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Article

***443 THE CALLING OF CRIMINAL DEFENSE**

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There is a call to us, a call of service--that we join with others to try to make things better in this world.
-Dorothy Day [\[FN1\]](#)

I have known men charged with crime in all walks of life . . . when you come to touch them and meet them and know them, you feel the kinship between them and you . . .

I have friends throughout the length and breadth of the land, and these are the poor and the weak and the helpless, to whose cause I have given voice.

-Clarence Darrow [\[FN2\]](#)

***444 I. Introduction: A Hostile Climate for Criminal Defense Lawyers and our Clients**

Criminal defense work is an increasingly difficult undertaking in these harsh times. Blame is a favorite pastime. Vengeance follows close behind. Compassion for those who commit wrongdoing out of misfortune seems either

nostalgic or naive. Instead, there is a universal call for individual accountability; wrongdoers ought to be held strictly responsible for their actions, no matter the circumstance. [\[FN3\]](#)

Along with blame and vengeance comes a lust for punishment. The public cannot seem to get enough of it. [\[FN4\]](#) The United States is building prisons at a record pace. If the current trend continues, the number of Americans behind bars will soon surpass the number of students enrolled full-time in four-year colleges and universities. [\[FN5\]](#) Incarceration remains a popular solution for a wide array of social problems. [\[FN6\]](#) As one criminologist has noted, “‘jail has become the social service agency of first resort.’ [\[FN7\]](#)

*445 If prisons were not enough, there is the ever-popular death penalty. [\[FN8\]](#) For some prosecutors, every homicide is a capital case. [\[FN9\]](#) The few prosecutors on the “other side”--those who have been long-standing opponents of the death penalty--seem to be changing their minds [\[FN10\]](#) or getting out of the prosecution business altogether. [\[FN11\]](#) Politicians and judges opposed to the death penalty are practically an endangered species; they pay a steep political price if they stick to their principles. [\[FN12\]](#)

It is not that those accused or convicted of crime have never before been reviled or reproved. Prior to the advent of penitentiaries in America in the nineteenth century, there were all sorts of cruel punishments inflicted upon convicted criminals, including whipping, *446 branding, mutilation, being put in the stocks, and execution. [\[FN13\]](#) Of course, these practices did not occur only in this country. [\[FN14\]](#)

Criminal lawyers cannot escape the scorn heaped upon our clients. Some see us as indistinguishable from those we represent. James Kunen's cleverly titled book “How Can You Defend Those People?” [\[FN15\]](#) captures the cocktail party experience of criminal defense lawyers everywhere. How many times must we face this question and be forced to respond with equanimity and charm? [\[FN16\]](#) The presumption is that there is something wrong with “those people” and something wrong with those of us who stand by their sides.

Unfortunately, it is not just our parents' friends at random social gatherings who think this way--it is our friends. It is the people with whom we have grown up, gone to college, and even gone to law school--a sad sign of the values being taught in the legal academy. [\[FN17\]](#) After they realize we are defenders and not district attorneys (the uninformed somehow find the two terms confusing), there is, at best, a kind of grudging respect for how tough the work is and for doing something “different.” [\[FN18\]](#) There is seldom admiration. [\[FN19\]](#) More and more, when they come to understand that we represent our clients proudly and zealously, [\[FN20\]](#) no matter the accusation, there is contempt.

*447 A. Recent Scholarly Criticism

This phenomenon is no different in academic circles. What is surprising is that, in academia, much of the recent

criticism of criminal defense lawyering is coming from progressive legal scholars, not conservatives. [\[FN21\]](#) Defense strategies and tactics that have traditionally been regarded as consistent with the ethic of “zealous advocacy” [\[FN22\]](#) are now being attacked as overly aggressive, immoral, or insensitive. [\[FN23\]](#)*448 Those of us who are defense lawyers find ourselves constantly having to explain or justify our role. [\[FN24\]](#)

Two especially disturbing critiques of criminal defense advocacy by progressive scholars, each of which has some appeal to the general public in the wake of the O.J. Simpson case, [\[FN25\]](#) are offered by William Simon and Anthony Alfieri. [\[FN26\]](#) In Simon's article, *The Ethics of Criminal Defense*, [\[FN27\]](#) he argues that defense lawyers routinely engage in overly aggressive and “ethically questionable” practices--such as delaying a case in order to frustrate government witnesses, presenting perjured testimony by defendants, [\[FN28\]](#) and embarrassing or blaming *449 alleged victims--for no compelling reason. [\[FN29\]](#) He rejects the argument that criminal defense is “different” from other kinds of law practice and therefore justifies a more aggressive level of advocacy. [\[FN30\]](#) He dismisses as empty rhetoric the suggestion that the state is an enormously powerful adversary that needs to be kept in check because he believes there is no “state,” only “harassed, overworked bureaucrats.” [\[FN31\]](#) With a snap of his fingers, Simon reduces the vast resources of the police and prosecution, with all its attendant agencies and offices, to the image of Larry Kramer, the endlessly burdened prosecutor in Tom Wolfe's *The Bonfire of the Vanities*. [\[FN32\]](#) Defense lawyers have the resources, public adulation, and pricey Italian suits of O.J. Simpson's “dream team.” [\[FN33\]](#) This, of course, is rarely the reality. [\[FN34\]](#)

Alfieri's critique is more complicated than Simon's. He has no objection to zealous advocacy on behalf of criminal defendants, [\[FN35\]](#) as long *450 as the advocacy does not perpetuate “dominant narratives” [\[FN36\]](#) about race, or “exploit racial difference.” [\[FN37\]](#) He acknowledges the high risk of “state violence” [\[FN38\]](#) in the criminal justice system but is less concerned with the power of the state to prosecute individuals than with the power of prosecuted individuals to injure the community. [\[FN39\]](#)

Alfieri looks at a novel defense theory [\[FN40\]](#)--diminished capacity under a “group contagion” [\[FN41\]](#) theory of mob violence--presented by lawyers on behalf of two African-American men prosecuted for crimes arising out of the violent aftermath of the Rodney King verdict in Los Angeles in 1992. He argues this criminal defense strategy perpetuates racism because it fosters the stereotype of black men as deviant and out-of-control. [\[FN42\]](#)*451 Alfieri wants criminal defense lawyers not only to defend the subordinated from the powerful, [\[FN43\]](#) something he acknowledges is a great burden, [\[FN44\]](#) but also to combat ignorance and advance racial harmony in the process. [\[FN45\]](#) When we fail this Herculean challenge, we are again singled out in the criminal justice system--hardly a model of enlightened “race-consciousness” [\[FN46\]](#)-- for blame. [\[FN47\]](#)

B. No More Apologizing

Must we as criminal defense lawyers defend ourselves as well as our clients as the accusations mount? The charges are tiresome and unceasing. Sometimes the critique of our professional role is a thinly veiled attack on our personal

integrity. What the critics really mean to say is that, on the whole, criminal defense lawyers are dishonorable or disreputable, immoral or amoral, manipulative or heartless--and now, according to Alfieri, racist or complicitous in the face of racism.

Criminal defense lawyers should stop apologizing for their work. There is no need to explain, justify, or defend it. The easy answer, as many scholars have pointed out, is that defense lawyers are an important part of the adversary system. [\[FN48\]](#) We think this answer, *452 notwithstanding its near universal acceptance, [\[FN49\]](#) damns defenders with faint praise. There is a more profound basis for criminal defense work than its systemic role, one that is older and runs deeper than the Anglo-American adversary system.

In this article, we will argue that criminal defense work is not merely necessary, but noble. Criminal defense work--especially indigent criminal defense, the work of public defenders--is consistent with the most fundamental Jewish and Christian teachings and traditions. We will argue that criminal defense lawyers, whether consciously or not, are drawn to the work because of deeply held values and convictions, and that criminal defense work is, indeed, a high moral calling. [\[FN50\]](#)

C. A Personal Disclosure

As our path to writing this article has been both scholarly and personal, we think it is important to disclose something about our individual backgrounds and perspectives. Both of us are die-hard criminal defense lawyers for the indigent. One is a former public defender now teaching law students and postgraduate fellows at Georgetown's criminal defense clinic; the other recently completed Georgetown's postgraduate fellowship in criminal practice and clinical teaching and is embarking on a career as a public defender.

*453 Neither of us is a religious scholar or even a religious person. Indeed, as adults, we have both been somewhat hostile toward organized religion and can readily point to the long list of atrocities perpetrated in the name of religion (and in the name of God). Admittedly, there is a paradox here. We have found inspiration in the faith traditions we too often consider hypocritical. Even though we have not embraced religion, we find ourselves powerfully influenced by it.

Abbe Smith, a "child of the sixties," [\[FN51\]](#) came to criminal defense work because of political and ideological convictions. [\[FN52\]](#) Although she grew up in a Reform Jewish family, she is best described as a secular Jew with a strong ethnic identity. Like many Jews of her generation, her sense of Jewishness comes more from the Jewish tradition of social justice activism--by childhood heroes like Emma Goldman, Louis Brandeis, Andrew Goodman, and Michael Schwerner--than religious study or observance.

Although he is a child of the seventies and eighties, William Montross has the soul of a sixties activist. A framed

and autographed picture of William Kunstler hangs on his office wall. He became a lawyer because of a commitment to social change. An alter-boy-turned-atheist, Montross was profoundly influenced by a Jesuit professor in college who taught that morality and ethics were not merely the substance of religion, but part of our shared humanity.

This article may seem a strange undertaking for a secular Jew and a lapsed Catholic. The reader might well wonder what has prompted us to seek support from texts and traditions from which we have previously recoiled--and to do so together. While there is, no doubt, a more complex answer that acknowledges our joint and individual evolution from persons of some faith to persons of little faith to persons somehow capable of writing about faith, what brings us together is a shared understanding about our life's work. In the course of writing this article, neither of us resolved our equivocal relations to our very different religious traditions, but we found much common ground (between each of us and our own religious teachings and traditions, and between the teachings and traditions of Judaism and Christianity).

In this article, we use religious text--the stories and passages in the Jewish bible, the Mishnah, the Talmud, and the Christian scripture--as part of a folk tradition. We do not purport to engage in strict scriptural interpretation. We are not equipped to do so. The stories and passages upon which we rely-- each of which is complicated and has produced a *454 substantial body of scholarly interpretation--speak to us as criminal defense lawyers. For many reasons, they provide motivation, inspiration, and solace.

In exploring the connection between Jewish and Christian values and criminal defense work, we demonstrate in Part II of this article that criminal defense is largely indigent criminal defense, and that criminal lawyers are poor people's lawyers. In Part III we examine the link between Jewish and Christian teachings and criminal defense. In Part IV we look at the influence of contemporary Jewish and Catholic activism on criminal defense advocacy. Finally, in Part V we propose an ethical framework for zealous criminal defense advocacy which is drawn largely from virtue ethics. Within this framework, we address the hard questions for criminal defense: the alleged excesses of zealous advocacy--unbounded zeal and the subversion of truth; the relationship between defense lawyer and alleged victim; the representation of the guilty and violent; and sustaining a career in indigent criminal defense.

II. Criminal Lawyers are Poor People's Lawyers

The people who go to jail are almost always poor people--people who have no other place to live When times are hard, then you find large numbers of people who go to jail who would not otherwise be in jail First and last, people are sent to jail because they are poor.

-Clarence Darrow [\[FN53\]](#)

Gideon was a fifty-one-year-old white man who had been in and out of prisons much of his life. He had served time

for four previous felonies, and he bore the physical marks of a destitute life: a wrinkled, prematurely aged face, a voice and hands that trembled, a frail body, white hair. He had never been a professional criminal or a man of violence; he just could not seem to settle down to work, and so he had made his way by gambling and occasional thefts. Those who had known him, even the men who had arrested him and those who were now his jailers, considered Gideon a perfectly harmless human being, rather likeable, but one tossed aside by life. Anyone meeting him for the first time would be likely to regard him as the most wretched of men.

-Anthony Lewis [\[FN54\]](#)

***455** For the Lord listens to the needy, and does not spurn His captives.

-Psalms 69:34 [\[FN55\]](#)

It is clear that the majority of those accused of crime are poor people. [\[FN56\]](#) The percentage of poor among those convicted of crime is even greater. [\[FN57\]](#) Consequently, most lawyers who represent criminal defendants are either public defenders or court-appointed counsel. [\[FN58\]](#) Moreover, the prevalence of public defenders and court-appointed counsel in criminal court appears to be on the rise. [\[FN59\]](#)

The clients of criminal defense lawyers are not only predominantly poor, but they are also disproportionately nonwhite. [\[FN60\]](#) This is not ***456** surprising in view of the composition of the urban poor in this country. [\[FN61\]](#) The United States currently has the highest child poverty rate among industrialized nations, [\[FN62\]](#) and most of the poor kids are either African-American or Latino. [\[FN63\]](#)

The war on drugs has certainly contributed to the massive influx of poor nonwhites into the criminal justice system. [\[FN64\]](#) In 1990 the incarceration rate for black males in the United States was five times higher than the incarceration rate for black males in South Africa. [\[FN65\]](#) One report has predicted that, if the war on drugs persists and we continue to incarcerate minorities at the current rate, by 2020 the African-American and Latino prison population will be five times greater than the current prison population for all races. [\[FN66\]](#)

Although people become public defenders for a wide variety of reasons, [\[FN67\]](#) there is no denying that public defenders are poverty lawyers. The clients of public defenders often have a host of poverty-related problems--of which the criminal charge may or may not be the most urgent. [\[FN68\]](#) Like other poverty lawyers, we never seem to have the resources we need. [\[FN69\]](#)

***457** Indigent criminal defense lawyers labor in the lowest courts of the land, [\[FN70\]](#) where the air is thick with

worry and fear, and the halls are lined with the aggrieved and the adamant. This is clearly a gathering place for poor people; it has the smell and feel of so many places to which they are shunted. [\[FN71\]](#) Everyone knows that a dank holding cell lurks just behind a respectable, wood-paneled courtroom.

We meet with our clients in these holding cells and in jails and prisons. We wander through the projects, the ghettos, and the crumbling neighborhoods where our clients live [\[FN72\]](#) to track down witnesses, view crime scenes, and talk with family members. In a time of increasing social neglect, we meet with overburdened social workers, case workers, mental health workers, and probation and parole officers--those who minister to the poor in the dreary, crowded waiting rooms, make-shift offices, and soup kitchens to which our clients seem forever resigned. [\[FN73\]](#)

Criminal defense lawyers minister to the poor and the outcast much as Jesus did. [\[FN74\]](#) Sometimes we are trial lawyers fighting for an acquittal or lesser sentence. More often, because most cases do not go to trial, [\[FN75\]](#) we are a kind of companion [\[FN76\]](#) to the poor accused. Many criminal *458 lawyers conduct their law practice in terms similar to the way poverty lawyers [\[FN77\]](#)-- and ministers [\[FN78\]](#)--conduct their practices. [\[FN79\]](#)

In sum, when we speak of criminal defense lawyers, we mostly mean indigent criminal defense lawyers, because crime and poverty so often go hand in hand. [\[FN80\]](#)

III. Criminal Defense as Rooted in Jewish and Christian Teachings

Speak up for those who cannot speak [for themselves], for the rights of all the unfortunate. Speak up and judge fairly; defend the rights of the poor and needy.

-Proverbs 31:8-9

For he saves the needy who cry out,

the lowly who have no helper.

He cares about the poor and the needy;

He brings the needy deliverance.

He redeems them from fraud and lawlessness;

the shedding of their blood weighs heavily upon him.

-Psalms 72:12-14

Let My people go.

-Exodus 8:16

A. Abraham, Moses, and Esther: Giving Voice to the Damned

The Bible depicts three figures who embody essential qualities of the criminal defense lawyer: Moses, Abraham, and Esther. Each was a champion of the oppressed and damned, and each gave voice to those who otherwise might not have been heard. The stories of these three are complex and have been the subject of considerable interpretation. They have also been recognized as sources of inspiration. [\[FN81\]](#)

*459 Abraham was a “zealous advocate” [\[FN82\]](#) who, like a criminal defense lawyer, often struggled alone to convince God about the righteousness of his cause. When God decided to destroy the people of Sodom and Gomorrah because “[t]he outrage of Sodom and Gomorrah is so great, and their sin so grave,” [\[FN83\]](#) Abraham stood alone and bravely challenged the “ultimate Judge.” [\[FN84\]](#) “Will You sweep away the innocent along with the guilty?” [\[FN85\]](#) Abraham beseeched. “Shall not the Judge of all the earth deal justly?” [\[FN86\]](#)

Abraham fought for strangers and his own people, the wrongdoer and the innocent, and the bad and the good. Employing a skillful argument, he convinced God to forgive the city for the sake of fifty, forty-five, forty, thirty, twenty, and finally ten “righteous people.” [\[FN87\]](#) He fought against harsh punishment born of anger and pleaded for mercy. “Oh let not my Lord be angry,” [\[FN88\]](#) implored Abraham. He also pleaded for justice. [\[FN89\]](#)

Like the public defender who rejects the affluence of high-level corporate law practice [\[FN90\]](#) in order to serve the indigent, Moses sacrificed a life of privilege and wealth in Pharaoh’s household to represent the slaves. He fought for the slaves before Pharaoh, his former benefactor. He allied himself with those who were in “cruel bondage” [\[FN91\]](#) and whose *460 “spirits [were] crushed,” [\[FN92\]](#) and he became their voice and leader. Like many defenders, Moses urged Pharaoh to “let my people go.” [\[FN93\]](#)

Like Abraham, Moses had the courage to stand up to the supreme Judge in the desert when God was about to destroy the Hebrews for idolatry. Even though Moses was furious at the Israelites' grave sin of worshiping the Golden Calf, he defended his people against God's fury. [\[FN94\]](#) When God told Moses that He would destroy the Hebrew people, [\[FN95\]](#) Moses reminded God of His enormous power and counseled restraint and forgiveness: "Moses implored the Lord his God, saying, 'Let not Your anger, O Lord, blaze forth against Your people, whom You delivered from the land of Egypt with great power and with a mighty hand . . . Turn from Your blazing anger, and renounce the plan to punish Your people.'" [\[FN96\]](#)

When God tried to seduce Moses away from his commitment to those he represented with the promise that He would "make of [Moses] a great nation," " [\[FN97\]](#) Moses would not forsake those who placed their trust in him. [\[FN98\]](#) He told God that if God would not forgive the Israelites' sin, he would rather not be known as having played a role in the history of his people. If God would not forgive the Jews, God should "erase me from the record which You have written!" " [\[FN99\]](#)

Much later in history, Esther risked her life and privileged status in order to appeal to King Ahasuerus on behalf of the Jews. [\[FN100\]](#) Her actions were like the criminal lawyer who persists in petitioning a federal court for a writ of habeas corpus on behalf of an unfairly convicted prisoner in the face of hostility, [\[FN101\]](#) or the lawyer who risks *461 physical safety or professional ambitions in the representation of unpopular clients. [\[FN102\]](#)

The story of Esther is well-known among Jews because it is the source of the festival of Purim. [\[FN103\]](#) King Ahasuerus, who "reigned over a hundred and twenty-seven provinces from India to Nubia," [\[FN104\]](#) had a wife, Queen Vashti, who fell from grace when she refused to obey the king's command to come before him and display her beauty to the people and officials gathered there. In response the king banished Vashti from the palace and went about finding a new queen. [\[FN105\]](#)

Esther was among the maidens who presented herself for consideration by the king. She did so at the behest of her uncle, Mordechai, who regarded the assembling of beautiful young virgins from every province of the king's realm [\[FN106\]](#) as a splendid opportunity for Esther. When King Ahasuerus met Esther, "she won his grace and favor more than all the virgins." [\[FN107\]](#) He immediately made her his queen and gave a great banquet in her honor. [\[FN108\]](#)

Upon the instruction of Mordechai, Esther did not reveal that she was a Jew. [\[FN109\]](#) Some time after Esther became queen, Haman, a notorious enemy of the Jews, became a high-ranking adviser to the king. When the king issued an order that everyone in the kingdom must kneel or bow before Haman, Mordechai refused to obey the king's order. When *462 he explained that, as a Jew, he could not comply with such an order, Haman became enraged and plotted to do away with all the Jews. [\[FN110\]](#) He got King Ahasuerus to issue a decree that would be proclaimed and publicly displayed in every province "to destroy, massacre, and exterminate all the Jews, young and old, children and women, on a single day, on the thirteenth day of the twelfth month--that is, the month of Adar--and to plunder their possessions." [\[FN111\]](#)

In other words, Jews, because of their religious beliefs, [\[FN112\]](#) were labeled “lawbreakers” and sentenced to die. When Mordechai and the other condemned learned of the edict, there was “great mourning.” [\[FN113\]](#) When Esther was told about what was happening throughout the kingdom--in every province, Jews had donned sackcloth and ashes and were “fasting, weeping, and wailing” [\[FN114\]](#)--she sought word from Mordechai, who informed her of what had happened between him and Haman and the issuing of the edict to destroy the Jews. He told Esther to go to the king--to be the representative of the condemned--and plead with him for her people. [\[FN115\]](#)

Esther agreed to go to the king at the risk of being put to death, as this was the punishment for appearing before the king unsummoned. [\[FN116\]](#) Casting aside fear and her own privileged self-interest, she allied herself with the damned. [\[FN117\]](#) In an artful and poignant plea, Esther persuaded the king to save her people and recognize Haman for the evil man he was. [\[FN118\]](#)

***463 B.** The Teachings of the Torah, Mishnah, and Talmud: To Perform Acts of Loving Kindness, Seek Justice, and Repair the World

The distinctive feature in the first period of Jewish history was the Prophet, and its chief product was the Five Books of Moses, or Torah. [\[FN119\]](#) In the next period the distinctive feature was the Rabbi, and its chief achievement was the Talmud. [\[FN120\]](#)

The Talmud was, in many respects, a natural sequel to the Torah. While the Torah consisted of Jewish history, the moral teachings governing Jewish life, and the code of Jewish law and religious practice, the Talmud offered interpretation of biblical stories and resolution of specific legal disputes and conflicts. [\[FN121\]](#) Rabbis--regarded as “teachers of the Law” [\[FN122\]](#)--gave broader meaning to the teachings of the Torah. In contrast to the Torah,

[t]he general issue [in the Talmud] was not what a man must do and what a man must not. It was, rather, what a man should do and should not, if he desired to carry out the Torah in its every detail; it was a code of life, rather than one of law. [\[FN123\]](#)

The first part of the Talmud is the Mishnah, or “Teaching.” [\[FN124\]](#) The Mishnah sorted out and put in writing the oral law that had accumulated for centuries. [\[FN125\]](#) Of course, as soon as the Mishnah was complete, a new generation of scholars began to comment on it. These rabbinic scholars produced further volumes of the Talmud, meaning “study” or “learning.” [\[FN126\]](#) Because new religious and legal questions would always arise, the Talmud was not meant to be comprehensive. [\[FN127\]](#) Its collected ***464** commentary and stories provide a rich foundation for further study and discussion. As one historian notes, “[The Talmud] comprises the accumulated wisdom of the Jewish people over many centuries.” [\[FN128\]](#)

The Torah and the Talmud are replete with stories, maxims, and commandments about the central obligations, or mitzvot, of Judaism: [\[FN129\]](#) to perform deeds of loving-kindness, seek justice, and repair the world. Kindness and

compassion, the pursuit of justice, and the desire to repair our clients' lives, their communities, and the great social injustices of our time, are also at the heart of criminal defense work. [\[FN130\]](#)

According to teachings in the Torah and the Talmud, Jews have an obligation to engage in acts of loving-kindness, or gemilut hasadim. [\[FN131\]](#) This duty of kindness includes generosity and compassion to family and community members [\[FN132\]](#) and charity, or tzeduka, to all those in need. [\[FN133\]](#)

The Israelites were commanded to set food aside regularly for “the Levite, the stranger, the fatherless, and the widow, that they may eat their fill in your settlements.” [\[FN134\]](#) The second chapter of the first *465 division of the Mishnah, Peah, [\[FN135\]](#) or Poorman's Tithe, codified the teachings of Leviticus:

When you reap the harvest of your land, you shall not reap all the way to the edges of your field, or gather the gleanings of your harvest. You shall not pick your vineyard bare, or gather the fallen fruit of your vineyard; you shall leave them for the poor and the stranger [\[FN136\]](#)

For Jews, there is a special obligation of kindness to strangers that is part of the legacy of the Israelites being “stranger[s] in a foreign land.” [\[FN137\]](#) The Torah teaches that Jews should treat strangers and outsiders as members of the community: “The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt” [\[FN138\]](#) Jews are told to extend the hand of friendship to the “other” and to identify with those at the margins: “You too must befriend the stranger, for you were strangers in the land of Egypt.” [\[FN139\]](#)

Because of the Israelites' plight as outsiders, they were told to give special care to “the fatherless and the widow,” [\[FN140\]](#) and the poor and the downtrodden. [\[FN141\]](#) This ethos of kindness to the poor stranger-- especially to the “fatherless”--has special resonance for criminal defense lawyers. The clients of criminal defense lawyers come from increasingly fractured communities and families. [\[FN142\]](#) Because of the massive incarceration of young black men, [\[FN143\]](#) there seem to be fewer and fewer fathers or father figures for our clients. [\[FN144\]](#)

*466 The pursuit of justice, or mishpat, is at the heart of the Torah and the Talmud. [\[FN145\]](#) As God said to the Israelites: “Justice, justice shall you pursue, that you may thrive and occupy the land that the Lord your God is giving you.” [\[FN146\]](#)

The quest for justice resounds throughout the stories of the Prophets. [\[FN147\]](#) As it is eloquently written in Amos: “But let justice well up like water, righteousness like an unfailing stream.” [\[FN148\]](#) Some commentators have interpreted Amos's image of justice as a “turbulent, cascading river” to suggest that justice is vigorous, spirited, and dynamic [\[FN149\]](#)--the kind of hard-fought justice that is at the heart of criminal defense work. Justice is a “process of struggle,” and “[l]aw . . . arises from the clash between the state seeking to enforce its rules” and others “seeking to create, extend, or preserve an alternative vision of justice.” [\[FN150\]](#)

The pursuit of justice for the poor person accused of crime finds support in Isaiah's admonishment to his people: "Devote yourselves to justice; aid the wronged. Uphold the rights of the orphan; defend the cause of the widow." [\[FN151\]](#) In our devotion to justice, defense lawyers aid those who have been wrongly accused or convicted, uphold the rights of the accused (and, in so doing, uphold the rights of all citizens), and defend the cause of those who are needy and alone.

Although the concept of justice, or mishpat, is complex and has multiple meanings, [\[FN152\]](#) the obligation to seek justice includes both individual justice and social justice. Social justice is the ultimate aim. [\[FN153\]](#) Jews must not pursue wealth as the main goal in life [\[FN154\]](#) but must reach out to those who are oppressed:

*467 The Lord stands up to plead a cause,
He rises to champion peoples.

The Lord will bring this charge

Against the elders and officers of His people:

"It is you who have ravaged the vineyard;

That which was robbed from the poor is in your houses.

How dare you crush My people

And grind the faces of the poor?"

-says my Lord God of Hosts. [\[FN155\]](#)

Individual justice embodies both equality before the law and fairness in the Torah and the Talmud. [\[FN156\]](#) Equality is a central principle in the Talmud, [\[FN157\]](#) and the law had a strong democratic basis. [\[FN158\]](#) Under Jewish law, "man was seen both as an individual, with rights, and as a member of a community, with obligations." [\[FN159\]](#)

Under Jewish law, people were not only equal as a matter of law, but they were entitled to be treated fairly and impartially. [\[FN160\]](#) People were also entitled to certain basic freedoms [\[FN161\]](#) and to the “benefit of the doubt” when accused. [\[FN162\]](#) The preservation of these rights is at the heart of criminal defense work. [\[FN163\]](#)

Although the Talmud recognizes the importance of individual culpability and judgment, it also embraces the notion of social responsibility. The community is responsible for a person who engages in wrongdoing, just as the community shares the pride of one who does well. [\[FN164\]](#)

***468** Another central Jewish obligation--or at least aspiration--is to repair the world, or tikkun olam. [\[FN165\]](#) Nearly every Jewish prayer service ends with a prayer, or Aleynu, which looks ahead to better times--to the messianic vision of the world being fixed or repaired. [\[FN166\]](#)

This mitzvah is said to be the legacy of the great Talmudic scholar, Hillel. [\[FN167\]](#) In the most famous story about Hillel, a non-Jew approached and asked Hillel to define the essence of Judaism while standing on one foot. Without pausing, Hillel responded, “What is hateful to you, do not unto your neighbour: this is the entire Torah. All the rest is commentary--go and study it.” [\[FN168\]](#)

Consistent with Hillel's life-long concern for the poor and his willingness to base Jewish law on principles, not just tradition, [\[FN169\]](#) tikkun olam finds its roots in Hillel's efforts to redress a hardship on the poor inadvertently created by the Torah. One law of the Torah, devised to prevent the creation of an underclass of poor debtors, [\[FN170\]](#) instead discouraged people from making loans to the poor. Hillel created a procedure which maintained the Torah ethic of helping the poor and invalidated a bad law. [\[FN171\]](#)

Tikkun olam is the culmination of the mitzvah of performing acts of kindness and seeking justice. It is, in essence, a call for human connection [\[FN172\]](#) and a commitment to social change. [\[FN173\]](#) It is the “struggle to change ourselves and our world.” [\[FN174\]](#)

Tikkun olam has particular meaning for those of us who see our work on behalf of the indigent accused as directly connected to a larger struggle for a better world. [\[FN175\]](#) We believe that, in the day-to-day work ***469** of giving voice to those who would otherwise not be heard, offering dignity and respect to those who have seldom experienced it, and embracing those whom others want to isolate or annihilate, we comport with the spirit of tikkun olam. [\[FN176\]](#)

C. Jesus: Reaching Out to the Condemned

And as he sat at dinner in the house, many tax collectors and sinners came and were sitting with him and his

disciples. When the Pharisees saw this, they said to his disciples, “Why does your teacher eat with tax collectors and sinners?” But when he heard this, he said, “Those who are well have no need of a physician, but those who are sick. Go and learn what this means, ‘I desire mercy, not sacrifice.’ For I have come to call not the righteous but sinners.”

-Matthew 9:10-13 (New Revised Standard Version)

When [Jesus] came to Nazareth, where he had been brought up . . . the scroll of the prophet Isaiah was given to him. He unrolled the scroll and found the place where it was written: “The Spirit of the Lord is upon me, because he has anointed me to bring good news to the poor. He has sent me to proclaim release to the captives . . . [and] to let the oppressed go free”

-Luke 4:16-18 (New Revised Standard Version)

If the three crosses on Calvary mean anything, they mean that no one is so repulsive, or so condemned, that he is not entitled to have a *470 companion in his misery, and that none of us--not even the Son of God-- is too good to be chosen as the companion.

-Thomas Shaffer [\[FN177\]](#)

Jesus serves as an obvious model for the indigent criminal defense lawyer. Like a defense lawyer, Jesus chose to stand beside many social pariahs and wrongdoers without passing judgment on them, [\[FN178\]](#) notwithstanding the consequences. He was so firmly “on the side of the poor and the outlaw” [\[FN179\]](#) that the castigation and criticism he faced for embracing those whom others condemned seemed only to spur him on. It mattered not what the wrongdoer had done; indeed, Jesus seemed especially drawn to the worst of the lot. [\[FN180\]](#)

Jesus was both a companion [\[FN181\]](#) to the condemned and an advocate [\[FN182\]](#) on their behalf. He was a companion to the outcast simply by being with them. [\[FN183\]](#) He spoke out for the outcast because of his ministry to them. [\[FN184\]](#)

*471 The most poignant story for criminal defense lawyers about Jesus reaching out to the condemned is the tale of Jesus and the adulteress. [\[FN185\]](#) When Jesus was teaching in the temple, the scribes and Pharisees brought a woman before him who had been caught in the act of adultery. They made the woman stand in shame before the assembly and they challenged Jesus, [\[FN186\]](#) asking him, “Moses in the law commanded us, that such should be stoned: but what sayest thou?” [\[FN187\]](#)

They meant to tempt Jesus to say or do the wrong thing so they could then discredit him. [\[FN188\]](#) Jesus stooped down, however, and wrote on the ground with his finger as if he had not heard them. [\[FN189\]](#) When they continued to ask him, Jesus stood up and said forcefully: “He that is without sin among you, let him first cast a stone at her.” [\[FN190\]](#)

Then Jesus returned to his writing, not heeding the reaction his words had on those gathered. Like an impassioned argument for mercy before a death-qualified jury, his words had power. One by one, those who had gathered to condemn and stone the woman searched their own consciences and withdrew from the temple. [\[FN191\]](#)

At last, Jesus was left alone with the woman. [\[FN192\]](#) He lifted himself up and said to her: “Woman, where are those thine accusers? hath no man condemned thee?” [\[FN193\]](#) The woman replied, “No man, Lord.” [\[FN194\]](#) Jesus, ever the forgiving defender, declared: “Neither do I condemn thee: go, and sin no more.” [\[FN195\]](#)

***472** Jesus literally turned away a mob bent on killing a wrongdoer who had no other protector. [\[FN196\]](#) In so doing, he not only saved the woman's life, but also forced the mob to consider and acknowledge its own wrongdoing. This is an inspiring feat for defenders: to turn the jury away from both vengeance and judgment.

D. Forgiveness, Mercy, and Redemption

I cry aloud to the Lord;
I appeal to the Lord loudly for mercy

I have no friend;

there is nowhere I can flee,

no one cares about me

Listen to my cry, for I have been brought very low;

save me from my pursuers,

for they are too strong for me.

