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Abbe Smith

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THE BURDENS OF REPRESENTING THE ACCUSED IN AN AGE OF HARSH PUNISHMENT

ABBE SMITH*

This case . . . is something that goes to the essence of a man's conscience—Scout, I couldn't go to church and worship God if I didn't try to help that man [B]efore I can live with other folks I've got to live with myself.

- Atticus Finch¹

Strange as it may seem I grew to like to defend men and women charged with crime I was dealing with life, with its hopes and fears, its aspirations and despairs.

- Clarence Darrow²

This much is true in my twenty plus years of criminal law practice: the sentences have gotten harsher. The crimes are not any worse than they used to be. They run, as crimes do, from the banal to the barbarous. But punishment seems to have taken on a life of its own.

There are people serving more than twenty years for nonviolent drug offenses.³ There are people serving more than thirty years for car theft, burglary, and unarmed robbery—crimes for which a harsh sentence used to be ten years. One Oklahoma woman is serving a thirty-five year sentence for “till-tapping”—stealing money out of cash registers—when she was in the throes of a heroin addiction.⁴ It is impossible to estimate the number of

* Professor of Law and Associate Director, Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program, Georgetown University Law Center. This essay is for Kelly.

1. HARPER LEE, *TO KILL A MOCKINGBIRD* 120 (Harper Collins 1995) (1960).

2. CLARENCE DARROW, *THE STORY OF MY LIFE* 75–76 (1932).

3. FOX Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at 1 (describing the case of forty-four-year-old single mother Karen Shook, who had no prior criminal record when she received a twenty to forty year sentence in Michigan for conspiracy to sell two and a half ounces of cocaine).

4. FOX Butterfield, *Women Find a New Arena for Equality: Prison*, N.Y. TIMES, Dec. 29, 2003, at A9. The forty-eight-year-old was unarmed during the offenses—she grabbed money out of cash registers in six stores over a three day period—and did not hurt anyone. She was originally offered 100 years in prison for a guilty plea. *Id.*

middle-aged prisoners who are still serving time for crimes committed when they were teenagers.⁵

Even as state and federal governments face budget crises, politicians continue to call for more punishment.⁶ As crime rates continue to fall, politicians call for more punishment.⁷ The United States now has the highest incarceration rate in the world.⁸ According to a recent Justice Department report, more than two million Americans are currently incarcerated,⁹ and more than five and a half million Americans have been incarcerated.¹⁰

Prison is the one sure boom industry these days.¹¹ As one prominent criminologist has noted, “[t]he prison has become a looming presence in our society to an extent unparalleled in our history—or that of any other industrial democracy. Short of major wars, mass incarceration has been the most thoroughly

5. See Michael H. Cottman, *Law Students Make 32 Cases for Clemency*, WASH. POST, Jan. 12, 2003, at C4.

6. See generally MARC MAUER, *RACE TO INCARCERATE: THE SENTENCING PROJECT 50–80* (1999); LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* (1994); see also Justin Blum, *Va. Eyes Longer Jail Sentences: Assembly Targets Drug ‘Kingpins,’* WASH. POST, Feb. 23, 2000, at B1. But see Butterfield, *supra* note 3, at 1 (noting that, in the interests of cutting costs, twenty-five states have passed laws eliminating some of the lengthy mandatory minimum sentences after two decades of “tough on crime” policies).

7. See Fox Butterfield, *Defying Gravity, Inmate Population Climbs*, N.Y. TIMES, Jan. 19, 1998, at A10 (reporting that, despite a decline in the national crime rate, the number of jail inmates rose by 9.4 percent and the number of prison inmates rose by 4.7 percent in the past year, making the total number of Americans locked up 1,725,842, as of June, 1997); see also Blum, *supra* note 6, at B1 (reporting that there is a push in Virginia’s legislature to increase criminal punishment for drug selling, drunk driving, infecting a sexual partner with the AIDS virus, and punching a referee at a children’s soccer game).

8. Gail Russell Chaddock, *U.S. Notches World’s Highest Incarceration Rate*, CHRISTIAN SCI. MONITOR, Aug. 18, 2003, at 2.

