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► CRIMINAL LAW

Why Criminal-Defense Lawyers Love Their Work (And You Should Too)

By Daniel E. Monnat, Paige A. Nichols and Jennifer Roth



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Introduction

Once upon a time, a young law student accepted a summer internship with a law office that represented death-row inmates in post-conviction proceedings. The student was vaguely opposed to the death penalty, but she had no aspirations of becoming a criminal-defense lawyer. The internship was a lark — other students recommended it, and the rumor was that one could wear shorts to the office.

The student's first assignment was to read the transcript of a capital trial and look for errors. As she read, she learned that the defendant had forcefully picked up two women he saw walking down a road late one night, taken them to a remote place, raped them, beat them, and left them for dead. One of the women lived to tell the gruesome tale, and gave very powerful testimony against the defendant at trial.

The law student imagined herself in the victim's shoes. This could have happened to her. The transcript was her first real exposure to the hard facts of a rape and murder case. She was sickened; how could she possibly represent this person?

And then she learned the rest of the story. After the defendant had been sentenced to death, new counsel in the case developed evidence that the defendant, a U.S. citizen of foreign birth, had sought asylum in the United States as a young adult fleeing a country mired in civil war. He suffered from post-traumatic stress, and, lacking a local support system, self-medicated with alcohol. He committed his crimes in an alcoholic blackout and had no memory of what he had done. He initially believed he was innocent, and began his trial angry and defensive, convinced that the prosecution was unjust. But he listened to the evidence. He heard the experts and he looked at the physical exhibits. And as he watched the surviving victim describe her ordeal from the witness stand, he recognized some shadow of himself in her description of her assailant's speech and mannerisms. He listened to her describe how this man had violated her, terrified her, and made her watch as he murdered her friend. And then he understood that he was responsible for this vile crime. By the time the law student was assigned to his case, the defendant — by now long sober — was fighting to give up his appeals and be executed. He believed he deserved nothing less than death.

We relish performing a complex role in a complex system, and, even when we can't share them, we are thankful for the stories our clients tell us of their lives—stories that inform our understanding of humanity.

And thus the student learned that a guilty person might be more than just the sum of his crimes. He might have a conscience. He might have an excuse, or at least an explanation. He might be both willing to change and capable of change. And he might, just maybe, be deserving of mercy.

Most criminal-defense lawyers have a story to tell of a client who inspired them to take up or carry on the challenging work of defending. We've been telling these stories a lot this year, both in celebration of the golden anniversary of *Gideon v. Wainwright*,¹ and to commemorate the lifework of Anthony Lewis, the great journalist who died this year after decades of giving voice to the powerless within our justice system.² But we too often only tell these stories to each other — preaching to the choir, as they say.

As public and private defenders,³ we offer this article to share with you, our other colleagues, why it is that you may find us so stubborn, obnoxious, and, yes, *defensive*, while representing our clients in the heat of trial or promoting their interests on the legislative floor. We offer this rather personal article in the spirit of collegiality, and in the hopes of contributing to a deeper appreciation of how a passionate commitment to criminal-defense work helps keep us all safe from injustice.

Gideon v. Wainwright

Our nation's early history is replete with stories of valiant criminal-defense lawyers, from John Adams, who, for the price of a pair of shoes and at great risk to his political career, represented the despised British soldiers charged in the Boston Massacre,⁴ to Clarence Darrow, known for, among other courtroom feats, successfully saving the unquestionably guilty Leopold and Loeb from the death penalty.⁵ But until Clarence Gideon came along, a person accused of a noncapital crime in many state courts had to have money or connections to get representation.⁶ Gideon had neither.

By now, we are all familiar with the story of how the poor, hapless, repeat-offender Clarence Earl Gideon, convicted of breaking and entering a poolroom, hand-wrote a petition to the United States Supreme Court successfully arguing that the federal constitution entitled him to the appointment of counsel. Less familiar is the epilogue to Gideon's story: how

Fred Turner, the local lawyer appointed to represent Gideon at his retrial, turned what had originally been a slam-dunk for the prosecution into an acquittal.

