

# Martyrdom and Criminal Defense

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## INTRODUCTION

It is beyond dispute that people accused of crime are often guilty—of something, if not exactly what they are charged with. If the state routinely rounded up and jailed innocent people, we would not be living in a free society. For those of us who represent the accused and convicted, the fact that our clients might be guilty is simply part of the package; it is the nature of criminal defense in a free society. Of course, there are many other, more salient factors than factual guilt in representing people caught up in the criminal legal system, including the question of legal guilt, the right to counsel and due process, the context of the alleged misconduct, the appropriateness of criminal punishment, and perhaps most importantly, the essential humanity of our client.

Still, the central duty of our vocation is to accompany, assist, and advocate for the guilty as well as the not guilty, doing everything we can

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to keep the state at bay and spare our clients from the clutches of a voracious criminal system—as required by law.<sup>1</sup>

But must criminal defense lawyers be guilty too? I am not talking about what our critics say—that we are not merely our clients’ apologists, but their accomplices, assisting them in the commission of crime. This is a ridiculous allegation that should prompt no guilt whatsoever. We are our client’s advocates, not their accomplices.<sup>2</sup>

Nor am I talking about a pervasive handwringing by and about criminal defense lawyers in both the popular culture<sup>3</sup> and scholarly writing,<sup>4</sup> which conveys the message that, at best, it’s dirty work, but “someone must do it.”<sup>5</sup> There is nothing dirty about criminal defense. Our

<sup>1</sup> See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2023) (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

<sup>2</sup> See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.”).

<sup>3</sup> Television shows like the late 1990’s *The Practice* (ABC television broadcast 1997–2004) and the 2020’s reboot of *Perry Mason* (HBO Max, 2020–23) come to mind, in which the central characters regularly wrestle with their roles in the system, and, occasionally, *The Lincoln Lawyer* (Netflix, 2022–23), where the protagonist is more of a happy diehard criminal defender. For a thoughtfully written memoir about a guilt-ridden criminal defense lawyer, see Seymour Wishman, *Confessions of a Criminal Lawyer*, 21 LEGAL STUD. F. 139 (1997) (first published in hardcover by Times Books in 1981).

<sup>4</sup> See, e.g., William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (arguing that zealous criminal defense causes too much damage); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (defending zealous defense for the poor with the exception of rape cases); see also WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998) (arguing for a “justice-oriented” approach to criminal defense and other law practice, rather than a client-centered one).

<sup>5</sup> See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177 (1983) (discussing “The Garbage Collector’s Reason” as a motivation for criminal defense). Babcock explains the necessity and elegance of this dirty work:

Yes, it is dirty work, but someone must do it. We cannot have a functioning adversary system without a partisan for both sides. The defense counsel’s job is no different from, and the work no more despicable than, that of the lawyer in a civil case who arranges, argues, and even orients the facts with only the client’s interests in mind.

This answer may be elegantly augmented by a civil libertarian discussion of the sixth amendment and the ideal of the adversary system as our chosen mode for ascertaining truth. Also, the civil libertarian tells us that the criminally accused are the representatives of us all. When their rights are eroded, the camel’s nose

criminal adversarial system could not function—at least not as it was meant to<sup>6</sup>—without skilled and devoted counsel for defendants.

By asking whether criminal defense lawyers must also be guilty, I am referring to those among us who feel beleaguered and blameworthy about the injustice we routinely witness, no matter our efforts to make a difference. I am also talking about law students drawn to criminal defense—especially indigent criminal defense<sup>7</sup>—who fear that if they become criminal defense lawyers, they will become mere “cogs” in the system,<sup>8</sup> legitimizers of it,<sup>9</sup> or obnoxious so-called “white saviors”—white people who believe they have been called to public defense to rescue the disadvantaged nonwhite “underclass.”<sup>10</sup>

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is under and the tent may collapse on anyone. In protecting the constitutional rights of criminal defendants, we are only protecting ourselves.

*Id.*

<sup>6</sup> *But see* RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163–64 (1999) (arguing that “poor” representation of criminal defendants and a “bare-bones” system of indigent criminal defense may be “optimal” as a matter of societal values and resources).

<sup>7</sup> Because “criminal defense” is largely “indigent defense,” I use these terms interchangeably throughout this Essay. *See* John Gross, *Reframing the Indigent Criminal Defense Crisis*, HARV. L. REV. BLOG (March 18, 2023), <https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis/#:~:text=And%20in%20those%20proceedings%2C%20according,too%20poor%20to%20hire%20counsel> (“[A]ccording to a Department of Justice Report, over 80% of defendants are unable to afford counsel. . . Thus, indigent defense isn’t just a part of our criminal justice system, it is our criminal justice system.”).

<sup>8</sup> This question has been raised by students during nearly every Clinic Orientation I have held. I have come to loathe the word “cog.”

<sup>9</sup> *See generally* Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (arguing that *Gideon* has done more harm than good for indigent defendants and those appointed to represent the poor only legitimize the harm). For my response to Butler, *see* Abbe Smith, *Defending Gideon*, 26 U.C. DAVIS SOC. JUST. L. REV. 235 (2022).

<sup>10</sup> *See generally* James M. Doyle, “*It’s the Third World down There!*”: *The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71 (1992) (discussing white saviorism in the criminal legal system). The idea of white saviorism may have originated in a poem about the 1889–1902 American-Filipino War. *See* RUDYARD KIPLING, *THE WHITE MAN’S BURDEN* (1899). For a present understanding of what is meant by the white savior complex generally, *see* Teju Cole, *The White-Savior Industrial Complex*, THE ATLANTIC (Mar. 21, 2012), <https://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/> (discussing the white savior complex as the harmful belief by even well-intentioned white people that they must save their Black and brown counterparts because they are unable to save themselves); Janice Gassam Asare, *What Is White Saviorism And How Does It Show Up In Your Workplace?*, FORBES (Sept. 30, 2022, 7:20

As to being “cogs” and legitimizers, I have written about this before.<sup>11</sup> The data conclusively shows that skilled and devoted criminal defenders make a significant difference in the outcome of criminal cases—and no doubt make a difference in the experience of clients.<sup>12</sup>

As to the white savior complex, I consider this a trope, and, if it exists at all, an anomaly in my more than thirty years of teaching would-be criminal defenders. When a student seems to suffer from a desire to be some kind of savior—especially if the student is white—other students knock that right out of the student. There are also students who use the white savior complex as an excuse to not become public defenders—and then carry their white privilege off to other law practice.

A favorite story about the irrelevance of the white savior trope comes from a law student who worked with long-serving prisoners seeking parole before she entered law school. After working with a lifer for a year, she asked him what he thought about “white savior types” in criminal defense. The lifer was initially puzzled, and then laughed when the student explained that this was a concern for many students. He told the student that, “as someone in a cage,” this was the least of his worries. If someone was genuinely interested in getting him out, he could care less what their motivations were. So long as they were committed to helping him, it didn’t matter to him whether they thought they were a white savior, Black savior, or any other kind of savior.<sup>13</sup>

For many defenders and would-be defenders, these various concerns—being a cog, legitimizer, white savior, or helpless witness to

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PM), <https://www.forbes.com/sites/janicegassam/2022/09/30/what-is-white-saviorism-and-how-does-it-show-up-in-your-workplace/?sh=48b58d1912> (defining white saviorism as “the belief that white people are here to save, help, teach, and protect their non-white counterparts”). For an especially critical description of public defenders with white savior complex, see Black Attorneys of Legal Aid Caucus (BALA), *Can Public Defenders Be Racist?*, GIDEONS SOLDIERS BLOG (Aug. 3, 2020), <https://gideonsoldiers.com/can-public-defenders-be-racist/> (describing the “white savior complex” in public defense as white defenders who talk of saving clients from themselves, who relate to adult clients as if they are children, and who try to “talk Black,” mimicking racial stereotypes).

<sup>11</sup> See generally Smith, *supra* note 9 (arguing that the right to counsel in criminal cases has made a profound difference to the law and to individual lives).

<sup>12</sup> *Id.* at 249-51 (referring to research on the impact of public defenders in the Bronx and Philadelphia).

<sup>13</sup> Shared by Abigail Van Buren, Georgetown Class of 2024, on Aug. 21, 2023. Because of my strong view that the white savior complex is a trope, I won’t dignify it further with any substantive response. Instead, I fold the idea of a “savior” into the idea of defender as “hero” *infra*.

systemic injustice—amount to a professional guilty conscience. It is a voice in the back of the head that insists the defender is not doing enough and is at risk of becoming part of the injustice they wish to combat. When these feelings of guilt firmly take hold, they can escalate into a mentality of *martyrdom*, a sense that suffering and sacrifice are essential, even inherent, to the job.

But this is not how I feel about my life's work. I am a very happy criminal defense lawyer. Although the work can be challenging—and sometimes heartbreaking—to me, there is nothing more fulfilling or meaningful than representing a person who has been accused of committing or convicted of a crime. More than this, it can also be *fun*.

I am not alone in this feeling. According to research on the emotional well-being of lawyers, public defenders may be among the happiest.<sup>14</sup> This comports with my own anecdotal experience as a teacher and mentor of law students and post-graduate fellows interested in criminal defense, many of whom are now career defenders. They may be deeply frustrated by the system in which they work, but they are happy to do what they can to make a difference for their clients. They also adore their defender colleagues. My former students and fellows in large law firms don't seem quite as happy.

Notwithstanding the data, there seems to be a trend in the direction of suffering. In this Essay, I first call out this damaging trend and discuss what is problematic about the martyr paradigm and its equally troubling analogue, the hero/savior paradigm. Then, I muse a bit about whether there might be a need for heroes and martyrs in the challenging work of criminal defense after all. Finally, I offer a happier, more satisfying, and more effective approach to being a defender.

