

Painting the Roses Red: Confessions of a Recovering Public Defender

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I. INTRODUCTION

The failings of the public defense system are well chronicled and oft bemoaned,¹ but for me the failings are also personal. My story is almost a cliché. I was a young, idealistic lawyer, fresh out of a clerkship, when I got my first job as a public defender. It was my dream job, the last legal job that I would ever have. It lasted for two years. Still a relatively young and idealistic lawyer, I got my second, even dreamier dream job. I became a Federal Public Defender, once again convinced of my forever, true calling. That gig lasted four years. The forces that drove me to leave both jobs are common ones that are cited by former public defenders² and studied by academics like myself: heavy caseloads and workloads, poor management policies and practices, and bad office cultures.³

When I was hired as an Assistant Professor, I was given a stern lecture on high expectations and the ruthless nature of up-or-out promotion and tenure. I was thrilled. Finally, I worked in a meritocracy, with quantifiable performance measures and consequences for failing to perform. The academy also gave me an

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¹ See generally Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No. I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (1971); Ting T. Cheng et al., *Notes From the Field: Challenges of Indigent Public Defense*, 12 N.Y. CITY L. REV. 203 (2008); Frank D. Eamen, *Public Defense in Michigan: From the Top to the Bottom*, MICH. BAR J., Nov. 2008, at 40; Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1987); Frank X. Neuner, Jr., *The Funding Crisis in the Louisiana Public Defender System: Public Defense Reform Has Far to Go*, 60 LA. B. J. 110 (2012); Scott Russell, *Public Defenders: A Weakened but Indispensable Link*, 66 BENCH & B. MINN. 20 (2009); Andrea Woods, *The Undersigned Attorney Hereby Certifies: Ensuring Reasonable Caseloads for Washington Defenders and Clients*, 89 WASH. L. REV. 217 (2014).

² I use "public defender" in the broadest sense of any attorney appointed to represent defendants, including those working at public defense agencies, in consortiums and on panels, and by direct court appointment.

³ See, e.g., Jan Pudlow, *11th Circuit PD Says His Office Is at 'The Breaking Point'*, FL BAR NEWS (Jan. 15, 2009), available at https://www.floridabar.org/_85256aa9005b9f25.nsf/0/cfd482f56dc686285257536004fa5ac!OpenDocument&Click=. Cf. Jonathan Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008) (arguing that cultural factors were responsible for inadequate representation).

outlet for my frustrations, a platform from which I could study the public defense system, try to reform it, and train (and maybe inoculate) my students to work in it.

Then, there is the second part of the cliché: the Freudian part. My brother suffers from mental illness. He does not like to take medication or otherwise comply with the recommendations of his treatment providers. As a result, he is a frequent flyer in his local criminal court. As I am writing this Essay, he is being represented by the metropolitan defender service for a low-level felony charge (his first). My experience with my brother's current case has dredged up anger and frustration that I did not realize that I still had. It is like I am suffering from some kind of PPDTS (post-PD TSD). In fairness, I did not go into his case with high expectations for his public defenders, which they have unsurprisingly met. Don't get me wrong. They are nice people who want to do well and help him. They just aren't doing either particularly well.

All of which inspired me to revisit my experiences as a public defender—what was broken, why I left, what I wished had been different—with the benefit of more than six years now to decompress and observe the system from the outside. Everyone agrees that the system is broken—the Innocence Project and DNA exonerations have made that conclusion almost unassailable⁴—but it is harder to put your finger on *why* the public defense system is such a mess, beyond the obvious culprits of overwork and underpay.

I have tried to answer that question in a more impersonal, scholarly way, but I have come to realize that the answer for me will always be colored by the personal and anecdotal. There is a robust academic context for many of my personal observations. Jonathan Rapping has written insightfully on the dysfunctional cultural environments of public defense offices.⁵ Stephen Schulhofer has explored the “assembly line” of public defense⁶ and documented the “incentive problems” of defense agencies.⁷ What follows are my more personal reflections about the system. This Essay includes some of the inside secrets of the trade, so inside and so secret that public defenders do not talk about them, even among themselves, because to do so would unravel the delicate rationalizations about “experience” and “choices” that keep so many of them psychologically afloat. It also includes “war stories,” which I generally find tedious and self-absorbed, but which, in this

⁴ See Carrie Leonetti, *The Two-Legged Stool: The Asymmetry of American Aid for the Rule of Law and the Risk of Wrongful Conviction*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 87, 97–103 (Sarah Cooper ed., 2014) (discussing the relationship between wrongful convictions, high caseloads, and ineffective assistance of counsel).

⁵ See Rapping, *supra* note 3 (discussing attitudes, assumptions, and pressures underlying public defense culture).

⁶ See Stephen Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 137 (1986).

⁷ See Stephen Schulhofer & David Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 78 (1993).

case, I think illustrate some hurdles that zealous defenders face and help explain why many of us leave.⁸

II. WAIVER

There are a handful of rights afforded to defendants that only they can knowingly waive.⁹ Most of their remaining rights are either asserted or waived by their attorneys, including by forfeiture—waiver by inaction. There is nothing inherently wrong with waiving a client’s rights. It depends on why a lawyer waives them. I have classified the waivers that I have observed into four broad (and oversimplified) categories: strategic, ignorant, lazy, and institutional. Strategy is a good reason; the other three are not.

Let me illustrate with an example. Any lawyer who has arraigned¹⁰ a client has, at some point, uttered the phrase: “Waive further reading and advisement.” The statement is shorthand for waiving the client’s right to have the judge explain the charges and their consequences and advise the client of his/her constitutional rights (silence, counsel, etc.). It is unlikely that anyone reading this has ever seen a full reading of charges and advisement of rights in an American courtroom. I was a public defender for six years, and I never have. Like all waivers, there is nothing inherently wrong with waiving reading and advisement—I did it hundreds of times—but this waiver makes a good example of the four classes of motivations that I have enumerated.

A. Strategic Waiver

You meet with a client prior to the arraignment, go over the charging document, the potential imprisonment, the process to come, and the rights entailed. During this interview, which is thankfully confidential, your client confesses, repeatedly. Your client may not think that it is a confession. On the contrary, confessions often start with: “They’ve got it all wrong.” I could not count the number of times that I had to tell a new client that a brilliant investment strategy was a Ponzi scheme. “That’s a Ponzi scheme. . . . Yes, I understand, but that’s a

⁸ I hope that it goes without saying that, while I believe that my experiences were typical, there are lawyers and offices resisting the dysfunction that I identify.

⁹ See *Godinez v. Moran*, 509 U.S. 389, 401–02 (1993) (holding that a defendant may only waive the right to counsel or plead guilty knowingly and voluntarily); *Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that a waiver of the right to counsel had to be knowing and voluntary); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the waiver of the right to counsel and silence during custodial interrogation had to be knowing and voluntary); *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938) (holding that Johnson could only waive his right to counsel knowingly and voluntarily); *Patton v. United States*, 281 U.S. 276, 312 (1930) (holding that the decision to waive a jury was personal to Patton).

¹⁰ I use “arraignment” not necessarily in its formal sense of arraignment and plea on an indictment, but rather in its informal sense of a defendant’s first appearance in court on any charge.

Ponzi scheme. . . . Okay, let me put it to you this way. What would have happened if there were no new investors after the initial ones? . . . Exactly. That's a Ponzi scheme. . . . Yes, it is. . . . Yes, it is. . . . Yes, it is. . . . Fine, just don't talk to anyone else about this, okay?" These confessions are a strategic reason to waive reading and advisement: the concern that your clients will "go over your head" to explain their "innocence" in open court.

B. Ignorant Waiver

You are a brand new public defender, straight out of law school. Your first week at work (or externship perhaps) involves observing other lawyers, including the "duty" lawyer who is handling arraignments. You quickly notice that there is a script: "I accept appointment on behalf of the public defender's office. I have received a copy of the complaint. My client's name is set forth correctly thereupon. I waive further reading and advisement of rights and request a detention hearing." You take frantic notes: "Accept. TN. Waive rdg & advice. D/H." The next week, you are assigned your first duty calendar. You faithfully read your script. You have no idea what the proceeding would look like if you did not waive reading and advisement, and you have not thought about why you are doing it. You are just trying to look like someone who is not arraigning a client for the first time.

