

## Keynote Address

# Reclaiming Our Rightful Place: Reviving the Hero Image of the Public Defender

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“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>1</sup> Justice Hugo Black wrote this in *Griffin v. Illinois*, seven years before he authored his groundbreaking opinion in *Gideon v. Wainwright*, establishing a Sixth Amendment right to counsel in state court prosecutions.<sup>2</sup> In *Gideon*, the Court recognized that a lawyer is essential to ensuring a fair trial.<sup>3</sup> While the *Gideon* Court did not lay out a standard for the type of lawyer to which a poor person is entitled, read in conjunction with the Court’s pronouncement in *Griffin*, the answer is obvious. He is entitled to a lawyer with the time, resources, experience, training, and commitment for which a person with means would pay. For if a poor defendant requires a comparable trial to his wealthier counterpart to ensure equal justice, and the quality of the lawyer dictates the quality of the trial, equal justice can only be guaranteed where the poor person has access to the same level of representation as the person who can afford to hire counsel.

But, while *Gideon* made clear that counsel is the engine necessary to ensure equal justice, for fifty years lawyers for the poor have been deprived the fuel needed to drive this lofty aspiration. Over these five decades we have unfortunately come to accept an embarrassingly low standard of justice for poor people accused of crimes. And sadly, far too often even our nation’s public defenders have lost sight of the critical role they are expected to play in forcing the system to live up to our nation’s highest ideals. Many have

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1. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).
2. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).
3. *Id.* at 344 (“Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

abandoned their heroic role and instead accepted a place in our criminal-justice system in which they facilitate the processing of human beings.<sup>4</sup>

But how did we stray so far from the world envisioned by the *Gideon* Court in which the lawyer is the hero? And how can our nation's public defenders reclaim their rightful position in this narrative? To answer these questions, we need to understand the evolution of the public defender in our nation's criminal-justice history. Let's begin with one of our nation's darkest criminal-justice places and times. Consider American justice a hundred years ago, at the turn of the twentieth century in the Deep South, and one will truly appreciate the importance of the right to counsel.

Public defenders always represent the outsider, the other. At the turn of the twentieth century in the Deep South, no group fit this bill more than African-Americans.<sup>5</sup> At this time and place in our nation's history, justice for the black man was frequently an accusation levied, a lynch mob assembled, guilt hastily declared, and the sentenced pronounced and executed.<sup>6</sup> Lynchings were commonplace, with no pretense of due process or justice.<sup>7</sup> But as the years passed, the nation lost its appetite for such obvious injustice.<sup>8</sup> Lynch mobs were less tolerated. And the southern criminal-justice system got the message. To adapt to changing attitudes, they needed at least the pretense of justice. And so they made an implicit bargain with the lynch mobs. If you bring the accused to us, instead of organizing a lynching, we will very quickly try them, convict them, and execute them.<sup>9</sup> These "legal lynchings" began to take the place of the less civilized variety. And for a while, this kept the nation at bay.

Then came the infamous case of the Scottsboro Boys.<sup>10</sup> In 1931, nine black teenagers were on a train passing through Alabama when two young white women accused them of rape after the black boys prevailed in a fight against a group of white youths on the train.<sup>11</sup> Deputies in Scottsboro, Alabama, pulled the nine young men from the train and charged them with

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4. See Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 164-65 (2009) (suggesting that too often public defenders have adapted to a culture that is hostile to the fundamental principles of representing indigents accused of crimes).

5. See Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts "Legal Lynchings,"* in CRIMINAL PROCEDURE STORIES 1, 2 (Carol S. Steiker ed., Found. Press 2006) (discussing the rise and fall of "legal lynchings" in the South and their subsequent implications in the criminal-justice system).

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.* at 2-3.

