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COMMENTARY

DEFENDING THE GUILTY

BARBARA ALLEN BABCOCK*

I. INTRODUCTION

How can you defend a person you know is guilty? I have answered that question hundreds of times, never to my inquirer's satisfaction, and therefore never to my own. In recent years, I have more or less given up, abandoning the high-flown explanations of my youth, and resorting to a rather peevish: "Well, it's not for everybody. Criminal defense work takes a peculiar mind-set, heart-set, soul-set." While I still believe this, the mind-set might at least be more accessible through a better effort at explanation.

My model is an article by Charles Curtis entitled *The Ethics of Advocacy*.¹ No piece in the field of professional responsibility has been so often cited, sometimes with a combination of outrage and disparagement.² I do not agree with all that Curtis says, but I admire the article for

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From 1964 to 1972, I was a criminal defense lawyer. I worked for two years with the firm of Edward Bennett Williams in Washington, D.C., and then as a Public Defender. I now teach courses in criminal procedure. Thus, I have had considerable opportunity to observe the pathology of the system. This piece is based, however, not only on my own reflections but on my reading of many dozens of books by and about criminal defense lawyers in the United States. Although my references to this literature are allusive rather than detailed, I find that these sources largely have mirrored my own experiences.

¹ Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

² The controversial reactions to the Curtis article are inevitable, particularly in light of some of its propositions. A fundamental premise of the article is that a lawyer's proper standard of conduct toward others is decidedly lower than his standard of conduct toward his clients. This standard adjusts proportionately: the more stringent the duty owed by a lawyer to his client, the less responsibly the lawyer may act toward the rest of the world. Hence, Curtis concludes, the situation may arise, albeit rarely, where a lawyer is duty-bound to lie on his client's behalf. *Id.* at 9. Reasoning that the lawyer-client relationship is "one of the intimate relations," and that occasions exist when one would lie for one's spouse or child, Curtis maintains that the real ethical dilemma for the lawyer is determining the point at which the lying must stop. *Id.* at 8. Curtis further indicates that this should not so shock the ethical sensibilities of the lawyer, since: 1) the lawyer is routinely required to make statements and arguments which he may hardly believe as a personal matter; and 2) the deliberate, tactical withholding of information from the court, while not technically a "lie," is often no more an advancement of truth than if an actual lie had been told. Thus, the

its rare candor: he wrote baldly and boldly about the conflict between a lawyer's work and common morality.

In discussing the dilemma of a lawyer faced with defending the guilty or handling a bad case, Curtis counseled the stoical approach of Montaigne:

There's no reason why a lawyer or a banker should not recognize the knavery that is part of his vocation. An honest man is not responsible for the vices or the stupidity of his calling and need not refuse to practice them. They are customs in his country and there is profit in them. A man must live in the world and avail himself of what he finds there.³

Curtis offered two devices to the advocate seeking to reconcile role with self: the first was to treat the enterprise as a game, and the second was to treat it as a craft.⁴ Both, in his view, involved the necessity of laying aside some of the normal rules of human interaction and devoting one's entire energies to the cause of another.

One reason that Charles Curtis could speak so directly was that he was safe—an unassailable member of the establishment, Choate '91, Harvard undergraduate and law school, a partner in a distinguished firm. Even without such Brahmin credentials, I too feel quite safe in discussing, without the usual handwringing or -washing, what it is like to defend the guilty. I have a good and secure job. I am no longer a criminal defense lawyer in actuality but regard the years I spent in the work as a source of immense satisfaction.

First we will examine the nature of the question, then the possible answers. We must know, too, of whom the question is asked and what characterizes the attitudes held by the criminal defender. Moreover, the lawyer's discipline requires that we consider whether the right question is being asked. Finally, we look to the answer provided by the life of the most famous criminal defense lawyer of all: Clarence Darrow.

lawyer's peculiar sphere of duty is defined not only by the intimacy of the lawyer-client relationship, but also by the trappings of his craft, and it is within these dimensions, Curtis contends, that the dilemma of defending the guilty must be addressed. *Id.* at 9-13. To subject the question to a conventional moral analysis would be to ignore the fact that the attorney must function in an adversarial system.

