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## Defending the Innocent

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# GEORGETOWN LAW

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## Defending the Innocent

ABBE SMITH\*

*“Abbe, . . . Thank you for your letter and for not forgetting me in this awful place. . . . Please forgive me if I seem a bit irritable. The noise is outrageous. . . . I’ve now spent over half of my life here. . . .”*

—Patsy Kelly Jarrett<sup>1</sup>

*“[S]imply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one’s mine, I guess.”*

—Atticus Finch<sup>2</sup>

I was in my second year of law school when I met Kelly. That’s what she told me to call her. She said all her friends called her Kelly, not Patsy. She had come to despise the name Patsy, because it summed up too precisely what had happened to her life. She was just a dumb patsy. In the summer of 1973 she played the patsy and she’s been paying for it the rest of her life.

“Oh God, why’d they ever name me that,” she lamented. “I am spending my life in prison for being a patsy.”<sup>3</sup>

I had just turned 24 and Kelly was barely 30 when we shook hands, said hello, and sat together for the first time in the 1960s-style cafeteria that

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\* Associate Professor of Law, Georgetown University Law Center. I wish to thank Professor Claudia Angelos, for the privilege of working with her in NYU’s prison law clinic in the early 1980s, and Patsy Kelly Jarrett, for the privilege of representing her then and now. Heidi Melnzer provided helpful research assistance to this project. Thanks also to Jane Aiken, Jen Di Toro, Tucker Carrington, Sally Greenberg, Sarah Marchesi, and David Stern for reading and sharing their thoughts on the piece.

1. Letter from Patsy Kelly Jarrett to the author 1 (Nov. 15, 1998) (on file with author). Ms. Jarrett’s letters have been used with her permission and are all on file with the author.

2. HARPER LEE, *TO KILL A MOCKINGBIRD* 76 (Warner Books 1982) (1960).

3. Letter from Patsy Kelly Jarrett to the author 3 (June 7, 1997) (on file with author) (referring to the book she’d like to write one day, which she’ll call *The Patsy*); cf. PAUL LIBERATORE, *THE ROAD TO HELL: THE TRUE STORY OF GEORGE JACKSON, STEPHEN BINGHAM, AND THE SAN QUENTIN MASSACRE* 176 (1996) (referring to Stephen Bingham, a lawyer prosecuted for murder and conspiracy in the 1971 San Quentin Massacre, in which three prison guards, Bingham’s client George Jackson, and two other prisoners were killed in an escape attempt, as a “wonderful patsy”).

is the Bedford Hills Prison visiting room. I hadn't known what to expect when I headed out to the prison that morning. Although there were news clippings about her case in the file, they contained no photographs of her. Though I had a sense of her from her letters—both from what she had written and her careful penmanship—I didn't have a picture of her in my head. Now, suddenly, here was Kelly before me: A pretty tomboy with a scrubbed look about her, like Scout from *To Kill a Mockingbird*<sup>4</sup> all grown up. She even had the southern accent to complete the image.

Kelly seemed both young and old to me then. She had already spent six years at Bedford Hills and, as I've learned since, nothing ages a person like prison. Still, she had a youthful innocence about her that was surprising under the circumstances. By any estimation of human nature, she should have forever lost that innocence when suddenly, in 1976, she was taken from her home in High Point, North Carolina and jailed in a distant town in upstate New York, perhaps never to see home again, charged with a terrible crime she has always maintained she did not commit.

I had read the transcript so I knew enough to have a conversation with her about her case.<sup>5</sup> At trial, the prosecution maintained that Kelly had traveled north with a man named Billy Ronald Kelly (no relation, but the shared name would serve to further tie the two together in the eyes of the jury), had knocked around with him for a few weeks in Utica, New York, and then helped him rob and murder a seventeen-year-old gas station attendant in the nearby town of Sherrill.<sup>6</sup> Kelly was alleged to have been the look-out or the get-a-way driver.<sup>7</sup> A witness who came through the Seaway station in the aftermath of the crime claimed to have spotted Kelly in the driver's seat of a car that pulled up to the gas pump while he was at the station.<sup>8</sup> His description of the car looked something like the one Kelly

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4. LEE, *supra* note 2.

5. The account of Kelly's case I am about to relate is derived from two federal court decisions, *Jarrett v. Headley*, 633 F. Supp. 1403 (S.D.N.Y. 1986), and *Jarrett v. Headley*, 802 F.2d 34 (2d Cir. 1986), and the following materials which are on file with the author: the transcript in *People v. Kelly & Jarrett*, Mar. 14-29, 1977 [hereinafter Trial Transcript]; police reports generated during the investigation of the robbery and murder of Paul Hatch [hereinafter Police Report]; the sworn testimony of eyewitness Robert Hyland at the grand jury proceeding, Mar. 3, 1976 [hereinafter Hyland Grand Jury Testimony]; the sworn testimony of eyewitness Robert Hyland at the suppression hearing (known as a "Wade hearing" in New York), Feb. 2, 1977 [hereinafter Wade Testimony]; Petition for a Writ of Habeas Corpus, filed in 1984 [hereinafter Habeas Corpus Petition]; Patsy Kelly Jarrett's Personal Statement in Application for Commutation of Sentence of Patsy Kelly Jarrett, filed in 1997 [hereinafter Clemency Petition]. The descriptive detail comes from my recollection of conversations with Kelly, Kelly's recollection of events, and an investigative trip I took to Sherrill, New York in 1996. An account of my representation of Kelly can be found in Karen Avenoso, *The Defense Never Rests*, BOSTON GLOBE MAGAZINE, Feb. 2, 1997, at 14.

6. See *Jarrett*, 802 F.2d. at 36; *Jarrett*, 633 F. Supp. at 1410-11.

7. See *Jarrett*, 802 F.2d at 36-38; *Jarrett*, 633 F. Supp. at 1410-11.

8. See *Jarrett*, 802 F.2d at 36-38; *Jarrett*, 633 F. Supp. at 1410-11.

owned, the car in which she and Billy Ronald had driven up north.<sup>9</sup>

The witness, a retired factory worker named Robert Hyland, had never before made a positive identification of the driver of the car he claimed to have seen.<sup>10</sup> Two days after the killing, Hyland had little to tell the police officers who came to question him: He didn't see enough to say for sure what the driver's gender was;<sup>11</sup> because of the driver's hairstyle, he had been unable to get a good enough look at the face to describe any facial features;<sup>12</sup> and he had nothing to offer about the driver's age, build, clothing, speech, or manner.<sup>13</sup> He had no contact with the operator of the car opposite him at the pump—no words passed between them, not so much as a greeting—so there had been no reason for him to pay attention.<sup>14</sup>

But, he had paid attention to the man who pumped his gas.<sup>15</sup> He got a good, close look at the man's face and body.<sup>16</sup> He had never seen this attendant before at the Seaway and there was something strange about how he was acting. Hyland noticed that the attendant had trouble making change from the large wad of cash jammed in his pants pocket and he seemed nervous.<sup>17</sup> Although he had only been at the station for a couple of minutes, when he talked to the police, Hyland was able to provide a detailed description of the man he had seen, and assist a police artist in producing a composite sketch.<sup>18</sup> The sketch looked very much like Billy

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9. See *Jarrett*, 633 F. Supp. at 1411; Trial Transcript, Testimony of Robert Hyland, *supra* note 5, at 269-70.

10. See *Jarrett*, 633 F. Supp. at 1411.

11. See *id.* at 1414-15 (noting that Hyland was unable to describe the driver of the other case "as other than a person of uncertain sex and race who had a tan and long hair, a situation explainable by the fact that he had not been able to see the driver's face while the driver sat in the other car"); *Jarrett*, 802 F.2d at 36 (noting that two days after the crime, Hyland gave a sworn statement to the police in which he stated, "I am not sure, but I believe the operator was a white female."); see also Police Report, *supra* note 5 at 1; Grand Jury Testimony, *supra* note 5, at 30. Although Hyland was confident about the gender of the driver at trial, see Trial Transcript, *supra* note 5, at 250, 253, he was initially so uncertain that the police looked for two *male* suspects for most of the investigation. See *Jarrett*, 633 F. Supp. at 1415 n. 22.

12. See *Jarrett*, 802 F.2d at 36; *Jarrett*, 633 F. Supp. at 1415; see also Trial Transcript, Testimony of Robert Hyland, *supra* note 5, at 311 ("I couldn't see much of her face, no."); Police Report, *supra* note 5.

13. See *Jarrett*, 633 F. Supp. at 1414-15.

14. See Trial Transcript, Testimony of Robert Hyland, *supra* note 5, at 311 (testifying that he observed the person in the other car for only "a few seconds").

15. See *id.* at 311-12 (testifying that he was facing the man who pumped his gas and looked at him "for sure").

16. See *id.* at 306-08 (Robert Hyland providing a detailed description of the man who had pumped his gas on August 11: "He had long hair down to his shoulders. The hair was curled in at the bottom. And he had piercing eyes and his face slanted. And he had a crease in his forehead. . . . And he had some sunburned spots on both sides of his head. . . . His hair was parted in the middle. . . . He was clean-shaven. . . ."). See also Wade Testimony, *supra* note 5, at 70.

17. See Trial Transcript, Testimony of Robert Hyland, *supra* note 5, at 225.

18. See *id.* at 276-77, 309-10.

Ronald Kelly.<sup>19</sup>

It turned out that Billy Ronald had indeed waited on Robert Hyland at the Seaway that day, after killing and robbing the seventeen-year-old attendant Paul Hatch. When the police discovered Hatch's bound and gagged body in the back room of the station—drenched in blood from a gash in the throat so deep the boy was nearly decapitated—they also found Billy Ronald's fingerprints.<sup>20</sup> Billy Ronald had used adhesive tape to bind his victim, a surface from which the prints were easily lifted.<sup>21</sup>

It took the police a long time to match the prints they found to Billy Ronald.<sup>22</sup> He was not from around there. However, the police would later learn—to Patsy Kelly Jarrett's horror—that this conduct was not unusual for Billy Ronald Kelly. Not long after he left New York, Billy Ronald was arrested and convicted of murdering a gas station attendant in Virginia. By the time he was tried for murder of the seventeen-year-old attendant, Billy Ronald was already serving a life sentence.<sup>23</sup>

When the police paid a visit to witness Robert Hyland in December of 1975, nearly two and a years after the crime, he was able to select a photograph of Billy Ronald Kelly as the man who had pumped gas for him at the Seaway station. He swiftly signed the back of Billy Ronald's picture, indicating this was the man he'd seen. He said he could not be more sure.<sup>24</sup>

The prosecution's case against Kelly was much weaker. It was basically a one-witness identification case, with a shaky witness at that. Hyland had observed the driver of the other car at the Seaway only fleetingly.<sup>25</sup> In contrast to Hyland's immediate identification of Billy Ronald upon seeing his photograph, when Hyland was shown a photo spread that included Kelly's picture, he stated that two of the photographs looked like the person he had seen in a car at the station.<sup>26</sup> At the grand jury proceeding, Hyland continued to express uncertainty about the gender of the second person he had seen at the station—saying only that the person operat-

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19. Hyland later positively identified a photograph of Billy Ronald as the man he had described to the sketch artist—the man who had pumped gas for him on August 11. *See id.* at 316-17.

20. *See Habeas Corpus Petition, supra* note 5, at 5; *Jarrett v. Headley*, 802 F.2d 34, 37 (2d Cir. 1986).

21. *See Jarrett*, 802 F.2d at 37.

22. *See id.* (noting that police were not able to match a latent fingerprint lifted from the tape that had been used to bind the slain attendant with that of Billy Ronald until more than two years after the crime).

23. This case is unreported. Billy Ronald remains incarcerated in Virginia.

24. *See Jarrett v. Headley*, 633 F. Supp. 1403, 1407, 1422 (S.D.N.Y. 1986) (noting that Hyland made a "very specific identification" of Billy Ronald after describing him well enough to assist in the creation of a composite sketch).

25. *See Trial Transcript, Testimony of Robert Hyland, supra* note 5, at 311.

26. *See Jarrett*, 633 F. Supp. at 1407-08. It is important to note that the photo display the police constructed for the driver of the car featured photographs of *women* only, notwithstanding Hyland's equivocation about the gender of the driver. Kelly's picture was the only one with a sheriff marking. *See id.*

ing the car looked like a female.<sup>27</sup> Looking at the photographs again, he said Kelly *could* be the driver, but he couldn't say for sure.<sup>28</sup> At the suppression hearing, Hyland testified that photographs of two different women looked like the second person he had seen at the Seaway, and Kelly was *possibly* the person he had seen.<sup>29</sup> Although Kelly was present at the hearing, Hyland failed to identify her in open court.<sup>30</sup>

The first and only time that Hyland identified Kelly in person as the driver of the car at the Seaway station was at trial. Suddenly, at trial, Hyland identified Kelly with a level of confidence and certainty that bordered on bravado.<sup>31</sup> It apparently did not bother either Hyland or the jury that *three and a half years* after having seen someone for a few seconds at most—someone he could not describe and had not previously identified without equivocation—Hyland could now positively identify that person as Kelly.

