The Supreme Court and the Profession of Law

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The Constitution of the United States in its original seven Articles has no mention of lawyers. The twenty-four Amendments to the Constitution contain only one reference to lawyers, that in the Sixth Amendment on the right to the assistance of counsel in criminal cases. The federal statutes on the profession of law are few and fragmentary. The guiding source drawn on by the Supreme Court in its decisions on the profession of law is its image of the American lawyer. This image is derived by the justices from their conception of the role of lawyers in our social order and the relation of the profession of law to the other elements of our society.

Law is the chief instrument of government. Lawyers have the chief part in employing and shaping this instrument. The standards of the profession of law—its structure, its choice of personnel, its guiding principles in action, even its tone—are of high public importance. In our times, when scientific developments and political ideologies have speeded social change, the standards need re-examination to help insure that the profession is best serving its social functions.

In the development of its standards a profession is apt to look inward and backward and to see most clearly its own needs and desires with lesser attention to the interests of the rest of society which it exists to serve. President Franklin Roosevelt made the point well in an address to the graduating class at West Point: ¹

"... those who enter into a profession, military or civilian, must eternally keep before their eyes the practical relationship of their own profession to the rights,

the hopes and the needs of the whole body of citizens who make up the nation. One of the most difficult tasks of government today is to avoid the aggrandizement of any one group and to keep the main objective of the general good clear and unimpaired.

It is the purpose of this paper to consider some aspects of the influence of the Supreme Court of the United States on the standards of the profession.

The profession of law operates within two larger systems, the economic and the political systems. On the power of government over the two systems the Court has developed contrasting principles. As to the economic system the Court has come to allow to government wide powers of control and even direction, with the old slogans of freedom of contract and sanctity of property rights giving way before the increasing needs of social control. As to the political system by contrast the Court has insisted on individual liberties without restraints or limitations on the competition of ideas. These liberties in our pluralistic society are threatened by the growth of great centers of power, big government, big business, big labor and even big profession. The contrasting attitude of the Court toward regulation of the economic and political systems may be explained in Professor Berle's words "through an evolving consensus that insists equally on enjoying the results of mass production and on the primacy of individual life."\(^2\)

Recognizing that lawyers are essential to the protection of the individual against these centers of power as well as against other individuals, the Court has come to consider the standards of the profession within the larger context of our democratic society. The action of the Court as to four aspects of professional standards will be discussed briefly. One is a structure of the profession that will make legal services available to those who need them. Another is the method of choice and control of the personnel of the profession that will help to assure liberty of thought and of action. The third is the principles of conduct that guide the members of the profession in their work. The last is public leadership.

**THE RIGHT TO COUNSEL AND HIS AVAILABILITY**

*Criminal cases.* The legal right to have effective counsel furnished in criminal cases has been made clear in three decisions. These decisions have been so thoroughly discussed by others that I may deal with them briefly.\(^3\) The


\(^3\) The three cases are Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963). Numerous subsidiary but important questions remain. For example, how serious or of what nature must the accusation be to bring the case within the requirement of counsel, say a traffic violation or a charge of juvenile delinquency; how early and how late shall counsel be provided; before or at arraignment and throughout post-conviction proceedings including attacks in the federal courts on
first decision declared the right in exceptional circumstances in the state courts; the second affirmed the right in all cases in the federal courts; the last extended the right to ordinary cases in the state courts.\^4

The bar has had a noteworthy share in these developments. In all three of the cases the counsel representing the accused in the Supreme Court served out of a sense of professional responsibility. In the culminating case the attorneys general of over twenty states joined in a brief as amici curiae in support of the right. Even before the decision came down the American Bar Foundation had undertaken a thorough study of the methods of providing counsel. With the aid of cooperating committees from all fifty states the foundation extended its inquiry throughout the country, and its findings reveal both deficiencies that need correction and methods that may serve as models.

Civil Cases. The bearing of the Constitution on the provision of counsel in civil matters is quite a different story. It has only begun to unfold through two cases that were about as unpromising as could be found for so important a matter, National Association of Colored People v. Button\(^5\) and Brotherhood of Railroad Trainmen v. Virginia.\(^6\)

The Button case arose from efforts by the State of Virginia to block the NAACP from encouraging and conducting through its legal staff litigation directed against racial segregation. The state had enacted statutes which, though clearly aimed at the NAACP, were general in terms and embodied a centuries old prohibition against the stirring up and conduct of litigation by outsiders. The decision of the Supreme Court, which barred the application of the statute to the NAACP, could have been rested simply on the ground urged by the Association that it was engaged only in protecting political rights or on the correlative nature of Virginia's action stated in Mr. Justice Douglas's concurring opinion as a thinly veiled part of Virginia's "massive resistance" to the law of the land. Instead Mr. Justice Brennan, speaking for the majority, placed the decision on the much broader ground of freedoms of association and expression with all the consequences these rights may encompass.

The Brotherhood of Railroad Trainmen case concerned a plan of the union to aid its members and their families in obtaining redress for acci-

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\(^1\) State court judgments and applications for parole or pardon; when is counsel so lacking in ability or loyalty or courage that his aid is inadequate; what additional aids shall be provided, as, investigators, expert witnesses, transcripts of record?