9. Fox Butterfield, *Prison Rates Among Blacks Reach A Peak, Report Finds*, N.Y. TIMES, Apr. 7, 2003, at A12 (reporting that there were 2,019,234 people in U.S. jails or prisons in 2002).

10. Chaddock, *supra* note 8, at 2 (reporting that 5.6 million Americans are either in prison or have served time there).

11. See THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 93–94 (Stephen R. Donziger ed., 1996) (describing prison expansion as a “rural growth industry” and noting that small towns throughout the country compete to be the site of new prisons); see also Fox Butterfield, *Punitive Damages: Crime Keeps on Falling, but Prisons Keep on Filling*, N.Y. TIMES, Sept. 28, 1997, at D1 (finding that “[s]ince 1990 alone, the number of prison and jail guards nationwide has increased by about 30 percent, to more than 600,000”); *Morning Edition*, Nat’l Pub. Radio broadcast, May 27, 1997 (reporting that employment in the prison industry has increased thirty percent, while employment in manufacturing has declined).

implemented government social program of our time.”¹² Some states spend more money incarcerating people than they do educating their college-age populations.¹³

Together with increased criminal sentences, the demise of parole also serves the prison industry.¹⁴ In the states that still have parole, prisoners—especially those convicted of violent offenses—are seldom released on their minimum date.¹⁵ Executive clemency—through which a governor or the President of the United States commutes a sentence or grants a pardon—is an elusive dream for most prisoners.¹⁶

All of this punishment—the national *obsession* with punishment—has a range of effects. One effect is the further destruction of family and community in impoverished urban areas, especially poor African American neighborhoods. As inner cities have become more isolated from lawful economic opportunity, unprecedented numbers of African American men have become caught up in the criminal justice system.¹⁷ By the mid-1990s, half of the nation’s prisoners were African American even though African Americans comprise only thirteen percent of the population.¹⁸ Twelve percent of African American males in their twenties and early thirties were incarcerated as of 2002.¹⁹ If current trends continue, a black male in the United States will have a one in three chance of going to prison during his lifetime.²⁰ As one researcher put it: “[F]or African American males, the rates of incarceration can only be described as catastrophic.”²¹

When probation and parole are added to the mix, the numbers are even worse. One in three black males between the ages

12. ELLIOT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 21 (1998).

13. See Butterfield, *supra* note 11, at D1 (noting that California and Florida spend more on prisons than on higher education).

14. See, e.g., Neely Tucker, *New Sentencing Rules Take Effect in District: Set Terms Mandated; Parole Eliminated*, WASH. POST, Aug. 6, 2000, at C1.

15. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 504–07 (2000).

16. See generally Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43 (1998).

17. See MAUER, *supra* note 6, at 124–26.

18. *Id.* at 124. Seventeen percent of prisoners are Hispanic. *Id.* at 119. The percentages of both African American and Hispanic inmates are “far out of proportion to their numbers in the general population.” *Id.*

19. See Butterfield, *supra* note 9, at A12 (citing a 2003 Justice Department report). By comparison, 1.6 percent of white males in their twenties and thirties are in prison or jail. *Id.*

20. Chaddock, *supra* note 8, at 2 (reporting that for Latino males, the figure is one in six and for white males, one in seventeen).

21. MAUER, *supra* note 6, at 19.

of twenty and twenty-nine is currently under some form of criminal justice supervision, either in prison or jail, or on probation or parole.²² In some cities, including our nation's capital, *one in two* young African American men are under the control of the criminal justice system.²³ These figures are so high that they "challenge[] our identity as a free society."²⁴

Residents of poor black neighborhoods invariably have friends or family who are locked up. Those on the outside organize their lives around prison visiting schedules. They know by heart the approved goods they may buy and send their loved ones.²⁵ In some areas, the rate of incarceration is so high for young black males that they are hardly seen on the streets.²⁶ It is no wonder that teenage girls in the "hood" are willing to share the few guys who are around—and are willing to be one of several of their man's "babies' mamas."²⁷

Another effect is the slow death of individuals who have been imprisoned for years. There is a rich body of prison literature about the experience of doing time, of growing old behind bars.²⁸ One such account is John Edgar Wideman's 1984 mem-

22. *Id.* at 124–25.