For contemporary treatment of Curtis' article and the ethical issues it raised, see Bregar, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. Rev. 282 (1982); Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 Md. L. Rev. 451 (1981); Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited*, 79 DUKE L.J. 1251 (1979); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63 (1980).

³ Curtis, *supra* note 1, at 20.

⁴ *Id.* at 21-22.

II. WHAT IS THE QUESTION?

Most people do not mean to question the defense of those accused of computer crime, embezzlement, or tax evasion. Usually the inquirer is asking how you can defend a robber, a rapist, a murderer.⁶ In all its components, the question is: first, how *can* you when you know or suspect that if you are successful, your client will be free to commit other murders, rapes and robberies? Second, how can *you* defend a guilty man—you, with your fancy law degree, your nice clothes, your pleasing manner? Third, how can you *defend*—move to suppress the evidence of clear guilt found on the accused's person, break down on cross-examination an honest but confused witness, subject a rape victim to a psychiatric examination, reveal that an eyewitness to a crime has a history of mental illness?

III. WHAT ARE THE ANSWERS?

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

This answer may be elegantly augmented by a civil libertarian discussion of the sixth amendment and the ideal of the adversary system as our chosen mode for ascertaining truth. Also, the civil libertarian tells us that the criminally accused are the representatives of us all. When their rights are eroded, the camel's nose is under and the tent may collapse on anyone. In protecting the constitutional rights of criminal defendants, we are only protecting ourselves.

The Legalistic or Positivist's Reason. Truth cannot be known. Facts are indeterminate, contingent, and, in criminal cases, often evanescent. A finding of guilt is not necessarily the truth, but a legal conclusion arrived at after the role of the defense lawyer has been fully played. The sophist would add that it is not the duty of the defense lawyer to act as factfinder. Were she to handle a case according to her own assessment of guilt or innocence, she would be in the role of judge rather than advocate. Finally, there is a difference between legal and moral guilt; the defense lawyer should not let his apprehension of moral guilt interfere with his analysis of legal guilt. The example usually given is that of the person accused of murder who can respond successfully with a claim of self-de-

⁶ In recent years, however, as white-collar crime has increased in both amount and sophistication, liberal critics of the criminal justice system have begun to raise the question in the context of the rich and powerful defendants and the way in which their almost unlimited legal resources twist results.

fense. The accused may feel morally guilty but not be legally culpable. The odds-maker chimes in that it is better that ten guilty people go free than that one innocent be convicted.

The Political Activist's Reason. Most people who commit crimes are themselves the victims of horrible injustice. This statement is true generally because most of those accused of rape, robbery and murder are oppressed minorities. It is also often true in the immediate case because the accused has been battered and mistreated in the process of arrest and investigation. Moreover, the conditions of imprisonment may impose violence far worse than that inflicted on the victim. A lawyer performs good work when he helps to prevent the imprisonment of the poor, the outcast, and minorities in shameful conditions.

The Social Worker's Reason. This reason is closely akin to the political activist's reason but the emphasis is different. Those accused of crime, as the most visible representatives of the disadvantaged underclass in America, will actually be helped by having a defender, notwithstanding the outcome of their cases. Being treated as a real person in our society (almost by definition, one who has a lawyer is a real person) and accorded the full panoply of rights and the measure of concern afforded by a lawyer can promote rehabilitation. Because the accused comes from a community, the beneficial effect of giving him his due will spread to his friends and relatives, decreasing their anger and alienation. To this might be added the humanitarian's reason: the criminally accused are men and women in great need, and it is part of one's duty to one's fellow creatures to come to their aid.

The Egotist's Reason. Defending criminal cases is more interesting than the routine and repetitive work done by most lawyers, even those engaged in what passes for litigation in civil practice. The heated facts of crime provide voyeuristic excitement. Actual court appearances, even jury trials, come earlier and more often in one's career than could be expected in any other area of law. And winning, ah winning has great significance because the cards are stacked for the prosecutor. To win as an underdog, and to win when the victory is clear—there is no appeal from a "Not Guilty" verdict—is sweet.