C. Lazy Waiver a/k/a (Caseload Waiver or Triage Waiver)

It takes about forty-five minutes to complete a typical arraignment calendar, but it would take five or six hours to arraign everyone if the judge had to do a full reading and advisement for all the defendants. You have not yet met with the waiting jump-suited defendants, but someone in your office will in the next day or two, and that person will go over the charges, etc. It is an imperfect system, but you have a massive and unwieldy caseload, choices have to be made, and watching a judge struggle through a dense, lengthy script about the right to counsel is not a good use of anyone's limited time and resources.

D. Institutional Waiver

Your office has a standing agreement with the local court always to take care of reading and advisement so that the Court can speed its docket along. This practice helps to foster the "good working relationship" that your office has with the prosecutors and judges, which your boss believes somehow helps your clients collectively in the long run. Also, if you demanded a full reading and advisement, you would anger the Court, and no one likes to get yelled at, especially by someone with contempt powers. Part of your job is playing nice, even at the

expense of acting as an agent for your clients, who fall into some combination of not caring or loving it when you piss off the judge and prosecutor.¹¹

I would love it if most of the time that public defenders waive, forfeit, or fail to assert clients' rights, it is strategic, but, in my experience, like so many of their other routine decisions, it is not. These waivers occur without reflection, to speed things along, and to further institutional relationships.

E. *Guilty Plea Waiver*

The most frequent waiver is one that public defenders repeatedly recommend: the guilty plea, which constitutes a waiver of pretty much all rights (other than the right to a voluntary guilty plea). This waiver is often done for non-strategic reasons as well. Here is an example. I was sitting in court one morning during the court's regular "law and motion" docket, the weekly docket during which the court takes care of routine matters in criminal cases—status conferences, non-evidentiary motion and sentencing hearings, and guilty pleas. A uniquely lazy colleague of mine had a client pleading guilty. I likely would not have paid attention to someone else's plea, except that the judge seemed really resistant to the guilty plea, which is not a common occurrence. Typically, when a defendant has accepted a plea offer, there is a long colloquy that a judge has to go through before accepting the guilty plea. It is essentially a script about the defendant's rights, options, mental status, etc., to make sure that the decision to plead guilty is voluntary.¹² Because judges ask these questions of hundreds of defendants every month, and because less-scrupulous lawyers tend to "coach" their clients how to answer them ahead of time (I have actually seen lawyers nudge, elbow, and step on the toes of clients to get them to change a "no" to a "yes" or vice versa), the conversation usually occurs at high-speed monotone. During this hearing, however, the judge appeared to be going off script and becoming animated, trying to make absolutely sure that this was *really, really, really* something that the defendant wanted. Ultimately, he permitted the defendant to plead guilty, but something about the judge's demeanor during the plea and the identity of the lawyer involved made me curious. When I got back to my office, I pulled a copy of the plea agreement from the court's electronic filing system.

The defendant had been charged with first-degree murder. Because the Assistant United States Attorney [AUSA] had not been authorized to seek the death penalty or filed notice of his intent to do so, the maximum sentence that the

¹¹ In my experience, defense attorneys who play along do not get good deals. Prosecutors do not make plea offers because they like you. They make plea offers because they fear you (if not your brilliance, then at least your power to make them work nights and weekends).

¹² See FED. R. CRIM. P. 11(b); FED. R. CRIM. P. 11, Advisory Committee's notes; *see, e.g.*, *Libretti v. United States*, 516 U.S. 29, 33–35 (1995) (describing Libretti's plea colloquy).

defendant faced was life imprisonment without the possibility of parole.¹³ Under the terms of the “deal,” the defendant agreed to plead guilty to first-degree murder, admit all of the alleged facts (including the mental state that made the murder first rather than second degree), agree to a sentence of life imprisonment (without parole), and waive all rights to appeal and *habeas corpus*. If you are thinking, “Isn’t that the worst-case scenario if there were no guilty plea?” Yes. He was pleading guilty to the “top” count of the indictment, agreeing to the maximum possible sentence, and waiving all of his rights, including the right to further judicial review. I was a public defender for six years, and I have been a law professor for longer than that. I can think of reasons why that plea agreement may have benefited my colleague, but I cannot think of even an implausible-but-theoretically-possible reason why accepting that deal was in her client’s best interest.¹⁴

III. FUTILITY

One of the striking (and for me, surprising and disappointing) aspects of the criminal-justice system is how many bad trial-court judges there are, particularly in county systems. By bad, I mean people who could not structure or evaluate a coherent legal doctrine with two hands and a flashlight and, quite frankly, have no interest in doing so anyway. No one likes to say that out loud, much less write it down and publish it, but it is true. A lot of state court judges are ineligible for Mensa.

Defense attorneys lose most of the time. Contrary to what you see on *Law and Order*, the system is stacked, heavily, against defendants. That is not the hard part of the job, though, losing cases because the law is against you. The hard part is losing when the law is on your side. Any halfway decent defender reading this is nodding now. You file a meritorious motion, citing the authorities that support it. The prosecutor files a stupid response, mis-citing the authorities. It does not appear that the judge understands the nuance of your argument (or has read the motion), but that does not stop the judge from denying it.

These same not-always-brilliant trial courts like to adopt policies and procedures, sometimes through formal rules, other times through informal practices. The purpose of these policies is usually to streamline the court’s

¹³ See 18 U.S.C. §1111(b) (1948) (affixing the punishment for first-degree murder as death or life imprisonment); 18 U.S.C. §3593(a) (1994) (requiring the Government to file pretrial notice of its intent to seek the death penalty); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL § 9-10.050 (2014) (establishing internal Department of Justice protocol in all potentially capital federal cases and prohibiting an AUSA from seeking death, “the Attorney General will make the final decision whether to seek the death penalty”).

¹⁴ Cf. *Boykin v. Alabama*, 395 U.S. 238, 240 (1969) (finding Boykin’s guilty plea to capital robbery, made at his arraignment, to be unconstitutional in part because the record gave no indication of any strategic benefit to Boykin of the plea).

caseload or “enhance courtroom security.” What is wrong with that? Start with the stunning frequency with which these procedures are patently unconstitutional. This is one of the first shocks that smart defenders experience. You take criminal-procedure and trial-practice classes in law school. You study under brilliant lawyers who teach best practices. Then, a public defender’s office hires you, and you start going to court, entering the rabbit hole. At first you just watch, kind of confused, but eventually you go through a three-stage process.

Stage One involves some variation of this conversation with a senior attorney in your office:

You: “Um, that thing that the court is doing seems kind of unconstitutional.”

Senior Lawyer: “Don’t get me started. Of course it’s unconstitutional.”

You: “Oh, right, I thought so”

End of conversation.

It continues to bug you. It is not just that the court is failing to do something that the Supreme Court has said that it is required to do (often decades ago). It is that no one in the room tries to do anything about it. They just seem resigned to the hopeless illegality. Eventually, you work up the nerve to enter Stage Two: revisiting the issue.

You: “So, um, you know that thing that the court is constitutionally required to do but doesn’t? Um, well, should we do something about it?”

Senior Attorney: “Believe me, we’ve tried. But it goes nowhere.”

Well, at least you tried once? I cannot tell you how many times, as a young public defender, I ran a legal argument by a senior attorney whose response was simply, “You’ll never win that.” Not, “You’re wrong,” or, “You might want to look at this case before you file that,” or any other objection to the merits. Just, “That’s hopeless and, therefore, a waste of your time.” I think of this as futility/frivolity distinction confusion syndrome. That needs a better name, but here is the point. An argument that has no legal basis is frivolous. An argument that has a sound legal basis but a lawyer likely won’t win because the judge is too feckless to appreciate its merits, at least in the short term and without an enormous amount of work and tenacity, might seem futile, but is not frivolous. It is a lawyer’s duty not to do things that are frivolous. It is not a lawyer’s duty to avoid things that seem futile.

Eventually, you get senior enough where you are no longer under direct supervision and can make independent decisions. You are more confident in your

skills now and likely less confident in the skills of those around you, so you enter Stage Three: taking matters into your own hands. You make an objection or file a motion or otherwise protest this illegal practice. If you are lucky, the illegal practice ends. It might work because the judge recognizes that your argument is well reasoned and researched, but probably not. More likely it will work the hundredth time because the judges eventually figure out that you are going to keep pestering them (making objections, slowing down dockets, filing motions, setting up appeals) until they change their practice, and it becomes easier to change the practice than to deal with your hectoring. Or the judge denies your motion, and the appellate court reverses the decision, which trial judges pretend not to care about, except that they do, especially when some young public defender told them so.

