

# The Difference in Criminal Defense and the Difference It Makes

Abbe Smith\*

In 1894 I opened an office and went into private practice. . . .  
When I began, it was with the intention of trying only civil  
cases. . . . I had never had anything to do with criminal cases,  
and, like most other lawyers, did not want to take them. . . .

—Clarence Darrow<sup>1</sup>

Strange as it may seem I grew to like to defend men and  
women charged with crime. It soon came to be something  
more than winning or losing a case. . . . [It] meant more than  
the quibbling with lawyers and juries, to get or keep money for  
a client so that I could take part of what I won or saved for  
him: I was dealing with life, with its hopes and fears, its  
aspirations and despairs.

—Clarence Darrow<sup>2</sup>

## I. INTRODUCTION: REPRESENTING MANNY

Last year, I undertook the representation of a young man I will  
call Manny.<sup>3</sup> He called the clinic<sup>4</sup> after he shot a man in the chest in

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workshop.

1. CLARENCE DARROW, *THE STORY OF MY LIFE* 74 (1934).

2. *Id.* at 75-76.

3. The names and some of the details of the case have been altered to protect my client's  
privacy. He has given me permission to write about his case.

the course of an argument. Manny said he hadn't meant to shoot, but when he saw the man reaching for what he thought was a gun, he shot out of fear. He was scared still—he knew he was in serious trouble—and he wanted to turn himself in. Unfortunately, things looked bad: Manny was unlawfully carrying a gun; the man he shot turned out to be unarmed;<sup>5</sup> and, although Manny fired only once, the other man nearly died.<sup>6</sup>

To make matters worse, it turned out that the other man was in the military and had no prior criminal record. Furthermore, Manny was on probation for a prior drug dealing conviction.<sup>7</sup> Although this was his only conviction, the conviction alone would make it difficult for Manny to testify. Moreover, the gun charge in itself qualified as a probation violation.

When Manny came to the clinic, he immediately acknowledged his guilt and inquired about cooperating with the government. Although he had sworn off his former lifestyle, he had been a part of the urban drug scene long enough to have some information that might be of use to the authorities. Manny understood that sharing this information could be dangerous, but he was ready to abandon that life. He was twenty-eight years old. A family man, Manny took his responsibilities as a husband, father, and son seriously. He was married to his childhood sweetheart and had three young kids. He also looked after his ailing mother. The main reason he stayed in the old neighborhood, which had become increasingly rough, was his mother's refusal to move. He had never shot anyone before, and was having trouble accepting what had happened. Manny was carrying a gun on the day of the incident only because someone had threatened

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4. I represented this client with a post-graduate fellow in Georgetown's E. Barrett Prettyman Fellowship Program.

5. In a peculiar variation on the Amadou Diallo case, in which a New York police officer shot an unarmed West African immigrant who was reaching for his wallet, *see* Jane Frisch & Amy Waldman, *Diallo Jurors Begin Deliberating in Murder Trial of Four Officers*, N.Y. TIMES, Feb. 24, 2000, at 1; *see also*, Editorial, *The Diallo Verdict*, N.Y. TIMES, Feb. 26, 2000, at A14. The complainant's version of the events at sentencing was that he reached for a wallet in the waistband of his sweat pants to hand to a bystander because he believed there would be a fistfight.

6. Manny shot the complainant in the chest, causing him to lose part of his lung.

7. Aside from this incident, Manny had done well on probation. He reported regularly to his probation officer, had refrained from drug use, and was holding a steady job with a carpet cleaning service.

him.

Manny turned himself in and accepted a plea agreement that included cooperation. Over the next twelve months he was repeatedly questioned by police and prosecutors, underwent lie detector tests, and testified before grand juries and trial juries.

Finally, it was time for Manny's sentencing. I was feeling cautiously optimistic, and shared this with Manny. A number of things had fallen into place. We had managed to get Manny's probation terminated without further incarceration. We had also arranged for his acceptance into a rigorous five-year residential program that specialized in working with drug offenders. The presentence report recommended the same program, and noted Manny's genuine remorse and strong prospects for rehabilitation. The courtroom was filled with neighbors and friends who had written letters of support attesting to Manny's good character.

I told Manny that under all the facts and circumstances, including his surrender and guilty plea, the mitigating circumstances of the offense, the breadth of his cooperation, and especially, because Manny had now been incarcerated for more than a year, we had a chance of getting the sentence we were urging: time served and probation, conditioned on his completion of the five-year residential program. I told him that the worst he would get was five to fifteen years.<sup>8</sup>

The judge sentenced Manny to twelve to thirty-six years. Under current law and practices he could easily serve thirty.

In the aftermath of the sentencing, I had a hard time coping. I had completely failed my client. I had completely miscalculated the judge's reaction. I felt incompetent, ineffective, and inept. I lost faith in my judgment.

My friend, a civil poverty lawyer, offered comfort. Then she

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8. This meant that Manny would be eligible for parole after five years, with a maximum possible sentence of fifteen years. I told Manny that even if the judge sentenced him to five to fifteen, it was likely that the judge would suspend all but five years. In this way, the judge would ensure that Manny served no more than five years. If the judge did not suspend part of the sentence, Manny's release would be up to the discretion of the United States Parole Commission, and would in all likelihood be considerably more than five years. D.C. Code. § 24-403.1-1 (1998) (revised sentencing law for felonies committed on or after August 5, 2000 as a result of the "Truth in Sentencing Amendment Act of 1998").

chided me: Are you so narcissistic that you never make mistakes? Good point, I said. Yes, I do make mistakes—but not of this magnitude. I reminded her that my client is looking at thirty years. Come on, she said. The best any of us can do is the best we can do. I know, I know, I said. But, I have to be able to rely on my judgment, and my *judgment* is what failed me. My client is looking at *thirty years*. Look, she persisted, I once had a case like this, a case in which I made a serious miscalculation, and I had a hard time getting over it. Then, she thought for a minute. *Thank God it was just money.*

My friend, who is every bit as strong an advocate for her clients as I am for mine, acknowledged that criminal defense is different. No matter how weighty the civil case, it is different from a criminal case. This essay examines this difference between civil and criminal cases, and the difference it makes in legal ethics.

## II. A BRIEF INTERLUDE TO ACKNOWLEDGE MONROE FREEDMAN

The preface to Monroe Freedman's 1990 treatise, *Understanding Lawyers' Ethics*,<sup>9</sup> is characteristically to the point. Acknowledging that some of his views are controversial, he begins by issuing a "Caution and a Challenge" to his readers.<sup>10</sup> He then states simply: "This book presents a systematic position on lawyers' ethics. Essentially, it carries forward a *traditionalist view of the lawyer's role in an adversary system that is rooted in the Bill of Rights.*"<sup>11</sup>

This is a fair summary of Freedman's approach—and a succinct one. It reminds me of Harper Lee's Introduction to the thirty-fifth anniversary edition of *To Kill a Mockingbird*.<sup>12</sup> In a few terse

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9. MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990).

10. *Id.* at ix. Freedman writes:

Students, particularly, should be aware that this book argues one position in a continuing and often heated controversy regarding the lawyer's role. I hope I can persuade you to my point of view. Even if you are not persuaded, however, you can benefit from the presentation, because it challenges you to come to grips with the underlying reasons for the position presented. There is no more effective way to achieve a real understanding of legal rules . . . than to test them against your own moral standards and reasoned judgment.

*Id.*

11. *Id.* (emphasis added).

12. HARPER LEE, *Foreword to TO KILL A MOCKINGBIRD* (35th anniversary ed. 1995)

sentences she basically says the book needs no preface; in sum, it speaks for itself.<sup>13</sup>

Freedman is an unabashed supporter of adversarial advocacy. He describes the adversary system as not simply a model for resolving disputes, but as the embodiment of a “core of basic rights that recognize and protect the dignity of the individual in a free society.”<sup>14</sup> Indeed, Freedman argues that an essential function of the adversary system is to “maintain a free society in which individual rights are central.”<sup>15</sup> As Freedman notes, the rights that comprise the adversary system include the right to personal autonomy, the right to counsel, the right to equal protection of the laws, the right to trial by jury, the right to call and confront witnesses, the right to be free from compelled self-incrimination, and the right to a presumption of innocence. Freedman further notes that the government must bear the burden of proof, and must prove its case beyond a reasonable doubt.<sup>16</sup>

Freedman regards the right to counsel as the most important of all rights because it is inextricably connected to the “client’s ability to assert all other rights.”<sup>17</sup> Through adversarial advocacy the lawyer functions to uphold the client’s rights, and protects the client’s autonomy, dignity, and freedom.<sup>18</sup> Thus, to Freedman, an ethical and

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(1960). Ironically, Monroe Freedman is not a fan of *To Kill a Mockingbird*, or at least of its central character. See Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994). I disagree with Freedman on this; I like Atticus Finch, both the man and the myth. See Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive, New Age Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 51-52 (1993) [hereinafter *Rosie O’Neill Goes to Law School*].

13. See Lee, *supra* note 12, at *Foreword* (1993):

Please spare *Mockingbird* an Introduction. As a reader I loath Introductions. To novels, I associate Introductions with long-gone authors and works that are being brought back into print after decades of interment. Although *Mockingbird* will be 33 this year, it has never been out of print and I am still alive, although very quiet. Introductions inhibit pleasure, they kill the joy of anticipation, they frustrate curiosity. The only good thing about Introductions is that in some cases they delay the close to come. *Mockingbird* still says what it has to say; it has managed to survive the years without preamble.

14. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, at 13.

15. *Id.*

16. *Id.* at 13.

17. See *id.* (citing Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1957).

18. FREEDMAN, *supra* note 9, at 15-17. As Freedman notes: “One of the essential values of a just society is respect for the dignity of each member of that society.” *Id.* at 57.

professionally responsible lawyer is an ardent civil libertarian who, in zealously representing individual clients, also upholds the political philosophy underlying the American system of justice.<sup>19</sup>

In Freedman's view, the central concern of a system of lawyers' ethics is to strengthen and protect the role of the lawyer in enhancing individual dignity and autonomy through advocacy.<sup>20</sup> This is a constant theme throughout Freedman's considerable body of work.<sup>21</sup> To use the phrase currently in vogue, which he himself may have coined, Freedman is an eloquent champion of "client-centered" lawyering.<sup>22</sup> Thus, to Freedman, lawyers do justice when they pursue their clients' interests with devotion and zeal.<sup>23</sup>

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19. *Id.* at 13-17.

20. *Id.* at 42. For a slightly different exposition of this same view, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986) (developing a theory of client autonomy as a justification of partisan representation); *but see* William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (questioning whether client autonomy is achievable).

21. See, e.g., FREEDMAN, *supra* note 9; MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); MONROE H. FREEDMAN, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); MONROE H. FREEDMAN, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); MONROE H. FREEDMAN, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987); MONROE H. FREEDMAN, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995); MONROE H. FREEDMAN, *The Ethical Danger of "Civility" and "Professionalism"*, 6 NYSBA CRIM. JUST. J. 17 (1998).

22. See generally FREEDMAN, LAWYERS ETHICS IN AN ADVERSARY SYSTEM, *supra* note 21, at 43-50; see also FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 9, at 87 (noting that "the ethic of trust and confidence is client-centered"); MONROE H. FREEDMAN, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 56 (1991) ("My view of lawyers' ethics is . . . client-centered, emphasizing the lawyer's role in enhancing the client's autonomy as a free person in a free society."). Fred Zacharias also credits Freedman with developing the theory of client-centered lawyering. See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1319 (1995) ("Monroe Freedman led the intellectual development of this theory, characterizing client orientation as a constitutional guarantee and as an essential element in upholding the dignity of individuals."). For clinical scholarship on client-centeredness, see, for example, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) [hereinafter BINDER, LAWYERS AS COUNSELORS]; DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974); Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97 (1985); Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697 (1992); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987).

23. See Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1727 (2002) ("In a free society . . . we lawyers act in the interests of justice not

My own view of criminal defense lawyering owes much to Monroe Freedman. I agree with his “traditionalist view”<sup>24</sup> of criminal defense ethics as a lawyering paradigm in which zealous advocacy and the maintenance of client confidence and trust are paramount. Simply put, zeal and confidentiality trump most other rules, principles, or values.<sup>25</sup> When there is tension between these “fundamental principles”<sup>26</sup> and other ethical rules, criminal defense lawyers must uphold the principles, even in the face of public or professional outcry.<sup>27</sup> Although a defender must act within the

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by acting as a self-appointed moral elite, but by serving our clients zealously within the rule of law.”). For criticism of zeal as the foundational principle of legal ethics, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50-148 (1988); see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

24. See FREEDMAN, *supra* note 9, at ix.

25. See, e.g., Abbe Smith, “*Nice Work If You Can Get It*”: “Ethical” Jury Selection in *Criminal Defense*, 67 FORDHAM L. REV. 523 (1998) (arguing that the ethic of zealous defense should trump the ideal of racially blind jury selection) [hereinafter Smith, *Nice Work If You Can Get It*]; Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000) (arguing for zealous advocacy on behalf of those who commit the most repugnant crimes) [hereinafter Smith, *Defending Defending*]. Criminal defense ethics are a much-considered topic in legal ethics treatises. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 244-93 (3d ed. 2001). The suggestion that criminal defense ethics can be reduced to zeal and confidentiality may seem unduly simplistic. Still, there is solace in simplicity. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 8-9 (1975):

The job of the lawyer . . . is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer’s assistance, or the avenues provided by the law to achieve that which the client wants to accomplish. The lawyer’s task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses. In this way, the lawyer as professional comes to inhabit a simplified universe . . . .

[A] simplified, intellectual world is . . . often a very comfortable one to inhabit.

26. See FREEDMAN, *supra* note 9, at 65, 87-88. For a discussion of “principlism” as an approach to legal ethics, see Paul Trembly, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 503-08 (1999).

27. Lord Brougham provided the classic statement of this ideal:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty: and in performing his duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

See FREEDMAN, *supra* note 9, at 65-66 (quoting TRIAL OF QUEEN CAROLINE 8 (Joseph

bounds of the law,<sup>28</sup> he or she should engage in advocacy that is as

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Nightingale ed., 1821)); *see also* Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 4 (1951-52) (noting approvingly that Brougham's idea of advocacy "has become the classic statement of the loyalty which a lawyer owes to his client. . . ."); ALAN DERSHOWITZ, *THE BEST DEFENSE* xv n.\* (1982) (quoting Brougham with favor and noting that zealous advocacy is "neither a radical nor a transient notion"). Monroe Freedman offers his own version: "Let justice be done—that is, for my client let justice be done—though the heavens fall. That is the kind of representation that I would want as a client, and it is what I feel bound to provide as a lawyer." FREEDMAN, *supra* note 9, at 66. Alan Dershowitz has his: "Once I decide to take a case, I have only one agenda: I want to win. I will try, by every fair and legal means, to get my client off—without regard to the consequences." DERSHOWITZ, *supra* at xv.

For legal scholarship criticizing Brougham's concept of advocacy, see Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 317 (1998) [hereinafter Alschuler, *The Ethics of Lord Brougham*]; Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Simon, *Ethical Discretion in Lawyering*, *supra* note 23; Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

28. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) [hereinafter MODEL CODE] ("A lawyer shall represent his client zealously within the bounds of law."). *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1999) [hereinafter MODEL RULES]:

A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized by a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

My approach to the phrase "within the bounds of law" is primarily pragmatic. I would not want to engage in conduct that would jeopardize my ability to practice law and serve clients. *See* GEOFFREY COWAN, *THE PEOPLE V. CLARENCE DARROW* (1993) (recounting and examining Clarence Darrow's 1912 prosecution for allegedly bribing a juror in the course of defending labor union activists accused of murder); Fredric Dannen, *Defending the Mafia*, THE NEW YORKER, Feb. 21, 1994, at 64 (examining the law practice and legal troubles of Gerald Shargel, a prominent criminal lawyer who often represents alleged members of organized crime).

Though mindful of the bounds of law, I will not cower in the face of unjust law, but will test and challenge it. *See, e.g.,* Smith, *Nice Work If You Can Get It*, *supra* note 25, at 531 (arguing that *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Georgia v. McCollum*, 507 U.S. 16 (1993), require criminal defenders to abandon their ethical obligation of zealous advocacy); *see also* J. ANTHONY LUKAS, *BIG TROUBLE* 325 (1997) (noting that Clarence Darrow's "principal allegiance had never been to the law itself [because of its] 'cant and hypocrisy'" and quoting Darrow: "'The law? . . . To hell with the law! My business is to save this defendant from the law!'").