## I. GIDEON'S ARMY AND THE MARCH TO MARTYRDOM

One illustration of this trend toward martyrdom is a 2013

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<sup>14</sup> In view of how unhappy most lawyers are, this might damn defenders with faint praise! See Douglas Quenqua, *Lawyers With Lowest Pay Report More Happiness*, N.Y. TIMES (May 12, 2015), <https://archive.nytimes.com/well.blogs.nytimes.com/2015/05/12/lawyers-with-lowest-pay-report-more-happiness/?searchResultPosition=1> (reporting a study that found public defenders and legal aid lawyers are the happiest among lawyers, especially when compared to Big Law lawyers). For a discussion of the data underlying the *Times* piece, which concludes that a broad swath of public interest/public service lawyers are generally happier than their private, commercial law counterparts, see Lawrence S. Krieger & Kennon M. Sheldon, Ph.D, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015).

documentary film, *Gideon's Army*, which explores indigent criminal defense in the Deep South through the stories of three young public defenders.<sup>15</sup> This film is regularly shown in law school criminal law courses, criminal defense clinics, and public defender trainings. In the film, the defenders struggle to represent their clients in the face of huge caseloads, long hours, low pay, few resources, and the daily challenges of representing the poor in a dehumanizing system.<sup>16</sup>

*Gideon's Army* developed a following beyond law schools and public defender offices. It won an award at the Sundance Film Festival,<sup>17</sup> received the Nation Institute/Fertel Foundation's Ridenhour Documentary Film Prize,<sup>18</sup> and got a glowing review in the *New York Times*.<sup>19</sup> In other words, lots of people have seen it.

One of the stars of the film, Georgia public defender Travis Williams, is the very image of the martyred defender. Williams literally wears his commitment on his skin: tattooed on his back are the names of every client whose case he lost at trial, making sure he never forgets them.<sup>20</sup> His belief in the cause is all-consuming: "Either this is your cause or this ain't," Williams declares in the film.<sup>21</sup> If it is your cause, you must be all in—which presumably means you should be covered in tattoos.

To Williams, all losses are the same. There is no asterisk by any of the tattooed names indicating that this might have been an especially difficult case because the evidence was overwhelming, or the client insisted on going to trial contrary to advice, or the case had to go to trial because there was no reasonable alternative. The client's loss is the lawyer's loss. The lawyer must bear and *wear* that loss. I understand how Williams feels, especially after a crushing defeat at trial. I often experience the client's loss as my own. Wounded by defeat—and the

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<sup>15</sup> GIDEON'S ARMY (HBO Documentary Films 2013). Dawn Porter is the director. The three defenders are Travis Williams, Brandy Alexander, and June Hardwick.

<sup>16</sup> *Id.*

<sup>17</sup> Pamela McClintock, *Sundance: Candescent Films Announces 2014 Documentary Awards*, HOLLYWOOD REP. (Jan. 18, 2014), <https://www.hollywoodreporter.com/movies/movie-news/sundance-candescent-films-announces-2014-672127/#!>

<sup>18</sup> *Documentary Film Prize Recipient, 2014*, RIDENHOUR PRIZES (2014), <https://www.ridenhour.org/recipients/dawn-porter> (last visited July 18, 2023).

<sup>19</sup> Stephen Holden, *Foot Soldiers in the Battle for a Fair Shake*, N.Y. TIMES (June 27, 2013), [https://www.nytimes.com/2013/06/28/movies/defending-the-underclass-in-gideons-army.html?\\_r=0](https://www.nytimes.com/2013/06/28/movies/defending-the-underclass-in-gideons-army.html?_r=0).

<sup>20</sup> GIDEON'S ARMY, *supra* note 15.

<sup>21</sup> *Id.*

consequences for my client—I inevitably feel that I failed the person I was supposed to protect.<sup>22</sup> That said, I have no tattoos and will not be getting any soon. And when I first saw the film, I worried that Williams might have to start using a smaller font if he plans to be a long-term defender given the huge stack of cards against us and our clients and how often we lose.

*Gideon's Army* also features Brandy Alexander, another Georgia public defender, paying for gas out of a small pile of change at the bottom of her purse, which is all she has left of her meager paycheck.<sup>23</sup> Unfortunately, Brandy also recounts stories about a former client who threatened to kill her if she lost his case, and a former client who bragged about raping his 12-year-old daughter.<sup>24</sup> These are unusual stories, not at all typical defender fare, that present a different kind of suffering for defense lawyers.

The third lawyer, Mississippi public defender June Harwick, is not featured as prominently as the other two,<sup>25</sup> perhaps because she doesn't seem to suffer as much. She diligently tries to represent her clients with limited resources while juggling the demands of her family.<sup>26</sup> She doesn't seem miserable. She understands her role and works hard to fulfill it. Soon after the film was made, she left her job to pursue a political career.<sup>27</sup>

The image of the public defender as all-sacrificing and long-suffering, as captured by Travis Williams' tattoos and Brandy

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<sup>22</sup> Robin Steinberg, fellow career defender (and one of my best friends), shares this view: There has never been a time when I was not filled with anxiety and fear as I was about to start a trial with a client. By the time trials roll around, good public defenders have gotten to know their clients, and the clients' families, well. The pressure to win—and get your client free—isn't political or theoretical; it is personal. Of course, clients and their loved ones bear the devastating burden of a loss, but public defenders carry the responsibility. ROBIN STEINBERG, *THE COURAGE OF COMPASSION* 31 (2023).

<sup>23</sup> *GIDEON'S ARMY*, *supra* note 15.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Holden, *supra* note 19. I have no problem with Ms. Harwick leaving public defense for politics. Ever since the 2016 election of Donald Trump as president, I tell my students the following: "I hope you join me in my life's work and become career defenders, because no legal work is more meaningful or urgent. But a career in indigent defense is not for everyone, and if it turns out it's not for you, you should move back to where you're from and run for office. The skill sets are transferable: If you can talk to a juror you can talk to a voter. We have too often ceded politics to the mediocre and mendacious, and the country needs you to step up."

Alexander's spare change, is not an anomaly. To many, it is the norm. This is not a good thing. It leads law students and young lawyers to revere criminal defense martyrs, but resist criminal defense for themselves. Those with interest and aptitude, but who also want children, a family, or pursuits and passions outside of indigent defense are often intimidated by the great sacrifice such a career implies.

It might also doom defenders to a short career—for how long can such self-sacrifice go on before it's time to get a more manageable, grownup job? Along the same lines, I can't tell you the number of people who, upon finding out what I do for a living, patronizingly exclaim, "So you're a do-gooder!" The subtext is there is something naïve and idealistic, even childish, about being devoted to something other than one's own self-enrichment, and you can't possibly keep doing the work into adulthood.

Unfortunately, various commentators, in both the legal profession and the academy, perpetuate this image. For instance, Jonathan Rapping, founder of the indigent defense organization Gideon's Promise, who appears in the film, lauds the "great personal sacrifice" and "nobility" of indigent criminal defense and calls the lawyers in *Gideon's Army* "Sisyphean . . . heroes . . . pushing forward, only to slip back under the crushing weight of the system."<sup>28</sup>

I have known Jonathan Rapping (his friends call him "Rap") since he was a young public defender in Washington, D.C. He was, and still is, a talented lawyer. He also seemed to enjoy what he was doing—the clients, the colleagues, and the work itself, win or lose. His enthusiasm was contagious, whether he was trying cases or training new lawyers. It was not all sacrifice.

The Public Defender Service for the District of Columbia (PDS), where Rapping worked, is one of the most well-resourced public defender offices in the country—one that pays staff federal wages. Perhaps it's easier to be a happy defender under those circumstances. Rapping created Gideon's Promise (originally called the Southern Public Defender Training Center) soon after he left PDS to fill the dire need for training and support in under-resourced defender offices.<sup>29</sup> Rapping won a

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<sup>28</sup> Jonathan A. Rapping, *The Revolution Will be Televised: Popular Culture and the American Criminal Justice Narrative*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 6–7, 22–25 (2015).

<sup>29</sup> See *Our History*, GIDEON'S PROMISE, <https://www.gideonspromise.org/justice-system-reform/> (last visited July 18, 2023).



MacArthur “Genius” Award for his efforts a few years later.<sup>30</sup>

I like and admire Rapping, and maybe I am interpreting his words too literally and setting up a straw man. What he probably means to say to defenders trembling under the weight of unreasonable caseloads in places where every conviction means jail is *Keep up the good fight. You are doing essential work. Those of us who understand the value of a good defense lawyer applaud you, no matter the public rebuke our work seems to provoke.*

But I worry that too much emphasis on the burdens of indigent defense, rather than the benefits, can leave a mark. It reminds me of a passage in famed criminal and capital defense lawyer Bryan Stevenson’s book *Just Mercy*,<sup>31</sup> in which Stevenson explains his work to civil rights icon Rosa Parks:

Ms. Parks turned to me and sweetly asked, “Now, Bryan, tell me who you are and what you’re doing.” . . .

“Yes, ma’am. Well, I have a law project called the Equal Justice Initiative, and we’re trying to help people on death row. We’re trying to stop the death penalty, actually. We’re trying to do something about prison conditions and excessive punishment. We want to free people who’ve been wrongly convicted. We want to end unfair sentences in criminal cases and stop racial bias in criminal justice. We’re trying to help the poor and do something about indigent defense and the fact that people don’t get the legal help they need. We’re trying to help people who are mentally ill. We’re trying to stop them from putting children in adult jails and prisons. We’re trying to do something about poverty and the hopelessness that dominates poor communities. We want to see more diversity in decision-making roles in the justice system. We’re trying to educate people about racial history and the need for racial justice. We’re trying to confront abuse of power by police and prosecutors.” . . .

Ms. Parks leaned back, smiling. “Ooooh, honey, all that’s going to make you tired, tired, tired.”<sup>32</sup>

Of course, Stevenson doesn’t seem to ever get tired. Instead, he runs a public interest office, tries cases in rural Alabama counties, argues cases before the United States Supreme Court, writes books, created a

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<sup>30</sup> *Id.*; see also Felicia R. Lee, *MacArthur Awards Go to 21 Diverse Fellows*, N.Y. TIMES (Sept. 17, 2014), <https://www.nytimes.com/2014/09/17/arts/macarthur-awards-go-to-21-diverse-fellows.html>.

<sup>31</sup> BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 291-93 (2014).

