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REMAINING HOPEFUL IN A HOPELESS SYSTEM

*Ephraim Margolin**

Having reached the age of anecdote, let me anecdote you with some of my earlier experiences. As Marquis de Sade would say, it will be fun. After some introductory remarks, it may not even be excessively boring.

I started my practice in California in 1962. Since then I have tried pro bono cases for the American Civil Liberties Union, the N.A.A.C.P., the San Francisco Bar, and just about anyone else who requested my services. My first jury trial was the defense of an art gallery owner in San Francisco accused of exhibiting obscene sculptures.¹ Next, we successfully defended, on freedom of speech grounds, a client accused of violating the San Francisco City College no speech rule by reading the United States Constitution on campus. We won all my criminal cases for the American Civil Liberties Union. We won our first case involving private job discrimination against women.

Gradually, my office became known as the winningest defender of underdogs. All of my clients were innocent, and my overhead was minimal. The law was expanding as we created new "rights." Hope was in the air, and the satisfaction of such a practice was indescribable. But things never remain the same.

In the last three years, I have played a part in some nationally known cases. We plea bargained the multi-count criminal Racketeer Influenced and Corrupt Organizations (RICO) and extortion case of Pat Nolan, the Republican minority leader in the state assembly, in Sacramento. We won the *Oscar v. University Students'*

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1. After we won the trial judge asked for a copy of all our exhibits. I got one of the sculptures as a gift from my client, but my wife promptly declared it obscene.

Co-Operative Association case en banc in the Ninth Circuit, limiting the reach of civil RICO to tangible financial losses. We prepared the *Weeks v. Baker & McKenzie* sexual harassment case where, for a time, I represented the largest law firm in the world. We represented the government of Mexico in the Juan Corona case and accepted appointment to represent Charles Ng and Lyle Menendez on specific constitutional motions. We also represented eighty-six judges over the last ten years before the Commission of Judicial Qualifications. We also represent the State of Israel and, on occasion, Tunis.

One-third of my practice remains pro bono. We never have two cases alike, but in recent times, we do not win as many cases as we used to and as we feel we should. Also, it is more difficult to maintain relationships with friends and family while trying increasingly complex cases.

From this backdrop, I have come to realize that a criminal defense lawyer's life is continually tested by conflicting responsibilities: to your client, to your family, to yourself, and to your community. In the face of this constant battle, a criminal defense lawyer must maintain a sense of humor, pursue pro bono cases, and remain hopeful.

To illustrate my point more effectively, here are some anecdotes from my practice.

In 1968 I tried my first murder case. My wife, pregnant with our second child, was ill. "If it is so important to you" she said, "try it; I will manage." I moved out of our house for three months to work around the clock and returned home on weekends for "visitations."

In the eleventh week of the trial, having survived thirteen forensic experts and almost 100 witnesses, the bailiff inserted his hand behind the cushions of my client's car, which was brought into the courtroom as an exhibit, and, in full sight of the jury, extracted a blood stained knife. The knife had my criminalist's initials on it. Until then, the police never found the knife. We did. We examined it and returned it to its original place behind the cushion, which then was—though it is not now—the proper practice. We also found the owner of the knife and subpoenaed him to court.

The next morning the front page headlines in the local press

screamed: "MURDER WEAPON FOUND IN COURT. DEFENSE KNEW ALL ABOUT IT." The jurors froze. I bided time until we could return and prove that the knife had nothing to do with our case! What a week! I could not wait to share it with my wife.

But what was center stage for me was not center stage for her. An angry woman opened the door on my arrival. She coldly said: "You will never convince me that your practice makes it impossible for you to take a month vacation; you just took three months. And you will never be able to convince me that I, or anyone else in the world, means as much to you as any damn suspect you choose to defend." I felt a wave of mixed reactions hitting me: part self-pity and part rage. I turned on my heel and left to prepare my summation.

After the trial it took years to work through what my wife told me that day and how I reacted. My wife inveighed against my exclusive professional agenda, which did not include her and her needs. She questioned the "one-night-stand" system of values, where each trial features another devotion and where all the "devotions" come at the expense of family life. Yet I was equally right. Trial has to come first. During a trial, as in a surgery, the concentration is unwavering. Everything else has to take a back seat. You can give up your practice; you can give up your family. You cannot practice part-time.

Being a trial lawyer seven days a week, a father on the eighth day, and a husband on the ninth is like Dante's hell. But look around you: Are not most of your friends in their own private hells, drinking too hard, playing too hard, dying too early? How many among them are true "heroes"? How many are seen as "heroes" by their significant others and their children?

We are a lonely lot. We save lives, and in the process we lose our own. It is hard to explain what we do to our children. We are not criminal defense lawyers for money alone; all top criminal lawyers could make much more money in civil law. We are not in it for glory, public approval, or acclaim. After all, we are "battered lawyers." It is one thing to be an indispensable component of the criminal justice system; it is something else to live, love, and take pride in it. Each client comes and leaves; we are then left with a neglected family and an empty personal life. But in the face of this adversity, we must remain committed to the legal system

and to making it work. We must remain hopeful that our pursuit is not futile. Sometimes, but not often, our hope is rewarded.

Many times this reward comes from pursuing pro bono cases. Years ago in Contra Costa County, a public defender finished a trial after 5:00 p.m. and asked the district attorney what case to prepare for the following morning. The next day the judge called another case and ordered Meistrell to proceed to trial. "I refuse," said my hero. "I will 'continue' your defense until the following day," offered the judge. The public defender refused again. "Just select the jury and let the D.A. put on his case," shouted the judge. "I had no time to prepare," said the public defender. "I can't and I won't do it." He was held in contempt for the refusal to obey a court order to behave like a "potted plant." In an unpublished opinion, the court of appeal reversed.