10. For a discussion of the Scottsboro Boys as an example of these "legal lynchings," see generally *id.*

11. *Id.* at 1.

rape.<sup>12</sup> They were rushed to trial twelve days later.<sup>13</sup> They were appointed counsel the morning of trial.<sup>14</sup> One of their lawyers was an alcoholic, real estate lawyer from Tennessee who had no knowledge of criminal procedure in Alabama.<sup>15</sup> The second was a local lawyer in his seventies who hadn't tried a case in thirty years.<sup>16</sup> The two lawyers willingly went to trial that day without conducting any investigation, litigating any motions, or preparing their clients.<sup>17</sup> As expected, the nine boys were convicted and eight were sentenced to die (the ninth, only thirteen, was sentenced to life in prison).<sup>18</sup>

This obvious injustice seemed to awaken America's sense of justice. The case became a cause celebre. Across the nation, and the world, voices decried the obvious unfairness of the system that now sought to execute these children. The case dramatically tested who we believed ourselves to be as a nation. Forced to look into the mirror and see this reflection, the American public jerked away. The protest seemed to remind us that at our core we are a nation that roots for the underdog. We don't like bullies. The Scottsboro Boys brought into focus the fact that the accused is the underdog of the criminal-justice system in need of protection—the defender, the protector who symbolizes American ideals.

This case seemed to propel public opinion reflected in the popular culture of the times. For a season and a half beginning in 1954, the CBS television series, *The Public Defender*, starred Reed Hadley as a public defender,<sup>19</sup> and for two seasons beginning that same year, NBC aired *Justice*, a series about Legal Aid Society lawyers.<sup>20</sup> From 1956 to 1957, Charlton Comics published a comic book called *Public Defender in Action* in which the court-appointed lawyer was the hero.<sup>21</sup> Hollywood also cast the criminal defense lawyer as the hero using the era's biggest stars to represent the protector of the accused. In 1959, James Stewart played defense lawyer Paul Biegler in the movie *Anatomy of a Murder*, in which he represented an Army Lieutenant accused of murder.<sup>22</sup> Three years later, in perhaps the most highly acclaimed criminal justice film, *To Kill a Mockingbird*, Gregory Peck

12. *Id.*

13. *Id.* at 3.

14. *Id.* at 3–4.

15. *Id.*

16. *Id.* at 3.

17. *Id.* at 4.

18. *Id.* at 5.

19. *The Public Defender* (CBS television broadcast Mar. 11, 1954–June 23, 1955); see also *The Public Defender*, IMDB, <http://www.imdb.com/title/tt0046638/> (last visited May 20, 2014).

20. *Justice* (NBC television broadcast Apr. 8, 1954–Mar. 25, 1956); see also *Justice*, IMDB, <http://www.imdb.com/title/tt0046616/> (last visited May 20, 2014).

21. *Public Defender in Action* (Charlton Mar. 1956–Oct. 1957), available at <http://www.comics.org/series/1185> (last visited May 20, 2014).

22. ANATOMY OF A MURDER (Carlyle Prods. 1959); see also *Anatomy of a Murder*, IMDB, <http://www.imdb.com/title/tt0052561/> (last visited May 20, 2014).

played Atticus Finch, the prototypical public defender, standing up for a handicapped black man against a racist Southern criminal-justice system.<sup>23</sup>

And a year later, riding this wave of a collective national mindset that embraced the concept of defending the most vulnerable among us against the power of the system, the Supreme Court decided *Gideon v. Wainwright*.<sup>24</sup> This was a quintessential American story about a poor drifter accused of burglarizing a pool hall for some change. Without the assistance of counsel, Gideon was convicted and sent to prison. His handwritten plea to the United States Supreme Court—basically saying in layman’s terms: “how could I have put up a fair fight without the help of a lawyer?”—led to arguably the most important criminal procedure opinion in our nation’s history. The Court declared that a lawyer is necessary to ensure that a trial is fair, and ensuring a fair fight when an individual’s liberty is at stake is a fundamental principal of our Constitution.<sup>25</sup> Gideon won a new trial. He was given a public defender. With the playing field leveled, he was acquitted.<sup>26</sup>

Proponents of a robust right to counsel celebrated. Protecting the underdog when the stakes are highest was no longer an American fairy tale told on television, in comic books, and in movies. It was a reality.

