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The Lawyer's Independent Calling

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As a young man, Oliver Wendell Holmes, Jr., desired to live greatly. He hesitated to become a lawyer because he was doubtful whether a man could live greatly within the law. Yet when Mr. Justice Holmes was ninety, he told a friend that if the ceiling should open and a great voice speak summoning him to his Maker, he would reply, “I am ready, Lord, but may I have ten more minutes.”

Today, many thoughtful observers say that lawyers do not and probably cannot “live greatly.” During the Watergate investigations Richard Reeves wrote in New York magazine:

The point about lawyers . . . is that they are free to commit outrages against common morality and sense behind hollowed and intricate shields, canons, and jargon.¹

Other observers, some themselves members of the bar, fear that constant, skilled, and zealous devotion to the interests of their clients, no matter how morally questionable or narrowly selfish, gradually blinds lawyers not only to the rights of others but even to “right” and “wrong.”² Such Watergate figures as John Mitchell, John Erhlichman, Charles Colson, and John Dean are cited as examples. A woman who had heard me make a speech, in which I urged the substitution of public funds for special interest money in financing political campaigns, wrote this letter:

I submit to you, Professor Cox, that getting lawyers out of politics is much more important than deciding who pays in what fashion for [election] campaigns . . . .

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A law professor told me recently that there are three basic characteristics of lawyers a law school education has done

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nothing to correct: (1) lawyers are generalists who really believe they know what is best for everybody; (2) lawyers are technicians who make no moral judgments, who are hired to hear a client’s predicament and set to work figuring out the techniques needed to extricate the client from his bind; (3) lawyers going into government service carry with them their technical, extricating competence and strict devotion to each client’s predicament, [and] cannot conceive of themselves as serving “all” those people who make up the “public.”

Are these appraisals justified? Is it still possible to live greatly in the law? Or are we in truth no more than expensively trained and highly competent “hired guns” available to the highest bidder?

Much of the current criticism of the legal profession is justified. We would be quite wrong to push it aside as no more than the layman’s ancient resentment of a learned profession. We have done too little to confront the ethical problems pushed to the front by changes in the character of a legal practice. Both bench and bar are too slow to deal with abuses. Being human, we have our individual failings. We excuse too much as loyalty to clients. But when all this has been said, I am proud of our profession and convinced that each of us can aspire to live greatly in the law—whether he deals with large affairs or the ordinary day-to-day lives of friends and neighbors.

I.

Ours is an open society dedicated to an extraordinarily large measure of human liberty, not so much because of the satisfaction of “doing one’s own thing” as because freedom and the accompanying responsibility permit a man to choose between right and wrong and thus to grow in the exercise of the noblest human capacity.

The very notion of freedom in society involves inherent contradiction. That we should all be free to choose and pursue our own objectives makes differences of opinion and sharp clashes of interest inescapable. That man is a social being — that we are destined to live and work together dependent upon each other for the progress of countless joint ventures and ultimately for the progress of the whole human enterprise — requires accommodations and especially constraints upon the ways in which we pursue our rival objectives.
In my view, the lawyer is the free society's expert in working out those necessary accommodations and constraints and in creating and operating the procedures into which we channel conflicts for at least temporary resolution. Every practicing lawyer, whether he deals in constitutional issues, advice to corporations, collective labor arguments, wills, or domestic relations, is engaged in helping people to live together, pursuing and achieving individual goals, with a minimum of force and maximum of reason — helping substitute reason for power, thus offering man's best hope of liberty, of mutual respect for human dignity, and of change and progress.

II.

History is filled with examples of the creativity of lawyers in helping people to live together.

The most creative acts in our political history were done at the Philadelphia Convention in 1787. Apart from Washington and Franklin, the leading figures at the Convention were all lawyers.

The economic base of our society depends in large measure upon lawyers' ingenuity. Mass production, mass transportation, and mass consumption require pooled and borrowed capital and also consumer credit. The corporate form, stocks, bonds, equipment trusts, and conditional sales, for example, have become so familiar that it is as hard to understand the inventiveness required to create these devices as it is in the case of the wheel. Even though they are subject to gross abuse, we could not do without these instruments of human cooperation and organization. Few of them existed two hundred years ago. Some lawyer had to have the imagination to conceive them.

