

## **Seeing Those We’ve Rendered Invisible – A Clarion Call for Criminal Justice**

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JONATHAN RAPPING, *GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO  
TRANSFORM CRIMINAL JUSTICE* (Beacon Press 2020)

Without a good defense attorney,  
the accused [will] find their humanity remain[s] invisible.  
– Jonathan Rapping (P. 16)

You must stand unshaken amidst the crash of breaking worlds.  
– Paramahansa Yogananda

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### INTRODUCTION

*I decided I wanted to be a lawyer the first time I walked into a courtroom. I could not have been more than six years old.* (P. 1) So begins this critical, hopeful book written by Jonathan Rapping—part recipe for what ails us, part memoir, and a surprisingly rich enmeshing of the two. In its first lines, we learn the young Rapping “had been taught to have a healthy dose of skepticism of authority,” so, “[t]rue to these teachings, I went to court with my toy water gun tucked in my pants.” (P. 1) Those words bring back fond memories for Stephen’s chronologically-similar days of yore. Yet we don’t experience similar joy when we picture in our minds’ eye what might follow were a young, black boy to bring a toy gun into a courtroom today. There is much that ails us indeed.

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In this brief review, we situate Rapping’s work among those demanding criminal justice reform, praise an unrelated bonus, and propose a friendly amendment to nudge his vision over the finish line of justice. It will not be enough to provide newly enabled and supported public defenders to those our systems consider indigent. We ought to provide them to us all.

## I. WHO ARE WE?

Good question. Because we’d like to be free to speak in our own voices, and because our experiences tutor our beliefs as do everyone’s, we should mention what brings us here. Stephen is mostly an ivory-tower academic who early on traded the potential to do real good in criminal justice for the hope that he might encourage others to heed that call. Jordan was his student, and is currently serving on the front-lines of criminal justice as a Deputy State Public Defender in Colorado.<sup>1</sup>

## II. A PLACE IN THE PANTHEON

*Courtroom 302.*<sup>2</sup> *Getting Life.*<sup>3</sup> *Just Mercy.*<sup>4</sup> *Picking Cotton.*<sup>5</sup> *The Innocent Man.*<sup>6</sup> American criminal justice is deeply flawed, to be sure, but we are fortunate to have tremendous books and films to guide us towards a better place. A natural question, then, is whether Rapping’s book has a place in the most rarified of that pantheon and, if so, what that place might be.

Fortunately, both questions are rather easily answered. First, Rapping chronicles different stories of injustice—primarily those he has personally witnessed in his work—and we simply can’t afford to grow tired of hearing such stories until we finally change the systems that daily generate them. But *Gideon’s Promise* has a much more central place than just that, for Rapping himself has a much more central place. While countless persons have made innumerable contributions to American criminal justice, nobody has done more to *systematically* improve public defense than Jonathan Rapping, Ilham Askia, and their *Gideon’s Promise*.<sup>7</sup> And since an estimated 80% of criminal defendants in this country receive such a defense (P. 10, 17), its place is obviously central. Rapping cut his chops as the training director for the illustrious *Public Defender Service* (PDS) of DC (P. 59), but he has become a training director for us all.

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<sup>1</sup> Her views shared herein of course no more reflect the views of that department than Stephen’s reflect those of Sooner football...or anyone else at his University.

<sup>2</sup> STEVE BOGIRA, *COURTROOM 302* (2005). This book, albeit just a bit dated, provides a wonderful sense of the day-to-day realities of an American criminal courtroom.

<sup>3</sup> MICHAEL MORTON, *GETTING LIFE* (2015). Perhaps the best single volume on false convictions, by the hand of he who lived it.

<sup>4</sup> BRYAN STEVENSON, *JUST MERCY* (2015). Stevenson shares powerful, inspiring, and deeply troubling accounts of American criminal justice leading to, and now improved by, his Equal Justice Initiative (<https://eji.org>).

<sup>5</sup> JENNIFER THOMPSON-CANNINO AND RONALD COTTON, *PICKING COTTON* (2010). What could have been ‘merely’ a harrowing story of the vagaries of eyewitness identification became an inspiring story of humanity.

<sup>6</sup> JOHN GRISHAM, *THE INNOCENT MAN* (2007). In his only work of non-fiction, Grisham deftly accounts the false conviction and (effectively) systematic torture of Ron Williamson.