This fundamental American value continued to be celebrated in our popular culture with television shows like *The Defenders*, featuring a father/son criminal defense team, running until 1965<sup>27</sup> and *Perry Mason*, perhaps the best-know television defender running until 1966 and making a revival for a season in 1973.<sup>28</sup>

And the people who public defenders represent, the outlaws, were depicted as deserving of sympathy and understanding. We could see this in movies like the 1967 classics *Cool Hand Luke*,<sup>29</sup> starring Paul Newman; and *Bonnie and Clyde*,<sup>30</sup> starring Warren Beatty and Faye Dunaway; 1969’s *Butch Cassidy and the Sundance Kid*,<sup>31</sup> starring Paul Newman and Robert Redford;

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23. TO KILL A MOCKINGBIRD (Universal Int’l Pictures et al. 1962); see also *To Kill a Mockingbird*, IMDB, <http://www.imdb.com/title/tt0056592/> (last visited May 20, 2014).

24. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

25. *Id.* at 343–44.

26. For a comprehensive account of the story surrounding the Court’s holding in *Gideon*, see ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964).

27. *The Defenders* (CBS television broadcast Sept. 16, 1961–May 13, 1965); see also *The Defenders*, IMDB, <http://www.imdb.com/title/tt0054531/> (last visited May 20, 2014).

28. *Perry Mason* (CBS television broadcast Sept. 21, 1957–May 22, 1966); see also *Perry Mason*, IMDB, <http://www.imdb.com/title/tt0050051/> (last visited May 20, 2014).

29. COOL HAND LUKE (Jalem Prods. 1967); see also *Cool Hand Luke*, IMDB, <http://www.imdb.com/title/tt0061512/> (last visited May 20, 2014).

30. BONNIE AND CLYDE (Warner Bros./Seven Arts & Tatira-Hiller Prods. 1967); see also *Bonnie and Clyde*, IMDB, <http://www.imdb.com/title/tt0061418/> (last visited May 20, 2014).

31. BUTCH CASSIDY AND THE SUNDANCE KID (Twentieth Century Fox Film Corp. et al. 1969); see also *Butch Cassidy and the Sundance Kid*, IMDB, <http://www.imdb.com/title/tt0064115/> (last visited May 20, 2014).

and 1975's *Dog Day Afternoon*,<sup>32</sup> starring Al Pacino. In each, whether the lawbreaker is stealing change from parking meters (*Cool Hand Luke*) or committing armed robbery (the other three), the outlaw is seen as likable, and empathetic. The system itself was called into question.

Sister Helen Prejean famously said “people are more than the worst thing they have ever done in their li[ves].”<sup>33</sup> During this post-*Gideon* era, films reflected this truism, showing outlaws as deeply human and portraying the lawyer who represents them against a system that strives to reduce these law-breakers to a label constructed from their worst acts, as heroic. This was a time when we believed in the worth of the individual, we believed in justice tempered by mercy, and we revered the professional willing to fight for these values.

But times quickly changed. As we entered the last quarter of the twentieth century, politicians began to see crime as a platform to galvanize the white middle class vote. Unrest over civil rights led to heightened racial tension. Politicians such as Barry Goldwater and George Wallace were able to rally working class whites by creating an image of the black criminals as dangerous and alien and depicting liberal judges as their allies.<sup>34</sup> Ronald Reagan took up the tough-on-crime mantle, “[d]escribing ‘[o]ur city streets [as] jungle paths after dark.’”<sup>35</sup> President Nixon declared drugs “public enemy number one,”<sup>36</sup> and with the introduction of crack cocaine into American cities in the 1980s, and the narrative of violence built around it, the War on Drugs became a driving influence on America’s perception of crime.<sup>37</sup> As the media joined politicians in fanning people’s fears about crime, the criminal defendant morphed from an underdog individual worthy of protection into a terrorizing bully holding law-abiding citizens hostage as he wreaks havoc on our communities.<sup>38</sup> The image of the accused

32. DOG DAY AFTERNOON (Artists Entm’t Complex 1975); see also *Dog Day Afternoon*, IMDB, <http://www.imdb.com/title/tt0072890/> (last visited May 20, 2014).

33. Sue Halpern, *Sister Sympathy*, N.Y. TIMES MAG. (May 9, 1993), <http://www.nytimes.com/1993/05/09/magazine/sister-sympathy.html> (quoting Sister Helen Prejean) (internal quotation marks omitted).

34. See Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 529–30 (2012).

35. *Id.* at 530 (quoting WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 237 (2011)).

36. See Richard Nixon, U.S. President, Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), available at <http://www.presidency.ucsb.edu/ws/?pid=3047>.

