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The Lawyer's Duty of Loyalty: To The Client or to the Institution?*

THE LAWYER'S DUTY OF LOYALTY—I.**

by Ramsey Clark ***

I.

My subject has within its range a major ethical problem of our society and of our profession.

Law can be very important to life. It is essential, finally, to survival. I would like to think of it, for purposes of this conversation, as Hegel did in his work on the philosophy of right where he saw in the development of civilization an expansion of the consciousness of freedom, with the securing of rights under law as the actualization of freedom.

Lawyers are involved in that process. All too often we think that law and legal justice can be something apart from life and social justice, that we can have one set of values and aspirations and attainments in one and something different in the other. But so profound an analyst and philosopher of our law and times as David Bazelon has wondered whether legal justice is possible without social justice.

II.

It is almost absurd to believe that humanity has a capacity to set aside its prejudices and other predilections in a courtroom.

Culture is lord of everything, of mortals and immortals king, Pindar said. Law is caught up within the confines of that culture. It's a slower part, but it *is* a part.

Felix Cohen has said that most judges and lawyers, indeed most people, are as unaware of their culture patterns as they are of the

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oxygen they breathe. Yet, if we are not aware of our culture patterns, our values, how can we hope to judge the ethical quality of our conduct?

III.

Now let's look at where we are and what we do in our profession.

There are probably more than the equivalent of half a million full-time lawyers in this country. We are probably a thirty-billion dollar industry. People don't think of it too often that way. We are probably less than two percent devoted to representation of people who cannot or will not pay money to their lawyers for their time. If you took all the lawyers' time, which is their stock in trade, ninety percent of that time would go to less than ten percent of the people in this country.

I've been saying that for many years. President Carter, to whom I was not close at all—it was his Attorney General who threatened me with ten years in prison and a $50,000 fine; I said, "The fine doesn't worry me, I don't have it, but the ten years, I'm not sure whether I have it or not but I do have other plans"—he made a speech to the Los Angeles Bar Association in which he said that ninety percent of lawyers' time goes to ten percent of the people.

Some audacious person in the audience asked him where he got that. He said he didn't know. They looked all around. Finally they found it. I had said it five years earlier.

So they came to me and asked me where I got it and I said, "I made it up." Isn't that where you get things like that? But it's right; I know it's right. Don't ask me how I know, but of course it's right.

Only two percent of the lawyers are in what we tend to call public interest law. All we are talking about when we say "public interest law" is interest in people who cannot or will not pay for their lawyers.

IV.

It tells us something that money is determining where lawyers' time goes.

Lawyers are dealing in justice, we say, although there is nothing in the LSAT or anywhere else that purports to measure the passion for justice or anything like that.

And if money determines, then we're back before *Griffin v. Illi-*

nois when we were told that equal justice under law is impossible when the kind of trial you get depends on how much money you have.[1] Indeed, we are back before *Marbury v. Madison* when the Chief Justice said that all civil liberty depends on the ability of each of us to protect himself from the violation of his rights.[2]

It is fascinating to read the Scottsboro Boys case, *Powell v. Alabama*, and think of Justice Sutherland with his starched collar. He is writing about young men who were threatened with execution. And he pronounces an extreme and widely condemned principle that in cases like this, where we are dealing with the illiterate, the ignorant, the mentally incompetent and the like, perhaps we should have court-appointed counsel.[3]

That opinion referred only to capital cases. But it did recognize the principle that a lawyer should be able to do better in a court than someone who is ignorant, illiterate, mentally incompetent, or the like. By that time we had gone through generations of people standing before the bar in fear without any effective right to counsel.

I practiced law in the 1950's. We knew that on arraignment days you didn't want to be hanging around a criminal courtroom because a judge might see you back there and assign you half a dozen cases for which he had no money to compensate you.

And there would be hundreds of young men—and once in a while a young woman, and sometimes somebody that wasn't even young—waiting to be arraigned in a terrifying environment, with no counsel or right to counsel, and Clarence Earl Gideon had not been heard of yet.[4]

V.

