Symposium: Gideon - a Generation Later
Introduction & and Keynote Speakers

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Good Morning. I'm Don Gifford. I'm the Dean of the University of Maryland Law School, and it's my privilege this morning on behalf of the law school community to welcome you to Westminster Hall, to the Law School, and to this Symposium: *Gideon v. Wainwright*,¹—A Generation Later. The beginning of the story goes like this.... “In the morning of January 8, 1962, the Supreme Court of the United States received a large envelope from Clarence Earl Gideon, prisoner No. 003826, Florida State Prison, P.O. Box 221, Raiford, Florida.”² This is the beginning of the story; this is the first sentence of Anthony Lewis’s award winning book, *Gideon’s Trumpet*. But how the story ends, we still do not know and perhaps we’ll never know. To declare a legal right is one thing. To enact it in a meaningful way is quite another. So the purpose of this Symposium over the next day or two is to look at this issue. How real are the rights articulated in *Gideon v. Wainwright*? How far have we come? How much further do we have to go? We thank you all for joining with us and taking time from your busy schedules as professors, as judges, as practitioners to help us answer these questions. I do want to begin, as is customary, by thanking the

1. 372 U.S. 335 (1963). [All footnotes have been added by editors of the *Maryland Law Review*. In conformity with the oral character of the speeches, footnotes have been kept to a minimum. Occasional lapses and inaudible portions in the recording of the speeches have made a perfectly verbatim transcription impossible. Such omissions are not indicated in the text. The text has been edited in a few places.—eds.].

2. ANTHONY LEWIS, GIDEON’S TRUMPET 3 (1964).
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First of all Clarence Earl Gideon won in the Supreme Court not only because he was right, but because he was represented by some of the world's best lawyers. And those lawyers happened to work at a firm where public service and pro-bono activities were deeply valued. That tradition continues today at the law firm of Arnold & Porter. So as they say on public television and public radio: "This program has been made possible by a grant from the law firm of Arnold & Porter." I want to thank Abe Krash for that as well as for being here. I also want to thank University of Maryland Law School graduate Steve Lockman for facilitating this generous gift. This Symposium is also sponsored by the Gerber Memorial Lecture Fund here at the University of Maryland School of Law, named for three members of the Gerber family, including our graduate Lloyd Gerber. Now symposia such as this don't just happen. This Symposium was conceived and has been executed by Professor Doug Colbert of the University of Maryland Law School Faculty. I would suggest to you that the fact that the indigent defendant's right to counsel has not yet been fully implemented has become something of a mission, no, probably an obsession, with Professor Colbert over the last several years. He has worked with his students in the clinical program. He has worked with the Maryland State Bar Association and with the American Bar Association. He frequently has had appearances on radio talk shows. If you will spare a proud law school dean a small indulgence, I will tell you that eleven days from now the Maryland Bar Foundation will bestow upon Doug the Seventh Annual Legal Excellence Award for the Advancement of Unpopular Causes. So join with me in thanking Doug and also in congratulating him for the award he is about to receive.

The papers and remarks of this Symposium will be carried in the Maryland Law Review. I want to thank our Editor in Chief of the Maryland Law Review, Abby Ross, and also particularly Joe Key of the Law Review for all of their hard work in helping Professor Colbert put this conference together.

Many of you have traveled far. We would like to make you welcome in whatever way is possible. I know that it's tough to believe, but on a Friday or Saturday it is probably even possible that we would find a faculty office where you could make a telephone call or two. So let us know if we can help you out in any way, shape, or form.

If you're going to begin a conference on *Gideon v. Wainwright*—A Generation Later, there are two people that you would want to begin with. We are very proud to have both of them with us this morning. Introducing Anthony Lewis is a very personal thing for me. In 1965,
as an eighth grader in rural Ohio who had never had any connection to the legal system, I picked up a book at the local public library. It was *Gideon's Trumpet*. At the end of that book I knew that I wanted to be a lawyer. About a dozen years later, however, I remember cursing that I had read the book because one February morning when it was twenty degrees below zero in rural Ohio, one of my court appointed defendants took a sheriff's deputy hostage at gun point and would only negotiate through me, his attorney. So every story has a flip side, Mr. Lewis.

Anthony Lewis, of course, is a columnist with *The New York Times*. He has twice won the Pulitzer Prize. He began with *The Times* in 1948. He began covering the Supreme Court and other related legal matters in 1958. He went on to write two other books, one about *New York Times v. Sullivan,* the other about the civil rights movement.

We welcome you Mr. Lewis.

Mr. Lewis is joined this morning by Mr. Abe Krash of the law firm Arnold & Porter. Over the last several afternoons we have been playing to our students the film version of *Gideon's Trumpet*. There are scenes in the movie in which Abe Fortas and Abe Krash are putting together the briefs and talking strategy. I overheard one of our students saying to another student, while pointing to the person playing Mr. Krash in the movie, "He's the brains of the outfit, and he's going to be here on Friday morning." Now if you think about that for just a moment, Justice Fortas was arguably the most intelligent member ever to serve on the United States Supreme Court. For Abe Krash to be compared with Abe Fortas, and to be called the "brains of the outfit" is really quite a compliment. (We might note also that the law clerk who worked on the brief wasn't bad either. It was John Hart Ely who went on to teach constitutional law at Harvard, and then to become the Dean of Stanford Law School.) Mr. Krash is a graduate of the University of Chicago Law School and for many years has been a visiting lecturer at both Georgetown and Yale. So please join with me this morning in welcoming to the University of Maryland School of Law Mr. Anthony Lewis and Mr. Abe Krash.

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Anthony Lewis

Dean, I like the story about the rural life in Ohio. Thank you. Ladies and gentlemen, it gives me great pleasure to be taking part in this Symposium. The issue to be discussed, the right to counsel, is one of profound importance, not just to those charged with crime, but to all of us as a sign and symbol of the kind of society we are. I have a personal reason to be grateful for having been invited here. The occasion brings me together again with Abe Krash. I have to say, having heard the Dean, that I think it's lucky that Abe Fortas never heard you described as the brains of the outfit.

We were in at the beginning of the Gideon story, he as a lawyer, I as a journalist. We were a bit younger then—it was 1962. But I don't think either of us has lost his sense of what justice and decency require on this question. To most Americans it must seem an easy and obvious question. Do you need a lawyer when you face a criminal charge? Of course you do. If you are too poor to hire one must the government provide you with a lawyer? Surely. So most people assumed when the Gideon case came along, but the assumption was false. The Supreme Court had held in 1938 that in federal prosecutions the Sixth Amendment provision that the accused shall enjoy the right to have the assistance of counsel for his defense required the provision of counsel for poor defendants. But in 1942 in the case of Betts v. Brady—\(^5\)—all of you who know the law, and maybe that's all of you, realize that I'm going over well-trodden ground—the Court declined to apply the same rule in state prosecutions. History drew that distinction in the application of the Constitution to the federal government and the states. The first ten amendments to the Constitution, The Bill of Rights, limited only the power of the federal government. But gradually, over many years, the Supreme Court held that the fundamental guarantees of the Bill of Rights were applied to the states by the provision of the Fourteenth Amendment that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."\(^6\) In the 1960s under Chief Justice Earl Warren, the Court held that most of the guarantees of fair criminal procedure in the Bill of Rights applied to the states.\(^7\) The rule against double jeopardy,\(^8\) for example, the requirement that no one be compelled to incriminate

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\(^5\) See Albright v. Oliver, 510 U.S. 266, 272-73 (1994) (plurality opinion) (listing these cases).

\(^6\) U.S. CONST. amend. XIV, § 1.

\(^7\) See Albright v. Oliver, 510 U.S. 266, 272-73 (1994) (plurality opinion) (listing these cases).

himself,⁹ and so on. Those cases were part of a larger movement to breathe new life into the Constitution, to make meaningful its protections of civil liberties and civil rights. It was in that atmosphere of what I would call "constitutional hope" that the case of Gideon v. Wainwright came along.

I well remember how I first encountered the case; I was covering the Supreme Court then. As part of the job I read the regular, printed petitions for review that came along. But I could not read the hundreds and hundreds of typewritten or handwritten documents that reached the court from indigent petitioners, mostly prisoners. This was in the pre-xerox age, ladies and gentlemen. Only one copy of those handwritten or typewritten petitions existed, and it was circulated among the Justices. So until they acted on it, we the press (the few of us who were then covering the Court) could not see it. When the Court infrequently granted one of those indigent petitions, then the jacket containing the documents would go back to the file room and I would read it. That's what I did on June 4, 1962, when the Court agreed to hear the case of Clarence Earl Gideon.

In granting review, the Justices asked counsel to discuss this question: Should this Court's holding in Betts v. Brady be reconsidered? That made it evident that the Court was ready to change its mind and require that the states as well as the federal government provide counsel for defendants too poor to retain their own. It needed no great wisdom to understand that it was a case of singular importance. In our system of federalism the overwhelming proportion of criminal prosecutions are brought by state authorities. So, potentially, the decision to overrule Betts would have a broad impact.

When I looked at Gideon's documents that day there was another notable aspect to the case. He was a prisoner in the Florida State Penitentiary in Raiford, a man who had been convicted several times in his life for petty crimes and now was serving five years for stealing a small amount of money from a pool room in Panama City, Florida. He had written the Court a letter on a lined prison pad, and the Supreme Court of the United States had responded to this powerless person, this loser, because he had had the gumption to protest when he was tried and convicted without a lawyer. It was a romantic story, ideally suited for journalists, and that is what it went on being.

To argue the case, as you just heard, the Court appointed Abe Fortas, one of the most skillful and powerful lawyers in Washington. So from having no one to speak for him, Gideon now had the best.

Fortas, assisted by Abe Krash, wrote a superb brief and made a compelling oral argument. The Court decided unanimously in Gideon's favor, overruling *Betts v. Brady*. And then, poetically, the Court's opinion was written by Justice Hugo Black, the sole remaining member of the Court who had passed on *Betts v. Brady*. He had dissented in *Betts* and had lived to see it overruled. Still the romance was not over. The Court's decision meant that Gideon was entitled to a new trial, this time with a lawyer provided by the state of Florida. I went down to Panama City for that trial. Gideon's appointed lawyer, Fred Turner (played in the movie, if you've seen it, by a very good character actor named Lane Smith) did a fine job. The jury quickly brought in a verdict of acquittal.

It was, as I say, a romantic story. That helped greatly when I wrote the book about it. Imagine what a letdown it would have been if the jury in the second trial had convicted Gideon. But ladies and gentlemen, I have to tell you that the romance has faded. I said in my book that it would be an enormous social task to bring to life the dream of *Gideon v. Wainwright*—the dream of a vast, diverse country in which every man charged with a crime will be capably defended no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense. That has not happened.

A book just published shows how far short we have fallen. It is *No Equal Justice* by Professor David Cole of the Georgetown University Law Center. Thirty-six years after the *Gideon* case was decided Professor Cole says: "Gideon's trumpet sounds only a distant and increasingly hollow echo." One reason for that conclusion is that state and local governments provide such meager resources of defense of poor men and women charged with crimes. The national average spent per case in 1990 (the last year for which we have figures) was five dollars and thirty seven cents.

In cities that have full time public defenders, many are simply overwhelmed. Rick Tisier, a public defender in New Orleans, protested his situation in 1991. In seven months that year he had represented 418 defendants. He had at least one serious case set for trial on every trial date in that period. Often he was unable to meet his client for an initial interview until that accused person had been in jail for a month or two, at which point the best he could do might be to

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bargain a plea of guilty for time already served. Those of you in this room, perhaps most of you who are lawyers, just think of that. A case for which you are responsible, a criminal case, set for trial on every trial date over seven months. That is surely not the dream of Gideon. New Orleans is not unique. A public defender in Fulton County, Georgia, Atlanta handles on average 530 felony cases a year. Overwork is the norm everywhere, and that means a skimmed defense.

In most states and cities the poor accused are represented not by public defenders but by private lawyers assigned to their case. Here again the resources made available are often a mockery of what fairness requires. Fees fixed by statute range, Professor Cole says, "from twenty dollars to fifty dollars per hour," which I don't have to tell you is a fraction of what lawyers ordinarily charge. About a third of the states set a limit per case on what appointed counsel can receive, no matter how many hours they work. In Virginia the maximum is $350 for most felonies.11 Kentucky has a limit of $1000 for noncapital felony cases, and $2500 for capital cases.12 A study found that the median time spent by a lawyer on a capital case ranges from 300 to 600 hours. Take the lower figure. An assigned counsel who spent 300 hours on a capital case would be paid a little over $8.00 per hour.

The American public has an image of criminal law based on sensational televised cases—O.J. Simpson, the nanny Louise Woodward, and the like. From those, we know that the defense lawyers hire investigators and experts, make innumerable motions, question potential jurors at great length, and are so thoroughly prepared that they can cross-examine prosecution witnesses in the most meticulous detail. But the harried assigned counsel has little ability to do those things. A study in New York showed that in three-quarters of homicide cases (those are serious cases, ladies and gentlemen) assigned counsel filed no pretrial motions.

The second reason that the dream of Gideon remains unrealized has to do with the quality of representation provided for poor defendants. To put it bluntly, the lawyers who defend the indigents are often

11. See Va. Code Ann. § 19.2-163 (Michie Supp. 1999) (compensating, after July 1, 1999, appointed counsel $845 for representing indigent defendants accused of a felony punishable by 20 years or more confinement, $318 for all other felonies, and "an amount deemed reasonable by the court" for capital cases).

12. The Kentucky statutory scheme provides that, if an indigent defendant is not represented through the Department of Public Advocacy, but instead by an appointed counsel, then the latter shall receive "reasonable and necessary fees and expenses," subject to the limitation that "[n]o fee shall be paid in excess of the prevailing maximum fee per attorney paid by the Department of Public Advocacy for the type of representation provided." See Ky. Rev. Stat. Ann. § 31.070 (Banks-Baldwin 1999).
below the most minimal standards of competence and commitment. Stephen Bright, who will be here later today, and who is the Director of the Southern Center for Human Rights, and a devoted defender in death cases, has shown that in a number of capital cases assigned counsel slept during portions of the trial. I am sure he will tell you about that in more compelling detail, but here is a description from the Houston Chronicle of a 1992 capital trial in that city.

[D]efense attorney John Benn spent much of Thursday afternoon’s trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders. . . . Every time he opened his eyes a different prosecution witness was on the stand . . . . When state district Judge Doug Shavers finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial. “It’s boring,” the 72-year-old long time Houston lawyer explained.13

Defense lawyers have used cocaine and heroin throughout a trial; they have been drunk; they have said openly that they knew nothing about the law or the facts at issue. Now why has nothing been done to save the victims of such representation, the defendants? Because when those convicted claim on appeal that they were denied the effective assistance of counsel appellate courts almost always turns them down. In one case the defense lawyer made no opening statement and did not object when the prosecutor told the jury about the defendant’s prior convictions. It turned out that the lawyer was suffering from Alzheimer’s Disease. But on appeal the court held that his lapses did not amount to ineffective assistance because they might have been “tactical decisions.”14

That case and many others like it are not eccentric. They follow the leading Supreme Court case on the effectiveness of counsel, Strickland v. Washington,15 decided in 1984. The Court held that there must be a strong presumption that counsel’s conduct falls within the wide

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14. It is unclear to which case Mr. Lewis is referring. In Pilchak v. Camper, 741 F. Supp. 782, 792 (W.D. Mo. 1990), aff’d 935 F.2d 145 (8th Cir. 1991), the district court stated that the fact that counsel suffered from Alzheimer’s disease was not by itself sufficient to constitute ineffective assistance of counsel absent a showing of actual prejudice. This court granted the petitioner’s writ, however, because “the cumulative effect of her trial counsel’s performance was ‘below the level of skill customary for competent counsel similarly situated.” Id. at 800.

range of reasonable professional assistance. In practice, the test of competence that has been suggested as a joke—the spoon test to see if the lawyer is breathing—is pretty close to the standard of competence enforced by the courts for indigent defense.

