THE ETHICS OF CAUSE LAWYERING: AN EMPIRICAL EXAMINATION OF CRIMINAL DEFENSE LAWYERS AS CAUSE LAWYERS

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INTRODUCTION

In 1990, Jose Orlando Lopez retained a prominent criminal defense attorney, Barry Tarlow, to represent him on serious narcotics charges.[1] Mr. Tarlow's understanding with his client was that Tarlow would "vigorously defend and try" the case but that he would not negotiate on Lopez's behalf if Lopez decided to turn in state's evidence and become an informant in exchange for a reduced sentence. For moral and ethical reasons, it was Tarlow's general policy "not to represent clients in negotiations with the government concerning cooperation." (Indeed, later in the case when Lopez decided to enter into a cooperator's agreement with the prosecution, Lopez sought to negotiate the deal on his own without the assistance of counsel. These *pro se* plea negotiations ultimately failed). According to Tarlow, such cooperation negotiations were "personally, morally and ethically offensive" and he would no sooner represent a snitch than he would represent "Nazis or an Argentine general said to be responsible for 10,000 'disappearances.'"[2]

Whatever one thinks of Tarlow's policy, this case highlights an important truth. For Barry Tarlow, and many other defense attorneys, the practice of criminal defense is about much more than helping individual clients achieve their individual goals. Criminal defense attorneys are often motivated by an intricate set of moral and ideological principles that belie their reputations as amoral (if not immoral) "hired guns" who, for the right price, would do anything to get their guilty clients off.[3] Some of the collateral causes advanced by these attorneys are laudable while others are not. But almost all of them raise ethical concerns that the rules of ethics and professionalism are not well-equipped to resolve. This is a note-worthy problem because cause-lawyering has played an important role in socio-legal movements in this country.

The cause-motivated approach to lawyering contradicts the traditional view of those in the legal profession as rights-enforcers or as neutral advocates of their client's interests.[4] Weighing the virtue of neutrality in an

1. United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991).

2. Gail D. Cox, *Fighting and Flaunting It*, NAT'L L.J., Apr. 19, 1993, at 28.

3. For a more detailed description of the "hired gun" approach to lawyering, see William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

4. See Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 318-19 (Austin Sarat & Stuart Scheingold eds., 1998) (distinguishing between lawyers who are "hired guns" and use

advocate versus that of activism, the ethics and professional responsibility literature seems to embrace the former as the more appropriate of the two. Lawyers are strongly advised to be zealous but neutral advocates of their clients' interests.[5] They also have a duty of loyalty to clients that may prohibit them from representing clients in cases where the attorney feels the pull of professional, personal or political interests distinct from those of the client.[6]

This raises significant ethical concerns for cause lawyers—activists lawyers who use the law as a means of creating social change in addition to a means of helping individual clients. These lawyers are known by many names in the legal and sociological literature, including radical lawyers, critical lawyers, public interest lawyers, poverty lawyers, socially conscious lawyers, visionary lawyers, and so forth.[7] The worry for the cause lawyer is that the pursuit of her "cause" may at times conflict with the client's interest. A lawyer's professionalism is measured in part by her ability to keep her personal and political agendas apart from (and secondary to) her clients' agendas. Accordingly, the repeated cautions against conflicts of interest when representing clients[8] suggest that lawyers ought be wary of non-client-centered goals in lawyering. Tarlow's particular policy of not representing snitches is open to criticism on this ground,[9] but is merely one example of an overall approach to criminal defense lawyering in which the attorney's moral and political values play centrally in her advocacy decisions.

In this Article— the first to seriously evaluate whether criminal defense lawyers are cause lawyers[10]— I consider several examples of cause lawyering as described by defense lawyers during the course of forty

their skills with no sense of accountability for the results and those who politicize their legal practice and use their skills to seek justice).

5. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.3 cmt. 1 (5th ed. 2003) [hereinafter MODEL RULES] ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf.").

6. MODEL RULES, R. 1.3 cmt. 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client . . . ."); Model Rule, R. 1.7(b) (prohibiting lawyers from undertaking representations in which there is a conflict of interest with "another client, a former client or a third person or by a personal interest of the lawyer").

7. Carrie Menkel-Meadow, *The Causes of Cause Lawyering*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 4, at 33.

8. *See e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. § 9 (2003) ("In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.").

9. There may be other grounds for disagreement with Tarlow's approach. It is not fully clear why Tarlow refuses to represent defendants who turn over state's evidence. Perhaps it is simply that he finds the decision to cooperate with law enforcement against others morally repulsive. It may also be that he refuses to participate in cooperation agreements as a strategic stance against the practice of snitching, believing that the eradication of snitching would cripple law enforcement capabilities and help criminal defendants generally. Tarlow would not be the first to adopt such a view.

10. *See infra* notes 102-03 and accompanying text.

interviews. Through their discussions, I explore the types of values or commitments that animate defense lawyers' approaches to the practice of law and the impact of such "cause lawyering" on the criminal defendant. I consider whether the cause lawyering approach in the criminal context is compatible with ethical and professional rules and argue that it should be. Sometimes criminal defendants are better represented by defense attorneys who are "cause lawyers" passionately seeking to advance their political and moral visions through the representation of their clients than by attorneys who have no overriding "cause" other than the representation of the individual client . Ethical and professional norms should be more adaptive to these instances.

This paper then can be viewed as a challenge to the well-established view that favors neutrality or at the very least client-centrality as the only ethical approach to lawyering. I provide empirical evidence supporting the contention that in many instances the cause lawyer's approach is not only defensible but preferable. My conclusion provides no quarrel with the notion that the defendant's goals should take priority over the attorney's personal or political goals. Rather, I illustrate that the common formulation of the conflict-of-interest problem is oversimplified and unrealistic for the many criminal defense lawyers who are also cause lawyers. The real conflict lies not between the client and the lawyer's political interests but rather between *this* client's interest and the interests of other clients that better embody the attorney's larger moral or political cause.[11] "Other clients" can be other current clients, other future clients or the class of criminal defendants generally. This conflict, one that criminal defense attorneys and other cause lawyers face regularly, is the focus of this paper.

The Article proceeds in four parts. In Parts I and II, I make the case that many criminal defense attorneys are in fact cause lawyers— lawyers who use their legal skills "to pursue ends and ideals that transcend client service."[12] Part I presents empirical evidence from a qualitative study of forty criminal defense attorneys. Following a brief description of the project design and methodology, I describe the attorneys' practices and attitudes about criminal defense and the reasons they choose it. The

11. Some cause lawyers are quick to discount these competing interests of individual clients as a real conflict and argue that priority is always given to the instant client. *See* Susan Sterett,*Caring About Individual Cases: Immigration Lawyering in Britain, in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 4, at 239, 306 (citing a British immigration lawyer's explanation that "[o]ne's duty as a lawyer is to one's client, not to the mass of other potential clients. So if there's a point you can get a result on your client on you have to pursue it. You can't say I won't take this point because it might be worse for other people unless the client wants to adopt altruistic self-sacrifice as part of his or her instructions to you.").

12. STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM AND CAUSE LAWYERING 3 (2004). The goals pursued by cause lawyers can be social, cultural, political, economic, or legal. *Id*.

interview data from this qualitative study reveal that many defense attorneys are motivated by a range of moral and political beliefs and that they practice in a manner consistent with those beliefs. Part II provides a brief review of the scholarly literature on cause or public interest lawyering and its application to criminal defending. Read together, Parts I and II leave little doubt that although criminal defense attorneys represent, almost by definition, individual clients in individual and unrelated cases, many are cause lawyers for whom law practice is "a deeply moral and political activity."[13] As Scheingold and Sarat put it in their recent book on cause lawyers, these are lawyers who "have *something to believe in* and bring their beliefs to work in their work lives."[14]

Parts III and IV consider the ramifications of having cause lawyers practicing criminal defense. In Part III, the heart of this paper, I consider the types of conflicts encountered by criminal defense attorneys precisely because they are working on behalf of causes in addition to working on behalf of individual clients. The focus of this section is on conflicts encountered by criminal defense lawyers when the goals that they "believe in" are different and possibly (though not necessarily) incompatible with the immediate goals of their individual clients. I explore in detail three conflicts mentioned repeatedly by the respondent attorneys: their decisions regarding whether to file *Anders* briefs informing the court that the defendant has no viable issues, the use of collective action by attorneys to challenge unfavorable Government policies, and decisions to forego making certain arguments on behalf of particular clients. Part IV considers the question of whether criminal defendants are better off with cause lawyers or with non-partisan attorneys operating under the conventional approach of neutrality. I conclude that contrary to conventional beliefs, defendants are not always better off when represented by criminal defense lawyers guided only by the formal dictates of the professional responsibility and ethics rules. I argue that the formalistic approach to conflicts of interest embodied by the ethical and professional rules fails to take into account the reality of cause lawyering in general and criminal defense lawyering in particular. While the paper ultimately raises more questions than it can answer given the limited data, its purpose is to contribute to an important dialogue regarding the ethical regulation of cause lawyers.

13. *Id*. at 2.
14. *Id*.

I. EMPIRICAL EVIDENCE OF CRIMINAL DEFENDERS AS CAUSE LAWYERS

This project emanates from an empirical study involving lengthy interviews of forty criminal defense attorneys. An earlier component of this study had as its central aim the exploration of how the federal sentencing guidelines affect these lawyer's perceived abilities to be successful advocates.[15] Despite my own brief experience as a criminal defense attorney, I quickly learned that in constructing my inquiry, I had made certain assumptions about what it means to be a successful advocate and that these assumptions were not necessarily shared by many of the attorneys being interviewed. For many of the lawyers with whom I spoke, the requirements set forth by the ethics rules (that lawyers zealously pursue their individual client's interests and objectives) were viewed as baseline or minimum requirements.[16] Many of these lawyers had goals and motivations that were distinct from their client's immediate objectives. My interest is in these extra-curricular commitments and their effect on the enterprise of criminal defense lawyering.

Understanding these lawyer's motivations, to the extent we can ever understand anyone's motivations to do anything, helps to gain purchase on the question of whether criminal defense lawyers ought to be included within the category of "cause lawyers". After all, that which distinguishes cause lawyers from conventional lawyers is their intent and motivation to pursue social change.[17] Although cause lawyers differ widely in their principles, ideologies, work settings and strategies, the essential and distinguishing feature that binds them is that they are drawn and motivated by moral and political commitments.[18] To denominate a group of lawyers as cause lawyers, one must begin by understanding what motivates them and what they believe themselves to be about. In the case of criminal defense lawyers, what are their motivations?

The issue of motivation in lawyering has been only marginally explored. Yet, among the questions asked by scholars who study cause

15. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: an Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Federal Sentencing Guidelines*, 92 CAL. L. REV. 425, 430 (2004) (discussing "the extent to which criminal defense lawyers perceive that their advocacy decisions are influenced by the acceptance of responsibility determinations or other provisions of the Guidelines").

16. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003) ("A lawyer must . . . act with commitment and dedication to the interests of the client . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980) ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules."); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.").

17. "Cause lawyering is associated with both intent and behavior. Serving a cause by accident does not, in our judgment, qualify as cause lawyering." SCHEINGOLD & SARAT, *supra* note 12, at 3.

18. *Id.*at 4.

lawyering, the most intriguing have to do with the issue of motivation. As Professor Carrie Menkel-Meadow asks, what motivates a lawyer to undertake work that is often poorly compensated and that may involve personal, physical, economic and status sacrifices in order to seek greater social justice?[19] She laments that very little of the writing done on cause lawyering expressly considers the political, experiential and psychological roots of its motivations.[20]

Even more under-examined are the motives of criminal defense lawyers and how these motives impact the way in which they do their jobs. An empirical examination of this small sample of criminal defense lawyers provides an illustrative though non-exhaustive list of some of the motivations that inspire and guide lawyers to seek social justice in the field of criminal law and policy. The interview data from this study reveal a wide range of motives, as mixed and varied as the lawyers themselves. From this range of motives, several useful categories emerge: ideological motives, personality-based motives, experiential motives, ambition-oriented motives, and motives based on group identity. While the causes for which criminal defense lawyers labor are as varied and mixed as the attorneys themselves, there are nonetheless some glaring commonalities revealed in the interviews of the defense attorneys. In the section that follows I describe the design and results of the empirical study.[21]

A. Empirical Study

1. Data and Project Design

The data for this study is derived from in-depth, semi-structured interviews with forty criminal defense attorneys who practice mostly or exclusively in federal court. The forty attorneys are from one of two large and demographically diverse federal districts—in two different regions of the country[22]—and comprise a mix of public defenders and private attorneys. Prior to each interview, the lawyers were told that neither their names nor the jurisdictions in which they practice would be revealed in the study. This level of anonymity was intended to increase the responsiveness and comfort level of the subjects. Each attorney interviewed was asked to fill out a short questionnaire prior to the interview. The interviews, lasting approximately sixty to ninety minutes each, explored the subjects'

19. *Id*. at 37.

20. *Id.*

21. Some of the description of the study has been borrowed from an earlier Article on the federal sentencing guidelines involving the same subjects. *See* Etienne, *supra* note 15, at 436-41.

22. I have omitted the specific jurisdictions in order to help preserve the anonymity of the respondent attorneys as well as the judges and prosecutors they mentioned.

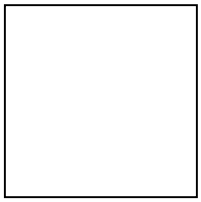
perceptions of themselves as advocates and the factors that they felt influenced their zealous representation of clients. Each interview was audio-taped, transcribed and coded.[23] While the interviews spanned various topics, each respondent was interviewed at some length about their motivations for doing the work they do. Some of the questions asked in this vein are listed below in Figure 1. (See Figure 1).

Figure 1

1. How would you characterize the goals of your job?
2. How do you determine what is the best result in any given case?
3. What are the kinds of things that the client gets to decide or that you decide and not the client? Are there such things?
4. How much control would you say that you have over how your cases develop? Why?
5. Do you think that public defenders face different challenges than private attorneys from prosecutors, judges, or their clients?
6. To what extent are you ever in the position of having to worry about your reputation and credibility?
7. To what extent do your colleagues or other members of your defense bar influence what you think is appropriate for you to do as an advocate?
8. Is there a particular culture in this office as far as advocacy issues?
9. Since you've started defending, has the nature of the job changes? How has it changed?
10. Is there anything about your background or training or values that you think significantly informs what kind of lawyer you are?
11. Why do you do this job?
12. Is there anything I haven't asked that maybe I should have asked? Any aspects of the work that you think bears on your ability to be an effective lawyer?

23. *See* Fig. 1, Interview Schedule 1.

The lawyers for the study were identified in "snowball"[24] fashion, starting initially with the federal public defender offices in each selected jurisdiction. Each of the two defender offices I visited employs fifteen to twenty attorneys.[25] I contacted each attorney in the public defender offices by electronic mail or telephone seeking an interview. From these attorneys, I obtained a response rate of approximately seventy percent.[26] I began by interviewing all the attorneys who responded, with the exception of those who worked exclusively on appeals or habeas corpus cases. I asked each respondent for the names of other criminal defense attorneys in that jurisdiction who might be willing to be interviewed. I maintained a list of lawyers whose names were mentioned by more than one respondent. I contacted these individuals, often mentioning the lawyers who referred me, and obtained positive responses from approximately thirty percent of the snowballed subjects.



2. Respondent Demographics

Of the forty respondents interviewed in the study, approximately half were public defenders and half were private attorneys. The lawyers ranged in experience and background. Most of the lawyers interviewed have been practicing law between six and twenty-five years. Three of the respondents have been practicing in federal court for five or fewer years and seven for more than twenty years. A number of the lawyers had previously worked in law firms or government organizations doing civil or other non-criminal work, but most of them had done only criminal defense work during their careers.[27] Three practiced for short stints as prosecutors.[28] The respondents self-identified as 14 female, 26 male, 28 White or Caucasian, seven Black or African-American, three Hispanic, Latina/o or Mexican, and two Asian or Indian. They ranged in age from twenty-five to sixty-three[29] and

24. Using a "snowball" or "chain" is one of several accepted methods of obtaining a reliable subject sample in qualitative research. It involves selecting an initial group of participants who help identify additional participants. Snowballing allows the researcher to "identif[y] cases of interest from people who know people who know what cases are information-rich." *Id.* at 119 (citing MATTHEW B. MILES & MICHAEL A. HUBERMAN, QUALITATIVE DATA ANALYSIS: A SOURCEBOOK OF NEW METHODS 28 (2d ed. 1994)).

25. At the time of the study, one federal defender office employed 19 attorneys and the other employed 16 attorneys. The private attorneys interviewed were either self-employed or worked in small firms. Although a significant portion of the private attorney's clients were privately retained, almost all the attorneys also handled court-appointed cases.

26. In approaching the lawyers, I told them very generally that I was conducting a study on the factors that influence defense attorney advocacy. Most of the attorneys agreed to meet with me but there were several whose schedules did not coincide with mine. Attorneys who declined to participate up front also cited trials, vacations or other scheduling conflicts.

27. *Id*. *See* Figure 3.

28. *Id*.

29. *Id*.

attended reputable law schools all over the country. I obtained demographic information by having each attorney complete a short questionnaire prior to beginning the interviews.[30] The questionnaire form appears below in Figure 2.

30. In addition to the interviews, each lawyer filled out a one page Questionnaire. All questionnaires, as well as the transcripts from the interviews, are on file with the author.

Figure 2

Preliminary Questionnaire

Thank you for agreeing to meet with me for an interview.
Please fill out this preliminary information below prior to our interview.

ID# (interviewer use only) _____
Gender _____
Race _____
Age (optional) _____
Number of years practicing law _____
Law School _____
Number of years as a defense attorney _____
Number of years as a prosecutor _____

How would you characterize the goals of your job as a defense attorney?

_____
_____

Thanks for your time.

Some of the information from the preliminary questionnaires has been synthesized in Figure 3 to facilitate comparison.[31]

31. *See* Fig. 3, Table of Questionnaire Results.

