

2017

The Richard J. Childress Memorial Lecture 2016 Keynote: The Continuing Denial of Counsel and Assembly-Line Processing of Poor People Accused of Crimes

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Recommended Citation

Stephen B. Bright, *The Richard J. Childress Memorial Lecture 2016 Keynote: The Continuing Denial of Counsel and Assembly-Line Processing of Poor People Accused of Crimes*, 61 St. Louis U. L.J. (2017). Available at: <https://scholarship.law.slu.edu/lj/vol61/iss4/3>

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**THE RICHARD J. CHILDRESS MEMORIAL LECTURE 2016
KEYNOTE: THE CONTINUING DENIAL OF COUNSEL AND
ASSEMBLY-LINE PROCESSING OF POOR PEOPLE ACCUSED OF
CRIMES**

STEPHEN B. BRIGHT*

My address today concerns the problem of poverty in our court system. There are many poor people with urgent, unmet legal needs who lack access to the courts and have no ability to even confer with a lawyer about their legal problems. I am going to discuss people in the criminal courts, but it is important to mention the people with civil legal problems, who do not have access to a lawyer. Our legal rights mean absolutely nothing without a lawyer. If you are being thrown out of your home illegally, it means nothing if you don't have a lawyer to defend you against that wrongful eviction. If you are being exploited by everybody from banks and big corporations on down, you probably have no ability to challenge it without a lawyer. If you are in a prison or a jail and you are subject to all kinds of abuse, there is a violation of the Constitution, no question about that, but unless you have a lawyer there is no way to get into court to assert the right to be protected from assault, to be protected from rape, to be protected from denial of medical care, and to be protected from all of the other unconstitutional practices and conditions that occur in prisons and jails every day.

Those of you going into the legal profession should worry about whether we have a legal system that actually provides justice to people high and low throughout our society. We are increasingly trending in a direction where many people who are wronged, who clearly are entitled to some kind of legal relief, have absolutely no ability to get it because they have no access to a lawyer. That is also true of some people in the criminal courts.

I am going to address what happens to people accused of crimes in the state courts. You learn a lot about federal courts, but that is five percent of the cases. Ninety-five percent of the cases, the great mass of people who come in

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accused of crimes, come into the state courts. As Michael Barrett¹ has pointed out, they come into the lower courts, they come into the municipal courts, like the eighty municipal courts in St. Louis County. They come in on all sorts of things as minor as a traffic ticket to as major as facing the death penalty. Ninety-five percent of the cases in the criminal justice system are resolved by plea bargains.² Many people don't understand that. They watch Law and Order and other television shows thinking these cases are about cross examination, that they are about all sorts of machinations that go on in the courtroom. They are really about plea bargaining. And that doesn't mean that the skills of trying a case are not important, or that investigation is not important, or that knowing legal issues is not important. They are of critical importance, but the vast majority of cases are going to be resolved by plea bargains. The consequence of that is the tremendous power that it gives prosecutors to decide, not only what the person is going to be found guilty of, but what the punishment is going to be.

That is accomplished with what is charged, sentencing guidelines, mandatory minimums, and other ways of enhancing sentences. Ninety-five percent of the elected prosecutors in this country are white.³ Seventy-some-odd percent are white men.⁴ The prosecutor's power is shown by the case *Bordenkircher v. Hayes*.⁵ Paul Hayes wrote a bad check for \$88.00. How would you punish somebody for writing a bad check for \$88.00? Would you send him to jail? Would you send him to prison? Would you put him on probation? What would you do? Let's say Paul Hayes has written some bad checks in the past. This is not the first time. The prosecutor offered Paul Hayes five years, and Paul Hayes didn't take it. The prosecutor said that if he didn't take the deal then he would charge him as a habitual offender so that he would serve life in prison. Five years is a pretty severe sentence for writing a bad check for \$88.00.⁶ A day or two in jail and requiring Hayes to pay back the \$88.00 would probably be sufficient punishment. But Hayes refused to take the plea offer, and the prosecutor followed through on his promise. It only takes an hour or two to try a bad check case, and Paul Hayes was convicted and sentenced to life in prison.⁷

1. Michael Barrett, Director of the Missouri State Public Defender System, was both a panelist and a speaker at the Richard J. Childress Memorial Lecture 2016.

2. Lindsey Devers, *Plea and Charge Bargaining Research Summary*, U.S. DEP'T OF JUSTICE: BUREAU OF JUSTICE ASSISTANCE, 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<http://perma.cc/6BJB-6Q49>].

3. JUSTICE FOR ALL*?, <http://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf> [<http://perma.cc/RWH5-FDFH>].

4. *Id.*

5. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

6. *Id.* at 358-59.

7. *Id.* at 359.

That tells you a lot of what you need to know about plea-bargaining. What it says is that you can be told, “Here is what you are going to get if you don’t take the plea. And here is what we’ll offer you today if you take the plea today.” People are threatened with the death penalty if they don’t take the plea offer to a lesser sentence.

For those who are not familiar with stages of a criminal case, I want to describe them and identify those stages in which the government must provide lawyers for people who cannot afford them. First of all, at trial, when a person is first hailed into court and charged with a crime, the Supreme Court said, in the 1963 case of *Clarence Earl Gideon v. Wainwright*, that every person has a right to a lawyer, at least in a felony case.⁸ A few years later, the Court said that in any case where there is any chance of a loss of freedom, the person accused is entitled to a lawyer.⁹ The same day the Court decided *Gideon*, it decided *Douglas v. California* that said a poor person convicted at trial is entitled to a lawyer for one appeal either to an intermediate appellate court in many states, or to the state supreme court.¹⁰ Not long after that, President Nixon appointed four members to the Court; the Court changed quite a bit and later decided that a defendant has no right to a lawyer beyond one appeal.¹¹

For example, if you are in state like Alabama and you get sentenced to death at the trial court, you get a lawyer for your appeal to the intermediate appellate court, but you have no right to a lawyer to petition the Supreme Court of Alabama to look at that case.¹² You are on your own. Most states will provide a lawyer there, but Alabama does not.

