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Defense-Oriented Judges

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DEFENSE-ORIENTED JUDGES

Abbe Smith*

I. INTRODUCTION

When I was a public defender in Philadelphia, I frequently appeared before a judge who was known both for her fierce intelligence and for the formality with which she conducted court. At the time, it was common practice to “back-room” a case—that is, to informally seek a favorable non-trial disposition with the judge in a chamber behind the courtroom—and a defender’s ability to back-room was as important as his or her trial advocacy skills.1 This particular judge did not believe in back-rooming cases. If the case was scheduled for trial, she expected the parties to be ready for trial. If there was to be a non-trial disposition, all relevant representations would be made on the record.

I loved this judge. As much as I like to shmooze, I have never been comfortable back-rooming judges. This was Philadelphia lawyering with a swagger and a wink and, try as I might, I couldn’t quite pull it off. Men, especially slightly older men, were much better at it. When judge and lawyer were both men of a certain age, so much the better: there was a fluidity and predictability to these sessions that belied their unscripted nature. Maybe because of my youth and gender, and maybe because this judge reminded me of the smartest and most demanding professors I had in law school, I preferred her formality and fierceness. She took judging seriously. She did not suffer fools gladly. She made you step up.

Because this judge was also among the most fair-minded and thoughtful judges on the Philadelphia bench—she welcomed complex

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* Professor of Law and Associate Director, Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program, Georgetown University Law Center. This essay is dedicated to unsung trial court judges all over the country who suffer the wrath of prosecutors, politicians, and the public in order to make the Bill of Rights a reality. Thanks to Sarah Smith for helpful research assistance.

pleadings, thought hard about rulings, deliberated long and hard about sentencing, and produced more written decisions than most state-level trial judges—she was known as “defense-oriented.” When, after some years on the bench, she learned of her reputation, she was surprised and, at first, a little concerned. She didn’t think of herself as defense-oriented; she saw herself as scrupulously nonpartisan. Then she thought about it further and concluded that she was flattered. If this means that I ensure that a defendant is presumed innocent, the government bears the burden of proof, and the accused is given the benefit of the doubt, why, it’s a compliment, she said. Our system of justice is built around protecting the rights of the accused. Judges are supposed to be defense-oriented.

The problem is that most judges are not. Though most judges no doubt consider themselves evenhanded and impartial, they fail to recognize how skewed the system is against the criminally accused and how they play into the prevailing bias in favor of law enforcement. Deliberately or not, most judges have lined up with the law-and-order politicians in this country (and these days, what politician isn’t?) who, unsatisfied with having the highest incarceration rate in the world, demand more convictions and harsher punishments. Most judges, like most prosecutors, seem unconcerned about abridging rights in the name of security in this post-September 11 era. Sadly, it is the rare judge who

2. There is an apt analogy here to the utility of the concept of colorblindness in law. Neither colorblindness nor impartiality can exist where there is deeply entrenched bias. See generally David A. Strauss, The Myth of Colorblindness, 1986 SUP. CT. REV. 99 (suggesting that race conscious affirmative action really advances the concept of race neutrality); see also GIRARDEAU A. SPANN, RACE AGAINST THE COURT 50-57, 70-82 (1993); Girardeau A. Spann, Proposition 209, 187 DUKE L.J. 187, 231-33 (1997).

3. See Adam Nagourney, After a Year Campaigning, Dean Officially Enters Race, N.Y. TIMES, June 24, 2003, at A22 (reporting that presidential candidate and former Vermont Governor Howard Dean, once a strong opponent of the death penalty, now supports it “in some cases”).

4. See Gail Russell Chaddock, US Notches World’s Highest Incarceration Rate, CHRISTIAN SCI. MONITOR, Aug. 18, 2003, at 2 (reporting that 5.6 million Americans are either in prison or have served time there, which translates to an incarceration rate of 1 in 37 adults); see also Adam Cohen, Editorial, What ‘Capturing the Friedmans’ Says About Getting Tough on Crime, N.Y. TIMES, July 6, 2003, at D8 (noting that “after a three-decade surge, which has continued even as crime rates have dropped, the United States has 702 inmates per 100,000 people”). For an examination of the American obsession with incarceration, see generally MARC MAUER, RACE TO INCARCERATE (1999).


bends over backwards to ensure that the "system-called-justice"\(^8\) comports with the principles underlying the Bill of Rights.

In this essay, I argue in favor of so-called "defense-oriented judges." Instead of the increasingly prosecution-oriented judicial aspirants who ascend to the bench,\(^9\) we need more judges who care about protecting the rights of the accused, who will put the government to the test, and who have some compassion for those who come before them. Instead of judges who are nothing more than rubber-stamps for prosecutors, deferring to prosecutors at every step because they believe most defendants are in fact guilty,\(^10\) or because they dislike defense lawyers,\(^11\) we need judges who are truly neutral and disinterested.\(^12\) Instead of judges who actively assist the prosecution and handicap the defense,\(^3\) we need judges who, at the very least, allow the adversarial system to play out.\(^4\)

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8. I take this phrase from an essay by criminal defense lawyer and legal scholar Michael Tigar. See Michael E. Tigar, Defending, 74 Tex. L. Rev. 101, 106 (1995). Tigar makes a point of distinguishing "justice" from the "system".

Just now, I used the term "justice system." That is a mistake. It is the system-called-justice. It is called-justice in the same sense that the Papal Legate was sent to Beziers to dispense "justice." The "system" is an abstraction, a machine for putting a name, the name "justice" or "judgment," on results. The "system" is not "justice" because the system makes "justice" into an abstraction. When I say "justice" I do not mean a name-giver. I mean... an idea that unites uniquely human values based upon compassion.

Id. at 106.

Tigar elaborates on his notion of justice:

I am talking of a prosaic, down-to-earth notion of justice. Something like Camus was describing when he said that our chance of salvation is to strive for justice, which is something that only the human species has devised. Justice, as Camus also reminded us, must be more than an abstract idea; it must be a reflection of compassion for one's fellow beings. In the name of Justice, the abstract idea writ large, great wrongs have been done.

