Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things

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DEFENDING: THE CASE FOR UNMITIGATED ZEAL ON BEHALF OF PEOPLE WHO DO TERRIBLE THINGS

Abbe Smith*

I. INTRODUCTION: THE ABNER LOUIMA CASE

When Haitian immigrant Abner Louima accused Officer John Volpe of committing an act of unspeakable brutality on him in a Brooklyn police station bathroom in 1997—shoving a broom handle into Louima’s rectum so hard he caused massive internal injuries—^one has to imagine that Volpe denied it in no uncertain terms. One has to imagine that Volpe vehemently disavowed the charge and asserted his innocence. One has to imagine that Volpe called Louima a liar, a

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* Associate Professor of Law, Georgetown University Law Center. B.A. Yale, 1978; J.D. New York University School of Law, 1982. This Article was first delivered as a speech at the Howard Lichtenstein Legal Ethics Lecture at Hofstra University School of Law on Oct. 6, 1999. I want to thank the Hofstra faculty, students, and alumni for their hospitality. I also want to thank Monroe H. Freedman for many things: his wisdom as a scholar and teacher, his generosity as a colleague and friend; and his clear, strong voice on behalf of those who need advocacy most. I dedicate this Article to him.


2. See id. at 154. Volpe asserted his innocence early on. See id. (quoting Volpe: “It didn’t happen the way they are saying . . . . It wasn’t me . . . . If it happened, it wasn’t me”). He pled not guilty and publicly maintained innocence until his change of plea in the middle of trial on May 25, 1999. See David Barstow, Officer, Seeking Some Mercy, Admits to Louima’s Torture, N.Y. TIMES, May 26, 1999, at A1.

3. See McAlary, supra note 1, at 154 (quoting Volpe as saying, “Now I know what it is like to be falsely accused”).

4. See Christopher John Farley, A Beating in Brooklyn: New York’s Finest Come Under Fire After a Haitian Man is Sexually Assaulted, Allegedly by Cops, TIME, Aug. 25, 1997, at 38, 38 (reporting that shortly after Volpe’s arrest, his lawyer, Marvyn Kornberg, claimed that Louima was lying about how and where his injuries occurred); see also Jimmy Breslin, Poignant Prose Fills Court, NEWSDAY (Queens), May 11, 1999, at A3 (noting the number of times attorney Kornberg called Louima a liar during cross-examination); Joseph P. Fried, Officers’ Lawyers Interrogate Louima on False Statements, N.Y. TIMES, May 11, 1999, at A1 (reporting Kornberg’s “relentless
charlatan, or worse—and insisted that he was incapable of even contemplating such conduct.7

How could Volpe not have denied it? He had family, friends, a good job, and standing in the community.8 He had an African American girlfriend.9 If, as he later admitted, he had actually brutalized Louima, he was no doubt in a state of shock and denial about his own shameful conduct, for he certainly knew he had crossed a line. Even those who think police officers have a right to engage in a little “street justice” were offended by the allegation; this was not simply a case of big-city cops getting carried away in the heat of battle,10 but outright torture.11

questioning” of Louima about lies he admitted telling and inconsistencies in accounts he gave of the incident).  
5. See McAlary, supra note 1, at 154 (quoting Volpe’s girlfriend’s response to Louima’s initial allegation that Volpe had proclaimed in the bathroom, “Dinkins time is over. It’s Giuliani time. . . . [No, Justin never compared the current and former mayors of New York]. . . . [He] is not a political person. The thing about its being Giuliani time is silly”).

6. See Jesse Green, Gays and Monsters: Fairies are Long Gone; now it’s Vengeful, Violent Queers that Have America Spooked, N.Y. TIMES MAG., June 13, 1999, at 13 (suggesting that Kornberg’s explanation of Louima’s injuries at trial—that Louima had engaged in consensual anal intercourse earlier on the night of the incident—played into the continuing vilification of gays in public discourse).

7. Volpe may have admitted that he roughed Louima up a bit because he believed that Louima had punched him during a street brawl. See David Barstow, Cross-Examination Studiously Avoids One Subject, N.Y. TIMES, May 11, 1999, at B6 (reporting that Louima was cross-examined about having “provoke[d] police officers by fighting and cursing at them”). It turned out that the man who had punched Volpe was not Louima, but Louima’s cousin. See Excerpts from First Day of Brutality Trial, N.Y. TIMES, May 5, 1999, at B6.

8. See Barstow, supra note 2, at A1 (reporting that Volpe wept at the end of the hearing at which he plead guilty, when he said, “Your Honor, if I could just let the record reflect I’m sorry for hurting my family”).

9. See Farley, supra note 4, at 38 (quoting Kornberg’s response to allegations that the incident was racially motivated: “They don’t know what they’re talking about—Volpe’s girlfriend is black”); see also Joseph P. Fried, Graphic Details as Trial Opens in Louima Case, N.Y. TIMES, May 5, 1999, at A1 (noting that Volpe’s African American “fiancée” Susan Lawson was prominently seated in the gallery on the opening day of trial and referring to Kornberg’s previous statements that Ms. Lawson herself is “evidence that [Volpe] would not engage in a racially motivated attack on a black person”); McAlary, supra note 1, at 154 (depicting Volpe’s girlfriend’s struggle to believe the accusation was false shortly after the incident).

10. See Tom Morganthau, Justice for Louima: A Police-Brutality Case Ends with a Guilty Plea, NEWSWEEK, June 7, 1999, at 42, 42 (“Big-city cops do a tough, dangerous job, and even their most ardent defenders will admit that sometimes, mistakes can happen and tragedy can occur. The Abner Louima case was never in that category.”). In one of the more bizarre—and revealing—comments about the Louima incident, Police Commissioner Howard Safir remarked, “after you’re down, I hit you on the head five times. That’s brutality. But taking someone 30 minutes after an event, taking them into a room and brutalizing them the way it allegedly happened, that’s criminal.” Jeffrey Goldberg, Sore Winner: Police Commissioner Howard Safir Crows About New York City’s Plummeting Crime Rate, and has About as much Regard for His Critics as He Does for Criminals, N.Y. TIMES MAG., Aug. 16, 1998, at 30, 33.
In any event, the likelihood is that Volpe’s lawyer, Marvyn Kornberg, had before him a client who insisted he was not guilty, insisted the allegations against him were untrue or overblown, and insisted on going to trial. Kornberg, an experienced criminal lawyer, likely probed Volpe’s story in order to learn as much as he could from his client about both the government’s case and any possible defenses. Undoubtedly, as the evidence began to mount, the probing became more confrontational. However, some clients can be unbudging, and at some point the lawyer may cause too much damage by challenging the client’s story, conduct, or character.

What was Kornberg to do? Let us imagine he did not believe his client and thought he had before him a sadistic, racist cop who, in some sort of monstrous rage, had brutalized an innocent, hard-working immigrant who had the misfortune to cross Volpe’s path. Reportedly, Marvyn Kornberg has a sign in his office that reads, “Kornberg’s Rule of Law: Presumption of Innocence Commences with Payment of Retainer.”

Holding aside the crudeness of such a placard, it does make explicit the way in which the right to counsel is the life blood of the fundamental principles afforded the accused in this country: the presumption of innocence, the government’s burden to prove guilt, and the

11. See Fried, supra note 9, at 81 (reporting that the prosecution’s opening statement portrayed the attack on Louima as “cruel” and “simply inhumane” and characterized the case as “the torture of a badly beaten and helpless man by two New York City police officers”).

12. See McAlary, supra note 1, at 153 (referring to Kornberg as “an incredibly capable lawyer”); Richard Zitrin & Carol M. Langford, Comment: Badge of Cowardice, THE RECORDER, June 9, 1999, at 5 (referring to Kornberg’s reputation as “one of New York’s better defense lawyers”).

13. See David Barstow, Brash Defense Lawyer Shrugs Off Attacks on Tactics in Louima Case, N.Y. TIMES, June 13, 1999, at 47 (relaying Justin Volpe’s father recounting that attorney Kornberg grilled his son about what the prosecution witnesses would say).

14. See ANTHONY AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 123 (1988) (“Increasingly, the client should be cross-examined in a fashion that may range from counsel’s mild expression of surprise at a contradiction to open incredulity and grilling, depending upon counsel’s best judgment of what is necessary to get at the truth while preserving the lawyer-client relationship.”).

15. See Barstow, supra note 13, at 47 (quoting Kornberg as saying: “What are you supposed to do? Get into your client’s brain? You have to trust your client”). It might not always be wise to entirely trust one’s client. See AMSTERDAM, supra note 14, at 123 (“Clients often do lie to their lawyers. If a client is to be saved from himself or herself, he or she must be counsel to tell the truth.”).

16. This seemed to be the general consensus early on. See McAlary, supra note 1, at 122, 153 (reporting his own belief in Louima’s story the moment he talked with him in the hospital even though he initially believed it was a hoax). Even New York City Police Commissioner Howard Safir immediately pronounced the incident a “horrific crime,” and promised that “the perpetrators . . . [would] go to jail.” Farley, supra note 4, at 38. Marvyn Kornberg’s own wife “was mad at him for taking the case.” McAlary, supra note 1, at 153.

17. McAlary, supra note 1, at 153.
high evidentiary standard of proof beyond a reasonable doubt.\textsuperscript{18} It also makes plain one of the most important things a defense lawyer can offer a client accused of a terrible crime:\textsuperscript{19} suspension of judgment.\textsuperscript{20}  

So Kornberg attempted to fashion a defense. He did what defense lawyers have always done, what defense lawyers always must do: he challenged the government’s case.\textsuperscript{21} He did so in the time-honored way: by attacking the credibility of the government’s chief witness; by attempting to discredit the other government witnesses; by offering alternative explanations for the government’s physical, medical, and scientific evidence.\textsuperscript{22}  

As he is ethically required to do, Kornberg advocated on behalf of his client with zeal.\textsuperscript{23} Kornberg also took to the press, as the case was...
high profile from the start.24 The defense theory he began to build and later articulated in his opening statement used what he had: a chief government witness who could not seem to keep his story straight, who could thus be portrayed as a liar,25 a troublemaker,26 and a mercenary.27

cate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.


24. Immediately upon being retained by Volpe, Kornberg called long-time New York Daily News columnist Mike McAlary. See McAlary, supra note 1, at 153; see also Farley, supra note 4, at 38 (noting Kornberg's public statements shortly after his client's arrest, asserting Volpe's innocence and revealing his interracial relationship).

25. See Farley, supra note 4, at 38. "What happened to [Louima] was not a result of anything that took place in the station house." Id. (alteration in original) (quoting Kornberg's statement to the press shortly after his client's arrest).

26. See Excerpts From First Day of Brutality Trial, supra note 7, at B6 (quoting from Kornberg's opening statement: "He lied... when he said at the time that it's now Giuliani time and not Dinkins time... That lie was told to create the divisiveness in the City of New York, and it succeeded for a period of time").

27. See id. (quoting from Kornberg's opening statement: "You have just heard an opening by the Government that is worth between $150 million and $450 million to Abner Louima because we will show that Abner Louima is suing the City of New York for that amount of money").
police officer informants who were not present during the incident, had no direct knowledge of what happened, and were motivated by their own self-interest;\textsuperscript{28} and evidence of physical injuries that could have occurred in a manner other than what was alleged.\textsuperscript{29} With rare exception, Kornberg’s cross-examinations of witnesses were intense and aggressive.\textsuperscript{30}

Of course, it is the aspect of the defense theory having to do with Louima’s injuries that is the source of controversy: Kornberg’s suggestion that Louima’s injuries were the result not of police brutality, but of consensual anal sex with another man.\textsuperscript{31} Although Kornberg laid out this theory rather clumsily, if emphatically—"the injuries sustained by Mr. Louima are not, I repeat, not consistent with a nonconsensual insertion of an object into his rectum"—\textsuperscript{33} he set the groundwork for arguing consensual homosexual sex. Kornberg noted that a trace of Mr. Louima’s feces found in the police station bathroom ‘contains the DNA of another male,’\textsuperscript{33} and told the jury, ‘[y]ou are going to be shown how somebody else’s DNA can get into another individual’s feces.”\textsuperscript{34}

Although some dismissed this theory as “absurd”\textsuperscript{35} or “crazy,”\textsuperscript{36} others self-righteously denounced it as a “vile insinuation,”\textsuperscript{37} a “vile


\textsuperscript{29} See Fried, supra note 9, at A1 (quoting Kornberg: “‘You will hear from a forensic pathologist and you will hear from other medical doctors that the injuries sustained by Mr. Louima are not, I repeat, not consistent with a nonconsensual insertion of an object into his rectum’").