<sup>32</sup> *Id.* at 292-93.

memorial to the victims of lynching, and opened two museums dedicated to understanding how mass incarceration carries on the legacy of slavery.<sup>33</sup>

Stevenson came to indigent criminal defense as a Harvard law student, and, upon meeting his first poor, Black prisoner on death row, couldn't imagine doing anything else with his life.<sup>34</sup> The work is a kind of calling for him.<sup>35</sup> Like his mentor Stephen Bright, another committed capital defender and founder of the Southern Center for Human Rights,<sup>36</sup> Stevenson is a hero to many public defenders, law students, and probably anyone who read his book or saw the movie.<sup>37</sup>

By my lights, none of the lawyers I have mentioned so far is a “martyr.” I have no doubt they would reject this description. But there is an intensity to the work they do—and to how they hold themselves out in the world—that can be daunting. When asked about the meager pay he received in his early years representing the condemned, Bright remarked, “This is what I do, seven days a week, 10 to 12 hours a day.” “I live just fine,” Bright said.<sup>38</sup>

And no doubt he did. I tell my students there's no such thing as a destitute lawyer. They can make a decent wage and “live just fine” both as a public defender and as a lawyer whose practice consists largely of court-appointed cases.

But the heroic status of lawyers like Bryan Stevenson, Stephen

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<sup>33</sup> See Campbell Robinson, *A Lynching Memorial is Opening. The Country Has Never Seen Anything Like It.*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html> (reporting on the opening of the National Memorial for Peace and Justice in Montgomery, Alabama, conceived by Stevenson's Equal Justice Initiative, which is dedicated to the victims of white supremacy, especially the thousands of Black people lynched during a decades-long campaign of racist terror across the South). As *N.Y. Times* reporter Campbell Robinson notes, “There is nothing like it in the country. Which is the point.” *Id.*

<sup>34</sup> See STEVENSON, *supra* note 31, at 33 (recounting his summer internship at his mentor Stephen Bright's Southern Center for Human Rights in Atlanta and meeting his first death row prisoner).

<sup>35</sup> I feel similarly. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 497, 508 (1999) (a secular Jew and a lapsed Catholic examining the pull of criminal defense).

<sup>36</sup> See David G. Stout, *The Lawyers of Death Row*, N.Y. TIMES MAG. (Feb. 14, 1988), <https://www.nytimes.com/1988/02/14/magazine/the-lawyers-of-death-row.html> (recounting Stephen Bright's path to the Southern Prisoners Defense Committee, now called the Southern Center for Human Rights).

<sup>37</sup> JUST MERCY (Warner Bros. Pictures 2019).

<sup>38</sup> Stout, *supra* note 36.

Bright, and Judith Clarke (another revered death penalty lawyer)<sup>39</sup> can bleed into the idea of criminal defenders as martyrs. Reading Stevenson’s book—though inspiring—left me wondering about his life. Although he mentions family, there is nothing about friends, a partner, or much of anything about his personal life.<sup>40</sup> The message is he doesn’t have much of a personal life because his professional commitments are so consuming.

## II. THE PROBLEM WITH THE PUBLIC DEFENDER AS A MARTYR/HERO

The idea of the heroic defender is a close cousin to that of the self-sacrificing martyr. These models are problematic. Neither is sustainable.

Harvard law professor Charles Ogletree<sup>41</sup> laid the intellectual groundwork for heroism/martyrdom as a motivation for indigent defense in his oft-cited 1993 law review article, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*.<sup>42</sup> In the article, he argued that “empathy” and “heroism” are the central and sustaining motivations for public defenders.<sup>43</sup> The article became a standard for many would-be defenders and more experienced ones.

But Ogletree’s idea of empathy as a deep and boundless connection between lawyer and client tends to invite the suffering I am worried about.<sup>44</sup> The empathy he describes goes beyond the ability to understand and feel compassion for another person, which, of course, is

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<sup>39</sup> See William Glaberson, *Loughner’s Lawyer Called a Master Strategist*, N.Y. TIMES (Jan. 10, 2011), <https://www.nytimes.com/2011/01/11/us/11defender.html> (calling Clarke the “best-known federal public defender in the country, with a reputation for taking on cases that seem impossible”); Patrick Radden Keefe, *The Worst of the Worst*, NEW YORKER (Sept. 7, 2015), <https://www.newyorker.com/magazine/2015/09/14/the-worst-of-the-worst> (profiling Judith Clarke and quoting friend and colleague Elisabeth Semel about what motivates Clarke to represent the “worst of the worst”: “[s]he has a well of compassion that just runs a little deeper”).

<sup>40</sup> See generally STEVENSON, *supra* note 31.

<sup>41</sup> I worked with Charles Ogletree (“Tree,” as he was affectionately known) at Harvard Law School’s Criminal Justice Institute from 1990 to 1996. I loved and respected him. Sadly, Tree died at age 70 from complications relating to Alzheimer’s Disease on August 4, 2023. For an especially lovely obituary, see Tovia Smith, *Noted defense attorney Charles Ogletree dies*, NAT’L PUB. RADIO (Aug. 4, 2023, 9:15 PM), <https://www.npr.org/2023/08/04/1192315392/charles-ogletree-harvard-law-professor-defense-attorney-dies>.

<sup>42</sup> Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

<sup>43</sup> *Id.* at 1243.

<sup>44</sup> See *id.* at 1271-75 (discussing the empathic defender).

important in criminal defense.<sup>45</sup> It goes beyond the ability to be curious about and *imagine* another person's life and circumstances no matter how different from one's own—qualities I believe are essential for defense lawyers. It transcends Charles Fried's theory of the lawyer as "friend,"<sup>46</sup> to the lawyer as *best friend*.<sup>47</sup>

Ogletree's concept of heroism is a harbinger of the martyred defender. Like Jonathan Rapping,<sup>48</sup> Ogletree began his career at PDS. While there, Ogletree considered himself a "sort of Robin Hood figure who can conquer what others cannot and . . . does not always have to conform to the moral rules society reserves for others."<sup>49</sup> Others have recognized the nonconformist outlaw as a model for (typically white male) criminal defense lawyers.<sup>50</sup> This persona has become ingrained in popular culture through characters like James Woods' Eddie Dodd, the pony-tailed, marijuana-smoking lawyer in the movie *True Believer*,<sup>51</sup> Al Pacino's idealistic and increasingly indignant Arthur Kirkland in the movie *And Justice for All*,<sup>52</sup> Mickey Haller in Michael Connelly's Lincoln Lawyer novels,<sup>53</sup> movie, *The Lincoln Lawyer*,<sup>54</sup> and television series, *The Lincoln Lawyer*,<sup>55</sup> and any number of television shows featuring brash,

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<sup>45</sup> See generally STEINBERG, *supra* note 22 (arguing the importance of compassion in public defense and life).

<sup>46</sup> Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L. J. 1060, 1067-67 (1976).

<sup>47</sup> See Ogletree, *supra* note 42, at 1272-73. For a longer discussion on the problem of empathy and heroism, see Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004).

<sup>48</sup> Rapping has also embraced public defender heroism in the movement to reclaim equal justice in the criminal legal system. Jonathan A. Rapping, *Reclaiming Our Rightful Place: Reviving the Hero Image of the Public Defender*, 99 IOWA L. REV. 1893, 1902 (2014).

<sup>49</sup> Ogletree, *supra* note 42, at 1275.

<sup>50</sup> Doyle, *supra* note 10. In this article, career criminal defense lawyer James M. Doyle identifies and critiques what he calls "the White Man's vision," in which mostly white men act as lawless imperialists on behalf of both defendants and victims in the criminal legal system.

<sup>51</sup> TRUE BELIEVER (Columbia Pictures 1989).

<sup>52</sup> AND JUSTICE FOR ALL (Columbia Pictures 1979).

<sup>53</sup> See MICHAEL CONNELLY, THE LINCOLN LAWYER (2005); MICHAEL CONNELLY, THE BRASS VERDICT (2008); MICHAEL CONNELLY, THE REVERSAL (2010); MICHAEL CONNELLY, THE FIFTH WITNESS (2011); MICHAEL CONNELLY, THE GODS OF GUILT (2015); MICHAEL CONNELLY, THE LAW OF INNOCENCE (2020); MICHAEL CONNELLY, RESURRECTION WALK (2023).

<sup>54</sup> THE LINCOLN LAWYER (Lion's Gate 2011).

<sup>55</sup> *The Lincoln Lawyer* (Netflix May 13, 2022), <https://www.netflix.com/title/81303831>.

typically (white) male criminal defense lawyers who love a good fight and thumbing their nose at authority.

The heroism of Robin Hood—the good-looking guy in tights who takes from the rich and gives to the poor—is at once altruistic and grandiose. I suppose grandiosity might be inevitable in criminal defense; trying criminal cases requires a certain amount of confidence, if not swagger. But that does not necessarily make it a good thing.

Waxing on about his own heroics as a defender, Ogletree compared the challenge of fighting the state to that of David and Goliath, recounting the “thrill of the trial,” and the “battle of wits” against both prosecutors and judges.<sup>56</sup> Ogletree’s idea and ideal of the heroic defender was focused almost entirely on winning at trial—even though criminal defense lawyers often lose. Moreover, in a system dominated by guilty pleas, we seldom go to trial.<sup>57</sup>

It is presumptuous to think of oneself as a hero, and such thinking can go to your head. As my friend and fellow career criminal defense lawyer David Stern says, “I’m offended by the notion that we’re heroes. Not only are there very few heroic moments, but thinking you’re a hero makes you act in ways that are not helpful to clients.”<sup>58</sup> In other words, the focus of the heroic lawyer is on the lawyer, not on the client.

The grand, heroic, in-the-limelight events are not the most important moments in criminal defense. What matters more are the little things: having conversations with the client; *listening* to the client; getting to know the client’s concerns, values, and interests; and counseling the client with those things in mind. This kind of engagement with the client, which sometimes includes conflict, and even outright battle, is at the heart of good lawyering. It may not bring the attention and hordes of admirers that come to watch a closing argument,<sup>59</sup> but it matters. Of course, being a skilled trial lawyer is crucial, but not necessarily more than being able to build a genuine, meaningful client-lawyer relationship.

And what about when the everyday demands of the work—waiting in court, waiting at the jail, running from courtroom to courtroom, the constant postponements, the hours of reviewing police body-worn camera footage—feel more tedious than heroic? Or when dire

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<sup>56</sup> Ogletree, *supra* note 42, at 1276.

<sup>57</sup> See *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (Kennedy, J.) (noting that, in the United States, “criminal justice . . . is for the most part a system of pleas, not a system of trials”).

<sup>58</sup> Smith, *supra* note 47, at 1237.