\(^2\) The cases are considered in the context of the development of the due process clause and of the approach to law by the French Institutionalist jurists in Broderick. Reflection on the Right to Counsel and the Adamson Dissent, 13 Catholic U. L. Rev. 95 (1964).

\(^3\) 371 U.S. 415 (1963).

\(^4\) 377 U.S. 1 (1964).
dents during employment. The part of the plan involved in the case called for the designation by the Brotherhood of selected lawyers in sixteen districts covering the country whom the Brotherhood would promptly and strongly recommend to its members, with the resultant channeling of cases to these lawyers. This was certainly not an area that called for special measures to insure the availability of counsel. For the protection given by the Federal Employers' Liability Act is the most extensive given to any workmen, these employees are alert in understanding and protecting their rights, and the breadth of liability without limitation on recovery make the cases most attractive to many lawyers. Yet the Court relying on the guarantees of free speech, petition and assembly upheld the plan against condemnation, as it stated, by the common law, the Canons of Ethics of the profession, and Virginia statutes prohibiting the unauthorized practice of law.

It would not be useful for my purpose to analyze the two cases in detail. The most unpromising nature of the cases for the purposes for which they were used reveals the depth of the dissatisfaction of the Court with the existing methods of legal services for some of our people. It demonstrates as well the strength of conviction within the Court that the existing standards of the bar must not stand rigidly in the way of the development of new methods. It will be helpful to try to understand the Court's methods in employing the cases as it did, to perceive the reasons for the decisions and, most importantly, to take note of the opportunities they open before the bar. In two surprising bounds the Court has leaped a long way forward in giving the protection of the Constitution to new methods of providing legal services.

In developing the law courts cannot create the cases they would like to decide. They must make do with the cases brought their way. However, they can employ devices to foster development. So in the Button case Mr. Justice Brennan, like a pretty girl dropping her handkerchief to encourage further advances, dropped a broad question as to the validity of earlier state decisions that condemned the furnishing of legal services by corporate intermediaries. Citing these cases he said:7

"We intimate no view one way or the other as to the merits of those decisions. . . ."

In the Brotherhood case Mr. Justice Black transformed the Button decision into something beyond its scope and, as Mr. Justice Brennan with his question, intimated that the protection of the Constitution may extend much beyond the methods involved in them.8

"It is interesting to note that in Great Britain unions do not simply recommend lawyers to members in need of advice; they retain counsel, paid by the union,

7 371 U.S. at 442.
8 377 U.S. at 7.
to represent members in personal lawsuits, a practice similar to that which we upheld in N. A. A. C. P. v. Button, supra."

The two cases are excellent illustrations of the creative nature of the judicial process.

In reaching the results it did the Court was given unintended aid by the opponents of the plans. The counsel for Virginia in the Button case were unwilling even to suggest in argument that the state's "interposition" or "massive resistance" could stand for an instant against the supreme law of the land. So they based their defense on the supposed professional and legal condemnation of corporations which as "lay intermediaries" placed between lawyers and clients provide legal services to those in need, and counsel argued that the NAACP was such a corporation. It was this defense which, though rejected by the Court, furnished Mr. Justice Brennan the opportunity for his far-reaching question and intimation. In the Brotherhood case the unintended aid was given by a ruling of the Committee on Unauthorized Practice of Law of the American Bar Association that legal services could not be provided as fringe benefits either by a corporation to its employees or by a labor union to its members. Though the ruling was not explicitly mentioned in either opinion the justices evidently had it much in mind, for in both opinions the Court cited a passage in the leading work on legal ethics in which the long-time chairman of the bar association's Committee on Professional Ethics had expressed his strong disagreement with the ruling. So Virginia's "massive resistance" to integration and the adamant opposition of a bar committee to group legal services contributed much to these developments.

The two civil cases discussed differ from the three key criminal cases on the right to counsel in several respects. The substantial unanimity within the Court on legal representation in criminal cases has not carried over to the civil cases. In both of the latter cases there were vigorous dissents, by Mr. Justice Harlan and Mr. Justice Clark, who expressed grave concern over the threat of the decisions to the standards of the bar. The organized bar, too, which had welcomed the results in the criminal cases, opposed the decisions in the civil case.

In the Brotherhood case the American Bar Association first vainly sought

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*"Much could be said in favor of the propriety as well as the practical wisdom of permitting a corporation to furnish, as part of its contract of employment, legal services to its employees where this is for the benefit of the corporation, where the relation between the lawyer and the employee is direct and no conflict of interest exists between the employer and the employee.... It is not believed that the Canon will prevent the labor unions from finding lawyers to advise their members. The whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services would materially lower and spread the total cost to the lower income groups." DRINKER, LEGAL ETHICS 164, 167 (1953).
permission to appear as amicus curiae and after the decision joined with most of the State bar associations in supporting a motion for a rehearing, which was also denied. Furthermore, the direction of the Court's decisions differ widely in the two sets of cases. In the criminal cases the holdings were in the affirmative that counsel for the accused must be provided, by the state itself if need be. In the civil cases the holdings merely protected private methods of providing counsel and thus forced the bar to reconsider the methods of making legal services available.

This century has seen notable advances by the bar in effective services to some segments of society. The rise of the large corporation law firm has been explained as the response of the bar to the needs of its clients. The development of specialization is a similar response. Closer to the situations in the two Supreme Court cases is the recent use of lawyer referral service for the more alert of the middle classes, and the continuing development of legal aid for the poor. Of the last Mr. Justice Potter Stewart has said:

"The quest for equal justice under law for those who cannot pay for the legal help they need will continue to demand unceasing and many-sided effort."