I first became involved in capital cases in 1979 when somebody called me and said that a person had been sentenced to death in Georgia and it had been upheld on appeal to the Georgia Supreme Court and the condemned man needed a lawyer to file a petition to the Supreme Court of the United States. I said, “You can’t mean that a person is under a death sentence doesn’t have a lawyer?” I questioned why I was called. I was a lawyer in Washington, D.C. I was a trial lawyer. Washington D.C. didn’t then, and still doesn’t, have the death penalty. I didn’t do much appellate work at the time. I didn’t do any Supreme Court practice. Why would I be called? The person on the other end said, “We are desperate and will take anybody we can get.” The person told me that condemned inmates didn’t have lawyers and that they were desperate. Two of my friends and I agreed to take the case. We braced ourselves. We

8. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

9. *Argersinger v. Hamlin*, 407 U.S. 35, 37 (1972).

10. *Douglas v. California*, 372 U.S. 355, 357 (1963).

11. *Ross v. Moffitt*, 417 U.S. 600, 617–19 (1974). The Court also held that there was no right to counsel in post-conviction challenges to a conviction or sentence. *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

12. See ALA. R. CRIM. P. 6.1 (West, Westlaw through 2017).

thought a Ryder truck would pull up and boxes of the record in this capital case would be unloaded. Actually, we only got a small package of documents. When we looked at the documents, we found that the penalty phase was nothing but two really bad closing arguments. The defense lawyer just gave a generic argument against the death penalty. The jurors had all agreed that they were for the death penalty during jury selection, so it wasn't a very good argument. We filed a petition for a writ of certiorari in the Supreme Court, but it was denied.

After the trial and direct appeals, a convicted defendant may challenge the conviction and sentence in what is called post-conviction review or collateral review. The only issues that can be raised at this stage are those that could not have been raised at trial or direct appeal like the ineffectiveness of the lawyers¹³ or the prosecution's failure to disclose exculpatory evidence.¹⁴

Xavius Gibson, who was under death sentence in Georgia, was brought into court without a lawyer for a hearing on his motion for post-conviction review. The judge said, "Mr. Gibson, do you want to proceed?" Mr. Gibson said, "I don't have an attorney." The judge told him that it didn't matter and that he should call his first witness. Mr. Gibson replied that he did not know what to plead. The judge and Mr. Gibson argued back and forth about Mr. Gibson's desire for a lawyer and the fact that Mr. Gibson was not entitled to a lawyer. Opposing Gibson was an assistant attorney general who specialized in capital post-conviction cases. He called Mr. Gibson's trial lawyer to testify. After the testimony, the judge asked, "Mr. Gibson, do you want to cross examine?" Mr. Gibson, an intellectually disabled seventeen-year-old, who would not be eligible for the death penalty today, replied, "I don't have any counsel." The judge said, "Do you want to ask him any questions?" Gibson, after again pointing out that he did not have a lawyer, said he did not know. The judge excused the witness and no further testimony was taken. This was a hearing on whether a man would live or die. It was upheld by the Georgia Supreme Court.¹⁵ One reason that Gibson wasn't executed was because he was under the age of eighteen at the time of his crime, and the United States Supreme Court later decided the Constitution does not allow execution of those under eighteen at the time of their crimes.¹⁶

A person convicted of a crime in the state courts can go to the federal court and file what used to be called the Great Writ of Habeas Corpus. It is now the shabby, barely existent writ of habeas corpus. A federal judge reviews the issues regarding the conviction and sentence, but in making a decision must

13. *See Strickland v. Washington*, 466 U.S. 668, 695 (1983).

14. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

15. *Gibson v. Turpin*, 513 S.E.2d 186, 194-95 (Ga. 1999).

16. *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).

defer to the decisions of the state courts.¹⁷ The biggest difference between federal courts and almost all the death states' courts is that most state court judges are elected, unlike federal judges, who are appointed and have life tenure. Political pressure on judges was clearly on display in Alabama, where judges could reject jury sentences and override and impose their own sentences.¹⁸ If a jury decided on a sentence of life imprisonment without any possibility of parole, the judge knew that if he or she did not override that sentence and impose the death penalty, the prosecutor might run against the judge in the next election. Or some other lawyer who is not making a very good living might run against that judge to get a government job. Over and over again, judges overrode and imposed death sentences even though an Alabama jury had decided to give the person life in prison.¹⁹ Getting a life verdict from an Alabama jury is no small feat. This is a state in which Barack Obama got less than twenty percent of the white vote.²⁰ You really are in a hostile territory if you are facing the death penalty in Alabama.

At any rate, when we talk about the constitutional right to counsel, we are talking about trial and one appeal. The Supreme Court has held there is no right to counsel for later stages of review. When I first started practicing law forty years ago, there were no statutes of limitation on filing a habeas corpus challenge. But now, in almost every state, in order to get into that stage in state proceedings, the collateral attack, there is a statute of limitations. And to file a federal habeas corpus petition in federal district court, there is a statute of limitations of one year. If you have seen the movie *The Hurricane*,²¹ you know it's about the boxer Rubin "Hurricane" Carter, who was the number one ranked middleweight contender when he was charged with three murders. He was convicted and spent twenty years at Rahway and other prisons in New Jersey. He wrote a book²² about his experience and some lawyers and some other

17. See Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015).

18. Alabama eliminated judicial override from its death penalty statute in April 2017. See *Alabama Ends Death Penalty by Judicial Override*, U.S. NEWS (Apr. 11, 2017), <https://www.usnews.com/news/best-states/alabama/articles/2017-04-11/alabama-ends-death-penalty-by-judicial-override> [<https://perma.cc/F6EL-4ZLQ>].

19. Paige Williams, *Double Jeopardy: In Alabama, a Judge Can Override a Jury That Sparing a Murderer From the Death Penalty*, THE NEW YORKER (Nov. 17, 2014), <http://www.newyorker.com/magazine/2014/11/17/double-jeopardy-3> [<http://perma.cc/9MH6-MEL3>].

