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Is Mediocrity the Best We Can Do?

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ESSENTIALS TO JUSTICE: A RIGHT TO COUNSEL SYMPOSIUM

WYC & LYN ORR DISTINGUISHED LECTURE*

IS MEDIOCRITY THE BEST WE CAN DO?

By: Stephen Bright
Introduction: Penny White

PROFESSOR WHITE: It is most fitting that the Wyc and Lyn Orr lecture this year is part of the "Essential to Justice: A Right To Counsel Symposium," and it is even more fitting that the Orr lecturer is Stephen Bright. If I had Ndume's talent and I were to draw a graphic for this introduction, it would consist of three concentric circles, all with the same center and the same common bond. The first circle would represent Wyc Orr, the second, Stephen Bright, and the third, the symposium, and at the core of all three would be the commitment to make good at last on Gideon's promise.

Over the past decade when the law school counted its supporters, at the top of the list has been Wyc and Lyn Orr. Wyc graduated from the College of Law in 1970 and his wife, Lyn, graduated as an undergraduate from UT as well. Their daughter, Kris, who is with us today, does not have a UT degree, but she is an attorney and she practices in the firm that she and her father started in North Georgia. We welcome you, Kris, and we welcome your friend, Angela, as well. Thank you for being here.

The Orr Brown Law Firm, and Wyc and Kris, have a mission of helping others. And because of an uplifting experience that Wyc had when he was a student at the College of Law when the law school hosted Jim Neal as a guest speaker, Wyc and Lyn endowed this lecture series in

* Edited for readability.

order to provide similar opportunities to members of the law school community. The College of Law is grateful to Wyc, to Lyn, to Kris for enabling us to share great speakers like today with our students.

It is really most important that this lecture is held this year in conjunction with the Right to Counsel Symposium because fulfilling the Sixth Amendment right to counsel was at the center of Wyc Orr's professional life circle. The hallmark of Wyc's practice was a commitment to the disadvantaged, a willingness to fight for equality, and a passion for justice. Wyc served on the Georgia Public Defenders Conference, on the Public Defenders Standards Council, and he was an outspoken advocate for adequate funding for public defenders in Georgia. Days before his recent death, Wyc received the Lifetime Achievement Award from Steve's shop, the Southern Center for Human Rights. And so you begin to see the symmetry of this event. In previous years before Wyc's death I would sometimes have the opportunity to talk with the dean, and with Wyc, and with Lyn about who would be a fitting person to deliver the Orr lecture. Wyc often said that hearing Jim Neal changed his life, and so we strived to meet a difficult challenge, to find a speaker who inspired, who was courageous, and who changed lives. Some years, we met Wyc's challenge, bringing as the first Orr lecturer Jim Neal, his personal hero, and then, in later years, Bobby Lee Cook, his friend.

For many, many reasons, I wish that Wyc were here today because he would enthusiastically acknowledge that this year's Orr lecturer is a perfect choice, an extraordinary individual who inspires, who is courageous, and who changes lives.

Stephen Bright is the president and senior counsel of the Southern Center for Human Rights. He is the Harvey Karp visiting lecturer in law at Yale Law School, he is a visiting professor intermittently at Georgia, Chicago,

Emory, Northeastern, Harvard, and he is now the advocate in residence at the University of Tennessee College of Law. Periodically, he is referred to in Georgia as the agitator of the year, and I think he is definitely going to earn that title this year. Don't you, Steve? But Stephen Bright is not a man of titles; he is a man of deeds. Steve's awards and accolades could cover the walls of this room. There is a documentary film that honors his work, books that have been written about him and the lawyers he works with at the Southern Center. He has received the ABA Thurgood Marshall Award, the ACLU Roger Baldwin Medal of Liberty, the John Minor Wisdom Public Service Award, the NACDL Lifetime Achievement Award, and the NLADA Kutak-Dodds Prize.

But Stephen Bright is not a man of accolades; he is a man of deeds. He's written books and dozens of Law Review articles and the titles sometimes make us uneasy, for example, "The Death Sentence Not For The Worst Crime But For The Worst Lawyer," "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases." And he can turn a phrase. He tells us in our criminal justice system it is poverty, not justice, that dictates outcome, and he says America has an inquisitorial system posing as an adversarial system with all the power concentrated in the prosecution.