Contemporary examples also abound. For decades, great racial injustice flowed from the discriminatory use of literacy tests. Fairly administered, literacy tests are constitutional. Unfairly administered, they become engines for violating the fifteenth amendment's command that no person shall be denied the right to vote by reason of race or color. When the Department of Justice proved a pattern or practice of using a

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2 U.S. Const. amend. XV, § 1.
The statutory literacy test as an engine of racial discrimination, the federal court would bar the statute's further application. The burden of investigation was time-consuming and enormously expensive. During the investigation, the discriminatory use of the test and the resulting racial injustice would continue. If literacy tests themselves were constitutional, what could be done? There was no easy answer.

After a time, a lawyer in the Department suggested shifting the burden of delay during the long interval between filing the complaint and the entry of the final judgment. Can we not identify — he asked — a few simple, quickly ascertained facts from which a probability of past misuse and therefore a significant risk of continuing misuse could be inferred, then provide by statute that a temporary injunction *pendente lite* shall issue upon establishing those few facts unless the defendant officials can disprove the inference? Where is the constitutional authority? Let the power to "enforce" the fifteenth amendment's prohibition against racial discrimination be read with the breadth given the "necessary and proper" clause in *McCulloch v. Maryland* so as to cover the elimination of significant risks of violation — at least pending a full trial of the facts. Judges have long stood ready to enjoin acts — which were lawful standing alone — when they had been parts of an unlawful course of action. The kernel of the Voting Rights Act of 1965 lies in these suggestions. The Act removed a grave national injustice, and it had elements of creativity.

In the field of industrial relations, the arrangement which we now call a "maintenance of membership clause" is a dramatic example of creative accommodation worked out by lawyerly reasoning. During World War II, efforts to build cooperation between unions and management broke down over organized labor's demand for the "closed shop" — that is, the demand for management's promise in each collective bargaining agreement not to employ anyone not a member of the labor

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*17 U.S. (4 Wheat.) 316 (1819).*

*E.g., Swift & Co. v. United States, 276 U.S. 311 (1928); Warner & Co. v. Lilly & Co., 265 U.S. 526 (1924).*

union. In 1941 the National Defense Mediation Board was destroyed by the resignation of the labor members following the Board's refusal to award the United Mine Workers the closed or union shop in "captive" coal mines. Efforts to re-establish a tripartite board for the peaceful solution of labor disputes in the wake of Pearl Harbor seemed about to founder upon the same reef until a Rooseveltian sleight-of-hand put the issue in the hands of a War Labor Board for case-by-case determination. The unions continued to press for the security of assured membership, majority status, and an assured flow of dues; these, they said, would together enable them to act with restraint and a sense of public responsibility during the wartime crisis. Management replied that the fundamental human right of freedom of association implies freedom not to associate, which includes freedom not to join a labor union. Management spokesmen went on to insist that a society embarking on a war for freedom should not force employers to violate this fundamental human right of employees by threat of discharge. The impasse seemed insoluble.

The first step towards resolution came when a wise and ingenious lawyer suggested that the freedom to contract and the right to rely upon a contractual undertaking once made where scarcely less fundamental than freedom of association or non-association. What principled objection could there be to requiring a man who had voluntarily joined a labor union to contract that he would maintain his membership for a fixed period, that is, for the duration of the collective bargaining agreement between his employer and the union? The reply was that when the employee joined the union he did not know that he was undertaking a binding contractual commitment. That point was met by provision for notice and a ten day period at the start of each agreement, during which each employee could choose between dropping or staying out of the labor union or giving an implied enforceable contractual commitment to remain a member for the duration of the agreement. The upshot proved to be a viable compromise that kept the War Labor Board in operation and enabled unions and employers to carry on together.

As in other human controversies, neither the problem nor the pressures making for compromise were wholly intellectual.
Each side had economic and political clout. Each needed and knew that it needed the other. Both feared public reprisals if the gulf were not bridged. Public Board members could keep impressing these pressures upon the protagonists but these pressures alone would not produce agreement. It took the close and imaginative analysis in which the best lawyers specialize to find the accommodation which would grant the point most strenuously pressed by management, yet also satisfy what the unions thought were their most pressing needs.

The maintenance of membership clause is only one of many examples of lawyers' creativity in the field of industrial relations. The organization of labor unions and the development of collective bargaining in the United States have been encouraged and structured by law, unlike the evolution in Great Britain where law was rigidly excluded. Here, lawyers played important roles, and the resulting mix of law and free collective bargaining proliferated an extraordinary variety of forms of negotiation, conciliation, mediation, and factfinding; of grievance and arbitration procedures; and of such diverse instruments as the AFL-CIO no-raiding pact, the Building and Construction Industry's National Joint Board for the Settlement of Jurisdiction Disputes, the human relations committees at Kaiser and U. S. Steel, and the Public Review Boards of the Upholsters' Union and the United Automobile Workers, all of which secured the rights of individual union members against over-reaching by union officials. By these means the clash between management and labor was softened and the common enterprises — on which management and labor and the public all depend — moved forward. A greater measure of industrial justice was brought into the mine, mill, and factory. Opportunities to share in the governance of industrial life were also increased for all workers — through chosen representatives — and for the able and energetic — by direct participation as shop steward, union officer or member of a specialized joint labor-management committee. The negotiated procedures had to be fitted into the surrounding legal structure. Gradually, lawyers and collective bargaining produced an extraordinary blend of

