



# Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender

*Abbe Smith\**

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\* Professor of Law and Associate Director, Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program, Georgetown University Law Center. I thank Ilene Seidman for her insights into what motivates poverty lawyers and for her wise counsel in general. I thank Jane Aiken for her insights into teaching about justice and injustice. I thank John Copacino, Cookie Ridolfi, and Ellen Yaroshefsky for reading and commenting on an earlier draft of this paper and for their lifelong sense of outrage — which makes me feel less alone in mine. This paper could not have been written without the assistance of career defenders Simi Baer, Marc Bookman, Bob Boruchowitz, Stuart Glovin, Stephanie Harrison, Penny Kahn, Carol Koller, Penny Marshall, Shawn Moore, John Packer, Stuart Schuman, Santha Sonenberg, Gregg Spencer, Robin Steinberg, David Stern, and Phyllis Subin, all of whom have defended the accused with heart and heat for more than two decades. I also benefited from discussions of earlier drafts at the Mid-Atlantic Clinical Theory Workshop, the Georgetown University Law Center Faculty Research Workshop, and from presenting a version of this paper at the Juvenile Defender Summit, the New Hampshire Public Defender Training Conference, and the Maryland Public Defender Training Conference. I am grateful to Supriya Molina and Jennifer Sepic for helpful research. This Article is dedicated to Shelley Stark, a passionate and tireless advocate for the poor.

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## INTRODUCTION

They were two stars: careful and creative litigators, incisive and insightful thinkers, quick-witted and good on their feet. Both had the ability to move judges, juries, even prosecutors on behalf of the most disaffected clients. Both came to the law school criminal defense clinic with prior related experience, expressed a deep commitment to indigent criminal defense, and wanted to be public defenders. Both were hungry for more.<sup>1</sup> This is why I'm a clinical law teacher, I said to myself when I was working with Erin and Zeke.<sup>2</sup> It doesn't get any better than this.

When Erin and Zeke began their legal careers — each at the public defender office they most wanted — they were thrilled. You could hear it in the message on their office answering machines: their voices radiated with pride and pleasure when they identified themselves as

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<sup>1</sup> Erstwhile public defender James Kunen had a similar law student profile:

Everything I had done in law school . . . was done with a view to landing a job as a public defender . . . I'd been a counselor in a group home for juvenile delinquents; I'd worked as an investigator and law clerk for a Legal Aid attorney; I'd immersed myself in the criminal clinic. A public defender was all I wanted to be.

JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER 27 (1983).

<sup>2</sup> Erin and Zeke are not real students. They are a composite of students and post-graduate fellows I have taught over the years at Georgetown University Law Center, Harvard Law School, American University Washington College of Law, Temple University School of Law, and City University of New York School of Law. Any resemblance to real persons is coincidental but probably inevitable. This story is not unique.

defenders. They were on their way, doing exactly what they wanted to be doing. They kept in touch with me at the beginning — to talk about their clients and their trials — but the calls tapered off after a while, as did the enthusiasm. This seemed only natural. The initial excitement was bound to wear off and give way to a more measured approach to the work. I figured I would hear from them when they had a particularly good story or when they wanted my counsel (something I knew would happen less over time).

What was unexpected was having them tell me they were leaving public defender work and joining law firms after less than two years. They were at once hangdog and haughty about the turnabout, and did not especially want to talk about it with me. I wondered at the apparent suddenness of the decision, but both claimed it didn't feel sudden to them. Both maintained that they continued to regard the work as meaningful and important, and that they admired those defenders who were in it for the long haul. Both eschewed the suggestion that any sort of modification in their work life might make it possible for them to continue. Instead, they said they were simply at the end of their rope — it was too much for them. The bottom line, they said, was they were burned out, worn out, emotionally spent.<sup>3</sup> If they didn't get out now, it would mean the end of them.

I had a range of feelings about this. I was disappointed. If these two couldn't last two years in a defender office, who could? I also acknowledge feeling "narcissistically wounded."<sup>4</sup> I put a lot of time into and care about students and fellows — especially those who want to

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<sup>3</sup> For other tales of defender burnout, see KUNEN, *supra* note 1; SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* (1981); Randy Bellows, *Notes of a Public Defender*, in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69, 71-72 (1988); *see also* LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 63-64, 71-91 (1987) (commenting on nature of public defender work and disillusionment). Some defenders disavow the significance of burnout. *See, e.g.*, Letter from John Packel, Chief, Appellate Division, Defender Association of Philadelphia, to Abbe Smith, Professor, Georgetown University Law Center (Oct. 23, 2002) (on file with author). John Packel states:

"[B]urnout" is an over-rated issue. Most PDs leave for more money . . . for family reasons, because they weren't really suited for the volume and pressure in the first place, or for dissatisfaction with the manner in which their offices function . . . . [Some leave] not . . . because of . . . burnout, but because their spouse or parents want them to be a "real lawyer."

*Id.*

<sup>4</sup> *See generally* ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD* (1981) (previously published as *PRISONERS OF CHILDHOOD*) (noting "narcissistic wound" inflicted on parent living vicariously through child when child disappoints).

follow in my footsteps.<sup>5</sup> I invariably invest in their choices. On some level, I can't help regarding their choices as a referendum on the values I attempt to teach and model.<sup>6</sup> I take the fellows' "defection" to private practice (meaning large civil law practice) harder than the students' defection. Unlike students, who are exploring criminal defense as part of their legal education, fellows claim to be committed to it. When prospective fellows are asked in the job interview where they see themselves in ten years, most state that they will be doing indigent criminal defense work. The rest vow they will be doing related work at a death penalty resource center, a juvenile justice agency, or a law school clinical program. I felt sad that there would be two fewer talented, committed defenders when more such defenders were needed.<sup>7</sup> I might have even felt rejected.<sup>8</sup>

I thought about the reasons for Erin and Zeke's early departure from indigent criminal defense work, reasons they were unable to fully articulate but which I needed to try to uncover in order to make sense of it for myself. Undoubtedly, it had to do with who they were and where they came from, why they were drawn to criminal defense, how they approached the work, the circumstances of their personal lives,<sup>9</sup> the

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<sup>5</sup> I was a public defender before becoming a clinical law teacher in a criminal defense clinic. See Abbe Smith, *Carrying on in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLINICAL L. REV. 723, 730-31 (1995) [hereinafter *Carrying on in Criminal Court*]. I do not necessarily prefer would-be defenders to other students, but I invariably spend more time with them. For an example of a clinic student with whom I spent plenty of time who chose not to go into criminal defense, see Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLINICAL L.J. 299 (1994) (reflecting on why he was not suited for criminal defense).

<sup>6</sup> See Smith, *Carrying On in Criminal Court*, *supra* note 5, at 725 (acknowledging desire to "recruit" clinic students to become public defenders).

<sup>7</sup> See ALAN DERSHOWITZ, *THE BEST DEFENSE* 410 (1982) (referring to "world full of underzealous, lazy, and incompetent defense lawyers"); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 176, 182 (1983) (referring to "[o]verburdened defense lawyers"); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994) (discussing pervasiveness of deficient representation of indigent capital defendants); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762 (1993) (referring to "world of lawyers for whom no defense at all . . . is the norm").

<sup>8</sup> See BARBARA TRAPIDO, *NOAH'S ARK* 19 (1984) ("But perhaps it was in the nature of proteges to let one down just a little?"); see also BARBARA TRAPIDO, *BROTHER OF THE MORE FAMOUS JACK* 7 (1982) (noting that "parents are destined to be disappointed" in children's decisions). Trapido's novels offer many examples of rejection from which to choose.

<sup>9</sup> See Letter from John Packel, *supra* note 3. Packel states:

One of the most important factors in sustaining one's PD life, or allowing it to be sustained, is the support, encouragement and appreciation (or alternatively

office and court culture in which they had practiced, and what it was about them that led them ultimately to be undone by “burnout” instead of getting through it. These factors would prompt some readily to forgive Erin and Zeke for their departure from the public interest world.<sup>10</sup> I thought about other students and fellows who were still public defenders, some after more than a decade. I thought about my former colleagues at the Defender Association of Philadelphia, excellent lawyers who elevate the profession, many of whom have been doing the work for decades. What makes some stay and thrive while others crash and burn?

I thought there was a connection among all those who persisted in the work year after year, those who managed to sustain a career in indigent criminal defense. Some of it had to do with temperament and style,<sup>11</sup> but there was also something about how they approached the work. They approached the work in a different way from the ones who burned out.

I wondered whether there exists a useful paradigm — a helpful model — that captures what motivates, sustains, and keeps defenders going, explaining why some public defenders last and others do not. Professor Charles J. Ogletree has offered one such paradigm, built on the concepts of “empathy” and “heroism.”<sup>12</sup> There is much to admire about Professor Ogletree’s work. It was the first attempt to offer a model for sustaining a career in indigent criminal defense. However, I have never been entirely comfortable with this model. I worried that the reason why Erin and Zeke burned out was precisely because of empathy (they both cared a lot about their clients, sometimes blurring the line between lawyer and

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scorn, discouragement and dismay) one gets from family and friends. [My wife] has never hinted at any dissatisfaction or disregard for my “career choice” . . . . My parents, and particularly my Dad, were proud of me, though my mother repeatedly said that I had “such good hands” it was a shame I didn’t go into dentistry.

*Id.*; cf. Telephone Interview with Stuart Schuman, Chief, Municipal Court Unit, Defender Association of Philadelphia (Sept. 10, 2002) (“It’s not easy. Especially when you have a family and children. But the older I’ve gotten the more they’ve come to respect it.”).

<sup>10</sup> See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088-89 (1976) (affirming “the moral liberty of a lawyer to make his life out of what personal scraps and shards of motivation his inclination and character suggest: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose . . .”).

<sup>11</sup> See Babcock, *supra* note 7, at 175 (referring to ““peculiar mind-set, heart-set, soul-set” that criminal defenders have).

<sup>12</sup> See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271-94 (1993).

“friend”<sup>13</sup> and heroism (they both wanted to rescue<sup>14</sup> their clients). I also wondered whether there might be another more effective model — if models are useful here at all.

In this Article I will examine Professor Ogletree’s paradigm for motivating and sustaining public defenders ten years after he proposed it. I will discuss whether Professor Ogletree’s paradigm works for defenders in the predominantly high-volume, urban settings in which they practice, and if so, for how long. If the paradigm works for short-term defenders only — or those with smaller caseloads — then perhaps it is a temporary, not a sustaining, motivation. I will examine whether the paradigm is helpful — on an aspirational level if nothing else — or whether it emphasizes motivations that are ultimately self-defeating.

After discussing Professor Ogletree’s paradigm, I will offer a paradigm of my own. As an alternative to the two-pronged model of empathy and heroism as sustaining motivations for public defender work, I suggest a three-pronged model of respect, craft, and a sense of outrage.

Defenders who approach the work out of respect for client, pride in craft, and a sense of outrage about inequality, injustice, and the routine abuse of power by those in a position to wield it are able to sustain their careers despite the systemic incentives to fail.

## I. MOTIVATIONS THAT DON’T SUSTAIN

Before proceeding, let me acknowledge that there are as many motivations as there are defenders. The classic motivations described in this section may have been what attracted the young lawyers in the first instance. These impulses, however, ultimately fail to sustain long-term careers. Nevertheless, they provide a useful contrast to the more enduring motivations that are the focus of this Article.

### A. *Civil Libertarianism*

The first motivation has been described in various ways, but the simplest way to put it is that defenders are civil libertarians,<sup>15</sup> protecting the rights of criminal defendants and the rest of us through the

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<sup>13</sup> See generally Fried, *supra* note 10 (analyzing whether loyalty to clients is compatible with moral purity); Ogletree, *supra* note 12, at 1271-75.

<sup>14</sup> See Ogletree, *supra* note 12, at 1275 (describing view of himself as defender as “hero of the oppressed”).

<sup>15</sup> The slogan of the National Association of Criminal Defense Lawyers is “Liberty’s Last Champion.” See <http://www.NACDL.org> (last visited Apr. 2, 2004).

adversarial system.<sup>16</sup> Whatever a defender's political or ideological orientation, he or she invariably works to uphold the constitutional "charter of human rights, dignity, and self-determination."<sup>17</sup>

To be a defender is to uphold and enforce the basic principles underlying the adversarial system and the Bill of Rights. These principles include: the right to counsel; the right to equal protection of law; the right to trial by jury; the right to call and confront witnesses; the right to be free from unlawful searches and seizures; the right to be free from compelled self-incrimination; the right against cruel and unusual punishment; the presumption of innocence; and the government's bearing the burden of proof beyond a reasonable doubt.<sup>18</sup> Indeed, defenders are the embodiment of the most important of all rights, the right to counsel,<sup>19</sup> which is inextricably connected to the client's ability to assert all other rights.<sup>20</sup> Thus, in zealously representing clients,<sup>21</sup>

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<sup>16</sup> See Babcock, *supra* note 7, at 177 (discussing civil libertarian rationale for criminal defense); David Feige, *How to Defend Someone You Know Is Guilty*, N.Y. TIMES MAGAZINE, Apr. 8, 2001, at 60 (declaring, "I believe in the Constitution."); Telephone Interview with Stuart Schuman, *supra* note 9 (stating that "[d]efenders make the Constitution come alive."). According to Packer:

A lot of people who are plagued by drug-related problems also feel plagued by the fact that a young black male can't walk down the street or talk to his friends on a street corner without being harassed. When the police do that to fifty people and in two cases they find some drugs and we then go to court and complain about it, we're not just representing the two people, we're also representing the other forty-eight who were stopped and searched and harassed by the police.

Andrea B. Wapner, *The Peter Pan of Appellate Practice*, THE PHILADELPHIA LAWYER, Winter 1992, at 54, 57 (quoting career defender John Packer). Ogletree refers to civil libertarianism as a "systemic justification" for criminal defense. Ogletree, *supra* note 12, at 1254-59.

<sup>17</sup> William J. Brennan, Jr., *What the Constitution Requires*, N.Y. TIMES, Apr. 28, 1996, at D13. On the other hand, many defenders are drawn to the work out of political conviction. They point to the ravages of poverty and racism and the fact that those in prison are disproportionately poor and black. See Babcock, *supra* note 7, at 177 (discussing political activist's reason for doing criminal defense work).

<sup>18</sup> See also David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, WASH. U. J.L. & POL'Y 83 (2003). See generally John B. Mitchell, *The Ethics of the Criminal Defense Attorney — New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980) (analyzing function of representing guilty criminal defendants).

<sup>19</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963); ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964); see also Bellows, *supra* note 3, at 97 ("Without a lawyer fighting with all of his strength to advocate for his client . . . the system simply is not legitimate.").

<sup>20</sup> See Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 10 (1975) ("[T]he adversary system only works if each party to the controversy has a lawyer, a person whose institutional role it is to argue, plead and present the merits of his or her case

defenders of the accused promote social justice.<sup>22</sup> Defenders uphold the political philosophy underlying the American system of justice and safeguard the dignity of each member of society no matter how low he or she has fallen.<sup>23</sup>

Although every defender is faithful to these principles<sup>24</sup> — a faith expressed through every pretrial motion filed, every investigation pursued, every trial conducted, every post-conviction challenged litigated — these principles are seldom a sustaining motivation.<sup>25</sup> As one commentator put it when he decided to throw in the towel after four years as a defender: “I am at a point right now where I need more than a

and the demerits of the opponent’s.”).

<sup>21</sup> Zealous representation is the central ethical obligation for defenders. See TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale, ed., London, Albion Press 1821) (quoted in MONROE FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 79-80 (2d ed. 2002).

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

See also DERSHOWITZ, *supra* note 7, at xv n.\* (1982) (quoting Brougham with favor and noting that zealous advocacy is “neither a radical nor a transient notion”); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 4 (1951-52) (noting that Brougham’s idea of advocacy has become “classic statement of the loyalty which a lawyer owes to his client”). Monroe Freedman offers his own version: “Let justice be done — that is, for my client let justice be done — though the heavens fall. That is the kind of representation that I would want as a client, and it is what I feel bound to provide as a lawyer.” MONROE FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 80 (2d ed. 2002).

<sup>22</sup> See Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1727 (2002) (“In a free society . . . lawyers act in the interests of justice . . . by serving . . . clients zealously within the rule of law.”). For criticism of zeal from the perspective of both ethics and justice, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50-148 (1988); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

<sup>23</sup> See KUNEN, *supra* note 1, at 27 (“We mean to protect the rights not only of the wrongly accused but of the guilty themselves. That’s the nature of rights — you don’t have to earn them or deserve them; you *have* them.”).

<sup>24</sup> See *id.* at 257; MCINTYRE, *supra* note 3, at 141-43; Bellows, *supra* note 3, at 97.

<sup>25</sup> See MCINTYRE, *supra* note 3, at 143 (“The litany of constitutional ideals rarely . . . emotionally empowers public defense lawyers”); see also KUNEN, *supra* note 1, at 142 (“You get tired of . . . defending the Constitution . . . defending *everybody’s* rights.”). One defender thinks that civil libertarianism motivates more men than women. See Telephone Interview with Carol Koller, First Assistant Federal Public Defender, Washington State (Aug. 26, 2002) (“[Those] who do . . . this work to serve the Constitution . . . often don’t appreciate where their client came from. . . . I think this group burns out early.”).

philosophical construct, even one as noble as the Sixth Amendment. I want direct . . . evidence that I am doing good, that I am doing justice.”<sup>26</sup>

The fact that constitutional ideals alone are insufficient to sustain a career in criminal defense may have to do with the nature of idealism itself. Inevitably, idealism (seeing things as they should be rather than as they are) comes up against bitter contrasting reality (admitting “the noble purpose of our criminal courts . . . has gone awry”<sup>27</sup>), causing disillusionment. Disillusionment can breed cynicism,<sup>28</sup> which can lead to retreat.<sup>29</sup>

Yet, a certain measure of idealism remains even in the most seasoned, seen-it-all defender. Idealism — believing in something — is a powerful thing. Believing that the fight itself makes a difference, whether or not one prevails in the end, is both powerful and essential for defenders. There is fuel there.<sup>30</sup>

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<sup>26</sup> Bellows, *supra* note 3, at 97. Bellows left public defender work to become a prosecutor in 1983. *See id.* at 69 n.\*, 97-98. In the next two decades he prosecuted many high profile cases, including that of John Walker Lindh, the young American initially accused of being involved in the September 11 World Trade Center bombing but who plead guilty only to providing services to the Taliban and carrying explosives. *See* David Johnston, *One Bargain, 2-Way Relief*, N.Y. TIMES, July 16, 2002, at A1. Neil A. Lewis, *American Who Joined Taliban Pleads Guilty to Felony Charges*, N.Y. TIMES, July 16, 2002, at A1. On October 15, 2002, Bellows became a judge on the Fairfax County Circuit Court in Virginia. *See* Siobhan Roth, *Building on Convictions*, LEGAL TIMES, Oct. 7, 2002, at 1, 8.

<sup>27</sup> *See* Mitchell, *supra* note 18, at 321-22 (“Our courts are not just, and they are most frequently unjust when dealing with the most powerless defendants, the poor, and the minorities.”).

<sup>28</sup> By cynicism, I mean the “hardened, defensive crust of individualistic resignation, [which is] often a veneer over despair.” LAURENT A. PARKS DALOZ, ET AL., *COMMON FIRE: LIVES OF COMMITMENT IN A COMPLEX WORLD* 12 (1996). I do not mean the sort of cynicism that might better be called *skepticism*, which is “the ability to stand back, question, and reveal the difference between ideals and practice,” and which leaves one “open to being informed in the service of shared purpose.” *Id.* at 11-12; *see also* Telephone Interview with Stuart Schuman, *supra* note 9 (noting, “I’ve always had a healthy skepticism of authority.”).

<sup>29</sup> *See* THE BIG CHILL (Columbia Pictures 1983) (depicting former Philadelphia public defender played by Mary Kay Place lamenting that her clients were just so *guilty*).

<sup>30</sup> *See* KUNEN, *supra* note 1, at 257. According to Kunen:

As my mood got more and more elevated, it dawned on me that my patriotic rap to the jury about the United States’ being different from most of the nations of the world, because we put the burden of proof on the government, was *true*. I had thought I was being cynical and manipulative when I’d said it, but it really was true. And if the government doesn’t prove its case, the accused *should* go free.