Free me from prison,

that I may praise Your name.

-Psalms 142:2-8

Let the groans of the prisoners reach You;

relieve those condemned to death,

as befits Your great strength.

-Psalms 79:11

[W]e are a Christian people. It is nineteen hundred years since Christ's teachings were given to the world--we profess to be the disciples of that lowly man who believed in no jails or clubs--who taught infinite love and infinite mercy . . . and yet today we know nothing better than hatred, repression, brute force, jails and clubs. We single out a considerable class of our fellow-men to shoot on sight. Of course, the world will continue to treat its so-called criminals in this enlightened human way. Therefore would it not be well to rechristen our churches, and stop calling them after Christ?

-Clarence Darrow [\[FN197\]](#)*473 Jewish law's notion of justice is neither narrow, nor strict. Justice is not simply punishment or vengeance for wrongdoing; it includes compassion, [\[FN198\]](#) mercy, [\[FN199\]](#) and forgiveness. [\[FN200\]](#)

In the Jewish tradition the sinner is dealt with "almost gently." [\[FN201\]](#) This is consistent with an age-old Jewish scorn for self-righteousness [\[FN202\]](#) and deference to God as the ultimate judge. [\[FN203\]](#) It has long been regarded as wrong for Jews to imagine that they are without sin: "For there is not one good man on earth who does what is best and doesn't err." [\[FN204\]](#) In Jewish thought, there is a fundamental recognition that everyone--even the prophets-- has weaknesses and limitations. [\[FN205\]](#)

The Jews were the first people to introduce the idea of repentance and atonement, [\[FN206\]](#) which later became a primary Christian theme. [\[FN207\]](#) In Judaism, if wrongdoers are truly sorry and atone for their sins, they will ^{*474} always be forgiven. [\[FN208\]](#) Judaism teaches that God is compassionate, gracious, and forgiving. [\[FN209\]](#)

In Christianity, Jesus died for the sins of others. [\[FN210\]](#) Having died to win redemption from sin, Jesus immediately provided for the forgiveness of everyone's sins. [\[FN211\]](#) Christianity espouses the central importance of forgiveness in everyday life. [\[FN212\]](#) Christianity also teaches that forgiveness is the answer to all the major problems of the world--hate, cruelty, and war. [\[FN213\]](#)

For Christians, forgiveness is not self-righteous or condescending; forgiveness is an expression of humility and an acknowledgement of human fallibility. [\[FN214\]](#) Christianity also teaches that there ought to be no limit to one's capacity for forgiveness. For example, when Peter came to Jesus and asked how often he should forgive another who had sinned against him and whether he should have to forgive him "[a]s many as seven times," [\[FN215\]](#) Jesus responded that Peter should forgive him not seven times, "but, Until seventy times seven." [\[FN216\]](#)

For Christians, what is often called forgiveness of sin is actually forgiveness of sinners. God cannot forgive sins; every sin must meet its own fate--in hell. [\[FN217\]](#) However, "forgiveness dissolves the glue that ^{*475} sticks the sinner to the sin." [\[FN218\]](#) If sinners repent and accept God's forgiveness, they will be absolved. [\[FN219\]](#)

Mercy, an increasingly quaint term in the criminal justice system, [\[FN220\]](#) is at the heart of both Judaism and Christianity. [\[FN221\]](#) Even when one is wronged, anger and a desire for vengeance must give way to compassion and mercy. [\[FN222\]](#) We must treat others as we would want to be treated, [\[FN223\]](#) with generosity and understanding. [\[FN224\]](#)

Whereas forgiveness is a change of heart [\[FN225\]](#) towards a wrongdoer arising out of an acknowledgment of the wrongdoer's basic moral ^{*476} goodness, mercy is the suspension or mitigation of punishment granted out of pity or compassion. [\[FN226\]](#) It is also an acknowledgment of our collective humanity. [\[FN227\]](#) Mercy is both an expression of love from God [\[FN228\]](#) and the "highest attribute of man." [\[FN229\]](#)

As Shakespeare so eloquently wrote:

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven

Upon the place beneath: it is twice bless'd;

It blesseth him that gives and him that takes:

'Tis mightiest in the mightiest; it becomes

The throned monarch better than his crown;

His sceptre shows the force of temporal power,

The attribute to awe and majesty,

Wherein doth sit the dread and fear of kings;

But mercy is above this sceptred sway,

It is enthroned in the hearts of kings,

It is an attribute to God himself,

And earthly power doth then show likest God's

When mercy seasons justice. [\[FN230\]](#)

Redemption, a quintessentially Christian notion, [\[FN231\]](#) includes the belief that even the sinful can change, grow, and cast off evil ways. This is done by embracing God [\[FN232\]](#) and by struggling to find the way. [\[FN233\]](#)

If redemption also means that wrongdoing is not an immutable condition, and that we are more than our worst conduct, it is both a *477 Christian [\[FN234\]](#) and Jewish concept. [\[FN235\]](#) It is the theological companion to the criminal justice theory of rehabilitation. [\[FN236\]](#) It is also a concept at the heart of the relationship between criminal lawyer and client. [\[FN237\]](#)

Forgiveness, mercy, and redemption--each of which focuses on the wrongdoer and not simply the wrongdoing [\[FN238\]](#)--are at the heart of Judeo-Christian teachings and criminal defense lawyering. Christianity and Judaism are basically charitable and forgiving religions. Insightful and effective criminal defense lawyers might also regard themselves as being in the “forgiveness business.” [\[FN239\]](#)

E. The Saints

Among the saints are the first proclaimers of humanitarian ideals, the first fighters for social justice, the first champions of the poor

-René Fülöp-Miller [\[FN240\]](#)

[F]or I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, I was *478 naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me.

-Matthew 25:35-37 (New Revised Standard Version)

For Christians, and particularly Catholics, the lives of the saints--holy men and women honored for exemplifying the life of Jesus [\[FN241\]](#)--provide inspiration for service to the poor and downtrodden, including the indigent defendant. Saints demonstrate the Christian mission to the poor, accused, and forgotten through example. [\[FN242\]](#)

Although the life of each saint exemplifies different Christian virtues, [\[FN243\]](#) they all demonstrate the “need for direct day-to-day personal involvement in service to the needy.” [\[FN244\]](#) Christianity has always stressed compassion and service, [\[FN245\]](#) and saints are the models for manifesting these “virtues with uncompromising exuberance.” [\[FN246\]](#) The *479 sanctity of the saints comes not from escaping this world, but in facing this world's problems. [\[FN247\]](#)

Two saints provide particular inspiration for the indigent criminal defense lawyer: St. Catherine of Siena and St. Vincent de Paul. Each was a companion to and advocate for the poor and imprisoned.

In a time when women were supposed to be private, unobtrusive figures, [\[FN248\]](#) St. Catherine of Siena served as a “modern exemplar of Christian contemplation leading to action in order to transform the world according to God's plan of justice and peace.” [\[FN249\]](#) St. Catherine began her dedication to the service of others when she became a Mantellata of the Dominican Order. [\[FN250\]](#) There she exhibited a passion for ministering to the poor, ill, and condemned.

In her ministry to the poor, St. Catherine was motivated by the belief that, in following Christ, it was necessary to share with those upon whom the rest of the world had trampled. [\[FN251\]](#) She sacrificed her own comforts for those in greater need. [\[FN252\]](#) She respected the pride of those in need and did not wait to be asked for help. [\[FN253\]](#)

As Jesus did before her, St. Catherine cared for people afflicted with dreaded diseases such as leprosy and the plague. [\[FN254\]](#) Indeed, she exhorted others to do the same. [\[FN255\]](#)

St. Catherine visited prisoners and often spent “nights in the prison in order to help those to be executed in the morning.” [\[FN256\]](#) Like Sister Helen Prejean, whose work with death row inmates came many years later, [\[FN257\]](#) St. Catherine ministered to the despised with “firm courage and smiling countenance.” [\[FN258\]](#)

***480** After a few years of ministering to the downtrodden, St. Catherine began to embrace direct advocacy. She defied the social dictates for her gender and became a political activist. [\[FN259\]](#) While her immediate objective was the reform of the Church, [\[FN260\]](#) she was driven by a desire for peace and economic justice. [\[FN261\]](#)

Fearlessly, St. Catherine wrote numerous letters and appealed to “nobles and private citizens, kings and queens and the Pope himself.” [\[FN262\]](#) Most of her letters called for action that would bring peace and provide for those in need. [\[FN263\]](#) She wrote in “the hope that [her letters] would be read and create in time channels of action.” [\[FN264\]](#)

Like many defenders of the indigent, St. Catherine was not very successful in her efforts. [\[FN265\]](#) In fact, she was often persecuted and criticized by both the needy she served and those in power whose influence she sought. [\[FN266\]](#) However, her success should be measured “in her sheer effort, and in its provenance.” [\[FN267\]](#) St. Catherine renounced social rank and status to follow her calling and urge others to act with her. [\[FN268\]](#)

In these times of chain gangs and prison labor, [\[FN269\]](#) the story of St. Vincent de Paul and the galley slaves has special relevance. From 1618 to 1625, St. Vincent lived in the care of the Count Philippe-Emmanuel de Gondi and his wife, a French family of wealth and power. [\[FN270\]](#) He tutored the Count's sons and cared for the spiritual needs of the Count's tenants.

However, Count de Gondi was also General of the Galleys--long, narrow ships used to protect France against marauding pirates. ***481** Although the ships had sails, they relied on 250 oarsmen--5 to a bench, 25 benches per side--prodded with whips and beatings. [\[FN271\]](#) Because volunteers for the galleys were not forthcoming, convicts were used. [\[FN272\]](#) The conditions were so horrific in the galleys that, once sent there, men seldom returned. [\[FN273\]](#)

Prior to being sent to the coast to man the galleys, the convicts were kept in prisons, some of which were underground. These prisons were extraordinarily brutal. The men were attached to the prison walls by chains fastened to their necks and ankles like dog collars. [\[FN274\]](#) They were half-naked and covered with sores; vermin nearly ate them alive. [\[FN275\]](#) Many of the prisoners went mad and engaged in self-mutilation. [\[FN276\]](#)

Despite his authority over the galleys and the men who would serve as slaves on them, Count de Gondi never set foot in the prison or the galleys. [\[FN277\]](#) However, St. Vincent de Paul, taking advantage of de Gondi's protection, decided to visit the prisons. He left outraged. St. Vincent vowed to change what he had seen, and he appeared before Count de Gondi pleading for assistance:

Ah, sir, consider these poor creatures who are under your direct authority. As you are their master on earth, so will you be held responsible before God. I do not deny that they have merited punishment, but human charity and your own integrity demand that they should not be left in their present abandoned state, helpless, hopeless. Have pity upon them. [\[FN278\]](#)

St. Vincent had the courage and conviction to approach the authorities for assistance in caring for these truly forsaken people, including those upon whom he relied for support. Although his own protector was responsible for the prison and galley conditions, St. Vincent persuaded *482 Count de Gondi to make significant changes. St. Vincent then took it upon himself to provide housing, food, and education for the prisoners, while managing to satisfy the security concerns of the authorities. [\[FN279\]](#)

St. Vincent's renown spread, and King Louis XIII soon appointed him Chaplain-General of the Galleys. [\[FN280\]](#) In this position, St. Vincent traveled to Marseilles and reformed the galley prison conditions there as well. St. Vincent's blistering representations of the conditions in the galleys moved Count de Gondi to assume his rightful duties and take moral responsibility for those under his authority. [\[FN281\]](#)

IV. The Influence of Contemporary Jewish and Catholic Activism on Criminal Defense Advocacy

When we heard on the car radio the tragic news that Julius and Ethel Rosenberg had been electrocuted at Sing Sing Prison, we stopped the car and began to cry.
-William Kunstler [\[FN282\]](#)

It began ten years ago when I wrote a letter to an inmate on Louisiana's death row and the man wrote back. Thus began a ten-year journey that led me into Louisiana's execution chamber There [I found] . . . crimes that defy description [and] the ensuing rage, horror, grief, and fierce ambivalence. But also courage and incredible human spirit.

-Sister Helen Prejean [\[FN283\]](#)

“Why did I become a lawyer? It's a way you can serve someone else. It's the satisfaction of being of service to someone For me, being a lawyer is about the clients.”

-Catherine Roraback [\[FN284\]](#)

The inspiration for this article was the joint--and, no doubt, self-referential--observation that there seem to be many Jews and Catholics in public defender offices, prisoners legal services offices, and death *483 penalty resource centers. There are also the ever-devoted nuns and priests who minister to the imprisoned. [\[FN285\]](#)

Upon reflection, we noted that there is a strong historical basis for Jewish and Catholic identification with the accused. [\[FN286\]](#) There is also a related tradition of Jewish and Catholic participation in struggles for social change and social justice. [\[FN287\]](#) It seems only natural that an interest in indigent criminal defense would follow. In addition to the Jewish and Christian teachings discussed above, the history of Jews and Catholics may well have contributed to both our decision and perhaps the decisions of others to become criminal defense lawyers.

A. Historical Persecution and Identification With the Accused

Jews are perhaps the ultimate accused. [\[FN288\]](#) Throughout history, Jews have been singled out for blame, ostracism, exile, acts of violence, and annihilation. [\[FN289\]](#) Jews have always been regarded as other, different, and foreign. [\[FN290\]](#)

The history of accusation and blame dates back to ancient times, as is recorded in the Torah. [\[FN291\]](#) Throughout the Greek and Roman eras, *484 Jews continued to be regarded with hostility. [\[FN292\]](#) Ironically, Jews fared worst under Christianity. [\[FN293\]](#)

Throughout Medieval and early modern times, things were no different for the Jews. [\[FN294\]](#) Although Jews had prospered in Spain under Muslim rule, life changed for them when the Christians conquered the Moors in the thirteenth century. [\[FN295\]](#) In addition, the fifteenth century brought the anti-Semitism of Martin Luther in Germany, with his accusation that Jews were “the anti-Christ.” [\[FN296\]](#) In the mid-seventeenth century, the Ukrainian Cossacks seized power in Poland and Lithuania, where Jews had lived in relative safety and prosperity for some time, [\[FN297\]](#) and directed the most savage violence against Jews that they ever encountered. [\[FN298\]](#)

*485 Although the Enlightenment, Emancipation, and French Revolution brought periods of increased tolerance

in Europe, anti-Semitism lurked just beneath the surface. [\[FN299\]](#) Much of the nationalism and anti-Semitism of modern Germany began as a reaction against the views of the Enlightenment and French Revolution. [\[FN300\]](#)

To many scholars of the holocaust, Hitler's rise to power in the 1920s, the virulent nationalism and anti-Semitism of the Third Reich, and the systematic murder of six million Jews was the culmination of centuries of German and European anti-Semitism. [\[FN301\]](#) Although the Nazis preached a more "racial" brand of anti-Semitism, it was not unconnected to the theological vilification that preceded it. [\[FN302\]](#)

Although American anti-Semitism has never been as vicious as its European counterpart, this country has not been free of this bigotry. [\[FN303\]](#)*486 While there has been progress in the struggle against American anti-Semitism, the vestiges of the past still linger. [\[FN304\]](#)

Three prosecutions against Jews, each of which was fueled by anti-Semitism, have become part of Jewish history and cultural identity and have helped to foster Jewish identification with the accused: (1) the Dreyfus affair in France in 1894, [\[FN305\]](#) (2) the prosecution and lynching of Leo Frank in 1913 and 1915 in Georgia, [\[FN306\]](#) and (3) the trial and execution of Julius and Ethel Rosenberg in New York in the 1950s. [\[FN307\]](#) Most Jewish children learn about these cases as part of a standard religious school curriculum.

Although not as common or virulent as the persecution of Jews, there has also been a substantial history of anti-Catholicism, especially in the United States. [\[FN308\]](#) Since its founding, America has been imbued with *487 a dominant anti-Catholic culture. [\[FN309\]](#) The passage of years did not ease anti-Catholic hostility. [\[FN310\]](#) In the nineteenth century, there were many acts of anti-Catholic violence, including anti-Catholic demonstrations in Boston in 1823, 1826, and 1829, the burning of the Ursuline Convent outside of Boston in 1834, and the burnings of thirty homes and two *488 churches in a Catholic neighborhood in Philadelphia in 1844. [\[FN311\]](#) Antyc-Catholic hysteria peaked again in the 1920s and 1930s, largely due to the resurgence of the Ku Klux Klan. [\[FN312\]](#) The Depression exacerbated religious division, and Protestants had a distinct advantage in getting hired for the scarce jobs available. [\[FN313\]](#)

The slander of Al Smith as "Al(cohol) Smith," whose defeat in the 1928 presidential election was ensured by a coalition of Protestants, Klan members, and others fearful of a Catholic president, played on the long-standing portrayal of Irish-Catholic immigrants as drunks. [\[FN314\]](#) Not until the election of President John F. Kennedy in 1960--which stirred up some anti-Catholic sentiment--did this fear lessen. [\[FN315\]](#)

For many--perhaps especially those of Italian-Catholic ancestry--the Sacco and Vanzetti case in the early 1920s stands as a symbol of *489 prejudice and mob rule. [\[FN316\]](#) While it is hard to separate the defendants' immigration status, identification as anarchists, and Italian-Catholic background as the source of the hysteria which accompanied their prosecution and execution for bank robbery and murder, the conviction of Nicola Sacco and Bartolomeo Vanzetti can be seen as a response to the threat posed first by Irish-Catholics and later by Italian-Catholics. [\[FN317\]](#) Their conviction

remains controversial. [\[FN318\]](#)

Recently, religious identity has become more of a private matter of conscience, and bigotry against both Jews and Catholics has become less overt. [\[FN319\]](#) However, the legacy remains in the form of lingering suspicions about Jewish and Catholic disloyalty (because of allegations of greater allegiance to Israel and the Pope, respectively), accusations of clannishness, and a continuing sense of Jewish and Catholic otherness. [\[FN320\]](#) This is why Jews and Catholics feel a connection to others at the margins. [\[FN321\]](#)

B. Tradition of Social Activism by Jews and Catholics

There has been a rich tradition of social activism by American Jews and Catholics, no doubt connected to the teachings of each faith and a shared history of persecution. This tradition of activism has included speaking out for the powerless and standing up to those in authority, both of which are hallmarks of indigent criminal defense.

Catholics and Jews have played leadership roles in all the significant social change movements of this century, including the following: the workers' right movement, civil rights movement, antiwar movement, and women's movement.

1. Workers' Rights. During the first half of the twentieth century, the Communist Party and the labor union movement, both of which sought to protect the rights of working people and included a substantial number of Jews and Catholics, [\[FN322\]](#) played an important role in American political life. [\[FN323\]](#) While Jewish activists played a significant role in organizing some industries, [\[FN324\]](#) Catholic activists were influential in others. [\[FN325\]](#)

The effects of the Depression and the large number of Catholics in the labor force combined to motivate the Church and Catholic organizations [*491](#) to enter into the labor movement in order to achieve social and economic reform. [\[FN326\]](#) During the 1930s, a large number of influential Catholic organizations devoted to social reform developed. [\[FN327\]](#) The most renowned of these organizations was the Catholic Worker Movement founded by Dorothy Day and Peter Maurin, the aim of which was to "influence the lives of the worker and the effectiveness of the labor movement." [\[FN328\]](#)

2. Civil Rights. Although the political alliance between Jews and African-Americans began much earlier, it culminated with the civil rights movement. [\[FN329\]](#) Jews participated in large numbers in the antisegregation efforts of the Student Nonviolent Coordinating Committee ("SNCC"), [\[FN330\]](#) grass roots organizing and teaching in Freedom Schools during "Freedom Summer," [\[FN331\]](#) and voter registration [*492](#) drives. [\[FN332\]](#) Jews were also a major source of financial support for the movement. [\[FN333\]](#)

Two of the most revered Jewish civil rights activists, Andrew Goodman and Michael Schwerner, died for the cause. [\[FN334\]](#) After investigating a church burning only ten days into Freedom Summer, Goodman, Schwerner, and an African-American civil rights worker, James Chaney, mysteriously disappeared; their bodies were not found until forty-four days later. [\[FN335\]](#)

Many prominent civil rights organizations had Jewish leaders. [\[FN336\]](#) Legal organizations including the National Lawyers Guild, American Civil Liberties Union, and Lawyers Constitutional Defense Committee, each of which had substantial Jewish membership, lent crucial support to the civil rights movement. [\[FN337\]](#)

Although Catholics were not a major force in the early part of the civil rights movement, [\[FN338\]](#) they began to play an important role by the height of the movement. [\[FN339\]](#) A number of Catholic organizations formed to fight for racial equality, [\[FN340\]](#) and some prominent activists, priests, and *493 nuns engaged in public education. [\[FN341\]](#) There was also strong Catholic support for school desegregation efforts, especially in the South. [\[FN342\]](#)

3. The Vietnam Antiwar Movement. In the 1960s and early 1970s, America experienced what was arguably “the largest and most important antiwar movement in American history.” [\[FN343\]](#) Those involved in the movement against the Vietnam War came from all segments of society [\[FN344\]](#) and included substantial numbers of Jews and Catholics. [\[FN345\]](#)*494 Like the civil rights movement, the Vietnam antiwar movement united different faiths in struggle. [\[FN346\]](#)

Catholic opposition to the war took many forms, including direct acts of civil disobedience. [\[FN347\]](#) Some of the more famous acts of civil disobedience with a strong Catholic presence were the draft board raids by the Catonsville 9 in 1968, [\[FN348\]](#) the draft board raid by the Camden 28, [\[FN349\]](#) and the “kneel-in” by the Sisters of Notre Dame de Namur. [\[FN350\]](#) In the draft board raids, activists unlawfully entered federal buildings and ransacked or destroyed files relating to the draft. [\[FN351\]](#) The “kneel-in” was a variation on the “sit-in.”

Jews also engaged in acts of civil disobedience in large numbers. [\[FN352\]](#) Jewish activists played a leadership role in the massive antiwar protest at the 1968 Democratic National Convention, which resulted in the highly publicized prosecution of seven protesters (originally eight) who *495 became known as the Chicago 7, [\[FN353\]](#) and other political demonstrations. [\[FN354\]](#)

4. Women's Rights. In contrast to the suffrage movement of the late nineteenth and early twentieth century, which was dominated by elite Protestants, [\[FN355\]](#) the “second wave” of the women's movement in the 1960s and 1970s [\[FN356\]](#) included many Jewish and Catholic activists and intellectuals. This movement continues today. Prominent Jewish feminists include Betty Freidan, Gloria Steinem, and Robin Morgan. [\[FN357\]](#) Prominent Catholic feminists include Eleanor Smeal, Patricia Ireland, and Mary Daly. [\[FN358\]](#) Although the struggle for reproductive freedom has posed difficulties for some Catholic feminists, [\[FN359\]](#) Catholics have remained a vital part of the women's movement. [\[FN360\]](#) Jews have always been at the forefront of the struggle for reproductive rights. [\[FN361\]](#)

*496 5. Liberation Theology. The link between the quest for social justice and religion is most explicit in Catholic-rooted liberation theology. Traditional Christian theology maintained a wall between the temporal world in which we live and the “hereafter.” It was the “hereafter” that mattered. [\[FN362\]](#) This constricted view, minimizing the importance of life in this world, rendered those with power and privilege secure from any real challenge. Those without power and privilege had little or no hope for justice in this world. [\[FN363\]](#)

Liberation theology ruptured this wall and attempted to establish the grace of God in this world, where human dignity, equality, and participation were valued. [\[FN364\]](#) Liberation theology was born in Latin America, the site of overwhelming poverty and social injustice. [\[FN365\]](#) Christians, particularly Jesuit priests and nuns, surrounded by misery and human exploitation, considered the circumstances of the poor and oppressed sinful and degrading. [\[FN366\]](#) They asked themselves how their Christianity could be reconciled with passive acceptance of this. The answer was that it could not; it was their Christian duty to work to overcome social and economic injustice. [\[FN367\]](#)

Liberation theology was, and remains, a radical intrusion of theology into the world of economics and politics. Today, not only is liberation theology prominent in the active and political Latin American Catholic Church, [\[FN368\]](#) but it also has adherents worldwide.

*497 What it means to confront the social and economic injustice of the world has created a host of divergent views, from the overthrow of capitalism to rebellion against other current political regimes. [\[FN369\]](#) However, the one constant in all perspectives of liberation theology is the need to turn to the poor. The confrontation of social injustice “stems from solidarity with the exploited classes, from a decision to take their side actively in the struggles of life.” [\[FN370\]](#) Liberation theology espouses solidarity with the oppressed, above all by standing next to them as they demand justice. [\[FN371\]](#)

Liberation theology speaks to the public defender and all defenders of the downtrodden. It spoke to Sister Helen Prejean, a passionate and articulate opponent of the death penalty in this country. [\[FN372\]](#) Prejean traces the evolution of her work with the poor, from praying for them and giving them food on holidays--acts of charity--to taking an active stand for the poor in housing projects and prisons--acts of justice, solidarity, and liberation. [\[FN373\]](#)

C. The Modern Heroes, Prophets and Saints of Criminal Defense

As every field has its champions and heroes, and every religion has its prophets and saints, criminal defense work has its heroes, prophets, and saints. [\[FN374\]](#) These are the men and women to whom we look for inspiration and leadership. We offer eight such heroes--seven lawyers and a nun--as the modern prophets and saints of criminal defense: Clarence Darrow, William Kunstler, Catherine Roraback, Terence MacCarthy, *498 David Rudovsky, Steven Bright,

Bryan Stevenson, and Sister Helen Prejean. [\[FN375\]](#)

The eight men and women we have chosen have a variety of religious backgrounds; however, it is not their religion that draws us to them, but their devotion to the criminally accused and convicted. The lawyers reflect a range of criminal defense work: private practice, public defense, capital representation, and prisoners' rights. Sister Helen Prejean ministers to prisoners on death row. Our eight heroes are not perfect people--they would not serve us very well if they were--but we admire them nonetheless.

1. Clarence Darrow. Clarence Darrow is universally recognized as a hero to criminal defense lawyers. [\[FN376\]](#) Throughout his career, he endured public condemnation, censure, and an indictment that resulted from his representation of the despised and his penchant for controversy. [\[FN377\]](#) Darrow is known for his willingness to defend anyone who was *499 in trouble, [\[FN378\]](#) his commitment to the principles underlying our constitutional criminal justice system, [\[FN379\]](#) his humanitarian values, [\[FN380\]](#) his contempt for racial and religious prejudice, [\[FN381\]](#) and his extraordinary talent as an orator. [\[FN382\]](#)

While Darrow often railed against the hypocrisy of organized Christianity, [\[FN383\]](#) he seemed to embrace basic Christian values. [\[FN384\]](#) Darrow's father was a graduate of a theological seminary who became disenchanted with Christian ministry, [\[FN385\]](#) but he and Darrow's mother ensured that their son received a Christian education. [\[FN386\]](#) Although he *500 poked fun at the term, Darrow admitted that he felt “called” to practice law. [\[FN387\]](#)

2. William Kunstler. Like Clarence Darrow, William Moses Kunstler, who died in 1995, [\[FN388\]](#) had many critics. [\[FN389\]](#) Because he seemed to go out of his way to champion the most despised and unpopular clients, Kunstler faced more public condemnation than most criminal defense lawyers. [\[FN390\]](#) Still, he stands as an inspiration for criminal defense lawyers who passionately and skillfully champion the cause of social outcasts and pariahs, [\[FN391\]](#) regard their work as part of a broader struggle for social and racial justice, [\[FN392\]](#) see themselves as the final protectors of the Bill of Rights, [\[FN393\]](#) and seek to live rich, full lives *501 measured not by material acquisition, [\[FN394\]](#) but by the “effect on the lives of people that [they touch].” [\[FN395\]](#)

Kunstler, the son of well-educated German-Jews, was raised Jewish. [\[FN396\]](#) Although he is an example of what Jerold Auerbach would call a “secular Jewish socialist,” [\[FN397\]](#) Kunstler's work on behalf of the stranger, the oppressed, and the condemned was consistent with the values of Judaism. [\[FN398\]](#)

3. Catherine Roraback. With a combination of feistiness, irreverence, and exacting professionalism, Catherine Roraback has represented the accused in virtually every social movement of the past fifty years. [\[FN399\]](#) In the 1950s, at the height of McCarthyism, she represented *502 Communists prosecuted under the Smith Act. [\[FN400\]](#) In 1964 she went to Mississippi as part of Freedom Summer to represent activists arrested in connection with the struggle for civil rights. [\[FN401\]](#) Throughout the 1960s she represented antiwar activists prosecuted for acts of civil disobedience and

conscientious objectors prosecuted for resisting the draft. From 1969 to 1971, she represented Ericka Huggins in the Black Panther trials in New Haven. [\[FN402\]](#) In 1975 she represented feminist antiwar activist Susan Saxe who was accused of armed bank robbery and murder. [\[FN403\]](#) In the mid-1970s she represented a Native American woman prosecuted in connection with the uprising at Wounded Knee in South Dakota. [\[FN404\]](#) In 1984 she again represented antiwar activists engaged in civil disobedience. [\[FN405\]](#)

Although she would probably regard such a characterization as pretentious, [\[FN406\]](#) Catherine Roraback's practice is the embodiment of the virtue of fidelity. [\[FN407\]](#) While her work has been connected to many causes, she represents clients, not causes. [\[FN408\]](#) She is client-focused in the way she set up her law practice [\[FN409\]](#) and the way she represents clients. [\[FN410\]](#) In contrast to many other lawyers with whom she has shared a public stage, there is little ego invested in her work, only a desire to do well by her clients. [\[FN411\]](#)

4. Terence MacCarthy. Terence MacCarthy has been the Executive Director of the Federal Defender Program in Chicago since *503 1966. [\[FN412\]](#) The office MacCarthy heads was the first federal defender office in the country and is uniformly regarded as one of the finest. [\[FN413\]](#)

Unlike Darrow and Kunstler, MacCarthy became a defender somewhat reluctantly. After trying several court martial cases as an officer in the Marines, he decided to go to law school to pursue a career as a criminal defense lawyer. [\[FN414\]](#) However, the first time he saw the criminal courts in Chicago, he was repulsed. [\[FN415\]](#) After graduating from law school, he taught for a while and then took a job with the Illinois Attorney General's office. [\[FN416\]](#)

When MacCarthy was asked to run the Federal Defender Program shortly after its creation, he agreed to do so for two years. As soon as he became a defender, however, he was hooked. He said, "I found that I loved the work. My two-year commitment has lasted [29] years." [\[FN417\]](#)

A charismatic lawyer with a stage actor's love of audience, MacCarthy suggests an Irish version of renowned lawyer, judge, and lecturer Irving *504 Younger. He has taught trial advocacy to lawyers and law students in every state in the country and is known for his humor and wit. [\[FN418\]](#)

Less known are the battles MacCarthy has taken on and won on behalf of indigent criminal defendants in the courts and in the legal profession. He has consistently fought against the increasingly harsh federal sentencing laws [\[FN419\]](#) and, as an active member of the Criminal Justice Section of the American Bar Association, he is a major force behind the ABA's continued commitment to quality representation for the indigent. [\[FN420\]](#) MacCarthy, a practicing Catholic who sees a clear link between his ethnic background [\[FN421\]](#) and criminal defense, continues to love his work after more than three decades in the trenches. [\[FN422\]](#) He has been a mentor and teacher to thousands of defenders. [\[FN423\]](#)

5. David Rudovsky. David Rudovsky is a lawyer in a community-based law practice that specializes in civil rights and civil liberties work and criminal defense. [\[FN424\]](#) After graduating from New York University School of Law, Rudovsky began his legal career by participating in a two-year clinical fellowship in community law and criminal defense run by acclaimed death penalty litigator and law professor Anthony Amsterdam at the University of Pennsylvania. He then joined the Defender Association of Philadelphia, where he was a staff attorney and chief of motions. [\[FN425\]](#)

In 1983, after having established a successful law practice, Rudovsky returned to the Philadelphia public defender's office as first assistant defender because of a "conviction that those unable to pay for good representation are nonetheless entitled to it." [\[FN426\]](#) He remained there for *505 three years--recruiting and training defenders as well as representing clients--before returning to private practice.