<sup>7</sup> While *Gideon’s Promise* is of course the title of Rapping’s book, it is also the name of their nonprofit organization. See *Gideon’s Promise*, <https://www.gideonspromise.org/>.

Rapping’s thesis has always been that American criminal justice has a culture problem, something both of us have witnessed. More than anything else, what disillusioned Stephen from a career in criminal practice were the blinders—both prosecutorial and defense—that he experienced in his law school internships. While he was still sufficiently naive to be entranced by a criminal defendant in the courtroom lockup playing long-distance hide and seek with a young child in the public gallery (presumably the defendant’s son), the system pounded away such that most of those working in the system noticed nothing at all.<sup>8</sup> In the twenty years since, little has changed. From Jordan’s first days as a public defender, her loved ones have encountered the commonplace, unfortunate perception that indigent criminal defense is somehow a ‘bottom feeder’ for those unable to get a ‘better’ job.<sup>9</sup> Indeed, to protect against the potential jury impacts of such ignorance, Jordan routinely requests that the prosecution not refer to her client’s representation as publicly funded or to her as a ‘public defender,’ a request that would be patently unnecessary in any just system.

In one of our favorite passages from the book, Rapping’s son Lucas experiences his own criminal justice awakening:

We had just spent the morning visiting the National Museum of African American History and Culture. We began our tour at the bottom level and journeyed from the early days of the transatlantic slave trade to the emancipation of enslaved people in America. We were emotionally drained and decided to return the next day to see the rest of the museum. After lunch, I decided to take the kids to see one of the courtrooms where I used to practice as a public defender.

We walked into courtroom C-10, where “first appearance hearings” take place. I knew many of the people working in the courtroom that day. I knew the judge. I knew most of the clerks who were handling the paperwork. I knew the defense lawyers. While I did not know the prosecutors working that day, I was sure I had known many just like them. These were all well-intentioned people. None harbored any conscious animosity toward the men who would be brought before the judge that afternoon.

Soon the clerk started calling cases. One by one, men were brought before the judge. All of them were black. They each had their hands cuffed together and attached to a chain around their waists. Each case was resolved fairly quickly. All were relatively minor charges. After about half a dozen cases were called, Lucas,

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<sup>8</sup> Again, *most* of those in the system noticed nothing at all. On the way to an initial appearance, a federal prosecutor took care to emphasize that an *arrest*—not a trial and not a conviction—could ruin a life. That was Jeffrey Alker Meyer, now a United States District Judge for the District of Connecticut. And the State’s Attorney for the Judicial District of New Haven made a forceful statement for justice when he refused to ever work again with an arson investigator he believed had presented false testimony. Both were valuable life lessons from those who managed to never stop seeing every person’s humanity, despite being knee-deep in systems that too often did just that.

<sup>9</sup> Ironically, of course, this sentiment is true: there is no better job than indigent criminal defense. But that is *not* what such persons are intending to express.

my ten-year-old son, turned to me and said, “Daddy, this is just like the museum.”

A room full of criminal justice professionals had become used to something that a ten-year-old child understood was more akin to slavery than to justice. Lucas was troubled. He was confused. ... No one else was troubled. ... [J]udges, lawyers, and courtroom administrators [had] become desensitized to injustices that even children can recognize. (P. 13–14)

One hundred years ago, G. K. Chesterton was called to jury duty and made somewhat the same discovery:

[T]he more a man looks at a thing, the less he can see it ... .

[I]t is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things ... . And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, ... [o]ur civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained [persons].<sup>10</sup>

Both Lucas Rapping and G. K. Chesterton poignantly express both the humanity of which we are capable and the cognitive dissonance that causes most institutional criminal justice actors to retreat from it. And while Chesterton saw untrained civilian jurors playing a saving ‘outside-the-system’ role, juries hardly participate in our systems anymore.<sup>11</sup> Thus it is that we have a “legal assembly line that whisks [defendants] from accusation to conviction,” “view[ing] people as case files to be quickly processed and disposed of.” (P. 11) We have a culture problem, and it will not be easily nor indirectly changed. After chronicling particular instances of judges doling out injustice, Rapping puts it like this:

These are less stories about individual judges than they are about a criminal justice culture. ... [E]veryone who participates in the criminal justice system is capable of being molded by it. This is true for judges. It is true for lawmakers. It is true for prosecutors. And it is true for public defenders. (P. 178)

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<sup>10</sup> G. K. Chesterton, *The Twelve Men* in TREMENDOUS TRIFLES 80, 85–86 (1920).