\textsuperscript{30} See Breslin, supra note 4, at A3 (reporting about Kornberg’s cross-examination of Louima to suggest he was lying); Fried, supra note 4, at A1 (reporting about Kornberg’s relentless questioning of Louima); Fried, supra note 28, at B1 (reporting about Kornberg’s cross-examination of Detective Eric Turetzky who had testified that he saw Volpe carrying a broken stick as he emerged from the station house bathroom); Paul Schwartzman, Lawyer’s Grilling Cheers Up Suspect, DAILY NEWS (New York), May 14, 1999, at 6 (noting the vigorous cross-examination of Detective Turetzky).

\textsuperscript{31} See Green, supra note 6, at 13 (noting that it was not Kornberg’s attack on Louima’s credibility that caused a “furor,” but his “lurid explanation for Louima’s injuries that . . . Louima . . . had engaged in consensual anal intercourse earlier that night at Club Rendez-Vous: he had sex with a man”). Kornberg later denied putting forward a defense of homosexual sex. See Kaplan, supra note 20, at A14 ("'If people want to jump from [the DNA evidence] to "gay sex," that's their leap,' Kornberg said with a shrug. 'It's not my leap. I never said that, directly.'"). One must wonder why Kornberg felt compelled to deny what was plainly part of his theory, except that there was a public outcry.

\textsuperscript{32} Fried, supra note 9, at A1 (quoting Marvyn Kornberg).

\textsuperscript{33} Id.

\textsuperscript{34} Id. Kornberg claimed to have had three doctors lined up to testify in support of his theory about Louima’s injuries and said the DNA came from the FBI’s file in the case. See Kaplan, supra note 20, at A14.

\textsuperscript{35} Green, supra note 6, at 13.
fantasy," and even as "‘a second rape.’" One commentator astutely suggested that the "outrage over the supposed slight shows that Kornberg was onto something" larger than the refutation of medical evidence at trial. This commentator argued that, holding aside the implausibility of the defense, "it cleverly played on the expectation that a jury of ordinary Americans would still see homosexuality as vile, and see violence as normal in a homosexual act—at least in preference to seeing sadism as normal in a heterosexual arrest. How else explain a torn rectum and bladder?"

Still, how else explain a torn rectum and bladder? Kornberg certainly did not invent the "rough sex" defense—many a defender has raised this defense, which gained notoriety in the "Preppy Murder" case in the 1980s. In rape cases in which there are physical injuries and no

38. Gay Group Faults Defense, N.Y. TIMES, May 7, 1999, at B6 (quoting Richard Haymes, executive director of the New York City Gay and Lesbian Anti-Violence Project, who denounced the defense strategy as "a clear effort on the part of Volpe and Kornberg to prejudice the jury by making them focus on a vile fantasy").
40. Green, supra note 6, at 13.
41. Id. In a thoughtful commentary about the continued vilification of gays in public discourse notwithstanding a venire of increased tolerance, Jesse Green notes a number of recent cases in which "lawyers and hucksters have . . . create[d] around gayness a nimbus of culpability." Id. at 14. He argues that Kornberg did the same with Louima:

If it could be suggested that Louima were gay (though he was at the club that evening indulging in archetypal straight behavior: flirting with other women while the wife stayed home), he might be deserving of the treatment he got, whoever may have done it, in love or fury.

The tactic failed, but not because it was despicable or even because it was a lie; what defeated Volpe was the testimony of other cops. Still, Kornberg’s easy recourse to assumptions about the violence and depravity of gayness—a Seinfeldian not—that—there’s—anything—wrong—with—that shrug—proved that homosexuality is still America’s favorite goblin.

Id. at 13-14. See also Gay Group Faults Defense, supra note 38, at B6 (reporting that a group of gay rights advocates criticized Kornberg for suggesting that Louima’s injuries were the result of consensual same-sex sex).
42. See generally George E. Buzash, Comment, The "Rough Sex" Defense, 80 J. CRM. L. & CRIMINOLOGY 557 (1989) (examining the "rough sex" defense to murder charges, in which the victim is said to have consensually engaged in the conduct that led to his or her death, literally "asking for it").
43. See id. On August 26, 1986, in New York’s Central Park, handsome, “preppie” 20-year-old Robert Chambers killed 18-year-old Jennifer Levin, the pretty daughter of a Manhattan real estate magnate. See id. at 558. Both were private school educated, part of a privileged and affluent set of young people who frequented New York City’s trendy night clubs. See id. Although Chambers initially denied involvement in Levin’s death, at trial he claimed that Levin had diedacci-
viable mistaken identification defense, the only possible defense is rough sex or accidental injury in the course of some sort of sex play. What else is there if a client insists on going to trial?44

Yet, Kornberg has been roundly reviled for his defense of Volpe.45 He has been called a "'racist,'"46 a "'villain,'"47 a liar,48 an "opportunist,"49 and a publicity seeker.50 He has even been attacked by fellow criminal

44. See Kaplan, supra note 20, at A14 (quoting Kornberg as saying, "'Look,' he went on, 'I have a right, as a defense counsel, to present to a jury, within the confines of the law, a reasonable explanation of what happened, based on what doctors would have testified to. Suppose that I didn't do that. Wouldn't I be remiss in my duty?'").

45. See, e.g., Barstow, supra note 13, at 47 (reporting that "[a]cross the nation, the words 'sleazy' and 'shameful' keep popping up in close proximity to [Marvyn Kornberg's] name"); see also Kaplan, supra note 20, at A14 (noting Kornberg's unpopularity with the public, the press, and fellow lawyers); John Tierney, Bar Sinister: Lawyers Earn Public's Wrath, N.Y. TIMES, May 13, 1999, at B1 (noting that there is widespread revulsion toward the lawyers in the Louima case, largely because of the allegation that Louima's injuries resulted from homosexual sex). Kornberg is certainly not the first defense lawyer to be castigated for his tactics or ethics, especially when sex or sexuality is part of the defense theory. Jack Litman, who represented Robert Chambers in the Preppie Murder case, was widely attacked for his use of the rough sex defense and his attempt to use Jennifer Levin's diary, which allegedly chronicled "kinky" and aggressive sexual activity. See Sydney H. Schanberg, Is There Honor in the Courtroom?, NEWSDAY (Long Island), Jan. 8, 1988, at 69; see also Gay Jervey, Sympathy for the Devil, THE AMERICAN LAWYER, Apr. 1987, at 128 (describing Litman as the "lawyer many people love to hate" for transforming a murder prosecution "into an inflammatory breed of rape trial in which the victim's morals get as much scrutiny as the circumstances surrounding her death"); Sydney H. Schanberg, Two Men Linked by Self-Absorption, NEWSDAY (Long Island), Mar. 25, 1988, at 91 (depicting Litman as an egomaniac). Other lawyers have been similarly criticized. See Mubarak Dahir, Homosexual Panic, The ADVOCATE, June 22, 1999, at 27 (decrying the use of the "homosexual panic defense" in the Jenny Jones television show case); Richard Lacayo, Whose Trial Is It Anyway?: Defense Lawyers Raise Hackles by Attacking Victims and Prosecutors, TIME, May 25, 1987, at 62, 62 (discussing both the Preppie Murder case and the defense raised in the Marla Hanson slashing case).

46. Kaplan, supra note 20, at A14.


48. See Newfield, supra note 37, at 12 ("Nobody in this city should believe Marvyn Kornberg today. His words are mud and fog. They are mischief and poison. . . [Kornberg is] another Lawyer Without Limits, who will invent any lie to get a guilty client off.").

49. Green, supra note 6, at 13.

50. See Barstow, supra note 13, at 47 (reporting rumors that Kornberg ignored overwhelming evidence of his client's guilt, dismissed the possibility of a plea bargain, and raised a sensational defense in order to prolong his own media exposure).
defense lawyers. One can only imagine what the usual critics of criminal defense advocacy are saying.

Although defending defending may be an endless pursuit, I cannot help taking it on. I am, after all, a defender myself, and defending

51. See, e.g., id. (noting that even “[f]ellow criminal defense lawyers ridicule his trial tactics as ‘outlandish’ and ‘stupid’”); id. (quoting lawyer Richard A. Dienst, who represents three police unions as saying: “I thought it was a shameful gutter tactic”); Mansnerus, supra note 36, at D10 (discussing the observation of law professor and criminal lawyer David Rudovsky, who suggested that Kornberg crossed an ethical line if he lacked scientific or medical evidence to back up the claim that Louima’s injuries were caused by consensual sex); Newfield, supra note 37, at 12 (quoting Russell Gioiella, counsel for Thomas Wiese, one of Volpe’s co-defendants as saying: “Kornberg is pathetic”). Of course, Gioiella might have been criticizing Kornberg on behalf of his own client.

52. Criminal defense has never been terribly popular with the public. See generally Smith & Montross, supra note 19, at 444-46. One has only to turn on a typical radio talk show or scan the editorial pages of most newspapers to find disparagement of criminal defense lawyers and their clients. For a sample of scholarly criticism of criminal defense advocacy, see MARVIN E. FRANKEL, PARTISAN JUSTICE (1978) (arguing that the unchecked partisanship in the adversary system undermines the search for truth and justice); Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1032 (1975) (arguing that the “adversary system rates truth too low among the values that institutions of justice are meant to serve”); Harry I. Subin, The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case, 1 GEO. J. LEGAL ETHICS 125, 126-227 (1987) (arguing that criminal defense lawyers should be prohibited from putting on evidence to accredit a false theory or impeaching truthful government witnesses); Harry I. Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 67 NOTRE DAME L. REV. 403, 435-45 (1992) (arguing that criminal trial advocacy routinely includes deceptive and frivolous claims). Aside from the usual critics, in recent years, there has been a growing chorus of heretofore progressive legal scholars who have taken to criticizing zealous criminal defense from a range of perspectives. See, e.g., Anthony V. Alfieri, Defending Racial Violence, 95 COLUM. L. REV. 1301, 1320-21 (1995) [hereinafter Alfieri, Defending Racial Violence] (discussing the perpetuation of racial stereotypes in criminal defense); Anthony V. Alfieri, Lynching Ethics: Toward a Theory of Racialized Defense, 95 MICH. L. REV. 1063, 1074-84 (1997) [hereinafter Alfieri, Lynching Ethics]; Anthony V. Alfieri, Race Trials, 76 TEX. L. REV. 1293, 1305-23 (1998) [hereinafter Alfieri, Race Trials] (discussing the ways in which “race trials” perpetuate racial status distinctions and hierarchies); William H. Simon, The Ethics of Criminal Defense, 91 MICH. L. REV. 1703, 1704-05 (1993) (asserting that criminal defense lawyers routinely engage in unscrupulous practices in the name of “aggressive defense”); see also LUBAN, supra note 23, at 150-53 (arguing that defense lawyers should refrain from cross-examining a rape complainant about her “sex life” where the defense is consent). Although David Luban is himself critical of some defense practices, he forcefully rebuts William Simon’s argument for limits on defense advocacy. See David Luban, Are Criminal Defenders Different? 91 MICH. L. REV. 1729, 1756-59 (1993).

53. This author has attempted to do so in prior work. See generally Smith, Carrying on in Criminal Court, supra note 19 (responding to a student who decided to eschew a career in criminal defense after a semester in law school’s clinic); 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 (1993) [hereinafter Smith, Rosie O’Neill Goes to Law School] (examining criminal defense lawyering from the perspective of feminism and clinical education); Smith & Montross, supra note 19 (examining criminal defense lawyering from biblical, historical, and ethical perspectives).
fellow defenders seems to go with the territory. Of course, attacks on
criminal defenders do not come out of nowhere—difficult and complex
questions often arise in criminal defense work. Unfortunately, the
questions that are raised in the aftermath of a high profile case such as the
Abner Louima case are usually the easy ones—questions that have more
to do with the nature of the adversarial system than with the values or
ethics of individual defense lawyers or the power structure of our legal
and political systems.

In this Article I will try attempt to examine the hard questions
raised by the Louima case. First, I will discuss the challenges that arise
in counseling a client to plead guilty or go to trial. Then, I will consider
the issues raised by theories of defense that exploit racism, sexism, ho-
mophobia, or ethnic bias. In the end, I will argue that even in the most
despicable cases, where clients have done terrible, terrible things,
criminal defense lawyers must represent the accused at full tilt, with
"utmost devotion and zeal."

