# CLOSING ADDRESS

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The one overriding thought I have about this subject, with which I've lived and watched, enjoyed and suffered for more than twenty years, is that generalization is a very difficult undertaking, and I try to avoid it. The academic side of me leads me to think that one can construct a particular model or system which will resolve a substantial portion of the problem. This is a noble undertaking, and you have heard many ideas of that sort presented today.

However, the practitioner side of me makes me very leery of that process—particularly so when modelling involves sixth amendment questions of delivery of legal services. Rather than comment on all of the provocative issues presented today, I think it best to single out those which are most intellectually meaningful to me. At the same time, I would like to give you some appreciation of my feelings about these issues, as well as an indication of where I think politicians, judges, and the criminal bar are headed.

To this presentation I bring a perspective which is rooted in my own personal life; a perspective which reflects the process by which I came to represent criminal defendants. When I think about Chet Mirsky's eloquent reminiscences,[1] I recall what things were like twenty years ago when we had no paper clips but lots of heart. One thing I recall is that many of us, myself included, started out as civil rights lawyers, picking up on the revolution that started with *Brown*, by working on racial matters in the South.

Specifically, I have always felt that the Warren Court's contribution to defining the rights of criminal defendants was an extension of this same process. The Warren Court made it easy for people like myself to find satisfaction in criminal defense work. While committed to becoming a defense attorney, one never paused to wonder, "Gee, you know, with this Harvard law degree I could make a lot of money."

Chet pointed to something which I think we may be losing sight of, and regrettably so. After all, we cannot separate ourselves from the direction our society has taken. I submit to you that the smallness of today's crowd, compared to prior colloquiums on less wide-ranging topics, is an indication of a diminishing concern with the sixth amendment in the 1980s. This is disturbing. Having taught at this law school for six years, I am terribly troubled

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1. *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 265 (1986) [hereinafter cited as *Effective Assistance*] (Remarks of Chester L. Mirsky).

by the apparent disinterest of so many law students in the very basic concerns that today's subject involves. There is no more basic concern than the right to counsel, especially when liberty and even death are at stake; yet so many of our young people seem much more preoccupied with corporate takeovers and the power that they seem to bring one close to. Is there anything one can do about that? I think it is difficult to talk about the adequate distribution of legal services when our country, and the people who come out of the best law schools, haven't got the spirit and the fire in the belly to enjoy the practice as did Judge Rothwax, Chet Mirsky, and I when we had no accoutrements such as word processors, xerox machines, Lexis and Westlaw. It's regrettable, but not necessarily the end of the line.

What makes it particularly painful, however, is to listen to the criticisms this afternoon of one's own organization, such as the Legal Aid Society. I do not assert that scrutiny should not be applied, but in this particular area, severe criticism is counterproductive because it provides tools for our adversaries to weaken or dismantle us; it provides ammunition to those who claim we are already providing too much representation, and therefore, that we should receive less funding. This sort of argument is particularly prevalent in these economically troubled times—it should not be serviced by those who are committed to the sixth amendment.

I fully agree with Judge Rothwax[2] that alternative systems of representation make sense and that competition brings out the best in everyone, but I disagree with the notion that that kind of criticism helps when it provides little else than grist for the funding source mill to cut back even further.

Professors Mounts[3] and Wilson[4] call up a more nostalgic than realistic view of systemic litigation. Having spent part of my days also running the Prisoners' Rights Project, and having closed down various institutions via class actions, I find that it is a fact of our current constitutional life that systemic litigation is not very successful. We are still litigating, in 1985, under the same docket number, the conditions of confinement at Riker's Island that were prevalent in 1970!

A litigating revolution has yet to hit the county jails in this country. There are no resources to litigate there, so that the prospect of systemic litigation for county jail deficiencies troubles me more as a realistic prospect than as a concept. I think the development in Arizona seems to be very providential;[5] how widespread it will be is another question.

2. *Effective Assistance, supra* note 1, at 255 (Remarks of Harold Rothwax).

3. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221 (1986).

4. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986).