Of course, historical context is critical. Notwithstanding Clarence Darrow's acquittal of bribery, he may well have committed the offense and believed his conduct justified: "Do not the rich and powerful bribe juries, intimidate and coerce judges as well as juries? . . . Why this theatrical indignation against alleged or actual jury tampering in behalf of 'lawless' strikers or



close to the line as possible, and, indeed, should test the line, if it is in the client's interest in doing so.<sup>29</sup>

It is important to note that no matter how far a defender is willing to go to pursue an accused's interests, or to maintain his or her confidence and trust,<sup>30</sup> this approach is consistent with the *traditionalist*, or "Freedmanian" view. As a defense lawyer, I have often derived comfort and support from Freedman's writings on legal ethics, and on more than one occasion from Monroe Freedman himself by cell phone in the thick of trial. I know that I am not alone in this regard. His often "lonely battle to prevent the subversion of the adversarial quest for justice"<sup>31</sup> has emboldened and ennobled

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other unfortunate victims of ruthless capitalism?" *Id.* Criminal defense at the millennium has its own context. *See generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (discussing persistently race and class-based law enforcement); *see also* MARC MAUER, RACE TO INCARCERATE (1999) (discussing the over-incarceration of a generation of Americans).

29. *See* ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996) ("What a defense attorney 'may' do, he *must* do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client's best interest . . ."). Of course, it is ethically permissible to take a legal position or pursue a strategy that is creative or contrary to existing law. *See* MODEL RULES, *supra* note 28, R. 3.1 (2000). A lawyer may always make a "good faith argument for an extension, modification or reversal of existing law." *Id.*

30. I have argued that it is ethically defensible to put forward a defense theory that exploits racism, sexism, homophobia, or ethnic bias, *see* Smith, *Defending Defending*, *supra* note 25, at 948-57; a defense theory that has scant support in the record, *id.* at 948; and a defense theory that perpetuates racial stereotypes, *see* Abbe Smith *Burdening the Least of Us: "Race-Conscious Ethics" in Criminal Defense*, 77 TEX. L. REV. 1585 (1999). I have also argued that it is ethical to engage in race or sex-based jury selection. *See generally* Smith, "Nice Work If You Can Get It," *supra* note 25. I have even argued that it is ethical to aggressively cross-examine truthful rape complainants though it might pain the complainant and perpetuate sexism. *See* Smith, *Rosie O'Neill Goes to Law School*, *supra* note 12, at 42-45.

31. Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 339 n.\* (1994).

Critics have roundly attacked Freedman for his theory of lawyers' ethics. *See* FREEDMAN, *supra* note 9, at ix. The typical charge is that Freedman is an advocate of "extreme partisanship." Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 169 n.5 (1997); *see also* Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 166 n.6 (1996) [hereinafter Zacharias, *The Civil-Criminal Distinction*] (calling Freedman "the guru of proponents of super-aggressive lawyering").

Like many defenders, I am unmoved by complaints of *extreme* partisanship or so-called "overzealousness." *See* DERSHOWITZ, *THE BEST DEFENSE*, *supra* note 27, at 410 ("I have been accused several times of overzealousness. I confess my guilt. In a world full of underzealous, lazy, and incompetent defense lawyers, I am proud to be regarded as overzealous. . .").

many lonely adversarial advocates.

The only issue I take with Freedman is within his Preface to *Understanding Lawyers' Ethics*, in which he claims that “[f]or the most part,” his approach “also corresponds to the ethical standards that are observed in practice by a large proportion of the bar.”<sup>32</sup> Unfortunately, this statement may not be accurate. My chief concern about indigent criminal defense is that most criminal lawyers do not engage in zealous advocacy and too often betray client confidences, sometimes for so-called “moral” reasons, but mostly out of institutional expedience or laziness.<sup>33</sup> There are also structural reasons: too few resources, too many clients, and fee systems that discourage zealous advocacy.<sup>34</sup>

As Professor David Luban has noted, the right to counsel “is hardly an entitlement to robust advocacy,”<sup>35</sup> and often means nothing more than a “warm body” seated beside a defendant.<sup>36</sup> Actually, a warm body might be benign compared to some of the dangerous, dim-witted defenders that roam the criminal courts.<sup>37</sup> Sadly, the

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Partisanship and zeal are well-established components of the adversarial ethic, especially in a criminal context. See DEBORAH C. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 49-80 (2000). In my view, there is no such thing as *overzealous* representation. There is zealous representation such as a lawyer using lawful means to achieve a client’s lawful ends, and there is conduct outside the bounds of law. See MODEL CODE, *supra* note 28, Canon 7-1; MODEL RULES, *supra* note 28, R. 1.3 cmt. As Freedman has noted, the answer to how far an advocate should go in any given situation is often more “tactical” than ethical. See FREEDMAN, *supra* note 9, at 74.

32. FREEDMAN, *supra* note 9, at ix.

33. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762-63 (1993).

34. See RHODE, *supra* note 31, at 60-63.

35. Luban, *supra* note 33, at 1759.

36. *Id.* at 1740. Luban portrays “a world of lawyers for whom no defense at all, rather than aggressive defense or even desultory defense, is the norm . . . .” *Id.* at 1762; see also Vanessa Merton, *What Do You Do When You Meet A “Walking Violation of the Sixth Amendment,” If You’re Trying to Put That Lawyer’s Client in Jail?*, 69 FORDHAM L. REV. 997, 1029 (2000) (noting the “low, low threshold for effective assistance”); Alan Berlow, *Requiem for a Public Defender*, AMERICAN PROSPECT, June 5, 2000, at 28 (noting that the “Supreme Court has . . . [set] a standard of competence for attorneys so ridiculously low that trained circus bears very nearly qualify.”). This is hardly a new phenomenon. See David Bazelon, *Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) (noting that, since taking the bench in 1950, he has seen few indigent defendants receive effective assistance of counsel, something “the criminal justice system goes to considerable lengths to bury”).

37. Professor Vanessa Merton brilliantly depicts one of these defenders in a recent article:

promise of *Gideon v. Wainwright*,<sup>38</sup> that “every [person] charged with a crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense,”<sup>39</sup> remains unfulfilled.<sup>40</sup>

### III. THE RECENT INCLUSION OF CRIMINAL DEFENSE IN THE CRITIQUE OF ADVERSARIAL ADVOCACY

In the past two decades, there has been a growing challenge to the traditional conception of adversarial advocacy. The main criticism is that adversarial advocacy is *too adversarial*; it needs to be softened or at least modulated. The critics argue that, in order for things to change, lawyers need to stop being so client-centered: If lawyers refrained from pursuing every lawful avenue in advancing a client’s

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All along, he had been leaning against a wall, scribbling with a pencil on a stack of files. He had no briefcase or satchel or backpack to hold a handy CPL or Penal Law. He was, to put it politely, unkempt: flushed, perspiring, uncombed, unshaven, shirt-tails hanging out of his trousers. My first thought was he must be unusually dedicated to come to court when he was so obviously sick with the flu.

As it developed, that didn’t seem to be the problem . . . .

“OK, here it is—Sanchez, yeah, another car thief. Probably young, though, you know? Maybe not such a bad kid—maybe he does it to support his dear mother. (Head thrown back, in a gleeful guffaw over his own wit.) What are you looking for? These guys don’t care if they get a conviction as long as there’s no jail. How ‘bout a fine? He can always steal another car to pay it.” (Another raucous guffaw that descended into a giggle. Then he started working on something in his ear.)

Merton, *supra* note 36, at 1007-08 (footnotes omitted).

38. 372 U.S. 335 (1963).

39. ANTHONY LEWIS, *GIDEON’S TRUMPET* 205 (1964).

40. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835, 1837 (1994) (“More than sixty years after *Powell* and thirty years after *Gideon*, this task remains uncompleted, the dream unrealized.”); see also Randy Bellows, *Notes of a Public Defender*, in PHILLIP B. HEYMANN AND LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 96 (1988):

[Many court appointed lawyers] simply do not care. They do not investigate. They do not file motions They do not talk to their clients. They do not think through a defense, prepare an opening statement, subpoena witnesses, or do any of the other myriad tasks necessary to adequate representation. Sometimes on the day of trial, they cannot even recognize their clients. For a prosecutor, trying a case against one of these lawyers is like shooting fish in a barrel.

interests, and instead considered the interests of third parties and the public, the legal merit of a client's position, and concepts such as "morality" and "justice," then we would all be better off.<sup>41</sup> There are many legal scholars, far more scholars than practitioners, who express variations of this view.<sup>42</sup> Although scholarly critiques of adversarial advocacy have generally exempted criminal defense,<sup>43</sup> there are still several prominent scholars who challenge this exemption. Most of these scholars have been longstanding critics of

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41. For a good example of this view as it has evolved, see WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998) [hereinafter SIMON, *THE PRACTICE OF JUSTICE*]; William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1703 (1993); Simon, *supra* note 23; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29. Simon believes that not only would such a revised, "justice-oriented" professional ethic further social justice, it would make lawyers happier and more fulfilled. *Id.* at 109-37.

42. *See, e.g.*, GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995) (urging a focus on victims); LUBAN, *LAWYERS AND JUSTICE*, *supra* note 23 (arguing against lawyers viewing role obligations as trumping ordinary moral sentiments); RHODE, *supra* note 31, at 81-115 (arguing against adversarial excess and in favor of more "truth" and "justice"); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001) (arguing against the use of race and "racialized narratives" in criminal trials); Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (same); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) [hereinafter Alfieri, *Lynching Ethics*]; Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999) (same); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998) (same); Carrie Menkel-Meadow, *Is Altruism Possible In Lawyering?* 8 GA. ST. U. L. REV. 385 (1992) (arguing for rejecting the adversary paradigm in favor of altruistic lawyering); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, *supra* note 27 (arguing the limits of adversarial advocacy); *see also* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990); Zacharias, *supra* note 22; John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L.Q. 429; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Wasserstrom, *supra* note 25, at 9-15. A prominent former federal judge also wrote an important, oft-cited critique of adversarial excess. *See* MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980).

43. *See, e.g.*, Wasserstrom, *supra* note 25, at 12:

I do believe that the amoral behavior of the *criminal* defense lawyer is justifiable . . . . But this does not, however, justify a comparable perspective on the part of lawyers generally. Once we leave the peculiar situation of the criminal defense lawyer, I think it quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate.

*See also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985).

zealous advocacy in criminal defense, so their argument against a criminal defense exemption is not entirely new or unexpected. I will briefly discuss the work of three of these scholars.

*William Simon*

Chief among those who reject the criminal defense exemption is Professor William Simon, who, in his 1993 essay, *The Ethics of Criminal Defense*,<sup>44</sup> and 1998 book *The Practice of Justice*,<sup>45</sup> extended his critique of the adversarial ethic in legal practice<sup>46</sup> to criminal defense. In these two works and others, Simon urges a unified system of ethics, the primary focus of which is the pursuit of “justice,” regardless of the field of practice.<sup>47</sup>

To Simon, justice is a normative concept, not unduly subjective, and readily apparent to lawyers.<sup>48</sup> Though other people may find the meaning of justice elusive,<sup>49</sup> Simon believes that lawyers know justice when they see it,<sup>50</sup> or at least have the means to know it.<sup>51</sup>

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44. See William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

45. SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41.

46. *Id.*

47. See *id.* at 1-25. For a characteristically thoughtful critique of Simon’s *THE PRACTICE OF JUSTICE*, see David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1999).

48. For a critique of Simon’s concept of justice from a communal and biblical perspective, see Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon’s Practice of Justice?*, 51 STAN. L. REV. 903 (1999).

49. See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 449 (1997) (noting that “larger macro justice issues do not lend themselves easily to rule or standard drafting”); see also Stanley Fish, *Condemnation Without Absolutes*, N.Y. TIMES, October 15, 2001, at A23 (arguing in favor of postmodern relativism even after the events of September 11, and noting that “invoking the abstract notions of justice . . . to support our cause wouldn’t be effective . . . because our adversaries lay claim to the same language.”).

50. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating with reference to hard core pornography, the now famous test, “I know it when I see it.”).

51. Simon avers that justice is “the basic value[] of the legal system.” SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 138. Yet, others would argue that the basic values of the legal system are individual dignity and liberty and that these values are *client*-centered, not justice-centered values. See FREEDMAN, *supra* note 9, at 13-42 (discussing the adversary system). Simon refines his definition somewhat: “Decisions about justice are . . . legal judgments grounded in the methods and sources of authority of the professional culture. I use ‘justice’ interchangeably with ‘legal merit.’” SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 138. It is this justice that Simon believes lawyers are uniquely equipped to determine. See *id.* at 18. Legal merit, however, is not always clear-cut. See, e.g., JEFFREY ABRAMSON, *WE, THE*

Accordingly, he cedes discretion to individual lawyers to determine justice in their law practice.<sup>52</sup>

Simon believes that lawyers perpetuate injustice when they engage in the standard adversary ethic, pursuing client interests without heeding the interests of others.<sup>53</sup> He dismisses the idea that lawyers serve individual clients in order to promote the dignity of the individual in a free society and thus to facilitate our constitutional system of justice.<sup>54</sup> Simon believes the chief problem with law practice, both civil and criminal, is that the practical tasks of lawyering cause injustice in the name of an increasingly abstract and “remote” justice.<sup>55</sup>

Simon disparages the idea that criminal defense is different in any meaningful respect from civil law practice, thereby justifying a more aggressive level of advocacy.<sup>56</sup> He argues his position both empirically and theoretically.<sup>57</sup> He dismisses as empty rhetoric the suggestion that the state is an enormously powerful adversary that needs to be kept in check, because by his assessment there is no *state*, only “harassed, overworked bureaucrats.”<sup>58</sup> Further, he rejects arguments that criminal defense is different because of its unique role in upholding individual dignity, equality, the privilege against self-incrimination, and the burden of proof.<sup>59</sup> Moreover, he is even reluctant to admit that criminal punishment is different from civil

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JURY (1995) (analyzing the American jury system and several high profile trials from the perspective of democratic theory). Moreover, as Richard Wasserstrom points out, there are good reasons to “charge the defense counsel with the job of making the best possible case for the accused—*without regard . . . for the merits. . .*” Wasserstrom, *supra* note 25, at 12 (emphasis added).

52. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 138-69; see also Alschuler, *supra* note 27, at 960 (proposing that a lawyer should not be “obliged to do everything helpful to a client that ethical rules . . . allow” but should instead “exercise a sound, independent judgment concerning the propriety of the means that he or she employs on a client’s behalf.”).

53. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 4.

54. See *id.* at 26-52.

55. *Id.* at 2.

56. See Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1707-22.

57. For a strong rebuttal, see Luban, *supra* note 33.

58. Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1707-78; cf. Luban, *supra* note 33, at 1735 (“‘The state’ is not just a group of harassed, overworked bureaucrats in the D.A.’s office. It is a group of harassed, overworked bureaucrats, backed by the police and able in many cases to immobilize their adversaries in cold concrete.”).

59. See Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1713-22.

compensation.<sup>60</sup>

Simon has a skewed picture of the typical players in the criminal justice system. Instead of the destitute defendant with an “overburdened and underprepared” court-appointed lawyer,<sup>61</sup> Simon sees O.J. Simpson—or maybe Tony Soprano<sup>62</sup>—with a herd of well-paid lawyers.<sup>63</sup> Instead of looking to the vast army of state and federal prosecutors, law enforcement agencies, and attendant investigators, scientists, and consultants, Simon sees Larry Kramer, the endlessly put-upon prosecutor in Tom Wolfe’s *The Bonfire of the Vanities*.<sup>64</sup> This is not the reality.<sup>65</sup>

Simon believes that if, in fact, the majority of the accused are poorly defended, then the answer is greater restraint, not greater zeal.<sup>66</sup> In other words, if criminal defense lawyers were *nicer people*, the public would be willing to adequately fund criminal defense. This proposition seems unlikely. First, the “good-faith factual defense” that Simon pines for is a defense that is supported by evidence, or lack thereof, and not a defense that avoids offending anyone.<sup>67</sup>

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60. *See id.* at 1721-22.

61. RHODE, *supra* note 31, at 61. *See also* Jay S. Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1010 (suggesting the “paradigm” of the indigent, twenty-one-year-old defendant with an IQ of 86).

62. Tony Soprano is the fictional head of both a mafia and suburban family in New Jersey in a popular HBO series. *The Sopranos* (Home Box Office).

63. *See* Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1714 (referring to the “skilled henchmen” of rich murderers).

64. TOM WOLFE, *THE BONFIRE OF THE VANITIES* 29-48 (1987).

65. *See* RHODE, *supra* note 31, at 61 (“In the courtrooms that the public sees, zealous advocacy is the norm. O.J. Simpson’s lawyers left no stone unturned. But they were charging by the stone. Most defense counsel cannot.”); Luban, *supra* note 33, 1730-1744, 1762-1766 (noting the “two worlds” of criminal defense, one for poor clients with overburdened public counsel and the other for moneyed clients with high-priced private counsel); *see also* Berlow, *supra* note 36, at 28 (quoting Nancy Gist, director of the Justice Department’s Bureau of Justice Assistance: “[T]he level of quality representation provided indigent defendants is uneven and frequently abysmal.”).

66. *See* SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 193:

Whether we can secure support for an increase in defense resources depends in part on what people think additional resources will be used for. If the extra resources will fund efforts to substantiate good-faith factual defenses, many will feel quite differently about them than if they will fund efforts to uncover evidence to impeach truthful witnesses.