<sup>59</sup> Ogletree’s closings generally gathered a crowd.

circumstances cannot be overcome? Or when clients get in trouble again, making the thrill of victory fleeting at best? The intractable and interwoven problems of family dysfunction, poverty, housing instability and homelessness, substance use, and mental health problems are a poor fit for the Robin Hood fantasy.

Being somebody's hero might be a motivation for short-term criminal defense lawyers. Some elite public defender offices seem to embrace this model by hiring talented young lawyers from prestigious law schools to work themselves to the bone for a couple of years before moving on to something more lucrative. Maybe this is cost-effective: it is cheaper to have a cadre of junior lawyers who leave after two or three years. But it hurts both the quality of representation and office morale to not maintain a critical mass of seasoned defenders. Too much attrition means career defenders will have little incentive to mentor younger ones or to stick around themselves.

Ogletree's most troubling tale of suffering and sacrifice is his undertaking a murder case shortly after his beloved sister was stabbed to death in her home.<sup>60</sup> This was not something he had to do—indeed, his colleagues tried to talk him out of it.<sup>61</sup> Ogletree had worked hard to solve his sister's murder, reviewing evidence, meeting with local police, conducting his own investigation, and even looking for suspects among the mourners at the funeral.<sup>62</sup> All of this might have helped him come to terms with the loss. No arrest was ever made.

Upon his return to work, Ogletree took on the case of a man accused of raping and murdering a woman his sister's age.<sup>63</sup> The man had been convicted of a rape before and was currently on parole for rape.<sup>64</sup> Ogletree disclosed his family tragedy to the client in case he wished to obtain different counsel.<sup>65</sup> The client did not.<sup>66</sup>

There was substantial evidence of guilt, including the defendant's wallet being found at the scene of the crime.<sup>67</sup> Nonetheless, Ogletree worked harder on this case than he had on any other.<sup>68</sup> He got to know the

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<sup>60</sup> Ogletree, *supra* note 42, at 1260.

<sup>61</sup> I learned this from someone who was a close colleague of Ogletree at the time.

<sup>62</sup> Ogletree, *supra* note 42, at 1261.

<sup>63</sup> *Id.* at 1263.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1264.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1263.

<sup>68</sup> *Id.* at 1266.

client and worked closely with him.<sup>69</sup> He prepared the case thoroughly and tried it skillfully. The jury was out for a long time before returning a guilty verdict on all counts.<sup>70</sup> Ogletree said he was “devastated.”<sup>71</sup>

While I admire Ogletree’s dedication, I honestly don’t know what to make of his ability to compartmentalize. Perhaps this was his way of grieving—to immerse himself in a case that was similar to what happened to his sister. I have often wondered whether I would be able to carry on as a defender if someone I loved was the victim of a violent crime. I hope I would—after some time off. But what Ogletree did on the heels of his sister’s murder asks for a lot. Although I understand why the client did not want to let go of such counsel—Ogletree was a gifted trial lawyer—he was not the only excellent lawyer in town.

Ogletree taking this case might reflect the culture of his defender office. In a well-known essay on indigent criminal defense, Randy Bellows, another alum of PDS (who, interestingly, went on to become a long-time federal prosecutor and then judge), described his “feverish” work on behalf of clients as “a holy mission.”<sup>72</sup>

Although PDS may represent one end of the spectrum, this kind of intensity and self-sacrifice is not limited to a single office. I have seen lawyers in this mold in many public defender offices. Moreover, as another commentator notes, there is a broad and “impassioned literature produced by writers who are one-hundred percent committed, with almost religious fervor, to indigent criminal defense.”<sup>73</sup>

Of course, criminal defenders have many motivations and approaches to the work. However, there are three common threads among defenders: a commitment to civil libertarianism, the feeling of camaraderie that exists among defenders, and a peculiar defender “personality.”

Defenders are civil libertarians because they uphold the Bill of Rights—especially the First, Fourth, Fifth, Sixth, and Eighth Amendments. This is on top of the values and principles that underlie the Bill of Rights, including individual autonomy, dignity, and freedom.

By camaraderie, I mean that most defenders like the *crowd*—the

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<sup>69</sup> *Id.* at 1265.

<sup>70</sup> *Id.* at 1266.

<sup>71</sup> *Id.*

<sup>72</sup> Randy Bellows, *Notes of a Public Defender*, THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES 71 (Philip B. Heymann & Lance Liebman, eds., 1988).

<sup>73</sup> Margaret Raymond, *Criminal Defense Heroes*, 13 WIDENER L. J. 167, 170 (2003).

community of defenders.<sup>74</sup> Most former defenders require only the slightest prompting to rhapsodize about their erstwhile colleagues as the best bunch of people they've ever known. There is a special *esprit de corps* among criminal defenders.

Many people also believe there is an identifiable "defender personality." My favorite rendering of this is by Mary Halloran, the former executive director of the Colorado Criminal Defense Bar. She called criminal defense lawyers "a breed unto themselves" and described them as "profane, argumentative, insecure, eccentric" and "ill at ease with people who are not themselves criminal defense lawyers."<sup>75</sup> She added, "They can't complete a sentence that doesn't include the F-word, and the more frequently and creatively it's used, the more effectively they feel they've communicated."<sup>76</sup> Halloran allowed that defenders have a few positive qualities. "Oddly," she noted, they "make loving parents."<sup>77</sup>

Barbara Babcock famously said that "criminal defense work takes a peculiar mind-set, heart-set, soul-set."<sup>78</sup> This may be the very best way of putting it, or at least the pithiest.

I, too, believe there is a defender prototype. "Natural defenders" are anti-authoritarian, irreverent, skeptical, curious, and resilient. The natural defender is the first grader who brings home a report card that says, "Abbe talks too much in class, disturbing her neighbors." (The natural prosecutor is the first grader who raises his hand and says to the teacher, "Abbe is chewing gum"). But defenders—including career defenders—may also be contrary to type. There are defense lawyers who do not thrive on anti-authoritarianism; they believe they can play by the rules, be congenial, and still persuade others to their point of view. There are defenders who are respectful and sometimes downright pious—at least about the Constitution—not irreverent or skeptical. To effectively defend another human being, defenders have to be curious about human nature and the complexities of crime. And, even after a crushing defeat, defenders must have the resilience to pick themselves up, dust themselves off, and move on to the next case.

Still, among the many motivations, approaches, and qualities of

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<sup>74</sup> See STEINBERG, *supra* note 22, at 82 ("One of the best things about being a public defender is working with other public defenders. We are an unusual crowd. We have our own language, steadfast devotion to clients, and a healthy dose of irreverence. . .").

<sup>75</sup> Mary Halloran, *An Ode to Criminal Lawyers*, 96 CAL. LAW. 1, 25 (1998).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Babcock, *supra* note 5, at 175.



defenders, aspiring to be a martyr/savior endlessly rolling that rock uphill is a recipe for unhappiness.

### III. BUT MAYBE WE NEED HEROES AND MARTYRS

Is there any place for heroes and martyrs in the world of criminal defense? Let me say clearly that criminal defense is hard work. Being committed to civil liberties, loving one's colleagues, and having a quirky personality may not lead to a *career* in indigent defense. Protecting individual rights can feel like an abstraction when the going gets rough, and the draw of camaraderie may not win out over competing pulls. It is not uncommon for some naturals to port their defender personality to other jobs.

So maybe we do need a few criminal defense heroes and martyrs to look up to and inspire us. I understand the desire for heroes. I have some of my own: Martin Luther King, Nelson Mandela, Eleanor Roosevelt, Arthur Ashe, Billie Jean King, and Sandy Koufax. The sports heroes might seem wildly out of place next to the others—especially the two Kings, Martin Luther and Billie Jean. But the sports heroes, like the others, showed courage in the face of adversity, challenged the status quo, and contributed to social change.

No doubt my heroes reflect my own cultural generation. All are from the twentieth century.

The only lawyer on my list is Nelson Mandela. But he is there for many more reasons than being a lawyer. I do have two other predictable lawyer heroes I did not include in my list: Clarence Darrow and Atticus Finch. One is real, the other fictional, and both are flawed. To me, the fact that they are flawed makes them more appealing.

Clarence Darrow is generally portrayed on stage and in film as a superstar who took on impossible causes and won—the country's first celebrity defense lawyer.<sup>79</sup> The real Darrow was a talented trial lawyer, passionate civil libertarian, and champion of both the criminally accused and laborers.<sup>80</sup> He was interested in socialism, wary of religion, and despised capital punishment.<sup>81</sup> He was well-read and witty.<sup>82</sup> But he was

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<sup>79</sup> See GEOFFREY COWAN, *THE PEOPLE V. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER* 54 (1993); CLARENCE DARROW, *THE STORY OF MY LIFE* vii (1932); IRVING STONE, *CLARENCE DARROW FOR THE DEFENSE* 251 (1941).

<sup>80</sup> See COWAN, *supra* note 79, at 5; DARROW, *supra* note 79, at 75; STONE, *supra* note 79, at 72, 519.

<sup>81</sup> See DARROW, *supra* note 79, at 14, 53; STONE, *supra* note 79, at 171, 282, 425.

<sup>82</sup> See COWAN, *supra* note 79, at 39, 187, 216; STONE, *supra* note 79, at 486.

also arrogant, sloppy, a womanizer, and may have bribed a jury (a charge for which he was acquitted).<sup>83</sup> He was an ambivalent feminist who went from being a fierce advocate of women's rights to a less than enthusiastic supporter of women's suffrage.<sup>84</sup> He once remarked that women should be public defenders because they don't need the money.<sup>85</sup>

Atticus Finch, the defender of a Black man falsely accused of raping a white woman in 1930s Alabama, is perhaps the single most revered lawyer in popular culture. No book is more celebrated than *To Kill a Mockingbird*.<sup>86</sup> It won the Pulitzer Prize, was made into an acclaimed movie starring Gregory Peck, sells a million copies a year, and is required reading at most American high schools.<sup>87</sup> Oprah Winfrey calls the book her favorite of all time<sup>88</sup> and "our national novel."<sup>89</sup> The American Film Institute selected Atticus Finch as the greatest movie hero of all time.<sup>90</sup> He has inspired generations of lawyers and would-be lawyers.

Still, Atticus has taken a beating in recent years. First, commentators questioned whether he deserved to be so celebrated. Among the detractors is writer Malcolm Gladwell, who describes Atticus as a paternalistic racial accommodator,<sup>91</sup> and legal scholars Monroe

<sup>83</sup> See COWAN, *supra* note 79, at 174-5; DARROW, *supra* note 79, at v-vi; STONE, *supra* note 79, at 83.