23. See NAT'L CTR. ON INSTS. & ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON, D.C.'S CRIMINAL JUSTICE SYSTEM FIVE YEARS LATER I* (1997) [hereinafter *FIVE YEARS LATER*] (finding that between 1992 and 1997 the percentage of young African American men who were under criminal justice control rose from forty-two percent to fifty percent); NAT'L CTR. ON INSTS. & ALTERNATIVES, *HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM OF AMERICA'S CITIES: BALTIMORE, MARYLAND I* (1992) (finding that fifty-six percent of African American males, eighteen to thirty-five years old, were in jail, in prison, on probation, on parole, awaiting trial or sentencings, or had arrest warrants out for them on any given day in Baltimore).

24. *FIVE YEARS LATER*, *supra* note 23, at 10.

25. See Howard Manly, *Where Prison is 'A Fact of Life'; Time Behind Bars No Longer Seen as Shameful for Many in Lower Roxbury Neighborhood*, *BOSTON GLOBE*, July 7, 1993, at B1 (depicting prison as part of the everyday fabric of life for those in a poor, black neighborhood in Boston).

26. See Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 *HARV. L. REV.* 1270, 1276–82 (1998) (discussing the race-based nature of criminal law enforcement generally and the war on drugs in particular).

27. See generally ADRIAN NICOLE LEBLANC, *RANDOM FAMILY: LOVE, DRUGS, TROUBLE, AND COMING OF AGE IN THE BRONX* (2003).

28. See, e.g., JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* (1981) (writing, as a prisoner who grew up in penal institutions, about being a long-term prisoner); CLAUDE BROWN, *MANCHILD IN THE PROMISED LAND* (1965) (writing, as a prisoner, about his life as a poor, black man who turned to crime); RUBIN "HURRICANE" CARTER, *THE SIXTEENTH ROUND: FROM # 1 CONTENDER TO NUMBER 45472* (1974) (writing, as a wrongly convicted death row inmate, of growing up black in America and his years in prison); JEAN HARRIS, "THEY ALWAYS CALL US LADIES": *STORIES FROM PRISON* (1988) (writing, as a

oir *Brothers and Keepers*.²⁹ In this book, Wideman examines his life as an award-winning writer, professor, and Rhodes Scholar, in contrast to that of his brother Robby, who is serving a life sentence for murder. The brothers grew up in the Homewood ghetto of Pittsburgh, Pennsylvania. Although John Edgar is an accomplished writer, Robby holds his own when he writes about prison life:

You got time but you can't do nothing wit it. I mean there's twenty-four hours to a day in here just like out in the world. You ain't booked up or nothing for most of them so you'd think you could take care of business, but ain't hardly no business gets taken care of in the joint.

Cause it ain't really your time. Don't know how many evenings I sat down to write you or write somebody else and there ain't nothing to say. Can't write word one. It ain't like I ain't got time. I be itching to write all day. Writing letters in my mind while I'm doing other stuff. Can't wait to get back to my cell so I can write this hot letter but then I'm by myself and I sit down and ain't nothing to say. Ain't nothing worth saying cause ain't nothing happening, really³⁰

The loneliness is hard to bear. As Robby Wideman writes: Being lonely's one the worst things about the joint. Probably *the* worst. Always a lot of fools and crazy people surrounding you so you ain't never alone but you always lonely. Longer I spend in here, the more I back away I got to find my own space. Even if it's tiny.³¹

The only thing deadlier than violence in prison³² is the unrelenting boredom there. Robby Wideman captures the tedium of prison life:

[O]utside your cell ain't nothing going on but the same ole shit. That's what gets to you after a while. Repetition.

former head mistress of a private school, about her prison experiences); WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* (1992) (writing, as prisoners, about the reality of life behind bars); SOL WACHTLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* (1997) (writing, as a former judge, about his prison experiences). For more overtly political memoirs, see MUMIA ABU-JAMAL, *LIVE FROM DEATH ROW* (1996); GEORGE JACKSON, *SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON* (1970). For the penetrating perspective of a journalist who worked undercover as a prison guard, see TED CONOVER, *NEWJACK: GUARDING SING SING* (2000).