All of which is a fantastic victory for your clients, justice, integrity, the American way, maybe even your poor bedraggled ego. A handful of your colleagues will congratulate you, but you should brace yourself for the blowback. I'll pose it as a hypothetical. Imagine that a young and inexperienced public defender achieves an impressive litigation victory after engaging in a novel strategy that various senior attorneys in her office advised her was a waste of time. The result will be: (a) the prosecutors and judges are furious, but her office celebrates her tenacity and dedication and defends her from their retaliation; (b) the prosecutors and judges are unhappy with the victory, but respect her intellect and are professional enough not to take it personally; (c) when her office hears about the victory, with a few exceptions, they ostracize her, talk about how she lacks "judgment," will "burn out" soon, or both, and learn nothing from this feedback about their earlier advice; or (d) the victory weirdly becomes the catalyst for her to leave the office for academia. It's a trick question, actually. The answer is definitely (c) and maybe (b) and (d), if you're lucky. Result (c) is what happens when you force an ostrich's head out of the sand, and all that it cares about is getting it back there as quickly as possible. Result (d) happens when you value your sanity and sobriety.

IV. THE COMBINE: CULTURE OF DEFENSIVENESS

All institutions have acculturation mechanisms. In legal practice, positive ones include wearing suits and calling people Mr. or Ms. In defender offices, negative ones include not rocking the boat. There are lots of mechanisms to do this. I believe that they exist more to support a network of rationalization and excuses than purposely to punish zealous defenders, but punish them they do.

Here is another true story from my time in practice, involving my former boss who tried to fire me on the ground that I had won a long and complicated piece of litigation over his express objection. No, that's not a typo. I almost got fired for winning.

I spent months researching, writing, and challenging an unconstitutional district-wide policy. After approximately eight hours of oral argument in the District Court, my motion was partially granted. The District Court's ruling

denying the other part of the motion was eventually overruled on appeal, resulting in a total victory. At one point during this litigation, my boss held a meeting at which he informed every lawyer in the office that I was reckless and that my litigation strategy constituted malpractice, but the worst moment actually came after my District Court victory. I think that the entire courthouse had gotten wind of how much trouble I was in at my office, so, a few days after issuing his ruling, the judge in the case, a lovely man who was trying to be chivalrous, called my boss to tell him what an exceptional job I had done litigating the matter. I pride myself at being pretty good at angering people. The ability to inspire rage quietly and politely was one of the things that I liked about being a defender. But I have never seen rage like my boss's reaction to the judge's phone call, other than on an episode of *Cops*. It was volcanic. It is possible that the reaction was a simple, human reaction to the egg that he had on his face for publicly berating my ultimately successful strategy, but I think that it was more than that.

Throughout our several-month disagreement over the litigation (during which time I actually retained an employment lawyer in the event that he fired me), he repeatedly kept yelling (and when I say yelling, I mean that people would walk by my office when he was on the phone and ask if I was all right because they could hear him, through my phone, up the hallway) that I “didn't know my place on the totem pole,” by which he clearly meant that I was not senior enough to have taken on the project. He never once criticized the substance of any of my decisions. He just objected to the fact that I was making them, which is weird given that, in four years as a federal defender, I filed hundreds of motions, and no one ever suggested that I lacked the seniority to do so before. Which is why I think that his rage was more about acculturation. I was in trouble because I was a junior attorney challenging a longstanding policy of questionable constitutionality that none of the senior attorneys in the office had bothered to challenge before, and that was unacceptable.¹⁵

¹⁵ To be fair to my former colleagues, within a few weeks of filing my motion challenging the court policy, two other lawyers in my office filed similar motions on behalf of their clients, which were joined with my case. But that fact actually makes the acculturation argument more compelling, and here is why. At one point during the protracted litigation in the District Court, one of the other (much more senior) attorneys in the consolidated case filed an objection to a piece of evidence that the Government had proffered, and I joined the motion. In the upper corner of the motion, his name was first, and mine was second—same thing with the case caption, his client first, mine second. Shortly after he filed the motion, my boss called the head of my branch office and ordered him to fire me because of this motion, which I had joined, but neither authored nor filed. The motion was fairly technical, involving rules of appellate procedure and the evidentiary law of authenticity, and my boss was enraged at the use of the word “purportedly” in the motion—seriously, he wanted me fired because my colleague had used the word “purportedly” in an evidentiary motion. The head of my office refused to fire me, no doubt because he did not want to be named as a defendant in the wrongful-termination suit, so he negotiated, on my behalf, a lesser sanction—a sort-of in-office probation. But here is the craziest part: no one ever said a word to the attorney who wrote and filed the motion, who had been in the office for more than fifteen years—not only was he not fired or yelled at or placed on “probation,” the administration reacted as if I had solely filed the motion,

A. *Evaluating Performance*

One mechanism of acculturation in defender offices is performance evaluation. The performance evaluations of zealous defenders tend to say things like “concerns about judgment” or “disproportionate use of office resources.” The problem is that those assessments, in my experience, exist devoid of any objective measures of performance—acquittal rates, reversal rates, average sentences.

An attorney who advises a client with no viable defense to turn down a three-year deal, resulting in a twenty-year sentence after a guilty verdict that the jury reached in less than five minutes of deliberation, exercises poor judgment. An attorney who advises a client to turn down a three-year deal and then wins a motion to dismiss has exercised excellent judgment (or at least made a lucky guess). Without outcome measures, there is no way to know who is reckless and who is zealous.

Here an example of this kind of acculturating “performance evaluation.” My first performance review as a federal defender contained the following sentence in the “needs improvement” column: “Carrie uses a disproportionate amount of investigation resources.” Naturally, I was concerned. When I met with my boss to discuss the evaluation, the conversation went like this:

Me: “Am I engaging in frivolous investigations?”

Boss: “No, of course not. We wouldn’t wait until your annual evaluation if that were the case.”

Me: “Um, okay, so why does this comment appear in the ‘needs improvement’ column of my evaluation?”

Boss: “According to our records, this past year, you submitted 173 requests for investigation assistance. We have ten lawyers in the office, but your investigation requests constituted 50% of all the investigation hours logged.”

Me: “But none of those 173 requests were frivolous?”

Boss: “No, they were all appropriate. There were just way too many. Let me try to explain this another way. [Another lawyer] submitted three requests for that same time period. Do you see how far you are out the continuum?”

because it was not the motion, it was the name on it, and I had not yet earned the right to fight for my clients.

Me: “Um, well that kind of sounds like more of an issue for [the other lawyer]’s performance evaluation.”

My boss never appreciated my subtle wit. A different year, my evaluation said “concerns about Carrie’s judgment.” My follow-up meeting went like this:

Me: “Wow, [boss], that’s a serious allegation. Can you give me an example of how I’ve exercised poor judgment?”

Boss: “You’ve advised a significant percentage of your clients to turn down plea offers, instead filing motions, requesting supplemental discovery, issuing subpoenas. You engage in very aggressive litigation tactics. I’ve been getting calls from the U.S. Attorney’s Office that you’re difficult to deal with.”

Me: “Ok, I see, but can you give me an example of a situation in which my ‘aggressive litigation’ has left a client worse off, a time when a client followed my advice, turned down a plea offer, and ended up getting more time?”

Boss: “No.”

Me: “Well, then, how can you describe those decisions as poor judgment?”

Boss: “You just don’t seem to have a good working relationship with the U.S. Attorney’s Office.”

Me: “I say ‘good morning’ and ‘please’ and ‘thank you.’ No one has had me audited by the IRS. More importantly, I tend to get better plea offers compared to other lawyers in this office. What makes you think that I don’t have a good relationship with their office?”

Boss: “You’re just very aggressive.”

B. *Social Pressure*

There is also social acculturation, the subtle suggestions that you don’t play well with others, that it’s sad that you take pleasure in pyrrhic victories, that you’re wasting time and resources working through things that you ought to be working through with your shrink. It’s often as fleeting as “We’ve tried that before. Why do you think that you’ll get different results?”, or “Don’t you have enough cases?” Sometimes, it is less subtle: being assigned additional cases because you “clearly have time on your hands.”