20. Alabama Presidential Race – 2012 Election Center, CNN POLITICS, <http://www.cnn.com/election/2012/results/state/AL/president/> [<http://perma.cc/U8MM-Q8HR>].

21. THE HURRICANE (Universal Pictures 2000).

22. RUBIN "HURRICANE" CARTER, THE SIXTEENTH ROUND (Lawrence Hill Books 2011) (1973).

people became interested in his case. I had him come to my class one time at Yale and he told his story and, at the end, he pulled out of his jacket this legal document. He opened it to the last page and he read it: “The petition of Rubin Carter for writ of habeas corpus is hereby granted; signed, the Honorable H. Lee Sarokin, United States District Judge.” He said, “This gave me back my life.” He spent the rest of his life helping free other people who had been wrongfully convicted.²³

Today, Hurricane Carter would be nineteen years too late under the statute of limitations. For most people in these later stages of their cases, there is no access to a lawyer unless the person is under a death sentence and a lawyer volunteers to represent them. But a person who is not sentenced to death may have no lawyer at all. In his book *Just Mercy*, Bryan Stevenson tells the story of Walter McMillian, an innocent man who was sentenced to death.²⁴ Bryan represented him until he was finally exonerated and released. The interesting thing is that Walter McMillian was sentenced to life in prison. Judge Robert E. Lee Key overrode the jury’s sentence of life in prison without parole and gave him the death penalty. Thank goodness he did, because if Walter McMillian had not been sentenced to death, it is unlikely that anyone would have ever taken his case. He would have lived out his life in the Alabama prisons because he would have had nobody to represent him. He would have still been just as innocent, but it wasn’t a death case so he never would have gotten an attorney.

Theoretically, people in prison can write and file their own petitions for habeas corpus review. But many of the people in prison are barely literate, some have major mental illnesses, and some are intellectually disabled. They have no training in the law. They have no ability to research the law and the facts and file their own petitions.

Eighty to ninety percent of people in the criminal justice system are poor.²⁵ The major consequence of poverty in the courts is not being able to afford a lawyer. There are a lot of other consequences, but that is the major consequence of which I will discuss.

Race matters too. There are two essential books you should read to learn about the history of the criminal justice system in this country. The first book is *Worse Than Slavery* by David Oshinsky which describes convict leasing.²⁶ Convict leasing was worse than slavery because when people owned slaves

23. Steve Almasy & Elliott C. McLaughlin, *Rubin ‘Hurricane’ Carter, Boxer Wrongly Convicted of Murder, Dies*, CNN (Apr. 20, 2016, 5:35 PM), <http://www.cnn.com/2014/04/20/us/rubin-hurricane-carter-obit/> [<http://perma.cc/22UE-WWB5>].

24. BRYAN STEVENSON, *JUST MERCY* (2014).

25. Alicia Bannon, Rebekah Diller & Mitali Nagrecha, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUSTICE, 4 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<http://perma.cc/F2NQ-UP44>].

26. DAVID M. OSHINSKY, *WORSE THAN SLAVERY* (First Free Press Paperbacks 1997).

they were property and at least they had some interest in protecting their property. When they leased convicts, they could literally work them to death because you just called the sheriff and got some more. The coal companies sent people down into the coal mines around Birmingham, Alabama. When the coal mine collapsed, the operators would just call the sheriff and rent some more prisoners. The second book is *Slavery by Another Name* by Douglas Blackmon, which is about how Alabama perpetuated slavery all the way to World War II.²⁷

Vestiges of this history are evident in the criminal courts today. Many people accused of crimes who are being detained in jails pending trial come to court wearing orange or stripped jumpsuits. They are in chains with a chain between shackles on their wrists and shackles around their ankles. They are allowed to wear street clothes if there is a jury, but for other hearings before a judge without a jury, they are brought in wearing jumpsuits and in shackles. Lawyers must stand up for the dignity of their clients and courts must recognize the dignity of the people who come before them, including those too poor to post bail. When judges are asked to allow clients to appear in street clothes in these non-jury hearings, they will often say it is not necessary because there is no jury and the judge will not be prejudiced. But this is about dignity. Those accused of crimes who cannot afford bail have the same right to appear in court as anyone else. The only reason a person is in a jumpsuit and is brought to court in chains, is because the person is poor. If the person wasn't poor, he or she would come to court in appropriate dress. Instead, they are shuffled into court like slaves brought off a slave ship. It is not fair and it's not the dignity which the courts should provide every person.

The case of Glenn Ford, a black man who was sentenced to death in Shreveport, Louisiana for a crime he did not commit and spent thirty years on death row illustrates the deficiencies in representation and the influence of race. Ford was accused of the robbery of a jewelry store and the murder of the owner who was white. He had occasionally done yard work for the victim and that was enough to make him the suspect in the case. There was not much other evidence that connected him to the crime. He was assigned two lawyers to represent him at his death penalty trial. One was an oil and gas lawyer who had never tried a criminal or civil case in his life. The second lawyer had been out of school for two years and specialized in slip and fall cases. They were given no money for expert witnesses.

The case was tried in the Caddo Parrish courthouse that has a monument to the Confederacy that every juror, every defendant, every lawyer, every person passing into the courthouse must pass. In the Deep South, just about every courthouse has a monument to the Confederacy, often much bigger than the

27. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (First Anchor Books 2009).

monuments to the people who were lost in World War I, World War II, Vietnam, or Korea. The one at Caddo Parish courthouse has Robert E. Lee, Stonewall Jackson, Pierre Beauregard, and Henry Watkins Allen, a lesser-known Confederate general. It's got an all-purpose Confederate soldier at the top. It's a monument to the Confederacy and to resistance to the United States and resistance to emancipation. Everybody who goes into the courthouse passes this monument that symbolizes resistance to the freedom of slaves. The prosecution struck all the African Americans from the jury so that he was tried by an all white jury. Despite the very weak case against him, Ford was convicted and sentenced to death.

