

COMMENCEMENT REMARKS

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Yale Law School, May 21, 2012

To all who are gathered here and, particularly, the Class of 2012.

First, I want to thank you for the honor of this opportunity to make a few remarks as we celebrate all that you have accomplished here. It has been an honor to teach many of you during the last three years and to work closely with some of you on matters of life and death. I have benefitted immensely from it. Thank you.

Second, congratulations to you, your families and friends – everyone – who have supported you throughout your lives or at different times in your lives. I hope you have a wonderful, celebratory day that is joyful in all regards.

Up until now, your life has been largely about you. We have a natural tendency to be self-centered as we grow up. And there is nothing wrong with that.

Up until now, it has been completely appropriate and acceptable to ask questions like what is the best experience for me? Where will I get the best education? What will I gain from this course or from this internship? And that is probably reinforced by the social media, where the most frequently used words and “I” and “me.”

But now it is time to pivot and ask, where are your extraordinary gifts needed? How do you make this legal world that you are entering a better world? One where no one is shut out; one where the weak and vulnerable are not exploited; one that produces fair results based on the merits of the issues before it.

And remember you are in control. There may a temptation, upon graduating from this law school, to pursue power and prestige for their own sake and worry later about whether it is what you want to do and how you can make a difference. I encourage you to make sure you go where you want to go with your life, and not where you are expected to go.

I.

I would like to talk for a few minutes about the failure to make good on what is supposed to be the defining principle of our nation – equal justice under law. Equal justice is part of our foundational creed. It is etched above the entrance of the Supreme Court building. But it is not a reality for racial minorities and the

poor. But the routine, daily denials of equal justice are not seen by most Americans and most lawyers.

I'm going to tell some sad stories on this happy day, but I hope they will serve a purpose; that you will take them to heart; and that all of you – no matter what you do – will take an interest in the plight of those who often speak in voices too faint to be heard and that you will make a contribution to bringing us closer to realizing the promise – and constitutional guarantee – of equal justice.

I received a letter two weeks ago from Shanna Shackelford, an African American woman, who for the last three years has been charged with arson in a court in west Georgia. The place she was renting was destroyed by fire and she lost everything that she had. She was homeless for some time after the fire, but she got two jobs – at Walmart and as a nurse's assistant – and a new place to live. And she continued her studies at a community college where she is majoring in criminal justice.

After she was charged, she applied for a public defender. Here is her description of what happened after that:

The lawyer I got is an addict, and anyone who sees him can tell at first glance. He was incompetent, and I did much of my investigation myself. I complained and, three months later, another lawyer was added to my case. She constantly encouraged me – a person never charged with a crime of ANY sort – to take a 15 years in prison offered by the prosecution. I declined.

A friend provided \$3500 of a \$5,000 fee so I could get my own attorney. This attorney misses court dates for weeks at a time. He has been fined by the court for not appearing. I have been to court so many times when he was not there and told to come back the next day, that I lost both of my jobs.

I have asked over and over to proceed with trial, but when a trial date comes, he doesn't show up. I have no way to pay this man, and no way to hire a new attorney.

I have no place to go. I am a certified nurse's aide, but I cannot find employment due to the arson charge hanging over me. I don't

know how to fix this, and I have asked to be placed in jail until this is over.

I asked this not to sound ungrateful for being out on bond, but because I fear I may take my own life or die from conditions of being homeless. That request was denied as well.

The last offer was 10 years on probation and restitution of half a million. I told my attorney absolutely not, and he told me that if I did not take this deal, there may not be another.

I told him that I don't care if I sit in prison for the next 20 years. I will NEVER accept the blame for something I did not do. A guilty plea even with no jail time will ruin my life more than this case has already. It means I could never use my degree effectively or be taken seriously.

I've had over 20 continuances, lost jobs, lost my home, and lost my dogs. I now sleep in my car. I am going to lose my car because I cannot repay a loan I took out to pay the lawyer's expenses. I am tired and beaten and I don't understand how to fight this.

My only question is what do I do now that I have no way to care for myself, no place to go, and an uninterested attorney. It has been days now since I have eaten, and I just constantly feel myself getting sick.