I felt proud to be an American.

*Id.*

Although there is tension between idealism and cynicism, career defenders with varying perspectives and sensibilities manage to strike a balance. Indeed, the pairing of idealism and cynicism is a badge of a certain community of defenders and fellow travelers, like civil poverty lawyers, death penalty lawyers, and prisoners' rights lawyers.<sup>31</sup> Every defender I know who has lasted in the business — frankly, every poor peoples' lawyer — is both reverential and irreverent, hopeful and doubtful, in short, a cynical idealist.<sup>32</sup> Idealism keeps you going; cynicism keeps you grounded.

The question is why some defenders surrender to cynicism<sup>33</sup> — leaving defender work for something they don't really believe in<sup>34</sup> — while others use it to steel themselves for a long fight against injustice.<sup>35</sup> This will be further discussed later in Part V.

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<sup>31</sup> One could add to these urban social workers and inner city teachers.

<sup>32</sup> Austin Sarat uses the term "democratic optimism" to describe what motivates death penalty lawyers to keep up the fight despite the reality that "the odds of ending capital punishment are so heavily stacked against them." Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 338 (Austin Sarat & Stuart Scheingold eds., 1998). Sarat defines democratic optimism as the "belief that present support for the death penalty is rooted in ignorance rather than venality, misunderstanding rather than clear-headed commitment." *Id.* This notion may have a parallel in jury trial advocacy for all criminal defenders. Defense lawyers almost always prefer the "democratic" judgment of a jury to the autocratic judgment of a judge. We believe that given the opportunity, we can educate a jury, get them to put aside ignorance and prejudice and cynicism, and enable them to do the right thing — acquit — when the government fails to prove the accused's guilt beyond a reasonable doubt. See KUNEN, *supra* note 1, at 181-87 (recounting his first jury trial, which resulted in acquittal); *id.* at 226-57 (recounting his first murder trial, which resulted in acquittal); cf. Bellows, *supra* note 3, at 95 ("Thankfully, the jury and not a judge was making the decision. A judge would have laughed at this defense. The jury, on the other hand, was open to all possibilities.").

<sup>33</sup> A disturbing example of a former defender surrendering to cynicism is the late Judge Harold Rothwax. Though Judge Rothwax began his career as a public defender his nickname on the bench was "Prince of Darkness." In his cynical, angry book about the criminal justice system, Rothwax ridicules defenders and their clients. See JUDGE HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 121-42 (1996).

<sup>34</sup> See KUNEN, *supra* note 1, at 29 (referring to salary as public defender as "better than half what you'd get paid to die slowly, writing memos as an associate at Pig and Swine on Wall Street."). Even worse is those who succumb to cynicism but remain defenders, doing the work in lackluster fashion, hurting clients. I would be happy to send these defenders to a law firm.

<sup>35</sup> See LEWIS, *supra* note 19, at 215 (describing unmet promise of *Gideon*).

### B. Camaraderie

Camaraderie undoubtedly plays an important role in drawing and sustaining defenders.<sup>36</sup> The support and friendship of colleagues may not, however, be enough to sustain one through an entire career. The fact that former defenders require only the slightest prompting to rhapsodize about their erstwhile colleagues (the best bunch of people they've ever known: Was there ever such an office? Was there ever such a time?)<sup>37</sup> does not make them any less former. Though there are defenders who practice in relative isolation — as a result of location or personality<sup>38</sup> — defending can be lonely work.<sup>39</sup> It can be lonely even if one has good friends and colleagues to find comfort in after a day in the trenches. But good friends and colleagues make it less so.<sup>40</sup>

In fact, for many defenders, the best thing about their job is the people.<sup>41</sup> Having colleagues who get it — the importance of the work, the joys and sorrows of it — and who rally around each other, make the work bearable and fun. Many defenders report that the best part of the work is the feeling of community and shared purpose, of being in this together, of *esprit de corps*.<sup>42</sup> As career defender Bob Boruchowitz puts it, "I like the people who like to do this work."<sup>43</sup> Another career defender,

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<sup>36</sup> See DALOZ, ET AL., *supra* note 28, at 51 ("No one has a vocation alone . . . [K]indred spirits . . . who share and help sustain the work [are critically important] . . . They provide perspective, comfort, advice, challenge, and most of all, the confirmation that one is not alone in the sometimes bone-aching, heart-weary [work].").

<sup>37</sup> See Letter from John Packel, *supra* note 3 ("[A]lmost any ex PD you meet will tell you that the best time, and the most fun, and the most gratifying experience s/he had . . . was when s/he was a PD.") Perhaps this sort of nostalgia is not unique to defenders. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 608 (1999) (writing about good old days at United States Attorney's Office for Southern District of New York).

<sup>38</sup> See, e.g., Richard Leiby, *Unorthodox Attorney*, WASH. POST, Aug. 8, 2002, at C1 (recounting criminal defense attorney's experience).

<sup>39</sup> See generally SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* (1981) (detailing criminal defense attorney's experiences).

<sup>40</sup> See Wapner, *supra* note 16, at 57 (quoting career defender John Packel: "It's a fox-hole mentality: We're in this together, and it's just a great place to be.").

<sup>41</sup> See Bellows, *supra* note 3, at 73 ("The best thing about PDS is its people."); Telephone Interview with Penny Kahn, Chief of Juvenile Unit, Maryland Public Defender (Aug. 28, 2002) ("I enjoy the camaraderie of the office. I like defenders."); Telephone Interview with John Packel, Chief of Appeals, Defender Association, in Philadelphia, Pa. (Oct. 22, 2002) ("One of the most important things is . . . loving the people you work with and seeing something in them that is really special.").

<sup>42</sup> See generally MCINTYRE, *supra* note 3 (analyzing public defenders and their work with emphasis on Cook County, Illinois).

<sup>43</sup> Telephone Interview with Bob Boruchowitz, Director, Defender Association (Seattle, Washington) (Oct. 16, 2002).

Stu Glovin, echoes that: "There's something special about us and we're different from others — certainly other lawyers. There's this kinship among us. You can't put a price tag on that."<sup>44</sup> There is an understanding that defenders had better stick together, because pretty much everyone else is against them.<sup>45</sup>

The culture of public defender offices is one of mutual support, collegiality, and generosity.<sup>46</sup> Defenders "attend each other's closing arguments, cross-examine one another's clients, handle court appearances for colleagues, commiserate, shoot the bull, and nibble at each other's food."<sup>47</sup> If time allowed, defenders would do anything for their colleagues.

The precise effect of camaraderie is hard to measure, and varies from person to person. For some career defenders, office friendships play a significant role in sustaining a career. These friendships are the defenders' community.<sup>48</sup> Some defenders are literally partnered with or married to other defenders; together they create public defender families.<sup>49</sup> For other career and more senior defenders, especially in offices that have become more transient over time, camaraderie plays a lesser role in why they continue to do the work.<sup>50</sup>

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<sup>44</sup> Telephone Interview with Stuart Glovin, Head Deputy, Compton Branch, Public Defender's Office (Los Angeles, California) (May 1, 2003).

<sup>45</sup> See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 451 (1999) ("[O]n the whole, criminal defense lawyers are [regarded as] dishonorable or disreputable, immoral or amoral, manipulative or heartless.").

<sup>46</sup> See Bellows, *supra* note 3, at 73 ("If we have an ethic, it is mutual support.").

<sup>47</sup> *Id.* This is a fairly typical description of most defender offices, except for the part about routinely cross-examining each other's clients. Having the time and personnel to go out to the jail to cross-examine colleagues' clients in anything other than very serious cases is a luxury that most busy urban offices simply cannot afford. See U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001) (reporting that caseloads have grown while staff has not in most defender offices).

<sup>48</sup> See Telephone Interview with Bob Boruchowitz, *supra* note 43 ("Many of my best friends and longest term friends have come out of the office.").

<sup>49</sup> For others, it would be unthinkable to set up house with another defender; someone has to keep the home fires burning.

<sup>50</sup> See Telephone Interview with Bob Boruchowitz, *supra* note 43. According to Bob Boruchowitz:

I have reconciled myself to the absence of contemporaries. Most of the folks I grew up with are long gone . . . . Although I have camaraderie with defender colleagues, it is a different kind of camaraderie from when I was on the staff and we were all coming up in the ranks together. I tend to go outside of the office now . . . . I talk to the head of the federal defender for advice and support and other defender leaders around the country who I've gotten to know and who I see a couple of times over the year. I keep up with old friends who used to do the work.

Camaraderie helps brace defenders for hostility from the rest of society.<sup>51</sup> Intellectually, defenders understand that they should “not tolerate criticism based upon the character of the client whom they represent or the cause they . . . defend.”<sup>52</sup> Still, public disapproval can sting. As career defender Stu Glovin notes, “The camaraderie is almost like a sanctuary around here.”<sup>53</sup>

Still, it can be difficult to feel unsupported in —or attacked for —your life’s work.<sup>54</sup> Even though defenders and other poverty lawyers reject many conventional standards — we tend to have our own set of hoops through which to jump —we still seem to care about what people think. Worse is the fact that it is not only the larger community that fails to properly regard criminal defenders, but the legal community.<sup>55</sup> It is hard enough to do work that is laborious without being lucrative;<sup>56</sup> it is harder still when the work is not esteemed in the profession.

There is also a cultural context. For my own cultural generation, being a public defender had cachet. It was cool to be a poverty lawyer, to be a lawyer working for social justice. Now, my cohorts in defender and legal services offices are regarded as somehow quaint. They are a living relic of the sixties.<sup>57</sup> It seems unlikely that the current generation of would-be public defenders will receive the same social and cultural support that I had.

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*Id.*

<sup>51</sup> For recent examples, see Cathy Young, *Presumed Guilty*, BOSTON GLOBE, July 29, 2002, at A11 (reporting that Fox television’s Bill O’Reilly called lawyer who represented man subsequently accused of rape/murder of Samantha Runnion, “accomplice”); Michael Powell, *A Fall From Grace*, WASH. POST, Aug. 4, 2002, at F1 (defense lawyer recounting how representing alleged pedophile priest in Louisiana cost him faith, family, and career).

<sup>52</sup> Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 1002 (1970).

<sup>53</sup> See Telephone Interview with Stuart Glovin, *supra* note 44.

<sup>54</sup> See MCINTYRE, *supra* note 3, at 173-78 (discussing importance of “legitimacy”).

<sup>55</sup> See *id.* at 87-89; see also *id.* at 80 (noting that several defenders reported that they had been counseled by law professors not to stay more than year or two at public defender’s office).

<sup>56</sup> See *id.* at 89-94 (discussing public defender pay). Public defenders are not only paid much less than their law school classmates who went to firms, they are often paid less than their prosecutorial counterparts. See Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic*, CRIM. JUST. 13, 14-15 (Summer 1994).

<sup>57</sup> See TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987). However, the mere fact that a defender came to the work out of a “sixties sensibility” is no guarantee that he or she will be able to sustain a career as an indigent criminal defense lawyer. See KUNEN, *supra* note 1, at 112 (describing “residually countercultural” defender who had all “trappings” of late sixties’ college generation — “a beard, longish hair, and laborer’s clothing” — and who lasted only five years at PDS).

Camaraderie is important. It makes an often thankless job less thankless.<sup>58</sup> But it cannot be the only reason for doing the work: one can always find “work comrades” no matter the work. Camaraderie alone is not enough to sustain a defender’s entire career.<sup>59</sup>

### C. *On the Matter of Personality*

Some commentators, and many defenders, believe there exists a defender “personality type.”<sup>60</sup> Career defender Marc Bookman recalls that when he was a law student at the University of North Carolina at Chapel Hill, he thought he might want to be a prosecutor.<sup>61</sup> He reasoned that “they had all the power, and thus had far more of an ability to make real change.”<sup>62</sup> His clinical teachers and mentors, Rich Rosen and Dave Rudolf, pulled him aside. “Trust us, Bookman, we know you — you are a public defender, not a DA.”<sup>63</sup> Reflecting back, Bookman says, “They were right . . . which leads me to conclude that there is a ‘personality type,’ at least for many of us . . . . I think true PDs might be a little like obscenity — you know one when you see one.”<sup>64</sup>

If such a type exists, Mary Halloran, executive director of the Colorado Criminal Defense Bar, captures it best. She believes that criminal defense lawyers are “a breed unto themselves . . . profane, argumentative, insecure, eccentric . . . .”<sup>65</sup> As to profanity, defenders seem to have a penchant for one particular word: “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>66</sup> Yet, Halloran notes that defenders do have some positive qualities: “Oddly . . . [they] make loving parents.”<sup>67</sup>

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<sup>58</sup> See Telephone Interview with Marc Bookman, Senior Trial Attorney, Defender Association of Philadelphia (Aug. 22, 2002) (“You almost never get gratitude in this job even if you’re . . . close to your clients. You don’t do it for that.”).

<sup>59</sup> See generally Bellows, *supra* note 3.

<sup>60</sup> See Babcock, *supra* note 7, at 175.

<sup>61</sup> Telephone Interview with Marc Bookman, *supra* note 58.

<sup>62</sup> *Id.*

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

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

<sup>65</sup> Mary Halloran, *Ode to a Criminal Defense Lawyer*, CALIFORNIA LAWYER, June 1998, at 96.

<sup>66</sup> *Id.* Halloran provides a helpful example of this aspect of defender speak: “I ordered a f-ing tuna salad on wheat, and that flea-brained f – brought me a ham and cheese on pumper-f-ing-nickel.”

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

The defender typecast is anti-authoritarian,<sup>68</sup> feisty,<sup>69</sup> nonconformist,<sup>70</sup> irreverent,<sup>71</sup> skeptical,<sup>72</sup> slightly voyeuristic,<sup>73</sup> slightly exhibitionist,<sup>74</sup> and resilient.<sup>75</sup> But some defenders, including career defenders, may be contrary to type. As a former defender puts it, defenders are “an eclectic lot whose only common denominator is a commitment to providing quality legal representation to poor persons.”<sup>76</sup> Some defenders need to get along with everybody and need to be liked, even by judges and prosecutors. These defenders don’t thrive on anti-authoritarianism or nonconformism; they believe they can play by the rules, comport with convention, and still persuade others to their point of view. There are defenders who are downright pious,<sup>77</sup> not skeptical or irreverent.<sup>78</sup> There are defenders who are basically shy and not terribly feisty in their “regular lives,” but manage to advocate — passionately, publicly — on behalf of another. Most defenders are curious about the complexities of life and crime, if not exactly voyeuristic.<sup>79</sup> And, of course, defenders must be resilient.

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<sup>68</sup> See also Adam Gopnik et al., *The Talk of the Town: The Woman Behind the Sheikh*, THE NEW YORKER, Jan. 23, 1995, at 28 (criminal defense lawyer Lynne Stewart remarking, “I always liked the idea of criminal law, because I could indulge my anti-authoritarian instincts”). See generally WILLIAM M. KUNSTLER, *MY LIFE AS A RADICAL LAWYER* (1994).

<sup>69</sup> See generally LESLIE ABRAMSON, *THE DEFENSE IS READY* (1997) (career defense lawyer recounting her career from Los Angeles public defender to defender in high profile cases).

<sup>70</sup> See, e.g., Halloran, *supra* note 65 (noting hip dress of defenders).

<sup>71</sup> See generally KUNEN, *supra* note 1 (describing personal factors that motivate people to perform role of criminal defense attorney).

<sup>72</sup> See Telephone Interview with Stuart Schuman, *supra* note 9 (career defender noting his own overriding skepticism).

<sup>73</sup> See Halloran, *supra* note 65 (noting that “heated facts of crime provide voyeuristic excitement”). Many defenders admit to a certain level of fascination with moral ambiguity and a desire to hang with the bad boys — without getting in trouble themselves. One former defender turned legal scholar dubbed this “crime for sissies.” Comment by Louis Michael Seidman, Georgetown University Law Center Faculty Workshop, November 19, 2002.

<sup>74</sup> See, e.g., Babcock, *supra* note 7, at 178 (citing “egotist’s reason” for doing criminal defense, which includes thrill of trying cases before juries); see also KUNSTLER, *supra* note 68.

<sup>75</sup> See generally CLARENCE DARROW, *THE STORY OF MY LIFE* (1934) (recalling experiences as defense attorney).

<sup>76</sup> Bellows, *supra* note 3, at 73.

<sup>77</sup> See, e.g., Halloran, *supra* note 65 (noting that defenders “cry in public if the subject has to do with justice or the death penalty.”).

<sup>78</sup> See Bellows, *supra* note 3, at 73 (“Our attorneys range from the ideological . . . to the merely idealistic to the bemused to the cynical.”).

<sup>79</sup> See DARROW, *supra* note 75, at 76 (“I was dealing with life, with its hopes and fears, its aspirations and despairs.”).

Even if one can identify typical defender qualities — or some sort of “defender gene”<sup>80</sup> — these qualities are not necessarily sustaining. Erin and Zeke were typical defenders in many ways. If one was more contrarian than anti-authoritarian, and the other a rather conventional sort of nonconformist, they nonetheless fit the mold. They had a defender sense of humor, always wry and occasionally scathing. They knew which side they were on. Still, they managed to port these qualities off to their new law firm jobs.

And these qualities are, of course, not unique to defenders. True anti-authoritarians are not lawyers at all; they take to the streets, not to the courts. And there are contrarians in every field; academia, for example, seems to have more than its share. No doubt, the arts claim more skeptics, voyeurs, nonconformists, and exhibitionists overall than does the law.

The classic motivators — civil libertarianism, camaraderie, and personality — are not able to sustain a lasting career in public defense. There needs to be something more. Ten years ago, Professor Ogletree offered a paradigm attempting to identify what that “something” might be.

## II. THE OGLETREE PARADIGM: EMPATHY AND HEROISM

The Ogletree paradigm for sustaining motivations for public defenders consists of two prongs, empathy and heroism.<sup>81</sup> Ogletree describes these motivations as fundamentally different from more abstract, theoretical, and external “justifications” for undertaking indigent criminal defense work.<sup>82</sup> He argues that mere justifications for doing the work, such as belief in the adversary system,<sup>83</sup> the right to counsel,<sup>84</sup> countering the power of the state,<sup>85</sup> or enhancing the power of clients,<sup>86</sup> fall short in the daily grind of defender life, and that defenders need a more internal motivation to sustain a career. He suggests that “the more the defender identifies with her client as a person”<sup>87</sup> — that is, the more she feels a deep, inner connection — the likelier she is to last.

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<sup>80</sup> Telephone interview with Stuart Glovin, *supra* note 44.

<sup>81</sup> See Ogletree, *supra* note 12, at 1271-94.

<sup>82</sup> See *id.* at 1244-60. Ogletree defines justifications as external moral criteria that provide a reason to take a certain action. *Id.* at 1269.

<sup>83</sup> See *id.* at 1258.

<sup>84</sup> See *id.* at 1254.

<sup>85</sup> See *id.* at 1257.

<sup>86</sup> See *id.* at 1250-51.

<sup>87</sup> *Id.* at 1270-71.

Ogletree names “empathy” as a sustaining motivation, in part because this is what helped sustain him as a zealous defender in a murder case shortly after his own sister was murdered.<sup>88</sup> By empathy, Ogletree does not mean pity, but rather the ability to relate to a client as a person and to develop a friendship.<sup>89</sup> Ogletree’s notion of empathy incorporates a deep lawyer-client identification and connection.<sup>90</sup>

In addition to empathy, which Ogletree says was not enough by itself to keep him going as a public defender, Ogletree points to “heroism” as a sustaining motivation in indigent criminal defense.<sup>91</sup> When he was a defender, he saw himself as his client’s hero, someone who would fight for a client and win.<sup>92</sup> By “winning,” Ogletree means obtaining an acquittal at trial.<sup>93</sup> These lawyers love the “thrill of the trial,” and doing what they can to “steal[]’ the case from the prosecution.”<sup>94</sup>

For Ogletree, the dual motivations of empathy and heroism drive the defender and make the defender’s performance more effective. Ogletree argues that the quality of a lawyer’s representation will improve when the lawyer takes an empathic view of the client: “When [the lawyer] cares about the client as an individual, not only does [the lawyer] want to assist [the client] through the complex maze of our legal system, but [the lawyer] also wants [the client] to succeed; as a result, her defense is zealous.”<sup>95</sup> In addition, empathy enables defenders to listen to and understand many different kinds of people, which enhances their ability to interview and counsel clients, to negotiate with opposing counsel, and to communicate effectively with a range of institutional actors.<sup>96</sup> Likewise, Ogletree argues that the heroic lawyer — the lawyer convinced of the heroic nature of criminal defense — may be inspired to argue more forcefully and persuasively on a client’s behalf.<sup>97</sup>

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<sup>88</sup> *See id.* at 1271.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at 1271-75.