After thirty years, the prosecutors admitted that they did not have a case against Glenn Ford, and they released him and gave him \$20.00.²⁸ In just this one case, race and poverty denied a man thirty years of his life. Marty Stroud was the chief prosecutor in the case, and he apologized to Ford in a letter that he wrote to the Shreveport newspaper that was published in 2015.²⁹ He said, "In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning."³⁰ He said, "I now realize, all too painfully, that as a young 33-year-old prosecutor, I was not capable of making a decision that could have led to the killing of another human being."³¹ He ended the article by saying that no one should be given the ability to impose a sentence of death in a criminal proceeding.³²

Glenn Ford was sixty-five when he was released from prison.³³ He was already diagnosed with stage 3 cancer.³⁴ Undoubtedly, the conditions at the Angola prison had contributed to that. He had only a short time to live, and he died shortly after he was released. The courts denied him any compensation except for the \$20.00 he got when he was released.³⁵ The story of Glenn Ford shows the difference lawyers make and the consequences of being represented by an oil and gas lawyer and a slip and fall lawyer in a death penalty case.³⁶

28. Alexandria Burris, *Glenn Ford, Exonerated Death Row Inmate, Dies*, USA TODAY (June 29, 2015, 7:36 PM), <http://www.usatoday.com/story/news/nation/2015/06/29/glenn-ford-exonerated-death-row-inmate-dies/29489433/> [<http://perma.cc/PTN3-DHWV>].

29. A.M. "Marty" Stroud III, *Lead Prosecutor Apologizes for Role in Sending a Man to Death Row*, SHREVEPORT TIMES, <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/> [<http://perma.cc/GC33-TR3M>].

30. *Id.*

31. *Id.*

32. *Id.*

33. Burris, *supra* note 28.

34. *Id.*

35. *Id.*

36. See Andrew Cohen, *Freedom After 30 Years on Death Row*, THE ATLANTIC (Mar. 11, 2014), <https://www.theatlantic.com/national/archive/2014/03/freedom-after-30-years-on-death-row/284179/> [<https://perma.cc/6AVA-SLC5>]; Andrew Cohen, *Glenn Ford's First Days of*

Today, there is a great deal of discussion in the criminal justice system about reentry. But, no one should think some little reentry program is going to straighten everything out after people have been singled out and mistreated by the police, humiliated in court, and brutalized in prison. Planning for reentry must begin right from the start of every case. It should begin by treating people with dignity.

Another person like Glenn Ford who spent thirty years on death row for a crime he did not commit, is Anthony Ray Hinton.³⁷ He was convicted based on a comparison of bullets recovered from the victims that were supposedly fired from a gun that had been found in Mr. Hinton's mother's home.³⁸ Bullet comparisons are done by using a compound microscope, to compare bullets shot from the suspected weapon and bullets from the victims or the crime scene. The prosecution's expert said the bullets recovered from the crime scene matched the bullets fired from the gun taken from the home of Mr. Hinton's mother. The defense lawyer also hired an expert. But the defense expert was not an expert in ballistics, but was some sort of engineer, and he was blind in one eye. It is very hard to operate a compound microscope if you are blind in one eye. He was not credited by the jury. Hinton spent thirty years on death row until, finally, leading ballistics experts at the FBI and elsewhere said that the bullets didn't match.³⁹ This is why resources matter. It matters to have resources for a competent expert. The Supreme Court of the United States held that Hinton's lawyer was ineffective.⁴⁰ When it came time for Alabama to give him a new trial, the prosecution was apparently unable to find an expert who would say the bullets matched, so, Mr. Hinton was released.

One of the saddest cases is that of Henry McColum and his half-brother, Leon Brown, both of whom are intellectually disabled. Both have IQ's in the 50s, and both were sentenced to death for a horrible murder of an eleven-year-old child. The defense lawyers didn't bring forth DNA evidence to establish that somebody else committed the crime.⁴¹ This is what happens when people

Freedom After 30 Years on Death Row, THE ATLANTIC (Mar. 14, 2014), <https://www.theatlantic.com/national/archive/2014/03/glenn-fords-first-days-of-freedom-after-30-years-on-death-row/284396/> [<https://perma.cc/HY65-D4GD>]; Andrew Cohen, *The Meaning of the Exoneration of Glenn Ford*, BRENNAN CTR. (Mar. 13, 2014), <http://www.brennancenter.org/analysis/meaning-exoneration-glenn-ford> [<https://perma.cc/2TKH-SF63>].

37. Abby Phillip, *Alabama Inmate Free After Three Decades on Death Row; How the Case Against Him Unraveled*, WASH. POST (Apr. 3, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/03/how-the-case-against-anthony-hinton-on-death-row-for-30-years-unraveled/?utm_term=.20e7f9fbf9eb [<http://perma.cc/7PCQ-MGBT>].

38. *Id.*

39. *Id.*

40. *Hinton v. Alabama*, 134 S. Ct. 1081, 1088–89 (2014).

41. See Jonathan Katz and Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES (Sept. 2, 2014), https://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html?_r=0 [<http://perma.cc/2VHT-TQQZ>].

are not adequately represented at trial and don't have lawyers who can test the state's case. In another sad case, James Fisher spent twenty-seven years on death row in Oklahoma without anybody ever figuring out whether he was guilty of the crime.⁴² He was first represented by a lawyer who spoke only nine words at the penalty phase of his trial⁴³ and who did not seem to like Mr. Fisher. His case was reversed many years later in federal court.

After his case was reversed, Fisher was sent back for a new trial, and he got another lawyer who was even worse than his first lawyer. The second lawyer was both an alcoholic and drug addict. This lawyer had such a bad relationship with Mr. Fisher that, at one time, he asked the sheriffs to take his handcuffs off so that he could have a fistfight with Mr. Fisher, his own client. Nonetheless, the judge left the lawyer on the case. Mr. Fisher was again sentenced to death at the second trial, but the conviction and death sentence were reversed by the Oklahoma courts. After that reversal, the prosecutor offered Fisher his immediate release if he would plead guilty, leave Oklahoma, and never come back. Fisher was allowed to maintain his innocence while pleading guilty, as allowed by *North Carolina v. Alford*,⁴⁴ leave Oklahoma, and never return. If you had the two trials that Mr. Fisher had, what would you do? He took the *Alford* plea. By insisting the Fisher plead guilty even while maintaining his innocence, the prosecutors protected themselves from being accused of prosecuting an innocent man.