29. JOHN EDGAR WIDEMAN, *BROTHERS AND KEEPERS* (1984).

30. *Id.* at 230.

31. *Id.*

32. See generally RIDEAU & WIKBERG, *supra* note 28.

Same ole, same ole all the time. Same bullshit on the hangout corner. Same slop at breakfast. Same nasty guards. One day just like the other. Same simple cats doing the same dumb numbers. Day in and day out, every day. It gets to you. It surely does.³³

Inmates also face the fear of actually dying in prison. In a haunting essay, Wilbert Rideau, who is serving a life sentence, describes the typical coffin: "It was a cheap beige coffin, made of some synthetic material that looked almost like wood. Someone had written HEAD across one end of it with a Mark-a-lot so people would know the difference."³⁴

Those who represent people in prison—thoughtful and articulate prisoners like Robby Wideman and Wilbert Rideau, as well as those who are not so thoughtful or articulate—cannot help but be affected by the unremittingly harsh punishment their clients endure. In many cases these clients have committed serious crimes, sometimes terrible crimes,³⁵ but they are also human beings. As our clients do the time, we do the time, too.

I have a young client whom I have represented since he was fourteen years old. He is now nineteen. His crimes reflect the damage done to him through physical and sexual abuse as a baby, child, and adolescent, and his own subsequent flight into drug abuse. The crimes are serious. My client understands that he may end up spending his life behind bars. He is not very articulate but he is able to acknowledge his fears. He says that he cannot let himself think about the future; it is too frightening. He can only live day by day. He says that if he thinks about the reality of spending his life in prison, he will kill himself. He calls me regularly, nearly as much as he calls his family. He says his mother won't let him talk about his fears, his worrying. She tells him that she doesn't want to hear that. I let him talk. I do not lie to him about what he is facing. I try to be kind without mincing words. It is a terrible thing to tell a fourteen year old that he may never go home again.

33. WIDEMAN, *supra* note 29, at 230; *see also* CARTER, *supra* note 28, at 163, 165 ("[I]n jail, boredom was an inescapable fact of daily life . . . [L]ife . . . became a dreary ritual. Time inside dragged, though the months flew past my window at an alarming rate.")

34. Wilbert Rideau, *Dying in Prison*, in RIDEAU & WIKBERG, *supra* note 28, at 159. Rideau is an award winning writer who is serving a life sentence for murder in storied Angola Prison in Louisiana.

35. *See generally* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000) (arguing for zealous advocacy on behalf of those who commit the most repugnant crimes).

I have another client who is serving ten to thirty years for drug dealing. Under the current sentencing regime in Washington, D.C., he could serve twenty-five years.³⁶ He is a charming, gregarious man—a good talker. He had been getting out of the drug business—he was building a legitimate career as a music producer—when he was arrested for possessing, with intent to distribute, a small amount of crack cocaine. He has been “in” for six years now and has just lost his last appeal. When I ask him how he copes with the time he says that he can’t really explain it. He says, “you have to do the time, or the time will do you.” He explains that he tries to be “of use.”³⁷ I ask him how he does that within the confines of prison, and he says that you have to be resourceful. He has devoted a lot of energy to working on his case, to learning the law. He now spends as much time as he can in the law library helping others.

Some might say that this is a good thing: at least this man is being productive in prison. He did the crime, and now he is making something of the time he was given. But, prison has not made him productive. He was always productive. He just wasn’t *law-abiding*. And, frankly, I am not sure how “productive” he is as a jail-house lawyer. He is filling the time.

He says that in the beginning, he kept rethinking the various choices he made that landed him behind bars. He has so many regrets. He had to stop because he couldn’t stand going over and over his foolish mistakes—the things he did, and the things he failed to do. He has to live with himself in prison; there is no one else.

I ask this client about the role of religion in finding the strength to do the kind of time he is doing. I say that many of my clients serving long sentences have turned to religion, but I never heard him mention anything about his faith. I tell him he is unusual in this respect. He tells me that he is now a Sunni Muslim.