Like Darrow and Kunstler, Rudovsky practices law because of a deep commitment to social change. [\[FN427\]](#) He connects crime to the "tremendous cleavages between the haves and the have-nots" and argues that the increasing division between rich and poor is "a matter of social policy [that is] part of the structure of our society." [\[FN428\]](#) Rudovsky believes that "the theory has been, in this country, that we can live with a permanent underclass, and we'll use prisons, and other means of force, to control them." [\[FN429\]](#)

Unlike Darrow and Kunstler, and perhaps more like MacCarthy, Rudovsky seems to be universally liked and respected. [\[FN430\]](#) In 1986, he received a MacArthur Fellowship (commonly known as a "genius award") for his work in law and civil liberties. [\[FN431\]](#) Included among Rudovsky's legal victories are "a decision by a federal judge to declare the Vietnam War unconstitutional; the acquittal of the 'Camden 28,' a group of Catholic draft resisters; the finding by a panel of judges that the Philadelphia prison system was cruel, inhumane and illegal;" [\[FN432\]](#) and *506 obtaining a new trial on behalf of an indigent Hispanic defendant in a highly publicized and controversial police shooting. [\[FN433\]](#)

A secular Jew best described as an atheist, Rudovsky acknowledges that there might be some connection between his work and his sense of Jewishness, but he believes it comes more from being the son of Jewish Communists than the son of Jews. [\[FN434\]](#)

6. Stephen Bright. Since 1982 Stephen Bright has been the Director of the Southern Center for Human Rights in Atlanta, Georgia, the preeminent death penalty resource center in the country. [\[FN435\]](#) He began his legal career at the Appalachian Research and Defense Fund in Lexington, Kentucky and the Public Defender Service for the District of Columbia. His commitment to those on death row later propelled him to help found what was then called the Southern Prisoners' Defense Committee. [\[FN436\]](#)

Working for minimal pay--many death penalty resource centers have closed because of funding [\[FN437\]](#)--Bright helps fund the Center by teaching at a number of law schools, in addition to seeking private donations and funds from

foundations and churches. [\[FN438\]](#) He is fueled by a steady sense of outrage about the administration of justice in capital cases and a belief that without the efforts of his organization and others like it, ““people could die without ever having meaningful representation.”“ [\[FN439\]](#)

Stephen Bright acknowledges that there is a connection between his faith and his devotion to the damned and the forgotten. [\[FN440\]](#) He regards *507 his work as both spiritual and political. [\[FN441\]](#) He also sees it as his calling. [\[FN442\]](#)

7. Bryan Stevenson. Upon graduating from law school in 1985, Bryan Stevenson became a staff attorney at the Southern Prisoners Defense Committee (later the Southern Center for Human Rights), joining Stephen Bright in his efforts to provide quality representation to those on death row. In 1989 he became the executive director of the Alabama Capital Representation Resource Center, now called the Equal Justice Initiative, in Montgomery, Alabama. [\[FN443\]](#) Like Bright, Stevenson donates the salary he earns teaching law and the honoraria he receives from speaking engagements to the Equal Justice Initiative. He also donated a \$230,000 award he received from the John D. and Catherine T. MacArthur Foundation (he and David Rudovsky are the only two criminal defense lawyers ever to receive “genius awards”) to the Equal Justice Initiative. [\[FN444\]](#)

Like Bright, Stevenson is moved by passion and anger. Although he acknowledged that his clients “are some of the most hated and despised people in our society,” he has devoted his life to fighting “[t]he tolerance *508 of abuse of power, racial bias and discrimination against poor people.” [\[FN445\]](#)

Stevenson came from a devout Methodist family, and his work reflects the values with which he was raised. [\[FN446\]](#) Like Bright, Stevenson regards his work on behalf of death row inmates as a calling. [\[FN447\]](#)

8. Sister Helen Prejean. Sister Helen Prejean, best known for writing the book that inspired the critically acclaimed movie, *Dead Man Walking*, [\[FN448\]](#) has devoted her life to ministering to the poor in Louisiana, both in housing projects and in prisons. [\[FN449\]](#) She became a nun as part of the reform movement in the Catholic Church in the early 1970s, “seeking to harness religious faith to social justice,” [\[FN450\]](#) and she embodies the values of another Catholic social activist who embraced the struggles of the poor, Dorothy Day. [\[FN451\]](#) For Prejean, ministering to those in prison is inextricably connected to ministering to the poor. [\[FN452\]](#)

Just as Bright noted the conjunction of politics and spirituality in his work, [\[FN453\]](#) Prejean sees herself as both a spiritual adviser and a political activist. [\[FN454\]](#) Embracing the teachings of liberation theology, [\[FN455\]](#) Prejean believes it is our responsibility to work to bring about social change, not just to pray for it. [\[FN456\]](#) Not only does she minister to the most despised--death row inmates at the Louisiana State Penitentiary at *509 Angola [\[FN457\]](#)--she has become a leading spokesperson against the death penalty. [\[FN458\]](#)

V. Towards an Ethical Framework: The Virtue of Fidelity

The Lord our God made a covenant with us at Horeb. It was not with our fathers that the Lord made this covenant, but with us, the living, every one of us who is here today.

-Deuteronomy 5:23

He that is faithful in that which is least is faithful also in much.

-Luke 16:10 (King James)

He and Morris had sat silent for a little while, with nothing left to say, and Morris had arisen to take his leave. Roger was fidgeting.

“What is it?” Morris asked.

The boy gave him one appealing look and dropped his eyes.

“Will you come when they do it to me?” he asked. And Morris, almost before thinking, said that he would. He would come and tell him the Supreme Court's decision, if it was unfavorable, and he would also come on the last day.

Morris had never witnessed an execution and had no stomach to, but he felt that he could do no less when Roger asked him. The boy had no one else to turn to in his extremity. Morris tried to imagine his loneliness, if no one came, and shuddered. He would go

-Curtis Bok [\[FN459\]](#)

Although the Jewish and Christian teachings and traditions offer a powerful motivation for undertaking the representation of the accused, they do not provide an analytical framework for maintaining a career as a criminal defense lawyer. The biblical and modern examples of advocacy on behalf of the accused and persecuted provide support and inspiration, but they do not answer the hard questions that arise in the course of representing people who do bad things.

In addition, the link between Jewish and Christian teachings and traditions may not, by itself, resolve whether one

can be both a good criminal defense lawyer and a good or moral person. This question is fundamental, for the answer determines both our professional integrity *510 and personal character. [\[FN460\]](#) It also determines how we conduct ourselves as criminal defense attorneys in difficult situations.

It is tempting to deny that any (new or different) ethical framework is necessary when one can easily find support for the zealous criminal defense paradigm in ethical rules and codes [\[FN461\]](#) and case law. [\[FN462\]](#) However, while the rules, codes, and law provide a basis for zealous criminal defense advocacy--and a defense for those accused of over-aggressiveness-- [\[FN463\]](#)they do not provide an affirmation of the zealous defender as righteous and virtuous. [\[FN464\]](#)

*511 It is also tempting to simply look to our heroes to determine what it means to be a defense attorney. Criminal defense attorneys could simply emulate the “prophets” and “saints” of the criminal justice system. Yet holding even saintly people out as role models strips them of their most appealing factor--their individuality. We display pictures of our criminal lawyer heroes not only because they are great attorneys, but because they are unique characters. Each has quirks, oddities, and abilities that make them appealing--and sometimes appalling. [\[FN465\]](#) It is this uniqueness that prevents them from serving as generic, stripped down models of good defense attorneys. [\[FN466\]](#)

The challenge then is to identify an ethical framework that provides a universal vision for defense attorneys and guides defenders through the hard moments. The framework must provide guidance [\[FN467\]](#) to a broad spectrum of defense attorneys--Jewish, Christian, Muslim, Hindu, atheist, public defender, and defender of the rich and famous--and must transcend cultural and individualistic notions of morality. This is a tall order, one that requires a new and different approach to criminal defense ethics.

A. Virtue Ethics

The question of who is a moral and ethical attorney rests with the moral actor, the attorney. [\[FN468\]](#) In contemporary moral thought, the focus is not on whether the right act occurred, but on a person's character, and whether that person strived to do the right thing. [\[FN469\]](#) The contemplation of the act is more important than the rightness or wrongness of the *512 end result. [\[FN470\]](#) Attorneys, like all people, are moral when they strive to be good, not when they blindly follow a rule.

The ethical framework we propose is “virtue ethics,” a system of ethics dating from Aristotle and Aquinas to the present. [\[FN471\]](#) Virtue ethics places the moral actor--the lawyer--at the center of the inquiry. [\[FN472\]](#) Instead of focusing on action, results, or rules, virtue ethics looks towards the development of the actor as a moral being. [\[FN473\]](#) Indeed, actions are subsequent to the exercise of the virtues; a person strives to exercise the virtues and, in doing so, commits certain acts. [\[FN474\]](#) Of course, the actions are of some importance, but the critical inquiry is the *513 actor's exercise of the virtues precedent to the act. [\[FN475\]](#) Exercise of the virtues enables us to “intend and execute other

rightly ordered acts.” [\[FN476\]](#)

People become virtuous by acquiring and developing practices--ways of ordering their life--that lead them to become moral people and to engage in moral conduct. [\[FN477\]](#) Virtues “are those characteristics of mind and will that are conducive to a good life.” [\[FN478\]](#) One is not born virtuous; virtue must be developed. [\[FN479\]](#) By exercising virtues, our lives are richer and we become more fully realized as people. [\[FN480\]](#)

Theologians and philosophers have identified numerous virtues. For example, Aristotle, one of the earliest and best known proponents of an ethics of virtue, identified a series of virtues corresponding to common life experience. [\[FN481\]](#)

In order to apply the ethics of virtue to everybody, it is essential to identify the virtues that are not dependent on cultural norms and local traditions. These universal virtues are known as the “cardinal virtues.” The identification of the cardinal (core) virtues is the search for “the possibility of naming certain minimal though universal expressions of virtue that are subsequently given content in diverse cultures.” [\[FN482\]](#) The *514 essence of the cardinal virtues is that they are the most basic, and therefore, most generalizable conceptions of the good. [\[FN483\]](#)

Thomas Aquinas identified the four cardinal virtues as prudence, justice, fortitude, and temperance. [\[FN484\]](#) Aquinas and classical theologians perceived these virtues to be the skeleton of humanity--shared virtues that exist independent of culture and geography. Each virtue governed a specific sphere of human nature and was hierarchically distinguishable. In the classical conception of the virtues, prudence was the governing virtue, the most important of all the moral virtues. [\[FN485\]](#) The virtue of prudence ordered the other virtues and applied them in particular circumstances. [\[FN486\]](#) Temperance and fortitude enabled people to govern themselves--with regard to desires, material needs, and inner struggles. [\[FN487\]](#) Justice was the only virtue that governed our relations with others. [\[FN488\]](#)

However, contemporary moral theologians have questioned the viability of the cardinal virtues of Aristotle and Aquinas. The primary objection relates to conflicts among the virtues. Aristotle and Aquinas believed that these virtues were compatible with each other, working as a unified whole such that a single person could possess them all at a given moment. [\[FN489\]](#) This “unity of the virtues” assumed that conflict *515 between the virtues was either nonexistent or, at most, incidental. [\[FN490\]](#) But numerous theologians have noted that sometimes the virtues do conflict. [\[FN491\]](#) It is easy to conceive of situations when the classical cardinal virtues may conflict. Pure application of the virtue of justice would compel defense lawyers to treat all those arrested, all those who allege to have been victims of crime, and their own clients equally. Justice alone does not distinguish among those in need, nor does it lend any moral authority to the difference many of us feel. [\[FN492\]](#)

B. Fidelity as the Governing Virtue for the Criminal Defense Lawyer

In response to the deficiencies of the classical cardinal virtues, James F. Keenan proposes alternative virtues that “encompass the basic and at times competitive claims to which a virtuous person must respond.” [\[FN493\]](#) For Keenan, virtues perfect who we are in our primary mode of being in relationships. [\[FN494\]](#) Our humanity is defined through our relationships with ourselves, those close to us, and society in general. [\[FN495\]](#) To each of these relationships, Keenan identifies a cardinal virtue.

***516** With regard to our relationships to ourselves, we are called to self-care. [\[FN496\]](#) With regard to the general community--the whole of humanity-- we are called to the virtue of justice. [\[FN497\]](#) In our relationships with specific people, we are governed by the virtue of fidelity. [\[FN498\]](#) Consistent with its Aristotelian derivation, prudence integrates the other three virtues in our lives. [\[FN499\]](#)

Unlike the classical virtues, these virtues conflict with each other. [\[FN500\]](#) The claims justice demands are different from the claims fidelity demands. [\[FN501\]](#) Whereas justice requires that we treat all others equally and impartially, [\[FN502\]](#) fidelity disposes us to treat those with whom we are in a special relationship differently and partially. [\[FN503\]](#) The justice we owe to those with whom we have a general relationship may conflict ***517** with the fidelity we owe to those with whom we have a special relationship. [\[FN504\]](#)

Criminal defense lawyers have a special relationship--a covenantal relationship [\[FN505\]](#)--with our clients. As Joseph Allegritti writes:

Everyone, even the guilty criminal--especially the guilty criminal!--needs a companion, a friend, someone to stand with him and for him. My covenant obligations call me to be faithful to my client and not abandon him, to be there for him, and to put his interests before my own. [\[FN506\]](#)

Fidelity is the governing virtue for a criminal defense practice. [\[FN507\]](#) This is because the relationship between lawyer and client is at the heart of a criminal defense practice. For many criminal defense lawyers, ***518** the connection between lawyer and client answers both the “why” question and the “how” question. We take on the heinous, unpopular, or difficult case because another person--somebody's son or daughter, somebody's brother or sister, somebody's friend is in trouble and needs help. [\[FN508\]](#) As to how we are able to shoulder this burden, we are sustained by human connection as well. Another person, someone in need with nowhere else to go, has placed his or her faith--and liberty--in our hands. [\[FN509\]](#)

The special, primary relationship between the defense attorney and the client-- governed by the virtue of fidelity--is obvious to those engaged in it. Without expressly naming the virtue of fidelity, Charles Curtis, in his classic article, *The Ethics of Advocacy*, [\[FN510\]](#) written nearly fifty years ago, lays out the very framework we propose here, even making reference to Aristotelian virtue ethics:

The person for whom you are acting very reasonably expects you to treat him better than you do other people,

which is just another way of saying that you owe him a higher standard of conduct than you owe to others. This goes back a long way. It is the pre-platonic ethics which Socrates had disposed of at the very outset of the Republic; that is that justice consists of doing good to your friends and harm to your enemies. A lawyer, therefore, insensibly finds himself treating his client better than others; and therefore others worse than his client. A lawyer, or a trustee, or anyone acting for another, has lower standards of conduct toward outsiders than he has toward his clients or his beneficiaries or his patrons against the outsiders. He is required *519 to treat outsiders as if they were barbarians and enemies. The more good faith and devotion the lawyer owes to his client, the less he owes to others when he is acting for his client. It is as if a man had only so much virtue, and the more he gives to one, the less he has available for anyone else. [\[FN511\]](#)

C. Fidelity in the Bible

The virtue of fidelity is reflected in a number of biblical stories in which a person caught between the demands of the community or government and the needs of someone special chooses to serve the latter. Two stories from The Prophets and The Writings seem especially fitting here: Jonathan and David, and Naomi and Ruth. [\[FN512\]](#)

Jonathan, the son of the powerful King Saul, was a dear friend of David. [\[FN513\]](#) David was a hero to the people of Israel because he conquered the Philistines. [\[FN514\]](#) As David's reputation for wisdom and *520 courage-- and popularity among the people--grew, Saul became jealous and declared that David was his enemy. [\[FN515\]](#)

When Saul ordered his son and all his courtiers to kill David, Jonathan refused. [\[FN516\]](#) Instead, because Jonathan and David had a "pact," [\[FN517\]](#) and Jonathan had great affection for David, [\[FN518\]](#) he warned David that his father was determined to kill him. [\[FN519\]](#) Jonathan managed to persuade his father--at least for a time--to do no harm to David. [\[FN520\]](#) Saul again tried to turn Jonathan against David--berating and humiliating him, and suggesting that while David lived Jonathan would never be king--but Jonathan would not betray his friend. [\[FN521\]](#) Jonathan had "covenanted" with David, [\[FN522\]](#) had sworn love and friendship to him, [\[FN523\]](#) and chose fidelity to his friend over his own pride and self-interest. [\[FN524\]](#)

Like a defender's fidelity to the client, Jonathan's steadfastness to David required a capacity for defiance as well as connection. As the defender must sometimes defy the wishes of family, friends, community, and those in power to undertake zealously the representation of an unpopular client, [\[FN525\]](#) so Jonathan defied his father, the king.

In order to escape starvation in the land of Judah, Naomi's husband took her and their two sons to live in Moab, where their sons found wives. When Naomi's husband and sons died, she was left in a strange land with her daughters-in-law, Orpah and Ruth. [\[FN526\]](#)

Naomi decided to return to Judah and told her daughters-in-law to return home to their mothers. [\[FN527\]](#) While Orpah did as Naomi instructed, [\[FN528\]](#) Ruth insisted on staying with Naomi. [\[FN529\]](#)

*521 Ruth's famous speech to Naomi is an ode to fidelity and selflessness: "[W]herever you go, I will go; wherever you lodge, I will lodge; your people shall be my people, and your God my God." [\[FN530\]](#) Like the criminal defense lawyer who leaves familiar comforts behind to embrace the client in need, [\[FN531\]](#) Ruth left her homeland to remain a faithful companion to Naomi. [\[FN532\]](#)

Perhaps because of the importance of brotherhood in Christianity--and perhaps because Jesus had friends as well as disciples--the Christian scriptures are replete with stories about fidelity. The best example is the story of Lazarus.

Lazarus was a dear friend of Jesus who fell seriously ill. As soon as Lazarus's sisters got word to Jesus that "he whom thou lovest is sick," [\[FN533\]](#) Jesus summoned his disciples and told them he was returning to Bethany to minister to his friend. The disciples protested, reminding Jesus that he would be in grave danger in Bethany. [\[FN534\]](#)

Out of love and fidelity, Jesus disregarded the risk to himself to attend to his friend. [\[FN535\]](#) However, when Jesus arrived, he was too late; Lazarus had died. [\[FN536\]](#) Summoning all of his healing powers, Jesus raised Lazarus from the dead. [\[FN537\]](#) This was an extraordinary act of fidelity. [\[FN538\]](#)

D. Virtue Ethics Applied: The Hard Questions

The first problem for us Christian lawyers is not: How can we serve the guilty? It is: Why don't we serve the guilty? . . . Whether the criminal law is a system of morals or not, it is a system of fear and *522 power It is not guilt which keeps us from serving the guilty. It is fear.
-Thomas Shaffer [\[FN539\]](#)

A defense lawyer, you know, is not just a prosecutor turned inside out. He tends, by practice and maybe by temperament, toward a little compassion for his felon.

-Rosellen Brown [\[FN540\]](#)

A righteous man is concerned with the cause of the wretched;

A wicked man cannot understand such concern.

-Proverbs 29:7

The virtue of fidelity provides the defense lawyer with a framework for answering the most difficult ethical questions which arise in criminal law practice. Whatever the question or dilemma, fidelity to the client is the governing principle, the lens through which all questions are examined, the bottom line. For the criminal defense lawyer, fidelity to the client is the virtue that trumps all other values and virtues. [\[FN541\]](#)

This is not to say that with a sleight of hand we offer easy resolution of every conflict--personal, professional, ideological, or ethical--a defender faces. There are some conflicts that are part of daily life for defenders. [\[FN542\]](#) There are some conflicts that are well worth struggling over. [\[FN543\]](#) For many defenders, the conflicts and dilemmas that arise in *523 practice are not just the stuff of dread and hand-wringing; sometimes they make interesting work even more interesting. [\[FN544\]](#)

1. Excessive Zeal. A chief complaint against criminal lawyers is that they are too aggressive, too zealous. [\[FN545\]](#) Critics point to the lack of civility between lawyers, the win-at-all-costs mentality, the running roughshod over witnesses, and with court procedures, rules, and the truth. Many point to the adversary system as the root of these evils. [\[FN546\]](#)

Under the framework of fidelity, the defense lawyer cannot be concerned with this criticism. It is not for the defense lawyer to maintain the integrity or civility of the legal system. [\[FN547\]](#) The defense lawyer has a client to focus on and, through that client, a cause. [\[FN548\]](#)

It is tempting to say that only those who have never been in trouble or need-- or never experienced a loved one in trouble or need--would argue that there is such a thing as excessive zeal on behalf of an alleged wrongdoer. Only those who have never stood alone, without a *524 true companion, would suggest there is such a thing as too much devotion. If lawyers truly embrace a client and wage the kind of defense that fidelity demands--the lawyers giving everything they have to defend and protect the client--it is only natural that the defense will be spirited, passionate, and aggressive. [\[FN549\]](#)

When defense attorneys act out of fidelity to clients, they must advocate with heart, soul, and zeal. Fidelity demands that defense lawyers go to the mat for their clients when needed and fight to the end. [\[FN550\]](#) The defense lawyer is absolutely devoted to the client and is unswayed by competing interests. Passion, not restraint, is the hallmark of a defense lawyer's fidelity. [\[FN551\]](#)

The defense lawyer who is guided by fidelity will do all sorts of things to protect the client from harm, including employing various strategies to produce delay, manipulating jury selection to obtain the most favorable jury, using evidentiary rules to prevent the admission at trial of information damaging to the client, rigorously cross-examining a truthful or sympathetic witness, and attempting throughout a trial to move the jury and stir its passions on the client's behalf.

These are examples of both fidelity and zealous advocacy. [\[FN552\]](#) Indeed, fidelity to the client and zealous advocacy go hand in hand, and the adversary system can be seen as the institutionalization of the virtue of fidelity. [\[FN553\]](#) Aggressive defense practices are absolutely moral in this *525 light--and a failure to defend a client with utmost zeal and vigor would be unvirtuous.

2. Truth. The criminal defense lawyer's "subversion of truth" is a favorite whipping boy for critics. [\[FN554\]](#) Those who attack the ethics of criminal defense lawyers in this regard often decry three practices: (1) rigorously cross-examining or impeaching a witness the lawyer knows to be truthful, (2) knowingly presenting perjured testimony by the defendant or defense witnesses, and (3) forcefully arguing something the lawyer knows is untrue. [\[FN555\]](#)

Monroe Freedman has consistently--and, in our mind, effectively--argued that these practices are not unethical. [\[FN556\]](#) Freedman bases his argument on the importance of lawyer-client confidentiality--the lawyer only knows the "truth" through client confidences--which safeguards individual autonomy and dignity. [\[FN557\]](#) Interestingly, Freedman also notes the roots of lawyer-client privilege and an accused's Fifth Amendment privilege against self-incrimination in Jewish law. [\[FN558\]](#)

We also regard confidentiality as an essential safeguard of the lawyer-client relationship. We regard it as especially fundamental when a criminal defendant is represented by a public defender or court-appointed counsel. Clients who are not paying for a lawyer's services and who essentially have a lawyer foisted upon them by the same entity conducting the prosecution have little basis for trust. [\[FN559\]](#) If there is to be any effective advocacy or counseling on behalf of the indigent client, confidentiality is crucial.

Confidentiality is also an essential component of the virtue of fidelity. To serve a client faithfully, one must provide a refuge for the client by steadfastly maintaining his or her confidences and secrets, regardless of *526 the circumstances. Of course, the centrality of confidentiality in ministering to another in need has roots in Judeo-Christian teachings. [\[FN560\]](#)

Because even the most devoted lawyers and scholars sometimes experience moral qualms about perpetuating untruths in the course of criminal defense advocacy, [\[FN561\]](#) it is important to be clear about the morality of this conduct under the framework of fidelity. For criminal defense lawyers, when there is a conflict, [\[FN562\]](#) the virtue of fidelity trumps even the "truth." Put another way, for defense lawyers it is more important--and more virtuous--to serve one's

client with devotion, faithfulness, and fidelity than to serve the truth.

This means that, under the framework of fidelity, it would be unethical for a defense attorney not to present a client's perjurious testimony or some other untruth, if the client insists upon it. It would be wrong for a criminal defense lawyer--especially an indigent defense lawyer--to engage in any of the conduct often recommended for an attorney in the face of a client bent on presenting perjured testimony: disclosure to the court, withdrawal from the case, refusal to present the *527 testimony, or refusal to comment on it. [\[FN563\]](#) Each of these courses of conduct would be a betrayal to the client, an act of duplicity and infidelity. The client whose lawyer engages in this sort of conduct would surely know whose side the lawyer is on when the going gets tough: not the client's.

Of course, fidelity--and good sense--should also demand that the attorney review with the client the tactical risks of presenting false testimony. This might well include a discussion of perjury as both wrong and illegal. [\[FN564\]](#)

It should be noted that, while truth is certainly an important value, it is often in conflict with other values. This is no different for lawyers than it is for anyone else. [\[FN565\]](#) A narrow focus on truth in the legal system can also be at odds with the needs of poor and disadvantaged people, [\[FN566\]](#) the struggle for social justice, [\[FN567\]](#) and other more important moral principles. [\[FN568\]](#)

*528 3. Conduct Towards Alleged Victims. Almost every defense attorney has been accused of putting the victim on trial in the course of representing a client. [\[FN569\]](#) Cross-examination is generally the villain here. [\[FN570\]](#) Although the defense attorney may be doing nothing more than testing credibility, alleged victims and their advocates [\[FN571\]](#) regard cross-examination as offensive, intrusive, demeaning, and often predicated on racist and sexist stereotypes. [\[FN572\]](#) It is bad enough, critics say, that the victim was killed, raped, or robbed, without the defense attorney putting victim or the victim's family through the ordeal again at trial.

What do defense lawyers owe complainants under the framework of fidelity? Under this framework, the criminal defense lawyer's chief concern must be to defend the client against all others. As cross-examination is the primary tool of the defender, [\[FN573\]](#) it is both the sword and the shield of fidelity to the client. Through cross-examination, devoted defense lawyers throw their bodies between the client and threatened harm. The only goal is protecting the client. Hence, the question of restraint--and the choice of specific strategies in cross-examination--is tactical, not ethical. [\[FN574\]](#)

*529 The virtue of justice provides some guidance for how defense attorneys should treat complainants; they should be treated the same as any other prosecution witness. Under the virtue of justice, a defender should cross-examine the complainant and any other witness with equal vigor. However, sometimes it is not enough to treat the complaining witness like any other witness. Sometimes it is necessary to "go after" the victim aggressively--to destroy the victim's credibility or even reputation--when the alternative is that the client will be hurt. Here again, fidelity would permit the attack on a complainant; fidelity to client would trump justice toward an alleged victim.

This is not to suggest that even the most faithful advocate can have no compassion for the victim. Sister Helen Prejean ministers to death row inmates like a devoted death penalty lawyer. She visits them in jail, appears before parole boards on their behalf, and accompanies them in their final walk toward death. In the course of her ministry to inmate Patrick Sonnier, she was confronted by the father of one of the victims, a Catholic, who demanded to know why Sister Helen was ministering to his son's killer and not him. [\[FN575\]](#) Although she did not cease her efforts on behalf of Sonnier, Sister Helen called the father and told him that her ministry for Sonnier did “not mean that [she] [does] not care about him and his family and what happened to his son.” [\[FN576\]](#)

Being a defense lawyer--or a nun engaged in prison ministry--does not mean one must forswear all compassion for victims. [\[FN577\]](#) Indeed, sometimes it is hard not to show compassion; some crimes are unspeakably cruel. [\[FN578\]](#)

***530** However, those feelings of compassion cannot threaten the fidelity owed to the client. The defense attorney is not ministering to the alleged victim but rather to the accused. If personal feelings of sympathy for the victim influence the attorney's representation of the client, the attorney is not acting with fidelity.

None of this suggests that the alleged victim should not have a lawyer of his or her own. Complainants may certainly retain counsel who will develop a special relationship of fidelity and devotion to them. [\[FN579\]](#)

4. Representing the Guilty and Violent. The most frequently asked question of defense attorneys relates to representing people who are guilty and violent-- especially murderers, rapists, and child molesters. For many attorneys, the easy answer is not terribly satisfying to themselves and their inquisitors. The right of all citizens to a lawyer, the importance of holding the state to its burden of proof, and the important principles underlying the adversarial system are all deeply rooted in our Constitution but inevitably leave everyone feeling a little empty. [\[FN580\]](#)

The American criminal justice system places great emphasis on the crime but increasingly little emphasis on the person accused or convicted of committing the crime. [\[FN581\]](#) The emphasis on the sin and not the ***531** sinner has obscured the humanity of those accused--as if they are nothing like the rest of us. [\[FN582\]](#)

The answer to how a defense lawyer can represent those whom others regard as violent criminals is at one with the virtue of fidelity: defense lawyers represent a person, not the conduct attributed to that person. The person may be deeply flawed--he or she may be a seriously damaged human being who has done terrible things to innocent, vulnerable victims--but he or she is a person. [\[FN583\]](#)

It is not for a defense lawyer to be judgmental about the conduct or character of clients, [\[FN584\]](#) and most defenders

are not. [\[FN585\]](#) There are usually plenty of others eager to offer judgment.

Thomas Shaffer suggests that an adequate moral answer to the issue of serving the guilty “involve[s] first a turning toward the guilty.” [\[FN586\]](#) For Christian lawyers, the question is not, “How can you work to get a guilty person off?” The real question is ‘Will you stand by this person, this flawed and sinful human being, and speak a word in his behalf?’“ [\[FN587\]](#) Defense attorneys are able to represent the criminally accused because they are able to turn towards the person and see the person standing next to them, not the act charged. Unfortunately, it is the act that gets all the attention, not the person. As a result, many *532 clients have no one left in the world for them. They stand abandoned, waiting to be condemned.

Whether out of institutional role or a desire to be near a person who stands alone, the defense attorney is often the only companion the defendant has. [\[FN588\]](#) When a defense lawyer stands next to a client, he or she engages in more than advocacy on the client's behalf--the defense lawyer engages in a kind of ministry to the client. [\[FN589\]](#)

Being a defense attorney is more than cross-examining a witness, arguing before a judge or jury, or winning and losing. It is about being there when there is nothing left to do and the full power of the system is about to come down on a client and family, friends, and community are nowhere to be found. The virtuous defense attorney is the companion to even the worst wrongdoer. Compared to other acts of devotion, this is a simple act of grace. [\[FN590\]](#)

5. Sustaining a Career as an Indigent Criminal Defense Lawyer. Representing indigent criminal defendants can be challenging, exhilarating, and gratifying, as well as tedious, frustrating, and draining--and sometimes all of these in a single day. A career in indigent criminal defense can be hard to sustain. [\[FN591\]](#) For a variety of reasons, defense attorneys, particularly public defenders, get burned out. [\[FN592\]](#)

Public defenders burn out for many reasons. The offices in which public defenders work can be dreary, [\[FN593\]](#) resources for defenders can be *533 woefully inadequate, [\[FN594\]](#) and public defenders are paid substantially less than many of their law school classmates. [\[FN595\]](#) Some public defenders get tired of the constant pressure to plea bargain cases, [\[FN596\]](#) and some get tired of difficult and demanding clients. [\[FN597\]](#) Others get “sick of representing so many bad people.” [\[FN598\]](#)

We believe that connection with one's client is the key to sustaining a career as a public defender, [\[FN599\]](#) just as connection with others is the key to a full and rich life in general. [\[FN600\]](#) Good advocacy and true *534 companionship mean standing beside another in need, sharing perspectives and experiences, bridging difference, and finding connection. [\[FN601\]](#)

VI. Conclusion

I want first of all to put advocacy in its proper setting. It is a special case of vicarious conduct. A lawyer devotes his life and career to acting for other people. So too does the priest The priest handles other people's spiritual aspirations. A lawyer handles other people's troubles.

-Charles Curtis [\[FN602\]](#)

It will be an enormous social 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 his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.

-Anthony Lewis [\[FN603\]](#)

For the needy shall not always be forgotten, nor the hope of the poor perish forever.

-Psalms 9:18

We cannot help but note that there are similarities between those who devote their lives to religious work and those who devote their lives to the indigent accused. Rabbis, priests, nuns, ministers, and defenders are generally not in it for the money. They work long, often irregular hours for modest pay. Although this was not always the case for aspiring clergy, these days the decision to enter the religious life, like the decision to become a career public defender, often produces alarm. Parents, family, and friends wonder why, with a myriad of professional choices available to those with ability and drive, someone they know would make such a peculiar choice. Of course, there is also the hovering question of martyrdom.

On the bright side, for both clergy and defenders, the work is challenging, fulfilling, and sometimes even joyful. The joy comes from *535 service to those in need and the comradery of those similarly engaged. [\[FN604\]](#) The joy comes from following one's calling. [\[FN605\]](#)

A calling is not dependent on the profession one chooses. Any profession can be a calling if it is done with the desire--or the need--to serve others. A profession is a calling if it "exists to serve others . . . [and the] very reason for being is tied up with the satisfaction of basic human needs" [\[FN606\]](#) People who are called to enter the religious life and those who are called to defend the criminally accused work with people who have the most basic human needs. Those who seek religious counsel have spiritual needs and, sometimes, material and legal needs as well. Those who seek criminal defense counsel have legal and material needs, and sometimes spiritual needs as well.

Criminal defense is a noble calling, certainly as noble as any other call to service. [\[FN607\]](#) When we befriend the poor and oppressed, counsel the forgotten and despised, visit the incarcerated and infirm, [\[FN608\]](#) recognize the humanity in the wrongdoer, and seek vindication or forgiveness, we do what the great prophets and saints did before us. Surely, if there is such a thing, public defenders do “God’s work.” And for the honor and challenge of doing this work--of being advocate, counsel, and companion to the criminally accused--we feel humble and proud and grateful.

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[\[FN1\]](#). Robert Coles, *The Call of Service* xxiii (1993).

[\[FN2\]](#). *Attorney for the Damned* 513, 530 (Arthur Weinberg ed., 1957) [hereinafter *Attorney for the Damned*].

[\[FN3\]](#). There are a growing number of commentators across the ideological spectrum that call for greater individual accountability for wrongdoers and ridicule as an “excuse” any suggestion of social causes. For a small sample, see Sharon Lamb, *The Trouble with Blame: Victims, Perpetrators, and Responsibility* (1996); Alan M. Dershowitz, *The Abuse Excuse* (1994); and James Q. Wilson, *Thinking About Crime* (1983).

[\[FN4\]](#). Lois G. Forer, *A Rage to Punish* (1994).

[\[FN5\]](#). See Fox Butterfield, *Crime Keeps on Falling; but Prisons Keep on Filling*, *N.Y. Times*, Sept. 28, 1997, at D1;

Fox Butterfield, 'Defying Gravity,' Inmate Population Climbs, N.Y. Times, Jan. 19, 1998, at A10. These are boom times for the prison industry, in which employment has increased thirty percent. Morning Edition (National Public Radio broadcast, May 27, 1997).