Yet it must be admitted that the bar has not shown all the imagination and initiative needed in developing new methods. If the bar had shown these qualities the Button and Brotherhood cases, we may guess, would never have been decided. The unfortunate fact remains that there are large segments of our people who do not obtain the legal services they need and who, as ample experience shows, will not obtain them except through the development of new methods of providing them. An accompanying fact is that those of our people who do not obtain the legal services they need are not all alike. Some of them are well off enough to pay for the services, if the services are rendered for moderate fees through agencies the clients trust. It is with this great middle class of the population with which the Brotherhood case, in its intimation rather than its decision, dealt. Others of our people are too poor to pay anything substantial, or are even so handicapped in life they are functionally incompetent to protect themselves in our complex society without affirmative help. It is with them that the Button case dealt. The Brotherhood case has caused the greater discussion by the bar, for it concerned the kind of

10 "The instance of the large law firm handling the problems of its clients, and particularly those created by big government and big labor, is an outstanding response to the demands of clients for the best possible service." Tweed, The Changing Practice of Law 15 (1955).
12 See Brownell, A Decade of Progress; Legal Aid and Defender Services, 47 A.B.A.J. 867,870 (1961).
cases with which the bar is familiar. The Button case, however, has the larger potential, for it deals with the functionally incompetent who have been almost ignored by us. The new methods for making legal services available will have to vary in their nature to achieve their purpose.

In the reconsideration and development of new methods there is public need for the same imagination and initiative that the bar has shown in dealing with its good clients. If the bar does not act, the void will be filled by shysters and sharpers. There is need, too, for the maintenance of such professional standards as those that call for competence and that condemn the representation of conflicting interests. The opportunity is a most appropriate one for the bar. It is of the essence that the lawyer's work to turn vague values and ideas into workable plans and programs.

In the two cases discussed the Court did not deny the power of regulation by the state or by the profession. The Court did insist that regulation meet the test of public interest, and seemingly it laid on those who would support a regulation the burden of showing that it meets this test. In the Button case Mr. Justice Brennan's opinion struck down the regulation because

"the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."

In the Brotherhood case Mr. Justice Black, after quoting this language of Mr. Justice Brennan, continued with the same idea saying,

"In the present case the State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan. . . ."

The best expression of the idea, because it is put in the affirmative form of the basic duty of the bar, is by Mr. Justice (now Mr. Chief Justice) Traynor of California who in a dissenting opinion years earlier would have upheld the Brotherhood plan because as he said:

"Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty."

In sum, the two cases have read into the law the moral right of availability of counsel. The Court made the standards of the bar confront the inade-

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15 371 U.S. at 444.
16 877 U.S. at 8.
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The adequacy of its methods in making counsel available in fact. In that confrontation, "solicitation of practice," "lay intermediaries" and other such ideas developed for ordinary cases dropped away. It is this return to the fundamental right to counsel in fact that is the essence of the decisions. The Court has done here what is needed in changing times throughout the law. It has tested the rules of law by the ends which it is the function of the rules to serve.

Despite the early hostile attitude toward the Brotherhood case there have already been several affirmative responses to the needs and more are in the making. The Civil Rights Act of 1964 authorizes the Attorney General of the United States to institute actions for the protection of some civil rights of persons unable to carry on appropriate legal proceedings, the situation to which the NAACP had directed itself in the Button case.18 The Criminal Justice Act of 1964 deals with the "adequate representation of defendants" in criminal cases in the federal courts.19 Earlier representatives of the organized bar had been active. Before the Gideon case the American Bar Foundation, as mentioned above, had initiated a searching inquiry into methods of providing counsel in criminal cases.20 Several years before the Button and Brotherhood cases the State Bar of California had begun a long continued inquiry into the desirability of group practice of law and the progress report of its special committee in 1964 is the best study so far.21 The Committee on Lawyer Referral Service of the American Bar Association has this year proposed a still wider inquiry into the methods of making legal services available in fact to all of our people. And President Powell in a statement to the American Bar Association concluded:

"more effective means of distributing legal services must be devised... the organized Bar must explore broadly, and with an open mind, the possibility of other solutions."

The breadth and openness of mind that may be called for are indicated by a conference of social workers and lawyers at which Attorney General Katzenbach, speaking of the twenty percent of our population "serving a life sentence of poverty", said:22

To be sure these are not new problems. It is our appreciation of them that is

20 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES—A FIELD STUDY OF THE PRACTICE IN AMERICAN STATE COURTS.
new, . . . . There must be new techniques, new services, and new forms of interprofessional cooperation to match our new interest.

The subject of providing legal services should not be left without mention at least of a method whose distinctiveness is obscured by our familiarity with it. It is the use of contingent fees. It is, as a writer recently reminded us, "a uniquely American development which has evolved in the fact of an historical position (still held by most countries) that its use is contrary to the public interest, unprofessional, and even criminal."

In this country the services of the plaintiff's counsel in the great bulk of cases in the courts of general jurisdiction and even before many administrative tribunals are financed through contingent fees paid out of the amounts recovered. The usefulness of contingent fees, the dangers inherent in them and desirable limitations, and possible alternatives in providing legal services make a story all their own, which has been excellently told elsewhere. It is enough here to say that the Supreme Court early and almost casually gave its approval to such fees.