Id. at 104.

9. See generally Gregory C. Sisk et al., Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. Rev. 1377 (1998) (discussing the demographics and ideological perspective of judges); see also Nan Aron, You Too Can Be a Judge, L.A. Times, May 19, 2003, at Pt. 2, p.11 (arguing that right-wing ideology and connections, not "real intellect, unquestionable integrity and a career-long commitment to equal justice for all," are the qualities that lead to a federal judgeship in the Bush administration).


11. See id. at 130-31, 141. "[T]he prosecutor's life is a constant call to accountability. . . ." Id. at 130. "[ Whereas] the defense attorney's role is to prevent, distort, and mislead." Id. at 141.


13. See generally Michael Pinard, Limitations on Judicial Activism in Criminal Trials, 33 Conn. L. Rev. 243 (2000) (discussing the ways judges use their judicial power to aid the prosecution); Brian R. Henry, The Criminal Defense Counsel's Concise Guide to Prejudicial
The truth is these so-called defense-oriented judges are not defense-oriented at all, but Bill of Rights-oriented. We should call them Bill of Rights judges. Instead of allowing these judges to be maligned and passed over for promotion, we should laud them and urge their advancement. And we should demand that there be more Bill of Rights judges.

After a brief diversion to acknowledge my own biases, I will explain what I mean by defense-oriented judges and argue why we need more of these judges in our courts. In the course of urging more defense-oriented judges, I will consider why there are presently so few. Then I will offer a few concluding thoughts.

II. A BRIEF INTERLUDE TO ACKNOWLEDGE MY CAPACITY TO COMPLAIN ABOUT JUDGES

I confess to having my own bias. I have been a criminal trial lawyer for more than twenty years, practicing mostly in state courts. I have defended the accused in four states—Maryland, Massachusetts, New York, and Pennsylvania—and the District of Columbia. I have appeared before hundreds of judges. Some of these judges do their jobs superbly, presiding over cases with wisdom, compassion, fair-mindedness, and humility. But far too many judges do not. Far too many judges preside over cases with an imperiousness that suggests they ought to be called “Your Majesty” instead of “Your Honor.” Far too many judges seem incapable of wisdom, compassion, and fair-mindedness.

I am not alone in this experience. As Alan Dershowitz baldly states:

[L]ying, distortion, and other forms of intellectual dishonesty are endemic among judges. In my . . . experience in the practice of law, I have been more disappointed by judges than by any other participants in the criminal justice system. That is partly because I, like so many

Judicial Communication During Criminal Jury Trials, 23 CRIM. L. BULL. 413 (1987); see also JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER 128 (1983) (“W]hile the prosecutor is supposed to be my adversary, the fiercest competition often comes from the police officer and the nominally neutral judge.”).


15. See, e.g., Editorial, A Sad Judicial Mugging, N.Y. TIMES, Oct. 8, 1999, at A26 (criticizing the Senate’s rejection of Missouri Supreme Court Justice Ronnie White for a federal district court judgeship because he was said to be soft on crime).
others, expected so much of these robed embodiments of the law. . . . Beneath the robes of many judges, I have seen corruption, incompetence, bias, laziness, meanness of spirit, and plain ordinary stupidity. I have also seen dedication, honesty, hard work, and kindness—but that is the least to which we are entitled from our judges. If I emphasize the negative side of the judiciary, that is because it is more noteworthy than the positive, and also because it threatens to corrupt the integrity of the American legal process.16

I have great range when it comes to complaining about judges. I can complain about judges young and old, male and female, black and white. I can complain about elected judges and appointed judges, federal judges and state judges, Supreme Court judges and traffic court judges. The older I get the more I complain about judges.17

I acknowledge that judging is a difficult business. Judges uphold the “integrity and independence” of the entire legal system.18 Judges must be “patient, dignified and courteous” to everyone with whom they come into contact,19 while at the same time efficiently disposing of cases.20 Judges must “avoid all impropriety and the appearance of impropriety [while under] constant public scrutiny.”21 Judges must refrain from engaging in all sorts of extrajudicial activities the rest of us take for granted.22 Not to mention the burdens of deciding cases day after day.

Still, no one forces anyone to become a judge. Would-be judges choose this on their own and often work hard to get themselves on the

17. Upon hearing that I was writing an article about judges, a friend reminded me about a time we went to lunch. We happened to be seated near a table with a half dozen judges who seemed to be celebrating something (a conviction after a lengthy trial? a life sentence? a death sentence? perhaps a birthday?). After shifting my chair to avoid detection—my idea of the rare luncheon outing does not include making small talk with the judges before whom I regularly appear—I rearranged the table. This one is an unbelievable prima donna, this one is volatile and intellectually dishonest, this one thinks he is smarter than he is, this one is rude and intemperate, this one is full of blather and bluster, and so on. My companion remarked I had nothing nice to say about any of them.
19. Id. Canon 3B(4).
20. See id. Canon 3B(8) (“A judge shall dispose of all judicial matters promptly, efficiently and fairly.”); see also id. Canon 3B(4) cmt. (“The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.”).
21. Id. Canon 2A cmt.
22. See id. Canon 4 (“A judge shall so conduct the judge’s extra-judicial activities as to minimize the risk of conflict with judicial obligations.”); Id. Canon 5 (“A judge or judicial candidate shall refrain from inappropriate political activity.”).
bench, sometimes being put through the ringer in the process. So why do so many go “bad”—if they weren’t bad in the first place? Why do so many get “black robe disease”? This may partly be an occupational hazard. We clothe judges in ceremonial robes, seat them above us, rise when they enter a room, and address them with honorifics. It is hard for many judges to resist the corruption of vanity and self-importance. Frankly, I can live with vanity and self-importance. It’s unfairness, meanness, willful ignorance, and refusal to see things from anyone else’s perspective that gets me.

Criminal defendants and their lawyers bear the brunt of this behavior. Honest prosecutors confirm this is so. No matter how experienced or accomplished the defender—and, in my case, no matter the lofty academic title—many judges seem to enjoy making us miserable. Let me share a few examples.