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*See, e.g., United Steelworkers v. Warrier & Gulf Navigation Co., 363 U.S. 574 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).*
law and private, voluntary, do-it-yourself instruments of accommodation and responsible self-government.

I choose and stress this example because it may be suggestive in thinking about one of the greatest problems facing the legal profession. What is to be done about our overburdened courts, crowded dockets, and ever longer delays? Better organization and management will do something, but I fear not enough. What is to be done about the mounting expense of litigation? What of the tendency to turn more and more human problems into lawsuits? Perhaps the greatest challenge we face is to find other, better, and cheaper solutions not only to civil controversies but for dealing with minor criminal behavior — solutions, I would hope, involving more participation and more responsibility on the part of those most intimately affected.

III.

During the years when World War II and the reconstruction of Europe were challenging the finest minds to find new vehicles for cooperation among the western allies in the face of clashing interests, Jean Paul Monnet, the great French economist and statesman, asked an American friend:

Will you please explain to me why the men whom I regard as the most effective — the most fruitful, the most creative — are lawyers?

Part of the answer lies in the peculiar mix of human understanding and intellectual discipline that fills the lawyer's professional life. The law's concerns are men and women, their daily lives, their fears and aspirations, their mean pursuits and high adventures. The great lawyer will know and understand them almost better than they know themselves. The great lawyer will be a dreamer too.

Still, these qualities are not confined to lawyers. Others have dreams and human understanding. Nor are these alone sufficient for the lawyer's role. The artist may see cathedrals in the clouds but he cannot build even a church without knowing the capacities of stone and steel and bricks and mortar. The lawyer may be the artist but he must also be the architect and engineer of social, economic, and political organization. His unique tools are the intellectual discipline, the constraints of
verbal accuracy and precise concept, the capacity for logical
development coupled with pragmatic attention to a specific
problem — skills which distinguish lawyers from many politi-
cal scientists and economists and which often vex the law stu-
dent. With these tools the lawyer also acquires a sense of rele-
ance that separates the essential from the trivial and the pri-
mary from the subordinate.

The lawyer is an expert in process and thus knows better
than others that conflicts of interest or principle — which seem
irreconcilable when abstractly stated — can be postponed and
accommodated in a step-by-step manner if a suitable proce-
dure is established into which to channel specific instances of
actual conflict.

Immersion in the development of existing law and institu-
tions is still another important source of creativity, even
though we must acknowledge that it makes some lawyers re-
sistant to change. Men can seldom sweep the chessmen off the
board and start afresh. Great changes more often flow from
adaptations that revolutionize gradually even though each step
alone seems not too inconsistent with the basic structure. Ap-
preciation of the past flow of lawyerly inventions gives a sense
of capacity which is itself creative.

The qualities which I have thus far mentioned will be only
"technical extricating competence"10 unless directed by a
larger vision. Here, the way in which the lawyer looks at him-
self becomes decisive. Does he see himself as a "hired gun" or
as the follower of an independent public calling? Does he see
himself as only a technician — a "professional" he might say
— who puts his knowledge of law and legal skills to whatever
use his client dictates? Or does he seem himself as also serving
larger interests? The lawyers whose work I have tried to suggest
had developed the capacity for taking a longer and broader
view than the first look of many clients who are engaged in
pressing immediate self-advantage. Independence kept them
free of the emotional involvement that confuses judgment. The
lawyer's habit of examining the implications of each step he
takes and each assertion he makes reminded them, and ena-
bled them to remind their clients, of the extent to which the

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10 See the letter quoted at page 6 supra in the text.
client's true long-range goals were bound up with standards of decency and with the welfare not only of the other parties to the immediate controversy but of wider segments of society.

Sometimes I think that the lawyer's role calls for a measure of ambivalence. The lawyer must constantly look to those interests of his client which a free society allows the client to pursue, but he must also look to the needs of the larger common enterprises in which the client is engaged — ultimately to the needs of the whole human enterprise of which the client is a part. Often the two clash, either in truth or because the client's interest, as perceived by the client, clashes with the lawyer's but not the client's view of the public interest.