At trial, the bulk of the evidence offered against Kelly had to do with her association with Billy Ronald. Witnesses testified to the fact that they traveled north together, stayed together at the home of friends of Billy Ronald along the way, rented a room together in Utica, spent time together at the same tavern in Utica, and shared Kelly's car.<sup>32</sup> Recognizing the danger of guilt by association for Kelly, her court-appointed lawyer moved for a severance. The lawyer cited a compelling reason for severance: At separate trials, Billy Ronald would testify that Kelly was not with him on the day of the crime and he had used her car.<sup>33</sup> If the two were tried together, Billy Ronald would maintain his right not to testify. The trial judge denied

27. See Grand Jury Testimony, *supra* note 5, at 30 ("Q: And who was operating that car? A: It looked like a female.").

28. See *id.* at 38 ("Q: Is it safe to say then that the best that you can say is that it could be the girl but you can't say for sure? A: Yes.").

29. See Wade Testimony, *supra* note 5, at 75.

30. See *id.* at 53-81.

31. See Trial Transcript, Testimony of Robert Hyland, *supra* note 5, at 228 (witness identifying Kelly as the girl he had seen at the gas station); *id.* at 330 ("I would stake my life on that, that it was a girl.").

32. See *Jarrett v. Headley*, 633 F. Supp. 1403, 1410-12 (S.D.N.Y. 1986).

33. During law school, in the course of preparing a petition for a writ of habeas corpus on Kelly's behalf, I took a trip down to the Virginia state prison, where Billy Ronald was being held, and obtained an affidavit from him which stated the same thing: Patsy Kelly Jarrett was not with Billy Ronald Kelly at the time the crime was committed and he had used her car:

At [a] separate trial, I was willing to and would have testified that Patsy Kelly Jarrett was not with me on the day or at the time of the crime, August 11, 1973, at 1:05 p.m.

....

... I had possession of Patsy Kelly Jarrett's car from approximately 7:00 p.m., Friday, August 10, until approximately 7:00 p.m., Saturday night, August 11. At no time during that period was Patsy Kelly Jarrett with me in the car or elsewhere.

Clemency Petition, Affidavit of Billy Ronald Kelly, *supra* note at 5. The student who accompanied me on that trip, Diana DeGette, is now a member of Congress from Colorado.

the motion.<sup>34</sup>

Now, Kelly's lawyer faced a dilemma. He understood that, at trial, the prosecution would do everything it could to link his client with Billy Ronald: They would try to make Kelly and Billy Ronald into some kind of latter-day Bonnie and Clyde. He also knew from his client that, notwithstanding what the prosecution believed, his client was not romantically involved with Billy Ronald. The two had never been sexually involved, not in Utica and not before; sex was never the basis of their relationship. Although they had traveled to New York together, shared expenses, a room in a boarding house, and the use of Kelly's car, they also shared an interest in members of their own sex.<sup>35</sup> What had brought Kelly and Billy Ronald together when they first met at a factory in Highpoint, North Carolina was a special bond between gay people in a small, hard-working, not terribly tolerant, southern town.<sup>36</sup>

As Kelly told her lawyer, when she and Billy Ronald arrived in Utica they immediately made themselves part of the gay community, indeed, shortly after arriving, Billy Ronald took up with a man named William Sullivan.<sup>37</sup> Sullivan, an effeminate-looking man in his twenties with shoulder-length brown hair—who matched the description witness Robert Hyland gave of the person he saw at the gas station—may well have been in the car that day.<sup>38</sup>

Although revealing his client's sexuality might have challenged the prosecution's depiction of Kelly and Billy Ronald as a couple, Kelly's lawyer worried about the consequences of such a revelation in upstate New York in the 1970s. He worried that jurors might be more hostile to Kelly if they knew she was a lesbian. Instead, he advised Kelly to avoid any mention of her lesbianism, present herself as heterosexual, and agree that she had "dated" Billy Ronald—but assert that it had not been a serious in-

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34. The issue was raised in Kelly's state court appeals. See *Jarrett*, 633 F. Supp. at 1412 (noting that Kelly's conviction, which she challenged *pro se*, was affirmed without opinion by the Appellate Division, Fourth Department on April 8, 1980, and Kelly was denied leave to appeal to the New York Court of Appeals on May 27, 1980). This severance issue was not raised in the habeas proceedings, as it did not raise a federal constitutional question.

35. See Clemency Petition, *supra* note 5, at 3-4 (Personal Statement of Patsy Kelly Jarrett).

36. See *id.* ("Billy Ronald . . . and I were part of the gay community in High Point, North Carolina. We met through mutual friends . . . and worked in the same factory."); see also David Firestone, *Murder Reveals Double Life Of Being Gay in Rural South*, N.Y. TIMES, Mar. 6, 1999, at A1 (examining the largely secret life of a 39-year-old gay man who was brutally murdered in a small city in central Alabama in February, 1999).

37. See *Jarrett*, 633 F. Supp. at 1412 (noting that, at trial, the defense put forward evidence that Billy Ronald used Kelly's car to date "at least one man . . . Billie [sic] Sullivan.>").

38. See Trial Transcript, Testimony of William Sullivan, *supra* note 5, at 105 (Sullivan admitting that he had an affair with Billy Ronald); *id.* at 107 (Sullivan admitting that his hair length and color was different in August, 1973 than it was at trial). See also Trial Transcript, Testimony of Patsy Kelly Jarrett, *supra* note 5, at 610 (Kelly testifying that, in August of 1973, Sullivan's hair was darker and much longer, he had no facial hair, and he had a more youthful appearance than at the time of trial).



volvement.<sup>39</sup>

Kelly testified at trial. She denied any knowledge of what happened at the Seaway station on August 11, 1973. She denied being there, participating in the crime, or having anything to do with the brutal slaying.<sup>40</sup> She testified that she couldn't recall exactly where she had been on that Saturday three and a half years before. She had been on vacation and those days just kind of blended together. She had spent her time hanging out with the new friends she had made, often at a local bar.<sup>41</sup> She said she was probably at a women's softball game at the time of the crime, watching a team called the Angels.<sup>42</sup> That's how she spent a lot of her time when she was in Utica, especially weekends.<sup>43</sup> She was a fan, was friendly with several of the Angels' players, and had played a little ball herself down south.<sup>44</sup>

The jury was out for two days.<sup>45</sup> I knew from Kelly's letters that she had been totally surprised by the jury's verdict. She had wanted to die. She thought there had been some kind of mistake. She believed in the system. She had believed she would be vindicated. After all, she was innocent.

As I sat with her in the prison that first day, I could feel her disbelief still. She remained incredulous that she had been convicted and sentenced to life in prison for something she did not do. She said everyone at the prison kept saying she was supposed to adjust, but how do you adjust to a nightmare from which you never seem to wake up?

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The annals of criminal defense scholarship are replete with discussions of—and justifications for—representing the guilty.<sup>46</sup> This is, of course, the

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39. See Clemency Petition, Personal Statement of Patsy Kelly Jarrett, *supra* note 5, at 4.

40. See Trial Transcript, Testimony of Patsy Kelly Jarrett, *supra* note 5, at 624.

41. See *id.* at 609.

42. See *id.* at 616-17.

43. See Clemency Petition, *supra* note 5, at 4.

44. See *id.*

45. See *Jarrett v. Headley*, 802 F.2d 34, 39 (2d Cir. 1986) (noting that the jury deliberated over the course of two days, during which it requested a rereading of the testimony of Robert Hyland). Kelly and Billy Ronald were convicted on March 29, 1977.

46. See, e.g., GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 76-92 (5th ed. 1993) (1884) (arguing that if lawyers fail to zealously represent the guilty they usurp the function of fact-finder); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-1984) (examining how criminal defense lawyers defend those they know are guilty); Roger C. Cramton, *Why Defend the Guilty*, 11 CORNELL L.F. 2 (1984) (justifying the defense of the guilty as maintaining the division between the role of the lawyer and the role of judge or jury, making the adversary system work, demonstrating a concern for individual dignity, rescuing the unfortunate from an oppressive system, and caring for the guilty); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 13-18 (1951-1952) (discussing the ethics of defending a guilty client or taking a "bad case"); John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223 (1986) (discussing the need to defend the guilty for institutional, symbolic, and pragmatic reasons); John B. Mitchell, *The Ethics of the Criminal*

most frequently asked question of defenders.<sup>47</sup> One commentator first dismisses this question, stating that it should not be asked because it is a “matter of utter unimportance,”<sup>48</sup> and then suggests that devoting one’s career to defending the guilty is simply a matter of “taste.” “It is important to remember that, for one reason or another, criminal lawyers want to defend criminal defendants. Their taste may be as baffling to us as is the proctologist’s, but we need both and should not try to dissuade either from pursuing his or her profession.”<sup>49</sup>

The literature on defending the guilty—which I prefer to think of as defending people who do bad things<sup>50</sup>—includes discussions of the social costs and benefits of zealous defense,<sup>51</sup> the bounds of proper advocacy,<sup>52</sup>

*Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 299-313 (1980) (discussing the screening function of the criminal justice system and the need for guilty defendants to routinely test this function); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (discussing the concepts of partisanship and neutrality); Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101, 104 (1995) (discussing the author’s representation of Terry Lynn Nichols in the 1995 Oklahoma City bombing case, and noting the importance generally of representing “[t]he most despised, the most endangered defendants”). For an entertaining account of a defense lawyer representing a client he believed to be guilty only to have it turn out that the client was innocent, see Barry Winston, *Stranger Than True: Why I Defend Guilty Clients*, HARPER’S MAGAZINE, Dec., 1986, at 70.

47. See generally JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER (1983). See also LISA MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 142 (1987) (When asked how they represent the guilty, public defenders often “respond in a manner that is more weary than indignant: ‘Oh God, *that* question!’ . . . Without exception the public defenders whom I interviewed all had spiels prepared for that question—another testimony to the fact that answering it is part of their routine.”).

48. Kaplan, *supra* note 46, at 255 n.59.

49. *Id.* at 255.

50. My preference for this characterization reflects how I have come to feel about representing the indigent accused after 17 years of practice. See Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLINICAL. L. REV. 723, 730 (1995).

I became a public defender out of a commitment to social change, an appreciation of clear lines . . . an intellectual interest in criminal law, a fondness for people and the stories they tell, a fondness for my own story-telling, and a deeply-held-but-not-yet-fully-developed sense that good people sometimes do bad things.

*Id.*

51. See generally KUNEN, *supra* note 47, at vii:

[I]t is of more importance to [the] community that innocence should be protected than it is that guilt should be punished, for guilt and crimes are so frequent in the world that all of them cannot be punished, and many times they happen in such a manner that it is not of much consequence to the public whether they are punished or not. But when innocence itself is brought to the bar and condemned . . . there [is] an end to all security whatsoever.

*Id.* (quoting John Adams). See also Kaplan, *supra* note 46 (discussing why society benefits from having guilty people represented by lawyers); James Mills, “*I Have Nothing to Do With Justice*,” LIFE, Mar. 12, 1971, at 56, 65 (quoting public defender Martin Erdmann: “I’m concerned with seeing that every client gets as good representation as he could if he had \$200,000. I don’t want him to get screwed just because there wasn’t anyone around to see that he not get screwed.”).

52. See, e.g., Curtis, *supra* note 46 (discussing the bounds of zealous advocacy); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1965-1966) [hereinafter Freedman, *The Three Hardest Questions*] (examining whether it is proper for criminal defense lawyers to discredit a truth-telling witness, put a witness on the stand who will commit perjury, or give a client legal advice that will tempt the client to commit per-

and reconciling the lawyer's role with his or her personal morality.<sup>53</sup> Within this literature, there is often little more than a comment about the related issue of defending the innocent.<sup>54</sup>

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jury); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (examining the paradigm of zealous advocacy in criminal defense). For a fictional exploration of the bounds of proper defense advocacy—and the bounds of family loyalty on behalf of an accused—see ROSELLEN BROWN, *BEFORE AND AFTER* (1992).

53. See generally RAND JACK & DANA CRAWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 27-50 (1989) (examining partisanship, neutrality, and moral distance by lawyers). See also Mills, *supra* note 51, at 64-65 (public defender Martin Erdmann describing how he is able to represent guilty people who may well commit more violent crime if released); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 51-60 (1993) (discussing the tension between professional and personal morality in criminal defense).

Criminal defense lawyer James Kunen offers a stark depiction of the tension between professional role and personal morality on the heels of a stunning trial victory in which his client was acquitted of murder. At first, Kunen is both humbled and elated:

“Get away with murder,” I thought, upon hearing the verdict. “I have gotten away with murder.” I was awed by the enormity of it. The Sixth Commandment. It made me feel bad—my stomach, particularly—but not as bad as losing would have. To those turkeys? Yet another client of mine locked up? I preferred to grapple with the moral problem of winning. That’s the sort of problem you want to have.

....

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

I felt proud to be an American.

KUNEN, *supra* note 47, at 255-57.

Eventually, the elation passes and Kunen begins to feel tormented by his own success:

It was around this stage of my career that the image of someone in my own family being the victims of a violent crime started coming to my mind more and more frequently. I imagined that the criminal would be put on trial, and that I would walk up to him in open court and shoot him dead.

*Id.* at 257.

For a moving account of a nun’s coming to terms with advocating on behalf of a man who committed a brutal rape and murder, see SISTER HELEN PREJEAN, *DEAD MAN WALKING* (1994).

54. See, e.g., Kaplan, *supra* note 46, at 238 (noting the “extreme tension a defense lawyer undergoes when she actually believes her client is innocent” without examining the matter further).