A. General judicial hostility

Defenders are accustomed to hostile judges. It is part of the job. The judge’s professional obligation to be “courteous” to litigants and

23. See Neely Tucker & Bill Miller, Inquiry Delays Seating of D.C. Judge; Federal Probe Centers on Investigator’s Acts, WASH. POST, Jan. 13, 2001, at B1 (reporting that, notwithstanding Senate confirmation, Gerald I. Fisher had not been seated as a D.C. Superior Court judge because of an inquiry into the conduct of an investigator who once worked for him). Many would-be judges don’t make it, no matter how qualified they are and how hard they try. See Editorial, Judgeships on Hold, WASH. POST, Aug. 28, 2000, at A18 (commenting on the deadlock on federal judicial nominations during the 106th Congress and noting that James Klein, chief of appeals at the Public Defender Service for the District of Columbia, “has waited longer than any other district court nominee nationwide to get the courtesy of a hearing”). It is probably no coincidence that both Gerry Fisher and Jimmy Klein come from the defense bar. Although Fisher is now on the D.C. Superior Court—and is an excellent judge—Klein never did receive a Congressional hearing on his appointment to the U.S. District Court.

24. See David A. Schkade & Cass R. Sunstein, Judging by Where You Sit, N.Y. TIMES, June 11, 2003, at A31 (finding that many judges are already biased when they arrive on the bench).

25. This is a common courthouse expression for lawyers-turned-judges who become full of themselves the minute they take the bench.


27. Of course, prosecutors get dumped on by judges, too. Some judges are equal opportunity bullies, happy to browbeat prosecutors and defenders alike. And a few judges have more ire for prosecutors than defenders.

28. See McIntyre, supra note 26, at 87 (reporting that judges are tougher on defenders than prosecutors—something defenders regard as “inevitable... if not entirely fair”—and often treat public defenders as “second-class citizens”).
lawyers seems to fall by the wayside when a defender appears. Some judges seem truly unhappy to see us when a case is called. They wish we’d go away; it would be so much easier without us; if only that pleasant prosecutor could handle both sides. When we greet these judges they barely respond. I believe that if a prosecutor were to object when a defender said, Good Morning, Your Honor, many judges would sustain it. In contrast, they warmly welcome the prosecutor, often by name.

Judicial hostility is expressed in many ways. Sometimes it is overt. In the course of jury selection in a recent case, the judge—who had specifically invited counsel to ask prospective jurors follow-up questions after the general voir dire—chastised me after every such exchange. He claimed that my questions were either too open-ended (which is how they should be if you wish to meaningfully probe a prospective juror’s biases), or too leading (which is how they should be if you wish to set up a challenge for cause or rehabilitate a prospective juror whom the government is challenging for cause). As the voir dire process was concluding, the judge lashed out at me one final time, claiming that my questioning had made the process take much longer than it should have. I replied that we would have to review the transcript of the proceedings, but I would wager that his yelling at me took up more pages than my questioning.

Sometimes the hostility is less explicit but present nonetheless. Some judges express a degree of disrespect and discourtesy toward the defense—in response to pleadings, during oral argument, and often when the defense raises a scheduling problem—that is not similarly directed toward the prosecution.

30. See Kunen, supra note 13, at 47 (“Judge Quinn was an embittered fifty-year-old who exhibited rather extreme mood swings. When he was in a bad, or normal, mood, he would ferociously lash out at defendants and their attorneys, simply for being defendants and their attorneys.”).
32. I said this in a light-hearted, not overtly contemptuous, way. Though, to paraphrase Jimmy Carter, I had contempt in my heart.
B. Judges bullying and ridiculing

Another voir dire story—for some reason, voir dire seems to bring out the worst in some judges—illustrates what I mean by judicial bullying and ridiculing. I was picking a jury in a case involving an allegation of interracial violence. My client was African American. The alleged victim was white. The jury venire was almost entirely white in a racially and ethnically diverse jurisdiction. After my motion to strike the venire was denied, I preserved the issue for appeal and began to question prospective jurors. Apparently, the judge thought I had already taken too much of the court’s time. He interrupted the proceedings. “Ms. Smith,” he said. “Do you realize that every time you talk, this man (pointing to the court reporter) has to take it down? And he’s not a young man, Ms. Smith.” Now, I realize this is a funny story. But the judge did not mean to be funny.

Some judges ridicule defendants and defense witnesses as well as defense counsel. This ridicule can occur verbally and nonverbally. Verbal ridicule tends to occur through judicial questioning. Judges express their disbelief or distaste for the defendant or witness through the questions they put to them. Nonverbal ridicule includes tone of voice, facial expressions, and gestures. In my experience, judges commonly convey their ridicule of defendants and defense witnesses through eye-rolling.

I once tried a case before a judge who was known for influencing the outcome of trials by various inappropriate means in order to favor the prosecution. His preferred methods, generally wielded during the defense case, were sarcasm, a disbelieving facial expression, a physical demeanor that expressed lack of interest—even going so far as to turn his chair away from the witness stand when a defense witness was

33. Judges, even more than the rest of us, like to be in control. When lawyers participate in voir dire—beyond submitting written questions for the judge to ask—judges have less control. This drives some of them crazy.

34. See generally Pinard, supra note 13, at 256-59.

35. See id. at 249, 263-66; see also MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) cmt. (1990) (“Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.”); A.F.G., Note, Judges’ Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality, 61 VA. L. REV. 1266, 1268 (1975) (quoting a juror: “‘During the testimony the attitude of the judge is very important. His movements and gestures, even his posture, affect the jury and they react accordingly.’”) (citing Mrs. Ben T. Head, Confessions of a Juror, in PROCEEDINGS OF THE ANNUAL JUDICIAL CONFERENCE, TENTH JUDICIAL CIRCUIT OF THE UNITED STATES, 44 F.R.D. 245, 333 (1967)).
testifying—and lots of eye-rolling. It is difficult to put this kind of behavior on the record for appellate purposes, but I tried. I asked to approach side bar with the court reporter and began to summarize what the judge was doing. The judge cut me off and told the court reporter that this was off the record and to go back to his chair. The judge then told me that if I persisted in what I was attempting to do and my client was convicted, he would give my client the maximum sentence.