<sup>91</sup> *See id.* at 1275 (“As I reflect upon my experiences as a public defender, I realize that empathy alone did not sustain me. I also felt various motivations that centered around how I envisioned myself and my task. I describe these motivations under the rubric of heroism.”).

<sup>92</sup> *See id.*

<sup>93</sup> *Id.* at 1275-76.

<sup>94</sup> *Id.* at 1276.

<sup>95</sup> *Id.* at 1274.

<sup>96</sup> *Id.* at 1274-75.

<sup>97</sup> *See id.* at 1277.

### A. *The Shortcomings of Empathy and Heroism*

Ten years after its publication, Professor Ogletree's empathy and heroism paradigm remains an important contribution to the study of public defense. Like the classic motivations described in Part I, however, his model leaves unanswered the more elusive question: what inspires a lifetime of public defense?

#### 1. Empathy and the Problem of Boundaries

One might wonder what could possibly be wrong with empathy, both as an important virtue in and of itself<sup>98</sup> and as a sustaining motivation for defenders?<sup>99</sup> What clinical teacher doesn't hope that, at the very least, students working with clients will begin to see "resemblance in difference,"<sup>100</sup> to feel for another in need,<sup>101</sup> and maybe even to suffer with them?<sup>102</sup>

There is nothing wrong with empathy.<sup>103</sup> It is an important aspect of moral development. It is also an important aspect of psychological development. It is no doubt essential to one's humanity. It may even be essential to good criminal defense advocacy, especially at sentencing,<sup>104</sup> when a defender must capture in words not simply a client's criminal

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<sup>98</sup> See DALOZ ET AL., *supra* note 28, at 67.

<sup>99</sup> See Ogletree, *supra* note 12, at 1271-75 (discussing empathy as sustaining motivation).

<sup>100</sup> ADRIENNE RICH, *WHAT IS FOUND THERE: NOTEBOOKS ON POETRY AND POLITICS* 6 (1993).

<sup>101</sup> See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987) (defining empathy as "feeling the emotion of another," "understanding the experience or situation of another," and engaging in "action brought about by experiencing the distress of another"). Jane Aiken prefers the term "compassion" to "empathy." See Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality"*, 4 CLINICAL L. REV. 1, 11 (1997); see also DALOZ, ET AL., *supra* note 28, at 69 (distinguishing between empathy and compassion, and noting that compassion is not only "be[ing] moved by another's pain" but being "move[d] . . . to act[ion]").

<sup>102</sup> See DALOZ ET AL., *supra* note 28, at 69.

<sup>103</sup> But see Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605, 605 (1999) ("There are two important things to remember about empathy — it is necessary, and it is impossible.").

<sup>104</sup> An ability to empathize can be useful at trial, too. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966). This is especially true when the defense theory reflects a client's experience and circumstances (e.g., genuine fear of imminent harm in a self-defense case), but it is also important for defenders to convey a connection to and belief in the client in less explicit ways. See *id.* ("Effective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is innocent.").

act, but a client's life.<sup>105</sup>

Empathy is important in the lawyer-client relationship as well.<sup>106</sup> It is easier to represent people who do bad things<sup>107</sup> if you are able to establish a personal connection with them.<sup>108</sup> Similarly, establishing rapport and mutual trust is easier when there is a shared understanding. There is no question that empathy is part of good defense lawyering, or if not exactly empathy, then at least the ability to imagine a client's situation.<sup>109</sup> When students in the clinic say they cannot represent a client accused of a certain crime — usually sex crimes or hate crimes — I ask them to put aside that particular client and consider whether there might be a similarly charged client whom they *could* represent. I ask them to describe the life experience of such a client and how it was they came to be the person they are now. Invariably, students describe a client for whom they feel some empathy, or at least sympathy — a client who has suffered terribly, has endured a history of abuse, neglect, or rejection, and has had few if any real chances in life. With some probing, students often find such an identifiable personal history in the client.

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<sup>105</sup> See ANTHONY AMSTERDAM, TRIAL MANUAL V FOR THE DEFENSE OF CRIMINAL CASES 339-40 (5th ed. 1989).

<sup>106</sup> See Marjorie Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 270-74 (1999) (noting that empathy is important tool in lawyering and distinguishing it from unchecked countertransference).

<sup>107</sup> This also includes people who do "terrible things." See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 934 (2000).

<sup>108</sup> See Babcock, *supra* note 7, at 178 (discussing "humanitarian reason" for doing criminal defense); MCINTYRE, *supra* note 3, at 143 (noting importance of empathy in defending factually guilty). *But see* Telephone Interview with David Stern, Partner, Rothman, Schneider, Soloway & Stern, L.L.P., New York, NY [small criminal defense firm consisting of former Legal Aid lawyers] (August 27, 2002) (noting that "sometimes the closer the lawyer is to the client the more intolerant they are. Because they got out. I've heard African American lawyers say to clients, 'That's no excuse.'").

<sup>109</sup> I have come to prefer curiosity and imagination to empathy. See generally Faith T. Fitzgerald, *Curiosity: On Being a Doctor*, 130 ANNALS OF INTERNAL MED. 70 (1999). A quote from Wishman's article reads:

[M]y new client was charged with beating his two-year-old daughter to death. I had shrugged off my initial disgust at the thought of such a horrible crime. Although repulsed, I had also felt curious, drawn to find out what normal restraints of decency were missing in this man. I had found over the years that having an intellectual curiosity about a client was a way of keeping some emotional distance from him.

*Id.*; see also WISHMAN, *supra* note 3, at 20. Curiosity also motivated Clarence Darrow to represent the accused. See generally DARROW, *supra* note 75 (describing interest in causes of human conduct and how that interest led him to represent criminal defendants).

Nevertheless, empathy is at best a problematic motivation for sustaining a career of public defense for several reasons. Empathy itself is often difficult to sustain in view of the volume and nature of the work.<sup>110</sup> In addition, even if a defender continues to empathize with each and every client, empathy as a motivator might wane as time goes on.

Erin and Zeke expressed enormous empathy for their clients, no matter the crime or the client. Empathy seemed to be a driving force for them, a conspicuous motivation. Whenever they described the cases they were working on, they made sure to comment on the client's sympathetic qualities and to say that they "really liked" the client. What seemed less clear to me — especially over time<sup>111</sup> — was whether the empathy was genuine. I wondered whether Erin and Zeke truly felt an empathetic connection with every client, every time — or whether they felt somehow *obliged* to proffer empathy as the motivating force in everything they did.

Of course, it might depend on how empathy is defined and its place in lawyering conceptualized. Professor Ogletree defines empathy "as understanding the experiences, behavior and feelings of others as they experience them."<sup>112</sup> In the context of criminal defense, Professor Ogletree argues that defenders must do more than simply "hear" their clients; they must understand their clients' problems and have "compassion" for them.<sup>113</sup>

But, Professor Ogletree's notion of empathy goes beyond understanding and compassion. Likewise, his notion of the lawyer-

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<sup>110</sup> See McIntyre, *supra* note 3, at 144. Shawn Moore states:

If the client is not your favorite person — and there are a number of clients I've represented that I don't like — the idea of being a bulwark between the state and the client may be more important . . . than individual feeling or "empathy." I've represented some clients who've done some heinous, heinous things. In those cases it's like if the Government wants a fight then we'll fight.

See Telephone Interview with Shawn Moore, Trial Attorney, Federal Public Defender for the District of Columbia (Nov. 6, 2002).

<sup>111</sup> I have found over the years that liking and "befriending" clients seems to be a natural part of the initiation into defending. I encourage this and am pleased to see it when it happens as a matter of course in the clinic. Law students meet their clients, who are often around the same age even if their lives have been quite different, and find things in common.

<sup>112</sup> Ogletree, *supra* note 12, at 1272; see also DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 14 (1977) (urging "effective use of empathetic understanding" in lawyering).

<sup>113</sup> See Ogletree, *supra* note 12, at 1272; see also Aiken *supra* note 101.

client relationship goes beyond ordinary friendship.<sup>114</sup> Instead, Professor Ogletree describes something that comes closer to *love*:<sup>115</sup>

My relationship with my clients approximated a true friendship. I did for my clients *all* that I would do for a friend. I took phone calls at all hours, helped clients find jobs, and even interceded in domestic conflicts. I attended my clients' weddings and their funerals . . . . Because I viewed my clients as friends, I did not merely feel justified in doing all I could do for them; I felt a strong desire to do so.<sup>116</sup>

Although Professor Ogletree's notion of lawyer-as-friend owes much to Charles Fried's classic *Lawyer as Friend*,<sup>117</sup> he goes well beyond Fried's model of "legal friendship." To Fried, a lawyer is a "special-purpose" or "limited-purpose"<sup>118</sup> friend who enters into a "personal" relationship with a client and "adopts [the client's] interests as his own."<sup>119</sup> While Fried's notion of the lawyer-client relationship is rooted in the legal system, with the lawyer's range of assistance "sharply limited" by law,<sup>120</sup> Professor Ogletree's relationships with clients "were not similarly bounded."<sup>121</sup> Professor Ogletree's "style of representation [includes] a degree of involvement in the client's life that transcends the conventional scope of criminal representation."<sup>122</sup>

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<sup>114</sup> See generally Fried, *Teaching "Justice, Fairness and Morality,"* *supra* note 10 (analogizing lawyer-client relationship to limited purpose friendship).

<sup>115</sup> See John T. Noonan, Jr., *Propter Honoris Respectum: The Lawyer Who Overidentifies With His Client*, 76 NOTRE DAME L. REV. 827 (2001) ("[T]he identification [with the client] which occurs in the love that informs friendships must be present if the lawyer is to do the lawyer's work well."). For a trenchant critique of the current embrace of "love" in lawyer-client relationships in clinical legal scholarship, see Robert Condlin, *What's Love Got to Do With It?* (Nov. 24, 2003) (unpublished paper on file with author).

<sup>116</sup> Ogletree, *supra* note 12, at 1272 (emphasis added).

<sup>117</sup> See *id.* at 1251-54, 1254 n.81 (citing with approval Charles Fried's "friendship analogy" for lawyer-client relationship and acknowledging that Fried's analogy is central to his own view of how public defenders should relate to their clients).

<sup>118</sup> Fried, *supra* note 10, at 1071-72.

<sup>119</sup> *Id.* In this respect, Fried's notion of friendship sounds very much like Charles Curtis' approach to advocacy. Compare *id.* at 1066 ("It is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests — that it is right [to] put the interests of . . . client above some idea, however valid, of the collective interest."), with Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 5-6 (1951) ("A lawyer . . . treat[s] his client better than others; and therefore others worse than his client . . . . The more good faith and devotion the lawyer owes to his client, the less he owes to others . . . . You devote yourself to the interests of another at the peril of yourself.").

<sup>120</sup> Ogletree, *supra* note 12, at 1071-72.

<sup>121</sup> *Id.* at 1273.

<sup>122</sup> *Id.* at 1243; cf. Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 86 (1994) (expressing support for "an extreme form of egalitarianism" in lawyering).

Taking Fried's lawyer-as-friend a step further, Professor Ogletree essentially offers us lawyer-as-best-friend. But, Professor Ogletree doesn't tell us exactly how this best/true friendship plays out. Is he *every* client's best friend? Is he every client's best friend all the time? If so, does he have any spare time for the kind of friendship that might actually sustain *him* in between all those weddings and funerals and domestic disturbances?<sup>123</sup> One has to wonder whether he truly feels a "strong desire" for the kind of friendship he describes with all his clients.

The bounds of the lawyer-client relation under Professor Ogletree's model are unclear. Professor Ogletree tells us only that he does not accept the "conventional" bounds of the lawyer-client relationship.<sup>124</sup> He does not agree that the lawyer-client relationship is confined to the legal system,<sup>125</sup> and he does not feel bound by the lines drawn by most lawyers in providing legal services.<sup>126</sup>

Although many lawyers eschew rigid boundaries in the lawyer-client relationship, and are willing to negotiate boundaries and offer other than strictly legal services depending on the client and the situation,<sup>127</sup>

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<sup>123</sup> Consider the first of Christopher Reeve's *Superman* movies. In the opening scene, Lois Lane, plummeting from a skyscraper, is caught midair by the flying superhero. See *SUPERMAN* (Warner Bros. 1978). "Don't worry," he assures her, "I've got you." "Yes," she replies, "but who's got *you*?" See *id.* While Professor Ogletree's willingness to intervene in domestic disturbances demonstrates great devotion to client, it also reveals an unusual confidence in his power to mediate often-violent conflict. This might have something to do with race and gender. Professor Ogletree is an African-American man. As a white woman, the last thing I would do upon hearing that one of my mostly male, nonwhite clients is involved in an escalating domestic conflict is go there myself to put a stop to it. Frankly, I wouldn't recommend this sort of personal intervention to law students or lawyers, whatever their race and gender.

<sup>124</sup> Ogletree, *supra* note 12, at 1272-73; see also Goldfarb, *supra* note 122, at 67-69 (urging lawyers to "move beyond the boundaries of [their] parochial lives . . . [to] feel and consider a wider range of possibilities than [they] would otherwise identify . . .").

<sup>125</sup> See Ogletree, *supra* note 12, at 1273.

<sup>126</sup> See *id.* at 1272; cf. George Packer, *Left Behind*, N.Y. TIMES MAGAZINE, Sept. 22, 2002, at 42 (discussing Lynne Stewart, lawyer who represented Islamic fundamentalist Sheik Omar Abdel Rahman at his 1995 conspiracy trial and who is being prosecuted for aiding terrorist organization).

<sup>127</sup> See Telephone Interview with Marc Bookman, *supra* note 58 ("How do you not get eaten up? I honestly think that's an issue for individuals to deal with. There must be a line there somewhere and I'm not 100 percent sure where you draw it. You can definitely cross the line, but I'm not sure where you draw it or that you actually draw a *line*."); Telephone Interview with Carol Koller, *supra* note 25 ("Everybody establishes boundaries in different ways. There's a lawyer here who takes a client at the halfway house out to lunch once a week. I couldn't do this — at least not regularly in the middle of a work day — but I do other things."). Indeed, there have been instances in which I have significantly renegotiated boundaries in my relations with clients. See, e.g., Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 517-21 (2000) (describing author's relationship with Patsy

Professor Ogletree seems to urge “going the distance” in every case and with every client.<sup>128</sup> He does not accept as a general proposition the desirability of drawing lines in a case or drawing lines between one’s professional and private life.<sup>129</sup> For example, his willingness to give out his home phone number and accept calls at “all hours” is worth commenting on. Although this is an issue upon which defenders differ — especially with the advent of cell phones and the notion of availability “twenty-four, seven” — the routine, indiscriminate distribution of one’s home or cell phone number is problematic. Does criminal defense necessarily mean giving up a home life, a private sphere, the *right to be let alone*?<sup>130</sup>

One problem with the friendship model is that there are no clear bounds in friendship. There are no rules for how far one goes in the name of friendship, for how much one might give, for the limits of devotion or zeal.<sup>131</sup> Professor Ogletree endorses the most generous sort

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Kelly Jarrett, who has been imprisoned for 27 years for crime she did not commit). The most unusual service I ever provided a client occurred in the course of representing a battered woman who had been convicted of murdering her abuser. When she was sent to prison, her sister took custody of her young son. The sister was hostile — she blamed my client for the predicament she was in — and did not refrain from telling the boy how she felt, causing the boy to have mixed feelings about his mother. In order to get the sister to agree to a prison meeting between mother and son I agreed to attend family therapy sessions as a stand-in for my client. The sessions took place in a therapist’s office near where the son lived, which was a two-hour drive. This is not something I have the time or inclination to do on a regular basis, although the circumstances of this case — the estrangement between incarcerated parent and child, the emotional fallout to the abandoned child — is hardly unique.

<sup>128</sup> One career defender believes in a less bounded lawyer-client relationship in the first few years of a defender career, but acknowledges that as time goes by defenders may need to figure out how to set some limits. See Telephone Interview with Santha Sonenberg, Chief of the Trial Division, Public Defender Service for the District of Columbia (Nov. 8, 2002) (“I don’t believe that boundaries have any place the first five to ten years you do this work. I don’t think you can do it the way you need to with boundaries. But, on the other hand it’s a long distance run. If you’re going to make it for the long distance you have to figure out how to have enough reserves for the next client.”).

<sup>129</sup> See Ogletree, *supra* note 12, at 1272 (“I did not draw rigid lines between my professional practice and my private life.”); cf. Telephone Interview with Carol Koller, *supra* note 25 (“I do have a life. I don’t think I would have been able to keep doing this if I didn’t ‘have a life.’ I don’t give out my home phone number.”).

<sup>130</sup> See *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>131</sup> For the limits of devotion and zeal in legal advocacy, see MODEL RULES OF PROFESSIONAL CONDUCT Canon 7 (1996) (“A lawyer shall represent his client zealously within the bounds of law.”); MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (1996) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized by a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.”).

of friendship, the love-is-blind version.<sup>132</sup> To Professor Ogletree, a lawyer's love ought to be unbounded, unqualified. Once he undertakes to represent a client, he commits himself — out of empathy and friendship — to meeting all of his client's needs and wishes.<sup>133</sup> All he knows as a defender — and, arguably, all any defender should know — is “I [am] my client's only friend . . . and . . . my friend want[s] to go home.”<sup>134</sup>

Although Professor Ogletree offers a lawyer-client relationship that is also unbounded in terms of time, it is not at all clear that most defenders — or most criminal defendants for that matter — want the relationship to last beyond the present case. Lawyers, especially criminal trial lawyers, are drawn to the urgency and focus of a criminal case; the *case* is the reason for the lawyer-client relationship. When the case is over, the relationship ends.<sup>135</sup> Criminal trial lawyers tend to like a beginning, middle, and end.<sup>136</sup> For the accused, the context in which a lawyer-client

<sup>132</sup> See Ogletree, *supra* note 12, at 1264-65 (sympathetically describing Strong's lack of “positive male role models”).

<sup>133</sup> See *id.* at 1271.

<sup>134</sup> *Id.*

<sup>135</sup> Career Defender Bob Boruchowitz notes:

Cases come to an end and you go on to something else. Even if a case goes on for a long time you have other clients. You can't be a friend with 100 other cases. It's unfair to the client to have him think you're his friend when you can't be all things to all people . . . . After a few years you have had thousands of clients, and you won't remember their names. It's not fair to them to let them think you are their friend . . . . On the other hand, I have stayed in touch with some clients after their cases ended . . . . Necessarily, it has to be a small number of clients for whom one can maintain this kind of relationship.

See Telephone Interview with Bob Boruchowitz, *supra* note 43. Career Defender Stephanie Harrison adds:

You have to be able to move onto the next one. You have to be able to keep going. There are hundreds of [clients]. Everyone has a need. Everyone has a problem. It's impossible to have a case load if you don't move on . . . . [I]t's important not to give clients unreasonable expectations. Don't promise clients what you cannot live up to. Because they're constantly disappointed. Not even I'll see you tomorrow, because maybe I'll get stuck in court . . . . I know I can't be everything for a [client.] I try not to be the one the person relies on for everything.

See Telephone Interview with Stephanie Harrison, Staff Attorney, Public Defender for the District of Columbia (Nov. 6, 2002).

<sup>136</sup> Bellows explains:

For a few clients, a point was reached where they began to view me as their in-house counsel. At that point, I would usually end the relationship. I would be no one's consigliere. I would be no client's insurance policy. But it was more

relationship arises — their own criminal prosecution — is generally not a pleasant experience. Especially if they emerge from the experience with their liberty, they may not be so eager to keep up with the lawyer who has seen them at their worst. The criminal lawyer is tied to what is invariably a bad memory for the client.<sup>137</sup> In contrast, one usually hopes that a true friendship — one built on more than one person's misfortunes — will last a lifetime.