36. D.C. CODE ANN. § 24-403.1 (2001) (revising sentencing law for felonies committed on or after August 5, 2000 as a result of the Truth in Sentencing Amendment Act of 1998, which authorizes the United States Parole Commission to determine the release of D.C. prisoners).

37. See MARGE PIERCY, *To Be of Use*, in *CIRCLES ON THE WATER: SELECTED POEMS OF MARGE PIERCY* 106 (1963). Piercy writes:

The people I love the best
 jump into work head first
 without dallying in the shallows
 and swim off with sure strokes almost out of sight
 I love people who harness themselves, an ox to a heavy cart,
 who pull like water buffalo, with massive patience,
 who strain in the mud and the muck to move things forward,
 who do what has to be done, again and again.

He doesn't say much more about this except that he doesn't consider himself terribly "religious."

I have a client who had no contact at all with the criminal justice system until she was in her mid-thirties. Although she had used drugs off and on since she was a teenager, she developed an addiction to crack cocaine in the aftermath of her husband's violent death. Suddenly, she started to get arrested for possession of drugs, prostitution, and failing to appear in court. She was in a bad way—living on the street, not taking care of herself, not able to tell one day from the next. She hadn't seen her kids, who were living with her mother, in more than a year. She was placed on probation, which she immediately violated by not keeping appointments with her probation officer. Since no "beds" are available in residential drug treatment, she is now incarcerated.

I do not mean to suggest by these examples that no one should ever be sent to prison. Some people pose a danger to society and must be locked up. But, these truly dangerous people are not the ones who are filling our nation's prisons. And, too often, the sentences imposed—for the dangerous and nondangerous alike—are excessive.

PBS recently aired a documentary about a writing program at New York's Bedford Hills Prison.³⁸ In the film, fifteen women, most of whom were convicted of murder and are serving lengthy sentences, talk openly about their crimes, the life circumstances that led to their crimes, and their lives in prison. Much of what they share is poignant, haunting. Most had lives of deprivation and abuse. At the end of the film, the women disclose how much time they are serving: twenty to life, two consecutive sentences of fifty to life, seventy-five to life, life without the possibility of parole, and so on. Although most of the women acknowledge having committed serious, violent crime—and they all acknowledge having made bad choices³⁹—the actual sentences come as a shock. None of these women need to spend that much time in prison.

We seem to have lost touch with the notion that people—not psychopathic killers or serial rapists, but ordinary people who make terrible mistakes—should be allowed to serve their time, pay their debt to society, and one day rejoin society. Instead, more and more, we lock them up and throw away the key.

38. *What I Want My Words to Do to You* (PBS television broadcast, Dec. 16, 2003).

39. All of the women disclose deep, personal feelings in the film. Almost all seem to be struggling with the nature of their crimes and their own culpability.

If doing time—decades of time—is hard on the guilty, it is unimaginably difficult on the innocent.

I represent a woman named Patsy Kelly Jarrett, who has spent twenty-seven years in prison for a crime that she did not commit. She had no prior criminal record when she was convicted of participating in the robbery and murder of a young gas station attendant in 1977. Her conviction was based on the testimony of a single eye-witness who, two days after the crime, could not describe the face of the person he later swore was Ms. Jarrett, and could not state for certain the person's gender.⁴⁰ Since being incarcerated, Jarrett has turned down two plea offers because she refused to plead guilty to a brutal crime that she did not commit.⁴¹ The second of those plea offers, which came after her petition for a writ of habeas corpus was granted by the United States District Court for the Southern District of New York, would have resulted in her release after ten years in prison.⁴² In 1996, she passed a polygraph examination administered by one of the most highly regarded polygraph examiners in the country, someone who trains state and federal law enforcement officers.⁴³ After exhausting her judicial remedies and filing four clemency petitions, she remains locked up.

I don't know how she has done the time. I feel certain that I wouldn't have been able to do it. I suffer enough just watching. I first met Jarrett when I was in law school and she was in her late twenties. She is now fifty-three years old. She has gone from youth to middle age behind bars. Since she has been incarcerated, she has lost both of her parents. She says that she can't remember the young, happy-go-lucky woman she once was.