The Independence of the Lawyer

An essential quality of the lawyer is independence. He must be independent of the tribunal before which he appears and independent of the social pressures which may threaten him along with his client. The Supreme Court has sought to preserve the independence of the lawyer at various stages and in various ways: in his admission to the bar, in his work before the court, in proceedings for discipline or for contempt of court, and even in bar organizations. In cases a century apart the Court held that former membership in rebel or revolutionary organizations could not be made a reason for exclusion from the bar. It protected the ex-Confederate in the 1860s as it has protected the ex-Communist in the 1960s.

Three sources of threats to the independence of the lawyer call for mention,—the Judges, the organized bar, and the public.

The Judges. An illustration of protection of the lawyer from the courts arose out of an indictment of an accused in the District of Columbia for having made a false noncommunist affidavit. The lawyer for the accused inquired...

24 Ibid.
26 Ex parte Barland, 71 U.S. (4 Wall.) 533 (1866).
of those grandjurors who were employees of the federal government about the influence which their bias or fear induced by the federal loyalty program had on their action in returning the indictment against the alleged Communist. The district judge found the lawyer guilty of contempt under a statute which empowered the court so to punish for "misbehavior of any of its officers in their official transactions". The Supreme Court unanimously reversed the judgment of contempt because "a lawyer is not the kind of 'officer' who can be summarily tried for contempt" under the statute.\textsuperscript{28} The Court relied in part on the history of the statute which showed it was designed to limit, not to expand, the power of courts in contempt proceedings. The Court relied no less on the importance of independence of lawyers, quoting a fine passage from a Congressional statement:

"The public have almost as deep an interest in the independence of the bar as of the bench."

In another case a lawyer representing the accused in a Smith Act case made a public speech during the course of the trial. The trial court suspended the lawyer from practice for a year. The Supreme Court by a vote of 5 to 4 reversed the suspension.\textsuperscript{29} The justices were not agreed on what the exact issue in the case was. It is clear the majority stressed the privilege of the bar to criticize the courts.

The protection of independence from the court may have an even broader base. So it was with a state's attorney who had denounced a bench of judges for inefficiency, laziness and connivance at vice. In a state court he was convicted of criminal defamation. The Supreme Court reversed the conviction because of the broad privilege of a citizen to criticize public officials.\textsuperscript{30} Mr. Justice Brennan stated:

"... where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."

These cases illustrate the protection given to lawyers from the courts in three sorts of proceedings, for contempt, for discipline, and for criminal libel.

Protection against the organized bar. Over half of the states now have the integrated bar, a form of bar organization to which all practicing lawyers in the state must belong. The Supreme Court of Wisconsin after unusually careful consideration of the matter, ordered the integration of the Wisconsin bar. A member of the bar, filing suit to recover the fifteen dollars annual dues

\textsuperscript{28} Cammer v. United States, 350 U.S. 399 (1956).
\textsuperscript{29} In re Sawyer, 360 U.S. 622 (1959).
\textsuperscript{30} Garrison v. Louisiana, 379 U.S. 64 (1964).
he had paid under protest, attacked the constitutionality of the integration order. The Supreme Court of the United States by a vote of 7 to 2 affirmed the decision of the State court upholding integration. It is exceptionally difficult to determine what was decided, for there were five opinions—three for affirmation and two in dissent—and no two opinions went on the same ground. It is clear that the central concern of the justices was, to quote language used in both an affirming and a dissenting opinion, that Wisconsin lawyers must retain

"full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against."

The asserted danger to the freedom of lawyers was not a real one in the case, and the dissenters, it would seem, were filing a caveat rather than a dissent. The courts have reserved to themselves power of control over bar membership. In the bar organization dissenting views may be expressed along with the views of the majority, and the dissenting members of the Court illustrated in the case itself how forcefully minority views on a subject may be expressed. The advantages that may be gained from a strong bar are real. Justices Brandeis, Stone and Cardozo before they went on the bench all expressed their support of a strong professional spirit. It is heartening to note that the most advanced bar action on group legal services, a matter discussed earlier, has come from the strongest of the state bars, the integrated bar of California.

The Public. There is an abiding kind of political and social conflict indicated in academic terms by the observation of a college dean that a normal student body is not made up entirely of normal students. Every normal society has abnormal persons in it, including the lunatic fringes of the left and of the right. One fringe cries out against everything to the right of left; the other fringe, much larger in our prosperous country, denounces everything to the left of right. In our times this abiding conflict has in some nations become social revolution, made vivid for us by Communism, Fascism and Nazism, World War II, and the Cold War. Social and political beliefs turned into agitation and then into successful revolutions. They have brought death to many millions and indirectly they have transformed our national life.

What is the scope of protection under the law of adherents and protagonists of such beliefs, who assert the privilege of every American to be a nonconformist and who demand the protection of the Constitution for them-

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82 Id. at 861, 874.
83 Id. at 834.
84 See note 19 supra.
selves in their nonconformity? More to our point, what is the duty of the bar to protect these persons and what protection is to be given to lawyers who share these beliefs or who defend their adherents?