*Id.*

67. *See* MODEL RULES, *supra* note 28, R. 3.1 cmt. and DR 7-102(A)(1) (allowing a

Second, the practice of impeaching a truthful witness has been around for a long time and is not something about which the public is newly exorcized.<sup>68</sup> Third, the underfunding of criminal defense is not because of the behavior of defense counsel, but instead results from the behavior of those they represent.

In *The Ethics of Criminal Defense*, Simon criticizes defense lawyers for routinely engaging in overly aggressive and “ethically questionable” practices<sup>69</sup> such as delaying a case in order to frustrate government witnesses,<sup>70</sup> presenting perjured testimony by defendants,<sup>71</sup> arguing an inference known to be false,<sup>72</sup> and embarrassing or blaming alleged victims.<sup>73</sup> As Simon acknowledges, however, many reputable lawyers and scholars view such tactics as ethical and justifiable both as a matter of law and social justice,<sup>74</sup> no

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criminal defense lawyer to “put the prosecution to its proof even if there is no reasonable basis for defense”); see also Smith, *Defending Defending*, *supra* note 25.

68. See JEROME FRANK, *COURTS ON TRIAL* 82 (1949) (noting that “the great Wigmore” endorsed a book that instructs lawyers on how to make truthful witnesses appear untruthful).

69. Simon, *The Ethics of Criminal Defense*, *supra* note 44, at 1705.

70. See *id.* at 1704.

71. *Id.* Simon joins a long line of legal scholars who believe that perjury by criminal defendants is widespread and threatens the integrity of the legal system. *But see* Silver, *supra* note 31 (disputing that client perjury is an ethical “dilemma” and arguing that client perjury rules cause more harm than good). Simon offers no evidence of the frequency of defendant perjury or its effect. Simon is not similarly concerned about police perjury, which he acknowledges is “widespread,” and is arguably more pernicious. Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1711, n.15. Indeed, Simon offers an excuse for police perjury, explaining it as a “police and prosecutorial response to strict federal court decisions on search-and-seizure issues.” *Id.* For discussions of police perjury in legal scholarship, see FREEDMAN, *supra* note 21, at 91-93; Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994); Stanley Z. Fisher, “*Just the Facts, Ma’am*”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992); see also PAUL CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* (1969).

72. See Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1717-19.

73. *Id.* at 1704-22. Simon concedes that the tactics he refers to are not prohibited. See *id.* at 1704. Moreover, his portrayal of criminal advocacy largely omits the fact that there is an opposing party. Prosecutors routinely anticipate and counter delay, untruthful testimony, implausible arguments, and victim/witness bashing. See JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER 256 (1983) (“I do think it’s better to be overzealous than underzealous. Overzealousness can be corrected by the prosecution. . . . Underzealousness cannot be corrected by anyone.”).

74. See Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1722-28 (discussing Stanford Law Professor Barbara Babcock’s “social worker” justification for aggressive defense). Babcock offers several justifications for zealous criminal defense. See generally



matter how “personally distasteful” to some.<sup>75</sup>

As *My Fair Lady*'s Henry Higgins laments in the song *Why Can't a Woman Be More Like a Man?*,<sup>76</sup> Simon wants a defense lawyer to be more like a prosecutor. He believes that defenders, like prosecutors, should pursue justice.<sup>77</sup> It is interesting to note that prosecutors are the one group of lawyers who are ethically obligated to do what Simon is proposing for the rest of the bar.<sup>78</sup> Indeed, Simon acknowledges that his formulation of what he calls the “Discretionary

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Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-84).

75. DERSHOWITZ, *REASONABLE DOUBTS*, *supra* note 29, at 145.

76. Alan Jay Lerner & Frederick Loewe, *Why Can't a Woman Be More Like a Man*, in *MY FAIR LADY* (1956).

77. See MODEL CODE, *supra* note 28, EC 7-13 “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict”; MODEL RULES, *supra* note 28, R. 3.8 cmt. (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); RESTATEMENT THIRD OF THE LAW: THE LAW GOVERNING LAWYERS § 97, cmt. h (2000) [hereinafter RESTATEMENT] (noting the prosecutor’s obligation to protect the rights of the guilty as well as the innocent); STANDARDS RELATING TO THE ADMIN. OF CRIM. JUST. § 3-1.2(c) (1980) [hereinafter STANDARDS] (describing the prosecutor’s role as “quasi-judicial”); see also Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607 (1999); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 1030 (2000); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973). For the prosecutor’s duty to uphold the truth, as well as justice, see Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

For a forceful argument against imposing a duty to seek justice on non-prosecuting attorneys, see James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court,”* 48 BUFF. L. REV. 349, 350 (2000) (arguing that changing the attorney’s role from “agent for a client” to “agent for ‘justice’” would lead to a “system [in which] the lawyer . . . substitute[s] her moral beliefs for her client’s lawful instructions”). As Cohen points out, lawyers who pursue “justice” on the backs of clients do them a serious disservice. See also Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 154-56 (1990) (arguing that David Luban’s proposal to limit cross-examination of rape complainants gives individual lawyers a “troubling . . . breadth of . . . authority . . . to weigh an innocent person’s defense against political considerations” and approves the “blatant use of the lawyer’s power over the client”); HON. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1896) (arguing that lawyers should not “usurp the functions of both judge and jury”).

In countries where the role of the defense lawyer is more like that of the prosecutor, the results have not been good. See RHODE, *supra* note 31, at 54.

78. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 10. (“Another pertinent context in which lawyers have been relatively willing to accept the possibility of meaningful discretionary judgment is the arena of the public prosecutor.”); see also Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

model” has been inspired by the maxim that the *Model Code* prescribes for prosecutors: namely, to seek justice.<sup>79</sup> Yet, Simon fails to acknowledge that, despite the maxim, the prosecutorial record for doing justice is hardly impressive.<sup>80</sup>

### *Harry Subin*

Professor Harry Subin may have been the first prominent legal scholar to argue against the idea that criminal defense is different. In his 1987 article, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*,<sup>81</sup> Subin argues that, contrary to Justice White’s oft-cited opinion about the different ethical duties of criminal defense lawyers,<sup>82</sup> defense lawyers ought to

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79. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 10.

80. See generally Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001). For a recent study documenting the failure of prosecutors to do justice, see JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000) (finding that between 1975 and 1993, two out of three capital convictions were reversed, with prosecutorial misconduct being a significant factor); see also Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHL. TRIB., Jan. 10, 1999, at 3 (reporting that convictions in 381 homicide cases nationwide have been reversed because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false). For the author’s view of prosecutors’ ability to do justice, see Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 375-91 (2001) (arguing that, in practice, the prosecutor’s duty to seek justice is empty and self-serving). For a thoughtful former prosecutor’s view, see Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992) (“[T]he standards regulating prosecutorial behavior—i.e., to ‘seek justice’—are often so nebulous as to be unenforceable. . . .”); see also Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705 (1999) (arguing that prosecutors regularly engage in selective prosecution, abuse of discretion, and excessive zeal for punishment with black defendants).

Simon also suggests that judges do justice by exercising “rational, grounded, discretionary judgment.” See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 10. Yet, the fact that “the judicial role requires the intelligent, context-sensitive exercise of discretionary judgment,” Luban, *supra* note 47, at 884, does not mean that most judges exercise their judgment in this way.

81. Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987) [hereinafter *The Criminal Lawyer’s “Different Mission”*].

82. See *United States v. Wade*, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part) (describing the defense lawyer’s “different mission”). Justice White believes that, in contrast to the ethical obligation of prosecutors to pursue the truth, it is the duty of “honorable” defense lawyers to subvert the truth:

be held to at least the same standard of truth-telling as civil practitioners.<sup>83</sup> He rejects the idea that criminal defense lawyers should be allowed to subvert the truth in order to preserve the adversary system,<sup>84</sup> or to protect individual rights and dignity.<sup>85</sup> He argues that criminal defense lawyers, like all lawyers, have an obligation as officers of the court to refrain from presenting a “false” case<sup>86</sup> or to otherwise “manipulate the truth.”<sup>87</sup> He goes further by arguing that the defense function should largely be that of a “monitor” of the system, assuring that convictions are based on adequate and admissible evidence,<sup>88</sup> instead of that of an advocate seeking to undermine the system.<sup>88</sup>

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The State has the obligation to present evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.

*Id.* at 257-58.

83. *See* Subin, *supra* note 81, at 125-26:

I limit my inquiry to criminal practice because this field is most frequently cited to justify the use of truth defeating devices for the higher purpose of preserving the adversary system, our defense against overreaching by the state . . . [C]ivil lawyers ride the ethical coattails of the criminal lawyer on this issue. If, as I shall argue, the criminal lawyer should not be permitted to impede arriving at a truthful verdict to the extent he or she can today, then similar claims by civil lawyers would be weaker still.

*Id.* (internal citations omitted).

84. *See* Subin, *supra* note 81, at 136-38; *see also* Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689, 689 (1988) [hereinafter *Is This Lie Necessary?*] (arguing that lawyers should not be permitted to “inject ‘disinformation’ in order to win over the jury”).

85. *See* Subin, *supra* note 81, at 143-49. Like Simon, Subin questions whether the state is really such a fierce opponent, and whether prevailing against the state is a good thing in most cases. *See id.* at 149.

86. By false case, or, more specifically “false defense,” Subin means “attempting to convince the judge or jury that facts established by the state and known to the attorney to be true are not true, or that facts known to the attorney to be false are true.” *Id.* at 126.

87. *Id.* at 152.

88. *See id.* at 144-47. For an effective rebuttal, *see* John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 GEO. J. LEGAL ETHICS 339 (1987); *see also* Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966) (“Effective trial advocacy requires that the attorney's every

Contrary to Simon, who was never a criminal lawyer,<sup>89</sup> Subin's opinion seems to come from his discomfort in representing the criminally accused after years as a prosecutor.<sup>90</sup> The inspiration for *The Criminal Lawyer's "Different Mission"* was Subin's representation of an alleged rapist who turned out to be both guilty and a liar. Even though Subin was in a position to uncover the truth of the allegation only because he was his client's advocate and *agent*,<sup>91</sup> Subin believes that his client's defense ought to be limited by the truth.<sup>92</sup> Notwithstanding the adversarial nature of the system,<sup>93</sup> or the viability of a particular defense theory,<sup>94</sup> Subin argues that the practice of perpetrating a falsehood through witnesses or argument exceeds the bounds of proper advocacy.<sup>95</sup> Although Subin does not take a position on aspects of zealous criminal defense other than subversion of truth, he shares Simon's feeling that there ought to be limits on what a criminal lawyer may do to advance a client's interests because of the effect on "justice."<sup>96</sup>

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word, action, and attitude be consistent with the conclusion that his client is innocent.”).

89. Simon apparently handled one criminal case in his legal career. See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 217 (1991) [hereinafter *Mrs. Jones's Case*]. Subin acknowledges his debt to Simon by beginning *The Criminal Lawyer's "Different Mission"* with a quote from Simon's influential article, *The Ideology of Advocacy*, see *supra* note 41.

90. See THE AALS DIRECTORY OF LAW TEACHERS 1028 (West Group & Foundation Press 2000-2001). Subin had expressed his discomfort with the ethics of criminal defense prior to writing *The Criminal Lawyer's "Different Mission."* See generally Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091 (1985) (arguing in favor of disclosing the confidences of clients who threaten harm to others).

91. See Cohen, *supra* note 77, at 387-408.

92. See Subin, *supra* note 81, at 149.

93. See FRANKEL, *supra* note 42, at 14 (“The [adversary] contest by its very nature is not one in which the objective of either side, or of both together, is to expose ‘the truth, the whole truth, and nothing but the truth.’”).

94. Subin describes a case with a viable theory of consent: the rape happened in the defendant's apartment; the complainant was not visibly bruised, had declined at least one opportunity to flee, and seemed more concerned about a missing watch than the alleged rape; and the client had made no statements to the police inconsistent with consent. See Subin, *supra* note 81, at 129-36.

95. *Id.* at 128.

96. See Subin, *supra* note 81, at 135:

I was prepared to . . . fool the jurors into believing a wholly fabricated story. . . . I was also prepared to demand an acquittal because the state had not met its burden of proof when, if it had not, it would have been because I made the truth look like a lie. If there

Subin's position has broad implications and is based on a surprisingly run-of-the-mill factual scenario, one that conveniently involves a violent crime by an arrogant and devious offender.<sup>97</sup> Although Subin maintains that he would not allow anyone to put on a false defense no matter the crime or the accused's guilt or innocence,<sup>98</sup> the fundamental principle he advances, truth, is not necessarily well-served by consistency. For example, Subin even goes so far as to say that in a mistaken identification case he would refuse to impeach a near-sighted witness who states that she wore glasses at the time of the crime.<sup>99</sup> Here, Subin reveals that he is simply not cut out to be a defense lawyer. Would he really fail to employ a lawful, prosaic means in order to vindicate an innocent client,<sup>100</sup> or a client facing an excessively harsh sentence,<sup>101</sup> or one

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is any redeeming social value in permitting an attorney to do such things, I frankly cannot discern it.

*See also id.* at 125 (referring to the "superior moral claim of the client's victim"); *but see* Curtis, *supra* note 27, at 12 ("[A] lawyer has to tell himself strange things on his way to court. But they are strange only to those who do not distinguish between truth and justice. Justice is something larger and more intimate than truth.")

97. *See id.* at 130-34 (recounting the client's initial claim that he was some place else at the time of the offense, along with his subsequent attempt to offer an alibi witness). As Subin recalls, he was not happy with his client's antics:

I was incredulous. I reminded him that at no time during our earlier conversations had he indicated what was plainly a crucial piece of information, despite my not too subtle explanation of the elements of an alibi defense. I told him that when the aunt was initially interviewed with great care on this point, she stated that he was not with her at the time of the crime. Ultimately, I told him that I thought he was lying . . .

*Id.* at 133. Subin later acknowledges that he chose this case intentionally because of the disturbing facts and describes his client as a "no-good rapist." Subin, *Is This Lie Necessary?*, *supra* note 84, at 690 n.9.

98. *See id.* (stating that he would disallow a false defense on behalf of a daughter stealing a \$1.79 Christmas ornament to cheer her dying mother); Subin, *supra* note 81, at 143 n.84 ("[A] false defense is just as objectionable in my view if the defendant is innocent.")

99. *See* Subin, *supra* note 81, at 150 n.113.

100. *See generally* Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000) (examining the "grueling and frightening" experience of defending the factually innocent) (quoting Babcock, *supra* note 74, at 180). Of course, I do not mean to suggest that only the innocent deserve a devoted, zealous defense. *See* Smith, *Defending Defending*, *supra* note 25. Seasoned defenders know, as Subin apparently does not, that there are many motivations for zealously defending the accused. *See generally* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993); Babcock, *supra* note 74.

101. *See, e.g.*, Babcock, *supra* note 74, at 178-79 (recounting her defense of an indigent

who committed a crime under mitigating circumstances?<sup>102</sup> If Subin were representing a factually innocent client, the truth of the client's innocence would surely trump the truth of whether or not a witness was wearing corrective lenses.<sup>103</sup>

In contrast to Subin's blanket approach, Simon's more "contextual" approach to legal ethics<sup>104</sup> suggests that guilt or innocence, the nature of the crime, and the fairness of punishment might make a difference in whether he considers that the advocacy is ethical.<sup>105</sup> Simon is, at least, concerned about the legitimacy of a system that disproportionately imposes harsh punishment on poor minorities, further alienating and disfranchising them,<sup>106</sup> and notes that discriminatory law enforcement perpetuates the same problems.<sup>107</sup> Given Subin's admiration of Simon,<sup>108</sup> and his professed general belief in the importance of zealous defense,<sup>109</sup> it would be interesting to know what advocacy Subin would employ on behalf of the victim of a racially motivated hoax, such as the one perpetrated in

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drug addict who faced twenty years for possession of heroin).

102. See generally Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994). Subin asserts that he would "no doubt have a passionate argument to make . . . at sentencing" in such a case. See Subin, *Is This Lie Necessary?*, *supra* note 84, at 690 n. 9.

103. See Subin, *Is This Lie Necessary?*, *supra* note 84, at 701 (suggesting that trials ought to be reserved for the innocent or at least the not guilty).

104. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 195-215.

105. Compare Subin, *supra* note 81, at 149 n.110 (questioning the argument that the imposition of criminal punishment is a "morally dubious exercise of state power" though acknowledging that moral questions would arise if the legal system were "inherently unjust") with Simon, *supra* note 44, at 1722-28 (noting that there is a compelling argument that lawyers ought to subvert "substantive legal norms" in order to avoid excessive and discriminatory punishment).

106. See Simon, *supra* note 44, at 1723, 1725.

107. See *id.*:

[I]n some jurisdictions the punishment practices are an [integral part of a system of policing that targets minority communities and people of color, especially young men, for intensive and often abusive surveillance, designed in part to keep them out of areas used by privileged racial and economic groups and in part to reinforce their subservience to a local power structure that excludes them.

108. See *supra* note 89. Subin cites Simon throughout his article.

109. See Subin, *supra* note 81, at 146 ("It is fundamental to our system of justice that the guilty as well as the innocent client be accorded the right to put the state to its proof and have the assistance of counsel in doing so."). Subin does not want to sound too hostile to criminal defense. See Subin, *Is This Lie Necessary?*, *supra* note 84, at 701 (remarking that "[s]ome of my best friends are defense attorneys.").