The prosecution's star witness Henry Cook was a young snitch who was himself a potential suspect in the crime. Turner familiarized himself with Cook in part by picking pears with Cook's mother before trial and talking to her about her son. Turner's intelligence gathering paid off in his cross-examination of Cook, when he forced Cook to admit to lying under oath at Gideon's first trial. Turner's preparation was otherwise thorough.

For instance, a cab driver testified for the prosecution that, after he drove Gideon downtown the morning of the crime, Gideon instructed him: "If anyone asks you where you left me off, you don't know me; you haven't seen me." This testimony was certainly inculpatory. But Turner knew his client well enough to ask the driver on cross-examination *why* Gideon had said this. The answer? "He had trouble with his wife."⁷

Beyond Gideon

Gideon was acquitted, and available evidence suggests that he was wholly innocent of breaking into the poolhall. Consequently, Turner's enthusiastic representation of Gideon rarely raises eyebrows. But we criminal-defense lawyers only sometimes represent wholly innocent people. We often represent people who are at least partially guilty. Of course, what it means to be "guilty" is a complex question in itself.

Some of our clients are not guilty of any crime, but rather are "guilty" of being social outliers. Some of our clients are guilty as charged, but may be deserving of mercy. Some are guilty of something, but not necessarily the crimes charged. Some are guilty of prohibited physical acts, but did not possess the required mental state, or were entrapped, or acted under duress.

We make these perhaps obvious points to emphasize that we are not "innocentrists," i.e., those who believe that the exoneration of innocents is the highest-ranking goal of defense lawyers. We believe that a wrongful conviction is not only a conviction of a person wholly innocent of *any* crime, but also one that is for the *wrong* crime; that a wrongful sentence is one that is too harsh despite the convicted person's guilt; and that a wrongful prosecution includes a factually defensible conviction and sentence that was secured in a wrongful (unconstitutional or unfair) manner. And we stand at the ready to defend even the guiltiest clients with as much zeal as the law allows.

How and why have we dedicated ourselves to this task? Numerous authors have discussed the philosophical justifications for the zealous defense of guilty clients.⁸ Although these authors take myriad positions, two complementary justifications for defense lawyering emerge in the literature: the "client-centered justification" and the "systemic justification."⁹

From a client-centered perspective, the zealous defense of guilty persons is necessary as a recognition of every person's intrinsic worth as a complex human being. This view may

arise from religious principles or a philosophy of secular humanism.¹⁰ It subscribes to the “dangerous philosophy of life” that recognizes that criminal conduct may arise from mental illness rather than evil intent.¹¹ And it accepts as a given that, regardless of culpability, everyone “has a natural, inalienable right to be treated as a person.”¹² From this perspective, we can appreciate the defense lawyer’s representation of the “person, not the conduct attributed to that person,” and we can accept the lawyer’s undivided loyalty to the otherwise-ostracized client as the necessary work of “giving voice to those who would not otherwise be heard.”¹³

From a systemic perspective, the zealous defense of even guilty persons is necessary to keep a powerful and sometimes corrupt (or merely sloppy) government in check. Ensuring the constitutional guarantees of procedural justice for all increases public confidence in the system, enhances political freedoms, decreases disobedience to law, and prevents the conviction of innocents.¹⁴ Thus, the defense lawyer’s role is that of maximizing society’s interest in the fair administration of justice, even if society’s interest in convicting the guilty appears in individual cases to be thereby compromised.¹⁵

As defense lawyers, we don’t think about these justifications every day, but they motivate us over time, as do our egos, our anger at injustice, our empathy, our heroic fantasies, and the emotional satisfaction that comes with being a small source of light in another person’s darkest hour.¹⁶ We relish performing a complex role in a complex system, and, even when we can’t share them, we are thankful for the stories our clients tell us of their lives—stories that inform our understanding of humanity.