In a Georgia case, Robert Holsey's lawyer drank a quart of vodka every night during the trial. That is the equivalent of twenty-one shots of vodka every day.⁴⁵ As a result of his inattention to his client's case, as Judge Barkett says in her dissent, he failed to put on evidence that Robert Holsey was intellectually limited, and that Mr. Holsey "subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home 'the Torture Chamber.'"⁴⁶ Despite all this, Mr. Holsey was put to death by the state of Georgia.⁴⁷

42. See Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. TIMES (Aug. 10, 2010), <http://www.nytimes.com/2010/08/11/us/11land.html> [<http://perma.cc/X78E-BJT7>].

43. *Id.*

44. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (finding that a judge can accept a guilty plea from a defendant who pleads guilty even while maintaining his or her innocence).

45. Marc Bookman, *This Man's Alcoholic Lawyer Botched His Case. Georgia Executed Him Anyway.*, MOTHER JONES (Apr. 22, 2016, 6:00 AM), <http://www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial> [<https://perma.cc/PT7F-EA73>].

46. *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1275 (11th Cir. 2012) (Barkett, J., dissenting).

47. *Robert Holsey*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/5978> [<http://perma.cc/K4UQ-J9R6>].

Over 100 people represented by court-appointed lawyers were sentenced to death in Philadelphia by 1992.⁴⁸ In 1993, The Defender Association of Philadelphia established a unit to defend murder cases that consisted of lawyers who actually knew what they were doing.⁴⁹ Today, the Defender Association has yet to have a client sentenced to death. Lawyers make a big difference.

Of all of the rights a person accused of a crime has, the most fundamental right is the right to a lawyer because every other right depends upon it.⁵⁰ If the lawyer doesn't know that the Fourth Amendment of the Constitution prohibits unreasonable searches and seizures, or if the lawyer doesn't even know there is a Fourth Amendment, like in the case of Terry Lee Godwin,⁵¹ then that lawyer is not going to assert that constitutional right. One's rights are only what the lawyer knows. The lawyer is responsible for investigation of the case. The lawyer is the one who mounts a defense if there is a defense to be mounted. The lawyer is going to see if the client is guilty of the charges, or maybe guilty of something less than what has been charged. If a defendant ends up getting sentenced, the lawyer is critical in helping the defendant get life instead of death, a shorter sentence than a longer sentence, or probation instead of prison.

But, how do you enforce the right to counsel? This was the question in the case of Gregory Wilson, an African-American man facing the death penalty in Covington, Kentucky. He was assigned a lawyer named William Hagedorn who was in the twilight of a very undistinguished career. He had been suspended a number of times, and he practiced out of his home. There was a Budweiser beer sign on the wall in his living room. If you are looking for a lawyer to provide you with legal services, and you go into a lawyer's house since they don't have an office, and you see a Budweiser beer sign, are you going to stick around for very long? Don't you think you might ease on down the street to one of those law offices where they have some mahogany and some books? They might not be using the books anymore, but the books at least show that they are serious about the practice of law.

Gregory Wilson learned that police had come to Mr. Hagedorn's house and retrieved eight bags of stolen property from underneath the living room floor. But what most bothered Gregory Wilson was that when he called Mr. Hagedorn on the number that Mr. Hagedorn had written on a piece of paper for

48. Frederic Tulsy, *Big-time Trials, Small-time Defenses*, PHILADELPHIA INQUIRER, Sept. 14, 1992, at A1.

49. David B. Caruso, *Money Matters in Death Penalty Defense*, Associated Press (Apr. 7, 2004), <http://www.prisontalk.com/forums/showthread.php?t=54396> [<https://perma.cc/6DX9-MHR9>] (reporting that sixty-one defendants represented by private attorneys had been sentenced to death in Philadelphia since 1993, but no clients of the Defender Association had received the death penalty).

50. *United States v. Cronin*, 466 U.S. 648, 654 (1984).

51. *Goodwin v. Balkcom*, 684 F.2d 794, 817-20 (11th Cir. 1982).

him, they answered the phone, “Kelly’s Keg.” Kelly’s Keg is a bar right across the street from the courthouse. When Wilson called, the bartender would answer the phone, and he would summon Mr. Hagedorn to the phone. But, Mr. Hagedorn might not remember the conversation the next day. When he was next brought to court, Wilson complained to the judge and said that he was from Detroit, that he was facing the death penalty, that he did not have a friend in the community, and that he need a real lawyer, not a lawyer who could be reached at Kelly’s Keg.⁵² The judge responded by telling Wilson that he was welcome to have any lawyer he wanted. The judge said he would not stand in the way of Wilson being represented by any lawyer he wanted, but Mr. Hagedorn was the lawyer the court was providing. This was his court appointed lawyer. Gregory Wilson went to trial with Mr. Hagedorn as his lawyer. Not surprisingly, he got sentenced to death.

What more could Gregory Wilson have done? What more could a poor person accused of a crime do to be capably represented? He didn’t choose this lawyer. He was stuck with this lawyer. And as a result, he was sentenced to death.

At the other end of the criminal justice system are municipal courts. Adele Edwards has an IQ of 50. His only income was food stamps. He was arrested for the high crime of burning leaves without a license. He was burning leaves in his own yard. He was arrested and fined \$500. He couldn’t pay \$500, so he was put in jail. The municipal judge said that he could pay on the installment plan, and a private probation company would collect the monthly installments. If a person of means was fined \$500, he or she would write a check for \$500 and never worry about going to jail and never required to pay a private probation company. But, Adele Edwards did not have \$500. He was put on probation to pay his \$500 in installments and a \$40 a month to the private probation company. The privatization of probation allows wealthy people to get rich off of destitute people like Mr. Edwards, who have no cash incomes whatsoever. There are so many more examples of these cases. By the time our office got involved in Mr. Edwards’ case, he owed more than \$600 on his \$500 fine. He had been able to pay only \$106.