Figure 3

Atty.	Gender	Race	Age (Optional)	Yrs. Practicing Law	Yrs. Defense Atty.	Yrs. Prosecutor	Private Atty./Pub. Defender
A1	Male	Caucasian	35	9	9	0	Public
A2	Male	African-American	35	10	6	0	Public
A3	Female	Caucasian	40	7	7	0	Public
A4	Male	Caucasian	34	7 ½	7 ½	0	Public
A5	Male	Caucasian	45	12	12	0	Public
A6	Female	African-American	37	1	9	0	Public
A7	Male	African-American	42	17	15	0	Private
A8	Male	Caucasian	49	23	18	0	Public
A9	Female	Hispanic	37	12	8	0	Public
A10	Female	Caucasian	44	19	9	Never!	Public
A11	Female	Caucasian	39	16	14	0	Private
A12	Female	African-American	38	6	5	0	Private
A13	Female	Caucasian	36	12	12	0	Private
A14	Male	African-American	52	24	23	0	Private
A15	Male	Caucasian	52	25	15	10	Private
A16	Male	Caucasian	51	27	23	0	Private
A17	Male	Caucasian	36	9	6	0	Private
A18	Male	Caucasian	59	30	25	5	Private
A19	Female	Caucasian	43	14	14	0	Private
A20	Male	Caucasian	40	14	13	0	Public
A21	Female	Asian	32	5	4	0	Public
A22	Male	White	40	8 ½	8 1/2	0	Public
A23	Male	White	44	16	16	0	Public
A24	Male	African-American	31	6	3	0	Public
A25	Male	Hispanic	48	24	24	0	Public
A26	Female	White	41	4 ½	4 1/2	0	Public
A27	Female	Black	25	5 months	5 months	0	Public
A28	Female	White	53	27	27	0	Public
A29	Male	Indian Subcontinent	Blank	15	12	0	Public
A30	Male	White	28	1 ½	1 1/2	0	Private
A31	Male	White/Hispanic	43	13	13	0	Public
A32	Male	White	52	27	27	blank	Private
A33	Male	White	43	18	18	0	Public
A34	Female	White	32	6	4	0	Public
A35	Male	White	48	23 ½	23 1/2	0	Private
A36	Male	White	43	18	18	0	Private
A37	Male	White	51	26	16	10	Private
A38	Male	White	57	31	27	4	Private
A39	Male	White	63	34	30	0	Private
A40	Female	White	54	23	20	0	Private

The sample of lawyers in this study is not designed to be statistically representative of the federal defense bar or of the specific jurisdictions visited. As with most qualitative empirical studies,[32] my goal was not to conduct a randomized survey but to obtain a nuanced understanding of defense lawyers' motivations for doing the work they do. Interviews play a critical role in qualitative empirical studies because they provide nuances and explanations that are difficult to obtain from quantitave or statistical analysis.[33] I expect that this study will broaden our understanding of cause lawyers in general and our sense of the cause for which criminal defense attorneys labor.

3. Preliminary Findings

As noted above, data were in the form of semi-structured interviews. The interviews focused on sentencing practices and defense attorney advocacy in the context of sentencing. As the attorneys explained their practices and strategies as advocates, they revealed many of the underlying values that animate their decisions. After gathering the interview data, I combed the transcripts to identify and categorize the factors they said motivated their conduct. Attorneys explained that they were motivated by: (1) their desire to achieve the "best result" for clients, (2) their interest in securing procedural fairness— as opposed to specific results— for clients, (3) their optimistic worldview about human nature,[34] (4) their belief in giving others the benefit of the doubt, (5) their commitment to equal justice for the poor, minorities, and the disadvantaged, (6) their "social worker" sensibilities, (7) their opposition to sentencing and prison policies, their

32. Although this methodology is used predominantly by sociologists, similar studies have appeared in other legal journals. *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975) (explaining that the usefulness of qualitative studies lies not in obtaining a scientific measure of a problem but in helping to "guide analysis and to permit an evaluation of the inherency of the problems"); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 & n.15 (1968) (describing the study as "legal journalism" with particular analytic utilities rather than a scientific survey); Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 278-79 (2001) (reporting that his qualitative study, consisting of interviews of thirty-nine attorneys, was conducted with the goal of in-depth exploration of case selection, management, and settlement strategies rather than arrival at a quantitative measure of specific variables); Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside The Cathedral*, 66 U. CHI. L. REV. 373, 421 (1999) (explaining that the small sample studied—twenty nuisance cases—is useful in generalizing about the types of problems encountered if not in measuring the extent of the problem).

33. Interviews play a critical role in data collection in grounded theory studies. It is recommended that grounded theorists interview twenty to thirty respondents in order to develop a reliable model or theory with adequate categorization of findings and adequately categorize these findings. *See* JOHN W. CRESWELL, QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE TRADITIONS 56 (1998).

34. I take this to be indicative of either a tendency to believe in innocence (until proven guilty) or to believe in rehabilitation as a goal of punishment.

desire to fight government overreaching and law enforcement corruption, (8) their respect for and desire to be respected by their colleagues in the defense bar, (9) their belief in the adversarial justice system, (10) the excitement of and opportunity for first-hand criminal litigation, (11) their feelings of identification with their clients, and (12) the financial compensation.

From these twelve broad categories, I identified those that relate to cause lawyering. The result was six more specific categories of motives: (1) the goal of securing fairness or procedural rights for those accused of crimes, (2) the desire to effectuate broader criminal justice reform, (3) providing an opportunity for disempowered defendants to have their day in court or have their voices heard, (4) helping defendants improve their lives through advice, counseling and tapping into resources, much like a social worker, (5) identification with clients' needs because of lawyer's particular background or experiences such as religion, race, ethnicity, and (possibly) gender, (6) a shared view among defense lawyers leading to the development of an influential group network and inter-group pressures. A seventh category was created for miscellaneous motives that did not correspond into any of the six described above. These themes were used as a framework with which to code the forty interviews. The coding involved a verbatim reading of interview transcripts, studying each text line by line, and highlighting statements falling within the noted themes. The section that follows focuses on these recurring themes raised by the respondents in discussing their "causes" and the factors that motivate them.

B. Criminal Defense Lawyers as Cause Lawyers: A Look at Motivations

During the course of the interviews, I began to focus on lawyer "motivations" in at least two senses of the word. I investigated the factors that lead lawyers to choose criminal defending as well as those that influence lawyers' approaches in how they do their jobs. I concluded that these motivations are best understood by viewing criminal defense attorneys as a distinctive breed of cause lawyers.

Motivations are notoriously difficult to discern. For every action, there are likely several influential motivations. The same is true for the motives of criminal defenders. Moreover, the motives that lead some attorneys to choose a career as a cause lawyer is often different from the motives that lead them to remain in these difficult and often poorly paid careers. Additionally, the "motives" inquiry is further complicated because its respondents hear one of two distinct questions. There is the "what motivated you to become a cause lawyer" question and the "what goals motivate your work" question. The conflation of the two is understandable

because in many instances, a single motivating factor (e.g., outrage over police brutality, opposition to unfair treatment of poor and minorities) answers both questions. For example, a lawyer's desire to eradicate police brutality may be both her inspiration and her goal. Thus when I refer to motives I refer both to the motivators that serve as the lawyers' inspirations as well as their goals.[35] The data shows that few of the lawyers interviewed were influenced by a single cause or motive. Instead many of them echoed variations of the twelve previously outlined "motives." I consider the wide mix of motives in greater detail below.

It is worth noting at this juncture that although this paper has as its focus an examination of criminal defense lawyers as cause lawyers, the data obtained from the interviews may also be valuable as an independent contribution to other areas of scholarship.[36] Understanding lawyer motives is also relevant to a host of policy concerns and proposals including the regulation of lawyers, the encouragement or requirement of pro bono legal work, the recruitment and admission policies of law schools.

From the perspective of the cause lawyering scholarship, the data reveals most notably several commonalities among respondents. The first commonality noted from the study is that criminal defense lawyers seem to have a shared ideology or worldview[37] that oddly combines skepticism of government action with an admiration of its underlying principles. Many (public) defense attorneys embody the seemingly contradictory position of working for the government, against the prosecutorial arm of the government in order to protect what they perceive to be the integrity of a governmental system of criminal justice. Their principal cause seems to be a dedication to fighting governmental tyranny and abuse. Variations of this include a strong desire to help the underdog or to protect the disadvantaged members of society. Second, the respondent attorneys generally believe that the process of representation is nearly as important as the result. They want the experiences of their clients to be as minimally traumatic as possible. This requires that the attorneys make great efforts to ensure that

35. It's not surprising that "cause" can have both a consequential significance as in "causation" and the meaning of "purpose" as in this is "my cause.' *See* THE OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (defining "cause" as "1. That which produces an effect; that which gives rise to any action, phenomenon, or condition. Cause and effect are correlative terms. . . . 3. A fact, condition of matters, or consideration, moving a person to action; ground of action; reason for action, motive").

36. The insights and findings from this qualitative study are at the intersection of the sociology of professions literature, the application of behavioral law and economics to principal and agent problems, and the law of professional responsibility.

37. *See* Transcript of Interview with Attorney 36 at 19 (May 13, 2003) [hereinafter Transcript of A36]. Attorney 36 is a private attorney who sees a great deal of similarity among the federal public defenders across the country. He explains, "I've gotten to know a lot of people in federal defenders offices around the country that way and most of 'em are exactly the same and they're just really really good people who know the law well." *Id.*

their clients feel informed, respected and empowered throughout the process. Most of the attorneys expressing this view discussed their desire to "help people" and are committed to the improvement of the lives of individual clients. And third, the lawyers studied tend to share a group identity with other criminal defenders and behave as though they are part of a movement or social agenda of legal reform that transcends their individual cases. The goal of this movement appears to be to change the way the law treats the criminally accused. The lawyers had a "soldier" mentality and were as devoted to their roles as part of a network of criminal defense lawyers as they were to the changes they sought to promote.

The vast majority of the respondent lawyers began by explaining that the primary goal of their representation was to "help" the client or to obtain "the best result."[38] For most attorneys, the best result was always an acquittal or the lowest possible sentence. But many attorneys realized early on that those goals were often difficult to attain and were not directly within their control.[39] As one lawyer explained, even when he does not win, " in those cases where even someone's life has been influenced in some small fashion by how I've litigated a case, I feel good."[40] Therefore, in conjunction with winning or reducing the length of confinement, the attorneys articulated numerous other goals of representation. These additional goals help elucidate these lawyers' attitudes and beliefs about their roles as defense attorneys.

38. *See* Questionnaire from Interview with Attorney 22 (Mar. 4, 2003) [hereinafter Questionnaire from A22]; Questionnaire from Interview with Attorney 9 (Feb. 25, 2003) [hereinafter Questionnaire from A9] (noting that a goal of criminal defense work is to "help others"); Questionnaire from Interview with Attorney 5 (Feb. 24, 2003) [hereinafter Questionnaire from A5] (explaining a goal of the job as doing "whatever I can to help my clients"); *see also* Transcript of Interview with Attorney 34 at 1 (Apr. 21, 2003) [hereinafter Transcript of A34] ("the best result is figuring out what it is that the client wants and working toward that."); Transcript of Interview with Attorney 27 at 1 (Mar. 10, 2003) [hereinafter Transcript of A27] (dealing with how the "best" result takes into account other circumstances of the individuals life); Transcript of Interview with Attorney 25 at 1 (Mar. 10, 2003) [hereinafter Transcript of A25] ("And hopefully you know when they're done with me not only will they have the best possible legal position that they can have, but they'll also be better people for it because they will have addressed the causes of their behavior.").

39. *See, e.g.*, Transcript of A25, *supra* note 38 ("In federal criminal law, the control that you have over . . . the end result . . . is not very great because we have the Guidelines and basically everybody gets pigeonholed into certain . . . Guidelines."). Generally, attorneys decried their own disempowerment as lawyers under the federal scheme. They described feeling powerless as advocates in the face of tremendously high stakes in which prosecutors "hold [all] the cards." Transcript of Interview with Attorney 11 (June 12, 2003) [hereinafter Transcript of A11]. As one respondent put it, the job of the defense attorney has been reduced to "professional begging." *Id.*; *see also* Transcript of Interview with Attorney 10 (Feb. 25, 2003) [hereinafter Transcript of A10] (explaining that "I feel like I have very limited power, as far as negotiations go. . ."). Many of the lawyers felt that they had been co-opted into the prosecutorial system and that their role was reduced to "helping them make the trains run on time." Transcript of A11, *supra*; *cf.* Transcript of A25, *supra* note 39 ("Attorneys can still make a difference under the right circumstances.").

40. Transcript of Interview with Attorney 33 at 14 (Apr. 21, 2003) [hereinafter Transcript of A33].

1. Procedural Rights and Fairness

The lawyers believed that they were there to guarantee that the procedural rights of their clients were not trampled upon.[41] Many of the attorneys felt that even if their clients were convicted and received significant sentences, they would have done a good job if they insured that their clients enjoyed all the procedural safeguards to which they were entitled under the law. A related point often articulated by the respondents was that they stood prepared to hold the government to its burden of proving guilt beyond a reasonable doubt. In many of the interviews, the lawyers described their work as upholding individual rights and liberties, or "constitutional rights."[42]

Related to the notion of procedural fairness is the idea that every party in a litigation action deserves a strong and dedicated advocate. These lawyers are believers in our criminal justice system and see themselves as the embodiment of the Sixth Amendment right to counsel.[43] Without the right to effective advocacy, other constitutional rights would be less meaningful.[44] To many of the lawyers interviewed, the belief that a good

41. Transcript of Interview with Attorney 32 at 17 (Apr. 21, 2003) [hereinafter Transcript of A32] (explaining that "these rights are the foundation of this entire country and that these rights are something to cherish").

42. Transcript of Interview with Attorney 23 (Mar. 4, 2004) [hereinafter Transcript of A23]; *see also* Transcript of A33, *supra* note 40, at 2 ("OK you've got a constitutional right to have a lawyer defend you and defending you meant fighting a case and making the government prove it's case beyond a reasonable doubt, challenging the evidence, putting the client on the stand, testifying that the cops said things or did things that influenced the evidence in the case."); Transcript of Interview with Attorney 29 at 8 (Mar. 11, 2003) [hereinafter Transcript of A29] (discussing how fifth amendment rights run the risk of being infringed upon when prosecution teams get to defendants before defense attorneys do); Transcript of A27, *supra* note 39, at 17 ("So that's something that really drives me in terms of continuing to do this work, because I really feel like that's something that people have the right, so that's a really. . .its really rights."); Transcript of A23, *supra*, at 17 (discussing the client's right to an appeal); *id.* at 11 ("My feeling though is that if I've got to suppress a motion that I think is a legitimate suppression motion, you know, an illegal search, let's say. . .I think you have a good argument to make that by challenging that, you're not expressing a lack of acceptance o responsibility, you have a legal right to challenge that.").

43. Transcript of A27, *supra* note 38, at 17 ("[I]t's always in my belief that people do, they have that right to be effectively represented. So that's something that really drives me in terms of continuing to do this work."); Transcript of Interview with Attorney 24 at 5 (Mar. 10, 2003) [hereinafter Transcript of A24] ("[P]eople who can't afford a 'paid attorney' should ultimately feel at the end of the day that 'if I paid this person I wouldn't expect him to do any more than they'd done.'").

44. *See* MONROE FREEDMAN, UNDERSTANDING LAWYERS ETHICS 13-42 (1990) ("An essential function of the adversary system . . . is to maintain a free society in which individual rights are central. In that sense, the right to counsel is the most pervasive of rights because it affects the client's ability to assert all other rights.") (citation omitted); *see also* Gideon v. Wainright, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); Transcript of A27, *supra* note 38, at 17 ("I see such a definite need for people who just don't have the resources to be able to hire an attorney, to in still be able to be provided with effective assistance of counsel, not just counsel, but actually effective assistance of counsel. People who will actually investigate the case and keep them informed of what's going on.").

defense attorney for the accused is a critical aspect of a strong criminal justice system motivates them to do the job.

2. Criminal Justice Reform

A number of the respondent attorneys described themselves as fighters.[45] They fight convictions or harsher sentences for their clients, to be sure, but they also fight the system. The two "fights" were viewed as symbiotic. For these lawyers, the criminal justice system was badly in need of repair in one way or another. The ills they sought to combat included police violence, law enforcement corruption, racism, overly harsh sentencing policies, prosecutorial abuses, and court processes and procedures that are unduly partial to the prosecution. All of these are causes that could be championed during the process of representing individual defendants.[46]

The ultimate goal for the lawyers seeking to reform the criminal justice system is either to change the law as it is written or as it is applied. Some lawyers target specific cases or statutes that they believe ought to be overturned and work toward that goal, much like cause lawyers in other fields work steadily toward a long-term goal of eradicating the death penalty, legalizing gay marriage or desegregating schools. Other lawyers identify certain practices such as racial profiling, automatic detention for certain crimes or mandatory minimum sentences and seek to challenge those. These criminal defense attorneys engage in what is often referred to as impact litigation but they use their criminal defense work as the medium through which they seek change.

Evidence of this was most stark when talking to lawyers about deciding when to pursue and when to forego certain legal arguments. Their decisions were often based not solely on the best interest of the client but with an eye on the effect it would have on the law. Some lawyers discussed their decisions to withhold certain arguments for fear of making "bad law"[47] while others combed favorable appellate cases in other districts in order to bring "good law" into their own district when the right case came along. As

45. Transcript of A33, *supra* note 40 (explaining that criminal defending "mean[s] fighting a case").

46. *See, e.g.*, Transcript of A34, *supra* note 38, at 7 ("I think that the criminal enforcement in general, specifically federal enforcement, is profoundly unfair: It's motivated by interests that are inappropriate for this kind of setting. I think that the criminal law targets the wrong people, and it targets certain people.").

47. Transcript of A23, *supra* note 42, at 8 ("I am a big believer in not fighting bad guidelines issues. . .I'm really wandering on thin ice, we may have a little bit of an argument, but it's really thin ice. Because I think you lose a certain amount of credibility when the judge can come in and say, 'Okay, there was an abuse of trust here.' I think you gain a certain level of credibility, so on the other issues that you may really fight out, you're better off.").

one lawyer put it, "You know, there I think it is a responsibility not just to the client but to make some good law . . . to litigate . . . out of a sense of responsibility to the system that would do things the right way." [48] For the most part, these lawyers perceived themselves as agents of legal reform and believed that their roles as criminal defenders transcended the specific benefits their advocacy afforded individual clients.

One noteworthy aspect of the criminal defense lawyer's desire to influence socio-legal reform is what appears as, unfortunately, anti-governmentalism.[49] Indeed, many defense lawyers describe themselves as "fighting the government"[50] and "making the government prove its case beyond a reasonable doubt."[51] It is probably more accurate to say that criminal defense lawyers are not anti-government but rather are anti-government misconduct or abuse.[52] They see the potential for government abuse in all stages of the criminal justice system: political pandering by the legislature, misconduct by the police, selectiveness and vindictiveness by prosecutors, arbitrariness and bias by judges, harsh and inhumane conditions imprisons, and so forth. These lawyers do not see themselves as defending the criminally accused per se but are committed to defending "the little guy" against each and every perceived manifestation of governmental overstepping.[53]

3. Giving The Defendant A Voice And Ownership Over Process

Although defense lawyers want to obtain substantive results for their clients, they noted that sometimes defendants also have the need for a

48. *See* Transcript of Interview with Attorney 37 at 11 (May 13, 2003) [hereinafter Transcript of A37].

