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Unstoppable v. Unwaivable

Steven Benjamin*

I've had some question as to what I wanted to do with you today. My assigned topic is to talk to you about my experience with indigent defense reform in Virginia. I've been asked to tell you that story to illustrate many of the points that you've heard discussed over these remarkable two days. But I think too that I want to do something in addition for some of you, especially the law students who are in attendance. How many law students are here? Oh, that's wonderful. Now I know what I want to do. I want to talk to you about what it is to be a criminal defense lawyer because you heard Norman [Reimer], our brilliant executive director, identify himself as a criminal defense lawyer, and say that he always has been, he always will be, and there is nothing he is prouder of than that fact.

So let me tell you about my first death penalty case. I was not so many years out of law school, when I woke up one morning to find in my paper the headline that several young men had been arrested the night before for the brutal assassination of a hotel clerk and a businessman in a botched hotel robbery. They had committed, obviously, capital crimes, they would be charged with capital murder, the death sentence would be sought, and I was sick to my stomach because I knew one of these young men. He was a kid I had represented from the projects on a variety of misdemeanor charges and now he was facing a certain death sentence, and I knew that the call would come. I was happy to see that he was appointed counsel, but I was unhappy with what might be expected from that counsel.

I hoped that he wouldn't call, but he called and I went to see him, and he begged me to represent him. I agreed to do so as long as he agreed that the only goal of my representation would be to

* President, National Association of Criminal Defense Lawyers. This Article is, with only slight alteration, the transcribed text of a speech given during the Symposium at Washington & Lee School of Law on November 9, 2012. Some client names have been omitted to protect anonymity.

save his life, and that the certain outcome would be his receiving at least a mandatory life sentence without parole. His guilt was obvious, he had been caught there at the scene, there was no question about it, the only question was whether he would die, and certainly he would, but I would try to avoid that, and he agreed to those terms.

We went to trial, and because this was such an awful case and the publicity so extreme—this happened in Henrico County, Virginia—a jury was brought in from Albemarle County, and they were sequestered for the duration of the trial. The first part went as expected, and he was convicted of capital murder; and then came the second part, and that was the death phase, that's what they call it. That is an awful experience, I'll just tell you. It's unconscionable that our system permits one person, requires one person to take responsibility for another person's life. When I arrived at the courthouse that morning, it hit me, terribly, that this young man was going to die because it was then and it remains still a fact in Virginia that if you are sentenced to death you will be put to death, and you will die within four to five years. That is a given in Virginia. It was also a given that day, many years ago, that at the end of that day my client was going to receive the death sentence. And the only way he was not going to receive the death sentence was if I performed at a level of such extraordinary skill, a level that so exceeded my ability, that the *only* chance he had was if I was 100 times, 1000 times a better lawyer than I knew I was, and yet I was his only hope. With those thoughts and knowing that the day was going to end with the imposition of a sentence of death, a result that was my responsibility to avoid, I went into that courtroom. That is what criminal defense lawyers live with every single day, that degree of responsibility.

The morning proceeded pretty badly. This guy had terrorized the public housing communities during these years of drug wars, and the police would come in as witnesses and take the stand and talk about their surveillance of him and his gang.

They talked about one instance where they watched him arrive in his vehicle with his gang and they described his getting out of the vehicle and they said they arrested him, and when they arrested him he was wearing a flak jacket. A flak jacket is a bulletproof vest made into an entire coat, it is a coat of armor,

and he was wearing this, such was the terror that he brought to this community. They introduced the flak jacket into evidence. They then asked the judge for permission to let the jurors pass the flak jacket, so they could experience this thing. Of course I objected, that was completely wrong, but they did that, and each of these poor jurors hefted this fifty-pound armor-plated coat, as they passed it from one to the other, and they got the point.