Plainly, it is for the client to choose after receiving the lawyer's advice. That advice will be better service to the client's interest if the lawyer preserves the independence necessary to look both to what the client thinks he wants and to the larger interests of others whom the client's action will affect, including the general public. With the larger consequences before him, the client may change his view of what he wants, he may separate out the main objective, thereby eliminating cause for controversy or harm to others, or he may pursue the same goal by a different method which likewise avoids or reduces injury. In truth, therefore, there is no real ambivalence.

Let me particularize again. Suppose that in 1970 a man about to undergo surgery went into his lawyer's office and asked the lawyer to draw him a will cutting off his only son without a penny. The son, who was deeply and conscientiously opposed to the war in Viet Nam, had gone to Canada to avoid the draft, having been denied deferment as a conscientious objector because he could not say that he was conscientiously opposed to all war. The law professor whose article brought this example to my attention observed that in the conventional view the role-differentiated character of the lawyer's work tends to render irrelevant such ordinary moral questions as whether this is a very bad reason for disinheriting a child; under this amoral, professional view, he wrote, the only job of the lawyer is to draw the will — providing the competence that the client lacks.

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12 Wasserstrom, supra note 2, at 6.
I disagree. I doubt whether the typical lawyer takes this limited view of his responsibility. If the father asks, "Can I cut my son off without a penny?" the lawyer doubtless must answer, "Yes, if you use the right words." If the client-father replies, "Then do it," the lawyer's responsibility — in my view — is not to begin drafting but, in words matching the intimacy of their personal relationship, to remind the father of all the unhappy implications of what he proposes, to speak of the son's strength of character even though misdirected in the particular instance, and to suggest that if the client were to die in surgery and could return twenty years later, he would probably regret his decision. I suspect that most lawyers would follow the latter course and that such fathers take their advice despite the original intention.

Consider one other example: A collective bargaining agreement is to run from October 13, 1976 to October 31, 1979, but the union has the right to reopen and renegotiate the wage scale by giving not less than fifteen days written notice prior to October 31, 1978. The contract has a no-strike clause. The employer-client received written notice from the union on October 18. He comes to the lawyer chortling with happiness because the union business agent had forgotten to mail his letter two days earlier and the notice was untimely. "They have no right to reopen, do they? I don't have to bargain, do I?" The lawyer tells the client that he has no legal duty to bargain about the wage scale. "They can't strike can they?" the client asks. The lawyer would say that a strike would violate the contract and might be an unfair labor practice.13 "Can you get an injunction if they strike?" the employer asks. The answer is "Possibly. There is some difficulty in enforcing a no-strike clause by an injunction where there is no arbitrable controversy."14 "Surely you could recover damages?" "Yes."

Such legal advice — using "legal" in a narrow sense — is unexceptionable. Has the lawyer lived up to his professional responsibility? Probably he has not violated any professional code, but I would not think well of myself if I had done no more. I should point out to the client the tremendous practical risks

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that he takes in precipitating a strike that may severely injure his business, not to mention his employees and perhaps the whole community. I should go on to say that, even if there is no strike, standing on the technical defect may cost the employer heavily in resentment, bad labor-management relations, bad morale, and low productivity. I would see this not merely as a duty attendant upon my independent calling but as part of the obligation of loyalty to my client.

Of course, the client may not take the advice. He may be perverse, short-sighted or bitterly antiunion. Or, since lawyers have no monopoly of wisdom, the client may be right. He may know or believe with some reason that the particular union is so corrupt that he must seize the occasion to fight when luck gives him the tactical advantage. He may be in such deep financial straits that the possibility of enforcing the letter of the contract is the only hope of keeping the business alive. A client’s true interests are seldom wholly aligned with the interests of those with whom he deals, and they may not conform at all closely with what you or I would take to be the general interest. The gaps may be still wider as the client sees his interests.

The lawyers whose creative work I so greatly admire were loyally representing this kind of client. They were not the arbitrators, mediators, or neutral members of tripartite boards. They did not have a neutral point of view. They were often pushing not only the selfish material interests of a company or of a union of employees but one of two clashing sets of opinion as to where the public interest lies. Yet the best of them were and still are constructive because they coupled with their “extricating competence” the independence of the lawyer’s calling. They stood with their clients yet they stood enough apart to remember better than their clients the general truth which the historian George Bancroft wrote to the workingmen of Northampton, Massachusetts, back in the time of Andrew Jackson:

The feud between the capitalist and laborer, the House of Have and the House of Want, is as old as social union and can never be entirely quieted; but he who will act with moderation, prefer fact to theory, and remember that everything
in this world is relative and not absolute, will see that the violence of the contest may be stilled.\textsuperscript{16}

Happily, these lawyers had clients who understood this idea when reminded, or who already understood it better than their lawyers, and so directed their lawyers' skills to the common good.

