

California Supreme Court Historical Society  
2010 Student Writing Competition

First Place Prizewinning Entry

“The Case of the Black-Gloved Rapist:  
Defining the Public Defender’s Role in the California Courts, 1913-1948”

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Note: This paper will be published in the 2010 volume of *California Legal History*, the annual journal of the Society. For that purpose, the author’s name and the asterisked footnote were added to page 1 of the paper after the judging was complete. All papers were read by the judges without identifying information.

**The Case of the Black-Gloved Rapist:  
Defining the Public Defender’s Role in the California Courts, 1913-1948**

Sara Mayeux\*

For seven months, an assailant that the San Francisco newspapers had nicknamed the “Black-Gloved Rapist” terrorized the city, breaking into his victims’ homes at midnight wearing black gloves and carrying a pencil flashlight. Finally, the police nabbed their man. Frank Avilez was arrested on Saturday morning, July 12, 1947, “and for many hours questioned by police inspectors and assistant district attorneys” until he confessed to everything: fourteen rapes and attempted rapes.<sup>1</sup> Avilez was 24 years old—with a 17-year-old wife—but had, according to his psychiatric records, the “mental age” of a 10-year-old, an IQ in the 70s, and a possible diagnosis of “sexual psychopathy.”<sup>2</sup> “My married life was all right,” he told the *San Francisco Chronicle*, when asked about his motive. “I just didn’t like staying home nights.”<sup>3</sup>

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\* [Editor’s note: Sara Mayeux is a JD Candidate at Stanford Law School and a PhD Candidate in American history at Stanford University. This article was the winning entry in the California Supreme Court Historical Society’s 2010 Student Writing Competition.] I am grateful for the helpful suggestions I have received on this paper and related research from professors Barbara Babcock, Bob Gordon, Amalia Kessler, Norm Spaulding, and Bob Weisberg. Thanks also to my classmates in the 2009 Legal History Workshop and the 2008-09 Legal Studies Workshop at Stanford Law School, and the San Francisco public defenders who inspired my interest in the topic when I was an intern in 2008.

<sup>1</sup> *People v. Avilez*, 86 Cal. App. 2d 289, 292 (Cal. App. 1st Dist. 1948); *Rapist Confesses*, S. F. CHRONICLE, July 13, 1947, at 1.

<sup>2</sup> Appellant’s Opening Brief at 12-13, *People v. Avilez*, 1 Crim. 2506 (Cal. App. 1st Dist. 1948). Avilez’s older brother had been committed to the Sonoma State Home for the Feeble-Minded since 1936. *Id.* All court documents related to *Avilez* cited in this essay are available at the California State Archives by requesting the file for California case number 1 Crim. 2506.

<sup>3</sup> *Confessed Rapist in Jail*, S. F. CHRONICLE, July 14, 1947, at 3.

After his bail hearing on Monday morning, July 14, Avilez's family sought the help of Melvin Belli, a young trial lawyer who would soon win national fame and fortune as the flamboyant "King of Torts."<sup>4</sup> Belli agreed to take the case, and contacted the district attorney's office to announce that he had been retained to represent Avilez. He also mentioned that the defendant's family was planning to attend the next day's arraignment, and asked that the case be held over until the family arrived.

The next morning in court, there was some confusion in the courtroom as to who was representing Avilez. The D.A. told the judge about his conversation with Belli, but no one told the defendant or the public defender about it. According to a police inspector, Avilez was unhappy because Belli had visited him in jail the night before and proposed an insanity plea; he said that "he was sane and guilty and wanted to get this over as soon as possible."<sup>5</sup> Meanwhile, not knowing the family had retained Belli, Avilez's wife had visited the public defender's office at some point to discuss the case.<sup>6</sup>

In light of all this, and since he was never told that Belli and Avilez's family were on the way, Gerald Kenny, the public defender, assumed Avilez to be his client. Kenny looked over the complaint, then went over to the cage and spent "a matter of seconds"

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<sup>4</sup> Belli was dubbed the "King of Torts" by *Time* magazine in 1954. In addition to being credited with pioneering modern products liability law, he grabbed headlines with his glamorous clientele, which included Mae West, Errol Flynn, the Rolling Stones, Jack Ruby, and Zsa Zsa Gabor. See Jim Herron Zamora, "'King of Torts' Belli dead at 88," S.F. EXAMINER, July 10, 1996. A somewhat fawning biography of Belli is Mark Shaw, *MELVIN BELLI: KING OF THE COURTROOM* (1976).

<sup>5</sup> *Avilez*, 86 Cal. App. 2d at 292.

<sup>6</sup> Appellant's Opening Brief, *supra* note 2, at 19.

conversing with Avilez through the bars.<sup>7</sup> “There are 32 charges against you,” he began. Avilez responded, “I know; I have admitted them all; I want to plead guilty.”<sup>8</sup> As Kenny saw it, once Avilez said those words, “there was nothing else I could do. I am not supposed to obstruct justice.”<sup>9</sup> According to Avilez, Kenny told him “not to worry about nothing,” just “to say whatever he told me” and “he would fix everything up.”<sup>10</sup>

Shortly thereafter Avilez’s case was called and the municipal court judge asked him to confirm that he wanted to be represented by the public defender. “Yes,” Avilez responded. The public defender added, “He stated he has no funds. His wife visited the office and she has no funds to employ private counsel.”<sup>11</sup> Satisfied with this brief colloquy, the judge appointed the public defender and accepted Avilez’s guilty pleas to seven counts of rape, four counts of attempted rape, one assault, and ten counts each of burglary and robbery.<sup>12</sup> By the time Belli arrived in court, the hearing was over and Avilez had been bound over to the superior court for sentencing. As Kenny was leaving the courtroom, he ran into Belli in the courthouse hallway. That was the first he heard that Avilez’s family had retained Belli’s firm.<sup>13</sup>

Belli moved to withdraw Avilez’s plea, but the superior court judge denied the

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<sup>7</sup> *Id.* at 16 (quoting testimony of Frank Avilez).

<sup>8</sup> *Avilez*, 86 Cal. App. 2d at 292-93.

<sup>9</sup> Appellant’s Opening Brief, *supra* note 2, at 18 (quoting testimony of Gerald Kenny).

<sup>10</sup> *Id.* at 16 (quoting testimony of Frank Avilez).

<sup>11</sup> *Avilez*, 86 Cal. App. 2d at 293.

<sup>12</sup> *Gets 440 Years for Rape*, N. Y. TIMES, Aug. 7, 1947, at 18.