1994 by Susan Smith before she admitted that she, not the black man she initially accused, drowned her children.<sup>110</sup> What if the basis of the accusation was race, class, sex, or neighborhood?<sup>111</sup> What if Subin does not know for a fact whether the accused is innocent or not, because the accused has read Subin's articles (and has wisely concluded that it is not in his interest to be completely forthcoming), but there are nonetheless reasons to doubt the complainant's accusation?

*Fred Zacharias*

Fred Zacharias, a scholar who often writes on prosecutorial ethics, also questions the criminal defense exemption in the critique of adversarial advocacy.<sup>112</sup> He has for some time expressed ambivalence about the criminal defense paradigm, characterizing it as "superaggressive,"<sup>113</sup> "unusually aggressive,"<sup>114</sup> "supremely partisan,"<sup>115</sup> and involving "extreme partisanship"<sup>116</sup> and "aggressive partisanship."<sup>117</sup> His membership in the Simon/Subin camp is not entirely surprising.

In his 1996 article, *The Civil-Criminal Distinction in Professional Responsibility*,<sup>118</sup> Zacharias joins Simon in disputing the basis for the "assumption" that criminal defense is different.<sup>119</sup> Zacharias argues that criminal penalties are not that different from civil remedies,<sup>120</sup>

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110. See Rick Bragg, *A Killer's Only Confidant: The Man Who Caught Susan Smith*, N.Y. TIMES, Aug. 4, 1995, at A10 (noting that if Susan Smith had not confessed, the "manhunt for the fictitious young black man she had accused of taking her children in a carjacking would have continued"). For a thought-provoking fictional treatment of the Susan Smith case, see RICHARD PRICE, FREEDOMLAND (1998).

111. See Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1724.

112. See Zacharias, *Reconceptualizing Ethical Roles*, *supra* note 31; Zacharias, *The Civil-Criminal Distinction*, *supra* note 31.

113. See Zacharias, *The Civil-Criminal Distinction*, *supra* note 31, at 167, 177. Zacharias draws a studied contrast between superaggressive criminal lawyers and the more restrained—and ethical—advocates who consider the effect of their advocacy on others. See *id.* at 167-71.

114. *Id.* at 171.

115. *Id.* at 167.

116. *Id.* at 169 n.17.

117. *Id.* at 169, 170.

118. See *id.*

119. *Id.* at 166.

120. See *id.* at 172-73.

criminal defendants are not much different from civil litigants,<sup>121</sup> and the resource imbalances are not all that different in criminal than civil cases.<sup>122</sup> He also challenges whether the constitutional arguments in support of the criminal defense paradigm have anything to do with legal ethics and declares that, in any event, the Constitution “do[es] not *mandate* superaggressive lawyering.”<sup>123</sup>

Zacharias’s contribution to the discussion is a more developed argument that criminal prosecutions and criminal clients are essentially indistinguishable from civil cases and civil litigants. He argues that some civil actions, such as those brought by the government, threaten the same sort of overreaching by a “government juggernaut” as criminal prosecutions, and are just as stigmatizing.<sup>124</sup> An allegation of racial discrimination or sexual harassment publicly brands a civil defendant as a social pariah in much the same way as a criminal allegation brands the accused.<sup>125</sup> A civil litigant faces loss of livelihood, savings, and reputation in much the same way that a defendant faces loss of liberty.<sup>126</sup> Zacharias denigrates the threat of incarceration as the critical difference because, with the exception of those arrested for the first time, he believes that many offenders do not mind serving a little jail time.<sup>127</sup> He goes so far as to assert that being arrested or incarcerated is no big deal to most “modern” defendants who “may meet incarcerated friends” at the local jail,<sup>128</sup>

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121. *See id.* at 173-74.

122. *See id.* at 174-76.

123. *Id.* at 176-77.

124. *Id.* at 172-73; *see also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795 (1992).

125. *See Zacharias, The Civil-Criminal Distinction, supra* note 31, at 173.

126. *See id.* at 172-73.

127. *See id.* Zacharias claims that he “do[es] not mean to suggest that a threat of incarceration is meaningless to such defendants.” *Id.* However, he then goes on to do just that:

[I]t is fair to conclude that jail alone may not be terrifying to a subset of defendants who are used to it and come from a community where incarceration is routine. Likewise, the effect of incarceration on defendants’ lives may not be as severe for those who are unemployed and whose community accepts incarceration as relatively routine than for defendants who will lose their livelihoods and face shame in their communities.

*Id.* at 172 n.32; *cf.* COLE, *supra* note 28 (arguing that race and class bias operate in every aspect of the criminal justice system); MAUER, *supra* note 28 (examining the unprecedented explosion in the United States’ prison population and its impact on the African American community).

128. *See Zacharias, The Civil-Criminal Distinction, supra* note 31, at 174.



thus, equating jail for the underclass<sup>129</sup> to Starbucks for the coffee klatsch. Zacharias concludes that, at the very least, “the assertion that criminal defendants are unique is a vast overgeneralization.”<sup>130</sup>

#### IV. WHY CRIMINAL DEFENSE IS DIFFERENT

There are two kinds of arguments for why criminal defense is different from other types of law practice, and why this difference warrants a different ethical standard. The typical argument approaches the question from the “outside in,” looking to law and politics, the balance of resources, and the stakes of punishment versus compensation.<sup>131</sup> The most thoughtful arguments also consider the balance of bargaining power and the notion of legitimacy, namely the public’s natural tendency to side with law enforcement.<sup>132</sup> As this

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129. See generally JEFFREY H. REIMAN, . . . AND THE POOR GET PRISON (1996); see also HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY (1995); CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS (1992); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1997); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); THE URBAN UNDERCLASS (Christopher Jencks & Paul E. Peterson, eds. 1991).

130. See Zacharias, *The Civil-Criminal Distinction*, *supra* note 31, at 177-78. Zacharias sees no difference between criminal and civil litigants:

[W]e cannot assume anything different about their situations, mental state, or resources than about those of their civil counterparts. Absent empirical evidence to the contrary, we cannot assume that criminal defendants as a whole are different from civil litigants; it is unclear that the majority of criminal defendants are more frightened, or more threatened, or less capable of mounting a defense than the majority of individual civil litigants.

*Id.*

131. See, e.g., Luban, *Are Criminal Defenders Different?*, *supra* note 33, at 1730-40; see also Ellen Yaroshevsky, *Balancing Victim’s Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 136-38 (distinguishing criminal defense); Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855, 863, 886-87 (1994) (arguing for partisanship in criminal defense); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 548-50 (identifying the criminal defense lawyer as the “archetype of the advocate in the adversary system” and distinguishing civil lawyers). At one time Fred Zacharias voiced support for this proposition. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 356-57 (1989) (assuming the difference between criminal and civil representation for purposes of analyzing attorney-client confidentiality rules).

132. See Luban, *supra* note 33, at 1740-48.

position has been well argued by others,<sup>133</sup> I will only take a moment to outline and endorse it. The other argument is from the “inside out,” which focuses on the relationship between the accused and counsel, the experience of defense counsel, and the experience of the accused. I will spend more time discussing this perspective, as it has not been fully developed by others, and offers new support for the zealous paradigm.

### *A. The Argument from the Outside In*

The principal argument for why criminal defense is different, thereby warranting a different and more adversarial approach, is both political and legal. There is a longstanding American commitment to protecting individual rights and curbing state power, especially the power to punish.<sup>134</sup> This commitment is embodied in the Bill of Rights and is further developed in constitutional criminal procedure.<sup>135</sup>

Proponents of a strong adversarial ethic in criminal defense often note that the Fourth, Fifth, Sixth, and Eighth Amendments provide rights and protections to the criminally accused that are not provided to civil litigants.<sup>136</sup> In addition, the government’s burden of proof, the requirement of proof beyond a reasonable doubt, and the presumption

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133. David Luban’s response is close to perfect. *See id.*

134. *See* LUBAN, *LAWYERS AND JUSTICE*, *supra* note 23, at 60 (“[W]e believe as a matter of political theory and historical experience that if the state is not . . . restrained . . . our political and civil liberties are jeopardized.”); *see also* Monroe H. Freedman, *A Proposal for Different Ethical Standards for Criminal and Civil Practice*, 31 *HOFSTRA L. REV.* (forthcoming 2002) (noting that the “civil libertarian justification for maintaining the traditional zealous representation by criminal defense lawyers does not have the same force in the context of civil representation.”).

135. *See* FREEDMAN, *supra* note 9, at 13-14 (“[T]he professional responsibilities of the lawyer within [the adversarial] system must be determined, in major part, by the same civil libertarian values that are embodied in the Constitution.”).

136. *See* Jay Sterling Silver, *supra* note 131, at 863 (asserting constitutional basis for the criminal defense paradigm); *see also* FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS*, *supra* note 9, at ix (characterizing his position on lawyers’ ethics as “rooted in the Bill of Rights”); Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 *J. LEGAL EDUC.* 55, 56 (1991) (“Grounded in the fundamental values of the Bill of Rights, my analysis of lawyers’ ethics gives individual dignity a central place”). *But see* Zacharias, *supra* note 31, at 178 (acknowledging but giving little weight to “constitutional and procedural benefits available to . . . defendants”).

of innocence reflect a commitment to checking state power even at the cost of freeing the guilty. This commitment has no parallel in civil proceedings.<sup>137</sup> Some commentators note the accused's Fifth Amendment right against self-incrimination as an especially critical distinction.<sup>138</sup>

At the same time, the Sixth Amendment's right to counsel has been called "'the most pervasive' of rights, because it affects the client's ability to assert all other rights."<sup>139</sup> As Professor Deborah Rhode notes, effective representation is especially important in the criminal context:

These rights-based justifications of neutral partisanship assume special force in criminal cases. Individuals whose lives, liberty, and reputation are at risk deserve an advocate without competing loyalties to the state. Ensuring effective representation serves not only to avoid unjust outcomes but also to affirm community values and to express our respect for individual rights.<sup>140</sup>

The principles embodied in the Constitution do more than check state power and protect individual rights, however. They "preserve the integrity of society itself . . . [by] keeping sound and wholesome the procedure by which society visits its condemnation on an erring member."<sup>141</sup>

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137. *But see* Luban, *supra* note 33, at 1741-42 (hypothesizing that despite, or perhaps because of these safeguards, jurors may be biased in favor of the prosecution).

138. *See* Stephen Ellmann, *Truth and Consequences*, 69 *FORDHAM L. REV.* 895, 905 (2000).

139. FREEDMAN, *supra* note 9, at 13 (citing Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 *HARV. L. REV.* 1, 8 (1957)).

140. RHODE, *supra* note 31, at 54; *see also* Luban, *supra* note 33, at 1758 ("[T]he injunction to zealous advocacy is at its most demanding in the criminal defense context, where the liberal argument for overprotecting rights against the state gives added heft to the norm.").

141. Lon Fuller, *The Adversary System in TALKS ON AMERICAN LAW* 35 (H. Berman ed. 1961); *see also* DERSHOWITZ, *THE BEST DEFENSE*, *supra* note 27, at 415:

The zealous defense attorney is the last bastion of liberty—the final barrier between an overreaching government and its citizens. The job of the defense attorney is to challenge the government; to make those in power justify their conduct in relation to the powerless; to articulate and defend the right of those who lack the ability or resources to defend themselves.

They also affirm the humanity of the accused. As Professor Laurence Tribe has stated:

The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.<sup>142</sup>

Although there is some debate about the relative balance of resources and power in criminal versus civil settings, especially when civil cases involving the government are included, there is no question that in most criminal cases the balance is weighted heavily on the government's side. While civil litigants come from a range of class backgrounds, the vast majority of criminal defendants are poor and must rely on public defenders and court-appointed counsel.<sup>143</sup> Indigent counsel are, in turn, wholly dependent on a strapped court or municipal budget for funding investigators, expert witnesses, and other services.<sup>144</sup> Simon's assertion that the state does not use its full arsenal of resources on most defendants<sup>145</sup> is rebutted by Luban's detailed accounting of overall police and prosecution personnel, as well as funding advantages of the state.<sup>146</sup> The government has the advantage even when facing a wealthy or powerful defendant—that

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142. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1392 (1971).

143. Most criminal defense lawyers are either public defenders or court-appointed counsel. See STEVEN K. SMITH & CAROL J. DEFRENCES, *INDIGENT DEFENSE* 4 (1996) (reporting that, in 1992, 81 percent of felony defendants in the nation's seventy-five largest counties had a public defender or court-appointed counsel at trial). In 1991, 76 percent of state prison inmates and 54 percent of Federal prison inmates had court-appointed lawyers representing them for the offenses for which they were serving time. See *id.* at 3. The percentage of non-white inmates with court-appointed counsel is even higher: 79 percent of black state prisoners and 64 percent of black federal prisoners were represented by court-appointed counsel in 1991. See *id.* In 1989, 78 percent of inmates in local jails had court-appointed counsel. See *id.*

144. See Luban, *supra* note 33, at 1734-35 and authorities cited therein.

145. See Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1707-08.

146. See Luban, *supra* note 33, at 1731-36.

is, if the government chooses to employ available resources.<sup>147</sup>

In terms of power, prosecutors wield both demonstrable procedural<sup>148</sup> and psychological<sup>149</sup> advantages. The outcomes tell it all: defendants are rarely acquitted.<sup>150</sup>

Surprisingly, even in an era of increasingly harsh criminal sentences, commentators like Simon and Zacharias question whether punishment is sufficiently distinct from civil penalties to warrant a different adversarial ethic.<sup>151</sup> For both violent offenders, like my client Manny, or the non-violent drug offenders who fill our nation's prisons in record numbers,<sup>152</sup> a decades-long prison sentence is not unusual. Still, there are those who argue the deeply cynical view that prison is not so bad for those communities that have grown accustomed to it,<sup>153</sup> and that the financial and reputational costs of a

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147. See Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1199 (1960) (noting the "inherent inequality of litigating position between the expanding state and even the most resourceful individual, much less the vast majority of resourceless ones"); DERSHOWITZ, *THE BEST DEFENSE*, *supra* note 27, at 415 ("Even the rich are relatively powerless . . . when confronting the resources of a government prosecutor."); see also Mike Robinson, *Rostenkowski Reflects on His Time in Jail*, ST. LOUIS POST-DISPATCH, June 1, 1998, at 5 (quoting former House Ways and Means Committee Chairman Dan Rostenkowski, who was convicted of misusing federal funds in 1996: "'No matter how powerful you may have been, the government can outgun you in every case . . . . Once you are in their sights, they hunt you like a wounded animal.'").

148. Luban notes procedural advantages held by the prosecution that have no analogy in civil practice, such as a limited (and, in some jurisdictions, nonexistent) obligation to disclose evidence prior to trial, many mechanisms for obtaining discovery themselves, and an enormous advantage in appellate and collateral review processes, including the "harmless error" doctrine. See Luban, *supra* note 33, at 1736-40.

149. See *id.* at 1740 (noting that people tend to side with authority and want to believe in police and prosecutors). See also NATIONAL JURY PROJECT, *JURYWORK: SYSTEMATIC TECHNIQUES 2-12 – 2-20* (2d ed. 2002) (1983) (finding that, notwithstanding the presumption of innocence, most jurors believe that those accused of crime are probably guilty, ought to testify if they are not, and bear the burden of proving their innocence).

150. See Luban, *supra* note 33, at 1729 n.1, 1729 n.2 (citing Department of Justice statistics revealing a 1 percent rate of felony acquittals in state courts and a 2.8 percent rate of acquittals in U.S. District Courts).

151. See also Mann, *supra* note 124, at 1796 (discussing the compensation-punishment distinction).

152. See MAUER, *supra* note 28, at 9 (referring to the "wave of building and filling prisons virtually unprecedented in human history"); ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA 3* (1998) (noting that "[o]ver the past twenty-five years, the United States has built the largest prison system in the world").

153. See *supra* notes 127-28 and accompanying text.

civil penalty might be more painful for some.<sup>154</sup>

As I discuss below, attempts to characterize the difference between punishment and monetary compensation without inquiring more deeply into the experience of criminal conviction and incarceration fall flat. Even at face value, however, criminal punishment involves all of the pain of the harshest civil penalty plus more. The difference is most visible when the punishment is prison; the imprisoned suffer not only loss of liberty, but some of the worst “punishment” of civil litigation: loss of “livelihood, savings . . . [and] credit rating.”<sup>155</sup> Additionally, the imprisoned may face a loss of home, family, standing in the community, and future employment.<sup>156</sup> The argument that most offenders are not incarcerated at all, but are “let off” on probation, misunderstands the reality of probation. Probation often leads to prison.<sup>157</sup> Even when the punishment is the mere fact of a criminal conviction, the individual suffers more than the diffuse stigma that may occur in some civil litigation. An individual may lose the fundamental rights of citizenship: the right to vote and the right to sit on a jury.<sup>158</sup>

### *B. The Argument from the Inside Out*

William Simon has disparaged the ethical perspective that sheds the most light on why criminal defense is different. He calls it a “personal relations” approach to legal ethics, dismissing as “extralegal” the underlying values of loyalty, trust, empathy, or

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154. See Zacharias, *The Civil-Criminal Distinction*, *supra* note 31, at 172-73; Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1721-22.