He's argued twice in the Supreme Court, numerous times in Federal Court, testified in Congress, and made a presentation before the United Nations. But despite his literary gifts and despite his talent for oratory, Steve Bright is not a man of words; he is a man of deeds. When Amy Bach was researching her book *Ordinary Justice* and she and Steve huddled with in a courtroom listening to a judge who could not be heard, it was Steve who stood up and politely asked the judge, speak up, these people have taken off from work, they need to hear what you're saying, you

are determining their future. And just recently when the Georgia Public Defenders Standards Council engaged in a sham application process to keep qualified lawyers from knowing about and applying for the job of Cordele Circuit Defender, Steve Bright not only sued the Council, he applied for the job. So, by his actions, Steve exemplifies what we all know but are sometimes too intimidated to say, that justice cannot flourish when the defense a person gets depends on the size of the person's bank account. He has, by his actions, inspired generations to follow the thankless call of indigent defense. He has, by his actions, demonstrated every day the power of respect and the importance of honoring human dignity. He exposes cracks in the system and he provides the mortar to plug them. And that is why it is most fitting that today, in honor of Wyc and Lyn Orr, the Orr lecturer is Stephen Bright. Join me in welcoming him.

MR. STEPHEN BRIGHT: Thank you, Professor White. When they named me the agitator of the year, I wasn't quite sure how to take that. Dr. Joseph Lowery, our great civil rights leader, the head of the Southern Christian Leadership Conference, called me and told me that he was once called a "racial agitator." Not long afterward, he said he went to visit one of the women in his church who took him to the very back of her house to the room where the washing machine was. She told him that it doesn't matter how hot the water, it doesn't matter how strong the soap, she didn't get anything done there without an agitator. So agitators are necessary not only in washing clothes but in stirring up issues, including some things that are unpleasant, if society is going to get anywhere.

It is great to be teaching once again at this law school. Dwight Aarons and I taught a class a few years ago, and now Penny White and I are teaching a course on the right to counsel. I am honored to be working with one

of the great teachers here, one of the great lawyers that this law school and that the State of Tennessee has ever produced, Penny White. And I have met such outstanding students here. Sarah McGee, who was in the class with Dwight Aarons just a few years ago, went on to be a Prettyman Fellow at Georgetown in Washington, following in Penny White's footsteps, and is now back a public defender in Nashville. I know many of the people that are in the class this year are going to follow a similar path.

I am also also tremendously honored to give a lecture named for Wycliffe and Lyn Orr and that is attended by Kris Orr Brown, his daughter and law partner. Last spring, in the last few weeks of his life, my organization, the Southern Center for Human Rights, recognized Wyc. We thanked him for all that he had done and particularly for his willingness to speak out. Dr. Martin Luther King, Jr. pointed out the value of a person who speaks out and says what needs to be said no matter how uncomfortable it may make the listener. Wyc was one of those people. He spoke out about the shameful quality of legal representation for poor people accused of crimes in Georgia.

It was no secret. Right there in Gainesville where Wyc practiced law, there was a lawyer who specialized in title searches and real estate closures. He was conscripted to do a certain number of criminal cases every year. Every lawyer in town was required to represent a poor person accused of a crime when his or her turn came. There was no compensation. The real estate lawyer finally hired a lawyer and filed a lawsuit seeking to prevent the judges from assigning him criminal cases. He pointed out that his practice was limited to real estate closings and title searches, that he did not have the personality to be a trial lawyer, and yet he was being assigned to represent young men facing tremendous amounts of prison time but he was not competent to do it.

On the third day of a trial in Gainesville, it was discovered that the person sitting at the counsel table beside the defense lawyer was not the person whose case was being tried. The wrong person had been brought over from jail and the lawyer didn't even realize it was not his client. The lawyer said the man kept saying it's not me, it's not me, but he thought he meant that he was not guilty. But it was not the right person who was on trial.