Holding aside the many other criticisms of the friendship model,<sup>138</sup> the notion of lawyer-as-best-friend puts an extraordinary burden on defenders to give their hearts away each time they represent a client, to figure out the limits in a lawyer-client relationship, and to find a way to “go home” themselves. If Professor Ogletree was “devastated”<sup>139</sup> by the conviction of a client who was not terribly sympathetic and was likely guilty — how much more devastation could he withstand?<sup>140</sup>

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than that. It was also the fact that, occasionally, you just burn out on a client. You burn out on particular clients long before you burn out on public defending.

See Bellows, *supra* note 3, at 99; see also Telephone Interview with Gregg Spencer, Chief Assistant Federal Public Defender for the District of Columbia, (Aug. 20, 2002) (“Holding someone’s hand through life leads to burnout. There’s a point where you can’t go beyond.”).

<sup>137</sup> There are, of course, exceptions to this. I have one client who calls me on his birthday every year to thank me for his freedom. He is an unusual client. I have also maintained correspondence with some clients, mostly those in prison.

<sup>138</sup> See, e.g., William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 108-09 (1978) (noting that, unlike true friends, lawyer “adopts the client’s interest for money . . . the classical notion, not of friendship, but of prostitution”). Because public defenders are paid by the state the prostitution analogy is inapt. Still, the lawyer-client relationship is an odd sort of friendship at best, whether the lawyer is privately retained or court-appointed. See Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2697 (1993) (“[T]he client receives more care from the lawyer than the lawyer ordinarily receives from the client.”); Marjorie Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 261 (1999) (“The lawyer’s devotion to the client’s needs is not reciprocated by the client.”); see also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 556-83 (1990).

<sup>139</sup> See Ogletree, *supra* note 12, at 1266.

<sup>140</sup> See Telephone Interview with Carol Koller, *supra* note 25 (“You have to have boundaries or you’d be off the bridge [of] . . . [p]rofessional boundaries . . . It’s a professional relationship [even though] you have a lot of personal feelings for clients.”); Telephone Interview with Shawn Moore, *supra* note 110 (“Too much empathy can be a problem. If you’re going to be a defender you better develop a veneer because you’re gonna hear guilty a lot of times.”); Telephone Interview with Stuart Schuman, Chief, Municipal Court Unit, Defender Association of Philadelphia, *supra* note 9 (“[P]eople who wear their hearts on their sleeve have problems. There’s a practical side to it. I want a lawyer with a good heart but one who’s practical and intellectual.”).

The trouble with the friendship model is most apparent whenever a lawyer represents an *actual* friend. As most lawyers will attest, there is nothing more difficult than representing a friend — or even a friend of a friend. The closer the connection to the lawyer the greater the burden. The only thing worse than representing a friend would be representing a family member. Even a client with an attenuated connection presents a greater burden than one with no connection at all. Perhaps it shouldn't be this way — or perhaps lawyers should feel this way about all clients — but when a lawyer represents a friend, professional responsibilities invariably become personal responsibilities. Boundaries are frayed as a result. Perspective is lost.

In criminal defense, clients are often convicted and sent to prison. This is so notwithstanding the best efforts of defenders. This is so whether the client was once a friend and is now a client, or was once a client and is now a friend. Defenders have to figure out a way to endure the losses and the heartache that comes with the work — and to at least come down a notch from devastation to disappointment.<sup>141</sup>

## 2. Idealizing the Lawyer-Client Relationship

Consider how Charles Ogletree describes his feelings about representing an alleged murderer at a time when he was struggling to cope with his own sister's murder:

[M]y empathy for Strong became one of the primary sustaining motivations for continuing zealously to defend him in spite of the pain of my sister's murder. I viewed Strong as a person and as a friend, and thus I was able to disassociate him from the person who had murdered my sister. I did not blame him, nor did I resent him because I had been victimized by crime . . . . [M]y empathy was based on my ability to relate to him as a person and to develop a friendship with him . . . .<sup>142</sup>

This is an extraordinary passage, at once inspiring and intimidating. Professor Ogletree had just experienced the worst personal tragedy: the violent death of a beloved family member. No one was ever arrested for

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<sup>141</sup> I recently offered similar advice to a young lawyer in the Prettyman Fellowship Program at Georgetown. She was disconsolate about a client with an indefensible case and a lengthy record who had just received a (relatively short) prison sentence. She pronounced the case "tragic." I suggested that it might be wiser to think of it as "unfortunate" rather than tragic — just to pace herself.

<sup>142</sup> Ogletree, *supra* note 12, at 1271.

the crime.<sup>143</sup> He was awash in grief, loss, and frustration.<sup>144</sup> Yet, on the heels of his sister's funeral, Professor Ogletree says he was able to feel empathy for someone accused of doing exactly what had been done to his sister<sup>145</sup> — someone Professor Ogletree concedes had likely committed these crimes.<sup>146</sup> There is a remarkable absence of ambivalence in Professor Ogletree's feelings toward his client, and in his approach to the lawyer-client relationship. He remains single-minded and sure-footed in his devotion to this client — and his desire to win his client's freedom — notwithstanding the complexity of the situation.<sup>147</sup>

Even the most devoted defender might have trouble here.<sup>148</sup> Other defenders have talked about how hard it is to empathize with certain defendants even when they have no personal association with the crime. As one remarked, "To put it simply, it is not easy to develop warm feelings when you . . . focus . . . on the devastation . . . your client has left in his wake."<sup>149</sup>

I worry about the standard Professor Ogletree sets. It all sounds so simple: feel for the client; be the client's friend; do the client's bidding. This is true friendship. But is it? Even when friends are freely chosen, friendship can be complicated.<sup>150</sup> Friends can disappoint; sometimes there is even betrayal.<sup>151</sup> Sometimes a friend simply runs out of steam; the need of another is too great; the friend needs to break free.<sup>152</sup>

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<sup>143</sup> See *id.* at 1261-62.

<sup>144</sup> See *id.* at 1260-64.

<sup>145</sup> See *id.* at 1263 (noting that "facts of the case struck a resonant chord"). But see *id.* at 1273-74 ("Had I seen Craig Strong only as a rapist and murderer, it would have been difficult to spend hours each day . . . fighting for his interests.").

<sup>146</sup> See *id.* at 1265 (noting that this was client's fourth rape case and government had strong case).

<sup>147</sup> See *id.* at 1271.

<sup>148</sup> See Bellows, *supra* note 3, at 78-79 (defender with pregnant wife refusing robbery case in which perpetrator allegedly threatened to kick pregnant woman in stomach if she did not turn over her purse).

<sup>149</sup> *Id.* at 80; see also *id.* at 97 ("I am tired of being a public defender. I am sick of representing so many bad people . . . . I am sick, in particular, of representing rapists . . . . I have lost much of the empathy I once had for my clients. It is time to go.").

<sup>150</sup> See generally Mary Duenwald, *Some Friends, Indeed, Do More Harm Than Good*, N.Y. TIMES, Sept. 10, 2002, at F5 (discussing studies that reveal health benefits and costs of friendship).

<sup>151</sup> See *id.*

<sup>152</sup> See Bellows, *supra* note 3, at 99 ("[Even for] the clients who once meant the most to me, for whom I shed blood, for whom I sweated . . . . [T]here is no more blood; there is no more sweat; certainly, there are no more tears. The well has run dry. Someone else will have to replenish it.").

There is something overly idealized about Professor Ogletree's ability to represent Strong because he saw himself as a true friend and his client wanted his freedom.<sup>153</sup> This may be a starting point, but it is seldom the whole story between defender and accused. What incarcerated client doesn't want to go home? What client facing serious charges doesn't want the whole case to go away? But, lawyers are not fairy godmothers granting wishes with a wave of the wand. Lawyers are not magicians with the power to make misfortune disappear. A lawyer may do a serious disservice to a client by pursuing his wish for freedom instead of helping the client face reality.<sup>154</sup>

Going to trial to seek an acquittal — often the first choice of an incarcerated client — is often not the best alternative.<sup>155</sup> Sometimes "friendship" requires telling clients the unpleasant truth: they will lose at trial and ought to plead guilty. Sometimes this advice does not go over very well.

Zealous, devoted, client-centered<sup>156</sup> lawyers do not only fight *for* their clients; they also occasionally fight *with* their clients. Like the

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<sup>153</sup> There is much to admire in Ogletree's ability to do this. Ogletree viewed his client as "more than the sum of his criminal acts" and was able to "genuinely feel" for him, notwithstanding the fact that Ogletree had just suffered a terrible, violent loss. See Ogletree, *supra* note 12, at 1266. Ogletree does recognize that there is something remarkable about this, *id.* at 1262-63, and reflects upon how he was able to do it. See *id.* at 1266-67. Although he believes that his sister would have wanted him to carry on as before, see *id.* at 1262-63, Ogletree also wanted to prove something to himself: "I was testing whether I would be able . . . to continue criminal defense work in the aftermath of my sister's death." *Id.*

<sup>154</sup> See generally Smith, *Defending Defending*, *supra* note 107, at 944-48 (discussing defense lawyer's failure to confront his police officer client early on with likelihood of conviction in Abner Louima case).

<sup>155</sup> Ogletree acknowledges this: "[A] defender's desire to bask in the glory of victory may find itself checked by her empathy with a client who is better served by a plea bargain." Ogletree, *supra* note 12, at 1280. This is a general statement about how heroism and empathy balance each other in Ogletree's model. Still, it is not at all clear what an empathetic, lawyer-as-best-friend defender would do if the client insists unwisely on going to trial — how much the defender would push in the other direction. For an example of how difficult it can be to be both a client's friend and advocate, see William Finnegan, *Defending the Unibomber*, THE NEW YORKER, March 16, 1998, at 52 (recounting lawyering in capital prosecution of Theodore Kaczynski).

<sup>156</sup> See DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) [hereinafter BINDER, LAWYERS AS COUNSELORS]; BINDER & PRICE, *supra* note 112; DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974); Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97 (1985); Dinerstein, *supra* note 138; Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987). See generally MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 43-49 (1975) (describing instances where zealous advocate will cross-examine witness who is testifying accurately to make witness appear as lying).

“nonaccused,” the accused come in myriad shapes and sizes, temperaments, and tendencies. Some criminal clients are easy to get along with and some are not.<sup>157</sup> What may distinguish the criminally accused from most people — though perhaps not from most legal clients — is that they are generally not happy in their current predicament. Some clients are not merely unhappy, they are sometimes furious — at the world, at the “system,” and at everyone connected with the system including (and especially) their court-appointed lawyer. This doesn’t always make for an amicable collaboration.

Most defenders will acknowledge that the most trying and emotionally draining part of the job is urging clients to cut their losses and take a plea rather than go to trial.<sup>158</sup> Understandably, especially when clients are facing a prison sentence, they resist pleading guilty. But, sometimes this is exactly what they should do, or risk a much greater sentence after trial.<sup>159</sup> Sometimes even lawyers who see themselves as their clients’ friends will scold clients, gang up on them, twist their arms, brow-beat them to do the right thing.<sup>160</sup>

The worst aspect of the idealization of the lawyer-client relationship, whether in the name of empathy or friendship or “care,”<sup>161</sup> is the idea that lawyers have to *love* their clients.<sup>162</sup> Defenders who claim to love all their clients are simply not being honest.<sup>163</sup> Not all clients are likeable.

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<sup>157</sup> Of course, some lawyers are easy to get along with and some are not.

<sup>158</sup> See MCINTYRE, *supra* note 3, at 154-56.

<sup>159</sup> See, e.g., Abbe Smith, *The Innocent and the Not So Innocent Alike: Untold Casualties in the War on Crime*, 29 HUM. RTS. Q. 14, 17 (2002) (noting that alleged drug dealer who insisted on going to trial is now serving nine to twenty-seven years when he would have likely gotten one to three years on guilty plea).

<sup>160</sup> See AMSTERDAM, *supra* note 105, at 339. Amsterdam argues,

[O]ften counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive. The limits of allowable persuasion are fixed by the lawyer’s conscience.

*Id.*; see also MCINTYRE, *supra* note 3, at 155-56 (defender describing “bullying” clients); Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 37 (1993) [hereinafter Smith, *Rosie O’Neill Goes to Law School*] (endorsing “arm twisting”). For a film depiction of a hot-blooded but effective lawyer-client relationship, see CRIMINAL JUSTICE (HBO 1990).

<sup>161</sup> See generally Ellmann, *supra* note 138, at 2665.

<sup>162</sup> See generally Conklin, *supra* note 115 (arguing that “love” has nothing to do with lawyering).

<sup>163</sup> Some defenders insist they *do* like all their clients. They find something to like about even the most damaged. See Telephone Interview with Penny Kahn, *supra* note 41 (“I like

Not all clients are easy objects of empathy or compassion. Some can be downright loathsome.<sup>164</sup> Of course, not liking a client does not mean providing poor representation.<sup>165</sup> After all, plenty of us don't like members of our own family; why should defenders like all their clients? But, the criminal defense credo endorsed by Ogletree and others — which can feel like an edict — of empathic understanding, true friendship, and unconditional love — suggests otherwise. It suggests that defenders ought to feel a real friendship, a real affection, for all their clients, or they aren't good defenders.<sup>166</sup> When defenders don't conform, when they don't feel that way about all their clients, there is cognitive dissonance. They think they're losing it: they're not the defender they're supposed to be, they no longer have the "right stuff."<sup>167</sup> They think maybe it's time for them to leave.<sup>168</sup>

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the work. I like the clients."); Telephone interview with Penny Marshall, Federal Defender, Wilmington, Delaware (Aug. 20, 2002) ("I'm probably an 'empathy person' . . . . I always find something to care about in a client."); Telephone Interview with Robin Steinberg, Director, Bronx Defenders (Aug. 15, 2002) ("I generally find something in every client to . . . care about and . . . relate to. In twenty years I don't think I've ever been unable to do this. Even the most damaged client."). Career defender Robin Steinberg puts herself in the "empathy camp." She believes that "if your heart and soul is in the work you go further, get more involved . . . ." *Id.* She also thinks that "[c]lients are better able to deal with devastating results if they have empathic lawyers . . . [if] they feel they had a skilled and caring advocate." *Id.* Still, she agrees that "empathy . . . leads to burnout far [too] often," and she acknowledges that "there are clients [she doesn't] love." *Id.*

<sup>164</sup> See Telephone Interview with Shawn Moore, *supra* note 110 ("There are clients that we don't like. A lot of my colleagues won't admit this."); Telephone Interview with Gregg Spencer, *supra* note 136 ("Some clients are not likable."); Telephone Interview with David Stern, *supra* note 108 ("I like most of my clients, not all."). Contrary to what many may think, the crime charged has little to do with whether a defender likes a client. See Telephone Interview with Marc Bookman, *supra* note 58 ("There are always gonna be clients you're closer to and clients you're not closer to. There are some clients you just don't feel an affinity for. But it's not because of the crime."); Telephone Interview with Carol Koller, *supra* note 25 ("Get federal defenders together and they will grumble about middle class fraud clients . . . not murderers."); Telephone Interview with Shawn Moore, *supra* note 110 ("Some clients have done some real shit but that didn't necessarily mean I disliked them more. Sometimes I liked them more than the ones who didn't do something that bad.").

<sup>165</sup> RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 104-05 (1989) (quoting criminal lawyer: "I'm a professional. . . . I'm going to do a good job if I think you're an asshole [or] if I think you're a nice guy.").

<sup>166</sup> See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 739 (1987) ("[It is] not necessary to approve of a client in order to recognize that his feelings and conduct are natural and human, and thus to offer him a measure of acceptance.").

<sup>167</sup> The very title of Tom Wolfe's book, *The Right Stuff*, illustrates the perception that attorneys must possess certain characteristics. See TOM WOLFE, THE RIGHT STUFF (1979).

<sup>168</sup> See Bellows, *supra* note 3, at 97.

But, good lawyers do not have to like, much less love, every client. Good defenders do not have to genuinely feel for every client — at least not to the same degree in every case. Good lawyers can try (or negotiate) the hell out of a case, zealously pursue their client's interests, and still be happy to say goodbye and even good riddance.

### 3. The Limits of Heroism

Charles Ogletree describes his notion of heroism in criminal defense in both altruistic and grandiose terms:

I saw myself as a kind of "hero" of the oppressed, the one who fights against all odds, a sort of Robin Hood figure who can conquer what others cannot and who does not always have to conform to the moral rules society reserves for others . . . . For the public defender, there is glory in the "David Versus Goliath" challenge of fighting the state, and the battle of wits that characterizes the courtroom drama only adds to the thrill of the trial.<sup>169</sup>

This is a classic depiction of lawyer as outlaw-hero.<sup>170</sup> Many defenders can relate to it.<sup>171</sup> The more downtrodden — indeed, the more despised — the client, the more heroic the lawyer. These are clients who, no matter what they are accused of doing, have never had much of anything in life; the cards were stacked against them from the start.<sup>172</sup> That they end up in the criminal justice system is not terribly surprising.<sup>173</sup> The worst offenders — those who commit the most heinous crimes — did not

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<sup>169</sup> Ogletree, *supra* note 12, at 1275.

<sup>170</sup> See KUNEN, *supra* note 1, at 190. Kunen writes,

It occurs to me that maybe I *like* putting criminals on the street; that, far from being an unfortunate side effect of the noble enterprise of defending the rights of the individual, maybe putting criminals on the street is the *main point*; that, possibly, I am motivated by the sheer joy of thwarting the will of authority. Maybe I became a defense attorney so I could *be bad*, and still be good. I don't know.

*Id.* 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).

<sup>171</sup> See Babcock, *supra* note 7, at 178 (describing "social worker" and "political activist" reason for doing criminal defense and noting that "[m]ost people who commit crimes are themselves the victims of horrible injustice . . . and are the most visible representatives of the disadvantaged underclass in America").

<sup>172</sup> See, e.g., JONATHAN KOZOL, AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION (1995) (recounting hardships faced by kids growing up in South Bronx).

<sup>173</sup> See JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 101-06 (1998).

get this way on their own.<sup>174</sup>

But Professor Ogletree's notion of heroism is not simply championing the disadvantaged. It is winning on behalf of the disadvantaged.<sup>175</sup> Professor Ogletree's lawyer-hero "fights," "battles," and "conquers." His hero is the nemesis of those who eschew traditional adversarial advocacy in favor of a more restrained, conciliatory approach.<sup>176</sup> The "thrill of winning" is an essential motivation to the lawyer-hero.<sup>177</sup> Winning is not simply one objective among many; it is everything.<sup>178</sup> Under Professor Ogletree's brand of heroism, the defender must either come away victorious or die trying.<sup>179</sup>

The lawyer-hero's need to win is not merely an individual motivation, or even an idiosyncratic personality trait, but the culture of practice in many defender offices. Professor Ogletree notes that defenders at his alma mater, the Public Defender Service for the District of Columbia, kept "track records" of acquittals, the best of which garnered universal admiration and "awe."<sup>180</sup> Other offices do the same thing.<sup>181</sup>

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<sup>174</sup> See, e.g., MIKAL GILMORE, *SHOT IN THE HEART* (1994) (recounting violent family history of multiple murderer Gary Gilmore); GITTA SERENY, *CRIES UNHEARD: WHY CHILDREN KILL* (1998) (exploring case of Mary Beard, child who killed two toddlers in England in early 1970s); cf. JOHN EDGAR WIDEMAN, *BROTHERS AND KEEPERS* (1984) (recounting very different paths taken by two brothers — one award winning writer, one doing life in Pennsylvania prison — who were raised in same urban ghetto).

<sup>175</sup> See Ogletree, *supra* note 12, at 1275.

<sup>176</sup> See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998) (arguing for advocacy that is more concerned with "justice" than client interest). See generally Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (examining effects of increased presence of women in legal profession on traditional adversarial model of litigation); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996) (arguing that adversary system may not be best method of dispute resolution).

<sup>177</sup> See KUNEN, *supra* note 1, at 190 ("I liked winning very, very much."); Babcock, *supra* note 7, at 178 ("And winning, ah winning . . ."); Ogletree, *supra* note 12, at 1275 (noting defenders' desire to win); cf. Telephone Interview with Bob Boruchowitz, *supra* note 43 ("I think altruism and egoism have a role to play. Lots of successful defenders are motivated by these things. They want to make the world a better place and help people who need help but they also really like being in the spotlight.")