In the district in which I worked, judges followed the sentencing guidelines almost religiously, even after *Blakely v. Washington*¹⁶ and *United States v. Booker*.¹⁷ The U.S. Attorney's Office, even after the guidelines became advisory, continued to make the following plea offer in most cases: if the defendant pleads guilty to the top count, admits all of the aggravating facts charged, and waives all appellate and post-conviction rights, we will agree to a sentence at the low end of the guideline range. Here is the problem with that offer—unless you are representing Al Capone on a tax-evasion charge or your client threatened to kill the judge yesterday, your client is going to get no worse than the low end of the guidelines anyway. And related counts almost always merge for sentencing under the federal guidelines, so dismissing any count other than the top count, barring some kind of collateral consequence like immigration penalties or sex-offender registration, is basically worthless. Early on in my career, I coined a retort that I liked to use in these situations: “That’s a plea offer, but not a plea bargain.” I started having my clients plead guilty to the indictment, without a plea agreement, and taking their chances with the court at sentencing. I do not have exact statistics, but I would estimate that about half of the time that I did that, followed up of course with substantial investigation and a lengthy sentencing memorandum, my clients “beat” the deal, not usually by much, maybe getting 48 months when the plea agreement had called for 51.¹⁸ The other maybe half of the time, my clients got the same low-end-of-the-guidelines sentence that the plea agreement had offered, except without waiving their appellate and post-conviction rights, which can be valuable. During the eight years that I practiced law, the Supreme Court decided *Apprendi v. New Jersey*,¹⁹ *Crawford v. Washington*,²⁰ *Rothgery v. Gillespie County*,²¹ and several other cases adopting “watershed rules of criminal procedure,” which are rule changes that might retroactively benefit people already

¹⁶ 542 U.S. 296, 308 (2004) (holding that an aggravated sentence, based on the judge's finding of an aggravating circumstance that was neither pleaded nor proven to the jury, violated the Sixth Amendment).

¹⁷ 543 U.S. 220, 226–27 (2005) (holding that the Sixth Amendment required severance of the provision of the Federal Sentencing Act making the federal sentencing guidelines mandatory).

¹⁸ If, like some of my former colleagues, you don't think that there is a real difference between a forty-eight month and a fifty-one month sentence, I think that you should spend three months in prison.

¹⁹ 530 U.S. 466, 490 (2000) (holding that any fact, other than a prior conviction, that increased the maximum penalty had to be submitted and proven to the jury).

²⁰ 541 U.S. 36, 68–69 (2003) (overturning *Ohio v. Roberts*, 448 U.S. 56 (1984), and holding that the Confrontation Clause barred admission of testimonial out-of-court statements unless the declarants were unavailable and the defendant had a prior opportunity to cross-examine them, regardless of reliability).

²¹ 554 U.S. 191, 213 (2008) (holding that the initial appearance, during which a defendant is advised of the charges and the defendant's liberty is subject to restriction, marked the initiation of adversary proceedings triggering attachment of the right to counsel).

convicted²²—but only if they have not waived their post-conviction rights.²³ In both cases (“tying” or “beating” the rejected deal by a small margin), both the prosecutors and many of the lawyers in my office acted as if it had been a colossal waste of time. One time, I advised a client to reject a deal, which he did, and he got a low-end guideline sentence anyway after a six hour sentencing hearing. The AUSA made a crack to me about wasting so much of my time. I replied: “I tied the deal that I rejected, without having to waive my client’s rights. I’m pretty sure that you’re the one who wasted your time.” The reaction was the same when I “beat” the deal—that I had somehow “wasted” all of these precious office resources spending countless hours and killing countless trees “just” to get my client a few months off.

The only people who seemed to get it (other than my clients, who, contrary to the stereotype that bad public defenders often promote, were very grateful) were the judges. One of the last sentencing hearings that I had was before a pretty conservative, former-prosecutor judge, the same one who had tried to do me a solid with the phone call to my boss a few months earlier. It was a half-day affair, during which I presented substantial mitigating evidence on my client’s behalf. Mostly, the evidence consisted of the nature of her mental illness and horrible childhood abuse that probably contributed to it—the same mitigating evidence that most criminal defendants have, if investigated and presented. At the end of the hearing, the judge gave my client a sentence substantially below her guidelines. After the Court recessed, I had this conversation.

Judge: “Boy, Ms. Leonetti, your clients seem to have the most incredible mitigating circumstances. It’s amazing how you always draw these really sympathetic clients.”

Me: “Your Honor, with all due respect, seriously? I work in an office with ten lawyers. Our cases are assigned pretty much at random. I’m not a statistician, but don’t you think that me ‘drawing’ all of the sympathetic ones is, um, mathematically unlikely?”

I will never forget the look on his face as it slowly dawned on him that he spent most of his days hammering equally sympathetic defendants simply because their lawyers were not doing their jobs.

²² See *Teague v. Lane*, 489 U.S. 288, 315–16 (1989) (holding that a new constitutional rule of criminal procedure would apply retroactively if the failure to do so would undermine the fundamental fairness of the prior proceedings or diminish the likelihood of an accurate conviction).

²³ See *Lefkowitz v. Newsome*, 420 U.S. 283, 288 (1975) (holding that in the normal case a knowing and voluntary guilty plea barred subsequent constitutional challenges to pre-plea proceedings); see, e.g., *Brown v. Herbert*, 288 F. Supp. 2d 351, 357 (W.D.N.Y. 2003) (holding that, when Brown admitted his guilt, he could not thereafter raise claims relating to the deprivation of his rights before his guilty plea).

C. “Mentoring”

There is a popular critique about legal education right now. It goes like this: Law schools should spend less time teaching students to “think like lawyers” and more time teaching students to “practice.”²⁴ Some have advocated two years of law school and a third year that is more like an apprenticeship.²⁵

I have no idea how valid these complaints and proposals are for future intellectual-property or family-law lawyers, but they make me very nervous for future criminal lawyers for this reason: “Practical skills training” in criminal law

²⁴ See generally JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* (2013); ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007); RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007); Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J. L. & SOC. JUST. 247 (2012); Brandon R. Ceglian, *Bridging the Gap Between Law School and Law Practice*, COLO. LAW., May 2008, at 59; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Brian D. Einhorn, *Waltz a Little Faster, They Are Playing a Tango*, 93 MICH. B. J. 18 (2014); Martin J. Katz, *Facilitating Better Law Teaching—Now*, 62 EMORY L. J. 823 (2013); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century*, 68 CHI.-KENT L. REV. 243 (1992); Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667 (2005); Sara K. Rankin, *Tired of Talking: A Call for Clear Strategies for Legal Education Reform: Moving Beyond the Discussion of Good Ideas to the Real Transformation of Law Schools*, 10 SEATTLE J. SOC. JUST. 11 (2011); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245 (1996); Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11 (2013); Stefanie M. Benson, *It Is Time for Legal Education to Prepare Law Students for Law Practice*, J. KAN. B. ASS'N, May 2005, at 12; Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at SR10; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1; cf. Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 736 (2011); Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 113 (2010); Karen Sloan, *ABA: Law Schools Getting the Message on Practical Skills*, NAT'L L.J., July 5, 2012, available at <http://www.nationallawjournal.com/id=1202561943191?> (last visited Nov. 24, 2014). But see Leonard J. Long, *Resisting Anti-Intellectualism and Promoting Legal Literacy*, 34 S. ILL. U. L.J. 1 (2009).

²⁵ See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 280–95 (1999); Robertson B. Cohen, *An Alternative to Law School: The Apprenticeship Model*, COLO. LAW., May 2009, at 83, 89; Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 606 (2012) (advocating for two years of law school plus a pro-bono hour requirement, but not a strict apprenticeship requirement); Ruth Tam, *Obama: Law Schools Should Think About Being 'Two Years Instead of Three'*, WASH. POST (Aug. 23, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/23/obama-law-schools-should-think-about-being-two-years-instead-of-three/?wpisrc=nlpmo>; Debra Cassens Weiss, *Two-Year Law School Was a Good Idea in 1970, and It's a Good Idea Now, Prof Tells ABA Task Force*, A.B.A. J. (Feb. 10, 2013, 1:36 AM), http://www.abajournal.com/news/article/two-year_law_school_was_a_good_idea_in_1970_and_its_a_good_idea_now.

often involves being handed a giant stack of cases and trained to parrot the practices of others, without critical reflection or being taught the “best practice” skills of due diligence, investigation, research, and statutory construction that empower them to reinvent a better wheel. I have counseled students to take jobs in large, corporate litigation departments immediately after graduation, slogging through tedious “document review” and carrying briefcases for senior lawyers, before trying to get jobs as public defenders (or prosecutors) because I have so little faith in the “on-the-job training” of the criminal justice system.