Judges are responsible in another way. In many places they choose the lawyers to represent poor defendants and they appoint some who utterly lack the experience, skill, or will to do the job. In Texas some of the appointees have been so incompetent or uncaring that they have missed deadlines (not just one or two, but a fair number) for filing motions that would hold up the execution of their clients. The Texas Court of Criminal Appeals has dismissed those cases one after another. I am sure that Steve Bright will have more to say on that subject.

A lack of competent counsel when life is at stake seems to me the most ghastly failure of our system, and it does happen. Some might say, “Perhaps those Texas judges say to themselves, ‘It doesn’t matter; those sentenced to death are evidently guilty and are only trying to put off the inevitable by appeals and habeas corpus actions.’” But that is not so. In Illinois, in this decade, ten out of twenty-one prisoners on death row have been freed after investigations carried out by journalism students at their professors’ suggestion have shown the prisoners to be innocent.

One more reason for disappointment thirty-six years after Gideon has to be mentioned. That is the fact the principle of publicly provided counsel for the poor criminal defendant is not applied at the beginning of the process, when a person is arrested and wants to be released on bail until his or her appearance in court. The result is that many arrested persons spend weeks in jail quite unnecessarily. Professor Colbert has studied and analyzed the situation in Maryland (I’m sure he’ll talk about it). He shows that the consequences are not only unpleasant for those who are kept in overcrowded cells, but burdensome to the system and expensive to the taxpayer.

Ladies and gentlemen, this subject is not a trivial one. Roughly three-quarters of those charged with crime in this country have no money to pay for a lawyer. Our criminal law has grown increasingly

16. See id. at 689, 690 (asserting that “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and must be conducted “in light of the facts of the case as of the time of counsel’s conduct,” without the distorting effect of hindsight).
17. Cf., e.g., Bacey v. State, 990 S.W.2d 319, 333-34 (Tex. Ct. App. 1999) (denying capital defendant’s claim of ineffective assistance of counsel because, although her lawyer failed to schedule a hearing on a motion for a new trial within the statutory period, the defendant’s allegedly new evidence would not have produced a different result in the trial).
severe and sweeping in recent years. American sentences are savage by world standards. We have more people in prison per capita than any country on earth. So the way we treat the indigent accused is extremely significant.

David Cole in his new book argues that the inequality in the way our criminal justice system treats those with means and without is deliberate. He puts it this way. “By denying the poor adequate lawyers and then holding their lawyers’ mistakes against them, we guarantee that we will never have to pay full cost for the Constitutional rights we purport to protect. And we achieve those savings without diluting the protections available to those who can afford competent counsel. We will never achieve perfect equality between the rich and the poor in legal assistance, but the current system does little more than place a veneer of legitimacy on a system that is patently inadequate and unjust.”

Perhaps it is naivete on my part, or a too simple belief in fundamental American decency, but I cannot bring myself to accept Professor Cole’s judgement. I prefer to think that we allow these wrongs to happen out of ignorance, or at worst, because we shield ourselves from unpleasant truths. If so, the remedy is to throw light, unremitting light, on the unjust reality of unequal treatment in our courts. That is what this Symposium can do and what all of us should be doing in our lives. Our concern, as I said at the start, is not only for those without means to defend against criminal charges, it is for us. As good a statement of this concern as I know was made in 1910 by Winston Churchill, who at the time was Home Secretary in the British Government. I will end with what he said. “The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal against the state, a constant heart searching by all charged with the duty of punishment, unfailing faith that there is a treasure if you could only find it in the heart of every man—these are the symbols which, in the treatment of crime and criminal, mark and measure the stored up strength of a nation and our sign and proof of the living virtue in it.”

Thank you.

Abe Krash

Thank you Dean Gifford. It’s a pleasure for me to be here, and especially a privilege for me to be here together with my old and good friend Tony Lewis, since the thirty-sixth anniversary of the Gideon deci-
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sion by the Supreme Court is going to be observed next week, March 18th. So he and I are here together to lift a toast, or perhaps share a toast, to a momentous occasion.

In looking over the extraordinary program which has been put together for the next two days, it occurred to me—odd as it may seem to you—that the organizers of this program may have been inspired to some degree by Charles Dickens' *A Christmas Carol*. If you recall, Dickens wrote about Christmas past, Christmas present, and Christmas future. In the same way the organizers of this Symposium have organized a program which is devoted to *Gideon* past, *Gideon* present, and *Gideon* future. You are going to be hearing in the next two days from a number of highly experienced and very knowledgeable people who are on the front line about the way in which *Gideon* is being implemented, or more accurately, not being implemented, about the way in which the high hopes have not been fulfilled, and, I am sure, about various remedial steps that could be made to implement it.

I have been asked to focus primarily on the history and background of the decision. I want to say something about the roles of Abe Fortas and Hugo Black. But I do want to share with you a few thoughts at the outset, and in conclusion, about the present status of *Gideon*.

Pursuing, if I may for a moment, the analogy from *A Christmas Carol*, the truth is that many states and municipalities are Scrooges when it comes to financing defense programs for indigent defendants. The vast majority of defendants in both the state and federal criminal system are indigent. Yet various estimates are that only about two and one half percent of all the money that is appropriated for the administration of criminal justice in this country is devoted to defense programs. There is no doubt whatsoever that the various defense programs are grossly underfinanced and that there is an extremely serious crisis affecting the right to counsel as a result of that. Now you may ask, why is that? I believe that one of the major reasons is that there is no effective constituency for the right to counsel. After all, we are lobbying legislators for appropriations. After all, who are the beneficiaries of those funds? They are by definition the poor and people drawn by and large from minority groups, so that there is no one effectively present to lobby legislators for money to assist in defense programs. If these programs are to be adequately financed, I suggest the responsibility rests with the Bar associations and with individual lawyers and with the law schools, who must take up the cudgel and do the job in educating legislators as to the need to finance this important right.
Now I am confident that a number of suggestions are going to be made during this Symposium for remedial steps, for things that could be done to make the right to counsel more effective. There are a number of people, let us face it, who believe that talk about rights of criminal defendants, of accused persons, is so much bah and humbug. I suggest, however, that the right to counsel is intimately tied up with the right to a fair trial and a fair hearing, and that right—the right to a fair trial—is a fundamental precept in a just and free society.

Now let me return at this point to the past. Judge Arnold used to say that, as he grew older, he realized that the things he remembered best never took place. I may say that I have a very vivid memory indeed of the events I am going to talk to you about. I was a young partner in the law firm of Arnold & Porter, then Arnold, Fortas & Porter. When Abe Fortas asked me in the summer of 1962 to assist him in writing the brief in the Gideon case, he said to me—and I recall the incident vividly—he said, "I want you to tell me everything there is to know about the right to counsel since the invention of money."

Now I want to begin more modestly this morning. Let me simply describe to you what the status of the right to counsel was in 1962, at the time we began to work on the case, so that you will appreciate what the issues were that were presented to those of us who were advocating Gideon's rights in the Supreme Court.

The important point to bear in mind is that there was a fundamental distinction between the right to counsel in the federal criminal prosecutions, on the one hand, and the right to counsel for indigent defendants in the state courts. In the federal courts, the Supreme Court had ruled in 1938 that every accused person was entitled by reason of the Sixth Amendment, if he was unable to hire a lawyer, to have a lawyer appointed to assist him. That was true in all felony prosecutions in the federal courts. In the state courts the situation was that, in capital cases, that is, in cases where the charge involved a death penalty, the state was required to appoint a counsel in all such cases. But in 1942, in a case arising from Maryland entitled Betts v. Brady, to which Tony Lewis referred, the Supreme Court de-

18. Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (footnote omitted)).
19. Powell v. Alabama, 287 U.S. 45, 71 (1932) (stating that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary prerequisite of due process of law").
cided that accused persons in state felony prosecutions which did not involve the death penalty were entitled to the assistance of a lawyer under the Constitution only if there were special circumstances in the case, such that, if the accused were tried without a lawyer, one could say in retrospect that the trial had been unfair. For example, if the defendant were a mentally retarded person or a very young person, the Supreme Court would say that in such circumstances the defendant had been denied a fair trial. But there were a great many cases where there were no special circumstances. So the persons were tried without a lawyer, found guilty, and sent to prison frequently for long terms.

Now, although the states were not required by the federal Constitution to do so, the great majority of states had in fact by 1962 established a right to counsel in all felony prosecutions, both in capital and noncapital cases. They had done so either by state constitutional provisions, by state statutes, by court decisions, or by court practice. Indeed that was true of forty-five states. There were only five states as of 1962 that did not guarantee an accused defendant who was indigent a lawyer in every case. Those five states were five southern states: Alabama, Florida, Mississippi, North Carolina, and South Carolina.

Now let me say it was not an accident—you should not think it was an incredible event—that the Supreme Court should have plucked Clarence Earl Gideon’s handwritten petition out of hundreds of petitions which came to the Court and decided to accept his case for review. The fact is that the Court had been on the lookout, I think for some time, for a case which presented the question of the right to counsel, and Gideon’s petition presented that case in as direct a way as one could hope for. I think that the Court, or at least that a majority of the Justices of the Court by 1962, had grown weary of the endless process of reviewing case after case which came to the Supreme Court involving the question whether the accused had been denied a fair trial by reason of special circumstances. I think they were looking for a case which would help them escape that particular predicament. I think a number of Justices were already convinced that you could not have a fair trial without a lawyer assisting the defendant. The Gideon case presented this issue directly. That is, it presented the question whether there was a fair trial in a noncapital state felony prosecution in the absence of a lawyer.

21. See id. at 473 (stating that counsel is required when "want of counsel in a particular case may result in a conviction lacking in such fundamental fairness [as would violate the Fourteenth Amendment]").
Now, apart from the basic issue of fairness, one of the great defects of this "special circumstances" test was that it invited endless litigation. There was simply no end to the number of cases which could arise in which that issue was presented. There was another problem. In every case in which a defendant was convicted without a lawyer, he would file a petition subsequent to the case saying that he had been denied a fair trial because he was not afforded a right to counsel. In addition, because the defendant did not have a lawyer, issues which could have been adjudicated or tried by a trial court in the presence of a lawyer were never raised and not decided, and that burden fell on appellate courts. It was a rule which made no sense; it was not an administratively defensible rule.

Now the two principle architects of the *Gideon* decision, given this background, were Abe Fortas and Justice Hugo Black. Fortas was appointed by the Supreme Court to write the brief on behalf of Gideon and to present the oral argument. Hugo Black wrote the opinion of the court. I want to say a few words, since we celebrate the thirty-sixth anniversary of *Gideon* this morning, to recall each of them and the contribution they made to the case and to say something about their very special and unique role. They were each in their own way remarkable men and the case bears the imprimatur of each one of them.

Let me begin by telling you something about Abe Fortas. Abe Fortas was a student of legendary brilliance at the Yale Law School in the early 1930s and came to Washington as a lawyer in the New Deal, and became, I think, famous among a renowned group of lawyers as one of the great lawyers in the New Deal era. After the war he started a law firm and private practice in Washington. He was not a specialist in the criminal law. His practice was primarily in matters involving various problems with the government in Washington. As I say, his practice did not involve the criminal law, except tangentially, but he had a very great interest in the criminal law.

In 1953 he was appointed counsel by the United States Court of Appeals for the District of Columbia Circuit in a case which raised the question of the insanity defense. It was a case called *Durham v. United States*, and I am sure that those of you who are students in law school today will have read that case. I was then a very young lawyer in the firm and he asked me to help him write the brief on that case. He argued at that time that the existing standard of criminal responsibil-

ity, which was the so called "right and wrong" test adopted in England in the mid-nineteenth century, was obsolete. Indeed he persuaded the Court of Appeals which, I think, was very much of that mind anyway, to adopt a totally new standard of criminal responsibility. It revolutionized the whole insanity defense in criminal cases. So Fortas was known to be a person with a keen interest in problems of the administration of criminal justice. He also, I should tell you, had a very passionate interest in questions of civil liberties. It was really in large part under his leadership that our law firm became involved during the McCarthy era in the early 1950s with representing government employees charged with questions of loyalty and security, cases in which there were very grave and serious questions about freedom of speech and freedom of association on the part of government employees. It was a rather dreadful period in American history I might say, and a period in which a relatively small group of lawyers had the courage to stand up. Abe Fortas and his partners Paul Porter and Thurmond Arnold did so. So Fortas had these two great interests.

Now the Supreme Court, of course, was well aware that the Gideon case presented an issue of critical importance, and it was obvious that Gideon had no lawyer and that a lawyer had to be appointed. They wanted, I think it's clear that particularly Chief Justice Warren wanted, to have an outstanding lawyer appointed. Fortas was known to be a brilliant advocate, and accordingly he was appointed. I should tell you that I regard him as a tragic figure in many ways. But Fortas was without any doubt one of the best lawyers of his generation.

Now Fortas wanted to persuade the entire Supreme Court, he wanted all nine of the Justices to agree, that there was a right to counsel in every felony prosecution in this country. That was the objective he put before me and the other young men who were working with him and assisting him in writing the brief in this case. What was the major obstacle he faced? You have to appreciate the problems that confronted him as an advocate. The problem in a nutshell was this. There were a number of Justices on the Court who were reluctant to expand the scope of the Fourteenth Amendment, which was the critical Amendment here, to impose further restrictions on the states in areas of criminal law. In other words there were questions, if you will, of states' rights, of state sovereignty involved here. The problem Fortas had, the problem he put to us, was how to address this particular problem of states' rights or state sovereignty—because we wanted to get those Justices who we knew would be reluctant to expand the scope of the Fourteenth Amendment to join the opinion. There were
basically two ramps, two roadways which Fortas devised as ways to deal with this issue.

The first point he made was that it would not be a revolutionary step to impose a requirement on the states that they must provide a lawyer in all cases because forty-five states already did so, as did the federal government. So we weren’t talking about anything revolutionary. This was not a radical step to require a few remaining states who didn’t do it to do it.

The second thing, and this was one of Fortas’s great insights and contributions to the whole case, was that he perceived that the special circumstances test was a test that should not be supported by those Justices on the Court who were sympathetic to claims of states’ rights or state sovereignty. Why not? Because Fortas pointed out that in every case tried in a state court where the defendant was tried without a lawyer, that defendant then would appeal to a federal judge in the habeas corpus proceeding to set aside the state court’s judgement. And Fortas asked rhetorically, and I think with great force, “What could be more of an affront to the state court judges than to have their judgements being reversed day after day by federal judges under a standard so ambiguous, so vague, as ‘special circumstances’”? It was an extraordinarily clever and insightful point because it was a way of persuading the Justices of the Court that the special circumstances test was in fact a test that they should not continue to embrace, even those Justices who were sympathetic to states’ rights.

The basic argument that Fortas made in the brief—he was the author of the brief, the “brains of this case,” let me assure you—the basic argument was essentially a very simple one and an elementary one. His fundamental point, which was illustrated in the brief in many different ways, was that an accused person cannot have a fair trial in the absence of a lawyer. An accused person who is not a trained lawyer is incapable of examining or making an argument about whether an indictment is valid, whether a search and seizure has been properly conducted, whether there is an improperly admitted confession. A layman is not capable of conducting an examination or cross-examination in the court room. He is not competent to participate in post-trial proceedings relating to sentence. He is totally at sea in the courtroom. In short, a lawyer for the defense is indispensable.