Next, they had another officer talk about how in addition to the flak jacket he was also carrying with him a submachine gun, which they introduced into evidence, and, same request, same objection, this was ridiculously inflammatory, but the judge permitted the jurors to take the machine gun, and pass it amongst themselves, and you can't imagine, it's one thing to imagine in your mind a gun like that, but until you hold this awful weapon of death, and feel the weight and the heft of the thing and know that it was designed to kill, and it has no other purpose. Until you have handled that, you don't really get it. Well, those jurors got it. He was a machine of death, protected by armor plates and armed with a machine gun, stalking through the public housing communities, and they were introducing this as relevant to whether he was a future danger.

Things looked bad. Things already looked bad. The entire community knew that he was going to be sentenced to death and believed that he deserved just that. It was a foregone conclusion. We had little or nothing to offer. We put on those who knew him, and they said he was, in their estimation, a good guy. My last witness was, I put on his mother, and she did what mothers do. But nothing was disturbing, nothing was affecting, the atmosphere of death that hung in the courtroom. Nothing. It was an awful place to be.

My last witness was the mother of his children. We took a recess before she came in, so I went out and knelt down in front of her and explained that she would be the next witness, and that I would ask her about my client. As I was going through the questions with her that I was going to ask, she was holding in her arms their infant child and seated on her lap was their young daughter, five years old. As I was talking to them, the little girl began playing with my fingers, as children do. I thought of something just then. I said to the mother, when you go in, if I ask

you to do something, do it. Don't hesitate, just do it, no matter what.

We went in, and I brought her in, she introduced herself, said who she was, I asked the judge for permission for her to go out and get the children so the jury could meet the children. The judge knew that a death sentence was going to result, better safe than sorry, let the defense do whatever they want, if he thinks bringing the kids in is going to help, then let him do it. So he said, "Sure, go ahead." So she brought in the children, and I said, "Judge, may we approach the jury rail?" and he said, "Yes, you may." And, law students, let me tell you, this is proper courtroom decorum. You must always ask for leave of court to approach the jury, to bring in an exhibit, you must always do that, that is an important function of the judiciary. But something had happened there. We had quite properly now, we were standing right in front of the jury—me, the mother of my client's children, and his children. Behind me was the prosecution, the team of prosecutors, and over there was the judge. But the most important thing was I was there with the jury.

So I looked at her and said, "Who is this in your arms?" and she said, "This is Junior" and I said, having picked the only juror who I thought would respond, "Please hand Junior to the juror." She reached out with the baby, and the juror just instinctively reached out, and took my client's baby into her arms. So I had a juror rocking my client's child. The prosecution awoke and they objected. That's understatement. There was a lot of yelling. The judge was . . . pissed off. Don't ever do that. What I did was wrong, let there be no mistake about it, and I don't seek to justify it to you today. The judge demanded to know what I was doing, and you know what I said, right? I said, "If they can hold a machine gun, they can certainly hold a baby." The judge let the baby stay. I thought "What do I do now?" because things had changed, everybody in the courtroom was now suddenly alert. So I thought, "Well, let's go one more step further."

I took the little girl, and I lifted her up, and stood her on the jury rail. She was precious. I said "How old are you?" "I'm five," as she waggles four chubby little fingers. I had just run out of questions, because I don't know what to ask children, so I said, "Thank you" and I picked her up and set her down, and I said,

“You may return the baby to the mother” and she did that, and I said, “You may take the children out.”

Now, what I did, in retrospect, I think it’s hackneyed. When I tell this story, I feel, what were you doing, what a cheap ploy, could it possibly have had any effect? I’m a little embarrassed about that, and what I did was certainly improper. But, you know what, I felt at that moment as if I actually had done something. I had made this instrument of death, my client, for one moment, into someone who had actually done something good. He had brought into life these two beautiful children. He wasn’t just a monster. He was a person. A real person. So when we got to the question of life or death, at the very least, everyone was going to know it was a person that we were talking about.

I would like to think that what I did there made a difference, but I am unconvinced. Because what happened next was that as their mother was taking them out, the little girl, for the first time, she spots her daddy out of the corner of her eye and she spins, on her little patent leather Sunday best shoes, toward her dad, and goes, “Daddy daddy daddy daddy,” just like that, and my client looks up and he grins and just does a little finger wave back at her. That moment was the life in the courtroom, a courtroom that until that moment had been filled with nothing but death, and the certainty of a death sentence.