The worst sort of ridicule is when a judge questions a competent lawyer’s competency in front of his or her client in open court. This not only publicly embarrasses the lawyer, it undermines client trust. Some judges routinely deride lawyers for things they do or fail to do, in order to maintain the courtroom hierarchy. These judges remind me of a New Yorker cartoon that featured a police car with large writing on it that read, “WE’RE COPS AND YOU’RE NOT.” Given the opportunity to throw their weight around, these judges will do so.

C. Judges interrupting and obstructing

Professor Michael Pinard has written a trenchant article documenting the extent to which “judges, through improper judicial intervention, interject their opinions, biases, and prejudices into criminal proceedings.” I have experienced improper intervention in the ways Professor Pinard describes, and then some.

A memorable example of judicial interruption and obstruction happened during the closing argument in a homicide trial. It was the climax of the argument: I was passionately arguing that my client had no choice but to defend himself. Because I wanted to convey my client’s perception of how quickly everything was happening and his mounting fear, I began to talk faster. Although my pace can sometimes be challenging for court reporters, I was not talking so fast that the court


37. It is another matter if the judge is genuinely concerned about the defendant’s right to counsel and due process, and is trying to redress a problem. I believe that judges—and prosecutors—could do much more to ensure that the accused is represented by competent counsel. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 330-33 (3d ed. 2004) (discussing the prosecutor’s duty to ensure a fair trial for the accused).

38. Pinard, supra note 13, at 249.

39. See id. at 260-66 (describing improper verbal intervention, including questioning prosecution witnesses in a helpful way, impeding defense cross-examination, and disparaging the defense case, and improper nonverbal intervention, including facial expressions, tone of voice, and gestures).
reporter could not keep up; she was typing along without complaint. More importantly, the jury was with me. Suddenly, the judge *sua sponte* called me to the bench with the prosecutor. We approached. He turned to me and asked, “Ms. Smith, where are you from—New York, Philadelphia?” Although I had lived in both cities, I am not from either place. As interesting as my home town (Chicago) is, I did not think this was the best time for the judge to get to know me. I was baffled by the judge’s query. He clarified his point by scolding, “Slow down, Ms. Smith. You are talking way too fast.”

Now some may think that telling a lawyer to slow down in a closing argument is an entirely appropriate thing for a judge to do. After all, judges have certain responsibilities pertaining to the management of courtrooms, and it is proper for a judge to be concerned about the well being of the court reporter (if she was having a hard time keeping up) and jurors (if they were having a hard time keeping up). But, judges should be loath to interrupt either side during a closing argument before a jury when no one except for the judge is having a problem. Even the prosecutor realized that I was doing exactly what I should to convey the emotion of the moment.

**D. Judges acting out of ignorance**

Alan Dershowitz puts this more plainly. He refers to judges’ “incompetence” and “plain ordinary stupidity.” I confess that, on occasion, I have used similar language to describe some judges, but I am too aware of my own incompetence and stupidity to adopt

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40. Several people who knew the judge and were in the courtroom when this incident happened believed his conduct was anti-Semitic. I don’t know. On the other hand, when another judge called me a “shyster”—as in Shakespeare’s Shylock—for “putting words in a witness’ mouth” during cross-examination, it may well have been anti-Semitic. Putting words in a witness’ mouth is precisely what one does in cross-examination. See generally *Paul Bergman, Trial Advocacy in a Nutshell* 151-221 (2d ed. 1989); *Thomas Mauet, Trial Techniques* 247-307 (5th ed. 2000); *Larry S. Pozner & Roger J. Dodd, Cross-Examination: Science and Techniques* 297-323 (1993).


42. *See id. Canon 3B(4)* (“A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.”).


Dershowitz’s characterization here. Moreover, I am less concerned about stupidity, which some judges simply cannot help (and which is different from incompetence, which I find galling), than I am about judges acting notwithstanding their ignorance, which judges can help.

Why can’t judges admit that they don’t know everything? Why must judges attempt to mask their ignorance and insecurity with imperiousness? Frankly, I have more respect for judges who acknowledge that an issue before them is a matter of first impression requiring further deliberation—or simply something they haven’t seen before—than those who rule badly to cover up lack of knowledge. I have appeared before judges who believe that the most basic rights, such as the right to cross-examination, do not apply in preliminary hearings, that evidence of law-abidingness is not appropriate character evidence, that lawyers may not ask leading questions during cross-examination, that lawyers may not argue the law in closing argument, that lawyers may not offer a narrative opening statement but should only state “what the evidence will show,” and that United States Supreme Court decisions do not apply to cases arising in South Philadelphia. This only skims the surface.

Some might say that these are not acts of ignorance, but of deliberate lawlessness. This may be true for some judges, but, in my experience, most of the time these judges are just in over their heads. The problem is they won’t admit it. They think there will be loss of respect—or, more importantly, control—if they say they don’t know something. Unfortunately, it is the rare judge who has the humility to say “I don’t know, let’s figure it out, let me hear argument.”

45. See Pointer v. Texas, 380 U.S. 400, 406-08 (1965) (holding that there is a right to confront and cross-examine witnesses at a preliminary hearing).
46. See, e.g., Curry v. United States, 498 A.2d 534, 544 (D.C. 1985) (affirming that a defendant may “advance one or more of his character traits as evidence of his innocence”).
47. This has happened numerous times.
48. They claim that this is for the judge to do when he or she charges the jury. But, of course, lawyers must argue both facts and law at closing. See ANTHONY AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES §§ 444, 446-48 (1988).
50. The judge was not kidding when he said this.
I share these stories partly to get them off my chest and partly because they convey the mundane, ordinary experience of defenders everywhere. In doing an increasingly difficult job with little public support, defenders routinely face hostile judges who bully, ridicule, interrupt, and obstruct. This is simply the reality for defenders and, as a result, we learn to cope with a certain level of meanness—it is difficult to see it as anything less—from those in positions of power. What is intolerable is the spillover to our clients. Mean-spirited, unfeeling, imperious judges hurt our clients, creating not just unpleasantness but injustice.