37. For a comprehensive discussion of the War of Drugs and how it has influenced criminal justice in America, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

38. See Craig Haney, *Politicizing Crime and Punishment: Redefining “Justice” to Fight the “War on Prisoners,”* 114 W. VA. L. REV. 373, 406–07 (2012); see also ELAYNE RAPPING, *LAW AND JUSTICE AS SEEN ON TV* 21 (2003) (identifying a shift in “TV series about crime and justice” in which the “defense-attorney hero” has slowly been “replaced by heroic policemen and D.A.s”).

was now that of an outsider; an “other” that society was told it must fear. The valued right to counsel was no longer so popular, as the public lost interest in cheering for a lawyer viewed as protecting the enemy.

It was against this backdrop that the right to counsel, cemented into our nation’s jurisprudence with the *Gideon* decision, was rendered toothless by a very different Supreme Court. Twenty-one years later, the Court was asked to do what the *Gideon* Court failed to explicitly pronounce. The *Gideon* Court declared that an accused has the right to a lawyer. This Court was asked to answer the question, “What kind of lawyer is a poor person entitled to?” And in *Strickland v. Washington*, it gave an answer: Not much of one.<sup>39</sup> With a public sentiment much changed over the past two decades, the *Strickland* Court created a new class of lawyer reserved only for poor people; incompetent yet constitutionally effective. The *Strickland* Court literally created a two-prong test that would allow incompetent lawyers to be found constitutionally adequate.<sup>40</sup> The Court placed the burden on the defendant to prove that his lawyer was incompetent.<sup>41</sup> He could do this by showing that his lawyer was intoxicated, asleep during trial, or did no pre-trial preparation.<sup>42</sup> But even if the defendant could meet this burden, he had to go even further.<sup>43</sup> He had to show that if he had a lawyer who was sober, awake, or prepared, he would have won the trial.<sup>44</sup> This proved to be an impossible standard to meet.<sup>45</sup> And states got the message. While they had to provide a lawyer, they did not need to provide a very good one. State public defenders subsequently found themselves being forced to handle crushing caseloads without the most basic resources needed to do the job. As public defenders were driven to accept this new status quo, the image of the court-appointed lawyer also changed.

Now, in Hollywood, the public defender is seen as an incompetent, bumbling fool, symbolized by the court-appointed lawyer seated alongside Joe Pesci in *My Cousin Vinny*.<sup>46</sup> The role of the public defender was also revamped for television. Consider the intro to *Law & Order*, the longest running crime drama in American television history:

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39. See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

40. See David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises, in CRIMINAL PROCEDURE STORIES*, 101, 111 (Carol S. Steiker ed., Found. Press 2006).

41. *Id.*

42. See *id.* 103–04; see also Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1842 (1994) (stating defense attorneys for the poor often lack “the most rudimentary knowledge, resources, and capabilities needed for the defense of a capital case”).

43. See Cole, *supra* note 40, at 113.

44. *Id.*

45. *Id.*

46. MY COUSIN VINNY (Palo Vista Prods. et al. 1992); see also *My Cousin Vinny*, IMDB, <http://www.imdb.com/title/tt0104952/> (last visited May 20, 2014).

*In the criminal justice system, the people are represented by two separate, yet equally important groups; the police who investigate crime and the District Attorneys who prosecute the offenders.*<sup>47</sup>

In this most revered and influential of TV series, defense attorneys are not worth mentioning in the introduction. When seen in the series, they are now either hopelessly stupid and incompetent, or slick, sleazy, and corrupt.

And the people they defend began to look less like Butch Cassidy and more like the young toughs portrayed in movies like *Menace II Society*<sup>48</sup> and *Juice*,<sup>49</sup> young “super-predators”<sup>50</sup> who care little for human life and pose a threat to our very survival. In fact, the new outlaw was not even worthy of the fundamental constitutional protections guaranteed us all. Consider one episode of *NYPD Blue* in which a seasoned detective coerces a confession from a suspect. When a naïve younger detective asks about the practice, the wiser man replies, “in the case of a murderer like this who’s gonna walk, I leave my gun and my jewelry outside with the Constitution.”<sup>51</sup>