The recent revolutionary movements and our own unfortunate racial discord have often commingled clients and their lawyers in common hatred. The role of the Court in standing firm against repressive political measures and racial discriminations has become intertwined with its role in preserving the independence of the bar in defending the hated. My discussion will be limited to the protection of the bar.

All the members of the Court are in agreement on the importance of the independence of lawyers. The disagreement within the Court in particular cases here, as indeed throughout our discussion, comes primarily from difference of view on two enduring problems as to the Court and the law. One concerns the role of the Constitution and of the Court in our federal system. Some justices have believed and some still believe the Constitution forbids any substantial interference with our economic and political systems as the justices conceive these systems to be. It was so with the Nine Old Men a generation or more ago in the protection of the economic system they knew. So it is today with some of the justices in the protection of civil liberties. Other members of the Court take a more restrained attitude toward their role and would not substitute their views for those of the Congress or the States unless the interference is very grave.

A second division of the justices is over whether there should be a weighing and valuing of competing interests—the balancing process—so that the values, say, of property rights or of civil liberties, must be weighed in the balance against other values. The difference in views may come from differences in temperament that are none the less important because difficult to classify. Or they may be merely a tactical maneuver in intra-Court controversies, for a combatant who asserts the uniqueness of his values lifts them above the battle. Some of the justices seem impatient at the thought of a balancing process when a preferred interest is in question. Most of them appear to believe that here as elsewhere in the law the balancing process is essential and even inevitable. It is indicated by Mr. Justice Cardozo’s often quoted phrase, “the concept of ordered liberty”, and by the inscription over the building in which the Court sits, Equal Justice Under Law. There shall be liberty and justice, and there shall also be order and law. Chief Justice Warren put the matter in lasting terms:35

“It is almost a commonplace to say that free government is on trial for its life . . . the members of a free society are called upon to bear an extraordinarily heavy responsibility, for such a society is based upon the reciprocal self-imposed disci-

pline of both the governed and their government... the rigorous self-control
that is essential to the maintenance of a proper relation between freedom and
order."

The resistance within the Court to social pressures on the independence of
the bar will be illustrated by cases at two stages, one admission to the bar,
the other contempt and disbarment proceedings.

The first case involved an able and high-minded young man who, after
passing the Illinois bar examination, was denied admission to the bar of the
State. The denial was based on his refusal to answer questions of the Com-
mmittee on Character and Fitness on whether he was a member of the Com-
munist Party. He had refused to answer the questions on the libertarian
ground this was a political matter into which the Committee could not in-
quire. The Supreme Court of Illinois upheld the Committee by a margin of
one vote\textsuperscript{36} and by the same margin the Supreme Court of the United States
affirmed the decision.\textsuperscript{37} The opinions in the case are a study in judicial meth-
ood. In the Supreme Court of Illinois, Mr. Justice Schaeffer, dissenting, would
have admitted the candidate, even though he believed the Committee on
Character and Fitness was within its power in asking the questions. The evi-
dence in support of his fitness was overwhelming and, in the view of Mr.
Justice Schaeffer, justice in the particular case should override the rule. In
the Supreme Court of the United States, Mr. Justice Harlan wrote for the
majority in affirming the decision of exclusion even though he evidently be-
lieved the exclusion unwise. He upheld the State court because of "the limit-
ed range of our authority" in reviewing State action. Mr. Justice Black dis-
sented in an eloquent and wide ranging opinion in which he insisted on the
importance of independence and courage of the bar.

The second illustration of the protection of independence against social
pressures is given by a controversy over the prosecution of the leaders of the
Communist Party, a controversy which went through the three levels of the
federal courts three times. In the first phase the Court was asked to reverse
the conviction of the accused on the ground that the federal statute under
which they were prosecuted violated their liberties under the Constitution.
By a vote of 6 to 2 the Court upheld the Statute.\textsuperscript{38} The concern of the justices
is indicated by the number and length of the opinions, three for affirmance
and two in dissent.

In the second phase the Court had before it a summary adjudication of
contempt of court by the counsel for the Communist Party leaders.\textsuperscript{38a} Again

\textsuperscript{36} In re Anastoplo, 18 Ill. 2d 182, 163 N.E. 2d 429 (1960).
\textsuperscript{37} In re Anastoplo, 366 U.S. 82 (1961).
\textsuperscript{38} Dennis v. United States, 341 U.S. 494 (1951).
\textsuperscript{38a} Ironically, the judge who presided at the trial had himself public calumny for defense
of a hated accused some years earlier but had received an appreciative statement from the
Supreme Court for his work in that court. Cramer v. United States, 325 U.S. 1 (1945).
the Court was divided in opinion. Mr. Justice Jackson, speaking for a majority of five, showed his realization of the importance of the independence of the lawyer for an unpopular accused:

"We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But that there may be no misunderstanding, we make clear that the Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. . . . It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling."

The third phase was a motion for disbarment in the Federal District Court of the principal counsel of the Communist leaders. The motion for disbarment was granted by the District Court, but the Supreme Court, with two justices dissenting, reversed the decision on the ground that permanent disbarment was "unnecessarily severe". The most enlightening thing in the case is the brief filed on behalf of the counsel. Granting as it did that the conduct of counsel in the trial of the Communist leaders was not justified, the brief in its conclusion placed the plea for reversal on the broad ground of prevention of any hazard to counsel who represent the hated:

"It is, indeed, a matter of common knowledge that the frequent unavailability of counsel to represent individuals accused of unlawful subversive activities or connections has increasingly aroused concern among bar associations and leading jurists, including members of this Court. . . . And if this punishment of wholly exceptional severity is now allowed to stand, the consequence must be to magnify contemporary hazards to the integrity and dispassionateness of the American bar."