Now in the oral argument Fortas made another point. He argued that if you look at the way in which a court is structured or composed, a properly structured court consists of a judge, a prosecuting attorney, a jury in criminal cases, and, if you don’t have a defendant’s lawyer at
the table, an important person in the cast of characters is missing. And that was a very dramatic and insightful point.

Now, as I say, the brief was really an elegant brief and I think it is frequently examined by students as an example of great advocacy. The oral argument, I would simply say, reminds you of what Justice Douglas wrote in his memoirs of the Court years, which he published in 1975. Douglas said that Fortas's oral argument in the Gideon case was the best oral argument that Douglas heard in the thirty-six years that Douglas sat on the Supreme Court. So that will give you some indication of the level of advocacy which Clarence Earl Gideon had received in this case.

Let me turn at this point to Justice Hugo Black. There was a biography of Black recently published by Roger Newman. Newman describes the situation in the courtroom that morning. He said that when Chief Justice Warren called on Black on the bench to deliver the Court's opinion, Black leaned forward, and he spoke in an almost folksy way reading sections of the opinion. Happiness, contentment, gratification, filled his voice. Newman goes on to say, "It was indeed a moment of supreme satisfaction for Hugo Black, one of the highlights of Black's thirty-four years on the Supreme Court." I'll explain why it was really a wonderful moment for Hugo Black.

Black had dissented from the Court's opinion in 1942 when the Court had said that an accused person was entitled to a lawyer only if there were special circumstances. He had written a brief dissenting opinion at that time. In the years that followed, Black had fought vigorously for the proposition that the Fourteenth Amendment to the Constitution, the Due Process Clause specifically, made each one of the Bill of Rights applicable also to the states. One of Black's most famous opinions was an opinion he wrote in 1948 called Adamson v. California, in which Black had reviewed the whole history of the Fourteenth Amendment and argued that the true meaning of this Amendment, adopted after the Civil War, was to make the Bill of Rights effective as against the states. The Supreme Court had refused to accept Black's view of the Fourteenth Amendment. But in case after case, a majority of the Court had begun to incorporate some of the Bill of Rights as against the states. By 1963, at the time Gideon was decided, the Supreme Court decided, for example, that the right of

24. 332 U.S. 46, 54 (1947) (holding that the Fifth Amendment right against self-incrimination does not apply to the states through the Fourteenth Amendment), overruled by Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding the contrary). For the opinion of Justice Black referred to by Mr. Krash, see Adamson, 332 U.S. at 68-123 (Black, J., dissenting).
free speech, freedom of the press, freedom of religion, was applicable to the states by reason of the Due Process Clause. Or that for example, the right against unreasonable searches and seizures, which is covered by the Fourth Amendment, is incorporated in the Due Process Clause and is good against the states. Or that the right against cruel and unusual punishment, which is provided by the Eighth Amendment, was also something that the states could not violate by reason of the Fourteenth Amendment. But the right to counsel had not been so incorporated. What made the Gideon case so wonderful for Black was that the majority of the Court agreed with him in Gideon that the Fourteenth Amendment did incorporate the right to counsel. So, it was a triumphant moment for Black after all of the years and the effort that he had poured into establishing that particular doctrine.

Now let me say that there are two separate themes in Black’s opinion; by the way, these themes are as significant today as they were then. The first theme in Black’s opinion is that the right to counsel is essential to a fair hearing and is therefore essential to due process of law. The second theme in Black’s opinion is that a right to counsel is essential because of equal protection.

Now let me speak for a moment about each of those two things. First, Black’s opinion reflects the view that in our adversary system of justice you can’t have a fair trial in the absence of a lawyer at the defendant’s side. Black knew from personal experience how important that right was. You must remember that Black had been a county prosecutor in Alabama. He had been a state trial court judge. He knew from his own experience as a lawyer how important a trial lawyer was. He had been a county prosecutor in Birmingham, Alabama which was a tough steel town in the early years of this century. And as he stated in his opinion in Gideon, “[R]eason and reflection require us

25. See Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (holding that the establishment clause of the First Amendment applies to the states through the Fourteenth Amendment); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the free exercise clause of the First Amendment applies to the states through the Fourteenth Amendment); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (stating that the right of free speech is a fundamental one that applies to the states through the Fourteenth Amendment).

26. See Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (applying the Fourth Amendment’s prohibition against unreasonable searches and seizures to the states through the Fourteenth Amendment). See also Mapp v. Ohio, 367 U.S. 643, 657 (1961) (holding “that the exclusionary rule is an essential part of the Fourth and Fourteenth Amendments”).

27. See Robinson v. California, 370 U.S. 660, 666 (1962) (holding that a law that punishes individuals for being addicted to narcotics violates the Eighth Amendment’s prohibition against cruel and unusual punishment, which applies to the states through the Fourteenth Amendment).
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.”28 The first theme was a reflection of Black’s experience. I recall once being present when Black, in a small audience, was talking to students one evening, and somebody asked him about the right to trial by jury. I will never forget the passion, and the eloquence, and the force when Black began to speak of the right to trial by jury. Black was a fighter and you have to understand how passionate and how intensely he felt about these fundamental human rights. The Gideon case reflects, in that sense, his intensity, his conviction that this was essential to the right of people in a free society.

As I say, there were two themes in the opinion. The first was the right to a fair trial. The other theme was the right to counsel for individuals regardless of their economic circumstances. Hugo Black had a profound empathy for persons who were disadvantaged. That too reflected the fact that he had witnessed the poverty and the racism growing up as a poor young man in Clay County, Alabama, and in being a lawyer in Birmingham, Alabama. When he ran for the Senate in 1926, I think it’s interesting what Black’s motto was. He said, “I am not now and I’ve never been a railroad power company or corporation lawyer. I am not a millionaire.” And it was simply unacceptable to Black that a man should be denied a fair trial because he didn’t have the money to hire a lawyer. For Hugo Black, a lawyer in a criminal case was not a luxury; it was a necessity. If you read his opinion, it reflects these two great and profound themes which I think are still cornerstones of the right to counsel.

Let me say a final word about Black. Of all the men and women in public life in Washington—I have been a lawyer there now for nearly half a century—I regard Hugo Black as one of the most admirable men in public life whom I experienced and witnessed in Washington. The Gideon decision, I believe, really is one of his greatest legacies to the country, of many great legacies that he bequeathed to us.

Finally, there is no doubt that the Gideon decision did have significant effects. To begin with, it did establish a regime in which at least there was some lawyer for the accused in every felony prosecution in this country. We could say that an indigent defendant was entitled to a lawyer in every criminal case. There were some public defender offices in place at the time the Gideon case was decided, but the Gideon

case inspired the expansion and development of the public defender movement. Most significantly, I think the *Gideon* case did enhance consciousness of Americans to the importance of a fair trial for all accused persons. It was a consciousness heightening decision.

In retrospect there are several things at the time *Gideon* was decided that we simply did not fully appreciate or emphasize. First, all of our emphasis at that time was on the right of a defendant to any lawyer. What we did not fully appreciate was that it is not enough just to say that you're entitled to some lawyer or a lawyer. One needs to have a lawyer who is competent to try a criminal case. To appoint individuals who are neophytes, who have never been in a court room, or hacks, or people who are marginally competent, does not satisfy in a meaningful sense the right to counsel. At that time we were not sufficiently focusing on that point. Second, I think we did not sufficiently stress the point that, in order to have an effective defense, the defense lawyer has to have funds to conduct an investigation, to retain experts, and do the other things that one needs to do if one is effectively preparing a case for trial. The right to counsel is meaningless if a lawyer does not have the resources to do those kind of things. Finally, our focus in *Gideon*, because of the kind of case it was—an appeal from the denial of counsel at trial—was on the trial stage. But the truth is that you need to have counsel at every stage of the proceedings. Here in Maryland, for example, there is a struggle to establish the right to counsel at the time of the question of bail. That is a vital right, because if an accused person does not have that right he may languish in jail for weeks and months and his case may be severely prejudiced as a result of the denial of counsel at the bail stage. By denying counsel at the bail stage you are effectively denying due process of law. You are effectively denying, in my judgement, the right to counsel that is guaranteed by the Sixth Amendment.

The problem of providing lawyers for indigent defendants has been exacerbated by a number of things which occurred subsequent to the *Gideon* decision in 1963. First of all, there has been the tremendous flood of narcotics prosecutions, which was not true in 1963, but which has greatly increased the volume of cases. In the second place, there has been this drive for indeterminate sentences, which makes the need for a lawyer that much more intense. A third thing has been that there has been since 1963 the movement to transfer juvenile defendants out of the juvenile courts into the adult courts. Fortas him-
self was later to write an opinion in a case called *Gault*\(^29\) that there should be a lawyer for accused persons in juvenile cases. But moving juveniles into adult courts just underscores the need for the right to counsel.

Thus, a number of things have happened to make the need for counsel greater than it was in 1963. I think it is true, and I think it must be said with some sadness, that the high hopes that we had for *Gideon* in 1963 have not been fulfilled. Nevertheless, having said that, I think one must recognize the fact that there have been very significant steps, and that progress has been made.

I find it significant that the *Gideon* decision has been immune from attack. It is immune from attack—it is not criticized—even by those persons who are most critical of a number of decisions by the Court led by Chief Justice Warren. For example, the view of the Court under Warren with respect to the right of habeas corpus has been considerably narrowed since 1963. The exclusionary rule with respect to illegal searches and seizures has been under attack. Recently, the Court of Appeals for the Fourth Circuit raised questions which I think go to the validity or vitality of the *Miranda* test, that is, the right to be informed that you have a right to a lawyer.\(^30\)

So a number of the decisions by the Warren court that were decided in the 1960s, which many of us thought were steps forward and which we welcomed, have been attacked and criticized since those years. But the *Gideon* decision is not criticized or attacked. I do not know of any responsible voice—Tony Lewis perhaps could attest to this—which has been raised anywhere against the *Gideon* case. I know of no one who stands up and who says, "We should in this country try people without their having a defense lawyer at their side." No one argues that. No responsible voice would be heard saying that. Everyone accepts the right. The sad thing is that we have accepted the right, given lip service to it, but we have not made it truly meaningful. That is the challenge which confronts us in the future.

So the *Gideon* decision, as we observe here the thirty-sixth anniversary of this great case, is indeed a milestone in American Constitutional Law, and is indeed a great decision, because it affirms a

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29. *In re* Gault, 387 U.S. 1, 41 (1966) (holding that indigent juveniles have a right to appointed counsel in delinquency hearings that could result in commitment to an institution).

30. See *United States v. Dickerson*, 166 F.3d 667, 671 (4th Cir.) (holding that 18 U.S.C. § 3501, which overruled *Miranda* and has not been enforced by the Department of Justice, governs the admissibility of confessions in federal courts), *cert. granted*, 120 S. Ct. 578 (1999).
principle that is, in my view, essential to a just and free society: the right to a lawyer in order to have a fair trial. Thank you very much.

**Afternoon Session**

**Professor Doug Colbert**

On the program we had invited the Chief Judge of the Maryland Court of Appeals, Robert Bell, to appear and unfortunately Judge Bell notified us this week that he could not attend because of a scheduling conflict; he is chairing a Bar Association committee in New Orleans. But we do have a wonderful colleague of Judge Bell who is here to speak to us today. I am speaking of Judge Arrie Davis, who is currently a judge on Maryland’s intermediate appellate court, the Court of Special Appeals.

Judge Davis graduated from University of Baltimore Law School and also received his Master’s Degrees in English and taught English in the public school system before he launched his legal career. Prior to being a judge, he worked for ten years as an Assistant Attorney General, mostly in the criminal appeals bureau, but also representing the Department of Public Safety. So let us all welcome Judge Arrie Davis.

**Judge Arrie W. Davis**

I need to start off by saying who I am not. You have already been told that I am not Chief Judge Bell. I also am not Judge Andre Davis. Judge Andre Davis and I were colleagues for approximately two months just before I went on the Court of Special Appeals in 1990, and I got everything, including his bills. The only thing that I did not get delivered to me was his paycheck. In fact, I once got this phone call, where someone said, “They are down there picketing you; they want to throw you off the bench.” I looked out the window and there were approximately eighteen to twenty people with signs saying, “Kick Judge Arrie Davis off the bench, he is not fair.” So I made a phone call and asked the person, “What is this all about?” They told me, “Apparently, you tried some domestic case and the wife is not happy with how you tried the case, and those people want your hide, so when the election comes up they want you thrown off the bench.” I said, “Wait a minute, I have not tried a domestic case for six years; I don’t know what this is all about.” Finally, it turns out that it was Andre Davis they were after. I called him up and said, “Look Andre, these

people are down here picketing me and it is really you they want, and you go down there right this minute and straighten this out.” He said, “Ah, you have got to be kidding.”

Let me say, first of all say, with respect to Judge Bell, I was in Annapolis both on Monday and Tuesday, and I got a phone call late Monday night. Judge Bell called and said, “Hey, look, I have a conflict and I really would appreciate it if you would show.” I asked him what it was all about, and he told me that it had to do with the Gideon Symposium. I initially thought that Professor Colbert was looking for somebody to speak about Gideon and its progeny and so forth. So, since I was not going to be in my office on Tuesday—I was due to sit in Annapolis—I called my law clerk, who put something together so that I could have a presentation for today. He began putting together the handout that you have. I am not going to get into that handout, with the exception of making one or two references to it. I simply want to explain to you that I came not being exactly sure what it was I am supposed to be addressing, but I am told that you have been so inundated with Gideon and all of the cases that have followed Gideon that I need to deal with some things that are more from a personal vantage point or, so as to speak, the view from the bench.

I am going to try to wrap all of this up in ten to twelve minutes and allow at least three to four minutes for questions, if you so choose. Let me outline briefly what I want to do before I begin. I am not getting into the right to counsel per se at all. What I really want to talk about has to do with the effective assistance of counsel, and I am going to focus on contrasting the Public Defender with private counsel, and my own experience with respect to that.

I was admitted to the Bar in November of 1969. Judge Bell and I were admitted at the same time. I bring that up because in 1969, which is only five years after Gideon, there was no Public Defender Office in Maryland. I am told that there are still some states that have not adopted the Public Defender System. That meant that indigent defendants had to rely on a system that was not quite as structured as the Public Defender system is. One thing that Chief Judge Bell could do here this afternoon that I probably cannot is to crunch the numbers and give you some idea about the case-load and the fact that it is overloaded. You ask: Why is that important for the right to counsel?

The issue of time is important because, when you are talking about the Public Defender System the key point is that, even if you have someone who is competent, who wants to do a good job, the absolutely essential factor in representing someone effectively is the time that it takes to do it. If you have a case-load which makes you cut
That time short, then there is no possible way that you can do the kind of job you need to do.

To make sure we are all on the same page, when I speak about "time," I mean that when you first bring on board a client, it is absolutely critical to take whatever time is needed. It may not be but ten to fifteen minutes if it is a petty case that does not involve jail time. But especially if the case is more complicated, the initial interview is crucial. You have to know what issues you are dealing with, insofar as you can get it out of your client, because if you don't take that time initially then, like building a faulty foundation, what you do from that point on may get thrown off. You may allow somebody who should not be convicted to be convicted because that amount of time was not spent. So let me try to make clear exactly what I am saying. We are not dealing with an incompetent lawyer. We are talking about a competent lawyer here, but a competent lawyer who has to restrict his or her time so much that he or she simply cannot make the diagnosis. I guess a doctor is a good example. If a doctor does not spend the time to figure out what your illness is, and he tries to operate, he may take out your appendix when really you may have a heart condition—I think you get the point that I am trying to make.

