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HOW CAN YOU DEFEND THOSE PEOPLE?

*Johnnie L. Cochran, Jr.**

One of the greatest misfortunes that can befall a human being is to be arrested and charged with a crime. During his¹ arrest the accused will be humiliated by police officers who have already judged him guilty and, therefore, unworthy of their respect. He may attract the stares of passers-by who shake their heads in disgust at the steel handcuffs fastened behind his back. He will be incarcerated and given a number. His captors will treat him with contempt, and his physical surroundings will reek with despair.

Driven by mere accusations, the government—through the machinery of criminal prosecution—will focus its formidable powers against the individual. Assembled against the accused will be the prosecutor, the police, and often, the general public. The accused will be forced to undergo public proceedings, many of which he will not understand. He may be forced to remain incarcerated, pending resolution of his case. And at all times he will remain keenly aware that a judgment against him may demand that he forfeit his reputation, his property, his liberty, and even his life.

Yet the Framers of the Constitution did not intend for the accused to battle the awesome powers of the government alone. And so into the fray steps defense counsel. Sworn to protect his client's rights, defense counsel may, too, find himself facing public disfavor. Yet nothing shall come between defense counsel and his unwavering commitment to his client.

Our American system of justice was designed to afford great protection to individuals charged with committing a crime. This protection includes the presumption of innocence, the right to be free from unreasonable search and seizure, and the right against

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1. It is the general policy of the *Law Review* to use gender-neutral language. The author, however, has used the masculine pronoun throughout this Essay because he feels it enhances readability.

self-incrimination. And because our system of justice values liberty above other human ideals, it places the sole burden on the government to prove the accused guilty beyond a reasonable doubt prior to conviction. One would think that a society that created such a system would revere those who defend the rights of the accused. Yet this is not so.

In reaction to increasing crime rates, America has adopted a "tough-on-crime" stance, which advocates stripping the accused of his constitutional protections and empowering the government with greater tools to level his claims of innocence or injustice. This relatively recent abhorrence of the criminal defendant extends to his counsel, no matter how skilled, talented, honest, or ethical. The oft-asked question, "How can you defend those people?" is now asked more often, by more people, with less tolerance, and with greater contempt.

This tough-on-crime climate makes the criminal defense attorney's job that much more difficult. The public outcry that fuels its fire calls for—and gets—radical changes in the law—changes designed to render defense counsel ineffective, to empower the government, to eliminate the possibility of judicial leniency, to clear a defendant's path to the prison doors, and to ensure that once there, there shall he so remain for the rest of his natural life.

After the acquittals in the O.J. Simpson case, the feverish outcry for changes to the system resonated more loudly than ever. Groups fought for nonunanimous verdicts, the admissibility of hearsay, and a ban on cameras in the courtroom. It was as if the public was thrashing about in the dark, searching for anything it could put its finger on that might explain this outrageous travesty of justice and might prevent it from ever recurring.

The angry reaction to the Simpson verdicts extended to defense counsel, who were generally seen as "slick," "sleazy," and "fast-talking." The defense bar as a whole was, by mere association, regarded with contempt and disgust. Conversely, the prosecutors who lost the so-called "trial of the century" were hailed as heroes and given pay raises and multimillion dollar book deals.

The general public's disdain for the defense team was apparently also felt by the prosecution team. Rather than admiring and respecting their opponents for a job well done, the prosecutors perpetuated the widely held belief that the defense team had acted unethically. Moreover, they seemed to misunderstand completely the role and responsibility of the criminal defense attorney. For

example, Christopher Darden, in his book *In Contempt*, bitterly recalls the moment I “chose” O.J. Simpson over him.² What could he mean? Did he really expect my loyalty to lie with the prosecutor trying to convict my client rather than with the client I was sworn to defend?