The jury retired to deliberate. They had only one question: death, or life without parole. They were out for many days. So angry was the community that they were taking this long to return a death sentence, that they tried very, very hard to find me and where I lived to deliver in person the threats of death that we were receiving at my office. There was someone else at my house while I was in trial, when we were unable to reach her we had to send the sheriff and many deputies, such was our concern. That went well. The jury finally came back after several days. They were hung, hopelessly hung, there was no chance of resolution. Under Virginia law, that meant he received a sentence of life. I had to leave town, this was right before Thanksgiving, because the atmosphere was not good. But from that moment on I knew that I had done something, as a human being, as a person, and as a lawyer.

Now what you should know is that at the same time in my career, I was also a court-appointed attorney. I mean, I was part

of the indigent defense bar. I wasn't a public defender, only half of Virginia at that time, not even that, had public defender offices, but I was one of those who routinely took court-appointed cases. I did that for the first eighteen years of my [career], and also took pro bono cases, and took, when I could get them, paying cases. And to do that I was also a member of the indigent community because I was flat broke. I mean, I was flat broke. In order to practice on my own I sold everything I had, a little bit at a time. Each winter, the question was, "Which utilities shall I keep on this winter?" Generally I elected to keep electricity on, but heat went first, the phone was routinely cut off because I couldn't pay my phone bills, my car died, I couldn't replace parts as they were broken, to the point of which, I had this old thing, the starter quit, fortunately it was a standard transmission vehicle, and some of you may know that, with those, if you put it in gear and roll it down a hill, you can start the engine, and so that's how I got around. Which meant, of course, that every place I went had to have sufficient incline that I could get it rolling, I became very good at that.

And I loved it, you know that? I don't want to go back there, but I was a criminal defense lawyer and I was making a difference. I was saving lives, I was preserving liberty, I was protecting people, and I was also vindicating certain fundamental freedoms because in the course of this work, and this is what I miss the most, each and every day these court-appointed cases would bring in these complex, potential constitutional issues, issues that had never been identified or litigated before, that I was able to take up, and I loved that about court-appointed work, just the sheer volume.

As I did this work, I became better at it, but I also had a sense of dissatisfaction because I was seeing the injustices that some of our panelists have alluded to, occur day in and day out in the courtroom. The lawyers being appointed, who everyone knew were going to do nothing, absolutely nothing, for their client, and yes, this offended me. Now in response to one of our panelists, no, when you're a lawyer in the audience, you don't get up and interrupt the proceedings to proclaim the unfairness, or you'll be arrested. But, see, our training, as lawyers, and the law license that the state gives us, imposes on us, I believe this deeply, a certain moral obligation to do what we can at any moment that

the opportunity arises. Think of it this way: If you are standing on a street corner and a puppy or a baby begins to wander into a busy street, you have no legal duty to intervene, unless you're the parent, but you can stand there and watch the awful thing that happens, and there's no legal liability, but you certainly have a moral obligation, don't you? And I think that is what we have as attorneys, and that's why we have pro bono obligations.

Well, for the criminal defense lawyer, who is in the middle of the system, we have that training to recognize fundamental unfairness, constitutional issues, and we have that obligation to object and to challenge. So, as I watched this, I realized, some years ago, I needed to object.

I began in 1993, with a gentleman named Paul Husske. Now, Mr. Husske had entered the criminal justice system on a relatively minor misdemeanor. He had been accused, he had been caught peeping in somebody's window. So the court appointed a lawyer, it was just a misdemeanor, and he agreed that he would plead guilty, and get no time, all he had to do was go through sex offender treatment, which was not much, but he had to do that. During the course of that, they required that he meaningfully participate, and that meant admitting to anything, any deviant acts he had committed in the past. If he didn't admit to his wrongs in the past of a sexual nature, then he would not have fulfilled the requirements of sex offender treatment, and he would receive an active jail sentence that had otherwise been suspended. So he did what he was required to do by the state, he admitted to having committed rapes. The mental health worker reported this fact, one thing led to another, and Mr. Husske was arrested and charged with a series of rapes. I was appointed to represent him.