Gideon had had to plead for himself. You can see the pleasure of Hugo Black in at last having an opportunity to overrule *Betts v.*

1. *See* Griffin v. Illinois, 351 U.S. 12 (1956). *See also* Note, *The Supreme Court*, 1955 Term, 70 HARV. L. REV. 95, 127 (1956); Comment, 55 MICH. L. REV. 413, 421 (1957). *Compare* Boddie v. Conn., 401 U.S. 371 (1971) *with* United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

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

4. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). *See generally* Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. (1951); Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused*, 30 U. CHI. L. REV. 1 (1962); *The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961).

Brady, an awful case.[5] It had held in effect, through the opinion of a former Attorney General (then an Associate Justice), that the state bar associations don't believe you really need counsel if you're accused of crime unless you have got money. Finally we had *Argersinger*.[6]

The slow development of the idea that the right to counsel had something to do with justice, and with equal justice, was *very* slow aborning, perhaps slowest of all among those whose time would be involved, the lawyers.

I do not mean to say that there were not thousands of wonderful illustrations of lawyers coming forward, like John Quincy Adams in the famous case that reached the Supreme Court involving slaves who had staged a rebellion on a schooner off the shore of Cuba which was then brought into Long Island, New York. They were there arrested for being on a boat they didn't own with the owner not apparently on board any longer.[7] But overwhelmingly, there was no representation, no thought of representation.

In the 1960's, as one of the many outcroppings of the civil rights movement, there was the poverty movement. It was 1964 before we had a federal Criminal Justice Act and the first penny appropriated to pay a lawyer to represent an indigent accused of crime in the federal system.[8]

It was 1965 before the federal government began to provide legal services as a part of the poverty program, in the Economic Opportunity Act, with the creation of neighborhood legal services.[9]

VI.

While legal aid had been known in many parts of the country, a place like Dallas, where I came from, had no legal aid until 1953 and then, after a bitter fight, only in civil cases. Criminal law work was considered dirty business in those days, which is not to say that many really practice at it these days.

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5. Betts v. Brady, 316 U.S. 455 (1942).

6. Argersinger v. Hamlin, 407 U.S. 25 (1972). *See also In re* Gault, 387 U.S. 1 (1967). *Compare* Scott v. Illinois, 440 U.S. 367 (1979).

7. *See* United States v. Libelants and Claimants of the Schooner Amistad, 15 Pet. 518, 10 L. ED. 826 (1841). *See also* THE ANTI-SLAVERY CRUSADE IN AMERICA: ARGUMENT IN THE CASE OF UNITED STATES V. CINQUE (1969); C. Martin, THE AMISTAD AFFAIR (1970).

8. The Criminal Justice Act of 1964, 18 U.S.C. § 3001-3772 (1982).

9. The Economic Opportunity Act of 1965, 42 U.S.C. § 2702-2996 (1981). *See generally* E. Johnson, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 39-70 (1978). *See also* The Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (1985); *see also infra* note 14.

With *Gideon* and *Argersiner* we had what has been called the germ of inarticulate truth, some early expression of the idea that we ought to have counsel for poor people. But the rate at which we have proceeded is incredibly slow and the quality is inadequate. As Scott Fitzgerald said, the poor are different—or something like that.

Our total legal defense capacity from public funding is insufficient, in my judgment, to provide effective assistance of counsel (a constitutional right that we ought to insist upon) to a fourth of the indigents accused of crime.

I had a death case in Texas. The fellow had been on death row nine years, two hundred and forty-seven days. One of the points on appeal was that the Texas statute provided only $250 for investigation in both the guilt-or-innocence phase and the penalty phase of his trial. The case was tried in an out-of-the way place. You couldn't get an investigator or anybody else even to go down there for $250, much less to investigate what he was supposed to go down there to learn about.

The case was tried the same year that Bert Lance recovered, from the bank that he had worked for before he was indicted, a million, nine hundred and fifty thousand dollars that he spent in his defense on a minor criminal charge. In a notorious murder trial in Houston, Texas, a defendant spent four million dollars in attorneys' fees.