II. PERSONAL/POLITICAL RESERVATIONS

Before going further, I feel I should disclose my own reservations
about this particular case. I share Monroe Freedman's view that the
decision to undertake the representation of a particular client has moral
significance. I agree with Freedman that lawyers are—and ought to be

54. The author has been a practicing criminal defense attorney since 1982, first as a public
defender and then as a clinical law teacher.
55. Apparently, not all defenders feel this way. See supra note 51 and accompanying text.
56. Zealous criminal defense lawyers are a critical part of the adversary system. See
FREEDMAN, supra note 18, at 13-42; see also Babcock, supra note 23, at 177-79 (examining the
essential role advocacy plays in our judicial system); Charles Fried, The Lawyer as Friend: The
Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060, 1060-61 (1976) (noting the
importance of the lawyer-client relationship); Michael E. Tigar, Defending, 74 TEX. L. REV. 101,
108-10 (1995) (discussing the role of criminal lawyers and zealous advocacy in the judicial sys-
(1997) (referring to the nihilistic function of a defense lawyer); Rosemary Nidiry, Restraining Ad-
versarial Excess in Closing Argument, 96 COLUM. L. REV. 1299, 1303 (1996) (pointing to the ad-
versary system as the cause of overly inflammatory closing arguments).
57. See CANONS OF PROFESSIONAL ETHICS Canon 15 (1908) (referring to the lawyer's obli-
gation to give "entire devotion to the interest of the client, warm zeal in the maintenance and de-
fense of his rights and the exertion of [the lawyer's] utmost learning and ability").
58. See FREEDMAN, supra note 18, at 68 ("The lawyer's decision to take or to reject a client
is a moral decision for which the lawyer can properly be held morally accountable."); Monroe H.
(arguing that whether to represent a particular client is a moral decision that, if challenged, re-
quires affirmative justification); see also Gerald B. Lefcourt, Responsibilities of a Criminal De-
are not obligated to stop at every stop"). Interestingly, in 1975, Monroe Freedman was a proponent
held—morally accountable for deciding to accept a particular client or cause. I believe that lawyers should make thoughtful decisions about whom they represent, about the causes to which they contribute, and about the mark they leave in law and life.

However, I also believe that public defenders and other lawyers representing the indigent accused ought to represent all those in need of their services, without regard to the nature of the accused, the crime involved, or the lawyer’s own values. Poor people accused of crime do not have the luxury to pick and choose among lawyers; lawyers should not pick and choose among the poor accused.

I am a lawyer who, with rare exception, represents poor people accused of crime. When I undertake the representation of someone with means, there is usually a compelling reason for taking the case that comports with the reasons I became a criminal lawyer in the first place. Unless there was no other lawyer willing to represent Justin Volpe—and, because of the high profile nature of the case and conse-

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of the view that it is wrong to criticize a lawyer for choosing to represent a particular client or cause. See Freedman, supra note 18, at 69 ("[I]f lawyers were to be vilified for accepting unpopular clients or causes, then those individuals who are most in need of representation would find it difficult if not impossible to obtain counsel.") (quoting Monroe H. Freedman, Lawyers Ethics in an Adversary System 11 (1975)). Simultaneously, Michael Tigar argued that lawyers should be held morally accountable for who they represent. See Monroe Freedman, Must You Be the Devil’s Advocate?, Legal Times, Aug. 23, 1993, at 19 (questioning Michael Tigar’s decision to represent John Demjanjuk, an alleged Nazi war criminal). By 1993, both Freedman and Tigar had rejected their previous positions. See id.; Michael E. Tigar, Setting the Record Straight on the Defense of John Demjanjuk, Legal Times, Sept. 6, 1993, at 22 (defending his choice to represent someone accused of a heinous crime and disputing the need for public justification).

59. See Freedman, supra note 18, at 71 ("Laywers are morally accountable. A lawyer can be ‘called to account’ and is not ‘beyond reproof’ for the decision to accept a particular client or cause.").

60. See generally Abbe Smith, When Ideology and Duty Conflict, in Ethical Problems Facing the Criminal Defense Lawyer (Rodney J. Uphoff ed., 1995) (discussing whether individual public defenders ought to be able to refuse cases on ideological or philosophical grounds).

61. The author became a criminal defense lawyer out of a concern for social justice. See Smith & Montross, supra note 19, at 452-53 (describing the author as having been drawn to criminal defense work out of political and ideological conviction); Smith, Carrying on in Criminal Court, supra note 19, at 729-31 (recounting the many reasons the author was drawn to criminal defense); see also Abbe Smith, For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor, 1997 Ann. Surv. Am. L. 869, 874-77 (describing the author’s growing belief that criminal defense lawyering is not merely a political imperative, but a moral one).

62. See Model Code of Professional Responsibility EC 2-29 (1986) (referring to the duty to represent a client who otherwise would be unrepresented); see also Freedman, supra note 18, at 57 n.57 ("In part because of the monopoly lawyers are given, the lawyer does undertake special responsibilities to society regarding the effective functioning of the legal system. To that extent, the lawyer’s autonomy may be circumscribed, for example, by the obligation to represent someone who otherwise would be unrepresented.").

63. The case made both national and international press. See McAlary, supra note 1, at 154.
quent widespread publicity," there were, no doubt, many—I would not have taken the case. I would have declined to represent Volpe even though I can think of many compelling reasons to take his case: the importance of representing the most unpopular and the most vilified; the challenge of representing a defendant against whom there is compelling evidence; my strong belief that there is always something redeeming about even the worst offender.

I would have chosen not to represent Volpe, not because of the viciousness of the conduct alleged, but because Volpe’s brutal crime came directly from his position of authority in a pattern I have too frequently encountered representing poor people in the criminal system. Although Volpe’s conduct was so egregious that it managed to crack the usually impenetrable “code of silence” among police officers, it is not

64. See id. at 153 (“Kornberg, I knew, was just happy to be back in the middle of things. ‘This is what I do,’ he explained.”).
65. See Tigar, supra note 56, at 102, 104 (discussing the author’s representation of Terry Lynn Nichols in the Oklahoma City bombing case); Tigar, supra note 38, at 22 (discussing the author’s representation of alleged Nazi war criminal, John Demjanjuk).
66. See Smith, Rosie O’Neill Goes to Law School, supra note 53, at 54-56 (recounting a defense’s successful representation of an alleged rapist in a strong government case).

We often see the good in people who are accused of crimes . . . . The closer you get to someone, the more you realize that the person’s life and character is complicated. As soon as you know a defendant and a defendant’s family, you begin to see the individual, not just the criminal act.

Id.; see also Smith & Montross, supra note 19, at 531.

[D]efense 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.

Id. As death penalty lawyer Bryan Stevenson eloquently puts it: “I believe that each of us is more than the worst thing we’ve ever done.” Id. at 531 n.583.

68. This author has represented many clients accused of equally vicious and indefensible conduct. It is impossible to be a criminal defense lawyer and not represent people who do terrible things. See generally Babcock, supra note 23 (discussing how defenders represent the violent and guilty). But see Smith, Defending the Innocent, supra note 19, at 493-95, 497-50 (examining the unique dilemmas and pressures of defending an accused who is factually innocent).

69. See Jack E. White, The White Wall of Silence: Fellow Cops Testified Against Justin Volpe, But Why Did it Take Them So Long?, Time, June 7, 1999, at 63. Some conduct does not hold back even police officers from telling what they know:

Suppose that on one fateful night in August 1997, New York City cop Justin Volpe had contented himself with pummeling Abner Louima with his nightstick instead of ramming a broom handle into Louima’s rectum and then waving it in front of his face. Suppose that after that vicious assault, Volpe had not pranced around the precinct house with the blood-and-feces-stained stick, inviting other cops to examine it. And suppose the victim had not made the headline-grabbing (though phony) allegation that his tormentors had exulted, “This is Giuliani time!” . . . There would be a good chance
unrelated to the type of conduct many of my clients regularly experience at the hands of police officers. Unlike Abner Louima, these clients generally have little or no ability to obtain vindication or redress. It is not that I would never represent a police officer—although, by the same token, I would not develop a law practice around representing police officers. I would not, however, represent Volpe, because his in-

that we would never have heard of Louima and that Volpe would still be patrolling his beat in Brooklyn.

70. See Morganthau, supra note 10, at 42 (“Apologists argue that such brutality is very rare. But a spate of high-profile incidents suggests that even good cops can overreact, damaging relations between police departments and the mostly minority communities they serve.”); see generally CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995) (investigating police misconduct in Miami, Florida, Houston, Texas, Los Angeles, California, St. Louis, Missouri, Indianapolis, Indiana, and Norfolk, Virginia). For reports on police practices by blue ribbon commissions in three major cities, see COMMISSION REPORT OF THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (1994) (Mollen Commission Report) (finding that police brutality, corruption, and perjury are widespread in New York, especially in poor neighborhoods); REPORT OF THE BOSTON POLICE DEPARTMENT MANAGEMENT REVIEW COMMISSION (1992) (St. Clair Commission Report) (finding that police brutality, corruption, and perjury are a problem in Boston); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) (Christopher Commission Report) (finding the same problems in Los Angeles).

71. Although the charges against him were eventually dropped, Louima was initially charged with assault and was handcuffed to his bed and under police guard at the hospital. See McAlary, supra note 1, at 124. Most of my clients who have been beaten up by the police are charged with assaulting a police officer and the charge tends to stick. See, e.g., Deborah Sontag & Dan Barry, Challenge to Authority: Disrespect as Catalyst for Brutality, N.Y. TIMES, Nov. 19, 1997, at A1 (recounting incidents in New York City in which citizens were arrested and brutalized by police officers because they had been “disrespectful”).

72. It appears likely that Louima will be well-compensated for his ordeal. See Fred Kaplan, Under Fire, Giuliani Names Task Force on NYC Police, BOSTON GLOBE, Aug. 20, 1997, at A10 (reporting that Louima’s family is suing the city for $55 million in civil damages); Amy Waldman, Keeping a High Profile in Cases Against Police: Legal Team Shadows the Prosecution, N.Y. TIMES, Apr. 29, 1999, at B1 (noting that the Louima case, among other high profile brutality cases, “could yield sizable awards or settlements”). Most victims of police brutality do not even get their foot in the courthouse door. See OGLETREE ET AL., POLICE CONDUCT IN MINORITY COMMUNITIES 67-70 (1995) (finding that few lawyers are willing to take the run-of-the-mill police brutality case). And if they do, they seldom meet with success. See id. at 69 (noting that most victims of police abuse lack evidence and witnesses); Lynette Holloway, Juries Back Police in Cases Like S.L. Death, Experts Say, N.Y. TIMES, Dec. 11, 1994, at A54 (noting that legal experts have found that jurors and judges generally give the benefit of the doubt to police officers in cases of alleged police brutality).

73. This seems to be Kornberg’s bent. In 1998, both he and Stephen C. Worth, counsel for co-defendant Charles Schwarz, competed for a contract to represent members of the Patrolmen’s Benevolent Association. See Barstow, supra note 13, at 47. Kornberg is also representing one of the police officers charged in the Amadou Diallo shooting in New York. See id. (noting that Kornberg is representing Sean Carroll, one of four officers charged with murdering unarmed West African immigrant Diallo by firing 41 bullets at him).
terests in this case are so contrary to the interests of my mostly poor, minority clients as to make representation of him an act of betrayal.\textsuperscript{74} Personally and politically, it does not sit well. Given the choice, I would not do it.

III. \textbf{THE CHALLENGES OF COUNSELING A CLIENT ACCUSED OF A TERRIBLE CRIME}

As one contemplates the counseling and decision-making in this case, it is important to note that the Abner Louima case occurred in both a legal and political context. In both contexts, the case was a symbol and not merely one more anonymous allegation of police brutality in the big city.

Legally, the stakes were high. This was a federal civil rights prosecution in which white police officers were accused of committing acts of unimaginable brutality and depravity on a prostrate, helpless black man who had apparently done nothing wrong. There could be no greater civil rights violation. Moreover, if convicted, Volpe and his co-defendants faced stringent federal sentencing guidelines.\textsuperscript{75} Kornberg surely knew this even before he had any specific dealings with the prosecutors. In a case of this sort, the prosecution was not about to offer

\textsuperscript{74} I believe that representing police officers accused of brutalizing those in my clients' community is an act of disloyalty that could threaten the "relationship of trust and confidence," which is so important in representing the indigent accused. \textit{STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION} 4-3.1(a). \textit{See also MODEL RULES OF PROFESSIONAL CONDUCT Rule} 1.3, cmt. 1 (1999) ("A lawyer should act with commitment and dedication to the interests of the client. . . . "). I acknowledge that my notion of loyalty to a client exceeds what is required as a matter of professional ethics. \textit{See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC} 7-10 (1986) ("The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client.").