My own reason for finding criminal defense work rewarding is an amalgam in roughly equal parts of the social worker's and the egotist's reason. I once represented a woman, call her Geraldine, who was accused under a draconian federal drug law of her third offense for possessing heroin. Under this law, since repealed, the first conviction carried a mandatory sentence of five years with no possibility of probation or parole. The second conviction carried a penalty of ten years with no probation and no parole. The third conviction carried a sentence of twenty years on the same terms. Geraldine was forty-two years old. During the few years of her adult life not spent in incarceration imposed by the state, she had been imprisoned in heroin addiction of the most dreadful sort. She was black, poor, and ugly—and there was no apparent defense to the charge.

But even for one as bereft as Geraldine, the general practice was to mitigate the harshness of the law by allowing a guilty plea to a drug charge under local law which did not carry the mandatory penalties. In this case, however, the prosecutor refused the usual plea. Casting about for a defense, I sent her for a mental examination. The doctors at the public hospital reported that Geraldine had a mental disease: inadequate personality. When I inquired about the symptoms of this illness, one said: "Well, she is just the most inadequate person I've ever seen." But there it was—at least a defense—a disease or defect listed in the Diagnostic and Statistical Manual of that day.

At the trial I was fairly choking with rage and righteousness. I tried to paint a picture of the impoverishment and hopelessness of her life through lay witnesses and the doctors (who were a little on the inadequate side themselves). The prosecutor and I came close to blows. At one point, he told the judge he could not continue because I had threatened him (which I had—with referral to the disciplinary committee if he continued what I thought was unfair questioning). Geraldine observed the seven days of trial with only mild interest, but when after many hours of deliberation the jury returned a verdict of "Not Guilty by Reason of Insanity," she burst into tears. Throwing her arms around me, she said: "I'm so happy for you."

Embodied in the Geraldine story, which has many other aspects but which is close to true as I have written it, are my answers to the question: "How can you defend someone you know is guilty?" By direct application of my skills, I saved a woman from spending the rest of her adult life in prison. In constructing her defense, I became intimate with a life as different from my own as could be imagined, and I learned from that experience. In ways that are not measurable, I think that Geraldine's friends and relatives who testified and talked with me were impressed by the fact that she had a "real" lawyer provided by the system. But in the last analysis, Geraldine was right. The case became my case, not hers. What I liked most was the unalloyed pleasure of the sound of "Not Guilty." There are few unalloyed joys in life.

IV. WHO IS ASKED THE QUESTION?

Criminal defense lawyers fall into several categories. First, there are lawyers who take criminal cases for fees. Among these are the big names who make headlines and are often known for their oratory, flamboyant life-styles, and high prices. There are many other lawyers who make a living from fee-paying criminal clients. Some of them would identify themselves as drug lawyers, gamblers' lawyers, and maybe even middle-class murderers' lawyers. There are also litigation lawyers who do not consider themselves specialists in criminal law, but will take some criminal cases for fees. Finally, there are the hustlers and hacks who live by a combination of court-appointed compensated cases and whatever fees can

be collected from defendants (or their families), who mistrust the "free lawyer" they could probably obtain from the government.⁶

The other large group within the profession of criminal defense lawyers are those paid by the government, either as public defenders in organized institutional programs or as appointed counsel, but on such a regular basis that it is the bulk of their practice. Within this subset, the practice varies greatly from the overworked offices where lawyers on the whole merely process most clients, to quite sophisticated institutions where some effort is made in many cases to afford a true defense.

The attitude of these various lawyers toward defending the guilty can be gleaned from the confessional literature of the defense bar. There are literally hundreds of books by and about defenders. They are also often the subjects of popular media articles in which inevitably "the question" is asked. Much of what is written is trashy, unreflecting, self-indulgent, and anecdotal to the point of being tiresome.⁷ Yet the books and articles provide insight into the attitude of criminal defense lawyers. Although some personalized version of the various reasons why one might do the work often emerges, the fundamental mind-set of most criminal defense lawyers toward defending the guilty is one of staggering indifference to the question.

From lawyers of impeccable professional integrity to those with whom we might be embarrassed to share a profession, all reiterate that innocence or guilt is of no real concern in their daily work. In their trial stories, they usually say nothing at all about the subject. On the general issue, they say it is far easier to defend the guilty because the defense lawyer always wins. If the defendant is acquitted, the lawyer has worked a minor miracle; if convicted, the correct result was reached. Most defense lawyers have reached a state of reasonable doubt in their own minds by the time of trial. Those rare trials of a defendant whom the lawyer truly believes to be innocent, as compared to one about whom she has a reasonable doubt, are grueling and frightening experiences, in which the usual will to win is elevated to a desperate desire to succeed.