155. Zacharias, *The Civil-Criminal Distinction*, *supra* note 31, at 172.

156. See MAUER, *supra* note 28, at 185-87.

157. See Fox Butterfield, *Getting Out/A Special Report: Often, Parole Is One Stop On the Way Back to Prison*, N.Y. TIMES, Nov. 29, 2000, at 1 (discussing the large number of offenders who go from prison to community supervision and then back to prison); see also Adam Gelb, *Forget the Extremes, Try a Dose of Both*, WASH. POST, May 6, 2001, at B3 (noting that with little or no drug treatment, drug-addicted offenders routinely violate probation and end up in prison); Editorial, *Put the Prison Bed Idea to Rest*, THE DALLAS MORNING NEWS, Jan. 19, 2001, at A28 (noting that in 1999, “37 percent of prison admissions in Texas were for probation revocations, with more than half of those being for technical violations”); Butterfield, *supra* (noting that in 1999, 68 percent of those sent to prison in California were parole violators).

158. See MAUER, *supra* note 28, at 178-87; Somini Sengupta, *Felony Costs Voting Rights for a Lifetime in 9 States*, N.Y. TIMES, Nov. 3, 2000, at A18 (reporting that 4.2 million Americans cannot vote because of felony disenfranchisement laws).

friendship.<sup>159</sup> Simon says the approach is descriptively inaccurate because as the lawyer-client relationship is *commercial*, not personal, as the client pays for the lawyer's loyalty and empathy.<sup>160</sup> The mere fact that a client pays for a professional's services, however, does not render the relationship commercial.<sup>161</sup> He also does not believe that the "personal values" of the lawyer-client relation could ever be more fundamental than the "values . . . that the relation threatens."<sup>162</sup> Why is it axiomatic that "legal merit" and "justice" are more important than the bond between a lawyer and client,<sup>163</sup> which Simon's approach not only threatens but disregards altogether? Why are institutional or public concerns more important than relational or personal ones?<sup>164</sup> Simon readily rejects a relational perspective as

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159. See SIMON, THE PRACTICE OF JUSTICE, *supra* note 41, at 19. For examples of this approach to legal ethics, see THOMAS SHAFFER & ROBERT COCHRAN, LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 40-56 (1994) (discussing the lawyer as friend); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (arguing that when lawyers act as the client's "friend" they act morally); Curtis, *supra* note 27, at 8 (analogizing the lawyer to a spouse, parent, and friend); Ogletree, *supra* note 100, at 1272 (characterizing his relationship with criminal clients as a "true friendship"); Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65 (1994) (describing her friendship with a client on death row); see also Zacharias, *Reconceptualizing Ethical Rules*, *supra* note 31, at 186-190 (examining legal ethics from the perspective of the nature of the representation and the attorney-client relationship).

I do not agree with the conception of the lawyer-client relationship as a "friendship." In my view, this asks both too much and too little of lawyers. See Robert J. Condlin, *"What's Love Got to Do With It?": The Contested Conception of the Lawyer-Client Relationship in Clinical Legal Scholarship* (unpublished manuscript on file with author). However, the lawyer-client relationship is a *relationship*—sometimes a very intense one. The lawyer-client relationship must be at the center of any discussion of legal ethics.

160. See SIMON, THE PRACTICE OF JUSTICE, *supra* note 41, at 19. Simon adds that the model also does not fit because lawyers often serves large organizations not individuals. *Id.*

161. See generally IRWIN Z. HOFFMAN, RITUAL AND SPONTANEITY IN THE PSYCHOANALYTIC PROCESS: A DIALECTICAL-CONSTRUCTIVIST VIEW (1998).

162. See SIMON, THE PRACTICE OF JUSTICE, *supra* note 41, at 19.

163. See John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223, 241 (1986) (referring to the "symbolic role of the lawyer as the defendant's only friend"); see also Fried, *supra* note 159, at 1068-69 (noting that "before there is morality there must be the person" and arguing the importance of "recogniz[ing] the concrete individuality of [an]other person").

164. Scholars with an interest in feminism and clinical legal education tend to examine this question. See, e.g., Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Smith, *Rosie O'Neill Goes to Law School*, *supra* note 12. Additionally, in contemporary philosophy—especially virtue ethics—the focus is on the intentions, motivations,

“simple and . . . appealing . . . but wrong.”<sup>165</sup> Indeed, to Simon an examination of lawyering from the inside out, exploring the dynamics and dilemmas of practicing lawyers,<sup>166</sup> is not legal ethics at all.<sup>167</sup>

However, if most lawyering, even criminal lawyering, takes place outside of a courtroom,<sup>168</sup> it would then make sense to focus more on the lawyer-client relationship, and on the experience of the participants. Important interests and values are served by the relationship, even if the parties may not have had these purposes in mind. Some of these interests and values might be just as righteous and virtuous<sup>169</sup> as those embraced by Simon. After all, our humanity—and our morality—is defined not only through our relationship to society, but through our relationships with other individuals.<sup>170</sup>

A relational approach to legal ethics sheds important light on the difference in criminal defense and helps explain the need for the zealous criminal defense paradigm. There are important aspects of the criminal defense relationship that are not found in any other area of practice. Included among them is the reluctance to enter into the relationship in the first place, the difficulty of establishing a

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and character of the actor, not on the rightness or wrongness of the act). See JAMES F. KEENAN, S.J., GOODNESS AND RIGHTNESS IN THOMAS AQUINAS’S *SUMMA THEOLOGIAE* 7 (1992); ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984); James F. Keenan, S.J., *Virtue Ethics: Making a Case as It comes of Age*, 67 THOUGHT 115 (1992); see also William C. Spohn, S.J., *The Return of Virtue Ethics*, 53 THEOLOGICAL STUD. 60, 61 (1992) (“Good character produces practical moral judgments based on beliefs, experience, and sensitivity more than . . . rules and principles.”).

165. SIMON, THE PRACTICE OF JUSTICE, *supra* note 41, at 19.

166. See MODEL RULES, *supra* note 28, *PmbI*. ¶ 8 (“Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person. . . .”); see also RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989) (exploring lawyers’ morality, social roles, and personal identity).

167. See Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1723 (commenting that Professor Barbara Babcock’s “social worker’s reason”—an ethical motivation for aggressive defense—“seems an odd way to characterize an argument about legal ethics”).

168. See RHODE, *supra* note 31, at 55-56.

169. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 885-902 (1996).

170. See James Keenan, *Proposing Cardinal Virtues*, 56 THEOLOGICAL STUD. 709, 723 (1995).



relationship of mutuality and trust, and the extraordinary burden of maintaining such a relationship.

### *Reluctance to Enter into the Relationship*

The most frequently asked question of criminal lawyers and law students contemplating a career in criminal defense, commonly called “The Question”,<sup>171</sup> is how can you defend those people?<sup>172</sup> Professor Deborah Rhode recounts her own struggle with The Question when she was an intern at the Public Defender Service for the District of Columbia.<sup>173</sup> Rhode prefaces her account by remarking that her first case was “almost my last” because it disturbed her “conscience.”<sup>174</sup> She explains why:

Two of the office’s juvenile clients had stomped an elderly “wino” to death, just for the fun of it. They confessed to my supervising attorney and to the arresting officer; indeed, they appeared somewhat proud of their accomplishment. However, the police committed a number of constitutional and procedural violations in obtaining the confession and other inculpatory evidence. My supervisor was able to get the case dismissed on what the public would consider a “technicality.” He also was proud of his accomplishment. The clients were jubilant and unrepentant. I had no doubt that the office would see them again. Nor did I doubt that I was utterly unsuited to be a criminal defense lawyer. I wasn’t sure I was ready to be a lawyer at all.<sup>175</sup>

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171. See Babcock, *supra* note 74, at 177; David Feige, *How to Defend Someone You Know is Guilty*, N.Y. TIMES, Apr. 8, 2001, at 59; LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 142 (1987); see also KUNEN, *supra* note 73, at xi (noting that the question is “not so much a question as a demand for an apology, as though a defense attorney needs to justify his work, in a way that a prosecutor doesn’t”).

172. See generally KUNEN, *supra* note 73 (exploring the title question through anecdotes about the author’s two and a half years as a public defender in Washington, D.C.).

173. See RHODE, *supra* note 31, at 49.

174. *Id.*; but see Curtis, *supra* note 27, at 15-16 (“[F]or every lawyer whose conscience may be pricked, there is another whose virtue is tickled.”).

175. RHODE, *supra* note 31, at 49.

Over time Rhode has come to appreciate her supervisor's role in "providing an essential and ethically defensible safeguard for constitutional values," but she maintains that she was right about not becoming a defender herself, and about feeling "morally troubled" by the case she worked on and by criminal defense in general.<sup>176</sup> To Rhode's credit, she did explore criminal defense for a summer; her rejection of criminal defense is based on experience.<sup>177</sup> For most law students and lawyers, however, the moral repugnance of the work is self-evident.<sup>178</sup>

No other field of law practice is so fraught. The moral dilemmas in civil law practice cannot compete with those in criminal defense. This is so notwithstanding Monroe Freedman's famous quip to law students: "When you get into practice you will find clients who will lie, steal, and *kill* other human beings out of sheer greed. If you can't handle it you have no business going into the practice of corporate law."<sup>179</sup>

The reality is that most criminal defendants are guilty of something, if not the precise charges they face.<sup>180</sup> As a former public defender put it: "One of the awkward truths about being a public defender is that you are in the practice of representing people who are, indeed guilty."<sup>181</sup> Representing the guilty, especially murderers,

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176. *Id.* As a criminal defense lawyer for nearly twenty years, I can say that Rhode's experience was atypical. Most serious offenders are not "jubilant" and "unrepentant." *Id.* Although the causes of crime are complex, see generally ELLIOT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* (1985), most commit crime out of misfortune, not malice.

177. For an article by a student who concluded that he could not be a criminal defense lawyer after a year in Harvard's criminal defense clinic, see Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 *CLINICAL L. REV.* 299 (1994). For a response to Rader by his clinical teacher, see Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense is Not So Sexy and Other Grievances*, 1 *CLINICAL L. REV.* 723 (1995) [hereinafter Smith, *Carrying On in Criminal Court*].

178. See Smith, *Can You Be a Good Person and a Good Prosecutor?*, *supra* note 80, at 355-62 (discussing the assumption by lawyers, law students, and the general public that criminal defense is amoral or immoral while prosecution is morally unassailable).

179. I have heard Monroe Freedman offer this "advice" many times before many audiences. It never fails to get a laugh—and make a point. *Cf.* Abe Fortas, *Thurman Arnold and the Theater of the Law*, 79 *YALE L.J.* 988, 1002 (1970) (noting that "[r]apists, murderers, child abusers, General Motors, Dow Chemical—and even cigarette manufacturers and stream polluters—are entitled to a lawyer.").

180. See Silver, *supra* note 31, at 380; Babcock, *supra* note 74, at 180.

181. Bellows, *supra* note 40, at 74; see also DERSHOWITZ, *supra* note 27, at xxi (stating that the first rule of the "Rules of the Justice Game" is: "Almost all criminal defendants are, in

rapists, child molesters, and other violent street criminals, seems a difficult undertaking for many.<sup>182</sup> Lawyers and law students contemplating criminal defense question whether they would feel comfortable helping dangerous criminals go free, whether they could employ the requisite methods of zealous defense, and whether someone with their talents and ambitions should engage in such work.<sup>183</sup>

Many commentators shrug and say that criminal defense is not for everyone.<sup>184</sup> Others continue to try to persuade, cajole, and market criminal defense to make it more appealing to those who would look elsewhere for legal work.<sup>185</sup> We offer justifications,<sup>186</sup> motivations,<sup>187</sup> pep talks,<sup>188</sup> and appealing stories.<sup>189</sup> We do this partly out of love for the work—for the challenge, the fun, and the sense of satisfaction—

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fact, guilty.”).

182. See Babcock, *supra* note 74, at 177; but see MCINTYRE, *supra* note 171, at 161-62 (noting that many defenders prefer their clients to be guilty). There is an even greater challenge when it comes to representing the most hated pariahs. See Peter Applebome, *The Pariah as Client: Bombing Case Rekindles Debate for Lawyers*, N.Y. TIMES, Apr. 28, 1995, at A28 (quoting Allen Smallwood, a Tulsa, Oklahoma defense lawyer, after Timothy McVeigh’s arrest in connection with the Oklahoma City bombing: “I’ve said to many people, the acid test of a criminal defense lawyer is could you represent Hitler or Adolph Eichmann? . . . . But the publicity and the downside to my life personally would be far, far greater in representing McVeigh than Hitler.”).

183. See Babcock, *supra* note 74, at 177.

184. See *id.* at 175-76; see also Mary Halloran, *An Ode to Criminal Lawyers*, CALIFORNIA LAWYER, June 1998, at 96.

185. See Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869; see also Smith, *Carrying On in Criminal Court*, *supra* note 177, at 735 (admitting the desire to “recruit” students to become indigent criminal defense lawyers).

186. See Babcock, *supra* note 74; Kaplan, *supra* note 163; Roger C. Cramton, *Why Defend the Guilty?*, 11 CORNELL L. FORUM 2 (1984).

187. See Ogletree, *supra* note 100, at 1667-77; see also Feige, *supra* note 171, at 60:

[O]ut in the world, in public, we lie all the time. We offer abstract answers full of half-truths. I do this too. I do it because the truth is too hard to explain. I say that I choose sides based on politics and ideology. I believe in the Constitution, and I think in terms of proof, not guilt. I tell them that trial work is fun. . . . Ultimately the thing I have so much trouble explaining to people is that when I get to know them, I just really, really like my clients.

188. See Smith, *supra* note 177, at 746-47.

189. See generally KUNEN, *supra* note 73; see also Babcock, *supra* note 74, at 179 (recounting her representation of a drug-addicted woman facing a life sentence for the possession of heroin); Smith, *Defending the Innocent*, *supra* note 100 (recounting her representation of a factually innocent woman).

and partly because we worry that no one will become defenders otherwise.<sup>190</sup>

The ethic of zeal is especially important here because it is comfortingly simple.<sup>191</sup> How else might would-be defenders be assured that they will be able to do the work and sleep at night,<sup>192</sup> and even feel good about it?<sup>193</sup> The paradigm of devotion and zeal serves as both the motivation for doing the work and the excuse for doing it well:

Just imagine what would happen if lawyers were to refuse, for instance, to represent persons whom they thought to be guilty. In a case where the guilt of a person seemed clear, it might turn out that some individuals would be deprived completely of the opportunity to have the system determine whether or not they are in fact guilty. The private judgment of individual lawyers would in effect be substituted for the public, institutional judgment of the judge and jury. The amorality of lawyers helps to guarantee that every criminal defendant will have his or her day in court. . . .

[T]he adversary system only works if each party to the controversy has a lawyer, a person whose institutional role it is

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190. The fear is not only that no one will become a defender, but that there are few people fit to practice criminal law. *See generally* Bright, *supra* note 40; *see also* Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101, 104 (1995) (“The most despised, the most endangered defendants may be without counsel. Yet their cases . . . are the ones most likely to have excited governmental passion in ways that make judgment fallible.”).

191. *See* Wasserstrom, *supra* note 25, at 9:

[T]he moral world of the lawyer is a simpler, less complicated, and less ambiguous world . . . . There is . . . something . . . seductive about being able to turn aside so many ostensibly difficult moral dilemmas and decisions with the reply: but that is not my concern; my job as a lawyer is not to judge the rights and wrong of the client or the cause; it is to defend as best I can my client’s interests.

192. *See* MCINTYRE, *supra* note 171, at 139-71 (examining how defense attorneys live with themselves when they help the guilty escape punishment).

193. *See* Wasserstrom, *supra* note 25, at 9; *see also* Feige, *supra* note 171, at 59:

[D]efending the reviled, even those who are guilty, is not some mental trick, nor even a moral struggle for me. I don’t lack imagination or willfully close my eyes to another’s suffering. Rather, the reality of my clients—their suffering, their fear—is more vivid to me than that of the victims. My clients . . . are the ones who desperately need my protection. Everyone else can look out for the victims. And they do . . . .

to argue, plead and present the merits of his or her case and the demerits of the opponent's.<sup>194</sup>

Because of the ethic of zeal, would-be defenders do not have to worry about the morality of undertaking the work, or about the day-to-day strategies employed on behalf of the accused. The defender is playing a critical role in a system that depends on adversarial zeal in order to function properly. He or she acts morally by embracing the ethic of zeal and devotion.