I made the objections and litigated it all the way through the Virginia Supreme Court, that this was a coerced statement, confession, and was inadmissible, but I lost on that, and that opinion is published, it's called *Husske v. Commonwealth*.¹ So we went to trial. What I did, though, in the trial, turned out to be important, not so much for Mr. Husske, but for the system of law and all of us in general, because there was DNA in the case, in addition to the confession, there was DNA. This was in 1993,

1. Husske v. Commonwealth, 476 S.E.2d 920 (Va. 1996).

these were the early days of DNA, and so my objection was that we were not prepared to go to trial, and could not go to trial, because the state was denying us a basic tool of an adequate defense, and that was a DNA expert, we had to have that. We litigated this pre-trial, we lost, but ultimately prevailed in the Virginia Supreme Court, and the Virginia Supreme Court recognized a constitutional right to expert forensic assistance, under certain conditions.² I had achieved something. That was a three-year battle, and that's something I was able to do as a court-appointed lawyer.

Fresh from that 1996 success in reforming the law, I turned next to the biggest problem that I saw facing the indigent defense community in Virginia, and that was mandatory fee caps. In 1997, when I was appointed to represent a man named Salahudin Webb, charged with first-degree murder of a young teenager, I accepted the appointment, it was going to be a troublesome case. It was troublesome for a number of reasons, one of them being that Mr. Webb was helplessly schizophrenic; and he was incompetent. We had competency hearings, and during the course of the psychiatric evaluation Mr. Webb explained to the psychologist that he really didn't trust what was going on because although Mr. Benjamin was a very nice man, Mr. Webb was aware of the severe limitations on compensation for court-appointed attorneys, and there just wasn't anything in it for the attorney, and so he didn't expect the attorney to do anything, and so, no, he didn't trust the system whatsoever.

I read that, and I thought, well, you know, he's right. I knew that I was going to work as hard as it would take to defend him, but he didn't know that, and I thought, you know, *Gideon* [*v. Wainwright*]³ and the Sixth Amendment⁴ doesn't require a defendant to take that risk, and let me tell you what I mean by

2. See *id.* at 925 (“We are of opinion that *Ake* and *Caldwell*, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with ‘the basic tools of an adequate defense,’ and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts.” (citation omitted)).

3. *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (holding the Sixth Amendment required the appointment of counsel for indigent criminal defendants).

4. U.S. CONST., amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

that. Back then, the way the indigent court-appointed compensation system worked, is we were paid on an hourly basis, \$45 out-of-court, \$65 in-court, not bad for court-appointed work, for each hour that we worked. The problem was that for the most serious of crimes, that is, crimes with a potential penalty greater than twenty years, up to life imprisonment, well, let me back up. There were caps on what you could be paid. You got paid by the hour, up to a certain cap, a ceiling on the compensation you could receive, and once you hit that cap, then you could not be paid anything else. The judge had no power to waive the cap, that's all you could be paid for your representation. So in an offense like first-degree murder that carried up to life imprisonment, no matter how many hundreds of hours you might expend in pre-trial litigation, no matter how many weeks you might be in trial, no matter what, no matter how many hundreds of hours you spent, the most that you could be paid for your representation of an indigent accused of first-degree murder was \$575.

This covered just a handful of hours. What this meant was that after you had spent ten hours or so of representation, two things: you weren't getting paid any more, but in addition, you see, you have to keep your office going, overhead. I moved to dismiss the prosecution. I put on evidence of all these factors, including evidence that it cost a frugal solo practitioner, if he worked, took no vacation, if he worked forty hours a week, fifty-two weeks a year, that it cost him \$62 an hour just to keep his office open, and that's before he received any compensation. And so what would happen is as soon as you hit that cap, not only were you not receiving compensation, it was costing you, the private attorney, the businessman, \$62 an hour just to keep your office going so you could provide free [representation]. In other words, this presented a debilitating financial disincentive to working anywhere beyond that handful of hours the state was willing to pay for you, and this I identified as a conflict of interest.