Wyc did everything he could do to expose this kind of representation and see that people accused of crimes were competently represented. He was a driving force on the Georgia Bar's indigent defense committee. Getting the Georgia Bar to do anything about indigent defense is about like trying to move Stone Mountain down to Macon. But he did it. He was head of the Georgia Indigent Defense Council, which allocated what little funds the Georgia legislature would appropriate for indigent defense in the 1990s to counties to improve representation. The county officials would agree to do certain things in exchange for the funding, but many of them just took the money and never did what the Council required of them. But Wyc persisted. Eventually, three consecutive chief justices of Georgia made the right to counsel a priority. One of them appointed a Blue Ribbon Commission and appointed Wcy to it. The Commission recommended creation of a public defender system. The legislature followed the recommendation and created the system which finally started providing representation on January 1, 2005, over 40 years after the Supreme Court's decision in *Gideon v. Wainwright* holding that states must provide counsel to people accused of crimes who could not afford to retain a lawyer.

When he honored, congratulated and thanked him for all that he had done on the evening that we recognized him, he said simply, "I've always felt that if there is going to be a fight, it should be a fair fight, particularly if

someone's life or liberty is at stake. And that is what I am here to talk about – a fair fight for people whose liberty and whose lives are at stake. When people accused of crimes do not receive competent representation and, as a result, it is not a fair fight, the courts lose their legitimacy and their credibility. People do not have faith in their verdicts and their sentences. They do not respect the criminal courts because they are not entitled to respect.

I would like to discuss three things. The first thing is the importance of the right to counsel just from the standpoint of the clients. I offer these comments particularly to the law students who are here. Because the answer to the failure to provide counsel is not going to come from the courts, it is certainly not going to come from judges, it is not going to come from bar associations, although it should, and it is not going to come from legislatures. It is going to come from people who graduate from law school dedicated to making the Sixth Amendment right to counsel a reality and willing to go to places where they are needed to serve people facing a loss of life or liberty. That is who is making the Sixth Amendment right to counsel a reality in this country today – public defenders and dedicated private lawyers. A law school graduate can make a tremendous difference as a public defender.

Secondly, we must recognize the complete failure to enforce the right to counsel over the last 50 years by all our institutions from the Supreme Court of the United States on down. It is more than a crisis; it is a colossal failure to make good on the most basic constitutional right that is essential for fair trials and reliable verdicts. No right is celebrated so much in the abstract and so little in reality as the right to counsel. And every day, from the highest court in the land to the municipal courts that serve as cash cows for their communities, the right to counsel is violated day in and day out.

And, finally, a little more must be said about what can be done to make the right to counsel a reality in these courts. As I said, the judiciary and those responsible for the criminal courts are not going to do it. Many of those courts are courts of profit that bring in thousands of dollars in fines, fees, forfeitures, surcharges and other assessments for their communities. They are worried about moving cases as fast as possible. But these courts of profit are not courts of justice. They are unwilling to spend money to see that those charged are competently represented and fairly treated. Beyond that, the legal profession is largely concerned with the incomes of lawyers, even if it means that the legal system fails completely as a dispute-resolving mechanism for the rest of society.

There are times when the bar and legislatures respond to crisis, but there is not the sustained commitment to the right to counsel that is needed for a fair and just system. When Harold Clarke was Chief Justice of Georgia, he described the representation of the poor in one of his annual addresses to the legislature as follows: "We set our sights on the embarrassing target of mediocrity. I guess that means about halfway. 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." Chief Justice Clarke, a real gentleman who tried to see the best in everything, was being charitable. Because Georgia had never set its sights on the target of mediocrity; it had never aimed that high. It had tried to do a little as it could get away with. *Gideon* came down in 1963, a decade after *Brown v. Board of Education*, when Georgia and other southern states were in massive resistance to the Court's decision requiring integration of the schools. They paid no attention to a decision that said states had to provide lawyers for poor people accused of crimes. Georgia just left representation of the poor up to its 159 counties, which

were not inclined to pay for representation of the accused. But finally it became so embarrassing and the chief justices kept pointing it out, so the Georgia legislature brought representation up to a level that still wasn't mediocrity, but a little better than what it had been. But then, everyone went home – the Georgia Bar, the new Chief Justice, and others were off to other things even though there was so much more to do with regard to the right to counsel.