<sup>11</sup> Not to mention that juries are of course an *ideal*, as they have often enough meted out injustices of their own. See, e.g., Kiel Brennan-Marquez & Stephen E. Henderson, *Artificial Intelligence and Role-Reversible Justice*, 109 J. CRIM. L. & CRIMINOLOGY 137, 156–63 (2019) (discussing both the ideal role and the practical vanishing of American criminal juries).

Culture is like the current of a mighty stream. ... If a person wants to swim against the current, they may be able to for a while. But only for so long. ... The person will either get out of the water or be carried by its flow. (P. 92)

Here's the crux that Rapping makes so clear. If every public defender in America suddenly had twice the salary and half the caseload, would it solve our systems of adjudicatory criminal injustice? No. Of course, it would *help*, because some good eggs could do even more good. But many public defenders would merely more happily do precisely what they've been doing, because, given our current culture, they believe they are doing great work!<sup>12</sup> Mere caseload reduction and resource increase—as important as they each are—would not bring about the client-centered defense necessary to recognize the humanity of criminal defendants. (P.22) Instead, just as the entire culture of contemporary policing must change, the entire culture of criminal adjudication—including indigent defense—must also change, and Rapping's hard work has made him its best champion.

For this reason, anyone who cares about criminal justice—from lawyer to educator, from policy-maker to prospective juror—ought to read his book.

### III. CAN I JUST WATCH THE MOVIE?

In 2013, the Fiftieth anniversary of *Gideon v. Wainwright*,<sup>13</sup> HBO Documentary Films released *Gideon's Army*.<sup>14</sup> Directed by Dawn Porter, the film features (among others represented) three young public defenders affiliated with Rapping and Askia's Southern Public Defender Training Center, the forerunner to Gideon's Promise: Travis Williams, June Harwick, and Brandy Alexander.<sup>15</sup> All three are captivating, the film is wonderful, and Stephen often shares it with students. As many times as he has seen it, the stories never fail to speak to him, never fail to urge him to be personally better, and, often enough, break his heart all over again.

Still...even *documentary* Hollywood *will be Hollywood*, and *Gideon's Army* tends to focus on those who are fascinating and burning bright, as opposed to those with the support, resources, and iron will necessary to be long-term change agents. Moreover, given the focus on three young defenders, the movie provides only glimpses of Rapping's own experiences in criminal justice reform. So, no, you can't *just* watch the movie.

Nonetheless, we recommend that you do!

### IV. CRIMINAL JUSTICE WARRIOR... AND ONE HELL OF A DAD

In addition to—or, better said, as an integral part of—its experiential call to reform, Rapping's book is a personal memoir, including chronicling his reform efforts toward statewide public defense in Georgia, his work in New Orleans

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<sup>12</sup> Rapping retells a particularly stunning, infamous example on pages 126–27.

<sup>13</sup> 372 U.S. 335 (1963).

<sup>14</sup> *Gideon's Army*, <https://www.imdb.com/title/tt2179053/>.

<sup>15</sup> See Shereen Marisol Meraji, *HBO's 'Gideon's Army' Looks at Three Defenders of the Poor*, NPR, June 30, 2013, <https://www.npr.org/sections/codeswitch/2013/06/30/196664265/a-look-at-three-types-of-lawyers-who-defend-the-poor>.

following the devastation of Hurricane Katrina, and his increasingly national work since. In various stages, that work emphasizes all three sides of Jeff Sherr’s “motivational triangle”: the *warrior* driven to fight authority (remember young Rapping and his squirt gun!), the *social worker* driven to personally help those society hardly gave a chance, and the *movement builder* driven to societal betterment. (P. 117–19) Yet because the book *is* memoir, and because a fourth motivation also drives Rapping, the book necessarily embodies it as well: *Family*.