[FN6]. For example, incarceration is increasingly proposed to address juvenile delinquency, illegal immigration, and drug use. See, e.g., Jerry Gray, House Passes Bill to Combat Juvenile Crime, N.Y. Times, May 9, 1997, at 1; Celia Dugger, Dozens of Chinese from 1993 Voyage Still in Jail, N.Y. Times, Feb. 3, 1997, at 1; Rick Murphy, Prosecutors Shun Drug Treatment Center, N.Y. Times, Apr. 6, 1997, §13 (Long Island Weekly), at 4. There may be constitutional limits to some of these practices. See, e.g., Fox Butterfield, Indiana Court Bars Mixing of Young and Adult Inmates, N.Y. Times, May 15, 1997, at A20.

[FN7]. Chris Reidy, It costs to lock 'em up: But jailing may not pay, Boston Globe, June 27, 1993, at 67 (quoting Elliot Currie). Prison is increasingly becoming a social service agency of last resort as well. David C. Anderson, Aging Behind Bars, N.Y. Times Mag., July 13, 1997, §6, at 28.

[FN8]. See, e.g., Sam Howe Verhovek, As Texas Executions Mount, They Grow Routine, N.Y. Times, May 25, 1997, §1, at 1. As of 1997, all but twelve states--Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin--permit the death penalty. *Id.*

[FN9]. See, e.g., Tina Rosenberg, The Deadliest D.A., N.Y. Times Mag., July 16, 1995, §6, at 22; Kevin Sack, Jury Holds a Drunken Driver's Life in the Balance, N.Y. Times, May 6, 1997, at A1.

[FN10]. Compare Rosenberg, *supra* note 9, at 24 (noting that before New York enacted the death penalty in March 1995, Manhattan District Attorney Robert Morgenthau opposed it, but now will “exercise [his] discretion wisely.” “), with Robert M. Morgenthau, What Prosecutors Won't Tell You, N.Y. Times, Feb. 7, 1995, at A25 (Morgenthau asserting that “[t]he death penalty actually hinders the fight against crime”), and James Traub, The D.A.'s Dilemma, New Yorker, July 28, 1997, at 26 (Morgenthau noting that Philadelphia, a city with a comparable population to New York County--and a D.A. who seeks the death penalty for every eligible case--had more than twice the number of homicides than New York in 1996). But see Morgenthau, *supra*. (Morgenthau indicating that he would decide whether to seek the death penalty for two men accused in the brutal slaying of Jonathan Levin, a beloved Bronx high school teacher, “on the merits”).

[FN11]. See, e.g., Arlo Wagner, Sonner named to judgeship: Will vacate prosecutor post for second-highest court, Wash. Times, Nov. 1, 1996, at C7.

[FN12]. See generally [Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 760 \(1995\)](#) (examining the politics of the

death penalty and finding that “[d]ecisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections”). Among politicians, the most steadfast, high profile death penalty opponent, former New York Governor Mario Cuomo, has been replaced as governor by an ardent supporter, George Pataki. See David Nyhan, *The cost of death penalty--it's a killer*, *Boston Globe*, Mar. 10, 1995, at 23. Even Washington, D.C. Mayor Marion Barry, a long-time opponent, recently jumped on the death penalty bandwagon. Vanessa Williams & Cheryl W. Thompson, *Outcry, Suspicions Greet Barry Death Penalty Plan*, *Wash. Post*, Apr. 22, 1997, at B1. As to judges, there are fewer and fewer who could fairly be called “liberal.” Neil A. Lewis, *Impeach Those Liberal Judges! Where are They?*, *N.Y. Times*, May 18, 1997, at E5.

[FN13]. Lawrence M. Friedman, *Crime and Punishment in American History* 31-50, 77-82 (1993) [hereinafter Friedman, *Crime and Punishment*].

[FN14]. Michel Foucault, *Discipline and Punish* (1975).

[FN15]. James S. Kunen, “How Can You Defend Those People?”: *The Making of a Criminal Lawyer* (1983).

[FN16]. Lisa McIntyre, *The Public Defender: The Practice of Law in the Shadows of Repute* 142 (1987); Barbara Allen Babcock, *Defending the Guilty*, 32 *Clev. St. L. Rev.* 175, 175 (1983-84).

[FN17]. Maura Dolan, *Defense Seldom Rests on Issues of Ethics and Duty*, *L.A. Times*, June 1, 1994, at A1. But see William Glaberson, *Prosecutors in Megan Case Credit Defense After Editorial*, *N.Y. Times*, May 30, 1997, at B4 (reporting the public support by two prosecutors of a public defender whose closing argument in a highly publicized trial was attacked in a local newspaper editorial). For a critical examination of the values taught in law school, see [Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 *Harv. L. Rev.* 1855 \(1990\)](#); Leslie G. Espinoza, *Constructing a Professional Ethic: Law School Lessons and Lesions*, 4 *Berkeley Women's L.J.* 215 (1989-90); and Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983).

[FN18]. For a portrayal of a recent college graduate in the late 1960s who wants his future to be “different,” see *The Graduate* (Embassy/Lawrence Turman, Inc. 1967).

[FN19]. Paul Hoffman, “What the Hell is Justice?” 22 (1974); Warren Berger, *New Life for a (Pre-O.J.) Legal Classic*, *N.Y. Times*, Oct. 12, 1997, §2, at 34.

[FN20]. Lord Brougham provided the classic statement of the ideal of zealous advocacy: “It is the duty of an advocate to save his client by all expedient means, to protect him at all hazards, and to the injury of all others, and of himself

among those others, if it be necessary.” 2 Trial of Queen Caroline 5 (London, Shackell & Arrowsmith 1821). The first codification of the requirement of zeal in this country was in 1908. Annotated Model Rules of Professional Conduct 41-52 (2d ed. 1992) (discussing the history of Rule 1.3 and whether it requires zealous advocacy). For examinations of zealous advocacy with an emphasis on criminal defense, see Monroe H. Freedman, *Understanding Lawyers' Ethics* 65-86 (1990) [hereinafter Freedman, *Understanding Lawyers' Ethics*]; David Luban, *Lawyers and Justice: An Ethical Study* 11-12 (1988) [hereinafter Luban, *Lawyers and Justice*]; Babcock, *supra* note 16, at 184; Charles P. Curtis, *The Ethics of Advocacy*, [4 Stan. L. Rev. 3 \(1951\)](#).

[FN21]. The attack on criminal defense advocacy by more conservative scholars is represented by what has come to be called the “truth school,” which heralds the truth-seeking process of the criminal justice system above all else. Jeffrey Toobin, *Ito and the Truth School*, *New Yorker*, Mar. 27, 1995, at 42. For examples of scholarship by law professors associated with the truth school, see Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, [93 Mich. L. Rev. 857 \(1995\)](#); Akhil Reed Amar, *Fourth Amendment First Principles*, [107 Harv. L. Rev. 757 \(1994\)](#); Harry I. Subin, *The Criminal Lawyer's “Different Mission”: Reflections on the “Right” to Present a False Case*, [1 Geo. J. Legal Ethics 125 \(1987\)](#); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, [123 U. Pa. L. Rev. 1031 \(1975\)](#). For an example of a judicial perspective consistent with the truth school, see Judge Harold J. Rothwax, *Guilty: The Collapse of Criminal Justice* 15-34 (1996). We believe that the writings of Monroe Freedman offer the dispositive response to the truth school. Freedman, *Understanding Lawyers' Ethics*, *supra* note 19, at 14-42, 109-141, 161-171; Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* 43-58 (1975); Monroe H. Freedman, *Judge Frankel's Search for Truth*, [123 U. Pa. L. Rev. 1060 \(1975\)](#); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, [64 Mich. L. Rev. 1469 \(1966\)](#). Because the critique by progressive legal scholars is more troubling to us--it comes from those we would like to consider ideological allies--we have chosen to focus on it.

[FN22]. See *supra* note 20.

[FN23]. William H. Simon, *The Ethics of Criminal Defense*, [91 Mich. L. Rev. 1703, 1704-05 \(1993\)](#); Anthony V. Alfieri, *Defending Racial Violence*, [95 Colum. L. Rev. 1301 \(1995\)](#) [hereinafter Alfieri, *Defending Racial Violence*]; Luban, *Lawyers and Justice*, *supra* note 20, at 150-53. Although David Luban criticizes some defense practices, he presents a forceful refutation to William Simon's argument for limits on defense advocacy. David Luban, *Are Criminal Defenders Different?*, [91 Mich. L. Rev. 1729 \(1993\)](#) [hereinafter Luban, *Are Criminal Defenders Different?*]. For a response to Luban's argument that defense lawyers should refrain from cross-examining a rape complainant about her sex life when the defense is consent, see 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, 42-45 \(1993\)](#).

[FN24]. See, e.g., Michael E. Tigar, *Defending*, [74 Tex. L. Rev. 101, 101 \(1995\)](#). It is interesting to note that, while at first, Michael Tigar firmly rejects the idea that he has any explaining to do in undertaking the defense of Terry Nichols, he nonetheless explains that he was “appointed by the court.” *Id.*; cf. Alan M. Dershowitz, *The Best Defense* 410 (1982) (“I have been accused several times of overzealousness. I confess my guilt. In a world full of underzealous, lazy, and

incompetent defense lawyers, I am proud to be regarded as overzealous on behalf of my clients.”).

[FN25]. There has been something of a backlash against the adversary system--with emphasis on the role of criminal defense lawyers--since O.J. Simpson was acquitted of murdering Nicole Brown Simpson and Ronald Goldman. The vitriol spewed about the system, the jury, the defense lawyers, and the defendant following the verdict was not limited to radio talk shows. See, e.g., Rothwax, *supra* note 21, at 222-38; Jeffrey Toobin, *The Run of his Life: The People Versus O.J. Simpson* 144-57, 208-26, 419-21, 423-24 (1996). Whatever else might be said about Simpson's defense team, they did not introduce the issue of race into the O.J. Simpson case. As many commentators have observed, the prosecution of a prominent African-American man for killing two white people in a city famous for racist police practices was saturated with race long before Simpson's lawyers settled on a defense theory. See, e.g., Ellen Willis, *The Wrath of Clark*, *N.Y. Times Book Rev.*, June 15, 1997, §7, at 15; Frank Rich, *The Circus Folds*, *N.Y. Times*, Sept. 30, 1995, at 19; Randall Kennedy, *Race, Crime, and the Law* 286-92 (1997).

[FN26]. Simon and Alfieri are both former poverty lawyers who became academics. They have written extensively on poverty law, lawyering, and legal ethics. Neither has ever been a criminal defense lawyer.

[FN27]. Simon, *supra* note 23.

[FN28]. There is a longstanding obsession in legal ethics with the question of defendant perjury, although there is never any accompanying evidence to suggest how often it occurs and to what end. See, e.g., Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 351-88 (2d ed. 1994); Andrew L. Kaufman, *Problems in Professional Responsibility* 151-207 (3d ed. 1989). It is rare to find any serious discussion of police perjury, although it is widespread. See, e.g., Simon, *supra* note 23, at 1711 n.15. But see Monroe H. Freedman, *Lawyers' Ethics in an Adversary System*, 91-93 (1975) (discussing examples of police perjury). For discussions of the routine nature of police perjury, see [Morgan Cloud, *The Dirty Little Secret*, 43 *Emory L.J.* 1311 \(1994\)](#); Stanley Z. Fisher, “[Just the Facts, Ma'am”: Lying and the Omission of Exculpatory Evidence in Police Reports](#), 28 *New Eng. L. Rev.* 1 (1993); and Myron W. Orfield, Jr., [Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts](#), 63 *U. Colo. L. Rev.* 75, 83 (1992). For a report by a major commission on a range of police misconduct, including perjury, see Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, City of New York, Commission Report 36 (1994).

[FN29]. Simon, *supra* note 23, at 1704-22. Simon concedes that the tactics to which he refers are not prohibited, *id.* at 1704, and does not even attempt to demonstrate a specific harm. Moreover, his portrayal of defense advocacy suggests that defense lawyers are somehow on their own in court, unimpeded by other actors and running the show without opposition. All prosecutors worth their salt anticipate and counter delay, untruthful testimony and victim/witness bashing. Kunen, *supra* note 15, at 256 (“I do think it's better to be overzealous than underzealous. Overzealousness can be corrected by the prosecution Underzealousness cannot be corrected by anyone.”).

[FN30]. For arguments that support a distinction between civil and criminal lawyers, see [United States v. Wade, 388 U.S. 218, 256 \(1967\)](#) (White, J., concurring in part and dissenting in part); Luban, Are Criminal Defenders Different?, supra note 23; Deborah L. Rhode, [Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 605 \(1985\)](#); and Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 12 (1975).

[FN31]. Simon, supra note 23, at 1707-08; cf. Luban, Are Criminal Defenders Different?, supra note 23, at 1735-36 (“‘The state’ is not just a group of harassed, overworked bureaucrats in the D.A.’s office. It is a group of harassed, overworked bureaucrats, backed by the police and able in many cases to immobilize their adversaries in cold concrete.”).

[FN32]. Tom Wolfe, The Bonfire of the Vanities 29-48 (1987).

[FN33]. Toobin, supra note 25, at 334.

[FN34]. Luban, Are Criminal Defenders Different?, supra note 23, 1730-44, 1755, 1762-66. In many jurisdictions, prosecutors are paid significantly more than public defenders. See, e.g., Maria Glod, Attorneys highlight pros, cons of public and private practice, Montgomery J., May 8, 1997, at A1. In Washington, D.C., Assistant United States Attorneys, who prosecute criminal matters in the Superior Court, make up to \$40,000 more than opposing counsel from the Public Defender Service. Telephone Interview with JoAnn Wallace, Director, Public Defender Service for the District of Columbia (Aug. 7, 1997).

[FN35]. Alfieri, Defending Racial Violence, supra note 23, at 1321 n.149.

[FN36]. Id. at 1305. Alfieri defines “narratives” as the “rhetorical structure of criminal defense stories.” Id. at 1304. When he refers to “dominant narratives” about race, he means defense theories--or stories--that comport with prevailing racial stereotypes. His essay “challenges criminal defense lawyers' freedom in story-telling,” id. at 1306, by placing “race conscious” ethical limits on the theories defense lawyers may advance, id. at 1331-42. See also [Anthony V. Alfieri, Lynching Ethics: Toward a Theory of Racialized Defenses, 95 Mich. L. Rev. 1063 \(1997\)](#). For an analysis of criminal defense storytelling and rhetoric as advocacy, not evidence of race consciousness, see Anthony G. Amsterdam & Randy Hertz, An Analysis of Closing Arguments to a Jury, 37 N.Y.L. Sch. L. Rev. 55 (1992).

[FN37]. Alfieri, Defending Racial Violence, supra note 23, at 1321. For a thoughtful discussion of the use of race and ethnic bias in criminal defense advocacy from a defense perspective, see Eva S. Nilsen, The [Criminal Defense Lawyer's Reliance on Bias and Prejudice, 8 Geo. J. Legal Ethics 1 \(1994\)](#).

[FN38]. Alfieri, Defending Racial Violence, supra note 23, at 1321.

[\[FN39\]](#). *Id.* at 1306, 1326-31.

[\[FN40\]](#). Patricia J. Falk, [Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage](#), 74 N.C. L. Rev. 731 (1996).

[\[FN41\]](#). Alfieri, *Defending Racial Violence*, *supra* note 23, at 1301-03.

[\[FN42\]](#). *Id.* at 1301-06. There is an assumption throughout Alfieri's article that defense counsel selected the defense of group contagion without consulting the clients. For the worst example of this sort of defense lawyering, see Ernest J. Gaines, *A Lesson Before Dying* (1993). But, what if, in the Reginald Denny case, defendants' version of the event for which they were prosecuted comported with group contagion, defendants considered and rejected other more responsible, race conscious defenses, see Alfieri, *Defending Racial Violence*, *supra* note 23, at 1339, defendants were aware of the stereotypical nature of the group contagion defense and still urged their lawyers to pursue it, and they were ultimately acquitted? What if the group contagion theory enables two poor African-American males to avoid incarceration at a time when one in three is locked up? See *supra* note 4. Is racial justice only about "intersubjective, communal sensibility," Alfieri, *Defending Racial Violence*, *supra* note 23, at 1342, or might it mean one less black man behind bars?

There is also something odd about Alfieri's analysis of the defense theory of group contagion. It is hyperbolic to characterize it as "portray[ing] young black males as deviant objects controlled by bestial instincts or pathological impulses." *Id.* at 1304. Why not characterize it as portraying otherwise good, law-abiding citizens who were suddenly swept up in a frenzy of emotion under extraordinary circumstances? Why not say, in other words, that this was a "situational offense"--a term which often appears in presentence reports and can be used to mitigate a defendant's culpability-- contrary to the character of the accused. Moreover, holding the defense responsible for "the image of the black male as a social deviant," *id.* at 1305, hardly seems fair in view of the balance of power in the criminal justice process, Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197 (1988), and the history of race and crime in this country. See generally Kennedy, *supra* note 25; Friedman, *Crime and Punishment*, *supra* note 13; Dan T. Carter, *Scottsboro: A Tragedy of the American South* (1969).

[\[FN43\]](#). Alfieri, *Defending Racial Violence*, *supra* note 23, at 1304.

[\[FN44\]](#). *Id.* at 1305.

[\[FN45\]](#). Cf. Curtis, *supra* note 20, at 5-6 ("A lawyer ... has lower standards of conduct toward outsiders than he has toward his clients He is required to treat outsiders as if they were barbarians and enemies. The more good faith and devotion the lawyer owes to his client, the less he owes to others when he is acting for his client. It is as if a man had only so much virtue, and the more he gives to one, the less he has available for anyone else."). For a critical response to

Alfieri's thesis, see [Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 Colum. L. Rev. 788 \(1996\)](#).

[FN46]. Alfieri, *Defending Racial Violence*, supra note 23, at 1339.

[FN47]. *Id.* at 1342.

[FN48]. Freedman, *Understanding Lawyers' Ethics*, supra note 20, at 13-42; see also Tigar, supra note 24, at 101; Babcock, supra note 16, at 177-78; Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1976). This justification has been called the “adversary excuse.” David Luban, *The Adversary System Excuse*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 83 (David Luban ed., 1984).

[FN49]. But see [Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 *Wm. & Mary L. Rev.* 5, 5 \(1996\)](#) (criticizing the adversary system and calling for a re-examination of “the practice based on the premises of that system”). Cf. [Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 *Wm. & Mary L. Rev.* 63, 63-69 \(1996\)](#) (characterizing Menkel-Meadow's article as an example of effective “adversarial advocacy” and arguing that alternatives to the adversary system tend to shunt the poor and disadvantaged aside); Laura Nader, [Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology](#), 9 *Ohio St. J. on Disp. Resol.* 1 (1993) (critically examining the emphasis on “harmony” values over “justice” values in alternative dispute resolution). See also [Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 *Vand. L. Rev.* 697 \(1988\)](#) (critically examining the adversary ethic from a historical and social ethics perspective) [hereinafter Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*].

[FN50]. While we use the term “calling” in a nonecumenical sense, we do not shy away from its religious connotation. See Sara Rimer, *Harvard Teaches Social Change*, *N.Y. Times*, May 27, 1997, at A12. Compare Coles, supra note 1 (examining the individual urge to engage in idealistic causes and community activism), with Joseph G. Allegretti, *The Lawyer's Calling: Christian Faith and Legal Practice* (1996) (examining the connection between Christian faith and the practice of law), and Timothy W. Floyd, [The Practice of Law as a Vocation on Calling](#), 66 *Fordham L. Rev.* 1405, 1408 (1998) (noting that Christian faith “emphasizes the call of God in everyday life” and Judaism teaches that “all work should be a calling”).

[FN51]. See generally Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (1987).

[FN52]. Abbe Smith, *Carrying on in Criminal Court: When Criminal Defense is Not So Sexy and Other Grievances*, 1 *Clin. L. Rev.* 723, 729-31 (1995).

[FN53]. Attorney for the Damned, *supra* note 2, at 8.

[FN54]. Anthony Lewis, *Gideon's Trumpet* 5-6 (Vintage Books 1989) (1964).

[FN55]. We have decided to use three different translations of the bible throughout this article. Except where otherwise indicated, we use the Jewish Publication Society's translation of the Torah, Prophets, and Writings, which when printed together are commonly referred to as the Tanakh. For the New Testament we use both the New Revised Standard Version (1989) and the King James Version. We are torn between these two translations of the New Testament. On the one hand, we are most familiar with the King James Version and appreciate its lyricism; on the other, the New Revised Standard Version offers a level of clarity and plain-spokenness that is consistent with our style of writing. We have accommodated our ambivalence by alternating between the two. Occasionally, we draw from each of the translations to create a composite.

A recent cartoon in *The New Yorker* reflects our struggle over biblical translation, but it goes a step further than the course we have chosen. In the cartoon, a minister is addressing his congregation from the pulpit: "And the Lord spoke to the children of Israel and said, 'Thou must forswear these practices which are a blasphemy and an abomination in my sight, you know what I'm saying?'" *New Yorker*, June 23 & 30, 1997, at 110.

[FN56]. Jeffrey H. Reiman, ... and the Poor Get Prison 48-49 (1996). Juveniles accused of delinquency are also predominantly poor. *Id.* at 96-98.

[FN57]. *Id.* at 104-07. It has long been acknowledged that prison is the final repository for the poor and disadvantaged. *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice* 44 (1967); Clarence Darrow, *The Story of My Life* 338 (1932) [hereinafter *Darrow, The Story of My Life*].

[FN58]. Steven K. Smith & Carol J. DeFrances, *Indigent Defense, Bureau of Justice Statistics: Selected Findings* (U.S. Dep't of Justice, Wash. D.C.), Feb. 1996, at 1. According to the Bureau of Justice Statistics, in 1992, 81% of felony defendants in the nation's 75 largest counties had a public defender or court-appointed counsel at trial. *Id.* at 4 tbl. 8. In 1991, 76% of state prison inmates and 54% of federal prison inmates had court-appointed lawyers representing them for the offenses for which they were incarcerated. *Id.* at 3 tbl. 3. In 1989, 78% of inmates in local jails had court-appointed counsel. *Id.* at 3 tbl. 5. The percentage of non-white inmates with court-appointed counsel is even higher. *Id.* at 3 tbl. 3.

[FN59]. National Association of Criminal Defense Lawyers, *NACDL Legislative Policies: Problems of Inadequate Funding* (visited 1997) <<http://www.criminaljustice.org>>; <<http://www.nacdl.org>>. Smith & DeFrances, *supra* note 58, at 1.

[FN60]. Reiman, *supra* note 56, at 48-49; The Report of the National Criminal Justice Commission, *The Real War on Crime* 99-129 (Steven R. Donziger ed., 1996) [hereinafter *The Real War on Crime*]; Kennedy, *supra* note 25, at 15. Lawyers who specialize in criminal appeals and other postconviction matters may have an even higher incidence of nonwhite clients. U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 548 (Kathleen Maguire & Ann L. Pastore eds., 1996) (showing that, in 1994, African-Americans were incarcerated at almost eight times the rate at which whites were incarcerated).

[FN61]. Reiman, *supra* note 56, at 94; see also Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (1992).

[FN62]. *The Real War on Crime*, *supra* note 60, at 27.

[FN63]. *Id.* at 29.

[FN64]. Elliot Currie, *Reckoning: Drugs, The Cities, and the American Future* 9-35 (1993); Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later 2* (The Sentencing Project, 1995); see also Reiman, *supra* note 56, at 96-104 (examining race and class bias in arrest and charging). The vast majority of those arrested for drug-related offenses-- especially nonwhite arrestees--have court-appointed counsel. Smith & DeFrances, *supra* note 58, at 4.

[FN65]. Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem 3* (The Sentencing Project, Feb. 1990).

[FN66]. *The Real War on Crime*, *supra* note 60, at 106; see also Mauer & Huling, *supra* note 64.

[FN67]. Babcock, *supra* note 16, at 177-82; McIntyre, *supra* note 16, at 83-87.

[FN68]. *Attorney for the Damned*, *supra* note 2, at 7 (quoting Clarence Darrow's address to prisoners at the Cook County Jail: "If we would open the doors and let you out, and leave the laws as they are today, some of you would be back tomorrow. This is about as good a place as you can get anyway."); cf. Phyllis Goldfarb, *A Clinic Runs Through It*, 1 *Clin. L. Rev.* 65, 71 (1994) (describing the needs of a client facing execution: "With his life in legal jeopardy, his immediate relationships took on paramount importance.").

[FN69]. *The Real War on Crime*, *supra* note 60, at 189; see also McIntyre, *supra* note 16, at 89-94. As McIntyre

documents, the State Attorney's Office in Illinois receives more than twice the appropriation of the Cook County Public Defender's Office, *id.* at 92 tbl.3, so that “the availability of resources that the lawyers might use is much more limited for attorneys in the public defender's office,” *id.* at 93.

[FN70]. See, e.g., Report of the New York State Judicial Commission on Minorities, 19 Fordham Urb. L.J. 181, 201 (1992).

[FN71]. *Id.*; see also [Gerald Caplan, Criminal Justice in the Lower Courts: A Study in Continuity](#), 89 Mich. L. Rev. 1694, 1704 (1991).

[FN72]. See generally William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (1996); Jonathan Kozol, *Amazing Grace: The Lives of Children and the Conscience of a Nation* (1995); Alex Kotlowitz, *There are No Children Here: The Story of Two Boys Growing Up in the Other America* (1991); Nicholas Lemann, *The Promised Land: The Great Black Migration and How it Changed America* (1991).

[FN73]. Kennedy, *supra* note 25, at 12; see also William Stringfellow, *My People is the Enemy* 6 (1964).

[FN74]. Allegretti, *supra* note 50, at 75; see also *infra* notes 178-96 and accompanying text.

[FN75]. Luban, *Are Criminal Defenders Different?*, *supra* note 23, at 1744; see also McIntyre, *supra* note 16, at 154 (“In large part, being [a] competent [public defender] is being able to convince a client that it is not in his or her best interests to insist on a trial that cannot be won.”).

[FN76]. Thomas L. Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* 78 (1981); see also Allegretti, *supra* note 50, at 74-77; cf. [Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders](#), 106 Harv. L. Rev. 1239, 1272 (1993) (characterizing the relationship between lawyer and indigent criminal defendant as “a true friendship”).

[FN77]. See, e.g., [Jane M. Spinak, Reflections on a Case \(of Motherhood\)](#), 95 Colum. L. Rev. 1990 (1995); Milner S. Ball, *The Word and the Law* 60-72 (1993).

[FN78]. See, e.g., Joe Klein, *In God They Trust*, *New Yorker*, June 16, 1997, at 40.

[FN79]. See, e.g., Ogletree, *supra* note 76, at 1272.

[FN80]. Elliot Currie, *Confronting Crime: An American Challenge* 144-79 (1985).

[FN81]. See, e.g., [Monroe H. Freedman, Legal Ethics from a Jewish Perspective, 27 Tex. Tech L. Rev. 1131, 1134 \(1996\)](#) [hereinafter Freedman, *Legal Ethics from a Jewish Perspective*]; Alan Dershowitz, *The Vanishing Jewish Lawyer*, *Cal. Law.*, Sept. 1997, at 36; Paul Johnson, *A History of the Jews* 101 (1987).

We were also tempted to draw on the story of David and Goliath, 1 Samuel 17:12-58, in which a young boy armed only with a slingshot and stone slew a giant Philistine warrior armed with a “sword and spear and javelin,” *id.* at 17:45. Indigent criminal defense lawyers often feel as if they are facing an enormously powerful, well-armed government without a slingshot--maybe a couple of legal pads and some law, at most. Instead, we will later draw on David's friendship with Jonathan in arguing that fidelity to the client is a central ethical mandate--and virtue--in criminal defense. See *infra* notes 513-25 and accompanying text.

[FN82]. Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 81, at 1134; see also Dershowitz, *supra* note 81.

[FN83]. Genesis 18:20.

[FN84]. Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 81, at 1134.

[FN85]. Genesis 18:23.

[FN86]. *Id.* at 18:25.

[FN87]. *Id.* at 18:26-33. It is interesting to note that Abraham's advocacy on behalf of Sodom and Gomorrah was built on a plea for compassion for the innocent (the “righteous”), whom God would punish along with the wrongdoers, and not on compassion for the guilty. This is a wise tactic to employ before God or any tough sentencer. An argument for leniency is sometimes more effective when it focuses not on the client, but on those who have done nothing wrong and will suffer most if a harsh sentence is meted out-- a client's family, for example. See, e.g., *Attorney for the Damned*, *supra* note 2, at 24, 35-58.

[FN88]. Genesis 18:30; *id.* at 18:32.

[\[FN89\]](#). *Id.* at 18:25. For a comment on the significance of Abraham's intervention on behalf of Sodom and Gomorrah, see *The Torah: A Modern Commentary* (W. Gunther Plaut ed., 1981).

[\[FN90\]](#). Not everyone thinks corporate practice is “high level.” Darrow, *The Story of my Life*, *supra* note 57, at 426.

[\[FN91\]](#). Exodus 6:9.

[\[FN92\]](#). *Id.*

[\[FN93\]](#). *Id.* at 8:16.

[\[FN94\]](#). *The Torah: A Modern Commentary*, *supra* note 99, at 644-56.

[\[FN95\]](#). Exodus 32:10.

[\[FN96\]](#). *Id.* at 32:11-12.

[\[FN97\]](#). *Id.* at 32:10.

[\[FN98\]](#). Moses's steadfastness can be likened to defenders who resist the constant institutional pressure to please those in power, to be a team player, and not to advocate “too zealously” for clients. McIntyre, *supra* note 16, at 45-73; Michael McConville & Chester Mirsky, *Criminal Defense of the Poor in New York City*, *N.Y.U. Rev. L. & Soc. Change* 581, 582-83 (1986-1987).

[\[FN99\]](#). Exodus 32:32. For another passage that portrays Moses as both counsel to and advocate for the people, see *id.* at 18:19-20.

[\[FN100\]](#). Esther 4:11.

[\[FN101\]](#). See, e.g., [Herrera v. Collins, 506 U.S. 390 \(1993\)](#) (holding that even a strong claim of innocence is not grounds for federal review).

[\[FN102\]](#). See, e.g., Fredric Dannen, *Defending the Mafia*, *New Yorker*, Feb. 21, 1994, at 64. For a favorite example in fiction, see Harper Lee, *To Kill a Mockingbird* 83 (Harper & Row 1960).

[\[FN103\]](#). See IX *The Midrash: Esther and Song of Songs* (Maurice Simon trans., 1961).

[\[FN104\]](#). Esther 1:1.

[\[FN105\]](#). *Id.* at 1:16-20. The story of Esther is offered as a model of advocacy on behalf of the damned, not as a model of enlightened thinking about sex roles. We are fearful of even commenting on sexism in the Bible; once we start, we may never return to the task at hand. We will leave feminist analysis of scripture to those with greater expertise. See, e.g., *Feminist Perspectives on Biblical Scholarship* (Adela Yarbro Collins ed., 1985); Katheryn Pfisterer Darr, *Far More Precious Than Jewels: Perspectives on Biblical Women* (1991); *Feminist Interpretation of the Bible* (Letty M. Russell ed., 1985); Elisabeth Schussler Fiorenza, *In Memory of Her: A Feminist Theological Reconstruction of Christian Origins* (1983).

[\[FN106\]](#). Esther 2:3.

[\[FN107\]](#). *Id.* at 2:17.

[\[FN108\]](#). *Id.* at 2:17-18.

[\[FN109\]](#). *Id.* at 2:20. No doubt, Mordechai believed that King Ahasuerus would not even consider Esther for his bride if he knew she was Jewish. But once the king got to know and love Esther, her Jewishness would simply be a part of her. Cf. Robert St. John, *Jews, Justice and Judaism* 227 (1969) (Woodrow Wilson was once asked by a less than broad-minded associate, “Isn’t it a pity that a man as great as [Louis] Brandeis should be a Jew?” “Wilson reportedly replied, “But he would not be Mr. Brandeis if he were not a Jew.””).

[\[FN110\]](#). Esther 3:1-6.

[\[FN111\]](#). *Id.* at 3:13.

[\[FN112\]](#). See Leviticus 18:3-4.

[\[FN113\]](#). Esther 4:3.

[\[FN114\]](#). Id. at 4:3-4.

[\[FN115\]](#). Id. at 4:7-8.

[\[FN116\]](#). Id. at 4:11.

[\[FN117\]](#). Id. at 4:15-16. Some will rightly note that, in this story, Esther intervened on behalf of the innocent (the Jews), while defenders mostly intervene on behalf of the guilty. Still, for us, the story is about a lone defender risking her own status and security in order to challenge a more powerful authority on behalf of others. Additionally, we do not believe that it is always easy to separate the righteous from the wrongdoer (in life and criminal court). One of the lessons of criminal defense work is that good people sometimes do bad things.

[\[FN118\]](#). Id. at 7:2-6. Unfortunately, the story of Esther does not end on this high, heroic note. Although Haman “plead[ed] with Queen Esther for his life [[when] he saw that the king had resolved to destroy him,” id. at 7:7, Esther was unmoved. Instead of showing mercy, Esther and Mordechai did nothing to stop a bloodthirsty revenge against Haman, id. at 7:10, and happily took possession of all of Haman's property, id. at 8:1-2. For a critical rendering of the story of Esther, see Ball, *supra* note 77, at 71-72.

[\[FN119\]](#). Cecil Roth, *A History of the Jews* 124-25 (1961); see also Samuel J. Levine, [Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts](#), 24 *Hastings Const. L.Q.* 441, 444-46 (1997).