Let me talk very briefly about what I do right now. When I first came on the Court of Special Appeals, we had a system where we distributed all of the collateral proceedings among all thirteen judges. That system went by the boards, in 1991 or so, when Judge Wilner, became the new Chief Judge, after Chief Judge Gilbert died. (I am Judge Gilbert's replacement.) At that time Judge Wilner put together a panel, consisting of Judge Wilner, Judge Garrity, and Judge Bloom, because Judge Garrity and Judge Bloom were both located in the Annapolis courthouse. Now, since Judge Wilner is on the Court of Appeals, Chief Judge Murphy, Judge Harrell, and I handle all collateral proceedings. The largest bulk of those collateral proceedings are post-convictions.

We usually receive forty to fifty applications for leave to appeal per month. We meet, after the staff attorney has read the transcripts of the post-conviction proceedings and reviewed the applications, and then we review them. The bulk of the post-conviction proceedings that we decide are on the basis of ineffective assistance of counsel. Now, I am not prepared to say, based on what we decide on those

32. The Honorable Alan M. Wilner presently sits on the Court of Appeals of Maryland.
33. Since this Symposium, Judge Glenn T. Harrell has been appointed to the Court of Appeals of Maryland.
applications for leave to appeal to our court, whether there is merit to any particular percentage of those applications because all we can do is to look at what has transpired at the proceeding. I guess the best example that I can give you is that if an attorney testifies that a decision was a trial tactic, then we usually have to accept that on face value.

In any event, we very rarely grant the petition on the basis of ineffective assistance of counsel. That does not mean that there has not been an ineffective assistance of counsel. But I do get to see those petitions as they come through.

Let me move along quickly to some other things I want to cover. When I first went into the State’s Attorney’s Office in 1969, right after I passed the Bar, my first case—I sat second chair with Howard Cardin, who is Delegate Cardin’s brother—involved the murder case of a thirteen-year-old girl in a tropical fish store. There, Doug Sharett was the assigned, or appointed, Public Defender.

Let me explain. In 1970 there was an Arraignment Court and a lot of lawyers would just hang around the Arraignment Court like dogs waiting for a bone. Ultimately, the judge would look at a given case on arraignment and say, “Mr. Morris Kaplan, take this gentleman outside in the hallway, talk to the client, and see whether you can represent him.” Mr. Kaplan might talk to the client for ten to fifteen minutes, and return and say, “Yes, Judge, I can represent him.” That is the way indigent defendants got lawyers back in those days. It is hard for us even now to conceive that you would get a lawyer that way. Now, in the Public Defender’s Office you have to fill out forms, you have to attest to indigency, and, I believe, the forms include a provision where you have to indicate that you will reimburse them under certain conditions.

All of that formality was not present at that time. You simply were told by a judge, “Hey, you have a case here.” You would take the client and try to talk to him. Again, I am getting back to the theme I started out with. There might have been some competent lawyers (I think about Doug Sharett, who was an absolutely excellent trial lawyer), but under that system the problem you had was this, no matter how bright the lawyer was: (1) Did that lawyer have the time to do the proper interview and diagnosis of what his client’s case was about? (2) Did the lawyer do all the other things to prepare a good case?
I prosecuted two death penalty cases when I was in the State’s Attorney’s office, and death was imposed. But Furman v. Georgia\(^{34}\) came along, and both sentences were commuted. Now, of course, a prosecutor must serve notice of intent to seek the death penalty. But at that time—and I thought it was shocking—the prosecutor did not have to do anything. All one had to do was put on one’s case. If the judge thought that this was the sort of case where the defendant needed to be put to death, then the judge simply would listen to the arguments of both sides, and the judge would indicate beforehand that he was going to impose death. But there was no pre-notification that your client (if you were a defense attorney) potentially was going to be subjected to the death penalty. When I think about how cavalier things were back in those days, I shutter because at every juncture you need to put yourself in the position of that defendant and say, “That could be me.” Believe it or not, innocent men do get convicted. Believe it or not, innocent men do go to jail.

Let me continue and very briefly touch upon a key point that I want to make. I was a trial judge for ten years, and during that period of time, I tried Nathaniel Applebee, which was a death penalty case.\(^{35}\) Kurt Schmoke, who is now Mayor,\(^{36}\) was the prosecutor, and Anton Keeting was the defense attorney. Applebee was charged with killing Herman Tolson, who was a prison guard, and he stabbed and injured Willie Newkirk. Anton Keeting was appointed as a panel attorney from the Public Defender’s Office. That is a case where I do not think that any more could have been done for Nathaniel Applebee. I think Mr. Keeting did as magnificent a job as one could do, simply because the circumstances were such that he was not going to have the defendant found not guilty. This murder took place in a prison setting with a million witnesses, so the defendant was going to be found guilty. But what Mr. Keeting did prove was that, normally, when there is going to be a fight in prison, people put newspapers and towels inside their clothing so that if someone stabs them with a shank it would blunt the blow and keep them from being injured. Mr. Keeting proved that Nathaniel Applebee was stripped down to his waist. The jury then decided—the logic may be flawed, but at least they were thinking—that the fact that he was stripped to his waist meant that there was no

34. 408 U.S. 238, 239 (1972) (per curiam) (holding that, in light of the statutory sentencing schemes used in the capital cases before the Court, the imposition of the death penalty in those cases violated the Eighth Amendment’s prohibition against cruel and unusual punishment).

35. This case appears to be unreported.

36. Since this Symposium, Martin O’Malley has been elected Mayor of Baltimore.
premeditation. In effect, Mr. Keeting saved Applebee from getting the death sentence.

The point I want to make has to do more with effective assistance of counsel from the perspective of a judge. There is no worse nightmare for any judge than to have a prosecutor who is doing an absolutely extraordinary job, and then to have John Doe, the defense attorney, looking around like he is trying to figure out where he is. The judge has to try that case. The judge almost is forced into the position of being an advocate, in order to keep the defendant from being steam-rolled, because you know that if he does not get a fair trial, or if the case truly involves ineffective assistance of counsel, then the case is going to come back on post-conviction anyway.

That takes me back to the Schmoke, Keeting, and Nathaniel Applebee case. The two lawyers were absolutely superb. The number of objections that were raised were very few because Mr. Keeting knew the right questions to ask, so that there was no reason to object. It is an absolute pleasure for a judge to try a case with two equal counsels, two combatants on a level playing field. The idea in the adversary system is that if both counsels are very strong, and both are pulling in opposite directions, then what comes out in the middle is the truth. That, theoretically, is what is supposed to happen. But, if you have one strong adversary and one weak adversary, you will never get to the truth because the weak adversary has never shown those facts that would raise reasonable doubt, or do whatever it takes to protect the interest of his client.

Going back to my own experience again—it has been almost nine years since I have been a trial judge—I do not know how many of you know who Jerome Deise is. Jerome became in charge of the Death Penalty Unit. I can tell you without any question, he was a consummate professional. I do not think that there are many private lawyers who could have done a better job, in my experience, in the cases before me. The other people who appeared before me most often are in management now, like Elizabeth Julian, Michael Gambrill, Bridgett Shepherd. These were the people who were in the Felony Trial Unit. All of these people, I believe, were very competent. If they ever had a problem, the problem was simply the one that I alluded to before—that of time. If you have to allocate your time based on your case load, then you are going to cheat your client if you do not give every bit of time that is necessary to do an effective job, whatever that particular case involves. Some cases involve fifty hours for preparation, some cases involve eighty hours, some involve more than that, but it is crucial that you do what it takes to prepare. Preparation is everything.
While I am talking about the Public Defender's office, I just want to mention one thing in the handout I have given you. I have here one page of the annual report of the Public Defender for fiscal year of 1998. I am going to read just one sentence to you. A letter was sent by Mike Gambrel, who was the District Director, to a committee for the Circuit Court, making recommendations as to what can be done with the heavy case load that he had. He says in the letter, "We tried three person teams in felony drug courts in 1997. The result was attorneys with case loads of 80 to 110 felony cases. With that number of open files, the attorneys' ability to provide adequate representation is seriously challenged." That is about as close as you can get to saying that we are providing ineffective assistance of counsel. He is almost coming out and saying it. This is a public document that has been distributed where there is almost an admission that the Public Defender is not doing all that needs to be done because of the case load.

I am not saying in any way that any of those Public Defenders are incompetent, or that they are not skilled attorneys. In fact, it has been my experience that in many cases the Public Defenders do a better job than some of the civil lawyers who do not practice criminal law who, suddenly, because somebody is a friend of their mother, or father, or relative, they take on that criminal case without having the foggiest notion of criminal procedure. Still, they attempt to try a criminal case even though they are civil lawyers. I guess Mr. Ginsberg is a good example of what happens when a civil lawyer tries to become a criminal lawyer.

I am going to wind this up, but let me make one or two points with respect to what I have said. The Arraignment Court, when I first began practicing, was a court where there was not a lot of activity. In order to understand the Arraignment Court, one has to understand the context. When I began practicing, cocaine—and I will be very blunt about this—powder cocaine was a drug that rich white people used, and heroin and sometimes marijuana is what you were dealing with here in Baltimore City. The drug trade was nowhere near what we are talking about right now. I make that point because what is driving so many things now, including the voluntary relinquishment of a lot of constitutional rights and other protections, is this hysteria in society that we have to do whatever it takes to deal with this drug problem. If it means we let the police come in, like the Gestapo, and go through our houses without warrants, or stop our cars with no articulable suspicion, then we are doing whatever it takes to stop drugs.

37. Judge Davis presumably is referring to Monica Lewinsky's initial attorney.
In order to do this, there are those of us who are willing to give up those protections because the drug scourge is so bad.

It was not like this when I first began practicing. Now, over this past year, I had occasion to sit in three or four arraignment courts, when I was waiting to speak to judges who were presiding over those arraignment courts. They have forty or fifty defendants shackled together across the front of the courtroom. The Public Defender comes in with a little note pad and there are perhaps two or three prosecutors scurrying around. It is almost like an auction. The Public Defender is moving from one client to the next to the next. The only three things you deal with at arraignment are: (1) what the plea is going to be; (2) whether a defendant wants to waive the jury trial and to accept a court trial; and (3) whether the defendant has counsel. What happens in these arraignment courts is that the Public Defenders are going from person to person to figure out who wants to plead guilty. A lot of these defendants simply want to get back out on the street. Some of them may have very valid defenses, some of them may be able to suppress the evidence because it was an illegal search, but none of that matters in this circumstance, because all these shackled people want to get out of there. So, out of those forty or fifty defendant, perhaps ten or fifteen might make the decision to plead guilty. Whether they have any merit to their case is beside the point. It is all about administratively trying to move these cases along.

Another thing happens when you have this kind of climate. As I said before, the situation is exactly analogous to that of a doctor. When a doctor initially talks to that patient, the doctor must take the time to find out what that patient's condition is. If the lawyer does not find out, and take the time to find out, exactly what the lawyer is confronted with, then everything from that point on may very well be thrown off track, and may never get put back on track because time is of the essence. Evidence gets destroyed, people change their stories, people are intimidated—all kinds of things happen in criminal cases. So it is important from the beginning that the lawyer do whatever is needed to secure the defendant's rights.

The bottom line is that effective legal representation requires the investment of time for consultation, investigation, interviewing of lay and expert witnesses, review of reports, documentary and other evidence, evaluation of the case, negotiation (possibly) with the prosecutor, and preparation of trial strategy. All of these things are part of representation. The resources that are available to the Public Defender budget or even to pay for private counsel dictate the amount of time you can buy. It may sound very crude and crass to put it that way,
but a defendant is buying time and buying services, whether they be those of DNA expert Dr. Lee in the O.J. Simpson case, or hiring an investigator to go out and find certain evidence. The issues are time, services, and resources.

The Public Defender has to allocate its resources. The death penalty cases that the Public Defender has are so important that the Public Defender must allocate a large portion of its budget for those cases. The question then becomes, with the huge mass of drug cases and defendants—many of whom are just drug users who are trying to sell to support their habits—how to allocate time and resources. Under this circumstance, the allocation necessarily becomes skewed to some extent. The allocation is less than what it needs to be for many of the defendants because there simply is not enough time and there are not enough resources for all of them. There are enough judges, and there are enough prosecutors. Now, I was talking with Professor Colbert, who thought that certain people with credibility could successfully advocate for more money for the Public Defender before the legislature. I do not quite agree with that. I think the legislature is biased against the Criminal Defense Bar, no matter who goes down there. While judges may get some money, and while prosecutors may be able to get some money, I think the Public Defender’s Office is the step-child who is going to be looking at the doughnuts in the bakery through the window.

I hope that I have added some practical considerations to all of the legal considerations that you have been discussing. It is clearly a new day now. I will leave you with just this one thought, which goes back to the issue of drugs: I am a little troubled by the fact that you have a new, more sophisticated defendant who does have a lot of money from the drug trade, and white collar crimes are becoming targeted in a much more high profile way by prosecutors now. What happens—please try to follow me, because I do not want you to misunderstand what I am trying to say—is that the uglier the enemy gets, the uglier you find yourself having to become. You find yourself determined to get the enemy no matter what. I hope that all of us do not lose our civil liberties because these powerful criminal defendants make prosecutors feels that they must, at all costs, put these defendants away.

**Professor Doug Colbert**

It has been a wonderful day thus far. I know that all of you who are here are going to tell everyone who couldn’t make it just what they missed, and you are going to tell all of them, of course, to come to-
morning morning for the second half of this Symposium. This is really a historic event. I could not think of anyone who would be a better person to close the first day’s event than Stephen Bright. In the words of my dear friend Dan Givelber, “Steve represents everything that is good about being a criminal defense lawyer.” He truly is a remarkable person. He is the head of the Southern Center for Human Rights. He is a scholar, a teacher who has taught at Harvard Law School, Yale Law School, Emory Law School, and Georgetown Law School. He is someone who teaches all of us, every day that we hear him or watch him, about what we need to do to be the strong and zealous advocates for poor people and working poor people in this country.

It really is a great pleasure for me to introduce him. He has had a brilliant record in capital cases; he is a consummate attorney. I can only tell you, without in any way putting any pressure on Steve at all, that you should hold on to your hats because you are in for a real treat. Thank you.

**Professor Stephen Bright**

I am honored to be here. It is a very important subject that obviously has been near and dear to my heart for a long time, ever since I read a book by Anthony Lewis called *Gideon’s Trumpet.* Here, Mr. Lewis has talked about the challenge of bringing to life the dream of *Gideon.* One thing always has disappointed me so often when I have gone to meetings like this—I remember going to one at the American Bar Association a few year ago in Atlanta. I saw all these people crowding out of a room. I thought, “That must be the meeting.“ It was a meeting about *Gideon,* and Tony Lewis and Abe Krash, and a number of other people were on the panel. But it turned out that that was not the room. When I got to the actual *Gideon* panel, there were as few people in the audience as there were on the stage. The room where all the people were crowding out into the hall was titled, “How to Collect Your Fee In A Case.” That says a lot about our profession.

