

STRENGTH IN DEFENSE

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ONE TAKES ON INVINCIBILITY DEFENDING, ONE TAKES ON VULNERABILITY ATTACKING.

Sun Tzu, *The Art of War* (c. 500 B.C.), Book IV.¹

... IT IS EASIER FOR THE DEFENSIVE THAN FOR THE OFFENSIVE TO MAKE ATTACKS FROM SEVERAL QUARTERS, BECAUSE, AS WE HAVE ALREADY SAID, THE FORMER IS IN A BETTER SITUATION TO SURPRISE BY THE FORCE AND FORM OF HIS ATTACKS.

Clausewitz, *On War* (1832), VI, ii.2

WE CHOOSE OUR OWN GROUND FOR THE TRIAL OF STRENGTH. WE ARE HIDDEN ON FAMILIAR GROUND; HE IS EXPOSED ON GROUND THAT IS LESS FAMILIAR. WE CAN LAY TRAPS AND PREPARE SURPRISES BY COUNTER-ATTACK, WHEN HE IS MOST DANGEROUSLY EXPOSED. HENCE THE PARADOXICAL DOCTRINE THAT WHERE DEFENCE IS SOUND AND WELL DESIGNED THE ADVANTAGE OF SURPRISE IS AGAINST THE ATTACK.

Corbett, *Some Principles of Maritime Strategy* (1911), I, ii.



There is something counterintuitive about a general theory of conflict which holds that the defense is inherently stronger than the attack. Corbett³ had to call this observation “paradoxical” because it rings a sour note in Western ears. Indeed, one considering any competitive enterprise, be it warfare, litigation or football, would likely hold that “The best defense is a strong offense.”⁴

While it is true that the attacker picks the time and place at which he will appear, once he has committed himself to that time and place, he has “used up” the advantage of surprise and is now fully exposed. Surprise and the ability to maneuver now shift to the defender, who may pick the time(s) and place(s) of his counter-strokes.

LET'S ILLUSTRATE THESE ABSTRACTIONS BY VISITING A HISTORICAL EXAMPLE.

Both Germany and Japan defended coasts against invasion. Over the objections of senior generals, Hitler demanded that all available resources be deployed at the beach. At Normandy the Allies met immediate resistance but penetrated the vaunted “Atlantic Wall” in one day.⁵

Japanese commanders watched and learned. At Iwo Jima they abjured their signature strategy of heavy beach defense and *banzai* charges in favor of a dug-in defense in the interior, where many elaborate traps and surprises were prepared.⁶ The invasion eventually succeeded due to numerical superiority and lack of Japanese reinforcement⁷ but it took five weeks and the cost was terrible.⁸ Had the defenders

started the battle with more soldiers, or been able to call in reserves, the invasion might have failed. The Japanese exploited the inherent strength of the defensive where the Germans did not.

The defense lawyer is sometimes daunted by being “on the defensive.” Our cultural bias predisposes us to believe that the advantage lies with the prosecutor, who selects what charge to file, what theory of guilt to advance, what witnesses to call, and what exhibits to present (in what order). But the authorities quoted above tell us that the defense lawyer has an advantage inherent in his defensive position.

Corbett implies that information favors the defense. Although discovery rights against the prosecutor are few, they do exist and should be exercised. Particularly in a Texas state case, the information flow is asymmetrical.⁹ Nor should other sources of discovery be neglected. Informal “open file” discovery allows for additional asymmetrical information gathering. Another source is affidavits for search or arrest warrants; these should always be obtained and scoured for information.

When the trial starts, the prosecutor goes first. As early as the *voir dire* he may commit himself to a specific theory. The defense can listen to his questions and “read” how he will try his case. The prosecutor may compound his problem when he makes his opening statement. The opening statement should receive utmost attention; while the prosecutor is giving the jury his “roadmap,” he is informing the defense what he intends to do and what he thinks is important.

The prosecution opens the evidence. Once the prosecutor has revealed his evidence, he has to live with his case-in-chief and is now “exposed” in Corbett’s terms. The defense can tailor its presentation to counter-attack the prosecutor’s evidence.