Here is an example. I worked in a public defense office with ten attorneys. Toward the end of my time there, I became the ninth most senior lawyer in the office when the office hired a new attorney to replace a colleague who had left. One day, my new colleague came into my office to ask me a question about the Bail Reform Act [BRA],²⁶ a notoriously incomprehensible statute. Accustomed to law clerks asking me what statutes said without having read them, I snapped, “What does the statute say?!” He responded with an incredibly nuanced construction of this cumbersome statute. The issue that he was attempting to resolve is somewhat complicated, but I will describe it as briefly as possible.

In the federal system, all defendants can be detained pending trial if they pose a flight risk.²⁷ Some, but not all defendants, can also be detained if they pose a risk of “danger” to the community.²⁸ So, the first question that a defender should ask is whether the defendant is eligible for detention due to dangerousness. If not, defendants can only be detained if they pose a flight risk. Almost all of the crimes that render a defendant eligible for dangerousness detention are subject to a “rebuttable presumption” of dangerousness—shifting the burden to the defendant to prove safety. There is a small subset of dangerousness crimes, however, to which the rebuttable presumption does not apply, placing the burden on the Government.²⁹ My recollection is that this small category comprises mostly gun charges. In other words, white-collar criminals can only be detained if they might flee. Drug dealers and child sex offenders are presumptively detained. Gun possessors can be detained if they might flee or be dangerous, but the Government has to prove the likelihood of the latter. My new colleague was representing a client who had been charged with illegal gun possession. He believed that his client could be detained if he posed a danger to the community, but was not subject to the presumption of danger. I apologized for biting his head off, confirmed his construction of the statute, and congratulated him, since the BRA is so complicated. Instead of leaving my office at that point, though, he closed the door.

Him: “Are you sure?”

²⁶ 18 U.S.C. § 3142 (2008).

²⁷ *See id.* § 3142(f).

²⁸ *See id.*

²⁹ *See id.* § 3142(e)(3).

Me: “Well, yes, but it doesn’t really matter if I’m sure. Are you unsure?”

Then it clicked.

Me: “Have you asked other attorneys in the office?”

He had. Of the eight other attorneys in the office, he had asked seven before he got to me. All seven other attorneys had assured him, incorrectly, that his client was subject to the rebuttable presumption.

Me: “Did they show you where in the statute they were getting that?”

Of course not. They had all just answered off the top of their heads, without bothering to consult the statute. This is what Rapping refers to as “shooting from the hip.”³⁰

This is why I personally think that we need the third year of law school. My former colleague luckily went to an excellent law school that trained him in “skills” far better than any “practical training” at a defender’s office could have. And he was right. His client was released from jail when the judge ruled that he was not subject to the rebuttable presumption.

V. GREASING THE WHEELS OF JUSTICE: THE DOUBLE-EDGED SWORD

The truth is that defense attorneys, especially public defenders, do a service for the rest of the criminal justice system: they grease it. Don’t believe me? Have you ever seen the look on a judge’s face when a defendant wants to go *pro se*? We are a filter, waiving “unnecessary” rights, pushing plea deals, convincing our clients that what they want to tell the court is irrelevant or inadmissible. And that’s fine, when the deal is good, the case is hopeless, and the rights that are being waived are less important than the prison time that is being avoided. The problem is that, somewhere along the way, a lot of public defenders get co-opted. They become “team players” at the expense of protecting their clients.

One time, when I was a pretty junior defender, I was assigned as the duty lawyer over Christmas week. The only judge in the building was a senior judge who was widely known to be senile. I guess that I already had a reputation as a troublemaker, because before the judge took the bench, his clerk pulled me aside and said something like, “Let’s all be sensitive today,” which clearly meant “Don’t take advantage of him by exploiting ‘technicalities.’” I played dumb and responded, “I’m sorry, what?,” which I think she understood to mean “F@*& Y+#, lady, I’ve got a job to do here, and it isn’t covering for your judge” because

³⁰ See Rapping, *supra* note 3, at 191.

she did not rephrase her request. It is possible that I made slightly more objections and motions than I normally would have that day, eh hem. It is definitely possible that I had a much higher percentage of objections sustained and motions granted than usual. I do not feel guilty about that. In fact, I am kind of proud of it. I am also sure that most of the other attorneys in my office would have played along instead.

This pressure to make it easier and more efficient for prosecutors and judges to convict and sentence your clients is unrelenting. But there is an upside. The system relies on you to do it. From time to time, some academic calls for all public defenders to simply refuse to plead any of their clients guilty and demand trial in 100% of their cases.³¹ The idea is that doing so would crash the system. Of course, there are problems with this suggestion. First, attorneys do not decide how their clients plead. Clients decide, and, when the deals are better than what trials promise, they usually choose to take them. Second, even if you amended the suggestion to advising all clients to demand a trial, and even if you assumed that 100% of defendants would follow that advice, it would still be unethical, and here is why: Many defendants could end up better off that way — with misdemeanors or even dismissals to clear the backlog. Some defendants would end up way worse off, serving thirty years after trial because they turned down a five-year offer as part of your “break the system” strategy. Your advice to those clients was malpractice. But I sympathize with the suggestion. There is a perception, which I share, that defenders do too much going along to get along and not enough standing up and fighting. But there is a way to use that power/curse of greasing to help clients without shooting them in the foot. Here is one small example.

My first assignment as a federal defender was as the duty lawyer in Yosemite National Park. There is a tiny full-time Magistrate Court in Yosemite that processes all misdemeanor cases in the Park. If you are thinking to yourself that Yosemite sounds like the most idyllic defender assignment ever, you have never been the duty lawyer there. In fact, I doubt that you have ever been to Yosemite. Picture a small municipal night court, heavy on drunk and disorderlies, but with all of the power and resources of the federal government. The continued funding of the court and Law Enforcement Office depends upon a steady flow of new cases. Overkill much?

The first day that I worked Yosemite also happened to be a new magistrate’s first day. The duty day is Tuesday. There is a 10:00 calendar for “serious” crimes, and a 1:30 calendar for citations. The courthouse opens at 8:30. When I was the duty defender, I would arrive at the court at 8:30. In the winter, an hour and a half was plenty of time to interview the three or four defendants on the calendar. In the summer, however, I would arrive to find a Friday night emergency-room crowd of

³¹ See, e.g., Michelle Alexander, Op-Ed., *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, at SR5, available at http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0.

dozens of defendants. I started in the summer, so, my first few Tuesdays on the job, I'd arrive at 8:30 and start interviewing people as fast as I could. Around 9:55, the clerk would pop her head into my office and ask if I was ready. I would say no and estimate of how much longer until I was ready. Until a month or two into the gig, when one day, during her 9:55 check-in, I told her that I was only about half way through the waiting clients, and she responded that the judge had "ordered" me to be in court and ready to start by 10:00. A judge can order you into a courtroom, but I was curious to see how he was going to enforce the part of the order that I be "ready."

The first case called was a client with whom I had met. I arraigned him quickly and easily. The second case, however, was one of the clients to whom I had not gotten before being unceremoniously told to get my butt into court. I accepted the appointment, acknowledged having received the complaint, and stopped talking. The judge prompted me with, "Are you waiving reading and advisement?" I responded, "No, Your Honor. I haven't had a chance to meet with this client, go over the charges, and advise him of his rights, so I guess that you will have to do it." Funny thing about reading and advisement: judges never do it. No one ever fails to waive it. So, they do not actually know how. Or at least this judge did not. The frantic look on his face more than made up for having been scolded into court. The judge fumbled the best that he could through the charges and consequences, relying on the prosecutor to fill in the elements and maximum sentences, while his clerk ransacked her desk for a script. But when it came time to advise my client of his rights, he faltered. Criminal defendants have *a lot* of rights, at least titularly. There was no way that he could wing it. Instead, he asked me how long it would take me to advise my client so that I could waive advisement. I told him fifteen-to-twenty minutes, and he took a fifteen-minute recess. After the recess, he called the third case, which turned out also to be a client with whom I had not met. Another fifteen-minute recess. We went on like that all morning and into the 1:30 calendar, inching through the docket one fifteen-minute continuance at a time. Then, without a break because we were running so late, we started the 1:30 calendar. Unfortunately, however, I had not met with any of those clients, since I was still in morning court during the lunch break. It normally took about forty-five minutes to get through the morning and afternoon calendars. That day we were in court for seven straight hours. The following Tuesday, when I told the clerk at 9:55 that I still had clients to interview, she told me to take my time.

VI. THE LAW OF (UN)INTENDED CONSEQUENCES: DOWN THE RABBIT HOLE

Public defender agencies are chronically mismanaged. It is as if being the senior litigator in the office does not necessarily make you the best chief administrator.