One of the things that Tony Lewis said in *Gideon’s Trumpet* is that it will be an enormous challenge to bring to life the promise of *Gideon v. Wainwright*—the promise of a vast and diverse country where every poor person would be capably defended by a zealous lawyer without resentment and an unfair burden. In order to wrap up our day here, I would like to talk a moment about why we have fallen so short of meeting that challenge. It says a lot about our commitment to equal

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38. Lewis, supra note 2.
justice under law. I think that we would all agree that we never have had equal justice under law. But, it has always been an aspiration of our legal system. That is why we have this motto on the front of the Supreme Court building.

The place where our commitment to equal justice is probably most tested is in the criminal justice system. It is there where we confront the emotions that come out of horrible crimes that have been committed, and terrible inhumanities—things that often raise such passions and such anger and that it is hard to look dispassionately at whatever facts are present. The criminal justice system also is the place where so often the Mack truck of poverty and the Allied Van of race come into intersection, often with results that are not very good for our justice system. And it is in the criminal justice system that we have our commitment to equal justice, to enforcement of the Bill of Rights, and to the right to counsel tested the most.

Now we are engaged, we are told by our political leaders, in a war on crime, a war in which, we are told, that anything goes, as was said this morning by Judge Arrie Davis. The notion is that we can do anything because we are fighting a war against drugs or a war against crime. Our politicians campaign on who can be most in favor of the death penalty, who can be most for locking up more people for longer periods of time—even in a country that locks up the largest percentage of its population of any country in the world. How can we charge more children as adults—when we have children as young as thirteen serving life in prison without any possibility of parole? I have come to the conclusion that fairness has become a casualty of this war on crime, as has our commitment to equal justice.

During one of the previous panels, someone mentioned that the Center for State Courts has done a study about whether a defendant is better off with a Public Defender or better off with private lawyers. I did my own little study; admittedly it is anecdotal. I looked at a wealthy habitual offender, the Royal Caribbean Cruise Line. As you may or may not know, the Royal Caribbean Cruise Line was found guilty last June for discharging oily waste in the Atlantic Ocean near Puerto Rico. They paid a fine because you cannot put a cruise line in jail, and they promised never to do it again. They were caught the very next month doing exactly the same thing. They were represented by two former Attorneys Generals of the United States, Elliot Richardson and Benjamin Civiletti, from here in Baltimore. They were also represented by two former heads of the Environmental Protection Section of the United States Department of Justice. Since I heard that, I have not lost a lot of sleep worrying about the quality of
legal assistance that Royal Caribbean Cruise Line receives. Now, those people down at the Center for State Courts may say that this defendant would be better off with a Public Defender. But that is the sort of conclusion one draws when one stays in the ivory tower, writes reports, and does not go into the field and see what is happening.

Let me tell you something that we should be concerned about, a much more important case, although I do not deny that discharging waste into our oceans is extremely important. But even in today's world life is surely more precious than any other thing. I want to tell you about a death penalty case in Houston, Texas. If you want to understand the right to counsel, particularly in the context of capital cases, then you have to understand Houston, because Harris County (which includes Houston) is responsible for more executions than any other state in the union except Texas itself. That is, if Harris County were a state, it would have the second largest number of executions. It is undeniably the capital of capital punishment.

In the *Houston Chronicle* ran the following account of George McFarland's trial. I am quoting:

Seated beside his client . . . defense attorney John Benn spent much of Thursday afternoon's [capital] trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulder, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again. Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of [the case against his client] George McFarland[, accused of] the robbery-killing of grocer Kenneth Kwan. When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial. "It's boring," the 72-year-old longtime Houston lawyer 9 explained.

Now, you would think that that would offend the Sixth Amendment right to counsel, wouldn't you? In fact, that fairly feisty reporter with the *Houston Chronicle* went up to the judge and confronted the judge about it. He asked the judge, "How can you preside over a case where the lawyer is sleeping during the trial." Judge Doug Shaver was once described to me by a Texas lawyer as a judge who would not read a case even if you made him a photocopy and highlighted the holding in it—I do not know if that is true, but that is what I was told. Now, Judge Shaver said to the reporter, "Well, the Constitution guarantees

you the right to a lawyer, but it does not guarantee that the lawyer has to be awake." I guess that is what we call a strict construction.

It would be funny except for the fact that George McFarland's case was upheld on direct appeal by the Texas Court of Criminal Appeals in *McFarland v. State,* 40 in which the majority of the Texas Court of Criminal Appeals said that it is not a denial of the Six Amendment right to counsel to have your lawyer sleep during the trial. 41 The court even suggested in its opinion—although there was not a shred of evidence to support this—that perhaps the lawyer was sleeping as a tactical decision to win sympathy. 42 Of the two lawyers who represented George McFarland at his trial, one lawyer said that he spent three hours preparing for that death-penalty trial, and the other lawyer spent seven. Together, Mr. Benn, and the young lawyer appointed to assist him, spent a grand total of ten hours preparing for a capital trial. 43 Rather than winning sympathy for their client by sleeping during the trial, they might have tried something else, such as impeaching the lead witness against George McFarland with the fact that the witness who identified McFarland had described a completely different person to the police after the crime. 44 And it would be funny, expect for the fact that George McFarland is not the only person sentenced to death in Houston, the capital of capital punishment, where his defense lawyer slept during trial. It happens with some frequency in Houston, apparently.

Both Calvin Burdine and Carl Johnson, like many other people in Texas, had the misfortune to be assigned Joe Frank Cannon. They did not hire Mr. Cannon. They got assigned Mr. Cannon, the lawyer who has a well-deserved reputation for trying cases like greased lightning, who does not file motions or make objections. When asked why he did not have but three pages of notes on Calvin Burdine’s trial,

41. *Id.* at 505-06 (holding that the defendant could not demonstrate that his counsel’s sleeping caused prejudice because the defendant “had two attorneys” and “was never without counsel”).
42. See *id.* at 505 n.5 (“We might also view [co-counsel] Melamed’s decision to allow [lead counsel] Benn to sleep as a strategic move on his part. At the new trial hearing, Melamed stated that he believed that the jury might have sympathy for [McFarland] because of Benn’s ‘naps.’”).
43. The source of this statement is unclear. For a description of each counsel’s preparation for McFarland’s trial, see *id.* at 500-03.
44. See *id.* at 506 (noting McFarland’s contention that the identifying witness’s in court testimony varied from the description that she gave to the police, but replying that McFarland “misinterprets the testimony” because “the subject matter of the State’s questioning was different in the instances cited us by [McFarland],” so that “[n]o discrepancy occurred in the testimony with which Benn could impeach [the witness].”)
he said, “Well, I don’t take a lot of notes.” Although there was undis-
puted testimony that he slept during both of those trials, that fact does
not violate the Sixth Amendment right to counsel. You can read Ex
parte Burdine,45 but you will not be able to read Carl Johnson’s case
because neither the Texas Court of Criminal Appeals nor the Fifth
Circuit published its opinion. I don’t blame them. I would be
ashamed to publish such an opinion. I am amazed, really, that the
Texas Court of Criminal Appeals had the courage to publish the Mc-
Farland and the Burdine cases, and the dissents that Judge Baird and
Judge Overstreet wrote, describing the quality of legal representation
in those cases.46 But Carl Johnson’s case was too far beyond the pale,
and neither court published its opinion before Carl Johnson was put
to death by the state of Texas.

There is no public defender in Houston. The lawyers are as-
signed by the judges there. In so many of the states, and in all kinds
of cases, not just death penalty cases, and not just in Georgia, Ala-
abama, Texas, Mississippi, Arkansas—the death-belt of our country—
there is no Public Defender System. Just recently both Arkansas and
Mississippi decided to set up such a system, but so far they have not
funded it. In many counties throughout the country today the indi-
gent defense work is assigned on the basis of the lowest bid. We re-
cently did a study of the low bidder in one county in Georgia and
found that, during the four years that he had had the contract and
processed literally hundreds of cases, he tried only one case to a jury;
that in four years he filed only three motions; and (after we went to
court to see how this happened) that most of the time he met his
clients in open court and after a few whispered conversations entered
a plea of guilty.

There are other examples: Wallace Fugate47 was represented by a
lawyer who never had heard of Gregg v. Georgia,48 or Furman v. Geo-

45. 901 S.W.2d 456 (Tex. Crim. App.) (en banc) (Maloney, J., dissenting from unpub-
lished denial of application for writ of habeas corpus, on the ground that the court had a
duty to consider the issue whether counsel’s sleeping during the trial violated the Sixth
Amendment right to counsel) (Baird, Overstreet, J.J., joining).

46. See id. Mr. Bright appears to be referring to Judge Maloney’s dissent, joined by
Judges Baird and Overstreet, from the decision not to grant a writ of habeas corpus in Ex
parte Burdine, because there is a concurring, but no dissenting opinion, in McFarland. It
appears, however, that the en banc majority decision in Burdine is unpublished.

47. As he explains infra, Mr. Bright is referring to one of his clients. All references to
the facts of cases in which Mr. Bright acted as an attorney rest on his authority.

48. 428 U.S. 153, 169 (1976) (plurality opinion) (stating that, although the death pen-
alty can violate the Eighth Amendment as applied, “the punishment of death does not
invariably violate the constitution”).
or any other case for that matter. The last client of mine executed, Larry Heath, was represented by a lawyer whose brief to the Alabama Supreme Court was one page long, and cited only one case, which went against his position. The lawyer cared so little about his client that he did not show up for oral argument. Yet the Alabama Supreme Court—and I will always wonder how that court could decide a case based on a one page brief and a lawyer who does not even show up for oral argument—affirmed the case. You would think that the judges would have said to themselves, “To do our job as a court, we have got to have a brief here, we have to have a real lawyer on this case.” But they did not say that, and Larry was put to death.  

There are many results of this sort in all kinds of cases, in terms of who goes to jail, who doesn’t, who gets probation, and who doesn’t. We know that there are now seventy-seven people who have been released from death rows who were innocent, and we know that often those people have been released, not because of anything that the legal system or the lawyers appointed to represent these individuals has brought out. For example, in Illinois just recently we now for the second time have had the journalism class at Northwestern prove that somebody was innocent. But it is not just innocence. Obviously it is important not to put innocent people to death, not to put innocent people in prison for long periods of time. But today when we incarcerate almost two million people, our courts are making lots of important decisions besides guilt or innocence. They are making decisions about probation or jail; they are deciding about whether somebody gets weeks in jail or months in jail, whether months in jail or years, whether they get life without parole, or whether they get death.

The Atlanta paper just recently did a study that shows that if you are white in Georgia you are thirty to sixty times more likely to be put on probation, even if you have a worse record, than if you are a person of color.  

Sentencing is probably the most important decision the criminal justice system is making, because when a white judge is

49. 408 U.S. 238, 239 (1972) (per curiam) (holding that, in light of the statutory sentencing schemes used in the capital cases before the Court, the imposition of the death penalty in those cases violated the Eighth Amendment's prohibition against cruel and unusual punishment).

50. See Ex parte Heath, 455 So. 2d 905, 906 (Ala. 1984) (affirming conviction in Alabama of defendant who hired men to kill his wife there, even though defendant was also convicted of murder in Georgia, where the body was left, on the ground that the two convictions presented no double jeopardy issue); see also Heath v. State, 536 So. 2d 142, 144 (Ala. Crim. App. 1988) (affirming lower court's denial of writ of coram nobis that sought to challenge Heath's conviction).

sitting there, without any information from the lawyers who have been assigned to those cases, about to make that sentencing decision, and that unconscious racism is coming into play—they see that white kid as a troubled youth who needs help, but the black youth as a thug that ought to be put away—nobody is providing that judge with any information about a drug program, or an alcohol program, or a work program, or something that could be done to divert that person. The one who goes to jail may lose all contact with his family and his community and ruin his life, while the one on probation may go into that drug program or the alcohol program and live a useful and productive life.

What is so troubling to me is that in the part of the country that I practice in, the deep south, in most cases in which people are sentenced to death today, no competent attorney, no journalist, no journalism class, ever reviews that case before that person is put to death. As to people who are not put to death, I am often told about Walter McMillian, whom Bryan Stevenson freed after eight years on death row in Alabama. It is interesting, the irony of that case. Walter McMillian was convicted of a crime that he did not commit. He was in the next county when the crime was committed. The jury in that case, probably in part because they had a doubt about his guilt, sentenced him to life imprisonment without possibility of parole. He had what seemed like the misfortune, but in hindsight turns out to have been the good fortune, of being before Judge Robert E. Lee Key, one of the all-time great racist judges in Alabama history. Judge Key just could not resist overriding the jury's verdict of life imprisonment without parole and imposing the death penalty. It is only because Walter McMillian was under death sentence that our office, and Bryan Stevenson, got involved in this case. If the judge had just left the verdict alone, at life imprisonment without parole, then McMillian never, ever, would have had a lawyer. There are no lawyers for people sentenced to life imprisonment without parole in Alabama, Arkansas, Georgia, Mississippi, Texas, and these other states. There is no lawyer for the person convicted of burglary, or anything else, who is rotting away in a prison, and Walter McMillian would have rotted away in one of Alabama's prisons until the day he died. The only reason that he is free today is because he got sentenced to death.

52. See McMillian v. State, 616 So. 2d 933, 946-49 (Ala. Crim. App. 1993) (reversing defendant's conviction, after prosecution's leading witness recanted his testimony, on the ground that the State had failed to turn over exculpatory evidence that would have cast doubt on that witness's testimony).
Well, I was asked to talk about not how bad the situation is, but why it is that way. Why haven’t we done better?—that was the question that Doug Colbert asked me to address. The first reason that I want to suggest for you to think about—see if you can help me with this, because I give it to my class every year—is this: How do you enforce the right to counsel? We count upon a lawyer to enforce all of our rights for us. When you have a lawyer who does not know any law, however, the lawyer obviously cannot enforce your rights. If you have a lawyer who never heard of Gregg v. Georgia or Furman v. Georgia never heard of anything, like my client Wallace Fugate had, then obviously the lawyer is not going to make any objections because he does not know any law. He does not challenge the under-representation of African-Americans in the jury pool, because he does not know that they have to be represented. Of course, the lawyer also must marshal the facts and the evidence and bring all the evidence to bear, bring it into court so that the court has it. But who enforces the right to counsel?

Let me give you an actual case and let us think it through. Gregory Wilson, an African-American man facing the death penalty in Covington, Kentucky, was from Detroit. He has no family in Kentucky, he has nothing. At that time, Kentucky paid the pricey sum of $2500 to represent someone in a capital case; like many states still do today, Kentucky has a flat cap on how much a defense lawyer can receive. The judge who had that case, for some reason, could not find any member of the Bar who wanted to represent Gregory for $2500. The judge tried a somewhat creative approach. (I am not saying many judges do this; I really am asking about how you enforce the right to counsel). Judge Lape put a sign on the courthouse door that said, "Desperate, please help." Underneath these words, the sign said that he had a death penalty case, that it only pays $2500, that he needed a

53. 428 U.S. 153, 169 (1976) (plurality opinion) (stating that, although the death penalty can violate the Eighth Amendment as applied, "the punishment of death does not invariably violate the constitution").

54. 408 U.S. 238, 239 (1972) (per curiam) (holding that, in light of the statutory sentencing schemes used in the capital cases before the Court, the imposition of the death penalty in those cases violated the Eighth Amendment's prohibition against cruel and unusual punishment).


56. See Wilson v. Commonwealth, 975 S.W.2d 901, 903 (Ky. 1998) (rejecting Wilson's post-conviction claim that "he was forced either to represent himself or to be represented by unprepared and incompetent [appointed] counsel"). More facts about the counsel and their representation in this case are set forth in the direct appeal, Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992).
lawyer to come forward and represent this man. The sign asked if anybody would volunteer. Two people did: Mr. Hagedorn and Mr. Foote. Mr. Foote never tried a case before, and Mr. Hagedorn was the lawyer who should never try another case. Here is what happened with Gregory Wilson.