I just don't want to die without someone knowing what these people are doing to me, and how I have cried, pleaded, and begged for help in the last three years. I am only 23, Mr. Bright, and I have fought to stay afloat for the last three years. I just want to know what there is that is left for me to do while I'm still here. [emphasis added]

I want you to know that there are thousands of people like Ms. Shackelford, who are crying, pleading and begging for help. And almost all of their cries go unanswered.

Fifty years ago, the Supreme Court held that poor people accused of crimes were entitled to lawyers. It held that lawyers were necessities, essential to a fair trial. On several occasions about that time, the Court said "there can be no equal justice

when the kind of justice a person receives depends upon the amount of money he or she has.”¹ And yet, we know that the kind of justice a person like Ms. Shackelford receives depends very much on the amount of money she has.

In the state courts, where the overwhelming majority of criminal cases are processed, all but a few of those arrested cannot afford a lawyer. Many will receive no representation or only token representation. Some will be fortunate to get high quality representation because of people like Kate Braner, who graduated from Yale 1993 and has spent the last 18 years at the San Diego Public Defender, and Ed Ungvarsky and David Voisin, who graduated that same year and have devoted their time to public defender and death penalty work. And of course there have been many since them.

A person who is arrested and can afford a lawyer – or whose parents can afford a lawyer – will hire one immediately and probably be out in a matter of hours. Poor people may not see a lawyer for weeks or months. Many lose their jobs, their homes, their cars, and fail to make their child support payments and other obligations, even though the charges may later be dismissed or the person found not guilty.

Most of those accused of misdemeanors will have a chance to get out of jail by pleading guilty and being sentenced to time served. This process is known in some places as McJustice. Those who maintain their innocence will spend several more months in jail.

Some lawyers appointed to represent the poor are so incompetent they cannot even file their papers on time. People are being executed who never had any review of their cases in the federal courts because lawyers missed the statute of limitations for filing. One lawyer in Texas missed it for three different clients. But that does not seem to bother the Texas judiciary or the Texas Bar.

I get several letters and calls like Ms. Shakelford’s every week and our office receives many more. Most are urgent – someone calling on behalf of a person without a lawyer or an incompetent lawyer who is facing a deadline in a death penalty case or an execution date; someone facing deportation without a lawyer; a mother calling about her child being raped in prison; people being evicted from their homes; veterans back from Iraq and Afghanistan with all sorts of problems, such as losing their jobs and being thrown in jail for failure to make child support; children

1. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

being thrown out of school for trivial reasons; adults and children being placed in solitary confinement; people going to debtors' prisons in clear violation of the law because they lost their jobs and cannot pay fines or child support, and many other issues.

Usually there is nothing we can do. The volume is too great. Our workload is too great. Many calls and letters are about areas of law that we do not even practice in. And they come from all over the country. The best we can do is listen patiently and answer questions. It reminds us every day of how many people with desperate needs are not receiving any kind of justice. With regard to Ms. Shakelford, I knew several people in this graduating class would tell me they would work on her case if I took it, so last Friday we undertook her representation, but she is a rare exception.

II.

We are also reminded every day that the legal system is the part of our society least affected by the Civil Rights Movement. Even after the equal protection clause was made part of the Constitution after the Civil War, there followed racial segregation, Jim Crow justice, lynchings and convict leasing.

People of color are more likely than white people to be stopped by police, more likely to be mistreated during the stop, more likely to be arrested, more likely to be denied bail and more likely to get harsher sentences. People of color are less likely to be seated on juries because peremptory strikes continue to be used, as they always have, against racial minorities.

Nicholas K. Peart, a black student at Borough of Manhattan Community College, was stopped by New York police while standing on the street in front of his apartment. The police handcuffed him, took his cell phone and keys and went up and rummaged around his apartment. Then they let him go. It was the fourth time he had been stopped because of the color of his skin. In one of the earlier encounters an officer pointed a gun at him. This is patently illegal, but the New York police made 600,000 such stops last year; 84 percent of those stopped were black or Latino.

One can go to courts that are no different today than they were in the 1950s. The judge is white, the prosecutors are white, the court-appointed lawyers are white, the clerk of court is white and the jury is all-white – even in communities with substantial black or Latino populations. The only person of color in the front of the courtroom is the defendant.