<sup>178</sup> See Ogletree, *supra* note 12, at 1276 n.153 (quoting Alan Dershowitz: "Winning is 'the only thing . . .'"); see also ALAN DERSHOWITZ, *THE BEST DEFENSE* xvi (1982).

<sup>179</sup> See Ogletree, *supra* note 12, at 1243 (defining heroism as taking on system and "prevail[ing] . . . even in face of overwhelming odds").

<sup>180</sup> *Id.* at 1276.

<sup>181</sup> See also *THE SHOOTING OF BIG MAN: ANATOMY OF A CRIMINAL CASE* (ABC NEWS, 1979) (depicting criminal case from indictment through verdict and featuring both defenders and prosecutors recording "wins"). See generally Kenneth Bresler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537 (1996) (critically discussing phenomenon of prosecutors keeping score of their "wins").

Yet, this sort of heroism — especially if it is defined as winning cases (meaning, obtaining an acquittal) — is fleeting at best.<sup>182</sup> First of all, the vast majority of cases do not go to trial.<sup>183</sup> Second, when you do go to trial, sometimes you lose.<sup>184</sup> This is true for all defenders, no matter how devoted or determined.<sup>185</sup> As career defender Marc Bookman notes, the losses are more powerful and linger longer than the wins:

Losses stay with you so long and wins are so fleeting. The wins are really not wins. They're relief that injustice wasn't done. You've avoided injustice . . . . The losses are devastating because it means

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<sup>182</sup> See Telephone Interview with Penny Kahn, *supra* note 41. Kahn states:

I carry around two letters from clients that explain what motivates me. Neither are cases I "won." In one case, I got someone out of jail so that he could be with his dying wife. The other was from a young client who was convicted of several robberies and did some time but for whom I got some services and who is out now and working very long hours in "heating and cooling" and feeling good about himself.

*Id.*; see also Marc Bookman, *Spotting Elvis*, 32:22 DESCANT 64 (1992) ("He was a lawyer who took both winning and losing poorly. He did not roll around enough in the occasional victory . . . and his losses, which came like clockwork . . . kept him at the cutting edge of nausea.").

<sup>183</sup> See David R. Lynch, *In Their Own Words: Occupational Stress Among Public Defenders*, 34 CRIM. L. BULL. 473, 486-87 (1998) (noting unpredictability of which cases will go to trial and which will not).

<sup>184</sup> See MCINTYRE, *supra* note 3, at 162 ("[L]osing a lot . . . is one of the costs of being a public defender."); see also Telephone Interview with Gregg Spencer, *supra* note 136 ("I try to tell some of the younger lawyers that it's not about winning . . ."); cf. Scott L. Cummings, *The Politics of Helping: Reflections on Identity, Ethics, and Defending the Poor*, 6 GEO. J. ON POVERTY L. & POL'Y 43, 62 (1999) (summarizing apprentice defender comments that losing cases was his "initiation into the [public defender] world").

<sup>185</sup> A passage from Kunen reads:

Walking back across the street with Lloyd, I told him that I loved this case because it was impossible, yet we would win it! I dreamed of winning the unwinnable case, because then, and only then, could I be sure that it was my work, rather than the evidence, that won it.

He agreed that was what defense attorneys strive for, and recalled how a colleague, one time, had spent fifteen minutes holding up the defendant's coal-black raincoat — the perpetrator had worn black — telling the jury it was blue.

"And he won?"

"No."

KUNEN, *supra* note 1, at 115; see also Telephone Interview with Santha Sonenberg, *supra* note 128 ("Winning is not a mark of how good you are in this work. Superb lawyers lose cases.").

you were unable to avoid an injustice. I'm talking about real injustice . . . . A guy that gets convicted of first degree murder when it should have been third or involuntary — this loss stays with you a long time . . . . Wins . . . don't stay with you. Losses stay with you forever.<sup>186</sup>

Moreover, even if you do win, this does not necessarily mean that you have spared a client a life in the criminal justice system; criminal clients often return.<sup>187</sup> Far too often, they are arrested on more serious charges next time.<sup>188</sup>

For some clients and some cases, heroics have no effect; there is literally nothing to be done.<sup>189</sup> How does the lawyer-hero motivate himself or herself under these circumstances? What if empathy doesn't help, because the situation is so dreadful all you can feel is *terrible* for everyone involved?<sup>190</sup> You feel terrible for the client, who has had an awful life and is facing an even worse future. You feel terrible for the client's family, who must also live with their family member's fate. You might also feel terrible for a victim who has suffered real harm.<sup>191</sup>

<sup>186</sup> Telephone Interview with Marc Bookman, *supra* note 58; *see also* Telephone Interview with Stuart Glovin, *supra* note 44 (“When you win a case you're a genius. When you lose you feel like an idiot. You do the best you can. A lot of times you do the job of a lifetime, you try the hell out of a case, but it doesn't work out.”).

<sup>187</sup> *See* KUNEN, *supra* note 1, at 255 (quoting client after he was found not guilty of murder: “Can I get my shotgun back?”); *see also* Bellows, *supra* note 3, at 99 (noting difficulties of going to bat for same client time after time).

<sup>188</sup> The “re-arrest” of clients is a routine experience in public defender offices and law school criminal clinics. Many of the serious cases we undertake at the Georgetown Criminal Justice Clinic come from clients who initially had misdemeanor cases. *See* KUNEN, *supra* note 1, at 102-03 (noting that one juvenile he had unsuccessfully defended on gun charges had escaped from juvenile jail and was arrested soon thereafter for first-degree murder while armed).

<sup>189</sup> *See id.* at 157 (defining “loser” as case that “leaves the lawyer nothing to do for the client”); *see also* Telephone Interview with David Stern, *supra* note 108 (“I often think the best thing we do is get good pleas for people. We badger a client who we think is gonna lose to take a plea. Isn't this really what we do? It's so *unheroic* . . .”).

<sup>190</sup> Kunen offered this advice to his seventeen-year-old client, who pled guilty and was given a sentence of fifteen to life:

“Now that's behind you,” I said after the door was closed. “You can get on with your life. You're seventeen now. When you get out, you'll be thirty-two. That happens to be exactly how old . . . I [am] — not that old.” I shook his hand through the bars and told him I'd call his mother. That was the one thing he was concerned about — call his mother. He didn't seem to “get” what had just happened to him, or care, if he did.

*See* KUNEN, *supra* note 1, at 180-81.

<sup>191</sup> As I write this Article, I am representing a client who is charged with two separate rapes. The client was a juvenile at the time of the alleged offenses. The alleged victims

In between winning and losing, there is a broad middle ground. Defender life consists of considerably more than the intense highs and lows of trial work.<sup>192</sup> This is a good thing for defenders in need of a break, a little down time, a little monotony even. But, it can be dull for lawyer-heroes who thrive on constant stimulation, or those who need to actually accomplish something.<sup>193</sup>

Moreover, there is something disturbing — and presumptuous — about thinking of oneself as a hero.<sup>194</sup> This may be especially so when a white, middle-class defender considers himself or herself a hero to the oppressed, black masses.<sup>195</sup> What makes these defenders think they are their clients' heroes? And why is providing counsel to the poor accused a "heroic" thing, rather than merely the client's due under the Constitution? Isn't it a lawyer's professional and moral duty to represent the poor accused?<sup>196</sup>

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were also young. The evidence is overwhelming and the government will likely succeed in prosecuting my client as an adult and convicting him. There is no question that he may well spend much of his life in prison. In his short life my client has only known abuse and neglect — and now incarceration. Still, damaged though he is, there is good in him. He doesn't understand why he does terrible things. He believes he can change. But, it is unlikely that he will ever have a chance to change. It is my job to tell him this. What does an empathic, heroic defender do here except grieve for everyone involved?

<sup>192</sup> See Telephone Interview with Simi Baer, Staff Attorney, Public Defender Office, in King County (Seattle), Wash. (Oct. 16, 2002) ("I think you have to get rid of that hero thing and realize it's about respect and inclusion.").

<sup>193</sup> See Bellows, *supra* note 3, at 76. Bellows describes life as a public defender:

It is minutia and frustration that fill my days, not passionate closing arguments. It is getting a client to court on time. It is finding student investigators to go out and get statements. It is training those investigators so they do not get you disbarred on their first day out. It is dialing the same probation officer, day after day, and finally concluding that he does not exist. It is duty day, a day spent fielding phone calls from the public and praying that this is not the day that all the fugitives decide to surrender. It is getting cops to return your calls. It is subpoenaing unfriendly witnesses. It is seeing that they get paid so they will come back next time. It is preparing for trials that never take place.

*Id.*; see also Rader, *supra* note 5, at 299 (describing tedium of lower criminal court practice).

<sup>194</sup> See Telephone Interview with Stuart Glovin, *supra* note 44 ("If you want to be a hero there are lots of easier ways to be a hero in life than being a public defender. We're not here to be a hero in a classical sense."); Telephone Interview with David Stern, *supra* note 108 ("I'm offended by the notion that we're heroes. There are very few heroic moments . . . . Thinking you're a hero makes you act in a way that's not helpful . . .").

<sup>195</sup> See also Telephone Interview with David Stern, *supra* note 108 ("I'm a white, Jewish, middle-class man. I've had a million breaks . . . . I don't know what it's like to wake up in the morning and not have food in the refrigerator . . ."). See generally Doyle, *supra* note 170 (drawing parallels between "White Men" working in criminal justice system to colonialists).

<sup>196</sup> See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969); MODEL RULES OF PROF'L

It may be that lawyer-heroes have less stamina for the tedium of criminal practice, for the day-to-day demands of the work when they're not winning.<sup>197</sup> And the pressure to win, win, win is enough to tire even the most tireless trial jock.<sup>198</sup> There are too many limits on heroism in view of the complexity of client lives, the intractable problems of poverty, drugs, and crime, and the nature of the criminal justice system.<sup>199</sup> Where the sustaining motivation is rescuing or "saving" people, the lawyer-hero often just runs out of steam.<sup>200</sup>

*B. Empathy and Heroism as Motivations for Short-Term Public Defenders*

It could be that Professor Ogletree never had in mind sustaining a *career* as a public defender, and is concerned instead with getting talented young lawyers to do the work in the first place, to do it well, and to last for just a few years.<sup>201</sup> It could well be that Professor Ogletree is not interested in encouraging the notion of career defenders as either an institutional or individual model, but is content with young devoted defenders giving heart and soul to the work for three to five years and then moving on. The empathy-heroism model may well be useful for these short-term defenders.

Interestingly, the two most cited memoirs by public defenders are by former Public Defender Service lawyers who had such a tenure.<sup>202</sup> Randy Bellows, who wrote *Notes of a Public Defender*,<sup>203</sup> lasted four years.

CONDUCT R. 6.1 (2002).

<sup>197</sup> See KUNEN, *supra* note 1, at 142 ("You get tired of the exertions of the practice, having to be in court — several courts — every single day."); cf. Rader, *supra* note 5 (discussing dislike of criminal defense work based on author's clinical experiences).

<sup>198</sup> See KUNEN, *supra* note 1, at 142-43 ("[Y]ou get tired of the pressure — someone's freedom always riding on you . . . . [It] needs to be done, but it doesn't need to be done *by you*, not all your life. After a while, it's somebody else's turn.") (emphasis in original).

<sup>199</sup> See generally LEON DASH, *ROSA LEE: A MOTHER AND HER FAMILY IN URBAN AMERICA* (1996) (depicting life of Rosa Lee Cunningham, who lives life of poverty and petty crime in southeast Washington, D.C.); KOZOL, *supra* note 172.

<sup>200</sup> See Bellows, *supra* note 3, at 99 ("I am through now, and I can say it: I saved some lives. Of course, that is only part of the story. Many lives I did not save; many lives I could not save. But I did save some lives.").

<sup>201</sup> See generally Ogletree, *supra* note 12 (discussing empathy and heroism as motivating factors to keep people working as public defenders). I think this may be a fair interpretation of Ogletree's *Beyond Justifications*. The article is required reading in many law school criminal law clinics for this reason. It does a good job of articulating what many students come to feel about representing the indigent accused. Many students readily relate to empathy and heroism as motivations.

<sup>202</sup> The authors were at PDS at the same time as Ogletree.

<sup>203</sup> See Bellows, *supra* note 3.

James Kunen, who wrote *How Can You Defend Those People?*,<sup>204</sup> lasted perhaps three. Apparently, while at PDS, both were devoted, hard working attorneys, consistent with Ogletree's empathy-heroism model. But it could also be said that they left just when they were getting really good.

Is this a good institutional model?<sup>205</sup> Is the office well served — and are clients well served — by a corps of defenders who last only a few years, but who gives every waking hour to their clients? No doubt there are financial advantages to maintaining an office of largely junior defenders. It costs less to pay lawyers with three to five years of experience, rather than lawyers who have been at it for ten or twenty years. There may be less tangible benefits as well — the burst of energy and creativity that fresh troops bring. New blood is always a good thing.

But, there is reason to worry about offices that, intentionally or not, discourage career defenders. Experienced defenders — those with the kind of hard-won wisdom that comes from years in the trenches — have a crucial role to play both in the office and in court.<sup>206</sup> They are an invaluable resource for other defenders. They are advisors, mentors, and role models. They are the office "diehards."<sup>207</sup> However, when there are only a few senior lawyers in an office, they can be overburdened by consultation requests from junior colleagues. This consultation is on top of their caseloads, which often include the most serious cases in the office.<sup>208</sup> When new lawyers come and go, senior lawyers are less inclined to reach out and get to know them, and less inclined to spend time sharing their knowledge and skills.

Moreover, when the most experienced and talented defenders routinely head for private practice, leaving supervisors who have only a couple of years more experience than those they manage, a bad pattern is set. Young defenders get the message that there is a fast track up and out, and no one with any ability stays. Clients, judges, and the general public get the message that it doesn't take much to represent the poor accused; young, inexperienced lawyers can handle even the most serious

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<sup>204</sup> See Kunen, *supra* note 1.

<sup>205</sup> For a general discussion of an institutional model, see Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996).

<sup>206</sup> See MCINTYRE, *supra* note 3, at 81 ("[I]n terms of institutional needs, if the public defender's office not only hires inexperienced lawyers but also fails to retain them past the point where they have learned the essentials of their craft, then the costs (to both the office and the clients) may well be staggering.").

<sup>207</sup> *Id.* at 84.

<sup>208</sup> See *id.* at 83.

and complicated cases. Clients get the message that the Sixth Amendment right to counsel doesn't mean much if you're poor. This is a sad state of affairs on the fortieth anniversary of *Gideon*.<sup>209</sup>

There will always be short-term defenders,<sup>210</sup> those who, like Bellows and Kunen, burn out after a few years,<sup>211</sup> or who go where the grass is greener — or at least the pay is.<sup>212</sup> But, there must be a corps of seasoned defenders in every public defender office, sharing their judgment and perspective, modeling commitment and love for the work.<sup>213</sup>

In a short story about a public defender, Marc Bookman describes the kind of career defender I have in mind. I am not talking about career defenders who stick around out of laziness, complacency, or lack of anything better to do. Bookman describes fictional assistant public defender Billy Koufax as a defender “in it for the duration . . . . [n]ot [because] he lacked the ambition or imagination to leave; it was just that

<sup>209</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 340-41 (1963) (guaranteeing right to counsel in criminal cases). See generally LEWIS, *supra* note 19 (telling story of *Gideon*). For a discussion of the failed promise of *Gideon* and the poor quality of most indigent criminal defense, see DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 63-100 (1999). As Anthony Lewis forecast the year after *Gideon* was decided, “It will be an enormous task to bring to life the dream of *Gideon v. Wainwright* — the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what . . . .” Unfortunately, forty years later the task remains. See Anthony Lewis, *The Silencing of Gideon’s Trumpet*, N.Y. TIMES MAGAZINE, Apr. 20, 2003, at 50 (discussing *Gideon* and state of criminal defense in United States forty-one years later).

<sup>210</sup> See MCINTYRE, *supra* note 3, at 80 (quoting defender: “A year and a half, maybe two years. That’s all I wanted to do. To get in, to stay for a short time, learn what I needed to know, get some experience, and then get out.”). *Id.* “[I]t is not uncommon to hear public defenders remind . . . themselves, ‘I can’t spend my whole life as a public defender; I can’t do this forever.’” *Id.*

<sup>211</sup> See Ogletree, *supra* note 12, at 1241-42.

<sup>212</sup> See MCINTYRE, *supra* note 3, at 80 (noting financial sacrifice of public defenders). *But see* Telephone Interview with Penny Marshall, *supra* note 163 (“I tell my clients I have a house, a car, and enough food to eat — and I’m fine.”); Telephone Interview with Stuart Schuman, *supra* note 9 (“I believe I’m making a positive difference . . . . I weigh this against the desire for the good things in life. Everyone wants to have those things . . . .”).

<sup>213</sup> See, e.g., Telephone Interview with Marc Bookman, *supra* note 58 (“I feel good about being a PD. I don’t think I could practice any other kind of law . . . . This is something I can feel honorable about.”); Telephone Interview with Stuart Schuman, *supra* note 9 (“[Y]ou end up where you should be . . . . [It’s about] your upbringing, something having to do with spirituality . . . . Somehow you end up where you should be.”); Telephone Interview with Gregg Spencer, *supra* note 136 (“[Y]ou don’t want to say it’s your calling, but it’s what I do — what I’m supposed to be doing. It’s not so much a reason for doing [the work] as a feeling that it’s what I should be doing . . . . At some point it becomes part of you . . . . it’s what you *have* to do. I can’t see myself doing anything else.”); *cf.* Telephone Interview with John Packel, *supra* note 41 (quoting defender with thirty-seven years experience saying: “People regard this as public service and noble work. That may be so, but I also regard it as a great job.”).

he understood himself as someone who defended poor people in trouble, and he was not certain he would understand himself doing anything else. He liked to tell people what he did for a living."<sup>214</sup> As Thomas Shaffer has written, "[I]t is a good thing when good people continue to be able to function for the oppressed."<sup>215</sup> I would like to offer guidance to defenders and prospective defenders — a framework or "paradigm,"<sup>216</sup> if possible — so that they may continue to function for the accused.

### III. AN ALTERNATIVE PARADIGM

Professor Ogletree's *Beyond Justifications* was the first serious, scholarly attempt to explore what sustains indigent criminal defenders, what motivates defenders to do work that is difficult and often denigrated.<sup>217</sup> The article raised important and provocative issues. It was also profoundly personal. The author bravely shared his own sensibility and life experience.<sup>218</sup> For good reason, the article has been influential in both clinical legal education and public defender worlds.

But, I wonder whether a single model, even a two-pronged one like Professor Ogletree's (or the three-pronged one I will propose shortly), can ever "fit all." Theory can overwhelm and distort experience. There is a reason that much of the literature on indigent criminal defense is anecdotal and varied: the stories are the "theory."<sup>219</sup> There are as many

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<sup>214</sup> Bookman, *Spotting Elvis*, *supra* note 182, at 182.

<sup>215</sup> Thomas Shaffer, *On Lying for Clients*, 1 J. INST. STUD. LEG. ETH. 155, 173 (1996).

<sup>216</sup> In recent years, clinical legal education has become enamored of lawyering paradigms. See, e.g., Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998); Grady Jessup, *Symbiotic Relations: Clinical Methodology — Fostering New Paradigms in African Legal Education*, 8 CLINICAL L. REV. 377 (2002); Minna J. Kotkin, *Creating True Believers: Putting Macro Theory Into Practice*, 5 CLINICAL L. REV. 95 (1998); Alan M. Lerner, *Law and Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107 (1999); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65 (1997); Marcus Soanes, *Flexible Paradigms and Slim Course Design: Initiating a Professional Approach to Learning Advocacy Skills*, 5 CLINICAL L. REV. 179 (1998). Although I have mixed feelings about this development, paradigms can be helpful to at least some lawyers and law students in some contexts. I mean to offer a helpful one here.

<sup>217</sup> See Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 356-60 (2001).

<sup>218</sup> See Ogletree, *supra* note 12, at 1260-67.