Now conflicts of interest, in the criminal justice system, we're familiar with that when, for example, you claim to represent co-defendants, and the law recognizes that that is an unavoidable conflict of interest, you can't be the attorney for two people facing the same charge because there will always be differences, some situations will be mitigated, and so the law will not permit you to

do that. If a judge, faced with this, fails to make an inquiry into the fact of conflict, then the case is reversed, even if there is no demonstration of prejudice, that's the law of conflict of interest.

I further put on evidence that the practice in Virginia had become one of a substandard practice, that as a result of these caps indigent defense was substandard, that lawyers used and employed a double standard of representation, one standard for the paying client, second standard, out of necessity, out of financial necessity, for the indigent. Having put all this on, then I argued that under the law, under *Gideon*, and the subsequent cases, that the Sixth Amendment right meant not only the right to assistance of counsel but also the right, and this was the holding of *Wood v. Georgia*,⁵ a later case, the right to conflict-free counsel.⁶ Just as the state could not appoint an attorney to represent co-defendants, the state could not create by statute an unavoidable financial disincentive. That was a conflict of interest.

The judge heard all this, and he denied it, and that's how the law advances. The trial judge had denied my request, my objection to the state's failure to provide a forensic expert in *Husske*, and so the law typically advances with preserving the objection, making the record, and moving on to appeal, so the law can adapt, and change, and progress as circumstances and society changes. That's what led to the recognition of the right to a mental health expert in *Ake v. [Oklahoma]*⁷ in 1985, the role of psychiatry and the role of mental health defenses in the criminal justice system had evolved to the point that it was recognized as a basic tool of an adequate defense⁸ and so this was the same thing for our forensic expert. I intended to appeal.

But, the thing is, my objection had captured a great deal of attention and there was a lot in the paper. So at the next criminal docket call, another trial court judge made an announcement to

5. *Wood v. Georgia*, 450 U.S. 261 (1981).

6. *See id.* at 271 ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.").

7. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

8. *See id.* at 78–83 (describing evolution of psychiatry in the criminal justice system and holding that when a defendant can show his sanity will be at issue in the trial, the state must provide a competent psychiatric expert to assist in the defense).

the criminal bar and said that he had read about this objection to the court-appointed scheme in Virginia and that he was outraged that an attorney would make such an objection, that henceforth there would be no more such objections. That's unconscionable. That's what we do: we object. That's part of our fundamental duties as defense lawyers, to challenge the process. Question the proof, challenge the process. That is our fundamental, sworn legal duty, and he was announcing: No more constitutional objections.

As each lawyer came up, he said, "I'm going to ask each of you, as you come up, do you feel you have this conflict of interest under Virginia law? Because if you do, the court will take you off the list of attorneys permitted to accept court-appointed cases." And having been ambushed, in their defense, by this declaration, and quite frankly, counting on court-appointed work as their livelihood, lawyer after lawyer went up and they were questioned by the judge, and they all said, "No, sir, I don't understand that to be a problem." He said, "Fine, I'll set your case for trial." My turn came, and, you know, there's so much involved in being a good lawyer, and one of those things is just being aware of everything around you, and paying attention to detail, and one of the details I noticed was that there was no court reporter there. He said, "Mr. Benjamin, do you have a conflict?" and I said, "Judge, let me suggest, and move, that we move this to a special day and time to reconsider your question," and he said, "Fine."