49. Many of the criminal defense lawyers were overwhelmingly on the political left and do not seem to oppose "big government" in other contexts as do those on the political right. Some of these lawyers were arguably libertarians.

50. Transcript of A34, *supra* note 38, at 7 ("I feel very strongly that no matter how frustrating it may be and how often we may lose, it is worth it to put up a fight."); Transcript of Interview with Attorney 31 at 5 (Apr. 21, 2003) [hereinafter Transcript of A31] ("[O]ftentimes we had fights . . . with the government."); *see also* Transcript of Interview with Attorney 28 at 17 (Mar. 11, 2003) [hereinafter Transcript of A28] (talking about how sometimes what the defense attorney must "fight" against is demoralizing).

51. Transcript of A33, *supra* note 40.

52. Transcript of A32, *supra* note 41, at 1 ("I feel it's very important that there be a check on the government and the only way that check can be effective is if I do my job to the best of my ability."); *see also* Transcript of A33, *supra* note 40, at 4 (giving an example about how it is the role of the defense attorney to make certain that constitutional violations like unreasonable searches do not get maneuvered around at trial).

53. Transcript of A28, *supra* note 50, at 7 ("I think the systemic harm is enormous . . . . The body of case law in the sentencing guidelines is exclusively intended to be based upon the law and judges are supposed to look for the heartland in the law . . . only the cases that they see are the cases that the prosecutors choose to have them, which means that we don't have a heartland. We have a core group of cases created by the government.").

process that allows them to express themselves—their defenses, their concerns, their fears and their remorse. Not surprisingly, some of the attorneys cited that a primary goal was to ensure that the client received her "day in court."[54] This goal can be difficult to accomplish because few defendants ever testify in court.[55] Accordingly, defense lawyers are the principal vehicle through which defendants can have their voices heard.[56] For example, one lawyer explained that he gave clients great latitude in making decisions about the case and about the strategies to be used even when he had doubts about the client's chosen strategy; it was important for the client to feel a sense of ownership over the case since it was the client and not the attorney who would have to live with the result.[57] This lawyer gave the example of a client who insisted that the lawyer call a particular witness to the stand even though the lawyer doubted that the witness's testimony would be helpful. Other lawyers gave examples dealing with making particular arguments or motions before the court even when they were certain that the motion would fail. One lawyer stated that sometimes you have to put on a show for a clients: they "appreciate[d] their story being put forth even though they knew the chances of winning were very, very low."[58] One lawyer gave as an example that she might make a lengthy and heartfelt argument in favor of releasing a defendant on bond even when experience dictates that the likelihood of a bond is slim to none. She related her response to the judges who questioned why she would make the argument:

> [J]udges later tell me, you know I can't release them, why are you making that argument? My response to the judge is I have to put up a good show for my clients so they sense that I am fighting for them. The

54. *Id.* at 1 (explaining that sometimes defendants express needs other than getting the best sentence and oftentimes told lawyers: "I need [m]y day in court. I don't care what the evidence is. I need the government to understand why this happened.").

55. As one attorney explained, "I don't think I have ever put a client on the witness stand." Transcript of Interview with Attorney 5 at 1 (Feb. 24, 2003) [hereinafter Transcript of A5]. For a more detailed discussion of why clients rarely testify in federal court, see generally Etienne, *supra* note 15, at 458-61.

56. *See* Transcript of A23, *supra* note 42, at 21 (discussing how ultimately a defense attorney should serve as a vehicle for letting the defendant's voice be heard).

57. Transcript of Interview with Attorney 21 at 3 (Mar. 4, 2003) [hereinafter Transcript of A21] ("I personally present a lot of [decisions] to the client as their rights, even if it is not technically, legally, their right alone to make. Or their choice alone to make. Even if I know that there are some instances where as the lawyer I can make the strategic decision to do something, I tend to try to get them on board or to make that decision themselves. I think that is the only way that really, they are truly assisting in their defense."); *see also* Transcript of A23, *supra* note 42, at 3 ("And if we disagree, I'll tell you if I think you're making a choice that's not wise, I'll tell you why, I just won't tell you it's a bad decision, I'll tell you why I think it's a bad decision, but ultimately you're going to make those decisions.").

58. Transcript of A37, *supra* note 48, at 2.

> judge knows it is a frivolous argument, and I know it as well, but it is an argument that I will make anyway.[59]

The lawyers who were proponents of the defendant's "day in court" rationale in justifying their work stressed that the criminal justice process can be particularly dehumanizing for defendants, whether or not they are guilty.[60] They saw it as an important part of their job to humanize the defendant and help her feel a sense of ownership in the process. [61] As one lawyer explained, "I'm a criminal defense lawyer because I like to represent people [as] individuals."[62]

4. The Social Worker Model: Providing Resources

While some attorneys sought to minimize "the impact of the criminal justice system" on the lives of their clients[63], others wanted to use the defendant's contact with authorities to help defendants bring change into their lives.[64] Most criminal defendants are underprivileged. Three-fourths of them are indigent and qualify for appointed counsel.[65] Many that do not qualify are nonetheless of modest means and may not have access to necessary resources. As one lawyer explained, whatever else happens in the case, my involvement is an opportunity to help the client obtain resources that she might not have received otherwise. These lawyers assist their clients in "accessing any community resources" that might help them bring change to their lives.[66] Examples of such resources included drug rehabilitations, skills, housing, medical assistance, psychological counseling[67], or other benefits. At least one attorney explicitly recognized

59. Transcript of Interview with Attorney 9 at 12 (Feb. 25, 2003) [hereinafter Transcript of A9].

60. Transcript of A28, *supra* note 50, at 1.

61. Transcript of A29, *supra* note 42, at 11 ("My training here was really good in terms of humanizing."); *see also* Transcript of A31, *supra* note 50, at 2; Transcript of A23, *supra* note 42, at 3; Transcript of A21, *supra* note 57, at 3.

62. Transcript of Attorney 40 at 1 (May 13, 2003) [hereinafter Transcript of A40] ("I'm a criminal defense lawyer because I like to represent people [as] individuals.").

63. *Id.* This attorney added: "[For] most of the people who I have ever represented it is their first time. That's not to say everyone is a first time offender, but most people are. And in my experience most people do not circle back through the system. And if you can minimize for them the adverse consequences, of their involvement with this system, and at the same time maximize their, or you know, you just need to lessen the aggravation for them." *Id.*; *see also* Transcript of A33, *supra* note 40, at 1 ("[I]n the event they want to fight the case [we help] them prepare to fight it as best as we can. And number two, [we do] it in a way that minimizes the damage to their lives.").

64. Transcript of A25, *supra* note 38, at 2 ("I think that beyond getting that not guilty verdict it's the greatest satisfaction to see somebody straighten out their lives.").

65. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1763 (1993).

66. Questionnaire from Interview with Attorney 3 (Feb. 24, 2003) [hereinafter Questionnaire from A3].

67. *See, e.g.*, Transcript of A40, *supra* note 62, at 2 ("[Y]ou have now a lot of people with mental health issues, not only in nursing homes, but in the county jails."); Transcript of A25, *supra* note 38, at 1 ("And hopefully you know when they're done with me . . . they'll also be better people for it because they will have addressed the causes of their behavior . . . if they need a drug program, alcoholic

that she had adopted a social worker's approach to her job.[68] It was knowing that she could make a difference in this way that motivated her to do criminal defense work and it was one part of the job in which she felt she had a lasting impact when all else was said and done.

5. Experience and Identity as Motivations

a. Religious Worldview

When asked why they do the work they do, a number of attorneys discussed their personal values and worldviews.[69] One recurring theme to these answers was a fundamental belief in about how to relate to those less fortunate. One lawyer explained that she tried to extend the golden rule— that is treat others in the way you want to be treated— to her work in representing criminal defendants.[70] Another explained that he believed in forgiveness and that everyone deserved a second chance.[71] It was this principle that led him to choose criminal defense work and that gave him comfort as he fought for the rights of criminal defendants. Criminal defense work was described by one attorney as "God's work" because it involved the unpopular choice of coming to the aid of society's outcasts.[72]

program . . . . I love to do that kind of thing. One of the greatest satisfactions I get out of this job is that later on in your life . . . like years after you're done with the client you'll get a card saying how great they're doing . . . they're supporting their family, they've done their programs, they're clean, they're working and they're being a positive influence in their neighborhood.").

68. Transcript of A33, *supra* note 40, at 1 ("[I]t's just sort of been . . . a social work aspect of being a lawyer that I, I think has become . . . the way that I approach my job. Every case is different and the needs of every person charged are different."); *see also* Transcript of Interview with Attorney 22 at 2-3 (Mar. 4, 2003) [hereinafter Transcript of A22] (giving an example of an instance in which, contrary to the wishes of the defendant, the attorney convinced the judge to let the individual stay with her father as opposed to with her grandmother because it was, in the attorney's eyes, a better place for her); Transcript of Interview with Attorney 12 (June 12, 2003) [hereinafter Transcript of A12] (explaining lawyer's role in helping client to find a guardian for her children).

69. *See, e.g.*, Transcript of Interview with Attorney 39 at 13 (May 13, 2003) [hereinafter Transcript of A39] ("I think it's just a philosophy of life. You know, that you um, there's just something about not being a bully and I think most of the time prosecutors are bullies."); Transcript of A27, *supra* note 38, at 17 (centering values around the importance of a presumption of innocence and citing upbringing as being pivotal in creating this worldview); Transcript of A23, *supra* note 42, at 24 (feeling that it is supremely important to help the "underdog"); Transcript of A22, *supra* note 68 at 18 (realting to "the damned" and wanting to help the "down-trodden"); Transcript of A21, *supra* note 57, at 25 (feeling that it is important to provide a client with "a sense of justice").

70. *See* Transcript of Interview with Attorney 6 at 22 (Feb. 25, 2003) [hereinafter Transcript of A6] (explaining that attorney did not like to file *Anders* briefs— briefs notifying the appeals court that there are no meritorious issues— because it was inconsistent with the "golden rule").

71. *See, e.g.*, Transcript of Interview with Attorney 14 at 2-4 (June 13, 2003) [hereinafter Transcript of A14] (discussing the goal of giving clients another chance at life).

72. Transcript of A25, *supra* note 38, at 1 (beleiving that working as a criminal defense attorney is like "God's work" in the sense that it is possible to incite "positive social change" and deal with the "roots" of problems).

Some of these lawyers are like many lawyers whose choice and manner of work are influenced by their religious beliefs.[73]

b. Experiential and Personal Background

Aside from these dogmatic and theological explanations, some lawyers simply credited their penchant for criminal defense work with personality, childhood background or culture. A lawyer who described himself as an optimist, felt that it was generally his tendency to want to "fight for the underdog."[74] Another explained that he believed that everyone deserved "the benefit of the doubt" and so it was easy for him to translate this personal view into a legal career as a defender.[75]

Attorney background also played a role in their career choices. Interestingly, both lawyers with financially privileged families[76] and those from poor or troubled families cited their backgrounds as motivating forces for them.[77] One lawyer noted that the fact that he grew up with so many more advantages than a lot of other people may have been a factor drawing him to a career of helping those who were less fortunate.[78] Another explained that when she looked at some of her clients she thought "that could have been me or my brother."[79] In explaining the kind of lawyers she

73. This emerging view of lawyering is thoroughly explored during a symposium conference at Fordham Law School. *See* Symposium, *The Relevance of Religion To a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L.REV. 1075 (1998).

74. Transcript of A39, *supra* note 69, at 13 (answering in the affirmative that he liked to "root for the underdog"); Transcript of A23, *supra* note 42, at 24 ("I sort of identify with the underdog, there's no bigger underdogs than the people we represent.").

75. *See* Transcript of A27, *supra* note 38, at 17 ("Even when people ask you now, they say, 'Oh, you represent criminals.' So that's automatically that assumption that's out there . . . that's what you're already working with countering.").

76. Transcript of A23, *supra* note 42, at 25 ("I came from an upper-middleclass, white-suburban background . . . primarily different from my clients—it's significantly different than my clients. But somewhere along the line the lesson was taught to me that the only reason I was where I was is because I had . . . was blessed with enormous opportunities that other people of equal or greater intellect were not presented with.").

77. *See, e.g.*, Transcript of A32, *supra* note 41, at 19 ("I have a brother who ran away from home . . . when he was young so I haven't talked to him in . . . 15 years[.]"); Transcript of Interview with Attorney 18 at 15 (June 13, 2003) [hereinafter Transcript of A18] ("I grew up, in you know, kind of a tough neighborhood . . . in North New Jersey.").

78. Transcript of A32, *supra* note 41, at 18 ("I really feel that I was almost like born with it. You know, I can remember as a little kid . . . I just always felt like some people were getting a raw deal. I was in my grammar school was mixed, you know racial background and everything and . . . I went to a party when I was like in 3rd grade and a girl that I was crazy about [who] was black and I went there and I just said something is not right here . . . . [She] lived in a poor area and I just I didn't understand it."); *see also* Transcript of A23, *supra* note 42, at 25.

79. Transcript of A6, *supra* note 70, at 4 ("[I] look at them like I would as a loved one, not just as putting myself in the shoes of a client, but also pretending that that is my brother or my sister."); *cf.* Transcript of Interview with Attorney 19 at 11 (June 13, 2003) [hereinafter Transcript of A19] ("explaining that if ever in the defendant's position, he would want an attorney who "would be looking at my life like it was either their life or their children's life").

sought to hire, one supervising attorney remarked that she looked for people with a "recognized commitment to working with people in poverty or some kind of special needs, who have a recognized commitment to helping others."[80]

c. Racial and Ethnic Identification

The feeling of identification with the plight of the criminal defendants was especially common among minority-race attorneys. The African-American and Latino/-a lawyers in particular discussed their feelings of connectedness to their clients, who were also predominantly African-American or Latino/-a. A number of these lawyers said that their work was an opportunity to repay a debt to their communities.[81]

It is not uncommon to find that minority attorneys lean toward criminal defense work. Historically, criminal law was the bread and butter practice of most African-American lawyers.[82] African-American lawyers catered almost exclusively to African-American clients in a sharply segregated America. Because blacks were systematically excluded from many commercial enterprises, they had fewer commercial legal needs. However, blacks and other minorities have not been excluded from the reach of criminal laws, as criminal laws have always played an important role in controlling all sorts of behavior (including traditionally non-criminal behavior) in minority and impoverished communities.[83]

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80. Transcript of A28, *supra* note 50, at 5 ("I look for somebody who's willing to learn, who seems to be passionate about the idea of doing the work, probably not the work 'cause they've probably not done much of it . . . who has recognized commitment to working with people in poverty or some kind of special needs, who have a recognized commitment to helping others.").

81. Transcript of Interview with Attorney 15 at 3 (June 13, 2003) [hereinafter Transcript of A15] ("[If] they're . . . school teachers or people who live in my community and if it's something in state court or misdemeanor court . . . I'll just represent them for free."). The attorney went on to state: "[I]t was a great way to learn you know, and a great way to serve the community at the same time and getting professional enjoyment." *Id*. at 23-24.

82. Aaron Porter, *Norris, Schmidt, Green, Harris, Higginbothom & Associates: The Sociological Import of Philadelphia Cause Lawyers, in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 4, at 162.

83. *See e.g.*, Ahmed White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667, 671, 674-86 (2004) (discussing generally the history of American policing after Reconstruction as a means of controlling poor and working class people and describing vagrancy laws in particular as a means of regulating labor and imposing a work ethic ideology).

It is not surprising that many of the most famous civil rights cases sprang from criminal matters. *See, e.g*., Powell v. Alabama, 287 U.S. 45 (1932) (known also as the Scottsboro Boys Case) (reversing rape convictions and death sentences of eight African –American boys on Fourteenth Amendment due process grounds); Plessy v. Ferguson, 163 U.S. 537, 538 (1896) (affirming Petitioner Plessy's arrest and conviction under Louisiana law that provided "for separate railway carriages for white and colored races" based on the "separate but equal" doctrine); JO ANN GIBSON ROBINSON, THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT: THE MEMOIR OF JO ANN GIBSON ROBINSON 43-44 (1987) (documenting how Rosa Parks' criminal arrest for refusing to surrender her seat to a white man led to the successful Montgomery bus boycott and the striking down of Alabama's bus

The nexus between civil rights law and criminal defense work is a second explanation for the black lawyer's interest in criminal law; it is not that African-Americans are somehow more altruistic when it comes to careers upholding the cause of criminal justice or other civil rights related causes. Just as African-American lawyers played a crucial role in the advancement of civil rights, the civil rights movement was crucial to the success and advancement of African-American lawyers. [84]

Today's African-American attorneys continue to recognize the roles that civil rights and inequality play in their own lives and those of close friends and family. They view the protection of the rights of the underprivileged as being in their self-interest.[85] In addition to the self-interest motive that many minority criminal defense attorneys experience, a number of minority attorneys believe that they have a duty to "give something back" to their communities. One prominent scholar has named this the "obligation thesis."[86] Consistent with his "obligation thesis", many of the minority attorneys interviewed described a sense of kinship with their minority clients. At least one specifically described his cause as improving the condition of African-Americans.[87] It is not to say that these African-

segregation laws); *see also* Paul Butler, *Much Respect: Toward a Hip Hop Theory of Punishment*, 56 STAN. L. REV. 983, 985-86, 1015 (2004) (arguing that the hip hop nation – which the author describes as a transformative and multicultural socio-political movement among white, black, Asian and Latino youth – perceives that criminal laws are at times used as an instrument of racial subordination).

84. Porter, *supra* note 82, at 157-58. As Porter notes with the example of Charles Hamilton Houston, the chief engineer behind the legal strategy of the civil rights movement:

> African American participation in the economic and political life of the country was in the best interest of Houston, his lawyers, and the black community in general. . . .. It was in [Houston's] interest to have a personal commitment toward the idea of fairness in equality of opportunity, although all educated black masses would benefit from such equality.

Id.

85. I do not mean to suggest that defense work has a monopoly on these goals when it comes to criminal law. As an interesting aside, African-Americans are increasingly joining the ranks of prosecutors. This phenomenon is not inconsistent with the recognition that issues of racial inequity and discrimination will continue to be fought on the terrain of criminal law. Some African-Americans may choose to prosecute because "[p]rosecutors, more than any other officials in the system, have the power, discretion, and responsibility to remedy the discriminatory treatment of African Americans in the criminal justice process." Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17-18 (1998) (arguing that prosecutors have tremendous power and discretion to cause or remedy discrimination against African-Americans as defendants and victims of crime); *cf.* Kenneth B. Nunn, *The "Darden Dilemma": Should African-Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1505 (2000) (questioning whether individual African-American prosecutors can be agents of social change in the black community given political and professional pressures on the prosecutor's role).