We can be certain the whole Court shared the concern.

**The Conduct of Lawyers at Work**

The administration of law through the adversary system involves a paradox. Admittedly, it is a function of government with this aspect of its character made visible through the presence of a public official, the judge. Yet the most
influential participants in this public function are private persons, the lawyers. The lawyers are privately retained and paid, they are partisan representatives of one side alone, and their independence is protected, as we have seen, even from the judge himself. The dominant position of lawyers in court proceedings in this country was indicated by Mr. Joseph Choate in a comparison drawn in a speech to the English bench and bar:

"In American we say that the counsel try the case and that the judge hears and decides; but, if I understand your common parlance here, the judge tries the case and the counsel hear and obey."

The adversary system in law administration has its parallel in our competitive economic system. The most fundamental needs of our society, food and clothing and shelter, are supplied by persons striving competitively for profit. The competitive economic system would destroy itself if its excesses were not limited in the public interest. So it is hedged about by a host of regulations, many imposed by statute and some developed by the courts.

What regulations of the competitive system in the administration of law has the Supreme Court developed? The importance of the Court's attitude in this matter is indicated by an English lawyer writing on law reform in the Nineteenth Century, a century notable for the sweep of statutory change. Yet he could say there was something still greater:

"Of all the mighty changes that have taken place in the nineteenth century, the greatest change has been in the tone of the administration of both the civil and the criminal law. The manners of our law courts have marvelously improved."

This mightiest change he attributed most of all to the judges.

Three matters will be mentioned here, loyalty, then the almost indivisible complex of candor and fairness and manners, and lastly costs.

Loyalty. The court is insistent that a lawyer's sense of loyalty to his client shall be personal and direct and shall not be impaired by conflicting interests. In criminal cases it has written this standard of the bar into the constitutional guarantee of the right to counsel. In the first of the leading cases on the subject the state judge had assigned the whole bar of the little town to represent the defendants charged with rape. The Court held such a designation did not satisfy the right to counsel for

"... they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which

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49 Odgers, A Century of Law Reform 41-42 (1901).
should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned."

In a federal court case, the conviction of an accused was set aside on constitutional grounds because his counsel had been appointed by the court to represent in the same trial another defendant whose interests were not identical. In reorganization proceedings the old evil of conflicting interests has been repeatedly condemned.

This insistence on unimpaired loyalty is especially important now. New methods of group practice will soon develop, encouraged as they are by the Button and Brotherhood cases. The most pervasive and insidious threat to effective services under those methods comes from the lack of a sense of personal relationship and the danger of conflicting interests.

Unimpaired loyalty on which the Court so wisely insists is not a modification of the adversary system. Rather, it is an insistence on the maintenance of its chief characteristic, a partisan representative who owes loyalty to one side alone. Are there nevertheless some limitations on what loyalty and zeal may induce?

Frankness, Fairness, Manners. The decision of even an appellate case, does not involve the matching of dry and clear facts with precise rules of law to reach an inexorable result. Rather the facts are frequently fuzzy, the law is often deliberately vague ("due process of law" is an example), and the values and emotions of the tribunal stirred by the arguments of counsel are the moving force in the decisions. Frankness, fairness and even manners by counsel will not be forthcoming from lawyers unless the courts require them.

The partisan adversary system encourages the lawyer on each side to employ the advantages of concealment. At least the tribunal, when asked to enter an order, should not be deceived as to the substantial issue and the plans of counsel. So in a liquidation controversy between two groups of stockholders concealment of the plan to use a delay requested from a state court for the purpose of filing a parallel proceeding in the federal court was reason enough for the Supreme Court to upset the federal court receivership. In a railroad reorganization case Mr. Justice Stone spoke for Justices Holmes and Brandeis, too, when in a dissenting opinion he denounced the failure of counsel to disclose to the Interstate Commerce Commission their intention to attack in court a portion of the reorganization order they sought and secured from the commission.

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46 Glasser v. United States, 315 U. S. 60 (1942).
47 An illustration is Woods v. City Nat'l Bank & Trust Co., 312 U. S. 262 (1941).
48 See notes 5 and 6 supra.
For the revealing of evidence in the federal courts the Court has left the parties to the wide opportunities given by the Federal Rules of Civil Procedure. Stating that the rules are "to be accorded a broad and liberal treatment" Mr. Justice Murphy continued:\[51\]

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

In another case the Court upheld an order of the Commissioner of Patents disbarring a lawyer from practice before the Patent Office because in a patent contest he had submitted as written by a disinterested labor leader an article which he knew had been prepared by an employee of his client.\[52\]

In criminal cases the Court has gone much farther in the requirement of frankness, as two cases the same year show. The Mooney case, holding that it would be a denial of due process for the state's attorney knowingly to use perjured evidence, stressed the constitutional requirement of frankness in the state courts.\[53\] Mr. Justice Sutherland, in reversing a conviction for misconduct by the prosecutor, stated the standard in the federal courts in often-quoted language:\[54\]