IV.

Thus far I have said nothing of the advocate — the branch of the profession which I know and love the best. Here the lawyer is more often concerned with operating the existing system for resolving adjudicable controversies than with creating new procedures, even though we desperately need them. Here too the epithet "hired gun" is most nearly applicable. It is not for the lawyer in the courtroom to worry about the justice of his client's cause; he is there to press the cause. His duty requires him to pursue tactics which seem unfair to the layman and offensive to any man of sensitivity, if they will serve his client. If his client has been charged with rape, it may be his duty to parade before the court the woman's previous sexual experience. If he is cross-examining a witness who once committed felonies, it may be his duty to bring them out into the open even though the convictions belong to a once-buried past and the witness may suffer undeserved present injury. The ultimate justification must be that the adversary system, under which each lawyer single-mindedly promotes his client's interests in the forum for resolving litigated disputes, achieves greater justice than any other. If this be untrue, the system should be changed. The fault is not with the individual lawyer doing his part in making it operate as successfully as possible.

Even in the context of litigation, the responsible lawyer has the repeated opportunity and the need to look beyond the immediate battle to larger and wider interests.

Most obviously, he must avoid abuse of legal process. Discovery, for example is often so time-consuming and financially burdensome as to wear down a plaintiff with limited resources and thus enable the defendant whose resources are large to

\textsuperscript{16} Boston Courier, Oct. 22, 1834.
secure a far more favorable settlement that could be justified on the merits. Perhaps the present rules concerning discovery are unwise or unjust and should therefore be modified, but the defendant’s counsel has no obligation to hold back because of the time consumed or the burden put on his opponent if he honestly believes that the information which he seeks will enable him to conduct the courtroom defense more effectively. On the other hand, loyalty to his client neither requires nor morally justifies delaying or burdening the opposing party solely for the sake of forcing a favorable settlement.

Even at a trial the client’s long range interests may be injured by its lawyer’s narrow devotion to winning the verdict. The over-riding objective of the defendant charged with rape is doubtless to secure acquittal and counsel must pursue every lawful means, but some opponents in litigation must go home and live together.

Suppose that an employer has discharged the president of the local union. Counsel for the management discovers that the union president had been convicted of an exceedingly distasteful and discreditable felony long before he went to work for the employer. By combining this evidence with a skillful, bullying cross-examination suggesting that the union president is an inveterate liar, cheat, and troublemaker, counsel might substantially increase the likelihood of persuading the arbitrator to uphold the discharge. He would also be proceeding — I ask you to assume — in a way that the union president, his friends, and fair-minded employees would think outrageously unfair and demeaning to any human being. Surely trial counsel must evaluate the risk of generating resentment quite beyond any flowing from a fair defense of the discharge which would be likely to poison future relations between management, union, and employees even if the discharge is sustained. If the discharge is not sustained, it will be almost impossible to achieve cooperation with the union president. Perhaps the decision would still be to fight with every weapon. My point is only that the trial lawyer, like others, owes his client a duty to look beyond the immediate combat to the client’s long range interests, which usually include a reputation for decent behavior and the promotion of some larger common enterprise.

Persuasive appellate advocacy also requires a lawyer to
look at the controversy from an angle other than passionate, short-run advocacy of the client's views. The single most serious mistake which I have observed in listening to many hundreds of appellate arguments is the tendency to make the argument which the lawyer thinks the client wants to hear, or which expresses the client's ideology or emotions, instead of facing up to the court's problem, which is the public problem, and then showing the court how to solve its problem and still render a decision favorable to the client's interest.

In the latter fashion counsel and court may be no less creative than the lawyers I mentioned earlier. Sometimes the vision may be grand, as in Daniel Webster's argument and Chief Justice Marshall's opinion in *Gibbons v. Ogden.* Sometimes a smaller bit of intellectual ingenuity permits shaping the law to a new need or turning it from a blind alley, as Justice Curtis did in *Cooley v. Board of Wardens.* The desegregation and reapportionment cases are more contemporary examples.

V.