You heard yesterday from Ndume Olatushani, who spent time on death row for a crime he did not commit. That is about as good a reason as you will ever hear about why the right to counsel is so important. The best possible guarantee against the conviction of the innocent is a competent, capable, well-resourced lawyer defending the accused. And that is true in cases not quite as dramatic as Olatushani's.

I received a letter not too long ago from a young woman whose apartment had burned – she lost everything except the clothes she was wearing. She lost photographs, her diploma, everything. She worked hard at two jobs, got a place to stay and continued to attend her community college part-time. But six months later she was charged with arson. She was assigned a public defender who recommended to her – as she wrote in all caps – "A PERSON NEVER CHARGED WITH ANY CRIME OF ANY SORT IN MY LIFE, TO TAKE 15 YEARS." She said, "I declined."

She went on to write,

> "My lawyer missed his court dates. I've been to court so many times that I finally lost both of my jobs. Because I have this arson charge pending over me, I can't get a job. I have no place to go. I'm a certified

> nurses' aid, but I can't find employment because of this arson charge. I don't know how to fix this. I've asked to be placed in jail because I fear I may take my own life, or I may die from the conditions of being homeless. But my request to be taken to the jail was denied as well.
>
> "The last offer was 10 years and restitution of half a million dollars. I told my attorney, I said I don't care if I spend the next 20 years in prison, I'm not going to plead guilty to something I didn't do. I will never accept the blame for something I didn't do. A guilty plea even with no jail time will ruin my life more than this case has already. It means I will never be able to use my nursing degree, and I will never be taken seriously."

She already appreciated the collateral consequences of a conviction. She continued:

> "I've lost my job. I've lost my dogs. I sleep in my car. I'm now going to lose my car because I can't make the next payment. I'm tired, I'm beaten, and I don't understand how to fight this. My only question is what to

> do now when I have no way to care for myself? I just don't want to die without someone knowing what these people have done to me and how I have cried out for the last three years. I'm only 23, Mr. Bright, and I have fought to stay afloat for the last three years. I just want to know what's left for me to do."

Her whole life was in the balance, as much as if she were facing the death penalty. She could either be convicted of arson and never again be a useful and productive citizen, or she could get the case behind her because she was not guilty of arson and move on and be a nurse, get her degree from college, and go on with her life.

We took her case. I know that innocent people get convicted in arson cases. Todd Willingham was executed in Texas after being wrongly convicted in an arson case. We found a lawyer who had represented insurance companies in arson cases for 30 years, knew about the forensic testing that is done in arson cases and all the leading experts. He provided his services *pro bono*. Within a short time he had taken the prosecution's case completely apart. We met with the assistant district attorney and the lawyer played a video on his laptop showing how quickly the fire could spread and that it started above the ceiling because of faulty wiring, not where they thought it did. He demonstrated that there was no case against the woman. The prosecutors dismissed the case.

And she went on with her life. She was a remarkable young woman. I remember one day when we were in court, and I looked over at Shanna, our client, and she was reading and underlining in her textbook while she

was waiting for her case to be called. Since the case was dismissed, she has worked sometimes 60 hours a week – always 40, but sometimes 60 – taking care of mentally-ill people who need nursing care. She is back in school getting her degree.

Her public defenders could have helped her enter a guilty plea if she had accepted the plea offer. They were perfectly capable of that. They did it all the time. But they could not try an arson case. They did not have a lawyer who knew the arson science, what experts to call, and how to investigate an arson case. The public defenders lacked the time and resources to learn how to defend an arson case – or even to reach out to someone like the insurance lawyer who could have helped them. Other innocent people accused of arson will not receive a capable defense.