Go to a courthouse in the South on the day of arraignments and it looks like a slave ship has docket outside the courthouse. A number of black men in orange jump suits and handcuffed together are brought in. A lawyer meets with each one for five to fifteen minutes. When the judge takes the bench, most, if not all, enter guilty pleas and are sentenced. This is called meet ‘em and plead ‘em. You’ll see several constitutional violations – equal justice, right to counsel, due process – it’s a complete mockery of justice.

The result is that more than 60% of the people in prison are racial and ethnic minorities. This is at a time of mass incarceration – 2.3 million men, women and children in prisons and jails – the highest incarceration rate of any nation in the world – at a cost of 70 billion dollars a year. Over five million more are on probation or parole.

One in three African American men between 18 and 30 are in jail, prison, probation or parole – compared to one in 31 of the population in general. Two-thirds of the people in prisons for drug offenses are people of color. There are more African Americans under correctional control today than were enslaved in 1850.

Judges will go to any extreme to avoid dealing with the racial discrimination that is pervasive in criminal cases. In *McCleskey v. Kemp*,² the Supreme Court observed that if it dealt with racial discrimination in the infliction of the death penalty, then it would have to examine racial discrimination in every aspect of the criminal justice system. Courts still have this “fear of too much justice.”

As Justice Stevens reminded us just a few weeks ago, the Chief Justice has said, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³ He needs to take that message to every prosecutor, judge, clerk, jailer, justice of the peace and law enforcement officer in the country. But of course, we cannot take that statement at face value because it was made as the Court continued its retrenchment from *Brown v. Board of Education* that started in the mid 1970s.

2. 481 U.S. 279 (1987).

3. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007).

III

In the criminal courts people accused of crimes get lawyers – often bad lawyers, often for short periods of time – but people with compelling civil needs may have no access to a lawyer at all. I spoke with a mother last February who lives near Jacksonville, Florida. She was divorced in 2005 in Georgia, moved to Florida and has had custody of the one child of the marriage ever since. Her son is 14-years old, and well adjusted in his school and community. He had many friends, was active in sports and in the junior honor society.

She told me about a harrowing ordeal that had occurred the week before in a courthouse in Georgia. She went for what was supposed to be a routine status hearing. She did not have a lawyer, but her husband did. And she got some home cooking. The judge awarded custody of the child to the father, who lives near Atlanta.

She had received no notice that custody would even be an issue. No guardian was appointed to look out for the best interests of the child, who desperately wanted to stay with his mother. It was doubtful that the Georgia court even had jurisdiction over her and the child. Nonetheless, the mother was helpless. Whatever protection the law provided to her and her child was out of reach because she had no lawyer to file a motion to reconsider or an appeal.

All the law you have learned here means nothing to a person who is unable to get a lawyer.

I deal mostly with the loss of life or liberty, but a parent's loss of a child and the child's loss of the life he was living are certainly significant deprivations.

But she is one of thousands who have no access to a lawyer.

The federal Legal Services Corporation has 900 offices throughout the United States to provide representation to poor people with legal problems. But its funding is so meager that it can assist only 20% of the people eligible for its services.

When I called Georgia Legal Services about helping this mother, I was told they were so overwhelmed with people needing their services that they took family cases only if violence was involved.

Last November, the Congress slashed funding for the Legal Services Corporation by \$56 million, or about 15 percent, continuing a steady decline in funding for legal services. That puts the corporation's 2012 budget at \$348 million, less than half of what it was at the end of the Carter administration when it was \$770 million. So, as the number of poor people has increased and their situations have become even more desperate in the recession, they have less access to the courts.

It speaks volumes that our society – with its enormous wealth – is cutting access to the courts for the poor, and other programs for the poor, in order to avoid adding a penny of taxation to people making millions of dollars. And some are proposing even more cuts to education, food stamps, job training programs and other programs for the poor – undoubtedly Legal Services will be among them – in order to give even more tax cuts to the wealthy.

This is deeply troubling. People in the highest income bracket were taxed at 90% in the 1950s – 70% from 1965 to 1981, and 50% from 1982 to 1986. Today, some say should not even be taxed at 35%, when, as we know from Warren Buffett and others, some are actually taxed at something like 15%.

Justice Brandeis warned, “We may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both.” And, needless to say, that was before the decision in *Citizens United v. Federal Elections Commission*.⁴ We are learning whether he was right.