That day came, and I had a court reporter there. He asked me about my objection, and did I intend to raise this objection, and I said, "I certainly do. Look, before I answer that question, I want to tell you something. It has been my privilege to have served on this list," the court-appointed list, "and to have served this court for a very long time. However, I am removing myself from the list of attorneys eligible to accept court-appointed cases in this county, and I am taking this action so that there will be no question in the future whether my judgment on behalf of any individual client is affected by fear of reprisal," and I had summarized the sanctions and the threats that he had made so that was clear on the record and I said I was taking myself off the list. And I said, "But I am not withdrawing from the representation of this individual to whom I have been appointed as his attorney." The judge said, "What would you have me do? If you're not going to promise me you're not going to make this

objection, what am I supposed to do?” and I said, “You’re supposed to,” I’m certain my words were much more succinct, but what I said to him was, “I want you to be a judge and I want you to rule on the objections that I, in my own discretion, choose to make. So hear me now, if I decide to make a constitutional objection, on any basis, including an unavoidable conflict of interest within this system on behalf of this client, then I will make that objection.” And he said, “Fine, you’re removed from this case.” The next morning I had another case that came up, it was a court-appointed case, and lo and behold, we’re in front of the same judge. Same colloquy: “Do you intend . . .,” “Yes I do,” “You’re removed.” The day after that, another court-appointed case, incredibly, same judge, same colloquy, same result. I started to sense a trend.

Meanwhile, things had become very, very ugly, there were threats of disbarment, of disciplinary proceedings. I was never sure what the ethical thing was I may have breached, and nobody else was either, because that never materialized, but it was a grave concern. Meanwhile I was calling NACDL⁹ and talking to my mentors there for a little assurance that they had my back. There’s tremendous value in NACDL, because in the courtroom you’re all alone. Kind judges would take me into the back and ask me, “What are you doing? You’re a good lawyer, everybody likes you, but this is bad. Come on.” Everything was going down that road, and this was during a two-week period.

Finally, one case, another murder case, had been set for trial and that judge called us back in and said, “Mr. Benjamin, I just can’t ignore this. Yes, you’ve raised the objection, and I denied it,” this was another matter where I had preserved the objection, that’s what we do. He said, “But I want to go back through this,” because obviously he had gotten pressure from the other judges, and so we went back through it, and I kept explaining the conflict of interest, it’s unavoidable, remove me, appoint another lawyer, whether he knows it or not, the same financial disincentive works there, unless he’s able to do this first-degree murder defense in like five hours or so, which he can’t, then each hour he works is going to cost him out of his own pocket. He might not mind, but the point is the client shouldn’t have to accept that risk. The

9. The National Association of Criminal Defense Lawyers.

Sixth Amendment and *Gideon* doesn't require the assumption of the risk that an attorney is going to discharge his ethical obligations. That's not *Gideon*. The judge said, "No, I'm going to remove you." At that point, he turned to my client and said "You're the victim here," I loved that, a defendant in a first-degree murder case being called a victim, "How do you feel?" My client, bless his heart, said, "Please don't remove Mr. Benjamin from this case, he's my lawyer, and I trust him, and you've got me set for trial in just a couple days, don't do this to me." And the judge said, "I'll think about it over the weekend."

On Monday he announced that he would leave me in, he did, and we went to trial. Interesting story, my client had refused to cooperate with my defense, and said, "Look, I'm innocent, just prove me innocent," and that was about it. Well, we had done a tremendous amount of work, far beyond the caps. We had dug into our pocket and hired a private investigator, and so we did that. We did that. We proved he was innocent. During my cross-examination of his wife—see, he was accused of having killed his mistress shortly after a dalliance in a local apartment, and when they walked out, somebody, they say he did, killed her. His wife testified and I cross-examined her and I did OK, and I think it became clear who was really guilty. But then during the course of this we were also able to bring in witnesses who testified to her having admitted having done it, and many, many things came into play, but the point is we demonstrated his innocence so well they arrested her mid-trial. Obviously they had to do something with his charges, dismiss them, and that turned out to be my last court-appointed case.