Systems more concerned with processing increasing caseloads than ensuring equal justice came to tolerate defenders whose lack of a sense of responsibility for their clients was shocking. Cameron Todd Willingham’s court-appointed lawyer served as a prime example. Willingham was convicted of capital murder for setting fire to his house and killing his three young children.<sup>52</sup> He was convicted, and ultimately executed, based on expert testimony, which was later shown to be unreliable.<sup>53</sup> Willingham maintained his innocence up until his final statement before execution.<sup>54</sup> Although multiple experts who subsequently reviewed Willingham’s case concluded that the original arson investigation was flawed and the fire was caused by an accident, one voice adamantly supported the jury’s verdict: Willingham’s court-appointed lawyer, David Martin. When David Grann, an investigative journalist with *The New Yorker*, later asked Martin about the evidence that proved his client’s innocence, the lawyer responded that

47. *Law & Order* (NBC television broadcast Sept. 13, 1990–May 24, 2010); see also *Law & Order*, IMDB, <http://www.imdb.com/title/tto098844/> (last visited May 20, 2014).

48. *MENACE II SOCIETY* (New Line Cinema 1993); see also *Menace II Society*, IMDB, <http://www.imdb.com/title/tto107554/> (last visited May 20, 2014).

49. *JUICE* (Island World 1992); see also *Juice*, IMDB, <http://www.imdb.com/title/tto104573/> (last visited May 20, 2014).

50. “Super-predator” is a term coined by Princeton’s Woodrow Wilson School Professor to describe the remorseless and violent young criminal. See James Traub, *The Criminals of Tomorrow*, *NEW YORKER* (Nov. 4, 1996), [http://www.newyorker.com/archive/1996/11/04/1996\\_11\\_04\\_050\\_TNY\\_CARDS\\_000375448](http://www.newyorker.com/archive/1996/11/04/1996_11_04_050_TNY_CARDS_000375448).

51. See Susan Bandes & Jack Beermann, *Lawyering Up*, 2 *GREEN BAG* 2D 5, 8 (1998) (quoting *NYPD Blue: A Tempest in a C-Cup* (ABC television broadcast Nov. 16, 1993)).

52. David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, *NEW YORKER* (Sept. 7, 2009), [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann).

53. *Id.*

54. *Id.*

“[t]here were no grounds for reversal, and the verdict was absolutely the right one.”<sup>55</sup> He went on to say: “Shit, it’s incredible that anyone’s even thinking about it.”<sup>56</sup> Speaking of people accused of crimes in general, Martin explained to Grann that, “[m]ost of the time, they’re guilty as sin.”<sup>57</sup>

David Martin is not alone in his contempt for the people he represents. Eddie Joe Lloyd was appointed a lawyer with a similar mindset. Lloyd was convicted of rape and murder when Bob Slameka was appointed to represent him on appeal.<sup>58</sup> During the two years he represented Lloyd, Slameka did not meet with or accept a single phone call from his client.<sup>59</sup> Slameka claimed his inattentiveness was because he was not paid enough.<sup>60</sup> After his appeal failed, Lloyd filed a complaint with the state claiming that Slameka did not devote enough time to his case.<sup>61</sup> Slameka’s response revealed what was perhaps the true reason for his lack of attention.<sup>62</sup> Of his former client, Slameka said, “[t]his is a sick individual who raped, kidnapped and strangled a young woman on her way to school. His claim of my wrongdoing is frivolous, just as is his existence. Both should be terminated.”<sup>63</sup> Lloyd was subsequently exonerated by DNA after spending seventeen years in prison.<sup>64</sup>

As public opinion changed about those accused of crimes and the lawyers who represent them, systemic pressures to process people efficiently became more acceptable. While David Martin and Bob Slameka represent extreme cases, defenders across the country face pressures to encourage clients to plead guilty without conducting any investigations or legal research, to be more concerned about the judges’ desires than the clients’, and to handle an increasing caseload without adequate time or resources.<sup>65</sup>

As these pressures wear down well-intentioned defenders, they are forced to abandon their critical role in ensuring equal justice. Some quit, like Marie-Pierre Py. As a young public defender in Georgia, Marie became discouraged over the countless clients who fell through the cracks on her watch.<sup>66</sup> In her final thirteen months as a Georgia public defender, Marie

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55. *Id.* (internal quotation marks omitted).