\textsuperscript{75} The sentencing guidelines for the offenses with which Volpe was charged ranged from 30 years to life in prison. \textit{See U.S. SENTENCING GUIDELINES MANUAL} APP. 1 (1999) (indicating that an offense level of "43" with a "3" level reduction and criminal history of "2," the sentencing range is between 360 months and life imprisonment). There has been widespread criticism of the federal sentencing guidelines since their institution in 1987, far too much to list. For a recent thoughtful book on the subject, see \textit{KATIE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURT} (1998) (arguing that guidelines reduce defendants to "inanimate variables in an equation" and denies judges the ability to sentence according to individual circumstance). Practicing criminal lawyers who can remember the time when making an eloquent plea for mercy at sentencing was an important part of advocacy have noted the sea change in criminal law practice. \textit{See, e.g., Plato Cacheris, Responsibilities of a Criminal Defense Attorney, 30 Loy. L.A. L. Rev.} 33, 33-34 (1996) (noting his nostalgia for old-fashioned sentencing advocacy and lamenting the replacement of consideration of "human factors" with a "grid," and the wholesale transfer of a traditionally judicial function to the prosecution).
anything resembling leniency in exchange for a plea, nor be content with anything less than a very harsh sentence.

Under the circumstances, a harsh sentence means a lengthy period of imprisonment: years and years in prison. For a police officer like Volpe, this possibility is especially frightening. With the exception of child molesters, arguably, no one does harder time in prison than convicted cops. The means of survival for police officers in prison are difficult, the choices few.

Politically, everyone wanted blood. This was a highly publicized case vividly demonstrating the interconnectedness of race, poverty, and police brutality. Those in charge clearly needed at least some of the officers involved to go down. In fact, this was the rare instance in which Mayor Rudolph Guiliani, Police Commissioner Howard Safir, and the Reverend Al Sharpton could find common ground. The police officers involved were bad cops who needed to be convicted and punished. The public was also outraged. Even those who usually defended the police regarded what happened to Louima as indefensible.

76. See All Things Considered: Federal Bureau of Prison Now Have the Problem of Placing Justin Volpe and Charles Schwarz Into a Prison and Protecting Their Safety (NPR radio broadcast, June 8, 1999) [hereinafter All Things Considered] (reporting that Michael Quinlan, former Director of the Federal Bureau of Prisons, believes that law enforcement officers in prison are at a greater risk of being assaulted than other inmates); id. (quoting Billy McElvain, a former California police officer, who is serving a prison sentence for murder agreeing that prisoners who are former police officers are the most despised of any inmate, "[m]ore than a child molester or a wife-beater or a rapist or anything"); see also Greg B. Smith, Maximum Security, Isolation Await Him, DAILY NEWS (New York), May 26, 1999, at 6 (reporting that ex-police officer Justin Volpe will likely do his time in segregation in a maximum security prison).

77. See All Things Considered, supra note 76. As one former California police officer now imprisoned explained, "[O]ther prisoners] feel that because you wear the badge, you're the reason they're in prison. And that's what they hold in their mind." Id.

78. See Dan Barry, Officer Charged in Man's Torture at Station House, N.Y. TIMES, Aug. 14, 1997, at A1 (reporting that Reverend Al Sharpton called the attack on Louima "perverted" and "dastardly"); Jere Hester, A Justice Plea as Heads Roll: Big Shakeup at the 70th, DAILY NEWS (New York), Aug. 15, 1997, at 2 (reporting that Mayor Giuliani removed the commanding officer and 11 other officers from their posts in the precinct where the Louima incident occurred, "implored tight-lipped officers at the scandal-scarred stationhouse to reveal what they know about the attack on Abner Louima," and declared that all good officers ought to be "revulsed and repulsed" by what happened); id. (reporting that Sharpton acknowledged that Giuliani's swift response was "appropriate"). But see Corky Siemaszko, Cop Nabbed in Torture Case, DAILY NEWS (New York), Aug. 14, 1997, at 2 (reporting that Sharpton blamed Mayor Giuliani for "creating a climate in which police think they're untouchable"). Mayor Giuliani and Commissioner Safir visited Louima at the hospital. See Barry, supra, at A1.

79. See Morganthau, supra note 10, at 42. Kornberg accused Mayor Giuliani, usually a defender of the police, of election-year grandstanding. See Hester, supra note 78, at 2. He com-
This setting tends to produce trials—hard fought trials—not pleas. There is nothing to lose by going to trial. There is no way to significantly cut the client’s losses short of a trial. A trial, on the other hand, can sometimes produce miracles. It happens. Even when the evidence appears overwhelming, lawyers make mistakes, witnesses break down, juries break down. Strange things suddenly happen that no one foresaw.

Ordinarily, when the consequences are grave and the crime especially shameful, it is difficult to persuade a client professing innocence to cut his or her losses and admit guilt. This happens often no matter how strong the evidence. There are simply too many reasons for a client to cling to his or her professed innocence: fear or dislike of prison;80 fear of public shame and rebuke;81 a desire not to hurt or disappoint family and friends;82 an inability to accept actually having committed the crime charged, which may amount to a state of psychological “denial”;83 or a need to at least not go quietly into the night.84

When one adds to the mix a client who has never been in this position before, who has become accustomed to exercising authority over others, and has come to believe that he or she is above the law, it is that
much harder to get the client to make a sound judgment about admitting wrongdoing or contesting the charges.\textsuperscript{85}

In representing Volpe, the officer against whom the most serious charges were lodged,\textsuperscript{86} Kornberg did not have much leverage. The prosecution was not interested in having Volpe as a government witness; it was Volpe they wanted most. Under the restrictive discovery rules and practice in federal court, the government did not have to disclose much of its case against Volpe,\textsuperscript{87} and prosecutors were probably feeling pretty confident about the police witnesses they had lined up.\textsuperscript{88}

\textsuperscript{85} In drawing this picture of an especially difficult client, this author cannot help but think about the challenges Bob Bennett and the White House lawyers faced in representing President Bill Clinton in the Paula Jones case and the subsequent impeachment proceedings. See Gloria Borger, \textit{Good Lawyer, Lousy Client}, U.S. NEWS & WORLD REP., Apr. 13, 1998, at 34 (noting that a lawyer cannot settle a case without the client’s approval and remarking that the “real verdict” in the Paula Jones case was “good lawyer, lousy client”). Volpe may have been an even more difficult client. Unlike President Clinton, Volpe was facing \textit{criminal} charges and was about to be locked up with the very people he was accused of having brutalized.

\textsuperscript{86} The following officers were charged in the incident: Sergeant Michael Bellomo was accused of covering up the beating of Louima in a police car and faced up to 10 years in prison; Officer Thomas Bruder was charged with violating Louima’s civil rights by beating him and faced up to 10 years in prison; Officer Charles Schwarz was charged with violating Louima’s civil rights by beating him and restraining him while Officer Volpe shoved a stick into Louima’s rectum and faced a sentence of up to life in prison; Officer Thomas Wiese was charged with violating Louima’s civil rights by beating him and faced up to 10 years in prison; and Officer Justin A. Volpe was accused of violating Louima’s civil rights by beating him and shoving a stick into his rectum and faced up to life in prison. See Fried, \textit{supra} note 9, at A1. After Volpe plead guilty midtrial, the jury convicted Charles Schwarz and acquitted the other officers. See Joseph P. Fried & Blaine Harden, \textit{Officer is Found Guilty in Torture of Louima: 3 Others Acquitted in Police Brutality Case, but Obstruction Charge Lies Ahead}, N.Y. TIMES, June 9, 1999, at A1 (reporting the verdicts in the Louima case).

\textsuperscript{87} See \textit{Fed. R. Crim. P.} 15, 16, 17. Rule 16 forms the core of the scope of federal criminal discovery and does not give a defendant the right to discover potential government witnesses’ names, addresses, or statements. See \textit{Fed. R. Crim. P.} 16(a)(2); see also Linda S. Eads, \textit{Adjudication by Ambush: Federal Prosecutors’ Use of Nonscientific Experts in a System of Limited Criminal Discovery}, 67 N.C. L. REV. 577, 583 (1989) (noting that Rule 16 does not provide for discovery of witness identity or statements and directs instead that the Jencks Act is the sole vehicle for the discovery of witness statements). Under the Jencks Act, the defense is allowed to see prior statements of a witness only after the witness has testified on direct at trial. See \textit{Fed. R. Crim. P.} 16(a)(2); United States v. Taylor, 802 F.2d 1108, 1118 (9th Cir. 1986), \textit{cert. denied}, 479 U.S. 1094 (1987); United States v. Campagnulo, 592 F.2d 852, 858 (5th Cir. 1979). Federal criminal discovery is so restrictive that it can render a criminal trial a game of “blind man’s bluff.” United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); see also Karen Freifeld, \textit{The Case Against Kornberg: Many See Luster Lost After Volpe}, NEWSDAY (New York), May 30, 1999, at A4 (quoting a law enforcement source: “[Kornberg] got sandbagged, boy”).

\textsuperscript{88} At trial, prosecutors would call several police witnesses to corroborate Louima’s account. See White, \textit{supra} note 69, at 63 (recounting that Detective Eric Turetzky testified that he saw Volpe lead a shackled Louima with his pants down around his ankles away from the bathroom, Officer Mark Schofield said that after the incident Volpe returned a pair of gloves he had
In short, Kornberg was going to get nothing from the prosecution; he had to rely on his client and his own resourcefulness to mount Volpe’s defense.

It appears that Volpe was singularly unhelpful in this regard. Like many criminal defendants facing their own demise, he may have become somewhat delusional. He may have convinced himself that the witnesses were not really going to hurt him, that they did not really know anything, and that they were not so impressive anyway. He must have convinced himself that his lawyer was so good, so brilliant, that he could undermine the credibility of even the most credible witnesses. He must have thought the case against him was just going to magically disappear. A cop in trouble, Volpe no doubt was also counting on the “blue wall of silence” to protect him.

The question of how hard to press a client to plead guilty is a difficult one. The lawyer must balance respect for client autonomy with his

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borrowed newly stained with blood, and that Sergeant Kenneth Wernick said Volpe had bragged about the incident and showed him the stick he had used).

89. See Barstow, supra note 13, at 47 (noting that Volpe’s father recalled Kornberg “quizzing his son about the prosecution witness list” and asking Volpe what the witnesses might say but getting no response); see also Kaplan, supra note 20, at A14 (quoting Kornberg: “I regret... that my client in this case didn’t tell me the full story before the trial started”).

90. See Dwyer, supra note 47, at 2 (quoting “Juror No. 6” as saying: “Mr. Kornberg is a brilliant man. If I were in trouble, I’d want him on my side”).

91. The author has frequently said to clients against whom the evidence is overwhelming that they need a magician, not a lawyer.

92. See OGLETree, ET AL., supra note 70, at 74-76 (discussing the code of silence); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 108-112 (1993) (discussing the culture of the police); id. at 112 (noting the “powerful prescription... of silence and loyalty in the culture of policing”); White, supra note 69, at 63. For one well-known story of what happens when a police officer violates the code of silence, see PETER MAAS, SERPICO (1973) (recounting the story of Frank Serpico’s efforts to blow the whistle on police corruption in New York in the early 1970s).

93. See Zeidman, supra note 84, at 849 (exploring the defense lawyer’s obligation to counsel clients on whether to plead guilty or go to trial). Under the American Bar Association (“ABA”) Standards, if defense counsel feels strongly that a particular course of action is in the client’s best interests, he or she may use “reasonable persuasion to guide the client to a sound decision.” STANDARDS FOR CRIMINAL JUSTICE 4-5.1 commentary at 198 (3d ed. 1993). However, the line between reasonable and unreasonable persuasion is not always clear:

When a lawyer refuses to “coerce his client,” he insures his own failure; the foreseeable result is usually a serious and unnecessary penalty that, somehow, it should have been the lawyer’s duty to prevent. When a lawyer does “coerce his client,” however, he also insures his failure; he damages the attorney-client relationship, confirms the cynical suspicions of the client, undercuts a constitutional right, and incurs the resentment of the person whom he seeks to serve.