But we also learn from the literature that the indifference to their clients' guilt takes its psychological toll on members of the defense bar. Although the books and articles are filled with stories of great victories, the lawyers reveal their feelings of isolation. They alone go through life being

⁶ In an interview of 149 defendants from New York and Los Angeles, 64% preferred retained counsel over appointed counsel. The interviewees felt that retained counsel did a better job and possessed more power. In essence, the defendants felt that "[y]ou get what you pay for." R. HERMANN, E. SINGLE & J. BOSTON, *COUNSEL FOR THE POOR* at 91-92 (1977).

⁷ For an excellent appraisal and summary of the literature in the area, see generally, Boudin, *Book Review*, 35 *STAN. L. REV.* 3 (1982) (reviewing A. DERSHOWITZ, *THE BEST DEFENSE* (1982)). A recent lively addition to the confessional literature of the defense bar is KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE* (1983) which anecdotally portrays many of the prevalent attitudes.

asked constantly to explain their professional existence. One can appreciate the exasperation of the lawyer who won an acquittal for a policeman who shot a ten-year-old black child in the back. At the victory party, a journalist acknowledged to the lawyer that he had done a good job on behalf of his client, but then said: "Didn't you have a deeper obligation . . . to society . . . to see that justice was done?" The defense attorney replied "What the hell is justice?"⁸

The defender is not only isolated from a public that misapprehends his work, but is often isolated from his clients as well. The client is usually not of the lawyer's social class, often not of the lawyer's race, and even the English-speaking defendant does not talk the same language. For those engaged in routine criminal work, the clients are primarily "impoverished defendants who have committed unspectacular crimes without imagination or style."⁹

Finally, there is what might be called the professional isolation of the defender. He is rarely the president of the local bar or the candidate for a federal judgeship; he does not have an elegant office with the latest in computer technology. The admiration he receives, if he succeeds, is bestowed grudgingly. Because of the defender's work and clientele, a cloud hangs over him; he is in danger of being accused of perjury, charged with complicity in crime, or held in contempt of court. One of the surprising aspects reflected in the defense bar literature is how often this threat becomes a reality for defenders.¹⁰

When to this picture we add its background, the hurly-burly atmosphere of most criminal courts, a new emphasis for the question appears. *How* can you? In a recent melodramatic novel about the life of a criminal defense lawyer, the courthouse is described:

The superior court building was home to him He felt comfortable here, even safe. The building was huge and dirty, with chewing gum ground into the grouting of its polished aggregate floors, but its immensity gave it a kind of grimy dignity. Everywhere he looked there were knots of people, the guilty and the bureaucrats of guilt, the retinue of the law-abiding dependent on and supported by the guilty. Lawyers with briefcases and district attorneys and public defenders with manila folders filled with case material and policemen appearing as witnesses wearing their badges clipped to their off-duty windbreakers and lumber jackets.

⁸ P. HOFFMAN, *WHAT THE HELL IS JUSTICE: THE LIFE AND TRIALS OF A CRIMINAL LAWYER* 243 (1974). See also A. STRICK, *INJUSTICE FOR ALL* 25-34 (1977) (describing the techniques of trial by ordeal).

⁹ Oaks & Lehman, *Lawyers for the Poor*, in *THE SCALES OF JUSTICE* 95 (A. Blumberg ed. 1970).

¹⁰ See G. GETTY & J. PRESLEY, *PUBLIC DEFENDER* 319 (1974). The authors illustrate this isolation by noting the volume of "revolting" mail received during the trial of Richard Speck, subsequently convicted of killing eight student nurses in Chicago.

Even the innocent took on the tainted look of the guilty. No one seemed to talk out loud, certainly not the blank-faced relatives of the accused. It was a building of whispers, of furtive looks and missed eye contact, of snatches of overheard conversation. . . . Nothing in the building ever seemed to work. . . . The building reminded him of the system of justice itself. Why do I love it? Why do I love the assumption of guilt?¹¹

Dantesque, perhaps, but also close to the atmosphere in which most criminal defense lawyers, at least in urban areas, work.