He got concerned with the legal representation that he had, and I think you will agree with me that his concerns were somewhat legitimate. When he first found out that Mr. Hagedorn didn’t have an office, that bothered him a little bit. Now, there might be people who practice out of their home, particularly today with computers. But the flashing Budweiser beer sign over the desk where Mr. Hagedorn worked was a worry when Gregory Wilson heard about that. When he heard also that the police had executed a warrant there not long before, and had taken up the floor boards in the living room of Mr. Hagedorn’s house, taking out bags of stolen property, is when he really began to be really concerned. I think most of us, if we were a consumer of legal services, e.g., if you were just going to a lawyer to get him to do a will for you, and you found that that person was practicing out of his house with a flashing Budweiser beer sign, with police raiding the house from time to time, you would probably say, “I think I will get this will done somewhere else. No hard feelings, but I want to go to one of those places where they have a lot of mahogany and a lot of law books and they look like they are serious about the practice of law, as opposed to this place.”

But I think what Gregory Wilson was most concerned about was when he called the telephone number that Mr. Hagedorn had given him, and received the answer, “Kelly’s Cave,” a bar in Covington. It actually worked pretty well because the bartender always would summons Mr. Hagedorn to the phone and one could talk to him. Nevertheless, when Gregory Wilson next got to court, he told the judge, “I want a lawyer. I want a real lawyer. I want a lawyer who is capable of defending me in a death penalty case.”

The judge said, “Mr. Wilson, if you come up with a lawyer, be my guest. This is your court-appointed lawyer; this is the lawyer whom I’m giving you. If you can find somebody else who will take your case, you are welcome to have him, but this is the lawyer whom the court is giving you.” Repeatedly, every time there was a motions hearing—and there were not many, because Mr. Hagedorn did not file any motions, although the court would have status hearings—Gregory Wilson

57. The quotation is Mr. Bright’s paraphrase. For the actual on-the-record colloquy between the trial judge and Wilson, see Wilson, 836 S.W.2d at 883.
would object. He would say, "I don't want this guy. I want a lawyer; I want a real lawyer to represent me." At the start of trial, even during trial, he kept saying, "Judge, I want a lawyer to represent me."

The trial was somewhat of a mockery of justice—I've read the whole transcript. It is one of the few trials I have ever seen where somebody, without having seen the direct examination, conducted a cross examination of a witness. It is always good to see the direct examination before you do the cross, just to know what the witness has said. Mr. Hagedorn was in the hall during the direct examination, but nevertheless he cross examined the witness.

The Kentucky Supreme Court upheld the conviction, both on direct appeal and post-conviction review.\(^{58}\) In fact, the court went so far as to say that Gregory Wilson was partly at fault because he did not cooperate with his lawyers.\(^{59}\) But what more could Gregory Wilson have done to enforce the most fundamental right that a poor person accused of a crime has?

Most people do not know any better. Most people do not know that they have a right to somebody better than a guy who tries cases like greased lightning. Some people do not know that "dream team" means a lawyer who is asleep beside you. Most people do not challenge their lawyer because, first of all, they do not want to alienate their lawyer, which certainly is what Gregory Wilson did. They also do not want to run the risk that they will get an even worse lawyer from the judge the next time.

"But," you say, "that is pre-trial." But the way in which one enforces the right to counsel is by bringing a claim of ineffective assistance of counsel \textit{after} the fact, after the person has been sentenced. Then, however, we return to the problem that I mentioned a moment ago. For most people there is no right to counsel in post-conviction proceedings,\(^{60}\) so that they have no way to raise a claim of ineffective assistance of counsel. It is very hard for a person with an I.Q. of eighty or eighty-five, or somebody who has only been through fifth grade, to raise a claim of ineffective assistance of counsel. Of course, if you end up with a lawyer who is even worse then the lawyer you had before, it is awfully hard to raise a claim of ineffective assistance of counsel.

\(^{58}\) See supra note 56 (citing both cases).

\(^{59}\) See Wilson, 836 S.W.2d at 879 (stating that "Wilson's own actions [including rejecting the advice of Hagedorn and Foote] severely hampered the efforts of counsel to assist him").

\(^{60}\) See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today." (citation omitted)).
Exzavious Gibson, in Georgia, filed his post-conviction pleading by using a fill in the blank form that all of the guys on the row file because the statute of limitation is running, and they do not have lawyers.61 (This is the first time in history that Congress has imposed a statute of limitations on habeas corpus and at the same time defunded the programs that were providing legal representation for people.62 Quite a one two punch.) The judge who got Exzavious Gibson’s case set it for a prompt hearing.63 When the case came up for hearing, the judge asked, “Are you ready to go, Mr. Gibson?” Mr. Gibson said, “Well, I need a lawyer.” The judge replied, “You are not entitled to a lawyer.”

Gibson is a man with an I.Q. in the 80s. He is completely disoriented and befuddled by this process; he cannot imagine what the judge is talking about. The judge said, “You can put on a case.” Gibson said, “I don’t know how to put on a case.” The judge said, “Well, you can call witnesses.” Gibson: “I don’t know who to call.” The judge: “Well sit down.”

The Warden, by contrast, was not representing himself at this hearing. He was represented by an expert, an attorney from the Attorney General’s office who specializes in nothing but capital habeas cases.

In Gibson v. Turpin, the Georgia Supreme Court upheld the conviction, and held that there is no right to counsel, even for a defendant’s first state post-conviction hearing.64 The court said that, under Murray v. Giarratano,65 the Supreme Court decision that there is not a right to counsel in habeas corpus, Exzavious Gibson could not successfully raise the issue that he had been denied his right to counsel.

As someone said during this last panel, in the case of Murray v. Giarratano, Justice Rehnquist said that Virginia can decide to concentrate its resources at the front end of the processes. Instead of providing money for lawyers to represent people in the post-conviction stages of review, Virginia can make the decision to put the money at

61. See Gibson v. Turpin, 513 S.E.2d 186, 189 (Ga. 1999) (holding that death-row inmates do not have a constitutional right to counsel in petitions for a writ of habeas corpus).
63. The reported opinion states that Gibson had an I.Q. in the 80s and an eighth grade education. See, respectively, Gibson, 513 S.E.2d at 193; id. at 195 (Fletcher, P.J., dissenting). The opinion does not, however, provide any facts relative to the post-conviction hearing. Mr. Bright’s paraphrase of the colloquy at the hearing rests on his own authority.
64. See Gibson, 513 S.E.2d at 189.
65. 492 U.S. 1, 10 (1989) (plurality opinion) (stating that there is no right to counsel in post-conviction proceedings, even in capital cases).
trial where it will make a difference.\textsuperscript{66} I do not know whether the Chief Justice did not know, but at the time that he wrote those words Virginia spent less then any other state in the country for lawyers for defendants facing the death penalty at trial, less then $1000 a case. The compensation still is near the bottom today.\textsuperscript{67} So Virginia had decided not to spend its money at \textit{either} end of the system, even in capital cases, but instead to spend its money on memorials to the Confederate War dead.

Some people in Texas would be better off probably representing themselves. I am delighted that Chief Judge McCormick of the Texas Court of Criminal Appeals has joined this Symposium, because I do not think that there is any state in the union that has failed more miserably with regard to \textit{Gideon} than the state of Texas. I do not think that there is any court in the country that has made a bigger mockery out of the right to counsel than the Texas Court of Criminal Appeals. I do not think that there is any court that has done a worse job of appointing lawyers for people than the Texas Court of Criminal Appeals. My students so often ask me, "How is it that judges do this?" I think some of you might be interested in knowing the answers.

What about Ricky Kerr.\textsuperscript{68} He was assigned a lawyer who was just four years out of school, had only been in practice three years, and had no experience in death penalty cases, even as second chair. The lawyer was too ill even to go to his office during the month before Kerr’s petition was to be filed. Believe it or not, the lawyer did not even know that in a post-conviction application for habeas corpus, one can challenge the conviction and the sentence—that is the whole purpose of a post-conviction proceeding. So he filed a nonsensical pleading that challenged the constitutionality of the Texas post-conviction statute. The court denied that petition, despite the court’s statutory responsibility to appoint competent counsel in post-conviction cases.

\textsuperscript{66} See \textit{id.} at 11 ("Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack.").

\textsuperscript{67} See \textit{VA. CODE ANN.} § 19.2-163 (Michie Supp. 1999) (compensating, after July 1, 1999, appointed counsel $845 for representing indigent defendants accused of a felony punishable by 20 years or more confinement, $318 for all other felonies, and "an amount deemed reasonable by the court" for capital cases).

\textsuperscript{68} See \textit{Ex parte Kerr}, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting) (dissenting from denial of writ of habeas corpus application because defendant’s attorney, having failed to challenge the trial and sentence on original application, was constitutionally ineffective).
Judge Overstreet dissented, saying that the court “would have blood on its hands” if this person is put to death. 69

The second reason, in addition to the difficulty of enforcing the right to counsel, that the situation is so bad is, obviously, money. In so many states the amount of money that a lawyer makes for representing someone in any kind of criminal case, if that lawyer really spends the time that is required to do the job, will be less than the minimum wage: Mississippi, $1000; 70 Alabama, a limit of $2000 for time spent out of court 71 —so that if you spend $500 getting ready for a capital trial, you will get paid four dollars per hour. And the old adage is true that you get what you pay for, as the Fifth Circuit said in one case that it reversed in Texas. 72 Fred Macias was freed, because he did not happen to get a lawyer like Ricky Lee Kerr or some of the other defendants whom I have described got. He was really fortunate that a lawyer from Skadden Arps volunteered to represent him and proved that he was innocent. When the Fifth Circuit reversed that case, it noted that the State of Texas paid $11.84 per hour, and that “the justice system got only what it paid for.” 73 But it is a rare case where we actually recognize that the limited amount of money that we pay has that direct influence on the quality of representation that people receive.

The third reason that the current situation is so bad is that the lawyers appointed to cases so often are not independent of the judges. For example, the United States District Court for the Southern District of Georgia did away with the whole Public Defenders Office because they did not like what was going on there. 74 As I said a moment earlier, my students always ask me when we study these cases, when we

69. Id.
70. See Miss. Code Ann. § 99-15-17 (1972) (limiting compensation for appointed counsel to $1000 per case, and, in capital cases in which two attorneys may be appointed, $2000).
71. See Ala. Code § 15-12-21(d) (1995) (limiting compensation to $1000 per case, except in capital cases, where the limit is $1000 plus payment for all in-court work at the rate of $40 per hour).
72. See Martizen-Macias v. Collins, 979 F.2d 1067, 1067-68 (5th Cir. 1992) (affirming the grant of writ of habeas corpus because defendant “was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question”).
73. Id. at 1067.
74. The editors could find no reference to such an action. The media in Atlanta, however, have reported on a case, filed in 1994 in the United States District Court for the Southern District of Georgia by former inmate and defendant Sam Stinson against the Fulton County commissioners and the Fulton County Public Defender’s Office. See Alfred Chambers, Fulton Commissioners Are Ordered into Court, ATLANTA J.-ATLANTA CONST., Apr. 30, 1999, at C4, available in 1999 WL 3766977. The lawsuit alleges that poor defendants wait in jail for months before seeing a public defender, in part because Fulton County does not adequately fund the Public Defender’s Office.
study McFarland,⁷⁵ when we study Kerr,⁷⁶ "How can a judge preside over a case where a lawyer was sleeping, or drunk—a judge who has taken an oath to uphold the Sixth Amendment as well as the rest of the Constitution?" It is very hard to explain that, not only do judges tolerate such representation, but also that the judges appointed those lawyers. Joe Frank Cannon has been appointed for the last forty-five years by judges in Houston to represent people. These judges know what kind of lawyer he is. They know that they would never ask Joe Frank Cannon to represent one of their children in a traffic matter, or anything else. But these defendants are so unworthy, are clearly so guilty, that we will just give them Joe Frank Cannon and let it go at that. It is hard to explain to law students the culture that has developed in our court system, the belief that we are doing the best we can for poor people with the money we are paying, and that these kinds of lawyers are just all the poor are going to get.

Of course, the larger problem is that judges are not independent. Judges in most of our states are elected, and elected judges cannot be soft on crime in today’s world. In fact, Judge Baird just recently lost his bid for re-election.⁷⁷

I don’t mean to pick on Texas, but it provides so many good examples. A few years ago, when the Texas Court of Criminal Appeals reversed a case, the chairman of the Republican party called upon the voters to have the Republican party take over the court. In the last six years, this has happened: The court has gone from a one hundred percent Democrat court to a one hundred percent Republican court, with Judge McCormick changing parties from Democrat to Republican during that process.⁷⁸ One of the people who led the charge was Steven Mansfield. Before the election it came out that Mansfield, to put it most charitably, is a pathological liar. He said that he was born in Texas, turned out it was Massachusetts; he said that he never had run for office before; he had run for Congress in New Hampshire. In

⁷⁸. Id. (noting that the Texas Court of Criminal Appeals was unanimously Democratic as recently as 1992); see San Attlesey, GOP Welcomes Party Switchers, DALLAS MORNING NEWS, Oct. 7, 1997, at 17A, available in 1997 WL 11526058 (reporting that the presiding judge of the Court of Criminal Appeals, Michael McCormick, announced his “conversion” to the GOP).
fact, he had even been fined for practicing law without a license in Florida.\textsuperscript{79} Even though these facts became public, he got fifty-six percent of the votes. He is now Judge Mansfield. \textit{Texas Lawyer} wrote an article after he got elected and said that he was an unqualified success—it is the truth.\textsuperscript{80} Last December he got arrested for scalping the complimentary football tickets that the judges get at the University of Texas football games. Someone wrote an interesting article advising Judge Mansfield of what kind of problems he would have, now that he was a criminal defendant, due to some of the opinions that he himself had written. But that is one of the judges on the court that reviews every capital case on direct appeal and every capital case on post-conviction, decides what \textit{Strickland vs. Washington}\textsuperscript{81} means, and decides about the appointment of counsel for people.

That brings me to another reason that we have the scandalous quality of legal representation in our courts. The \textit{Strickland} standard has made a mockery of the right to counsel. The poor person who is represented by a lawyer not only has to prove the deficient performance of that lawyer, which is impossible to prove if you do not have a lawyer, but also that the lawyer’s performance was so deficient that it affected the outcome of the trial.\textsuperscript{82} Justice O’Connor argued that the reason we are putting the burden of proof on the defendant to prove this deficiency is that the government is not responsible for the errors that the defense lawyer makes.\textsuperscript{83} But in all the cases that I have had the government is responsible. Every one of my clients got their lawyer from the government; they did not ask for these lawyers. Gregory Wilson did not ask for his lawyer. Wallace Fugate did not ask for his lawyer. Nobody, as far as I know, ever has asked for Joe Frank Cannon.


\textsuperscript{80} See, e.g., John Sirman, \textit{Texas Court of Criminal Appeals Judge Stephen Mansfield}, 62 Tex. B. J. 686 (1999) (noting the controversy surrounding Judge Mansfield and the fact that he was "arrest[ed] for hawking a complimentary pair of football tickets on the University of Texas campus").

\textsuperscript{81} 466 U.S. 668 (1984).

\textsuperscript{82} See id. at 687-96 (setting forth criteria for determining a constitutionally deficient performance by counsel).