Albert W. Alschuler, The Defense Attorney’s Role in Plea Bargaining, 84 YALE L.J. 1179, 1310 (1975). The difficulty of deciding how much pressure to put on a client to plead guilty is intensified in a capital case, especially when a plea offer might save a client’s life. See Welsh S. White,
or her professional responsibility to effectively counsel the client. While the decision whether to plead guilty or go to trial is the most important event in a criminal case and is reserved to the client, this does not mean that a lawyer should quietly defer to a client’s inclination. Sometimes effective counseling—actually getting through to a client about the reality of his or her situation—means leaning very hard.

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94. See Stephen Ellmann, Lawyers and Clients, 34 UCLA L. REV. 717, 733-53 (1987) (discussing client autonomy and lawyer responsibility in view of the power imbalance between lawyers and clients); David Luban, Paternalism and the Legal Profession, 1981 Wis. L. REV. 454, 457-61 (1981) (arguing that lawyers should properly engage in paternalistic coercion when a client’s goal fails to meet a minimal test of objective reasonableness); William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. REV. 29, 132-33, 139-42 (1978) (discussing client autonomy and lawyer responsibility in poverty law practice); see also Smith, Rosie O’Neill Goes to Law School, supra note 53, at 27-37 (discussing client autonomy and lawyer responsibility in criminal defense). For a fascinating and troubling examination of the process of decision-making by lawyers and client in the prosecution of Theodore Kaczynski, the convicted Unibomber, see William Finnegan, Defending the Unibomber, THE NEW YORKER, Mar. 16, 1998, at 52. In the Kaczynski case, defense lawyers believed that the only way to avoid the death penalty was to put forward a mental illness defense while the defendant steadfastly resisted being portrayed as mentally ill. Cf. Josephine Ross, Autonomy Versus a Client’s Best Interests: The Defense Lawyer’s Dilemma When Mentally Ill Clients Seek to Control Their Defense, 35 AM. CRIM. L. REV. 1343, 1343-48 (1998) (suggesting that Kaczynski’s lawyers chose a strategy that was in Kaczynski’s “best interests” but did not enhance his “autonomy”).

95. See STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard 4-5.2(a) (indicating that the “decisions which are to be made by the accused after full consultation with counsel” include what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to appeal); AMSTERDAM, supra note 14, at 339 (“The decision whether to plead guilty or to contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client’s wishes. Counsel cannot plead a client guilty, or not guilty, against the client’s will.”).

96. See AMSTERDAM, supra note 14, at 339. How much pressure to put on a client to plead guilty depends on the case and the lawyer’s conscience:

But counsel may and must give the client the benefit of counsel’s professional advice on this crucial decision; and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive. The limits of allowable persuasion are fixed by the lawyer’s conscience.

Id. (emphasis added); see also Smith, Rosie O’Neill Goes to Law School, supra note 53, at 37 (noting that “[i]here are times when a criminal lawyer, if he or she is a caring and zealous advocate, must lean hard on a client to do the right thing. The clearer the right thing is . . . the stronger the advice”); Uphoff, supra note 80, at 131 (indicating that “[i]t is appropriate to lean on clients to keep them from making poor decisions regarding plea bargains”). For an interesting essay that raises questions about how far and under what circumstances defense counsel might pressure a client to accept a plea offer, see William H. Simon, Lawyer Advice and Client Autonomy: Mrs. Jones’s Case, 50 MD. L. REV. 213, 213 (1991).
On the other hand, there are considerable systemic pressures on defendants to plead guilty. This is especially problematic for those who may be innocent but cannot afford bail. Most defenders will admit, albeit uneasily, that they have talked factually innocent people into pleading guilty. The guilty—and those who value the swift disposition of cases above all else—tend to be the beneficiaries of plea bargaining.

Maybe Komberg should have pressed Volpe harder than he did to plead guilty. Kornberg has been criticized for failing to recognize the strength of the prosecution's case and advising his client accordingly. Although Volpe was not going to receive probation for pleading guilty—even if he bared his soul and begged for forgiveness—he certainly would have benefitted from an early admission of wrongdoing. By the time Volpe pleaded guilty, he was all but convicted by the testimony of Louima and fellow police officers. At sentencing, he can hardly be portrayed as a man who has taken responsibility for his conduct and feels genuine remorse.

97. See Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 60-66 (1968) (examining the considerable systemic pressure on innocent defendants to plead guilty); Babcock, supra note 23, at 183-84 (discussing the pressure on poor defendants asserting innocence to plead guilty); John B. Mitchell, The Ethics of the Criminal Defense Attorney—New Answers to Old Questions, 32 Stan. L. Rev. 293, 313-21 (1980) (arguing that defenders serve an important role in protecting the innocent from a coercive plea bargaining system); Uphoff, supra note 80, at 81-86 (discussing the pressures on defendants to plead guilty).

98. See Mitchell, supra note 97, at 319 (noting that "defendants are coerced into pleading guilty because of the pressures accompanying pretrial detention, when the defendant cannot make bail"); Uphoff, supra note 80, at 85-86 ("Many defendants, especially first offenders, will agree to almost anything to get out of jail.").

99. See Smith, Defending the Innocent, supra note 19, at 494 n.56 (quoting attorney David Stern: "In the 17 years I have been a lawyer I have tried approximately 100 cases. I shudder to think of the number of pleas I have taken. Some have been good, and maybe some not so good, but in both groups I know that I have plead factually innocent people guilty. I try not to let it bother me, but in the end it always does").

100. See James Mills, "I Have Nothing to Do With Justice": Brilliant and Cynical, a Legal Aid Lawyer Wins Freedom for Thousands of Muggers and Thieves, LIFE, Mar. 12, 1971, at 56, 59 ("[N]o matter what sentence is finally agreed upon, the real outcome of this bargaining context is never truly in doubt. The guilty always win. The innocent always lose.").

101. See, e.g., Zitrin & Langford, supra note 12, at 5. But see Kaplan, supra note 20, at A14 (asserting that Kornberg claimed he would never have let his client go to trial if Volpe had told him the "full story").

102. See Zitrin & Langford, supra note 12, at 5 (noting that defendants generally receive some benefit from an early guilty plea).

103. See Kaplan, supra note 20, at A14 (noting Kornberg's concession that by the time the plea was entered the evidence was overwhelming).

104. See Zitrin & Langford, supra note 12, at 5 ("Volpe will now stand before Judge Nickerson at sentencing as someone who vociferously and unequivocally denied his guilt, put his victim through the trauma of reliving his worst nightmares in public, and sounded reluctant to accept re-
Even if Kornberg did not know exactly what the police witnesses would say—and he may not have known how extensive or damning the police testimony would be—he had reason to believe that Louima would be a compelling witness. Effective criminal defense advocacy requires both devotion and perspective. While a defender must always stand by the client, he or she must also maintain enough distance to make good judgments. Louima had made several public appearances. He always seemed humble and sincere, if not eloquent. His testimony alone could have sufficed to convict Volpe.

Still, it is easy to second-guess Kornberg. Why did he not at least wait until he had really worked with his client before he went to the press and vehemently disavowed Louima’s accusations? One has to
wonder whether Volpe locked himself into a claim of innocence or was locked in by his lawyer. The lawyer-client relationship evolves over time. Hopefully, if it is a good relationship, mutual trust develops. A client who initially believes that an emphatic assertion of innocence is the best way to galvanize a lawyer might gradually learn that his or her lawyer is genuinely concerned with the client’s best interests, not guilt or innocence. Ordinarily, a lawyer cannot meaningfully assess what course of action is in the client’s best interests until the completion of substantial investigation and discovery. A good lawyer gives the client the room to move, make different choices, or change his or her story.

Although much has been written about lawyer-client counseling and the proper allocation of power in decision-making, nothing can prepare a criminal lawyer for the intensity of counseling clients about the decision to plead guilty or go to trial, especially where the stakes are

Profile Client, 30 Loy. L.A. L. Rev. 13, 13 (1996) ("[W]hen representing a high-profile client, most often the issue is not whether an attorney deals with reporters, but only how that attorney deals with them... In political and other high-profile cases, effective press advocacy can help neutralize the [prosecutorial climate]."); Stanley A. Goldman, First Thing We Do, Let's Kill All the Defense Lawyers, 30 Loy. L.A. L. Rev. 1, 4 (1996) ("If a prosecutor fires the first salvo by expressing personal feelings as to the defendant's guilt, proclaiming factual innocence may be an appropriate defense response."); Barry Ivan Slotnick, Defense Counsel as Advocate Outside the Courtroom, 30 Loy. L.A. L. Rev. 113, 113 (1996) ("I frequently proclaim my client's innocence from the courthouse steps, or from any other location where there is likely to be a TV camera or a pocket notebook. I do so without the slightest apology.").

111. See Amsterdam, supra note 14, at 340-46 (discussing the many factors to consider in the decision to plead guilty or go to trial); see also id. at 348 (indicating that "[a]dequate factual investigation and legal research are the necessary preconditions of intelligent [plea] negotiation").

high. The timing of this conversation is crucial and can sorely test even a good lawyer-client relationship.113 Sometimes the moment of reckoning is early on, and sometimes not until the eve of trial.114

Most experienced criminal defense lawyers have had grueling sessions during which they urge recalcitrant clients to plead guilty.115 These intense and often unpleasant encounters can ultimately be enlightening and even redemptive for the client. Sometimes there is enormous relief in accepting the reality of a situation, putting an end to the uncertainty, and admitting guilt.116 Of course, sometimes the client simply sees the

113. See Amsterdam, supra note 14, at 348. Discussing the possibility of a plea is a sensitive topic, and one that ought to be dealt with tactfully:

The plea decision will ultimately be the client's, and although some clients are . . . anxious to discuss a deal others persist long after arrest in vigorously protesting innocence and spouting plausible tales (some true, some not) that, if true, render the suggestion of a guilty plea inconceivable. Counsel cannot broach the subject of a possible guilty plea to these clients, for the purpose of obtaining their authority to negotiate, without appearing to call the client a liar; and counsel has not yet established the rapport needed to probe the client's position tactfully yet skeptically to see whether the client will stick to it in the face of all the hard questions and hard facts that counsel will eventually have to put to the client.

Id.; see also id. at 123 (noting the need for multiple client interviews in order to review and analyze new information and cross-examine the client about weaknesses in the defense that may be exposed at trial).

114. See id. at 347-50 (discussing when plea negotiations should begin); see also Criminal Justice (HBO Pictures, 1990) (depicting the prosecution of a man who initially denies committing a vicious assault and robbery and turns down a generous plea offer only to plead guilty on the eve of trial and receive a greater sentence).

115. See Amsterdam, supra note 14, at 346 ("For many clients . . . the only realistic service that a defense attorney can provide is to work out with the prosecutor the least damaging deal that can be made in a case in which there is no serious prospect of acquittal.").

I have certainly had my share of difficult, draining, and nearly destructive counseling sessions during which I pressed a client to plead guilty rather than be convicted at trial and face a greater sentence. The relationship between lawyer and client may be especially fragile in indigent criminal defense; the poor accused does not choose his or her counsel and is often not sanguine about having a lawyer appointed by the court. In the course of these sessions, some clients have questioned my loyalty and accused me of selling them out to curry favor with the court or prosecution. Other clients have disparaged the motivation behind my advice as laziness or lack of concern. Recently, one client stormed out of the room—or at least summoned a corrections officer to let him out of the jailhouse interview booth. Still, I have always been able to repair these lawyer-client relationships, often after only a night of soul searching by the client. Maybe this is just dumb luck. But, I think it helps that I always assure my clients that I am ready and willing to go to trial—and demonstrate my readiness in a concrete way. In fact, I often say that I would prefer trying the case to having this unpleasant, emotional session in which I am doing everything I can to make the client see the light and the client is doing everything he or she can to resist. I enjoy trying cases; I am a trial lawyer. I like being in the lime light. I like the challenge. I like the intensity. It is not much fun to plead a client guilty. But I am not the one who is going to be convicted and do the time.

116. Recently, a client who had insisted for months that he was wrongly accused of a serious crime—notwithstanding overwhelming evidence of guilt—embraced Christianity as he admitted
writing on the wall and wishes to cut his or her losses. This is apparently what happened to Justin Volpe late in the trial.\footnote{117}

IV. EXPLOITING RACISM, SEXISM, HOMOPHOBIA, OR ETHNIC BIAS IN CRIMINAL DEFENSE

The burning question raised by Kornberg's advocacy is whether he crossed an "ethical line" when he suggested in his opening statement that Louima's injuries were the result of consensual homosexual sex and not police brutality.\footnote{118} As discussed above, Kornberg was well within ethical bounds to offer a \textit{flimsy} theory of defense, even if the evidence to support it was largely illusory.\footnote{119} The more interesting question re-

wrongdoing. His change of heart came on the heels of an emotional series of meetings at which I urged him to plead guilty and enlisted his family to do the same. The client claims to have found peace as a result of his decision to plead guilty, as well as a relationship with God. While I find this a bit frightening—I am uncomfortable being a catalyst for such a life-changing revelation—I have no doubt that the client's decision to plead guilty and accept a relatively lenient plea offer was in his best interests.