<sup>13</sup> Appellant’s Opening Brief, *supra* note 2, at 19.

motion and sentenced Avilez to 440 years in prison.<sup>14</sup> On appeal, the First District overturned the convictions on the grounds that Avilez had been denied “a fair opportunity to secure the aid of counsel” and that “the aid of counsel furnished was not effective and substantial.”<sup>15</sup> The appellate court’s central complaint about the proceedings below was that the judge and prosecutor had allowed Avilez to proceed with his guilty plea though knowing that his family, with private defense counsel, was on the way. However, the appellate court also rejected the public defender’s contention “that when [Avilez] declared to him that he wanted to plead guilty there was nothing else for him to do without obstructing justice.”<sup>16</sup>

By the time of Avilez’s hearing, public defenders would have been familiar figures in San Francisco courtrooms. San Francisco established its public defender’s office in 1921; it was one of several California jurisdictions to establish such an office in the Progressive era, beginning with Los Angeles in 1913, in an effort to replace corrupt “shyster lawyers” with well-funded public servants, while also ensuring that indigent defendants would receive adequate representation.<sup>17</sup> From the start, lawyers, judges, and reformers debated the proper role of this novel courtroom figure. The earliest public

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<sup>14</sup> *Gets 440 Years for Rape*, N. Y. TIMES, Aug. 7, 1947, at 18. According to press reports, when he heard the sentence Avilez “made a wild attempt to escape,” kicking and flailing until six police officers “finally got [him] down and were able to hold him.” *Id.*

<sup>15</sup> *Avilez*, 86 Cal. App. 2d at 295.

<sup>16</sup> *Avilez*, 86 Cal. App. 2d at 296.

<sup>17</sup> The Los Angeles County Public Defender’s website describes its history since 1913. Los Angeles County Public Defender, History of the office, <http://pd.co.la.ca.us/History.html> (last visited Aug. 31, 2009). See generally Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1270-77 (2006) [hereinafter *Inventing*] (describing the origins of the public defender idea and the rationales offered by its supporters).

defender proposals, originated by California's pioneering woman lawyer Clara Shortridge Foltz, contemplated a skillful trial attorney who would provide the indigent accused with the same zealous representation that wealthy defendants could buy.<sup>18</sup> But many Progressive reformers envisioned the public defender as a partner to the public prosecutor, rather than an adversary. The Progressive public defender would collaborate with the district attorney to develop the facts of each case and propose a fair resolution, taking into account not just the defendant's interests but also the needs and safety of the community.<sup>19</sup>

As the *Avilez* case demonstrates, as late as 1948 this debate over the public defender's function and ethical duties was still ongoing. The case can thus be read as an encapsulation of these competing views of the public defender's proper role: Is he a state official akin to the public prosecutor, whose overriding duty is to the public? If so, when a defendant admits his guilt, then the public defender should not waste valuable court time contesting the charges. For San Francisco public defender Gerald Kenny, it would have been an "obstruct[ion of] justice"<sup>20</sup> not to allow the Black-Gloved Rapist to plead guilty right away. This approach apparently satisfied the judge who sentenced *Avilez*, who assured the defendant that the public defender "would not have proceeded" with the plea if there had been any available alternative, because in his experience lawyers from the public defender's office "[didn't] overlook anything when they appear[ed] in court." He even praised public defenders for avoiding "the tricks and methods used by some

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<sup>18</sup> *Inventing*, *supra* note 17, at 1275.

<sup>19</sup> *See id.* at 1275-77 (contrasting Foltz's model with the Progressive model).

<sup>20</sup> *Avilez*, 86 Cal. App. 2d at 296.

criminal attorneys” and instead representing their clients “properly” and “honestly.”<sup>21</sup>

But in the competing view, the public defender is no different from a private defense attorney (apart from who signs his paychecks): His overriding duty is to provide each individual client with zealous advocacy. If so, it would be a violation of that duty to allow a defendant to plead guilty at an initial appearance. The appellate judge who decided *Avilez* sided with this latter view, holding that

[t]he public defender stands in the same relation to the accused he is appointed to represent as an attorney regularly retained. It is his task to investigate carefully all defenses of fact and of law which may be available to the defendant and to confer with him about them before he permits his client to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty. . . . By giving his client such aid the attorney does not obstruct, but assists justice.<sup>22</sup>

This essay traces these two competing visions of the public defender in California from 1913 to 1948, and examines how and why the second view ultimately prevailed, at least doctrinally. On the ground, some public defenders may have continued to see themselves primarily as public servants, and some trial judges may have endorsed this view. But in the 1940s, California appellate judges rejected the Progressive ideal of the public defender. They constructed the public defender as an opponent of the state, leaving intact (at least in theory) the American adversary system of criminal justice. In so doing, they followed the direction of the United States Supreme Court, which had recently issued a robust defense of adversary process in the landmark right-to-counsel case of

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<sup>21</sup> Appellant’s Opening Brief, *supra* note 2, at 25 (quoting transcript of judge’s remarks).

<sup>22</sup> *Avilez*, 86 Cal. App. 2d at 296.

*Powell v. Alabama.*<sup>23</sup>

That California courts defined the public defender in this way, eschewing the Progressive vision of cooperative justice, was a landmark development in the history of California criminal law and procedure. Through decisions like *Avilez*, appellate judges provided definition and guidance for a still-developing institution that has since become a cornerstone of California criminal practice. Today, half of California counties operate full-time public defender's offices, including the ten most populous counties—Los Angeles, San Diego, Orange, Riverside, San Bernardino, Santa Clara, Alameda, Sacramento, Contra Costa, and Fresno—which are home to almost 75% of the state's population.<sup>24</sup> In some California jurisdictions, the public defender's office represents almost everyone charged with a crime.<sup>25</sup>

Yet historians have largely neglected the “little known” story of how and why public defenders came to occupy such a central place in California's criminal

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<sup>23</sup> *Powell v. Alabama*, 287 U.S. 45 (1932). *See infra*, Part II.

<sup>24</sup> Counties that do not run a full-time public defender contract out to private attorneys to provide indigent defense. Of California's 15 most populous counties, only San Mateo County employs a contract public defender. California Public Defenders Association, “California Federal, State, and Local Public Defender Office Directory,” April 1, 2010, *available at* <http://www.cpda.org> (last visited June 29, 2010); State of California, Department of Finance, “Press Release: California Population Continues Slowed Growth, According to New State Demographic Report,” Dec. 17, 2009, *available at* <http://www.dof.ca.gov/research/demographic/reports/estimates/e-2/2000-09/> (last visited June 29, 2010).