Part of the effort to cut programs for the poor and cut taxes for the rich has included demonizing poor people. To suggest that they are not really poor and blame them for their poverty – as if they caused the recession, as if they are responsible for Apple and other companies shipping all those jobs to China, as if they caused the injuries they suffered in Iraq and Afghanistan that make them unable to work, as if some people chose to suffer from mental illnesses or be intellectually disabled.

Have we lost our moral bearings? Have we abandoned concepts like, “the strong protect the weak for the benefit of all” and “the duty of privilege is absolute integrity?”

The poor are not a faceless mass. Each person is an individual with a different life, a different story. Over twenty percent of our children – and our children are the

4. 558 US 50, 17 (2010).

responsibility of all of us – are living in poverty. For some parents and children, days are spent going through garbage cans and dumpsters looking for food to eat and bottles and cans to sell.

I have worked with and for the poor for over 35 years. I have seen a lot of suffering, loss and grave injustices. But my clients, their families and others I have served have enriched my life, my work, writing, advocacy and teaching. I am awed by the magnitude of their struggles, dismayed by the limits on their opportunities, such as denial of a decent education, and inspired by their incredible resilience.

I came to the work because I had the good luck and great fortune to grow up during the Martin Luther King, Jr. era – that time between the Montgomery Bus Boycott started by Rosa Parks and the assassination of Dr. King on April 4, 1968.

It was a time of turbulence and tragedy. It involved a life and death struggle to end racial segregation and establish the right of black children to attend decent schools and the right of black people to vote.

In just 39 years with us, Dr. King inspired us with his courage, motivated us with his eloquence and taught us with his words and his deeds. I took away two essential lessons from Dr. King: that nothing was more important than ending racism, poverty, materialism, and militarism, and nothing is less important than how much money one makes doing it. Obviously, the vast majority of people in our society rejected those lessons. But a few followed the teachings of Dr. King and many of them have lived rich and fulfilling lives.

I ask you not to forget the poor – both those caught up in the legal system and those who have no access to it – and to help them in some way throughout your life in the law. You must make the effort because so many communities are segregated by race and income. The poor are largely out of sight and out of mind. You will not learn the reality of their plight by reading an article, book, or Supreme Court opinion. Represent them, visit the soup kitchens, get to know them. Listen to them.

As Dietrich Bonhoeffer observed, there is “an experience of incomparable value . . . to see [things] from below; from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled – in short, from the perspective of those who suffer . . . to look with new eyes on matters great and small.”

A number of you will represent people who desperately need a competent lawyer. And you'll make a difference, client by client. And if for some reason you cannot represent someone because you work for the government or some other reason, I suggest being a big brother or big sister to some child from a family that is destitute, that struggles to put food on the table and keep shelter over its head. And as you get to know that child and her family, and see all the disadvantages visited upon her and all the opportunities denied her, you will look with new eyes on matters great and small.

The injustices that continue to pile up require that we make good on the promise of equal justice. The credibility and legitimacy of the legal system is at stake. It is a huge undertaking, the continuation of a struggle that has gone on throughout our history.

At the moment it looks like a losing battle, but this is only a moment. And it is your moment.

Dr. King said we stand on the shoulders of others so that someday others will stand on our shoulders. Now it is your turn.

It is something much bigger than any one of us, but each of you – and all of us – have the ability to help one person at a time, to do what we can to bring us closer to the country that we proclaim to be.

The challenge is summed up nicely by Langston Hughes:

There's a dream in the land.
With its back against the wall.

...

There are those who claim
This dream for theirs alone –
A sin for which, we know,
They surely must atone.

Unless shared in common
Like sunlight and like air,
The dream will die for lack
Of substance anywhere.

The dream knows no frontier or tongue,
The dream no class or race,
The dream cannot be kept secure
In any one locked place.

This dream today embattled,
With its back against the wall –
To save the dream for one
It must be saved for ALL.⁵

Thank you again.

Good luck and Godspeed.

5. Langston Hughes, Dream of Freedom, in GOOD MORNING REVOLUTION:
UNCOLLECTED WRITING OF SOCIAL PROTEST BY LANGSTON HUGHES 170 (Faith Berry, ed.,
1992).