<sup>219</sup> See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea For Narrative*, 87 MICH. L. REV. 2411 (1989) (examining use of stories in structuring social reality).

reasons for doing the work as there are defenders.<sup>220</sup> Frankly, I often find this anecdotal material more convincing — and more powerful — than even the most compelling theory.

In my mind, Barbara Babcock's classic 1983 article *Defending the Guilty* remains the best thing ever written on criminal defense because of its broad yet personal approach. Babcock clearly knows her subject well; she writes about public defenders with the ease of someone who has been there, as she has.<sup>221</sup> Babcock identifies several motivations for doing criminal defense work — and several “criminal defense personality types” — and doesn't distinguish between “justifications” and “motivations.”<sup>222</sup>

I often prefer personality and perspective to paradigms. Sometimes the least likely people — those who don't comport with anyone's image of an indigent criminal defender — make superb defenders.<sup>223</sup> Good lawyering often transcends models. The best new models for indigent criminal defense go beyond lawyering. They offer a broad, collaborative approach to representing people accused of crime.<sup>224</sup>

Still, I think Professor Ogletree was on to something when he linked the altruistic concept of empathy with the more egoistic concept of

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<sup>220</sup> See Menkel-Meadow, *supra* note 176, at 46 (noting that “motivations [for] poverty lawyering are . . . varied”).

<sup>221</sup> Babcock was the Director of the Public Defender Service for the District of Columbia from 1968-1972.

<sup>222</sup> Compare Babcock, *supra* note 7, at 177-79, with Ogletree, *supra* note 12, at 1269-77.

<sup>223</sup> See Telephone Interview with David Stern, *supra* note 108 (“I know a lot of defenders who hate their clients and are great defenders. Maybe it's ego . . . . Still, it's hard if you hate your clients.”).

<sup>224</sup> See Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 893, 506-23 (1997) (describing mission and structure of Bronx Defenders); see also Telephone Interview with Robin Steinberg, *supra* note 163 (recapping Director of Bronx Defenders' intention to create office structure that sustains and nurtures defenders serving clients in myriad of ways). The Bronx Defenders office believes in being “proactive” in helping clients to stay out of the criminal justice system and lead full, free lives. See Telephone Interview with Robin Steinberg, *supra* note 163. Although she very much believes in career defenders — and is one herself — Robin Steinberg's approach to indigent defense lawyering is in keeping with Ogletree's notion of empathy:

[I]f your heart and soul is in the work you go further, get more involved, are more proactive in helping clients to not return to criminal justice system and achieve their life goals. The more you come to know and understand clients and get involved the more you can help them achieve positive life outcomes. If you don't know what's going on in client's home you can't offer solutions.

*Id.*

heroism.<sup>225</sup> Altruism alone is rarely a sustaining motivation; even the most devoted need something for themselves.<sup>226</sup> If there is a useful paradigm, it must offer something for the lawyer — if not quite heroism, then at least some level of satisfaction<sup>227</sup> — as well as the client.

### A. *Respect*

Somehow we have forgotten about respect. In our effort to befriend,<sup>228</sup> mentor,<sup>229</sup> and collaborate with<sup>230</sup> clients we have neglected something much more basic. To many clients, respect may be the most important thing.<sup>231</sup>

<sup>225</sup> See MCINTYRE, *supra* note 3, at 169 (“In an important sense . . . there is a synergistic relationship between the public defenders’ egoistic and altruistic concerns, their desire to win, and their view that they are needed.”).

<sup>226</sup> See Menkel-Meadow, *supra* note 176, at 47 (noting that altruism is not enough to sustain defenders because of situational and structural aspects of work). See generally ALFIE KOHN, *THE BRIGHTER SIDE OF HUMAN NATURE: ALTRUISM AND EMPATHY IN EVERYDAY LIFE* 181-204 (1990) (discussing tensions between selfishness and altruism); ALPHONSO PINKNEY, *THE COMMITTED: WHITE ACTIVISTS IN THE CIVIL RIGHTS MOVEMENT* (1968) (examining motivations of white activists working for racial justice in sixties).

<sup>227</sup> See generally ROBERT COLES, *THE CALL OF SERVICE* 68-94 (1993) (examining personal satisfactions of social activism).

<sup>228</sup> See Fried, *supra* note 10; Ogletree, *supra* note 12; see also THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 44-48 (1994) (arguing that lawyers and clients should be friends in Aristotelean way, dealing with moral issues in way that friends deal with moral issues); Thomas L. Shaffer, *A Lesson From Trollope*, 35 WASH. & LEE L. REV. 727 (1978) (same).

<sup>229</sup> See Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 455-59 (1990).

<sup>230</sup> See Rosenthal, *supra* note 156, at 28; SHAFFER & COCHRAN, *supra* note 228, at 47 (urging lawyers to see clients as “collaborator[s] in the good”).

<sup>231</sup> See generally PHILIPPE BOURGOIS, *IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO* (1995) (detailing urban anthropologist’s first-hand account of street-level drug dealers in East Harlem, New York). In a memorable passage, Bourgois offers a young crack dealer’s bitter memory of being “legal,” working in an office mailroom. His boss, a white woman, used to talk about him in his presence:

When she was talking to people she would say, “He’s illiterate,” as if I was really that stupid that I couldn’t understand what she was talking about.

So what I did one day — you see they had this big dictionary right there on the desk, a big heavy motherfucker — so what I just did was open up the dictionary, and I just looked up the word, “illiterate.” And that’s when I saw what she was calling me.

So she’s saying that I’m stupid or something. I’m stupid! . . .

Ray would never disrespect me that way, because he wouldn’t tell me that

What I mean by respect is something both more and less than empathy or friendship.<sup>232</sup> The respect I have in mind is not merely treating clients respectfully or courteously — surely, this is their due as a human being<sup>233</sup> — but the sort of RESPECT that Aretha demands.<sup>234</sup> I mean respecting and embracing the client's dignity, autonomy, and humanity.<sup>235</sup> I mean taking clients *seriously*, acknowledging that they have lived a life, recognizing that there is more to them than their current predicament.

Every client has a life story.<sup>236</sup> Much of defense work lies in finding, appreciating, and effectively telling that story. The unlikeliest clients can have the most compelling stories. Recently, a post-graduate fellow and I represented a homeless man accused of assaulting an openly gay man because of anti-gay bias. To complicate things, our client was African American and the complainant was white. Our client had fired several previous lawyers, and the judge who appointed us told our client that this was it for him; he was not getting any other lawyers. He was a litigious client who had filed several motions in his case already. None of these motions was especially helpful to his case. Our client's defense theory was that white people, especially those from Virginia, were out to get him (this, notwithstanding the fact that the complainant was not even from Virginia, but was a German citizen in D.C.). Because the post-graduate fellow working with me on the case is unusually gifted at establishing rapport with all sorts of people, we managed to establish a good, trusting relationship with this client. Though our client was

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because he's illiterate too, plus I've got more education than him. I almost got a GED.

*Id.* at 144.

<sup>232</sup> See TOM WOLFE, *THE BONFIRE OF THE VANITIES* 382 (Bantam Books 1987) ("What did I tell you the first time you walked into this office? I told you two things. I told you, 'Irene, I'm not gonna be your friend. I'm gonna be your lawyer. But I'm gonna do more for you than your friends.'"); see also Telephone Interview with Robin Steinberg, *supra* note 163 (noting importance of representing clients with "dignity and respect" and acknowledging that if one's "definition of being a good lawyer is broad and is truly based on respect" you would accomplish tasks as empathy-driven defender).

<sup>233</sup> See Telephone Interview with Santha Sonenberg, *supra* note 128 ("Clients should not be called by their first names. It might be the first time in their lives they have ever been called anything other than their first names. Do you think Arnold and Porter lawyers call their clients by their first names?").

<sup>234</sup> See Aretha Franklin, *Respect* (Atlantic Records 1967).

<sup>235</sup> See *Jones v. Barnes*, 43 U.S. 745, 763 (1983) (Brennan, J., dissenting) ("The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process.").

<sup>236</sup> See Telephone Interview with Stuart Glovin, *supra* note 44 ("There is no job in the world with more stories than this job.").

difficult at times, we came to appreciate his intelligence, pride, and resilience. He did not want to go to jail — indeed, he was terribly afraid of law enforcement, which is probably what provoked the incident in the first place: the complainant had threatened to summon the police. He was, however, willing to risk incarceration for what he regarded as principle. The trial occurred over a cold, wintry period and our client had no regular place to sleep, yet he arrived on time each day, neatly dressed, with all of his belongings in tow. He conducted himself at all times with a quiet dignity. When he was found guilty, he expressed no rancor. He thanked us for our efforts on his behalf. We never learned how our client came to be homeless; he was not forthcoming in that way.<sup>237</sup> Still, he certainly had a story.

Career defender Stuart Schuman makes the connection between client stories and respect: “Everyone has a story . . . . I’ve always liked people and their stories. The story comes first for me and the law later . . . . [I]t is respect for the individual . . . . respect for the person and the person’s story that [motivates] me.”<sup>238</sup> We learn to respect our clients through their stories, and we learn about both them and ourselves.<sup>239</sup>

Implicit in this sort of respect is an acknowledgment that we can never really know another’s experience, never really walk in another’s shoes, never fully comprehend the forces that led the client to where he or she is now. As career defender David Stern notes, we are also in no position to judge those whose lives are often much harder than our own:

I don’t look down on any of my clients . . . . I try to understand and do understand how people end up doing the things they do. If I

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<sup>237</sup> Our client was a very private person and we tried to respect this. Defenders generally get to know clients very well, especially in serious cases. See Telephone Interview with Stuart Glovin, *supra* note 44 (“When you walk into the room of your first capital client you have to recognize that you will know this person better than pretty much anyone in your life. You *better* know this person as well or better than just about anyone you’ll meet in life.”).

<sup>238</sup> Telephone Interview with Stuart Schuman, *supra* note 9.

<sup>239</sup> See generally ROBERT COLES, *THE CALL OF STORIES* (1989) (psychiatrist making case for moral power of stories). Coles’ method for drawing out psychiatric patients’ life stories — getting beyond the oft-elicited “clinical history” — is worth emulating in criminal defense:

I had something else in mind, though I wasn’t sure exactly what . . . . I recall saying, finally, to my own barely suppressed annoyance — perhaps it was directed as much at myself as at her — that we should try to “begin at the beginning again.” To amplify that spectacularly original suggestion, I asked her to try to tell me a few stories about her life — “moments in it,” I went on to say, “you remember as important, as happy or sad.” Then I sat back and waited.

*Id.* at 10-11.

didn't have money to take care of my family and had to work at McDonald's, I'd sell drugs in a heartbeat. People have to find a way to understand their clients . . . . I probably couldn't have made it in their world. But, there is something to be said for another's experience, and we can learn from it — both about them and about us.<sup>240</sup>

Finding the humanity in clients, no matter who they are or what they are alleged to have done, is part of respecting them. After more than twenty years of practice and hundreds of clients, I can honestly say that I have never met a client who is utterly without humanity. Even the most damaged — and some clients are terribly damaged, disturbed, and dangerous — have something redeeming about them. Most didn't mean to end up the way they have.<sup>241</sup> As career defender Penny Marshall notes, finding the humanity in a client, no matter how despicable they appear to others, and treating that client with respect, is what defenders do.

How do you deal with people that society doesn't like? You . . . find . . . the human quality and the value of a human being . . . [and] you . . . do the best for them. Someone stand[ing] beside them is an act of respect. And out of respect you don't judge them prematurely. There is a strong aspect of respecting human dignity in why there should be defense lawyers defending people vigorously . . . . By respecting [a client who has done hateful things] the client also learn[s] something from me — that I [am] willing to lend myself to him.<sup>242</sup>

Respect is not love. It may be an aspect of friendship, but it need not be accompanied by friendship. Once we become our clients' lawyers, we are their *advocates* not their friends.<sup>243</sup> This is so no matter where we

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<sup>240</sup> Telephone Interview with David Stern, *supra* note 108.

<sup>241</sup> See generally Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953 (1995) (arguing against criminalizing juvenile delinquency and discussing role of inequality, peer influence, and family violence in fostering youthful offending).

<sup>242</sup> Telephone Interview with Penny Marshall, *supra* note 163.

<sup>243</sup> See Telephone Interview with Bob Boruchowitz, *supra* note 43 ("I see myself as my client's advocate, not friend or hero."); see also Telephone Interview with Santha Sonenberg, *supra* note 128 ("Suddenly everybody is hugging their clients at the end of interviews at the jail. I don't understand this. Big firm lawyers aren't hugging their clients after every meeting. Clients want a *lawyer* to get them out of the jam, first and foremost. I don't think you need to be buddy-buddy. I think you send a mixed message."). For juvenile defenders, advocacy and friendship may be harder to separate. See Telephone Interview with Simi Baer, *supra* note 192 ("I definitely see myself as my client's friend, but also as my client's *voice*. Until they have the tools they need to be able to speak for themselves I see

came from, no matter how close we feel to our clients.<sup>244</sup> As career defender Gregg Spencer notes, the lawyer-client relationship is a professional relationship, not a personal one:

[T]he thing that takes over is your professionalism and . . . that you're this person's *legal representative* in the system and you're gonna do your best for this person regardless of the charge or personality of the person. That's the essence of being a public defender. It's about making sure this person has not just adequate but very effective representation.<sup>245</sup>

Clients do not seek our friendship. The lawyer-client relationship has its genesis not in compatibility, but as a result of a criminal arrest, a finding of indigence, and luck of the draw. As career criminal defender David Stern notes, this is why respect is so important in defending the accused:

You have to respect them, not love them. People deserve respect, especially those in a terrible situation. Respect is what counts. I don't think most of our clients want to be friends with us. Who the fuck are we? We're thrust on our clients . . . . I think they want respect. Respect is a huge thing for our clients. And they're good at recognizing who respects them and who doesn't.<sup>246</sup>

Although we care about our clients — and the truth is, we do like most of them<sup>247</sup> — our advocacy is not contingent upon something as inconstant as affection.<sup>248</sup> Often, the clients we like least are the ones who need our advocacy most.<sup>249</sup> Our homeless client was one such client. There are countless more.

Respectful advocates maintain appropriate boundaries and acknowledge that, no matter how much we might care, we are not our

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myself as their voice.”).

<sup>244</sup> See Telephone Interview with Shawn Moore, *supra* note 110 (“I always had a ‘there but for the grace of God go I’ feeling.”).

<sup>245</sup> Telephone Interview with Gregg Spencer, *supra* note 136.

<sup>246</sup> Telephone Interview with David Stern, *supra* note 108.

<sup>247</sup> See MCINTYRE, *supra* note 3, at 168 (noting that most defenders like their clients); Telephone Interview with Stuart Glovin, *supra* note 44 (“By and large, we do like the clients we represent.”).

<sup>248</sup> See MCINTYRE, *supra* note 3, at 144 (quoting defender expressing that sometimes “you have to care more about your clients’ rights than you can usually care about your clients”).

<sup>249</sup> *But see* Telephone Interview with Shawn Moore, *supra* note 110 (“Some clients have done some real shit, but that didn’t necessarily mean I disliked them more. Sometimes I liked them more than the ones who didn’t do something that bad.”).

clients. One of my favorite vignettes from James Kunen's memoir, *How Can You Defend Those People?*, shows a young lawyer beginning to respect his client's different experience and also beginning to understand his own professional role:

As we crossed Lafayette Street, [my client] asked, out of nowhere, "how do you know how I feel?"

"I don't. All I know is what you tell me."

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?" I thought of saying I didn't have that much money. "It feels lucky," I said.<sup>250</sup>

Lawyers are privileged.<sup>251</sup> The criminally accused are generally among the least privileged members of society. Even those defenders who came from the same sort of neighborhood as many of their clients can no longer claim to be part of their client's community once they are lawyers; they have altered their socio-economic status. Respecting clients notwithstanding their life circumstances is part of being a professional. Acknowledging that we may not be able to do much about our clients' life circumstances is helpful to maintaining appropriate professional and emotional distance.

Although we are not our clients, it is our job to convey to a judge or jury what it is like to be our clients. We don't have to feel everything the client feels. But we have to respect that this is how the client feels. And we should do our best to understand how the client feels because we might have to communicate it to others.

If we advocate for our clients as an act of respect — for the client as a *person* — the duty is clear and the lines clearer. Though it's hard to say what the bounds of friendship are, the bounds of zeal are set by law.<sup>252</sup>

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<sup>250</sup> KUNEN, *supra* note 1, at 9.

<sup>251</sup> See generally Aiken, *supra* note 101.

<sup>252</sup> See MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969) ("A lawyer shall represent his client zealously within the bounds of law."); MODEL RULES OF PROF'L CONDUCT R 1.3 cmt. (2002) ("A lawyer must also act with commitment and dedication to

Of course, some zealous lawyers have been known to cross the line.<sup>253</sup> But, at least there is a line.

We can be caring, devoted, and *friendly* professionals without being everyone's best friend. There has been a growing disparagement of professionalism in recent years — often in the name of "client-centeredness."<sup>254</sup> This view suggests that professionals, by virtue of the position they have attained, are paternalistic, elitist, uncaring. This is unfortunate, because being a professional is principally about *service*.<sup>255</sup> As Monroe Freedman notes, although lawyers have power, it is the "power to help."<sup>256</sup>

Although lawyering is human and sometimes messy — the lawyer-client relationship is a relationship, after all<sup>257</sup> — professional boundaries are far less confusing, less malleable, than the bounds of friendship.<sup>258</sup> Unlike friends, legal professionals are guided and girded by a code of behavior and ethics that separates us from clients. Though the lines are

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the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued."). *But see* Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 90 n.28 (2003) (noting that my approach to phrase "within the bounds of law" is primarily pragmatic — I would not want to engage in conduct that would jeopardize my legal career — but I will test and challenge bounds of law).

<sup>253</sup> See Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart*, 44 S. TEX. L. REV. 31, 36 (2002).

<sup>254</sup> See generally BINDER ET AL., *supra* note 156. I have often felt that "lawyer self-loathing" is at the root of the lawyering model put forward in the oft-cited *Lawyers as Counselors*, and especially its predecessor, *Legal Interviewing and Counseling: A Client-Centered Approach*. See BINDER & PRICE, *supra* note 112. Any expression of expertise or knowledge by the lawyer is seen as an assertion of dominance. Deference by the client to the lawyer's advice is seen as a sign of subordination.

<sup>255</sup> See also PLATO, *THE REPUBLIC* bk. I, §§ 341-346, at 16-22 (A.D. Lindsay trans., 1992) (noting that professionals serve others principally for others' good). See generally COLES, *THE CALL OF SERVICE* (1993) (exploring methods of "service" activities offered to others and ourselves).

<sup>256</sup> Freedman, *supra* note 21; cf. Thomas Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987) (noting that legal ethics often studies what is good for client over whom lawyer has power).

<sup>257</sup> See Telephone Interview with Stephanie Harrison, *supra* note 135 ("[We] want some sort of human connection, not too much but some. We don't want to restrict ourselves more as a lawyer than we might as a human being.").

<sup>258</sup> See Ellmann, *Ethic of Care*, *supra* note 138, at 2686 ("Lawyers and clients are thrown together by the client need that generates the relationship. From this more or less intimate encounter can come strong feelings, particularly from the client for his lawyer, on whom the client may be dependent for emotional sustenance and legal aid.").

not always crystal clear,<sup>259</sup> they are helpful.

If a lawyer is motivated by respect, he or she does not have to feel responsible for all the client's life choices.<sup>260</sup> There is no need to be on call at all hours, no need to provide every sort of emergency service, no need to feel devastated by each loss or setback.<sup>261</sup> There is a difference between appropriate distance — the sort of distance that provides perspective — and detachment.<sup>262</sup> Detachment kills passion. It kills compassion. It threatens one's ability to connect at all with anyone — client, client's family, judge, jury. Maintaining appropriate distance leads to more effective lawyering,<sup>263</sup> and is also important for longevity.<sup>264</sup>

It is not an easy thing to believe in a client, to care about a client's plight, to fight hard for that client — and eventually walk away. But defenders have to learn how to do this. They have to figure out how to give all they have in the moment, but be able to let go when it's over. They have to recognize that life isn't fair, the criminal justice system isn't fair, and some people never get a fair shake — but there is only so much

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<sup>259</sup> See generally Smith, *supra* note 253 (discussing case of New York lawyer Lynne Stewart, who is being prosecuted for allegedly aiding a terrorist organization).