<sup>25</sup> For instance, about 90% of defendants in the City and County of San Francisco qualify for the services of a public defender, as documented in “Presumed Guilty,” a documentary on the office by KQED (San Francisco's PBS affiliate). *See* PBS, Presumed Guilty, <http://www.pbs.org/kqed/presumedguilty/4.0.0.html> (last visited Aug. 31, 2009).



courtrooms.<sup>26</sup> The standard histories of Progressivism, even those that focus on California, do not mention the public defender movement.<sup>27</sup> Yet the public defender idea was “widely advocated” throughout the country in the 1910s and 1920s, attracted a great deal of scholarly attention, and was viewed by many jurists as crucial to the broader project of modernizing the legal system.<sup>28</sup> Fortunately, the history of California’s public defenders has not gone entirely untold. In the course of her biographical work on Clara Shortridge Foltz, Barbara Babcock has excavated the forgotten origins of the public defender movement in Foltz’s writings, speeches, and model legislation; framed the competing visions of the public defender among Progressive-era reformers; and outlined the constitutional and legal arguments that Foltz marshaled to bolster her proposal.<sup>29</sup>

Drawing on California court records, this essay builds on Babcock’s work by

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<sup>26</sup> *Inventing*, *supra* note 17, at 1269. Standard histories of the American legal profession do not discuss the development of the public defender, and histories of crime and punishment mention it only briefly, if at all. *See, e.g.*, LAWRENCE FRIEDMAN, *CRIME & PUNISHMENT IN AMERICAN HISTORY* 394 (“A twentieth-century innovation was the public defender.”). A history that does discuss the early public defender movement in more detail is GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH* 195-99 (2003).

<sup>27</sup> Barbara Allen Babcock, *Inventing the Public Defender* 8 n. 35 (Stanford Public Law Working Paper No. 899993, 2006), *available at* <http://www.law.stanford.edu/publications/details/3244/Inventing%20The%20Public%20Defender> [hereinafter *Inventing Working Paper*].

<sup>28</sup> ELIZABETH KEMPER ADAMS, *WOMEN PROFESSIONAL WORKERS* 74 (1921). For a bibliography of some 110 scholarly articles on the public defender between 1914 and 1924, see A. Mabel Barrow, *Public Defender: A Bibliography*, 14 J. AM. INST. CRIM. L. 556 (1924). On Progressive efforts to modernize the criminal justice system, see generally Jonathan Simon, *Visions of Self-Control: Fashioning a Liberal Approach to Crime and Punishment in the Twentieth Century*, in *LOOKING BACK AT LAW’S CENTURY* (Austin Sarat et al., eds., 2002).

<sup>29</sup> *See generally Inventing*, *supra* note 17. Prof. Babcock has shared with the author that she is also planning to include some information on the early public defender movement in her forthcoming biography of Foltz.

following the story of the public defender further into the twentieth century, and by focusing more on how the idea was translated into practice and doctrine. How did California lawyers and judges conceive of this new player in the criminal justice system? How did they define the public defender's professional and ethical commitments? In Part I, I contrast Foltz's original vision of the public defender with the Progressive conception, which was embraced by the nation's first public defender, Walton J. Wood of Los Angeles. In part II, I analyze a key case in which the California Supreme Court embraced the adversary model, and suggest some broader constitutional and cultural developments that may explain this result.

### **Part I: Competing Visions of the Public Defender**

The public defender was the invention of Clara Shortridge Foltz, California's first woman lawyer.<sup>30</sup> Based on her 15 years of trial practice, Foltz observed that although courts usually appointed counsel for "pauper" defendants who requested it, the caliber of those lawyers was low. Typically "they [had] no money to spend in an investigation of the case, and [came] to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the State."<sup>31</sup> To level the field, Foltz envisioned replacing

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<sup>30</sup> *Inventing*, *supra* note 17, at 1271. Babcock has written several articles on Foltz's biography and pioneering achievements. See Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673 (1988), reprinted with a new introduction in 28 VAL. U.L. REV. 1231 (1994); Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991); Barbara Allen Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, in REVEALING LIVES 131 (Susan Groag Bell & Marilyn Yalom eds., 1990).

<sup>31</sup> *Inventing*, *supra* note 17, at 1271 (quoting Clara Foltz, *Public Defenders—Rights of Persons Accused of Crime—Abuses now Existing*, 48 ALB. L.J. 248 (1893)).

appointed counsel with salaried county officials, provided with public funds to maintain their offices—just as counties funded their district attorney’s offices.<sup>32</sup> Although Foltz lobbied for the public defender nationwide,<sup>33</sup> her campaign’s earliest successes came at home. In 1913 Los Angeles County established the nation’s first public defender office, and in 1921, California became the first state to pass her model legislation, the Foltz Defender Bill.<sup>34,35</sup>

The public defender idea found sympathetic ears among elite jurists, who were horrified by the tawdry pageant of criminal law in general and by criminal defense attorneys in particular. Criminal defense had once been considered every lawyer’s “sacred duty,”<sup>36</sup> and as late as 1900 it was not uncommon for prominent lawyers to be generalists. But by the 1920s the bar had specialized and stratified, with criminal

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<sup>32</sup> For the text of the bill, *see id.* at 1272 n. 30.

<sup>33</sup> *Id.* at 1273.

<sup>34</sup> *Id.* For a bibliography of some 110 scholarly articles on the public defender between 1914-1924, see Barrow, *supra* note 28.

<sup>35</sup> CAL. STAT. 245 § 5 (1921). The bill allowed for counties to establish and fund public defender’s offices, but did not require it.

<sup>36</sup> *See* Alan Rogers, “A Sacred Duty”: *Court Appointed Attorneys in Massachusetts Capital Cases, 1780-1980*, 41 AM. J. LEGAL HIST. 440, 440-41 (1997). For representative nineteenth-century views of criminal defense as a duty lawyers owed in their capacity as officers of the court (which persisted into the 20th century at least in a few influential works), *see* THOMAS COOLEY, 1 CONSTITUTIONAL LIMITATIONS 697 (8th ed. 1927). However, by 1929 the American Bar Association’s *Canons of Professional Ethics* had recast criminal defense from a “duty” to a “right” of the bar. *Compare* CANONS OF PROF’L ETHICS (1908) (“I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man’s cause for lucre or malice.”) *with* CANONS OF PROF’L ETHICS (1929) (“A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.”).

defenders joining the tort plaintiff's bar at the lowest stratum.<sup>37</sup> Surveys found that only a tiny minority of lawyers accepted criminal cases; most viewed the work as disreputable.<sup>38</sup> No longer a "sacred duty," neither did criminal practice offer much promise of earthly rewards, "since it is impossible to build up a clientele except among professional criminals."<sup>39</sup>

In the Prohibition years, with tableaux of "g-men" and "gangsters" dominating newsreels and headlines, elite jurists lamented the rise of a cadre of "habitual defenders" who gleefully exploited loopholes and technicalities to keep their well-paying patrons out of prison.<sup>40</sup> Procedural safeguards designed to protect the innocent in rural pioneer

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<sup>37</sup> Roscoe Pound observed, "The great achievements of the Bar were in the Forum and the most conspicuous success was before juries in the trial of criminal cases. . . . In the second stage leadership passed to the railroad lawyer. . . . Criminal law became the almost exclusive field of the lower stratum of the Bar." Sienna Delahunt, *Chapter IV: The Gentleman at the Bar*, in RAYMOND MOLEY, *OUR CRIMINAL COURTS* 62 (1930). For historical analysis of the specialization and stratification of the bar, see, e.g., Robert W. Gordon, *The Legal Profession*, in *LOOKING BACK AT LAW'S CENTURY* 287-336 (Austin Sarat et al., eds., 2002).