\footnote{117} See Barstow, \textit{supra} note 2, at A1. Volpe's lawyer Marvyn Kornberg noted that "'there came a point in time when the evidence became overwhelming.'" \textit{Id.}

\footnote{118} See generally Mansnerus, \textit{supra} note 36 (discussing the ethics of the theory of defense offered on behalf of Volpe); see also Barstow, \textit{supra} note 13, at 47 (commenting that "'If Mr. Kornberg today, the question is whether he crossed an ethical line during his opening argument for Mr. Volpe, in which he implied—without quite saying it outright—that Mr. Louima's injuries were the result of homosexual sex'.")

\footnote{119} See \textit{supra} notes 31-41 and accompanying text. The author would argue that Kornberg's theory that Louima's injuries were obtained through consensual sex was sufficiently supported by the government's own medical evidence (various hospital records) to allow him to argue it, whether or not he produced his own experts. Under ethical rules, Kornberg is entitled to present an opening statement that refers to the "evidence defense counsel believes in good faith will be available and admissible" and to argue at the close of the case "all reasonable inferences from the evidence in the record." \textit{STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION §§ 7.4, 7.8 (1971).} By raising the theory of consensual sex, however offensive or difficult to support, Kornberg acted consistent with his obligation to represent Volpe zealously within the bounds of law. \textit{See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1986) ("A lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means . . . ."). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1986) ("In his representation of a client, a lawyer shall not . . . conduct a defense . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). It is clear that Kornberg undertook this defense to serve his client and not "merely to harass or . . . injure another."} \textit{Id. Kornberg was not making a "false statement," but rather, was putting the state to the test.} \textit{See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1999). "A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established."} \textit{Id. Further, the Comment to Rule 3.3 states: The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.}
lates to the propriety of putting forward a theory of defense built on the exploitation of potential juror prejudice.\textsuperscript{120}

There is a growing body of legal scholarship criticizing the exploitation of bias in lawyering strategies,\textsuperscript{121} most of which focuses on racial bias.\textsuperscript{122} Some scholars have singled out criminal defense lawyers for criticism.\textsuperscript{123}

\begin{itemize}
\item \textbf{MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1999).}
\item \textbf{120. See Standards Relating to the Admin. of Criminal Justice, The Defense Function § 7.8(c) (1971) ("A [defense] lawyer should not make arguments calculated to inflame the passions or prejudices of the jury.").}
\item \textbf{121. See generally George P. Fletcher, With Justice For Some: Victims’ Rights in Criminal Trials (1995) (examining the new “political” criminal trial, in which traditionally maligned victims—blacks, Jews, gays, and women—are demanding their day in court); Luban, supra note 23, at 150-53 (arguing that it is unethical—and sexist—for defense lawyers to cross-examine a rape complainant about her sex life when the defense is consent); Alfieri, Defending Racial Violence, supra note 52, at 1308-10 (critically examining the racial rhetoric in the defense raised by Damian Williams and Henry Watson for beating Reginald Denny during the 1992 South Central Los Angeles riots); Alfieri, Lynching Ethics, supra note 52, at 1074-84 (critically examining the racial rhetoric in the civil and criminal trials of the Ku Klux Klan arising out of the 1981 lynching of Michael Donald); Alfieri, Race Trials, supra note 52, at 1323-39 (critically examining the racial rhetoric in the state and federal prosecutions of Lemrick Nelson for killing a Hasidic man in the Crown Heights section of Brooklyn in 1991); Richard Delgado, Making Pets: Social Workers, “Problem Groups,” and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives, 77 Tex. L. Rev. 1571, 1571-72 (1999) (agreeing with Anthony Alfieri that we need to “combat racialized narratives colored by racism” and urging that he expand his inquiry to include civil trials and groups other than African Americans); Bill Ong Hing, In the Interest of Racial Harmony: Revisiting the Lawyer’s Duty to Work for the Common Good, 47 Stan. L. Rev. 901, 904 (1995) (arguing that lawyers should elevate the goal of racial harmony above adherence to the adversary ethic); Andrew E. Taslitz & Sharon Styles-Anderson, Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession, 9 Geo. J. Legal Ethics 781, 785 (1996) (examining bias in lawyering and proposing to amend Model Rule 8.4 to include the following: “It is professional misconduct for a lawyer to . . . commit, in the course of representing a client, any verbal or physical discriminatory act, on account of race, ethnicity, or gender, if intended to intimidate litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage”) (emphasis added); Lawrence Vogelman, The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom, 20 Fordham Urb. L.J. 571, 575 (1992) (arguing against the use of racial stereotypes in advocacy). At least sixteen states and the District of Columbia have passed ethical rules prohibiting lawyers from engaging in discriminatory conduct. See Taslitz & Styles-Anderson, supra, at 781 n.4. Other states are actively considering adopting such a rule. See id. at 782 n.6.}
\item \textbf{122. See, e.g., Alfieri, Defending Racial Violence, supra note 52, at 1310-16; Alfieri, Lynching Ethics, supra note 52, at 1074-84; Alfieri, Race Trials, supra note 52, at 1305-23; Delgado, supra note 121, at 571-72; Hing, supra note 121, at 904; Vogelman, supra note 121, at 575.}
\item \textbf{123. For example, in the past several years, legal scholar Anthony Alfieri has devoted himself to examining racial rhetoric in high profile criminal trials, with an emphasis on criminal defense. He concludes that criminal defense lawyers and their advocacy strategies cause enormous social harm, especially to the African American community. See Alfieri, Defending Racial Violence, supra note 52, at 1310-16 (discussing the reliance on deviant racial imagery in criminal defense advocacy and rejecting the notion that advocacy is private conduct); Alfieri, Lynching Ethics, supra}
\end{itemize}
Of course, criminal defense lawyers have always been an easy bogeyman; after all, they spend their time advocating for the most deprived, disturbed, and despised. To many, defenders are indistinguishable from those they represent. James Kunen’s cleverly titled “How Can You Defend Those People?” captures the cocktail party experience of criminal defense lawyers everywhere. While this is the first question that comes to mind when people meet defense lawyers, “But How Can You Do That On Their Behalf?” follows closely behind.

note 52, at 1074-84 (discussing the way in which “lynching defenses” are “status-preserving” and perpetuate racism); Alfieri, Race Trials, supra note 52, at 1305-23 (discussing the ways in which “race trials” perpetuate racial status distinctions and hierarchies). Alfieri has proposed an ethic of “race-conscious responsibility” for lawyers. See Alfieri, Defending Racial Violence, supra note 52, at 1307. He defines this new legal ethic as “an alternative community-centered obligation” that includes a duty to “contribute[e] to the shape of a client’s social identity” in addition to the client’s “legal identity.” Id. Alfieri believes that an ethical obligation of race-consciousness will “transform[]... the liberal regime of colorblind criminal defense practice from the perspective of race.” Alfieri, Lynching Ethics, supra note 52, at 1091. For this author’s commentary on Alfieri’s work, see Abbe Smith, Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense, 77 Tex. L. Rev. 1585, 1587-91 (1999) (criticizing Alfieri’s work as wrongly focused on defense lawyers as the cause of racism in the criminal system and unduly hostile to zealous advocacy on behalf of the accused). For other discussions of the exploitation of prejudice in trial advocacy from a criminal defense perspective, see Robin D. Barnes, Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled, 96 Colum. L. Rev. 788, 789-93 (1996) (discussing the criminal defense lawyer’s duty to advocate on behalf of individual client interests even if it means using racialized narratives); Eva S. Nilsen, The Criminal Defense Lawyer’s Reliance on Bias and Prejudice, 8 Geo. J. Legal Ethics 1, 1-5 (1994) (examining, from the view of a defense attorney, the ethics of exploiting race in advocacy); Ellen Yaroshefsky, Balancing Victim’s Rights and Vigorous Advocacy for the Defendant, 1989 Ann. Surv. Am. L. 135, 146-47 (1989) (discussing, from the standpoint of a defense attorney, the use of race and gender stereotyping in advocacy).

124. See Arguedas, supra note 67, at 9 (“Defense lawyers fight for the dispossessed, the disadvantaged, the poor, and the powerless.”).

125. See, e.g., Paul Hoffman, What the Hell is Justice: The Life and Trials of a Criminal Lawyer 22 (1974) (“Most lawyers consider criminal practice ‘grubby.’”); see also Warren Berger, New Life for a (Pre-O.J.) Legal Classic, N.Y. Times, Oct. 12, 1997, § 2 (Arts & Leisure), at 34 (discussing a remake of the early 1960s television show, “The Defenders,” and noting that the criminal lawyers we saw as “‘heroic’ 35 years ago are now regarded as “‘sleazy’”); Raymond M. Brown, A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer, 30 Loy. L.A. L. Rev. 21, 21 (1996) (referring to the criminal defense lawyer as “a pariah and bottom feeder on the legal food chain” and noting that the defender is “disdained, mocked, and unappreciated in both the popular and the legal culture”). In a more existential vein, one criminal defense lawyer described criminal defense work as heroic but lonely, because devotion to a client comes at the expense of devotion to everything else, including family and community. See Ephraim Margolin, Remaining Hopeful in a Hopeless System, 30 Loy. L.A. L. Rev. 81, 83 (1996) (“We are a lonely lot. We save lives, and in the process we lose our own.”).


127. See Arguedas, supra note 67, at 9 (“The question posed to us at every dinner party is, ‘How can you represent “those people?”’”).
What is interesting about this latest criticism of criminal defense ethics is that it comes from those who are politically progressive and who might otherwise be supportive of the rights of the accused and the importance of zealous defense. Yet, when the progressive veneer is peeled away, the criticism sounds like the usual complaints about the role of the defense lawyer in the adversary system. Once again, when criminal lawyers act in accordance with Lord Brougham's notion of zeal—that criminal lawyers have as their "first and only duty" to "save the client by all means and expedients, and at all hazards and costs to other persons"—we are in trouble because we are not thinking about these "other persons," in this case, African Americans, women, gay people, ethnic minorities.

Anthony Alfieri, the most prominent progressive scholar on this subject, wants to have it both ways: He would like criminal defense lawyers to be more "community-centered," and to embrace a "color-conscious, pluralist approach to advocacy that honors the integrity of diverse individual and collective . . . identities without sacrificing effective representation." This is both untenable and disingenuous. In truth, he wants to transform criminal defense lawyers from defenders of individuals accused of crime to defenders of the community and of certain values he holds dear.

It is difficult, if not impossible, to zealously represent the criminally accused and simultaneously tend to the feelings of others. This is

128. See infra notes 129-132, 163-172 and accompanying text.
129. See Smith, supra note 123, at 1591-97 (arguing that Anthony Alfieri's work on race is part of an emerging neo-conservatism in legal ethics focusing on criminal defense lawyers); see also Smith & Montross, supra note 19, at 447-51 (discussing recent criticism of criminal defense lawyering from progressive legal scholars).
130. TRIAL OF QUEEN CAROLINE, supra note 23, at 8.
131. See Alfieri, Race Trials, supra note 50, at 1335 ("Criminal defense strategies involve weak commitments to the liberal ideals of personhood and community."). Alfieri blames this "weakness" on legal training and an overly antagonistic institutional environment built on narrow legal definitions. See id.
132. Alfieri, Defending Racial Violence, supra note 52, at 1307.
133. Alfieri, Race Trials, supra note 50, at 1295 (emphasis added).
134. David Luban, in discussing William Simon's critique of zealous criminal defense in The Ethics of Criminal Defense, see supra note 52, recognizes the problems inherent in Alfieri's model:

[T]his . . . argument, applied to the criminal defense context, means that defenders will have to refrain from zealous advocacy, or even subvert their clients' cases, whenever the social good of doing so outweighs the moral costs. It is hard to see why a lawyer with such views should be regarded as a defender.

Id. at 1758.
135. This is arguably a conflict of interest:
so in any political climate, but even more so in a time when criminal punishment is regarded as the answer to almost all of our social problems. We cannot seem to build prisons fast enough, and we are on the road to the virtual banishment of young African American men from society. It is simply wrong to place an additional burden on criminal defense lawyers to make the world a better place as they labor to represent individuals facing loss of liberty or life.