In speaking of the point of view from which the lawyer should advise his clients, negotiate in their behalf, and conduct litigation, I have approached but always skittered away from the question: What of the lawyer whose client persists in a wholly immoral course of conduct or one plainly and seriously against the public interest? The narrow, embittered, and irascible father may persist in disinheriting the son who followed his conscience and thereby destroyed the father's mistaken image. The employer may reject fair-minded, constructive proposals for compromise with a responsible, democratically-run union, which are plainly in his long-run interest, and choose instead to take a strike in the hope of breaking the union — without regard for the suffering which the strike will inflict upon the employees and the community. What of the lawyer in such a situation?

Perhaps a few things can be said with some assurance.

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*22 U.S. (9 Wheat.) 1 (1824).*

*53 U.S. (12 How.) 143 (1851). There was no hope for a sound resolution of the debate over the negative implications of the Commerce Clause so long as the debate focused upon the location of the power to regulate commerce.*

1. The final decision is for the client. The lawyer's question is whether he may or should withdraw.

2. The lawyer's duty to the legal system requires him to refrain from assisting a client to violate the criminal law's command.

Personally, I would lay down a higher standard. If an employer insists to his attorney that he will talk the union to death before signing a collective bargaining agreement, or proposes to discharge the most active union organizers, I would say that the lawyer should not lend himself to the commission of those patently unfair labor practices. I would apply the same rule to plain violations of many public law commands because I think that liberty depends upon the rule of law and the rule of law ultimately depends upon voluntary compliance. I am told, however, that the prevailing professional standard may tolerate helping a client to break civil law duties — to break a contract, for example.

3. The lawyer's duty to the legal system sometimes requires him to continue to represent a client whose conduct deeply offends his own sensibilities. He cannot withdraw at a time or in a way which will injure the client's interests. He may be under a professional duty to defend a criminal case which would otherwise be morally distasteful. A person charged with crime is presumed innocent. The presumption carries a right to a trial. The right to a trial implies a right to competent representation. The public interest in the administration of justice may therefore require a lawyer to represent an unpopular defendant.

I have grave doubt about how far a lawyer can invoke the duty of single-minded loyalty to clients' interests as justification for otherwise unworthy or questionable conduct outside the courtroom in situations in which the lawyer is free to step aside. The presumption of innocence and right to a fair trial with the aid of competent counsel are not involved. Nor is the adversary system. One can point out that the lawyer is a purveyor of a limited supply of professional services to which laymen must have access in a society governed by an ever-growing, complex, and technical mass of laws and regulations. From this premise it can be argued that failure to fill the need would result in lawyers imposing their moral standards or their sense of the public interest upon individuals and enterprises in cir-
cumstances in which society allows the individuals and enterprises freedom to press for what others think to be selfish or immoral goals. Given the diversity of opinion among lawyers, the danger of coercing such conformity seems small; moreover, freedom from government is not a guaranty of freedom from other pressures. In my opinion, it would make no contribution to either the administration of justice or the democratic process to give a lawyer an immunity from the kind of moral and political judgments — the kind that laymen make all the time — based upon his selection of clients or choice of tactics in pursuing the client’s business. The lawyer does not put aside humanity and duty to others upon entering the profession. He is free to decide, and must decide, like any other person, to which causes and clients he will devote time, energy, and expertise and which, because of the offense to conscience, he will refuse.

How does one decide when to refuse?

At this point I must acknowledge a lack of experience. My law has been practiced from the security of a professor’s chair or in government positions offering extraordinary independence. The Solicitor General and the lawyers in his office, for example, are not only free to do so, but consider it their duty to go before the Supreme Court of the United States and, confessing error, to ask for a reversal of the judgment below when satisfied that the defendant in a criminal case was unfairly convicted or ought not to have been prosecuted. However, not even the Solicitor General has the privilege of defending only those positions which he would take if he were judge. He too is part of the adversary system. If the government’s position is fairly arguable, both the government and the Court are entitled to have him make, with openness and candor, the best argument he can.

In the 1960’s Congress attached to the Post Office Appropriations Bill a rider prohibiting the Post Office from delivering communist propaganda which came through the mails from foreign countries, unless the addressee filed a written request for the communist propaganda. The measure was challenged as a violation of the first amendment. When the case reached the Supreme Court, it seemed to me and to all my staff that the

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19 Lamont v. Postmaster General, 381 U.S. 301 (1965).
law was pretty plainly unconstitutional. Nevertheless, I argued and defended the statute with all the power at my command. It could not be said that there were no honest arguments to be made in its support. Its wisdom or folly was scarcely relevant to the litigation. Both the Congress and the Court were entitled to have the strongest arguments presented for the Court’s consideration. The Congress was so entitled because legal forms had cast the challenge in the form of a suit against the Postmaster General and for the Postmaster General’s usual advocate to withdraw was to display belief in the unconstitutionality of the rider. The Court was so entitled because hearing the best that can be said on both sides is the best way to reach the wisest decision.

