. DEF. LAWYERS (July 10, 2018), https://www.nacdl.org/trialpenaltyreport [https://perma.cc/D4FJ-FPLE]. Even if the defendant first offered to plead to the exact counts for which he is eventually convicted at trial, he may still get hit with the jury tax. *See, e.g.*, United States v. Gaspar-Felipe, 4 F.4th 330, 342–43 (5th Cir. 2021) (denying the defendant credit for acceptance of responsibility because he "put the government to its burden of proof at trial"—even though he only went to trial because the prosecutor had rejected his offer to plead guilty to the precise counts of which he was eventually convicted).

69. *See* Michael D. Cicchini, *Plea Bargains, Prosecutorial Breach, and the Curious Right to Cure*, 89 BROOK. L. REV. 1095, 1099 (discussing how plea bargains, rather than trials, resolve 95%, 99%, or even 100% of criminal cases, depending on the jurisdiction and venue); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

70. *See supra* notes 47 and 54.

71. Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1081 (1976) (quoting John D. Nunes).

the defendant; "not even defense counsel, who is duty-bound to act in [their] client's best interest and is usually in a position to make better decisions, can overrule the defendant's choice."[72] Despite protecting the defendant from their own advocate, the law permits the defendant's adversary (the prosecutor) to override the defendant's decision without rhyme, reason, or explanation.[73]

***MIRANDA* WARNINGS, n.** A statement, read by an interrogating officer to an in-custody suspect, informing the suspect of certain rights such as the right to counsel and to remain silent.[74] The officer will first minimize the importance of the rights[75] and will then read them very quickly,[76] both of which are done in the hope that the suspect will not understand the rights[77] and will therefore waive them.[78] Fortunately for the government, suspects who *do* understand their rights will find it virtually impossible to actually invoke them.[79]

OTHER-ACTS EVIDENCE, n. The defendant's prior bad conduct, usually preceding the charged crime by months or years, which the prosecutor will ostensibly use as evidence of the defendant's intent or motive to commit the charged crime months or years later.[80] In reality, other-acts evidence has nothing to do with its stated purposes and is simply "character evidence in disguise."[81]

PLEA BARGAIN, n. A contract between the state and the defendant in which the prosecutor offers to dismiss some charges and recommend a particular sentence in exchange for the defendant's plea to other charges.[82]

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72. Michael D. Cicchini, *The Myth of Fundamental Decisions*, 112 KY. L.J. 261, 265 (2023-24).

73. *See, e.g.*, FED. R. CRIM. P. 23(a) (allowing the defendant to waive the jury only if "the government consents"); MICH. COMP. LAWS ANN. § 763.3(1) (West 1988) (requiring "consent of the prosecutor"); TEX. CODE CRIM. PRO. ANN. art. 113(a) (West 2011) (requiring "approval of . . . the attorney representing the state"); FLA. STAT. ANN. § 3.260 (West 1993) (requiring "consent of the state").

74. Miranda v. Arizona, 384 U.S. 436, 490–91 (1966).

75. Anthony J. Domanico, Michael D. Cicchini, & Lawrence T. White, *Overcoming* Miranda*: A Content Analysis of the* Miranda *Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 15–16 (2012) (discussing several minimization tactics).

76. *Id.* at 17 ("A repeated-measures analysis of variance revealed that, on average, detectives spoke significantly faster—31% faster—during the *Miranda* procedure than they did in the thirty seconds before or after *Miranda*, $F = 41.43$, $p < .001$, $r = .77$.").

77. *Id.* ("[D]etectives read the *Miranda* warning at an average rate of 268 words per minute (wpm). This finding is worrisome because speech comprehension declines slightly up to a speaking rate of 275 wpm and even more rapidly beyond that point.").

78. *Id.* at 13 ("Twenty-seven of the twenty-nine suspects (93%) waived their *Miranda* rights.").

79. *See* Michael D. Cicchini, *The New Miranda Warning*, 65 SMU L. REV. 911, 922–25 (2012) (discussing how the system is rigged to prevent the invocation of any of the *Miranda* rights); Roseanna Sommers & Kate Weisburd, *"Legally Magic" Words: An Empirical Study of the Accessibility of Fifth Amendment Rights*, 119 NW. U. L. REV. 637, 637 (2024).

80. FED. R. EVID. 404(b).

81. People v. Crawford, 582 N.W.2d 785, 794 (Mich. 1998); *see also* Cicchini & White, *supra* note 28 (empirically demonstrating how other-acts evidence is used as character evidence rather than for its ostensible, stated purpose).