<sup>84</sup> See COWAN, *supra* note 79, at 124, 173; STONE, *supra* note 79, at 176.

<sup>85</sup> See KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* x (1986).

<sup>86</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

<sup>87</sup> CHARLES J. SHIELDS, *MOCKINGBIRD: A PORTRAIT OF HARPER LEE* 271 (2006) (noting that, according to a 1988 National Council of Teachers of English survey, *Mockingbird* was taught in 74 percent of the nation's public schools, and only *Romeo and Juliet*, *Macbeth*, and *Huckleberry Finn* were assigned more often); see also NAT'L PUB. RADIO 'Mockingbird' Moments: 'Scout, Atticus, and Boo' (July 8, 2010), <http://www.npr.org/templates/story/story.php?storyId=128387104>.

<sup>88</sup> *15 Years of Summer Reading*, OPRAH.COM (Jun. 15, 2015), [http://www.oprah.com/book/Summer-Reading-To-Kill-a-Mockingbird?editors\\_pick\\_id=58371](http://www.oprah.com/book/Summer-Reading-To-Kill-a-Mockingbird?editors_pick_id=58371).

<sup>89</sup> Rosa Inocencio Smith, *The Subtle Strength of To Kill a Mockingbird*, ATLANTIC (Apr. 28, 2016), <https://www.theatlantic.com/culture/archive/2016/04/harper-lee-birthday-to-kill-a-mockingbird/624150/>.

<sup>90</sup> *AFI's 100 Years... 100 Heroes and Villains*, AM. FILM INST. (2005), <https://www.afi.com/afis-100-years-100-heroes-villains/#:~:text=1.,Atticus%20Finch&text=In%20a%20small%20Alabama%20town,to wn%2C%20jeering%20at%20eccentric%20Mrs> (reporting that Atticus Finch came in first in the hero category, followed by Indiana Jones and James Bond).

<sup>91</sup> Malcolm Gladwell, *The Courthouse Ring: Atticus Finch and the Limits of Southern*

Freedman and Steven Lubet, who argue that Atticus is a racist and anti-Semite (Freedman),<sup>92</sup> and exploiter of sexism and class bias (Lubet).<sup>93</sup> Gladwell likens Atticus to James (“Big Jim”) Folsom, a southern liberal who was Governor of Alabama for most of the 1950s, and who believed in changing “hearts and minds” one by one, rather than in massive legal and social change.<sup>94</sup> Freedman, the first and most prophetic of the critics, assails Atticus for being conscripted to represent Tom Robinson instead of volunteering, for not challenging Jim Crow, and for calling the Ku Klux Klan a “political organization,” rather than a racist and anti-Semitic one.<sup>95</sup> Lubet criticizes Atticus for a sexist theory of defense—that complainant Mayella Ewell “wanted it”—along with a class-based slap at Mayella’s credibility as “unwashed and illiterate” poor white “trash.”<sup>96</sup>

It almost makes you want to tell Atticus’ daughter Scout to sit back down in the most memorable scene in the book—what Gladwell calls “one of American literature’s most moving passages”<sup>97</sup>—when, after the jury finds the accused Tom Robinson guilty, Atticus quietly gathers his belongings and walks out of the courtroom. As Scout recounts:

Someone was punching me, but I was reluctant to take my eyes from the people below us, and from the image of Atticus’s lonely walk down the aisle.

“Miss Jean Louise?”

I looked around. They were standing. All around us and in the balcony on the opposite wall, the Negroes were getting to their feet. Reverend Syke’s voice was as distant as Judge Taylor’s:

“Miss Jean Louise, stand up. Your father’s passin’.”<sup>98</sup>

Atticus deserves recognition, no matter the post-modern post-mortems, some of which are more persuasive than others. Atticus should be revered for unflinchingly defending a man accused of interracial rape in the Depression-era South, for literally putting himself between a lynch mob and his client, and for insisting on a measure of justice when injustice

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*Liberalism*, NEW YORKER (Aug. 10, 2009), <https://www.newyorker.com/magazine/2009/08/10/the-courthouse-ring>.

<sup>92</sup> Monroe H. Freedman, *Atticus Finch, Esq., R.I.P.*, LEGAL TIMES, Feb. 24, 1992, at 20; Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473, 475, 479 (1994).

<sup>93</sup> Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1353 (1999).

<sup>94</sup> Gladwell, *supra* note 91.

<sup>95</sup> Freedman, *Atticus Finch—Right and Wrong*, *supra* note 92, at 475.

<sup>96</sup> Lubet, *supra* note 93, at 1345, 1353.

<sup>97</sup> Gladwell, *supra* note 91.

<sup>98</sup> LEE, *supra* note 86, at 242.

was inevitable.

Moreover, Atticus is not an activist but a criminal lawyer defending a man charged with a capital offense. That Atticus is of his time and place, prefers to see the best in people—even those with “blind spots”<sup>99</sup>—and plays on peoples’ prejudices to defend his client instead of working to end all prejudice, does not make him less of a hero. Moreover, there is no shame in accepting a court appointment rather than volunteering, downplaying the Klan to his own frightened children, putting forward the only viable theory of defense in a rape case—a combination of consent and fabrication—or even in a certain amount of accommodation as a trial lawyer.<sup>100</sup>

Then comes the much-publicized release of Harper Lee’s *Go Set a Watchman* in 2015.<sup>101</sup> The book, a long-buried sequel to *Mockingbird* (though written before it), did further damage to the heroic image of Atticus Finch.

Most of the coverage of *Watchman* was about the circumstances underlying the book’s publication—whether it was suddenly discovered when thought lost, whether Lee really wanted it released or was manipulated by her lawyer and publisher, whether the increasingly frail Lee, who died seven months after the book’s release, could provide informed consent.<sup>102</sup>

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<sup>99</sup> *Id.* at 168.

<sup>100</sup> For a longer treatment of the criticism of Atticus Finch in *To Kill a Mockingbird*, see Abbe Smith, *Defending Atticus Finch*, 14 LEGAL ETHICS 143 (2011).

<sup>101</sup> HARPER LEE, *GO SET A WATCHMAN* (Harper Collins 2015).

<sup>102</sup> I am among the skeptics as to whether Lee wanted this book published. My view is based on the 35th anniversary edition of *To Kill a Mockingbird*. When this special edition was released in 1995, it had the original jacket design but was emblazoned with a new gold band that boasted, “A New Foreword by the Author.” For the millions of readers who loved *Mockingbird*, the prospect of a few more words from its reclusive author was thrilling. Since *Mockingbird*, Lee had written nothing else and had barely uttered a word in public. But the promised new foreword was nothing of the kind. Instead, the publisher reprinted part of a letter Lee had written two years before, rejecting a British publisher’s request for an introduction to the novel:

Please spare *Mockingbird* an Introduction. As a reader I loathe Introductions. To novels, I associate Introductions with long-gone authors and works that are being brought back into print after decades of internment. 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.

HARPER LEE, *TO KILL A MOCKINGBIRD* (Harper Collins 1995) (1960) (foreword by

That said, what should we make of Atticus Finch in this book, either as a follow-up to *Mockingbird* or as a different man in *Watchman*? In *Watchman*, the erstwhile champion of an innocent Black man is now a member of a white “Citizens’ Council,” or, in the words of *New York Times* book critic Michiko Kakutani, a “racist” and “bigot.”<sup>103</sup> I admit I found this new portrayal of Atticus painful. *Another one bites the dust*. But as one wise commentator points out, Atticus is a typical southern white liberal in both books.<sup>104</sup> He was “liberal” in the sense that he opposed lynching and was humane in his dealings with Black people, if paternalistic. But, like other southern liberals, he did not oppose racial segregation, Black disenfranchisement, or laws prohibiting interracial marriage.<sup>105</sup>

*Watchman* does nothing to diminish Atticus’ exemplary effort on behalf of Tom Robinson in *Mockingbird*, and, similarly, in *Watchman*, “he could not for the life of him let the black boy go to prison because of a half-hearted, court-appointed defense.”<sup>106</sup> It is also noteworthy that the case Atticus undertakes in *Watchman* is very different from that of the innocent Tom Robinson. The Black defendant in *Watchman* is factually guilty: he was driving fast when he ran over a drunken white man.<sup>107</sup> It turns out Atticus represents the guilty and innocent alike.

All of this begs the question of why we need heroes when we seem to enjoy debunking them.

Still, many people seem to think that heroes are important.<sup>108</sup> As

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Harper Lee dated February 12, 1993). In my view, those hundred words convey how Lee felt about *Mockingbird*: she had said what she wanted to say in the book, was proud it had stood the test of time, and wished to leave well enough alone. If this is how she felt, she would hardly be inclined to publish a sequel.

<sup>103</sup> Michiko Kakutani, *Review: Harper Lee’s ‘Go Set a Watchman’ Gives Atticus Finch a Dark Side*, N.Y. TIMES (July 10, 2015), <https://www.nytimes.com/2015/07/11/books/review-harper-lees-go-set-a-watchman-gives-atticus-finch-a-dark-side.html>.

<sup>104</sup> Richard H. McAdams, *Past Perfect*, NEW RAMBLER, <https://newramblerreview.com/book-reviews/fiction-literature/past-perfect> (last visited Aug. 16, 2023).

<sup>105</sup> *Id.* McAdams is not surprised by any of this. “Those who cannot remember the past are condemned to being shocked by the most ordinary things,” he writes.

<sup>106</sup> LEE, *supra* note 101, at 139.

<sup>107</sup> *Id.* at 188.

<sup>108</sup> See, e.g., Howard Chua-Eoan, *Time 100: Heroes and Icons of the 20th Century*, TIME (June 14, 1999), <https://content.time.com/time/subscriber/article/0,33009,991272,00.html>, <https://content.time.com/time/magazine/article/0,9171,26473,00.html> (revealing,

Ernest Hemingway once wrote, “As you get older, it is harder to have heroes, but it is sort of necessary.”<sup>109</sup> Bernard Malamud explains, “Without heroes, we are all plain people, and don’t know how far we can go.”<sup>110</sup>

But to regard *oneself* as a hero is something else entirely. Maybe this is how some people motivate themselves. For instance, Charles Schultz’s alter-ego Charlie Brown desperately wants to be a hero. In one famous strip, Charlie Brown’s baseball team is one out away from the championship.<sup>111</sup> He is on the mound, pitching.