86. David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 STAN. L. REV. 1981, 1983- 84 (1993).* Specifically speaking of corporate lawyers, the obligation thesis holds that successful blacks have moral obligations to help the black community that must be balanced against other professional and personal commitments when making particular decisions and when constructing a moral life plan. *Id.*

87. Transcript of A14, *supra* note 71, at 3-4 ("I was involved in the Black Student Movement in the 60's. President of the Black Student Union, Vice-President of Production, President in high school, Vice-President at the University of Nebraska, um, so I came out, when I, went to law school, I went to

American lawyers felt less of a *professional* obligation toward their non-minority clients but rather that their motivation to engage in the work in the first place was brought on by the *personal* obligation they felt toward members of their minority communities.

d. Gender

Contrary to the roles that race and ethnicity play as a motivating factor in cause lawyering, none of the respondents claimed that gender played a role in motivating attorneys to choose criminal defense work. Not one of the women attorneys interviewed provided a gendered justification for her choice of work. As the "gender-based motive" argument goes, women engage in an ethic of care that leads them to empathize with oppressed or subordinated people.[88] As lawyers, their feminine side leads them to choose careers in which they can play out the caring or nurturing instincts that prioritize relationship-centered approaches over rights-centered approaches.[89] One explanation for this absence might be that the gender-based stereotype (even if true) cuts both ways when it comes to criminal law. Both defendants and crime victims can be viewed empathetically and are logical beneficiaries of an ethic of care.At least one scholar lamented the fact that criminal defendants were too often indistinguishable from their victims as a group.[90] It is possible that women might be more likely to identify with crime victims than with the alleged perpetrators of crimes (especially in sex crimes, domestic violence and property crimes where women are particularly vulnerable). Of course, this is mere conjecture because this study did not explore this precise question with respondents.

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law school with a mission. And, that mission was to in some way alleviate the conditions of the African-American people. I mean, that's what I went there for. And, and, and I, and I kind of swore once I took the bar exam that I would never betray that.").

88. *See e.g.*, Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 76-77 & nn.8-9 (1994) ("Opposed to male moral reasoning was the female 'ethic of care,' based on the structure of the 'web.' This female ethic was grounded in a relational, connected, contextual form of reasoning that focused on people, as well as the substance of a problem.").

89. Transcript of A19, *supra* note 79, at 12 (" I started doing this kind of work because I wanted to help people and that was my whole goal. I never wanted to be any other kind of lawyer other than a criminal defense lawyer and I always did it because I wanted to help people."); Transcript of Interview with Attorney A3 at 3 (Feb. 24, 2003) [hereinafter Transcript of A3] (referring to the role of the defense attorney that of both a shepherd and a social worker and concludes that it is consistent with her goals to be that sort of "support person.").

90. Harvard Law Professor and criminal defense attorney Charles Ogletree described his growing discomfort in the role of defender when he began to realize how much victims and defendants—both often poor and black—resembled one another. "When victims become indistinguishable from clients, I become very introspective about what I am doing in the process, very self-critical about the role lawyers play." SARA LAWRENCE-LIGHTFOOT, I'VE KNOWN RIVERS: LIVES OF LOSS AND LIBERATION 130 (1994).

6. Colleagues and the Defense Bar as Motivators

The vast majority of the attorneys in the study had not practiced in any other legal field but criminal defense. Nor did they want to. When asked if she had ever considered prosecuting cases, one lawyer emphatically answered "Never!"[91] Another lawyer stated that she would leave the practice of law altogether if she ever quit being a defense attorney.[92] These answers were somewhat surprising given how difficult criminal defense work can be. Many cause lawyers enter their fields completely devoted to their causes but then experience "burn out" after a few years. The lawyers interviewed for this study went on to explain that they were continually motivated by their friends and compatriots in the criminal defense bar.[93] Although they too experienced fatigue and burn out, they were rejuvenated by attending criminal defense conferences, exchanging ideas with other defense lawyers, and even watching each other in court or hearing of one another's victories.[94] As one lawyer put it, "[W]e see each other in court. We read each other's motions and we. . .it gives us that hope. . .it provides us that impetus to be zealous. . .to be the best advocates we can be."[95]

Many lawyers were proud to be members of what they viewed as an exclusive group of attorneys. It was important to them that they retained the respect of their colleagues[96] and were not perceived as incompetent, lazy, or worse yet, as "sell-outs."[97] Many lawyers repeatedly explained that

91. Questionnaire from Interview with Attorney 10 (Feb. 25, 2003) [hereinafter Questionnaire from A10]; *see supra* Fig. 3; *see also* Transcript of A39, *supra* note 69, at 13 ("I could never be a prosecutor."); Transcript of A19, *supra* note 79, at 12 ("I never wanted to be any other kind of lawyer other than a criminal defense lawyer.").

92. Transcript of A34, *supra* note 38, at 7 ("I cannot imagine not doing this . . . and I don't mean just that I can't imagine retiring . . . . I cannot imagine going a week or two weeks without, like really caring, not just having to care, but really caring about what happens to these people.").

93. Transcript of A40, *supra* note 62, at 16 ("The people in the office, and I would say it's the defense bar influences us greatly.").

94. Transcript of A34, *supra* note 38, at 8 ("I think every . . . it's so interesting going to court or co-counseling with other attorneys, especially in this office, we all have such different styles, and sometimes you know, you reach past the client or the prosecutor, just bringing in somebody else who's so different than you is really what you need, but we're all so different that I take a little bit away from everyone that I work with, and learn a little bit from each and every person in this office.").

95. *See* Transcript of A31, *supra* note 50, at 19.

96. *See* Transcript of A9, *supra* note 59, at 12 (explaining that "it has been ingrained in me from my colleagues that you just don't want to screw your clients that way.").

97. Many of the lawyers interviewed spoke often in disparaging terms about lawyers that were widely considered "bad lawyers" by their peers. The desire not to be so categorized by peers was one factor, among others, that motivated some attorneys to do a good job. *See, e.g.*, Transcript of A39, *supra* note 69, at 5 ("I don't think that anything that the client does really changes the performance of that lawyer. Either they're lazy and do a bad job or incompetent and do a bad job. . . ."); Transcript of A37, *supra* note 48, at 28 ("[Y]ou know there are attorneys who are lazy and this is regardless of the guidelines, you know, want to plead out all their cases, you know, take a retainer fee, plead out their case and . . . go fishing."); Transcript of Interview with Attorney 8 at 19 (Feb. 25, 2003) [hereinafter Transcript of A8] ("[S]o it looks like the retained counsel is filing that motion in court a lot and fighting

their colleagues—whether through positive or negative reinforcement—were one of the primary influences over what kind of advocates they were.

7. Material and Miscellaneous Motives

Not all the motives discussed by the attorneys were related to cause lawyering. In addition to those discussed above, many of the lawyers mentioned motives for choosing their work that had little to do with the common themes of cause lawyering. There were both positive and negative motivators. They talked about the compensation, the autonomy of having to answer to no one but the client, the improved hours over large law firms, and the early litigation experience available in criminal work. Others discussed feeling initially excluded from top government or law firm jobs for reasons ranging from being minorities to mediocre grades in law school. Although no one said this explicitly, a few of the attorneys seemed to remain in their fields out of inertia. For instance, one lawyer who had been defending criminal cases for over twenty years explained he was just a few years from retirement and didn't want to change careers despite being "very tired of it all." Although these motives have little to do with cause lawyering, they are important to mention insofar as it should be acknowledged the presence of other motives does not necessarily negate cause lawyering. That is, it may be possible for a cause lawyer to be motivated by a mix of traditional "causes" and also be attracted to the work for reasons unrelated to a cause.

II. CRIMINAL DEFENSE LAWYERS AS CAUSE LAWYERS: THEORETICAL SUPPORT

While Part I of the paper is empirical, Part II is grounded in theory—applying the existing literature on cause lawyering to the enterprise of criminal defending. The purpose here is to define the theoretical conception of cause lawyering to determine whether and where criminal defenders fit. The study of cause lawyering contributes to our understanding of social movements and legal reform. Likewise, an appreciation of criminal defense lawyers as cause lawyers can reveal scores about the nature and progress of criminal law reform.

As part of the study of socio-legal change, scholars have long been trying to define cause lawyering: recognize its forms and understand its motivations. They have done so largely by attempting to determine the boundaries of cause lawyering—that is, determining what it is by

for them and all, that is like salesmanship in some ways . . . . The retained counsel would file things just to make the impression to the client.").

distinguishing what it is not.[98] Must these lawyers serve traditional liberal causes or can they serve conservative ideals?[99] Can they represent individuals or groups and classes of people?[100] Can they be employed by the government, large firms, or individuals?[101] Can they be paid handsomely for their work or must the work be remuneratively altruistic?[102] Can their opponents also be cause lawyers? Is traditional litigation required or can they be activists, demonstrators and lobbyists? Must they be full-time public interest lawyers or can private attorneys doing pro-bono work be included as cause lawyers?[103]

In the conventional literature on cause lawyering, the paradigmatic cause lawyer is a poorly-paid altruistic attorney who handles impact litigation cases on broad constitutional or moral issues. The often touted examples of cause lawyers are human rights lawyers, civil rights and civil liberties lawyers, environmental lawyers, and anti-abortion lawyers.[104] Criminal defense attorneys, whose cause is often the individual freedom of a particular defendant (without regard to guilt or innocence), are often omitted from the studies of cause lawyering.[105] The exclusion of traditional criminal defense lawyers is in some respects understandable. Criminal defense attorneys are often uncharitably depicted as using legal "technicalities" to represent individual defendants despite who these defendants are and what they have done rather than because of it. While what they do in some ways resembles public interest work, the similarities extend principally to the high case-loads, impoverished clients, squalid work places, and low salaries that have become emblematic of the condition of the government lawyer.

98. Menkel-Meadow, *supra* note 7, at 33.

99. *See, e.g.*, John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5, 7 (2003) ("Some of the lawyers serving conservative causes are motivated by ideological commitment . . . Lawyers for religious, patriotic, and libertarian groups are, perhaps, more likely than business lawyers to be driven primarily by ideals rather than by financial gain or professional advancement.").

100. *See* Sarat, *supra* note 4, at 333 (explaining that for some death penalty attorneys, successful cause lawyering is expressed in the important and intense relationships formed with individual clients); Sterett, *supra* note 11, at 307 (discussing the radical lawyer's focus on individual clients rather than on the cause in Britain).

101. *See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1281 (1976)* (articulating changing nature of litigation toward broad social reform cases, often involving government, rather than litigation between private parties).

102. Menkel-Meadow, *supra* note 7.

103. Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 4, at 201 (arguing for a reconsideration of the assumed separation between socially conscious lawyering and private practice).

104. SCHEINGOLD & SARAT, *supra* note 12, at 5.

105. The exception to this is the anti-death penalty attorney. *See, e.g.*, Sarat, *supra* note 4.

If in fact criminal defense attorneys are cause lawyers, they are an interesting case precisely because they defy the conventional stereotypes of cause or public interest lawyers. It is feasible that no case need be made for classifying criminal defense lawyers as cause lawyers. Much of the recent scholarship on cause lawyering has focused on questioning the perceived boundaries between conventional and cause lawyers. Prominent contributors to the field tell us that cause lawyers can be private as well as public,[106] can represent class actions and impact cases as well as individual clients,[107] can be poorly-compensated or well-paid, can be altruistic or harbor ulterior motives.[108]

Criminal defense attorneys themselves encompass a diverse group, clouding certain classifications. They bridge the divide between public interest and private practice, between government attorneys and anti-establishment lawyers, between poorly paid and well-compensated professionals, between impact litigation lawyers and advocates for individuals. This further makes the branding of defense attorneys as cause lawyers more difficult.

Nevertheless, the interviews with lawyers suggest that many criminal defense attorneys perceive themselves to be cause lawyers motivated by moral, political and ideological convictions. While this self-perception is instructive in categorizing defense attorneys as cause lawyers, it cannot be dispositive. The fact that criminal defense lawyers defy an easy categorization as cause lawyers helps illustrate that cause lawyering is a "contested concept"[109] with room for divergent attorney practices and experiences. The literature on cause lawyering and on the taxonomy of cause lawyers emphasizes that cause lawyering can take on a wide variety of forms.

Although scholars recognize the breadth of forms that cause lawyering can take, it is not so fluid as to become meaningless. There is some agreement about a general definition. The term cause lawyer describes the activist lawyer who is committed to using the law as a vehicle for building a "good" society.[110] Because cause lawyers— also referred to as social justice lawyers— seek social change, they defy the common view of lawyering as a purely instrumentalist endeavor in which legal professionals

106. Anna Marshall & Scott Barclay, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, *in* THE WORLDS CAUSE LAWYERS MAKE (Stuart Scheingold & Austin Sarat eds., 2005).

107. Sterett, *supra* note 11, at 239-316.

108. Menkel-Meadow, *supra* note 7.

109. SCHEINGOLD & SARAT, *supra* note 12, at 5.

110. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 4, at 410.

are hired to secure whatever goal the client desires.[111]For these activist lawyers, the client's goal may reflect the greater cause but it is not necessarily an end in itself.

The stereotypical cause lawyer has strong moral convictions that she seeks to effectuate through her work. Her work is most commonly litigation or client representation. Her work is part of a social movement in pursuit of an ideal or the protection of a group. She is often a dissident and an opponent of authoritative figures and institutions. When the cause lawyer represents individual people or takes on specific cases, they are generally in pursuit of furtherance of incremental changes that are part of a greater strategy. She gets paid little for hard and unpopular work that can bear significant social, professional and status costs. The stereotypes have been increasingly questioned, if not debunked, in cause lawyering studies.

Criminal defense lawyers, for example, problemmetize any attempts to simplify the conception of the cause lawyer as they are not a monolithic group. Some defense lawyers often have strong ideological and political beliefs that they seek to effectuate through their work, but others have chosen the profession because they enjoy the fight itself. They represent individuals, but over time tend to think of these individuals as a class. This is especially true for public defenders who represent so many individuals serially that their corpus of clients resembles a group.[112] Moreover, some define their work not by whom they represent but by whom they oppose. Their purpose is to challenge law enforcement and the government. Criminal defense lawyers do not necessarily fit the stereotype of public interest lawyers who are poorly compensated. These lawyers are simultaneously some of the worst and best compensated attorneys in the profession. In addition, the work settings for criminal defending run the gamut from the public defender's office to some of the nation's most prestigious law firms. Their clients can be drug dealers, traffic violators, tax evaders, white collar executives, the mafia or institutions. Although the public defenders and appointed attorneys are not government employees in the traditional sense, they are typically paid by a governmental entity. Finally, criminal defense lawyers are critical players in the criminal justice system. The system could not, constitutionally, function without them. Thus these cause lawyers are in the odd situation of legitimizing the very system and laws they seek to challenge.

111. SCHEINGOLD & SARAT, *supra* note 12, at 3.

112. I am reminded of a federal trial I once witnessed where the prosecutor, in his final opportunity to sway the jury, began his closing argument with the trembling words "Ladies and Gentlemen of the jury, I represent the people of the United States of America." Not to be bested, when it was his turn to address the jury, the defense attorney began: "Ladies and Gentlemen of the jury, I too represent people of the United States of America. I just do it one person at a time."

Despite some of these anomalies in the criminal defense enterprise, there can be little doubt that they are cause lawyers. Admittedly my research shows that not every criminal defense attorney interviewed is motivated solely or even predominantly by "the cause."[113] Nonetheless that does not disqualify criminal defending as a profession that is generally occupied by cause lawyers. As Marshall and Barclay explain, many lawyers who would accurately be categorized as cause lawyers are frequently excluded by scholars because they do not fit squarely into the cause lawyering framework.[114] Lawyers who work in firms, are handsomely paid, handle cases outside of their "causes," or do not even identify themselves with a cause may nonetheless be cause lawyers. Marshall and Barclay caution that scholars of cause lawyering do best to emphasize the "cause" over the "lawyer" because focusing on the lawyer's habits, practice or demographics leads to an overly rigid and under-inclusive approach. A cause-centered approach ultimately provides a more nuanced view of social movements and those involved in them. [115]

III. MANAGING CONFLICTS

Having established that many criminal defense lawyers are cause lawyers, the question arises: What difference does this make? Do criminal defense lawyers *qua* cause lawyers handle their cases differently? Are their clients better off or worse off? I argue that lawyers who are guided by their own moral and political values – in addition to the ethical and professional rules—are better lawyers for criminal defendants. For them, the baseline of what constitutes successful advocacy is generally higher. In addition, the stakes of advocacy are greater for lawyers who are concerned about both the client and the cause. It stands to reason however that the greatest danger arises when there is a potential conflict between the cause pursued by the lawyer and either the interests of the client or the norms of the profession. In other words, if we are to evaluate the merits of criminal cause lawyers, a critical part of that evaluation must turn on how they manage conflicts.

One very distinct feature of cause lawyering is the nature of the ethical and professional conflicts encountered and how they are resolved. For all cause lawyers there exists, at least theoretically, a tension between serving the individual client and serving the social cause. Under the Model Rules of Professional Conduct and the Model Code of Professional Responsibility

113. *See infra* Part I.B.7.
114. Marshall & Barclay, *supra* note 106.
115. *Id.*

attorneys must, first and foremost, represent the interests of their clients.[116] And they must do so zealously.[117] These guidelines say nothing of the lawyer's own cause. The cause lawyer hopes that her cause and the client's interests will be compatible, if not identical. However, the potential for conflict may be heightened for the criminal defense attorney who must use all legal means at her disposal to help defend her client regardless of her own feelings about the client's innocence and whether the client's release is in society's best interest.

At first blush there appears to be little room in the criminal defense enterprise for any cause other than the defendant's freedom. But the lawyers interviewed during the course of the qualitative study described above found interesting ways to handle the conflicts that arise in their work. Some of these situations were not perceived as conflicts by the lawyers but seem, from the outsider's perspective, to involve very real potential for conflict. In this section, I consider three examples of the types of "conflicts" commonly faced by the attorney respondents in the study.