Robert Halsey, executed by Georgia in December, 2014, was represented at trial by a lawyer who was about to be indicted, and ultimately convicted and disbarred for stealing client funds. He was so concerned about his situation that he was drinking a quart of vodka every day during the trial. He did not put on evidence of Holsey's intellectual limitations or any evidence that, as a child, he was, as Judge Rosemary Barkett put in her dissent, subject to abuse so severe, so frequent, so notorious, that his neighbors called his childhood home "the torture chamber." The state trial judge who held a hearing on the representation thought it was obvious that Holsey had been denied the effective assistance of counsel and was entitled to a new trial. He granted a new trial, but the Georgia Supreme Court reversed, holding that the despite the vodka, the pending indictment, and the failure to present critical evidence, it would not have made a difference.

The Court relied on the U.S. Supreme Court's decision in *Strickland v. Washington*, which allows judges to sweep ineffective lawyering under the rug by saying there is a substantial probability that the lawyer's deficient

performance did not make a difference. When courts make this finding – that it probably didn't make a difference – their legal holding is that there was no ineffective assistance of counsel, despite the scandalous quality of representation. The media reported that the courts found that Holsey's lawyer was not ineffective and that's technically correct under *Strickland* but completely dishonest with regard to the representation that Robert Holsey received. It is a significant way in which the courts hide the truth about how poorly people are represented.

Thurgood Marshall, the one justice who had actually been in trial courts and had tried death penalty cases,[231] was the sole dissenter. He pointed out that the Court had adopted a malleable standard that it is in the eye of the beholder – some judges will say it made a difference and some will say it did not. But judges are unable to determine whether bad representation at a capital trial made a difference. They didn't see the witnesses. They weren't on the jury. Yet they make a guess that it didn't make a difference, shrug their shoulders, and send the defendant to the executioner.

Eric Wyatt was arrested in March in Ben Hill County, Georgia. He kept trying to get the public defenders there to talk to him. One of the important roles that attorneys play is in interviewing and counseling clients. Wyatt spent four months in jail and didn't talk to anybody. Finally, he is hauled to court in a jumpsuit and chains. That's the way those accused are treated – like slaves. There is a lot of discussion of re-entry programs. But it is unrealistic to expect that people who are abused by law enforcement, degraded and humiliated by the courts,

[231] See Gilbert King, *Devil in the Grove,* a Pulitzer Prize-winning account of the defense of black youths accused of rape of a white woman in Groveland, Florida in the late 1940s by Thurgood Marshall and other lawyers from the NAACP.

brutalized in prison are going to overcome all that in a few months in a re-entry program.

When Wyatt gets to court, a public defender tells him he can plead guilty and be sentenced to 20 years in prison, 10 to serve. There has been no interview with the public defender. No investigation of the charges. Wyatt has been trying to tell them that he is not guilty, but he has been unable to get a public defender to listen. He rejects the plea offer and is returned to jail. Eight days later, he is called from his cell to the front of the jail and told the prosecution has dismissed the case and he is free to go. He would not have been in jail four months if his public defender had talked to him about his case, looked into it, and explained to the prosecutors what they found out later – that there was no case against him. Of course, he is just a poor fellow and no one cares.

Jacqueline Winbrone had a similar experience in New York. She was arrested and bail was set at $10,000. No lawyer represented her at the bail hearing, and Winbrone, who was the sole caretaker of her husband, could not reach her court-appointed lawyer to seek a bail reduction in order to care for her husband, who needed transportation to dialysis treatment several times per week. Days later, her husband died.[232] Eventually, she contacted a prisoners' rights organization that secured her release on her own recognizance – her promise to return for court. Ultimately, the charge against Winbrone – possession of a firearm found in the family car – was dismissed.

We were recently contacted by a man who was arrested for driving under the influence. He was thrown in jail. He had no lawyer. He was taking care of his mother who was in her 90s; he fed her, clothed her, cleaned her, and everything else. Without his care, she died while he

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[232] Hurrell-Harring v. State, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff'd as modified*, 930 N.E.2d 217 (N.Y. 2010).

was locked up. These are the consequences that most people never think about. There are no small cases. If you are a lawyer, you can prevent these kind of things from happening.

In Florida, lawyers missed the statute of limitations in the cases of 34 people sentenced to death.[233] That means that 34 people condemned to die will never have their cases reviewed by federal judges who have life tenure and some protection in following the law that elected state court judges do not have. There is no more basic responsibility of a lawyer than filing within the statute of limitations in any kind of case. If a person cannot file papers on time, that person should not be practicing law. If state bar associations care at all about protecting the public from incompetent lawyers, they should be suspending and disbarring those lawyers. But as long as the victims of such gross malpractice are poor, the bar associations take no interest, even in capital cases.