And here is an indigent accused of crime, with two lawyers, terrified at the prospect, appointed to defend him over their protests, and only $250 to investigate a case that involved incidents from Georgia across Arkansas and into Texas and the final fatalities there.

VII.

There are more than thirteen hundred people on death row today.[10] We have executed five this year, two last week. Since we are putting about two hundred and fifty a year on death row now and the rate is accelerating, we can't catch up this century, even if we executed one a day.

In my judgment, from having been involved in a number of those cases and reviewed many more transcripts, seventy-five percent were deprived of the effective assistance of counsel. The law

10. *See* Silas, *The Death Penalty: The Comeback Picks Up Speed*, 71 A.B.A.J. 48 (April 1985).

doesn't have the will to do what it says. That's why we don't execute them.

We are now a generation after *Chessman* where we held up our judicial system to ridicule world-wide for our inability to decide and act.[11] And we still can't decide and act because we know we can't really make judgments in a rational and principled fashion.

We muddle through, not providing the accused effective assistance of counsel because we fear and hate them.

VIII.

We create public defender offices. We have a major one in New York City. It's called the Legal Aid Society. It was created over a hundred years ago. It has by contract taken on the criminal work in New York City. It does ninety percent of all the criminal work in Brooklyn, which has a lot of criminal work.[12]

In all of the years until 1983, no attorney working for the Society had ever filed a workload grievance. No attorney had sought to assess his workload in a way that would determine whether he could find enough time to do what ought to be done for his clients.

In the fall of last year, a lawyer was fired immediately after having represented to courts and to his employer (the Legal Aid Society) that the volume of cases assigned him was so great that it was impossible for him to provide effective assistance of counsel. He said that the Sixth Amendment to the United States Constitution and Disciplinary Rule Number 2 of the New York Canons of Ethics for attorneys required him to seek relief.

In civil cases, the vast majority of the public is priced out of the market for attorneys' services. An ABA study a few years back showed that two-thirds of the public had never retained a lawyer or consulted a lawyer more than once. If you're caught in a terrible family dispute where everything seems at stake, including your children, the law doesn't apply to you in a meaningful way if you don't have money.[13]

You may have all the rights that the government has created for you, like Social Security. But after the Watts riots we made a sur-

11. For a chronology of the career of Caryl Chessman see M. Machlin and W. Woodfield, NINTH LIFE 518 (1961).

12. *See* Wallace v. Kern, 392 F. Supp. 834 (E.D. N.Y.), *rev'd*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 420 U.S. 947 (1975).

13. *See* Polk County v. Dodson, 454 U.S. 312, 332 (1981) (Blackmun, J., dissenting); Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974); Ligda v. Superior Court, 5 Cal. App. 3d 811, 827-28, 85 Cal. Rptr. 744, 754 (1970); Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980).

vey through the curfew zones and found that one-third of the people living there and entitled to Social Security benefits weren't receiving them. (In Beverly Hills, however, everyone entitled to Social Security benefits was receiving them, whether needed or not, so far as the survey could tell.) Those people in Watts had earned benefits as a matter of statutory and contractual rights but they weren't receiving them. Courts would resist class actions seeking to compel the government to do its duty to make those payments.

We live in a materialistic society. We love things. We measure by money. Law won't be different. Overwhelmingly, deans and professors of law schools feel proudest of students they have trained to enter major law firms. The power of the bar is in the major law firms more and more.

If you take the lawyers who go into the Cabinet of the President of the United States, I don't think you'll find one since me who wasn't making several hundred thousand dollars a year practicing law before appointment, as in the case of Patricia Harris. Joe Califano, who was appointed to HEW, made over $500,000 the preceding year, even though he spent more than half of his time campaigning for Jimmy Carter. Cy Vance, with a more genteel approach, made $285,000 the year before he became Secretary of State.

X.

We have various institutions designed to serve the needs of those with serious problems of access to legal services. It is the dynamics of those institutions that I now want to look at briefly and the ethical pressures that the people there are under.

In public defenders' offices and in the Legal Services Corporation offices around the country, overwhelmingly the key to success is to serve the institution. In a public defender's office, the institution has to dispose of a *lot* of cases.