A. Workload as Punishment

One perpetual management problem is the use of caseload as a proxy for workload. My first defender job was in appeals. Each lawyer in my division was usually assigned four cases per month, chosen in a way that roughly equalized the pages of trial transcripts. That sounds equitable, but it is actually an excellent example of the difference between caseload and workload, because the same case in two different lawyers' hands can vary significantly in its workload. Appellants have the option of filing one brief (opening brief) or two (opening brief and reply).³² Some lawyers always or almost always file both an opening and a reply brief. Some lawyers never or almost never file both. There was a thirty-five-page limit on opening briefs.³³ There were lawyers in my office who routinely filed three—or four—page opening briefs and never filed reply briefs. Others filed motions asking the appellate court for extra pages,³⁴ which in my extensive personal experience,³⁵ were always granted. The result of this disparity was that there were lawyers who averaged forty or fifty or even sixty pages of legal writing per case and there were lawyers who averaged one tenth of that. Both lawyers had the same caseload, but staggeringly different workloads.

In the words of people who sell knives on TV, “But wait, there’s more!” The decision whether to appeal beyond the initial court of appeals lay primarily with individual lawyers.³⁶ Some of us asked higher courts to review most if not all of our losses. Some lawyers never or almost never did. I learned toward the end of my tenure, when I saw a document circulated by my boss, that there were lawyers in my office who dismissed an average of one-to-two appeals per month—or almost half their caseload. They tended to be the same lawyers who filed tiny briefs and never appealed past the first automatic appeal. When a lawyer in my office dismissed a case, they were not assigned another one in its place. When a lawyer decided to pursue a case to a higher court, that petition did not count as additional caseload, but was done in addition to the four cases that kept coming each month. When you put it together, the math becomes staggering, and the workload continuum at my office spread across the horizon like a New Mexico sunset. At one end, there were those of us filing 150-250 pages of briefs, plus another 50 pages of petitions for higher review, each month. At the other end of the spectrum, there were people who may not have written double digits of pages

³² See, e.g., FED. R. APP. P. 28.

³³ See MD. CT. R. 8-503(d)(1).

³⁴ See *id.* (permitting parties to request an extension of the page limits on Principle Briefs).

³⁵ I am sure that the rumors that this motion is referred to as the “Leonetti” in the clerk’s office are exaggerated.

³⁶ See Maryland Public Defender Act, MD. CODE ANN., CRIM. PROC. §§ 16-101 to 16-403 (West 2008) (mandating that the Office of the Public Defender represent indigent defendants charged with serious crimes before the trial courts and Court of Special Appeals, but not the Maryland Court of Appeals).

each month. But, to our bosses, we had the same “caseload.” Some of us were just less “efficient” at managing it.

B. *Outcome Aversion*

One of my pet peeves with my offices was that they refused (when I say “refused,” I am not using a rhetorical flourish for “did not;” I mean that I asked them, and they said “no”) to collect data on lawyers’ success rates (which, in appeals, would have been a largely bimodal measurement: affirmed or reversed—that is a bit of an overgeneralization, but not an unfair one). In the aggregate, when I worked there, the statewide reversal rate was eight percent, and our office-wide reversal rate was twelve percent (you would expect the appellate division of a public defender’s office to beat the non-PD average). My reversal rate was about forty-eight percent—*i.e.*, almost half of my clients were no longer in prison when I was done representing them. I had friends in the office with similar reversal rates. I reveal this not to brag, but for mathematical reasons. First, I am not a statistician, but if there is an office of approximately twenty lawyers, and their collective success rate is twelve percent, and several lawyers have a success rate of almost fifty percent, it seems mathematically certain that there are other lawyers who are grossly underperforming in comparison to the average. There were a couple of lawyers in my office whom I suspected of having a success rate near zero. Second, it made no difference whatsoever. Because the office did not gather these statistics—in fact, intentionally turned a blind eye to them—there were no rewards for high performers, no penalties for low ones. Third, while I am not privy to the workloads or success rates of any lawyers beyond myself and a few close friends, I would be stunned if workload and success rate did not strongly correlate—*i.e.*, if the 200-page lawyers were not also the fifty-percent lawyers and the ten-page lawyers were not also the near-zero lawyers. I know that the correlation exists at least anecdotally across my small cohort of hard-worker high-performer colleagues.

Until I became a public defender, I considered myself to be a model employee, but my bosses made it clear that they did not share that assessment. One of the things that I naively thought made me a valuable asset in an organization is that I do not believe in mindless complaining, which I define as pointing out a problem without suggesting a solution. Toward the end of my first job, I went to my boss, described some of what I have detailed here, and made two suggestions: that the office collect and evaluate individual attorney reversal rates (and incorporate them into performance evaluations) and that the office assign duties on the basis of workload not caseload—*e.g.*, assigning more cases to lawyers when they dismiss appeals and fewer to lawyers who engage in multiple levels of appeals. Of course, the latter suggestion (giving more cases to the lazy lawyers and fewer to the hard working ones) would be a disaster for clients without the former (measuring and acting on poor performance, defined by outcome). When I had this conversation with my then-boss, did I expect a standing ovation?

Even I am not that naïve. But I also did not expect to be shrieked at and thrown out of his office.

Then, it got worse. I had a case with a client who had been convicted of carjacking and attempted murder and sentenced to eighty-five years in prison. I had serious doubts about his guilt, although that is not a particularly cognizable appellate issue. I also had a good chance at getting him a reversal because the State had destroyed all of its exhibits after trial. Where I practiced, if the appellate record was incomplete, and the appellant makes a good-faith effort to reconstruct it but cannot, he is entitled to summary reversal without a showing of prejudice.³⁷ But documenting the required good-faith effort is time consuming. About a week before my opening brief was due, I had written two versions of the brief. In the first, I argued that the record could not be reconstructed through due diligence and that my client was entitled to summary reversal. In the second, I argued for reversal only on the merits of the claim that the exhibits were inadmissible, in case they were found or reconstructed. I asked the Assistant Attorney General to agree to a one-month continuance while I finished my due diligence (so that I knew which brief to file), she agreed, and the court granted the stipulated extension.

The next day, I was called into the office of the deputy who was responsible for case assignment, where she ordered me to file my brief immediately. I explained the situation to her, and she replied with something along the lines of: “I don’t care. Just file anything.” I refused, and she ordered me again. I refused a second time, then went to the head of the division (whom I thought should know that I had been ordered, essentially, to commit malpractice in the name of caseload), who shrieked at me for bothering him again (he might still have been pissed about the performance evaluation conversation). As bad as my experience was, I am more worried about the lawyer who, afraid of being fired, follows the order.³⁸

My workload experience with my first office was not an isolated case. I had a similar, “Please make an attempt to quantify, assess, and respond to outcome-based performance measures” conversation with my second boss shortly before I quit that job. I had noticed similar (obvious) correlations in that office. Lawyers who appeared to work the hardest (filing motions, going to trial, having contested sentencing hearings, litigating appeals) also appeared to achieve the best results for their clients (lesser charges, shorter sentences, dismissals, reversals). My second boss was not a yeller. He responded with a multi-page memo about why my idea was a terrible one, which mostly focused, in a passive-aggressive way, on my

³⁷ See *Wilson v. State*, 639 A.2d 696, 701 (Md. 1994).

³⁸ I was never able to reconstruct the missing exhibits, and so I filed the version of the brief arguing for both summary reversal and reversal on the merits (based on what could be gleaned about them from their description in the transcript) the following month. I left the office before the case was decided in an unpublished opinion, which would have been mailed privately to the lawyer assigned to take over the case for me, and so I do not know the outcome, but I continue to believe that the client’s conviction was likely reversed.

psychological infirmity. It probably took him longer to draft that memo than it would have to develop objective performance measures.

C. Seniority Is Paramount: "Experience" = "Skill"

This is what I call "going to work at the post office," by which I mean the common defender-office practice of promoting and remunerating lawyers solely on the basis of length of service, without regard (and often inversely proportionate) to the quality of their representation. The first Federal Defender who hired me did not subscribe to the post-office method of management. I was smart. I worked hard. I got results for my clients. I got big raises. My first annual merit raise was so big that I panicked and hung up on him when he gave it to me. My second annual raise was equally lifestyle changing. Then, he retired. His replacement was apparently vying for the position of Postmaster General. This was my first annual salary conversation with him:

Him: "Hi, Carrie. I've been reviewing salaries in the office, and I've discovered some concerning anomalies. For example, you make more money than [a lawyer in the office two years longer than me] and the same amount of money as [a lawyer in the office four years longer than me]. I really want to iron out those asymmetries."