III. What it Means to Be Defense-Oriented

Defense-oriented judges believe in the adversary system and consider its day-to-day maintenance to be a central responsibility. They understand that the adversary system is the American system for the administration of justice—a system rooted in the Constitution which has been elaborated upon by the Supreme Court for two centuries. They recognize that this system is more than a model for resolving disputes, but rather consists of a core of basic rights that enhance and protect the dignity of the individual in a free society.

Defense-oriented judges understand that every criminal defendant—whether guilty or not—has certain fundamental rights. They are mindful of the threat of government encroachment on these rights, whether motivated by politics or adversarial advocacy. They understand

52. See generally MCINTYRE, supra note 26. The combination of budget shortfalls and lack of public support for adequately funding indigent defense has prompted some states to charge the poor accused for the “right to an attorney.” See, e.g., Robert E. Pierre, Right to an Attorney Comes at a Price; Minnesota Law Requiring Fees for Public Defenders is Challenged, WASH. POST, Oct. 20, 2003, at A1 (reporting that a new Minnesota law requires the poor accused to pay as much as $200 for an attorney and that the chief public defender in Minnesota prefers the fees as opposed to laying off dozens of lawyers in an office that is already “severely overworked”).


54. FREEDMAN & SMITH, supra note 37, at 13.

that constitutional criminal procedure is a "reminder to the community of the principles it holds important"—and that

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

Defense-oriented judges recognize the important systemic purpose served by assuring that the guilty have rights and are well-represented by counsel. They see it as a strength of the system, not a weakness, that the majority of those prosecuted in American courts are guilty. This is so because by affording fundamental rights to the guilty, we "preserve the integrity of society itself...[by] keeping sound and wholesome the procedure by which society visits its condemnation on an erring member."

In contrast to judges who are leery of defense lawyers, defense-oriented judges understand that zealous advocacy, the protection of individual rights, and the maintenance of the adversary system are inextricably connected. Defense-oriented judges are relieved, not threatened or annoyed, when an experienced and skilled defense lawyer appears before them. They understand that defenders who provide a

57. Id. at 1392.
58. For a competing view, see generally Rothwax, supra note 10.
61. See ABA Standards Relating to the Defense Function 145 (1971) (describing the lawyer as the client's "champion against a hostile world").
62. See Wyzanski, supra note 53, at 219 (federal judge noting that Ray Charles, who appeared before him on a federal drug charge, was represented by "a lawyer of whom I wish there were more of the same type"); see also id. at 209 (cheerfully recounting a case in which a probably guilty "black, crippled, blind man" was acquitted of passing bad checks because he was represented by a
vigorous defense for their clients help to make the legal system comport with our ideals.\textsuperscript{63}

In contrast to judges who are basically "robed prosecutors,"\textsuperscript{64} accepting improbable police accounts in order to sustain a questionable search or seizure, making rulings that ensure convictions, and putting offenders away for as long as possible,\textsuperscript{65} defense-oriented judges make sure that the government is put to its burden of proof. In contrast to judges who delegate the judicial function to prosecutors, adopting verbatim judicial orders drafted by prosecutors no matter how one-sided and no matter the strategic advantage they afford the prosecution post-conviction,\textsuperscript{66} defense-oriented judges decide cases on their own. In contrast to judges who believe that the only important issue is public safety and order—which is not necessarily best served by trampling individual rights\textsuperscript{67}—and who are driven more by fear (of politicians, the public, the press) than by the Constitution, defense-oriented judges try to strike a balance between the public welfare and individual liberty.

As we Jews say at Passover, \textit{dayenu}. If defense-oriented judges only believed in and cherished our constitutionalized adversary system, \textit{dayenu}, that would be enough. If they only recognized the connection between the adversary system and individual rights and dignity, \textit{dayenu}, that would be enough. If they only recognized the critical role that defense lawyers play and put the government to its burden, \textit{dayenu}, that would be enough. But, defense-oriented judges go further. Defense-oriented judges contemplate the lives that come before them, in all their complexity and uncertainty.\textsuperscript{68} They have compassion.\textsuperscript{69}

\textsuperscript{63} John B. Mitchell, \textit{The Ethics of the Criminal Defense Attorney}, 32 STAN. L. REV. 293, 298 (1980) (noting that criminal defense counsel "makes the screens work").

\textsuperscript{64} See Bright & Keenan, \textit{supra} note 51, at 811-13 (discussing prosecutors who become judges and "continue to prosecute from the bench").

\textsuperscript{65} See Smith, \textit{supra} note 6, at 388-91 (discussing the overriding desire of prosecutors to win cases).

\textsuperscript{66} See Bright & Keenan, \textit{supra} note 51, at 803-11.

\textsuperscript{67} See generally DAVID COLE, \textit{NO EQUAL JUSTICE} (1999); COLE, \textit{ENEMY ALIENS}, \textit{supra} note 7.

\textsuperscript{68} See Wyzanski, \textit{supra} note 53, at 218:

We are exercising a power which is literally suitable only for someone with divine insight. Even if we know all about the past of somebody, and who does know that, what can we really tell about future stresses and strains? How can we have any certainty? We can only have, in Holmes' phrase, "certitude," which is, of course, the most dangerous of deceptions.
I have had the good fortune to appear before some of these judges. These are the judges who are courageous enough to take a chance on another human being, even one who has broken the law. These are judges who understand that good people sometimes do bad or even terrible things. These are the judges who see the humanity in those who commit crime without minimizing the harm the crimes may have caused.