From the book’s very first ‘origin story’ pages, to wife Ilham Askia dropping a deserved and hilarious, “Hell no!” (P.72),<sup>16</sup> to a sister with sage advice about naming an organization (P.136), to the book’s terminal pages relating a gift last Father’s day (P. 207), to literally the book’s final paragraphs sharing the humanity of daughter Aaliyah (P. 208–09), Rapping’s book is—remarkably—a love story. Not only would Gideon’s Promise the *organization* not exist without Askia, but Jon would hardly be the Rapping of these pages without her and their children. In turn, Askia would not exist without the love of Shakir Askia, a man our criminal justice system needlessly shattered. (P. 2–3) Thus, while it should at some level not surprise that a book about reforming criminal justice is a book about how *people matter*, it is worthy of note for at least two reasons.

First, the lives our criminal justice system shatters are often those of the following generation, including on account of removing male role models.<sup>17</sup> It is therefore always refreshing—yet sobering—to realize the importance of family relations in any criminal justice story. Second, Rapping’s quest for justice, which he invites the reader to join, is, at core, a quest simply to recognize the good in humanity, which *includes* its moral complexity. Returning to the long-ago experience of G. K. Chesterton when serving on a criminal jury:

All the time that the eye took in these light appearances and the brain passed these light criticisms, there was in the heart a barbaric pity and fear which men have never been able to utter from the beginning; but which is the power behind half the poems of the world. The mood cannot even inadequately be suggested, except faintly by this statement that tragedy is the highest expression of the infinite value of human life. Never had I stood so close to pain; and never so far away from pessimism.<sup>18</sup>

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<sup>16</sup> We *could* share the context, but we want you to read the book!

<sup>17</sup> For example, according to the authors of one study, “Adult children of incarcerated parents were more likely to engage in criminal behavior, have mental health problems, use illegal drugs, and fare worse in their educational achievement, earnings, and intimate relationships.” Daniel P. Mears & Sonja E. Siennick, LSE US Centre, *Children’s Life Chances Are Hurt When Their Parents Are Sent to Prison*, <https://blogs.lse.ac.uk/usappblog/2016/09/23/childrens-life-chances-are-hurt-when-their-parents-are-sent-to-prison/>. See also Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RSCH. ON ADOLESCENCE 369 (2004) (finding that adolescents in father-absent households faced elevated incarceration risks).

<sup>18</sup> Chesterton, *supra* note XX at 82.

In seeking to embrace—rather than shy away from—humanity’s moral complexity, we might turn to the words of Helen Prejean that have long inspired Rapping,<sup>19</sup> or to those of Robert Penn Warren:

And what we students of history always learn is that the human being is a very complicated contraption and that they are not good or bad but are good and bad and the good comes out of bad and the bad out of good, and the devil take the hindmost.<sup>20</sup>

Only Rapping—unlike Warren’s fictional Jack Burden—is not satisfied leaving those who cannot cope to whatever fate befalls them; a criminal defense attorney would never accept such result. At least not before that person receives a good defense. And how ought we to *define* a ‘good’ defense? “[T]o be successful as a public defender ... mean[s] being able to look in the mirror each night and know that today you gave each and every client the representation you would want for your own loved ones.” (P.59) Our current system depends upon dehumanizing criminal defendants, and thus the antidote is an affirmation of the humanity and dignity of all persons, meaning the system would treat every defendant as someone’s son, someone’s daughter.<sup>21</sup> And for Rapping—fiercely proud and thus protective of his children—that is a meaningful standard indeed.

#### V. ACROSS THE FINISH LINE

Obviously, we agree with Rapping’s prescription for reforming the culture of public defense, and thereby, ultimately, the culture of our criminal adjudication. But we think that goal will require at least one further move, and we tentatively proffer a potential second.

##### *i. Everyone Deserves a Public Defender*

First, consider the introduction to *Law and Order*, which classically is this:

In the criminal justice system, the people are represented by two separate yet equally important groups: the police, who investigate crime; and the district attorneys, who prosecute the offenders. These are their stories. *Dun dun.*<sup>22</sup>

Rapping’s longstanding objection, which he repeats in the book,<sup>23</sup> is that the introduction ought to include public defenders (P.46). He’s absolutely right. But even as Rapping wishes those defenders to be, there is something disjointed about our new, improved version, which might read something like this:

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<sup>19</sup> “The dignity of the human person means that every human being is worth more than the worst thing they’ve ever done.” (P.45)

<sup>20</sup> ROBERT PENN WARREN, *ALL THE KING’S MEN* 262 (1959).