The Supreme Court said in *Bearden v. Georgia*⁵³ and *Tate v. Short*,⁵⁴ that people could not be jailed because they cannot pay a fine. These two decisions might as well not exist as far as many municipal courts are concerned. These

52. See *Wilson v. Commonwealth*, 836 S.W.2d 872, 878 (Ky. 1992) (noting that “[a]t many points during the trial, Wilson repeated his assertion that his court-appointed standby counsel were, to use Wilson’s words, ‘unprepared, ill-trained, ill-equipped, and lacked the necessary competence and experience’”); see also *Wilson v. Commonwealth*, 975 S.W.2d 901, 902–04 (Ky. 1998).

53. See *Bearden v. Georgia*, 461 U.S. 660, 674 (1982).

54. See *Tate v. Short*, 401 U.S. 395, 398–99 (1971).

courts routinely ignore them and, in many of the courts, there is no lawyer to assert *Bearden* and *Tate*. There is no lawyer to say to the judge, “You have got to make some determination whether this is a willful failure to pay before you can lock this person up.”

These cases mean nothing in a municipal court that is a cash cow for the community. In one of these municipal courts, the judge told a person he had fined that he was not getting out court that night if he didn’t put up some money. He told the man to go to the ATM, call his mother, call whoever he had to call because if he didn’t come up with some money, he was not getting out of there.⁵⁵ Here, the judge is not enforcing the Constitution of the United States. He is making money for Bowden, Georgia. Of course, some people can pay—but many can’t. Just recently, we filed our first lawsuit where a person was fined for being *the victim* of a crime. A woman who had alleged domestic violence told the judge she did not wish to pursue the charges. She was fined \$150 and told if she couldn’t pay it she would go to jail. This was a new type of case for us. We found out that it had happened to other people as well, and we are going to try and do what we can to stop that.

In some courts, multiple people waive their rights together and plead guilty together. This happens in the courts in Cordele, Georgia. Everyone pleads together and waives their rights together, and then the judge sentences each person after asking them, “Are you satisfied with your lawyer?” How would they know if they were satisfied with their lawyer? They don’t have any idea of what to expect from a lawyer. All they did was meet with a lawyer for five or ten minutes, and that lawyer convinced them to take the plea bargain, and now they are pleading guilty and being sentenced. Their total time with a lawyer may be anywhere between ten and fifteen minutes, and their total time in front of the court might be about the same. That is all the “justice” that they are going to get in these courts. In these systems, a person accused of a crime will meet a public defender or court appointed lawyer for the first time when they come to court and are told, “You can get this severe sentence or we can put you on probation today.” Probation is very common practice with black defendants because it disenfranchises them as long they plead to a felony. The judge puts them on probation and imposes fines they will not be able to pay and conditions they will not be able to meet. This just sets them up to fail. They will be out of jail that day but in prison soon enough. They will not be able to vote, and they will be on their way to prison whenever they can’t do one of the many things that they have been required to do as a condition of probation, including pay for the probation.

55. Shaila Dewan, *A Surreptitious Courtroom Video Prompts Changes in a Georgia Town*, N.Y. TIMES (Sept. 4, 2015), <http://www.nytimes.com/2015/09/05/us/a-surreptitious-courtroom-video-prompts-changes-in-a-georgia-town.html> [https://perma.cc/KL5S-5VTC].

When I was a public defender in Washington, D.C., I took my clients to the probation office after sentencings. We didn't pay the probation officer anything. The goal was not to suck money out of defendants, but to help defendants deal with whatever it was that got them into the criminal justice system to begin with so they could become useful and productive citizens. That is not the goal in jurisdictions that make defendants pay the probation officer.

Defendants who reject plea offers and insist on trials will pay a heavy price if they are convicted at those trials. They will receive a more severe sentence, even death, for rejecting the plea offer. Georgia executed Kelly Gissendaner, a woman, in 2015. She was tied to the gurney and managed to get half way through the second verse of *Amazing Grace* before the lethal drugs stopped her.⁵⁶ She and her boyfriend had killed her husband. This crime is tragic, but occurs from time to time. Most of the time, it does not usually result in the death penalty. In this case, the boyfriend actually did the stabbing. He was covered with blood. Knowing that the state had a locked case against him, he agreed to plead guilty and testify against Ms. Gissendaner so that he could get a life sentence. The prosecutor offered Ms. Gissendaner life imprisonment plus twenty-five years and told her that, if she didn't plead guilty, the state would seek the death penalty. Based on some bad advice, she rejected the plea offer, went to trial, and was sentenced to death. For over twenty years, she was a model prisoner. The guards wrote about how she had been a powerful and positive influence in their lives and their children's lives. The former chief justice of Georgia, Pope Francis, and many others urged the state's board of pardons and paroles to commute the sentence. The state was satisfied with life imprisonment plus twenty-five years. Surely, it did not need to kill this woman. But the prosecutor reminded everyone that she had rejected the plea offer. She was executed. A legal education should not teach one to "think like a lawyer" in a way that finds this morally acceptable.

There are solutions for the problems I have addressed. First, there is a need for structure to maximize resources and personnel. There are some states that do not have public defender offices. Without a public defender program, states are left with a bunch of lawyers taking cases and getting paid small amounts or, even worse, lawyers contracting with jurisdictions to handle a high number of cases at a flat rate. Few defendants will be well defended.

Second, the public defender programs must be independent of the executive and judicial branches. In states like Missouri, the public defender program is independent and run by a board. There have been two important

56. Holly Yan, Catherin E. Shoichet & Moni Basu, *Georgia Inmate Kelly Gissendaner Executed After Failed Appeals*, CNN (Sept. 30, 2015, 4:26 PM), <http://www.cnn.com/2015/09/29/us/georgia-execution-kelly-gissendaner/> [<http://perma.cc/3QFU-26UD>].

challenges taken to the Missouri Supreme Court⁵⁷ that would never be brought in other states because the public defender would be fired if they brought these lawsuits.