82. *See* People v. Killebrew, 330 N.W.2d 834, 838 (Mich. 1983) ("[T]he practice [of plea

Unlike other contracts, the prosecutor may be permitted to breach the agreement without penalty,[83] and the judge, upon accepting the defendant's plea, may be permitted to set aside the agreement, sandbag the defendant, and impose a sentence greater than previously agreed upon.[84]

PRELIMINARY HEARING, n. A pretrial evidentiary hearing[85] at which the defendant has the right to counsel;[86] the hearing is designed to determine whether probable cause exists to believe the defendant committed the charged felony.[87] However, the use of evidence,[88] the right to counsel,[89] the identification of the defendant as the perpetrator,[90] and even notice to the defendant of the felony they allegedly committed[91] are all optional at the discretion of the Honorable Court.

PRESUMPTION OF INNOCENCE, n. The principle that, unless and until the state proves guilt, the defendant is considered innocent of the charged crime.[92] Paradoxically, once the jury hears the evidence and finds the defendant "not guilty," the presumption of innocence disappears, and the learned judge may replace the jury's actual finding with a presumption of guilt.[93]

PRIVACY, THE RIGHT OF, n. Rooted in the Fourth Amendment, privacy is largely an illusory right, which, even if violated, will not result in

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bargaining] involves the act of self-conviction by the defendant in exchange for various official concessions.").

83. *See* Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 163–69 (2008) (discussing numerous examples of prosecutorial breach).

84. *See* Michael D. Cicchini, *Deal Jumpers*, 2021 U. ILL. L. REV. 1325, 1329–30 (2021) ("[T]he defendant may be in for quite a shock after giving up the valuable right to trial by pleading guilty or no contest. Rather than imposing the bargained-for sentence, judges in some states are free to completely disregard it and instead impose *whatever sentence they wish*.").

85. *See* Paul G. Cassell & Thomas E. Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah's Preliminary Hearings to Felony Offenses*, 4 UTAH L. REV. 1377, 1382–83 (2011).

86. *See* Coleman v. Alabama, 399 U.S. 1, 10 (1970).

87. *See* State v. Rodriguez, 215 P.3d 762, 765–66 (N.M. Ct. App. 2009).

88. *See* Michael D. Cicchini, *Defense Lawyer Decision-Making and the Preliminary Hearing*, 119 NW. U. L. REV. ONLINE 165, 179 (2024) (discussing how some courts allow prosecutors to substitute the criminal complaint for the testimony of actual witnesses with personal knowledge of the event).

89. *See* Cicchini, *supra* note 40, at Part IV.D. (discussing how courts allow defendants to proceed without counsel and without any notification or waiver of the right to counsel).

90. *See* Cicchini, *supra* note 49, at 495 (discussing how courts do not require anyone to identify the defendant as the alleged perpetrator).

91. *Id.* at 506–07 (discussing how courts can bind the defendant over after finding probable cause for *any* felony the magistrate can imagine—even if the state has not charged the defendant with that crime).

92. *See, e.g.*, WIS. J.I. CRIM. 140 (2024) ("The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless, in your deliberations, you find it is overcome by evidence that satisfies you beyond a reasonable doubt that the defendant is guilty.").

93. *See* Nargiz Aghayeva, Note, *Enhancing a Defendant's Sentence Based on Acquitted Conduct Is Against the Presumption of Innocence and Should Be Abolished*, 99 N.D. L. REV. 441 (2024).

the suppression of evidence or any other remedy for the defendant.[94]

PROOF BEYOND A REASONABLE DOUBT, n. The constitutional standard required to convict a defendant at trial.[95] Prosecutors will spend a great deal of their time, energy, and creativity to try to lower or shift the burden,[96] and pro-state judges may even help them by instructing the jurors "not to search for doubt" when deliberating.[97]

PROSECUTOR, n. Known as a "minister of justice,"[98] this government lawyer is often a sophist,[99] and "tries to convict by hook or crook, even when he is himself persuaded of the defendant's innocence."[100]

PROSECUTOR IN A ROBE, n. *See* JUDGE.[101]

SCHEDULING ORDER, n. A potentially important, written court order imposing deadlines for filing witness lists, motions, and other documents. Much like the rules of evidence,[102] the scheduling order will be relaxed or even ignored for prosecutors but strictly applied to defense lawyers.[103] The judge who ostensibly issued the order may not comprehend it and may not

94. Herring v. United States, 555 U.S. 135, 140 (2009) (Even when the court finds that the police *did* violate the defendant's privacy, exclusion of evidence from trial is "our last resort, not our first impulse."); *see also* Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 459–60 (2010).

95. In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . . .").

96. *See* Cicchini, *supra* note 35, at 905–08 (discussing several arguments that lower or shift the burden).