[\[FN120\]](#). Roth, *supra* note 119, at 125; see also Suzanne Last Stone, In [Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory](#), 106 *Harv. L. Rev.* 813, 816 n.13 (1993).

[\[FN121\]](#). Roth, *supra* note 119, at 125; see also Jerold S. Auerbach, *Rabbis and Lawyers: The Journey from Torah to Constitution* 38-39 (1990).

[\[FN122\]](#). Roth, *supra* note 119, at 124; see also Auerbach, *supra* note 121, at 36-37.

[\[FN123\]](#). Roth, *supra* note 119, at 126.

[\[FN124\]](#). *Id.* at 127; see also *The Mishnah* xiii (Herbert Danby trans., 1933).

[\[FN125\]](#). Johnson, *supra* note 81, at 152-55; Elliot N. Dorff & Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law* 8-9, 152-160 (1988); see also Jacob Neusner, *The Mishnah: An Introduction* 37-39, 41 (1989). The Mishnah prescribes behavior on a wide range of topics--from agriculture, commerce, and law, to domestic relations and what might be called "hygiene." *The Mishnah*, *supra* note 124, at xvi.

[\[FN126\]](#). Johnson, *supra* note 81, at 153.

[\[FN127\]](#). Roth, *supra* note 119, at 125-27.

[\[FN128\]](#). *Id.* at 131.

[\[FN129\]](#). Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, in *Narrative, Violence, and the Law: The Essays of Robert Cover* 239-40 (Martha Minow et al. eds., 1992).

[\[FN130\]](#). Dershowitz, *supra* note 81, at 39.

[\[FN131\]](#). *Gemilut hasadim* also means "bestowing compassion." The more commonly known term, *rachmanos*, also means compassion. Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 81, at 113. Freedman makes the connection between *rachmanos* and criminal defense work: "I stress *rachmanut*, or compassion, for a fellow human being who is suffering, even though his suffering may be his own fault. According to Jewish tradition, compassion is one of the seven things with which God created the world." *Id.*; see also *The Fathers According to Rabbi Nathan* 153 (Judah Goldin trans., 1955).

[\[FN132\]](#). *The Mishnah*, *supra* note 124, at 446 [Aboth 1:2]; see also *Ahavath Chesed* (Leonard Oschry trans., Feldheim Publishers 2d rev. ed. 1976). The story of Joseph can be seen as a story about kindness and compassion as well as forgiveness. Even though Joseph's brothers sold him into slavery as a young boy, he saved his brothers and the Israelites from starvation when he rose to a position of power and wealth in Egypt. Genesis 42:1-50:26. Although Joseph could have reproached his brothers with anger and vengeance, Joseph responded instead with compassion:

His brothers went to him themselves, flung themselves before him, and said, "We are prepared to be your slaves." But Joseph said to them, "Have no fear! [A]lthough you intended me harm, God intended it for good, so as

to bring about ... the survival of many people. And so, fear not. I will sustain you and your children.” Thus he reassured them, speaking kindly to them.

Id. at 50:18-21.

[\[FN133\]](#). The Mishnah, supra note 124, at 10, 11 [Peah 1:1].

[\[FN134\]](#). Deuteronomy 26:12.

[\[FN135\]](#). Peah means the portion of a crop left for the benefit of the poor. The Mishnah, supra note 124, at 795.

[\[FN136\]](#). Leviticus 19:9-10.

[\[FN137\]](#). Exodus 2:22.

[\[FN138\]](#). Leviticus 19:33-34; see also Deuteronomy 26:8-9, 11.

[\[FN139\]](#). Deuteronomy 10:19; see also Proverbs 16:19 (drawn from both the Jewish Publication Society translation and the New Revised Standard Version).

[\[FN140\]](#). Deuteronomy 24:17-18, 26:12-13.

[\[FN141\]](#). Jeremiah 22:15-16; Proverbs 14:31; Psalms 35:10; cf. Dershowitz, supra note 81, at 39 (“[W]henver the downtrodden need legal representation, you will often find a Jewish lawyer”).

[\[FN142\]](#). Kozol, supra note 72.

[\[FN143\]](#). See Mauer & Huling, supra note 64, at 1 (finding that one in three young African American males are currently under the supervision of the criminal justice system, either in prison or jail, or on probation or parole).

[\[FN144\]](#). Undoubtedly, this has long been the case for the indigent criminal defendant. Darrow, *The Story of my Life*, supra note 57, at 338-39.

[\[FN145\]](#). Jack Newfield, A Decent Judge in a Rotten System, in *Cruel and Unusual Justice* 182, 187-88 (1974) (Newfield asking Judge Irwin Brownstein what makes a good criminal judge, and Brownstein replying, “I think Jews generally make good judges because of the Talmud The Talmud teaches us justice and respect for the law, and compassion. I think that is why so many great judges, like Brandeis, were Jewish.”)

[\[FN146\]](#). Deuteronomy 16:20; see also Amos 5:15; Micah 6:8; Hosea 2:21.

[\[FN147\]](#). Auerbach, *supra* note 121, at 59.

[\[FN148\]](#). Amos 5:24.

[\[FN149\]](#). Jules Lobel, [Losers, Fools and Prophets: Justice as Struggle](#), 80 *Cornell L. Rev.* 1331, 1333 (1995); see also Abraham J. Heschel, *The Prophets* 212 (1962).

[\[FN150\]](#). Lobel, *supra* note 149, at 1333.

[\[FN151\]](#). Isaiah 1:17.

[\[FN152\]](#). Auerbach, *supra* note 121, at 59-61; Dorff & Rosett, *supra* note 125, at 110-23; Eliezer Berkovits, *The Biblical Meaning Of Justice*, 18 *Judaism* 188 (1969). The American concept of justice is no less complex. See, e.g., William Glaberson, *Killer in ‘Megan’ Case Is Sentenced to Death*, *N.Y. Times*, June 21, 1997, at 1.

[\[FN153\]](#). Johnson, *supra* note 81, at 75; see also Albert Einstein, *Why Do They Hate the Jews*, in *Out of My Later Years* 249 (1950).

[\[FN154\]](#). Isaiah 5:8.

[\[FN155\]](#). *Id.* at 3:13-15.

[\[FN156\]](#). Leviticus 19:15; Deuteronomy 10:17-19, 16:19; see also *The Mishnah*, *supra* note 124, at 446-61.

[FN157]. Johnson, *supra* note 81, at 156; see also Sol Roth, *Halakhah and Politics: The Jewish Idea of a State* 61 (1988). Unfortunately, women did not figure in the Mishnah's notion of equality. Neusner, *supra* note 125, at 121-48.

[FN158]. For example, a body similar to the Anglo-Saxon jury determined community practices so that local norms might be taken into account in legal decisions. Johnson, *supra* note 81, at 157.

[FN159]. *Id.*

[FN160]. Deuteronomy 10:17; Leviticus 19:15.

[FN161]. Johnson, *supra* note 81, at 158 (referring to the general reluctance to use imprisonment as punishment and the support for a person's basic right to roam freely).

[FN162]. The Mishnah, *supra* note 124, at 446 [Aboth 1:6]; see also [Coffin v. United States, 156 U.S. 432, 454 \(1894\)](#) (noting that the presumption of innocence has been traced to Deuteronomy).

[FN163]. Babcock, *supra* note 16, at 177.

[FN164]. Johnson, *supra* note 81, at 157-60. For an example of the authors' views on individual and social responsibility for crime, see [Abbe Smith, Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer, 21 N.Y.U. Rev. L. & Soc. Change 433 \(1994\)](#). For a poignant story about the individual and social forces leading to an especially gruesome crime, see Curtis Bok, *Star Wormwood* (1959). See also Richard Wright, *Native Son* (1940).

[FN165]. Rabbi Joseph Telushkin, *Jewish Literacy* 121 (1991); cf. Michael Lerner, *Jewish Renewal: A Path to Healing and Transformation* 33 (1994) (describing *tikkun olam* more broadly as “healing, repair, and transformation” and “decreasing the pain in the world”). Alan Dershowitz learned at an early age that to “[r]epair the world” was an imperative.” Dershowitz, *supra* note 81, at 39.

[FN166]. Lerner, *supra* note 165, at 399-407.

[FN167]. Telushkin, *supra* note 165, at 120-22.

[\[FN168\]](#). *Id.*; see also Johnson, *supra* note 81, at 127.

[\[FN169\]](#). Johnson, *supra* note 81, at 127.

[\[FN170\]](#). Deuteronomy 15:1-2.

[\[FN171\]](#). Telushkin, *supra* note 165, at 120-22.

[\[FN172\]](#). Lerner, *supra* note 165, at 27.

[\[FN173\]](#). *Id.* at 33.

[\[FN174\]](#). *Id.* at 404.

[\[FN175\]](#). In an essay discussing the difference between the Western notion of “rights” and the Jewish notion of mitzvah, Robert Cover eloquently articulates the Jewish obligation of tikkun olam through participation in the struggle for social justice:

[A]s I scan my own--our own--privileged position in the world social order and the national social order, as I attend the spiritual and material blessings of my life and the rather obvious connection that some of these have with the suffering of others--it seems to me that the rhetoric of obligation speaks more sharply to me than that of rights. Of course, I believe that every child has a right to decent education and shelter, food and medical care; of course, I believe that refugees from political oppression have a right to a haven in a free land; of course, I believe that every person has a right to work in dignity and for a decent wage. I do believe and affirm the social contract that grounds those rights. But more to the point I also believe that I am commanded--that we are obligated--to realize those rights. Cover, *supra* note 129, at 248; cf. Mishnah Sanhedrin 4:5 (“Whoever saves a single soul, it is as if he had saved the whole world.”).

[\[FN176\]](#). Monroe Freedman has also suggested that his law practice, which “includes substantial indigent criminal defense work and litigation advancing civil rights and civil liberties,” and “[t]he way [he has] practiced law” is consistent with his understanding of Jewish tradition and values. Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 81, at 1137 & n.32.

[\[FN177\]](#). Shaffer, *supra* note 76.

[\[FN178\]](#). John 8:2-11 (recounting Jesus's refusal to condemn an adultress); see also Luke 23:32-43 (recounting Jesus's

kind dealings with the two others crucified with him).

[\[FN179\]](#). Mary Gordon, *Jesus Christ, Superstar*, *Nation*, June 23, 1997, at 27.

[\[FN180\]](#). Shaffer, *supra* note 76, at 50, 52.

[\[FN181\]](#). *Id.* at 55.

[\[FN182\]](#). [1 John 2:1](#). (“[I]f anyone does sin, we have an advocate with the Father, Jesus Christ”)

[\[FN183\]](#). Shaffer, *supra* note 76, at 55. For an example of a Christian lawyer in this mold, see Stringfellow, *supra* note 73. Stringfellow was a lawyer, author, activist, and lay Episcopalian theologian, who went to Harlem to live and work among the poor upon graduating from Harvard Law School in 1956. Wolfgang Saxon, *William Stringfellow, Author and Activist in the 60's*, *Dies*, *N.Y. Times*, Mar. 3, 1985, at A32. He represented drug addicts, prostitutes and “‘homosexuals in trouble with police or in some kind of trouble’ [related to their sexual orientation] ... the outcasts of society-- those who live somehow on its fringe” W. Stringfellow; *Theologian and Activist Lawyer*, *L.A. Times*, Mar. 10, 1985, Part II, at 2. Stringfellow was once criminally charged with harboring the Reverend Daniel Berrigan, a Jesuit priest who had been convicted of burning draft records to protest the Vietnam War. A strong dissenter within the Episcopalian laity, Stringfellow fought for Christian church support for racial integration and the ordination of women. Saxon, *supra*. “‘[Stringfellow] was a friend of the poor,’ [Daniel] Berrigan said. ‘He took up causes that no one else wanted to touch, whether it was housing or racism or the plight of women in the church.’” W. Stringfellow; *Theologian and Activist Lawyer*, *supra*. Stringfellow took on these causes because of his vision of Christianity: “For a Christian to be poor and to work among the poor is not conventional charity, but a use of the freedom for which Christ has set men free.” Stringfellow, *supra* note 73, at 32.

[\[FN184\]](#). Shaffer, *supra* note 76, at 78.

[\[FN185\]](#). There are many powerful stories about Jesus standing beside--and standing up for--sinners and wrongdoers. As defense lawyers, we are especially drawn to the story of the adulteress because it shows Jesus as the lone defender of a wrongdoer against a vengeful mob, a familiar experience for us. Although Jesus tells the adulteress to “go, and sin no more,” *John 8:11* (King James), like many of our clients, it is not at all clear that she is repentant. The story of Jesus and the prostitute, Mary Magdalene, also resonates for defenders, although this is truly a story of repentance. See *Luke 7:37-8:2*.

[\[FN186\]](#). *John 8:3* (King James).

[\[FN187\]](#). Id. at 8:5.

[\[FN188\]](#). Id. at 8:6. In Norman Mailer's controversial interpretation of the Gospel, he suggests that they meant to tempt Jesus to become either lustful or vengeful, and Jesus yielded to neither temptation. Norman Mailer, *The Gospel According to the Son* 174-78 (1997).

[\[FN189\]](#). John 8:6 (King James).

[\[FN190\]](#). Id. at 8:7.

[\[FN191\]](#). Id. at 8:9.

[\[FN192\]](#). Id.

[\[FN193\]](#). Id. at 8:10.

[\[FN194\]](#). Id. at 8:11.

[\[FN195\]](#). Id.

[\[FN196\]](#). Cf. *Attorney for the Damned*, supra note 2, at 16-88 (Clarence Darrow arguing to save the lives of Richard Loeb and Nathan Leopold while a mob raged outside the courtroom).

[\[FN197\]](#). Clarence Darrow, *Verdicts Out of Court* 224 (Arthur & Lila Weinberg eds., 1963) (originally published in *The International Socialist Review*, February 1909).

[\[FN198\]](#). See supra notes 131-33 and accompanying text. For a modern-day judicial interpretation of justice including compassion, see Carey Goldberg, *In a Startling Turnabout, Judge Sets Au Pair Free*, *N.Y. Times*, Nov. 11, 1997, at A1 (quoting Massachusetts Judge Hiller Zobel when he reduced au pair Louise Woodward's conviction from murder to manslaughter and ordered her release from prison).

[FN199]. See Psalms 25:6-7, 10-11; Psalms 28:2, 6; Psalms 145:9; Luke 6:36; Matthew 25:34-36; see also Rev. Virginia Mackey, Punishment in the Scripture and Tradition of Judaism, Christianity, and Islam, in *Crime, Values, and Religion* 3, 28 (James M. Day & William S. Laufer eds., 1987); cf. Darrow, *The Story of My Life*, supra note 57, at 353 (“Real justice can be neither stern nor forbidding in its attitude, but must radiate mercy and charity, and cannot be measured alike to all.”).

[FN200]. Dorff & Rossett, supra note 125, at 157.

[FN201]. Nathan Ausubel, *A Treasury of Jewish Folklore* 379 (1948).

[FN202]. *Id.*

[FN203]. *Id.*; see also Debra Nussbaum Cohen, Juror's faith had impact on decision, *Wash. Jewish Wk.*, Jan. 15, 1998, at 9.

[FN204]. Ecclesiastes 7:20.

[FN205]. See, e.g., Jonah 1:1-3.

[FN206]. “Atonement” is the preferred term for Jews, while “repentance” is the term most often used by Christians. Although the concepts are similar, they are not identical. For Jews, atonement requires thoughtful acknowledgment of wrongdoing, more than any particular act of penance. Johnson, supra note 81, at 75. For Christians, there are specific rituals of penance. F.J. Sheed, *Theology for Beginners* 149-52 (1981) (discussing confession and absolution) (“And he is the atoning sacrifice for our sins”); *id.* at 99 (noting that “atonement” comes from “at-one-ment”--the notion of God and man being “at one”).

[FN207]. See [1 John 2:2](#).

[FN208]. Moses Maimonides, *The Guide for the Perplexed* 346 (M. Friedlander trans., Dover Publications 1956); see also Johnson, supra note 81, at 75. For a thoughtful discussion of the view of forgiveness expressed in classical Jewish sources, see Louis E. Newman, *The Quality of Mercy: On the Duty To Forgive in the Judaic Tradition*, 15 *J. Religious Ethics* 155 (1987).

[\[FN209\]](#). See Exodus 34:5-7; Joel 2:13; Jonah 4:2.

[\[FN210\]](#). Sheed, *supra* note 206, at 149; Peter Kreeft, *Fundamentals of the Faith: Essays in Christian Apologetics* 222(1988).

[\[FN211\]](#). Sheed, *supra* note 206, at 149-52; see also John 20:21-23 (“Jesus said to them ... ‘Receive the Holy Spirit. If you forgive the sins of any, they are forgiven them; if you retain the sins of any they are retained.’”)

[\[FN212\]](#). See Mark 11:25-26 (“And when ye stand praying, forgive, if ye have ought against any”). Of course, the most powerful passage of forgiveness in the Christian bible is at Calvary, just before Jesus was crucified: “Father, forgive them; for they know not what they do.” Luke 23:34 (King James); cf. [Alan W. Perry, Javert or Bebb, 27 Tex. Tech L. Rev. 1271 \(1996\)](#) (discussing the importance of forgiveness in the practice of law).

[\[FN213\]](#). Kreeft, *supra* note 210, at 223; see also Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 10-13 (1988) (noting the Christian message of forgiveness is not always incorporated into everyday Christian life).

[\[FN214\]](#). Reinhold Niebuhr, *Justice and Mercy* 44 (Ursula M. Niebuhr ed., 1974).

[\[FN215\]](#). Matthew 18:21 (New Revised Standard Version).

[\[FN216\]](#). Matthew 18:22 (King James); cf. Catechism of the Catholic Church § 979 (1994) (“The Church must be able to forgive all penitents their offenses, even if they should sin until the last moment of their lives.”) [hereinafter Catechism].

[\[FN217\]](#). Kreeft, *supra* note 210, at 223. No doubt, this is the basis for the often repeated Christian exhortation to “Hate the sin and love the sinner.”

[\[FN218\]](#). *Id.*

[\[FN219\]](#). *Id.* at 224.

[\[FN220\]](#). Mercy appears to have been out of favor for some time. Attorney for the Damned, *supra* note 2, at 48-49.

[\[FN221\]](#). See *supra* note 199; see also Maimonides, *Guide for the Perplexed*, *supra* note 208, at 271; Jon Sobrino, *The Principle of Mercy* 20 (1994).

[\[FN222\]](#). Leviticus 19:18 (“You shall not take vengeance or bear a grudge against your countryman.”). But see generally Susan Jacoby, *Wild Justice: The Evolution of Revenge* (1983) (exploring the role of revenge in the criminal justice system); Murphy & Hampton, *supra* note 213, at 3-4; 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 81-82 (London, MacMillan 1883). One commentator has noted the link between the Jewish notion of mercy and the work of public defenders. Donna E. Arzt, *The People's Lawyers: The Predominance of Jews in Public Interest Law*, 35 *Judaism* 47, 55 (Winter 1986).

[\[FN223\]](#). Leviticus 19:18 (“Love your fellow as yourself”); Matthew 7:12 (“In every thing do to others as you would have them do to you.”); Luke 6:31 (“Do to others as you would have them do to you.”). The Jewish scholar, Hillel, is known for embracing the same message. See *supra* note 168. One commentator has noted that, in Christianity, “[a]nger does not give way entirely to love ... [for] Jesus exhibited anger against injustice.” Mackey, *supra* note 199, at 38.

[\[FN224\]](#). Attorney for the Damned, *supra* note 2, at 48. Darrow's plea for mercy in the Loeb and Leopold case is among the most poignant ever uttered and offers a clear explanation of the concept:

If a man could judge a fellow in coldness without taking account of his own life, without taking account of what he knows of human life, without some understanding--how long would we be a race of real human beings? It has taken the world a long time for man to get to even where he is today. If the law was administered without any feeling of sympathy or humanity or kindness, we would begin our long, slow journey back to the jungle that was formerly our home.

Id. David Bruck, a talented death penalty lawyer, was equally poignant in his plea for mercy for Susan Smith, who faced the death penalty in 1995 for killing her two small sons. In his closing argument at the penalty phase of the trial, Bruck quoted from the Bible, described his client's virtuous life before “she became known to the world,” and talked of the “hell of life imprisonment, alone in a cell to ponder the murders of her sons.” Brian McGrory, *Smith given life term in sons' deaths*, *Boston Globe*, July 29, 1995, at 1. “‘She'll be all alone again soon,’ Bruck concluded his summation. ‘Don't leave her just yet. Stay with her just a little while longer. Watch over her.’” *Id.*

[\[FN225\]](#). Jean Hampton, *The Retributive Idea*, in Murphy & Hampton, *supra* note 213, at 158.

[\[FN226\]](#). *Id.*; see also [Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 *Seton Hall L. Rev.* 288, 289 \(1993\)](#).

[\[FN227\]](#). See Matthew 5:38-40; James 2:13.

[\[FN228\]](#). Hampton, *supra* note 225, at 165-66.

[\[FN229\]](#). Attorney for the Damned, *supra* note 2, at 87. But see Jeffrey G. Murphy, Mercy and Legal Justice, in Murphy & Hampton, *supra* note 213, at 174 (“There thus simply is no room for mercy as an autonomous virtue with which their justice should be tempered. Let them keep their sentimentality to themselves for use in their private lives with their families and pets.”).

[\[FN230\]](#). William Shakespeare, *The Merchant of Venice*, act 4, sc. 1, lines 184-197 (William Lyon Phelps ed., Yale Univ. Press 3d prtg. 1943) (1600). For a thoughtful discussion of this passage, see Muller, *supra* note 226, at 307-11. Muller argues that, according to Shakespeare, mercy goes beyond “mere leniency,” *id.* at 313, to considering the impact of the punishment and the crime from the defendant's perspective, *id.* at 320-23.

[\[FN231\]](#). Sheed, *supra* note 206, at 85-105; cf. Isaiah 11:11-12 (“In that day, My Lord will apply His hand again to redeeming the other part of His people from Assyria--as also from Egypt, Pathros, Nubia, Elam, Shinr, Hamath, and the coastlands.”).

[\[FN232\]](#). Sheed, *supra* note 206, at 104.

[\[FN233\]](#). *Id.*; see also Philippians 2:12 (“work out your own salvation with fear and trembling.”).

[\[FN234\]](#). Mackey, *supra* note 199, at 79, 80; cf. Deuteronomy 25:1-3 (“When there is a dispute between men and they go to law, and a decision is rendered declaring the one in the right and the other in the wrong--if the guilty one is to be flogged, the magistrate shall have him lie down and be given lashes in his presence, by count, as his guilt warrants. He may be given up to forty lashes, but not more, lest being flogged further, to excess, your brother be degraded before your eyes.”).

[\[FN235\]](#). See Ezekial 33:11-12 (“[D]eclares the Lord God--it is not My desire that the wicked shall die, but that the wicked turn from his [evil] ways and live.”); see also Mackey, *supra* note 199, at 78. Maimonides clearly believed in the capacity of wrongdoers to change. Maimonides, *Guide for the Perplexed*, *supra* note 208, at 332. The writings of Maimonides on the coming of the Messiah and, with it, the attaining of true knowledge also suggest a Jewish belief in restoration and redemption. *Id.* at 267; *Ethical Writings of Maimonides* 165-82 (Raymond L. Weiss & Charles E. Butterworth eds., 1975); see also Isaiah 11:3.

[\[FN236\]](#). David Garland, *Punishment and Modern Society: A Study in Social Theory* 185-86 (1990); Charles E. Silberman, *Criminal Violence, Criminal Justice* 371-73 (1978); Norval Morris, *The Future of Imprisonment* 28-58. Some

of us continue to believe in the notion of rehabilitation--and redemption. See, e.g., Kunen, *supra* note 15, at 60-72 (recounting a former bank robber's desire to be an aerial physicist); cf. Bok, *supra* note 164, at 207-08 (“The worse a man's behavior, the more must be done for him to set him straight; and the more that is done for him, the more likely he will be to respond to it.”).

[\[FN237\]](#). Lewis, *supra* note 54, at 78.

[\[FN238\]](#). Muller, *supra* note 226, at 320-29.

[\[FN239\]](#). Interview with Marc Bookman, Senior Trial Attorney, Homicide Unit, Defender Association of Philadelphia (Apr. 13, 1997).

[\[FN240\]](#). René Fülöp-Miller, *The Saints that Moved the World* 16 (1984).

[\[FN241\]](#). The Catholic Church encourages its members to imitate and honor the saints, not as deities, but as people with exceptional virtue and grace. *Sainthood: It's Manifestations in World Religions* vii (Richard Kieckhefer & George D. Bond eds., 1988) [hereinafter *Sainthood*]. Originally, the term “saint” was used by Greek and Roman pagans (Greek *hagios*, Latin *sanctus*) as simply meaning a “holy person.” When Christians adopted the term, it took on the meaning of the faithful, those on earth and in heaven who are worthy of honor and veneration. The Church has established three definitions of the term “saint”: (1) the moral definition, a person who has led a life of heroic virtue; (2) the theological definition, a person who has gone to heaven; and (3) the liturgical definition, a person who is the legitimate object of a public cult by virtue of the Church's judgment. Richard Kieckhefer, *Imitators of Christ: Sainthood in the Christian Tradition*, in *Sainthood*, *supra*, at 2-3, 9.

[\[FN242\]](#). John Stratton Hawley, *Saints and Virtues*, in *Saints and Virtues* xiv (John Stratton Hawley ed., 1987).

[\[FN243\]](#). Some commonly known saints and their virtues are St. Francis, the saint of love; St. Augustine, the saint of intellect; and St. Elizabeth, the helper of the poor. See Fülöp-Miller, *supra* note 240; see also Edith Deen, *Great Women of the Christian Faith* (1959). In addition to personifying certain virtues, saints may also hold the position of “patron” to a place, class of persons, or even an abstract idea. For example, St. Genevieve is the patron saint of Paris, St. Joseph is the saint of carpenters, and the ever-popular St. Anthony is the patron saint of lost causes or things (often invoked by children when something is misplaced: “St. Anthony, St. Anthony, please come around; Something is lost and cannot be found.”).

[\[FN244\]](#). *Sainthood*, *supra* note 241, at 19.

[\[FN245\]](#). Id. at 17.

[\[FN246\]](#). Id. at 13. As the saints dedicated their life to following Christ's example, so too are their lives an example to the average man. Fülöp-Miller, *supra* note 240, at 18. These holy individuals served others, not for rewards on earth, but for rewards in the afterlife. As a result, despite their intense dedication to active service, saints had a tendency to stay out of political or public life. In general, they did not try to achieve global reform, but focused on individuals in need. Sainthood, *supra* note 241, at 19.

[\[FN247\]](#). *The Radical Tradition: Revolutionary Saints in the Battle for Justice and Human Rights* xi (Gilbert Márkus ed., 1993) [hereinafter *The Radical Tradition*].

[\[FN248\]](#). Duncan MacLaren, Catherine of Siena, in *The Radical Tradition*, *supra* note 247, at 68. During the 1300s, even women dedicated to the religious life were discouraged from being public figures. Igino Giordani, Catherine of Siena: Fire and Blood 36 (Thomas J. Tobin trans., 1959).

[\[FN249\]](#). MacLaren, *supra* note 248, at 65.

[\[FN250\]](#). The Mantellate were nuns attached to the Dominican Order who performed charitable works and penitential acts. Id. at 66.

[\[FN251\]](#). Michael de la Bedoyere, Catherine: Saint of Siena 51 (1947).

[\[FN252\]](#). Giordani, *supra* note 248, at 42-45.

[\[FN253\]](#). Blessed Raymond of Capua, *The Life of St. Catherine of Siena* 118-19 (George Lamb trans., 1960).

[\[FN254\]](#). Id. at 130-31.

[\[FN255\]](#). Deen, *supra* note 243, at 54-55.

[\[FN256\]](#). de la Bedoyere, supra note 251, at 54.

[\[FN257\]](#). See Helen Prejean, *Dead Man Walking* (1993); see also infra notes 448-58 and accompanying text.

[\[FN258\]](#). Deen, supra note 243, at 54.

[\[FN259\]](#). de la Bedoyere, supra note 251, at 149, 197; MacLaren, supra note 248, at 72.

[\[FN260\]](#). MacLaren, supra note 248, at 69.

[\[FN261\]](#). Giordani, supra note 248, at 152.

[\[FN262\]](#). Deen, supra note 243, at 55.

[\[FN263\]](#). de la Bedoyere, supra note 251, at 140; Giordani, supra note 248, at 178.

[\[FN264\]](#). de la Bedoyere, supra note 251, at 235.

[\[FN265\]](#). *Id.* at 239.

[\[FN266\]](#). See, e.g., Giordani, supra note 248, at 48, 173, 194-95; Deen, supra note 243, at 55; MacLaren, supra note 248, at 67.

[\[FN267\]](#). MacLaren, supra note 248, at 71. St. Catherine taught that “if you believed passionately in anything you should [not] limit your endeavor to realize it.” de la Bedoyere, supra note 251, at 1.

[\[FN268\]](#). de la Bedoyere, supra note 251, at 235.

[\[FN269\]](#). See Richard P. Jones, *Chain gangs to toil under spotlight: state prisoners who trade cells for shackles will be first to wear stun belts*, *Milwaukee J. Sentinel*, June 2, 1997, at 1A; Frank Swoboda, *Military-Glove Suppliers Protest*

Prison Competition; With Captive Work Force, Unicorn Can Undercut Contractors, Wash. Post, June 10, 1997, at A15; Paul Blustein, Prison Labor: Can U.S. Point Finger at China?, Wash. Post, June 3, 1997, at C1.

[\[FN270\]](#). Mary Purcell, *The World of Monsieur Vincent* 93 (1989).

[\[FN271\]](#). Theodore Maynard, *Apostle of Charity* 91 (1939).

[\[FN272\]](#). Purcell, *supra* note 270; cf. *supra* note 269.

[\[FN273\]](#). Purcell, *supra* note 270.

[\[FN274\]](#). Henri Lavedan, *The Heroic Life of Saint Vincent de Paul* 141-43 (Helen Younger Chase trans., 1929).

[\[FN275\]](#). *Id.*

[\[FN276\]](#). *Id.* at 143; Purcell, *supra* note 270, at 94.

[\[FN277\]](#). Lavedan, *supra* note 274, at 148.

[\[FN278\]](#). *Id.* at 147; cf. Leo Weismantel, *The Mantle of Mercy* 164-65 (Albert Paul Schimberg trans., 1939) (“Are not they, too, children of the Almighty Father? Granting that they have been plunged into this misery because they committed crimes, for which they will be sternly punished through many years, perhaps until the end of their lives--does not the responsibility for the future rest on us? Who has a right to call them the scum of humanity? Who will wipe the scabs of Hell from their faces, so that what is beneath may become visible--the souls which God breathed into them?”).

[\[FN279\]](#). Purcell, *supra* note 270, at 95; Lavedan, *supra* note 274, at 146.

[\[FN280\]](#). Maynard, *supra* note 271, at 90.

[\[FN281\]](#). Purcell, *supra* note 270, at 97.

[\[FN282\]](#). William M. Kunstler & Sheila Isenberg, *My Life as a Radical Lawyer* 90 (1994).

[\[FN283\]](#). Prejean, *supra* note 257, at xi.

[\[FN284\]](#). Telephone Interview with Catherine Roraback, long-time criminal defense and civil liberties lawyer (July 29, 1997) [hereinafter Roraback Interview].

[\[FN285\]](#). We would like to take this opportunity to recognize Sister Antonia Maguire, who has been in prison ministry for twenty-four years at the Bedford Hills Correctional Facility and the Taconic Correctional Facility in New York. She has reached out to so many in need. We especially thank her for her long-time support for Patsy Kelly Jarrett, a woman who was wrongly convicted of murder and has served twenty years at Bedford Hills.

[\[FN286\]](#). Arzt, *supra* note 222, at 52; Dershowitz, *supra* note 81, at 39; cf. Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *Cause Lawyering* 31 (Austin Sarat & Stuart Scheingold eds., 1998) (a former legal services lawyer-- and the child of Holocaust survivors--examining the motivations of social justice lawyers).

[\[FN287\]](#). This discussion raises a number of paradoxes. Notwithstanding the Christian ethos of love and compassion, some Christians have been largely responsible for the persecution of both Jews and Catholics. There has also been a long and shameful history of Catholic anti-Semitism (as well as Catholic persecution of Protestants and Muslims). See, e.g., Roger Cohen, *French Church Issues Apology to Jews on War*, *N.Y. Times*, Oct. 1, 1997, at 1. It is not the task of this paper to attempt to explain these paradoxes--or the centuries of war, domination, and cruelty perpetrated in the name of religion.

[\[FN288\]](#). Alan M. Dershowitz, *Chutzpah* 101 (1991) [hereinafter Dershowitz, *Chutzpah*].

[\[FN289\]](#). Cecil Roth, *The Jewish Contribution to Civilization* 22-51 (1940); Dershowitz, *Chutzpah*, *supra* note 288, at 101-13. Dershowitz notes that Jews have been “vilified and persecuted over millennia.” *Id.* at 101; see also Charles Patterson, *Anti-Semitism: The Road to the Holocaust and Beyond* (1982)

[\[FN290\]](#). Arnold Forster, *Square One* 16 (1988).

[\[FN291\]](#). Patterson, *supra* note 289, at 3; see also Dershowitz, *Chutzpah*, *supra* note 288, at 101.

[FN292]. Patterson, *supra* note 289, at 5. The tension between Romans and Jews culminated in a bloody war early in the second millennium, which ended with the destruction of the temple of Jerusalem. *Id.* at 5-6.