Of course, there is plenty of popular literature and film built on the drama of a wrongful—or at least questionable—accusation. For a sample of popular literature on this topic, see CHRIS BOHJALIAN, *MIDWIVES* (1997); SAM CHAITON & TERRY SWINTON, *LAZARUS AND THE HURRICANE: THE UNTOLD STORY OF THE FREEING OF RUBIN “HURRICANE” CARTER* (1991); ERNEST GAINES, *A LESSON BEFORE DYING* (1993); STEPHEN KING, *HOPE SPRINGS ETERNAL: RITA HAYWORTH AND SHAWSHANK REDEMPTION*, in *DIFFERENT SEASONS* (1982); LEE, *supra* note 2; SCOT TUROW, *PRESUMED INNOCENT* (1987). For a sample of film (several of which are screen versions of the above books), see *A LESSON BEFORE DYING* (HBO NYC Prod. 1999); *LEGAL EAGLES* (Universal Pictures 1986); *MY COUSIN VINNY* (Twentieth Century Fox 1992); *PRESUMED INNOCENT* (Warner Bros. 1990); *SUSPECT* (Tri-Star Pictures, Inc. 1987); *THE FUGITIVE* (Warner Bros. 1993) [starring Harrison Ford]; *THE FUGITIVE* (RKO Radio Pictures, Inc. 1947) [starring Henry Fonda]; *THE THIN BLUE LINE* (J.G. FILMS, INC. 1988); *THE TRIAL* (British Broadcasting Corp. 1993); *THE WRONG MAN* (Warner Bros. 1956); *TO KILL A MOCKINGBIRD* (Pakula-Mulligan Productions, Inc. & Brentwood Productions, Inc. 1962). Of course, there are also classic treatments of the wrongful accusation. See, e.g., FRANZ KAFKA, *THE TRIAL*

Of the legal scholarship examining the representation of the innocent accused, most has to do with guilty pleas,<sup>55</sup> not trial or post-trial advocacy. Most of this literature is concerned with the pressure put on innocent defendants to plead guilty in order to receive a more lenient sentence than what they would get if found guilty at trial.<sup>56</sup> This problem is compounded by the inability of poor defendants to make bail.<sup>57</sup> Unfortunately, there are other, equally insidious ways to pressure innocent defendants to plead guilty.<sup>58</sup>

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(1937); ARTHUR MILLER, *THE CRUCIBLE* (1954). Interestingly, none of these offer a serious exploration of the lawyer's role in defending the innocent accused.

55. See, e.g., Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-66 (1968-1969) (examining the considerable systemic pressure on innocent defendants to plead guilty); Babcock, *supra* note 46, at 183-84 (discussing the pressure to plead guilty on poor defendants asserting innocence); Mills, *supra* note 51, at 59 ("[N]o matter what sentence is finally agreed upon, the real outcome of this bargaining context is never truly in doubt. The guilty always win. The innocent always lose."); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

56. See Alschuler, *supra* note 55, at 60-66. I am sure that I have represented some innocent people who have pled guilty. I believe this happens with some frequency in the lower criminal courts, especially in misdemeanor diversion programs, but also where probation is offered. The benefit of avoiding criminal prosecution or serious criminal punishment is just too great to pass up, even if the price is having to admit to a crime you didn't do. See also Letter from David Stern, criminal defense lawyer, Rothman, Schneider, Soloway & Stern, P.C., to Abbe Smith, Associate Professor of Law, Georgetown University Law Center 1-2 (Mar. 24, 1999) (on file with author):

In the 17 years I have been a lawyer I have tried approximately 100 cases. I shudder to think of the number of pleas I have taken. Some have been good, and maybe some not so good, but in both groups I know that I have plead factually innocent people guilty. I try not to let it bother me, but in the end it always does. I try to limit myself to the question of whether my client will win or lose, but sometimes I can't forget that the system is betraying even its most ardent supporters when innocent people are convicted.

*Id.*

57. See Uphoff, *supra* note 55, at 85-86 ("Many defendants, especially first offenders, will agree to almost anything to get out of jail."). Studies indicate that bail practices play a substantial role in a defendant's decision to plead guilty, especially if a defendant's inability to make bail is coupled with a delay in the appointment of counsel. See HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 47-49 (1982); Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419, 437-39 (1992); Gerald R. Wheeler & Carol L. Wheeler, *Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice*, 26 CRIME & DELINQ. 319 (1980).

58. See Letter from David Stern, *supra* note 56, at 2:

The longer I have practiced the more difficult things have become. Now I sometimes plead innocent people guilty to years in prison because I think they will lose, or for even more insidious reasons like the threat of someone they love losing. Most recently, and most on my mind, is a case where a woman and her estranged husband were charged with a narcotics crime where the minimum sentence is 15-life. I was convinced from the day I got the case that she would be acquitted, and I always encouraged her to go to trial. Although she was terribly afraid, she wanted a trial and was prepared to go through with it.

Finally the day of trial came and the D.A. said, "[I]f you go to trial I will not let your husband plead guilty to the lesser charge and the 6-life he is being offered. I will force him to go to trial and he will get at least 15-life." The husband had no defense. After anguished soul searching my client decided that she could not deprive her two year old child of her father forever and that she would plead guilty. I disagreed and told her so. In the end she plead guilty to 4-8 on a case where she was probably innocent and certainly had a good

When addressing the question of defending the innocent at trial or in a post-conviction challenge, most criminal defense commentators agree that nothing is more burdensome.<sup>59</sup> As one commentator put it: "Those rare trials of a defendant when the lawyer truly believes to be innocent . . . are grueling and frightening experiences, in which the usual will to win is elevated to a desperate desire to succeed."<sup>60</sup>

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Under the guidance and direction of clinical law professor Claudia Angelos, I worked on Kelly's petition for a writ of habeas corpus for the next two years at New York University School of Law. I must have gone through her trial transcript a hundred times, reading and rereading it, indexing it, scrutinizing the testimony of witnesses, and incorporating useful bits into the petition. I became an expert on identification law. I became an expert on the law of severance (to the extent there is any law—mostly, there is enormous judicial discretion about whether defendants accused of taking part in the same offense may be tried together).<sup>61</sup> Under Claudia's tutelage, I learned to be both creative and careful in arguing the law.<sup>62</sup>

I visited Kelly at the prison on a monthly basis, sometimes more. I wanted to keep her apprised of what we were doing on her case. I wanted her to know which issues we were exploring and raising. I wanted to keep her company.

The process of writing and filing the petition was painstaking and

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chance of an acquittal. Her plea was solely the result of the D.A. whipsawing her between her husband and child.

*Id.*

59. See, e.g., Greg Hernandez, *Man Faces Life Term in Murder by Mistake*, L.A. TIMES, June 6, 1998, at B1, available in LEXIS, News Library, Lat File (quoting a defense lawyer who continued to believe in his client's innocence after conviction: "It's a lot harder to defend somebody who you think is innocent . . . That's why this job is so tough sometimes.").

One defense lawyer acknowledged both the *uncertainty* and the burden of defending the innocent. See Mills, *supra* note 51, at 66 (quoting defender Martin Erdmann's response to a question about whether he could be sure that in 25 years of law practice he had ever defended an innocent client: "No. That you never know. It is much easier to know guilt than innocence. And anyway, it's much easier to defend a man if you know he's guilty. You don't have the responsibility of saving him from unjust punishment.").

60. Babcock, *supra* note 46, at 180.

61. See N.Y. CRIM. PROC. § 200.40 (McKinney 1992); *People v. Mahboubian*, 543 N.E.2d 34, 38 n.4 (N.Y. 1989) ("The decision to grant or deny a separate trial is vested primarily in the sound judgment of the Trial Judge, and defendants' burden to demonstrate abuse of that discretion is a substantial one.").

62. Claudia Angelos was more than a law teacher to me during those years: She was an important mentor and role model. I worked with her at a time when I was feeling disengaged from law school, and she helped reignite and redirect my passion for law practice. I can still picture her office in the old clinic building at Broadway and 13th, filled with photographs of clients, thank-you notes in prisoner scrawl, and assorted books on politics and prisons. Her office, and the clinic generally, were a real refuge for me.

slow. This was partly because of the nature of the project; it was difficult to effectively formulate a federal constitutional challenge to Kelly's conviction, when the mistakes at trial were mostly factual (the witness made a mistake), not legal (the judge made a mistake). The sluggish pace also had to do with being represented by a law school clinic. The dual function of a clinic to represent clients and educate students<sup>63</sup> means that things take longer.<sup>64</sup>

The petition was filed after I graduated from law school, some time after I had joined the Defender Association of Philadelphia. I was glad to receive a copy, but I was engrossed in my new life, my new career, my new cases. I was a lawyer now, a public defender. I had my hands full. I kept in touch with Kelly, but our contact was sporadic. I thought about her sometimes—when I had a case with an identification issue, when I'd come upon a newspaper story about the release of a wrongly convicted prisoner, when it was softball season (Kelly and I both played—she on the prison team and I on a women's team in the city league).

I had been a defender for three years when Claudia called to tell me that Kelly's habeas petition had been granted by the United States District Court for the Southern District of New York. I shared in the joy of victory, an amazing against-the-odds decision proving that the system could actually work. I couldn't believe that Kelly had prevailed after all this time. The Court had accepted all of our arguments about the wrongful admission of unreliable identification evidence at trial. The Court even expressed concern about an innocent person being unjustly convicted. Claudia was pleased but measured. The state will appeal, she said. And the United States Court of Appeals for the Second Circuit will be a much tougher forum, she added.

Claudia was right. The state appealed and the case was immediately scheduled for argument before the Court of Appeals. Before the case was heard, the state made an offer to Kelly: If she pled guilty she would receive a sentence of time-served. This meant that she would be released from prison, she would have her freedom, she could go home. Kelly had

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63. See, e.g., David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998) (examining the tension between representing clients and educating students); Catherine Gage O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLINICAL L. REV. 485 (1998) (discussing the unique role of the clinical supervisor).

64. While in law school, I had the occasion to experience clinical education from the perspective of both student and client. As a student, the experience could not have been more positive: I learned a lot; I worked on interesting cases; I worked with terrific people. As a client—or rather, a patient—the experience was more mixed. Burdened with tooth pain and seeking quality dental care at a fee I could afford on a student budget, I went to N.Y.U.'s dental clinic. While I had no complaints about either the price or quality of work (which was closely supervised by experienced dentists and teachers who taught at the dental school), I had to keep my mouth open for what felt like years while dental students prodded and probed.

already served ten years. She had already spent ten years of her life in a maximum security prison. Kelly refused the plea offer. She told Claudia that she couldn't do it, couldn't plead guilty to a crime she did not commit. The crime was too horrible. She didn't think she would be able to live with herself if she admitted having taken part in a senseless, brutal murder of a teenager that she had nothing to do with. She didn't think she would be able to look herself in the mirror or face anyone she cared about.

Kelly also believed she would be vindicated by the Court of Appeals.

Six months after the district court granted Kelly's petition, the Court of Appeals reversed. The Court ruled that the district court had erred in finding that the identification of Kelly at trial was unreliable and resulted from improper police and prosecutorial procedures, and upheld Kelly's conviction.

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The question of how hard a lawyer should lean on a client to take a plea is a difficult one. The lawyer must balance respect for client autonomy against his or her professional responsibility to effectively counsel the client.<sup>65</sup> While the decision whether to plead guilty or go to trial is the most important event in a criminal case and is reserved to the client,<sup>66</sup> this does not mean that the lawyer should quietly defer to a client's inclina-

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65. See generally Stephen Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998) (exploring the defense lawyer's obligation to counsel clients on whether to plead guilty to go to trial); see also Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 733-53 (1987) (discussing client autonomy and lawyer responsibility in view of the power imbalance between lawyers and clients); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 493 (arguing that lawyers should properly engage in paternalistic coercion when a client's goal fails to meet a minimal test of objective reasonableness); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 132-33, 139-42 (discussing client autonomy and lawyer responsibility in poverty law practice); Smith, *supra* note 53, at 27-37 (discussing client autonomy and lawyer responsibility in criminal defense). For a fascinating and troubling examination of the process of decision-making by lawyers and client in the prosecution of Theodore Kaczynski, the convicted Unibomber, see William Finnegan, *Defending the Unibomber*, THE NEW YORKER, Mar. 16, 1998, at 52, 54. In the Kaczynski case, defense lawyers believed that the only way to avoid the death penalty was to put forward a mental illness defense while the defendant steadfastly resisted being portrayed as mentally ill. Cf. Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1343-48 (1998) (suggesting that Kaczynski's lawyers chose a strategy that was in Kaczynski's "best interests" but did not enhance his "autonomy").

66. See A.B.A. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard 4-5.2(a) (indicating that the "decisions which are to be made by the accused after full consultation with counsel" include what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to appeal); 1 ANTHONY AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201, at 339 (1988) ("The decision whether to plead guilty or to contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will.").

tion.<sup>67</sup> Sometimes effective counseling—*getting through* to a client about the reality of the client's situation—means leaning very, very hard.<sup>68</sup>

Claudia agonized over how hard to press Kelly. She agonizes over it still.<sup>69</sup> Should she have “made” Kelly take the plea, urging her to seek vindication outside the prison walls?<sup>70</sup> Was she too deferential to her client's “autonomy”<sup>71</sup> at the expense of her professional obligation to make

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67. See generally Zeidman, *supra* note 65 (suggesting that defense lawyers must counsel clients on the wisdom of accepting or rejecting a plea in order to provide effective assistance).

68. See AMSTERDAM, *supra* note 66, at 339:

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

See also Smith, *supra* note 53, at 37 (“There are times when a criminal lawyer, if he or she is a caring and zealous advocate, must lean hard on a client to do the right thing. The clearer the right thing is . . . the stronger the advice.”) (footnote omitted).