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Yet disclosure by the prosecution, whether as an affirmative duty on the prosecutor or a privilege of the accused to require, seemingly has not been developed as far by the Supreme Court of the United States as it has been in at least one state, California.\[55\] Nor has the requirement of disclosure of some matters by the accused been so employed.\[56\]

Even in the matter of citation of the relevant authorities the Supreme Court of the United States does not appear to have gone as far as the House
of Lords in its insistence on frankness by counsel. The position of that court was stated a generation ago:57

"Their Lordships are therefore very much in the hands of counsel, and those who instruct in these matters, and it is the practice of the house to expect, and indeed to insist, that authorities that bear one way or the other upon matters under debate should be brought to the attention of their Lordships, by those who are aware of those authorities. That observation is irrespective of whether or not the particular authority assists the party who is aware of it. It is an obligation of confidence between their Lordships and all those who assist in the debates in this house in the capacity of counsel."

The court is now active in the reconsideration of the notable rules of procedure for the federal courts. This month the Chief Justice announced that it would begin the consideration of Uniform Rules of Evidence for the United States District Court through the accustomed method of the appointment of a nationwide committee to formulate proposed rules for submission to the Court. Perhaps, through the rules or through independent action by the Court, there will be insistence on a greater measure of frankness at the trial and the appellate levels.

The importance of values and emotions in reaching a decision could be illustrated by almost any of the cases here discussed. The justices of the Supreme Court often reach their judgments with a strength of feeling they do not seek to conceal. If it is so in their secluded place, how much more is it so in the trial court with the lay tribunal, the jurymen. The lawyer surely does not neglect this decisive element.

"The symbol of justice as it is actually administered is not the goddess disinterested and infallible, holding the scales, but rather the Gaul who throws his sword into the balance."58

What limitations are there on the lawyer in the emotions he throws into the balance? May he appeal to every emotion that might stir the tribunal?

Here the Supreme Court has done something. Justice Stone wrote for a unanimous court when a decision for damages against a railroad company was reversed because of the appeal at the trial to class and sectional prejudice:59

"The public interest requires that the trial court of its own motion, as is its

59 New York Cent. R. Co. v. Johnson, 279 U. S. 310 (1929)
power and duty, protect suitors in their right to a verdict uninfluenced by the
appeals of counsel to passion or prejudice."

On the whole, however, the Court has done very little. The cases already
discussed that involved the unpopular may indicate that the appeal by coun-
se1 to emotions will be condemned when it is directed to emotions which our
ideals seek to allay rather than to inflame, or when it is directed against per-
sons under a special disadvantage, as, a minority group or enemies in war
time.

"Manners maketh man", the old motto of William of Wykeham, is the
central idea of an essay by an outstanding judge on what he called the three
great domains of human action: Positive Law, Free Choice, Obedience to
the Unenforceable.60 "Obedience to the Unenforceable", the third domain is
the author's foreword of the leading work on Legal Ethics.61 Yet when the
temptations of the adversary system lead the partisan representative to vitu-
peration of his opponent, the Supreme Court has not left the matter to the
unenforceable. In a series of cases62 the Court moved on from striking the
brief of counsel from the files, to animadversion upon his bad temper and
recklessness, and to suspension from the bar of the Court, saying:63

"We insist that arguments in this Court, either oral or written, though often
properly in sharp controversy, shall be gracious and respectful to both the Court
and opposing counsel and be in such words as may be properly addressed by
one gentleman to another."

Candor and fairness and manners, without sacrifice of vigor and effective-
ness, can be attained by lawyers. Their attainment is best illustrated by the
Solicitor General of the United States and his staff. The sense of professional
responsibility shown by this office has long set a standard that the Supreme
Court could do more to encourage in all lawyers in their work.

Costs. The risk and burden of costs, like the availability of counsel, affect
the willingness of persons to litigate and the consequent amount of litiga-
tion. On this matter there is a sharp contrast between the systems in Eng-
land and the United States. In England the losing party pays the reasonable
litigation expenses of his adversary as well as his own. In this country the
costs that the defeated party pays beyond his own expenses include ordinarily
only the insignificant charges of the tribunal. In a case at the present term

61 "True civilization is measured by the extent of Obedience to the Unenforceable." Lord
Moulton, quoted in Drinker, Legal Ethics 2 (1953).
62 Royal Arcanum v. Green, 237 U. S. 531 (1915); National Surety Co. v. Jarvis, 278 U. S.
610 (1928); In the Matter of Thomas Marshall, 55 S. Ct. 344, 313 (1935)
63 National Surety Co. v. Jarvis, id. at 611.
the Court deal with the power of a district court under the words of the Federal Rules of Civil Procedure 54 (d) "costs shall be allowed as of course to the prevailing party unless the court otherwise directs". The plaintiff, who had filed suit in New York against an oil company operating in Saudi Arabia had a verdict against him at a first and at a second trial. After the plaintiff’s defeat at the first trial the judge approved the clerk’s taxation of costs against him in the amount of over $6,000. On his defeat the second time, the clerk taxed against the plaintiff nearly $12,000 as costs for both trials, consisting principally of the transportation expenses of defendant’s witnesses brought from Saudi Arabia and the costs of overnight trial transcripts. On review the second judge reduced this “staggering” bill to about $800. The Supreme Court upheld the order of the second judge in its entirety. In affirming the existence of power in the trial court Mr. Justice Black stated that the words of the Rule

“quite plainly vest some power in the court to allow some ‘costs’.”