I currently have a case before a judge who is generally regarded as prosecution-oriented. Indeed, when this judge was first assigned to the case I was wary. However, it turns out this judge’s reputation is inaccurate: he is a prime example of what I mean by a defense-oriented judge. In order to avoid revealing my client’s identity I will refrain from telling a good story about a wise and humane judge. Let me say only that my client is a young man who is being aggressively prosecuted for serious felonies that he likely committed, but for which there is also strong mitigation. Though mindful of public safety, the judge has been willing to inquire into the diminished mental capacity of my client with respect to both competency and criminal responsibility and to provide an opportunity for treatment.

I can pay no greater tribute to this judge than to say that his conduct in the case is in the tradition of the writings of David Bazelon. Judge Bazelon, who died in 1993, was Chief Judge of the United States Court of Appeals for the District of Columbia Circuit.

69. I am not saying that defense-oriented, Bill of Rights judges are always “lenient” sentencers. One can have compassion and be a firm disciplinarian (in law and life). But defense-oriented judges are mindful of the enormity of their sentencing power; they do not underestimate what it means to send another human being to jail or prison, even though this is sometimes necessary.


73. See Supreme Court Justice William J. Brennan, Jr., Foreword to David L. Bazelon, Questioning Authority: Justice and Criminal Law (1988), at ix (“David L. Bazelon is among the great judges in American judicial history.”).
of Appeals for the District of Columbia from 1962 to 1978. He is perhaps the prototypical defense-oriented judge, whose legacy includes the development of the law of insanity and criminal responsibility.

Predictably, while he was on the bench, conservatives assailed Bazelon as being soft on crime. U.S. Supreme Court Chief Justice Warren Burger, who had served with Bazelon on the appellate court, was said to despise him. Supreme Court Justice William Rehnquist accused the Bazelon court of "judicial intervention run riot." Judge Bazelon was not daunted by these attacks.

Just as predictably, civil libertarians loved Bazelon. Joseph L. Rauh Jr., a Washington lawyer who clerked for Justices Benjamin Cardozo and Felix Frankfurter, said that Judge Bazelon had the greatest social impact of any judge in his lifetime. Justice William Brennan credited Bazelon for expanding the right to counsel in criminal cases and developing the right to prohibit improperly seized evidence. Bazelon was also known for speaking out against the trend toward overly harsh punishment.


75. See generally Martha Minow, Questioning Our Policies: Judge David L. Bazelon's Legacy for Mental Health Law, 82 GEO. L.J. 7 (1993); see also Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled by United States v. Brawner, 471 F.2d 969, 982 (D.C. Cir. 1972). Durham enunciated the so-called "product" test for insanity. Durham, 214 F.2d at 874-75. If criminal conduct was the product of a mental disease or defect then "moral blame shall not attach, and . . . there will not be criminal responsibility." Id. at 876.

76. See Berger, supra note 74; see also Patricia M. Wald, Tribute: The Legacy of Judge David L. Bazelon, 82 GEO. L.J. 19, 25-26 (1993) (referring to Bazelon's "strongly worded criminal opinions in which he was constantly probing into the background of those criminal defendants, much to the consternation of some of the law and order types"). Unfortunately, this sort of attack is often effective. See A Sad Judicial Mugging, supra note 15, at A26 (lamenting the Senate's rejection of Ronnie White for a federal district court judgeship in Missouri largely because of then Senator John Ashcroft's depiction of White as "pro-criminal").

77. See Berger, supra note 74.


80. See Berger, supra note 74.

81. See id.

82. Bazelon believed that because crime was often the result of poverty, racism, and mental illness, it was wrong to see it as a matter of "free choice." Hence, "[t]hrowing offenders into 'the savage jungle that is our prison system' . . . is no solution." Taylor, supra note 74, at A20; see also Stephen J. Schulhofer, Just Punishment in an Imperfect World, 87 MICH. L. REV. 1263 (1989) (book review) (reviewing Judge Bazelon's autobiography). See BAZELON supra note 79.
Bazelon believed in the adversary system: he believed in “independent and capable” counsel engaging in “diligent and conscientious advocacy.” For Bazelon, it was not enough that criminal defendants had legal representation; they were entitled to high quality representation. Indeed, Bazelon was one of the first to speak out about the poor quality of indigent criminal defense in this country. Disgusted with what passed as adequate representation for the poor accused, he is credited with coining the phrase, “There goes a walking violation of the Sixth Amendment.” Unfortunately, not much has changed since then.

Judges in Judge Bazelon’s mold have been criticized as “activist,” “partisan,” or, as Professor Mary Ann Glendon puts it, “romantic.” In an article in Commentary magazine, and later in her 1994 book, A Nation Under Lawyers, Professor Glendon ridicules judges like Judge Bazelon as being overly soft, “sensitive,” and “subjective.” She eschews the idea that these judges are kinder or more compassionate than others, arguing that their “compassion” only extends to those they favor not

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84. See generally id.
85. See id. at 2 (stating that many—if not most—indigent criminal defendants do not receive effective assistance of counsel and noting that “the criminal justice system goes to considerable lengths to bury the problem”). Consider that:

[m]uch like the provision of medical care to the poor, the provision of legal counsel to the indigent is a non-prestigious activity that the public and the profession would rather not think about. Just as we assume our medical responsibility is met when we provide poor people a hospital, no matter how shabby, undermanned and underfunded, so we pretend to do justice by providing an indigent defendant with a lawyer, no matter how inexperienced, incompetent or indifferent.

Id. at 4.
86. Berger, supra note 74; Bazelon, Defective Assistance of Counsel, supra note 83, at 2 (attributing the saying to “[a] very able trial judge”); see also Vanessa Merton, What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" if You’re Trying to Put That Lawyer’s Client in Jail?, 69 FORDHAM L. REV. 997, 1029 (2000) (noting the “low, low threshold for effective assistance”).