56. *Id.* (internal quotation marks omitted).

57. *Id.*

58. See Ailsa Chang, *Not Enough Money or Time to Defend Detroit’s Poor*, NPR NEWS (Aug. 17, 2009, 12:52 AM), <http://www.npr.org/templates/story/story.php?storyId=111811319>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. See Rapping, *supra* note 4.

66. See Marie-Pierre Py, *Letter: Without Funds, PD System Will Deteriorate Further*, DAILY REPORT (Mar. 19, 2009), available at <http://www.nlada.org/DMS/Documents/1237466797.97>. I also had the opportunity to know Marie and her story personally.



resolved 900 cases, allowing her three hours per year to devote to each client if she worked fifty-hour weeks without taking any vacation time or sick leave.<sup>67</sup> Given that these three hours included court time and client meetings, Marie had no time to be competent.<sup>68</sup> She struggled on as she and her colleagues shared an environment in which lawyers routinely facilitated pleas without looking into the strengths and weaknesses of the case; where investigative and expert resources were the exception, not the rule; and where lawyers were instructed to disregard ethical rules governing conflicts of interest that could prove detrimental to their clients.<sup>69</sup> Marie found herself at a crossroads. She quit.<sup>70</sup>

Others remain, and succumb to the status quo. Take Robert Surrency as an example, a lawyer who held the contract to represent indigent defendants in Greene County, Georgia, for fourteen years.<sup>71</sup> Although his position was considered part-time, allowing him to maintain a private practice, Surrency's annual appointed caseload was twice the recommended national standard.<sup>72</sup> He began his public defender career as a young lawyer and quickly adapted to the expected standards of practice. The judges demanded that he process his cases quickly, and he obliged.<sup>73</sup> In one four-year period he handled 1493 cases, with 1479 (more than ninety-nine percent) resulting in guilty pleas.<sup>74</sup> Some days he would plead dozens of clients in a single court session, and he had little time to get the details necessary to negotiate on their behalf.<sup>75</sup> He did not request investigative or expert services, claiming "not to need these resources, anyway, because most of his cases were 'pretty open and shut.'" <sup>76</sup> In addition, "[h]e didn't want to get people riled up about spending the county's money."<sup>77</sup> When clients complained about the insufficient time Surrency spent talking to them, he chalked it up to "their need for attention," adding, "[y]ou have to draw the line somewhere."<sup>78</sup> Surrency considered his high-volume, plea-bargain practice "a uniquely productive way to do business" and believed that he "achieved good results" for his clients.<sup>79</sup> Attorney and journalist Amy Bach concludes that "[u]nder the weight of too many clients to represent, he

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 12–13 (2009).

72. *Id.* at 12.

73. *Id.* at 13.

74. *Id.* at 14.

75. *Id.* at 14–15.

76. *Id.* at 15.

77. *Id.*

78. *Id.* at 17.

79. *Id.* at 13 (internal quotation marks omitted).

seemed to have lost the ability both to decide which cases required attention and to care one way or the other.”<sup>80</sup>

It is the exceptional lawyer who remains in this system conscious of his or her obligations to those s/he represents. For it is hard to be exposed to injustice every day and not subtly come to accept it as the way things are meant to be. But the lawyers who do not accept the injustice are the true heroes. And if we are to ever realize *Gideon*'s promise, we must find a way to reclaim the narrative in which the public defender is the hero. We must cultivate a generation of public defenders who remain mindful of the duty of an advocate and collectively fight to remind the system of this essential role.

Perhaps no definition of the role of the defender is more apt than that given by Henry Lord Brougham. In an effort to represent his client, Queen Caroline, against King George IV, he threatened to reveal a secret that would disgrace the king and potentially wreak havoc on the kingdom.<sup>81</sup> When criticized for his aggressive advocacy, he described his role as follows:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.<sup>82</sup>

This is the role the *Gideon* Court envisioned. We must reclaim this narrative. It is up to those of us in this room to drive this reclamation. It is up to law students to choose to use their law degree to push our system to live up to its highest aspirations. It is up to law professors to inspire students to play this important role and to prepare them to succeed in this challenge. And it is up to law schools to create opportunities for its graduates to become the heroes our system so desperately needs.