First, I examine the criminal cause lawyer's desire to allow each defendant a day in court regardless of the merits of the defendant's argument. One example of this dilemma occurs when attorneys refuse to file *Anders* briefs. The refusal to file such briefs conflicts with the attorney's duty, as an officer of the court, to refrain from filing frivolous motions. A second conflict involves the cause lawyer's temptation to use collective action to improve the condition of criminal defendants as a group even when it poses risks to individual defendants. The two examples of collective action presented by the respondent attorneys were used to combat prosecutorial or government policies. In one instance, some lawyers described the prosecutorial policy of requiring defendants to waive appellate rights in plea agreements, and in another instance the execution of Miranda warnings for bilingual defendants. The third conflict entails the triage engaged in by criminal cause lawyers who attempt to be selective in determining which claims to make for which clients. They do with an eye of reserving certain issues for test cases or foregoing certain claims to reserve credibility for future cases. The situations described by the defense lawyers involved conflicts between the court and professional rules and

116. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003) ("A lawyer must . . . act with commitment and dedication to the interests of the client . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980) ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.").

117. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt 1 (2003) ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.").

their visions of their roles as cause lawyers, conflicts between client's immediate interests and the cause, and between present clients and future clients. I contend later that all of these practices are to some degree endemic to cause lawyering but they present conflicts of interest and would be prohibited by a strict reading of the professional responsibility rules.

A. The Anders *Brief: Navigating the Duties to the Court Versus the Client*

Criminal defense lawyers who are cause lawyers oftentimes face ethical conflicts between their perceived duties to the profession as officers of the court and their perceived duties to their clients.[118] This sort of conflict is not unique to cause lawyers[119] but may take different forms in the cause lawyer context. One particular variation of this conflict for criminal defense lawyers who are cause lawyers arises with the filing of *Anders* briefs on appeal.

An indigent criminal defendant has the constitutional right to the assistance of appointed counsel that generally extends to the first appeal.[120] In some instances, attorneys are appointed in cases in which no meritorious appellate issues exist. A court appointed attorney saddled with an appeal that appears to lack grounds faces the choice of either filing a frivolous appeal or informing the court (almost certainly against the client's wishes) that there are no worthwhile claims to present. The vehicle by which an attorney could communicate the lack of meritorious issues and her subsequent desire to withdraw is called an *Anders* brief— named for a 1967 Supreme Court case.[121] The *Anders* brief allows the attorney a constitutional yet graceful retreat from an appeal she perceives to be frivolous.[122] By submitting an *Anders* brief, an attorney can circumvent the conflict between protecting the defendant's constitutional rights to access to the appellate process[123] and the lawyer's ethical responsibility to pursue

118. *See* Margareth Etienne, *Remorse, Responsibility and Regulating Advocacy: Making Defendants Pay for the Sins of their Lawyers*, 78 N.Y.U. L. REV. 2103, 2115-17 (2003) (describing conflicts arising between a lawyer's obligations to the legal system and her obligations to the client).

119. *See* MODEL RULES OF PROF'L CONDUCT, pmbl. § 9 ("In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.").

120. Douglas v. California, 372 U.S. 353 (1963).

121. Anders v. California, 386 U.S. 738 (1967).

122. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . . ."); David Mote, *Appealing Issues*, THE BACK BENCHER, Jan. 1998, *available at http://www.ca7.uscourts.gov/benchv10.htm* ("Fed. R. App. P. 38 . . . require[s] that all appeals and arguments be well grounded and provide[s] for sanctions for making frivolous arguments or filing frivolous appeals.").

123. *Anders*, 386 U.S. at 745 ("This procedure will assure penniless defendants the same rights and opportunities on appeal . . . as are enjoyed by those persons who are in a similar situation but who are

only claims of merit.[124] The key to preserving constitutionality[125] is that the attorney remain an "active advocate on behalf of [her] client," even if she finds the appeal lacking merit.[126]

The safeguards in place under *Anders* to insure "active advocacy" are quite strenuous.[127] Judges require that the *Anders* brief meet the strict requirements laid out in *Anders v. California*.[128] Nonetheless for most criminal defense lawyers who are committed to the cause of helping their needy and often disadvantaged clients,[129] the filing of an *Anders* brief against the client's wishes and interests is perceived as a betrayal. Not surprisingly, many of the attorneys I interviewed avoided writing *Anders* briefs in any circumstances. They devised clever ways to justify their decisions not to file Anders briefs or to avoid the conflict altogether.

Of the defense attorneys interviewed, only five had ever filed an *Anders* brief.[130] Each of the interviewed attorneys that had filed an *Anders*

able to afford the retention of private counsel."); *see also* Mary R. True, *The Constitutional Basis of the Indigent Appellant's Right to Appointed Counsel*: Penson v. Ohio, *109 S. Ct. 346 (1988)*, 58 U. CIN. L. REV. 1137, 1149 (1990).

While the *Anders* Court primarily based their decision on the necessity of protecting the defendants' Fourteenth Amendment equal protection rights, subsequent caselaw has added to the analysis the attorney's ethical duty to withdraw in the event that the appeal sought is frivolous. *See* McCoy v. Court of Appeals Of Wisconsin, 486 U.S. 429, 437-38 (1988) ("Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy.").

124. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

125. Cases after *Anders* also discuss, in more detail than *Anders*, the constitutional concerns implicated by the defendant's due process rights and right to counsel. *See* Penson v. Ohio, 488 U.S. 75 (1988) (finding that the Ohio Court of Appeals failed a defendant in first granting appellate counsel's motion to withdraw, and then failing to appoint new counsel); Evitts v. Lucey, 469 U.S. 387 (1985) (asserting that *Anders* recognized a due process right as well, by requiring effective assistance of counsel during a defendant's first appeal).

126. *Anders*, 386 U.S. at 744; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

127. The attorney must first perform a "conscientious examination" of the case. *Anders*, 386 U.S. at 744. If she then finds the appeal to be "wholly frivolous," she must notify the court and request the court's consent to withdraw. *Id.* Next, she must file a brief discussing any potential appellate issues and also allow her client to review the brief, giving the client time to raise further points if desired. *Id.* The burden then falls on the court to review the brief and decide whether or not the appeal is truly frivolous. *Id.*

128. *Anders*, 386 U.S. at 744; Andrea Lynn Evensen, *Ethics Extra: Removing Illinois Attorneys From Between the Ethical Rock and a Hard Place: Illinois Current* Anders *Requirements Should Be Reconsidered*, 18 CHI. B. ASS'N REC. 56, 56 (2004).

129. *See* infra Part I (B).

130. *See* Transcript of A40, *supra* note 62, at 13 (asserting that *Anders* briefs in her office are rare, because of the limited appellate work they do; also stating that she avoids writing an *Anders* brief by withdrawing at District Court level); Transcript of A37, *supra* note 48, at 23 ("[T]he one time I did an *Anders* Brief . . . I truly felt ethically anything else would of been frivolous; on the other hand if I can find a borderline frivolous issue, then I'll bring through on *Anders*."); Transcript of A36, *supra* note 37, at 17 ("[T]here just was no . . . question there was no argument that could be made . . . so and I didn't have a choice but to file it."); Transcript of A32, *supra* note 41, at 14; Transcript of Interview with Attorney 7 at 12 (Feb. 25, 2003) [hereinafter Transcript of A7].

brief in the past had done so only once[131] and seemed to do have done so with great reluctance. One of the few attorneys who had written an *Anders* brief in the past explained, "I hated having to argue against my client."[132] When another was asked why she had filed only one in her career, she responded, "I just feel like if you have some sort of an argument go ahead and make it to the client that is all. I guess it is sort of ideological."[133]

The attorneys who had not filed *Anders* briefs gave various explanations for avoiding them. Of particular concern to many of the interviewees was a belief in the client's right to appeal, and the attorney's duty to zealously advocate for the client.[134] Many attorneys feel as if the *Anders* brief is a sign of disloyalty to the client. As one lawyer explained:

> [T]o me an Anders Brief is almost like a slap in the face to the client. Why are you even bothering to write the brief, if all you are going to say is here is all the reasons to deny relief. To me it is sort of inherently conflicts with your obligation to represent the client zealously. . . . To me it is just contrary to every instinct I have as the defense lawyer to get up in public, a public document, say my client is a loser, or his issues are loser issues.[135]

According to another attorney, filing an *Anders* brief is tantamount to surrendering or waving a "white flag" on the client's behalf.[136] Perhaps for this reason, there seems to be a stigma attached to any attorney filing and *Anders* brief. Some attorneys noted that their colleagues actively or covertly discouraged the action.[137] Others consider fellow lawyers that file *Anders* briefs as "lazy."[138]

Because attorneys do not like to file Anders briefs, they find all sorts of justifications for avoiding them. Most attorneys faced with a conflict between their obligation to the client and their ethical obligation to avoid bringing frivolous cases largely opt in favor of the client. One attorney, confronted with a "very weak, and terrible issue," appealed anyway.[139]Another, considering the possibility, asserted that:

131. *See* Transcript of A40, *supra* note 62, at 13; Transcript of A37, *supra* note 48, at 23; Transcript of A36, *supra* note 37, at 17; Transcript of A32, *supra* note 41, at 14; Transcript of A7, *supra* note 130, at 12.

132. Transcript of A36, *supra* note 37.

133. Transcript of A7, *supra* note 130.

134. *See* Transcript of A23, *supra* note 42.

135. Transcript of A10, *supra* note 39.

136. Transcript of A7, *supra* note 130.

137. *See, e.g.*, Transcript of A25, *supra* note 38, at 11; Transcript of A23, *supra* note 42, at 17; Transcript of A8, *supra* note 97, at 17.

138. *See, e.g.*, Transcript of A39, *supra* note 69; Transcript of A37, *supra* note 48; Transcript of A8, *supra* note 97; Transcript of A3, *supra* note 89.

139. Transcript of A39, *supra* note 69; Transcript of A37, *supra* note 48; Transcript of A8, *supra* note 97; Transcript of A3, *supra* note 89.

> I would I would think that if . . . [I'm] in a position to do [an Anders brief], I'd rather write up an appeal in which I had an issue no matter how weak the issue was than write up an appeal in which I had to explain why every issue I considered is a failure. I mean if you're gonna have to write it, I'd just rather write something I was adversarial in and as acting as an advocate.[140]

Some attorneys viewed the *Anders* dilemma not as a formalistically ethical problem but rather as a moral problem. One attorney was quite blunt: "I know it's not an ethical problem. I think it's immoral. I don't think any defense attorney should ever file one."[141] Other attorneys argued that *not* filing *Anders* briefs seemed more consistent with their ethical obligations as officers of the court than filing them. They argued that filing the *Anders* brief was time consuming and a waste of resources for the court.[142] Most lawyers explained that preparing an *Anders* brief often requires much more writing than an appeal itself.[143] Anders briefs "take like 10 times the amount of time and energy that filing an actual appellate brief does," said one attorney.[144] In support of this belief, one interviewee described the typical *Anders* process:

> Frankly, the *Anders* brief is more work than the other one, because [here is] . . . almost always what [our] Circuit does [when] you file an *Anders* brief, which takes a lot of time because you have to argue why all these issues are not issues: [Our] circuit will look at it . . . and say, "Well, we disagree with you on this issue," or they'll issue an order saying, "Here's an issue we think you should appeal that you didn't discuss." So . . . you've filed the *Anders* brief, and then now you've got to brief this other issue, which the []Circuit says you should have—you feel kind of foolish then. You file [the issue identified by the court], you go up and argue it, and you're in this sort of awkward position because you're advocating a position that you first either didn't think about or said you didn't believe in. And then what usually happens almost always is that the []Circuit denies it anyways. So, raise this issues, and so you do all this work raising this issue, and then they say, "Well, no, you're wrong." So to me it's easier, it's just less time consuming, to find some sort of legal foothold to raise [the standard appeal].[145]

140. Transcript of A33, *supra* note 40.

141. Transcript of A5, *supra* note 55, at 9.

142. For a contrary view, see James E. Duggan & Andrew W. Moeller, *Make Way For the ABA:* Smith v. Robbins *Clears a Path for* Anders *Alternatives*, 3 J. APP. PRAC. & PROCESS 65, 103-06 (2001); Frederick D. Junkin, *The Right to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of* Anders v. California, 67 TEX. L. REV. 181, 187 (1988).

143. *See, e.g.*, Transcript of A23, *supra* note 42 ("But I think as a practical matter, it's harder to do, it's more work.").

144. Transcript of A34, *supra* note 38.

145. Transcript of A23, *supra* note 42; *see also* Transcript of A10, *supra* note 39, at 15 ("In fact in this circuit in particular, which I think arguably keeps spreading, if you submit an *Anders* Brief our experience has been, they send it back to you and tell you to argue the issue, or they will give oral

Another strategy used by attorneys to avoid filing the *Anders* brief involves persuading the client to forego the appeal. If the client can be made to agree to waive the right to appeal, this effectively nullifies the conflict between actively following the client's wishes and responsible use of court resources. Most lawyers thought that if one searched hard enough, there was almost always an appealable issue to be found. But as one lawyer said, "if you reach that point, your client needs to understand why an appeal is not the right course of action."[146]

Finally, some attorneys avoided the conflict altogether by adopting a very limited definition of frivolousness and often found merit in issues that had been squarely decided against them.[147] They admitted that the meaning of frivolity seems to differ between defense attorneys and the judges and prosecutors. Many of the defense attorneys think that the charge of frivolous is "overused" by judges and prosecutors.[148] Their perspective is different by virtue of their roles.[149] As one attorney put it, if defense lawyers did not file claims that had only a small chance of winning, "we would never file anything at all."[150] Another attorney explained, "prosecutors and judges who are mostly former prosecutors tend to have a cynical view." [151] Not all of the interviewees perceived judges as harshly narrow on the frivolity question. While one noted that judges were often apt to find claims without precedent frivolous, she also added: " I think . . . some judges have a greater appreciation of the need to make some arguments to satisfy the client's needs. . . knowing that you are obliged to make some arguments that you may not even believe in.[152] Still, most of

argument on it. You know then they are very quick to criticize what they perceive to be frivolous appeals, but at the same time they seem not inclined to accept *Anders* Briefs.").

146. Transcript of A23, *supra* note 42; Transcript of A10, *supra* note 39, at 15; *see also* Transcript of A12, *supra* note 68 (discussing the decision to file an appeal or an *Anders* brief and explaining that "part of that job is, I believe, getting your client to understand the course of action that is probably most prudent for them"); Transcript of A8, *supra* note 97 ("When there have been cases where there is no possible appeal issue, I discuss that with the clients, they generally ask for an appeal to be done. I haven't had that situation come up. I think part of it . . . with a lot of the clients, is communicating with them sufficiently so they understand the situations.").

147. Transcript of A10, *supra* note 39 ("You may have an issue that you think is a great issue, and you recognize the court's authorities against you, but you want to preserve a case, a law changes down the road, or you want to make a rehearing or a certain petition. That is one way to acknowledge the weight of authority from saying this has no merit.").

148. Transcript of A7, *supra* note 130.

149. Transcript of A12, *supra* note 68 ("I can feel how important every issue is to that client. How it affects their freedom. [And] I'm not in court as often as most prosecutors and as often as judges . . . .").

150. Transcript of A11, *supra* note 39, at 4.

151. Transcript of A6, *supra* note 70 ("I have been doing defense work for nine years, and that necessarily means that I have different perspective than prosecutors do . . . . [F]or instance, they would think it is frivolous for me to argue that the person who has dealt drugs on numerous occasions in the past, on this occasion was just in the wrong place at the wrong time. They would think that is frivolous. I think that is entirely possible . . . .").

152. Transcript of A10, *supra* note 39.

the attorneys interviewed seemed prepared to risk a charge of frivolity rather than submit an *Anders* brief, even understanding that such a charge could result in sanction.[153]

B. Collective Action in Furtherance of the Cause

Criminal defendants and their attorneys often feel outmatched by the strength and resources of the state to investigate and prosecute.[154] The enormous power differential between the state and the defense consists of resource imbalances, procedural advantages, and political and psychological advantages.[155] These inequities lead to further imbalances in bargaining power[156]—a critical element in the over ninety-six percent of cases that end in guilty pleas.[157] The power imbalance is likely to be reinforced by legislators given the political pressures of the "tough on crime" climate. Similarly, the Supreme Court is not likely to intercede as it was held long ago that there is no requirement that defendants be placed on the same footing as the Government.[158]

One way in which defense attorneys have attempted to address the power differential is by subscribing to the old adage that there is power in numbers. Collective action is a promising idea for criminal defendants who, if acting together, could work to seriously handicap the criminal justice process. The potential of the collective action strategy is obvious if one imagines what would happen if all criminal defendants exercised their rights to a trial by jury. The criminal justice system would probably collapse under the tremendous backlog of cases such a strategy would generate.[159] Most governments simply do not allocate enough resources—prosecutors, judges, jurors or even courtrooms—to handle a large trial

153. *See* Transcript of A24, *supra* note 43; Transcript of A3, *supra* note 89 ("Well you can get fined if you raise trouble with arguments. . . . Not only have they been fined but they've been disbarred. So that's a big problem."). *But see* Transcript of A39, *supra* note 69 ("[T]here's no harm in filing a frivolous brief. I mean, what are they going to do? 'This is frivolous! We're going to . . . .' No. They're just going to say, 'This is frivolous – appeals denied.' And at least the client has had a shot at . . . venting some . . . he feels that he's at least had a shot at the process . . . .").

154. Luban, *supra* note 65, at 1731-44.

155. *Id.*

156. *Id*. at 1744-48.

157. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2000, 426, tbl. 5.16 (Kathleen Maguire & Ann L. Pastore eds., 2001).

158. Ake v. Oklahoma, 470 U.S. 68 (1985) (clarifying that the relevant inquiry was not whether defense resources approximated prosecutorial resources but whether the defendant had access to "the basic tools" of an effective defense). *See also* Peter Arenella, *A Forward: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1234-35 (1996) (describing the resource imbalance problem between defense and prosecution and demonstrating the problem in reverse in the O.J. Simpson case); David Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 482 (1992);

159. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

caseload. Arguably if a such a strategy could be implemented, defendants would be better off as a group. Perhaps prosecutors would have to dismiss more cases, provide more enticing plea bargains, or do a less thorough job on each case tried.

So why don't criminal defendants and their lawyers act collectively to seek jury trials in all cases? Most defendants enter into plea agreements because they believe that they would be convicted at trial and risk harsher penalties. If defendants collectively demanded trials, many would likely enjoy some benefit. However, the first to be tried would pay the cost for this benefit by receiving higher sentences post-trial than they could have negotiated pre-trial. The criminal justice system is designed to take advantage of the self-interested focus of most defendants.