69. See Telephone Interview with Claudia Angelos, Clinical Professor of Law, New York University School of Law (Apr. 7, 1999). Claudia does not think this question is as difficult and complex as I have come to regard it. She believes it was her responsibility to *make* Kelly take the plea back in 1986 and she blames herself for not pressing Kelly hard enough. She blames herself for Kelly's continued incarceration. Although she advised Kelly to take the plea, told her they were lucky to win in the district court, warned her that they would likely lose in the appeals court, and told her that if *she* were in Kelly's shoes she would surely take the plea, she believes she erred on the side of “client-centeredness.” See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 147-53 (1977) (recommending that all decisions be left to the client because only the client can know the values he or she places on the consequences of a decision); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 2, 154 (1974) (proposing a “participatory model” of client counseling, in which clients “participate actively in dealing with their problems and share control and decision responsibility with the professional”); Mark Spiegel, *Lawyer-ing and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (urging that client decision making be protected by requiring lawyers to obtain the clients' “informed consent” to a range of decisions); see also GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 1040 (1978) (maintaining that lawyers cannot avoid influencing client decisions, but offering ways to “provide guidance and direction without implicitly giving orders” to clients). Cf. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* xxi-xxii (1991) (offering a slightly tempered version of their previous book on client-centered interviewing and counseling, which they acknowledge “overreact[ed] to the tendency of many lawyers to tell their clients what to do. . . .”); Ellman, *supra* note 65, at 720-21 (uncovering the ways in the methods Binder and Price propose for client-centered interviewing and counseling are manipulative).

70. Claudia believes she could have gotten Kelly to take the plea if she had pressed her, because they had a good relationship and Kelly trusted her. See Telephone Interview with Professor Claudia Angelos, *supra* note 69. I agree with Claudia that a good, trusting lawyer-client relationship often translates into the lawyer having more power to influence the client.

71. See *supra* note 65 and accompanying text; see also William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 215 (1991) (describing the legal counseling of an elderly African American housekeeper accused of a crime in the face of a plea offer and arguing that it is often hard to distinguish between a client choice that is autonomous and a choice in the client's best interest).



sure Kelly did the right thing?<sup>72</sup> What was in Kelly's best interest here—her freedom or her peace of mind?<sup>73</sup> Would release under these spurious circumstances have so damaged Kelly's sense of herself that the cost of freedom would have outweighed its benefit? Did Kelly mean what she said—that she couldn't live with herself—or was she only trying to express how difficult it would be for her to claim under oath that she had committed a terrible crime when she had not? Was Kelly making a decision because of misplaced faith—either in the system (she had won in the district court), or in God (she had embraced Catholicism in prison and became more and more devout as the years passed)? Did Kelly fully understand that this might be the one chance she had to avoid a *life sentence*? Who was in a better position to know what was best for Kelly—Claudia or Kelly?<sup>74</sup>

This last question is harder than it may seem. Criminal defense lawyers learn from experience that there are many possible meanings to a client's initial refusal to take a plea or assertion of innocence. A client might be expressing unhappiness at his or her general situation, or expressing anger at the system. A client might be testing the lawyer, making sure the lawyer does everything possible on the client's behalf, that the lawyer will represent the client *as if he or she were innocent*. A client might be telling the lawyer that he or she won't go down without a "fight," that they would rather be convicted at trial and sentenced to prison than go to the gallows willingly. A client might be masking a range of feelings from having engaged in embarrassing, shameful, or hateful conduct; it is easier to deny the conduct than admit guilt and face family and friends. A client might be expressing his or her assessment of the evidence in the case. A client might simply be seeking a lawyer who *believes* in the client in the broadest possible way.

Claudia now holds herself fully responsible for Kelly refusing the plea—something she regards as the worst mistake of her professional career.<sup>75</sup> Kelly disagrees. She insists that she was right to refuse the plea and

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72. See AMSTERDAM, *supra* note 66, at 339-40 ("[C]ounsel's difficult and painful responsibilities include making every reasonable effort to save the defendant from the defendant's ill-informed or ill-estimated choices.").

73. See generally Finnegan, *supra* note 65 (exploring why Theodore Kaczynski refused to allow an insanity defense because to do so would have been a renunciation of his beliefs).

74. See AMSTERDAM, *supra* note 66, at 339 ("Counsel's appraisal of the case is probably far better than the defendant's. . ."). But, there may be times when only the client can say what he or she really needs—and when emotional matters take precedence over legal ones. See Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 71 (1994) (describing the needs of a client facing execution—"With his life in legal jeopardy, his immediate relationships took on paramount importance").

75. See Telephone Interview with Professor Claudia Angelos, *supra* note 69. The worst part of it for Claudia is that at the time she conveyed the plea offer to Kelly she was fully conscious of the gravity of the situation and she made deliberate choices about the way in which she counseled her client. She believes she bought into a foolish notion of "client-centeredness" in her discussions with Kelly. See BINDER & PRICE, *supra* note 69. She believes she also suffered from lack of experience in criminal

claims that nothing Claudia could have said would have changed her mind.<sup>76</sup> To this day, Kelly says that if she were offered a chance to plead guilty and gain release from prison, she would turn it down. Since Kelly has been imprisoned, both of her parents have died, she has lost touch with other family and friends, and she has passed from youth to middle-age. Still, she claims she would refuse a plea. When I suggest I would *make* her plead if such an opportunity ever arose again, she is quiet.<sup>77</sup>

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Years passed. I went from being a public defender to a law teacher to a combination of the two, a clinical law teacher in a criminal defense clinic. I lived in Philadelphia, New York, Philadelphia again, and then Boston. I took a job at Harvard Law School, helping to create and direct a criminal justice program that provided representation for the indigent accused, as well as producing research and scholarship on a range of criminal law issues.

Life was busy. I had plenty of clients, plenty of students, plenty of projects. I thought of Kelly from time to time, but didn't really know *how* to think of Kelly. It was painful to think of her. She had won and she had lost. The win had been incredibly short-lived. The loss remained. There had been no appeal to the United States Supreme Court, because there were no appealable issues.

I was somewhat comforted by the fact that Kelly had been represented by excellent lawyers. Aside from Claudia, at least two other N.Y.U. law professors had contributed to Kelly's appeal, Anthony Amsterdam and Randy Hertz. Amsterdam is a latter-day Clarence Darrow. He literally

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defense. When she took on Kelly's case, she was a prisoners' rights lawyer, representing civil plaintiffs, not criminal defendants. As a result, she did not have the kind of perspective on how a client might react to a plea offer that a veteran public defender has after years in the trenches of criminal court. See Telephone Interview with Professor Claudia Angelos, *supra* note 69.

76. Claudia is not comforted by Kelly's continued insistence that it was *her* decision to refuse the plea and it was the right decision. "I take responsibility for Kelly taking responsibility," she says. "I set things in motion so that it *was* her responsibility and this was wrong." Telephone Interview with Professor Claudia Angelos, *supra* note 69.

77. It is impossible to know what is behind Kelly's insistence that she would *never* take a plea—that if someone approached her today and said, I'll let you out of here right now if you just say you're guilty, she would say no. Because I have never been wrongly accused of murder, I can't really say what it would mean for me to falsely admit my guilt. This is one of those situations when it is truly difficult to imagine what another human being might feel. It could be a matter of principle or conscience. It could also be that Kelly cannot bear to think that she rejected the one opportunity she had to free herself for *no reason other than principle* and she continues to be incarcerated as a consequence. Principle may be small comfort after 20 years.

For a memoir which explores what it feels like to be wrongly convicted and imprisoned for murder, see RUBIN "HURRICANE" CARTER, *THE 16TH ROUND: FROM NUMBER 1 CONTENDER TO # 45472* (1974).

wrote the book on criminal defense advocacy<sup>78</sup> and is a renowned death penalty litigator, having argued *Furman v. Georgia*.<sup>79</sup> Hertz was a well-respected trial attorney at the Public Defender Service of the District of Columbia before becoming a clinical law teacher specializing in juvenile justice.

So, I figured whatever was happening with her case, Kelly was in good hands. At least she didn't exactly need me. We would exchange an occasional holiday card and I would feel bad about Kelly from time to time, but I didn't have to think about her much.

Then, in the course of representing a client who was part of an organized campaign in Massachusetts to gain clemency for women who had killed abusive spouses and partners, I helped organize a conference on "Women in Prison." Jean Harris, the notorious "Scarsdale Diet Doctor" killer,<sup>80</sup> who had recently been released from Bedford Hills Prison, was the keynote speaker.

I felt that I *knew* Jean Harris. Not only had her case been highly publicized (and being a longtime criminal law junkie—especially when it came to women accused of crime—I had followed her case closely), but I had seen her in the Bedford Hills visiting room so many times before when I'd visit Kelly. She was always easy to spot. She had the uncanny ability to make the Bedford Hills Prison uniform—which consisted of at least one dark green item of clothing—look like a prep school uniform. She would generally be wearing a dark green cardigan sweater with a white round collared blouse underneath, complete with a collar pin, and sometimes a matching green skirt. She often carried a clipboard, like she was organizing a social event.

I knew she had to know Kelly. They had both been locked up too long in the same place *not* to know each other. When I introduced myself to Jean Harris, I said she probably wouldn't remember me but I used to spend a lot of time at Bedford Hills visiting Patsy Kelly Jarrett. She reacted immediately. "Oh, Kelly," she said. "Everyone knows she's innocent."

We talked. Jean Harris said she had written about Kelly in one of her books.<sup>81</sup> She told me that for the last several years Kelly had been devot-

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78. See AMSTERDAM, *supra* note 66 (a widely-read and cited manual addressing all aspects of criminal defense advocacy).

79. 408 U.S. 238, 239-40 (1972) (holding that the death penalty as then administered in most states violated the Eighth Amendment's prohibition against cruel and unusual punishments).

80. Harris, the head mistress of the Madeira School, a prestigious private boarding school in Virginia, was convicted in 1980 of shooting Dr. Herman Tarnower, the author of a highly successful diet book and Ms. Harris' lover. See generally SHANA ALEXANDER, *VERY MUCH A LADY: THE UNTOLD STORY OF JEAN HARRIS AND DR. HERMAN TARNOWER* (1983).

81. See JEAN HARRIS, *MARKING TIME: LETTERS FROM JEAN HARRIS TO SHANA ALEXANDER* 142-145 (1991). Jean Harris had the same impression of Kelly upon meeting her that I had:

I spent this afternoon in the yard with a young woman I don't think I've ever mentioned to you. Her name is Kelly. I noticed her the first week I arrived. She had a freshness about her . . . a lovely, clear complexion, rosy cheeks, and a kind of complete innocence about her.

ing herself to caring for women in the prison infirmary who were dying of AIDS and cancer, that this had become something of a calling for her. She didn't know the status of Kelly's case. She urged me to contact Kelly.

So I did, apologizing for being out of touch. I wrote about what I'd been doing since we had last written and how I had come to have a conversation about her with Jean Harris. I asked about her and inquired about her case. I wondered whether a clemency petition had ever been filed on her behalf and what she thought about this idea. She told me that a friend and her husband were putting together a clemency petition for her. Neither was a lawyer (the friend had spent some time in Bedford Hills with Kelly); they simply believed in her and wanted to do something to help. Kelly said she didn't think the petition would amount to anything, but she was happy to have their support just the same. She was happy to hear from me.

I said I would like to help her. Maybe I could write a letter in support of clemency for the petition? Maybe I could find a lawyer in New York to assist her friends in drafting the petition? Maybe I could find a lawyer in New York to pursue clemency or provide whatever legal assistance she might need?

Although I was licensed to practice law in New York, I didn't offer myself. I had just spent months representing a Massachusetts prisoner in a clemency petition and it had involved many trips to the prison (to work with my client, meet with prison employees who might write letters of support, and collect prison records) and many trips to the town in Massachusetts where the crime occurred (to talk to witnesses and jurors and visit the crime scene). It always helps to be local.

Maybe I didn't offer myself because I needed the distance. I cared about Kelly. Aside from feeling the injustice of her case, I had always liked her. She was a good person, even a wonderful person. She was kind, generous, open, warm, and fun. She had her fierce moments—against the prison administration for the too-frequent indignities of prison life, against the police and prosecution who had wrongfully convicted her, against some of the younger, more aggressive prisoners who caused needless hostility in

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She had come to Utica, New York, from a farm in High Point, North Carolina, looking for adventure, I suppose, fleeing from boredom, or perhaps fleeing from a small town's reaction to what was considered unforgivable there. Kelly is a lesbian.

*Id.* at 142-43.

After describing the weak case against Kelly and noting the serious problems with Robert Hyland's identification testimony, Jean Harris points to Kelly's refusal to accept the guilty plea as evidence of her innocence:

Kelly was offered the opportunity to plea-bargain and have her sentence reduced. . . . Against the urging of most of her probably wiser friends in prison, she refused to take the plea. "I didn't commit a crime. I never have nor would I rob a person or kill them, and I don't want to go through the rest of my life as a convicted felon." She would be out of prison by now if she had taken the plea. I don't believe any guilty person after twelve years of incarceration would have turned down that plea.

*Id.* at 144-45.

an already hostile environment.<sup>82</sup> Every once in a while she railed against the world, the system, mankind, but this was rare.<sup>83</sup>

She liked the idea of having a lawyer that I recommended, someone who was a friend of mine. I told her I would only get her someone I really trusted, someone who was a good lawyer. I set about finding one. I was surprised by how hard it was. I knew a lot of people in New York and a lot of lawyers. I had a number of good friends in New York who were criminal lawyers. For one reason or another—burdensome workloads, other life demands, and perhaps also a recognition of how emotionally draining the undertaking would be—no one was eager to take Kelly on.