Me: "Honestly, I'm okay with that."

Him: "Thanks for understanding, Carrie. So, this year, you are only going to get a COLA. In fact, you are only going to get a COLA for the next several years, until this gets straightened out."

Me: "I'm sorry. I guess I was unclear. I'm okay with making more than [lawyer #1] and the same as [lawyer #2]. Apparently, [your predecessor] thought that I was a better lawyer. And I think that there is evidence to support that conclusion."

Dial tone.

D. Self-Flagellate Much?

The result of these Dilbert-like management policies, which appear to be crafted almost intentionally to insulate the incompetent (who return the favor by keeping litigation costs low with their lack of work or skill), is that these offices rely on personal heroism to achieve their mission. The incentives that exist encourage (I hope unintentionally) cutting corners and giving up. The lawyers who insist on doing better for their clients do it at personal expense, not just in the long hours that they work for less money than their more-senior, less-zealous

colleagues, but also in the emotional strain of always being the bad guy—angering prosecutors and judges who are so unaccustomed to zealous advocacy that they no longer recognize it, viewing it instead as “obstructionism” or personality disorder; being ostracized by colleagues for making them look bad; and being reprimanded about “resource use,” “aggression,” and “rash choices.”

This is the human part that no one ever talks about. Even public defenders, who tend to be an antagonistic, anti-authoritarian bunch, do not like to be disliked, ridiculed, and yelled at, which is what happens to zealous advocates. Because zealous defenders are rare, when one comes along, prosecutors and judges take it as an affront. One time, I tried a case, at the end of which the jury deadlocked. In fairness, the prosecutors should have easily gotten a conviction, but then again, I was a hell of a lawyer. When it came time to schedule the retrial, both of the AUSAs actually cried at the hearing—not tears of sorrow, but of rage. They implored the judge to stop me from “*repeating what I had pulled at the first trial,*” which was, just to be clear, attempting to create a reasonable doubt about my client’s guilt. During this period of time, several other AUSAs would turn and walk the other way if they saw me coming in the courthouse, in a dramatic snub.

Another time, I had painstakingly negotiated a plea agreement with an AUSA, which he later memorialized, and my client signed. When it came time for sentencing, this AUSA breached the agreement, claiming that a word in the agreement (which he had drafted) did not mean what we had agreed that it meant. Unfortunately for him, we had an extensive email exchange about this term of the agreement, and it meant exactly what I said that it meant, and also (practice tip!): email creates a permanent written record. This AUSA lied to the judge, in open court, denying that this (WRITTEN!) conversation had happened. I offered our emails in evidence, catching him red handed in his lie (which so rarely happens but, I promise, is every bit as satisfying as you might imagine). My client got the benefit of his bargain. And I got an email from the U.S. Attorney’s Office informing me that AUSAs would no longer negotiate with me over email, the clear implication being that I had done some horribly unforgivable thing—you know, by proving that a prosecutor had lied in court.

I can laugh about these things now, at least bitterly, and at the time, I put on a brave (perhaps even defiant) face. The reactions that I invoked were patently ridiculous in light of the “sins” that I committed, but the truth is that it was rough. I am pretty sure that I am a mostly decent and nice person. I am pretty sure that I was being castigated for making the only ethical choice that I had in light of my job description. But it was still really hard to be treated like toxic waste, especially when my colleagues, who betrayed their obligations to their clients, were described, by contrast, as “collegial” and wizened by “experience.”

In the end, it is too much to ask. The system grinds down all but the most ardent square pegs of advocacy until they can fit into the round holes of apathy. At a certain point, it is just too hard to always be the bad guy, the buzz kill, the lunatic.

VII. CASELOADS: ELEPHANT IN THE ROOM

It is a truism that public defender caseloads are so high that they are *per se* unconstitutional in many places.³⁹ But I think that the caseloads are just the tip of the iceberg.

In the wake of *Gideon v. Wainwright*,⁴⁰ many states and the federal government built well-funded, expertly staffed public defense agencies to fulfill their new constitutional duties to provide counsel for everyone who could not afford to retain an attorney. Then, in the 1980s, two events collided to undo a lot of that. First, the Reagan Era ushered in a new hostility toward government funding, especially for people whose job it was to coddle criminals. Wanting to slash public defense budgets, like so many other previous social, cultural, and political third rails (state mental hospitals, public schools), became acceptable. Second, the Supreme Court decided *Strickland v. Washington*.⁴¹ *Strickland* was one of those the-Court-giveth-and-the-Court-taketh-away opinions. The gift: the Court recognized that the right to counsel required more than simply a licensed attorney to stand (or sleep) next to a defendant, also demanding that said attorney effectively defend her client. The take: the *Strickland* majority defined “effective” representation *very* forgivingly and grafted an unforgiving prejudice standard on top, so that the right has been honored in its breach ever since.⁴²

Around the time that the government’s budget austerity combined with the Court’s paper-tiger ruling on “effectiveness,” local governments (onto whom many States lob their public-defense obligations) started slashing their public defense systems. For the previous generation of defenders, it was heart wrenching to

³⁹ See Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 324–26 (2002); Steve Hanlon, *Needed: A Cultural Revolution*, A.B.A. HUM. RTS., Apr. 2013, at 2; Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433 (1999); Roberta G. Mandel, *The Appointment of Counsel to Indigent Defendants Is Not Enough: Budget Cuts Render the Right to Counsel Virtually Meaningless*, FLA. B. J., Apr. 2009, at 43; Douglas Vick, *Poorhouse Justice: Underfunded Indigent Defense Services & Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

⁴⁰ 372 U.S. 335 (1963) (establishing the right to appointed counsel).

⁴¹ 466 U.S. 668, 687 (1984) (holding that, in order for ineffective assistance of counsel to warrant reversal of a conviction, Strickland had to show that counsel’s performance was so deficient that it ceased to constitute representation and that counsel’s errors so prejudiced the trial that it rendered the result unreliable).

⁴² See, e.g., *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) (holding that courts must apply a doubly deferential standard of review to a petitioner’s claims of ineffective assistance of counsel during plea bargaining); *Premo v. Moore*, 562 U.S. 115, 122–23 (2011) (holding that the state courts were not unreasonable in finding that counsel’s advising Moore to enter a quick no-contest plea without moving to suppress his confession was neither deficient performance nor prejudicial); *Cummings v. Sec’y for the Dep’t of Corr.*, 588 F.3d 1331, 1360–61 (11th Cir. 2009) (holding that the state courts were not unreasonable in finding that counsel’s failure to investigate and present mitigating evidence over Cummings’s objection at his capital sentencing hearing was neither deficient performance nor prejudicial). See generally Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 333.

watch their beloved, well-run agencies decimated. Some soldiered on in the trenches. Others left in protest, refugees to bigger and better jobs. A list of former public defenders from the 1970s reads like a who's whom of the accomplished—judges, federal lawyers, law professors, and directors of nonprofit organizations.

The funding problem is now in its second generation, and this has created its own legacy problem that goes deeper than underfunding and overloading defenders. Defender agencies have been gutted for so long that there are few lawyers left in them who remember what best practices looked like. New lawyers now join offices with no institutional memory of zealous representation, no perspective on the size of the corners that they are cutting. The second generation of defenders, the triage generation, which has never known sufficient funding, reasonable caseloads, or attentive and wise trial judges is now training a third generation of lawyers, passing on the ignorance. When I was a defender, I had colleagues who I truly doubted would know how to practice law, if the urge ever hit them, the caseloads eased, or the funding returned. The brain is like any muscle; it atrophies with long-term disuse.

Moral character also does not get exercised nearly as often as it should in these offices. The rationalization is usually something like: there is nothing that we can do about caseloads; we just have to do the best that we can with the only system that we have. That is, simply, untrue, unless the primary goal of a public defender is zero personal risk. Here are the ethical responses to high caseloads that I have come up with: (1) You can tell your boss no, even if doing so gets you fired. You may have to eat cat food for a while, but I will represent you *pro bono* in your wrongful termination suit.⁴³ Even at-will employees can be wrongfully terminated if they are fired for blowing the whistle or exercising a constitutional right (in this case, that of their clients to effective representation).⁴⁴ (2) You can declare a conflict of interest. Repeat after me: “Your Honor, because of my high caseload, agreeing to represent this client would pose a conflict of interest because it would necessitate my inadequately representing another client—in other words, it would force me to make a choice of whom to represent and whom to neglect.”⁴⁵ (3) You

⁴³ Individual results will vary. Possible side effects include losing your lawsuit, since I'm not an employment lawyer.