Lawyers scrupulously observing their ethical duty to zealously represent each client would never advise a client to join this sort of collective action unless the client would clearly be one of the beneficiaries. Cause lawyers might have a different view. For the criminal defense cause lawyer who may see the class of criminal defendants generally as the beneficiary of her work, collective action has great allure. It offers these lawyers an opportunity to help large numbers of people rather than one individual at a time.[160] The defense lawyers with whom I spoke described two examples of how collective action was used to affect legal change in ways that went beyond benefits to their individual clients.

1. Collective Opposition to Appeal Waivers

In September of 1995 the Department of Justice distributed a memorandum to federal prosecutors recommending that they consider including waivers of the right to appeal as a standard part of plea agreements in their districts.[161] The Government worried that far too many government resources were being squandered on meritless appeals by

160. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 U.C.L.A. L. REV. 1103, 1111 (1990) (explaining that legal services lawyer face the dilemma of choosing between allegiance to individual clients and large groups of needy people).

161. The Department of Justice sent a memorandum to its prosecutors in September of 1995 advising that appeal waivers were legal, and suggesting that prosecutors "evaluate whether waivers of sentencing appeal rights and post-conviction rights would be a useful addition to plea agreements in their districts." Catharine M. Goodwin, *The Appeal Waiver Controversy Summary: 1996 Committee on Criminal Law Memo on Waivers of Appeal and Advisement of the Right To Appeal*, 10 FED. SENT. R. 212 (1998). Many of the attorneys corroborated their district's attempts to institute appeal waiver policies in the mid-nineties. *See* Transcript of A23, *supra* note 42, at 15 (explaining that the Government "didn't used to ask for appeal waivers up until about 5 years ago, I'd say they started asking for appeal waivers . . . for every plea, they wanted appeal waivers"); Transcript of A11, *supra* note 39, at 19 (discussing meeting with U.S. Attorneys in one district to discuss the Government's policy of including appeal waivers in all plea agreements); *id.* at 20 (describing a conversation with one prosecutor who admitted to being evaluated on how often appeal waivers were successfully used).

defendants who were merely unhappy with their sentences but had no good legal claims.[162] On the other hand, defense attorneys worried that criminal defendants were being pressured to waive an important safeguard when faced with the threat of exorbitant guideline sentences. As one lawyer explained, despite all attempts to prepare clients for what will happen at sentencing, defendants are put in a terrible position if "something unexpected comes up, . . . all of a sudden their sentence has jumped [up] by a third and they don't have any appeal rights."[163] The bargaining away of the appeal right might negatively impact the individual defendant who would like to appeal a sentencing judge's erroneous decision.[164] At worst, the reduction of appeals on a mass scale could severely handicap the development of the law generally. In the example provided by one attorney, he explained:

> The law in [this] circuit may be well settled on a particular downward departure, nevertheless if we don't keep raising it the Court is never going to change their mind. I think [the waiver] does impact on the ability to excel at what we want to accomplish for advocating purposes.[165]

Another lawyer argued that with the rise in appeal waivers, not as many issues are being litigated and sometimes it becomes difficult to find cases on particular issues.[166] To the extent that appellate courts play an important role in creating the common law of sentencing and regulating divergent applications of the law, their systematic exclusion from the criminal justice process is grounds for concern.

In response to these concerns, one strategy employed by some public defender offices and private criminal attorneys attempted to institute a "no waiver" policy. The assumption was that if defendants refused plea

162. Transcript of A8, *supra* note 97, at 10 ("That is why the government wants the waiver, in my mind, because they don't want to do the work"); Transcript of Interview with Attorney 1 at 7-8 (Feb. 24, 2003) [hereinafter Transcript of A1] ("I think that [appeal waivers are] a way for [prosecutors] to reduce their workload" because "they don't want" to write appeals on what they see as frivolous issues.").

163. Transcript of A1, *supra* note 162, at 7.

164. Transcript of A25, *supra* note 38, at 9 ("arguing that one problem with the waivers is that if "problems arise" at sentencing, "there's really no avenue that's available to [defendants]. Everything's foreclosed."); Transcript of A23, *supra* note 42, at 5 (explaining that a waiver of appeal could impact a case if "your sentencing judge makes an incorrect legal decision— a decision that could be aptly incorrect based on the law in fact. . . . Yet there is an appeal waiver and in that sense it just almost totally eliminates the defense attorney's ability to advocate. Even in the case of an incorrect application of law.").

165. Transcript of A1, *supra* note 162, at 8.

166. Transcript of A5, *supra* note 55, at 18 (arguing that cases involving charges that carry higher sentences, such as gun charges, tend to be resolved with pleas carrying appeal waivers and so they tend to produce less sentencing case law than they might otherwise); *see also* Transcript of Interview with Attorney 13 at 17 (June 12, 2003) [hereinafter Transcript of A13] ("You know, there's so many plea waivers and there's so many pleas, that we're not getting a true represented sampling in appeals about the great issues. Um, people are just letting them you know, go down the old appeal waiver river.").

agreements containing waivers of the right to appeal, the United States Attorneys Office would eventually reverse its own policy rather than suffer the huge backload of cases. A systemic rejection of waivers would only be successfully implemented if a sufficiently large number of defendants consistently took this position. Because the decision regarding whether to accept a plea agreement is the defendant's to make, a "no waiver" policy essentially means that attorneys would strongly discourage their clients to accept plea agreements that required a waiver of the right to appeal. This technicality notwithstanding, most attorneys noted that they had a great deal of influence over their clients in such matters.[167]

The "no waiver" policy has its risks for the individual defendant and therefore should create a conflict for attorneys who recommend it only because of the benefit it creates to other defendants. A defendant who rejects an attractive plea deal because it requires a waiver of appeal may end up with a higher sentence after going to trial or pleading with no agreement. Taking this stance against appeal waivers is particularly questionable for the defendant who either has no good appeal issues or had no intention of appealing anyway.

Despite these risks, the lawyers interviewed described the strategies employed in their jurisdictions to address the appeal waivers. Some lawyers explained the difficulty of trying to encourage a system-wide rejection of appeal waivers. Attorneys often found that in individual cases, it was often in the defendant's best interest to take a plea even if it included a waiver of appeal. Although waivers of appeal were never beneficial to clients on their own, if they accompany some other benefit— such as the dismissal of a charge, the elimination of a mandatory minimum or consecutive sentencing provision—it would be difficult not to recommend that a client accept it.[168]

In one jurisdiction, the attorneys did not adopt a collective approach but rather treated the appeal waiver as an issue to be negotiated on a case by case basis. The result of the negotiation depended on the leverage of the parties in that particular case and their commitment to including or excluding the waiver.[169] But because the benefit of the collective approach

167. Transcript of Interview with Attorney 4 at 7 (Feb. 24, 2003) [hereinafter Transcript of A4] (explaining that overall clients tend to take attorney's advice to reject appeal waivers). *See also* Ann Southworth, *Lawyer-Client Decision-making in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1105 (1996) (explaining that legal services attorneys had great influence over their clients).

168. Transcript of A8, *supra* note 97, at 10.

169. Transcript of A13, *supra* note 166, at 13 ("I have not been very effective in removing the waivers from pleas that I've negotiated."); Transcript of A9, *supra* note 59, at 4 ("I know some prosecutors, if by force, they will just give up and leave the client without an appeal waiver. Some prosecutors won't give up at all.").

is lost in a case by case determinations, many of the attorneys explained that they encouraged their clients to plead "straight" without plea agreements[170] or they complained that they did not get much in exchange for waiving appellate rights.[171]

In another jurisdiction, the attorneys there were able to use their collective power to greatly reduce the use of appellate waivers across the board in the vast majority of cases.[172] After the Government began its concerted effort to include appeal waivers in all plea agreements, a large number of lawyers in the district resisted them by encouraging their clients not to sign those plea agreements and to plead "blind" instead.[173]The waivers were included only in the few cases where the defendant received a significant benefit in return. An example of such a benefit was the reduction of a felony to a misdemeanor.[174] Interestingly the attorneys in this particular district believed they were more successful than attorneys in other districts at fighting the appeal waiver policy.

> We don't get a requirement of Appeal Waivers nearly as often as a lot of districts because from the beginning. . .well I guess a couple of reasons. We fought them hard from the beginning and they got tired of fighting us on this. Now our US Attorney's office backs down pretty quickly. We would say, "We're not agreeing." And they would basically say, "Okay." It's becoming a little bit harder now with this administration but we still get less Appeal Waivers than a lot of districts that I've heard of. So it isn't as major a problem as I think it is for other places. The

170. Transcript of A14, *supra* note 71, at 15 ("[In] many instances my advice to my clients, I let them make the decision, is let's go in without a plea agreement."); Transcript of A11, *supra* note 39, at 11 ("That's one of my best strategies. I do this all the time. I plead straight up.").

171. Transcript of Interview with Attorney 16 at 21 (June 13, 2003) [hereinafter Transcript of A16] ("I've had a lot of cases where a prosecutor agrees and I'm not getting anything in the plea agreement that I couldn't otherwise get by pleading to the indictment."); Transcript of A10, *supra* note 39, at 12 ("By and large, I haven't gotten much for appeal waivers.").

172. Transcript of A21, *supra* note 57, at 15 (describing being able to get appeal waivers removed from plea agreements in 90 percent of cases).

173. Attorneys used the term "blind plea" to refer to guilty pleas with no plea agreement. Both parties would argue any sentencing issues to the judge and the judge would impose the sentence she thought was proper. In such a case, both parties could appeal a sentence they believed to be erroneous. The blind plea became the primary means of resisting the appeal waiver. *See* Transcript of A23, *supra* note 42, at 15 ("[F]or every plea, they wanted appeal waivers. And the initial reaction was . . . and they wouldn't back down, we just started doing blind pleas."). As another attorney in that district explained, the appeal waiver soon became an ineffective tool against experienced lawyers who became known among prosecutors for advising their clients against them.

> [Waivers] don't have any major effect. Historically, first they didn't exist. Then the government tried to put them into lots of pleadings and then people like myself started doing blind pleas left and right. Because if the government's offer is worse than what I can do without a plea agreement why would I take your offer? So the Government . . . they try to put in plea waivers . . . appeal waivers whenever they can. . . . But not, I think with somebody like me, if they've got a reputation that says "Don't bother 'cause he doesn't . . . he doesn't do these."

Transcript of A22, *supra* note 68, at 11.

174. *See* Transcript of A21, *supra* note 57, at 15-16 (describing negotiation of a plea with an appeal waiver because a felony charge was reduced to a misdemeanor).

> cases ordinarily that they ask for an Appeal Waiver in are cases which they at least feel like they've given us a huge amount of stuff.[175]

Although the attorneys did not describe the response to appeal waivers as a collective action or coordinated policy, [176] every attorney I spoke to in that district dealt with appeal waivers in the same way. The consequence was that the prosecutor's office also developed a categorical rather than case-by case approach to the appeal waiver—demanding it in only cases where they believed defendants were enjoying a substantial benefit.[177]

2. Collective Action to Expand Miranda

The attorneys in one of the public defenders' offices provided another interesting example of the use of collective action. They explained that there was a sizeable and growing number of Spanish-speaking defendants in the district.[178] Perhaps in response to the changing demographics, most federal law enforcement agencies were regularly providing the Miranda warnings to arrestees who did not speak English. But the Latino defendants who spoke some English but were still more comfortable with Spanish were not being offered the Spanish-version Miranda warnings. The defense lawyers were receiving complaints from these defendants who argued that they might have responded differently had they received the warnings in Spanish.

Unfortunately the law on this issue was not favorable to the defendants who have a functional command of the English. The Miranda waiver must be voluntary, knowing, and intelligent.[179] Although the Government has the burden of proving the propriety of the waiver, the standard is quite broad. A waiver is knowing and intelligent if the totality of the circumstances surrounding the interrogation reveals that it was "made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it". [180] Under this totality of the circumstances test, it is unlikely that a court would exclude a statement made by someone marginally proficient in English simply because she

175. Transcript of A28, *supra* note 49, at 7.

176. *See* Transcript of A21, *supra* note 57, at 15 (explaining that there was no office policy regarding appeal waivers).

177. Transcript of A39, *supra* note 69, at 6 ("I'm not just going to sign the plea agreement with that [waiver] paragraph in there unless you tell me something that you're giving. You know, like downward departure, agreeing to an out of the way departure."); Transcript of A37, *supra* note 48, at 19 (stating "I've never, I've never waived an appeal that I didn't want to waive, I've either gotten something major in return or haven't waived it."); Transcript of A28, *supra* note 49, at 7.

178. Indeed one of the largest growing demographics groups in federal prisons has been the Latino population. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 157.

179. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

180. Moran v. Burbine, 475 U.S. 412, 421 (1986).

would have been more protected had the warnings been given in her native Spanish.[181]

Although these lawyers had very little hope of changing "the law on the books," they devised a strategy to change "the law on the streets." The lawyers in both public defenders' offices I visited had weekly meeting during which they discussed new cases, reported recent victories and strategies and shared concerns.[182] In one such meeting, some of the lawyers discussed a plan to address the problem of Miranda warnings for Spanish-speaking defendants. The proposal required every attorney who had a case with Spanish-speaking or bilingual defendants to aggressively question the arresting officer on the stand (during preliminary hearings and suppression hearing) about her failure to read the Miranda rights in Spanish. The idea was that over time, these officers would begin perceive the failure to provide the rights in Spanish as a weakness in the case that defendants could potentially exploit. This tactic could be employed in most cases with Spanish-speakers, whether or not the defendant claimed she did not understand the warnings, whether or not there was a suppressible statement involved, and whether or not the case was eventually likely to be resolved by plea. The strategy was viewed as a harmless one even though the defendants in the cases in which it was used would not receive a benefit.

I attended an office meeting during which some of the lawyers were reporting on the success of this strategy. According to the lawyers, it was remarkably successful, at least among some of the federal agencies. One lawyer explained that it was now the unofficial policy of the U.S. Customs agents to read the Miranda warnings in Spanish for its many Spanish-speaking arrestees. Because many of the Customs officials spoke Spanish to the many Spanish-only speaking detainees, this was not difficult for the agents to adapt. What was interesting was that even those Customs officers

181. Several courts have found a perfunctory understanding of the Miranda warnings sufficient to support a knowing and intelligent waiver. *See* United States v. Bustillos-Munoz, 235 F.3d 505, 517 (10th Cir. 2000) (finding that despite defendant's claims to the contrary he understood enough English to render his Miranda waiver knowing and intelligent); United States v. Hernandez, 93 F.3d 1493, 1502 (10th Cir. 1996) (explaining that despite imperfections of language translation, defendant understands the "essence" of Miranda warnings); *United States v. Yunis, 859 F.2d 953, 964-65 (D.C. Cir.1988)* (holding that errors in translated Miranda warning did not render warning constitutionally insufficient where defendant understood essence of rights); P*erri v. Director, Dep't of Corrections, 817 F.2d 448, 452-53 (7th Cir. 1987)* (holding Miranda warning administered in Italian by police officer with no formal training in Italian in dialect different from defendant's sufficient to effectuate valid waiver); *United States v. Boon San Chong, 829 F.2d 1572, 1574 (11th Cir.1987)* (holding that waiver is proper if defendant understands that he does not need to speak to police and that any statement he makes may be used against him); *United States v. Gonzales, 749 F.2d 1329, 1335 (9th Cir.1984)* (holding waiver valid where defendant appeared to understand Miranda warning administered by officer in broken Spanish).

182. I attended at least one of these meetings in both of the public defender offices I visited. It was during one of these meetings that I first heard this particular strategy discussed. For further descriptions of these meetings see Etienne, *supra* note 15, at 442-43

who did not speak Spanish were now carrying wallet-sized cards with a Spanish translation of the Miranda warnings. The change among some of the larger agencies in the district, such as the Federal Bureau of Investigations and the Drug Enforcement Agency, was not as significant, but the lawyers noticed that some of those agents were also starting to testify during hearings to have read the Miranda rights in the language spoken by the defendant.

The attorneys happily reported that they had succeeded in changing the law by "training" the agents to provide Miranda warnings in Spanish. What pleased them more is that they believed that they had made a small change in the minds of the prosecutors and judges as well. The more some agents testified to providing the warnings in Spanish, the more it appeared that other agents were lacking if they did not do so. The attorneys triumphantly recounted that it was not uncommon for the prosecutors to ask the federal agents on direct examination, before the defense had an opportunity to do so, if the Miranda warnings had been read in Spanish. The prosecutor would then sit down gloatingly when the agent answered that she had.

What appeals to the cause lawyer about the use of collective action is its potential to harness the limited leverage of criminal defendants into a powerful bargaining entity. However, the limitation of this strategy is that it puts the individual defendant at risk. It is understandable why lawyers, including criminal defense lawyers, differ strongly in their views about the merits of collective action. That said, understanding the attraction of collection action makes it easier to understand the actions of some attorneys which might otherwise appear arbitrary and unreasonable.

For example, this discussion of collective action brings us full circle to the Attorney Tarlow's "policy" of not representing defendants who agree to assist law enforcement in cases against other suspects. In light of the discussion on collective action, Tarlow's policy may begin to look different to some.[183] There is little doubt that the government relies heavily on snitches, informants and cooperating defendants to investigate and prosecute cases. Although it is difficult to obtain figures regarding the number of cases that are founded on information provided through cooperation, it is safe to say that it is probably a significant percentage. Of all federal sentences imposed, approximately 20% are reduced based on substantial assistance departures.[184] Downward departures requested by the

183. It is worth noting here that I have no knowledge as to whether Tarlow's policy is part of some collective action strategy or an individual strategy.

184. U.S. SENTENCING COMMISSION, 2000 COMMISSION - DATAFILE USSCFY00, tbl.29 (2000) (showing that 9,506 defendants out of 52,660 received downward departures for substantial assistance in 2001); U.S. SENTENCING COMMISSION, 1997-2001COMMISSIONN - DATAFILES USSCFY97-

prosecutor, generally for substantial assistance, constitute over 80% of all downward departures.[185] If all defendants stopped cooperating with authorities, this collective action would greatly hamper law enforcement efforts. While this could be arguably disastrous for the general public in terms of crime reduction, criminal defendants might be better off as a whole if they collectively adopted Tarlow's advice.

C. To Raise or Not to Raise an Issue?: Managing Cases and Credibility

Perhaps one of the best known forms of cause lawyering involves the impact litigation model of lawyering. Impact litigation lawyers seek "to win cases to establish good precedent for future cases."[186] They select their clients carefully to pursue only those that are likely to advance the law in the direction they want it to go.[187] Like many cause lawyers who engage in impact litigation,[188] criminal defense attorneys oftentimes have particular issues or areas of the law in which they seek legal reform. The problem faced by these lawyers, particularly the public defenders, is that unlike most impact litigation lawyers, they do not handpick their clients.[189] In order to pursue impact litigation strategies, these lawyers tend to watch their dockets and wait for the right case to come along in which to raise a particular issue. This form of impact litigation can be fraught with interesting conflicts.