87. See generally DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 60-63 (2000); Alan Berlow, Requiem for a Public Defender, AMERICAN PROSPECT, June 5, 2000, at 28 (noting that the “Supreme Court has... set... a standard of competence for attorneys so ridiculously low that trained circus bears very nearly qualify.”). Taking a page from Judge Bazelon, Professor David Luban notes that the right to counsel still often means nothing more than a “warm body” seated beside a defendant. See David Luban, Are Criminal Defenders Different?, 91 Mich. L. REV. 1729, 1740 (1993). Luban portrays “a world of lawyers for whom no defense at all, rather than aggressive defense or even desultory defense, is the norm.” Id. at 1762.
88. See Mary Ann Glendon, Partial Justice, COMMENTARY, August 1994, at p. 22.
89. MARY ANN GLENDON, A NATION UNDER LAWYERS (1994).
90. Id. at 160.
91. Id. at 165.
those they rule against. Indeed, Professor Glendon thinks that compassion has no place in judging and is at odds with impartiality, intelligence and integrity.

Interestingly, the judge whom Professor Glendon cites as a model of integrity and intelligence—and what she calls "neoclassical judging"—is Justice Byron White. White, the former University of Colorado football All-American and National Football League rookie of the year, is known for being a consistent hard-liner in criminal cases. During his tenure on the Court, he almost always sided with law enforcement over civil liberties. Justice White also penned the majority decision in Bowers v. Hardwick, in which he derided as "facetious" the claim that there is a liberty interest in private, consensual same-sex sex.

IV. WHY JUDGES OUGHT TO BE DEFENSE-ORIENTED AND WHY THEY ARE NOT

Judges ought to be defense-oriented because, in practice, defense-orientation ensures fair-mindedness and neutrality. Defense-oriented judges are the only judges who afford the accused the presumption of innocence, place the burden of proof squarely on the government, and hold the government to its burden of proof beyond a reasonable doubt. Defense-oriented judges act in conformity with the Bill of Rights.

To be a defense-oriented judge in the best sense of the phrase you don’t have to be David Bazelon, Louis Brandeis, or Thurgood Marshall. You can be one of a number of fine judges sitting on a state or federal bench. You could, for example, be federal judge Shira A. Scheindlin, who ruled in May 2002, that prosecutors are not allowed to detain material witnesses to secure their testimony in grand jury investigations.

92. See id. at 160.
93. See id. at 165.
94. See id. at 170-73.
98. See supra note 2 and accompanying text. See also Judith Resnick, Managerial Judges, 96 Harv. L. Rev. 374, 380-86 (1982) (discussing the traditional judicial role in an adversary system); Stephen A. Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 Va. L. Rev. 1, 13-21 (1978) (discussing the role of the judge in the American version of the adversary system).
as a matter of constitutional law.\textsuperscript{99} In an eloquent opinion citing \textit{United States v. Robel},\textsuperscript{100} Judge Scheindlin writes: “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties... which makes the defense of the Nation worthwhile.”\textsuperscript{101} In her ruling, Judge Scheindlin dismissed a perjury indictment against a Jordanian who was detained as a material witness after the September 11th attacks and then charged with lying when he denied knowing the name of one of the suspected hijackers. Judge Scheindlin found that the material witness law in grand jury inquiries was “illegitimate” and “posed the threat of making detention the norm and liberty the exception.”\textsuperscript{102} She made her ruling notwithstanding the unfortunate first name of defendant Osama Awadallah.

You could also be Judge Gerard A. Lynch, who, like Judge Scheindlin, sits on the Federal District Court in Manhattan. In an internet child pornography case involving an eighteen-year-old college student who was facing a ten year mandatory minimum sentence, Judge Lynch, a former prosecutor who once ran the criminal division of the United States Attorney’s office in Manhattan, agreed to take the extraordinary step of instructing the jury on the penalty.\textsuperscript{103} He did so only after the government refused to reconsider the charge or offer a plea that would allow the student, who had no prior criminal record, to avoid the mandatory term.\textsuperscript{104} When he was prevented from instructing the jury by the Court of Appeals, Judge Lynch decried the case as “the worst case of [his] judicial career.”\textsuperscript{105} He deplored the “unjust and harmful” sentence, which “has the potential to do disastrous damage to someone who himself is not much more than a child.”\textsuperscript{106}

You could also be the judge to whom I refer in the Introduction of this essay, Carolyn Engel Temin, who sits on the Court of Common Pleas in Philadelphia. A former public defender (and the first full-time female public defender in Philadelphia), and former Chief of Appeals for

\textsuperscript{100} 389 U.S. 258 (1967).
\textsuperscript{101} Awadallah, 349 F.3d at 57.
\textsuperscript{102} Id. at 79.
\textsuperscript{103} See Benjamin Weiser, A Judge’s Struggle to Avoid Imposing a Penalty He Hated, N.Y. TIMES, Jan. 13, 2004, at A1.
\textsuperscript{104} See id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
the Philadelphia District Attorney's Office, Judge Temin works tirelessly to ensure that the Constitution lives—at least in her courtroom. She sets high standards for all lawyers who come before her. She manages to be both dispassionate (unbiased and even-handed) and compassionate (to defendants and their families as well as victims and their families).107

Of course, there are others. The real question is why these judges are so noteworthy, why they are the exception and not the rule. What is it about the way we go about selecting and retaining judges that makes them so prosecution-oriented?

An admittedly nonexhaustive review of the research on judicial decision-making revealed few hard truths.108 However, we do know some things.