Representing "things" makes one old and tired; pro bono cases induce smiles. The reversal, even where unpublished, is real. We leaked the opinion to legal periodicals. It remains an unpublished case but became a "published" victory.

This was one of dozens of successful pro bono cases we won. In fact, we pursued so many pro bono cases for various groups that I was practically forced into taking a case against the City of Berkeley for allowing a Jewish woman to celebrate Good Friday but not Yom Kippur. By this time I had represented many cases involving African Americans, Mexicans, and other minority groups, so when I hesitated in accepting the case, the woman asked me "What do you have against Jews?" Although shamed into taking the case, we won it.²

Despite these types of fulfilling victories, much of a criminal defense lawyer's life is spent defending less dramatic and principled cases. Sometimes, there are even cases that appear ridiculous or absurd to the average person but that nevertheless require our attention. In the face of such circumstances, it is always helpful to maintain a sense of humor.

I once represented a client who had his dog seized when it was mistaken for a pit bull. I stood before the judge and asked that he bail out the dog. "We do not bail dogs out," said the judge. "Then free him on his master's own recognizance," I tried.

2. Humorously, we settled on attorney fees only after we filed interrogatories to determine how much the California Legislature allocated for ice cream for children of visitors in legislators' chambers.

“Denied,” said the judge. “Allow the dog to spend Christmas with his master!” I implored. “Does the record reflect the religion of the dog?” deadpanned the judge. In the end, we won. Our mixed breed dog of questionable ancestry, adopted from a city pound by my client and mistaken for a pit bull by a canine-illiterate cop was freed. The ordinance was declared unconstitutionally vague—held to violate due process for failure to provide for a hearing before the seizure of dogs—and we got attorney fees. Back in the office, we received pots of flowers from other dogs. When my son Evan clerked for another Alameda Superior Court judge a couple of years later, he was constantly asked whether he was the son of the dog-loving fanatic. And I continue to look back upon the experience with enjoyment. From defending underdogs to defending dogs, I have always enjoyed the development of my career.

Let’s face it, criminal defense is not a profession for the apathetic. It places enormous pressure on you and demands most of your time. It is filled with eccentricities and absurdities. However, if you fight for what you care for and maintain a sense of humor and excitement, criminal defense is a fulfilling career.

Recently, the *People v. Simpson* trial brought many of the problems of today’s legal system into the public eye and reinforced the need for criminal lawyers to remain hopeful about the future of what appears to be a hopeless system. How does one explain the prosecutorial decision not to seek capital punishment for O.J. Simpson, an alleged double murderer, while simultaneously seeking it against the Menendez brothers, whose first trial ended with two six to six hung juries? Is there any explanation for seeking or not seeking death other than office politics? How immoral is it to target people for death not in the name of principles but only when you think that you are more likely to win your case when capital punishment is thrown into the equation?

And what of the systemic incompetence of the police investigation, the coroner investigation, and the prosecution experts in the *Simpson* case? Do you think they vanished when the next case came around with a less notorious defendant with less resources? Why is your freedom so dependent on how much money you have?

We ask these questions even as we witness the systematic effort to dismantle the writ of habeas corpus; the closing of centers of lawyers trained in capital defense; the nightmare of the Federal

Sentencing Guidelines; and the fading of the very concept of innocence in the face of worshipping the appellate calendar. Like the Greek "eio," criminal "justice" is a concept with a perfect past, an imperfect present, and no future: a bright theory, surrounded by the jurisprudence of harmless error.

In California we are debating verdicts by nonunanimous juries. Why? Don't ask. Statistically, only ten in every 100 felony cases charged in California will go to trial; ninety cases will be plea bargained.³ Of the remaining ten, nine will be decided unanimously, one way or another.⁴ The one percent of felony trials where the jury is unable to reach a verdict will include a number of different results: six to six verdicts—for example, the first Menendez trial—ten to two verdicts, nine to three verdicts, etc. The number of cases in which we need to protect society from a single "crazy juror," is infinitesimal. If we truly cared about it, we would have spent more effort to restore meaningful voir dire.

So the problem, if it exists, is minimal. But the price in giving up unanimous juries is enormous. Minority jurors, where their vote differs from the majority, will not count. When ten jurors agree, deliberation will end. We lose not only racial, religious, and ethnic minority views, we lose any minority views: whatever is unpopular, new, or different.

Perhaps our system of criminal justice is falling apart. Woody Allen said: "It's not that I'm afraid to die, I just don't want to be there when it happens."⁵ I do not relish being a critic who arrives at the battlefield after the battle is over to shoot the wounded. I love criminal law. I came to it as an idealist; to do good and to do better. It is falling apart now.

"Hope is definitely not the same thing as optimism. It is not the conviction that something will turn out well, but the certainty that something makes sense, regardless of how it turns out."⁶ Criminal trial work may be as pleasurable as bathing a cat, but unless we aim at the top or shoot at the bottom, we hit somewhere below in between. It is the responsibility of the criminal defense

3. Bob Tanenbaum, *The Great Pizza Felony; Three Strikes: 25 Years for Petty Theft, 5 for Homicide—A Clear Case of D.A. Grandstanding*, L.A. TIMES, Mar. 8, 1995, at B7.

4. Dwayne Bray, *Prosecutors Seek a Change in Jury-Voting System*, L.A. TIMES (Ventura County ed.), June 11, 1995, at B1, B8.

5. ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 215 (quoting from Woody Allen's *Death (A Play)*).

6. *Id.* at 420 (quoting the Czech playwright, Vaclav Havel).

bar to aim at the top, despite the personal and professional adversity along the way. Since we remain that ingredient of the criminal justice system without which no one can be executed, it is our duty to excell.