<sup>21</sup> Even “the best lawyers in the country ... could not walk into [our] incredibly dysfunctional systems and guarantee justice for their clients. ... However, what they [can] do [is] immediately give the people they represent dignity.” (P. 23) From the commonplace refusal of prosecutors and judges to use defendant’s names, to their routine shackling while in court, our systems needlessly dehumanize in countless ways.

<sup>22</sup> *Law and Order* (NBCUniversal Television 1990).

<sup>23</sup> The authors have heard him present the argument verbally many years before.

In the criminal justice system, the people are represented by three separate, yet equally important groups: the police, who investigate crime; the district attorneys, who prosecute the offenders; and the public defenders, who provide the poorest 80% of them a defense.

So long as that caveat remains, we will never achieve true equality, because—for those wishing to see it—there remains a less-desirable ‘other.’ Instead, recognizing (1) the absurdly low levels of wealth our systems require for indigency;<sup>24</sup> (2) that, even so, some eighty percent of criminal defendants satisfy those levels (P. 10, 17);<sup>25</sup> and, most importantly, (3) that respecting human dignity in an adversarial system—which is our chosen system—requires that *everyone* be provided a skilled advocate when the very State in all its might comes after an individual; we ought to provide a *complete* public defense, meaning a public defender for *everyone* accused of crime.<sup>26</sup> Of course, a person ought to be given a (probably Sixth Amendment) right to *opt out* and pay for her own counsel, and the very richest among us might do just that. But for most Americans, they will be far better off with a quality public defense. With this move, finally, that *Law and Order* introduction reads just right:

In the criminal justice system, the people are represented by three separate, yet equally important groups: the police, who investigate crime; the district attorneys, who prosecute the offenders; and the public defenders, who provide them a constitutional defense. These are their stories. *Dun dun.*

*That* sounds like television worth watching. In his book, Rapping identifies the problem as this:

All of the problems identified by experts—the financial and structural challenges facing public defenders—were symptoms of a culture in which people charged with crimes were less human. These people were not worthy of justice. Therefore they were undeserving of the kind of lawyer we would demand for ourselves. (P.19)

In other words, “[o]ur criminal justice system suffers from a disease. It is a narrative of otherness.” (P. 186) Only when *everyone* gets a public defender does that false narrative become truly hard to accept.

Of course, there is a ready objection to our proposal. If jurisdictions will never pony up the money this would require, then instead of making criminal defense better for everyone, such a system would even further stretch the absurdly low

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<sup>24</sup> A state might use some low multiple of the federal poverty line, which line in 2020 is only \$12,760 in annual income for a single individual. See <https://aspe.hhs.gov/poverty-guidelines>. And, as Rapping points out, there are some judges who go to ridiculous lengths to find a defendant not indigent. (P. 174) On the other hand, Rapping asserts that, “When a person can afford to pay a lawyer, they can fire that lawyer and choose another. That person can find a lawyer who is willing to act as their agent.” (P. 26) *Maybe*. The reality is that relatively few Americans can afford to hire, and then fire and choose anew, a quality criminal defense attorney.

<sup>25</sup> Rapping poignantly notes that our criminal justice system is “one of the few systems to which a person has greater access the less income they have.” (P. 10)

<sup>26</sup> One could argue this as a constitutional matter—it shocks the conscience to throw a human being into a cage without providing a single person to urge her interests—but it could, of course, also be enacted as statutory law.

resources invested into public defense, once again most acutely hurting the poorest among us who cannot possibly opt out. After all, *Gideon v. Wainwright* was a rather exceptional unfunded mandate to state systems of criminal justice, and thus one that has never been adequately funded. And, in many jurisdictions, even our systems of prosecution are terribly underfunded, requiring those offices to shamefully rely upon probation and other conflict-of-interest creating fees.<sup>27</sup> All true. Still, we contend that we will never achieve truly fair public defense until it is universally available. We have abandoned historic systems of private prosecution, moving to entirely State-funded prosecutors. In a society that distrusts government as much as any, why have we not done the same for criminal defense? So, if the move to a fully realized public defense genuinely presents a catch-22—alleging fairness in theory but necessarily being awful and thereby punishing the worst-off in practice—that is a deep indictment of our political priorities and, ultimately, a failure of our democracy.