She credits her faith—she is a devout Catholic—and the love and faith of those who have stood by her for her survival behind bars. Notwithstanding her faith—and her belief that she has done God's work while in prison, taking care of women dying of AIDS and cancer in the prison infirmary—she knows the cost of her incarceration.

Though she has only a high school education, Jarrett writes powerfully about what it means to spend decades behind bars. She has given me permission to share some of what she wrote in a recent letter to me. She writes:

40. Smith, *supra* note 15, at 488–91; *see also* Jarrett v. Headley, 633 F. Supp. 1403 (S.D.N.Y. 1986); Jarrett v. Headley, 802 F.2d 34 (2d Cir. 1986).

41. Smith, *supra* note 15, at 497.

42. *Id.* at 496–97; Jarrett v. Headley, 633 F. Supp. 1403 (S.D.N.Y. 1986).

43. Smith, *supra* note 15, at 514–15.

The young woman in those pictures is Patsy, a young country girl . . . who died in 1977 . . . and was buried alive in the prison system. It takes a while to die inside . . . it's a slow process that occurs when you're locked in a cage like an animal and forced to be away from people you love and care about. You learn in order to survive you had better be tough and hard and take no shit from no one. You get . . . strong, you get hard, you learn how not to cry and how not to show any kind of emotion (that is if you want to survive). You're locked up with people that really did kill and they brag about it. You watch them leave and come back and leave again and you wonder why. And you are angry that these people who are really dangerous get to leave and you have to stay. Your parents die and you can't even attend their funerals. You watch inmates' children grow up and have children of their own, then you watch the grandchildren grow up. You hold women and watch them die of the AIDS virus, cancer, lupus . . . and you hope with all your heart that you will not die here too. And then you realize that you're already dead. That the real you isn't here anymore.⁴⁴

Of course, I cannot compare Jarrett's suffering—the suffering of an innocent who has served nearly three decades in prison—to my own suffering as her lawyer. My pain is nothing by comparison. But, it is nonetheless painful for lawyers—more often than not overburdened and underpaid public defenders who do the work because they care⁴⁵—to see and share their client's despair.

When Patsy Kelly Jarrett writes that the young woman she used to be “died” in 1977 when she was convicted and given a life sentence for a crime she did not commit, she is not being hyperbolic. She experiences her loss of freedom as a loss of *self*—of youth, of spirit, of identity. When she looks in the mirror, she sees both the passage and stillness of time. She has faded away. The person she was is no longer.

As Jarrett says, she simply could not have held on to her true self and served twenty-seven years. She had to pull back and

44. Letter from Patsy Kelly Jarrett to Abbe Smith (Oct. 31, 2003) (on file with author).

45. See generally Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Heroic, Empathic Public Defender*, 37 U.C. DAVIS L. REV. (forthcoming 2004); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

recede from view.⁴⁶ Still, Jarrett continues to have hope; she continues to have faith. I marvel at this after all these years. I marvel at her resilience. She may be the strongest person I know.

Defenders bear witness to people fading away; it is only a matter of time before they are completely forgotten. First, prisoners lose friends; they have less and less in common as time goes by. Then they lose girlfriends and boyfriends, spouses and partners; how long can those on the outside wait? They eventually lose family. The worst is when their loved ones die while they are behind bars.

Defenders bear witness to an awful social experiment gone awry. Punishment has taken the place of every other intervention because it is so simple. It divides the world neatly into good people and bad, the worthy and unworthy, victims and perpetrators. Once we punish the bad, the unworthy, the perpetrators, the rest of us can rest easy. We can say that we are different from them. We can wag our finger at them and assert our moral superiority. In this social and political climate, hardly anyone ever asks *why*. Why did this man or woman end up this way? What were the forces that contributed to his or her downfall? The only question is how much punishment should be imposed. It is remarkable that in this post-modern era—when so much is known about crime and violence—the best that we can do is to put millions of people in cages.