One friend finally agreed to do it. She was a prisoner's rights lawyer. I thought it was a good match: My friend was a former public defender with excellent advocacy skills, and she was already working with prisoners in New York so Kelly's case would fit right into her workload. I thought she and Kelly would like each other and work well together. In talking to my friend about the case, I emphasized how important Kelly was to me, and, though I very much wanted her to take the case, I told her she shouldn't agree to do it unless she was prepared to really throw herself into it. I told her I needed someone to be a stand-in for me. I believed that her friendship for *me* would not be enough to see her through—it was *Kelly* who needed her friendship.<sup>84</sup> She said she understood and would do it.

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82. In 1995, Kelly was attacked by another prisoner—a younger woman who was angry at Kelly for enforcing the rules of the infirmary and not allowing her to use the space for her own purposes struck Kelly in the face and head with a blunt instrument, causing a concussion, facial lacerations, and injury to her left eye. Kelly had resisted the other prisoner's demands not out of blind adherence to rules, but out of concern for the women confined to the infirmary who were ill. *See* State of New York, Department of Correctional Services, Inmate Misbehavior Report, June 28, 1996 [on file with author] (reporting the assault on Kelly on June 25, 1996).

83. She usually expressed her frustration with her ordeal sardonically, as in the words she scrawled at the top of a letter to me in 1997: "20 yrs. in prison. Wish me a happy anniversary!" Letter from Patsy Kelly Jarrett to the author (Apr. 24, 1997) (on file with author). Kelly was unusually restrained about her feelings toward the cast of characters in her case. Over the years, she had run out of anger at Billy Ronald Kelly and had little to say about him anymore. She was mostly just mad at herself for associating with him at all. *See, e.g.*, Letter from Patsy Kelly Jarrett to the author (May 19, 1996) (on file with author) (referring to her "never-ending remorse [for] my choice of friendship with a person I did not really know at all"). She felt compassion for Robert Hyland, the equivocating witness who, suddenly, at trial, was confident it was Kelly he saw at the Seaway station. She believed Hyland was another victim in the case, an elderly man in ill health, pressured by the police and prosecution to help them close a big case. *See id.* (noting her "understanding and . . . compassion toward Mr. Hyland"). She had always felt nothing but sympathy and sorrow for the parents and family of the young man who had been killed, Paul Hatch. *See id.* (expressing "heartache for the victim and his family").

84. *See* Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1272 (1993) ("My relationship with my clients approximated a true friendship. I did for my clients *all* that I would do for a friend."); *see also* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (arguing that the moral foundation of the lawyer-client relationship is friendship); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999) (examining the Jewish and Christian

But she did not. She never went out to the prison to meet Kelly. She never did the basic things lawyers do to establish rapport and trust with clients (especially clients who had little faith in the system and had been represented by a constantly changing army of students). Instead, she wrote Kelly a couple of lawyerly letters with requests for information and instructions to call her at her office. When I questioned my friend, she reacted defensively and blamed Kelly. When things didn't change, I told Kelly she should tell my friend she didn't want her as a lawyer. After this, it didn't feel right to entrust Kelly to anyone else.

I realized I had to do it myself. Maybe I should have known this from the start. If I felt so strongly about Kelly, how could I not do it? The geographical distance would make things difficult, but if Kelly was willing to accept the situation, I would do all I could to make it work. I was fortunate to have the resources of Harvard Law School—smart students, a wonderful library, and some financial support—and New York was not *that* far from Boston. Kelly was pleased.

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Serious questions are raised whenever a lawyer undertakes a righteous but largely hopeless case. I was vaguely aware of this when I decided to resume representing Kelly, but I didn't know the full extent of it. Most of the questions are painful to think about and difficult to answer.

The most vexing of these questions has to do with hope itself. The act of providing hope where there is little can plague the lawyer as well as the client. When a lawyer takes on a cause—out of belief in the cause, friendship for the client, or even ego-gratification<sup>85</sup>—hopes are raised. But, it is the client who bears the brunt of these raised hopes.<sup>86</sup>

For Kelly, I must have seemed like a knight in shining armor. Suddenly, here I was—a former student who had worked on her case early on and had never forgotten her returned to her as an experienced criminal

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roots of criminal defense lawyering and arguing that fidelity to client is the abiding virtue of criminal defense).

85. See Babcock, *supra* note 46, at 178 (noting that she [the author] found criminal defense work rewarding for both humanitarian and egotistical reasons).

86. The more we worked on Kelly's case, the more hopeful she became. Compare Letter from Patsy Kelly Jarrett to the author (Mar. 31, 1995) (on file with author) ("Abbe—I hope to win my life back through you, but even if I must remain here I will never forget your care and concern about my life."), with Letter from Patsy Kelly Jarrett to the author (June 25, 1997) (on file with author) ("When I hear [from] you I remember you care about my life. Each time I receive a letter I have hope that one day—someday—I can be free."), and Letter from Patsy Kelly Jarrett to the author (Oct. 11, 1997) (on file with author) ("[A nun at the prison] did say before though, that she did not think I would be granted clemency and that they probably won't even bother to read [the petition]. Where is her faith? I will keep my 'faith' anyway.").

lawyer now teaching at Harvard, of all places.<sup>87</sup> There might have been a mysterious power to my return for Kelly: Things were now coming full circle; an old supporter who had never lost faith had come back to save her, so maybe now was the time for her vindication.

When I first offered myself to Kelly I worried about what I was offering—and what Kelly would think I was offering. Was I offering to start from scratch with her case and go wherever the case took me? Was I just signing on to simply draft a clemency petition? What if the clemency petition required a kind of starting from scratch? Wouldn't all of this raise Kelly's hopes—most of which centered on the unlikeliest of prospects: obtaining a new trial and/or being exonerated by the United States Supreme Court? How could I raise her hopes *again* only to have them dashed?

This raised a question about the role of hope for someone like Kelly. Was hope a good thing—something that would sustain her through her years of incarceration, and perhaps the rest of her life? Or was hope a bad thing, a foolish fantasy that would render her unable to deal with the reality of her life circumstances?

I tried to be as forthright as possible with Kelly. I told her that although there was nothing I wanted more than her freedom, we both had to be sober about our chances. No matter how hard I worked—or how much I cared—this whole thing was an incredible long-shot. I told her that I was willing to explore every possible option for her, including filing a further appeal, getting the police and prosecution to reopen the case, and pursuing clemency. But I believed that executive clemency was all she had left, and this was unlikely, especially for a convicted murderer who maintained innocence.<sup>88</sup>

At this time, Mario Cuomo was Governor of New York. Although he was an ardent opponent of the death penalty and, in many respects, an old-fashioned liberal, Governor Cuomo was known for stinginess when it came to granting clemency.<sup>89</sup> Apparently, because of his opposition to the death

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87. To Kelly, the fact that I had never forgotten her was probably more important than the Harvard part, though she was wise enough to know that Harvard could open some doors for us.

88. See generally Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L & SOC. CHANGE 43 (1998) (arguing that clemency should be granted more frequently in view of restricted access to post-conviction relief, especially habeas review). Kelly has generally been skeptical about clemency. See Letter from Patsy Kelly Jarrett to the author (Feb. 10, 1996) (on file with author) ("In my heart I know that I must return to court and get a fair trial. I must prove my innocence. Clemency is given to mostly people in for drugs. . . . I really want to go back into court and *win* my case, Abbe. The clemency is not hopeful to me.").

89. See Editorial, *Holiday Politics*, NEWSDAY, Dec. 28, 1996, available in LEXIS, News Library, Newsdy File (noting that in the two years since he has been Governor, George Pataki has "recommended clemency almost as many times as Mario Cuomo did in 12 years"); Peter Marks, *Cuomo Grants Few NY Inmates a Holiday Break*, NEWSDAY, Dec. 23, 1990, at 7, available in LEXIS, News Library, Newsdy File (remarking that under Governor Mario Cuomo, "grants of clemency—the process

penalty, Cuomo could not afford to commute prison sentences and appear soft on crime.<sup>90</sup> I reminded Kelly that, although Jean Harris had widespread public support, it took Cuomo twelve years to commute her sentence.<sup>91</sup>

I told Kelly that things looked bleak not only because of the serious nature of her conviction, but because she had no constituency, no clout, no cachet: She was not from New York, not a member of a minority, not a battered woman, not a drug mule, not a former anti-war activist, not a mother, and certainly not a celebrity. I told her I was willing to reach out to potential constituencies like the gay or Catholic communities, but I didn't think I would be able to galvanize either one.<sup>92</sup> I told her the problem with her case is she is *just plain innocent*, and nobody seems to care much about the wrongful conviction of innocent people unless it's happening to them or someone to whom they're close.<sup>93</sup>

I realized I was raising hopes even as I attempted to lessen them. Just

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by which a governor can commute the sentence of a state inmate—have become almost as rare as prison breakouts"); Colman McCarthy, *Cuomo's Small Favor to Jean Harris*, WASH. POST, Jan. 9, 1993, at A21 (noting that Cuomo's record of denials of clemency "ranks him among the least merciful governors").

90. See Ian Fisher, *Clamor Over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at A45 ("A central paradox of Mr. Cuomo's 12-year tenure is that no matter what he has done on crime, he is judged most often by his opposition to the death penalty. . ."); Nicholas Goldberg, *Crime: It's Cuomo's Albatross; But record belies voters view*, NEWSDAY, Oct. 12, 1994, at A4, available in LEXIS, News Library, Newsdy File:

A . . . big misimpression—a direct result of his position on the death penalty—is that Cuomo is an old-fashioned liberal who is soft on crime. The reality is, that under his administration, the number of prison cells in the state more than doubled, average prison sentences for violent felony offenses climbed from 38.2 months to 45.2 months, and thousands more police officers were deployed to the streets. The number of executive pardons and clemencies dropped significantly, from 155 granted during Hugh Carey's eight years in office, to 31 during the 12 years under Cuomo.

91. See McCarthy, *supra* note 89 (noting Harris' three prior unsuccessful petitions for clemency despite support from the prison superintendent, the trial judge, the foreperson of the jury that convicted her, and others). See also Ellen Goodman, *Clemency for Prisoner 81-G-0098*, BOSTON GLOBE, Jan. 3, 1993, at 71 (observing that, notwithstanding the mitigating circumstances of the crime and Jean Harris' exemplary conduct in prison, it took 12 years, 3 books, and advancing age before Governor Cuomo granted clemency as she was about to undergo coronary bypass surgery).

92. The gay community posed a particular challenge. Although Kelly's identity as a lesbian and considerations of juror homophobia had played a role at trial, the case was hard to characterize as a gay rights case or even an instance of injustice based on sexual orientation. Moreover, the gay community was more associated with the victims' rights movement than with defendants' rights, *see generally* GREGORY M. HEREK & KEVIN T. BERRIL, *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN* (1992) (arguing that the gay community is often the target of hate crimes and secondary victimization), and I didn't know of any gay organization that had anything to do with gay prisoners. What Kelly needed was an organization devoted to lesbians wrongly convicted of murder.

93. It may also be that prisoners with life sentences are worse off than prisoners with death sentences when it comes to capturing public attention. Although this is understandable—the death cases are arguably more urgent, more drastic—I often wonder how many Kellys there are in prisons across the country about whom no one knows a thing. See Wilbert Rideau, *Dying in Prison in LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 158-78* (1992) (describing the lonely, anonymous deaths of "lifers" at the Louisiana State Penitentiary at Angola).



listing the things I would do raised hope. Talking about her case raised hope. Making a plan to visit Kelly at the prison raised hope. I wasn't at all sure it was a good thing to be a source of hope under the circumstances.

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After recruiting a couple of students,<sup>94</sup> I set out to do what I could for Kelly. First I got the voluminous files and trial transcript for Kelly's case from NYU, and the students and I pored through them.<sup>95</sup> Then we brainstormed about the questions that remained unanswered in Kelly's case and how we might go about getting some answers. Then we took a day and drove to Bedford Hills.

It was good to see Kelly again after all those years. Good to see her face, to hug her, to be in her presence. But it was also sad. Sad to find her older, greyer, a little heavier, and not so light-hearted anymore. Sad to feel that life had been so full for me since I'd graduated from law school, while for Kelly, it had just been ten more years in prison.<sup>96</sup> Sad to see that there was less life in her now.

We talked and reminisced and strategized. The students seemed delighted with Kelly, and she with them.<sup>97</sup> We created a list of tasks—some having to do with prison concerns, and some having to do with her case. We set a time-table for ourselves, so Kelly would know that there was an end to what we were doing and she could feel some control.

In the next several months, we carried out the tasks we had identified. We contacted eye-witness Robert Hyland and the judge who had presided over the case and arranged to meet with them. We attempted to contact others—the defense lawyer and investigator who worked on Kelly's behalf; the police and prosecutor who investigated the case and prosecuted

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94. I also had the good fortune to work closely with a post-graduate fellow working at the Criminal Justice Institute, Lael E. M. Chester. Lael put in an enormous amount of time and energy on Kelly's behalf.

95. There was a strange symmetry to this for me; here I was poring through Kelly's papers again, only this time around I was the clinical teacher.

