

# Daily Journal

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Representing 'Those People' —

## Notes on Criminal Defense

By Steven P. Ragland

**“H**ow do you defend those people?” It’s a question that sooner or later every criminal defense lawyer must field, and I’ve heard it a lot. When I was a public-defender law clerk, “those people” were poor folks in Washington, D.C., accused of crimes. In my first job out of law school, “those people” referred to someone targeted by the Bush Justice Department for alleged aiding of terrorism. And the last time that question (really an accusation) was hurled my way, “those people” meant wealthy individuals accused of white-collar offenses.

The funny thing is that all these “thoses” are vastly different, and supporters of one “type” of defendant might bristle at the idea of championing the cause of one of the others. There is one constant in all these cases, though — the other side is the government. It is the state wielding its power to try to imprison someone, and perhaps to send a message to others. It is the abuse of that awesome, and at times frightening, power that criminal defense lawyers stand guard against.

Anyone who has ever faced down state power, even in

**Steven P. Ragland** is an associate at Keker & Van Nest in San Francisco

the most minor way, knows how daunting it can be. A routine traffic stop can be an intimidating encounter, even if you didn’t do anything. Imagine being charged with a crime and knowing the state can take away your money, your liberty and even your life.

It doesn’t really matter who you were yesterday: CEO or homeless person, lefty activist or Federalist Society member. Today, you’re an accused criminal, an enemy of the state. The stakes could not be higher. For a lawyer, confronting those challenges and speaking up for the accused can be not only an important, fascinating and

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Sadly lost in discourse on crime is the role criminal defense lawyers have played in securing the core liberties and protecting against executive abuses. Even before the founding of the republic, a defense lawyer helped

establish freedom of the press. Andrew Hamilton’s defense of publisher John Peter Zenger in 1735 laid the foundation for the First Amendment. Zenger was charged with seditious libel for daring to challenge His Majesty’s Government in the press. Barred from presenting evidence in the colonial court, Hamilton won his case through a brilliant closing argument.



As related in the wonderful book “Great American Trials,” Hamilton first spoke of his duty as an attorney.

“I should think it my duty, if required,” he said, “to go to the utmost part of the land where my service could be of any use in assisting to quench the flame of persecutions upon informations set on foot by the government to deprive people of the right of remonstrating of the arbitrary attempts of men in power.”

He continued by empowering

the jury to do justice: “Gentlemen of the jury, ... it is not the cause of a poor printer, nor of New York alone, which you are now trying. No! It may in its consequences affect every freeman that lives under a British government on the main of America. It is the best cause. It is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life

## Thoughts From a Defense Attorney

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of slavery will bless you and honor you, as men who have baffled the attempt of tyranny.”

In 1735, then, “those people” were the free press.

Who are some of the other “those people” historically held in disdain by the state? In 1873, “those people” included Susan B. Anthony, prosecuted for illegal voting. Four decades later, in 1917, Alice Paul and other suffragists were tried and convicted for picketing in front of the White House. The government wanted to charge them under the Espionage Act, but prosecutors had to settle for obstruction of traffic when it turned out the suffragists’ allegedly seditious banners quoted President Wilson’s own speeches. Alice Paul went on a hunger strike and endured brutal treatment in jail until her defense attorney, Dudley Field Malone, got her released to a hospital on a writ of habeas corpus. Malone later filed an appeal, and the court ruled that the women had been illegally arrested, convicted and imprisoned. A couple years later, the 19th Amendment was adopted, guaranteeing women’s right to vote. Alice Paul later became a lawyer, attending Washington College of Law, one of the first law schools to admit women.

In 1907, “those people” meant mine workers and the nascent labor movement. For years, workers struggled to organize in the mining area of Coeur d’Alene, Idaho. President McKinley, siding with big business, sent in federal troops to crush a general strike. When the former governor of Idaho was later killed, the government charged labor leader “Big Bill” Haywood with conspiracy to commit murder. Even though Haywood’s accuser was a confessed assassin and admitted liar, the prosecution pressed on. Haywood, luckily, was defended by Clarence Darrow, and the jury found him not guilty.

Decades later, “those people” were

Southern blacks in cases such as that of the “Scottsboro Boys.” In that case, nine young African-American men, ranging in age from 12 to 20, were falsely charged with raping two white women in Scottsboro, Ala., in 1931. The judge appointed incompetent (and inebriated) defense counsel, and all but the 12-year-old defendant were quickly convicted and sentenced to death. The jury deadlocked on the youngest defendant because they couldn’t agree whether to kill him or send him to prison for life. Defense lawyers mounted lengthy post-conviction challenges, resulting in new trials and, sadly, new convictions for some. Some of the men were paroled, one escaped and was recaptured, and in 1976, the last surviving “Scottsboro Boy” was pardoned at 64.

And, in 1990 in Cincinnati, Ohio, “those people” were museum personnel who dared display the work of Robert Mapplethorpe. They were charged with criminal obscenity, and their criminal defense lawyers won an acquittal.

Today, “those people” include anyone and everyone charged with crimes by the state. That means everyone, regardless of guilt or innocence, irrespective of station in life and notwithstanding the notoriety of the case. It doesn’t matter whether the client is likable or a jerk, wealthy or poor, deserving sympathy or worthy of disdain, oppressed or accustomed to every advantage. That person is facing the monolithic power of the state, and his or her world has been changed unalterably. The only one who unfailingly stands up for the accused, the only one who puts the government to the test and the only one who stands between kangaroo justice and due process of law is the criminal defense attorney.

Much bad law and many encroachments on our liberties have been achieved by prosecuting unpopular defendants. The formerly illegal search tolerated today because it unearthed the murder weapon can haunt us tomorrow as it erodes innocent people’s liberty. The expanded scope of conspiracy accepted at a particular moment because it snared a so-called “corporate cheat” can morph into the Alien

and Sedition laws of tomorrow. In our highly regulated republic, breaking the law without really trying is shockingly easy. The level of mens rea required to be guilty has eroded greatly through expansion of crimes into new realms of conduct and broad use of conspiracy charges.

Clarence Darrow said of the charges in the 1895 trial of railroad strike leader Eugene Debs, “Conspiracy, from the days of tyranny in England ... has been the favorite weapon of every tyrant. It is an effort to punish the crime of thought.” This governmental erosion of the intent element of crimes will continue, making all manner of formerly innocent conduct criminal, without vigilant and vigorous defense lawyers fighting against the tide.

So welcome to the profession, and give criminal defense work a try. But never, ever apologize for doing so. By forcing the government to justify its actions, by limiting its power to act unilaterally, the criminal defense lawyer safeguards our liberties and fights to expand them — one defendant at a time.

But if you can’t become an unfailing advocate for the accused, please try another discipline. Lord Brougham famously said in his defense of Queen Caroline during her 1821 trial, “[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.”

Our clients, our system and our country deserve nothing less from each and every advocate for the accused.

Finally, what’s my answer to that inevitable question “how do you defend those people”? With honor, unbounded zeal and to the very best of my ability.