But he insisded the discretion to tax costs should be “sparingly” exercised in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation:

“Any other practice would be too great a movement in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, . . .”

It is a fair question whether the heavy emphasis in this country on litigation is socially desirable; or whether as in England litigation should be discouraged; or whether there is a wiser middle way which encourages conciliation and fair settlement. There is no doubt that the narrow interpretation given by the Court to the vague Federal Rule on the charging of costs is in accord with our past professional policy.

**PUBLIC LEADERSHIP**

“No tradition of our profession is more cherished by lawyers than that of its leadership in public affairs. . . . The great figures of the law stir the imagination and inspire our reverence according as they have used their special training and gifts for the advancement of the public interest.”

In making the notable University of Michigan address from which this


passage is taken Justice Stone was mindful of the fact that the members of the bar conspicuous in prestige among their fellows are not serving in political office now in the same measure as of old. He had in mind not merely political activities and office holding, however important these may be because of the opportunities for usefulness they bring. He directed himself to leadership in thought and plans and action throughout the wide areas of public responsibility. He urged that lawyers seize the varied opportunities for public leadership open before them in our time, some of which may usefully be mentioned here.

The legislative and executive branches of the governments of the nation, the states and the municipalities continue to be dominated by lawyers. There are other areas of our community life that are no less public even though not political, in which lawyers who do not desire political office or would be unacceptable to the electorate can, and do, contribute much to public life. These areas include the schools, the charities and the cultural institutions. Closer to our professional work are the activities of the numerous organizations directed to the improvement of the law and of law administration. Most important of all is the formation of public opinion. This function of lawyers in our democracy goes back to the beginning of our government when Hamilton and Jay along with Madison wrote the Federalist Papers. It continues today when lawyers defend unpopular clients in court or uphold their right to be heard. Surely public leadership by lawyers is as important now as ever when swiftly changing conditions call for rapid yet wise development in our institutions.

These matters of public leadership rarely get into the cases. Occasionally they appear in the opinions. In the case already discussed involving the denial of admission of a libertarian nonconformist to the bar of Illinois, Mr. Justice Black lauded illustrations of independence before the courts and the public in a passage that is worth remembering:

"It is such men as these who have most greatly honored the profession of the law—men like Malsherbes, who, at the cost of his own life and the lives of his family, sprang unafraid to the defense of Louis XIV against the fanatical leaders of the Revolutionary government of France—men like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threat and clamorous protests of self-proclaimed superpatriots—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly

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6 The members of the Court have lent their moral support to such organizations as The Legal Aid Society, The American Law Institute, The American Judicature Society, and sections of the American Bar Association. The Court has drawn directly on the bar for aid in its own constant efforts to improve law administration.

advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party—men like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these."

Almost a century earlier there came before the Court an Arkansas lawyer who, after the secession of his state, had served in the Congress of the Confederate States. On receiving a pardon by the President, he sought permission to resume practice before the Supreme Court of the United States. He was halted by an Act of Congress which provided that anyone who sought to practice in the federal courts must take an oath that he had never held office "under any pretended government in hostility of the United States". The Court by a margin of one vote struck down the act as in violation of the constitutional prohibitions against bills of attainder and ex post facto laws. Mr. Justice Miller in the dissenting opinion made vivid for his times and also for our own the influence of lawyers on public opinion:68

"... the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government.... I venture to affirm, that if all the members of the legal profession in the States lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of that Rebellion."

**Conclusion**

A discussion of the influence of courts on the American bar may be misleading and even unfair when it treats of the Supreme Court of the United States alone. It is the so called lower Federal courts and the State courts, with many members of no less distinction than their titular superiors, which will continue to do most to set the standards of lawyers.

Yet the Supreme Court of the United States does have unique responsibility and power under the Constitution to prescribe requirements of fairness for agencies of government throughout the nation, as well as special control over the federal courts. Our brief discussion reveals even though dimly the image of the American lawyer held by the Court and the consequent professional values which it has written into its judgments and so into the

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Constitution. The services of a lawyer should be available in fact to those who need them and professional limitations that stand in the way must be swept aside. The lawyer will be courageous and loyal in his client's behalf, and threat to his independence will be struck down. He will be zealous in partisan advocacy, yet the conditions of practice should encourage the development of the full facts before the tribunal. Hopefully, the American lawyer will continue to provide in varied ways the responsible public leadership that has marked him in the past and that is so needed in our times.

There is at least an intimation by some of the justices of another set of developments ahead. The Constitution in the Preamble states as its first purpose, "in order to form a more perfect Union". The principal imperfection of the earlier Union under the Articles of Confederation was the lack of limitation on the centrifugal forces of the several states. These forces, checked by war a century ago, are in their continuing minor manifestations now checked by the Court.

Another set of centrifugal forces has developed out of the diverse components of our national society. Each of the terms, big business, big labor, big profession, covers a variety of diverse elements. Every one of these elements naturally sees and seeks its own advantage, and for the general good it must be restrained and also coordinated with the other elements. Under the Sherman Act and its successors the Supreme Court has been given much control over business. Under the National Labor Relations Act and its successors it has received some power as to organized labor. In the expansive provisions of the Constitution the Supreme Court of the United States may find a like power as to the professions, especially the profession of which it is a part, the profession of law.60

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