96. I realize that this is an unfairly narrow characterization of Kelly's years in prison. Who is to say that the years Kelly has spent in prison have been less full than the lives many people lead? Do my worldly accomplishments necessarily make my life fuller? While in prison, Kelly has made and maintained deep relationships, she has done important and meaningful work (caring for the sick as a nurse's aid, working with the prison clergy), she has grown spiritually and emotionally. She has a true sense of purpose and a clear, strong voice; perhaps in some ways Kelly is freer than many of us. Still, because she has had to *stay put* while I have lived a life of (at the very least) *motion*, I can't help feeling that her confinement has frozen her in time, deprived her of the most basic life choices, taken *whole stages of life* from her. See Letter from Patsy Kelly Jarrett to the author (May 21, 1999) (on file with author) ("I thank God I . . . was not given the death penal [sic] or I could have been put to death by now. However, when a person is serving life, it is a *slow* death. The emotions slowly begin to die along with the physical body as it ages.").

97. I found Kelly's openness and warmth remarkable. So many students had paraded in and out of Kelly's life over the years; she could well have become guarded and reserved.

her; people who knew Kelly while she was in Utica. We made efforts to learn the whereabouts of William Sullivan, the man we believed was with Billy Ronald Kelly when he committed the crime. We carefully drafted a letter to the parents of the young man who had been killed.

Finding all of these people was a difficult undertaking; the events of the case had occurred more than 20 years before and the case had been tried almost as long before. Robert Hyland had become old and frail since the trial. He agreed to speak with us, but he wasn't sure he could be helpful: His memory wasn't much good anymore; he had heart problems; he had just gotten out of the hospital and was on oxygen. There were other problems: Many people had moved and we couldn't find them; while the judge, long retired, was happy to talk, he kept asking us to repeat the name of the case; all the police officers who had worked on the case were retired or dead; the prosecutor had left the District Attorney's office as a result of an ethical breach and had apparently been disbarred. Most of our letters went unanswered.

The students and I took a trip to upstate New York. The most important aspect of the trip was meeting with Robert Hyland. We had high hopes about this meeting and did what we could to temper them. But, over the course of the several-hour drive, we couldn't help but fantasize: What would happen if Hyland admitted that he had never known who was in that car at the Seaway station, that he had testified falsely when he positively identified Kelly, that the person in that car could very well have been a man, and that he had been pressured to testify and to identify Kelly by the police and prosecution? Could we get a new trial on this basis? Could we get the police to reopen the case on this basis? Might this at least help in a clemency petition?

We were wise to temper our hopes. Robert Hyland gave us nothing. It was difficult to get him to focus enough to answer the questions we put to him and difficult to understand his answers. He seemed vaguely happy for the attention and company,<sup>98</sup> but confused about his own role in the case. He stuck to the story he'd told at trial and denied having any second thoughts about it. He admitted something new—that he had attended the dead boy's wake after the killing—but denied that this had any impact on him as a witness. He spent most of his time talking about how good a look he'd gotten of the man who pumped his gas and how sure he was of his identification of Billy Ronald Kelly. He said he felt sorry for Kelly, for how long she'd been locked up.

We were disappointed, but used the rest of our time in upstate New

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98. His daughter was not happy. When she telephoned to talk to the nurse who was caring for her father and learned that we were there, she threatened to call the police. She said her father was very sick and frail and if he died we would be responsible. I told her that her father knew who we represented and why we were there and had agreed to talk to us, and she should call the police if she wished.

York productively. We went to the crime scene. We went to the courthouse and dug up all the old documents in the case, including some things we had never seen before—crime scene photographs, the autopsy report, police reports documenting the months of investigation before suspicion focused on Billy Ronald Kelly, mug shots of Billy Ronald Kelly and Patsy Kelly Jarrett, press accounts of the crime and trial, and a jury list. We were especially happy to come upon the list of names and addresses of prospective jurors from which the trial jury was selected, because such lists are no longer public information in New York.<sup>99</sup>

Surprisingly, the most hopeful moment of the investigative trip was a meeting with a sergeant in the state police force. Although at first he seemed only mildly interested in our purpose there—he was more entertained by the sudden appearance of a group from Harvard Law School in Sherrill, New York, than concerned about an alleged miscarriage of justice—by the end of our time with him he seemed genuinely willing to work with us. He was youthful and engaged—he considered himself part of the “new breed” in policing. He agreed that one-witness identification cases were especially troubling. He told us there is no worse nightmare for a conscientious police officer than helping to convict the wrong person.

The sergeant knew the whereabouts of the officers who worked on the case back in the early 1970s, said he’d be willing to help track down William Sullivan, and that he would be willing to reopen the case if Kelly took and passed a polygraph exam. He suggested an experienced and well-known polygraph examiner, Robert Arther, who had trained many New York State police officers.

In other words, if he believed that Kelly was telling the truth about her innocence, he would help us.

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The truth is a complicated thing in criminal defense.<sup>100</sup> I learned this

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99. Unfortunately, the letters we sent to jurors yielded only two responses, neither of which was terribly useful.

100. In teaching students and post-graduate fellows about the role of truth in criminal defense, my colleague, John Copacino, offers a useful paradigm: There are two sets of “facts” in any criminal case, the “facts of the world” and the “facts of the case.” Criminal defense lawyers must concern themselves with the latter. I take a similar approach: In criminal defense, the focus must be on proof, not truth. There have been many criticisms of this indifference to truth by criminal defense lawyers. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (arguing that the adversarial system places too little value on truth); Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987) (arguing that a criminal defense lawyer should not be allowed to put forward a “false defense”); Jeffrey Toobin, *Ito and the Truth School*, THE NEW YORKER, Mar. 27, 1995, at 43 (examining the philosophy of scholars and judges associated with “the truth school,” which heralds the truth-seeking process of the criminal justice system above all else). I believe that Monroe Freedman offers the dispositive response to those who would burden defense lawyers with the truth: The central obligation of a

early on as a public defender. During the initial training for new defenders, one of the senior lawyers shared a story. He was representing a man who maintained innocence about a series of thefts. The man claimed that he had nothing to do with the crime—instead, an enormous talking chicken had done it. The lawyer thought the client had a mental health problem and referred the case to the office's social services unit. Fortunately, he also asked an investigator to look into it. By doing so, the lawyer learned that on the day of the thefts there had been a promotional event for a newly opened fast-food restaurant specializing in fried chicken. As part of the event, the restaurant had hired a man to wear a chicken suit and hand out flyers. Several witnesses confirmed that they saw this "chicken-man" in possession of several of the stolen items near the location where the thefts had occurred.

I understood this anecdote to be a broad institutional lesson, the sort that gives rise to a number of maxims: Truth is stranger than fiction; don't be too quick to judge; you never know; and, most importantly, investigation is central to good defense work. I also understood it to suggest that the truth may not always be the most convincing or credible story,<sup>101</sup> and,

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criminal defense lawyer is to devotedly and zealously represent his or her client and not to uphold the "truth." See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 43-58 (1975); MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 14-42, 109-141, 161-171 (1990); Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); Freedman, *The Three Hardest Questions*, *supra* note 52.

It is fair to say that truth is a complicated matter not only for criminal defense lawyers, but for the adversary system as a whole. Notwithstanding the rhetoric about guilt and innocence, the system is built on a concern for *process*, not accuracy of outcome. See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 55-58 (1993) (discussing the emphasis on fairness in arrest, trial, and punishment). Because there is a shared institutional understanding that those who are accused are probably guilty, but are nonetheless entitled to a certain amount of procedural fairness, injecting an innocent person into the system throws a wrench in the works. See HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 133-34 (1996) ("Defendants don't just show up in court on a whim, railroaded by the system. By the time a person reaches trial, he has been deemed 'probably guilty' several times—by the grand jury and by the court in preliminary hearings."). This is so notwithstanding the presumption of innocence. See *id.* at 134 ("[T]he presumption of innocence . . . is a way of stating that the burden of proof is on the People, not the accused. . . . What the presumption of innocence does *not* mean is that the defendant is probably innocent."). When criminal defenders advise clients about a plea offer, they would be wise to explain this basic premise of the legal system: The system doesn't care about who you are, what you did, and why you did it. The only questions are can the prosecution prove what they have charged and what will they offer based on their concerns about proving it. If there is any doubt that the system is concerned more with the *system* than with someone who may be factually innocent, one need only look to recent court decisions limiting the right to habeas corpus review. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (denying federal relief to a death row inmate with evidence of actual innocence and holding that federal courts need not be concerned with "errors of fact" when reviewing habeas corpus claims).

101. See generally JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* (1999) (examining the prosecution and defense of Sheila McGough, a criminal lawyer convicted of conspiring with a client to defraud investors). In *The Crime of Sheila McGough*, Malcolm examines the case not only by considering and weighing the evidence against McGough, but by looking at its strength as a *narrative*. Even though Malcolm concludes that McGough was innocent of the crimes charged, she acknowledges that

while the truth in this case led to the client's vindication, there may well have been other effective defense theories that could have been employed.<sup>102</sup>

The best criminal defense lawyers have some sense of what the truth is, but are not hamstrung by it. Good criminal trial lawyers know how to use various aspects of the truth in order to construct a compelling narrative—one that jurors will accept, or one that will at least raise reasonable doubt. But, generally, criminal defense lawyers cannot and must not spend much time or energy worrying about the truth. After all, most criminal defendants are not innocent,<sup>103</sup> and the truth is usually not helpful to the defense. When a crime is caught on videotape, this usually means a guilty plea.<sup>104</sup>

By and large, I find the defense lawyer's relationship to the truth liberating. I like being unfettered by what "really happened." I like being free to craft my own story. I like putting the evidentiary pieces together in a puzzle of my choice. Criminal defenders are not mere lawyers; we are creative artists. Good defenders can make something of nothing and nothing of something.

When students and new lawyers complain about clients who fail to come in to the office for an interview, I suggest there's a bright spot: Look how free you are now to develop your own theory of defense. Not only are you not bound by the government's case, you are not even bound by your own client's story.<sup>105</sup> I remind students that some cases might have greater urgency for them than for their clients, and I urge students to be zealous, creative advocates whether or not a particular client is actively involved in

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McGough's story had serious problems. The way McGough saw it, she was both an unwitting pawn of a client to whom she had been devoted (he was an experienced and skilled con artist) and a victim of vindictive prosecutors, the trail of evidence to the contrary notwithstanding. Although she was a relatively inexperienced criminal defense lawyer, lack of experience alone could not account for the very poor judgment McGough exhibited in the case that led to her prosecution. Unfortunately, not only were there problems with McGough's story, but McGough was herself a terrible—"overtruthful, under-communicative"—storyteller. *Id.* at 26. For a cutting critique of Malcolm's book, see Richard A. Posner, *In the Fraud Archives*, THE NEW REPUBLIC, Apr. 19, 1999, at 29 (decrying the book as inaccurate, irresponsible, and overwrought).

102. See MALCOLM, *supra* note 101, at 67 ("Trials are won by attorneys whose stories fit, and lost by those whose stories are like the shapeless housecoat that truth, in her disdain for appearances, has chosen as her uniform.").

103. See generally FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 100, at 113 ("Most people who are formally accused of crimes in our system are guilty. Often, however, they are guilty of a lesser offense than what is charged."); Babcock, *supra* note 46 (commenting on the mind-set necessary for criminal defense work).

104. The Rodney King case is an exception, no doubt because of the race and social position of the accused police officers and that of the victim. The defendants were willing to go to trial in the hope that they could convince jurors that what they saw on the videotape was not really what happened. See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME 37-68 (1995) (critically examining the Rodney King case).

105. Of course, defense counsel is never bound by a client's version of events unless the client testifies. Cf. Freedman, *The Three Hardest Questions*, *supra* note 52, at 1470-74 (discussing the importance of confidentiality in the adversary system).

his or her defense.

As defenders construct a theory of the case, much of their energy is spent trying to put the “truth” out of their minds. It can be disheartening to look at a police report with its damning account of your client’s commission of a crime. You want to throw up your hands and say, how the hell am I supposed to defend against *these* charges? But, then you remind yourself: These are simply the allegations; they don’t have to be taken at face value; there are many ways to raise questions and *doubts* about what is being alleged.

In some cases, the theory of defense may be that the truth of what happened is an existential question. Life is complicated. People are complicated. Memory is complicated. Motive is complicated. Sometimes defenders start believing that truth is itself illusory.<sup>106</sup> No one can *ever* know what really happened in anything.<sup>107</sup> Life is the movie *Rashomon*.<sup>108</sup>

Given the defense lawyer’s typical relationship to truth, there is a stunning change of perspective when a lawyer represents someone who is innocent. Suddenly, there is nothing more important than the truth, nothing more sacrosanct. Now, the lawyer who is ordinarily indifferent to the truth is outraged that the *system* is indifferent to it.

Sometimes the defense lawyer representing a client he or she believes to be innocent is downright desperate.<sup>109</sup> Gone is the cocky irreverence that characterizes many defenders. Gone is the nonchalance. Defenders who seek to vindicate a factually innocent person wear their hearts on their sleeves: “Please, please, please,” they beg, “my client is really *innocent*.” They are willing to lay themselves bare before the most recalcitrant prosecutor. They are willing to reveal information they would never ordinarily divulge. They are willing to be thought of as naive.

Being accused of naivete is an occupational hazard for defenders. When one undertakes a professional obligation to represent criminal defendants—the vast majority of whom are probably guilty—it seems quaint at best to suddenly start talking about innocence. After all, only Abraham Lincoln built a career representing *only innocent clients*.<sup>110</sup> It is no easier

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106. See FREEDMAN, *LAWYER’S ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 100, at 51-53.

107. See generally Erica Goode, *To Tell the Truth, It’s Awfully Hard to Spot a Liar*, N.Y. TIMES, May 11, 1999, at F1 (reporting that studies overwhelmingly demonstrate that people are miserable at distinguishing truth-telling from lying).