Schroeder: “Get this last man out, Charlie Brown, and the championship is ours!”

Violet: “You can do it, Charlie Brown. . . We’re all behind you!”

Lucy: “That’s right, Charlie Brown. . . We’re with you. . . Pitch it to ‘im, boy! Strike him out. . . You blockhead!”

Gang: “It’s a high fly ball! Catch it, Charlie Brown! Catch it, and the championship is ours!”

“Have you got it, Charlie Brown?”

”Don’t miss it!”

“Get under it, Charlie Brown!”

“Isn’t this exciting?”

“What if he drops it?”

“If he drops it, let’s all kick him!”

“If Charlie Brown catches this fly ball, we’ll win the championship!”

“Just think of it. . . We’ll be champions!”

“We’ll all get our names in the paper!”

“And they’ll give us a gold cup!”

“And pins and buttons and pennants. . .”

**“DON’T DROP IT!!”**

“It’s coming down!”

“The fly ball is coming down!”

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respectively, *Time Magazine*’s 100 heroes and icons of the 20<sup>th</sup> century, including Rosa Parks, Harvey Milk, and Che Guevara, and stating that they exemplify “courage,” “selflessness,” “exuberance,” “superhuman skills,” and “brutal grace”).

<sup>109</sup> Lillian Ross, *The Moods of Ernest Hemingway*, NEW YORKER (May 13, 1950), <http://www.newyorker.com/magazine/1950/05/13/how-do-you-like-it-now-gentlemen>.

<sup>110</sup> BERNARD MALAMUD, *THE NATURAL* 140 (1952).

<sup>111</sup> Charles Schultz, *Peanuts* Comic Strips from June 9-13, 16-17, 1958, PEANUTS WIKI, [https://peanuts.fandom.com/wiki/June\\_1958\\_comic\\_strips](https://peanuts.fandom.com/wiki/June_1958_comic_strips) (last visited Aug. 16, 2023).

Charlie Brown: “If I catch it, we’ll win the championship, and I’ll be the **HERO!** If I miss it, I’ll be the **GOAT!** I can hear it now. . . ‘Charlie, the Goat, Brown!’ Good Grief! How did I ever get into this?!”

The fly ball comes down, lands in Charlie Brown’s glove. . . and drops out on the ground.

Gang: “**AAUGH!**” . . .

Charlie Brown: “So I drop the fly ball, and we lose the championship! I could have been the hero. . . Instead, I’m the **GOAT!** The other team is carrying their manager home on their shoulders. . . Heroes ride. . . Goats walk. . . I wanted so much to be the hero. . . But I always end up being the **GOAT!** No matter how hard I try, I always end up being the **GOAT!**”<sup>112</sup>

The quest for heroism doesn’t work out for Charlie Brown. It is too much pressure, leading to inevitable disappointment, defeat, and disgrace—just like it might be for criminal defense lawyers.

For some, the desire to be a hero is primal. Ernest Becker argues in *The Denial of Death* that the quest for heroism is a way of fending off mortality and being part of something eternal, which, in turn, gives life meaning.<sup>113</sup> No doubt, having a life of purpose and meaning is a key motivation for criminal defenders. To Becker, the quest is mostly based in fear.<sup>114</sup> As he writes in the beginning of the book: “The idea of death, the fear of it, haunts the human animal like nothing else; it is a mainspring of human activity—activity designed largely to avoid the fatality of death, to overcome it by denying in some way that it is the final destiny for man.”<sup>115</sup>

Whatever its genesis, believing you are a hero can lead to a toxic combination of self-sacrifice and self-importance in criminal defenders. Nothing can compete with the urgency of the work and no one is more important than the lawyer. This is not a supportable professional or personal model, especially for those interested in having a family and raising kids.

Monroe Freedman says that “the lawyers we should hold up as role models are those who earn their living in the kinds of practices that most lawyers pursue—corporate, trusts and estates, litigation, even teaching—but who also volunteer a small but significant amount of their

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<sup>112</sup> *Id.*

<sup>113</sup> See generally ERNEST BECKER, *THE DENIAL OF DEATH* (1973).

<sup>114</sup> *Id.* at ix.

<sup>115</sup> *Id.*

time and skills to advance social justice.”<sup>116</sup> He may be on to something, even though these lawyers are worthy of respect in a pedestrian way.<sup>117</sup>

But if what Freedman means is that he admires ordinary people who put themselves out, work hard, and manage to cope with whatever is thrown at them, but never lose their appreciation for life, the model seems less pedestrian. Aren’t these the people most of us are drawn to, unsung though they may be? This reminds me of a wonderful Marge Piercy poem:

The people I love the best  
 jump into work head first  
 without dallying in the shallows  
 and swim off with sure strokes almost out of sight.  
 They seem to become natives of that element,  
 the black sleek heads of seals  
 bouncing like half-submerged balls.  
 I love people who harness themselves, an ox to a heavy cart,  
 who pull like water buffalo, with massive patience,  
 who strain in the mud and the muck to move things forward,  
 who do what has to be done, again and again.  
 I want to be with people who submerge  
 in the task, who go into the fields to harvest  
 and work in a row and pass the bags along,  
 who are not parlor generals and field deserters  
 but move in a common rhythm  
 when the food must come in or the fire be put out.  
 The work of the world is common as mud.  
 Botched, it smears the hands, crumbles to dust.  
 But the thing worth doing well done  
 has a shape that satisfies, clean and evident.

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<sup>116</sup> Freedman, *Atticus Finch, Esq., R.I.P.*, *supra* note 92, at 21.

<sup>117</sup> MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS’N 2023). The Rule states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.” Comment [1] to the Rule states as follows:

Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. . . . Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.



Greek amphoras for wine or oil,  
 Hopi vases that held corn, are put in museums  
 but you know they were made to be used.  
 The pitcher cries for water to carry  
 and a person for work that is real.<sup>118</sup>

The producer of a public television movie on Clarence Darrow preferred the flawed version of the man to the heroic one for good reason: “If he was just a hero, a knight in shining armor, it’d be really boring,” said Stephen Stept.<sup>119</sup> He called Darrow a “beautifully flawed character . . . a man with great passion [and] a profound sense of justice . . . [but] who was, in his own right, kind of cynical and . . . somewhat vain.”<sup>120</sup> Stept found “personal heroism” in Darrow’s “perseverance, of believing in [himself] and pulling [himself] up and moving on and doing even greater work.”<sup>121</sup>

Acknowledging that people you admire have flaws doesn’t mean you can’t look up to them. A former fellow (now an experienced capital defense lawyer) and I once “anointed” a handful of people “criminal defense prophets and saints,” including Stephen Bright, Bryan Stevenson, and Sister Helen Prejean.<sup>122</sup> We probably shouldn’t have used the word saint (or prophet, for that matter)—even though we did so in a paper about Judeo-Christian influence in criminal defense. We wanted to recognize the remarkable work of these people, not deify them.

When hero-lawyers morph into “moral saints,” the work is more a burden than a blessing. Philosopher Susan Wolf describes the moral saint as so devoted to a “moral imperative” that they essentially lack “an identifiable, personal self” and have a “life strangely barren.”<sup>123</sup> Moral saints either have no personal life, or a tattered one. This is because the moral imperative of the heroic work leaves no room for anything else. As

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<sup>118</sup> MARGE PIERCY, *To Be of Use*, in *CIRCLES ON THE WATER: SELECTED POEMS OF MARGE PIERCY* 106 (1982).

<sup>119</sup> Bill Steigerwald, *Darrow, Flaws and All: A PBS Biography Focuses on the Man Behind the Lawyer*, L.A. TIMES (Dec. 29, 1990, 12:00 AM), <http://articles.latimes.com/1990-12-29/entertainment/ca-65051clarence-darrow>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Smith & Montross, *supra* note 35, at 497; see also Richard Zitrin, *Five Who Got it Right*, 13 WIDENER L.J. 209, 209-10 (2003) (eschewing the idea of the “lawyer heroic[s]” and preferring instead the many “exemplary lawyers”—“ordinary people who are each extraordinary, conducting their professional lives in a way that makes them worthy of the highest praise”).

<sup>123</sup> Susan Wolf, *Moral Saints*, 79 J. PHIL. 420, 421, 424 (1982).

legal ethics scholar Bradley Wendel says, there is something “unsettling about a person who was so single-mindedly committed to doing good that [they] had no other projects, passions, and commitments,” and we would “recoil from this kind of hero.”<sup>124</sup> Or as billionaire real estate tycoon George Wade (played by Hugh Grant) says to “cause lawyer” Lucy Kelson (played by Sandra Bullock) in the movie *Two Weeks Notice*, “No one wants to live with a saint. Saints are boring.”<sup>125</sup>

There is such a thing as too much commitment.

The problem is losing perspective, losing touch, losing *judgment* about what you can affect and what you cannot.<sup>126</sup> Good judgment is key to good lawyering.<sup>127</sup> There is also a need to pace yourself in work as demanding as criminal defense. Not everything can be equally urgent. Not everything is equally devastating. I try to point this out to students and fellows who, upon encountering an unwinnable case, an unsympathetic client, an inevitable jail sentence, declare the situation to be awful, disastrous, or tragic. How about *unfortunate*? Just so there’s enough gas in the tank to go on to the next case and client.

Looking up to others as role models, for inspiration, or guidance is a fine thing. I will hang onto my admiration of the Kings. But considering *oneself* a hero, or aspiring to be one, is grandiose and narcissistic. Who appointed you hero? And what makes you think you can only do good and never confront the problems and predicaments the rest of us face? In view of the powerful, voracious, and random nature of our criminal system, a little *humility* would serve defenders—and our clients—better than heroism.

#### IV. A HUMBLER, MORE EFFECTIVE APPROACH TO CRIMINAL DEFENSE

I prefer a combination of motivations for, and approaches to, criminal defense that productively address the lawyer’s relationship to the client, to oneself, and to the system. I have come to believe that an amalgam of five things—respect for the client, dedication to professional

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<sup>124</sup> W. Bradley Wendel, *Our Love-Hate Relationship with Heroic Lawyers*, 13 WIDENER L. J. 1, 7 (2003).

<sup>125</sup> TWO WEEKS NOTICE (Warner Brothers 2002).