First, we know that ideology matters.109 According to a study of thousands of votes by federal appellate judges randomly assigned to three-judge panels, judges appointed by Republican presidents show more conservative voting patterns, while Democratic appointees are more liberal.110 Interestingly, in criminal matters, Republican and Democratic appointees do not differ in their appellate rulings except in capital cases. In capital cases, Republican appointees are much more likely to permit executions to go forward.111

Second, experience matters.112 In a comprehensive study of federal district court rulings on the constitutionality of the federal sentencing guidelines in the 1980s, researchers found that judges with criminal defense experience ruled against the guidelines more than judges who never practiced criminal law.113 Former prosecutors and those who had no experience with criminal law tended to ratify the guidelines.114

I am not saying that former defenders are always better judges—or even more defense-oriented judges—than former prosecutors. I have appeared before many thoughtful, fairminded, compassionate judges

107. Judge Temin is currently the President-elect of the National Association of Women Judges.
108. See, e.g., Sisk, supra note 9, at 1385-95.
110. See id.
111. See id.
112. See Sisk, supra note 9, at 1470-74 (discussing rulings on the constitutionality of the federal sentencing guidelines by judges with criminal defense experience).
113. See id. at 1471.
114. See id. at 1473-74.
who used to be prosecutors. I have also appeared before former defenders who do everything possible to reject their former defense perspective. Still, there is something to be said for having worked closely with individuals accused of crimes. It may be embittering for some—these are the judges whose burnout spills from the bench onto those unfortunate enough to appear before them—but most at least recognize that criminal defendants are people, too. It seems clear that most judges are not defense-oriented because we are not selecting judges who are likely to be defense-oriented. Once on the bench, judges who are defense-oriented receive little support. Although all judges take oaths to uphold the Constitution, including the provisions guaranteeing certain rights to the accused, a commitment to the Constitution is not the most important criterion for judicial selection. Politics are much more important than principle when it comes to selecting judges. Indeed, a demonstrated commitment to the constitutional rights of the accused is a liability for a prospective judge or one who wants to remain on the bench.

Whether elected or appointed, one thing is certain: it is much more common for a former prosecutor to become a judge than a former public defender. Especially in jurisdictions that elect judges, a typical route to the bench is through a prosecutor’s office, where trying high profile capital cases can result in publicity and name recognition for a prosecutor with judicial ambitions. And yet we know that judges

115. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 236 (1st ed. 1990) (arguing that a “conscientious prosecutor” can protect civil liberties and prevent abuse of power).

116. See SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER (1981); Randy Bellows, Notes of a Public Defender, in PHILIP B. HEYMANN & LANCE LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES 69 (1988). Harold Rothwax, one of the most feared judges on the New York bench in the 1980s and 1990s—known not so affectionately as the “Prince of Darkness”—began his career as a public defender. See generally ROTHWAX, supra note 10. As a young man, Rothwax and I had the same idol: Clarence Darrow. See id. at 12. You wouldn’t have known this by how he acted on the bench.

117. See generally ROTHWAX, supra note 10.

118. See generally Aron, supra note 9 (arguing that political connections, not commitment to equal justice, lead to judgeships); see also A Sad Judicial Mugging, supra note 15.

119. See Bright & Keenan, supra note 51, at 785 (noting that, in the political arena, constitutional rights are dismissed as mere “technicalities,” and a judge’s rulings in high profile cases are “more important to a judge’s survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the rule of law.”).

120. Id. at 776.
with criminal defense experience are likelier to be vigilant about encroachments on the Bill of Rights.121

Something needs to change in the way we select and retain judges.122 The first thing that surely has to go is judicial elections, where judges who enforce the Constitution are vulnerable to an anti-crime constituency concerned only about the end result of a ruling: “Judges who must keep one eye on the next election often cannot resist the temptation to wink at the Constitution.”123 On the other hand, many systems for the appointment of judges are hardly a panacea. Politics and cronyism remain the order of the day when it comes to selecting judges.124

It is beyond the scope of this essay to solve this difficult problem.125 At the very least, we ought to do better at drawing prospective defense-oriented judges and supporting those defense-oriented judges currently on the bench.126 If this essay does nothing more than lend support to these Constitutional stalwarts, I shall be pleased.

121. See Sisk, supra note 9, at 1383. Again, I’m not saying that all former defenders become defense-oriented, Bill of Rights judges. Many disappoint. But, former defenders bring an important and underrepresented set of experiences to the bench.


123. See Bright & Keenan, supra note 51, at 795.

124. See, e.g., Clifford J. Levy, Picking Judges: Party Machines, Rubber Stamps, N.Y. TIMES, July 20, 2003, at A1 (reporting about judicial conventions in New York where, in theory, informed citizens are supposed to help decide the makeup of the state’s highest trial court, but in practice the conventions are the most cynical sort of exercise, “just another cog in the operations of political party machines”).

125. In the course of writing and presenting this paper I have given some thought to whether a European style judiciary, which at least in theory is removed from the political process, might be a preferable model to ours. I will leave this question for another paper—hopefully after I have had the opportunity to actually experience criminal practice abroad.

126. The defense-oriented judicial nightmare happened to federal district court judge Harold Baer in 1996 when he granted a motion to suppress drugs in a routine drug distribution case, citing lack of probable cause. See Don Van Natta Jr., Judge’s Drug Ruling Likely to Stand, N.Y. TIMES, Jan. 28, 1996, at A27. Despite the fact that the accused in the case, Carol Bayless, was a grandmother and a first-time offender, there was widespread public outcry against Judge Baer. There were no party lines to the outcry; President Bill Clinton was among the critics, going so far as to threaten impeachment proceedings. See Linda Greenhouse, Judges as Political Issues, N.Y. TIMES, March 23, 1996, at A1. Within weeks, Judge Baer reversed his decision. See Don Van Natta Jr., Under Pressure, Federal Judge Reverses Decision in Drug Case, N.Y. TIMES, Apr. 2, 1996, at A1.
VI. CONCLUSION

The truth is I admire many judges. Although I complain bitterly about judges who should not be on the bench, I have also had the privilege of appearing before judges who are a tribute to the bench. These judges understand the importance of their role as keepers of the Constitution and models of honor, decency, and integrity. They are willing to risk public disfavor to do the right thing.

I wish all judges would strive to be defense-oriented—Bill of Rights-oriented, fairminded, open-minded, and open-hearted. These judges are not biased in favor of the accused; they merely afford the accused due process and dignity. They embody the best in the adversary system, allowing each side to vigorously present its case, and bringing their own humanity—and humility—to the process.

127. See generally Saltzburg, supra note 98.
128. See generally Wyzanski, supra note 53; see also Judith S. Kaye, The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern, 73 Cornell L. Rev. 1004, 1015 (1988) (Chief Judge of the New York Court of Appeals stating: “[T]he danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them. ... [A] far greater danger exists that they do not.”).