108. RASHOMON (Daiei 1950) (recounting a heinous crime and its aftermath from differing points of view).

109. See *supra* notes 59-60 and accompanying text.

110. See Andrew Reisman, *An Essay on the Dilemma of “Honest Abe”: The Modern Day Responsibility Implications of Abraham Lincoln’s Representations of Clients He Believed to be Culpable*, 72 NEB. L. REV. 1205, 1209 (1993) (“When Lincoln believed that a prospective client was seeking his representation to advance a false claim or defense, Lincoln always would refuse the representation.”). Cf. FREEDMAN, *LAWYER’S ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 100, at 52 (quoting Dr. Samuel Johnson: “A lawyer is not to tell what he knows to be a lie. . . . [but] he is [also] not to usurp the province of the jury and of the Judge and determine what shall be the effect of evidence.”).

for the factually innocent client to profess his or her innocence.<sup>111</sup>

Of course, the problem with the defender's new-found embrace of truth in this posture is that truth is no simpler when a client is factually innocent than in a more typical case. The truth—even when it supports innocence—is often murky and complicated and may not make a very good story.<sup>112</sup>

Kelly's truth was especially complicated. The Virginia gas station killing for which Billy Ronald Kelly was serving a concurrent life sentence had apparently been committed on the drive back from Utica to North Carolina, when Kelly was still with him. Kelly maintains that she was completely ignorant of what Billy Ronald did in Virginia, although she may have been physically present. She had no idea he was a violent criminal until she was contacted by the Virginia police and she responded by cooperating fully with them, telling them all she knew and agreeing to testify against Billy Ronald. Law enforcement officials in Virginia, not generally known for lenience with those who take part in serious crime,<sup>113</sup> apparently believed that Kelly was an innocent bystander and did not prosecute her.

But things were more complicated. In the same time period as the New York and Virginia gas station killings, there was a gas station killing in Vermont, in a spot through which Billy Ronald and Kelly may well have

111. There is a popular but inaccurate assumption that everyone in prison professes innocence. Kelly has tended to be fairly taciturn about her case with other prisoners and corrections officers; she does not want to stand out. Benjamin La Guer, a man who has been incarcerated for 15 years in Norfolk State Penitentiary in Massachusetts after being convicted, on the identification of a single witness, of a brutal rape for which he maintains innocence, puts it this way:

How do I approach a person, a group, a court and tell them, in the most effective way I can, that [I am] innocent? No one wants to be made a fool of. . . . I think . . . a woman saying "I don't know if he's guilty or innocent, all I'm saying is that I [would] trust my children with him," appears to me more credible than a naked proclamation of innocence and even a proclamation of innocence with substance. How do you make people, lawyers and nonlawyers, understand and empathize with an actually innocent client? . . . It does not require a lot to grasp this concept. It does require patience . . . to communicate the innocent person's truth.

Letter from Benjamin La Guer to the author (Feb. 19, 1999) (on file with author). Mr. La Guer was recently denied parole, in part because he continues to maintain innocence and has failed to show remorse. See Record of Decision in the Matter of Benjamin La Guer, Mar. 16, 1999 (on file with author).

112. As one author has observed:

[T]ruth is a nuisance in trial work. The truth is messy, incoherent, aimless, boring, absurd. The truth does not make a good story; that's why we have art. The prosecutor prosecuting an innocent person or the defense lawyer defending a guilty client actually have an easier task than their opposite numbers. In the unjust prosecution and in the lying defense, much of the work of narration—of transforming messy actuality in to an orderly story—has already been done. The just prosecution and the defense of an innocent require a great deal more work. For truth to prevail at trial, it must be laboriously transformed into a kind of travesty of itself.

MALCOLM, *supra* note 101, at 26

113. See, e.g., Donald P. Baker, *As Execution Nears, Man's Mental Illness at Issue*, WASH. POST, Apr. 30, 1999, at B1, 8 (reporting about the pending execution of a mentally ill man in Virginia and noting that Virginia is second only to Texas in number of executions).

passed through on their drive home. This crime was never solved, but Billy Ronald was a strong suspect.

This would have been enough to complicate things for Kelly. Unfortunately, there was more. Shortly after her conviction and sentencing and before she was to be transferred from the medium security correctional facility at Albion to the maximum security women's prison in Bedford Hills, Kelly escaped. She did so for all of the reasons an innocent person wrongly convicted of a serious crime might want to escape.<sup>114</sup> She made her way to Hell's Kitchen, in New York City, where she got a menial job and set about earning enough money to pay for a lawyer who could right the horrible wrong that had occurred. Unfortunately, Kelly had again trusted someone she shouldn't have. An inmate in Albion told the authorities where they could find Kelly and she was apprehended a few months later. Kelly would try to escape once more early in her stay at Bedford Hills. This time, after fashioning a dummy and putting it under the covers in her bunk, she got no further than a friend's cell. She received a total of five more years for the escapes, tacked on to her twenty-five year to life sentence.

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Kelly was a nervous wreck about taking a polygraph exam. Who could blame her? After nearly twenty years of imprisonment—of struggling daily to make sense of what had happened and find meaning in her life—a *machine* was going to say once and for all whether she had been telling the truth about her innocence. She wanted to know why she should trust a machine—especially one operated by someone recommended by the New York police—when so many police officers, lawyers, juries, and judges had already failed her. She wanted to know what would happen if for some reason she didn't pass it (because machines don't always work, because she was nervous, because of the passage of time, because she now knew so much about the evidence in the case)—how I would feel about her and how she would feel about herself.

This was not an easy question. Although, from a strategic point of view, Kelly had nothing to lose by taking a polygraph—if she didn't pass it, no one would ever have to know and she'd be no worse off than she

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114. See, e.g., *THE FUGITIVE*, *supra* note 54 (movie starring Harrison Ford as a man wrongly convicted of killing his wife, who escapes in order to uncover the truth and bring to justice those who committed the crime). The movie and, especially, the long-running television show starring David Jansen on which the movie is based are etched into the American psyche. Anyone who grew up watching the show can easily relate to the nightmare of the innocent person wrongly accused living on the run.



already was<sup>115</sup>—from an emotional point of view, there was a lot to lose.

On the other hand, there might be something—maybe something big—to be gained by taking a polygraph. Although I knew not to count on the *police* to vindicate a client, we had to take the sergeant up on his offer. At the very least, we would get some help locating Billy Ronald's former paramour. At best, we'd have a positive polygraph result and the police on our side in a clemency petition.

With her heart pounding—and mine too—Kelly took the polygraph exam on November 22, 1996 in one of the lawyer interviewing rooms at the prison. As administered by Richard O. Arther<sup>116</sup> and his daughter, Catherine Arther,<sup>117</sup> the examination was thorough and professional. To Kelly's relief and joy, the Arthers concluded that she "was telling the truth when she denies any involvement in the crime for which she was convicted."<sup>118</sup> The Arthers found that Kelly did not merely pass the exam, her performance in the exam demonstrated the strongest indication of truth-telling.

For Kelly, the polygraph results were a powerful vindication. Suddenly, after all these years, there was something to corroborate her claim of innocence. In the absence of a clear alibi (which had been impossible for Kelly to establish because she had been arrested so long after the crime), it had always been impossible to "prove a negative"—that Kelly was not at the Seaway station when the crime occurred. Now, it wasn't just her word anymore. Now, she could say to the world—to the prison superintendent, the corrections officers, the prison counselors, the other inmates, the Governor of New York—"see, I've been telling the truth, I was wrongly identified, I've been locked up all these years for no reason." Now, she could say to her family and friends and lawyers—"see, you were right to believe in me."

It must be said that the sergeant did keep his word: He took another look at the case. But unfortunately, what he saw was the most complicated, least flattering truth. After spending several days going through the police files, the sergeant was horrified by what they revealed. Maybe if there had been just the Seaway case he'd feel different, he said. But, there were three cases—in New York, Vermont, and Virginia. The sergeant simply did not believe that Kelly could be so naive, so *stupid* as to drive up

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115. Arranging a polygraph examination for a client is part of investigation and any information that arises from the examination is protected by lawyer-client privilege.

116. Richard O. Arther had conducted polygraph training for many state, county and federal law enforcement agencies (including the United States Army, Coast Guard, Customs Service, and Marine Corps) and was the Chief Polygraph Consultant to the United States House of Representatives Assassination Committee, which investigated the murders of both President John F. Kennedy and Reverend Martin Luther King.

117. Catherine Arther was President of the New York State Polygraphists and Secretary of the New Jersey Polygraphists.

118. Arther Polygraph Examination of Patsy Kelly Jarrett, 2 (Nov. 22, 1996) (on file with author).

the eastern seaboard with a guy who was killing people at service stations along the way and not have anything to do with it. After confirming the rumors we had heard that Billy Ronald's erstwhile boyfriend William Sullivan had died of AIDS, the sergeant said he was uninterested in doing anything further.

Kelly was devastated. Notwithstanding the caution we had urged, she had placed her hopes in the police. Then she got mad. "That sergeant lied to you," she said. He never meant to look into my case. She said, "I don't care whether the sergeant believes it or not, I am *sickened* by Billy Ronald's vicious conduct and I had absolutely no idea at the time that he was doing anything like that. Maybe I was stupid. God knows I was naive. I admit I made a big mistake in associating with Billy Ronald and I deserve to be punished. But haven't I been punished enough?" she asked.<sup>119</sup>

I told her we had to go forward. I had consulted a number of experienced and knowledgeable appellate lawyers, and without newly discovered evidence (we had none) or clear incompetence by Kelly's trial lawyer (there was none), Kelly had no further legal avenues. We had only clemency remaining and we needed to focus on that: We needed to exhaust our attempts to contact people who might offer mitigating information about the case;<sup>120</sup> we needed to contact people who might write letters of support; we needed to collect Kelly's prison records, help Kelly draft a personal statement, and write a memorandum in support of clemency; we needed to mount a campaign to obtain helpful publicity for Kelly in order to generate public support.

We knew this would be a difficult undertaking from the beginning, and here we were: Kelly was a convicted out-of-state murderer with a strong claim of innocence seeking clemency from a conservative governor—George Pataki had since taken office—who would be loath to grant it.<sup>121</sup> Although the process of pulling together and filing a clemency petition was affirming in some ways for Kelly—it was a concrete reminder that many, many people believed in her—she also despaired that nothing would come

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119. Letter from Patsy Kelly Jarrett to the author (Dec. 6, 1996) (on file with author) ("I want you to understand how hurt, disappointed and disgusted I am over the state trooper's offer to re-open my case should I pass the Arthers' polygraph. . . . The state trooper did not keep his word to you.").

120. Letters written to the Hatch family and a close friend of Kelly's from her days in Utica who might have been able to provide an alibi went unanswered. Billy Ronald, whom we learned was suffering from AIDS, responded to a carefully worded letter in which we mentioned Kelly's prison infirmary work caring for those with AIDS and cancer with one terse line: "I decline your invitation and wish you luck in your endeavors." Letter from Billy Ronald Kelly to the author (May 17, 1996) (on file with author).

121. See, e.g., Raymond Hernandez, *Pataki Would Ease Drug Laws, But Ties Plan to Ending Parole*, N.Y. TIMES, May 4, 1999, at A1 (reporting that Governor George Pataki proposed a plan to reduce the minimum sentence for drug distribution from 15 years to 10 years only if the state legislature agreed to abolish parole).

of it.<sup>122</sup>

I despaired, too.

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Boundaries are a tricky thing in lawyering,<sup>123</sup> and they get trickier the closer a lawyer gets to a client, and the more the lawyer *believes* in the client.<sup>124</sup> Although I consider myself a proponent of firm boundaries in lawyering,<sup>125</sup> I found myself renegotiating those boundaries in my representation of Kelly.

I was carrying Kelly around with me constantly. It had been the same way in law school; I used to feel guilty whenever I went to a record store, the movies, a coffee shop—that Kelly had only her jail cell. It seemed so unfair, such an awful stroke of rotten luck that Kelly was where she was and the rest of us got to live our lives.<sup>126</sup> Here I was again, feeling the same way. I was worried about her, plagued by her case, guilty about not doing enough.

I wanted so much to rescue her, to give her back her life. This is what I was trained for, why I became a criminal trial lawyer.<sup>127</sup> I fantasized about what it would have been like to represent Kelly at trial. I believed the result would have been different; the case was so triable, the identification testimony so weak, I believed I could have won it. I was probably being an egomaniac—identification cases are notoriously tough—but, God, I would have given anything to have had a shot at that trial.

I was mad sometimes, both on Kelly's behalf and on my own—mad at her trial lawyer, mad at the court system, mad even at Claudia, my beloved teacher. What the hell had Claudia been doing when Kelly was offered that plea for time served, I fumed. What could she have been thinking,

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122. Sometimes Kelly would express her despair and frustration by telling me to withdraw the clemency petition, she would just "do the time." See, e.g., Letter from Patsy Kelly Jarrett to the author 2 (July 11, 1996) (on file with author) ("Clemency is a waste of your time. Pataki does not give clemency to [those] convicted [of] felony murder."); Letter from Patsy Kelly Jarrett to the author (June 14, 1998) (on file with author) ("When my father died, I had asked Father O'Shea the Priest here to call you and stop the clemency because I only did that to be able to see my father before he died.").

123. For an example of poor boundaries in criminal defense lawyering, see generally MALCOLM, *supra* note 101.

124. I mean to include clients who are factually guilty as well as factually innocent here.

125. See Smith, *supra* note 53, at 36 ("We are not our clients' friends, parents, big brothers/big sisters, or even brothers or sisters-in-struggle. Though we are connected in many ways, there is a clear separation between clients and lawyers, a necessary separation.").