<sup>38</sup> The influential *Cleveland Survey of Criminal Justice Survey* found that of 386 Cleveland lawyers, almost 40% accepted no criminal cases at all, and only 3% took them regularly. Delahunt, *supra* note 37, at 62. President Hoover's Wickersham Commission reported on polls showing that lawyers considered criminal work "unremunerative," disreputable because "it involves association with an undesirable element in the profession," and overly technical. U.S. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, 4 U.S. WICKERSHAM COMM'N REPORTS 27 (1931) [hereinafter WICKERSHAM COMM'N].

<sup>39</sup> Delahunt, *supra* note 37, at 63.

<sup>40</sup> E.g. WICKERSHAM COMM'N, *supra* note 38, at 19 ("Habitual defenders of criminals have learned to take advantage of [the prosecutor's nol pros power]."). On the cultural image of the "gangster" in the Prohibition years, see generally DALE E. RUTH, *INVENTING THE PUBLIC ENEMY: THE GANGSTER IN AMERICAN CULTURE, 1918-1935* (1996) (analyzing constructions of the "gangster" in mass culture); BRYAN BURROUGH, *PUBLIC ENEMIES: AMERICA'S GREATEST CRIME WAVE AND THE BIRTH OF THE FBI, 1933-34*

communities had become, in chaotic urban courtrooms, “pieces to be played” by the guilty.<sup>41</sup> At the other end of the spectrum were a different but equally worrisome set of “habitual defenders,” who, rather than helping wealthy clients exploit the system, busied themselves with exploitation of a more direct sort. For Progressive reformers concerned with the plight of the poor, the problem was not that there were not enough lawyers. Rather, the courthouses were overrun with lawyers—of the wrong kind. Whether labeled “shysters,” ... ‘snitch lawyers,’ ‘jail lawyers,’ ‘vampires,’ ‘legal vermin,’ ‘harpies,’”<sup>42</sup> “‘Tombs runners,’”<sup>43</sup> or “‘parasites,’”<sup>44</sup> these “unofficial public defenders”<sup>45</sup> were all too eager to volunteer their services to a hapless defendant, only to extort the defendant’s family for any payment they could muster and, if none was forthcoming, provide a perfunctory defense at best.

It is hard to know how many lawyers deserved the epithets.<sup>46</sup> As with criticisms of the plaintiff’s bar, criticisms of the criminal defense bar were tinged with ethnic and class biases.<sup>47</sup> However, there is probably a great deal of truth to the seamy picture that

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(2004) (tracking the lives and crimes of some of the era’s most notorious real-life fugitive criminals and the FBI’s much-publicized attempts to track them down).

<sup>41</sup> WICKERSHAM COMM’N, *supra* note 38, at 21.

<sup>42</sup> MAYER GOLDMAN, *THE PUBLIC DEFENDER: A NECESSARY FACTOR IN THE ADMINISTRATION OF JUSTICE 19-20* (1917).

<sup>43</sup> CARNEGIE FOUNDATION, *JUSTICE AND THE POOR* 113 (1919).

<sup>44</sup> Delahunt, *supra* note 37, at 66. Delahunt was an editor of the *Columbia Law Review*.

<sup>45</sup> *Id.* at 64.

<sup>46</sup> *See* Gordon, *supra* note 37.

<sup>47</sup> *Id.* at 295; *see also id.* at 297 (describing how bar association disciplinary mechanisms were used not for self-regulation of the bar generally but primarily to discipline immigrant personal injury lawyers).

emerges from the pages of these reports on the urban criminal courts. Clara Foltz would not have disagreed with elite complaints about jailhouse lawyers: it was precisely her experience with such characters that had inspired her public defender proposal. Relegated to criminal courtrooms because, as a woman, she had few professional choices, Foltz observed her counterparts with dismay, noting their “soiled linen” and “whiskey breath.”<sup>48</sup>

But while Foltz proposed to solve the problem by using the public purse to attract higher-caliber lawyers to criminal defense, some Progressive reformers reimagined the public defender as a replacement for criminal lawyers altogether.<sup>49</sup> Their goal was not to provide poor defendants with the equivalent of the gladiator that the rich could afford, but to remake the system entirely so that gladiator-style defense was no longer welcome, or rewarded. The Progressive public defender promised to transform each criminal prosecution into “a cooperative search for corrective and preventive care” rather “than a contest of skill,”<sup>50</sup> with “officers on the state” on both sides, sharing “a singleness of purpose.”<sup>51</sup> Although the public defender could and should zealously defend an innocent client, his only duty to the guilty was to “see that [he was] fairly punished—not over-

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<sup>48</sup> *Inventing*, *supra* note 17, at 1282 (quoting Foltz).

<sup>49</sup> *Id.* at 1275.

<sup>50</sup> Delahunt, *supra* note 37, at 62. In some of the more extreme proposals, private practice would be eliminated altogether and every defendant would be required to submit to the representation of a public official—ensuring that high-paid lawyers on the payroll of organized crime could no longer run circles around DAs, even as the public defender would also solve the different problem of indigent defense. *See, e.g.*, Maurice Parmelee, *Public Defense in Criminal Trials*, 1 J. CRIM. L. & CRIMINOLOGY 735-47 (July 1911).

<sup>51</sup> Delahunt, *supra* note 37, at 71.

punished.”<sup>52</sup>

In 1913 Los Angeles County was the first jurisdiction to implement Clara Foltz’s public defender proposal. But though Foltz took credit for the Los Angeles office, the office quickly departed from her vision.<sup>53</sup> The first public defender in Los Angeles and thus the nation, Walton J. Wood, adopted the Progressive model. In 1918 he wrote with pride that his young office had “worked harmoniously” with the prosecutor’s office: “We have not felt that it was our duty to oppose the district attorney, but rather to co-operate with him in setting all the facts before the courts.”<sup>54</sup> The district attorney returned the sentiment, having written to Wood as early as 1914 that they shared a common goal: “You are performing a duty which this office has attempted to perform in safeguarding the rights of the defendant, but I believe under the circumstances your position gives you a better opportunity to perform that duty than the prosecutor has.”<sup>55</sup> On the basis of these early reports, Progressive reformers around the country praised Wood’s office as a model of their vision of public defense.<sup>56</sup>

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<sup>52</sup> GOLDMAN, *supra* note 42, at 8.