5. State v. Smith, 104 Ariz. 355, 681 P.2d 1374 (1984).

With respect to new models, Professors Schulhofer[6] and Alschuler[7] presented some highly provocative papers. Although I am unfamiliar with the Philadelphia system, I am suspicious of judge trials in the main, particularly when the first case I ever had in the Supreme Court, *Baldwin v. New York*,[8] recognized a right to trial by jury in misdemeanor cases. My work in *Baldwin* required me to specifically document the scandals of judge trials in misdemeanor cases by including in my brief, extracts from the minutes of many judge trials. My skepticism persists.

With respect to determining who is indigent and thus entitled to free representation, the indigency standard has taken some very interesting turns. As Justice Frankfurter said, if you take any idea to its logical extreme, you can reduce it to absurdity. That may well be the process now engaged in by the federal government under the new statutes. "Pauperization" of white collar and organized criminals, taken seriously, will develop a broader white collar practice for Legal Aid. That may be a positive development only in the sense that we at Legal Aid may then be ab'e to compete for the finest minds from the finest law schools by offering them the kind of training that will later be useful in the law firms that service white collar and corporate crime. We already have been assigned to complex white collar cases because the courts, despite criticizing us for inability to do this or that, also believe that we are capable of handling complex multi-defendant phony share-selling cases.

It is troubling to me that when we indulge in self-criticism of public defender programs, as we do in today's hand-wringing exercise, we seem to devour ourselves extremely well. Unionization of a large defender organization does pose the threat of "Shankerizing" the lawyering process and reducing it to mediocrity. Something sacrosanct exists in the relationship between a defendant and her attorney, and I submit that an attorney's loyalty to her union has produced a *deus ex machina* which interferes with that relationship to the disadvantage of the client. The union's presence indicates that there is something more important to the attorney than the client. When some overarching thing could be yourself, in terms of salary or conditions of employment, the union's existence is a patently disruptive feature. When the union insists that one walk away from a client and leave the client *in extremis* for ten weeks, as was the case of the Society three years ago, the relationship between a lawyer's needs, her client's needs, and the role of the union has to be re-examined. In my view, the desire to defend a client allows no interference from anyone. Constant self-criticism, indeed guilt tripping, of the kind espoused here today may foster an attitude which will erode the selflessness of defense attorneys that is essential to the defense function.

6. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137 (1986).

7. Alschuler, *Personal Failure, Institutional Failure and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149 (1985-86).

8. 399 U.S. 66 (1970).

I don't think anybody ever said that Harold Rothwax shortchanged a defendant twenty years ago when he couldn't even xerox a piece of paper. Under those extreme circumstances, far worse than they are now, a lawyer with fire in the belly could find the way to provide effective counsel.

I believe that Professor Goodpaster's lawyer Phillips[9] with the heavy caseload would have been overmatched if he had only two cases on his docket for the entire year. The mere fact that he was willing to accept an alibi without checking it showed that he shouldn't be in the profession. Even if you have hundreds of cases, you can find a little time to check out an alibi. None of what has been said today is dispositive, but the time has come to take a look at who we are and what we are, to fight for what we believe in, and to do what attorneys must do. That's what the Scottsboro case[10] was all about. Our society has discovered, and is reacting negatively to, the fact that not all of our clients have the panache, for lack of a better word, of the Scottsboro boys. You *can* feel sorry for the Scottsboro boys; they were victims of an outrageous system. The sensationalism behind alleged "vigilantes" like Bernhard Goetz tells you that there are a lot of folks out there who don't feel sorry for anybody and you can't argue against that.

Backlash is a fact of life in current urban and rural America. What do you do with it? You go back to the basics; you do everything that was recommended here today. Law schools have a tremendous role in letting people know that criminal law is a great practice. That has never been done. When I was at Harvard twenty-plus years ago, Criminal Law wasn't even a full year course, and it was taught by a first-year professor who generally had his eyes on greater things in life. Criminal law has gone beyond that and will continue to do so, and the law schools have played an important role in that process. Freud said you were "done in" when you were born or certainly so by your fifth year. I say law school has a tremendous role, not just in training, but in directing people to certain areas. Is there a more exciting life than the life of a defense attorney? Last year I had the good fortune of having a case in which I was able to save a man from a twenty-five years to life sentence; he was entirely innocent. Granted, there aren't many cases like that, but you only need one to live happily ever after. If I die tomorrow, at least I'll be able to reflect on saving Nathaniel Carter from twenty-five to life in a box for a crime he didn't commit.