126. For a dramatic depiction of this question, see MURDER IN THE FIRST (Warner Bros. 1994) (portraying the relationship between a young defender, played by Christian Slater, and his client, played by Kevin Bacon, who was imprisoned at Alcatraz Prison for stealing five dollars during the Depression and had since been accused of murdering another inmate).

127. The post-conviction role has always been difficult for me. One of the reasons I am better suited for trial work is my relatively short attention span. A trial has a beginning, middle, and end. The post-conviction process can be never-ending.

deferring in some touchy-feely way to Kelly's supposed wishes? If only Claudia had done what she should have done and talked Kelly into pleading, Kelly would have been out years ago and I wouldn't be saddled with this hopeless, endless case.<sup>128</sup>

Sometimes I was mad at Kelly. She should have known better after ten years in prison to take the damn plea when it was offered. There were plenty of people she trusted urging her to take the plea—her lawyer, her friends, even a former New York City police officer who had been locked up at Bedford Hills and become a good friend of Kelly's. I felt conflicted about her religious faith.<sup>129</sup> Sure, it had sustained her all these years, but it probably also led her to rely on "God's will" in the appellate process, when God had nothing whatsoever to do with the Court of Appeals for the Second Circuit.<sup>130</sup> Every once in a while I would get mad at Kelly for getting herself into this mess, for not seeing through Billy Ronald, for being naive and trusting and *innocent*.

Sometimes, too, I would get mad at Kelly's *need*. I didn't like being so needed, so important to her. It wasn't that Kelly was demanding; most of the time she was remarkably undemanding. Still, I felt her need. Sometimes she had legal needs and sometimes more personal ones. The problem was I wasn't meeting her needs in either category. I wasn't making a *dent* in the need.

Then, I would get hopeful. The clemency petition was good, really good.<sup>131</sup> It was a thorough and persuasive plea for Kelly's release, with impressive supporting materials. I couldn't help but feel hopeful; how could anyone read the petition and not be moved to do the right thing? There must be someone in the Pataki administration who will read the petition and believe that, if nothing else, twenty years in prison is enough time.

It felt silly being hopeful, but familiar. How could I not believe in my own efforts when believing in them had always seemed to work in the past? Hope was a good motivator. I might not have worked so hard on the

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128. See *supra* notes 65-77 and accompanying text. As noted above, Claudia remains her own harshest critic and remains deeply scarred from this experience. She is eternally grateful to me for "taking [her] off the hook" by taking Kelly's case, and says "I could never do this again, ever. . . . I could never represent anyone who is innocent. . . . I don't know how you do what you do for a living." See Telephone Interview with Claudia Angelos, *supra* note 76.

129. Kelly had come to believe that God had a purpose for her in prison, to tend to the sick and needy.

130. Frankly, Kelly would not like it if she knew I ever lost patience with her faith, and I don't blame her. Her religious faith has sustained her throughout the years in a way that nothing else could have. When I first contacted polygraph examiner Robert Arther about Kelly's case, he wondered how an innocent person could still be in her right mind—sane enough to take a polygraph exam—after 20 years of wrongful incarceration. He was immediately reassured when he learned that Kelly had become religious.

131. Kelly calls it a "masterpiece." See Letter from Patsy Kelly Jarrett to the author (Sept. 3, 1997) (on file with author).

petition if I was without all hope. Maybe I could work a miracle. Who knows? So long as the jury was still out (it took the clemency bureau almost two years before ruling on our petition) there was still hope.

But I knew that no matter how much I wanted to, I wasn't going to rescue Kelly. It was going to take a whole lot more than me. The reality was that Kelly was probably going to be locked up for many more years and there was nothing, *nothing* I could do about it. I hated this. I hated the reality. It made me rail against the system, against the interconnectedness of politics and criminal justice, against whatever divine force caused this horrible chain of events to happen to Kelly and rendered me powerless to do anything about it.

In the course of representing Kelly, I have acted in ways I have never acted with other clients. It is a very different lawyer-client relationship than my usual relationships. My visits with her at Bedford Hills are long, unstructured, and chatty, broken up with frequent trips to the vending machine for snacks and an occasional photo session (in the approved manner of the prison visiting room). We don't talk much about law—only enough to catch up on things we need to—mostly, we talk about friends and family and life.

I do things for Kelly that I don't ordinarily do for other clients. I have intervened in prison matters (disputes with corrections officers, disputes with other inmates, health concerns, housing arrangements), and family matters (a dispute over her father's will and related financial matters, a concern about her brother's problems)—things I generally leave to others better suited. I have shared my life with Kelly in a way I have never done with another client.<sup>132</sup> She is grateful for this in a way I never expected.<sup>133</sup> It reminds me that sometimes being a good lawyer means letting go of being a *lawyer* altogether and just being a friend.<sup>134</sup>

I send things to Kelly, beyond the law-related books I occasionally send to clients. I have sent her clothes, novels, food, and a Scrabble set. These seem like small things to me, the very least I can do. Still, I have never done this before with another client. I want Kelly to know she can ask me for things, no matter what. I want her to feel this level of ease with me.

I get as much out of the relationship as Kelly does—if not more. I couldn't ask for a better friend. She is my most faithful correspondent, a

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132. For an interesting article depicting the close, family-like relationship among four different women, including one law professor, and a man on death row, see Calvin Trillin, *Paris and His Sisters*, THE NEW YORKER, April 19, 1999, at 62.

133. See, e.g., Letter from Patsy Kelly Jarrett to the author (Apr. 26, 1999) (on file with author) ("Received my treasured pictures of Joe and Sally. They are just wonderful. . . . Thank you for caring enough about me to share your family with me."); Thanksgiving card from Patsy Kelly Jarrett to the author (Nov. 29, 1996) (on file with author) ("Abbe, you're not just my attorney, but my friend too.").

134. See generally Goldfarb, *supra* note 74.

devoted letter-writer in a world of e-mail and cell phones. Not a birthday or holiday goes by without a card from her;<sup>135</sup> she is better than some of my dearest friends at remembering my birthday.

There is an intensity to my relationship with Kelly that I don't feel with many other clients. It is not just that she's innocent; I believe I bring the same sort of intensity to clients who are guilty—at trial, at sentencing, even when I am counseling a client to do what is in his or her best interests even though it is difficult. I fight hard for all of my clients, whether they are innocent or guilty; there is always something to fight for,<sup>136</sup> or at least to fight against.<sup>137</sup> I do not believe I would have worked any harder for Kelly had I represented her at trial than I do for all my clients.<sup>138</sup>

Still, there is an unusual intensity that must have something to do with her innocence. That innocence is a cry that rings in my head constantly. It is a need so stark, so self-evident, there is no turning from it. It is a tragedy.

Kelly's innocence challenges all my usual methods of maintaining

135. This includes Jewish holidays. I've never received a Passover card from anyone else.

136. I fight for a client's freedom, and, failing that, for his or her dignity or humanity. See Tigar, *supra* note 46, at A10 ("I am and will be there to try and see that the system-called-justice respects and renders justice properly-so-called. I am there to see that done for a fellow creature whose life I am to shelter.").

137. I fight against over-incarceration, the disproportionate confinement of minorities, and the power of the state in general. See Fox Butterfield, 'Defying Gravity,' *Inmate Population Climbs*, N.Y. TIMES, Jan. 19, 1998, at A10 (reporting that, despite a decline in the national crime rate, the number of jail inmates rose by 9.4 percent and the number of prison inmates rose by 4.7 percent in the past year). See generally MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I* (The Sentencing Project ed., 1995) (finding that one in three African American males are currently under the supervision of the criminal justice system, either in prison or jail, or on probation or parole). See David Luban, *The Adversarial System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 92 (David Luban, ed. 1983):

[C]riminal defense is a very special case in which the zealous advocate serves atypical social goals. The point is one of political theory. The goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us. And so the adversary system is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government and we have political reasons for wanting this. . . .

In the criminal context . . . the primary end of the adversary system is not legal justice but the protection of accused individuals against the state or, more generally, the preservation of the proper relation between the state and its subjects.

138. There is, however, an interesting question about how a lawyer's judgment at trial might be affected by the representation of a factually innocent person. The 1997 trial of Louise Woodward (the "nanny trial"), in which an English au pair was prosecuted for the murder of an 18-month-old boy, comes to mind here. I wondered at the time what role the lawyers' belief in their client's innocence (which they had publicly proclaimed) played in their strategic decision to not request a jury instruction on the lesser included offense of manslaughter, and whether they would have made the same decision in the "usual" case. Lawyers and client appeared stunned and horrified when the jury convicted Woodward of murder (a verdict which was subsequently overturned by the trial judge). See Abbe Smith, *How to Defend Clients You Know Are Innocent*, NAT'L L.J., Dec. 1, 1997, at A22. The decision to "go for broke" at trial, as in the Woodward case, is not unlike the decision whether to plead guilty or go to trial, and ought to be made after careful consultation with the client and frank disclosure of the risks. See *supra* notes 65-68 and accompanying text.

distance. In most cases, there is something that separates me from my client, something that provides needed space. Sometimes it is professional role (I am my client's lawyer, not my client's friend)<sup>139</sup> and sometimes it is the client's life circumstances and choices (we did not give birth to our clients, we are not responsible for how they got to us, there is only so much we can do for them now, *shit happens*).<sup>140</sup>

With Kelly, I no longer have the safety of a traditional, boundaried professional role. We mean too much to each other. What we have is uncharted, risky. I sign my letters, "love." I also don't have the distance of believing she has made her choices and is simply experiencing the consequences. She didn't make any choices, except in her youth to take a trip north with someone she didn't know very well. She is a true victim of circumstance.<sup>141</sup>

Kelly's innocence also challenges the way in which I have learned to live with a certain level of injustice. Injustice is a part of the day-to-day world of criminal practice: Criminal defenders and their clients routinely encounter arbitrariness, rigidity, ignorance, and mean-spiritedness by those in positions of authority. There is often no rhyme or reason to how things work. Sometimes it seems as if the most sympathetic clients fare worse than the most aggravating ones. Sometimes the whole system seems out of whack.<sup>142</sup> It is a painful realization you learn to live with. With Kelly, I am reminded that I can't always live with it.

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The clemency petition was denied on July 21, 1998. The letter to Kelly consisted of three short sentences:

I regret to inform you that, after a careful review of your case, it has been determined that there is insufficient basis to warrant the exercise of the Governor's clemency powers. A grant of executive

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139. See *supra* note 125.

140. Although I believe that "choice" lies on a spectrum—depending on circumstance, some people have more choices and some have fewer—I still take comfort in knowing that my clients have some individual agency. That they have *some* responsibility lifts responsibility from me. See Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 457-60 (1994).

141. I have certainly made this argument—at trial, at sentencing—on behalf of many clients. Many of my clients have been victims of circumstance. No one is born to be criminally accused. See generally GITTA SERENY, *CRIMES UNHEARD* (1999); GITTA SERENY, *THE CASE OF MARY BELL* (1972) (both books examining the case of Mary Bell, an 11-year-old girl who killed two toddlers in Newcastle, England, in 1868, and was herself the victim of terrible abuse). But Kelly stands out in this respect.

142. Recently, a client convicted of selling a small amount of drugs in the District of Columbia was sentenced to 9 to 27 years in prison. He has no history of violence, is intelligent and articulate, and begged for mercy at sentencing, offering insight into what had led him to sell drugs and a recognition of the harm he had caused his community by doing so.

clemency involves intervention in the normal course of the criminal justice process. Such action constitutes extraordinary relief and is taken in only the most compelling of circumstances.<sup>143</sup>

Under New York clemency procedures, we must wait a year after the denial of clemency before filing another petition.<sup>144</sup> I will wait, update the petition, gather more letters of support, and submit it again. I will keep submitting clemency petitions until Kelly is one day released.

I often dream about meeting Kelly at the prison gate—her with all her belongings, wearing non-prison approved clothing for the first time since I have known her, hugging other prisoners and a couple of corrections officers goodbye, and wishing everyone well as she heads for freedom. I imagine picking her up with my family. We'll take her out for a celebration dinner—Kelly and all the friends and supporters she wants to include.

I would take her to my home for a while, until she is ready to get back on her feet. Or I would take her wherever she wants to go, home to North Carolina, on a vacation in Cape Cod, or to the convent in Westchester County where she says she wants to live out her days if she is ever released from prison.

In seventeen years of law practice, I have represented a handful of other clients I believed to be innocent. I have represented many clients who were not guilty of the crime charged, and many more who, guilty or not, did not deserve to be harshly punished. Since I became a lawyer, I have never had another case like Kelly's. I am glad I have not; I don't think I could bear another.

Defending the innocent is no more noble than defending the guilty, no more honorable, no more virtuous; the calling of criminal defenders is to represent the guilty and innocent alike.<sup>145</sup> But, the burden of defending the innocent is an extraordinary burden. It is constant and unrelenting. It is both a professional burden and a deeply personal one. It poses a challenge to everything I believe in, including myself.

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143. Letter from James V. Murray, Director, Executive Clemency Bureau, State of New York to Patsy Kelly Jarrett (July 21, 1998) (on file with author).

144. See EXECUTIVE CHAMBER, GUIDELINES FOR REVIEW OF EXECUTIVE CLEMENCY APPLICATIONS, STATE OF NEW YORK (on file with author).

145. See generally Smith & Montross, *supra* note 84.