Cause lawyers may not often have *direct* conflicts of interest between their clients' goals and their own causes because they choose their clients (or the class of clients) in order to avoid such conflicts. An *indirect* conflict of interest more commonly arises when the interests of one client are not fully compatible with the interests of other future clients who otherwise (and perhaps better) embody the lawyer's cause. This generally means that lawyers have to prioritize among clients.

USSCFY01, Fig. G (1997-2001) (showing that from 1997 to 2001, the percentage of all defendants receiving downward departures for substantial assistance ranged from 19.3 to 17.1 percent).

185. Frank O. Bowman, III, *When Sentences Don't Make Sense*, WASH. POST, Aug. 15, 2003, at A27.

186. Kevin R. Johnson, *Lawyering For Social Change: What's a Lawyer to Do*?, 5 MICH. J. RACE & L. 201, 220-21 (1999).

187. *Id*. at 220 (citing JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) and Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976) for detailed history on legal reform and cause lawyering).

188. *See* Kirsten Edwards, *Found! The Lost Lawyer*, 70 FORDHAM L. REV. 37, 63-64 (2001) (defining impact litigation as litigation involving social reform and affecting a broad group of people beyond the immediate parties); Deborah M. Weissman, *Gender-Based Violence As Judicial Anomaly: Between "The Truly National and the Truly Local", 42 B.C. L. REV. 1081, 1159 n.268 (2001)* (defining impact litigation as litigation involving systemic relief to large numbers of people).

189. Although this is clearly the case for public defenders it also applies to the many private attorneys who take appointed cases.

The need to prioritize among clients is common among criminal defense lawyers, particularly those with limited resources. Professor Darryl K. Brown describes the basis for the triage that often occurs as a result.

> Defenders cannot choose to forego a case completely in the way that prosecutors can choose not to prosecute a crime, but they can come close. More to the point, they must, and commonly do, vary their level of representation among cases toward two ends (the second mandated by the first): allocating extremely limited defense budgets and giving priority to some clients in the most important cases.[190]

Lawyers who are limited in time and financial resources face these prioritizing decisions and must resolve them in an ethical and professional manner—assuming this is even possible to do.[191] Time and funds are certainly precious resources for criminal defense lawyers, and must be managed accordingly. But also valuable, and less discussed is the parsimony lawyers must employ in distributing their best (and worst) legal arguments. This is a prioritizing dilemma that may be different for criminal lawyers who are also cause lawyers.

Two variations of the need to prioritize arise with criminal cause lawyers. On the one hand, there is potential for conflict when lawyers try to determine which cases are the best vehicles for raising which claims. This means that they avoid wasting good claims and arguments on weak cases or cases with unsympathetic facts. A distinct version of this conflict occurs when lawyers try to avoid wasting time and credibility on clients with weak cases. Presumably this is because other cases are more deserving of time or risky arguments that might warrant a loss of credibility.

Almost every attorney interviewed discussed the importance of maintaining credibility before the judge.[192] Interestingly, they weighed the benefit to a particular client of making an argument in her case against the benefit to future clients. If it was a strong legal argument (but a weak case) otherwise, some lawyers worried that it would be less persuasive later (in a

190. Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 207 (2003) (arguing that "this practice is problematic—not because it occurs, but because lawyers largely deny it occurs and as a consequence do it poorly").

191. Brown says that it is and offers a specific suggestion for how attorneys ought to go about favoring some clients over others. *Id.* at 214 (arguing that these strategic decisions are the sort of professional discretion *Strickland* strongly protects). He recommends several informal practice guideline to improve resource allocation. First and foremost, there must be enough resources for initial case evaluations, in order to better prioritize. *Id.* at 215. Then the decision can be made whether to focus on "likely cases of factual innocence" or the likelihood of success in the defense litigation, apart from any considerations of factual innocence. *Id.* Brown recommends giving priority to vindicating actual innocence, and towards "clients who are likely to gain the greatest benefit from those efforts." *Id.* This would mean a focus on parties who face the most severe sanctions. *Id.*

192. *See e.g.*, Transcript of A21, *supra* note 57, at 20 ("I put a lot of stake in credibility. I probably put more into it than other people do. I believe that I cannot do good work for clients in the future unless I can establish credibility with the judges for clients that I have now.").

more deserving case) to the judge who had already heard and rejected it. If it was a weak argument, some lawyers worried that they would lose credibility before the judge and thereby not receive the benefit of the doubt when they argued an issue for another client that presented a close call.[193]

Criminal defense lawyers face this prioritizing daily.One attorney described the process as spending one's "credibility capital."[194] They need to decide what arguments to make for the client, considering the possible success for the client *and* the potential effect on the attorney's future credibility in the courtroom.[195] For example, one attorney noted the importance of balancing her credibility with the client's demands.[196] If she makes what she considers to be a borderline frivolous argument to the court on behalf of one insistent client, it may hurt her chances of winning in the future.[197]

> [U]ltimately my credibility is important to me so there are some arguments that I would make because I feel like there is no chance in hell they are going to win it. I am not protecting a right that the client really has or may have in the future and it is ultimately going to affect my credibility with respect not only to this particular client, but to other clients that I represent.[198]

Another attorney characterized this picking and choosing as the potential for "crying wolf:" if you present a judge with one too many arguments that she considers frivolous, when the extraordinary situation occurs, the judge will not give one the benefit of the doubt.[199] "[I]t also does more for your credibility . . . maybe not this client, but for the one down the road when I can step up and say 'Judge, you know that if I felt my client really, really needed to go to jail, I would tell you,'" explains yet another interviewee.[200] If this is true, this sort of argument may help the attorney's present client but not the ones that may "need[] to go to jail." This suggests that there are significant concerns about the need to preserve credibility in one case with an eye toward future or other cases.

The decision about what arguments to make in what cases and how much "credibility capital" each case warranted was more pronounced among lawyers who worked consistently with the same judges and

193. Transcript of Interview with Attorney 30 at 14 (Mar. 11, 2003) [hereinafter Transcript of A30] (talking about the importance of not stretching an argument to the point that it no longer reconciles with existing law of the Circuit); Transcript of A23, *supra* note 42, at 8 (discussing the importance of making legitimate arguments in terms of the effect that it will have on the outcome for a client).

194. Transcript of A6, *supra* note 70, at 13.

195. *See, e.g.*, Transcript of A30, *supra* note 193, at 13.

196. Transcript of A4, *supra* note 167, at 13.

197. *Id.*

198. *Id.*

199. Transcript of A33, *supra* note 40, at 13.

200. Transcript of Interview with Attorney 38 at 12 (May 13, 2003) [hereinafter Transcript of A38].

prosecutors. Attorneys who were repeat players in the courtroom, particularly the public defenders interviewed, noted this concern. As one explained:

> But I do think that if you are in a public defenders office or if you're in private practice when you do um, 95% of your work in a particular court, you are to some extent, going to think about the next case before you know, call the prosecutor a liar or the judge an idiot or whatever. . . . [S]o that you might not take extraordinary steps because you have to think about the next case. And . . . I think it's something that clients perceive as drawback: . . . public representation or in having an attorney . . . that works in a particular district all the time.[201]

In the final analysis, the issue of credibility lies less in the attorney's concern about how she is perceived by others than in her ultimate concern for the client and her success in obtaining the best for every client. While most lawyers evaluate themselves as advocates based on their level of zealousness, they recognized that they are evaluated by judges based on the credibility of their arguments. The quandary of how to spend this important resource of credibility, without detriment to the current client, the future client, and the attorney's cause, is one with which many criminal defense attorneys struggle.

IV. THE ETHICS OF CAUSE LAWYERING

A. Is Criminal Defense Cause Lawyering Desirable?

While the categorization of criminal defense lawyers as cause lawyers has explanatory power, it also raises interesting questions regarding the interplay of personal politics and lawyering and what it means for the consumers of criminal legal services. In essence, are criminal defendants generally enriched or disadvantaged when served by lawyers who are representing a cause as well as representing their clients? It is not possible to determine if cause lawyering is better for all criminal defendants in all circumstances. However, the empirical evidence demonstrates that there are many instances in which cause lawyering is very valuable to criminal defendants. Consider the examples provide earlier by the attorneys themselves.

In the context of the Anders requirement, it may very well be that the cause lawyer's instinct against the *Anders* brief is exactly correct. Not only

201. Transcript of A19, *supra* note 79, at 15. This description of the problems faced by criminal defense lawyers who are repeat players in a bureaucratic system is consistent with the classic and well-known study by sociologist Abraham Blumberg. *See* Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15 (1967) (describing defense attorneys, judges and prosecutors as cooperative players in the courtroom and how attorney conduct and advice to clients are influenced in part by the need to satisfy other players).

do attorneys prefer *not* to file *Anders* briefs, it appears that judges may prefer not to receive them. Martha C. Warner, a judge on Florida's Court of Appeals, wrote, "A continuing source of frustration for the appellate judge is the review of appeals by indigent defendants whose appointed counsel can find no meritorious issues and files what is known as an *Anders* brief."[202] Some commentators suggest that judges would rather face a possibly meritless appeal than an Anders brief.[203] Not only does the brief force the court to spend additional resources to review the record and flag issues for the attorney that it finds potentially meritorious, but that the *Anders* opinion gives courts insufficient guidance on distinguishing between meritless and wholly frivolous cases. Again, Judge Warner notes that "the Court's requirements present a logical inconsistency . . . . If the appointed attorney can raise 'anything that might arguably support an appeal,' then, as a whole it may be without 'merit,'[but] it would not be entirely frivolous." [204]

If it is difficult for courts to distinguish between meritless, frivolous and just plain weak, it is even more so for attorneys. Lawyers trying earnestly to respect the ethical rules on frivolity while being zealous advocates for their clients have great difficulty predicting what courts really expect of criminal defense lawyers on appeal. One attorney believed that the court "frowned on [*Anders* briefs], chastising us for sloppiness [for raising weak issues], but when people raised valid issues, which they did all the time, they found a way to deem them frivolous and throw them out . . . ."[205] Another noted, generally the court. . .doesn't really like it because they don't like to take the position [that] the defendant doesn't have a legal issue either."[206] Expressing clear frustration with the Court's mixed message regarding the Anders brief, one respondent offered:

> You know then they are very quick to criticize what they perceive to be frivolous appeals, but at the same time they seem not inclined to accept *Anders* Briefs. So one has to wonder, what is it you think the lawyer should do under these circumstances knowing a lawyer has an obligation to file a direct appeal at their request to do so by the client."[207]

Supreme Court Justice Clarence Thomas addresses this criticism in *Smith v. Robbins*, noting that "the *Anders* procedure appears to adopt gradations of frivolity and to use two different meanings for the phrase

202. Martha C. Warner, Anders *in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others*, 23 FLA. ST. U. L. REV. 625, 625 (1996).
203. *Id*.
204. *Id*. at 632 (quoting Anders v. California, 386 U.S. 738, 746 (1967) (Stewart, J., dissenting)).
205. Transcript of A3, *supra* note 89, at 10.
206. *See* Transcript of A23, *supra* note 42, at 23.
207. Transcript of A10, *supra* note 39, at 15.

'arguable issue.'"[208] Attorneys feel trapped between these gradations when they are chastised by courts for arguing issues that are too frivolous for appeal briefs but not sufficiently frivolous for *Anders* briefs.

Most criminal defense lawyers caught in this predicament rightly err on the side of full and faithful representation on appeal even if it means filing a frivolous brief. It is their commitment to the cause of "pushing the envelope"[209] on behalf of disadvantaged clients and against the power of government that leads to this position. This is precisely what we should want them to do. In close cases, it seems that cause lawyers are more likely to err on the side of the defendant and on behalf of the cause. This will usually involve better representation of their clients than would a strict loyalty to the rules of the court.[210]

Similarly, the lawyers' goals of challenging appeal waivers and the execution of Miranda warnings are beneficial to defendants and to society. Without belaboring the point, the arguments in favor of clearer Miranda warnings for bilingual suspects are the same as those in favor of Miranda warnings generally.[211] To the extent that improving the prophylactic benefits are relatively costless for law enforcement (as they were in the case described by the attorneys) this is a worthwhile improvement for lawyers to seek. When changing the law on the books seems improbable, cause lawyers sometimes seek to change the law as it is practiced and executed on the streets. Collective action proved a useful tool in changing legal policy regarding Miranda warnings for Spanish-speaking detainees.

Collective action in one jurisdiction was also more effective in challenging the appeal waiver policy than was individual negotiation in the other jurisdiction.[212] Appeals are critically important to the functioning of our criminal justice system. The development of a common law of criminal and sentencing law depends on a sizeable and representative appellate docket. This is particularly true for a sentencing guideline regime—whether advisory or mandatory—that is regularly adjusted by the administrative and

208. Smith v. Robbins, 528 U.S. 259, 282 (2000).

209. Transcript of A10, *supra* note 39, at 15.

210. On this topic, Judge Warner writes:

> If the ultimate fairness of the proceeding is determined by the effectiveness of counsel in representing the defendant, then the goal should be to compel full representation through appeal and not to allow ways for that representation to be avoided. Thus, those states that refuse to allow withdrawal of counsel on the ground that the appeal is frivolous more effectively provide the right than do those who allow counsel to withdraw.

Warner, *supra* note 202, at 662.

211. Miranda warnings provide constitutional safeguards against violations of the right against self-incrimination while in custody. Miranda v. Arizona, 384 U.S. 436, 441-42 (1966); *see also* Dickerson v. United States, 530 U.S. 428 (2000); Oregon v. Elstad, 470 U.S. 298, 305 (1985); Edwards v. Arizona, 451 U.S. 477, 492 (1981). The safeguard is far less effective if the warning is poorly understood or misunderstood.

212. *See supra* notes 169-177 and accompanying text.

legislative bodies to account for the shifting "heartland" of cases.[213] The federal sentencing system for instance is based on the need to increase uniformity and limit unwarranted sentencing disparity.[214] Without appeals—or in the instance that the Government can determine through its powerful bargaining leverage when appeals can be filed—the risk of greater disparity increases significantly. Some have argued that the Deprat of Justice's policy to seek broad appeal waivers in most cases frustrates the Sentencing Reform Act's goal of using appellate review as a means to oversee and contain unwarranted disparity among lower courts.[215] As it is, only 10 percent of federal cases are appealed and ninety percent of those are filed by the defense.[216]

Obviously, appeals are valuable to individual defendants for correcting legal errors at the trial level. But they are also valuable in correcting constitutional violations when the courts decide a case that leads to a significant change in the law. The 1995 *United States v. Booker*[217] decision is an excellent example. When the Supreme Court decided in *Booker* that the mandatory federal sentencing guidelines were unconstitutional, the expectation was that thousands of defendants who had already been sentenced would be effected and seek resentencing. Interestingly, most of the the huge number of defendants who had signed waivers of appeal as part of their plea agreements were unable to have their sentences reconsidered even though they were sentenced under a regime that was deemed unconstitutional.[218] Given the twenty years of guideline sentencing preceding *Booker*, it is doubtful that defendants made knowing and voluntary waivers of their rights to constitutional sentences.

For the cause lawyer, appellate cases are a far more effective venue for seeking legal change. By their very nature, appellate cases have a greater impact on all the courts within a jurisdiction. They often receive media coverage that extends beyond the precise jurisdiction. Even a loss on appeal can be a successful way to further publicize an important issue.

213. Catharine M. Goodwin, *The Appeal Waiver Controversy Summary: 1996 Committee on Criminal Law Memo on Waivers of Appeal and Advisement of the Right To Appeal*, 10 FED. SENT. R. 212 (1998); John C. Keeney, *Appeal Waiver Controversy Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 FED. SENT. R. 209 (1998).

214. Keeney, *supra* note 213.

215. *See* Douglas A. Berman, *Windows into Sentencing Policy and Practice: The Crack/Cocaine Ratio and Appeal Waivers*, 10 FED. SENT. R. 179, 181-82 (1998).

216. U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls. 57 & 58 (2002), *available at* http://www.ussc.gov/ANNRPT/2002/fig-g.pdf.

217. United States v. Booker, 125 S. Ct. 738 (2005).

218. *See* United States v. Bradley, No. 03-6328 (6th Cir. Mar. 10, 2005) (upholding validity of appeal waiver on *Booker* claims); United States v. Ginard-Henry, No. 04-12677 (11th Cir. Feb. 11, 2005) (refusing to consider defendant's claim regarding the unconstitutionality of his pre-*Booker* sentence due to an appeal waiver). *But see* United States v. Killgo, No. 03-3407 (8th Cir. Feb. 9, 2005) (reviewing the defendant's sentence for reasonableness despite the existence of an appeal waiver).

Given the significant demerits of appeal waivers for defendants and for those seeking legal change and development, it is not surprising that criminal cause lawyers would strategize to eliminate or limit them as a matter of policy.

Finally, it is worth saying a few words about the criminal lawyers who adopt an impact litigation approach. They cautiously select certain cases in which to raise particular issues. The idea that the criminal defendant and her case may be "merely" a vehicle for social change can be distasteful to those who insist on a very client-centered approach to lawyering.[219] And yet, our legal system requires that judicial decisions be made only where there is a case or controversy.[220] Lawyers may not bring advisory cases before the courts or challenge legal doctrines without a particular client or case at issue. It is not then surprising that cause lawyers—lawyers whose goal it is to effect social change through the law—would occasionally view clients instrumentally. Moreover, the government can lawfully engage in this sort of selectivity all the time. It can decide to prosecute or not prosecute solely to make good precedent. It can decide to forgo arguments in one case (or even dismiss the case altogether) in order to preserve its credibility and time for other cases that offer greater publicity or provide a better vehicle with which to make a particular claim. It is no wonder defense lawyers would like to use similar but more limited version of selectivity. However, although a strict reading of our ethics laws might forbid such lawyering, this mode of cause lawyering in the criminal defense context oftentimes leads to good results for defendants and for the courts.

In addition to the worthwhile goals of criminal defense cause lawyers, there is another reason why society may be better off sanctioning some forms of cause lawyering even when they formally conflict with classic norms of professionalism and ethics. Some commentators have argued, the problem with ineffective and dispassionate criminal defense attorneys is far more serious than the problem of overzealous or cause-centered lawyers.[221]

219. A growing trend among scholars has been the encouragement of a "client-centered" approach to lawyering that focuses on the client's articulated needs and desired outcome and rejects the traditional view of lawyers as independent actors making professional legal decisions. Martha L. Davis, *Access to Justice: the Transformative Potential of Pro bono Work*, 73 FORDHAM L. REV. 903, 916 (2004); *see also* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 2-13 (2004) (arguing that client preferences and not lawyer preferences or lawyers' assumptions about client's preferences ought to guide the representation); Robert Dinerstein, *Client Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990) (defining and discussing client-centered lawyering as an approach that places the client's goals at the center of the representation); Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065 (2003) (same).