And for those thinking our rhetoric and ideas just too naive for their taste, there is this: the current system makes public defenders adverse to potential clients anytime there is a dispute as to indigency, and in our current rather disastrously-underfunded systems, that adversity can be acute. Imagine a defendant at a first appearance who is not considered indigent, and so is not provided the public defender standing in the courtroom. Yet the defendant is also not a corporate CEO—far from it—and she has never been accused of crime before, and thus has next to no understanding of precisely what is happening nor any sense of how to acquire competent defense counsel. The judge, often enough a former prosecutor, might suggest to this defendant, ‘Talk to the DA; she might give you a deal that can end this.’ Horrified, the public defender nonetheless stands silent. This is not her client. She has no say in this matter. That is hardly a system best recognizing the dignity and humanity of every person drawn into its clutches, yet it is the system we are forced to have unless the public defender can represent everyone.<sup>28</sup>

To risk what might be an inapt metaphor,<sup>29</sup> criminal defense is more like the hospital emergency room than places of elective surgery. When a person has been physically torn apart—even if partially by their own stupidity or moral failing—we choose as a society to stitch them up. Not so much because they particularly deserve it, but because doing so reaffirms the collective humanity of us all. And so when a person is legally torn apart—ripped from loved ones and threatened with further worse treatment to come—we ought to commit as a society to provide them a defense. After all, they might be the most deserving among us, as nothing has been proved.<sup>30</sup> And, regardless of particular guilt, it affirms the collective humanity of us

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<sup>27</sup> For example, in Oklahoma, probationers until recently had to pay fees directly to the district attorney that would fund that district attorney. See Darla Slipke, *Budget Includes Change to District Attorney Funding*, THE OKLAHOMAN, June 3, 2019. When such payments “may be mailed or delivered to: Oklahoma County District Attorney’s Office, ATTN: DA Reimbursement Department,” payable to “OKDA,” it’s hard to perceive justice. *991c Reimbursement*, Oklahoma County District Attorney, <https://www.oklahomacounty.org/464/991c-Reimbursement> (visited Sept. 18, 2020).

<sup>28</sup> This is *not* to say that, given current funding, public defenders have been wrong in sometimes refusing to take new clients. (P. 108–09, 142, 170–72). Quite to the contrary, desperate situations call for difficult measures everyone would rather be able to avoid.

<sup>29</sup> In the words of George Box, “All models are wrong but some are useful.”

<sup>30</sup> After all, even when something *has* been “proved,” we are too often simply dead wrong. See, e.g., The National Registry of Exonerations,

all; it is how we would wish our own loved ones to be treated, no matter what wrong they might have done.

So, again, if we truly wish criminal *justice*, we'd urge public defenders in every sense, meaning public defenders for *everyone* accused of crime. If that seems too high a price to pay, then we will continue to reap the false sense of 'otherness' and the accompanying 'justice' that bargain-basement-pricing affords.

*ii. And Maybe a Judge Advocate Too*

Finally, we'd suggest serious consideration of a 'judge advocate' model, in which advocates alternatively serve in periods of criminal prosecution and criminal defense, or at least in which both are housed under the same umbrella organization.<sup>31</sup> Such a model does not endlessly aspire to equal resources; it *finally* achieves them. And it eliminates the potentially undesirable extremes: If you cannot prosecute, *ever*, you need not apply. And if you cannot defend, *ever*, you need not apply. Further, there is no interest like self-interest, and no teacher like 'walking a mile,' and this provides both: if you play the ass when prosecuting, what's likely to happen when you are called to defend? Finally, and most importantly, just like providing a public defender to *everyone* accused of crime, it rhetorically and meaningfully conveys that we are serious about criminal defense.

While neither of us are military people, we suspect that flavors of this model can operate within those systems because every person prosecuted is seen, ultimately, as a (possibly wayward) brother or sister, not as an 'undesirable outsider.'<sup>32</sup> Since the latter is of course as false in civilian (non-military) justice as it would be in our militaries, we would do well if we could likewise eliminate it.

Once again, the most ready objection is probably cost, and we 'get it.' There are also concerns about defenders appearing on the 'same team' as the prosecution, and those deserve careful consideration.<sup>33</sup> But since our current systems of mass incarceration are hardly cheap,<sup>34</sup> and since if we continue doing as we've always done, we might just continue getting what we've always got...we'd personally welcome serious consideration of even this radical overhaul.