⁴⁴ See, e.g., Mark Hansen, *P.D. Funding Struck Down*, A.B.A. J., May 1992, at 18 (describing how a New Orleans judge held the city's entire indigent defense program unconstitutional because among other reasons it required public defenders to handle more than 300 cases at a time).

⁴⁵ See *Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 607–08 (Mo. 2012) (holding that compelling a public defender, through excessive caseloads, to choose between the rights of multiple clients, created an inevitable conflict of interest); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (concluding that public defenders have an ethical obligation to withdraw and refuse new appointments when excessive caseloads prevent ethical representation); ABA, EIGHT GUIDELINES OF INDIGENT DEFENSE RELATED TO EXCESSIVE CASELOADS 12 (2009), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf (dictating that public defender organizations faced with a caseload so excessive that its lawyers cannot render effective assistance to every client must seek judicial relief from appointment to

can rebel passively aggressively. Ask for a one year continuance of every case, citing your caseload as grounds. Request that the court set hearings in your cases at 7:00 a.m. or 7:00 p.m., citing your impossibly choked schedule as grounds. Will these requests be granted? No. If you make the record well, will they make interesting appellate issues? Yes.

I am sure that there are other options. The point is not which one of these or other choices is best. The point is that you almost never see public defenders try any of them.

VIII. CONCLUSION

Back when I was a public defender, from time to time, a friend or colleague would quit in protest, usually due to the caseloads and the poor performance that they caused. At the time, I would think what most public defenders think: How irrational, immature, and self-absorbed. What were you thinking; now that you're gone they (judges, legislatures, administrators) will suddenly have an epiphany and fix the system? All that you've accomplished is taking another good lawyer out of a system that desperately needs them. These days, I have switched sides in that debate. If the executioner refuses to throw the switch, I'm sure that they will get one who will. That does not make the executioner's job a moral one.

My guess is that eighty percent of the public defenders who read this Essay will be pissed. Their reaction will range from perturbed ("Oh, great, one more person contributing to the stereotype about 'dump truck' public defenders. Thanks, that makes my incredibly difficult job easier."), to enraged ("This ivory tower quitter thinks that after only six years of practice she knows more than people who have been doing this stuff for decades! No wonder she got bad evaluations!"). I didn't write this for them. They live in a world of such overwork and underpay that it is structurally impossible for them to engage in best practices for their clients. At best, they can be minimally competent. They know it, and they don't want to know it. Their defensiveness cannot be overcome.

I wrote this for the other twenty percent. Do not read into this Essay that they do not exist. Over the years, I have worked with brilliant, talented, hard-working people. I am in awe of how they stay in the game, some of them without becoming alcoholics. They are the ones reading this and thinking, "Thank god. Someone is saying it out loud." I would love to tell you that I have a brilliant solution to these problems, a way to keep the twenty percent going to work every day and get the eighty percent either out or in line, but I don't, beyond the obvious. We grossly underfund our public defense. As long as we do, I don't think that we can re-staff and re-acculturate them.

additional cases); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2014) ("[A] lawyer shall not represent a client if the representation . . . will be materially limited by the lawyer's responsibilities to another client . . . [or] by a personal interest of the lawyer. . . . [unless] the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.").

My goal for this Essay is more modest: to start the conversation, to reassure good, young defenders in dysfunctional offices that they are not crazy, and to empower them to challenge the systems in which they work. If this Essay sparks a robust debate in the lunchrooms of a handful of defender agencies, instigated by people who recognize themselves or their colleagues in this Essay, it will be a beginning.

You might be thinking: two offices are not a large data set. Maybe her experience is anomalous. Or even: Professor Leonetti seems to be the common denominator in these stories. Maybe she is just self-righteous, arrogant, and impossible to work with. What can I say? This might be true, but my experience was not anomalous. I believe that it was typical. Rapping has documented many of these same phenomena in the New Orleans Defender's Office that he helped to reform: the cooption of public defenders through the "team player" mentality and expectations of streamlining, the "pro forma" arraignments conducted by duty lawyers who had never met their "clients," the process by which defenders accepted without challenging the shortcomings of their own representation, and the way that defender organizations promote from within on the basis of lawyering "success" rather than management acumen.⁴⁶

The sad truth is that, if you asked around, the consensus would be that I worked in two of the better offices. The Federal Defenders are considered the gold standard of public defense⁴⁷ (and, to be fair, I think that many offices, albeit perhaps not the one that I worked in, are), and the state system that I worked in is one of the best—a relatively well-funded statewide defender system, at all levels of litigation, in a large metropolitan area with relatively high salaries and good benefits. All of which means that it probably gets much worse in some other defender offices.

Which leads me back to my brother. He was arrested sometime early on a Wednesday morning. I started calling his local public defender service Thursday morning. I was told that he would be arraigned at 3:00. I left a message for the attorney whom I was told was the duty defender, only it turned out that he was not. I told him that my brother was mentally ill and could not post bail. I also told him that I would be willing to be my brother's custodian for the purpose of conditional release, if he would agree to certain mental-health conditions. He told me that his

⁴⁶ See Rapping, *supra* note 3, at 190–99.

⁴⁷ See, e.g., Inga L. Parsons, "Making It a Federal Case": A Model for Indigent Representation, N.Y.U. ANN. SURV. AM. L. 837, 839 n.7 (1997); Harvie J. Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1126–28 (2014); cf. Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 49–50 (2008) (discussing the significant quality difference between federal public defenders and appointed private attorneys).

office did not usually “visit” the issue of detention at arraignment (a good example of a local practice of questionable constitutionality).⁴⁸

I arrived at the courtroom in the jail about half an hour before arraignments were scheduled to begin. I relayed my information a second time to the duty attorney, who told me that she “could not” raise the issue of my brother’s release at that hearing, but that his assigned attorney would address it the following day, a Friday, which also happened to be my brother’s 40th birthday.

I spent my brother’s birthday leaving messages for anyone and everyone with a voice-mail account at the public defender service. I was told initially that no one was “legally allowed to take my call” without my brother’s written consent (not true).⁴⁹ I was told that every lawyer in the office would be in court all day, so nothing could be done for my brother. Bear in mind: a motion seeking his release could be a page long. It just has to be filed to be put on the court’s calendar for a hearing. I finally called the head of the defender service, who told me that he would call the branch office representing my brother and try to get someone to call me back. I finally received a call at around 3:00 that afternoon, much too late for a motion to be calendared that day. So, my brother spent his 40th birthday in the mental-health isolation unit in jail. He (probably obviously) spent the weekend there. And (perhaps less obviously) remained there another week.

I was never able to get my brother’s motion for release calendared. On his ninth day in jail, I broke down and bailed him out on the private agreement that he comply with a mental-health treatment program. The fact that I have to enforce this agreement personally, instead of as a court’s condition of release, makes it less likely that he will comply, which is in neither his best interest nor the best interest of the other people who live in his county. He had his first meeting with an attorney more than a month after arrest. Less than a week later, at his first status hearing, she handed him a plea agreement and advised him to take it, because she did not think that his prospects at trial were great. Neither did I, given that trial prospects are not inherent, but rather the end result of the attorney’s work.

Was the quickie plea deal malpractice? Probably not. Best practices? Definitely not: my brother never even saw or discussed initial discovery with his

⁴⁸ See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that the Fourth Amendment required that defendants arrested without a warrant or indictment were entitled to a prompt judicial determination of probable cause and the basis for detention); see also *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that, barring extraordinary circumstances, “prompt” meant presenting the defendant within forty-eight hours of arrest); cf. *Pelekai v. White*, 861 P.2d 1205, 1207 (Haw. 1993) (holding that the court abused its discretion when it detained the defendant pursuant to a bail schedule without considering his relevant personal characteristics); *Clark v. Hall*, 53 P.3d 416 (Okla. Crim. App. 2002) (“[The statute] sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances. We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail.”); Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, A.B.A. CRIM. JUST., Spring 2011, at 12, 14.

⁴⁹ Cf. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2014).

lawyer. I went with my brother the one time that he had a full interview with his lawyer, and there was no indication at that meeting that any investigation had been conducted. Could a different lawyer have gotten him a better result? Maybe not. Did I urge my brother to take the deal? It was a no-time misdemeanor deal with diversion to mental-health court. Absolutely. Because that is how the system works.