### *Difficulty Establishing a Relationship of Trust*

Once a lawyer has undertaken to represent an accused, it is often difficult to establish a relationship of trust and confidence.<sup>195</sup> This can also be a problem for non-criminal lawyers, especially court-appointed or otherwise “free” lawyers.<sup>196</sup> Clients who are unable to choose because they cannot pay for their own lawyer are more likely to be unsophisticated about the law,<sup>197</sup> to feel more alienated in a legal setting,<sup>198</sup> and to believe that their lawyer is not really working for them.<sup>199</sup> When a poor person has been accused, arrested, and detained, and then given a lawyer by the very system that has taken his liberty, the client is all the more wary.<sup>200</sup>

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194. Wasserstrom, *supra* note 25, at 10.

195. See Silver, *supra* note 31, at 364 (“In the eyes of many defendants, their attorney is the most despicable member of the cast of characters who have conspired to deprive them of their liberty; of all the figures in the courtroom, only defense counsel *pretends* to be on their side.”) (emphasis added).

196. Unfortunately, notwithstanding the commitment and expertise of lawyers who regularly accept judicial appointments or are employed by legal services or public interest law offices, or agree to take a client pro bono, many clients persist in believing that you “get what you pay for.” See 9 ANTHONY G. AMSTERDAM, AMERICAN LAW INSTITUTE & AMERICAN BAR ASSOCIATION, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 108 (5th ed. 1988); MCINTYRE, *supra* note 171, at 65.

197. See Zacharias, *The Civil-Criminal Distinction*, *supra* note 31, at 192. The exception is the repeat offenders who have spent substantial time in prison, have educated themselves about the law, and have developed into “jail-house lawyers.” These are a small minority of indigent defendants.

198. See *id.*

199. See MCINTYRE, *supra* note 171, at 62; Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No I had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (Spring 1971).

200. See AMSTERDAM, *supra* note 196, at 108 (“As far as the client is concerned, the lawyer is “the law,” along with the police and the judge. . . . S/he will distrust the lawyer even

There is a considerable body of literature devoted to client counseling.<sup>201</sup> This literature offers strategies and techniques for overcoming resistance by distrustful or hostile clients,<sup>202</sup> such as establishing a bond with clients who are “different” from their lawyers,<sup>203</sup> establishing a bond with clients who are not so different from their lawyers,<sup>204</sup> and building a relationship of trust, confidence, and respect.<sup>205</sup> The assertion of the criminal defense paradigm, or its civil law variant, is among the most important techniques for effective client representation.<sup>206</sup>

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more if the client is indigent and the lawyer is court-appointed.”). *See also* Silver, *supra* note 31, at 364 n.91, quoting CHARLES SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 305 (1978):

For the bulk of defendants—represented by Public Defenders—their attorney is at best a middleman and at worst an enemy agent. Not only is the process of criminal justice . . . an assembly line dedicated to turning over cases . . . but the defendant’s own attorney is . . . a production worker on the line. He is not “their” representative, but in league with those who would determine the defendants’ fates.

201. *See, e.g.*, ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990); BINDER ET AL., LAWYERS AS COUNSELORS, *supra* note 22; BINDER & PRICE, LEGAL INTERVIEWING AND COUNSELING, *supra* note 22; MARK K. SCHOENFIELD & BARBARA PEARLMAN SCHOENFIELD, AMERICAN LAW INSTITUTE, INTERVIEWING AND COUNSELING (1981); THOMAS L. SHAFFER & JAMES R. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (2d ed. 1987) (1997); Ellmann, *supra* note 22.

202. *See* BINDER ET AL., LAWYERS AS COUNSELORS, *supra* note 22, at 32-45, 239-56; Ellmann, *supra* note 22, at 721-32; *see also* AMSTERDAM, *supra* note 196, at 106-10 (suggesting techniques for putting a criminal client at ease).

203. *See* AMSTERDAM, *supra* note 196, at 108; Smith, *Rosie O’Neill Goes to Law School*, *supra* note 12, at 15-27; *see also* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1052 (1970) (“[P]oor people are not always delighted with their lawyers. . . . [T]here are important problems of style, differences in income and education, frustration and anger about failure, and a host of social, cultural and psychological differences that tend to divide rather than unite poor people and their lawyers.”).

204. *See* Ogletree, *supra* note 100, at 1271-75 (discussing “empathy” as a motivation for public defenders and a technique for connecting with clients).

205. *See* AMSTERDAM, *supra* note 196, at 105:

The initial interview in a criminal case is probably the most important single exchange that counsel will have with the client. It largely shapes the client’s judgment of the lawyer. This first judgment may be indelible. At the least, it gravely influences all future dealings of the two. The lawyer’s primary objective in the initial interview, therefore, is the establishment of an attorney-client relationship grounded on mutual confidence, trust, and respect.

206. *See* AMSTERDAM, *supra* note 196, at 107 (“The essential impression to convey is that counsel views his or her own job as being exclusively to serve and help the client to the best of counsel’s abilities.”); *see also* KUNEN, *supra* note 73, at 44:

The mere assertion of the paradigm or the principles underlying it, however, does not ensure a trusting, productive lawyer-client relationship.<sup>207</sup> The lawyer will have to earn the client's trust through zealous, devoted, client-centered conduct,<sup>208</sup> and may have to do so over and over again, continually proving herself.

Still, the struggle to obtain, and hold on to a client's trust can be stressful and tiresome. A recent study of occupational stress among public defenders found that difficult or "abusive" clients are the number one cause of stress.<sup>209</sup> As one experienced defender put it, "I do like my job, [but] what I don't like about it is the difficulty of the clientele. . . . [They] make the job difficult."<sup>210</sup> Indigent criminal clients are often "unhappy."<sup>211</sup> They may worry about their lawyer's competence,<sup>212</sup> be suspicious of their lawyer's loyalty,<sup>213</sup> and may

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"Wyatt, my name's Jim Kunen. I'm a lawyer with the Public Defender Service. Here's one of my cards." I pushed it through the inch-high slot at the base of the screen. "You're charged with armed robbery. I'll be your lawyer, if you want one. You want a lawyer?"

"Yeah."

No one ever said no. When you're locked inside, you can't help yourself. Somebody on the outside *might* help you. Can't hurt.

"Good. Okay. Now, as your lawyer, I work for you. You're the boss. Whatever you want, that's what I'll try to get. Like, you want to stay in jail, I'll try to help you stay in jail. You want to get out, I'll try to get you out. What do you want, in or out?"

"I want to get out," Wyatt said patiently.

207. See Ellmann, *supra* note 138, at 916.

208. Compare BINDER ET AL., LAWYERS AS COUNSELORS, *supra* note 22, at 241 (advising lawyers to offer a strong statement about confidentiality to assure the client of the lawyer's trustworthiness) with AMSTERDAM, *supra* note 196, at 108 ("Counsel will seldom find that it is possible to overcome [client distrust] . . . merely by promising the client that counsel intends to work assiduously in the client's behalf; rather, counsel must actually *do* something for the client.").

209. See David R. Lynch, *In Their Own Words: Occupational Stress Among Public Defenders*, 34 CRIM. L. BULL. 473, 476-79.

210. *Id.* at 476.

211. *Id.*

212. See *id.* at 477 (noting that public defenders are often believed to be less able than private lawyers); *id.* at 478 (quoting a South Carolina public defender: "[A]s it is now, a lot of them out there don't even think public defenders are lawyers.").

213. See *id.* at 477-78 (reporting that clients accused the defenders of being in league with the prosecution and of getting a "kickback" for convictions); see also Silver, *supra* note 31, at 364 n.91, quoting CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE at 305 (1978) ("[D]efendants . . . tended to see their [court-appointed] lawyer as representing the legal

never get enough time and attention from their lawyer.<sup>214</sup> There is a tendency on the part of clients to blame their lawyers for whatever results from their case.<sup>215</sup> It is not an easy relationship.<sup>216</sup>

It is remarkable that public defenders are able to establish effective lawyer-client relationships, notwithstanding widespread misgivings about both their abilities and institutional role.<sup>217</sup> Yet, they manage to do so with all kinds of clients: the guilty and innocent, the sophisticated and naive, the hardened and vulnerable.<sup>218</sup> Without a strong defense ethic, defenders could not establish a lawyer-client relationship built on trust and confidence, or, frankly, any relationship at all. Criminal defense lawyers, more than any other type of practitioners, must be able to assure clients: “I’m *your* lawyer. I don’t give a [expletive deleted] about anyone else.”<sup>219</sup>

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system to them, rather than representing them to the system.”). One public defender puts it plainly:

[Indigent criminal clients] do not know me from beans; they do not trust anyone who works in the court system; I am white and they are usually black; they are not paying me a dime and since when does that get you anything; even worse, they know that the people who are paying me are the same people, more or less, who pay the cops and the D.A.’s.

Bellows, *supra* note 40, at 88.

214. See Lynch, *supra* note 209, at 478 (quoting a South Carolina public defender: “Usually the first thing I hear when I finally have time to talk to a client is, “you never return my phone calls . . . . You never talk to me, I don’t think I’m getting good representation.””).

215. See *id.* at 477 (quoting a New York public defender: “Let’s see. I’ve been blamed for people losing their babies. I’ve been blamed for families breaking up. I’ve been blamed for people in jail, for people losing their liberties . . . .”).

216. But see *id.* at 490 (quoting a South Carolina public defender: “I’ve tried sixty death penalty cases . . . . Every person is a human being. You learn to like them.”); MCINTYRE, THE PUBLIC DEFENDER, *supra* note 171, at 168 (reporting that most public defenders said that they end up liking their clients); Lynch, *supra* note 209 (quoting a public defender: “A lot of criminals I have gotten to like. There are some real nice human beings even if they are in real serious trouble.”).

217. See MCINTYRE, *supra* note 171, at 89 (reporting that most clients believe that public defenders are not “real lawyers”).

218. See generally KUNEN, *supra* note 73.

219. CRIMINAL JUSTICE (Home Box Office 1990) (legal aid lawyer counseling indigent criminal client and trying to get client to trust him).



## *Extraordinary Burden of Maintaining the Relationship*

Even commentators who would temper criminal defense advocacy acknowledge that there is something uniquely burdensome about representing the criminally accused.<sup>220</sup> Indeed, there is an entire body of literature devoted to the burdens—and blessings—of criminal defense.<sup>221</sup>

As Professor Barbara Babcock has noted, the confessional literature by defense lawyers is filled with great triumphs as well as deep isolation.<sup>222</sup> The triumphs are a source of pride and vindication; they are the payoff for otherwise unremitting professional isolation.<sup>223</sup> Defenders are isolated from a public that misapprehends

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220. See Alfieri, *Race Prosecutors, Race Defenders*, *supra* note 42, at 2269 (“No one would quarrel with [the] observation that ‘there is something exceptionally burdensome about lawyering on behalf of the accused.’”) (internal citations omitted); see also Simon, *Mrs. Jones’s Case*, *supra* note 89 (acknowledging the special burden of criminal representation that exists in even a minor case). In *Mrs. Jones’s Case*, Simon recounts his one criminal defense experience, representing the housekeeper of a partner in his law firm who was accused of leaving the scene of an accident. Although there is a degree of hubris in Simon writing about criminal representation when he has handled only one such case, it is nonetheless a thoughtful piece, and one that is especially useful to law students and new lawyers. For a critical reply to Simon, see Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307.

221. See, e.g., LESLIE ABRAMSON, *THE DEFENSE IS READY: LIFE IN THE TRENCHES OF CRIMINAL LAW* (1997); G. GETTY & J. PRESLEY, *PUBLIC DEFENDER* (1974); PAUL HOFFMAN, *WHAT THE HELL IS JUSTICE: THE LIFE AND TRIALS OF A CRIMINAL LAWYER* 22 (1974); KUNEN, *supra* note 73; SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* (1981); IRVING STONE, *CLARENCE DARROW FOR THE DEFENSE* (1941); Randy Bellows, *Notes of a Public Defender*, in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS*; CASE STUDIES 69-101 (1988); James Mills, *I Have Nothing To Do With Justice*, LIFE, Mar. 12, 1971, at 65; see also DERSHOWITZ, *supra* note 27, at 289-318 (recounting the representation of Ricky and Raymond Tison, who were sentenced to death for helping their father escape from prison); Babcock, *supra* note 74, at 180-81 (noting the psychological toll of criminal defense); Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY’S L.J. 981 (1998) (discussing the dilemmas in being a feminist and defending men convicted of rape and murder); Ogletree, *supra* note 100, at 1239-42 (discussing the phenomenon of public defender “burnout”); Smith, *Defending the Innocent*, *supra* note 100 (discussing the extraordinary burden of defending the innocent).

222. See Babcock, *supra* note 74, at 180.

223. See ABRAMSON, *supra* note 221, at 134-43 (a defense lawyer commenting on prevailing in a righteous case: “Sometimes, this job is worth all the angst.”). However, a defender’s satisfaction in a victory or a job well done must largely come from within. See Babcock, *supra* note 74, at 181 (“The admiration [the defender] receives, if he succeeds, is bestowed grudgingly.”); see also DERSHOWITZ, *supra* note 27, at 417:

their work, from mistrustful clients who tend to be very different from their lawyers in class, race, culture, and language, and even from the bar.<sup>224</sup> The isolation from other lawyers is caused by the uniquely precarious moral position that defenders occupy in fulfilling their professional obligations to clients and to the system: “They alone go through life being asked constantly to explain their professional existence.”<sup>225</sup>

Some defenders don’t mind explaining themselves and do so with a kind of rebellious pride, if not bravado:

I could, if I wanted to, represent only defendants who I believe are innocent or decent. I deliberately do not do that. I select my cases without regard to whether the defendant is guilty or what I think of him personally. Nor do I consider the likelihood of winning. . . . I regard the representation of a guilty and despicable defendant, with little prospect of winning, as a challenge—and, indeed as one of the highest obligations of my profession.

I try to pick the most challenging, the most difficult, and the most precedent-setting cases.<sup>226</sup>

Others are more ambivalent about the constant demand to explain and justify their work in criminal defense. Defense lawyer Michael Tigar, for example, initially dismisses the suggestion that he ought to respond to the criticism of his representation of one of the accused in the 1995 Oklahoma City bombing:

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Attorneys who defend the guilty and the despised will never have a secure or comfortable place in any society. Their motives will be misunderstood; they will be suspected of placing loyalty to clients above loyalty to society; and they will be associated in the public mind with the misdeeds of their clients. . . .

There will never be a Nobel Prize for defense attorneys who succeed in freeing the guilty. Indeed, there are few prizes or honors ever bestowed on defense lawyers for their zealous advocacy.

224. See Babcock, *supra* note 74, at 181.

225. *Id.* at 180-81. Alan Dershowitz agrees that there is something wrong with this. See DERSHOWITZ, *supra* note 27, at 416 (“One of the truest tests of a free country is how it treats those whose job it is to defend the guilty and the despised. . . . One of the surest ways of undercutting the independence of defense attorneys is to question the propriety of their representing the guilty.”).

226. See DERSHOWITZ, *supra* note 27, at xv.

The editors . . . hinted vaguely that I might want to answer criticism of my representing Terry Lynn Nichols. I am not responding to those hints, because I do not need to, at least not in a publication by and for lawyers. I was appointed by the court . . . The man who ably keeps my boots repaired told me last week that he well understood what I was doing. “If people who get arrested did not have lawyers, then anybody the police suspect would be railroaded off to jail. It would be a police state.”<sup>227</sup>

If a shoe repairman can understand the importance of defending an unpopular client, says Tigar, surely law students and lawyers can understand it as well.<sup>228</sup> Still, Tigar proceeds to offer an eloquent apologia for criminal defense, indeed, a love letter: “To accept a great challenge requires, at least for me, a passionate commitment to fulfill it. In litigation as in love, technical proficiency without passion is not wholly satisfying.”<sup>229</sup>

Then there is the burden of the work itself: the burden of standing between the accused and the state, of standing beside a person in need. Although many defenders regard their work as an honor, it is no small undertaking to “see [that justice is] done for a fellow creature whose life [they are] to shelter.”<sup>230</sup> It is often draining,

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227. Tigar, *supra* note 190, at 101.

228. Indeed, Tigar says that any attempt to justify himself would be “an arrogant, foolish, pointless act.” *Id.* at 110.

229. *Id.* at 102. There is anger as well. *See id.* at 103 (“I am dismayed and angered by what I see around me, and I think that as a lawyer the only way through the present terrible time is to fashion and refashion a certain image of justice.”). Tigar’s notion of justice is very different from William Simon’s, and has a decidedly defense perspective:

The past—the suffering and tragedy—are established events, to be understood as well as one can. Stepping into the moment now is a search for something called justice. Justice or injustice, in the now and in the future, is part of a process. The past events cannot be unraveled or undone, but one can perhaps prevent people’s attitudes towards those events from becoming an excuse for injustice.

I am talking of a prosaic, down-to-earth notion of justice. Something like Camus was describing when he said that our chance of salvation is to strive for justice. . . . Justice, as Camus also reminded us, must be more than an abstract idea; it must be a reflection of compassion for one’s fellow beings.

Tigar, *supra* note 190, at 103-04.

230. Tigar, *supra* note 190, at 110;

exhausting, and heart-breaking.<sup>231</sup> Of course, it can also be fun, interesting, and gratifying,<sup>232</sup> but, there is no way around the burden.