A lawyer in Houston, Jerome Godinich, missed the statute of limitations in three federal habeas corpus cases in 2009. Both clients were executed. Yet, the Texas Bar took no action, nor did the Texas Court of Criminal Appeals. One would hope that at least the trial judges in Houston would quit appointing him to represent poor people in criminal cases or – at the very least – stop appointing him to represent people in capital case. But the judges kept appointing him so often that he has had 350 criminal cases at one time. One of his clients, Juan Balderas, was sentenced to death in Houston in March 2014. The only way to explain this is, at best, that the judges do not care what kind of representation poor people receive, or, at worst, that judges are intentionally appointing incompetent lawyers to make it easier for prosecutors to get convictions and death sentences. The judges know how bad he is; they

[233] Lugo v. Secretary, 750 F.3d 1198, 1216-18, 1222-26 (11th Cir. 2014) (Martin, J., concurring) (listing the 34 cases).

would not have him represent a member of their family in traffic court, but they appoint him to represent people facing the death penalty.

In many courts, people accused of crimes are processed in assembly line fashion. When they get to court, a lawyer who they have never seen before tells them about the prosecution's plea offer and tells them to take it or they will get a much more severe sentence. After a conversation of five to fifteen minutes, the defendant pleads guilty, the judge accepts the plea and imposes sentence. This meet 'em and plead 'em processing of people is the utter corruption of the courts. The judge knows, the prosecutor knows, the defense lawyer knows, the lawyers sitting around the courtroom know – everyone knows that there is no legal representation whatsoever of the defendants. It is like a fast-food restaurant – putting on a slice of lettuce and moving it on, putting on a tomato, putting on a pickle, and moving it on down the line. This is not representation.

How could this be? The primary reason is that the government that is trying to convict people, trying to fine people, trying to imprison people, trying to kill people, has no incentive to provide a lawyer to those people who might frustrate its purpose. And so most state legislatures, county commissions, and city councils do as little as they possibly can with regard to providing representation and the courts let them get by with it. And prosecutors take full advantage of the perfunctory representation of the poor. It was not always that when. When Clarence Earl Gideon's case was before the Supreme Court presenting the question of whether a poor person accused of a crime had a right to a lawyer, twenty-three state attorneys general led by Walter Mondale, then the attorney general of Minnesota, filed an *amicus* brief in support of Gideon and the right to counsel. They said if there is going to be an adversary system, then the accused must be represented by a lawyer just as the

government is represented by a lawyers. Today, most prosecutors oppose any efforts to improve representation for the poor and, at least in my experience, they are usually successful.

What do we do about this? I recently applied for the job of public defender in a four-county judicial district in Georgia. The public defender office has three lawyers and a caseload of 1,700 – 566 cases for each attorney. It is a rural area and a lot of time is spent in travel from one county to the others, which gives the lawyers even less time to work on their cases. And the lawyers are incompetent. One wrote a letter to one of her clients who had told her he wanted a preliminary hearing asking the client to write and tell her why he needed a preliminary hearing.

I applied for this job because I am so discouraged that so little is being done about a problem that is so great and an issue that is so fundamental to how human beings are treated in the courts. I have gone to a lot of meetings; I have written some articles; I have testified before Congressional and state legislative committees; our office has published some reports on the problems; and we have filed some class action lawsuits seeking to improve things. But I feel like we are not accomplishing anything. We must to go to the places where we are needed and make the right to counsel a reality in those cases. Law students, upon graduation, must go to the places where the need is, where people are languishing in jail without lawyers, and provide representation.

In response to my application, I was interviewed by two senior lawyers who practiced in the district. They asked me how, with two other lawyers, I was going to handle all of the cases. I said we're not going to do it. It is impossible. There are four counties and each one has an adult court, a juvenile court, and a jail. Three lawyers

cannot be in all those courts and all those jails and provide people with real legal representation.