<sup>53</sup> *Inventing*, *supra* note 17, at 1275.

<sup>54</sup> Barrow, *supra* note 28, at 569 (quoting W. J. Wood, *Annual Report of the Public Defender of Los Angeles County, California*, 9 J. CRIM. L. & CRIMINOLOGY 289-96 (1918)). Barbara Babcock provides two examples of cases in which the Los Angeles public defender’s approach differed from that of a traditional defense attorney. In one case, the defender facilitated a guilty plea in exchange for a lenient sentence “by showing that his client was starving and seeking work when he stole.” In contrast, Babcock suggests, “Clara Foltz’s defender ... might well take these appealing facts to a jury.” *Inventing*, *supra* note 17, at 1277.

<sup>55</sup> GOLDMAN, *supra* note 42, at 38-39.

<sup>56</sup> A 1924 bibliography of articles on the public defender lists several that favorably assess the Los Angeles office. *See* Barrow, *supra* note 28. Mayer Goldman, a New York attorney who became a leading crusader for the Progressive public defender, cited its

By the time that the 1921 statewide public defender law passed, the pioneering Los Angeles public defender's office had achieved a high degree of respectability, overcoming any disrepute that the public and legal profession reserved for criminal lawyers generally. The office enjoyed weeks of favorable press when it handled the 1921 trial of Louise Peete, accused of defrauding and murdering the wealthy oil magnate James Denton. Peete was convicted, but spared the death sentence<sup>57</sup>—as a Progressive might have put it, “punished—not over-punished.”<sup>58</sup> The trial “attracted headlines around the world and was the sensation of Los Angeles while it lasted,” with some 147,000 onlookers attempting to crowd into the courtroom.<sup>59</sup> The case received favorable coverage throughout the state, with the public defender's participation meriting prominent mention.<sup>60</sup> When the deputy P.D. who conducted Peete's defense was promoted to the head of the office—replacing Walton Wood, who had recently been named to a judgeship—his hometown paper, the San Jose *Mercury Herald*, reported with

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successes approvingly in his 1917 book on public defense, quoting the 1914 letter. GOLDMAN, *supra* note 42, at 38-39.

<sup>57</sup> Later Peete worked for many years as a housekeeper, and one by one her employers met with suspicious ends, but apart from her conviction in the Denton case, the apparent serial killer managed to convince the authorities that all of the deaths were accidents until she was finally convicted and sentenced to death in a 1945 prosecution for the murder of Margaret Logan. *See Louise*, TIME, June 11, 1945 (summarizing Peete's biography upon the occasion of her death sentence).

<sup>58</sup> GOLDMAN, *supra* note 42, at 8.

<sup>59</sup> *Former S.J. Man Now L.A. Public Defender*, SAN JOSE MERCURY HERALD, March 23, 1921, at C13.

<sup>60</sup> *See, e.g., Slaying Case Is Opened*, SAN JOSE MERCURY HERALD, Jan. 20, 1921, at C20. The headlines read: “DENTON SLAYING CASE IS OPENED – Eleven Prospective Jurymen Are Selected in Los Angeles Court – Public Defender Acts as Attorney for Mrs. Louise M. Peete During Trial.”



pride on this “signal honor.”<sup>61</sup> The extent to which the Los Angeles model had convinced California reformers of the merits of the public defender idea is also indicated by the 1920 recommendations of a San Francisco civil grand jury.<sup>62</sup> After sketching an image of the San Francisco justice system that would have been familiar to many Progressive reformers—“the absence of decorum, delinquences of judges, the prevalence of ‘shysters’”—the grand jury recommended sweeping reforms, including the establishment of a public defender’s office.<sup>63</sup>

## **Part II: Judicial Visions of the Public Defender—*In re Hough***

Throughout the 1920s, legal scholars debated whether the new public defenders should aspire to be “individual advocate[s]” or “Progressive public servant[s].”<sup>64</sup> As public defenders became fixtures in many counties, this debate moved from the pages of legal journals into courtrooms throughout California. In the 1940s, appellate judges stepped into the fray to provide an authoritative construction of the public defender’s role. In California Supreme Court cases such as *In re Hough* and intermediate appellate

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<sup>61</sup> *Former S.J. Man Now L.A. Public Defender*, SAN JOSE MERCURY HERALD, March 23, 1921, at C13.

<sup>62</sup> California counties convene civil grand juries each year to scrutinize county government and propose reforms. *See* Calif. Pen. Code § 905; Calif. Const. art. I, § 23 (requiring counties to empanel a grand jury to serve during each fiscal year). California counties do also convene criminal grand juries for some cases, but the state does not require that every prosecution proceed by grand jury indictment. *See* Jon M. Van Dyke, *Trial Juries and Grand Juries*, in 2 ENCYC. OF THE AM. JUDICIAL SYSTEM 738-39 (1987).

<sup>63</sup> *Drive Shysters from S.F. Courts, Is Demand of Jury*, SAN JOSE MERCURY HERALD, July 21, 1920, at 8. The grand jury also proposed that the city increase judges’ compensation, eliminate private practice by judges, and extend judicial terms to six years, among other reforms. *Id.*

<sup>64</sup> *Inventing*, *supra* note 17, at 1277.

cases like *Avilez*, the courts vindicated Foltz's model of the crusading trial lawyer—rejecting any suggestion that public defenders might have a different role than private defense attorneys.

Although California was unique in its early adoption of the public defender system, it took a confluence of legal-historical developments that were not unique to California to open the space for appellate judges to opine on the question. Beginning in the 1920s and '30s, state court judges across the country became increasingly willing to entertain prisoners' claims that their convictions should be overturned because they had suffered from ineffective or negligent defense at trial.<sup>65</sup> In some cases, judges familiar with the same courthouse conditions that so horrified Progressive reformers were sympathetic to young, uneducated, non-English-speaking prisoners who had been scammed by so-called jailhouse lawyers.<sup>66</sup> In such cases, it was difficult to maintain the legal fiction, carried over from the civil context, that attorney negligence must be imputed to the client, because the attorney was no more than the client's agent (i.e., the client had assumed the risk). The Supreme Court provided a constitutional imprimatur to this nascent line of cases with *Powell v. Alabama* in 1932, overturning the rape convictions of nine black teenagers who had effectively gone without counsel: a lawyer

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<sup>65</sup> The early development of the “ineffective assistance of counsel” claim as a grounds for criminal appeal is discussed briefly in James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 443-44, 447 n.17 (1977). See also D.F.M., Note, *Incompetency of Counsel as the Basis for a New Trial in Criminal Cases*, 71 U. PA. L. REV. 379, 379 (1923) (discussing early cases and observing that “[t]he not infrequent jeopardizing of a man's life in a criminal trial by the inefficiency or negligence of his attorney has given rise to a new doctrine which, in several jurisdictions, has permitted a letting down of the bars of strict legal procedure”).