<sup>126</sup> See W. BRADLEY WENDEL, CANCELING LAWYERS: CASE STUDIES OF CRITICISM, TOLERATION, AND TRAGIC CHOICES 171-72 (Oxford Univ. Press 2024) (discussing the imperfect nature, and the limitations imposed by the structure, of our legal system).

<sup>127</sup> Jean Cha, *Lawyer Wellness and Ethics Go Hand in Hand*, AM. BAR. ASS’N (2023), <https://www.americanbar.org/groups/litigation/resources/newsletters/ethics-professionalism/lawyer-wellness-ethics-go-hand-hand/> (discussing burnout leading to poor judgment and legal ethical violations).

craft, a powerful sense of outrage, the ability to let go, and a profound sense of humility—is the best model for long-term defenders.<sup>128</sup> I believe that this five-pronged paradigm can enable a defender to sustain a career doing the work, not crash and burn from martyr fatigue.<sup>129</sup>

### A. Respect for the Client

Aretha Franklin captures what I mean by respect (and Otis Redding, who wrote the song).<sup>130</sup> I mean R-E-S-P-E-C-T, in capital letters, spelled out—as an anthem of empowerment, an expression of deep regard for the humanity, dignity, and autonomy of our clients. The respect I have in mind recognizes that every client has life experience, values, and interests which must be considered, and which *matter*. And every client has a story.

I believe that respect, as the core bond between lawyer and client, is more sustaining and fundamental than empathy or friendship. Empathy can feel empty and patronizing to a client. The reality is we *do not know* how our clients feel. Writer and former public defender James Kunen recounts a conversation he had with a client when he was a law student at NYU’s criminal defense clinic that captures this. As he was walking from court with a client, the client suddenly asked, “How do you know how I feel?” Kunen replied, “I don’t. All I know is what you tell me.”<sup>131</sup> Kunen then writes:

We walked on in silence. Then, as we got on the elevator at 50 Lafayette, he said, “All you wealthy people. . .” and smiled, looked at the floor, shook his head.

“What about us wealthy people?” I asked. “We don’t know how it is?”

He laughed. “How’s it feel to have all that money?”

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<sup>128</sup> For a longer discussion of what I mean by respect, craft, and a sense of outrage, see Smith, *supra* note 47.

<sup>129</sup> Readers of my previous work will note that I have expanded my previous three-pronged model to a five-pronged one. This might suggest a continuing capacity for reflection and insight—or the fact that I am older and, as the losses mount, I’ve come to learn the importance of the last two prongs.

<sup>130</sup> David Remnick, *Soul Survivor: The Revival and Hidden Treasure of Aretha Franklin*, NEW YORKER (Apr. 4, 2016), <https://www.newyorker.com/magazine/2016/04/04/aretha-franklins-american-soul>.

<sup>131</sup> JAMES KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE?: THE MAKING OF A CRIMINAL LAWYER 9 (1983).

I thought of saying I didn't have that much money. "It feels lucky," I said.<sup>132</sup>

Kunen was tempted to "identify" with the client—to close the distance between them, as if they had a shared experience about poverty—by saying he didn't have much money. It's good he resisted that impulse because he is right about luck. I feel lucky every time I'm on the other side of a prison gate. I feel lucky about the family I was born into and every advantage I have had. Not everyone is so lucky.

Respect is also more honest than phony promises of friendship. At most, it's a time-limited friendship; lawyers *leave* and go on to the next client. Besides, our clients don't look to us for friendship. They can make their own friends. They look to us to provide a helpful service.

As the defense lawyer in Tom Wolfe's *The Bonfire of the Vanities* says to his client, "What did I tell you the first time you walked into this office? . . . I told you, ' . . . I'm not gonna be your friend. I'm gonna be your lawyer. But I'm gonna do more for you than your friends.'"<sup>133</sup>

For indigent criminal defendants, respect is more important than friendship because they get so little of it. Devoted, zealous defense<sup>134</sup> is an act of respect. Standing beside a client when everyone else is piling on, meeting with a client in jail on a weekend, rising together for the verdict—these are acts of respect.

Respect offers cleaner lines to clients than the more porous lines of friendship or empathy. When you respect a client, you don't have to feel responsible for all their choices, or be crushed by every setback. I am not urging detachment; good, respectful lawyers often become fiercely attached to their clients. But appropriate professional distance promotes good judgment and the ability to last.

A young lawyer in Georgetown's Prettyman Fellowship Program learned to appreciate respect. In her law school clinic and public defender internships, she had always liked her clients and they had liked her. This was a powerful motivator. Then she was appointed to represent a difficult, hostile client. He was accused of unlawfully entering certain government buildings, a charge he vehemently denied. He was smart, articulate, and seriously mentally ill, which he also denied. He did not like the young lawyer and made this clear. He was irritated by her earnestness and youth. He was determined to fire her. The fellow was crushed by this. She tried

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<sup>132</sup> *Id.*

<sup>133</sup> TOM WOLFE, *THE BONFIRE OF THE VANITIES* 382 (1988).

<sup>134</sup> I insist on using the word "zealous" notwithstanding its deletion from the Rules of Professional Conduct and the ambivalence of some commentators about the word.

hard to win him over, but he would scream at her for hours in her office. Sometimes I intervened to calm him down. At the client's insistence, she filed a motion to withdraw, but the motion was denied, as was an accompanying motion that he be allowed to represent himself. Ultimately, the fellow learned to set some limits. She worked hard on the client's behalf out of respect. He might have come to respect her as well.

### **B. Dedication to Professional Craft**

Defenders should take pride in their professional craft. There is craft in every aspect of defending—and sometimes even art. Defending the accused and convicted requires a serious and sophisticated set of abilities that include ingenuity, nimbleness, and grit.

The craft of defending includes trying the hell out of a case, keeping a jury out for a couple of hours when they should have convicted in twenty minutes, litigating a creative motion, keeping a juvenile at home instead of in an institution, and persuading a judge or prosecutor that a hapless client deserves a second chance.

Caring about the quality of the work is a craft—giving a poor client the same quality representation that a rich person would have. Even high-volume defending is a craft—juggling several cases on the same day, having back-to-back hearings and trials, soundly counseling one client after another.

Volume may be the single most difficult aspect of indigent defense. A St. Louis public defender once lamented to a colleague of mine that her caseload made her feel more like a pallbearer than a lawyer.<sup>135</sup> “Meet ‘em and plead ‘em” is the extent of the representation in far too many jurisdictions.

In 2015, one young defender in New Orleans—a jurisdiction with one of the highest caseloads for public defenders—began representing people facing mandatory life sentences the same week she passed the bar.<sup>136</sup> Her caseload was so high she was not able to meet minimal ethical standards:

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<sup>135</sup> Conversation with the late Samuel Dash, Georgetown law professor and former Watergate special prosecutor, at or around the 40th anniversary of *Gideon v. Wainwright*, 372 U.S. 335 (1963), in 1993.

<sup>136</sup> Tina Peng, *I'm a Public Defender. It's Impossible For Me to Do a Good Job Representing My Clients*. WASH. POST (Sept. 3, 2015, 5:13 PM), <https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8story.html>.

I miss filing important motions . . . I am unable to properly prepare for every trial . . . I have serious conversations about plea bargains with my clients in open court because I did not spend enough time conducting confidential visits with them in jail. I plead some of my clients to felony convictions on the day I meet them. If I don't follow up to make sure clients are released when they should be, they can sit in jail for unnecessary weeks and months.<sup>137</sup>

I acknowledge that it is impossible to ply one's craft under these kinds of circumstances. Public defenders, like all lawyers, owe "loyalty" to each client in each case.<sup>138</sup> As Monroe Freedman has argued, when defenders facilitate guilty pleas with virtually no factual or legal investigation, or manage their caseload by triage based on the nature of the charge or a claim of innocence, they have a conflict of interest.<sup>139</sup> This is harsh, especially for committed defenders doing everything they can to provide zealous representation under difficult circumstances. But an excessive caseload invariably creates a risk that a defender's ability to effectively represent one client will be materially limited because of responsibilities to other clients (or to oneself to get some sleep)—the definition of conflict of interest.

This is a systemic problem requiring a systemic solution. More restraint in charging decisions (not all misconduct needs to be charged as a crime) and greater use of diversionary programs (the kind that truly divert cases from the system instead of requiring a guilty plea) would help. Bail reform would help. Fully funding *Gideon* would also help. Some legal organizations have brought these kinds of challenges.<sup>140</sup>

Still, for most defenders, craft is essential. Developing a viable defense theory, making points consistent with your theory on cross-examination, effectively challenging the credibility of government witnesses, properly preparing defense witnesses, and making powerful and persuasive arguments—all of these are part of the craft. There is nobility in sharpening one's craft, and doing it well, but you don't have to

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<sup>137</sup> *Id.*

<sup>138</sup> STANDARDS RELATING TO THE DEFENSE FUNCTION § 4-3.5 (b)(iii) (AM. BAR ASS'N 2018).

<sup>139</sup> Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VALPARAISO UNIV. L. REV. 911, 918-21 (2005).

<sup>140</sup> The American Civil Liberties Union has brought lawsuits challenging defective indigent criminal defense systems in several states, including New York, Louisiana, Utah, and Idaho. See *Indigent Defense*, ACLU, <https://www.aclu.org/court-cases?issue=indigent-defense> (last visited Dec. 5, 2023). There has been an accompanying legislative reform effort as well.

be a hero.

### C. Sense of Outrage

Outrage is an essential driving force for defenders. By outrage, I do not mean the feeling that leads some to throw their hands in despair at the difficulties of defending. These defenders do not last. I mean a sense of shared moral and political outrage.

If you spend any amount of time in criminal court, you can't help being outraged. Defenders see the ravages of poverty and inequality up close. We bear witness to the pervasiveness of injustice and randomness of justice—the fact that so much depends on the luck of the draw: the judge, jury, prosecutor, and defender.

I have been defending the poor for more than forty years and I still come back from court outraged. I am outraged about what happens in the lowest courts in the land—and the highest one.<sup>141</sup> The way alleged misdemeanants are treated is outrageous.<sup>142</sup> The length of sentences handed out to those convicted of felonies is outrageous.<sup>143</sup>

Too often, our clients become accustomed to their tiny allotment of “justice” in the world and in the legal system. I can't tell you the number of clients who have comforted *me* upon being incarcerated, saying “I'll be all right. Don't worry about me.” In a familiar courtroom ritual, they empty their pockets of the trappings of freedom—wallet, keys, cell phone, coins—before a bailiff takes them away.