"Representation" is a term of art. It involves much more than meeting and pleading people guilty. It involves interviewing each client – some, particularly those with intellectual limitations or mental illnesses – will require several interviews. It involves counseling each client and answering the questions they have, learning about their backgrounds, developing a sentencing plan if the client is convicted. It involves investigating – obtaining police reports and other documents and interviewing witnesses. It includes looking into whether there are any legal issues in the case and raising them in motions and other pleadings such as requests for jury instructions. It involves being as familiar as possible of the prosecution's case, getting discovery asking for any exculpatory evidence. I told them that just relaying a plea offer from a prosecutor to a person, that is not representation. And the Sixth Amendment requires representation. If we cannot provide representation because of the number of clients we already have, we must decline taking any more cases.

There is also the ethical responsibility to accept a case only if the lawyer can represent the client competently. Every lawyer is bound by this ethical requirement. A lawyer who had 300 clients and is asked to take another one is going to have a choice of neglecting some of the existing clients to represent the new one, or giving short shrift to the new one in order to continue providing representation to the clients the lawyer already has. And so, not being able to do one of those things, we would have to stop taking cases that we could not handle competently. They would need to find lawyers from somewhere else to take the cases until we got the public defender office to where it needed to be. Obviously, it needed a lot more lawyers – at least twice as many as it now has – and it needs investigators. It became clear that I am not going to

get that job. Because the decision that is being made there and the decision that is made all across this country is to minimize costs, not meet the requirements of the Sixth Amendment and the ethical responsibilities of lawyers. The decision is to process people through the courts, give them a few minutes with a lawyer and call it representation.

This corruption of the courts, this treatment of the poor has some serious repercussions beyond the harm done to the accused, their families and their communities. There has been a great deal of concern about white law enforcement officers killing unarmed black men in Ferguson, Missouri, Staten Island, Cleveland, Milwaukee and other places. There have been demonstrations and even some riots, as there were in the 1960s in response to police shootings of blacks. People of color know they are being abused all the time by law enforcement. All over this country a person of color is more likely than a white person to be stopped by the police, more likely to be abused during that stop – knee in the back, chokehold, gun pointed, made to sit in squad car, handcuffed – more likely to be arrested at the end of that stop, more likely to be charged with a more serious crime and denied bail, and more likely to be treated more harshly all the way through the court system. The courts are the institutions least affected by the Civil Rights Movement. The courts are not much different now than they were in the 1940s and 1950s. The judges are white. The prosecutors are white. The defense lawyers are white. Even in communities where 35 percent of the population is African-American, the jurors are all white because the prosecutors are striking all the blacks from the jury. The Supreme Court decision in *Batson v. Kentucky*, which was supposed to prevent discrimination in striking juries, may as well not exist. Many people of color know this system is not legitimate. They know they will not be treated fairly there. They are being marginalized and they realize they are being marginalized by the very institutions

that are supposed to uphold order and the rule of law. And that mistreatment coupled with the lack of legitimacy and credibility of the courts produces distrust, bitterness, hopelessness, and desperation. People feel that they are outside the system – denied its protections and subject to abuses from it – and outside the larger community.

There are things we can and must do – large and small. We must keep bringing lawsuits to make "representation" a reality. Mark Stephens, the community public defender in Knox County, has filed two lawsuits. The first one declared that his office could not represent all the people who were entitled to representation and the courts appointing the mayor of Knoxville, a Congressman, and some other prominent lawyers and almost immediately there was funding for public defense. More recently he filed a lawsuit about caseloads. He may have lost the suit, but when it was over his staff had grown substantially and the number of cases had been reduced. Public defenders in Missouri and Florida have brought suits to limit caseloads, but, unfortunately, many public defender offices are not independent and cannot bring such suits.

My experience in Georgia demonstrates that the people in control of public defense in that judicial district are not going to hire anyone who would challenge caseloads. The same is true for the entire state. The director of the public defender agency in Georgia serves at the pleasure of the governor. His main concern is that no one in the public defender agency do anything that might aggravate the governor, not zealous representation of poor people accused of crimes. If a public defender challenged case loads in Georgia, he or she would be fired and the case would be over.