Defenders bear witness to the damaged children and adults who never stood a chance. We get them too late; their fates are sealed long before they are arrested and prosecuted for a particular offense. We know that we can't do anything about what brought them here. We see the consequences of familial and social neglect. Our clients have already lived lives of punish-

46. John Edgar Wideman sees this in his brother's struggle to maintain his identity behind bars—as a son, a brother, a friend, a *man*—while coping with lengthy incarceration. He concludes that the trick is to stay connected to life on the outside but not overly attached to it:

Robby cares about family business and likes to keep up with who's doing what . . . but he also treats the news objectively, cold-bloodedly. Family affairs have everything and nothing to do with him. He's in exile, powerless to influence what goes on outside the walls, so he maintains a studied detachment; he hears what I say and quickly mulls it over, buries the worrisome parts, grins at good news. When he comments on bad news it's usually a grunt, a nod, or a gesture with his hands that says all there is to say and says, a million words wouldn't make any difference, would they. Learning to isolate himself, to build walls within the walls enclosing him is a matter of survival.

WIDEMAN, *supra* note 29, at 193.

ment; otherwise they wouldn't have ended up in criminal court. They have lived lives of despair.

It is not that defenders are naive about our work. We are accustomed to having our clients locked up. Defenders have always lost cases, and our clients have always gone to prison.⁴⁷ It is an occupational hazard. Yet, we don't take it lightly. Career public defender Marc Bookman notes:

Losses stay with you so long and wins are so fleeting. The wins are really not wins. They're relief that injustice wasn't done. You've avoided injustice. . . . The losses are devastating because it means you were unable to avoid an injustice. I'm talking about real injustice Wins . . . don't stay with you. Losses stay with you forever.⁴⁸

Defenders learn how to handle losing. We learn how to cope with our clients going to prison. We have to learn this in order to do the work: how to make an intense connection with a client and then move on to the next; how to go from one trial to another, sometimes back to back; how to hold on and let go. Of course, many of these lessons serve us beyond criminal defense.

We learn how to handle the burdens of defending the accused and convicted by focusing on the good we are able to do. When we win—through an acquittal, a successful pretrial motion, a favorable negotiation, a favorable sentence—the burden is lifted, at least for a time. As the Talmud instructs, “if you save one life, it is as if you have saved the entire world.”⁴⁹ At the very least, our advocacy affirms the dignity of another human being—someone who often hasn't been treated with much dignity or respect. I am amazed by how gracious many clients are after other than triumphant results. It matters that I am there for them. It matters that they are treated no differently than a client with wealth or privilege.

Still, it is difficult to have clients locked up for so many years that they are virtually unrecognizable when they emerge from prison. By the time they rejoin society they have nothing and no

47. See LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 162 (1987) (acknowledging that “losing a lot . . . is one of the costs of being a public defender”); Scott L. Cummings, *The Politics of Helping: Reflections on Identity, Ethics, and Defending the Poor*, 6 *GEO. J. ON POVERTY LAW & POL'Y* 43 (1999) (noting that as an apprentice defender, losing cases was his “initiation into the [public defender] world”). *Id.* at 62.

48. See Smith, *supra* note 45.

49. See Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 *LOY. L.A. L. REV.* 1771, 1779 (1996).

one.⁵⁰ It is hard not to weep for these clients. It is especially hard not to weep for Patsy Kelly Jarrett who—if she ever emerges from prison—will have served all that time for no reason at all. Indeed, she has served these last seventeen years for refusing to plead guilty to a crime that she didn't commit.

The burden of representing innocent people like Jarrett never lifts. It is hard enough to defend the guilty in these angry, punishing times. I live Jarrett's incarceration every day. I will not be at peace until she is free.

These are the burdens of defending in a time of harsh punishment. We fight for our clients, and sometimes we win. When we lose, we remain steadfast. We go through it with our clients, at least for a time. We tell them the truth. We let them tell us the truth. But, in the end, it doesn't feel like we have accomplished much. In the end, we fade away too.

So we write the occasional essay.

50. This essay is about the burdens of representing clients facing increasingly long prison sentences. I have never represented a client on death row and can only imagine how excruciating that must be. See generally Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65 (1994).