97. WIS. J.I. CRIM. 140 (2024); *see also* Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 COLUM. L. REV. ONLINE 22, 23 (2017) (peer reviewed) (Unsurprisingly, for a second time as this was a replication study, "mock jurors who were instructed 'not to search for doubt' . . . convicted at a significantly higher rate than mock jurors who were properly instructed on reasonable doubt.").

98. MODEL RULES OF PRO. CONDUCT r. 3.8, cmt. 1 (AM. BAR ASS'N 2011).

99. *See* Michael D. Cicchini, *Spin Doctors: Prosecutor Sophistry and the Burden of Proof*, 87 U. CIN. L. REV. 489, 498–517 (2018) (detailing numerous sophistic arguments to lower the burden of proof).

100. Ambrose Bierce, *Some Features of the Law*, *in* THE SHADOW OF THE DIAL AND OTHER ESSAYS (1909), https://www.gutenberg.org/files/25304/25304-h/25304-h.htm#link2H_4_0022; *see also* Cicchini, *supra* note 35, at 895–913 (discussing several improper prosecutorial arguments, made in violation of case law and ethics rules, that are designed to convict the defendant).

101. One example of this phenomenon is the trial judge who encouraged the prosecutor to object several times during the trial, prompting defense counsel to ask, "Judge, do we have two prosecutors here?" Then, whenever the prosecutor would decline to object, the judge would simply "sustain objections never made . . . ." Johnson v. State, 722 A.2d 873, 877 (Md. 1999). For more examples of judges prosecuting from the bench, see Charles Sevilla, *Protecting the Client, the Case and Yourself from an Unruly Jurist*, CHAMPION 28 (Aug. 2004).

102. *See supra* the dictionary entries for "*Daubert* Standard" and "Hearsay, The Rule Against."

103. In my twenty-three years of practicing criminal defense and regularly reading state-court decisions, I can recall only one case in which a judge applied a scheduling order against the prosecutor, and even then, the judge gave the prosecutor multiple chances. *See* Admin, *Yearlong Failure to Disclose Witnesses Merits Exclusion*, ON POINT (Dec. 31, 2015), https://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/yearlong-failure-to-disclose-witnesses-merits-exclusion/ ("Nearly three years after the defense demand, and a year after the first (of two) court orders to produce a witness list, the state still hadn't done so. The circuit court's response? No list, no witnesses.").

have even read it.[104]

SELF-REPRESENTATION AT TRIAL, n. Usually the equivalent of an involuntary, unknowing, and unintelligent guilty plea.[105]

SENTENCING HEARING, n. A post-conviction hearing at which the judge considers all relevant facts and then imposes a "fair and just" sentence.[106] If the facts do not exist to support the judge's predetermined fair and just sentence, the judge may resort to the facts underlying the defendant's prior acquittals[107] and may even pluck the necessary facts from the judge's own imagination.[108]

SEX OFFENDER REGISTRY, n. A mandatory, public registry, which carries severe social stigmas and is designed to keep track of individuals who have been convicted of serious sex crimes—and crimes that have nothing whatsoever to do with sex.[109]

SILENCE AT TRIAL, n. The defendant's constitutional right, the exercise of which cannot be used as evidence of guilt.[110] After the judge instructs the jury to that effect, the prosecutor will promptly use the defendant's silence as evidence of guilt.[111]

SILENCE, PRE-ARREST, n. To the prosecutor and judge, evidence of

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104. Anecdotally, I have had a judge throw a tantrum on the bench because he mistakenly thought that my motion in limine was due before the "judicial pretrial," when his own scheduling order clearly indicated it was due before the "jury status conference," which is held several weeks or even months after the judicial pretrial. I have also had a judge fail to appreciate that his scheduling order specifically extended my statutory deadline for filing other motions. *See* WIS. STATS. § 971.31 (5) (a) (setting a filing deadline of "10 days after arraignment in a felony action *unless the court otherwise permits*.") (emphasis added). Unbeknownst to the judge, his own scheduling order "otherwise permit[ted]."

105. *See* Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 46 (2004-05) (arguing that if defendants were as good as lawyers at making legal decisions, then "criminal defense lawyers, as a class, would have little reason to exist.").

106. *See generally* MICHAEL O'HEAR, THE FAILED PROMISE OF SENTENCING REFORM (Praeger 2017).

107. *See supra* note 15.

108. *See, e.g.*, State v. Devera, Appeal No. 2010AP126-CR, ¶ 11 (Wis. Ct. App. 2010) (sentencing the defendant to prison for previously "flouting conditions of probation and bail," even though the evidence at sentencing showed the defendant had "no criminal record," had "never been on probation" at any time, and, because he "had been unable to post bail," was never subject to bail conditions).