Georgia had an independent system briefly, but it was too much justice for Georgia. Wyc Orr was on the board when the public defender agency was created in 2004. He and other members of the board cared about

representation. They would go to the legislature and say we cannot do the job with the funding provided. After about five years, the legislature amended the statute and gave the governor the power to appoint a majority of the board. He put people on it that cared little about right to counsel and more about limiting expense. So any lawsuit to enforce the right to counsel in Georgia is going to be brought by an organization like the Southern Center for Human Rights because the public defenders are not able to do it.

Gideon's Promise, the program directed by Jon Rapping, is critical to making the right to counsel a reality. One of the great challenges is to overcome the culture in places where it has become acceptable to process people through the system instead of representing them. Gideon's Promise is teaching law school graduates how to represent the poor in criminal cases. It teaches more than trial techniques. It teaches the attitude that one must have to be an effective public defender. It is producing the people who will refuse the 300th case or the 156th case when they can no longer represent clients competently and ethically.

The question for real representation and for fairness for the accused is an enormous issue, bigger than any one of us. The struggle has gone on for generations and will never end. But as Dr. King said, we stand on the shoulders of others so that someday others will stand on our shoulders. Those of you who are now students can make a huge difference in the lives of people like Shanna Shackelford, Eric Wyatt, and Jacqueline Winbrone. You can get people released on bail so that they keep their jobs, their homes, and their means of transportation. You can keep them from becoming a street person. You can keep them alive. Of course, you are not always going to be successful, but that is one of the things that makes being a public defender such a high calling, right up there with kindergarten and elementary school teachers and people

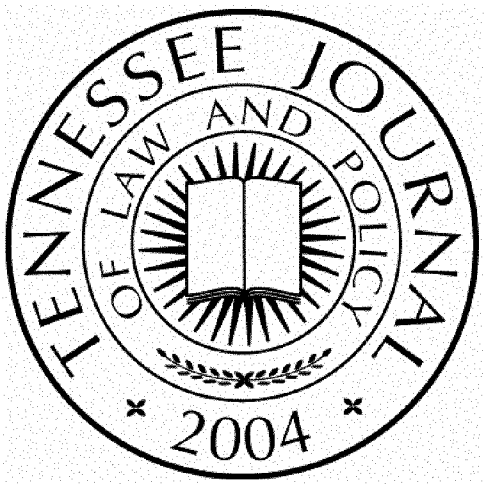
who run soup kitchens and other people who serve those most in need.

A doctor who was reflecting on treating Ebola victims, said that one of the most valuable lessons he had learned as a doctor was what you could do for patients when there was not anything medicine could do for patients. The same can be said for what a lawyer does when there is nothing the law can do for them. A lawyer can still be there to be their confidant, their friend, their supporter, the person who's there for them when no one else is.

My friend William Neal Moore was sentenced to death a long time ago, and when the judge sentenced him to death, he said, "Mr. Moore, you will be taken to the Georgia State Prison and so many volts of electricity will be run through your body on September the 20th until you're dead and may God have mercy on your soul. Sheriff, take him away, take him away." His lawyer never told him that there was an automatic appeal. He never told him that he was not going to be executed on September 20th. So Billy thought he was going to be executed that day. As the day is getting closer, he is writing his sister and his mother in Columbus, Ohio. There is nobody with him in Georgia. But when the day came, he was not taken off to be executed. It is not hard to see the value of a lawyer as a counselor, talking to him and letting him know that they would be an appeal and explaining the whole review process in the state and federal courts. About all the reasons to hope – for a reversal in the courts or, as in Billy's case, commutation of the sentence by the Board of Pardons and Paroles.

The law is a system of oppression that masks a lot of cruelty. But being a lawyer can be a helping profession, just like teaching school, like practicing medicine was at one time. People who are committed to that old-fashioned notion of practicing law – the client-oriented, the family-

oriented lawyers with a good "bedside manner," – who are reaching out to people, and doing it every day, despite all the setbacks, are in some small way taming some of the savagery and the corruption of the system and making the world a little more gentle, a little more humane, and a little more decent for all God's children.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