In Georgia, the public defender serves at the pleasure of the governor. If the public defender had the audacity to bring cases like the Missouri public defender, he or she is gone. Georgia public defenders know that, so they don't bring these cases. It raises several questions. Are we concerned about the clients? Are we concerned about zealous representation of the clients? Or are we concerned with just getting by? I've gone all over the country advocating for the right to counsel and over and over I hear the same thing: "We don't want a Cadillac. We just want a Chevy."⁵⁸ When we talk about the right to a lawyer, we are talking about life and liberty. Why would we settle for a Chevy? Why wouldn't we want a Cadillac? Why wouldn't we want to make sure that before we deprive somebody of their liberty or their life that they have been properly prosecuted and that they are really guilty of the crime? We should make sure that we have looked into everything about their life and background before sentencing them. Why do we shoot so low? Why do we shoot for the floor instead of the stars?

The chief justice in Georgia said in 1993, "We have set our eyes on the embarrassing target of mediocrity. I guess that means about half way. And that raises a question: Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice and one-half injustice is no justice at all."⁵⁹ This is a very succinct summary of exactly what is going on in much of this country.

Third, there must be training. When students graduate law school, they should want to be trained to practice their craft as well as they possibly can. It is important that lawyers and public defender programs ensure the competence of lawyers representing the poor, because the courts are not doing it. In *Strickland v. Washington*,⁶⁰ the Supreme Court said that, no matter how bad the lawyer is or how deficient the lawyer's performance, judges can just shrug their shoulders and say it did not make any difference; the outcome would not have been different. How could judges possibly know? They didn't sit on the jury. They didn't see the witnesses. They don't know whether the deficient

57. See *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012); *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. 2009).

58. Supreme Court Justice Elena Kagan was asked what kind of lawyering is a person entitled to. She said, "Well I think about a Taurus. A Ford Taurus." See Debra Cassen Weiss, *Kagan Says Poor Defendants Are Entitled to Ford Taurus Defense*, ABAJOURNAL.COM (Mar. 19, 2013), http://www.abajournal.com/news/article/kagan_says_poor_defendants_are_entitled_to_a_ford_taurus_defense/ [<http://perma.cc/J4V8-9KZ3>].

59. Chief Justice Harold G. Clarke, *Annual State of the Judiciary Address*, reprinted in FULTON CTY. DAILY REPORT, Jan. 14, 1993, at 5.

60. See *Strickland v. Washington*, 466 U.S. 668, 695 (1983).

performances of lawyers made a difference or not. Yet, like in Mr. Holsey's case, where the judge who heard the claim of ineffectiveness of counsel concluded that the lawyer was not competent and did not put on evidence that was critical. But, the Georgia Supreme Court decided on appeal that it did not make a difference. The *Strickland* test is dishonest and misleading because it allows courts to say that a lawyer was effective when in fact he was grossly incompetent.

Fourth, adequate resources are necessary to carry out these objectives. Public defenders cannot do their jobs if their caseloads are too high. If a lawyer is representing forty people at one time, he or she will have more time for representation of each client than if that same lawyer is representing 200 people, which is a common case load for public defenders. The caseload may be so great that it is impossible for some public defenders to know the names of all their clients. There must be resources for enough lawyers to do the job, for enough investigators to go out and investigate the cases, and for experts, when needed, so there are not innocent people like Anthony Ray Hinton spending thirty years on death row.

Rebuilding the criminal justice system is the collective responsibility of everyone in society, and it is the collective responsibility of lawyers. When Robert Kennedy was the Attorney General of the United States, he said that the poor person accused of a crime has no lobby.⁶¹ At that time, the Attorney General of the United States was a pretty good lobby for poor people accused of crime. Today, we have the Criminal Justice Act in the federal courts, and we have the federal public defenders because Robert Kennedy initiated that legislation.⁶² But lobbying for effective representation for poor people accused of crimes by attorneys general and prosecutors is long gone today. Unless we realize that the legal profession and the judiciary have to be the advocates for independence and resources, these problems will not be corrected.

Some highly regarded scholars and lawyers argue that we shouldn't have an adversary system, but instead a European-style inquisitorial system. I don't have any idea if this is right, but I will tell you, the worst system to have is an inquisitorial system that masquerades as an adversary system. In this system, there are billions of dollars for prosecutors, law enforcement agencies, crime laboratories, expert witnesses, and other aspects of the prosecution, while the people on the other side have virtually nothing. We say this is an adversary system. It is not an adversary system by any stretch of the imagination.

Every lawyer from a big firm lawyer to a lawyer prominent in the bar, to a prosecutor, to a legislator, has the responsibility to make sure this system

61. MARIE MULVEY-ROBERTS, WRITING FOR THEIR LIVES: DEATH ROW USA 48 (2006).

62. *Statement by Robert F. Kennedy Before the Senate Committee on the Judiciary Regarding S. 1057, the Proposed Criminal Justice Act*, 88th Cong. 1 (1963) (statement of Attorney General Robert F. Kennedy).

works for everybody. Every lawyer has the responsibility to make sure that it works for the Adele Edwardses of this world. We should not lock people up because they burn leaves in their yard and cannot pay the fine, or because they are loitering. We should not sentence people to death because their lawyers don't know anything about their cases or the people they are representing. If we allow these injustices to continue, the court system is not going to have any credibility or legitimacy. When the courts give somebody an incompetent lawyer or an overworked lawyer or when they don't give them a lawyer at all, the system is rigged. It is as rigged as a professional wrestling match.

Hugo Black declared for the Supreme Court that there can be no equal justice when the kind of justice a person gets depends upon the amount of money he or she has.⁶³ But, in our legal system as it operates today, nothing matters more to the kind of justice a person receives than the amount of money a person has. This is apparent from the outset. People who get arrested want two things. They want out of jail. And they want a lawyer to get them out. In a case that one of my big firm lawyer friends handled, a person who had been arrested called him from a drunk tank, and my friend got him out in two hours. On the other hand, Diego Moran was arrested in Del Rio, Texas, and charged with capital murder. He didn't see a lawyer for eight months. That is the difference between a person with means and a person who doesn't have means. A lawyer makes all the difference in the world. It is important because it determines whether people get out and go back to work and are able to support their families and maintain their means of transportation and keep the place that they live. It is important because it determines whether a child gets out of juvenile court and goes to college or whether they get caught up in this court system and never, ever get out of it. It is important because it determines whether children are taken away from their parents because their parents are thrown in jail for all sorts of minor things like not paying traffic tickets.