Any lawyer who decides what evidence to offer or what positions to assert based upon considerations such as, “Will this advance the goal of racial equality?” or “Will this lessen public confidence in the justice system?” is cheating the client. In effect, the lawyer has created a conflict of interest. The lawyer who has personal objections to asserting the cause of the client because of a perception that the cause of the nation is more important has only one choice: to resign.


136. *See generally* MARC MAUER, *RACE TO INCARCERATE* (1999) (examining the unprecedented explosion in the prison population in the United States). The nation’s approach to drug abuse is one example of the criminalization of social problems. *See id.* at 7 (noting that middle-class families see drug abuse as a social problem, requiring treatment, whereas “the nation has been engaged in a very different ‘war on drugs’ to respond to drug abuse and its associated ills among low-income and minority families”). The increasing call to punish juvenile offenders as adults and abolish the juvenile court altogether is another. *See generally* Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953 (1995).

137. *See ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA* 3 (1998) (noting that “[o]ver the past twenty-five years, the United States has built the largest prison system in the world”); MAUER, supra note 136, at 9 (referring to the “wave of building and filling prisons virtually unprecedented in human history”); Fox Butterfield, *Crime Keeps on Falling, but Prisons keep on Filling*, N.Y. TIMES, Sept. 28, 1997, § 4, at 1 (“Already, California and Florida spend more to incarcerate people than to educate their college-age populations.”); Fox Butterfield, *Defying Gravity, Inmate Population Climbs*, N.Y. TIMES, Jan. 19, 1998, at A10 (reporting that, despite a decline in the national crime rate, the number of jail inmates rose by 9.4% and the number of prison inmates rose by 4.7% in the past year, making 1,725,842 the total number of Americans locked up as of June 1997).

138. *See generally* MAUER, supra note 136, at 118-41 (examining the disproportionate numbers of African Americans in the criminal justice system); see also ERIC LOTKE, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN-AMERICAN MALES IN WASHINGTON D.C.’S CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (1997) (finding that one in two African American men residing in Washington, D.C. are in jail or prison or on probation or parole); MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (The Sentencing Project ed., 1995) (finding that one in three African American males are currently under the supervision of the criminal justice system, either in prison or jail, or on probation or parole); JEROME G. MILLER, NATIONAL CTR ON INSTS. AND ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM OF AMERICA’S CITIES: BALTIMORE, MARYLAND* 1 (Sept. 1992) (finding that 56% of young African American males, 18 to 35 years old, were in jail, in prison, on probation, on parole, awaiting trial or sentencing, or had arrest warrants out for them on any given day in Baltimore in 1991); *see also* Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1270 (1998) (referring to the “ugly fact” that “[h]alf of the young black men residing in Washington, D.C.—the capital of the freest nation in the world—are in prison or under the supervision of the criminal courts”).
There is also the concern about lawyers imposing their personal values on clients. It is one thing for a client to forego a particular case theory or strategy as a matter of his or her individual conscience; it is another for the lawyer to make that call. There are certainly times when criminal defense lawyers feel bad about what they must do on behalf of clients, but the lawyer's conscience is generally not a helpful strategic guide.

Criminal defense work poses certain challenges. Although I believe there is virtue in representing even the worst among us, I also care deeply about social justice. I came to criminal defense work out of a desire to fight for the underdog and participate in a larger movement for social change. There are times when my concern for individual justice, for the rights and interests of an individual accused of crime, are at odds with my concern for the rights and interests of some larger community. I do not enjoy stirring up or manipulating homophobia or race, gender, or ethnic prejudice in the course of representing a client. However, my own ideological values cannot be the determining factor. A

139. See Smith, supra note 123, at 1595-96 (“Lawyers should not set limits on what they will do to achieve a client’s interests because they conflict with the lawyer’s values.”); see also Monroe H. Freedman, Religion Is Not Totally Irrelevant to Legal Ethics, 66 FORDHAM L. REV. 1299, 1304 (1998) (noting that “it would be immoral as well as unprofessional for the lawyer . . . to deprive the client of lawful rights that the client elects to pursue”).

140. See Smith, supra note 123, at 1596 (noting that especially in high profile cases it may be appropriate for the accused to decide to forego certain legal strategies because they may hurt his or her community); see also Uelmen, supra note 135, at 122. An attorney must explain all available positions so that the client can make an educated decision:

This is not to say that such considerations are irrelevant to the client. A lawyer can, and probably should, advise a client that a particular position or argument may hurt the best interests of the country. The choice of whether to forego the advantage, however, must be left to the client. In a criminal case, where the life or liberty of the client is at stake, it will be a rather unusual client who will say, “I’d rather go to jail—or be gassed or electrocuted—than imperil the interests of my country.”

Id.

141. See Greta Van Susteren, Responsibility of a Criminal Defense Attorney, 30 LOY. L.A. L. REV. 125, 128 (1996) (“The criminal defense attorney in the courtroom with a ‘conscience’ or the criminal defense attorney who worries about reputation is not an advocate.”); Uelmen, supra note 135, at 122 (“I would take this position a step beyond simply rejecting the suggestion that lawyers owe some higher duty to their country. I would argue that it would be unethical for a lawyer who felt some higher duty to act upon it to the detriment of the client.”).

142. See generally Smith & Montross, supra note 19; see also Curtis, supra note 23, at 5-6 (noting that the lawyer who devotes him or herself to the client above all others acts in consonance with the pre-platonic ethic that “justice consists of doing good to your friends and harm to your enemies”); Uelmen, supra note 135, at 122 (“By being a good lawyer who zealously represents the interests of a client, the lawyer is being a good citizen who preserves the tenets of our adversary system of justice.”).

143. See supra note 61 and accompanying text.
lawyer ought not undertake the representation of a client if he or she will be hobbled by personal or ideological conflicts. 144

Frankly, a tremendous amount of power and influence is sometimes misguidedly attributed to criminal defense lawyers. 145 It is not that criminal lawyers do not mean to be powerful, but the defender is not the only person in the courtroom. A prosecutor is also present. It is the prosecutor's responsibility to anticipate and counter defense strategies—even those that play into juror prejudice. If they fail to do so, why blame the defense? 146

There is nothing unethical about using racial, gender, ethnic, or sexual stereotypes in criminal defense. It is simply an aspect of zealous advocacy. 147 Prejudice exists in the community and in the courthouse, and criminal defense lawyers would be foolhardy not to recognize this as a fact of life. 148 Of course, most bias and prejudice works against the accused, disproportionate numbers of whom are poor and nonwhite. 149 Defense lawyers must incorporate this knowledge, as well as knowledge about the stereotypes that might apply, to the prosecution and defense witnesses in all their trial decisions. 150

144. See Smith, supra note 60, at 18 (arguing that individual public defenders should represent all clients, no matter the moral or ideological conflicts posed by such representation, unless the lawyer cannot do so with the requisite zeal).

145. See Smith, supra note 123, at 1589 ("[T]he only time defense attorneys are depicted as powerful is when we are being taken to task for adhering to the central ethical mandate for criminal lawyers: the requirement of zealous advocacy.").

146. There are occasions when even the most die-hard defender wants a prosecutor to prevail at trial—though maybe not in the defender's own case. See Van Susteren, supra note 141, at 128 (noting that there is nothing wrong with defenders wanting prosecutors to do their job and meet their burden of proof: "After all, you are a citizen, and presumably, you abhor crime and want our communities to be safe").

147. I have previously argued, for example, that the ethical requirement of zealous advocacy trumps the "new ethic" of color- and gender-blind jury selection. See Abbe Smith, "Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 529-31 (1998); Alschuler, supra note 23, at 313.

148. See Yaroshesky, supra note 123, at 152 ("A courtroom is a laboratory of life . . . [and] each lawyer's wish to win may lead him or her to exploit prevailing cultural biases.").

149. See generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (arguing that race and class bias operates in every aspect of the criminal justice system).

150. For an interesting article by two criminal defense lawyers suggesting ways of addressing racial bias against the accused in a case involving interracial violence, see James McComas & Cynthia Strout, Combating the Effects of Racial Stereotyping in Criminal Cases, THE CHAMPION, Aug. 1999, at 22; cf. Stephen A. Saltzburg, Race: Fair and Unfair Use, CRIMINAL JUSTICE, Summer 1999, at 36 (examining two recent District of Columbia cases in which the defense and prosecution were accused of injecting race into trials).
A trial is theater. Defense lawyers cannot afford to be color-blind, gender-blind, or even slightly near-sighted when it comes to race, gender, sexual orientation, and ethnicity, because jurors will be paying close attention and they have come to the trial with their own feelings about these issues. Many stereotypes arise in a criminal trial, whether or not they are actively exploited by either party. Sometimes the exploitation of stereotypes is unavoidable.

While I do not regard the use of stereotypes in criminal defense as an ethical matter, it is a serious tactical matter. Although Kornberg would have been within ethical bounds had he intentionally sought to discredit or disparage Abner Louima by suggesting that he engaged in homosexual sex or was secretly gay—whether or not Louima was in fact gay—it would have been a poor tactical choice.

151. See generally David Ball, Theater Tips and Strategies for Jury Trials (National Institute for Trial Advocacy 1997) (explaining how the trial is a play, attorneys are actors, and the juries are the audience; also discussing the tools to become the best actor in the courtroom).

152. This is so for both the prosecution and defense. It could be said that every prosecution of a young black man for a violent crime perpetuates a stereotype about young black men being more prone to criminal violence, every prosecution of a mother on welfare prosecuted for child abuse perpetuates a stereotype about poor women being bad mothers, and every prosecution of a Spanish-speaking person for drug distribution perpetuates a stereotype about Latin drug dealers. Likewise, many defenses could be said to exploit stereotypes or bias, whether or not this is the aim of the defense. Consider, for example, whether the assertion of self-defense by an African American male who claims to be in fear of another African American male might be said to perpetuate the stereotype that African American males are violent. Consider whether the defense of consensual sex in a rape case where the complainant is an African American woman perpetuates the stereotype that African American women are promiscuous. Consider whether the cross-examination of an openly gay male complainant to suggest that he was acting out of jealousy, peevishness, or pettiness might perpetuate a stereotype that gay men are shallow or manipulative.

153. It is interesting that much of the outrage generated by the suggestion that Louima was injured during consensual homosexual sex was because Louima is, in fact, not gay. See supra notes 31-52 and accompanying text. Reverend Al Sharpton took particular offense on Louima's behalf, calling the intimation of homosexuality "beyond the realm of any decency." Barstow, supra note 13, at 47. Sharpton referred to Kornberg's allegation of homosexuality as a "second rape." Mansnerus, supra note 36, at D10. Sharpton even threatened to file a complaint with the disciplinary agency that oversees lawyers, accusing Kornberg of "slandering" Louima, who is married and has two children. See Barstow, supra note 13, at 47. This is an overblown reaction, at the very least. While it might have been unpleasant for Louima to be called something that he is not, all Louima had to do was deny it. The idea that being called gay is an equal outrage to what happened to Louima in the police station bathroom and that it was a "second rape" of Louima is both ludicrous and homophobic. It demeans the brutality Louima endured and it demeans gay people. Moreover, the indignant insistence that Louima could not have been injured as a result of consensual anal sex because he is married and has two children is naive. Plenty of married men have been known to engage in extramarital sex, of both the heterosexual and homosexual variety, not to mention the fact that anal sex is not the sole province of male homosexual sex.
Times have changed. Although gays are still the victims of hate crimes, and they have yet to obtain equal rights in all areas, there is much more tolerance, acceptance, and support of gay people today than there was twenty or thirty years ago. There was a time when the mere suggestion that a complainant was gay might lead to a generous plea offer because a gay witness was considered less credible or because the witness wished to avoid public disclosure. There was a time when a jury might acquit a defendant simply because the alleged victim was gay. This is no longer the case.

A good criminal lawyer—one with sound judgment—would recognize a weak and potentially offensive strategy and carefully assess the benefits and hazards before raising it. It may be that the lawyer has


156. See Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAm. URB. L.J. 927, 972 (1994) (noting the increased societal recognition of lesbian and gay families). But see Cooper, supra note 154, at A1 (referring to a collective sense among those protesting Matthew Shepard’s killing that “even as gay people have become more accepted than ever, there are reminders of the hatred and violence of the not-so-distant past”); Donna Minkowitz, *Love and Hate in Laramie: Matthew Shepard Was Killed in Wyoming’s Most Progressive Town*, THE NATION, July 12, 1999, at 18 (arguing that “Laramie [Wyoming] was the likeliest place in the state for an antigay murder to happen, not because of its backwardness but because of its progressive nature and its pockets of wealth and poverty”).