For similar reasons I believe that the Attorney General and the Solicitor General were wrong when they decided in the autumn of 1975 not to defend the Federal Election Campaign Act amendments of 1974.20 Congress had adopted amendments putting a ceiling on the expenditures individuals might lawfully make in support of a candidate for Senator or Representative in Congress. The President had signed the bill. In my view the adversary system called for them not to assume the role of judge and decide whether they thought the amendments constitutional but to act as advocates in defense of what their official clients had done and make the best arguments available.

Determining when to confess error and when to act as advocate and leave the decision to the court requires a delicate judgment. I had no better test than to ask whether I would feel that I would stultify myself by making the argument for affirmation.

Even the Solicitor General sometimes has a client — the President or the Attorney General — who authoritatively determines that the United States should take a position which the Solicitor General disapproves in the depths of his being. President Eisenhower’s first Solicitor General, Simon Sobeloff, refused to defend the discharge of government employees for

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disloyalty or as being security risks solely on FBI reports quoting unidentified informers.21 Solicitor General Griswold refused to defend the Selective Service Regulations classifying any young man “1-A” — for immediate service — who burned his draft card in a public demonstration against the draft.22 I never had to answer the question, but I am inclined to think that a Solicitor General cannot properly refuse to sign a brief for his “client” unless the refusal is accompanied by an offer to resign. The omission of the Solicitor General’s name tells the Court that he cannot in good conscience support the government’s position and thus undercuts the submission that others will make. That seems disloyal to the client, although the client — the President or Attorney General — may choose to have the Solicitor General’s position revealed rather than to have him leave the government.

When is refusal or resignation warranted? The question seems to parallel the question: When does conscience require a lawyer in private practice to tell his client to retain another attorney? Surely resignation is warranted when the only alternative is to engage personally and directly in conduct violating moral principles. Surely not only refusal but public disclosure is the only honorable course if the superior is engaged in illegality or other breach of public trust. Mitchell, Erlichman, and Dean are not to be excused as lawyers using their “extricating competence” to aid their client, President Nixon. The question is different, I think, when the top-side decision requires no dishonorable or immoral personal conduct and offends no moral standards but does offend some deeply-held personal conviction as to where the public interest lies. This was the posture of Solicitors General Sobeloff and Griswold. Were one to focus on the single item, the subordinate might deem the decision to require his resignation. Before he resigns, should he not also consider whether by staying and conforming in the particular instance, he will be enabled to do more to promote the public interest on the whole? If that be the case, may he not ask whether the net gain is not enough to offset the distaste of implementing the decision which he deems so wrong? The

task of striking such a balance would be delicate and difficult even if one could trust one's own motivation. The task is made the more difficult by the fear, on the one side, that one may be jumping too quickly to find a "principle" where none is at issue and by the awareness, on the other side, that in thinking that one can do more by staying one may really be clinging to the pleasures and prerequisites of office.

Even true questions of principle often become so entangled with hard pragmatic judgments as to make it difficult to know which is at stake or what course of conduct will best promote the principle. A good example arose while I was Special Watergate Prosecutor. It had to do with the problem of sorting out — not with the lawyer-client relation. If the Special Prosecutor had any client except his conscience, it was the American people, but there was no one, except possibly the Congress, to speak to him for them.

After Judge Sirica had ordered the production of the so-called Watergate tapes and the court of appeals had affirmed his ruling, there were signs that President Nixon might disobey the order. Two principles were at stake: (1) the need to demonstrate that our system of government and justice is capable of investigating and dealing with alleged misconduct even at the very highest levels; and (2) the precept that the Executive is under the law. If President Nixon disobeyed the court decree, he would violate the second principle. The violation, if successful, would put the first principle at hazard. The habit of voluntary compliance — the notion that a powerful executive official has no choice but to comply with a judicial decree — is a fragile bond. President Nixon had received an overwhelming popular endorsement less than a year before. The people might think it unseemly for judges in lower courts to be issuing orders to the Chief of State. There were few, if any, signs that the country had turned against the President. There was even precedent for executive disobedience. In *Marbury v. Madison*, the very case establishing the doctrine that the Ex-

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23 The principle flows from *Marbury v. Madison*, 5 U.S. (1 Cranch) 49 (1803), but had not been authoritatively applied in legal process directed to the President prior to the subpoenas for the Watergate tapes.
24 5 U.S. (1 Cranch) 49 (1803).
ecutive is under the law, President Jefferson and Secretary of State Madison scorned John Marshall's pretentions; they would have defied the Court successfully if it had not avoided issuing a decree. President Lincoln disregarded a judicial writ of habeas corpus at the start of the Civil War.27 President Franklin D. Roosevelt was ready to take his case to the country if the Supreme Court invalidated one of his financial measures.28 What if President Nixon did defy the judicial orders successfully? Was it possible, in an age of presidential aggrandizement, that if defiance succeeded once, President Nixon or another President might follow the example until the principle had been destroyed? Should one provoke this kind of constitutional crisis with the outcome so uncertain? Would pressing the confrontation or avoiding it do more to serve the principle?