<sup>66</sup> *E.g.* *People v. Nitti*, 312 Ill. 73 (Ill. 1924); *Sanchez v. State*, 199 Ind. 235 (1927).

was appointed the morning of trial, leaving no time to investigate or prepare a defense.<sup>67</sup> Finally, the expansion of state and federal habeas corpus review beginning in the 1940s made it easier for prisoners to bring collateral appeals introducing new evidence. This last development was particularly important since it is often impossible to prove an attorney's negligence from the trial record alone.<sup>68</sup>

To be sure, successful cases of this type remained relatively rare until the 1960s and the complex jurisprudence of "ineffective assistance of counsel" that has developed since the 1984 case *Strickland v. Washington*, after which IAC claims became the most common type of criminal appeal, did not yet exist.<sup>69</sup> Well into the twentieth century, most state courts took for granted that it was "beyond the power of the court to set aside a verdict because of the inefficiency of counsel."<sup>70</sup> But whether or not his appeal was successful, every time a convicted prisoner pressed an attorney negligence claim he provided appellate judges with an occasion to opine on the proper role and duties of the defense attorney. It was through one such case, in 1944, that the California Supreme Court clarified the question of the public defender's duties to his client.

The case of William Leva Hough got to the California Supreme Court on a writ of habeas corpus. Hough was on death row at San Quentin for the 1942 murders at a Long

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<sup>67</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>68</sup> See Strazzella, *supra* note 65, at 444. IAC litigation exploded in the 1960s after a series of landmark Supreme Court cases expanded avenues for collateral attack of criminal convictions.

<sup>69</sup> *Strickland v. Washington*, 466 U.S. 688 (1984).

<sup>70</sup> *Commonwealth v. Dascalakis*, 246 Mass. 12, 26 (1923).

Beach café of his estranged wife and a gentleman friend of hers.<sup>71</sup> Hough argued that his guilty pleas were void because he had been misled by the trial judge, prosecutor, and public defender to believe that if he pled guilty, he would be sentenced to life imprisonment.<sup>72</sup> The court rejected Hough's claims that the judge and prosecutor had misled him out of hand, finding no showing in the record of any promises to Hough.<sup>73</sup> Hough's claims against his counsel—Erling Hovden, a 12-year veteran of the Los Angeles County public defender's office—were no more successful, but in the course of rejecting them, the court took the opportunity to elaborate upon the public defender's role.

Hough's first contention (as construed by the court) was that “the public defender [was] an officer of the county, and represent[ed] the state in the prosecution of criminal actions, in the same light and to the same extent as the district attorney . . . .”<sup>74</sup> Echoing the Progressive reformers who imagined the public defender as a partner of the prosecutor, this position did have a certain logic: the public defender was on the county

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<sup>71</sup> *In re Hough*, 24 Cal.2d 522, 524 (Cal. 1944); Return to Writ of Habeas Corpus at 11, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944). At the time of the murders, the Houghs had initiated divorce proceedings and each had taken out a restraining order against the other. Return to Writ of Habeas Corpus at 11. All court documents cited in this essay relating to *In re Hough* are available at the California State Archives by requesting the file for California criminal case number Crim. 4500.

<sup>72</sup> *Hough*, 24 Cal.2d at 525, 527-28, 533. Hough, who suffered from syphilis and various neuroses, also argued on appeal that he was mentally incompetent at the time of the plea. The California Supreme Court quickly dispatched with this claim, observing that of the three alienists appointed by the trial court, two had evaluated him as sane at both the time of the murders and the time of their examination, and the third had been inconclusive. As such, the trial judge did not abuse his discretion when he allowed the prosecution could proceed. *Id.* at 533-34.

<sup>73</sup> *Id.* at 527.

<sup>74</sup> *Id.* at 528.

payroll.<sup>75</sup> But the California Supreme Court rejected it out of hand: “Petitioner cites no authority in support of his contention and none has come to our attention.” Rather, under the Court’s interpretation of the California public defender statute,

when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court.<sup>76</sup>

Thus the public defender was an agent of the client, not the county.<sup>77</sup>

But the court had overstated Hough’s argument. Hough’s appellate lawyer was Morris Lavine of Los Angeles, who apparently took the case *pro bono* at the urging of friends of Hough’s.<sup>78</sup> Nowhere in his briefs or oral argument did Lavine argue, as the court claimed, that “the public defender ... represents the state in the prosecution of criminal actions, in the same light and to the same extent as the district attorney ... .”<sup>79</sup> Rather, Lavine’s brief acknowledged that the public defender “acted on behalf of the defendant”; but it also made the common-sense observation that, as a public official, the

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<sup>75</sup> Compare recent cases that have tried (mostly unsuccessfully) to frame the public defender as a state actor for the purposes of constitutional analysis. *Vermont v. Brillon*, 556 U.S. \_\_\_\_ (decided March 9, 2009) (no speedy trial violation if delay was public defender’s fault); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defenders are not state actors for Section 1983 litigation). Many studies have found that clients perceive public defenders as part of the criminal justice bureaucracy, rather than individual advocate. See William Stuntz, *The Uneasy Relationship between Criminal Law and Criminal Procedure*, 107 YALE L.J. 1, 33 n. 117 (1997).

<sup>76</sup> *Hough*, 24 Cal. 2d at 528-29.

<sup>77</sup> *Id.* at 529.

<sup>78</sup> Affidavit of Morris Lavine (January 17, 1944) at 2-3, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

<sup>79</sup> *Hough*, 24 Cal. 2d at 528.

public defender “was an officer of the state and county, just as much as the district attorney.”<sup>80</sup> Thus far Lavine had not written anything controversial or even controvertible. His novel legal argument came at the next step, when he argued that “any representations made by the court to Mr. Hovden,” and then conveyed by Hovden to Hough, were, by some transitive property of criminal law, direct representations from the state to the defendant. As such, Hough had a right to rely on them. For this proposition Lavine did indeed cite authority: a line of cases holding that public officials’ promises are binding.<sup>81</sup> It is telling that the court did not distinguish these cases, instead implying that it was self-evident that public defenders were not public officials in a legal sense, even if they received a public salary.

But while a reasonable construction of the public defender statute, the court’s reading is not self-evident. The statute simply provided that the public defender “shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged with the commission of any contempt, misdemeanor, felony or other offense.”<sup>82</sup> The precise content of the verb “shall defend” was not specified. Nor did any provision in the statute clarify whether the fact that public defenders were salaried by the county transformed them into public officials for other legal purposes. Nonetheless, after *Hough* the authoritative judicial construction of the statute was clear: “shall defend” meant “shall defend just as retained counsel would do.” The *Hough* court also elevated this statutory equivalence to a constitutional requirement:

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<sup>80</sup> Petitioner’s Brief at 10, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

<sup>81</sup> *Id.* at 11-12 (citing cases).