The Dark Side of Defense Lawyering

Some may assume that, despite our lofty pronouncements to the contrary, criminal-defense lawyers suffer from cognitive dissonance when they represent guilty clients.¹⁷ But there are far greater and more immediate burdens on criminal-defense lawyers than the status of our clients. We recognize that the justice system imposes burdens on all of its players, from the police to prosecutors to judges.¹⁸ That said, we hope you will indulge us as we share some of the frustrations we feel are unique to criminal-defense lawyering.

“How can you defend those people?” Criminal-defense lawyers must field this question everywhere they go, from cocktail hours to church socials to family reunions. As two authors familiar with this burden have asked, “How many times must we face this question and be forced to respond with equanimity and charm? The presumption is that there is something wrong with ‘those people’ and something wrong with those of us who stand by their sides.”¹⁹

Popular distaste for our work is so strong that some public defenders jokingly wear buttons or T-shirts that say: “Don’t tell my mother I’m a public defender; she thinks I play piano in a whorehouse.” Both public and private defenders who zealously represent guilty clients are depicted on television and in the movies as ethically shifty at best.²⁰ And even when the media

calls for public-defender funding, it makes no effort to recognize the valiant defenders who do good work daily under near-impossible conditions, instead describing defenders collectively as apathetic, drug-addicted, meet-’em-and-plead-’em potted plants.²¹

Criminal-defense lawyers don’t fare much better in the Kansas Legislature, which, in recent years, has passed a number of laws that appear to reflect a belief that criminal-defense lawyers are singularly untrustworthy. For instance, our kind are now required to seek court permission before disclosing certain evidence provided in discovery, including witness “identifiers,” to our clients or “any other person.”²²

In other words, we may not share so much as a witness’s address or phone number with a secretary, a paralegal, an investigator, or an expert without first securing a court order. No other category of Kansas lawyers — not prosecutors, and not civil lawyers — must seek such permission. Singling out criminal-defense lawyers in this way not only makes our jobs harder, it “write[s] into law the unsavory presumption that lawyers, usually considered trusted officers of the court, are somehow less trustworthy if they represent a particular class of clients.”²³

Finally, no list of defender woes would be complete without mentioning the problem of resources. *Gideon’s* promise of constitutionally effective counsel for poor people accused of crime simply cannot be met without adequate funding. In these austere days, public defenders manage overwhelming caseloads under increasing pressure to cut costs. And private lawyers who take appointments are shamefully underpaid. Once fee caps and overhead costs are taken into account, the earnings for competently representing a criminal defendant by appointment in Kansas may run as low as minimum wage.

These conditions have serious results. Recent studies have shown that “under-funding indigent defense does not save the state money,” but rather increases court and incarceration costs as well as wrongful convictions and disproportionate sentences.²⁴ Additionally, legislative demonstrations of distrust chill defense lawyers from engaging in the legislative process, despite the fact that defenders may be uniquely suited to advise our lawmakers about the need, effectiveness, and cost of justice-related legislation.

Lastly, conditions of parsimony and public reproach discourage new lawyers from becoming private or public defenders, and causes burnout in current defense lawyers. These results put the entire justice system at risk.²⁵ But a little respect, trust, and funding goes a long way with criminal-defense lawyers, and we are grateful to all of our colleagues who have given us that and more.

Conclusion

How can we defend those people? “Those people” — our clients — are the underdogs who energize and motivate us, regardless of charge or culpability, from the innocent kid whose “friends” duped him into carrying their pot in his car, to the hard-boiled murderer whose mother still loves him (bless

her heart). Life is messy, and we're in the thick of it. How can we defend the guilty? Perhaps the better question is "Why don't *you* defend the guilty?"²⁶

Here is a thought experiment. Let us all close our eyes and think back upon our lives. What is the worst thing I have ever done? Cheated on a lover or spouse? Hit someone in anger? Taken something that wasn't mine? Gotten behind the wheel after one or two or 10 too many? Let's be honest with ourselves; nobody's listening. Now for the easy part. Is this awful act the thing that defines us? Of course not. Even if we had no excuse for our behavior, "each of us is more than the worst thing we ever did."²⁷ This is our bottom line; we have never met a client for whom this wasn't true. As the Bishop who sheltered escaped-convict Jean Valjean in *LES MISERABLES* taught us, no person is beyond redemption.²⁸ And thus that tenacious advocacy that frustrates or puzzles you? We hope we never have to, but should the need ever arise, we'll give it to you or your loved one too. ▲