157. Certainly a federal jury in New York would be sophisticated enough to see through a strategy that sought to vilify an alleged victim because of his or her sexuality. One has to imagine that such a jury would include people who are either close to gay people or are gay themselves. Playing to anti-gay bias does not seem to work in less urban areas either. See *Accomplice Convicted in Killing*, N.Y. TIMES, Aug. 6, 1999, at A15 (reporting that Charles Butler, charged with participating in the savage slaying and burning of Billy Jack Gaither because of an unwanted homosexual advance, was convicted of capital murder by a jury in Rockford, Alabama). In the Gaither case, the accused was 21 years old, handsome, and only 5 foot 3 and 120 pounds. See David Firestone, *Trial in Gay Killing Opens, to New Details of Savagery*, N.Y. TIMES, Aug. 4, 1999, at A8. The decedent was 39. See id. Butler admitted that he had kicked the decedent to the ground after he had “‘started talking, you know, queer stuff,’” but claimed that he had been strong-armed by an older and larger co-defendant into participating further. Id. The attack was especially vicious. Gaither was beaten, his throat slashed, and he was then thrown into the trunk of his own car. See id. When Gaither’s attackers found that he was still alive, they beat him to death with an axe handle, threw his body onto burning tires at a trash dump and incinerated him along with his car. See id. Still, this is the kind of case that in the “old days,” because of anti-gay prejudice, might have resulted in a lesser verdict, perhaps manslaughter.
nothing else and must go forward because the client insists on a trial. But, it may also be that the lawyer is able to demonstrate to the client that putting forward such a strategy will work to the client’s disadvantage and will actually hurt the client, both at trial and sentencing. This may then influence the client’s decision to go to trial.

V. CONCLUSION: THE CASE FOR UNMITIGATED ZEAL EVEN FOR THE WORST

Justin Volpe had a right to a lawyer who was willing to do everything within the bounds of the law on his behalf, to go to the mat for him, no matter the crime alleged, no matter whether he was guilty or innocent, and no matter whose sensibilities might be offended. As Alan

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158. Defense lawyers express this view in a remarkably similar way. This view may be explained based on the O.J. Simpson murder trial:

Our purpose was to employ every advantage the law permits to enhance the prospects of our client’s acquittal. Our purpose was to utilize every device and stratagem the law allows to weaken and discredit the prosecution’s case. The vindication of our client was the beginning, the end, and the substance of our every effort. Anything less would have been a violation of our ethical responsibility to faithfully perform the duties of an attorney-at-law.

Gerald F. Uelmen, Lessons from the Trial: The People v. O.J. Simpson 2 (1996); see also Clarence Darrow, The Story of My Life 332-33 (1932) (stating that “[e]very criminal trial is a man-hunt where the object of the pack is to get the prey. The purpose of the defense is to effect his escape”); Arguedas, supra note 67, at 7 (noting that a criminal defense lawyer must “defend his or her client vigorously, aggressively, and completely, within the bounds of the law. . . . [O]ne of the first things that attracted me to the practice of criminal law is the clarity of the mission . . . . There is but one duty, one loyalty. That is to defend the client”); Johnnie L. Cochran, Jr., How Can You Defend Those People?, 30 Loy. L.A. L. Rev. 39, 42 (1996) (stating that “[i]t is the responsibility of the criminal defense attorney to police the police, to audit the government, to speak for the accused, to fight for fairness, and to rail against injustice. We are true advocates and true believers”); Stephanie B. Goldberg, Playing Hardball, A.B.A. J., July 1, 1987, at 48, 50 (reporting that Gerry Spence believes a criminal defense lawyer must go “[r]ight up to the line”); Albert J. Krieger, Friendly Fire and Casualties of the War on Crime, 30 Loy. L.A. L. Rev. 49, 50-51 (1996) (indicating that, when representing a person accused of a crime, an attorney “must be creative, honorable, skilled, courageous, and independent. The dedication to the interests of the client must prevail against whatever powers the opposing side may possess. The lawyer must also be immune to public opprobrium for appearing on behalf of an object of general revulsion”); Leftcourt, supra note 58, at 61 (describing zealous defense as “uncompromisingly represent[ing] the client” and being “prepared to do whatever it takes to improve the client’s position,” and characterizing this notion of zeal as “sacrosanct”); Michael J. Lightfoot, On a Level Playing Field, 30 Loy. L.A. L. Rev. 69, 69 (1996) (explaining that “a defense lawyer must use all his energies, talents, and intellect, within the bounds of ethics, to defend his client and . . . neither the nature of the accusation nor the popularity of the client or his cause matters one whit”); Van Susteren, supra note 141, at 128 (asserting that the defense lawyer’s duty is to put the government to the test in order to get the client “‘off the hook’”). Monroe Freedman is the most eloquent scholarly defender of this Lord Brougham-style advocacy. His classic article, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966), sparked enormous controversy and even led Warren Burger, then a federal appellate court judge, to initiate
Dershowitz puts it, "What a defense attorney 'may' do, he must do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client's best interest—even if the attorney finds the step personally distasteful."

While a lawyer has enormous room to make strategic judgments, he or she should make these judgments because they best serve the interests of the client, not those of the community or the lawyer. Especially in representing clients accused of crime, most of whom are poor professional disciplinary proceedings against Freedman. See MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9, 10 (1975) (concluding that zealous and effective advocacy are essential to the adversary system); Monroe H. Freedman, Legal Ethics and the Suffering Client, 36 CATH. U. L. REV. 331, 331 (1986) (stating that "legal ethics is concerned with the limits on how far I can go as a lawyer in helping [a defendant] and, therefore, with the limits of that [defendant's] rights"); Monroe Freedman, Personal Responsibility in a Professional System, 27 CATH. U. L. REV. 191, 199, 204 (1978) (stressing that "once the lawyer has assumed responsibility to represent a client, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or the client's cause"); Jay Sterling Silver, Truth, Justice, and the American Way: The Case Against the Client Perjury Rules, 47 VAND. L. REV. 339, 352-53 (1994).

The author shares Freedman's approval of the ABA's characterization of the defender as the client's "champion ... [a]gainst a 'hostile world.'" STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION 109-10 (1971).


160. See generally AMSTERDAM, supra note 14 (discussing numerous strategic judgments and decisions that lawyers are required to make, including election or waiver of a jury trial, selecting the jury, the handling of witnesses, proposing jury instructions, and appeals). As a clinical law teacher, this author has come to believe that good—or at least better—strategic judgment can be taught. See Alan M. Lerner, Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver, 32 AKRON L. REV. 107, 111-12 (1999). As Professor Alan Lerner, explains:

[The heart of what lawyers do is the exercise of critical judgement. In order to accomplish this, lawyers need to analyze the law critically ... gather, analyze, and synthesize information from a variety of sources and disciplines, while understanding that each source has its own perspective. They need to recognize and deal with ambiguity. They need to communicate effectively, orally and in writing with people as different from each other and themselves as clients, government officials, judges, jurors, and experts in various fields. In today's multi-cultural "global village," lawyers will need to engage in difficult discussions about complex and contentious issues such as the law's relationship to matters of race, culture and gender. Further, because so much of being an effective lawyer is learned through experience and reflection, they need to apply the same critical skills that they apply to a problem brought to them by a client in order to examine their work as lawyers.

Id.; see also Mark Neal Aaronson, We Ask You to Consider: Learning About Practical Judgment in Lawyering, 4 CLINICAL L. REV. 247, 247-48 (1998) (examining the exercise of judgment in lawyering).
and are all too often poorly represented, lawyers should err on the side of overzeal rather than underzeal.162

In a recent article, one usually dependable supporter of zealous criminal defense seems to be hedging.163 Using the O.J. Simpson case as a backdrop, Albert Alschuler worries that defense lawyers have taken Lord Brougham’s admonition too much to heart.164 He disagrees with Alan Dershowitz and argues that it is wrong to require certain lawyering strategies simply because they are allowed.165 Relying on the Model Rules of Professional Conduct,166 which he acknowledges is more “tepid” than the Model Code167 on the question of zeal, Alschuler argues that the Lord Brougham style of advocacy embraced by so many defense lawyers is “optional but not mandatory.”168

161. See Cole, supra note 149, at 63-100 (discussing the failed promise of Gideon v. Wainwright, 372 U.S. 335 (1963), and the poor quality of most indigent criminal defense).
162. See 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.”).
164. In his article on the O.J. Simpson case, Alschuler is largely concerned about civility and fair play by both the defense and prosecution. See Alschuler, supra note 23, at 299-311, 315-17 (criticizing the pretrial and trial tactics of the defense and prosecution in the case). Race seems a lesser concern. See id. at 311-15 (decrying the defense’s use of the “race card” in jury selection).
165. See id. at 293-96.
166. See Model Rules of Professional Conduct Rule 1.3 cmt. 1 (1996). Rule 1.3 Comment 1 states:
A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

Id.
167. See Model Code of Professional Responsibility Canon 7 (“A lawyer [should] represent his client zealously within the bounds of the law.”).
If Alschuler were talking about the importance of informing zeal with careful strategic judgment, I would take no issue with his position. Simply because certain conduct is allowed as an ethical matter does not mean that it will be an effective strategy. While, as Lord Brougham advised, the criminal defense lawyer ought not be concerned with offending the public, a wise defender must be concerned about offending a jury.

However, Alschuler is not talking about strategic judgment, but the exercise of individual "ethical" discretion about the bounds of zeal. Joining the growing ranks of those who want to "moderate the excesses" of the adversary system, Alschuler proposes a new ethical rule:

A lawyer is not obliged to do everything helpful to a client that ethical rules and other legal provisions allow. Instead, he or she should exercise a sound, independent judgment concerning the propriety of the means that he or she employs on a client's behalf. A lawyer's duty of faithful representation does not justify his or her departure from ordinary social norms of civility and fair dealing.

Such a rule is dangerous, especially in serious, high profile, politically charged, and personally distasteful criminal cases—those cases in which lawyers represent people accused of doing terrible things. These are the cases that test lawyers most, both personally and professionally. Many lawyers might take the "out" provided by Alschuler and offer a more tempered defense in order to escape public condemnation.

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169. Id. at 318.
170. Id. at 319 (emphasis added).
171. See, e.g., Stephen Jones & Jennifer Gideon, United States v. McVeigh: Defending the "Most Hated Man in America," 51 OKLA. L. REV. 617, 620 (1998). Jones explains the challenge he faced when he was appointed to represent the alleged Oklahoma City bomber:

With this appointment [to represent Timothy McVeigh in the Oklahoma City bombing], I had a clear appreciation of my responsibility and of that "individual sense of duty which should ... accompany the appointment of a selected member of the bar ... to defend" such a case as this. In accepting, I recognized that in my position as McVeigh's defense counsel, it would be impossible to satisfy everyone. I ultimately decided that I could satisfy only my professional conscience.

I was to try and defend McVeigh in the face of an overwhelming public condemnation—a demonization of McVeigh in which the presumption of innocence was replaced by the assumption of guilt. I was to defend McVeigh in a community in which literally thousands of lives had been adversely affected, indeed ruined, by the act with which my client was charged.

I also recognized that no matter how severe the public criticism might be, how damning of me, I had to subordinate my self interest to that which was best for McVeigh.

Id. (alteration in original) (citation omitted); see also Tigar, supra note 56, at 103 ("I am visited every day with the sense of loss felt by all the people of Oklahoma.").
Who is to say that this less-than-zealous advocacy might not become acceptable in more ordinary cases? There may as well be no defense counsel if he or she is more concerned about propriety than the client’s liberty.172

As a matter of professional ethics, criminal defense lawyers are required to thoughtfully consider all lawyering strategies that ethical rules allow and to employ them if they serve the client’s interests. Defense lawyers should reject strategies not for reasons of propriety or personal inclination, but only because those strategies are not advantageous to the client.

Justin Volpe did a terrible thing, and he will pay the price for his brutal crime for a long time. Given his client’s insistence on going to trial, Volpe’s lawyer had no choice but to try to mount a vigorous defense, however ill fated. This was the right thing for Volpe’s lawyer to do—for his client and for the rest of us.

172. See Goldman, supra note 110, at 2 ("How arrogant and lazy and convinced of their own infallibility would the prosecution and court become if the defendant had no advocate?").