V. IS THE QUESTION RIGHT?

The persistence and insistence of the question is based on the image of the defense lawyer who uses daring courtroom skills and legal technicalities to free a homicidal maniac. Yet this is a fantasy almost never realized. The vast majority of those accused of crime plead guilty,¹² in some jurisdictions as many as ninety percent of those charged.¹³ In one sense this may appear to be a fair result, since most defendants are guilty of something along the lines of the accusation. Yet, in some places many of those who plead guilty do so without their lawyers' serious consideration of possible defenses or extenuating circumstances. The existence of an adversary system designed to protect precious rights while determining individual guilt is a popular myth; rather, we have a bureaucratic mill grinding out guilty pleas for all alike. Overburdened defense lawyers, without investigation or preparation, arrange for the going rates on cases, and trade one off against the other. The appropriate question for many defense lawyers becomes "How can you participate in such a process?" or even "Why *don't* you defend the guilty?"¹⁴

¹¹ J. DUNNE, *DUTCH SHEA JR.* 87 (1982).

¹² A. ROSSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 33-34 (1976); see *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY* 134 (1967).

¹³ A 15-year study of criminal cases processed in New York City Metropolitan Court found that more than 90% of the defendants pleaded guilty each year. A. BLUMBERG, *CRIMINAL JUSTICE* 28-29 (1974).

¹⁴ Whether the guilty plea system does in fact determine guilt or innocence is open to serious question:

While the conviction of the innocent would be a problem in any system we might devise, it appears to be a greater problem under plea bargaining. With the jury system the guilt of the defendant must be established in an adversary proceeding and it must be established beyond a reasonable doubt to each of twelve jurors. This is very staunch protection against an aberrational conviction. But under plea bargaining the foundation for conviction need only include a factual basis for the plea (in the opinion of the judge) and the guilty plea itself. Considering the coercive nature of the circumstances surrounding the plea, it would be a mistake to attach much reliability to it. Indeed . . . guilty pleas are acceptable even when accompanied by a denial of guilt.

The realities of a criminal justice system in which few are actually defended seldom surface in print. *Life Magazine*, however, once followed an experienced public defender on his daily rounds in New York City.¹⁵ The defender entered a crowded cell-block on the day of trial to discuss a proposed deal with a client he had never seen before. Highlights of the conversation between Erdmann (the lawyer) and Santiago (the client) were recorded:

"If you didn't do anything wrong," Erdmann says to Santiago, "then there's no point even discussing this. You'll go to trial."

Santiago nods desperately. "I ain't done nothing! I was asleep! I *never* been in trouble before." This is the first time since his initial interview [with a law student] seven months ago that he has had a chance to tell his story to a lawyer, and he is frantic to get it all out. Erdmann cannot stop the torrent, and now he does not try. . . . "I been here 10 months. I don't see no lawyers or nothing. I ain't had a shower in two months, we locked up 24 hours a day, I got no shave, no hot food, I ain't *never* been like this before, I can't stand it, I'm going to kill myself. I got to get out, I ain't —."

Now Erdmann interrupts, icily calm. . . . "Well, it's very simple. Either you're guilty or you're not. If you're guilty of anything you can take the plea and they'll give you a year; and, under the circumstances, that's a very good plea and you ought to take it. If you're *not* guilty, you have to go to trial."

. . .
"I'm innocent. I didn't do nothing. But I got to get out of here. I got to —."

"Well, if you *did* do anything and you are a little guilty, they'll give you time served and you'll walk."

. . .
"I'll take a plea. But I didn't do nothing."

. . .
"No one's going to let you take the plea if you aren't guilty."

"But I didn't *do* nothing."

"Then you'll have to stay in and go to trial."

"When will that be?"

"In a couple of months. Maybe longer."

Santiago has a grip on the bars. "You mean if I'm guilty I get out today?"

"Yes." . . .

Kipris, *Criminal Justice and the Negotiated Plea*, 86 *ETHICS* 93, 105 (1976).

Interviews with 724 defendants who entered guilty pleas established that more than 51% still claimed to be innocent. A. BLUMBERG, *supra* note 13, at 91.