\textsuperscript{83} See id. at 693 ("[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence.").
I think that the law schools also have to take some responsibility. We have to ask why it is that we turn out people who are more prepared to be associates at law firms than people who want to defend life and liberty. I know that there is no money out there for such defense work, and that that is a big factor. But I do think that clinics—like Doug Colbert has here, like Harvard has with the Criminal Practice Institute, like Georgetown, and like NYU with its many clinics—are essential if we ever are going to change things.

I think also that we have to realize that this "war on crime" that we are fighting is responsible for the situation. There is a notion that some people among us are so unworthy, that they are not entitled to counsel, that they are not entitled to protection of the Bill of Rights, that they are not entitled to anything. You hear the Bill of Rights routinely denigrated as nothing but a collection of technicalities. We had a judge on the Fourth Circuit talking about dotting the "I's" and crossing the "T's," as if that is all that the Bill of Rights is.\footnote{See United States v. Williamston, 14 F.3d 598 (4th Cir. 1993) (per curiam) (unpublished opinion).} You see people coming here from around the world, trying now that communism is no longer part of their country, to get a Bill of Rights, trying to get habeas corpus, while we are denigrating and eliminating these protections for our own people. Hugo Black, when he was on the Supreme Court, said that our courts should "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."\footnote{Chambers v. State, 309 U.S. 227, 241 (1940).} But today the despised are so despised that they do not even get a lawyer at all, or lawyers so bad that the latter are literally walking violations of the Sixth Amendment. If things continue, we will have to acknowledge that our courts are not havens of refuge, but are more like the soldiers who come to the battlefield after the war and shoot the wounded. If that is our situation, then we seriously have to consider whether we should sandblast the words "Equal Justice Under Law" off the Supreme Court Building. Perhaps we simply should say that our courts are just like the country clubs and the sky boxes at the stadium which the government paid for—they are just for the wealthy. If you are Charles Keating, then no problem: You can bring your lawyer into court, you can get habeas relief, and Charles Keating did.\footnote{See Keating v. Hood, 191 F.3d 1053, 1061 (9th Cir. 1999) (affirming district court's grant of habeas relief).} If you are Royal Caribbean Cruise Line, then you can have the former Attorney
General of the United States represent you. But if you are George McFarland, if you are Calvin Burdine, if you are Exzavious Gibson, then you stand virtually alone at the bar of justice.

Some of my colleagues at Yale are a lot smarter than I am, and they talk about whether we should have an adversary system, an inquisitional system—it's way over my head. But I do know this: The worst system we can possibly have is to pretend to have an adversary system when we do not have one at all. That is what we are doing now in so many places.

What do we do about it? I think that we have to change the discussion, to remind ourselves that we are talking about the most fundamental right of all, the most precious right of all, the right whose lack of enforcement renders other rights meaningless. Every time I go to a meeting in Georgia to talk about indigent defense, all we talk about is how we can move the cases through the system quickly. It is all about efficiency. It was a refreshing moment there when Harold Clarke was the Chief Judge, because it was the first time that I ever heard anybody in one of those meetings actually ask, "Is it fair?" Not: "Will it move the cases more quickly? Will we kill people more quickly? Will we have fewer appeals?" It is a fundamental question: Is it fair to let somebody be represented like this?

In the Gibson case, the Georgia Supreme Court, who no longer has Justice Clarke, said that, if there were a right to counsel in post-conviction proceedings, then the petitioner could claim that that counsel was ineffective. In other words, petitioners would say that they had a right to a good lawyer if we said that they had a right to a lawyer—what Justice Brennan, when he was on the Supreme Court, called the fear of too much justice.

I would like to take a moment or two to talk to the law students. All of you are going to be in some position of leadership in your state and in this country. I hope that one of the things you will do, in positions of leadership, is not make the suggestion that anyone who believes in fairness is soft on crime. I hope that anybody who graduates from the University of Maryland Law School will not go out into this world and suggest that the Bill of Rights, the most precious set of protections that we have, is nothing more than a collection of technicalities. I hope that some of you will provide the kind of leadership that was provided at the time Clarence Gideon's case was before the

87. See Gibson v. Turpin, 513 S.E.2d 186, 191 (Ga. 1999) (stating that "if there is a constitutional right to counsel upon state habeas corpus, an additional Sixth Amendment claim will exist in Georgia: ineffective assistance of habeas counsel").
Supreme Court. Florida asked Attorney Generals from all around the country to argue its side, that poor people did not have a right to a lawyer. Walter Mondale, later Vice President, then the Attorney General of Minnesota, Tom Eagleton, Attorney General McCormick in Massachusetts, and a number of others said, "Yes, we are coming into this case—but on Gideon's side." Twenty-two states filed amicus briefs in support of Clearance Earl Gideon and the right of every poor person accused of a crime to a lawyer.88 (Only two states, North Carolina and Alabama, supported Florida's position). That is leadership.

When Robert Kennedy was the Attorney General of the United States and Gideon was handed down, he went to Congress and got the Criminal Justice Act passed.89 Robert Kennedy was not soft on crime—he was a tough Attorney General—but he believed in fairness. When the Death Penalty Resource Centers were representing people and proving, for example in the case of Walter McMillian90 and others, that people sentenced to death were actually innocent of their charges, it was the National Association of Attorneys General that went to Congress and urged Congress to de-fund those programs, and thus to leave people facing the death penalty literally defenseless and without counsel. That is not leadership. That is simply taking advantage of people because of their poverty.

What do you do about it, those of you who are students, who look at these problems, and think that the truth of the matter is, as we all know, that the government is not going to fund a solution, the courts are not going to order one, and we are going to be left where we are today? My advice is that you have to do it yourself. When he won the Nobel Peace Prize in 1986, Elie Wiesel said that our lives are not our own, that they belong to those who need us desperately. I only have started to discuss some of the desperate needs that people have. They need lawyers who will represent them, not because there is money or glory in doing so, and not for any other reason except that these people desperately need legal counsel.

88. These states are listed in the opinion. See Gideon v. Wainwright, 372 U.S. 335 (1963).
90. See McMillian v. State, 616 So. 2d 933, 946-49 (Ala. Crim. App. 1993) (reversing defendant's conviction, after prosecution's leading witness recanted his testimony, on the ground that the State had failed to turn over exculpatory evidence that would have cast doubt on that witness's testimony).
Cornelius Singleton\textsuperscript{91} spent eight years on death row in Alabama without any lawyer ever coming to see him, just to explain to him where his case was in the process. Billy Moore told my class about how, when he was sentenced to death, they set a date for his execution, and when that day came every time the door opened in the cell block he thought they were coming to kill him, because his lawyer never bothered to tell him that the date was automatically stayed for the automatic appeal. So he spent a whole day just thinking he was going to be killed. What kind of legal representation is that? Just to counsel people, just to explain to people what their rights are, just to talk to people about the consequence of a guilty plea before they accept one. There is not any money in it, but I will tell you, as Oliver Wendell Holmes said, there can be great deal of exhilaration in trying your heart out in pursuit of the unattainable.

For a small number of you who graduate from law school—and this is a notion we all have to get back to—you will find that law is a calling, not just a job or even a profession. As for those in ministry, some in teaching, and a few in medicine, you will find that law is a calling to go out and help those most in need, and that it is not a burden to represent poor people; it is a privilege. You will find that there is absolutely nothing wrong with lawyers making the same kind of salaries that teachers, and farmers, and police officers, and prison guards, and other people make.

In this light, the real heroes in the legal profession, when it comes to \textit{Gideon v. Wainwright}, are the public defenders who, day in and day out, in case after case, are in the courts with staggering caseloads, inadequate resources, often no respect from the court and certainly no appreciation. And the court-appointed lawyers who take cases for small amounts of money, but who give those cases everything that they are due because that is the right thing to do, and who work hard, are also heroes. Because of them, some wrongfully accused people are not convicted. Because of them some young people are diverted into alcohol programs, and into drug programs. Because of them, some defendants understand what it is like to go through this foreign land of the criminal justice system. To the small extent that \textit{Gideon} has been realized in our country, it is these public defenders and hard-working court-appointed lawyers who have done so. They also have shown, by the work they have done every day, that providing lawyers to poor people accused of crimes is not beyond the grasp of

\textsuperscript{91} See Singleton v. Thigpen, 897 F.2d 668, 670 (rejecting Singleton’s claims that he had ineffective assistance of counsel during the penalty phase of his trial).
this very wealthy society. It is just a matter of reaching out and delivering on constitutional promises that we made a long time ago.

PROFESSOR DOUG COLBERT

It really is a pleasure for me to introduce our final keynote speaker; it is clear to me that this is one of those individuals about whom there may be a generation gap. The good news is that that generation gap is soon to be overcome because, in a very short time, Denzel Washington will be playing Rubin Hurricane Carter in a Norman Jewison film; Rod Steiger will be playing the federal judge to whom I am about to refer. I think that people of the younger generation will certainly come to know Rubin Hurricane Carter.

When I was growing up, I knew of Rubin, knew of Hurricane, because he was the number one contender for the middle weight boxing champion of the world. In those days I used to watch boxing matches, and I was incredibly impressed with his skills in the boxing ring. I remember several fights quite clearly, even today, in which Rubin knocked out the then champion Emile Griffith in sixty-nine seconds into the first round. Rubin Carter was clearly a force, a powerful force, and he remains that today, although he has taken on a different fight, a different battle. When I was a college student, in 1966, we heard about the police charging Rubin Carter and John Artis, who is also present here today, with the most serious crime of having committed murder against (I believe) three white people. I couldn’t believe it then, and I continued not to believe it as a law student at Rutgers Law School. The crime itself occurred in New Jersey, so many of us at Rutgers became involved in Rubin’s case. Unfortunately, it took nineteen years, during which time Rubin was incarcerated, before a federal judge agreed and dismissed the conviction against Rubin Hurricane Carter.92 The judge in that decision said that Hurricane’s conviction had been “predicated upon an appeal to racism rather than reason, and concealment rather than disclosure.”

Today Rubin Hurricane Carter lives with his family in Toronto, Canada. He is the Executive Director of the Association in Defense of the Wrongly Convicted, here in the United States, in Rubin’s home country of Canada, and in England. It is a great pleasure for me to introduce him. Welcome Rubin Hurricane Carter.

93. Id. at 534.
Thank you. Good afternoon everybody. Ladies and Gentlemen, Professor Doug Colbert, Stephen Bright, honored guests, and friends, it is truly, truly a great honor and privilege for me to be here at the University of Maryland today. But when you come to think about it, given my history, it’s a great pleasure for me to be anywhere today. I know that some people may be disappointed that Bryan Stevenson is not here. Bryan couldn’t make it for some reason, and so they called in the second string. I hope you won’t be disappointed.

But he who bemoans the lack of opportunity forgets that small doors often open up into large rooms. So I want to take a moment here and pause. For whom does the bell toll? It tolls for thee, my friend, my brother, my love. I bow to you and I respect and accept everything that you stand for, truth and righteousness. Ladies and Gentlemen, we have in the audience with us this afternoon the one and only person, the one and only reason why I am standing here today, alive and well—other than the Creator, of course. John Arnold Artis, for twenty years, literally, had the outcome of my life in the palm of his hand to do with whatever he chose to do with it. I had no choice in the matter whatsoever; only John and the Creator were calling the shots, and I was simply a puppet. My life was not my own; it belonged to John Artis. My innocence belonged to John Artis.

Do you know what a shitska is? “Shitska” is Russian for stool pigeon. John Artis is not a stool pigeon. If he were, I would have been dead thirty-three years ago. In every case of wrongful conviction that I have come across, a stool pigeon is always the main element of that atrocity—a jailhouse stool pigeon, a jailhouse snitch trying to buy his way out of jail or simply trying to get some money without sticking the gun to somebody’s head. Wouldn’t you agree with me, Stephen [Bright], that stool pigeons are the most central ingredient to all wrongful convictions. All John had to say was that Rubin Hurricane Carter, that bald-headed loud-mouth prize fighter who hated everybody, including himself, killed those people. And I would have been dead. And John would have been free and alive to carry out his life as he intended.

You see, I didn’t know John Artis and John Artis didn’t know me when we were convicted of this crime. I was twenty-nine-years old and John was nineteen years old. We didn’t hang out together, or anything like that. John was a church-going young boy; John had just graduated from high school and was on athletic scholarship to go to college. John was one of the best track people in the United States at
that time. John never had any problems with the police, ever, ever, before. He didn’t know anything about the police.

Me—I was that loud-mouth prize fighter on television every week getting my brains beaten out, or knocking somebody else’s brains out, and speaking about what was going on in the United States at that time where people of African decent were segregated, where people of African descent were riding in the backs of buses, where people of African descent couldn’t drink out of this water fountain, or couldn’t go to that school, or couldn’t live in this neighborhood. Yes, the government wanted me because I was saying, “Protect yourself. Do not allow anybody to hurt you; even if that person is wearing a blue uniform, he is still a criminal.”

And if John Artis had snitched, he would have had a great life ahead of him. But he didn’t do that; he didn’t snitch. Every time someone asked John to make a deal, John responded by saying, “My mother and father didn’t teach me to lie; they taught me to tell the truth.” The government itself, the government of New Jersey, went to prison, took John Artis out of prison, brought him home to Patterson, New Jersey, sat him down in front of his mother and father, and promised him (six weeks before Christmas) that, if John would give a statement that in any way inculpated me with this crime, then the Governor of New Jersey would guarantee that John Artis would be home for good before Christmas. That’s what this whole deal was all about—lying. John wouldn’t do it. That is miraculous. Sitting in jail for fifteen years where everybody all around him was giving up, giving out, and giving over, John Artis had the courage, the integrity, the tenacity, the honesty, and the fortitude, to say no: “My mother and father didn’t teach me to lie.” And you know what John told me in private while we were walking around the prison yard one day. John said, “Rubin, if I thought that you really had something to do with murdering those people, I would have told the police because I wouldn’t lie for you either.” Now that’s the truth; that’s John Artis. I am tickled pink that it was you who got busted with me, and not somebody else who would have made a deal.

John is my chosen angel, chosen by the Creator. I don’t think there is another human being on this planet who could have withstood the tremendous horrors that we faced in prison together—the degradation, the humiliation, the rampant violence—and not become a shitska, not become a stool pigeon. For that alone, John, I cherish you and will forever be in your debt, for maintaining strength enough, courage enough, fortitude enough, honesty enough, and all of those other good things to go the distance. Ladies and Gentleman
I would like to introduce to you my hero. So that you will see what a real hero looks like and never be fooled again, Ladies and Gentlemen, please recognize my hero and his lovely wife, Mr. & Mrs. John Artis. John please stand up for us; you too Dolly. Thank you.

There is another reason, beside John Artis, why I am here today. If it had not been for a quaint Latin phrase, "habeas corpus," I am afraid that I would have been a "No Show" here today due to a "prior commitment." You see, the state of New Jersey had me booked for something else.

In 1966, at the age of twenty-nine, I was at the peak of my career—a professional prize fighter, about to fight for the championship of the world. The next thing I knew we were fighting for our very lives, on trial in criminal court. We were accused of murdering three people in a New Jersey bar. The state sought the death penalty; we were facing the electric chair for a crime that we did not commit. The odds of our being alive today were not exactly in our favor. There were three murdered victims, all of them white. The jury was all white. The judge, the police, the state’s witnesses, and the prosecutor were all white. We, at that time, were “black.” But luckily—if you can call the hell of a triple life sentence “luck”—because I was a somewhat successful prize fighter and had the money to pay for first rate lawyers, we escaped execution. But it was the quality of our legal representation that made the critical difference. It allowed us to remain alive.