ENDNOTES

- 1 372 U.S. 335 (1963).
- 2 See Adam Liptak, *Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85*, N.Y. TIMES A1 (March 26, 2013).
- 3 Dan Monnat is a private practitioner who has in the past served as appointed counsel; Jen Roth is a public defender; and Paige Nichols has worked as a private practitioner, an appellate defender, and appointed counsel. We don't presume to speak here on behalf of all of our defender colleagues, but, rather, from our individual and shared experiences.
- 4 John E. Ferling, *SETTING THE WORLD ABLAZE: WASHINGTON, ADAMS, JEFFERSON, AND THE AMERICAN REVOLUTION* 77 (2002). See also David McCullough, *JOHN ADAMS* 65-68 (2001).
- 5 Accounts of Darrow's representation of Leopold and Loeb may be found, among other places, in John A. Farrell, *ATTORNEY FOR THE DAMNED* 333-60 (2011), and Irving Stone, *CLARENCE DARROW FOR THE DEFENSE* 380-421 (1941) (describing this episode of Darrow's career in a chapter titled "Even the Rich Have Rights!").
- 6 This was not the case in Kansas, which since at least the 1930s had required appointment of counsel upon request for indigent people accused of felony offenses. See Kan. Gen. Stat. 62 1304 (1935).
- 7 For the best factual and legal history of Gideon and his landmark case, nothing beats Anthony Lewis's account in *GIDEON'S TRUMPET* (1964), on which the description in this article is based.
- 8 See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1244-60 (1993) (reviewing justifications for defense lawyering).
- 9 *Id.*
- 10 See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999) (exploring "the connection between Jewish and Christian values and criminal defense work").
- 11 See Stone, *supra* note 5 at 407 (reporting prosecutor's description of mitigating psychiatric evidence at Leopold and Loeb's sentencing as "Clarence Darrow's dangerous philosophy of life!").
- 12 Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1711, 1716 (1992) (noting that this right is "a value that infuses the Constitution").