But I wasn't done. Of course not. What we did next, and we did the appeal I had talked to you about, and that was unsuccessful, the Virginia Supreme Court did not feel that they could review this question for a variety of reasons. And that's when I did what we do as defense lawyers, I went then to NACDL, and this is where the power of the organized bar comes into play. I said, "We need your help in Virginia." And they got it, and they understood, because this is what the organized bar will do. What happened is over the next eight years NACDL focused its efforts and its resources and its funds on Virginia and we went to work. We commissioned a study, you've got to have a study, we did a study of the system there. We brought in Covington &

Burling to do pro bono assistance, and they did a magnificent job, dedicating years of attorney power to this. We did a broad, across every front you've got to deal with, I had every editorial writer in the state, and *The Washington Post* editorializing on injustice in Virginia. I was talking indigent defense 24/7 on every possible front. Every time someone was exonerated I was bringing it forward, it was nothing but a seething morass of injustice and inhumanity 24/7. Still, no movement on those damn caps.

Finally, Covington [said], "Hey, we've got to pull the trigger." We put together a class-action lawsuit. Once it's filed, things change dramatically, including, you could lose, for any number of reasons, other than the merits. So we met the summer of 2006 with the attorney general, to show him the class action we were prepared to file, and he said, "Look, I understand. But if you file this I have to become adverse to you. I am your friend. Let me work with you one more legislative session." So we agreed, but that was a very difficult decision to make.

That following session we worked with the state political leadership, including some very law-and-order folks, who understood, because we had educated them, we had educated them through years of efforts and talks, and because of the credibility of the folks that we brought into the process. At the end of that legislative session, in 2007, almost ten years, well, actually, ten years after I first raised, I first dared as an individual defense lawyer in an individual, court-appointed case, to raise an objection, to dare to question the adequacy of the state compensation, ten years later the Virginia General Assembly voted to, and did, abolish the caps on indigent defense compensation.

We made a difference. I did, because I did what defense lawyers do, I stood up to the tyranny of a judge who would not permit an objection on constitutional grounds at threat of sanction. I stood up to that. I put myself at risk, and I'd do it again. I put at risk my young, at the time, associate, now brilliant law partner, because she was dragged into this too because of guilt by association. That's what I did, that's what we did with NACDL. We did this together. That's how any court-appointed lawyer, any public defender, can make a fundamental difference in the criminal justice system and in society.

And it kept getting better. Virginia, when we began this, was 51st, counting D.C., in the nation in what we paid to court-appointed attorneys because of the draconian effect of that mandatory cap, 51st, and not even close to number 50. Alabama and Mississippi shone by example next to Virginia. I think we are now in the tops, overall, in how we provide indigent defense. We now have an indigent defense commission that regulates and oversees public defenders and the private, court-appointed bar. We have standards of practice that are brilliant. We have an enforcement mechanism for the standards of practice. We even have a complaint process so that individual defendants can complain about their own attorney and a resolution process. We have training that is untouchable: a boot camp for new public defenders, weekly sessions, annual training, and, then finally, the Supreme Court sponsors a free advanced indigent defense seminar every year, we have 650 attorneys attending in one room with two satellite locations, and we fly in the very best from across the country to teach indigent defense. That is Virginia now.

And so, today and yesterday as we talk about *Gideon* and the promise of *Gideon*, as we have some very interesting and stimulating discussions that dare to question the existence or the expansion of *Gideon* and even raise the question of whether we might, just out of practicality, consider turning some of the attorney functions over to nonattorneys, I want to tell you, if I haven't conveyed this yet, what it is to be a criminal defense lawyer, because it is a remarkable thing.

Gideon is a promise, right? Well, so is the Fourth Amendment, and that hasn't worked out so well. A right without a remedy is a meaningless ideal, and that's what *Gideon*, the promise of *Gideon*, would be except for one thing, there's one reason why it works. It means that no prosecution can proceed unless there is an *attorney* in that courtroom. And if there isn't an *attorney* there, and by that I don't mean, just a warm body with a law license. I mean somebody who's had the experience, and the training, the education to identify even in a trespassing case—I took a trespassing case, I was in the United States Supreme Court, I argued a misdemeanor trespassing case because it presented fundamental due process and free speech issues, that I, as an attorney, could recognize in the course of defending, pro

bono, a trespassing case. The gift of *Gideon* is that they have to have an attorney present.