Now, when Professor Colbert asked me to substitute for Bryan Stevenson and to speak to you about *Gideon v. Wainwright*94 and the right to counsel, I worried because it is absolutely impossible to speak about the right to counsel without speaking first about habeas corpus, politics, popular culture, and fear. A big topic with so little time. I recently heard someone say that the law is just politics by other means. Now, that’s a rather cynical view of justice, but what is driving the current push to clamp down on habeas corpus if not politics? And what drives the politics, if not fear? We will get back to this question of fear in a moment, but first let’s deal with some myths of popular culture.

People, professionals and lay people alike, say and believe that there are certain absolutes that will keep you from being sent to prison. First of all, don’t commit a crime. Now that is absolute, and we all believe in that, right? Sure we do. Second, tell the truth. If you have done nothing wrong, you have nothing to hide. Third, if you are accused of a crime, get a good lawyer. Fourth, have a solid alibi supported by credible witness. Fifth, pass a lie detector test. Sixth, if you

don't have the motive, means, or opportunity to commit the crime in question, you are home free. Right? Wrong!

We didn't have a motive, we didn't have the means, and we didn't have the opportunity. Even though we did not remotely fit the description of the assailants; even though the two surviving victims did not and could not identify us, and even though they said that it was not us; even though we had a number of alibi witnesses placing us elsewhere at the time of the crime; even though we passed lie detector tests showing that we had no involvement; and even though we had nothing to hide and testified voluntarily before the Grand Jury—we were still convicted.

So what happened? Well, as cynical as it may sound, as cynical as it may be, politics reared its ugly head. The prosecution, the State, is out to win. Winning is how careers are advanced. Successful police officers are promoted; successful prosecuting attorneys become judges, and a successful judge is one who is seldom reversed on appeal. Discovery rules notwithstanding, the State is not going to tell you what they don't want you to know. So you are going to have to go out and find it for yourself. Let me give you an example from our case.

There was no motive offered at our first trial in 1967. No one, not a living soul, had any kind of explanation at all as to why John Artis and this Rubin Hurricane Carter would do such a thing. But after the recantation of the state's two key shitska witnesses—themselves suspects in the crime—in our second trial nine years later, in order to rehabilitate its case, the prosecution suddenly conjured up a motive: racial hatred, racial revenge. The prosecutor said that we, my co-defendant and I, committed this crime because we hated white people. We invaded a white neighborhood and picked that bar in particular because the bartender was a known racist who refused to serve black people. The bar, the prosecutor proffered, was therefore a natural target for racial revenge. That's what the prosecution proffered and that's what the jury heard.

Now, in our own investigation, we discovered witnesses known to the police, a black couple, who had been served by that same bartender that very night, and even had a running account with him. We also discovered that the bar in question was actually in a mixed neighborhood, and that the bartender was in fact friendly to black people. But still the prosecutor distorted and manipulated the facts. The prosecutor started with the fact that the victims were white and the assailants black. Then the prosecution began to concoct an elaborate
fiction that played right into the jury’s worst fears—Armageddon, race riots.

Now, in the face of all of this, what do you as lawyers do? How do you keep us alive, or out of jail? Well, you don’t do it by being a “defense” lawyer. You have to be an offensive lawyer, even if it offends the powers that be, because that is your job. If offending the powers that be in any way disturbs or distresses you, then, putting it to you very mildly, you had better find a different occupation, because lawyering is not stress-free.

I’m sure that some of you, or maybe all of you, are familiar with the late great Edward Bennett Williams. He was a giant in the legal field. He is what we called a pawn broker; every President was his client. I had the good fortune to know Mr. Williams before my incarceration in 1966. Mr. Williams had tried to recruit me to play football for the Washington Redskins, for $25,000 per year. That was good money, but I was already making over $100,000 a year by myself. So I said to Mr. Williams, “You must be crazy, you can get hurt playing football. I’ll stick to a kinder, gentler occupation. I’ll stick to boxing.” Throughout my twenty-two year legal nightmare, Mr. Williams, while not on our legal team per se, never hesitated to give us advice whenever we asked for it. He gave it pro bono. The best time to get him was always 8:30 in the morning. His secretary would promptly put my call through, and Mr. Williams would always take the time to answer any and all of my questions, which indeed were very many. But that kind of access, that kind of care, that kind of attention, means more to a prisoner than you can possibly imagine. That in spades is the whole raison d’être of a lawyer—to provide legal access, care, and attention to those whom he or she represents, especially to those who find themselves on the bottom of the empowerment pile with nowhere else to turn.

I am on the Board of Directors of the Southern Center for Human Right in Atlanta, Georgia. We deal with death penalty cases in the South on a daily basis, as Stephen Bright no doubt has told you. I am also on the Board of Directors of the Alliance For Prison Justice in Boston. We deal with medical cases and with brutality in the prison system, because I lost my eye for the lack of basic medical attention while I was in prison. John Artis contracted an incurable circulatory disease, such that John’s fingers and toes were amputated daily. Nobody ever leaves prison unscathed. I am also the Executive Director of the Association in the Defense of the Wrongly Convicted, based in Canada, Great Britain, and in the United States. I say that, not to toot
my own horn (because my horn doesn't toot), but simply to make a point.

The Director of the Southern Center for Human Rights, Stephen Bright (and there he is sitting right here) is a young, white, southern boy, and absolutely brilliant and with a beautiful heart. Stephen once told me, "Rubin, only one heart can teach another heart what the written word doesn't say." Stephen's heart has been teaching my own heart ever, ever since. I love you Stephen. Now, Stephen Bright is a great lawyer because Stephen doesn't hide his outrage; he allows himself to be outraged. He isn't complacent either. The first thing that Stephen and his colleagues at the Southern Center do when representing a black defendant in the South is to make an immediate motion to have the Confederate Flag removed from the court room—get that flag out of here, because it is a symbol defiant of Brown v. Board of Education. It is a defiant cry that we will not educate all of our citizens. Even if the motion is denied, as it so often is, Stephen and his colleagues have sent out a strong message that this is not going to be business as usual, and that anything less than equal justice will not be tolerated and will be vigorously opposed.

You don't have to look far to find plenty to be outraged about. This country, which considers itself the leader of the free world, is the only western industrialized nation that insists upon maintaining the anachronism of the death penalty. We don't even deny its racist application; we even kill children and mentally retarded adults. It's not hard to be outraged when you realize that in no other country does the legal specialty of death-penalty litigation even exist. It's not hard to be outraged when you hear that lawyers in Louisiana and Mississippi representing indigent clients receive the ridiculous sum of $1000, and that this is the maximum, no matter how intensive the investigation, the preparation, or the trial. In Georgia, the fee is even less. As I learned last night, in Virginia, for representing juvenile defendants lawyers are only given $200. It's not hard to be outraged when you look at the crazy politics of electing judges, and


96. See LA. REV. STAT. ANN. Rule 31 (1999) (requiring district indigent defender boards to remit "reasonable" compensation to appointed counsel); Miss. CODE ANN. § 99-15-17 (setting $1000 cap for noncapital cases, and allowing 2 attorneys, and a $2000 cap in capital cases).

97. See GA. CODE ANN. § 17-12-61 (1999) (limiting to $250 the compensation allowed to an attorney prosecuting a post-conviction appeal).

98. There does not seem to be a separate statute dealing with compensation for representing juvenile defendants. See VA. CODE ANN. § 19.2-163 (Michie 1999) (including juvenile defendants within the statutory scheme).
District Attorneys whose sole livelihood depends upon satisfying a vengeful, but poorly informed, electorate.

It's not hard to be outraged—so get outraged and wear your outrage proudly. Let it show to your client, to your adversary, to your students, to the judge. It will make a hell of a difference in their attitude. They will respect you for it; they may not like it, but they will respect you for it. There is nothing more self defeating and more disheartening to a client than a tired, cynical, timid lawyer just going through the motions. You need outrage. It will make you a more effective lawyer; it will catapult you up to the very same level as a Stephen Bright. It will give you the energy, the courage, and the strength that you are going to need to persevere. The right kind of attitude always produces the right kind of actions.

The first thing you have to do is to make a connection with your client. Make sure, even if only in your own mind, that you too are not dehumanizing your client, because let me tell you exactly what your client feels like while being on trial in a capital case, or in any case for that matter. Your client feels like he is contaminated, as if he has some vile disease that must be eliminated before it infects others. He feels like a non-person, like a thing. He feels like an object that everyone is staring at, talking about, and arguing over, without ever addressing him directly. Your client does not understand the process. He doesn’t understand what’s admissible and what isn’t admissible, and why it is not admissible. He doesn’t understand why this question is asked and not that one. Your client doesn’t understand the language. Everybody in the court room is speaking legalese, and he doesn’t speak it. He doesn’t understand the people, because the people come from another world. So he trusts no one, including you. The only thing your client does understand is that his life hangs in balance and that there is nothing that he can do about it. Your client feels helpless, powerless to do anything, or to say anything, all with the dread of violent death coming closer and closer as this terrifying ritual plays itself out. Because that's what going to prison means—death. Prison is the lowest level of existence that a human being can exist on without being dead. That’s how diabolical prison really is. So open up the lines of communication to your client. Don’t hold it against your client if he is defensive, skeptical, or evasive, because more often than not your client has already been abused by the system. You are going to have to prove to him or to her that you are not there simply to continue that abuse.

The next thing that you have to do—please, that you must do—is to refuse to accept the prosecution’s case at face value. Don’t be satis-
fied with merely rebutting the case, because you owe it to yourself and
to your client to conduct your own investigation, an investigation in-
dependent of the prosecution, and independent of the police. I guar-
antee you that in every case you will find something useful, whether it
goes to the charge, to guilt, or to sentencing. (Even if your investiga-
tion convinces you that there is no chance of success at trial, explain
that to your client and to his family.) This evidence must be uncov-
ered before trial, because appellate rules are being severely restricted,
and access to writ of habeas corpus is being limited, not only by the
United States Supreme Court, but also by Congress and the
President.99

The writ of habeas corpus, the federal check on abuses at state
court levels, the one life-affirming jewel in the crown of thorns that we
know as the criminal justice system, is being threatened with extinc-
tion. That is one more thing to get outraged about. The writ of
habeas corpus is not just a piece of paper, not just a quaint Latin
phrase; it was the key to my freedom, the only thing that rescued me
from dying in prison. This simple piece of paper, these few words—
"It is ordered that the petition of Rubin Carter for writ of habeas
corpus hereby is granted."—gave me back my life, and gave precious
hope to so many others. The great writ ladies and gentlemen is in-
deed something tangible. It is not abstract. It is the concrete right of
every man, women, and child, in this country. It is our birthright to
be free from arbitrary, capricious, unjust, unconstitutional judgement,
confine ment, or execution. Now there are forces at work trying to
limit our access to it even further than they already have. Why don't
we realize that by taking away our access to habeas corpus we are be-
ing robbed of something as real as money and far more valuable?
Why aren't the burglar alarms sounding? Where are the cops when
you really need them, when our freedom account is being looted?

You, as lawyers, have an awesome responsibility, whether your cli-
ent is innocent or guilty. You can't afford to make a mistake. Your
clients can't afford for you to make a mistake because the penalty for
them is just too high. Criminal cases, and especially capital cases, are
not for the faint of heart. We just heard individuals talking about law-
yers who are assigned to capital cases becoming burned-out. Well,
they are. I am not trying to frighten you, but as they say on the street,
"This sh-t is real, homey."

(Supp. 1999)).
There is a rush to death in our society, a chilling climate of anti-crime hysteria and fear. That is our real adversary here, fear. We can't turn on our television sets or open up a newspaper without the specter of violent crime entering our living rooms, and frightening us to death. Fear is really at the heart of everything. Fear feeds prejudices, inflames passion, but clouds judgement. When you fear someone, anything is possible. You can then justify anything, psychologically and legally, from slavery to segregation, to antisemitism, to the McCarthy witch hunt. You can justify the erosion of constitutional protections, and justify the wholesale application of the death penalty against minorities, the poor, the disadvantaged, and the disenfranchised.

Blinded by our fear of crime, we focus only on the symptom and completely ignore the causes, the roots of crime—the poverty, illiteracy, unemployment, drugs, and, yes racism. Instead of extending opportunities to people, we punish them further. I count on my thumb and my index finger the number of people from privileged backgrounds that I have met during my two decades in the penitentiary: zero. It is the people who are marginalized in our society who most need our help because, overwhelmingly, they are the ones that we so eagerly consign to our nation's prisons and death chambers, albeit under the color of law.

So what can we do about it? Well, we can't do anything if we let ourselves become overwhelmed, jaded, and cynical. Our attorneys—Myron Beldock, Professor Leon Freedman, and Lewis Steel, all New Yorkers—took up our case after we had long since run out of money. They labored on our behalf for over ten years without any expectation of ever being financially compensated. Mr. Beldock's office alone booked 11,000 man hours, over $100,000 in out-of-pocket expenses, and millions of dollars more in unbilled legal fees. They did it, they say, because it was the right thing to do, and I am glad they did it. They did it pro bono. They are the first to proclaim how much richer they are for having done it. As Mr. Beldock likes to say, "Money is not the only currency." He also likes to say—and I guess this is a lawyer's joke—that people make counterfeit money, but in many more instances, money makes counterfeit people. Now I know there is no danger of monetary contamination happening when you are dealing with capital cases, because most capital cases involve indigent clients. So I commend you for earning so much of that other currency, and I applaud you for your efforts, which all too often go unrecognized. More often than not, the law is steady only as an abstraction. We for-
get that human lives are critically affected by law, that human lives are literally at stake.

You have the power to make a difference. You can save lives. Is that important? "The petition for Rubin Carter for writ of habeas corpus is hereby granted." It has been almost fourteen years now since the Honorable H. Lee Sarokin penned his big, bold, beautiful signature beneath these words. Fourteen years—I can still scarcely believe it. But without the tireless efforts and dedication of lawyers and aspiring lawyers like yourselves, I wouldn’t have this document now. I sure as hell wouldn’t be here in Maryland with you today alive and free. Is your work important? I defy anyone to tell me that it isn’t. But then again, what does an old punch-drunk prize fighter like me know? What I do know is that, in order to be successful, you are going to need courage, you are going to need strength, you are going to need sustenance, you are going to need energy to persevere, in order to be successful. Therefore John [Artis] and [his wife] Dolly and I would like to invite all of you out for dinner tonight—the treat’s on us, because you, and you, and you, are going to be the ingredients upon which we feast. First, we will begin with our appetizer, which will be a long life marinated in good health, but seasoned with moderate wealth, and sautéed in a rich broth of a very satisfying family life, with just a dash of rewarding progeny. Our main course will consist of a succulent roast of freedom, and justice, braised in the clear sauce of brotherhood, which has been carefully glazed and crystallized over an open fire of human dignity, stuffed with prosperity, sprinkled with a sparkling wine of love and friendship, drunken out of golden cups of higher consciousness. For only happiness can be the wine that sharpens the taste of the meal. And now for the pièce de résistance: We will have a warm and loving gel of understanding, which can only be filled by the fruits of both knowledge and being, surrounded by the sweet syrup of goodness, which always come from within. This, my friends, will be topped with a soothing after dinner drink of good habits, laden with success. Of course, in order to enjoy the suckling morsel of success, we must also have a jigger of happiness, and laughter will be our handmaiden who serves us. Ladies and gentlemen, dinner is on the table. Let’s get busy! Thank you.