The right course to follow seemed tolerably plain so long as the only question was whether to press ahead or retreat. A constitutional principle is not much good if you dare not invoke it. There came a time, however, when various compromises were proposed, the last of which became known as the Stennis Compromise. Should one now stand on principle, reject compromise and perhaps destroy the principle? Which would be the more "principled" course? There was also the chance that in the end the Supreme Court would reverse the decisions of Judge Sirica and the court of appeals, so that pushing our view of the law to the limit might diminish our ability to achieve the goal of demonstrating that the American system of law and government can cleanse itself of wrongdoing even at the very highest level. A sufficiently favorable compromise would seem to be a sensible practical accommodation — avoiding risk of injury to the principle that the Executive is under the law and probably producing at least some of the evidence necessary to a thorough investigation. But what compromise would be favorable enough? At some point compromise would mean surrender of the principle that the Executive is subject to law; it also would be personally dishonorable because it would violate my promise to press ahead and do everything possible to show

that our system of law and government can deal with serious charges of wrong-doing even at the highest level. My worry was not eased by the knowledge that what I judged a sufficiently favorable compromise, others would see as a "sell-out" of both principle and honor.

It never came to the crunch. President Nixon broke off talk of compromise and chose not only to announce complete defiance of the judicial decree but to order me to violate the promise which I had made to challenge all claims of executive privilege. At this point, the questions of both political and moral principle became clear enough, and choosing the course to follow became easy. Happily, public opinion soon forced President Nixon to submit to the supremacy of the law by complying with the decree.

Perhaps I have digressed too far. I suspect, however, that the problems of this kind which face one in public life are not very different from those which arise when a lawyer is free to choose whether he will continue or cease to represent a client whose proposed course of action offends the lawyer's deep convictions.

VI.

Before closing I should acknowledge that three long-run changes in the practice have made it harder for the lawyer to preserve his independence as one who follows a public calling.

As the bulk of legal practice has shifted from courtroom advocacy to counselling, more lawyers have been drawn more deeply and more continuously into planning and conducting the active pursuit of their client's interests, including the influencing of legislatures and executive and administrative decisions.

Another change is the specialization of each lawyer's interests and clients. The segments of society now receiving able and dedicated legal representation from the profession as a whole are far more numerous and far more diverse than ever in the past, but, while the profession as a whole has grown broader, the concerns of individual lawyers and law firms have constantly narrowed. Most of them represent corporations or labor unions, personal injury claimants or insurance companies, or civil rights organizations, or some other group. Even
those who call themselves "public interest law firms" are plainly special pleaders for distinct points of view. The inescapable consequence of the changes is closer economic and psychological association of each lawyer or law firm with some particular segment of the community.

Finally, the change in the functions of law and government is also important. Law and members of the legal profession spend more of their time dealing with intricate technical regulations than formerly and less in dealing with "right" and "wrong." The broad scope and immense volume of purely regulatory laws, the variety of ways in which laws are made and changed — often by rather low-level agencies, the fluidity of even judge-made law, and the lack of moral foundation for many regulatory statutes all reduce the law's power to command obedience from the citizen and loyalty from the profession. Not even the most sensitive among us can feel in any simple, direct sense that circumventing subparagraph (z) of paragraph (GG) of Section 10,000.2 of the departmental regulations pertaining to construction of fly swatters involves the course of liberty or justice.

I submit, nevertheless, that the goals of the legal system and the profession have not changed even though the complexity of the crowded modern world tends to obscure them. Indeed, the more difficult, the more intricate, technical and complex the law with which we deal, the more we need a compass to guide us.

The ideal of the independent lawyer is therefore as important as a pragmatic understanding of the profession's problems and faults. The ideal tells us what we are trying to do: some among neighbors, others for larger enterprises, still others in government. Our aspirations are part of us. What we can be, and what we seek to be, belong to what we are. If our reach sometimes exceeds our grasp, Holmes would assure us that "to live greatly in the law" lies in the endeavor.