CONCLUSION

In his book's first paragraph, Rapping shares this: "My parents were activists in Pittsburgh, Pennsylvania. As Jews, they both embraced the concept of Tikkun Olam:

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<https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (reporting, as of Sept. 18, 2020, "2,670 exonerations since 1989, [collectively representing] more than 23,950 years lost").

<sup>31</sup> Stephen many years ago suggested this in his first, well-intentioned-if-hardly-flawlessly-executed law review article. See Stephen E. Henderson, *Hijacked From Both Sides – Why Religious Extremists and Religious Bigots Share an Interest in Preventing Academic Discourse on Criminal Jurisprudence Based on the First Principles of Christianity*, 37 IDAHO L. REV. 103, 121–22 (2000).

<sup>32</sup> The motto of those defending Army personnel is, tellingly, "Defending Those Who Defend America." United States Army Trial Defense Service, [https://en.wikipedia.org/wiki/United\\_States\\_Army\\_Trial\\_Defense\\_Service](https://en.wikipedia.org/wiki/United_States_Army_Trial_Defense_Service) (visited Sept. 11, 2020).

<sup>33</sup> See, e.g., *id.* (describing such concerns leading to the creation of the Army TDS).

<sup>34</sup> Estimates of the price of incarceration run between \$80 billion to \$182 billion per year. See Nicole Lewis & Beatrix Lockwood, The Marshall Project, *The Hidden Cost of Incarceration*, Dec. 17, 2019, <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration>.

that we all have a duty to help repair the world.” (P. 1) Whether or not that is so, we certainly share the belief that to do so is a noble calling, and the belief that American criminal justice is badly in need of repair. Fortunately, more than ever before, these beliefs seem widespread—even mainstream.

Then again, we ought to have learned them long before. In the spring of 1963, Justice William Brennan shared these thoughts at the Washington University School of Law:

My subject involves ... a question of criminal procedure—the process by which one accused of any crime has his guilt or innocence decided. Now it’s a matter for real concern, I submit, that so many in our society, laymen and lawyers alike, show impatience with any and all procedures which appear to hamper the task of law enforcement agencies to bring an accused to conviction. ... [T]he Framers of the Constitution weren’t “soft on criminals.” These safeguards are checks upon government—to guarantee that government shall remain the servant and not the master of us all. ...

But public misunderstanding of the true function of the procedural guarantees is, I submit, something in great measure the fault of our profession. How can we blame laymen for their impatience with procedural safeguards when so many lawyers believe that contributing one’s legal services to an unpopular or unremunerative cause is dirty, or nasty, or opprobrious? It is a much overworked observation, but one which I can’t resist repeating because it is central to this point, that far too many lawyers—usually without knowing why—look askance at criminal practice, even as an incidental supplement to a regular corporate or business practice.

... [A] noble tradition seems to have been forgotten by far too many.<sup>35</sup>

Indeed. Still, in a period of renewed commitment to bettering our systems of criminal justice, might we finally be able to answer that Founding vision? Could we establish, once and for all, that we really *do* “hold these truths to be self-evident, that *all* [persons] are created equal, ... endowed ... with certain unalienable Rights,”<sup>36</sup> and that central among those are the criminal adjudication rights of the Fifth, Sixth, and Eighth Amendments? By providing an adequately-funded and trained public defender to *every* American charged with crime, we could replace words that have for centuries rung mostly hollow for “the poor and the weak in our society,” and “those who differ, who do not conform,”<sup>37</sup> with actions more true to our better natures.

As a defense attorney, Rapping learned early that, “to be effective, public defenders had to be committed to learning and telling the stories of impacted people.” (P.3) We each live through at least one dark time in which we need someone else to tell our story, perhaps because the time is so dark that we are incapable of ourselves even seeing it. In other words, everyone needs a public

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<sup>35</sup> William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. Q. 279 (1963).

<sup>36</sup> U.S. Declaration of Independence.

<sup>37</sup> *Bartkus v. Illinois*, 359 U.S. 121, 162–63 (1959) (Black, J., dissenting).

defender. Rendering the ideal practical will be difficult, to be sure. But, as Rapping invites, “Let’s try another way.” (P. 6) Lord knows that what we’ve been trying so far just isn’t working.