Gideon still works no matter how poorly they pay us, no matter how harsh their rulings, no matter how unfair the system. It doesn't matter. If you're a court-appointed attorney, you embrace the challenge because of your passion and your belief. That's what it is to be a court-appointed lawyer, and that is what makes *Gideon* work. It's because of who we are. I want you to understand that we become lawyers not to lie down. We become lawyers because we believe in freedom, we believe in the inherent worth of the individual, and we believe in the fair and equal protection of the law. These are our core beliefs. This is who we are as people. And because we fear the unchecked power of government, the power of government, always remember what the stakes are, when you talk about can we take a lawyer out of the equation. Remember, what we're talking about is the complete, raw power of the government against one individual, and the question being can that government take his life, or his liberty. And the only thing that checks that power is an attorney.

So when we talk about maybe decoupling the requirement of a lawyer here and there, remember what we're talking about; that is, the unchecked power of government that we fear. We fear it just as we fear the irrational hatred, the bloodlust of an angry mob, and very often, too often, that is exactly what our government appears to be, the lynch mob of old, and we are the only thing standing between them and the accused. We became lawyers because we are incapable, we are simply incapable, of walking away from injustice. Because we believe, I think the best state slogan there is in the entire country, "Thus Always to Tyrants."¹⁰ I love that. That's how we see ourselves. That is how we respond to tyranny. That's why we became lawyers: to do battle. To slay tyrants. To protect liberty. That is who we are, no matter what.

And so the strength of *Gideon* is in what we do. We come forward to confront injustice when no one else will. That's who we are as lawyers. We speak for those who have no voice, we sacrifice

10. The state motto of Virginia is "Sic Semper Tyrannis," or "Thus Always to Tyrants." JANET V. KELLY, SEC'Y OF THE COMMONWEALTH, REPORT OF THE SECRETARY OF THE COMMONWEALTH 10 (2013), <http://www.commonwealth.virginia.gov/StateGovernment/BlueBook/2012-2013/Virginia%20Facts.pdf>.

for those who have no resources, and we defend with every ounce of our being those who have no means to answer an accusation that would otherwise take away their life or deprive them of their freedom. We don't do this for recognition. We certainly don't do this for reward. We do this because what unites us is an understanding of a moral obligation to stand up so that tyranny won't prevail. It's that simple. That's what lawyers understand.

Now, there [are] hardships. It's not easy, and I've tried to illustrate that with what I've talked to you about. Those hardships, it's the anguish of responsibility for another person's life. Nights of—you think it's bad the night before an exam? Nights of fitful sleep and trial dreams, you know, the days of eking out an existence on court-appointed pay, the threats and the hatred to which we and our families are exposed. Anyone else would quit. But the strength of *Gideon* is that criminal defense lawyers will not. We call ourselves liberty's last champion. To give life to that, we do what we do, we return to those courts that anyone else would abandon, and we fight another day, and another day after that for our clients, for their rights, for the freedoms of us all, and we do this until we can do it no more. Until we're depleted, our objections, our arguments, our pleas are exhausted and we have quite simply nothing more to give.

That's why we come together. I can't overstate the power, and the strength, and the need for the organized bar, and for the criminal defense lawyers it's the National Association of Criminal Defense Lawyers. Because when we come together from wherever we practice, we draw strength from each other, much as I think we are drawing strength today, from the shared experiences and the losses and the victories that we sustain in a world that no one else can possibly understand. That's my request for all of us today, as we consider the challenges, the failures of *Gideon* and the solutions toward moving forward, that we also remember the strength of having a criminal defense lawyer, a real lawyer, involved in the situation. With that strength, with that involvement, we can do unimaginable things, and we can make a very real difference. Thank you for letting me speak to you today.