That Darden interpreted my vigorous defense of my client as a “choice” is interesting in and of itself. Although the general public may widely hold this misconception, it is a wonder that a lawyer would fail to understand the responsibility of the criminal defense attorney. Darden’s belief that a criminal defense attorney might properly “choose” to defend an “innocent” client and reject the defense of a “guilty” client strikes at the heart of the public’s disdain for the criminal defense attorney who defends a person widely perceived as guilty. A public who believes that *ethical* criminal defense lawyers reject the cases of guilty defendants necessarily finds all others to be *unethical*. Such a public is, therefore, angry with both the guilty defendant and the lawyer who “chooses” to defend him.

To defense counsel’s dismay, this angry tough-on-crime general public includes the jurors who hear criminal cases. Defense counsel would be wise to wonder if such an audience would be sensitive to the plight of his client. Yet recent “three strikes” cases have shown counsel’s fears to be unfounded. When faced with the shocking reality of sending a human being to prison for the rest of his life for stealing a slice of pizza or possessing a piece of rock cocaine, these tough-on-crime jurors are speaking out about the inherent injustice of such a result. Jurors have changed their votes from “guilty” to “not guilty” after learning the conviction would send the defendant away for twenty-five years to life.³ As a Louisiana prison warden said about his statutory obligation to give the signal that prompts the execution of a prisoner sentenced to death, “[It’s] easy to be for [the death penalty]. It’s not easy to be the one to [pull the switch].”⁴

And so it seems that even the general public, when forced as jurors to administer the unfair rules they voted into law, cannot in

2. CHRISTOPHER A. DARDEN & JESS WALTER, *IN CONTEMPT* 172 (1996).

3. See Alan Abrahamson, *Disorder in the Court*, L.A. TIMES, May 15, 1996, at B1.

4. *Primetime Live* (ABC television broadcast, June 19, 1996).

good conscience mete out a punishment so vastly disproportionate to the crime. The reactionary solution to the fear and frustration brought about by an increasingly violent society is really no solution at all.

Nevertheless, the backlash continues, and in the wake of this backlash against the rights of the accused and the lawyers who protect those rights, we as attorneys are duty-bound to vigorously defend the job that we do and the reasons that we do it. We must say to all who will listen that the rights we defend and the protections we uphold are the very rights and protections guaranteed to every American citizen. We must emphasize to them that the only way that they can be assured of their right to a fair trial is if O.J. Simpson is assured of that same right. Thus, by virtue of the very fact that we do what we do, the laws and ideals on which our system of justice is based remain safely intact.

The group to whom our impassioned pleas are directed would almost certainly argue that they would never find themselves in the same position as one of our clients, that is, arrested and charged with a crime. However, while they can guarantee that they will not *commit* a crime, they cannot guarantee that they will not be *charged* with a crime. And if they found themselves in that unfortunate situation, wouldn't they want every protection afforded by the Constitution? Or would they feel that they had too many rights?

It is the responsibility of the criminal defense attorney to police the police, to audit the government, to speak for the accused, to fight for fairness, and to rail against injustice. We are true advocates and true believers—believers in a system of justice that prohibits unfettered police invasion into our lives and our homes. We owe it to our clients, to our belief in our Constitution, and to our commitment to upholding the tenets of our system of justice to battle the government, to fight for individual rights and protections, to stand up against criticism and adversity in our client's name, and to fight for the protection of the jury system that is, in the words of Thomas Jefferson, "the only anchor . . . by which a government can be held to the principles of its constitution."⁵

And so in response to the oft-asked question, "How can you defend those people?" we must proudly stand up and move for-

5. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, March 27, 1789-Nov. 30, 1789, at 269 (Julian P. Boyd ed., 1958).

ward with the advocate's creed firmly in mind:

While I live and have my health, I must walk the mountain ranges of my profession, swept by the storms of human hate and passion. As an advocate, representing a client charged with a crime, my duty to my client will not permit me to seek obscurity and consequent shelter of deep valleys and smooth meadows.⁶

Rather, we march into the trenches, with our heads held high, to fight for fairness, humanity, and basic civil rights on behalf of our clients—"those people"—until justice is served. Only then shall the defense finally rest.

6. The "advocate's creed" is an unofficial oath displayed by various members of the legal profession.