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- 13 Smith & Montross, *supra* note 10 at 531, 469. See also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer Client Relation*, 85 YALE L. J. 1060 (1976) (arguing that “[t]he lawyer acts morally because he helps to preserve and express the autonomy of his client vis a vis the legal system”); Ogletree, *supra* note 8 at 1250 (explaining that “client centered justifications are premised on a vision of the lawyer as a facilitator for the client’s interaction with an otherwise impenetrable legal system”). Some advocates of this justification liken the lawyer-client relationship to a friendship. See Smith & Montrose, *supra* note 10 at 532 (remarking that “the defense attorney is often the only companion the defendant has”). But see Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart*, 44 S. TEX. L. REV. 31, 47 (2002) (cautioning against “excessive devotion,” and observing that “[w]hen lawyers get too close to clients...things can go off-course”).
- 14 See Andrew E. Taslitz, *Trying Not to Be like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315, 386 (2012) (describing the right to counsel as “a right that benefits the system and the people as a whole by increasing the fairness of procedures and the community’s confidence in them”).
- 15 See *id.*; see also David Luban, *The Adversarial System Excuse*, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 92 (David Luban ed., 1983) (noting that “the goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens...the primary end of the adversary system is not legal justice but the protection of accused individuals against the state or, more generally, the preservation of the proper relation between the state and its subjects”); John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission,”* 1 GEO. J. LEGAL ETHICS 339, 342, 347 (1987) (arguing that the system “help[s] keep innocents out of the process and, at the same time, limit[s] the intrusion of the state into people’s lives,” so that the principal good sought is not “truth” in a factual sense, but rather “the legitimate use of the prosecutor’s power as embodied in the concept of ‘legal guilt’”); Ogletree, *supra* note 8 at 1258 (explaining that “[t]he adversary system functions not only to find truth, but also, perhaps more fundamentally, to protect individuals from the tyranny of a powerful government. Within this framework, zealous advocacy serves as an effective constraint on the power of the state”); Smith & Montrose, *supra* note 10 at 527 (observing that “while truth is certainly an important value, it is often in conflict with other values. This is no different for lawyers than it is for anyone else. A narrow focus on truth in the legal system can also be at odds with the needs of poor and disadvantaged people, the struggle for social justice, and other more important moral principles”); 4 WILLIAM BLACKSTONE, COMMENTARIES 358 (“It is better that ten guilty persons escape, than that one innocent suffer.”); VOLTAIRE, ZADIG (1747) (“It is better to risk saving a guilty person than to condemn an innocent one.”).
- 16 See Ogletree, *supra* note 8 (proposing empathy and heroism as dual motivations for defense work); Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U. L. REV. 175 (1998) (evaluating different approaches for motivating people to “create a just society”); Smith & Montrose, *supra* note 10 at 452, 509, 533 (accepting systemic justification for criminal-defense lawyering, but offering “virtue ethic” as more sustaining motivation for defense work).
- 17 See generally Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 346 (2006) (examining the “emotional costs” of criminal-defense lawyering, such as lawyers’ purported “denial or disavowal” of the fact that they “have to defend people accused of acts that are morally objectionable, even horrific”).
- 18 See Alexis Resnick, et al., *Surviving Bench Stress*, 49 FAM. CT. REV. 610, 610-11 (2011) (describing judicial stress as including “endless caseloads, social isolation, and heightened public scrutiny” in addition to the burdens of conscience that go along with deciding the fates of others); Allie Phillips, *The Few and the Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases*, 42 SEP PROSECUTOR 20, 23 (2008) (discussing vicarious trauma experienced by prosecutors who handle cases involving violent crimes); Bandes, *supra* note 17 at 344-45 (noting existence of denial and defense mechanisms among judges, prosecutors, and civil lawyers); Ralph Slovenko, *Police Suicide*, 18 MED. & L. 149, 149 (1999) (describing police work as “an occupation replete with psychological stress and trauma”).
- 19 Smith & Montrose, *supra* note 10 at 446. See also Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 933 (2000) (noting that “defending defending may be an endless pursuit”).
- 20 Query whether PERRY MASON would have been so popular were his accused clients not always innocent. American movies that portray as heroes those who advocate on behalf of the accused also tend to feature innocents. Some examples of this include THE GREEN MILE, THE HURRICANE, I WANT TO LIVE!, THE THIN BLUE LINE, TO KILL A MOCKINGBIRD, and, on a lighter note, LEGALLY BLONDE and MY COUSIN VINNY. Rare exceptions include MURDER IN THE FIRST, DEAD MAN WALKING, and LAST DANCE. And although the defense attorneys on the popular television series THE GOOD WIFE have represented guilty clients, the attorneys are more-often-than-not shown to agonize over acts they take on those clients’ behalf. See also Katherine R. Kruse, *Lawyers Should Be Lawyers, but What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J.L. & POL’Y 49, 60 (2004) (noting that “in the world of Hollywood defense lawyers, zealous adversarial advocacy coincides with social justice precisely because the clients are either innocent or else are portrayed as otherwise worthy”); Smith, *Defending Defending*: *supra* note 19 at 961 n.52 (observing that “[c]riminal defense has never been terribly popular with the public.... One has only to turn on a typical radio talk show or scan the editorial pages of most newspapers to find disparagement of criminal defense lawyers and their clients”).
- 21 See Jonathan Rapping, *A Promise Worth Keeping: Restoring Fairness to America’s Justice System*, HUFFINGTON POST (March 18, 2013) (decrying court precedent that “has set an embarrassingly low bar [for criminal-defense lawyers] and enabled a system in which lawyers have been unprepared, drug addicted, and even asleep for portions of the trial”); Carrie Johnson, *50 Years after Key Case, Problems Defending the Poor Persist*, NPR MORNING EDITION (March 15, 2013) (quoting law professor for proposition that “[t]here are a lot of stories of what are called meet ‘em and plead ‘em lawyers”); Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years after ‘Gideon,’* THE ATLANTIC (March 13, 2013) (bemoaning *Gideon* as “another unfunded mandate,” while broadly describing the overworked, underpaid public defender as “often just a potted plant”).
- 22 K.S.A. 22-3212(b)(5).
- 23 Brendan M. Driscoll, *The Guantánamo Protective Order*, 30 FORDHAM INT’L L.J. 873, 927 (2007) (analyzing and critiquing protective orders