Defense lawyer Seymour Wishman shares a nightmarish “moment of reckoning.” Often, at least in big city practice, defenders have a level of anonymity; they generally do not run into former clients, witnesses, or jurors. Still, Wishman tells of encountering a rape complainant in a hospital that he had once cross-examined. At trial, Wishman succeeded in convincing a jury that the complainant had invited several men to have sex with her, contrary to her accusation of being a victim of gang rape. Upon seeing Wishman, the woman became so enraged, that she had to be restrained.<sup>233</sup>

The incident caused Wishman to reflect on his life as a criminal defense lawyer:

Since starting out, I had represented hundreds of people accused of crimes, and not only had most of them been guilty—many of them had been guilty of atrocities.

Hundreds, I had represented hundreds—trying to keep them out of jail, keep them out on the street. I could no longer deflect the realization—this chilling glimpse of myself—that I had used all my skill and energy on behalf of a collection of criminals. Not all of them, but many, had been monsters—nothing less—who had done monstrous things. Sure, some of them might have been guilty of crimes made inevitable by poverty, but their victims hadn’t caused their poverty, and most of the victims were equally poor. Furthermore, many people from backgrounds similar to my clients’ didn’t go out and mug or rape or kill.<sup>234</sup>

Though Wishman had apparently reached a breaking point long before running into the complainant,<sup>235</sup> his story is not unlike how many defenders feel, especially when they handle serious cases. In

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231. See generally Smith, *Defending the Innocent*, *supra* note 100.

232. See ABRAMSON, *supra* note 221, at 163; Babcock, *supra* note 74, at 178; Feige, *supra* note 171, at 59.

233. See WISHMAN, *supra* note 221, at 3-6.

234. *Id.* at 16.

235. See WISHMAN, *supra* note 221, at 18 (admitting that his severe reaction to the woman in the hospital came at a time when he had begun to have reservations about criminal defense).

homicide and other violent felony cases, the stakes are increasingly high for the accused,<sup>236</sup> as well as for the alleged victim.<sup>237</sup> Representing “people who do terrible things”<sup>238</sup> takes its toll on a lawyer in a way that other law practice simply does not.<sup>239</sup>

There is no question that the burden on criminal defenders is real.<sup>240</sup> In addition to dealing with difficult clients and grappling with personal-professional conflict,<sup>241</sup> there are a host of other burdens, including: unwieldy caseloads,<sup>242</sup> the judicial practice of punishing defendants who exercise their right to go to trial,<sup>243</sup> the necessity of dealing with unreasonable, self-righteous prosecutors,<sup>244</sup> the unpredictability of whether a case will go to trial,<sup>245</sup> and the enormous responsibility of “saving clients.”<sup>246</sup>

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236. See Lynch, *supra* note 209, at 483 (describing a trial for a sixty-one-year-old man who faced a minimum of 15 years in prison if convicted—a virtual death sentence for the client); *id.* at 489-90 (noting the enormous stress of representing defendants in death penalty cases).

237. See WISHMAN, *supra* note 221, at 17 (referring to the “unjustified disgrace” in court of a woman who might well have been raped and sodomized).

238. See Smith, *Defending Defending*, *supra* note 25, at 928 n.19.

239. WISHMAN, *supra* note 221, at 16 (noting other kinds of law practice that were “less anxiety-ridden, more profitable, and more prestigious than criminal law”).

There are other nightmares for criminal defenders worse than the one Wishman shares. See MCINTYRE, *supra* note 171, at 168-69 (public defender recounting the “defense lawyer’s nightmare”—of making a “brilliant” argument that led to the dismissal of a murder indictment only to have the client later kill three other people); Cookie Ridolfi, *Statement on Representing Rape Defendants* in LEGAL ETHICS, 279-80 (Deborah L. Rhode & David Luban, eds., 3d ed. 2001) (defense lawyer discussing her discomfort defending rape cases after obtaining an acquittal for a client who raped again).

240. See generally Lynch, *supra* note 209; see also JACK & JACK, *supra* note 166, at 72-78 (discussing the criminal lawyer’s obligation to protect the client’s rights even though doing so might conflict with the needs of the community and the client’s own conscience).

241. See Smith, *Rosie O’Neill Goes to Law School*, *supra* note 12, at 51-60. Lynch refers to this as “role conflict.” Lynch, *supra* note 209, at 475.

242. See RHODE, *supra* note 31, at 61 (noting that caseloads can be as high as 3500 misdemeanors and 900 felonies annually); Lynch, *supra* note 209, at 479-81; see also Chester L. Mirsky, *Quality Legal Aid: Going, Going, Gone*, NAT’L L.J., Dec. 4, 1995, at A19; Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?* 28 CRIM. L. BULL. 419, (1992).

243. See Lynch, *supra* note 209, at 482-84.

244. See *id.* at 484-85; see also Smith, *Can You Be a Good Person and a Good Prosecutor*, *supra* note 80, at 378-79.

245. See Lynch, *supra* note 209, at 486-87.

246. See DERSHOWITZ, *supra* note 27, at 318; see also Lynch, *supra* note 209, at 489 (quoting a North Carolina public defender: “I remember the first time I waited for a jury to come back and my blood pressure was literally so high I could see the blood coursing through my little capillaries.”).

One can only imagine what criminal representation would look like if there were no ethical requirement of zealous criminal defense. Disincentives to effective representation of the criminally accused already prevail: institutional pressure on both the public and private defense bar to turn over high volumes of clients at the lowest cost; low hourly payment rates, flat fees, and ceilings on compensation for court-appointed attorneys; lack of investigative and other resources; pressure on defenders by judges and prosecutors to avoid “obstructing” justice; and ineffectual judicial and professional checks on inadequate representation.<sup>247</sup> Neither market forces nor regulatory systems effectively counteract these disincentives, particularly as the livelihood of court-appointed lawyers and public defenders is not dependent on the satisfaction of clients, and judges often prefer lawyers not known for zealous defense advocacy to their more demanding alternative.<sup>248</sup>

It is simply harder to take on the professional responsibilities of criminal defense than other kinds of law practice.<sup>249</sup> The stakes are higher, the responsibilities are greater, the consequences are broader, and public support is nonexistent. This is why my friend, a civil poverty attorney, acknowledged that her own prior misjudgment in a case, no matter how much suffering it caused her or her client, was different from my own.

When I say the system is weighted against the accused, I am referring not only to the inequality of resources, information, and

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247. See RHODE, *supra* note 31, at 61-64.

248. See *id.* at 62; see also Berlow, *supra* note 36, at 28 (depicting Johnny B. Mostiler, the only public defender in Spalding County, Georgia, “the archetype of what many public defenders refer to as ‘meet ‘em, greet ‘em, and plead ‘em’ lawyers”). Berlow describes a case in which Mostiler represented a fifteen-year-old girl who had shot her great aunt during an argument a year before. Her guilty plea and sentencing—resulting in a sentence of life in prison—took ten minutes. Mostiler assembled no family members or friends as a show of support, presented no mitigating evidence, and raised no challenge to his client being tried as an adult. *Id.* Another former client complained that the first time he spoke with Mostiler was the day before his murder trial. The client maintains his innocence and has filed an appeal alleging ineffective assistance of counsel. See *id.*

249. For one of the most wrenching dilemmas in criminal defense, see generally Anne Hull, *A Living Hell or a Life Saved?*; *Capitol Shooter’s Untreated Madness Fuels Legal and Ethical Debate*, WASH. POST, Jan. 23, 2001, at A1 (discussing the strategy of federal public defenders to resist psychiatric treatment for their severely mentally ill client who faces the death penalty for shooting two U.S. Capitol Police officers in July, 1998).

power, but to the *intentional design of indigent criminal defense to process the maximum number of defendants at the lowest cost.*<sup>250</sup> This is not simply the jaded view of a life-long criminal defender. Richard Posner, the presiding judge of the United States Court of Appeals for the Seventh Circuit, and a prominent legal scholar, applauds the intentional maintenance of an inadequate system of indigent criminal defense:

I can confirm from my own experience as a judge that criminal defendants are generally poorly represented. But if we are to be hardheaded we must recognize that this may not be an entirely bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for defense of indigent criminal defendants may be optimal.<sup>251</sup>

At first glance, Posner's observation is stunning; it is also remarkably candid. Still, Posner's view that a bare-bones indigent criminal defense system serves the greater social good by ensuring that it is not too difficult for the government to obtain convictions is hardly surprising, at least not to those who are familiar with the quality of criminal justice for the poor.<sup>252</sup> In contrast to Simon's assertion that the public does not adequately fund criminal defense

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250. See Berlow, *supra* note 36, at 29. Among the payment schemes that favor cost containment over quality representation are low-bid fixed price contracts, resulting in one attorney handling all of the indigent defense in one Georgia county for an average cost of \$189.00 a case—and low hourly rates, such as \$18.00 in one Montana county. *Id.* at 30. In federal court, fees average \$53.00 hour, causing even Chief Justice William H. Rehnquist, hardly a defender of “criminal’s rights,” to complain that the low hourly rate “‘is seriously hampering the ability of judges to recruit attorneys to provide effective representation.’” *Id.*

251. RICHARD A. POSNER, *THE PROBLEMATICS OF MORALS AND LEGAL THEORY* 163-64 (1999).

252. See, e.g., Bob Herbert, *Cheap Justice*, N.Y. TIMES, March 1, 1998, at WK15 (quoting Stephen Bright: “‘If you’re the average poor person you are going to be herded through the criminal justice system about like an animal is herded through the stockyards. . . . [O]ur system of justice is like the sky box at the stadium, or membership in the country club—available only to people who can afford it.’”).

because of criminal defense lawyers' offensive conduct,<sup>253</sup> Posner sees low-quality representation as beneficial to society.

Those who challenge the difference in criminal defense are not engaged in a mere intellectual exercise. They aim to drastically alter the nature of advocacy in a system that is already heavily weighted against the accused. Whether in the name of "justice,"<sup>254</sup> "truth,"<sup>255</sup> or "equality,"<sup>256</sup> these scholars seek to deprive the accused of lawyers passionately committed to their cause. Finding that David's slingshot is too much for a well-intentioned, but weary, Goliath,<sup>257</sup> they would deprive the accused of defenders with mettle or metal.

### *A Comment on the Purported Diminished Significance of Punishment*

Scholars disputing the difference in criminal defense, and the difference between compensation and punishment, seldom seriously reckon with the client's experience. Clients who have been in both civil and criminal court can tell the difference. Likewise, clients currently embroiled in the criminal system, whether incarcerated or "free" on bail, but restricted to work, home, and the drug testing center, would jump at the chance to be in a noncriminal setting. And what about prospective clients? Just ask the random person on the street whether he or she would rather be civilly sued or criminally prosecuted, and you will have the answer. No one who knows the slightest thing about criminal prosecution would choose it over civil litigation.<sup>258</sup>

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253. See SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 41, at 193.

254. See *supra* notes 44-80 and accompanying text.

255. See *supra* notes 81-111 and accompanying text.

256. See Alfieri, *Defending Racial Violence*, *supra* note 42, at 1066 (arguing that defenders should be more "race-conscious"); Alfieri, *Lynching Ethics*, *supra* note 42, at 1066 (proposing a rule which would prohibit lawyers from employing "racialized strategies" in advocacy).

257. See Zacharias, *The Civil-Criminal Distinction*, *supra* note 31, at 170 (arguing against the idea of a "government juggernaut"); Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1707 (arguing against the "image of the lonely individual facing Leviathan").

258. For an example that should resonate for lawyers, see JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* (1999) (examining the criminal prosecution of a lawyer convicted of conspiring with a client to defraud investors). Malcolm tells the story of a naive and inexperienced solo practitioner who ended up in prison for not maintaining proper professional bounds with a conartist client. There is no question that the lawyer would have preferred to face disciplinary proceedings by the local bar rather than a criminal trial. For a biting critique of the book—and the author's belief in the lawyer's innocence—see Richard A. Posner, *In the Fraud*



It is simply wrong to suggest that for some communities, criminal prosecution, which always carries with it the threat of loss of liberty or life, is no big deal.<sup>259</sup> In nearly two decades of law practice, I have seen too many weeping clients contradict this assertion.<sup>260</sup> The dolorous defendants come in all shapes and sizes. It is not just the first-timers who feel dread, fear, sorrow, regret, and self-loathing at their predicament. Experienced offenders often understand the horror of what they are facing more than the first-timers: the feeling of banishment; the shame and anguish of family and friends; the dependence on lawyers and others who are bound to fail them; and the reality of doing *time*.<sup>261</sup> Some would call my client Manny a member of the community that has grown accustomed to incarceration. He had been arrested, convicted, and locked up before. He knew plenty of others who had been or were currently locked up. He had friends who were both perpetrators and victims of drugs and guns. But he cared deeply about his loss of freedom and of family: his children growing up without him, his wife growing old without

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*Archives*, THE NEW REPUBLIC, Apr. 19, 1999, at 29; see also John Diamond & Stephen Franklin, *Pardon Is Emotional Triumph for Rostenkowski*, CHICAGO TRIBUNE, Dec. 24, 2000, at C10 (reporting that former chair of the House Ways and Means Committee, Dan Rostenkowski, spent more than \$2 million in legal fees and lost his House seat in the course of his prosecution for improper use of public funds).

259. See Zacharias, *The Civil-Criminal Distinction*, *supra* note 31, at 173 (“[C]ivil litigants probably are at just as much risk and under the same cloud of suspicion as criminal defendants”); Simon, *The Ethics of Criminal Defense*, *supra* note 41, at 1721 (acknowledging that the argument that punishment is different from compensation has “some substance,” but dismissing punishment as a “categorical rationale for aggressive defense”). Indeed, I think the argument is obscene.

260. For support from a career public defender, see Feige, *supra* note 171, at 59 (“My client . . . is very human and very real. It is his tears I see, his hand I hold and his mother I console.”).

261. See JOHN EDGAR WIDEMAN, *BROTHERS AND KEEPERS* 230 (1984):

You got time but you can't do nothing wit [sic] it. I mean there's twenty-four hours to a day in here just like out in the world. You ain't booked up or nothing for most of them so you'd think you could take care of business, but ain't hardly no business gets taken care of in the joint.

Cause it ain't really your time. Don't know how many evenings I sat down to write you or write somebody else and there ain't nothing to say. Can't write word one. It ain't like I ain't got time. I be itching to write all day. Writing letters in my mind while I'm doing other stuff. Can't wait to get back to my cell so I can write this hot letter but then I'm by myself and I sit down and ain't nothing to say. Ain't nothing worth saying cause ain't nothing happening, really . . . .

him, and his mother dying without him.<sup>262</sup>

The suggestion that prison is no big deal for communities with high rates of incarceration is belied not only by the experience of defenders,<sup>263</sup> but by the experience of the imprisoned themselves. Although educated white prisoners tend to have their prison writings published more than other prisoners,<sup>264</sup> the voices of the more typical inmate can still be found.<sup>265</sup> Whether depicting the physical or sexual violence of prison,<sup>266</sup> loneliness,<sup>267</sup> lack of privacy and dignity,<sup>268</sup>

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262. Manny wrote a letter to the judge prior to sentencing. In it, he wrote:

Your Honor, I am truly sorry for what I have done. I have disappointed my family and my kids . . . . This is the longest time I have ever been incarcerated. I hate to say it but I needed to come to jail to really see how it feels to be away from my family. Now I see it's no place for me, and while I'm here I am taking the first real steps to changing my life for the better . . . . I want to be a positive role model for my kids and my nieces and nephew.

*Letter from "Manny",* May, 2000 (on file with author).

263. See ABRAMSON, *supra* note 221; Babcock, *supra* note 74; Feige, *supra* note 171.

264. See, e.g., SOL WACHTLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* (1997); JEAN HARRIS, *THEY ALWAYS CALL US LADIES: STORIES FROM PRISON* (1988); JEAN HARRIS, *MARKING TIME: LETTERS FROM JEAN HARRIS TO SHANA ALEXANDER* (1991); JEAN HARRIS, *STRANGER IN TWO WORLDS* (1986). For the penetrating perspective of a journalist who worked undercover as a prison guard, see TED CONOVER, *NEWJACK: GUARDING SING SING* (2000).

265. See, e.g., JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* (1981) (a prisoner who grew up in penal institutions writing about being a long-term prisoner); MUMIA ABU-JAMAL, *LIVE FROM DEATH ROW* (1995); CLAUDE BROWN, *MANCHILD IN THE PROMISED LAND* (1965); RUBIN HURRICANE CARTER, *THE 16<sup>TH</sup> ROUND: FROM NUMBER 1 CONTENDER TO NUMBER 45472* (1974) (wrongly convicted death row inmate writes of growing up black in America and his years in prison); GEORGE JACKSON, *SOLEDAD BROTHER* (1970); WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES RAGE AND SURVIVAL BEHIND BARS* (1992) (prisoners writing about the reality of life behind bars). One prisoner's experience is gracefully depicted by his brother, acclaimed writer John Edgar Wideman. See WIDEMAN, *supra* note 261. The experience of a death row inmate is powerfully portrayed by the nun who was his spiritual adviser. See SISTER HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).