We have seen case loads in public defenders' offices double while staffs have been cut twenty-five percent. Now, you have to ask, Were they doing nothing before? Can they, facing the constitutional requirement for effective assistance of counsel, really handle that increment? Is there anyone who cares enough to begin to try to measure systematically what is required to provide effective assistance?

When we began, we followed the lead of others and said that there ought to be one lawyer for five thousand poor people. If you look around the country now, in most public defenders' offices, it

would perhaps be one for fifteen thousand. But one for five thousand is no bargain, let me tell you. The amount of time that any poor person is likely to get on his case involving his liberty compared to the time that someone gets who can afford a $10,000 fee, is very likely to be negligible.

Time in court is wasted if you've got to run a lot of cases through. If you complain about the number of cases you're assigned, you're not considered to be helping. Supervisors tend conscientiously to say, "Look, we're doing the best we can; we've got all these cases; we've got to handle them." It's like a vegetable stand.

The same tends to be true on the civil side. Impact cases are controversial. The emphasis is placed on handling as many little individual cases as you can. This is the service approach, rather than handling cases which can have an impact, such as class action suits. Impact cases are controversial: funding sources and others get angry with you.

But you can't begin by using a pure service approach (even with a tenfold increment in lawyer capacity), to handle the volume that's there. If you want to secure rights and actualize freedom, you've got to have an impact.

The Legal Services Corporation was created to deal with these matters. But if you take the most controversial areas of legal representation today, you find that the Congress has either prohibited Legal Services Corporation attorneys from acting in those areas or legislation to do so has been introduced and its enactment is threatened: gay rights, military personnel, draft resisters. Even school desegregation cases: it is said that attorneys' fees are otherwise provided for, but the only trouble is that you never get them. Such cases are off limits.

For anything that's really controversial, such as abortion, poor people are not going to get lawyers through public funds. But what's a lawyer worth, if he can't independently and zealously pursue the rights of the individual who wants him? A right that cannot be fulfilled is worse than no right; it *can* become an insult.

XI.

We can see related problems in the major law firms. There we see partners billing clients for associates' time three times what they are paid. We see associates being told, "Two thousand billable hours a year or you're out."

Is an honest two thousand billable hours possible? Is not this a

very cruel thing to do to a young person who may want to work very hard? That's forty hours a week, fifty weeks a year, fairly and directly attributable to a client's matter for which the client can be appropriately billed. These are young people. They're still learning; they've got to spend some time of their time just trying to figure things out.

How often do you see them, with family break-up and other problems, sitting around ten o'clock at night in a fancy restaurant, running up billable hours until one in the morning? They will go out for an hour and a half and have their dinner and come back and work at something or nothing for another hour because they have got to get those billable hours in. And if they don't, no partnership for them.

The overhead is at such a level that the firm "has" to have it. It is teaching people to be soft on an ethical issue of critical importance.

XII.

There's no wonder drug for all of this. It is going to require, in my judgment, a higher commitment by lawyers to justice itself, some growing sense of a personal desire and an obligation to secure rights and actualize freedom, something that you can believe in. It is going to require the ingenuity and determination and perseverance to find a way to do it because it matters to you, because justice matters *to you*. You feel you can make a difference and you're going to take some time to do it. Of course, if you do too much of this, some may think you're peculiar, and you may be out on the streets.

But when you think about it, there are only four ways to find the time for the rights of the unrepresented:

The first is through people in the legal profession wanting to use their time for that purpose because they believe it is important.

The second is what people hate to hear called socialized law practice. What do you think a public defender's office is? What do you think a Legal Services Corporation lawyer is? Why do we tend to cut back on such offices? Why do people want to abolish the Corporation itself, to abolish public funding for it? It doesn't meet a small fraction of the need.[14] It's the second most important opportunity that you have.