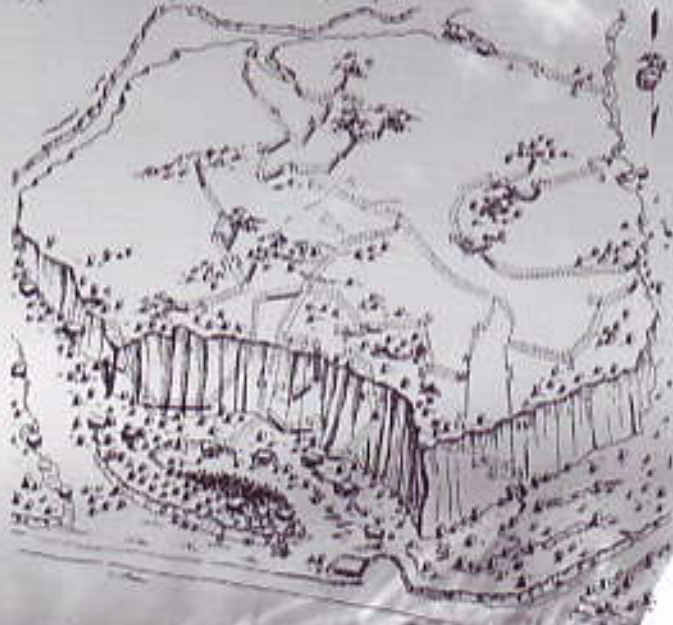


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When a prosecution witness testifies, his testimony is usually presented in an orderly manner, and should contain few surprises. Cross-examination provides various opportunities for counter-attack, both direct (aimed against the testimony of the witnesses) and indirect (aimed at the witness himself). These avenues include the credibility of the witness, as well as possible biases, prejudice, or ulterior motives, even his mental and physical capacities. Courts allow the defense wide latitude in exploring and exploiting these methods of attack.¹⁰

Rather than becoming unnerved by being always on the defensive, the defense lawyer should exploit its inherent strength. Consider taking Corbett's advice. Emulate the Japanese at Iwo Jima, not the Germans at Normandy. Defense may indeed be stronger than attack.

Japanese tunnel system in Hill 362, Iwo Jima



Footnotes

- ¹ www.southcoast.com.
- ² *Trans. Col. J. Graham* (1877), adamson.org.
- ³ Sir Julian Stafford Corbett (1854-1922) was Britain's leading naval strategist at the time of the creation of the modern Royal Navy. He was a lawyer who, upon his retirement from practice, interested himself in naval history and strategy and became the Admiralty's unofficial but most influential adviser. His works are sprinkled with legal maxims and analogies.
- ⁴ Corbett rejected this "misleading maxim" explicitly, *ME 3, ii*. He says no more than that the best defense is a strong defense, it is a tautology.
- ⁵ Ambrose, Stephen E., *D-Day, June 6, 1944: The Climactic Battle of World War II* (1994); see also Ryan, Cornelius, *The Longest Day* (1959).
- ⁶ In fact, all the defenders were underground. See Pross, H. John, *Phantom Soldier: The Enemy's Answer to U.S. Firepower* (2001), Ch. 6; Brady, James, *Flags of Our Fathers* (2000), Ch. 6; Col. Richard Haines, USMC, Ret., personal interview (2006).
- ⁷ Not to mention the fighting spirit of the Marines!
- ⁸ There were about 75,000 Americans vs. 22,000 Japanese. About a third of the Americans became casualties. Brady, *op. cit.*
- ⁹ See, e.g., *Tex. Code Crim. Pro. Art. 39.14(a)*, and compare with the reciprocal discovery in Federal court, *Fed. R. Crim. Pro. Rule 16, Art. 39.14(b)* is the exception, allowing the State to get the names of defense experts.
- ¹⁰ *Hurd v. State*, 725 S.W.2d 249 (Tex. Crim. App. 1987); *Cooper v. State*, 95 S.W.3d 488 (Tex. App. Houston [1st Dist.] 2002, pet. rel'd) (denial of such cross is constitutional error).