[FN293]. Dershowitz, Chutzpah, *supra* note 288, at 101-04; Patterson, *supra* note 289, at 6-7. The Gospels, especially Matthew and John, lay the foundation for Christian anti-Semitism by depicting Jews and Judaism as the forces that persecuted and killed Jesus. Dershowitz, Chutzpah, *supra* note 288, at 101. The writings of the Christian Fathers in the second, third, fourth, and fifth centuries portrayed Jews as “lustful, rapacious, greedy, perfidious bandits ... inveterate murderers, destroyers, men possessed by the devil.” Patterson, *supra* note 289, at 9-10 (quoting John Chrysostom, the fourth-century Bishop of Antioch).

[FN294]. In the eleventh and twelfth centuries, the Crusades resulted in the massacre of thousands of Jews. Dershowitz, Chutzpah, *supra* note 288, at 102; Patterson, *supra* note 289, at 11-12. In the thirteenth century, Jews were expelled from England and France. Patterson, *supra* note 289, at 13. In the fifteenth century, they were expelled from Austria and Portugal. Dershowitz, Chutzpah, *supra* note 288, at 103. In the Middle Ages, the false accusation that Jewish ritual required the killing of a Christian child during Passover became widespread, see *id.*, and led to sporadic attacks upon Jews and the segregation of Jews in overcrowded ghettos in many cities. Patterson, *supra* note 289, at 13-14.

[FN295]. Patterson, *supra* note 289, at 14. As a result, many Jews were forced to convert to Christianity. *Id.* Still, the Inquisition led to thousands of Jews--including those who had converted--being burned at the stake, tortured, imprisoned, stripped of their property, and finally expelled from the country in 1492. *Id.* at 14-15.

[FN296]. *Id.* at 17. Luther resurrected all the old accusations against the Jews: they were “ritual murderers, poisoners, usurers, parasites, and corrupters of Christians.” *Id.* (footnote omitted). He called for the expulsion of Jews from Germany. *Id.*

[FN297]. Jews had successfully sought refuge in Poland and Lithuania to escape the Crusades. *Id.* at 15.

[FN298]. *Id.* During the war between the Ukrainian cossacks and the Polish overlords, seven hundred Jewish communities were destroyed, and as many as five hundred thousand Jews were killed. *Id.* As a result of the partition of Poland by its more powerful neighbors at the end of the eighteenth century, the bulk of the Polish Jews came under the rule of the Russian czars, where, starting in 1881, they suffered pogroms and other forms of persecution. *Id.* at 15, 20, 36-42.

[FN299]. *Id.* at 17-25.

[FN300]. *Id.* at 28. In czarist Russia during the same period, Jews were paradoxically reproached both for being poor peasants and for being part of an international conspiracy of wealth and power. Dershowitz, Chutzpah, *supra* note 288, at 108. In 1903 the czarist police issued the fraudulent *The Protocols of the Elders of Zion*, which purported to be a transcript of meetings of Jewish elders who were planning to destroy the non-Jewish world and replace it with a Jewish empire. After the Russian Revolution, it was circulated throughout Europe as an accurate account of the Jewish conspiracy, contributing to anti-Semitism in the early twentieth century. *Id.* at 108-09.

[FN301]. See, e.g., Daniel Jonah Goldhagen, *Hitler's Willing Executioners* (1996); Lucy S. Dawidowicz, *The War Against the Jews 1933-1945* (1975); Theodore Abel, *The Nazi Movement: Why Hitler Came to Power* (1966).

[FN302]. Dershowitz, Chutzpah, *supra* note 288, at 109.

[FN303]. See generally Charles E. Silberman, *A Certain People* 21-156 (1985). In many states in the eighteenth century, Jews were prohibited from voting, holding office, and serving as witnesses in trials. Dershowitz, Chutzpah, *supra* note 288, at 115. In the nineteenth century, Jews were excluded routinely from many aspects of non-Jewish life. See, e.g., Silberman, *supra*, at 48. In the post-World War I period, Jewish immigration was limited, Ivy League and other prominent colleges and universities created quotas, the Ku Klux Klan, which had been especially powerful in the nineteenth century, experienced a resurgence, and anti-Semites like Henry Ford and Father Charles Coughlin were prominent figures. Dershowitz, Chutzpah, *supra* note 288, at 115-16; Forster, *supra* note 290, at 68-73, 82-83, 94-95. For a thorough examination of the Ku Klux Klan's anti-Semitism, see Jack Nelson, *Terror in the Night: The Klan's Campaign Against the Jews* (1993). See also Seth Cagin & Philip Dray, *We are not Afraid: The Story of Goodman, Schwerner, and Chaney and the Civil Rights Campaign for Mississippi* (1988); Wyn Craig Wade, *The Fiery Cross: The Ku Klux Klan in America* (1987). The 1940s and 1950s brought anti-Zionism and anti-Communism, each of which served as an impetus for anti-Semitism. Forster, *supra* note 290, at 104-25. Even staunch anti-Communist and former general counsel for the Anti-Defamation League Arnold Forster acknowledges the connection between anti-Communism and anti-Semitism. *Id.* at 126-29.

[FN304]. Forster, *supra* note 290, at 378-94; see also Dershowitz, Chutzpah, *supra* note 288, at 116.

[FN305]. Alfred Dreyfus, a colonel in the French military, was tried and convicted on espionage charges in 1894 and sentenced to Devil's Island. Although it is now clear that Dreyfus was framed for a crime committed by someone else--the critical evidence against Dreyfus was a forged document--at the time, Dreyfus's prosecution confirmed longstanding beliefs that Jews were disloyal and untrustworthy and stirred up a new level of anti-Semitic hysteria in France and western Europe. His vindication and pardon twelve years later did little to dampen the revived anti-Semitism. Dershowitz, Chutzpah, *supra* note 288, at 110; Patterson, *supra* note 289, at 32-34. Foreshadowing the rise of Nazism, the Dreyfus case spawned French cries for the massacre of Jews. See Jean-Denis Bredin, *The Affair: The Case of Alfred Dreyfus* 352 (1986).

[FN306]. In an atmosphere of anti-Semitism, Leo Frank, an Ivy League educated engineer, who was managing a family-owned pencil factory, was wrongly convicted of murdering a young Christian factory worker, Mary Phagan. The anti-Jewish bigotry that sparked the prosecution and infected the trial led to the lynching of Frank two years later. Melissa Fay Greene, *The Temple Bombing* 68-74 (1996). The lynch mob consisted of twenty-five men, including a clergyman, two former state supreme court justices, and an ex-sheriff. *Id.* at 73; see also Leonard Dinnerstein, *The Leo Frank Case* (1987); Patterson, *supra* note 289, at 48-50.

[FN307]. The prosecution of the Rosenbergs for being Communist spies nearly fifty years ago is still very much a part of present day American Jewish experience. At the height of the “Red Scare,” Julius and Ethel Rosenberg were charged, convicted, and sentenced to death for giving atomic secrets to the Soviet Union, a charge each of them steadfastly denied to their deaths on June 19, 1953. Secret Agents: The Rosenberg Case, McCarthyism, and Fifties America (Marjorie Garber & Rebecca L. Walkowitz eds., 1995); Alvin H. Goldstein, *The Unquiet Death of Julius & Ethel Rosenberg* (1975); John Wexley, *The Judgment of Julius and Ethel Rosenberg* (1955). That the Rosenbergs were prosecuted by Jewish lawyers and sentenced to death by a Jewish judge only exacerbated the anguish of many American Jews. Dershowitz, Chutzpah, *supra*note 288, at 310.

[FN308]. Andrew M. Greeley, *An Ugly Little Secret: Anti-Catholicism in North America* (1977).

[FN309]. Although the English Act of Toleration of 1689, which applied to both England and the colonies, established relations of tolerance between the Church of England and dissenting Protestant denominations, that tolerance did not extend to Catholics. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 79 (1986). While this country was overwhelmingly colonized by English Protestants seeking both economic opportunity and religious freedom, their interest in the latter did not lead to tolerance for those who practiced religions different from theirs. Leonard Dinnerstein & David M. Reimers, *Ethnic Americans: A History of Immigration and Assimilation 2* (1977) [hereinafter Dinnerstein & Reimers, *Ethnic Americans*].

Catholic settlers in the colonies were double taxed, ship captains bringing Catholics were charged with discriminatory head taxes, and Catholics were forbidden to hold public office, establish schools, or hire anyone other than Protestants to teach their children. Philip Perlmutter, *Divided We Fall: A History of Ethnic, Religious, and Racial Prejudice in America* 82 (1992); Curry, *supra*, at 80.

Even Maryland, originally founded as a refuge for Catholics, eventually passed laws designed to prevent the spread of the “Growth of Popery” by Jesuit missionaries. Perlmutter, *supra*, at 87. Maryland Catholics complained of being treated no better than the black slaves and being stripped of the advantages promised to their ancestors when they immigrated to Maryland. *Id.*

[FN310]. The approximately three million Irish who came to America in the 1850s and 1860s were almost all poor and Catholic. Leonard Dinnerstein et al., *Natives and Strangers: A Multicultural History of Americans* 94 (1996) [hereinafter Dinnerstein et al., *Natives and Strangers*]. Their arrival in such massive numbers posed a direct threat to many Americans. *Id.* at 60-61, 93-94. Controversies over the funding of Catholic parochial schools, the control of church property, and the separation of church and state resulted in vicious attacks on Catholics and allegations of

Catholics plotting to overthrow the government, establish the Pope as ruler, and suppress Protestantism. Perlmutter, *supra* note 309, at 120-21; Dinnerstein & Reimers, *Ethnic Americans*, *supra* note 309, at 32-33, 60-61. Samuel Morse, the inventor of the telegraph, published propaganda that the Church was sending Jesuit-controlled missionaries to the country to destroy the United States. Dinnerstein & Reimers, *Ethnic Americans*, *supra* note 309, at 32.

Many of the allegations were both spurious and outrageous. Dinnerstein & Reimers, *Ethnic Americans*, *supra* note 309, at 32 (discussing the 1836 publication of Maria Monk's *Awful Disclosures on the Hotel Dieu Nunnery of Montreal* in which the author claims she was forced to engage in sexual intercourse with priests in the nunnery and witness the execution of nuns who refused to submit to the sexual demands of the priests). In the book, Monk also describes the strangling of babies and their burial in the convent basement. *Id.* Despite the exposure of these tales and the author as fraudulent, the stories were believed by many. *Id.*

[FN311]. Perlmutter, *supra* note 309, at 121; Dinnerstein & Reimers, *Ethnic Americans*, *supra* note 309, at 32-33. In 1893 anti-Catholic hysteria reached a fevered pitch when rumors spread that the Pope had written a letter to all Catholics calling on them to exterminate heretics in the United States. The Mayor of Toledo called out the National Guard to prevent the coming slaughter of Protestants. *Id.* Dinnerstein & Reimers, *Ethnic Americans*, *supra* note 309, at 62. Not all anti-Catholic sentiment was expressed in acts of violence. The political arena also served as a willing recipient of anti-Catholic expression. The most prominent example was the formation of the Know-Nothing Party, which flourished in the 1850s. The party was vehemently anti-Catholic, believing that Catholic voters were slaves of the Pope who desired to establish complete rule over the country. Anti-Catholicism was not merely a platform of the party, but was indeed its genesis. The party was born from the reactions of American-Protestants against Irish-Catholics, who were viewed as immoral and drunkards. Know-Nothing candidates won offices at all levels, with particular strength in Massachusetts, New York, Delaware, and Pennsylvania. Richard Bernstein, *Dictatorship of Virtue: Multiculturalism and the Battle for America's Future* 161 (1994); Dinnerstein & Reimers, *Ethnic Americans*, *supra* note 309, at 33; Perlmutter, *supra* note 309, at 139-40.

[FN312]. Wade, *supra* note 303, at 264-65, 307-09; see also Dinnerstein & Reimers, *Ethnic Americans*, *supra* note 309, at 69; Dinnerstein et al., *Natives and Strangers*, *supra* note 310, at 238; Perlmutter, *supra* note 309, at 29. Particularly in the South, where the civil rights movement was in its embryonic stages, politicians and southern demagogues often pointed to Catholics and Jews as sources of racial unrest. John Egerton, *Speak Now Against the Day: The Generation Before the Civil Rights Movement in the South* 109 (1994).

[FN313]. Dinnerstein et al., *Natives and Strangers*, *supra* note 310, at 243 (noting that employers would specify only “WPX,” or white Protestant Christians, in their advertisements and in requesting men from employment agencies).

[FN314]. Perlmutter, *supra* note 309, at 217-18; see also Darrow, *The Story of my Life*, *supra* note 57, at 377-78 (referring to his “enthusiastic” support for Governor Alfred Smith's presidential campaign and noting “the many bigoted people who refused to vote for a Catholic”). During this period, numerous anti-Catholic pamphlets, similar to those produced during the years of the Know-Nothing Party, warned of the continuing Catholic threat to take over the country. Perlmutter, *supra* note 309, at 217-18.

[\[FN315\]](#). Dinnerstein et al., *Natives and Strangers*, supra note 310, at 260.

[\[FN316\]](#). See generally Herbert B. Ehrmann, *The Case That Will Not Die: Commonwealth vs. Sacco and Vanzetti* (1969); Herbert B. Ehrmann, *The Untried Case: Sacco and Vanzetti and the Morelli Gang* (1934).

[\[FN317\]](#). Sacco and Vanzetti, a shoemaker and fish peddler respectively, were charged with the robbery and murder of a paymaster and his guard in Braintree, Massachusetts, on April 15, 1920. According to witnesses, there were two gunmen who fled in a car with three other men, all but one of whom “were dark and looked Italian.” Friedman, *Crime and Punishment*, supra note 13, at 369. The case has been called “the American equivalent of the Dreyfus case.” *Id.*

[\[FN318\]](#). Ehrmann, *The Case That Will Not Die*, supra note 316; see also Friedman, *Crime and Punishment*, supra note 13, at 369-70.

[\[FN319\]](#). Reportedly, general feelings of bigotry against Jews and Catholics have declined in recent years. Perlmutter, supra note 309, at 307. But see Anti-Defamation League, *1996 Audit of Anti-Semitic Incidents* 27 (1997) (noting the rise of bigotry on the Internet) [hereinafter A.D.L. 1996 Audit]; Anti-Defamation League, *Beyond the Bombing: The Militia Menace Grows* 1-2 (1995) (finding that the militia movement, with its anti-Semitic, antiminority, and antigovernment ideology, has continued to grow since the Oklahoma City bombing). See also [Sally Greenberg, Threats, Harassment, and Hate On-Line: Recent Developments](#), 6 *B.U. Pub. Int. L.J.* 673, 685-88 (1997).

Bias crimes, including acts of violence motivated by the religion of the victim, also appear to be on the decline. A.D.L. 1996 Audit, supra, at 1. Compare Federal Bureau of Investigation, U.S. Dep't of Justice, *Hate Crime Statistics 1997*, tbl. 1 with Federal Bureau of Investigation, U.S. Dep't of Justice, *Hate Crime Statistics 1997* tbl. 1. On the other hand, the incidence of hate crimes appears to be cyclical. Sally J. Greenberg, *The Massachusetts Hate Crime Reporting Act of 1990: Great Expectations Yet Unfulfilled?*, 31 *New Eng. L. Rev.* 103, 153 (1996); see also Jack Levin & Jack McDevitt, *Hate Crimes* (1993).

Economically, Catholics still hold today predominately blue-collar jobs and rank among the lower white-collar jobs. Although Jews are more likely to be employed as professionals, the top ranks of American businesses and institutions remain overwhelmingly closed to them. Dinnerstein et al., *Natives and Strangers*, supra note 310, at 262.

[\[FN320\]](#). Dershowitz, *Chutzpah*, supra note 288; Andrew M. Greeley, *The Catholic Myth: The Behavior and Beliefs of American Catholics* 65-89 (1990).

[\[FN321\]](#). Albert Einstein, *Our Debt to Zionism*, in *Out of My Later Years* 262 (1950); Lucia Ann Silecchia, *On Doing Justice & Walking Humbly with God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 *Cath. U. L. Rev.* 1163, 1165 (1997).

[FN322]. At least half of the membership of the Communist Party in the 1930s and 1940s was Jewish. Guenter Lewy, *The Cause That Failed: Communism in American Political Life* 294-95 (1990); Paul Buhle, *Themes in American Jewish Radicalism*, in *The Immigrant Left in the United States* 95 (Paul Buhle & Dan Georgakas eds., 1996); Maurice Isserman, *Which Side Were You On?* 10 (1982). During that same period, a large percentage of unions were under Catholic leadership. Neil Betten, *Catholic Activism and the Industrial Worker* vii, 112 (1976).

[FN323]. Lewy, *supra* note 322, at viii; Betten, *supra* note 322, at 118.

[FN324]. Isserman, *supra* note 322, at 19 (indicating that, by 1939, the Communist Party either controlled or influenced the United Electrical, Radio, and Machine Workers Union, the National Maritime Union, the Transport Workers Union, the American Newspapers Guild, and the Fur and Leather Workers Union). Jewish Communist leaders also had a leadership role in the Furriers Union. Harvey E. Klehr, *Communist Cadre: The Social Background of the American Communist Party Elite* 39 (1978).

[FN325]. Betten, *supra* note 322, at 112 (indicating that the Steelworkers Union, Electrical Workers Union, Fisherman's Union of the Pacific, and American Newspaper Guild were under Catholic leadership).

[FN326]. Douglas P. Seaton, *Catholics and Radicals: The Association of Catholic Trade Unionists and the American Labor Movement, from Depression to Cold War* 13-28 (1981). While, historically, the Catholic Church was hostile to state intervention on behalf of workers, the conditions in the early twentieth century changed this opinion. In 1919, the Conference of American Bishops endorsed public housing, minimum wages, and other measures of state legislation in American social and economic life. *Id.* at 20; see also Betten, *supra* note 322, at 3.

[FN327]. Some of the more well known organizations were the National Union of Social Justice, focusing on political reform, the Association of Catholic Trade Unionists, focusing on unionization, and the Catholic Worker, focusing on social and economic reform. Betten, *supra* note 322, at 71, 95-96, 124. The notorious anti-Semite, Father Charles Coughlin, founded the ironically-named National Union of Social Justice. See *supra* note 303.

[FN328]. Betten, *supra* note 322, at 71. The Catholic Worker Movement advocated nonviolent social change through the use of strikes and, in particular, sit-down strikes, Janice Brandon-Falcone, *Experiments in Truth: An Oral History of the St. Louis Catholic Worker, 1935-1942*, in *A Revolution of the Heart: Essays on the Catholic Worker* 321 (Patrick G. Coy ed., 1988), strove to aid and nurture community life in the establishment of houses of humanity, Angie O'Gorman & Patrick G. Coy, *Houses of Hospitality: A Pilgrimage into Nonviolence*, in *A Revolution of the Heart*, *supra*, at 248-49, and published and distributed the *Catholic Worker*. Nancy L. Roberts, *Dorothy Day and the Catholic Worker* 15 (1984). The *Catholic Worker* "supported organized labor and regularly reported labor views," often urging Catholics to organize

with unions and “fight for social justice.” Betten, *supra* note 322, at 67. In 1935, the Catholic Worker had a circulation of 110,000. Nancy L. Roberts, Dorothy Day: Editor and Advocacy Journalist, in *A Revolution of the Heart*, *supra*, at 119. Child psychiatrist and social activist Robert Coles noted the influence Dorothy Day and the Catholic Worker Movement had on the values he learned in childhood. Coles, *supra* note 1, at xi-xix. While in medical school, he lived in a Catholic Worker hospitality house. *Id.* at xix.

[\[FN329\]](#). Paul Berman, Preface to *Blacks and Jews: Alliances and Arguments* xii (Paul Berman ed., 1994) [hereinafter *Blacks and Jews*].

[\[FN330\]](#). Gitlin, *supra* note 51, at 26, 127-70.

[\[FN331\]](#). Paul Berman, Introduction: The Other and the Almost the Same, in *Blacks and Jews*, *supra* note 329, at 13. The Jewish contingent of the United Federation of Teachers assisted in setting up Freedom Schools to replace schools that closed as a result of the resistance to the Brown ruling. Murray Friedman, *What Went Wrong? The Creation and Collapse of the Black-Jewish Alliance* 181 (1995) [hereinafter *Friedman, What Went Wrong?*].

[\[FN332\]](#). Andrew Hacker, Jewish Racism, Black Anti-Semitism, in *Blacks and Jews*, *supra* note 329, at 159.

[\[FN333\]](#). Berman, *supra* note 331, at 13-14.

[\[FN334\]](#). Cagin & Dray, *supra* note 303, at 27. For a film version of the story of Goodman, Schwerner, and Chaney, see *Mississippi Burning* (Orion Pictures 1988).

[\[FN335\]](#). Cagin & Dray, *supra* note 303, at 27; see also Doug McAdam, *Freedom Summer* 69-70 (1988).

[\[FN336\]](#). See, e.g., *Friedman, What Went Wrong?*, *supra* note 331, at 178-80 (noting that James Farmer, the founder of the Congress of Racial Equality (“CORE”), recruited Marvin Rich, a Jew, to be CORE's key speech writer and fund-raiser).

[\[FN337\]](#). *Id.* at 181. See generally Jack Greenberg, *Crusaders in the Courts* (1994) (recounting the civil rights efforts of lawyers in the NAACP Legal Defense and Educational Fund, several of whom were Jewish); Arthur Kinoy, *Rights on Trial: The Odyssey of a People's Lawyer* (1983) (Jewish lawyer and teacher recounting his activism through the National Lawyer's Guild).

[FN338]. For some reason, other churches were far more active in the civil rights struggle. James F. Findlay, Jr., *Church People in the Struggle: The National Council of Churches and the Black Freedom Movement, 1950-1970* (1993). For one explanation of the roots of Catholic noninvolvement, see George K. Hunton & Gary MacEoin, *All of Which I Saw, Part of Which I Was: The Autobiography of George K. Hunton* 64 (1967).

[FN339]. Findlay, *supra* note 338, at 57.

[FN340]. Hunton & MacEoin, *supra* note 338.

[FN341]. *Id.* at 60 (noting that the Catholic Hour, a radio show sponsored by the National Catholic Interracial Federation, addressed the historical injustice done to blacks and articulated the ideology of the civil rights movement). Through the influence of George Hunton and Father Markoe, a Catholic bulletin called *Interracial Review* was established to educate Catholics about the civil rights movement. *Id.* at 8, 59. Archbishop Patrick O'Boyle of the Washington diocese wrote memorable pastoral letters that were read in churches on Sundays and initiated a compulsory recitation of prayers for racial justice. Thomas Gentile, *March on Washington: August 28, 1963*, 174 (1983). Archbishop Joseph Rummel of the New Orleans diocese frequently spoke out for school desegregation and ordered a day of prayer for racial integration. *Civil Rights 1960-63: The Negro Campaign to Win Equal Rights and Opportunities in the United States* 24 (Lester A. Sobel ed., 1964) [hereinafter *The Negro Campaign*].

[FN342]. The fight for desegregation was led primarily by the bishops in the southern dioceses. In February 1961 Rev. Francis Hyland, Thomas McDonough and Paul J. Hallinan, bishops of Georgia and South Carolina, announced that all parochial schools were to be desegregated. *The Negro Campaign*, *supra* note 341, at 53. Bishops in Virginia, North Carolina, Texas, Kentucky, and Tennessee also made similar announcements. *Id.* Two of the most active bishops in the desegregation movement were Archbishop Patrick O'Boyle of Washington, D.C. and Archbishop Joseph Francis Rummel of New Orleans. Archbishop Rummel excommunicated three Louisiana Catholics for attempting to foment resistance to his announcement that parochial schools be desegregated. *Id.* at 73. In addition to ordering the desegregation of Washington schools, Archbishop O'Boyle bused inner city African-Americans to affluent, private parochial schools. Gentile, *supra* note 341, at 173.

[FN343]. *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* xv (Melvin Small & William D. Hoover eds., 1990); see also Nancy Zaroulis & Gerald Sullivan, *Who Spoke Up?: American Protest Against the War in Vietnam 1963-1975* xi (1984) [hereinafter *Zaroulis, Who Spoke Up?*].

[FN344]. Charles DeBenedetti, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (1990); Zaroulis, *Who Spoke Up?*, *supra* note 343.

[FN345]. Catholic organizations and members of the Catholic clergy were especially involved in the movement against the Vietnam War, including the Catholic Peace Fellowship, which was established by Jim Forest, Tom Cornell, and Daniel Berrigan. DeBenedetti, *supra* note 344, at 96; see also Murray Polner & Jim O'Grady, *Disarmed and Dangerous: The Radical Lives and Times of Daniel and Philip Berrigan* 109 (1997); Richard Curtis, *The Berrigan Brothers: The Story of Daniel and Philip Berrigan* 49 (1974). The Union of American Hebrew Congregations, the official arm of Reform Judaism, passed a number of resolutions critical of American policies regarding Vietnam. Mitchell K. Hall, *CALCAV and Religious Opposition to the Vietnam War*, in *Give Peace a Chance: Exploring the Vietnam Antiwar Movement*, *supra* note 343, at 35, 37.

[FN346]. DeBenedetti, *supra* note 344, at 144-45; Hall, *supra* note 345, at 39.

[FN347]. DeBenedetti, *supra* note 344, at 195.

[FN348]. The Catonsville raid was led by two Catholic priests, Philip and Daniel Berrigan, and seven of their confederates. DeBenedetti, *supra* note 344, at 219. The Berrigan brothers' role in the Catonsville 9 inspired similar protests elsewhere and sparked the radicalization of the Catholic antiwar movement. Curtis, *supra* note 345, at 94. After Catonsville, the Berrigan brothers continued to participate in acts of civil disobedience to protest the Vietnam War. *Id.*; see also Polner & O'Grady, *supra* note 345. Philip Berrigan, now age seventy-four, continues to fight against nuclear weapons and the arms race. Carey Goldberg, *From Prison, Old Militant Struggles On*, *N.Y. Times*, Nov. 29, 1997, at A1; Paula Span, *One Man's War*, *Wash. Post*, July 28, 1997, at C1. Berrigan is currently incarcerated in a federal jail in Maine for his participation in an unlawful boarding of a U.S. Naval warship during which blood was poured on navigational charts and equipment. Although, since 1967, he has spent more than seven years behind bars for various acts of civil disobedience, he is undeterred: “[T]his arms thing is insane, out of control, and I love this country and I've fought for it and served its poor for three decades, and I can't not do what I do.” Span, *supra*.

[FN349]. Paul L. Montgomery, *25 Draft Office Raiders Held in Jersey and Buffalo*, *N.Y. Times*, Aug., 23, 1971, at 1.

[FN350]. Four Sisters of Notre Dame de Namur, while on a standard tour in the White House, dropped to their knees to say the Lord's Prayer. DeBenedetti, *supra* note 344, at 360. This protest by the Sisters resulted in numerous other “kneel-ins” in the next six weeks, resulting in 158 arrests. *Id.*

[FN351]. See, e.g., Montgomery, *supra* note 349.

[FN352]. See, e.g., Pegi Taylor & Stanley Mallach, *The impact of The Milwaukee 14*, *Milwaukee J.*, Sept. 19, 1993, at 4.

[FN353]. See generally Mark L. Levin et al., *The Tales of Hoffman* (1970) (containing an edited transcript of the Chicago 7 trial, featuring Jewish defendants/activists Abbie Hoffman and Jerry Rubin, and Jewish political/criminal defense attorneys William Kunstler and Leonard Weinglass). Abbie Hoffman and Jerry Rubin were among the Chicago 7. Zaroulis, *Who Spoke Up?*, supra note 343, at 249.

[FN354]. Zaroulis, *Who Spoke Up?*, supra note 343, at 401 (noting that, on the eve of President Nixon's second inauguration, a group that described itself as “the largest assembly of Jewish organizations ever to protest the Vietnam war” “gathered in Central Park in New York to plant a tree as a symbol of their dedication to healing and rebuilding the divided country”).

[FN355]. See generally Eleanor Flexner, *Century of Struggle* (Antheneum 1974) (1959); Nancy Cott, *The Grounding of Modern Feminism 13-50* (1987).

[FN356]. Judith Hole & Ellen Levine, *Rebirth of Feminism* (1971); Cott, supra note 355, at 283; Catharine A. MacKinnon, *Feminism Unmodified 1* (1987).

[FN357]. Susan Weidman Schneider, *Jewish and Female* 504 (1984); see also Lois W. Banner, *Women in Modern America: A Brief History* 229-31 (1974).

[FN358]. Abortion foes ask pope to punish 27 in U.S., *Chi. Trib.*, Nov. 23, 1991, §1, at 6; Kim Sue Lia Perkes, *Protesters are vying for spotlight*, *Ariz. Republic*, Aug. 13, 1993, at A2; see also Mary Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (1973).

[FN359]. See, e.g., *Abortion foes ask pope to punish 27 in U.S.*, supra note 358. Catholic prochoice feminists must take on two powerful institutions: the American political system and the Catholic Church.

[FN360]. *Id.* Unfortunately, some Catholic feminists who are against abortion feel that there is no place in the women's movement for them. But see Nat Hentoff, *Yes, There Are Pro-Life Feminists*, *Wash. Post*, Oct. 29, 1994, at A19 (describing *Feminists for Life of America*, an organization opposed to abortion, that works with prominent feminist organizations to combat inequality in the work place, denial of welfare benefits to needy women and children, violence against women, and breast cancer).

[FN361]. Schneider, supra note 357, at 229-33. Furthermore, in a 1977 survey of American women and religion, Jewish women were considerably more liberal than Protestant or Catholic women on birth control and abortion—for example, only 15% of Jewish women surveyed were against abortion, compared to 67% of Catholic women and 50% of Protestant

women. Id. at 231.

[FN362]. Gustavo Gutiérrez, Liberation Praxis and Christian Faith, in *Frontiers of Theology in Latin America* 3 (Rosino Gibellini ed. & John Drury trans., 1979).

[FN363]. Id. at 3-4; see also Sobrino, *supra* note 221, at 3 (describing his growing embrace of liberation theology).

[FN364]. Sobrino, *supra* note 221, at 4.

[FN365]. Id. For an example of interfaith liberation theology--or a derivation of it--at work in urban North America, see Steven Greenhouse, Nonprofit and Religious Groups Vow to Fight Workfare Program, *N.Y. Times*, July 24, 1997, at A1.

[FN366]. José Míguez Bonino, Historical Praxis and Christian Identity, in *Frontiers of Theology*, *supra* note 362, at 263.

[FN367]. Segundo Galilea, Liberation Theology and New Tasks Facing Christians, in *Frontiers of Theology*, *supra* note 362, at 167 (noting that liberation theology rests on three assumptions of the present juncture of Latin American history: that the vast majority of the population is unjustly dependent, that unjust dependence and underdevelopment is sinful, and that it is the duty of the Christian to overcome the injustice); see also Sobrino, *supra* note 221, at 22-23.

[FN368]. Galilea, *supra* note 367, at 165. Liberation theology is not promoted by either the ecclesiastical or political hierarchy. However, the Catholic Church as an institution has moved to the forefront of the worldwide human rights movement and has taken strong positions on human rights both at the papal and local levels. John Witte, Jr., [Law, Religion and Human Rights](#), 28 *Colum. Hum. Rts. L. Rev.* 1, 20-21 (1996).

[FN369]. Juan Luis Segundo, Capitalism Versus Socialism: Crux Theologica, in *Frontiers of Theology*, *supra* note 362, at 240-59 (arguing that the most urgent choice facing the Latin American continent is the choice between capitalism and socialism); Juan Carlos Scannone, Theology, Popular Culture, and Discernment, in *Frontiers of Theology*, *supra* note 362, at 215-22 (noting different emphasis between adoption of Marxist philosophy and theology incorporating culture and religiosity of people).

[FN370]. Raul Vidales, Methodological Issues in Liberation Theology, in *Frontiers of Theology*, *supra* note 362, at 54.

[\[FN371\]](#). Galilea, *supra* note 367, at 181.

[\[FN372\]](#). Sister Helen Prejean, *Dead Man Walking: A Sharing of the Journey*, [3 Geo. J. on Fighting Poverty 73 \(1995\)](#).

[\[FN373\]](#). *Id.*

[\[FN374\]](#). Of course, we use these terms more broadly here. By “prophets” we mean teachers, leaders, and spokespersons, and by “saints” we mean those who are exceptionally good, caring, and devoted. Interestingly, at the conclusion of Barbara Babcock’s influential article, *Defending the Guilty*, she turns for inspiration to “an exemplary life”—that of Clarence Darrow—“in the mode of nineteenth century biographies of saints and statesmen.” Babcock, *supra* note 16, at 184. Following Babcock’s lead, we offer Darrow and others.

[\[FN375\]](#). There are many others who bear mention, including: David Bruck, Judy Clark, Ramsey Clark, Morris Dees, Millard Farmer, Liz Fink, Charles Garry, Ernest Goodman, Nancy Hollander, George Kendall, Arthur Kinoy, John Packel, Barry Portman, Stuart Schuman, Palmer Singleton, Morton Stavis, Lynne Stewart, William Stringfellow, Michael Tigar, Leonard Weinglass, and lesser known, but equally devoted, others associated with the National Lawyers Guild, the NAACP Legal Defense and Education Fund, public defender offices, and death penalty resource centers across the country.

There are three teachers and scholars who particularly inspire and guide us: Monroe Freedman, Anthony Amsterdam, and Barbara Babcock. Each has written numerous articles and books on criminal defense, too many to cite.