Not only is this the fiftieth anniversary of *Gideon*, but it is also the fiftieth anniversary of the March on Washington where Martin Luther King gave his famous call not only for racial equality but for jobs and justice.<sup>83</sup> It is appropriate that these two anniversaries coincide, for the greatest civil rights challenge facing this generation is in our criminal-justice system. For

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80. *Id.* at 15.

81. Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319, 1320 (2006).

82. *Id.* at 1322 (quoting 2 TRIAL OF QUEEN CAROLINE 3 (1821)).

83. See 50TH ANNIVERSARY MARCH ON WASHINGTON, <http://50thanniversarymarchonwashington.com/> (last visited Apr. 11, 2014).

nowhere else are poor people and people of color facing greater civil and human rights abuses. More than 80% of those charged with crimes are poor enough to qualify for a public defender.<sup>84</sup> In 2012, 2.2 million people were incarcerated in America's prisons and jails.<sup>85</sup> African-Americans are nearly six times more likely than their white counterparts to be locked up<sup>86</sup> and suffer all of the consequences that go with a conviction.<sup>87</sup> In the rush to process people with whom we do not identify into a system of mass incarceration, we have lost sight of the humanity of the system's victims. For only when we see defendants as less than human can we toss their lives away as they rot in a small cage. Only then can we allow a state prison system like California's to get to the point where sick prisoners die after being deprived basic medical treatment as the prison capacity hits 200%.<sup>88</sup> Only then can we approve of Arizona jailers forcing those convicted of crimes to wear pink underwear and live in canvas tents during triple-digit summer heat.<sup>89</sup> Only then can we watch as prisoners engage in hunger strikes, clearly preferring death to the intolerable conditions of confinement.<sup>90</sup> Only when we fail to see the accused as members of our community can we accept how the system destroys any chance they have to get back on their feet and become productive members of society.

The challenge is to reawaken the public to the fact that the people we represent are human and that the system we are throwing them into is inhumane. The challenge is to force a system that is lost to find its way back to our noblest ideals. The role of the twenty-first century public defender

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84. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

85. *Incarceration*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Apr. 11, 2014).

86. *Interactive Map*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/map/map.cfm> (last visited Apr. 11, 2014).

87. Once convicted, a person:

may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and federal educational assistance. His driver's license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses. If he is convicted of another crime he may be subject to imprisonment as a repeat offender. He will not be permitted to enlist in the military, or possess a firearm, or obtain a federal security clearance. If a citizen he may lose the right to vote; if not, he becomes immediately deportable.

Marc Mauer & Meda Chesney-Lind, *Introduction to INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 5 (Marc Mauer & Meda Chesney-Lind eds., 2002) (citing STANDARDS ON COLLATERAL SANCTIONS AND ADMINISTRATIVE DISQUALIFICATION OF CONVICTED PERSONS, introduction (Proposed Draft Jan. 18, 2002)).

88. See *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011).

89. See *Sheriff Joe Arpaio Loses Pink Underwear Appeal*, ABC 15 ARIZONA (Mar. 4, 2013), <http://www.abc15.com/dpp/news/state/sheriff-joe-arpaio-loses-pink-underwear-appeal>.

90. See Sam Quinones, *Inmate Hunger Strike Expands to More California Prisons*, L.A. TIMES (July 6, 2011), <http://articles.latimes.com/2011/jul/06/local/la-me-0706-hunger-strike-20110706>.

involves reminding the criminal-justice system, and the public, that these lives being thrown away belong to human beings.

We must inject humanity back into law. To do this, we will need a movement of public defenders empowered to reclaim these ideals. It will take a heroic effort. But the best of our profession have served as heroes throughout our history. Those of us who teach are well-positioned to begin the process of forging this community of heroes. We are the ones who are in a position to ensure that our graduates have a strong appreciation for our nation's most cherished ideals. We are the ones given the opportunity to help our young lawyers develop strategies to infuse our justice system with these values. We are the ones given a platform to inspire tomorrow's lawyers to become agents for change rather than beneficiaries of the status quo. On this fiftieth anniversary, we are among those who must remember that *Gideon* called for nothing less.