<sup>260</sup> See Telephone Interview with Phyllis Subin, Chief Public Defender, State of New Mexico (Aug. 21, 2002) (“[Thinking] that what we do in the courtroom will ultimately change life patterns that have existed forever is an unrealistic expectation.”).

<sup>261</sup> In addition, there would be no more going to clients' homes unannounced when they fail to come to the office or in order to escort them to court. This is simply disrespectful, whether or not such conduct is motivated by empathy.

<sup>262</sup> See Telephone Interview with Phyllis Subin, *supra* note 260 (“You need to have a certain distance and a certain perspective. You have to manage your expectations about why clients fail.”).

<sup>263</sup> See Ellmann, *Lawyers and Clients*, *supra* note 156, at 777-78 (noting that lawyers who treat clients with more distance are better able to counsel them); see also Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (discussing benefits of nonjudgmental partisanship on behalf of client).

<sup>264</sup> See JACK & JACK, *supra* note 165, at 105. According to Jack and Jack:

Professional commitment is juxtaposed with a thick skin, a barrier that limits the nature of attachment and separates emotion from action. The commitment of attorney to client is not the devotion of marriage or friendship, but an objective dedication which maintains separation. Both commitment and barrier may be essential to career success and psychological peace for someone whose job it is to act as the mouthpiece of another.

*See id.*; see also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) (discussing “role differentiation” in lawyering); cf. Telephone Interview with Gregg Spencer, *supra* note 136 (“Sometimes it happens — you get attached to a person and your whole career this person calls you and seeks your advice — but you can't do it for every client over twenty-two years. It'll just kill you. At some point you're going to pick up the paper and see that they were killed the night before.”).

we can do about it. Defenders must be able to connect *and* separate.

Respect is more sustaining than empathy or friendship and is a better fit for defenders and poverty lawyers generally.<sup>265</sup> These lawyer-client relationships are intense, short-term, and goal-oriented — not lighthearted, long-term, or diffuse. They demand enough of the lawyer without requiring friendship. In order to sustain the work you have to pace yourself. Giving your heart away every time will be the end of you. We honor our clients and ourselves, and we endure, when we act out of respect. As career defender Robin Steinberg notes:

[T]here is value in standing up and representing another human being because that person is entitled to that kind of . . . dignity and respect and advocacy no matter what they did . . . . [T]his sustains you. You can never be disappointed. It's not result oriented . . . . This kind of representation is ennobling in and of itself.<sup>266</sup>

### B. *Professional Craft*

Defending is a craft.<sup>267</sup> It is a professional craft that requires, among other things, knowledge, skill, experience, creativity, tenacity, and passion.<sup>268</sup> It is a craft that requires careful attention to detail, sound judgment, and an ability to communicate.<sup>269</sup> There is craft in every aspect of defense work: interviewing and counseling, investigation, pretrial litigation, plea negotiation, trial, sentencing, and appellate advocacy.

At its best — and most of us would like to defend at this level, especially at trial — defending may go beyond craft and become art.<sup>270</sup> Defenders — and others who pay attention — know what artful trial

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<sup>265</sup> See Telephone Interview with Shawn Moore, *supra* note 110 (“What sustains me . . . is . . . having this person who basically has nothing . . . and showing them that there’s someone who does respect them and cares about what happens to them. Showing them that there’s someone who cares about the loss of liberty they’re facing.”).

<sup>266</sup> Telephone Interview with Robin Steinberg, *supra* note 163.

<sup>267</sup> See generally Curtis, *supra* note 21.

<sup>268</sup> See Telephone Interview with Bob Boruchowitz, *supra* note 43 (“We do need to see ourselves more as the trained professional advocate who has a craft.”).

<sup>269</sup> See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* 63-312 (Criminal Supp. 1978) (providing materials on interviewing, investigation, negotiation, witness examination, argument, and counseling). See generally AMSTERDAM, *supra* note 105 (providing guidelines for conducting criminal defense).

<sup>270</sup> See Telephone Interview with Stuart Glovin, *supra* note 44 (“I think we get to the point where defending — even at a high volume — becomes an art form. You get so good at it.”); Telephone Interview with Stephanie Harrison, *supra* note 135 (“[Defending] is a craft or an art.”).

advocacy is. This is the sort of advocacy that leaves a courtroom spellbound: even the dyspeptic court clerk lifts her head from her papers to watch, and afterwards, the usually impassive sheriff claps the defender on the back and says *well done, counselor*. These are the closing arguments that draw a crowd.

The defender's craft — indeed, the defender's reason for being — is individual client representation. Defenders represent individuals in trouble. There are few grand cases, class action lawsuits, or "impact litigation."<sup>271</sup> The hoped for impact is on individuals.<sup>272</sup> Defenders try to make a difference for individuals in need.<sup>273</sup>

Pride in professional craft — taking pride in a job well done — may be more important to defenders than other lawyers because we so often lose. As career defender John Packel notes,

A lot of this [work] is really frustrating. We have a lot of cases, including some that we should win, and yet we know we don't have

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<sup>271</sup> Directors of defender agencies may see their role somewhat differently. See Telephone Interview with Bob Boruchowitz, *supra* note 43 (recapping director saying that he regards himself as having "systemic role" which has led him to help create national defender standards, to address issues of racial disparity, and to take on certain high profile national appellate cases); Telephone Interview with Phyllis Subin, *supra* note 260 (recapping director noting that she has gotten involved in policy and policy development, especially in area of alternatives to incarceration and causes of crime and violence). Some staff attorneys also regard their jobs as broader than individual client representation. Juvenile defender Simi Baer has undertaken broader community based projects in the course of representing individuals accused of crime and delinquency. See Telephone Interview with Simi Baer, *supra* note 192 ("I see my job as very broad . . . . I try to think of new projects that will address systemic problems.").

<sup>272</sup> Bellows, *supra* note 3, at 98. Bellows writes:

Before I came to the Public Defender Service, I worked in a public interest law firm. I worked on huge, ambitious projects, projects that affected whole states, projects that affected the country. It was good work . . . . But I rarely had that sense of individual impact; I rarely had that sense that there was some one person out there who was desperately depending upon me. For whom I really, really counted.

*Id.*

<sup>273</sup> See *id.* ("[T]hat is why I came to PDS. To count. To make a difference in individual lives."). Defenders typically express the desire to help others or to "make a difference" as a central motivation for doing the work. See Telephone Interview with Penny Kahn, *supra* note 41 ("My philosophy is 'if I can help someone.' I'm not so egotistical that I think I can change people's lives around. If I can help one or two change their life . . . that's enough for me."); Telephone Interview with Penny Marshall, *supra* note 163 ("Helping people sustains me."); Telephone Interview with David Stern, *supra* note 108 ("For me, it's the idea that I'm doing some concrete useful thing. Would I rather have argued *Furman v. GA*? No. I'd rather try to make a difference in someone's life."); Telephone Interview with Phyllis Subin, *supra* note 260 ("My main motivation is to make things better for people.").

a great chance of winning with the political atmosphere being what it is . . . . We function here largely on pride because you can't depend on the results or you would just die.<sup>274</sup>

It is not easy to take comfort in a well-tryed case that you *lose*, but it is something defenders must do in order to survive in the work.<sup>275</sup> As career defender Penny Kahn notes, the measure of a performance must be the performance, not the outcome: "I can win a case despite a lackluster closing argument, but that bad closing keeps me up at night . . . . When I try the hell out of a case and honestly could not have done a better job and *lose*, I feel bad for the client but I don't have the *regret*."<sup>276</sup> As career defender Stu Glovin says, "We get a tremendous amount of satisfaction in trying to right what we see to be a wrong. This is what gives us energy . . . . We take pride in looking at a case and, no matter how bad things look, rising to the challenge."<sup>277</sup>

Often, the challenge of defending is making something out of nothing. The government's case can initially appear incontrovertible, unshakeable, ironclad. The ability to be creative — to come up with something when all is lost — is a great feeling, and a sustaining one. As career defender Shawn Moore says, "The idea of coming up with something against all odds, being creative, using what we've been taught, our own personality . . . to try to develop some way to defend this person when it looks like the case is indefensible — that motivates me."<sup>278</sup> Career defender Carol Kohler agrees: "Even in a losing case, [y]ou can be motivated by . . . [p]utting on a good show and feeling like you've done well . . . ."<sup>279</sup>

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<sup>274</sup> Wapner, *supra* note 16, at 56 (quoting John Packer, defender with thirty-seven years experience); see also Telephone Interview with Gregg Spencer, *supra* note 136 ("Professional craft is sustaining for me . . . . Winning is great. But because of our situation you can't depend upon winning to keep you going.").

<sup>275</sup> See Telephone Interview with Penny Kahn, *supra* note 41 ("Craft is sustaining."); Telephone Interview with Carol Koller, *supra* note 25 ("You have to have a pretty strong ego to know you've done a good job when you lose. But this is sustaining.").

<sup>276</sup> Telephone Interview with Penny Kahn, *supra* note 41.

<sup>277</sup> Telephone Interview with Stuart Glovin, *supra* note 44.

<sup>278</sup> Telephone Interview with Shawn Moore, *supra* note 110; see also Telephone Interview with Stuart Glovin, *supra* note 44 ("The odds are always against you. Overcoming the odds is what moves us.").

<sup>279</sup> Telephone Interview with Carol Koller, *supra* note 25.

There is nothing quite like winning at trial.<sup>280</sup> There are no two better words in the English language than “Not Guilty.”<sup>281</sup> What defender — frankly, what person — doesn’t prefer winning to losing? Still, much of defending has nothing to do with winning trials or even going to trial.<sup>282</sup> Most cases are resolved short of a trial, usually by a guilty plea.<sup>283</sup>

Because relatively few cases go to trial and those that do don’t necessarily end well, defenders have to take satisfaction in small successes, in different kinds of successes. To experienced defenders, making the best of a bad situation is a win. As career defender Gregg Spencer explains, this approach to winning is “more [about] professionalism than heroism . . . . It’s winning the small battles. If you can make a bad situation better in the end then it’s a win — even if the person doesn’t walk out of the courtroom with you. Sometimes a good plea bargain is a victory.”<sup>284</sup>

Career defender Carol Kohler agrees that defenders have to redefine winning and find a way to feel good about “small successes”:

You have to be able to find your satisfaction in small successes . . . . My sense of success comes from getting someone into treatment against all odds. Or a one-month sentence when they relapse and use heroin again when the probation officer is asking for eleven months. The sense of achievement is small, but it comes from getting something from a system that doesn’t work . . . . [s]ome small step for a client . . . .<sup>285</sup>

By professional craft, I do not mean craft for the sake of craft, craft without passion or heart. As career defender David Stern has found, “Craft without heart doesn’t work.”<sup>286</sup> Not only does craft without heart

<sup>280</sup> See Telephone Interview with Penny Kahn, *supra* note 41 (noting that “there’s no greater high” than “try[ing] the hell out of a case and win[ning]”).

<sup>281</sup> SMITH, *Rosie O’Neill Goes to Law School*, *supra* note 160, at 37.

<sup>282</sup> See Telephone Interview with Carol Koller, *supra* note 25 (“You don’t . . . win . . . cases in the federal courts. You win a trial once every three years. The feds don’t take them if they can’t win them; whenever you think you have a winner they dismiss the day before.”).

<sup>283</sup> See Matthew R. Durose et al., *Felony Sentences in State Courts, 1998*, BUREAU OF JUSTICE, BUREAU OF JUST. STAT. BULL., Oct. 2001, at 8-9 (reporting that 95% of convictions in federal courts are result of guilty or nolo contendere pleas, and 94% of state felony convictions are guilty pleas); see also Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30 (2002).

<sup>284</sup> Telephone Interview with Gregg Spencer, *supra* note 136.

<sup>285</sup> Telephone Interview with Carol Koller, *supra* note 25.

<sup>286</sup> Telephone Interview with David Stern, *supra* note 108.

fail the client, it is also not satisfying for the defender.<sup>287</sup> Passion — for the client's plight, the client's cause, the client's freedom — often drives craft.<sup>288</sup>

A central part of the craft of defending is pushing the criminal justice system to *step up*. Defenders are the "institutional opposition."<sup>289</sup> We are the lone voice in the courtroom urging that the right thing be done — not necessarily the easy thing, but the right thing — as a matter of law and as a matter of humanity.<sup>290</sup> At the very least, we make sure an injustice does not go unnoticed. As Marc Bookman notes:

The feeling of being heard is incredibly important . . . . [W]hen you're in a courtroom and there's a lot of injustice one of the important things is saying your piece, saying *this is not right*, what is happening here is just *wrong*. To some extent it's writing in the sand, but . . . there was an injustice and someone was there to say something about it . . . . [I]t's on the record. It's not secret.<sup>291</sup>

It may be that taking pride or comfort in craft is harder for new or young defenders. They might not feel they have a craft yet.<sup>292</sup> Still, they are developing their craft; they are learning how best to make a difference. New, unseasoned defenders should feel good about this, and take pride in the effort, because the skills they are acquiring will serve

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<sup>287</sup> See Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101, 102 (1995) (noting that "technical proficiency without passion is not wholly satisfying").

<sup>288</sup> See Telephone Interview with Simi Baer, *supra* note 192 ("It's about passion, not about knowledge. If you keep integrating into your practice what you're passionate about, you'll last."); Telephone Interview with Phyllis Subin, *supra* note 260 ("Defending is my passion.").

<sup>289</sup> Telephone Interview with Stuart Schuman, *supra* note 9.

<sup>290</sup> See *id.* ("[The] craft of being a [defender is] always speak[ing] to higher values. Maybe the next time — *maybe* they'll be more enlightened.").

<sup>291</sup> Telephone Interview with Marc Bookman, *supra* note 58.

<sup>292</sup> See e-mail from Sarah Marchesi, Staff Attorney, Bronx Defender, to Abbe Smith, Professor, Georgetown University Law Center (Aug. 19, 2002) (on file with author). Marchesi writes:

[M]ore experienced and successful attorneys can afford to embrace the respect/craft approach as their own because they have demonstrated that their "dedication to craft" is worth something . . . . Their [experience and] talent . . . allows them to comfortably emphasize craft over heroism . . . . [A]t the end of a tough case . . . [they have] an easier time dismissing the loss with an honest evaluation of how the case was tried and a conclusion that "almost nothing" could have been done to change the outcome . . . . As a newer lawyer . . . I probably do believe in . . . craft over heroism . . . but . . . I feel like my "craft" isn't there yet.

*Id.*

them and their clients in the long run.

I work with novice defenders — students in Georgetown's Criminal Justice Clinic and recent law graduates in the E. Barrett Prettyman Fellowship Program. I do what I can to teach them the craft of defending — the skills associated with indigent criminal defense, the ethics and ethos of defending, the singular challenges of the work in the current social and political climate — so that they will have a foundation from which to do the work in the future. Often, fledgling defenders regard trial advocacy as the one and only craft; the only thing worth learning is trial skills. This is, of course, wrongheaded. I have come to believe that the craft of defending can be summarized as *the ability to work with sometimes difficult people and get them to make better decisions than they would otherwise make*. Clients, prosecutors, court staff, and judges can all be difficult — and sometimes downright hostile. A day in the life of a defender can feel like an exercise in patience.

Counseling an untrusting, recalcitrant client is the defender's craft. Getting an unfriendly prosecutor determined to give your client a felony record to consider a misdemeanor is the defender's craft. Getting a curmudgeonly judge bent on sending your client to prison to consider alternatives to incarceration is the defender's craft. Getting the system to see your client as a person and not a criminal is the defender's craft.

Handling volume is also a craft. This may be the single most difficult aspect of defender work. Former Watergate prosecutor Sam Dash, who has evaluated public defender offices across the country, says that some defenders in high-volume jurisdictions feel that they are little more than their clients' "pall bearers."<sup>293</sup> Indeed, there are jurisdictions in which defenders do little more than meet their clients and arrange guilty pleas for them.<sup>294</sup> In some places, they barely meet.<sup>295</sup>

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<sup>293</sup> Comment by Professor Sam Dash, Georgetown University Law Center, Faculty Research Workshop (November 19, 2003).

<sup>294</sup> See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 61 (Oxford 2000) (noting that defender caseloads can range as high as 3,500 misdemeanors and 900 felonies each year and "some attorneys haven't taken a case to trial in years"); see also Alan Berlow, *Requiem for a Public Defender*, AM. PROSPECT, June 5, 2000, at 28; Chester Mursky, *Quality Legal Aid: Going, Going, Gone*, NAT'L L.J., Dec. 4, 1995, at A19.

<sup>295</sup> See Adam Liptak, *County Says It's Too Poor to Defend the Poor*, N.Y. TIMES, Apr. 15, 2003, at A1 (reporting about quality of indigent criminal defense in Quitman County in Mississippi Delta). Liptak describes a typical case:

Diana Brown met her court-appointed lawyer for the first time on the day she pleaded guilty to several serious crimes five years ago. They spent five minutes together and have not spoken since.

In extreme situations, broader institutional and political action is needed.<sup>296</sup> However, defenders and other poverty lawyers will always have to deal with volume; this is an economic and political reality.<sup>297</sup> The ability to advocate for an individual notwithstanding a crushing caseload is a craft.<sup>298</sup> The ability to size up a case and make choices about

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“You are guilty, lady,” the lawyer, Thomas Pearson, told Ms. Brown, according to her sworn statement, as he met with her and nine other defendant as a group, rattling off the charges against them.

He told her she was facing 60 years in prison for assault, drunken driving and leaving the scene of an accident, and should accept a deal for 10 years . . . . He gave her five minutes to decide. Offered no other defense, she took the deal.

*Id.*

<sup>296</sup> An example of an effective political response happened in 1992 in Kentucky. The Jefferson County Public Defender was confronted with a five percent budget cut, which meant the loss of \$65,000 out of a \$1.2 million budget. The office was already stretched to the limit with thirty-one lawyers handling 54,000 cases a year. Dan Goyette, the Chief Defender of the Jefferson County Public Defender, announced a commensurate cutback in services. As a first step, the Jefferson County Public Defender stopped supplying attorneys to represent indigent people facing involuntary mental hospitalization. The result was the release of four involuntarily committed former clients and an order by the Chief Jefferson District Judge that the official in charge of the state budget either restore the public defenders’ funds or be held in contempt. See Cary B. Willis, *Public Defender’s Budget Cut; Mental Patients Lose Their Attorneys*, COURIER-J., Mar. 4, 1992, at 1 [hereinafter Willis, *Public Defender’s Budget Cut*]; Cary B. Willis, *Judge’s Bid to Aid Public Defender May Face Legal Test*, COURIER-J., Mar. 6, 1992, at 1. Other offices have followed suit. See, e.g., James H. Andrews, *Poor Defendants and Foggy Mirrors*, CHRISTIAN SCI. MONITOR, Mar. 29, 1993, at 13 (reporting that New Orleans public defender who had been jailed for refusing to let trial proceed after judge denied his request to retain expert witness, filed and won motion to have his representation of defendant declared ineffective as matter of law); Dennis Cassano, *Public Defender Sues State Over Funding*, MINNEAPOLIS STAR TRIBUNE, Apr. 3, 1992, at 5B (reporting that Hennepin County, Minnesota public defender filed lawsuit against state contending that rights of indigent criminal defendants were being violated by inadequate funding); Lynne Tuohy, *CCLS Files Suit Against State*, HARTFORD COURANT, Jan. 6, 1995, at A1 (reporting that Connecticut Civil Liberties Union filed lawsuit claiming that state’s public defender system is so “swamped with cases that it can no longer satisfy its clients’ constitutional rights to an adequate legal defense”).

<sup>297</sup> See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163-64 (1999) (federal judge and prominent legal scholar Richard Posner arguing that “bare-bones system” for indigent criminal defense is “optimal” because if we fully funded defender offices “either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases”); cf. *State ex rel. Metropolitan Public Defender Services, Inc. v. Courtney*, No., 64 P.3d 1138 (Or. 2003) (holding that Oregon Legislature’s decision to slash budget for public defender’s office, which will force office to forgo representing indigent clients in large categories of cases, does not violate Oregon Constitution).