14. *See* Conservative Think Tank Recommends LSC Be Abolished, Legal Services Corporation News, Nov.-Dec., 1980, p. 2. *See also* J. T. Moran, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE SPENDING (Transcript of a Hearing on The Crisis in Indi-

The third is through charity. The trouble is that charity, like everybody else, is prejudiced, just on different subjects. Charity doesn't support matters that are unpleasant to it. The venturesomeness of charity is very limited, as is its capacity. It can fund a litigation officer here or there; it can provide lawyers for certain types of representation from time to time. But it is fragile and limited, invaluable but minor.

Then there is the ingenuity of lawyers in creating associations. For example, there are six or eight million retarded people in this society. They come overwhelmingly from the poor. Individually, they have little power; they have no rights to speak of; the institutions many must live in are worse than prisons. But collectively, they do have an opportunity. State and national associations for retarded citizens and many other groups have major litigation projects, full-time lawyers working on their rights, conceiving and designing and enforcing those rights.[15] That sort of thing has to be a major part of what law schools teach us to do.

There are other methods of lawyer combination. We developed what we used to call "a package" for rural law practice in the South in the civil rights days. You could go down there with nothing except a license and make money serving people in matters that concerned you. You had to be versatile. You had to be able to take the criminal cases the court would appoint. You had to learn how to bring class action suits representing poor people who were being ripped off by loan sharks and the rest. [a]

I don't say it's easy to provide the legal services the unrepresented need. I don't say it's the golden road. But it *is* possible.

XIII.

In a society that is highly materialistic, lawyers won't be much different from the rest of the society. Unless we use our imaginations in expanding the opportunity to help, the public will see that we are rationing justice and creating ethical dilemmas at every institutional level.

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gent Defense Funding, November 1982) (A.B.A., 1983). *See also* E. A. Brownell, LEGAL AID IN THE UNITED STATES (1951); *see also supra* note 9.

15. *See* Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.C. 1972); Pennsylvania Assoc. for Retarded Children v. Penn., 334 F. Supp. 1257 (E.D. Pa. 1972). *See also* Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461 (1976); Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180 n.2. *See generally* Note, *Creating an Implied Malpractice Action for the Handicapped in New York*, 46 ALB. L. REV. 520 (1982). *Compare* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

Take the government lawyer. Does he serve the rule of law? Or does he serve the appointive power? What should an Attorney General do? What should a young lawyer in the Civil Rights Division of the Department of Justice do?

How many resignations have we had? Quite a few, actually, in the environmental law area, in the civil rights law area and in a few other areas. These have been young lawyers who have been told that they would not be allowed to enforce the law as their intellect and conscience told them they should. But however encouraging such resignations are, they are still the exception.

What we need is some sense of unity among ourselves in seeing how and why we ration justice, why we have a huge prison population made up predominantly of poor young black men. The law not only fails to do its duty respecting their rights but often helps cause the conditions which put them in prison.[16]

So long as commercial success is the highest value of the profession, justice will be rationed. So long as we don't work as hard for social justice as we do for legal justice, not realizing that legal justice cannot be accomplished without social justice, justice will be rationed.

If we can look beyond our mores, our value patterns, and see the meaning of materialism for the conduct of the agents of the rule of law, then we can liberate ourselves. As individuals we can find ways to pursue justice, to share justice, to spread justice among people for whom it has been a rare quality. In doing so, we find freedom for ourselves as well.

Fear will be the enemy, as it is of every human act that defies cultural norms. I would leave you with Justice Black's admonition from a glorious case we should all remember, *In re Anastaplo*: "We must not be afraid to be free."[17]

16. *See* R. Clark, CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL (1970).

17. *In re* Anastaplo, 366 U.S. 82, 116 (1961) (Black, J., dissenting). *See* MEMORIAL ADDRESSES AND OTHER TRIBUTES IN THE CONGRESS OF THE UNITED STATES ON THE LIFE AND CONTRIBUTIONS OF HUGO LAFAYETTE BLACK, 92d Cong., 1st sess., House Document No. 92-236 (U.S. G.P.O., 1972), at 64-65. *See also* Nat'l L. J., June 18, 1979, p. 21; Anastaplo, *How to Read the Constitution of the United States*, 17 LOY. U. CHI. L. J. 1, 26, n. 74 (1985).