220. *See* CHARLES A. WRIGHT, THE LAWS OF FEDERAL COURTS 60 (5th ed. 1994) (explaining the case or controversy requirement that American courts refrain from deciding "questions of law in a vacuum, but only such questions as arise in a 'case or controversy'").

221. As Luban argues, the world of most criminal defenders is a world in which

In the context of concerns about effectiveness and dedication, criminal cause lawyers are to some extent model criminal lawyers. Many cause lawyers whose cause is the zealous representation of the underprivileged[222] or the importance of giving their clients access to justice[223] take very seriously their role as effective lawyers. They struggle over what it means to be a "good lawyer" and a "good citizen."[224] The question over the decision to file an *Anders* brief illustrates this point. Among the many reasons lawyers offered for avoiding the *Anders* brief is that the appeal gives the lawyer a second chance to do better for clients. As one lawyer put it, "Well, you know, you're human. And you always want to look yourself in face say you've done a good job and sometimes it's difficult to admit you didn't do the job that you should've done."[225] This is a laudable sentiment and not one that ought to be discouraged when so many criminal defense lawyers are criticized for incompetence and ineffectiveness.[226] This is not to suggest that everything cause lawyers do is beyond reproach or that they should be exempt from ethical regulation. But if it is the case that some forms of cause lawyering are socially beneficial then perhaps the professional and ethical rules—particularly those related to conflicts of interest— should be sufficiently flexible to account for such lawyering.

B. The Ethics of Cause Lawyering in the Criminal Defense Context

Despite the desirability of the results sought by the cause lawyers interviewed, a strict reading of the ethics rules would deem their lawyering strategies improper. Lawyers have long been considered to have a strict duty of loyalty or fidelity to their clients that requires "exclusive devotion"

> no defense at all, rather than an aggressive defense or even desultory defense is the norm; a world of miniscule acquittal rates; a world where advocacy is rare and defense investigation virtually nonexistent; a world where lawyers spend minutes, rather than hours, with their clients; a world in which individualized scrutiny is replaced by the indifferent mass-processing of interchangeable clients.

Luban, *supra* note 66, at 1762; *see also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 63-100 (1999) (discussing the extremely poor quality of most indigent criminal defense representations); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994) (arguing that the right to competent counsel remains unattainable until more "defender organizations are established and properly funded to employ lawyers at wages and benefits equal to what is spent on the prosecution, to retain expert and investigative assistance, to assign lawyers to capital cases, to recruit and support local lawyers, and to supervise the performance of counsel"); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986) (detailing how severe underfunding undermines the Sixth Amendment guarantee of effective assistance).

222. *See infra* Part I(B).

223. *See infra* Part I(B).

224. Transcript of A12, *supra* note 68.

225. *Id*.

226. *Id*.

to the client's interest.[227] Model Rule 1.7 describes two types of situations in which a lawyer may not engage in a representation due to conflict. A lawyer has a conflict under Model Rule 1.7(a)(1) if "the representation of one client will be directly adverse to another client."[228] And under Model Rule 1.7(a)(2) if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyers responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[229] The ALI's Third Restatement has a similar provision.[230] Most lawyers are very cautious not to handle cases in which the representation of one client is *directly adverse* to that of other clients. The problem for the cause lawyer is that there are a number of instances in which one client's representation may become *materially limited* by concerns for the class of clients generally and the moral and political cause of the attorney. Cause lawyering, in may of its forms, seems to directly violate the rules against "material limitation" conflicts of interest .

"Material limitation" conflicts are more subtle and less obvious than "directly adverse" conflicts. The interests at issue in situations that may lead to material limitations do not have to directly oppose the client's goals.A material limitation conflict exists "if there is some pull on the lawyer's judgment" or something about the situation that causes a reasonable attorney to pause and question its propriety.[231] Nor must the lawyer actually behave in a manner or make a decision that negatively impacts the client. The risk of the adverse consequence is sufficient to create a conflict because ethical rules tend to be prophylactic in nature.

Material limitation conflicts are a helpful way to understand the cause lawyer's predicament precisely because they focus on the lawyer's incentives and motivations to act.[232] As discussed in Part II, cause lawyers are often motivated by political and moral goals that are collateral to the goals of the client. The cause is generally one that is consistent with the defendant's interest but may still impact the attorney's judgment in such a way that her decisions experience the pull of her other commitments.

Among the examples offered by the lawyers interviewed, the collective action strategy regarding the execution of Miranda warnings for bilingual

227. Williams v. Reed, 29 F. Cas. 1386 (C.C.D. Me. 1824) (No. 17,733).

228. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2003).

229. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2003).

230. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000) ("A conflict of interest is involved if there is substantial risk that the lawyer's representation of the client would be materially or adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.").

231. W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS 266 (2004).

232. GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 395 (2005).

detainees seems the least objectionable from a conflict of interest standpoint. Yet even this scenario may materially limit the attorney's representation. The lawyer's decision to question officers about the reading of Miranda warnings in a case where the warnings raise no legal concerns will probably not be directly adverse to the client's interest. While this tactic may pose no risk in some cases, in other cases a lawyer who was thinking only of her client's interests might decide not to raise that issue for a variety of reasons. But time and good-will are limited resources in criminal courtrooms. Raising this issue may be time consuming; it may distract from relevant issues; it may annoy the judge and prosecutor; it may anger the officer who might otherwise have provided helpful testimony. If nothing else, using a predetermined blanket strategy in every case seems to deprive the defendant of individualized treatment and representation. It certainly does not consist of the "exclusive devotion" underlying the principle of loyalty in the attorney-client relationship.[233]

The same argument can be made of the other use of the collective action strategy described by some of the attorneys to challenge the government's policy of appeal waivers. The conflict involved here potentially involves adverse impact as well as material limitation. The lawyers explained that in plea agreements where defendants were receiving something substantial in exchange for their waiver of appellate rights—or to put it another way, in cases where declining the plea agreement would have an adverse impact on the client—they would recommend the plea deal. Yet this caution hardly seems to eliminate the "pull" on the attorney's judgment that emanates from the collective agreement with other colleagues on behalf of their clients.

The dilemma regarding the *Anders* brief also raises a distinct ethical concern. First, to the extent that a case has no merit and an attorney knowingly files a standard brief raising claims as though they were legitimate, the attorney violates the rules against making frivolous arguments.[234] As officers of the court permitted to practice under a state-issued license, attorneys have duties of professionalism they are bound to respect. The decision to ignore the rules established by the Court in *Anders* and enacted into most court rules, attorneys who purposefully ignore Anders engage in a form of civil disobedience. The attorneys who avoid Anders briefs do so for two significant reasons: they want to give their clients "their day in court" at the appellate level and they worry that the

233. Williams v. Reed, 29 F. Cas. 1386 (C.C.D. Me. 1824) (No. 17,733).

234. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) (stating that "a lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.").

time-consuming nature of the Anders brief will harm other clients. Again this becomes an issue of triage between clients that could otherwise cause material limitations in representation.

The problem of "materially limited" conflicts is sometimes described as one of lawyers "pulling [] punches" or "soft-pedaling" the representation.[235] In a sense, this is precisely what is at issue when criminal defense lawyers use the impact litigation strategy of seeking test cases in which to raise to particular issues or when they decline to raise issues in certain cases so as to reserve their credibility for more deserving cases. Cause lawyers may engage in such practices not to deprive current clients but to aid future clients. For instance, as one commentator has previously, lawyers become more effective representatives of future clients if they are willing to provide less than fully zealous advocacy for current clients. [236] Attorneys may attempt justify these practices on numerous grounds. First, there may be no direct adverse impact if the cases are such that they would not prevail anyway. Nor, one could argue, would there be a Sixth Amendment violation if the attorney can argue that the decision to raise or not raise an issue was a strategic one. [237] Indeed, one could argue that this is not a problem at all under our rules of ethics and professionalism because a lawyer is not required to make every argument or raise every claim that the client wants. Clients may decide the objectives of the representation but lawyers, using their legal expertise, may decide the means.[238] But the argument that a lawyer's decision to give priority to one client over another is not an ethical conflict if it amounts to a strategic decisions regarding the means of representation is not ultimately persuasive. Perhaps the lawyer's tactical decisions would be ethically justified if they were based only on the best of the interest of the client. But once the attorney begins to weigh the interests of the clients against the cause or that of other clients, the lawyer's representation becomes materially limited.

While the ethics rules are necessary to regulate lawyer conduct generally, they seem woefully out of touch with the realities of cause-centered criminal defense work. They effectively prohibit many of the

235. HAZARD ET AL., *supra* note 232, at 395.

236. W. Bradley Wendel, *The Deep Structure of Conflicts of Interest*, 16 GEO. J. LEGAL ETHICS 473 (2003).

237. *See* Strickland v. Washington, 466 U.S. 668, 690-93 (1984). The *Strickland* test used by the Supreme Court in assessing an attorney's ineffectiveness excludes unsuccessful strategic decisions by lawyers as evidence of ineffectiveness. Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (stating that appellate courts are to be "highly deferential" when reviewing tactical decisions of defense attorneys for purposes of assessing ineffective assistance of counsel).

238. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.3 cmt. 1 (2003) ("A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.").

strategies employed by cause lawyers to the extent that some of these strategies take into account the welfare of other criminal defendants—whether they be other clients or similarly situated third parties. The options permitted by the ethical rules in such situations—withdrawing from the conflicted representation or proceeding with the informed consent of the client—leave much to be desired in the context of indigent criminal defense. The high caseloads and limited resources of many criminal defense lawyers make the notion of withdrawal impractical. Defendants would likely be worse off with fewer qualified attorneys available to do the work than they would be with the existing conflict. The criminal justice system would come to a standstill if lawyers regularly withdrew from cases in which they harbored ulterior motives of social change. In short, excessive concern about this sort of conflict might unjustly deprive criminal defendants of competent and zealous representation.

C. No Quick Fix: The Impracticality of Waiver

The laws of ethics themselves provide a means of resolving conflicts of interest: knowing and informed consent by a competent client. Although some conflicts cannot be waived by the client even with informed consent, the conflicts encountered by criminal defense cause lawyers and their clients does not formally fall into the realm of non-waivable conflicts. The ALI's Third Restatement of the Law Governing Lawyers explains that:

> Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:
>
> (a) the representation is prohibited by law;
>
> (b) one client will assert a claim against the other in the same litigation; or
>
> (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.[239]

Subsections (a) and (b) are obviously not implicated in the types of conflicts discussed by the attorneys interviewed in this study. The third subsection is probably not implicated either. The threshold of "adequate representation" is fairly low. For instance the Sixth Amendment constitutional guarantee of "effective assistance" of counsel seems more demanding than the "adequate assistance" requirement. And yet, the leading case on ineffective assistance of counsel in the criminal context

239. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §122(2) (2000). The Model Rules have a corresponding provision. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (b)-(b)(3) (2003).

makes it very difficult for defendants to succeed on such a claim.[240] This is particularly true if the attorney's conduct is based on a strategic choice (even an ill-advised one) rather than on incompetence or negligence.[241]

But although the rules suggest that these conflicts theoretically could be consented to with full disclosure, consent is impractical and undesirable in reality. Let us return full-circle to the predicament facing Attorney Barry Tarlow—who had a policy against representing cooperating informants—and his then client Jose Orlando Lopez. While we can speculate as to the reason for Tarlow's belief in the immorality of snitches, his reasons are immaterial to the conflict analysis. An ethical conflict exists so long as Lopez' representation would be materially limited by Tarlow's commitment to his moral cause. Tarlow's response was to explain the limitation to his prospective client. The client knowingly agreed to the representation despite this limitation. But during the course of the representation, when Lopez realized that he might want to consider the government's offer to provide evidence in return for a favorable plea agreement, he did not fire Tarlow or seek new counsel (as the ethical rules would expect) when a potential conflict becomes an actual conflict.[242] Instead, Lopez attempted to negotiate unsuccessfully on his own. It is unclear if he revealed important weaknesses in his case, made admissions, or did anything else during these failed negotiations with prosecutors that had an adverse impact on his case.

What is clear is that waiver is not an effective strategy for criminal defendants like Lopez. First, it would be nearly impossible to obtain a knowing and informed waiver. The subtlety of material limitation conflicts can render them difficult to explain and anticipate. Second, requiring defendants to forego representation by lawyers who are motivated by

240. *Strickland*, 466 U.S. at 690 (explaining that among other things, a defendant must show that the lawyer's acts or omissions were "outside the wide range of professionally competent assistance"). Generally, the standard articulated by the Supreme Court in *Strickland* for evaluating claims of ineffective assistance of counsel requires a showing that counsel's performance was seriously deficient and that the deficient performance was so prejudicial as to deprive the defendant of a fair trial. *Id*. at 687. The absence of zealous advocacy is not presumed sufficient to satisfy the prejudice prong of the *Strickland* test.

241. *See* United States v. Brooks, 125 F.3d 484, 496 (7th Cir. 1997) (finding decision by defense attorney not to recall inconsistent witness for further questioning "tactical decision" reflecting reasonable professional judgment that cannot be considered ineffective assistance); Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1983) (holding that tactical decisions are not ineffective simply because in retrospect better tactics are known to have been available); United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981) (stating that "nothing more than a difference of opinion" as to trial tactics does not establish denial of effective assistance); Gallo v. Kernan, 933 F. Supp. 878, 881-82 (N.D. Cal. 1996) (establishing that defense counsel's decision not to use inconsistent statements to impeach witness was "tactical," and holding that it is "well settled" that impeachment strategy is a matter of trial tactics).

242. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt e, §122 cmt. f. (2000) (explaining that a conflict that was not initially apparent or a conflict for which consent is later revoked usually requires the withdrawal and replacement of counsel).

political or social causes would greatly limit the availability of many highly regarded lawyers. Apparently, one of the reasons Lopez insisted on hiring Tarlow despite the limitation was that Tarlow had an excellent reputation for being a dogged criminal defense attorney who got good results. Third, those defendants who accept the representation and then change their minds may experience greater difficulty in changing attorneys than do clients in other contexts. Not only do criminal cases move more rapidly than civil cases generally but the majority of criminal defendants are of moderate means and have limited resources. The Tarlow/Lopez scenario warns us that it would be folly to rely on client waivers to solve the ethical problem of diverging interests that arises from cause lawyering.

A detailed solution to this problem is beyond the scope of this paper and must be left to another day. One possibility would be to amend the ethics rules so as to provide an exemption for criminal defense lawyers. This would not be the first argument in favor of exempting criminal defense attorneys from specific ethics norms.[243] Another possibility would be to more effectively prohibit criminal defense cause lawyering, or at least certain forms of it. A cause-benefit analysis would need to be undertaken in which the benefits of having committed and competent defense attorneys should be seriously weighed against the drawbacks of these ethical concerns. Besides, my own experience and the interviews from this study suggest that the cause-based mentality may be pervasive in criminal defending and difficult to eradicate. A third possibility is to continue with the status quo, while increasing ethics training among lawyers to help them better identify possible conflicts and educate their clients about them. None of these possible solutions are perfect or easy. The principal goal of this paper is to expose the ethical tensions that exist in a growing, and often socially-beneficial, trend among lawyers to use the law as a means of societal change. Only then can we engage in an honest dialogue about good cause lawyering versus bad cause lawyering. [244] The practice of law, even when motivated by good intentions and causes, must still be subject to ethical standards. But those standards must be informed by honest dialogue

243. Professor William Simon describes a trend among scholars arguing for a relaxation of certain ethical rules for criminal defense lawyers. *See* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (citing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 58-66 (1988); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985); Richard Wasserstron, *Lawyers as Professionasl: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975)).

244. Manuel Berrélez et al., Note, *Disappearing Dilemmas: Judicial Construction Of Ethical Choice As Strategic Behavior In The Criminal Defense Context*, 23 YALE L. & POLICY REV. 225, 226 (2005) (arguing that greater intellectual honesty in the treatment of ethical issues in the criminal defense context will help judges and practitioners to distinguish between "strategic choices that genuinely represent bad lawyering and those choices that actually reflect laudable attempts to inject an ethical dimension into the criminal defense process").

regarding the realities of cause lawyering if they are to be accepted by the attorneys and courts that must implement them.

CONCLUSION

My own impression from years as a public defender was that most criminal defense lawyers are as motivated by political and moral beliefs about injustice or the need for legal reform in the criminal process as they are by the particular interests of their clients. Criminal defense attorneys tend to feel strongly about the work they do, tend to share a worldview about the prevalence of injustice, perceive themselves as fighting for a "cause." While these causes may contribute to positive social change in the criminal law context, they are not without costs. This paper explores the causes that motivate criminal defense lawyers to do what they do and some of the ethical costs of their cause-centered lawyering.

In considering the motives that animate the criminal defense agenda, I rely on the well-developed literature on cause lawyering along with data from a qualitative study involving interviews of forty criminal defense attorneys. The respondents were questioned about the factors that influence their advocacy practices, the motivations for their advocacy decisions, and what they perceived to be the goals of their jobs. Even within this small sample, there is much evidence to support that many of them are in fact engaged in cause-lawyering as that term is defined in the extant literature. Their motives ranged from ideological to experiential to personality-based and their strategies focused on changing the law and its impact on people like their clients. Their orientations invoked themes that permeate the practice of criminal defending. They also help shed light on the motivations of attorneys more generally to enter and remain in other cause lawyering practices.

It's my hope that understanding criminal defense lawyers as cause lawyers—albeit an unusual breed—could help shed light on the particular aspects of the cause lawyering enterprise. In this Article, I take a first step in this direction by exploring some of the ethical conflicts encountered by criminal defense lawyers *qua* cause lawyers. Criminal defense attorneys who are committed to improving the lot of criminal defendants as a group and the laws that govern them, occasionally face situations in which their individual client's interests are not fully compatible. While the client's needs may not be directly adverse to the lawyer's other goals, these situations involve more subtle conflicts labeled by the ethics rules as leading to "materially limited" representation by the lawyer. The ethics rules generally permit the client to waive such conflicts once they have been informed by the attorney, I argue that waiver in these instances is highly

impractical. While a solution to this problem is beyond the scope of this paper, it appears that a more flexible approach to the rules of ethics is needed in the context of criminal cause lawyering if this type of lawyering continues to be deemed valuable.