There are two judges, a Catholic and a Jew, who represented the finest traditions of their faith in all regards and also stood up for the accused: former Supreme Court Justice William Brennan and former judge of the United States Court of Appeals for the District of Columbia David Bazelon. Justice Brennan died on July 24, 1997. Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, *N.Y. Times*, July 25, 1997, at A1. In a speech at Georgetown University in 1985, he acknowledged that his views on the death penalty were contrary to current popular opinion: “On this issue, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived.” *Id.* Judge Bazelon died on February 19, 1993. Marilyn Berger, *David Bazelon Dies at 83; Jurist Had Wide Influence*, *N.Y. Times*, Feb. 21, 1993, §1, at 38. As Judge Bazelon wrote: “It is always easy to concede the inevitability of social injustice and find the serenity to accept it. The far harder task is to feel its intolerability and seek the strength to change it.” *Id.*

[\[FN376\]](#). Babcock, *supra* note 16, at 184. Darrow was born on April 18, 1857 and died on March 13, 1938 at the age of eighty. Kevin Tierney, *Darrow: A Biography* 3, 438 (1979). He attended college at Allegheny College and studied law at the University of Michigan. *Id.* at 20-21; Darrow, *The Story of My Life*, *supra* note 57, at 26-30.

[\[FN377\]](#). Babcock, *supra* note 16, at 184-95. For an exhaustive and fascinating account of Clarence Darrow’s bribery prosecution in 1912, see Geoffrey Cowan, *The People v. Clarence Darrow* (1993). See also Darrow, *The Story of My*

Life, *supra* note 57, at 172-91; J. Anthony Lukas, *Big Trouble* 288-345 (1997).

[\[FN378\]](#). Irving Stone, *Clarence Darrow for the Defense* 354 (1941).

[\[FN379\]](#). See, e.g., Tierney, *supra* note 376, at 280.

[\[FN380\]](#). Darrow, *The Story of my Life*, *supra* note 57, at 337-38 (discussing his compassion for those arrested and convicted of crime); see also Babcock, *supra* note 16, at 185.

[\[FN381\]](#). See, e.g., Darrow, *The Story of My Life*, *supra* note 57, at 366 (noting that blacks are disproportionately imprisoned); Stone, *supra* note 378, at 484 (quoting from Darrow's closing argument in the Sweet case, in which a black doctor and his friends and family were tried for murder arising out of a racially motivated mob attack on his house in Detroit); Tierney, *supra* note 376, at 279-82 (describing Darrow's law partnership with Peter Sissman, an immigrant Russian Jewish socialist, from around 1915 to 1925).

Unfortunately, Darrow's egalitarianism did not extend to women. Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present ix-x* (1986). Darrow once lectured a group of female lawyers in Chicago on the futility of their endeavor:

You can't be shining lights at the bar because you are too kind. You can never be corporation lawyers because you are not cold-blooded. You have not a high grade of intellect. You can never expect to get the fees men get. I doubt if you [can] ever make a living. Of course you can be divorce lawyers. That is a useful field. And there is another field you can have solely for your own. You can't make a living at it, but it's worthwhile and you'll have no competition. That is the free defense of criminals.

Id. at x. Perhaps it can be said that, in his way, Clarence Darrow encouraged women to be public defenders.

[\[FN382\]](#). Babcock, *supra* note 16, at 185.

[\[FN383\]](#). See, e.g., *supra* note 197. See also Darrow, *The Story of My Life*, *supra* note 57, at 14; *Verdicts out of Court*, *supra* note 197, at 120-21 (Darrow lambasting organized religion for its role in Prohibition).

[\[FN384\]](#). He did so in his choice of work. Floyd, *supra* note 50, at 1410. He also did so in the way he examined difficult philosophical questions. Darrow, *The Story of My Life*, *supra* note 57, at 385-95.

[\[FN385\]](#). Darrow, *The Story of My Life*, *supra* note 57, at 15. Darrow described his father as “a visionary and dreamer.” *Id.* at 13. His parents were regarded as “infidels” for their unorthodox religious views, notwithstanding his father's traditional religious education. *Id.* at 14. Along with other “infidels,” they formed their own religious group. *Id.*

[\[FN386\]](#). *Id.* Darrow was apparently raised Presbyterian. *Id.* at 12-13.

[\[FN387\]](#). *Id.* at 31.

[\[FN388\]](#). See David Stout, William Kunstler, 76, Dies; Lawyer for Social Outcasts, *N.Y. Times*, Sept. 5, 1995, at B6.

[\[FN389\]](#). Kunstler's detractors included not only the “usual suspects”—those who always castigate defenders of the despised—but those who would otherwise be on his side. For example, fellow criminal lawyer Alan Dershowitz seemed to harbor a particular dislike for William Kunstler. Dershowitz, *The Best Defense*, *supra* note 24, at 117, 409-10 (alleging that Kunstler cares more about causes than clients); see also Stout, *supra* note 388 (noting that Kunstler's critics saw him as a show-off and publicity-seeker). But see Stout, *supra* note 388 (noting that Kunstler did not entirely disagree with his detractors: “I enjoy the spotlight ...”).

By most accounts, Kunstler's most outrageous conduct occurred during the Chicago 7 trial in 1969-1970. While he did not directly participate in the defendants' various antics, munching jelly beans in court, donning judicial robes in mockery, attempting to hold a birthday party in court, and referring to Judge Julius Hoffman as “Mr. Magoo,” he did not do much to uphold the dignity of the proceedings. Stout, *supra* note 388; see also Dershowitz, *The Best Defense*, *supra* note 24, at 406-09. At one point, when defendant Abbie Hoffman received an envelope in the mail that appeared to contain marijuana, Kunstler brought the matter to the judge's attention. “I'm sure counsel can find a way to take care of this matter without further troubling this court,” Judge Hoffman said. A deadpan Kunstler replied, “Your honor, I will personally see that it is burned this evening.” Stout, *supra* note 388.

[\[FN390\]](#). Stout, *supra* note 388. Among Kunstler's clients were suspects in the World Trade Center bombing in 1993; Colin Ferguson, who shot six people to death on a Long Island Railroad train in 1993; El Sayyid Nosair, accused of killing Rabbi Meir Kahane in 1990; Darryl Cabey, one of four black youths wounded by Bernhard Goetz in the New York subway in 1984; Wayne Williams, accused of killing children in Atlanta, Georgia in the 1980s; prisoners charged in the aftermath of the 1971 rebellion at Attica Correctional Facility in upstate New York; antiwar activists in the Chicago 7 conspiracy trial in 1969-1970; Stokely Carmichael in the late 1960s; and civil rights activists in the early 1960s. Kunstler, *supra* note 282.

[\[FN391\]](#). Stout, *supra* note 388.

[\[FN392\]](#). Kunstler, *supra* note 282, at 94-152.

[\[FN393\]](#). *Id.* at xiii.

[FN394]. Associated Press, William Kunstler, lawyer noted for defending rights cases; at 76, Boston Globe, Sept. 5, 1995, at 31.

[FN395]. Kunstler, *supra* note 282, at 402.

[FN396]. *Id.* at 52-57. Kunstler attended Yale University and Columbia Law School. *Id.* at xiii.

[FN397]. Auerbach, *supra* note 121, at 15-16. Auerbach asserts that, even though they “strayed the farthest from religious tradition,” *id.* at 15, Jewish socialists embraced biblical tradition in the writings of the prophets, especially Isaiah, *id.* at 15-16. Auerbach quotes a socialist poet at the turn of the century who could be speaking for William Kunstler seventy years later: “Each era has its own Torah Ours is one of freedom and justice.” *Id.* at 16.

[FN398]. See *supra* notes 137-39, and accompanying text. Kunstler also had a strong Jewish identity. When some Jewish critics accused Kunstler of deliberately seeking out Muslim terrorists as clients, Kunstler responded: “[T]hey called me a nigger-lover down south when I worked with civil rights activists, and now up north they call me a self-hating Jew. Believe me, this is one Jew who loves himself.” Josh Getlin, *The King of Controversy: Once, William Kunstler epitomized movement lawyers: fighting for civil rights, against Vietnam. He hasn't changed much since then. But his clients have*, L.A. Times, Sept. 2, 1994, at E1. In his autobiography, he notes with pleasure that “Kunstler, in Yiddish, means magician or artist, a man of wonderful tricks and abilities.” Kunstler, *supra* note 282, at 401 (quoting Louis Nizer, another well-known Jewish criminal lawyer); cf. Cassell's German Dictionary 373-74 (1978) (defining “kunstler” as an “artist,” “virtuoso,” or “artiste,” or “performer”).

[FN399]. Catherine Roraback, a graduate of Mount Holyoke College, and one of two women in her graduating class at the Yale Law School, now practices law in Canaan, Connecticut. From the 1950s to the 1980s, she practiced in New Haven, Connecticut. Aside from criminal defense work, Roraback is known for her work in civil liberties. She was lead counsel in [Abele v. Markle, 452 F.2d 1121 \(2d Cir. 1971\)](#) (known as *Women v. Connecticut*), which sought to secure the right to an abortion in Connecticut. She litigated [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#), the landmark birth control case, through the Connecticut courts and was co-counsel with Thomas Emerson before the United States Supreme Court. Carole Bass, *Client-Centered Approach Drives Defender of Unpopular Causes*, Conn. L. Trib., Apr. 6, 1992, at 1; Andi Rierden, *Griswold v. Connecticut: Landmark Case Recalled*, N.Y. Times, May 28, 1989, §23, at 6.

[FN400]. Bass, *supra* note 399.

[FN401]. Roraback Interview, *supra* note 284.

[\[FN402\]](#). Bass, *supra* note 399.

[\[FN403\]](#). Curtis Wilkie, Nancy Gertner makes the leap from movement lawyer to federal judge, *Boston Globe Mag.*, Oct. 23, 1994, at 14, available in [1994 WL 6006418](#).

[\[FN404\]](#). Roraback Interview, *supra* note 284.

[\[FN405\]](#). *Id.*

[\[FN406\]](#). In a telephone conversation, when she was asked whether she regards her work as a “calling,” Roraback laughed and said, “That’s awfully gucky-sounding.” *Id.* While she acknowledged a connection between her work and her faith, she rejected the term “Christian” as “too narrow” to describe her faith tradition. *Id.*

[\[FN407\]](#). See *infra* notes 501-04 and accompanying text.

[\[FN408\]](#). Roraback Interview, *supra* note 284.

[\[FN409\]](#). She has always maintained a general law practice, with a mix of traditional legal work and high profile cases. When asked once why someone of her stature continued to do “bread-and-butter legal work,” she replied that it is all about the clients. Bass, *supra* note 399. As one former protégé put it, ““Her joy as a lawyer was in representing clients.””*Id.*

[\[FN410\]](#). Roraback characteristically represents clients with devotion and humility. *Id.*

[\[FN411\]](#). Editorial, *Following in Katie Roraback’s Finest Tradition*, *Conn. L. Trib.*, July 27, 1992, at 14.

[\[FN412\]](#). Hilary Anderson, *Defender logs road record in teaching*, *ISBA Bar News*, Apr. 1, 1996, at 1.

[\[FN413\]](#). *Id.* MacCarthy says that he first became interested in becoming a criminal lawyer when he read Irving Stone’s biography of Clarence Darrow. Telephone Interview with Terence MacCarthy, Executive Director of the Federal Defender Program, Northern District of Illinois (Oct. 10, 1997) [hereinafter *MacCarthy Interview*]. Apparently, Stone’s biography has influenced many criminal lawyers. See, e.g., Lois Romano, *A Man of Independent Means*, *Wash. Post*,

Sept. 29, 1997, at D1 (noting that when Michael Tigar--a feisty and erudite criminal lawyer who has represented Angela Davis, the Chicago 7, John Demjanjuk, and alleged Oklahoma City bomber Terry Nichols--told his father at age eleven that he wanted to be a lawyer, his father gave him a copy of Irving Stone's Clarence Darrow for the Defense). MacCarthy says he never even contemplated being a prosecutor. He attributes this to his Irish background and a related deep identification with the accused. MacCarthy Interview, *supra*.

[\[FN414\]](#). Anderson, *supra* note 412. MacCarthy attended St. Joseph's College and DePaul Law School. MacCarthy Interview, *supra* note 413.

[\[FN415\]](#). See Anderson, *supra* note 412; see also MacCarthy Interview, *supra* note 413.

[\[FN416\]](#). Anderson, *supra* note 412.

[\[FN417\]](#). *Id.*; see also MacCarthy Interview, *supra* note 413. MacCarthy met the challenge full force. From the start, he insisted on setting high standards for the first federal defender office:

Before I would agree to be Executive Director, I told the judges who offered me the job that they must agree to follow the ABA Standards. The judges said, "Fine." Then I said, "This means you must resign from the Board." The judges were dumbfounded. I explained, "The ABA Standards say that judges can't serve on the Board. It is important that the office be independent." They said, "Okay," and resigned.

MacCarthy Interview, *supra* note 413. MacCarthy says that he wouldn't give up his job as a federal defender for anything. The only other jobs he "would even consider" are "Pope, United States Supreme Court Justice, and Ambassador to Ireland." However, if he were Pope, he would "move the Vatican to Chicago where it belongs." *Id.*

[\[FN418\]](#). Anderson, *supra* note 412.

[\[FN419\]](#). MacCarthy Interview, *supra* note 413 (MacCarthy describing the sentencing guidelines as the "greatest travesty to ever hit the federal courts"); see also [Terence F. MacCarthy & Nancy B. Murnighan, *The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing by Numbers*, 67 Chi.-Kent L. Rev. 51 \(1991\)](#).

[\[FN420\]](#). Telephone Interview with Maureen Rowley, Chief Defender, Federal Defender for the Eastern District of Pennsylvania (Sept. 30, 1997). MacCarthy is the first defender to sit on the Board of Governors of the ABA and has consistently been an active member. MacCarthy Interview, *supra* note 413.

[\[FN421\]](#). MacCarthy Interview, *supra* note 413. Both of MacCarthy's parents were born in Ireland and fueled MacCarthy's love of Irish history. *Id.* MacCarthy worries that second and third generation Irish-Americans have forgotten that the "Irish were terribly oppressed over the years." *Id.*

[\[FN422\]](#). MacCarthy Interview, *supra* note 413.

[\[FN423\]](#). Anderson, *supra* note 412.

[\[FN424\]](#). Peter Ross, David Rudovsky States His Case, *Pa. Gazette*, Oct. 1990, at 21, 23.

[\[FN425\]](#). *Id.*

[\[FN426\]](#). *Id.*

[\[FN427\]](#). While Rudovsky does not regard his work as a “calling,” he sees it as “the natural and right thing to do.” Telephone Interview with David Rudovsky (Oct. 15, 1997) [hereinafter *Rudovsky Interview*]. Rudovsky practices law in order to make a difference: “If I am going to be a lawyer, which I enjoy, I have to feel that I’m arguing the right issues, the important issues of the day.” *Id.*

[\[FN428\]](#). Ross, *supra* note 424, at 27.

[\[FN429\]](#). *Id.* at 26.

[\[FN430\]](#). *Id.* at 21; cf. *id.* (quoting longtime chief of appeals at the Defender Association of Philadelphia, John M. Packel: “I have been married 23 years, and the only person my wife was ever jealous of was David Rudovsky. He is the most perfect human being I ever met.”).

In addition to being a practicing lawyer, Rudovsky is a beloved teacher. In 1990 he received the Harvey Levin Award for Excellence in Teaching from the third-year law students at the University of Pennsylvania School of Law. *Id.* at 27.

[\[FN431\]](#). Rudovsky received the award with characteristic humility. Michael Kimmelman, 4 with Phila. ties are among winners of ‘genius awards’, *Phila. Inquirer*, July 15, 1986, at 1 (“I think it reflects ... very positively on a large number of people who are doing this kind of work”). Upon receiving the prestigious award, Rudovsky shared with reporters his mother’s reaction: “I called my mother ... and she said, “Don’t they give that to really smart people?””). *Id.* In addition to questioning her son’s qualifications for the award, Rudovsky’s mother—who left the Communist Party, but not the Left, derided the generous grant he received. “My mother was a little disgusted when she learned how much money I was to receive. She said, ‘\$100,000 to one person? Why not give \$1000.00 to a hundred people?’” Rudovsky Interview, *supra* note 427.

[\[FN432\]](#). Kimmelman, *supra* note 431.

[\[FN433\]](#). Lisa Brennan, *Santiago Appeal Heard by Judges: Superior Court Argument Focuses on Withheld Evidence by Prosecution*, *Legal Intelligencer*, Jan. 20, 1994, at 1.

[\[FN434\]](#). Rudovsky Interview, *supra* note 427.

[\[FN435\]](#). *Who's Who in American Law* 112 (7th ed. 1991). Bright attended the University of Kentucky for college and law school. *Id.*

[\[FN436\]](#). Vicki Quade, *Prison Law: Defending the Forgotten*, *Barrister*, Winter/Spring 1988, at 39 [*hereinafter* Quade, *Defending the Forgotten*].

[\[FN437\]](#). Mark Hansen, *Death's Door*, *A.B.A. J.*, June 1996, at 58.

[\[FN438\]](#). Quade, *Defending the Forgotten*, *supra* note 436.

[\[FN439\]](#). *Id.* Although he has been a death penalty lawyer for twenty years, Bright's passion for the work has not abated: “It amazes me that more people don't feel the same as I do [It's like] standing outside of a burning building and watching the flames go higher and higher. You know you've got to do something to help.” *Id.*

[\[FN440\]](#). In response to a question about the connection between religious faith and his work, Bright replied, “It inspired it.” Interview with Steven Bright, Director of the Southern Center for Human Rights, Georgetown University Law Center (Aug. 1, 1997) [*hereinafter* Bright Interview]. He credits the Reverend George A. Chauncey, the minister of the Presbyterian church he attended when he was growing up in Danville, Kentucky, as being a major influence in his life. In a time and place where it wasn't popular to hold such views,

Rev. Chauncey preached that you had to be involved in racial integration and helping the poor. For him, being Christian meant being on the side of the poor Rev. Chauncey made an impression on me at a time when I thought there was a lot of hypocrisy in the Christian Church--the message always seemed different from how people lived their lives After I took a class with Rev. Chauncey, I thought this is what I should be doing--standing with the poor.

Id. Bright also makes explicit--and effective--reference to scripture when he litigates capital cases. *Id.*

[\[FN441\]](#). *Id.*

[\[FN442\]](#). Id.

[\[FN443\]](#). Who's Who in American Law, *supra* note 435, at 853. Stevenson attended Eastern College in St. David's, Pennsylvania, for his undergraduate education and received a full scholarship to study law and public policy at the Harvard Law School and the Kennedy School of Government. Meg Grant, Bryan Stevenson: A stubborn Alabama lawyer stands alone between death and his clients, *People*, Nov. 27, 1995, at 71. Although he could have gone to any high-paying law firm in the country, Stevenson had spent time at the Southern Prisoners' Defense Committee during law school and decided it was “better to be about something and get nothing for it than be about nothing and get something.” Miriam Bensimhon, A Higher Law: Fighting Daily for Those Whom Society Would Rather Forget, Attorney Bryan Stevenson Demands that the Country Live Up to its Ideals, *Life*, May 5, 1997, at 64 (collector's ed.), available in [1997 WL 8498476](#).

[\[FN444\]](#). Bensimhon, *supra* note 443; see also Earnest Reese, Activist lawyer true to self; Fellowship winner prefers human rights over ritzy life, *Atlanta Const.*, June 23, 1995, at D7. Stevenson teaches at New York University School of Law.

[\[FN445\]](#). Bensimhon, *supra* note 443.

[\[FN446\]](#). Grant, *supra* note 443, at 71, 74.

[\[FN447\]](#). Id. at 76. Former colleague Stephen Bright observes that Stevenson “is driven by a spiritual feeling to minister to the poorest people in our society.” Id.

[\[FN448\]](#). *Dead Man Walking* (Polygram Film Productions 1996); see also Prejean, *supra* note 257.

[\[FN449\]](#). Prejean, *supra* note 257, at 5-22.

[\[FN450\]](#). Id. at 5.

[\[FN451\]](#). Prejean credits Dorothy Day with articulating the social justice agenda at the heart of the Christian gospel--that Christians should “[c]omfort the afflicted and afflict the comfortable.” Id. Prejean agrees that “taking on the struggles of the poor invariably means challenging the wealthy and those who serve their interests.” Id.

[FN452]. Prejean, *supra* note 257, at 9; see also Vicki Quade, *The Voice of Dead Men: Interview with Sister Helen Prejean*, *Hum. Rhts.*, Summer 1996, at 12, 15 [[hereinafter Quade, *The Voice of Dead Men*].

[FN453]. See *supra* note 441 and accompanying text.

[FN454]. Prejean, *supra* note 257, at 10; see also Quade, *The Voice of Dead Men*, *supra* note 452, at 15 (Prejean referring to herself as someone who “stands on the side of poor and struggling people and tries to bring the love of God, or love from faith to the transformation of society.”).

[FN455]. See *supra* notes 362-73 and accompanying text.

[FN456]. Prejean, *supra* note 257, at 11.

[FN457]. Interestingly, Angola Prison has inspired wonderful prison literature. In addition to Prejean's powerful book, see Wilbert Rideau & Ron Wikberg, *Life Sentences: Rage and Survival Behind Bars* (1992) (a collection of essays by prison editors of *The Angolite* at the Louisiana State Penitentiary depicting prison life).

[FN458]. Quade, *The Voice of Dead Men*, *supra* note 452. *Id.* at 14.

[FN459]. Bok, *supra* note 164, at 170-71.

[FN460]. One commentator regards this question as “ancient and fundamental.” Rob Atkinson, [Beyond the New Role Morality for Lawyers](#), *51 Md. L. Rev.* 853, 854 (1992); see also Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 *Am. B. Found. Res. J.* 613, 614; Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, in *The Good Lawyer*, *supra* note 48, at 287; Fried, *supra* note 48, at 1060.

[FN461]. Joseph Allegretti, *Christ and the Code: The Dilemma of the Christian Attorney*, 34 *Cath. Law.* 131, 134 (1991) [[hereinafter Allegretti, *Christ and the Code*].

[FN462]. See, e.g., [United States v. Wade](#), 388 U.S. 218, 250-59 (1967) (White, J., concurring in part and dissenting in part) (discussing the different roles of defense counsel and prosecution in the adversary system).

[FN463]. Compare Simon, *supra* note 23, at 1704-22, with Freedman, *Understanding Lawyers' Ethics*, *supra* note 20, at 65-86.

[FN464]. Heidi Li Feldman, [Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?](#), *69 S. Cal. L. Rev.* 885, 885-902 (1996); Allegretti, *Christ and the Code*, *supra* note 461, at 134.

Some Jewish scholars might disagree with these critiques of law as limiting because of the central and expansive role of law in Judaism. See, e.g., Auerbach, *supra* note 121, at 26-48 (exploring the “rule of sacred law” in Judaism). See also Levine, *supra* note 119, at 469 (“Jewish law consists of a detailed legal system, regulating both public and private life ... [and] presents at least guidelines for virtually every aspect of ideal societal and personal behavior.”); Suzanne L. Stone, In [Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory](#), *106 Harv. L. Rev.* 813, 894 (1993) (“Jewish law is not only a legal system; it is the life work of a religious community.”). Jewish law is not a narrow set of rules, but is a “divine revelation binding [the Jewish people] in an intimate relationship with God.” Auerbach, *supra* note 121, at 28. But see *id.* at 44 (“When Jewish law is compared with American law, the contrast is striking. Modern legal thought compartmentalizes, insisting upon boundaries, limits, separations, and carefully defined spheres. It imposes distinctions--between secular and religious, legal and moral, public and private.”). Cf. Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 81, at 1132 (“Professor Shaffer thinks of lawyers' ethics as being rooted in moral philosophy, while I think of lawyers' ethics as being rooted in the Bill of Rights and expressed in the American constitutionalized adversary system. These fundamental rights recognize and enhance the dignity and the sanctity of the individual, even when he is charged as an enemy of the state.”).

Some scholars have explored the vision of the virtuous prosecutor that emerges from ethical rules. Compare Stanley Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, *15 Am. J. Crim. L.* 197 (1988) (proposing a framework that focuses on the prosecutor's duty to pursue justice), with H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, *71 Mich. L. Rev.* 1145 (1973) (arguing that prosecutors should act primarily as zealous advocates).

[FN465]. See *supra* notes 381, 389.

[FN466]. James F. Keenan, *Proposing Cardinal Virtues*, *56 Theological Stud.* 709, 712 (1995) [hereinafter Keenan, *Proposing Cardinal Virtues*]. Some commentators are skeptical of the very notion of sainthood. See, e.g., George Orwell, *Reflections on Ghandi*, in *Shooting an Elephant* 93 (1950).

[FN467]. We mean to offer general guidance rather than answers to specific questions.

[FN468]. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 118-19 (2d ed. 1984) [hereinafter MacIntyre, *After Virtue*].

[FN469]. James F. Keenan, *Goodness and Rightness in Thomas Aquinas's Summa Theologiae* 7 (1992) [hereinafter

Keenan, Goodness and Rightness]; see also William C. Spohn, The Return of Virtue Ethics, 53 Theological Stud. 60, 61 (1992) (“Good character produces practical moral judgments based on beliefs, experience, and sensitivity more than on (or instead of) rules and principles.”).

[FN470]. Robert Araujo, The [Virtuous Lawyer: Paradigm and Possibility](#), 50 SMU L. Rev. 433, 470 (1997); Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients, and Moral Responsibility 60-61 (1994); Feldman, *supra* note 464, at 885; John McDowell, Virtue and Reason, 62 Monist 331, 336 (1979).

[FN471]. “Virtue ethics” is considered one of three major types of ethical systems. For a description of these ethical systems, see Séamus Murphy, The Many Ways of Justice, 26/2 Studies in the Spirituality of Jesuits 1, 20-23 (March 1994) (noting that there are three major types of ethical theory: an ethics of outcomes or results--proportionalism or consequentialism, an ethics of duty--deontology, and virtue ethics) [hereinafter Murphy, The Many Ways of Justice].

Although virtue ethics is part of the Judeo-Christian heritage, it does not presuppose believing in God or ascribing to religious faith. Keenan, Proposing Cardinal Virtues, *supra* note 466, at 717; Murphy, The Many Ways of Justice, *supra*, at 22.

Although the notion of “virtues” is generally regarded as more Christian than Jewish, there have been noteworthy Jewish scholars who have embraced this originally Aristotelian idea. See, e.g., The New Jewish Encyclopedia 302 (David Bridger ed., 1962) (describing Moses Maimonides, the foremost medieval Jewish philosopher, as an admirer of Aristotle, and his 1190 masterpiece, *Moreh Nevukhim* (Guide for the Perplexed), as an attempt to harmonize the teachings of Judaism with the philosophy of Aristotle “to promote the true understanding of the real spirit of the Law.”). See also Albert Einstein, Moses Maimonides, in *Out of My Later Years* 269 (1950) (referring to the influence of Maimonides on the synthesis of the Jewish bible and Greek philosophy and art, which marked “the beginning of our present cultural epoch”). Maimonides' *Guide for the Perplexed* is replete with references to Aristotle. Maimonides, *Guide for the Perplexed*, *supra* note 208, at 18, 148, 151, 226, 272, 273, 377. Maimonides refers to Aristotle as the “chief of philosophers.” *Id.* at 18; see also Lerner, *supra* note 165, at 300-01 (discussing the “Jewish virtues” of humility, compassion, honesty, hopefulness, joyfulness and humor).

[FN472]. Michael Slote, From Morality to Virtue 89 (1992); see also Keenan, Proposing Cardinal Virtues, *supra* note 466, at 710.

[FN473]. Murphy, *supra* note 471, at 22; cf. Lerner, *supra* note 165, at 300 (“Judaism is not only about doing the right thing, but also about being the right kind of person. And this means developing the right kind of characterological features, attitudes, aspirations, and hopes.”).

[FN474]. Keenan, Proposing Cardinal Virtues, *supra* note 466, at 711; see also MacIntyre, After Virtue, *supra* note 468, at 149.

[\[FN475\]](#). Ethical Writings of Maimonides, *supra* note 235, at 107.

[\[FN476\]](#). Keenan, Goodness and Rightness, *supra* note 469, at 13.

[\[FN477\]](#). Keenan, Proposing Cardinal Virtues, *supra* note 466, at 711. There is a connection between exercising virtues and practicing law. Both are to be practiced and are never truly mastered. Bradford Morrow, *Trinity Fields* 317-18 (1995).

[\[FN478\]](#). Lawrence B. Solum, Virtues and Voices, 66 *Chi.-Kent L. Rev.* 111, 117 (1990); see also MacIntyre, *After Virtue*, *supra* note 468, at 185.

[\[FN479\]](#). Ethical Writings of Maimonides, *supra* note 235, at 83-84; Gilbert C. Meilaender, *The Theory and Practice of Virtue* 38 (1984).

[\[FN480\]](#). MacIntyre, *After Virtue*, *supra* note 468, at 149.

[\[FN481\]](#). Aristotle attempted to identify universal virtues that reflected common experience. In the realm of the bodily appetites and their pleasures, Aristotle identified the virtue of moderation. To address fear of future death or injury, Aristotle pointed to the virtue of courage. With regard to the distribution of limited resources and application of law, he pointed to justice. Aristotle identified the virtue of practical wisdom in planning one's life and making sound decisions. In the management of personal property, generosity was the governing virtue. Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *XIII Midwest Studies in Philosophy: Ethical Theory: Character and Virtue* 35 (Peter A. French et al. eds., 1988).

With regard to application of law, the virtue of justice was paramount. *Id.*; see also MacIntyre, *After Virtue*, *supra* note 468, at 152; Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 *S. Cal. L. Rev.* 1735 (1988); Murphy, *supra* note 471, at 23.

[\[FN482\]](#). Keenan, Proposing Cardinal Virtues, *supra* note 466, at 714.

[\[FN483\]](#). A number of scholars have examined virtues in a cultural context. See, e.g., MacIntyre, *After Virtue*, *supra* note 468; Keenan, Proposing Cardinal Virtues, *supra* note 466, at 712; Murphy, *supra* note 473, at 23. Although we recognize the role that culture, local norms, and traditions play in the shaping of social values--and we agree that some virtues are culturally created--we believe in the existence of certain universal, or cardinal, virtues. Aquinas's articulation of the cardinal virtues built upon the work of Plato, Augustine, and Cicero, each of whom believed there were knowable virtues that were universal enough to apply to all cultures. Keenan, Proposing Cardinal Virtues, *supra* note 466. The universal

virtues become more detailed and nuanced when applied in a particular cultural context. These virtues are modest enough to accommodate a range of cultural applications. *Id.* When one considers the virtuous lawyer, one must, of course, acknowledge the cultural context in which the lawyer plies his or her trade. Feldman, *supra* note 464, at 911-14.

[FN484]. 23 St. Thomas Aquinas, *Summa Theologiae* 1a2ae, Q. 61, art. 2-3 (W.D. Hughes trans., Blackfriars 1969); see also Josef Pieper, *The Four Cardinal Virtues* (1965); Catechism, *supra* note 216, §§1804-1809.

[FN485]. Aquinas, *supra* note 484, 1a2ae, Q. 61, art. 2.

[FN486]. *Id.*; see also [R.J. Araujo, Thomas Aquinas: Prudence, Justice, and the Law, 40 Loy. L. Rev. 897, 905-11 \(1995\)](#); Catechism, *supra* note 216, § 1806; Pieper, *supra* note 484, at 7-8.

[FN487]. Aquinas, *supra* note 484, 1a2ae, Q. 61, art. 2; see also Catechism, *supra* note 216, at §§1808-1809.

[FN488]. Aquinas, *supra* note 484, 2a2ae, Q. 57, art. 1; see also Catechism, *supra* note 216, at §1807; Pieper, *supra* note 484, at 54.

[FN489]. Meilaender, *supra* note 479, at 20; see also Spohn, *supra* note 469, at 70.

[FN490]. Spohn, *supra* note 469, at 70-71.

[FN491]. For example, A.D.M. Walker notes that the command of justice--to possess an impartiality towards all others--conflicts with the duty we may owe to specific individuals to whom we form attachments. A.D.M. Walker, *Virtue and Character*, 64 *Phil.* 349, 356 (1989). This has resonance for the public defender.

Alasdair MacIntyre illustrates the developing recognition of competing virtues in his account of the conflicting visions of Henry II of England and Archbishop Thomas Becket. Henry II attempted to extend the rule of law, thereby replacing feudal law, self-help, and local custom as the governing bodies of England. Becket attempted to establish that human law was in the shadow of divine law, appealing to a law greater than the law articulated by Henry II. When Henry II and Becket confronted each other, they had a shared view of human and divine justice, notwithstanding Becket's role as martyr. After Henry II secured the death of Becket, he took to his room, donned a sackcloth, and fasted to do penance for the death of Becket. He did so in an attempt to restore unity. MacIntyre then recounts the dispute between Henry VII and Thomas More in which the two men inhabited rival conceptual worlds and could find no shared view. With More's death, Henry VII did no penance and instead delighted in the death of his rival. In this conflict, the framework of medieval agreement had been lost. Medieval Aristotelians tried to articulate that framework of agreement. MacIntyre, *After Virtue*, *supra* note 468, at 172-73; cf. Meilaender, *supra* note 479, at 20-21. (Such an emphasis on the necessary

unity of the virtues may seem bizarre and counterintuitive. Can we not admire the courage of the spy or soldier committed to what we think an evil cause? Are not men often temperate because they are too proud to act otherwise? Are not generosity and injustice quite compatible in certain circumstances?).

[\[FN492\]](#). See, e.g., Curtis, *supra* note 20, at 5; Fried, *supra* note 48, at 1071.