That's not a bad way to live. I suggest that it's a way that competes very well with running around the country and taking somebody's company away from them; unfortunately, law schools have never put our practice on that plane. That's one shortcoming. What's more unfortunate is that we haven't picked up on the civil rights revolution—the source of our sixth amendment

9. Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 76-77 (1986).

10. Powell v. Alabama, 287 U.S. 45 (1932).

developments. It is quite right, I think, to look to *Strickland v. Washington*[11] in a very limited way. You cannot anticipate the Supreme Court in any case and you can't do it in the area of delivering effective counsel to the indigent. *Miranda* was the first noble attempt by the Court to set down a code of conduct in criminal justice. By contrast, *Strickland* harbors negative thoughts about what courts are prepared to do. But the interesting thing is, why did the Court take *Strickland*? No matter who sits on the Supreme Court, the majority frequently will take a case with a fact pattern that suits the result which it wants to reach. *Strickland*, albeit a capital case, addressed only the sentencing phase of that case. Arguably, one could say that there wasn't much that counsel could have done for his client and I think the Court sensed that; *Strickland* did not contain a set of facts where the moderates would declare counsel's behavior unacceptable.

Professor Grano,[12] who was extremely articulate and well-reasoned, betrayed the greed of the prosecution. In *Strickland*, the result was Rehnquistian in the Court's determination that there was no meaningful intrusion on the standards of effective counsel. To the extent that members of the Court criticize the extensive effort that was put into the review of the case, is it really too big a cost to society to have that much brain power to make sure that somebody does not go to his death when it may not be appropriate? Remember that these same Justices will spend a much longer time on corporate takeovers.

I want to talk briefly about ethical perspectives. Institutional defender representation is an advantage to the defendant, rather than a hindrance as some have argued. An institutional defender, as opposed to the attorney who pops into criminal court once a year, can and should build up a nice stock of integrity. The court and your adversaries know that you are a person of integrity, knowledge, and expertise. A number of years ago, the presiding justice of an appellate court called and said, "Will, your office does fine work, you have integrity, couldn't you just put an asterisk on the back of each brief that you thought should be reversed and save us a lot of work?" Tactfully, I got out of that. A number of years ago I argued five cases in the court of appeals in two days and at the end of the fifth case the chief judge said to me, "Mr. Hellerstein, which ones do you really want?" Of course I said I want them all. I argued a case only two years ago and I got a phone call from one of the justices of our High Court who asked me was I really serious because I sounded so convinced in the rightness of my cause. But neither the judges nor the prosecutor expect me to answer, "Well, you know, of the five, why don't you give me those two and scrub the three or give me four and scrub the one." I'm not going to do that; dealing at the trial level with a prosecutor and a judge, I let it be known that I have a wide range of reasonableness but there are certain things that can never be asked of me. Once that issue is squared

11. 466 U.S. 668 (1984).
12. *Effective Assistance*, *supra* note 1, at 97. (Remarks of Joseph Grano).

away, the attorney earns respect. Moreover, you can then do what you must and your client, represented by an institutional defender with *presence*, will be better off. Why is everybody on our tails? A lot of the lawyers for small timers in organized crime want to use Phyllis Bamberger's briefs as a guide because they know the high quality of the work of the office. So there are benefits from such representation if you can get them. Problems do exist. I have no easy answers to them but I do urge you not to take one or two of these as dispositive. It's absolutely important that whatever criticism is offered be constructive with the awareness, however, that it could easily be destructive.

This Colloquium goes to the heart of what our legal system is all about; that our society is not ready to address such crucial issues is troublesome, and very damning. I recall a dialogue between Katherine Hepburn, the queen, and her daughter in "The Lion in Winter." The Queen was proposing to kill her husband and her daughter remonstrates, "My God, that's barbaric!" The Queen responds that "it is only the Twelfth Century." I wish our system of justice was beyond that, but there is still too much of the medieval in the delivery of legal services.