109. *See, e.g.,* State v. Smith, 780 N.W.2d 90, 106 (Wis. 2010) (placing the defendant on the sex offender registry for making his male friend go with him to collect a drug debt, even though "the State, the circuit court, the court of appeals, and [the state supreme court] all agree that there is no allegation that the false imprisonment entailed anything sexual"); *see also* Michael D. Cicchini, *The New Absurdity Doctrine*, 125 PENN. ST. L. REV. 353, 378–81 (2021) (discussing how the absurdity doctrine should prevent the absurd outcome of sex-offender registration for non-sex crimes).

110. *See* Sharon R. Gromer, *Fifth Amendment—The Right to a No "Adverse Inference" Jury Instruction*, 72 J. CRIM. L. & CRIMINOLOGY 1307, 1307 (1981).

111. *See, e.g.*, State v. Jackson, 444 S.W.3d 554, 585 (Tenn. 2014) (commenting to the jury on the defendant's decision not to testify by "walking across the court room, facing Defendant, and declaring in a loud voice, while raising both arms to point at and gesture toward Defendant, 'Just tell us where you were! That's all we are asking, Noura!'"); *see also* Cicchini, *supra* note 35, at 897–99 (discussing numerous improper arguments designed to turn the defendant's decision to remain silent into evidence of guilt).

the defendant's guilt.[112]

SPEEDY TRIAL, n. A constitutional right ensuring the defendant gets a trial within three years,[113] five years,[114] or eleven years,[115] depending on the whims of the judge.

VICTIM, n. Any person who claims to be a victim, regardless of the preposterousness of their allegation, as long as the prosecutor's assistant decides to cut and paste the allegation from a police report into a criminal complaint.[116]

III. GRAB A WEAPON AND JOIN THE BATTLE

This *Devil's Dictionary of Criminal Procedure*, modeled after the great Ambrose Bierce's *Devil's Dictionary*, will (hopefully) accomplish two objectives. First, on a personal level, I aim to bring a smile to the faces of my experienced compatriots who have long battled prosecutors and judges in the trenches of criminal practice. That alone has some value.

Second, and far more importantly, I aim to provide a unique and valuable educational resource for the *aspiring* criminal defense lawyer. "Humor and wit, after all, can make interesting an otherwise dry and dull" subject, "so that it might be better appreciated and understood."[117] And more specifically to criminal law, would-be defense lawyers need to be braced for the lawless chaos that awaits them inside the courthouse. Rather than being blind-sided by prosecutorial misconduct and judicial ignorance of the law, the dedicated reader of these dictionary entries and their footnotes will be better prepared to combat those twin forces.[118]

To adapt the words of the Stoic philosopher Seneca to the practice of criminal defense, "Rehearse them in your mind . . . [W]e should be anticipating not merely all that commonly happens but all that is conceivably capable of happening," so that we are not "overwhelmed and struck numb" by cheating prosecutors and ignorant judges.[119] Once again, because it is

112. *See* Lukas Mansour, *The Sound of Silence: Evidentiary Analyses of Precustodial Silence in Light of* Salinas v. Texas, 105 J. CRIM. L. & CRIMINOLOGY 271, 273 (2015).

113. *See, e.g.*, United States v. Brown, 325 F.3d 1032, 1035 (8th Cir. 2003) (no speedy trial violation for three-year delay).

114. *See, e.g.*, United States v. Tannehill, 49 F.3d 1049, 1054 (5th Cir. 1995) (no speedy trial violation for five-year delay).

115. *See, e.g.*, United States v. Tchibassa, 452 F.3d 918, 927 (D.C. Cir. 2006) (no speedy trial violation for eleven-year delay).

116. The correct term for such a person is not "victim," but rather "complaining witness." However, prosecutors, judges, and lawmakers routinely jump the gun, presume the defendant's guilt, and anoint the complaining witness as a victim. *See Marcy's Flaws*, WISCONSIN JUSTICE INITIATIVE, https://www.wjiinc.org/marsys-flaws.html (last visited Jan. 24, 2025) (collecting numerous articles and other links responding to the popular victims' rights legislation).

117. Ryesky, *supra* note 13, at 54.

118. For more specific strategies and techniques for combating judicial and prosecutorial misconduct, see, for example, Cicchini, *supra* note 10, at 1297–1325 (providing specific measures for combating judicial misconduct); Cicchini, *supra* note 35, at 913–930 (providing specific measures for combating prosecutorial misconduct in closing arguments).

119. SENECA, *supra* note 11, at 179.

"unfamiliarity that makes a thing more formidable than it really is," a serious study of this *Devil's Dictionary of Criminal Procedure* "will ensure that no form of adversity finds you a complete beginner."[120]

To the new criminal defense lawyer, then, grab a weapon and join the battle.

Godspeed.

120. *Id.* at 198.