¹⁵ Mills, *I Have Nothing to Do With Justice*, 70 *LIFE*, March 12, 1971, at 56.

“But if I’m innocent, I got to stay in?”
“That’s right.”¹⁶

The wrong question is asked and nobody really cares, because most of those accused of crime are poor and often are minorities.¹⁷ A “we/they” mentality allows the shameful discontinuity between the criminal justice system described on paper and that which occurs in reality. Yet unlike other sores on the body politic that arise from fear and prejudice, the breakdown of the criminal justice system is a tractable problem—once we determine to solve it. There simply should be more lawyers doing defense work. These could be drawn both from expanded public defender offices and from the litigating bar generally. If there were a large base of lawyers willing to represent the criminally accused, the question of how one defends the guilty would be subsumed in the greater question of what lawyers’ work is about. This is where the question belongs.

The ethical dilemmas and amoral stance toward society are really no different when a lawyer chooses to represent someone guilty of a crime than when he represents a “bad” person in a civil case—even if, or perhaps especially if the “bad” person is in corporate form. Criminal cases are said to be different in terms of the heatedly controverted facts, the extreme high stakes, and the resultant ethical pressures on the lawyer. Yet many civil cases are hotly contested for huge sums and there are great pressures to win by shading the facts, crossing the line in witness preparation, destroying or creating evidence. The root of the perception of lawyers as dishonest is the tradition of unmitigated devotion to the client’s interest. This attitude may appear dramatically deviant when the client is one accused of some awful crime. But unless and until we shift the focus of lawyers work, the defense of the guilty should be regarded in the same way as the civil representation of the “bad.”

To inspire many more lawyers to enter the lists, let us finally turn to an exemplary life—in the mode of nineteenth century biographies of saints and statesmen, presented for their pedagogic effect. In all of the writing by and about criminal defense lawyers, only one of them is universally recognized as being exemplary: Clarence Darrow. Most of the things that defense lawyers dread happened to him: notably, indictment for obstruction of justice in a case where it was said that he arranged to bribe a potential juror;¹⁸ public obloquy for and misunderstanding of his repre-

¹⁶ *Id.* at 60-62.

¹⁷ J. RIEMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* 127 (1979).

¹⁸ Darrow defended James and Joseph McNamara, who in 1911 were accused of killing 21 people in a dynamite explosion at the Los Angeles Time building. The killings stemmed from a labor dispute. Shortly before the prosecution accepted guilty pleas in exchange for the lives of the McNamara brothers, Bert Franklin, the defense attorney conducting the examination of jurors, was arrested for bribing a juror with \$4,000. Franklin received a promise of immunity on condition that he implicate Darrow in a conspiracy to bribe jurors. At that trial, after deliberating for less than 10 minutes, a jury acquitted Darrow.

sentation of Leopold and Loeb; frequent condemnation of all his activities because he represented the despised. Darrow had the characteristic criminal defense lawyer's view of defending the guilty, as exemplified in a conversation with a friend who asked him, some years after an acquittal in a famous case, whether the accused had actually done it. Darrow said: "I don't know; I never asked him."¹⁹

One of his law partners said that Darrow "would defend anyone who was in trouble. . . . Though his motivations were different, he sometimes used the same methods as cheap criminal lawyers."²⁰ Yet Darrow comes to us from the pages of the not-so-distant past as a mythic figure. This has not happened solely because of his amazing oratorical talent, which was the mark of his practice. Rather, the kind judgment of history is a result of his ability to convey directly to juries and judges the humanist values that compelled him to defend the guilty. In virtually all of his cases, Darrow spoke much more about the defendant as an individual, the societal conditions that had produced the crime, the philosophical difficulty of distinguishing right from wrong (particularly for historical purposes), than he ever spoke about the facts of the case or the particulars of the defense.

Perhaps the most striking example of a "Darrow defense" was in the Sweet case, which Darrow tried when he was an old man. Doctor Ossian Sweet and some of his friends and relatives were tried for murder in Detroit in 1925. The case arose when Sweet, who was black, bought and moved into a house in a white neighborhood. A mob gathered one night in front of the house, rocks were hurled at it, and ominous threats were uttered. The men in the house were heavily armed and they fired. A man across the street was killed on his own porch and another man severely injured.