[\[FN493\]](#). Keenan, *Proposing Cardinal Virtues*, *supra* note 466, at 722.

[\[FN494\]](#). *Id.* at 723.

[\[FN495\]](#). *Id.*

[\[FN496\]](#). *Id.* at 723, 726-28. The virtue of self-care governs the relationship we have with ourselves on a number of levels: physically, mentally, spiritually. Cf. Lerner, *supra* note 168, at 102 (referring to “inner tikkun” and the importance of healing oneself as well as the world).

[\[FN497\]](#). Keenan, *Proposing Cardinal Virtues*, *supra* note 466, at 723.

[\[FN498\]](#). *Id.*

[\[FN499\]](#). MacIntyre notes that conflict in the virtues can produce, even in the life of a virtuous person, unfortunate results. For example, commitment to a community in which the virtues can flourish may be incompatible with the solitary devotion required by certain practices, such as the arts. MacIntyre notes the importance, therefore, of an overriding conception of the human telos, or goals and ends. MacIntyre, *After Virtue*, *supra* note 468, at 201-02; see also Feldman, *supra* note 464, at 909 (“[Virtue ethic’s] recognition of a plurality of virtues explains the possibility of ethical tragedy: If two traits are admirable but incompatible, a situation that calls for the exercise of both will pose a tragic dilemma.”). The virtue of prudence looks to the overall end of human goodness and provides guidance in exercising competing and conflicting virtues. Keenan, *Proposing Cardinal Virtues*, *supra* note 466, at 728.

[\[FN500\]](#). Keenan, *Proposing Cardinal Virtues*, *supra* note 466, at 723-24.

[\[FN501\]](#). Slote, *supra* note 472, at 154; see also Keenan, *Proposing Cardinal Virtues*, *supra* note 478, at 724-25. Interestingly, the Bible often refers to justice and fidelity as going hand in hand. See, e.g., Isaiah 11:5; Psalms 36:6-7.

[FN502]. James F. Keenan, *Learning the Virtue of Justice*, Church, Fall 1993, at 38-40; see also Catechism, *supra* note 216, § 1807. It is important to note that the virtue of justice, as articulated by contemporary theologians, differs from the pursuit of justice in Judaism. The chief difference may be the Jewish emphasis on individual rights. See *supra* notes 145-64 and accompanying text.

[FN503]. James F. Keenan, *The Virtue of Fidelity*, Church, Summer 1993, at 38-39; James F. Keenan, *Confidentiality, Disclosure, and Fiduciary Responsibility*, 54 *Theological Stud.* 142 (1993); Keenan, *Proposing Cardinal Virtues*, *supra* note 466, at 724-26; cf. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rhts.* 1, 5 (1975) (“[T]he role of the professional (like that of the parent) is to prefer in a variety of ways the interests of the client or patient over those of individuals generally.”).

[FN504]. See, e.g., Walker, *Virtue and Character*, *supra* note 491, at 353 (noting that justice includes a commitment to principle rather than a direct concern for another person). James Keenan explains the conflict between justice and fidelity as follows:

[W]e acquire and cultivate fidelity in order to strengthen the bonds of specific relations: familial, sacramental, social, professional, and civic. We acquire and cultivate justice because of our concerns for fairness, equality, the distribution of goods, and response to needs. The virtues differ particularly in this: Fidelity requires that we treat each person differently, justice that we treat each person the same. Fidelity tells us that our spouse, friend, parent, child, community member, client is more important than another person. Justice tells us that inequalities are wrong. Justice tells us to be blind to relationships, not to be influenced by friendships or loyalties

James F. Keenan, *Confidentiality: Erosion and Restoration*, 51 *Rev. for Religious* 882, 890-91 (1992) [hereinafter Keenan, *Confidentiality*]. The different virtues of justice and fidelity parallel the different ethical obligations of prosecutors and defense attorneys. See *ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2(c)* (3d ed. 1993) (“The duty of the prosecutor is to seek justice”); *Id.* *Standard 4-1.2(b)* (“The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.”).

[FN505]. Allegretti, *supra* note 50, at 75; Auerbach, *supra* note 121, at 59; Floyd, *supra* note 350, at 1421-23 (discussing loyalty as a core concept in the Bible, primarily expressed through the notion of “covenant”). In Judaism, the concept of “covenant” relates to the relationship between God and the people of Israel, formed at Mt. Sinai when God gave the Torah to Moses. Deuteronomy 5:2-3; see also Auerbach, *supra* note 121, at 27 (“One episode is so fundamental that it not only forms the centerpiece of the biblical narrative structure but also is vicariously reenacted at periodic intervals of crisis thereafter: the covenantal moment at Sinai, the giving of the Torah, which marks the creation of the Jewish people and defines its relationship to God.”).

[FN506]. Allegretti, *supra* note 50, at 75. Allegretti concludes by noting: “Jesus, after all, died for the guilty--I am called only to serve the guilty.” *Id.*

[FN507]. Cf. Floyd, *supra* note 350, at 1423 (“[L]oyalty is the cornerstone of lawyers' relationships with their clients.”).

[FN508]. See *Attorney for the Damned*, *supra* note 2, at 530.

[FN509]. See Smith, *supra* note 23, at 62; Ogletree, *supra* note 76, at 1271-75; Allegretti, *supra* note 50, at 77. Sister Helen Prejean voices the same view when she explains that each new death row inmate she meets is different. Quade, *The Voice of Dead Men*, *supra* note 465, at 16. A recent example of this model of criminal lawyering, David Dinkins's and Percy Sutton's representation of twelve-year-old Malcolm Shabazz, who set a fire that killed his grandmother, Betty Shabazz. Jane Gross, Sutton and Dinkins: Labor of Law and Love, *N.Y. Times*, Aug. 5, 1997, at A1. For Dinkins and Sutton, criminal defense advocacy is truly a form of ministry:

From the defense table in Westchester County Family Court, with Malcolm, the grandson of Malcolm X, slumped beside them, Percy E. Sutton and David N. Dinkins, the boy's lawyers, make what they call “a motion to hug.”

Then, with the formal permission of Judge Howard Spitz, the two grandfatherly men, longtime friends of the Shabazz family, fold the youngster in their arms just before he is handcuffed, shackled and led back to detention.

Id.

[FN510]. Curtis, *supra* note 20. This article has been a source of inspiration for criminal defense lawyers since its publication in 1951, and it has directly spawned at least one other article on criminal defense advocacy, itself regarded as a classic. See Babcock, *supra* note 16, at 175.

[FN511]. Curtis, *supra* note 20, at 5-6.

[FN512]. We are not unmindful that these two stories have been cited by some scholars as biblical affirmation of same-sex love. For an example of a gay interpretation of the story of Jonathan and David, see Edward A. Malloy, *Homosexuality and the Christian Way of Life* 198 (1981), and Paul F. Bauer, *The Homosexual Subculture at Worship: A Participant Observation Study*, in *XII Homosexuality and Religion and Philosophy* 43, 50 (Wayne R. Dynes & Stephen Donaldson eds., 1992).

The passage most often cited in support of a gay interpretation of Jonathan and David is David's eulogy upon learning of Jonathan's death:

I grieve for you,
My brother Jonathan,
You were most dear to me.
Your love was wonderful to me
More than the love of women.

2 Samuel 1:26. For an example of a lesbian interpretation of the story of Ruth and Naomi, see Rebecca Alpert, *Finding Our Past: A Lesbian Interpretation of the Book of Ruth*, in *Reading Ruth: Contemporary Women Reclaim a Sacred Story* 91 (1994). The passage most often cited in support of a lesbian interpretation of this story is Ruth's pledge to Naomi:

“[W]herever you go, I will go; wherever you lodge, I will lodge; your people shall be my people, and your God my God. Where you die, I will die, and there I will be buried. Thus and more may the Lord do to me if anything but death parts me from you.”

Ruth 1:16-17. For a feminist poet's rendering of the relationship between Ruth and Naomi, see Marge Piercy, *The Book of Ruth and Naomi*, in *Reading Ruth*, *supra*, at 159. We use these stories not to suggest that there must be love between criminal lawyer and client, but to demonstrate the link between virtue ethics and biblical teachings.

[\[FN513\]](#). 1 Samuel 18:1.

[\[FN514\]](#). *Id.* at 17:38-54.

[\[FN515\]](#). *Id.* at 18:8-29.

[\[FN516\]](#). *Id.* at 19:1-4.

[\[FN517\]](#). *Id.* at 18:3.

[\[FN518\]](#). *Id.* at 19:1.

[\[FN519\]](#). *Id.* at 19:2.

[\[FN520\]](#). *Id.* at 19:3-7.

[\[FN521\]](#). *Id.* at 20:30-34.

[\[FN522\]](#). *Id.* at 20:16.

[\[FN523\]](#). *Id.* at 20:17.

[\[FN524\]](#). *Id.* at 20:34.

[\[FN525\]](#). Tigar, *supra* note 24. For an interesting exchange about moral decision-making and client choice, compare Monroe Freedman, *Must You Be the Devil's Advocate?*, *Legal Times*, Aug. 23, 1993, at 19, with Michael E. Tigar, *Setting the Record Straight On the Defense of John Demjanjuk*, *Legal Times*, Sept. 6, 1993, at 22.

[\[FN526\]](#). Ruth 1:1-5.

[\[FN527\]](#). *Id.* at 1:8.

[\[FN528\]](#). *Id.* at 1:14.

[\[FN529\]](#). *Id.* at 1:14-18.

[\[FN530\]](#). *Id.* at 1:16.

[\[FN531\]](#). See Kunstler, *supra* note 282; Kinoy, *supra* note 337.

[\[FN532\]](#). For a story about friendship and fidelity from the Midrash, see *The Test of a True Friend*, in Ausubel, *supra* note 201, at 570, 571-73.

[\[FN533\]](#). John 11:3 (King James).

[\[FN534\]](#). *Id.* at 11:8.

[\[FN535\]](#). *Id.* at 11:11.

[\[FN536\]](#). *Id.* at 11:14, 17.

[\[FN537\]](#). *Id.* at 11:43-44. This remarkable act is not something Jesus did routinely in his travels. Nor is it something most criminal lawyers are able to do. However, defenders in capital cases may come close when they save clients from execution.

[FN538]. There are many examples in the popular culture--perhaps they are biblically derived--of fidelity to those with whom one has a special relationship. For examples of unbounded fidelity to the wrongdoer in music, fiction, and film, see Bruce Springsteen, *Highway Patrolman*, on Nebraska (Columbia Records 1982), Rosellen Brown, *Before and After* (1992), and *Ulee's Gold* (Orion Pictures 1997). In each of these examples, fidelity to family triumphs over legal duty.

[FN539]. Shaffer, *supra* note 76, at 56.

[FN540]. Brown, *supra* note 538, at 249.

[FN541]. We do not mean to suggest that the virtue of fidelity absolves criminal defense lawyers (or any other lawyers) from unlawful conduct in the name of fidelity, along the lines of former President Richard Nixon's legal counsel and members of the Justice Department during the Watergate scandal. See generally Ken Gormley, Archibald Cox: *Conscience of a Nation* (1997). Lawyers are, of course, bound by the same criminal laws as all citizens.

[FN542]. Smith, *supra* note 23, at 53-60; see also Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* 95-129 (1989).

[FN543]. See, e.g., Smith, *supra* note 23, at 54-56 (recounting a public defender's struggle with obtaining an acquittal in a rape case for a client who was arrested shortly after his release on two new charges of rape); see also Kunen, *supra* note 15, at 255 (““ Get away with murder,”“I thought, upon hearing the verdict. ““I have gotten away with murder.”“ I was awed by the enormity of it It made me feel bad--my stomach, particularly--but not as bad as losing would have. To those turkeys? Yet another client of mine locked up? I preferred to grapple with the moral problem of winning. That's the sort of problem you want to have.”); cf. Jack & Jack, *supra* note 542, at 101 (recounting a lawyer's response to a hypothetical dilemma involving a murderer whose confession was suppressed, allowing him to go free and kill again).

[FN544]. Smith, *supra* note 23, at 56. We do not mean to be flip about the tension that arises in criminal defense work--and we acknowledge that this article has its own unresolved tension. There is a tension between individual justice (on behalf of an individual who may have committed wrongdoing) and social justice (on behalf of powerless groups, such as poor women--who are disproportionately crime victims), between unbounded fidelity to client and concern for anyone and anything else, and between the role of the defense lawyer as the government's chief antagonist and the role of defense lawyer as a legitimizing agent of the state. Unlike some defenders, for whom detachment is not merely a coping mechanism but a way of life, we believe the tension in criminal practice is well worth exploring. It will surely always be there.

[FN545]. See *supra* notes 28-31 and accompanying text; Menkel-Meadow, *supra* note 49; Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, *supra* note 49.

[FN546]. See, e.g., Menkel-Meadow, *supra* note 49; Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, *supra* note 49; see also [Rosemary Nidiry, Restraining Adversarial Excess in Closing Argument](#), 96 *Colum. L. Rev.* 1299, 1303 (1996); [R.J. Gerber, Victory vs. Truth: The Adversary System and its Ethics](#), 19 *Ariz. St. L.J.* 3, 6-21 (1987).

[FN547]. Under the virtue of fidelity, it is not the defense lawyer's role to ward off racism, sexism, homophobia, or other social ills by rejecting otherwise effective defense theories or practices. It is the job of those criminal justice actors who are governed by the virtue of justice to combat prejudice and inequality. See *supra* note 504; see also Jeffrey Abramson, *We, the Jury* 131-39 (1994) (discussing the exercise of peremptory challenges in voir dire on the basis of group identity).

[FN548]. Police, prosecutors, and judges, on the other hand, do not have clients--and, hence, no corresponding obligation to act with fidelity--so they might well be concerned about such matters. These criminal justice actors should principally be guided by the virtue of justice. See *supra* notes 491, 502, 504; see also [United States v. Wade](#), 388 U.S. 218, 256 (White, J., concurring in part and dissenting in part); Kathleen P. Browe, [A Critique of the Civility Movement: Why Rambo Will Not Go Away](#), 77 *Marq. L. Rev.* 751, 766-67 (1994) (noting that prosecutors see themselves as protectors of justice and criminal defense attorneys see themselves as protectors of individual rights).

[FN549]. Floyd, *supra* note 50, at 1423; see also ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-1.2(c) (3d ed. 1993).

[FN550]. *Id.*; cf. Raoul Lionel Felder, *I'm Paid to Be Rude*, *N.Y. Times*, July 17, 1997, at A23 (divorce lawyer arguing that "if lawyers truly care about the causes they represent, they should, on occasion, get hot under the collar, raise their voices, become pugnacious.").

[FN551]. Cf. [Kenneth W. Starr, Christian Life in the Law](#), 27 *Tex. Tech L. Rev.* 1359, 1360 (1996) (arguing that the Christian lawyer has a deep respect for prosecutors and judges, is kind and considerate to opponents, is civil even when others are not, routinely "turns the other cheek," and never does anything that might be called "questionable"). One has to wonder whether Kenneth Starr's adversaries in his investigation of Whitewater and White House sex scandals regard him as a "Christian lawyer."

[FN552]. Luban, *Lawyers and Justice*, *supra* note 20, at 11-12.

[FN553]. Lord Brougham, long credited for articulating the meaning of zealous advocacy, see *supra* note 20, could well have been articulating the meaning of fidelity in his speech before the House of Lords in 1821 when he described the relationship between advocate and client as "of the most sacred nature." 2 *Trial of Queen Caroline*, *supra* note 20. He

linked zeal to loyalty when he declared, “It is the duty of an advocate to save his client by all expedient means, to protect him at all hazards, and to the injury of all others, and of himself among those others, if it be necessary.” *Id.* Lord Brougham was not concerned with civility, patriotism, truth, justice, or playing fair. His concern was for his client, and only his client. *Id.* at 6. As Monroe Freedman has remarked, “That is the kind of representation that I would want as a client, and it is what I feel bound to provide as a lawyer.” Freedman, *Understanding Lawyers Ethics*, *supra* note 20, at 66.

[\[FN554\]](#). See *supra* notes 21 & 28.

[\[FN555\]](#). See, e.g., Simon, *supra* note 23, at 1704; Subin, *supra* note 21.

[\[FN556\]](#). Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *Mich. L. Rev.* 1469 (1966) [hereinafter Freedman, *The Three Hardest Questions*].

[\[FN557\]](#). *Id.* at 1470-74; Freedman, *Understanding Lawyers' Ethics*, *supra* note 20, at 121; cf. Allegretti, *supra* note 50, at 78-79 (arguing that lawyers have an ethical duty to “facilitate the search for truth and the protection of human dignity” and that suborning perjury in the name of lawyer-client confidentiality “transforms a covenant into a conspiracy”).

[\[FN558\]](#). Freedman, *Legal Ethics from a Jewish Perspective*, *supra* note 81, at 1131 & n.2; see also [Miranda v. Arizona](#), 384 U.S. 436, 458 n.27 (1966) (“Thirteenth century commentators found an analogue to the privilege [against self-incrimination] grounded in the Bible.”); cf. Allegretti, *supra* note 50, at 77-80 (arguing that, for the Christian lawyer, truth is a paramount concern).

[\[FN559\]](#). Freedman, *The Three Hardest Questions*, *supra* note 556, at 1473.

[\[FN560\]](#). In Jewish teachings, the Torah forbids talebearing, see Leviticus 19:16, and the Talmud prohibits sharing a confidence without permission, see *The Babylonian Talmud*, Part 2, Seder Mo'ed, Volume 3, Tractate Yoma 16 (Rabbi Dr. I. Epstein, trans., Soncino Press 1938). See also Rabbi Alfred S. Cohen, *Privacy: A Jewish Perspective*, *J. Halacha & Contemp. Soc'y* 53, 73 (Spring 1981) (noting that Jewish tradition generally forbids the disclosure of a confidence as “a terrible invasion of another person's privacy”). But see [Russell G. Pearce, To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence](#), 29 *Loy. L.A. L. Rev.* 1771, 1776-79 (1996) (arguing that, under Jewish teachings, confidentiality must give way to preserving life); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 *Iowa L. Rev.* 1091, 1172-80 (1985) (arguing in favor of disclosure of client confidence to prevent death or injury to another); cf. Keenan, *Confidentiality*, *supra* note 504, at 889-93 (suggesting that, where there is a threat of death or serious bodily injury to an innocent person, confidentiality and fidelity might give way to disclosure and justice); Keenan, *Confidentiality, Disclosure, and Fiduciary Responsibility*, *supra* note 503, at 152-55

(acknowledging that fidelity might be overruled when a claim of justice is particularly profound).

In Catholicism, confidences communicated in confession may never be divulged. This is because the priest receives these confidences as God's representative. Dexter S. Brewer, *The Right of a Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law*, 54 *Jurist* 424, 429-30 (1994); see also [Anthony Cardinal Bevilacqua, Confidentiality Obligation of the Clergy from the Perspective of Roman Catholic Priests](#), 29 *Loy. L.A. L. Rev.* 1733, 1734-37 (1996); Teresa Stanton Collett, *Sacred Secrets or Sanctimonious Silence*, 29 *Loy. L.A. L. Rev.* 1755, 1747 (1996).

[FN561]. See, e.g., Freedman, *Understanding Lawyers' Ethics*, supra note 20, at 121.

[FN562]. As we have noted, the virtues do sometimes conflict. See supra notes 489-92 and accompanying text.

[FN563]. But see [D.C. Rules of Professional Conduct Rule 3.3\(b\) \(1991\)](#) (delineating the way in which a lawyer may permit a criminally accused client to present false testimony, including eliciting the testimony in a narrative fashion and not arguing the probative value of the client's testimony in closing argument).

[FN564]. Freedman, *Understanding Lawyers' Ethics*, supra note 20, at 120; cf. Allegretti, supra note 50, at 80 (arguing that lawyers must counsel lying clients to “come forward and admit the lie,” and if the client will not comply, the lawyer “may have to reveal the falsehood”).

[FN565]. Curtis, supra note 20, at 8-9. As Curtis notes:

The relation between a lawyer and his client is ... intimate You would lie for your wife. You would lie for your child. There are others with whom you are intimate enough, close enough, to lie for them when you would not lie for yourself I don't see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client; and on rare occasions, as I think I have shown, I believe it is. Happily they are few and far between, only when his duty gets him into a corner or puts him on the spot. Day in, day out, a lawyer can be as truthful as anyone. *Id.*; see also Fried, supra note 48, at 1066.

[FN566]. See, e.g. Jack & Jack, supra note 542, at 68.

[FN567]. Smith, supra note 23, at 42.

[FN568]. Monroe Freedman tells a story which makes this point. Freedman's friend, a Reform rabbi, claimed to believe as a matter of moral principle that human life was sacred. However, the rabbi had never served on a capital jury because he always indicated on the jury questionnaire that he was morally opposed to the death penalty. Freedman pointed out to the rabbi that his conduct was not consistent with his expressed moral principles. According to the rabbi's conduct, his paramount concern was not human life, but being truthful on the jury questionnaire. Because the rabbi was unable

to answer the jury questionnaire untruthfully, he was forever disqualifying himself from sitting on a jury and upholding the primacy of life. Upon reflection, the rabbi lied the next time he received a jury questionnaire. Monroe H. Freedman, [Religion is Not Totally Irrelevant to Legal Ethics](#), 66 *Fordham L. Rev.* 1299, 1300 (1998).

[FN569]. Ellen Yaroshefsky, [Balancing Victim's Rights and Vigorous Advocacy for the Defendant](#), 1989 *Ann. Surv. Am. L.* 135, 135 (1990).

[FN570]. See, e.g., Seymour Wishman, *Confessions of a Criminal Lawyer* 6-7 (1981).

[FN571]. It should be noted that the victim is no longer a marginal actor in the criminal justice system. Since the early 1970s, the victims' rights movement has succeeded in securing a greater voice for victims at all stages of criminal proceedings. George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (1995); see also Christopher R. Goddu, [Victims' "Rights" or a Fair Trial Wronged?](#), 41 *Buff. L. Rev.* 245, 248-50 (1993). There is currently a strong movement afoot for a federal constitutional amendment guaranteeing victims' rights. Chief Justice Richard Barajas & Scott Alexander Nelson, [The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance](#), 49 *Baylor L. Rev.* 1, 4 (1997). In recent years numerous states have passed their own constitutional amendments guaranteeing a role for crime victims in criminal proceedings. [Id.](#) at 11 n.37.

[FN572]. See, e.g., Simon, *supra* note 23, at 1704-22.

[FN573]. Larry S. Pozner & Roger J. Dodd, *Cross-Examination: Science and Techniques* (1993); see also Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* 127-53 (1989).

[FN574]. Many considerations go into the tone and content of cross-examination. In most cases, it would be counterproductive to attack harshly a sympathetic or sincere victim or witness. Larry S. Pozner & Roger J. Dodd, *Cross-Examination: Science and Techniques*, at 1-29 (Supp. 1994). We reject the rhetoric of cross-examination as "re-victimization." Not only is cross-examination merely words, but it belittles serious crime victimization to suggest that the experience of being questioned in court even comes close to the experience of being a victim of crime. For a powerful personal account of criminal victimization by a progressive commentator on criminal justice, see Bruce Shapiro, *One Violent Crime*, *Nation*, April 3, 1995, at 437. But see Catharine A. MacKinnon, *Only Words* (1993) (arguing that there is no meaningful distinction between speech and conduct in the context of pornography, harassment, and hate speech).

[FN575]. Prejean, *supra* note 257, at 64.

[FN576]. *Id.* at 66.

[FN577]. Smith, *supra* note 23, at 50; Jack & Jack, *supra* note 542, at 107.

[FN578]. Cf. David Margolick, *At the Bar*, N.Y. Times, May 21, 1993, at B9 (reporting that, when a female lawyer who had survived a brutal rape and would-be murder testified at the sentencing hearing that she did not seek vengeance on her mildly retarded assailant, the presiding judge cried). The summer of 1997 featured two particularly emotional criminal trials, the prosecution of Timothy McVeigh for the Oklahoma City bombing, with its horrific tales of death and destruction and the prosecution of previously convicted child molester Jesse Timmendequas for the murder of eight-year-old Megan Kenkas in New Jersey. See Bruce Tomaso, *McVeigh gets death sentence: Appeals in Oklahoma City bombing case expected to take years*, Dallas Morning News, June 14, 1997, at 1, available in [1997 WL 11497706](#) (reporting that even the generally steely Judge Richard Matsch had to fight back tears upon hearing some of the testimony in the McVeigh case); Jo Thomas, *Lawyers Seek To Disqualify U.S. Attorney In Bomb Trial*, N.Y. Times, Aug. 14, 1997, at A12 (U.S. Attorney Patrick M. Ryan admitting that his “voice quivered” and he needed “10 seconds to try to regain control” when he was questioning a witness in the trial of Timothy McVeigh); Dale Russakoff, *Defense Describes Tortured Childhood of Megan's Killer: Lawyers Try to Persuade Jury to Spare Timmendequas's Life*, Wash. Post, June 10, 1997, at A19 (recounting the defense presentation of “gruesome details” about Timmendequas's own sexual and physical abuse as a child at the trial's penalty phase in the hope of persuading the jury to sentence him to life in prison instead of death).

[FN579]. Yaroshefsky, *supra* note 569, at 145-46; see also Abbe Smith, *On Representing a Victim of Crime*, in *Law Stories* 164 (Gary Bellow & Martha Minow eds., 1996).

[FN580]. Allegretti, *supra* note 50, at 72. But see Kunen, *supra* note 15, at 255-57 (public defender exploring his reaction to the acquittal of a probably guilty client). In this passage, Kunen becomes downright rhapsodic about what he initially regarded as a clichéd portion of his closing argument:

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. at 257.

[FN581]. Shaffer, *supra* note 76, at 55; Michele H. Kalstein et al., Comment, [Calculating Injustice: The Fixation on Punishment as Crime Control](#), 27 *Harv. C.R.-C.L. L. Rev.* 575 (1992).

[FN582]. Frequently, when someone is arrested for a heinous crime, unknowing neighbors and friends comment about what a nice person the accused is and how out of character the accusation is. See, e.g., Bernard Lefkowitz, *Our Guys* 4-5 (1997) (“[T]hese Glen Ridge kids [who raped a retarded girl], they were pure gold, every mother's dream, every father's

pride They were Our Guys.”); James Collins, *The Burden of Proof*, *Time*, May 26, 1997, at 32, 34 (quoting Michael Fortier, prosecution witness and former army buddy of Oklahoma City bombing defendant Timothy McVeigh, “‘If you don't consider what happened in Oklahoma, Tim was a good person.’”).

[FN583]. Allegretti, *supra* note 50, at 77; David L. Bazelon, *Questioning Authority* 170-71 (1988). Bryan Stevenson eloquently makes this point:

I have a vision of justice. I believe that a society that defines itself by a commitment to law and to the fair and just application of law can never accept or tolerate injustice within legal systems, particularly when that injustice exploits the powerlessness of the poor. I believe that each of us is more than the worst thing we've ever done. I believe if you hurt somebody you're not just hurtful; if you offend somebody, you are not just offensive, if you tell a lie, you're not just a liar; if you take something you're not just a thief; even if you kill somebody, you're not just a killer.

Bryan Stevenson, 1997 Commencement Address, *Georgetown Law: Res Ipsa Loquitur*, Fall 1997, at 28, 36.

[FN584]. McIntyre, *supra* note 16, at 151; Hoffman, *supra* note 19, at 37.

[FN585]. McIntyre, *supra* note 16, at 168.

[FN586]. Shaffer, *supra* note 76, at 55.

[FN587]. Allegretti, *supra* note 50, at 77.

[FN588]. *Id.*

[FN589]. See *supra* notes 178-84 and accompanying text; Shaffer, *supra* note 76, at 78.

[FN590]. Allegretti, *supra* note 50, at 75 (“Jesus, after all, died for the guilty. I am only called to serve the guilty.”).

[FN591]. Ogletree, *supra* note 76, at 1240-41; see also Randy Bellows, *Notes of a Public Defender*, in *The Social Responsibility of Lawyers: Case Studies 97* (Phillip B. Heymann & Lance Leibman, eds., 1988); cf. Hoffman, *supra* note 19, at 23 (“There's the unique chemistry of the criminal lawyer. He has to have more than legal lore; he has to be a bit of the ham and a lot of the gambler. He has to thrive on the tensions of the courtroom; to think on his feet, hurling questions at a witness and objections at a judge; to stake his reputation on the all-or-nothing of a jury's verdict of guilty or not guilty. Small wonder then that so few are ‘called’ to the criminal bar.”). For a fictional example of a burned out public defender-turned-private investigator, we recommend the work of mystery writer Sara Paretsky. The central character, V.I. Warshawski, still has the voice and sensibility of a public defender. See, e.g., Sara Paretsky, *Windy City Blues* (1995); Sara Paretsky, *Tunnel Vision* (1994); Sara Paretsky, *Guardian Angel* (1992); Sara Paretsky, *Burn Marks*

(1990); Sara Paretsky, *Blood Shot* (1988); Sara Paretsky, *Bitter Medicine* (1987); Sara Paretsky, *Deadlock* (1984); Sara Paretsky, *Indemnity Only* (1982).

[\[FN592\]](#). Bellows, *supra* note 591, at 97.

[\[FN593\]](#). Kunen, *supra* note 15, at 29.

[\[FN594\]](#). Fox Butterfield, *With Juvenile Courts in Chaos, Some Propose Scrapping Them*, N.Y. Times, July 21, 1997, at A1; see also Luban, *Are Criminal Defenders Different?*, *supra* note 23, at 1731-36. Clarence Darrow explains why there will always be inequitable resources: “If the courts were organized to promote justice the people would elect somebody to defend all these criminals, somebody as smart as the prosecutor--and give him as many detectives and as many assistants to help, and pay as much money to defend you as to prosecute you.” *Attorney for the Damned*, *supra* note 2, at 12.

[\[FN595\]](#). See *supra* note 34; see also McIntyre, *supra* note 16, at 89. There is some basis for public defenders' feelings of “relative deprivation.” *Id.* at 94. For example, the starting salary for a public defender in the Defender Association of Philadelphia is \$32,400. Law school classmates who enter large (250 attorneys or more) law firm practice make approximately \$70,000. *More Large Firms Combine Lockstep, Merit*, 2 No. [11 Law Firm Partnership & Benefits Rep. 1 \(Dec. 1996\)](#). Some first year associates who work for large firms in New York start at over \$86,000, while large firms in Washington, D.C. routinely pay first year associates over \$75,000. Larry Smith, *Bold Associate Pay Hike ... Facing Stiff Competition from New York Branches, One D.C. Firm Rolls the Dice*, 15 No. 21 of Counsel 2, 3 (1996).

[\[FN596\]](#). Ogletree, *supra* note 76, at 1241.

[\[FN597\]](#). See, e.g., Paretsky, *Bitter Medicine*, *supra* note 591, at 13.

[\[FN598\]](#). Bellows, *supra* note 591, at 97.

[\[FN599\]](#). By connection, we mean the companionship that comes with fidelity to client. Cf. Ogletree, *supra* note 76 (arguing that empathy and heroism are sustaining motivations for public defenders). Charles Ogletree's notion of empathy as a sustaining force for public defenders is both less and more than the lawyer-client companionship we embrace. One can empathize with clients-- that is, “understand their problems, and ... have compassion,” *id.* at 1272, without undertaking to be that client's faithful companion to the bitter end. On the other hand, empathy seems to spawn a more boundless companionship than we would propose. *Id.*; cf. Darrow, *The Story of My Life*, *supra* note 57, at 337 (“I can hardly remember the time when I was not sorry for the inmates of prisons. I have no doubt that this feeling made me more

readily undertake their defense in courts.”).

Ogletree also offers “heroism” as a sustaining motivation. Ogletree, *supra* note 76, at 1275-77. Although there is some similarity between Ogletree's notion of heroism and our rendering of the courageous advocacy of Abraham, Moses, and Esther, see *supra* notes 82-118 and accompanying text, we regard zealous advocacy as an expression of fidelity. We believe that a desire for heroism does not sustain indigent criminal defense lawyers, both because it is too self-centered and because it is difficult to be a hero for very long in the trenches of criminal court. See Paretsky, *Bitter Medicine*, *supra* note 591, at 144-45; see also Babcock, *supra* note 16, at 178.

[\[FN600\]](#). Keenan, *The Virtue of Fidelity*, *supra* note 503, at 39. Cf. E.M. Forster, *Howards End* 186 (1921) (Margaret Schlegel declaring, “Only connect!”).

[\[FN601\]](#). Smith, *On Representing a Victim of Crime*, *supra* note 579 (“The truth is, no matter what crimes my clients are accused of committing, once I become their lawyer I feel a connection to them. No matter who they are, there is almost always something to like about them, or at least something redemptive.”).

[\[FN602\]](#). Curtis, *supra* note 20, at 3.

[\[FN603\]](#). Lewis, *supra* note 54, at 215.

[\[FN604\]](#). Prejean, *supra* note 257; Ogletree, *supra* note 76, at 1288.

[\[FN605\]](#). See *supra* note 50.

[\[FN606\]](#). Allegretti, *supra* note 50, at 29; see also Charles L. Kammer, III, *Vocation and the Professions*, in *The Annual of the Society of Christian Ethics* 168-78 (1981).

[\[FN607\]](#). See Coles, *supra* note 1.

[\[FN608\]](#). Fox Butterfield, *America's Aging, Violent Prisoners*, *N.Y. Times*, July 6, 1997, §4, at 3.

50 Mercer L. Rev. 443

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50 MERLR 443
50 Mercer L. Rev. 443
(Cite as: 50 Mercer L. Rev. 443)

Page 113