In one recent case, our client's home was raided at four o'clock in the morning because he had not paid traffic tickets. The court took both his children and gave them to the state because he was going to jail. In another case we had, a woman was nine months pregnant and was sleeping on the floor of the jail in Columbus, Georgia. She was in jail because she couldn't pay her traffic tickets. She wasn't the Boston Strangler. She was just somebody who couldn't pay her traffic fines.

W.E.B. Du Bois said that we must complain.⁶⁴ That plain, blunt complaint, ceaseless agitation, and unflinching exposure to dishonesty and wrong is the ancient, unerring way to liberty, and we must follow it. There cannot be

63. See *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

64. See W.E.B. Du Bois, *The Niagara Movement*, 2 THE VOICE OF THE NEGRO 619, 621 (1905).

enough agitation. Agitation like what we have seen in St. Louis County since a police officer shot and killed Michael Brown.⁶⁵ The agitation like what Black Lives Matter has carried on all over this country. But lawyers have to be agitating, too. Every type of lawyer has a responsibility in this. This means going out and trying to make sure that we have a full measure of justice for everybody.

There is a story told about General Patton. The General sent someone out to do some scouting, and the scout found out they had been outflanked by the enemy. The scout came back to General Patton, and said, "General, we have got one hell of a problem." General Patton said, "Soldier, in this army we don't have problems. We have opportunities." The soldier replied, "General, we have got one hell of an opportunity." When you think about our criminal justice system, you can feel very discouraged. You can think that it looks so overwhelming and so bleak that there is no hope of ever achieving justice.

My recommendation to lawyers and law students is that they look at the state of the criminal justice system as an opportunity. Look at it as a great challenge. They should decide whether they want to take on this challenge and, as Oliver Wendell Holmes said, wear their hearts out in pursuit of the unattainable.⁶⁶

Brandon Buskey⁶⁷ has talked about the proximity to the suffering of the people we serve. There is no question that all our hearts go out to the victims of crimes. I have met with the families of victims. I have seen their suffering. I have seen the ripple effect of it. I know what it is like. It is important to be close to that suffering. What I find to be not so expected is that, as you work with criminal defendants, you discover that, no matter what their crimes are, there is always a story there. There is always a human being there. People are much more than the worse thing they ever did in their lives.

I met a young man, Tony Amandeo, who at eighteen years of age, participated in an armed robbery. He killed a man, and he got his wallet and took his money. He got sentenced to death in Georgia. A Georgia jury decided he was so beyond redemption that he deserved to be eliminated from the human community. I represented him and learned that he was a very thoughtful person who had done a terrible thing. I argued his case in the Supreme Court and ultimately got him a sentence of life imprisonment with the possibility of

65. See John Eligon, *Michael Brown's Family Sues Ferguson Police Officer Who Killed Him*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/us/michael-browns-family-sues-ferguson-police-officer-who-killed-him.html> [<https://perma.cc/QTV5-MENC>].

66. Oliver Wendell Holmes, Jr., *The Profession of the Law*, HARVARD LAW SCHOOL LIBRARY DIGITAL SUITE (Feb. 17, 1886), available at <http://library.law.harvard.edu/suites/owh/index.php/item/43198539/1> [<http://perma.cc/X36X-MBPS>].

67. Brandon Buskey, a Senior Staff Attorney with the American Civil Liberties Union - Criminal Law Reform Project, was a speaker at the Richard J. Childress Memorial Lecture 2016.

parole. Several years later, he invited me to see him graduate from Mercer University at a prison. At one time, the state was going to terminate his life, and then he graduated *summa cum laude* from Mercer University. A few years ago, we won parole for Tony. He is now a useful and productive citizen.

Recently, I talked to Jimmy Horton, a man who I met when he was on death row. He had killed the district attorney in Macon, Georgia. We ultimately overcame the death penalty. Today, he, his wife, and I go out and have dinner from time to time. I have seen these people like Jimmy Horton. I have seen that there is much more to them than what they have done. They are not beyond redemption. There is a resilience. There is something there if we will, as Winston Churchill said, just look for it and find it in people.

One can look at the criminal justice system, and think that we have all these problems with the lowest courts, with the traffic courts, with the misdemeanor courts. We have problems with the death penalty cases. We have problems of unequal treatment because of race and poverty at every stage of the system. We know the system for providing lawyers for the poor is underfunded and has all these other problems. Dr. King said that we stand on the shoulders of others so that someday people will stand on our shoulders. Just as at the time he led the Civil Rights Movement, he stood on the shoulders of Frederick Douglass and Theodore Parker and other people throughout history who struggled for civil rights. In the 1920s, Clarence Darrow stood before a judge in Chicago and gave a closing argument on behalf of Nathan Leopold and Richard Lobe. He said to the judge, "I am here to speak for the future. Your honor, you can sentence these two boys to death, and, if you do you, you will turn your face to the past. But I am asking you to look to the future. I am asking that we look to a future when our decisions will be governed by compassion and love and kindness and concern for all people and that mercy will be seen as the highest attribute of humankind." He had a long vision. We are going to see that vision realized. We are getting closer. We must look to the future.

In *The Fire Next Time*, James Baldwin wrote, "I know that what I'm asking is impossible. But in our time, as in every time, the impossible is least that one can demand—and one is, after all, emboldened by the spectacle of human history in general, and American Negro history in particular, for it testifies to nothing less than the perpetual achievement of the impossible."⁶⁸ Now, we must go out and seek the impossible.

68. JAMES BALDWIN, *THE FIRE NEXT TIME* 104 (First Vintage International Edition 1992) (1962).