The first trial ended in a hung jury; in the second, Darrow spoke for eight hours in final argument, almost none of it devoted to the law of self-defense, defense of the home or others, the lack of ballistics testing, or the inability of the government to prove beyond a reasonable doubt whose gun fired the shot. Rather, "he went back through the pages of history and the progress of the human race to trace the development of fear and prejudice in human psychology."²¹ His peroration was as follows:

I do not believe in the law of hate. I may not be true to my ideals always, but I believe in the law of love, and I believe you can do nothing with hatred. I would like to see a time when a

C. DARROW, *THE STORY OF MY LIFE* 172-89 (1932). Darrow's career as a labor attorney ended with the McNamara case, after which he devoted himself almost exclusively to criminal defense. J.E. SAYER, *CLARENCE DARROW: PUBLIC ADVOCATE* 2-3 (1978).

¹⁹ I. STONE, *CLARENCE DARROW FOR THE DEFENSE* 254 (1941).

²⁰ *Id.* at 355.

²¹ I. STONE, *supra* note 19, at 484.

man loves his fellow man and forgets his color or his creed. We will never be civilized until that time comes. I know the Negro race has a long road to go. I believe the life of the Negro race has been a life of tragedy, of injustice, of oppression. The law has made him equal, but man has not. And, after all, the last analysis is, what has man done . . . and not what has the law done. I know there is a long road ahead of him before he can take the place which I believe he should take. I know that before him there is suffering, sorrow, tribulation and death among the blacks and perhaps the whites. . . .

What do you think is your duty in this case? I have watched day after day these black, tense faces that have crowded this court. These black faces that now are looking to you twelve whites, feeling that the hopes and fears of a race are in your keeping.

The case is about to end, gentlemen. To them it is life. Not one of their color sits on this jury. Their fate is in the hands of twelve whites. Their eyes are fixed on you, and their hopes hang on your verdict.

I ask you, on behalf of this defendant, on behalf of these helpless ones who turn to you and more than that—on behalf of this great state and this great city which must face this problem and face it fairly—I ask you, in the name of progress and of the human race, to return a verdict of not guilty in this case.²²

It is interesting that neither this, nor virtually any, of Darrow's famous summations would be considered proper in any courtroom today. There is clearly an appeal to the prejudices, passions, and sympathy of the jury that violates codes of professional responsibility,²³ as well as an expression of personal opinion and belief that steps over the line of accepted practice. Yet Clarence Darrow's view of defense lawyering, with its constant reference to a perspective larger than the individual and the facts of the crime, is still with us. We are not allowed to say the things he said so eloquently and explicitly. But whenever a defense lawyer truly represents his client the factfinder, be it judge or jury, on a guilty plea or a trial, sees and senses what Darrow said. Among the defense bar today there are

²² *Id.* at 484-85. After deliberating for three hours, the jury came back with a verdict of acquittal for Sweet. The state's attorney dismissed the charges against the remaining defendants.

²³ The ABA Code of Professional Responsibility states:

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused.

CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(4) (1980).

hundreds of lesser Darrows, giving partial and implicit expression to what he could more openly state: that the causes of crime are unknown, perhaps unknowable, and that, in the end, we all share a common humanity with the accused.

To draw the final example from Darrow's life, we must realize that his reasons for defending the guilty were an amalgam of the humanitarian, egotistical, and cynical-realist, the last of which would be worthy of old Charles Curtis. In his autobiography, Clarence Darrow summarized his life at the defense bar:

Strange it may seem, I grew to like to defend men and women charged with crime. It soon came to be something more than the winning or losing of a case. I sought to learn why one goes one way and another takes an entirely different road. I became vitally interested in the causes of human conduct. This meant more than the quibbling with lawyers and juries, to get or keep money for a client so that I could take part of what I won or saved for him: I was dealing with life, with its hopes and fears, its aspirations and despairs. With me it was going to the foundation of motive and conduct and adjustments for human beings, instead of blindly talking of hatred and vengeance, and that subtle, indefinable quality that men call "justice" and of which nothing really is known.²⁴

²⁴ C. DARROW, *supra* note 18, at 75-76.