<sup>82</sup> *Hough*, 24 Cal. 2d at 528 (quoting the statute as on the books at the time of *Hough*).

The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right 'to have assistance of counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime.<sup>83</sup>

Hough made a second argument that, even if Hovden's advice to plead guilty was attributed only to himself and not the county, it was still unconstitutionally coercive. In an affidavit, Hough testified that Hovden had told him, "I guarantee you that if you plead guilty you won't get gassed."<sup>84</sup> The *Hough* court did not reach the question of whether such a promise could ever be the basis for overturning a plea. Instead, the court rejected the factual predicate for the argument, finding it implausible that Hovden would have actually given such misleading advice. Not only did Hovden himself deny making any such assurances, the Court emphasized that he was an experienced public defender and that even Hough's appellate counsel admitted of his reputation as a "courageous" and "high class attorney."<sup>85</sup>

To reach this result, the court engaged in some remarkably creative misreading of Hough's briefing. Lavine had indeed praised Hovden as "courageous" at oral argument, but he was not referring to Hovden's general reputation. Rather, he was praising Hovden (and his supervisor at the P.D.'s office) for supporting Hough in his habeas petition. Hovden had sworn a lengthy affidavit with his account of the plea negotiations, even though given "the circumstances" (presumably, the risk that he would face opprobrium

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<sup>83</sup> *Id.* at 529.

<sup>84</sup> *Id.* at 529.

<sup>85</sup> *Id.* at 530.

for his conduct of Hough's defense), other public defenders would have likely been "inclined to forget it and let the defendant defend himself."<sup>86</sup> Hovden did deny making the verbatim statement, "I guarantee you that if you plead guilty you won't get gassed," or any other "guarantee" of a particular punishment.<sup>87</sup> But he did so only in response to a letter from the clerk of the California Supreme Court, requesting that he clarify whether or not he had made that precise statement.<sup>88</sup> In this supplemental affidavit filed at the court's request, Hovden remained quite clear that although he had made no guarantees, he had informed Hough that "in view of the repeated statements made to [him] by the trial court, [he] could not conceive of the imposition of the extreme penalty on a plea of guilty."<sup>89</sup> At oral argument, Lavine suggested that the issue was not Hovden's exact words but whether "it was a reasonable inference for Hough to conclude that the promise of a life sentence had been made."<sup>90</sup>

In Hovden's original affidavit, he was even more explicit. He described multiple conversations with both the young deputy district attorney assigned to the case and a senior deputy district attorney with whom he had a close working relationship, as well as the trial judge, Leslie Still. Although the D.A.'s office insisted upon officially recommending a sentence of death, Hovden testified that Judge Still had repeatedly

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<sup>86</sup> Oral Argument of Morris Lavine, Esq., on Behalf of Appellant (May 8, 1944), In re Hough, Crim. 4500 (Cal. Sup. Ct. 1944).

<sup>87</sup> Supplemental Affidavit of Erling J. Hovden (April 21, 1944), In re Hough, Crim. 4500 (Cal. Sup. Ct. 1948).

<sup>88</sup> Clerk of Supreme Court to Attorney General Robert W. Kenny and Morris Lavine, April 13, 1944, California State Archives, Crim. No. 4500.

<sup>89</sup> *Id.*

<sup>90</sup> Oral Argument, *supra* note 86, at 8-9.



indicated that he would not impose such a sentence if the defendant pled guilty to two counts of first-degree murder, and at least one deputy D.A. agreed that a life sentence would be appropriate. True, the day before trial Judge Still had cautioned Hovden that he might have to impose death after all, but Hovden interpreted that proviso merely

as a statement by the court to defense counsel which would protect both the court and counsel from any criticism that a definite promise had been made as to the disposition of the case. ... For many reasons trial judges are unwilling to make positive commitments but counsel is guided by and relies upon their expressed general impressions and act with complete confidence on tacit understandings as to the disposition of their cases. So in this instant case the court had on every occasion when he had expressed himself as to what he believed to be a proper punishment in the light of the facts of the case, he had agreed ... that life imprisonment would serve the ends of justice. Furthermore, the court well knew that the sole and only reason for entering pleas of guilty would be to eliminate even the possibility of the death penalty. ... Up to the very moment of the pronouncement of sentence there was no intimation by the court that such a penalty would be imposed.<sup>91</sup>

Hovden concluded that he “was misled by the comments of the court,” that he had advised his client on that basis, and that Hough’s guilty pleas “would not have been entered had counsel not been so misled by the trial court’s remarks.”<sup>92</sup>

Perhaps the California Supreme Court simply chose not to credit Hovden’s testimony over the competing affidavits filed by the state, in which the prosecutors and Judge Still denied much of Hovden’s account. But instead of saying so, the court

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<sup>91</sup> Petition for Writ of Habeas Corpus and Supporting Affidavit of Erling J. Hovden (May 25, 1943) at 7-8, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

<sup>92</sup> *Id.* at 15-16. Compare the court’s reasoning: The court acknowledged that Hovden had “filed a lengthy affidavit” and been “a most willing witness” in Hough’s behalf, but concluded that as “Mr. Hovden emphatically denies making any such assertion as that attributed to him by petitioner, we are unable to give credence to petitioner’s claim that he was misled in entering his pleas of guilty by any assurance or guarantee on the part of Mr. Hovden.” *In re Hough*, 24 Cal. 2d 522 (1944).

misdescribed Hovden's testimony, as if Hovden had testified against his former client, rather than acknowledging that Hovden's affidavits, if credited, tended to support Hough's claims. In a curious way, the court's rewriting of Hovden's testimony reveals the high regard in which California judges held public defenders. The court's opinion portrays Hough as the typical disgruntled death row prisoner, turning his back on those who tried to help him, including Hovden, a veteran public defender and "high-class attorney" who would never have done what Hough had accused him of doing. Against the murderer stood the rule of law—judges and lawyers—and by ignoring Hovden's testimony on the murderer's behalf, the California Supreme Court welcomed him into that august circle. Perhaps the justices imagined themselves to be defending Hovden's reputation against the slander of an ungrateful former client. But Hough had never accused Hovden of intentionally harming him. In his briefings Hough had argued that if Hovden had misled him, it was only because he had been misled in turn.

In fact, William Hough described his public defender Erling Hovden as his only friend in the days after his arrest. But to establish an identity between public defenders and private defense attorneys, the California Supreme Court necessarily ignored Hough's descriptions of this relationship—a relationship quite different from that of wealthy defendants to their lawyers. A welder in the Long Beach shipyards, Hough could hardly afford to retain counsel to defend a double murder trial. What else could he do besides rely on the assurances made to him by his public defender?