266. See ABBOTT, *supra* note 265, at 65-86; Wilbert Rideau, *The Sexual Jungle*, in RIDEAU & WIKBERG, *supra* note 265, at 73-107.

267. See WIDEMAN, *supra* note 261, at 230:

[I]t got something to do with being lonely. Being so [expletive deleted] up inside you never feel like doing nothing. Being lonely's one the worst things about the joint. Probably *the* worst. Always a lot of fools and crazy people surrounding you so you ain't never alone but you always lonely. Longer I spend in here, the more I back away. . . . I got to find my own space. Even if it's tiny.

268. See CARTER, *supra* note 265, at 162:

claustrophobia,<sup>269</sup> boredom,<sup>270</sup> routine humiliation,<sup>271</sup> or the fear of

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I needed a shower—bad! Instead, I was given a bucket of scalding hot water, then locked into my cell. Thus began my initiation into the weird ritual of “bird bathing.”

“Dip and dunk,” they called it. “Dip your towel, and with your soap you dunk, you scrub your tail in your own nasty funk.”

See also ABU-JAMAL, *supra* note 265, at 10:

What visitors do not see, prior to the visit, is a horrifying spectacle—the body-cavity strip search. Once the prisoner is naked, the visiting-room guard spits out a familiar cadence:

Open yer mouth.  
Stick out your tongue.  
You wear any dentures?  
Lemme see both sides of your hands.  
Pull your foreskin back.  
Lift your sac.  
Turn around.  
Bend over.  
Spread your cheeks.  
Bottom of yer feet.  
Get dressed.

269. See ABBOTT, *supra* note 265, at 25:

I suffered from *claustrophobia* for years when I first went to prison. I never knew any form of suffering more horrible in my life.

The air in your cell vanishes. You are smothering. Your eyes bulge out; you clutch at your throat; you scream like a banshee. Your arms flail the air in your cell. You reel about the cell, falling.

Then you suffer cramps. The walls press you from all directions with an invisible force. You struggle to push it back. The oxygen makes you giddy with anxiety. You become hollow and empty. There is a vacuum in the pit of your stomach. You retch.

270. See CARTER, *supra* note 265, at 163, 165 (“In jail, boredom was inescapable fact of daily life. . . . [L]ife . . . became a dreary ritual. Time inside dragged, though the months flew past my window at an alarming rate.”); WIDEMAN, *supra* note 261, at 230:

[O]utside your cell ain’t nothing going on but the same old [expletive deleted]. That’s what gets to you after a while. Repetition. Same ole, same ole all the time. Same [expletive deleted] on the hangout corner. Same slop at breakfast. Same nasty guards. One day just like the other. Same simple cats doing the same dumb numbers. Day in and day out. It gets to you. It surely does.

271. See ABBOTT, *supra* note 265, at 13:

Can you imagine how I feel—to be treated as a little boy and not as a man? And when I was a little boy, I was treated as a man—and can you imagine what that does to a boy? . . .

So. A guard frowns at me and says: “Why are you not at work?” Or: “Tuck in your shirttail!” Do this and do that. The way a little boy is spoken to. This is something I

dying there,<sup>272</sup> these prisoners write of a living death.

Robby Wideman, the brother of novelist John Edgar Wideman, is serving a life sentence for murder in a Pennsylvania prison. He grew up in the Homewood section of Pittsburgh, an impoverished urban community in which incarceration was, and remains, commonplace. This fact does not alter his painful prison life. He writes of the way in which law can eradicate an existence:

I heard from the courts they denied my appeal, they denied my existence as being in any way meaningful or of having any worth at all. I received this devastating news last Friday . . . and have been in a state of depression ever since. I'm trying hard to keep it all together but right now it's really hard to find a reason to keep it together, for they seem to have taken away all reasons worth trying.<sup>273</sup>

John Edgar Wideman observes his brother's difficulty in maintaining his identity behind bars—as a son, a brother, a friend, and a man—and coping with a lengthy incarceration. The trick is to stay connected to life on the outside but not overly attached to it:

Robby cares about family business and likes to keep up with who's doing what . . . but he also treats the news objectively, cold-bloodedly. Family affairs have everything and nothing to do with him. He's in exile, powerless to influence what goes on outside the walls, so he maintains a studied detachment; he hears what I say and quickly mulls it over, buries the worrisome parts, grins at good news. When he comments on bad news it's usually a grunt, a nod, or a gesture with his hands that says all there is to say and says, A million words wouldn't

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have had to deal with not for a year or two—nor even ten years—but for, so far, eighteen years.

272. See Wilbert Rideau, *Dying in Prison*, in RIDEAU & WIKBERG, *supra* note 265, at 158-78. In one passage, Rideau describes the dead inmate's coffin: "It was a cheap beige coffin, made of some synthetic material that looked almost like wood. Someone had written HEAD across one end of it with a Mark-a-lot so people would know the difference." *Id.* at 159.

273. WIDEMAN, *supra* note 261, at 170 (quoting a letter from Robby Wideman). For a broader comment on law's violence, see NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203-39 (Martha Minow, et. al, eds. 1993); Austin Sarat, *Robert Cover on Law and Violence*, in NARRATIVE, VIOLENCE, AND THE LAW, *supra* at 255-65.

make any difference, would they. Learning to isolate himself, to build walls within the walls enclosing him is a matter of survival. If he doesn't insulate himself against those things he can't change, if he can't discipline himself to ignore and forget, to narrow the range of his concerns to what he can immediately practically effect, he'll go crazy.<sup>274</sup>

Rubin "Hurricane" Carter made his wife divorce him because he could not strike that balance. He could not cope with emotional attachment, with need. These things did not fit with prison.<sup>275</sup> No matter how shameful the civil allegation or how steep the penalty, one simply cannot say that there is no meaningful difference between the stakes in civil and criminal court. The price of criminal punishment is unparalleled.

#### V. DOES THE DIFFERENCE IN CRIMINAL DEFENSE WARRANT A DIFFERENT ETHICAL STANDARD?

Generally speaking, those questioning the difference in criminal defense assume that if criminal defense is different, there ought to be a different ethical standard.<sup>276</sup> This is by no means an inevitable step. Some argue that law practice is varied and contextual and there ought to be different ethical standards throughout law practice.<sup>277</sup> The fact that different types of law practice may be different, however, does not necessarily mean that ethical standards should be tailored to fit each type of practice.

There is an important question of context and degree. While I disagree with those who argue that criminal defense cannot be meaningfully distinguished from civil law practice as a whole, I agree that some noncriminal law practice comes awfully close: involuntary mental health commitment proceedings, some immigration proceedings, and termination of parental rights.<sup>278</sup> Each of these

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274. WIDEMAN, *supra* note 261, at 193.

275. See SAM CHAITON & TERRY SWINTON, *LAZARUS AND THE HURRICANE* 67 (1991); CARTER, *supra* note 265, at 307; *THE HURRICANE* (Universal Pictures 1999).

276. See Zacharias, *Civil-Criminal Distinction*, *supra* note 31, at 165-67.

277. See Zacharias, *Reconceptualizing Ethical Roles*, *supra* note 31, at 190-203.

278. See Mann, *supra* note 124, at 1795 (suggesting that clients who are subjected to government-initiated punitive investigation or litigation are in the same posture as criminal

proceedings involves the state and threatens a terrible loss. Importantly, each of these proceedings usually involves an indigent party with court-appointed counsel.

From both an outside-in and an inside-out perspective, adversarial zeal is most important when the stakes are high, the adversary powerful, and the level of trust between the lawyer and client low.<sup>279</sup> The only way to compensate for the disadvantage in resources and power is to allow a more fiercely adversarial ethic on behalf of intimidated and isolated clients who lack the means to hire their own attorneys. Only through zealous advocacy can there be meaningful access to justice.<sup>280</sup>

Still, I am not convinced that even this set of circumstances, a frightened client facing an adversary with more resources relying on an untrusted lawyer, is so unique to criminal and quasi-criminal proceedings to justify a different ethical standard. As a criminal defender who has had limited experience in other areas of legal practice,<sup>281</sup> I am wary of the self-reference, if not self-importance, of suggesting that no other lawyer has felt what I have. What about hard-fought divorce cases involving a well-connected lawyer husband and his homemaker wife?<sup>282</sup> What about unwitting or unsophisticated victims of industrial pollution who take on multinational corporations and their high-powered lawyers?<sup>283</sup> What about poor black rural southerners who take on the political establishment to obtain their own share of power?<sup>284</sup> What about

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defendants). It should be noted that a criminal prosecution can lead to these other proceedings, and often does.

279. It is worth noting, however, that Lord Brougham's classic statement of zeal occurred in the context of a divorce: the divorce of Queen Caroline from George IV before the House of Lords. *See supra* note 27. *But see* Zacharias, *Reconceptualizing Ethical Roles*, *supra* note 31, at 170 n.10 (asserting that "modern professional responsibility theory does not fully accept Brougham's extreme conception of lawyer partisanship, but does contemplate supreme loyalty by criminal defense lawyers").

280. *See* Ellmann, *supra* note 77, at 131-41 (defending the commitment of zealous advocacy against David Luban's moral critique).

281. *See generally* Abbe Smith, *On Representing a Victim of Crime*, in *LAW STORIES* (Gary Bellow & Martha Minow eds., 1996).

282. *See generally* BELLA STUMBO, *UNTIL THE TWELFTH OF NEVER: THE DEADLY DIVORCE OF DAN AND BETTY BRODERICK* (1993).

283. *See generally* JONATHAN HARR, *A CIVIL ACTION* (1995).

284. *See generally* MELISSA FAY GREENE, *PRAYING FOR SHEETROCK: A WORK OF NONFICTION* (1991).

battered women seeking protection for themselves and their children?<sup>285</sup> What about poor people in general, with problems relating to government benefits, decent housing, medical care, and their family situation?<sup>286</sup>

Although thoughtful scholars have proposed ethical schemes with two or more tiers,<sup>287</sup> I believe this is a bad idea and ultimately a dangerous one. Not only is it impossible to draw a principled line between criminal and civil practice,<sup>288</sup> but it is impossible to draw tenable categorical lines at all. There are also a host of practical difficulties in developing an ethical scheme that reflects all of the contexts of legal practice.<sup>289</sup>

The danger is to the adversary system itself, and the constitutional principles underlying it. The push to curb zealous representation in civil cases will inevitably jeopardize zealous representation in criminal cases and the rights of the accused.<sup>290</sup> As we have seen, the critique of “adversarial excess” invariably spills over into the criminal system. Formalizing distinctions in practice through different ethical standards will lead to diminished advocacy on behalf of everyone, especially those who need it most.

The accused and their defenders are politically vulnerable. As the criminally accused and convicted have limited support and clout in the general community, the criminal defenders have similarly limited support and clout in their own professional community.<sup>291</sup> The power lies with civil practitioners, members of large firms who represent

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285. See generally Abbe Smith & Ilene Seidman, *Lawyers for the Abused and Lawyers for the Accused: An Interfaith Marriage*, 47 LOY. L. REV. 415 (2001).

286. See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-73* (1993); Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995) (reviewing DAVIS, *supra*); Louise G. Trubek, *The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today*, 22 FORDHAM URB. L.J. 1123 (1995).

287. See Freedman, *A Proposal for Different Ethical Standards for Criminal and Civil Representation*, *supra* note 134; LUBAN, *LAWYERS AND JUSTICE*, *supra* note 23, at 58-66; Rhode, *Ethical Perspectives on Legal Practice*, *supra* note 27, at 605-07; Zacharias, *Reconceptualizing Ethical Roles*, *supra* note 31.

288. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 23, at 65 (“[T]he simple criminal/civil (or criminal + quasi-criminal/civil) distinction is too simple to capture the real [ethical] issues at stake between the criminal defense and civil suit paradigms.”).

289. See Freedman, *A Proposal for Different Ethical Standards*, *supra* note 134.

290. See *id.*

291. See MCINTYRE, *supra* note 171, at 62-66.

wealthy corporations and individuals in civil matters,<sup>292</sup> and their clients. With a unitary ethical standard, civil practitioners have an incentive to maintain the ethic of zeal in criminal defense as well as civil litigation. As Monroe Freedman notes: “[C]ivil practitioners typically justify their own zealous representation by invoking the criminal defense paradigm. If we were to mitigate zealous representation in civil representation, therefore, criminal representation could ultimately suffer the same fate.”<sup>293</sup>

It has become “old-fashioned” to defend, or worse, exalt, the adversary system. It is hopelessly prehistoric in a postmodern world.<sup>294</sup> But could it really be possible that values such as liberty, dignity, and autonomy have lost their relevance? Could it be that the defense lawyer’s role in maintaining a free society is passé? I do not think so. Even an ardent proponent of alternative dispute resolution like Professor Carrie Menkel Meadow concedes that if she were in trouble she would want a zealous advocate.<sup>295</sup>

The criminal defense paradigm must continue to serve as a standard, not an anomaly. The criminal defense lawyer must continue to be “the archetype of the advocate in the adversary system.”<sup>296</sup> Without a high standard of adversarial zeal, the standard of the impassioned lawyer fighting for a client “though the heavens [may] fall,”<sup>297</sup> will diminish throughout the legal profession.

To the extent there are excesses in advocacy, civil or criminal, eliminating zeal altogether is not the answer. There are built-in checks. There is an *adversary*; there is a judge; and there are disciplinary boards.<sup>298</sup>

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292. See FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, ch. 10; *Corporate Lawyers and Their Clients: Some Special Ethical Rules*; Freedman, *A Proposal for Different Ethical Standards*, *supra* note 134.

293. See Freedman, *A Proposal for Different Ethical Standards for Criminal and Civil Representation*, *supra* note 134.

294. See Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern Multicultural World*, *supra* note 42.

295. See *id.* Telephone Interview with Carrie Menkel-Meadow, Professor of Law, Georgetown University Law Center (Nov. 6, 2002).

296. Schwartz, *supra* note 131, at 548.

297. FREEDMAN, *supra* note 9, at 66.

298. *But see* Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 549 nn.12,



There is inevitably some individual judgment about what methods to employ on behalf of a client, but this judgment should be strategic. The aim should be to best serve the client's interests and not the product of individual lawyer misgivings, regardless of whether we call these misgivings "justice." The lawyer is, of course, free to share his or her misgivings with the client. But the client need not heed them.<sup>299</sup>

## VI. CONCLUSION

The air was dead and flat, and nothing stirred but Roger's slow, half-creeping march into the room. He had paused on the threshold with a little gasp when he first saw the chair, and the guards had gently urged him forward. He reached it now and paused to turn around.

"Have you any last request?" the Warden asked?

Roger's eyes darted about. He couldn't see into the darkened room from within the circle of light. "Mr. Longa?" he asked timidly.

"I'm here, Roger." Morris's voice came distinctly from the shadow, and the Warden looked up angrily. The rule was silence, and Morris had not dared to speak before, in fear of being excluded or even ejected from the room. But now he spoke in answer to the boy's question. A light jumped into Roger's eyes and a faint smile crossed his face.

"Mr. Longa," he managed to whisper, looking in the direction of the voice. "Thanks for everything."

—Curtis Bok<sup>300</sup>

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13 (1998) (noting that the number of complaints filed against lawyers has increased steadily, but the rate of formal disciplinary charges has remained constant).

299. See FREEDMAN, *supra* note 9, at 74-49.

300. CURTIS BOK, *STAR WORMWOOD* 182 (1959).

I lived through Manny’s case. I even managed to ameliorate the sentence.<sup>301</sup> But the case remains with me, the burden not quite lifted so long as Manny is in prison. I hear from him from time to time; he is serving his sentence in a prison somewhere in the Midwest, far away from friends and family. He laments the lack of programs and the lack of training. He wants desperately to make something of his time there. He is grateful for what we did for him; sometimes I think he is too thankful. He remained gracious at the worst moments, never blaming us for anything that happened.

The difference in criminal defense is in Manny’s continuing plight, and in my connection to his plight. In his 1951 paean to zealous advocacy, *The Ethics of Advocacy*,<sup>302</sup> Charles Curtis calls the lawyer-client relationship “intimate,” like kinship and friendship.<sup>303</sup> Curtis notes that zealous advocacy puts the client above all others, even above the lawyer: “You devote yourself to the interests of another at the peril of yourself . . . . Men will do for others what they are not willing to do for themselves—nobler as well as ignoble things.”<sup>304</sup>

This is lawyering at its best. If the archetype of the zealous criminal defender—the devoted advocate fighting for fairness, dignity, and justice for her client—sets the standard for all lawyers, this is a good thing both for the profession and those that the profession will serve.

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301. Remarkably, and to the credit of a “conscientious” senior prosecutor (*see* FREEDMAN, *supra* note 9, at 236) the United States Attorney’s Office joined our efforts to modify the sentence. Together, we convinced a judge not ordinarily inclined to change his mind to suspend all but six years of the sentence imposed.

302. *See* Curtis, *supra* note 27.

303. *Id.* at 8.

304. *Id.* at 6.