Far too many clients live with the feeling that incarceration is inevitable. Far too many have family members in prison. According to the most recent data, 47 percent of state prisoners and 57 percent of federal

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<sup>141</sup> See Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making*, BRENNAN CENTER FOR JUSTICE (Sept. 15, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making> (noting the Supreme Court's current legitimacy crisis due to politically-influenced decisions that went well beyond law and ethics lapses).

<sup>142</sup> See generally ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018) (exposing the way misdemeanor “processing” unjustly brands millions as criminals).

<sup>143</sup> See Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, THE SENTENCING PROJECT (Nov. 5, 2018), <https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/> (reporting that defendants convicted of felonies in the U.S. are more likely to be sentenced to prison and to serve more time in prison than in comparable nations).

prisoners are the parents of a minor child, resulting in nearly two million children with an incarcerated parent.<sup>144</sup> The number of mothers in prison increased almost one hundred percent between 1991 and 2016.<sup>145</sup> Mass incarceration has fallen especially hard on African American families. Appallingly, one in nine Black children has a parent in prison.<sup>146</sup> Many of these children end up in the foster care system,<sup>147</sup> the juvenile justice system, and sometimes the penitentiary.<sup>148</sup>

With outrage as motivation, the struggle is everything. It says to clients, their families, and the community: “This person is worth fighting for.” It says to the system: “Hold your horses, not so fast, not without a fight.” It stops the conveyor belt of punishment—at least for a moment.

#### D. Ability to Let Go

I understand how it feels to get close to clients and share the gravity of the stakes with them. I understand how painful criminal defense can be—the bad rulings, disappointing verdicts, shockingly harsh sentences—and how difficult it can be to let go of that pain. Some cases can come close to breaking you. Clarence Darrow, who defended more than a hundred men facing the death penalty, said it was a good thing none were executed because if just one had been, Darrow feared he might not have survived it. “It would almost, if not quite, kill me,” he said.<sup>149</sup> Darrow knew his limits: “I had a strongly emotional nature which has caused me boundless joy and infinite pain. I had a vivid imagination. Not

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<sup>144</sup> See Nazgol Ghandnoosh, Ph.D, et al., *Parents in Prison*, THE SENTENCING PROJECT (Nov. 17, 2021), <https://www.sentencingproject.org/policy-brief/parents-in-prison/>.

<sup>145</sup> *Id.* (reporting a 96 percent increase in the number of mothers in prison over that time period).

<sup>146</sup> See Danielle Paquette, *One in nine black children has had a parent in prison*, WASH. POST (Oct. 27, 2015, 7:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/10/27/one-in-nine-black-children-have-had-a-parent-in-prison/>

<sup>147</sup> *Children and Families of the Incarcerated Fact Sheet*, NAT’L RES. CENTER ON CHILD. & FAMS. OF THE INCARCERATED (2014), <https://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf> (“About 15-20% of children entering the child welfare system have incarcerated parent.”).

<sup>148</sup> Elizabeth J. Gifford et al., *Association of Parental Incarceration With Psychiatric and Functional Outcomes of Young Adults*, JAMA NETW. OPEN 1 (2019), doi:10.1001/jamanetworkopen.2019.10005 (“[P]arental incarceration was associated with young adults’ increased odds of . . . having a felony charge, spending time in jail[.]”).

<sup>149</sup> Jill Lepore, *Objection: Clarence Darrow’s Unfinished Work*, NEW YORKER (May 16, 2011), <http://www.newyorker.com/magazine/2011/05/23/objection>.



only could I put myself in the other person's place but I could not avoid doing so."<sup>150</sup>

Darrow's work did not kill him—even if it “almost” did. He wouldn't have been able to keep going otherwise. He used *imagination*—his brain as well as his heart—to help him understand his clients, no matter how different they might have been from him. He got close, but not too close. He figured out how to give a hundred percent of himself to a client and then let go in order to move on to the next client.

I admit that I am not known for my ability to let go. My friend Ilene once remarked, “You? You can't even let go of a bad sandwich.” I get attached—to people, things, interests, causes. This kind of attachment can be a good thing: it has led to many long and deep friendships, and has helped me persist on behalf of clients whose cases are not readily resolved. But it is sometimes hard for me to moderate my attachments.

As a criminal defense lawyer, the hardest thing for me to let go of is *getting it wrong*. When this happens, I beat myself up. Sometimes the beating goes on for some time. But lawyers get it wrong all the time, especially trial lawyers. Trial work can sometimes feel like mistake management—because mistakes are inevitable, and you have to manage them. Trials happen at a fast and furious pace. Lawyers are bound to miss some things, or not address them as cogently as they would like. A good friend and career public defender in Rochester, New York, says the real reason criminal trial lawyers like to win at trial is so no one will ever see the trial transcript with all the idiotic things we said and did.<sup>151</sup>

I have come to understand my intolerance for being less than perfect as a form of vanity. It's about *me*: I'm feeling sorry for myself. Perfectionism is as narcissistic as calling yourself a hero. We all make mistakes. Hopefully we can learn from our mistakes and make new and different ones next time. Dwelling on one's mistakes—perseverating on them—is not helpful.

To last in criminal defense, defenders must learn to let go of the disappointment and dismay that are an inevitable part of the work. They must learn to get over their own errors and less than perfect judgments. They must figure out how to let some things roll off them. They must learn to attach, give it their all, and then move on. Defenders must learn to *forget*.

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<sup>150</sup> *Id.*

<sup>151</sup> Jill Paperno, a career defender at the Monroe County Public Defender in Rochester, New York, is the source of this terrific line.

Criminal lawyer-turned-judge Edward Feathers, the central character in Jane Gardam's novel *Old Filth*, learned the importance of forgetting early on: "I am trained to forget," Feathers says. "Otherwise . . . how could I function?"<sup>152</sup> He explains: "[F]acts, memories, the pain of life—of lives in chaos—have to be forgotten."<sup>153</sup>

Or as Ted Lasso frequently reminds the soccer team he coaches: *Be a goldfish*.<sup>154</sup> Why? Because, as Lasso explains, "they are the happiest animal on earth."<sup>155</sup> And why is this? They have a "ten second memory."<sup>156</sup> A professional athlete who dwells on every single mistake or mishap will never be successful, confident, or joyful. Neither will a criminal defender.

But how to forget, without entirely forgetting? Not only would the latter be impossible, but it is also not desirable. Certain things should not be entirely forgotten. Certain injustices need to live somewhere. Instead of tattooing myself, there is a small drawer in the back of my brain where I put painful court experiences. The memories aren't gone, they are carefully tucked away.

I have come to regard this kind of forgetting, this ability to let go, as essential to a long and happy defender career. Together with respect, craft, and a sense of outrage, a defender who is able to let go can be a passionate and devoted advocate for years to come.

### E. Humility

Humility is a thread running through this essay. It deserves explicit mention as an essential element for a career in criminal defense. It is the antidote to the grandiosity of heroism. It is also how one can continue to find meaning and purpose when representing individuals in an arbitrary, inhumane, unjust, and racist system.

Defenders can only do what we can do; ours is a weighty enough commission. We are part of something, not the whole—nor are we at the *center*. There are movements with which defenders are aligned—the Movement for Black Lives, the movement against overcriminalization and mass incarceration, the Restorative Justice movement, to name three—that are working to fundamentally change the criminal legal system. We work on the inside, doing what we can to uphold our clients'

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<sup>152</sup> JANE GARDAM, *OLD FILTH* 9 (2004).

<sup>153</sup> *Id.*

<sup>154</sup> *Ted Lasso: Biscuits* (Apple TV+ Aug. 14, 2020).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

liberty and dignity, while activists on the outside work to “dismantle the master’s house.”<sup>157</sup>

It is sometimes a challenge for defenders to be both brash and humble. Confidence and enormous self-belief are important in trial work. It often feels like it’s you and your client against the world—or at least against some very powerful forces. So you need to show strength. But just as humility is fundamental in effectively relating to clients, it can be helpful at trial as well. It can temper one’s “trial psychosis”<sup>158</sup> with a more measured assessment of what is possible. It can make you more trustworthy to a judge or jury—and even to a hostile witness.

Humility in criminal defense is knowing what you can and cannot change. Humility is working your ass off because this is what we must do to counter the power of the State. Humility is staying focused on the *client*, not your vainglorious self.

## CONCLUSION

I admit I have my own guilt, or at least things I feel bad about. It might be an ethnic thing; guilt is ubiquitous among “my people,” neurotic intellectual left-wing Jews. But I am not suffering, have no desire to suffer, and no aspiration to be a hero or martyr.

The bottom line is you can be an excellent, committed defender and have fun. The job does not have to be (and cannot be) all swagger-filled heroics. But nor does it have to be all guilt, sacrifice, and suffering. As legal ethics scholar Alice Woolley notes, not only do criminal lawyers have perfectly good lives, their lives are made especially rich and meaningful by helping those who need them most—“people down on their luck, underdogs, people whom everyone else has thrown on the dust heap”—and by contributing to a “world that is compassionate and fair and holds people in authority to account.”<sup>159</sup>

Defenders must be intrepid. I do not mean to make light of what

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<sup>157</sup> See generally Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master’s House, and the Master Wouldn’t Let Them Anyway*, 90 *FORDHAM L. REV.* 1983 (2022).

<sup>158</sup> This is what happens when a trial lawyer believes utterly in their case, no matter the evidence.

<sup>159</sup> Alice Woolley, *Not Only in America: The Necessity of Representing ‘Those People’ in a Free and Democratic Society*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 207, 208 (Abbe Smith & Monroe H. Freedman, eds., 2013); see also Alice Woolley, *Context, Meaning and Morality in the Life of the Lawyer*, 17 *LEGAL ETHICS* 1 (2014). Woolley is now a Justice on the Court of Appeal of Alberta in Calgary, Canada.

is required; the work is consuming and can be grueling. There is some sacrifice in criminal defense work, as there is in any important work. But one need not be a martyr. For me, the work is a privilege. There is nothing more stimulating, fun, challenging, heartbreaking, and rewarding than representing people accused or convicted of crime.