adopted in Guantánamo cases). Other recent legislation that expresses a unique distrust of defense lawyers includes discovery provisions prohibiting defense lawyers (but not prosecutors) from possessing evidence of alleged child pornography in preparation for trial, and requiring defense lawyers (but not prosecutors) to make certain detailed pretrial disclosures regarding expert witness credentials and testimony. See K.S.A. 22-3212(j); K.S.A. 22-3212b(c)(2).

- 24 John P. Gross & Jerry J. Cox, *The Cost of Representation Compared to the Cost of Incarceration: How Defense Lawyers Reduce the Costs of Running the Criminal Justice System*, 37-MAR CHAMPION 22 (2013) (discussing studies).
- 25 See Ogletree, *supra* note 8 at 1241 (“The phenomenon of burnout is widespread and can be particularly troubling when it undermines our commitment to the representation of criminal defendants, which in our justice system is a constitutional, if not a moral, imperative.”); Jonathan Rapping, *Redefining Success as a Public Defender: a Rallying Cry for Those Most Committed to Gideon’s Promise*, 36-JUN CHAMPION 30, 35 (2012) (“It is a grueling task to spend every day pushing back against a system that harbors such low expectations for the quality of representation. It is not surprising that some lawyers enter this system full of idealism but ultimately resign themselves to the status quo. Others simply find it too difficult and leave before the pressure to conform overwhelms them.”).
- 26 See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 175 (1983-1984).
- 27 Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety About Innocence Projects*, 13 U. PA. J. L. & SOC. CHANGE 315, 324 (2009-2010) (quoting death-penalty lawyer Bryan Stevenson).
- 28 See Victor Hugo, *LES MISERABLES* Vol. I, Book Second, Ch. XII (1862).

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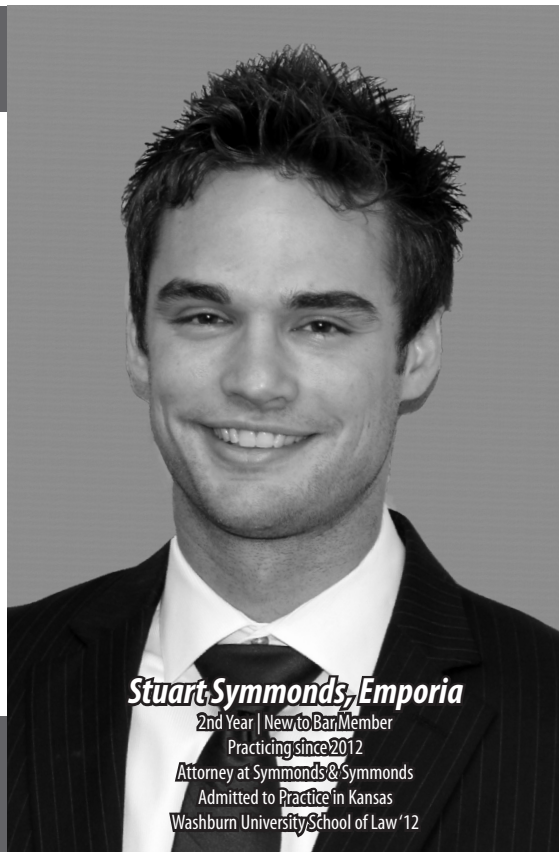
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