<sup>298</sup> See Telephone Interview with Stuart Glovin, *supra* note 44 (“Sometimes you feel crushed by the case load . . . but it has never deterred me. That’s what I’m here for.”).

resource allocation is a craft.<sup>299</sup> The ability to pick yourself up after one trial and go immediately to the next (which defenders call “back-to-back trials”) is a craft. In many ways, these skills — this craft — are unique to defenders and other poverty lawyers.<sup>300</sup>

Thorough knowledge and creative use of the law of evidence is also part of the defender’s craft.<sup>301</sup> Defenders who are skilled in the law of evidence — those who know the rules and law cold — know how to do what defenders must do: keep the bad stuff out and get the good stuff in. Effective criminal defenders develop an expertise in evidence that, at the very least, makes judges (and prosecutors) think twice.

Indigent criminal defense is a challenging, demanding, absorbing craft. If there is honor — or heroism — in the work, it is in doing it well.<sup>302</sup> It is heroic to serve clients with passion and wisdom day in and

<sup>299</sup> See *id.* According to Glovin:

[Dealing with] volume requires an ability that is almost instinctive. You look at a given situation and you know how to respond to it. It’s a matter of survival. It’s amazing how people develop that talent. You can give good defenders a pile of cases and they can juggle it all, make sense of it, devise a method of attack, and keep it all straight in their heads.

*Id.*

<sup>300</sup> *Id.* Glovin states:

There is craft — and art — to handling volume. I don’t know why people would see it as anything less than a skill. I like to see law firm lawyers — people who are well regarded within the legal community by traditional standards — walk into court having just picked up three cases. *Only* three cases. I’ve seen this and they fail miserably. This is something new defenders regard as elementary. But, law firm lawyers can’t figure out how the rules of evidence apply, how to cross-examine, how to take an answer they didn’t expect and follow up on it. It’s a special skill.

*Id.*

<sup>301</sup> See generally AMSTERDAM, *supra* note 105, at 69-125.

<sup>302</sup> For a discussion of criminal defense heroes, see Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 497-509 (1999). Career defender Marc Bookman hopes that, because of his life’s work, he will at the very least end up with an “honorable skull.” Telephone Interview with Marc Bookman, *supra* note 58. He points to a scene in the Woody Allen film *Manhattan*, in which the character played by Allen has just learned that his friend is leaving his wife for the woman Allen is dating. Allen and his friend have met in a classroom, in which there is a hanging skeleton. Allen takes a look at the skeleton and muses:

What are future generations going to say about us? . . . You know, some day we’re going to be like him (pointing to the skeleton) . . . . It’s very important to have some kind of personal integrity. You know, I’ll be hanging in a classroom one day, and I want to make sure that when I thin out I’m well thought of.

MANHATTAN (Jack Rollins & Charles H. Joffe Productions 1979). Bookman quips, “I

day out, a lone and sometimes lonely voice. The defenders who do it best take their craft and their clients seriously.

### C. A Sense of Outrage

Respect and craft are important motivators for defenders. But, without more, these motivators be said to apply to all lawyers and probably all professionals. Plus, without more, defenders would buckle under the pressures of the job, the prevailing atmosphere of disrespect and contempt for the accused, the relentless cycle of poverty, inequality, and crime.<sup>303</sup> Soon, craft would feel like faint — or false — comfort, and respect would feel like nothing more than good manners.

The *more* — the motivator that supplies the combustion for defenders — is outrage. By outrage, I do not mean the feeling of indignation that leads some defenders to throw up their hands in despair at the difficulties of defending. These defenders don't last. I mean a sense of moral outrage,<sup>304</sup> the sort of outrage that accompanies *conviction*.<sup>305</sup> I mean outrage as a kind of principled resistance.<sup>306</sup>

My friend Ilene Seidman, a career poverty lawyer and clinical law teacher, regularly says to students, "If you're not outraged you're not paying attention."<sup>307</sup> This captures what I mean here. You cannot represent the poor without finding occasion for outrage. The outrages just keep coming. They prevail. They reign. And if you pay attention to the outrageous things that are routinely inflicted on the poor accused

believe most public defenders . . . will be well thought of when they 'thin out.'"; Telephone Interview with Marc Bookman, *supra* note 58.

<sup>303</sup> See also MARC MAUER, RACE TO INCARCERATE (1999) (documenting dramatic rise in incarceration in United States and critically examining politics of crime control); JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 12-50 (1998) (examining politics of crime control). See generally ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA (1998) (examining distortion of public debate about crime and punishment); ELLIOT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 148-212 (1993).

<sup>304</sup> See MCINTYRE, *supra* note 3, at 169 ("[Public defenders] believe that it is right to defend even the guilty because their clients *need* someone to defend them against police, prosecutorial, and judicial abuse. Because of what they see happening in the system every day. . .").

<sup>305</sup> See ALPHONSO PINKNEY, THE COMMITTED: WHITE ACTIVISTS IN THE CIVIL RIGHTS MOVEMENT 100 (1968) (noting "ethical and moral conviction" that motivated white civil rights activists in 1960s and one activist's description of his "outrage at the entire racist system of this nation").

<sup>306</sup> See MCINTYRE, *supra* note 3, at 169 (referring to public defender's "rebellion").

<sup>307</sup> Seidman, a clinical professor of law at Suffolk University, claims she is not the original source for this.

you will be driven to act. You will be inspired.<sup>308</sup>

With outrage as a motivation, the struggle may be more important than victory. Indeed, sometimes the struggle is everything.<sup>309</sup> As career defender Simi Baer says: “[O]utrage [is] it for me. The good fight. If I didn’t do it every day I’d be saying to the state I was acquiescing . . . saying that how you treat people is okay. I can’t live that way.”<sup>310</sup> This is important for sustaining a career: the good fight, not the win, is what counts.

You cannot be a defender without having a sense of outrage, a sense of injustice.<sup>311</sup> It is a natural response to the injustice of “a system that refuses to see the humanity of who our clients are . . . .”<sup>312</sup> It is a response to the day to day abuse of power by prosecutors and judges, and to the utter randomness of justice.<sup>313</sup>

<sup>308</sup> Political cartoonist Gary Trudeau, who has pilloried the powerful for more than thirty years, explains his inspiration as a continuing “sense of indignation.” *Up Close* (ABC television broadcast, Dec. 4, 2002) (Ted Koppel interviewing Gary Trudeau). This is a variation on the same theme and, as an erstwhile cartoonist myself, I was happy to note the common inspiration. See ABBE SMITH, *CARRIED AWAY: THE CHRONICLES OF A FEMINIST CARTOONIST* (Sanguinaria Publishing 1984).

<sup>309</sup> This is in keeping with the slogan of the National Lawyer’s Guild, a progressive organization of lawyers, law students, and legal workers: “Justice is a constant struggle.”

<sup>310</sup> Telephone Interview with Simi Baer, *supra* note 192.

<sup>311</sup> See Telephone Interview with Stuart Glovin, *supra* note 44 (“I can’t imagine any other way to respond than outrage. I can’t help myself. Of course, nearly thirty years later I am still outraged. It would bother me more to walk away from the work.”); Telephone Interview with Penny Kahn, *supra* note 41 (“You can’t do this work without having a sense of injustice . . . .”); Telephone Interview with Phyllis Subin, *supra* note 260 (“A sense of outrage rings true for me — this speaks to me more than the other motivations. It speaks to my core, to why I became a lawyer in the first place . . . . It’s important . . . to be engaged . . . and not just walk away . . . .”).

<sup>312</sup> Telephone Interview with Phyllis Subin, *supra* note 260.

<sup>313</sup> See Telephone Interview with Penny Kahn, *supra* note 41 (“I’m outraged at the abuse of power by . . . prosecutors.”); Telephone Interview with Shawn Moore, *supra* note 110 (“[P]eople . . . don’t relate to our clients and many . . . really don’t care that much about our clients. I would include in that some judges and . . . prosecutors. Not all but some.”); Telephone Interview with Stuart Schuman, *supra* note 9 (“[My sense of outrage comes from] a DA who doesn’t know the limits of his or her power and from a judge who’s not being a judge. I definitely still have that.”). Robin Steinberg states:

I think my sense of outrage is characterological maybe. It has grown over the years the more I see. The political trends have gotten worse and worse. My patience with DAs and judges has gotten worse. Now I have the moral authority that comes from twenty years of experience. I can’t believe the abuse of power by those who have it . . . . My outrage and disgust are profound . . . and they are connected to action.

Telephone Interview with Robin Steinberg, *supra* note 163.

There is outrage at the ravages of poverty and inequality that defenders see up close.<sup>314</sup> There is outrage at prevailing social and racial injustice.<sup>315</sup> There is also outrage at the destructiveness of incarceration.<sup>316</sup> As career defender Carol Koller puts it, “A lot of us find our outrage in the fact of . . . imprisonment — for way too long — or [probation or] supervised release under conditions that most *judges* couldn’t meet.”<sup>317</sup>

I have been defending the poor for twenty-two years now. Yet, I still come back from court outraged. No matter how many times I have seen my clients mistreated by the system — no matter how many outrages I have seen my clients endure — I have not gotten used to it. I remain appalled and offended by injustice. It gets me every time.

One of the most outrageous things about indigent criminal defense is the lack of outrage in many clients. Too often the poor become accustomed to mistreatment. They become accustomed to being processed like parts on a conveyor belt, to not being seen at all.

<sup>314</sup> See Telephone Interview with Shawn Moore, *supra* note 110. Shawn Moore explains:

The people I wanted to represent were indigent people. These were the people who were never going to get a fair shake from the authorities and the justice system and I wanted to represent them . . . . [My] outrage is driven by the fact that this is an indigent person and due to the fact that he or she is poor and is [facing] such a substantial loss of liberty . . . by people who don’t relate to our clients and many of whom really don’t care that much about [them].

*Id.*; see also Telephone Interview with Penny Marshall, *supra* note 163 (“[My] sense of outrage [comes from the] differences in quality of representation for those who are rich. They are apt to have a result that is way different.”).

<sup>315</sup> See Telephone Interview with Gregg Spencer, *supra* note . . . As Spencer explains:

I still feel a sense of outrage 22 years out . . . . I was raised in Greensboro [North Carolina] where the civil rights movement and sit-ins started. For me, this is the burning flame of my sense of outrage. Not so much that I’m trying to change the system but I want to make sure everyone is treated fairly in the criminal justice system . . . . It’s an outrage that means you don’t want someone to be treated unfairly by the system.

*Id.*

<sup>316</sup> See Telephone Interview with Shawn Moore, *supra* note 110 (“Having seen what I saw about jails and prisons [at the Civil Rights Division of the Justice Department and the ACLU Prison Project], I decided I wanted to keep people *out* . . . rather than try to clean things up once they’re already there.”); Telephone Interview with Santha Sonenberg, *supra* note 128 (“We build prisons instead of hospitals and community care facilities.”); Telephone Interview with David Stern, *supra* note 108 (“I think nobody should spend all that time in prison . . . . I continue to do what I do because of my sense that, by representing those who the state wants to put in cages, I am fighting both to keep the state honest and to help a group with very few advocates.”).

<sup>317</sup> Telephone Interview with Carol Koller, *supra* note 25.

I can't say the number of clients who have comforted me upon being incarcerated. They tell me, "It's okay, I'll be all right." They are unbelievably gracious in the face of what I, in their shoes, would experience as disaster. In an all too familiar rite for some, they empty their pockets, taking out wallet, keys, and spare change in preparation for being taken back to the cellblock. They quietly turn to the marshal, who directs them from the land of the free to the land of the not.

For too many, there is an inevitability to their incarceration and they know it. The cards are stacked against them from the start; jail is always a possibility.<sup>318</sup> The data supports the feeling of jail as destiny. According to current figures, three out of ten African-American baby boys will grow up and spend some time in prison.<sup>319</sup> A black boy born in 1991 stands a twenty-nine percent chance of being imprisoned at some point in his life, compared to a sixteen percent chance for a Hispanic boy and a four percent chance for a white boy.<sup>320</sup> This is a frightening forecast, but it is in synch with the current reality. On any given day in this country, one in fourteen adult black males is locked up in a prison or jail.<sup>321</sup> One in three black males between the ages of twenty and twenty-nine is under some form of criminal justice supervision, either in prison or jail, or on probation or parole.<sup>322</sup> In some cities, including our nation's capital, *one in two* young African-American men are under the control of the criminal justice system.<sup>323</sup>

Defenders get to know the more than two million disproportionately poor and nonwhite people incarcerated in the United States one by one by one.<sup>324</sup> We hold each of these lives in our hands. We put ourselves

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<sup>318</sup> See generally DASH, *supra* note 199 (depicting life of Rosa Lee Cunningham, impoverished black woman who is in and out of criminal justice system in Washington, D.C.); KOZOL, *supra* note 172 (depicting lives of children in South Bronx, where drugs and crime are part of daily life).

<sup>319</sup> See MAUER, *supra* note 303, at 124-25; see also Fox Butterfield, *Prison Rates Among Blacks Reach a Peak, Report Finds*, N.Y. TIMES, Apr. 7, 2003, at A12 (reporting that Bureau of Justice Statistics have found that twenty-eight percent of black men will be sent to jail or prison in their lifetime).

<sup>320</sup> See MAUER, *supra* note 303, at 125.

<sup>321</sup> See Allen J. Beck, *Prison and Jail Inmates at Midyear 1999*, BUREAU OF JUST. STAT. BULL., Apr. 2000, at 124.

<sup>322</sup> See MAUER, *supra* note 303, at 124-25.

<sup>323</sup> See ERIC LOTKE, NATIONAL CTR. ON INSTS. & ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON, D.C.'S CRIMINAL JUSTICE SYSTEM FIVE YEARS LATER 1* (1997); JEROME G. MILLER, NATIONAL CTR. ON INSTS. & ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM OF AMERICA'S CITIES: BALTIMORE, MARYLAND 1* (1992).

<sup>324</sup> See Butterfield, *supra* note 319 (reporting that number of people in U.S. jails and prisons exceeded two million in 2002, and that twelve percent of African-American men in

between our clients — the guilty and the nonguilty, those whose conduct may merit time in prison and those whose conduct surely does not — and the prisons built with them in mind. We do what we can to avoid the gallows so that they might do things differently next time. At the very least we call the government on what it is doing. We do it because we cannot imagine not fighting this fight. The stakes are too high.

The outrage that sustains defenders is productive.<sup>325</sup> As career defender Gregg Spencer says, outrage is a “driving force.”<sup>326</sup> It keeps us going back for more.<sup>327</sup> Some career defenders note that clients keep their outrage going.<sup>328</sup> Outrage motivates us time and again to put ourselves between our clients and the threat of loss of liberty.<sup>329</sup> This sense of outrage is necessarily expressive and outward. Defenders give *voice* to the outrage; it is not something to simply forbear. As Faulkner has written:

Some things you must always be unable to bear. Some things you must never stop refusing to bear. Injustice and outrage and dishonor and shame. No matter how young you are or how old you have got. Not for kudos and not for cash: your picture in the paper

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their twenties and early thirties are in jail or prison, highest rate ever measured). According to the Justice Department, the total number of people incarcerated in 2002 was 2,019,234. *See id.*

<sup>325</sup> *See* Telephone Interview with Marc Bookman, *supra* note 58. Bookman states:

Maintaining outrage is easy . . . . You . . . have three choices. You can . . . not care about it or care so much it paralyzes you or get angry and do something about it. Whenever my client has gotten screwed I go back to my desk and write a motion. It’s a practical outlet for being pissed off. When someone fucks you in court you can either get incredibly pissed off or get to work to rectify it.

*Id.*; *see also* Telephone Interview with David Stern, *supra* note 108 (“One of my partners is constantly mad. He finds something to make him mad about every case. He hangs on to that to let himself be fired up. He finds something so wrong in every case.”).

<sup>326</sup> Telephone Interview with Gregg Spencer, *supra* note 136.

<sup>327</sup> *See* Telephone Interview with Shawn Moore, *supra* note 110 (“[I]t does make you want to go back and do it again.”).

<sup>328</sup> *See* Telephone Interview with Simi Baer, *supra* note 192 (“The clients keep my passion going . . . . I love going every morning thinking maybe we can make a difference today. At the very least I will be a thorn in the State’s side — and that will be very good.”); Telephone Interview with Penny Marshall, *supra* note 163 (“I maintain my sense of outrage because I get another client. They keep coming and their situations keep coming.”).

<sup>329</sup> Telephone Interview with Shawn Moore, *supra* note 110 (“I just [feel] that if the state is gonna do something as drastic as trying to take somebody’s liberty then . . . I want . . . to be the one to try to stand between them. It’s not quite as idealistic as it sounds. It’s more like ‘You’re just gonna have to run over both of us.’”).

nor money in the bank either. Just refuse to bear them.<sup>330</sup>

### CONCLUSION

It goes without saying that in order to do this work well you have to care.<sup>331</sup> Of course, you have to care; I do not mean to suggest otherwise. Most of the time you can't help but care: you are defending someone in need and in fear, someone whose life has been marked by misfortune, someone who stands accused not because he was born "bad" but because bad things have happened to him. But you can care too much — feel too much, give too much — and have nothing left for the next time. This is what happened to Erin and Zeke.

There is also nothing better than using whatever skill or talent you possess to rescue a client from disaster, whether it is by winning a case at trial or avoiding disaster through a well-negotiated plea and carefully crafted sentencing. But you can want this too much — need it too much — because often all you can do is confront disaster head on.

There is undoubtedly a range of motivations that sustain individual defenders; it is impossible to offer a template that fits everyone. It may also be hard to distinguish the characteristics that mark a good defender from what motivates or sustains that defender over the long haul. As career defender Stu Glovin says: "I sometimes wonder if there is a defective gene for public defenders. We live in the land of broken toys. There's something broken about all of us. Defenders all understand each other but no one understands us."<sup>332</sup>

Still, it seems to me that you cannot be a defender for any period of time without thinking about and articulating the motivations that sustain you — especially through the hard times and hard cases. This is what Charles Ogletree did in his article, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*.<sup>333</sup> Likewise, I have attempted to offer the motivations that move and sustain me. Although neither of us is a full time public defender anymore,<sup>334</sup> both of us have remained in

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<sup>330</sup> WILLIAM FAULKNER, *INTRUDER IN THE DUST* 206 (Random House 1948).

<sup>331</sup> See Interview with David Stern, *supra* note 108 ("I care about my clients."); see also *AND JUSTICE FOR ALL* (Columbia Pictures 1979) (starring Al Pacino as embattled defender who works hard and genuinely cares about his clients). In one memorable scene in the film, Pacino confronts a less conscientious colleague and asks, "Don't you care? Don't you even care? They're people." *Id.*

<sup>332</sup> See Telephone Interview with Stuart Glovin, *supra* note 44.

<sup>333</sup> Ogletree, *supra* note 12.

<sup>334</sup> There is irony in this: who are we to say what motivates public defenders when neither of us have remained in the trenches? Although I acknowledge my cushy perch in

criminal defense, teaching and mentoring future defenders.

There is a synergy when respect, craft, and outrage come together; there is fuel. Respect and craft keep defenders anchored — and help defenders to pace themselves — while outrage supplies the combustion. These three motivations also provide balance: they reflect the lawyer's relation to the client (respect), to oneself (craft), and to the system (outrage). Defenders who approach the work out of respect for client, pride in craft, and a sense of outrage are better able to have a long and effective career.

There is nothing like defender work. There is nothing more absorbing, challenging, or meaningful. As one career defender exclaims: "I can't think of another specialty practice of law that at once engages your heart, your mind, and your soul. [I]t's a privilege to represent people . . . who have more resilience than any of us . . ." <sup>335</sup>

The bottom line for most defenders is clients. The clients motivate us. The clients inspire us. The clients make it all worthwhile. The thing is, they also need us to stick around.

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the academy, I still consider myself a defender. I did not leave the Defender Association of Philadelphia, where I was a Trial Attorney from 1982 to 1987, and Senior Trial Attorney from 1989 to 1990, because I was burned out. I accepted an opportunity to teach and mentor prospective defenders. As the students and fellows with whom I've worked over the years will attest, I am in court nearly everyday. And, notwithstanding my exalted status as a law professor, I am often treated with the same contempt as when I was a defender. There is distressing — and comforting — familiarity about this.

<sup>335</sup> See Telephone Interview with Santha Sonenberg, *supra* note 128.

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