You see I was a verry sick man all this time and I was trying to get money to Hire a Lawyer and it did look like I did not have a friend in the world and then Mr Houden come to me and told me. I have talked to Judge Still and he has led me to bee able to tell you if you will Change your Plee to Guilty and withdraw the Insanity Plee I can guarantee that he wont give

you the Extreame Pinalty ... .<sup>93</sup>

Of course Hough had relied on Hovden's advice, he said: "I had no one else to rely on."<sup>94</sup>

#### **Part IV: Conclusion**

The California Supreme Court's explication of the public defender's role did nothing to help William Hough; in the end, Hough was spared execution, but by executive rather than judicial clemency.<sup>95</sup> In fact, perhaps it was the justices' inclination to uphold Hough's conviction that motivated them to construe the public defender statute the way they did in *Hough*. But the precedent had been set, and in 1948 this precedent would work in the favor of another California prisoner, Frank Avilez.

Avilez's experience with the San Francisco public defender in 1947 demonstrates that confusion persisted among lawyers and trial judges about the public defender's role. Avilez's public defender apparently believed that his role was to facilitate quick guilty pleas, at least in egregious cases.<sup>96</sup> As Melvin Belli described it in his appellate brief, the public defender "spent some *seconds* with the defendant before a plea of guilty was entered, which subjects the defendant to some four hundred fifty-three years in prison!"<sup>97</sup>

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<sup>93</sup> Lavine Affidavit, *supra* note 78, at 3 (quoting letter from Hough).

<sup>94</sup> Traverse to the Return to Writ of Habeas Corpus and Affidavit of William Hough (July 5, 1943) at 6, *In re Hough*, Crim. 4500 (Cal. Sup. Ct. 1944).

<sup>95</sup> In 1945 Hough's death sentence was commuted to a life sentence by acting Gov. Frederick F. Houser. See AUSTIN SARAT, *MERCY ON TRIAL* 223 (2005).

<sup>96</sup> *But see Love Killer Spurns Test*, L. A. TIMES, June 21, 1936, at 3 (discussing a case in which Gerald Kenny did provide a vigorous defense, even though his client wanted to plead guilty).

<sup>97</sup> Appellant's Opening Brief, *supra* note 2, at 5, 22. Belli claimed this sentence was "the longest ever meted out in the history of the State." *Id.* at 22.

The Progressive reformers who imagined the public defender as a partner to the public prosecutor, with no interest in wasting the court's time defending an admittedly guilty client, may have seen nothing wrong with this behavior.<sup>98</sup>

But California's appellate judges rejected this approach wholesale, as a derogation of the defense attorney's duty. In overturning Avilez's convictions, the First District Court of Appeal confirmed that it was Clara Foltz's individual advocate, not the Progressive public servant, that a California public defender should aspire to be. As the California Supreme Court had held in *Hough*, "The public defender stands in the same relation to the accused he is appointed to represent as an attorney regularly retained."<sup>99</sup> To allow a client to plead before conducting any investigation of the facts and the law beyond the client's bare assertion of guilt was to risk overlooking meritorious defenses or mitigating evidence that the client might have, even if the client, unschooled in the law, did not dispute what he perceived to be the charges against him. For this proposition, the *Avilez* court quoted at length from the U.S. Supreme Court's decision in *Powell v. Alabama*, which had elevated to the status of constitutional law the defense attorney's central role in the American system of adjudicating criminal guilt:

The right to be heard would be of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. ... He lacks both the skill

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<sup>98</sup> GOLDMAN, *supra* note 42, at 66-67. Mayer Goldman's book *The Public Defender* spelled out what a public defender should do when a client admitted guilt, and it was precisely what the San Francisco public defender had done with Avilez: plead the client guilty.

<sup>99</sup> *People v. Avilez*, 86 Cal. App. 2d 289, 296 (1948) (citing *Hough*).

and knowledge adequately to prepare his defense, even though he had a perfect one.<sup>100</sup>

Barbara Babcock notes that Clara Foltz herself never addressed explicitly the difference between the two competing models of public defense, and suggests that perhaps they differed only in emphasis.<sup>101</sup> Even so, in cases at the margin, such as *Avilez*, which model the court adopted could mean the difference between upholding and reversing a conviction. And in the public defender's day-to-day work, any number of small decisions would come out differently depending on how the defender viewed himself: as a zealous advocate for each individual client, or a public servant helping the justice system as a whole run smoothly. By 1948 California courts had clearly established, doctrinally, the former view.

Although the appellate court used *Avilez* to make a point about public defenders, the subsequent story of Frank Avilez makes a different point: Sometimes there's only so much a defense attorney can do for a client—regardless of who signs his paychecks. After winning the appeal, Melvin Belli realized he “couldn't really put on a new trial, not one that would end up with any different verdict.”<sup>102</sup> In addition to physical evidence and Avilez's own confessions, the state had five eyewitnesses. So Belli pled him guilty to ten

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<sup>100</sup> *Powell v. Alabama*, at 68-69. *Powell* is cited repeatedly in *Avilez*, 86 Cal. App. 2d at 296. It had also been quoted in Avilez's appellate brief. Appellant's Opening Brief, *supra* note 2, at 30-31 (quoting *Powell* excerpt from *People v. McGarvy*, 61 Cal. App. 2d 557).

<sup>101</sup> *Inventing*, *supra* note 17, at 1279. The narrow width of any gap between the two ideals is also indicated by the fact that Walton Wood, though upheld as an ideal Progressive public defender, did not dispute that in some cases a public defender should not allow his client to plead guilty right away: “Often the defendant does not know whether he has in fact committed a crime.” Walton J. Wood, *THE PLACE OF THE PUBLIC DEFENDER IN THE ADMINISTRATION OF JUSTICE* 17 (1914).

<sup>102</sup> MELVIN M. BELLI & ROBERT BLAIR KAISER, *MELVIN BELLI* 84 (1976).

counts, and 340 years.<sup>103</sup> Essentially it was still a life sentence. Nevertheless, as Belli recalled years later, “Avilez was grateful and sent me a telegram from San Quentin: THANK YOU FOR CUTTING MY SENTENCE IN HALF.”<sup>104</sup>

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<sup>103</sup> *Prison Terms 340 Years*, L. A. TIMES, Dec. 4, 1948, at 4.

<sup>104</sup> BELLI, *supra* note 101, at 84. Belli likely embellished this account of Avilez’s case for poetic effect, describing the sentence as having been halved from 440 to 220 years, but contemporary reports suggest it was only cut to 340 years. *See supra*, text at note 102.