Kentucky Law Journal

Volume 54 | Issue 3 Article 8

1966

The Unpopular Criminal Defendant: His Right, Lawyer's Duty, Ways of Ensuring Both

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Notes

THE UNPOPULAR CRIMINAL DEFENDANT: HIS RIGHT, LAWYER'S DUTY, WAYS OF ENSURING BOTH

The sixth and the fourteenth amendments guarantee to every man accused in a criminal prosecution the right "to have the Assistance of Counsel for his defense." The United States Supreme Court, in *Gideon v. Wainwright*,[1] decided unanimously that the right to counsel of one charged with crime is so fundamental that the prosecution must provide the accused with a lawyer when he cannot afford to retain one. Then followed *Escobedo v. Illinois*[2] which projected the right to counsel even into the police station under certain circumstances. The federal constitution, the state constitutions, in all but one state, and the decisions of the Supreme Court spell out definitively the right to the assistance of counsel.[3]

Moreover, individual lawyers of seventeen states,[4] including Alabama, Georgia, and Mississippi, upon admission to the bar swear, "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed."[5] A report of the American Bar Association Special Committee on Individual Rights as Affected by National Security states: "American Lawyers generally recognize that it is the duty of the Bar to see that all defendants, however unpopular, have the benefit of counsel for their defense."[6]

Yet despite the almost unanimous acceptance of the duty to represent *all* criminal defendants, which perforce includes unpopular defendants,[7] many, perhaps most, lawyers today fail to discharge this responsibility when unpopular defendants are involved.

During the McCarthy era, Supreme Court Justice William O. Douglas described the difficulties faced by unpopular defendants in obtaining counsel in these words, "Fear even strikes at lawyers and

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[1] 372 U.S. 335 (1963).

[2] 378 U.S. 478 (1964).

[3] See Beaney, The Right to Counsel in American Court (1955) for a complete account of the historical background of the sixth amendment provision.

[4] Ala., Calif., Ga., Idaho, Ind., Iowa, Minn., Miss., Neb., N.Y., N.D., Ore., Okla., S. D., Utah, Wash., Wisc.; Cheatham, Cases and Materials on the Legal Profession 557 (1955).

[5] Oath of Admission to the Bar commended by the American Bar Association.

[6] Report, *The Independence of the Bar*, 13 Law Guild Rev. 158 (1953).

[7] "Unpopular" defendants as used here is defined as anyone whose conduct offends the religious, social or political mores of a community; *e.g.*, a Negro asserting his civil rights in the South, or a draft-card burner.

the Bar. Those accused of illegal Communist activity—all presumed innocent, of course, until found guilty—have difficulty getting reputable lawyers to defend them. . . . This is a dark tragedy."[8]

Today, the civil rights era, the battle rages on. Only the battlefront has changed. Rostow, Dean of Yale Law School, focused attention on this situation when he asserted:

> Complaints have come from different areas where accused persons have been deprived of right to counsel because of the refusal of the members of the bar to represent discredited defendants or become involved in unpopular cases. Throughout the year, and particularly in recent weeks, instances have been reported . . . that persons under criminal charges in certain sections of the South have been deprived of their right to effective counsel because of the refusal of lawyers of the Caucasian race to appear in the defense of colored defendants; and a late request has come to the Committee that it assist in providing counsel to represent so-called "freedom riders" when they are arrested in the South and cannot obtain the service of local white lawyers to defend them.[9]

In support of Dean Rostow's appraisal, Jack Greenberg, director and counsel of the N.A.A.C.P. Legal Defense and Education Fund, speaking to the Harvard Student Bar Association commented that it was "almost impossible to get a white man to bring a school desegregation suit."[10] It is apparent, therefore, this "dark tragedy" still persists.

Regrettably, this fact is understandable, although not justifiable, in that attorneys who undertake to fly in the face of public opinion by representing the unpopular are subjected to personal vilification, loss of practice, social reprisals from friends both within and without the bar, and political disabilities.[11] In addition, there are cases where lawyers who have counseled unpopular persons have faced contempt citations and disbarment proceedings.[12] Some lawyers have even been abused by the bench itself. Lawyers counselling negroes in civil rights cases in Mississippi have not been afforded the usual considerations by the court.[13]

This then is the problem. Our adversary system, fraught with technical legal rules, is such that a fair trial requires effective legal

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[8] Douglas, *The Black Silence of Fear,* New York Times Magazine, Jan. 13, 1952, p. 1.

[9] Rostow, *The Lawyer and His Client,* 48 A.B.A.J. 146 (1962).

[10] Alexander, *The Right to Counsel for the Politically Unpopular,* 22 Law in Transition 19, 45, fn. 64 (1963).

[11] *Id.* at 28-42.

[12] *In re* Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961); Schlesinger V. Musmanno, 367 Pa. 476, 81 A.2d 316 (1951). Sacher v. Association of the Bar of the City of New York, 347 U.S. 388 (1954) (per curiam); *In re* Disbarment of Isserman, 345 U.S. 286 (1953), order set aside, 348 U.S. 1 (1954); Sacher v. United States, 343 U.S. 1 (1952).

[13] New York Times, October 30, 1961, p. 14 col. 4.

representation of criminal defendants.[14] While theoretically representation in criminal trials is guaranteed by the Constitution, the practical success of our system depends upon the willingness of lawyers to represent these defendants. And presently, the attorney who endeavors to counsel an unpopular defendant must bear repressive social, economic, professional and political pressures and, as a consequence, is loathe to perform his professional duty.

A solution must be directed toward eliminating both the cause and the effect of the problem. Ameliorating the cause—adverse public opinion, and reducing the effects—failure of the legal profession in general, and the individual attorney in particular, to fulfill their professional duty to counsel the unpopular, is the ambitious goal of this writing.[15]

Today's American society, the product of an economic and social leveling, has generated the mass personality which requires its members to conform. Thus society, including the intelligentsia, has little tolerance for the social, moral, or political deviate, and this intolerance manifests itself, in part at least, in the pressures bearing on one who counsels such an individual. While it is regrettable that society through its oppressive pressures seemingly fails to apprehend that one of the cornerstones of democracy and liberty is a fair trial for all and that there can be no fair trial without the aid of counsel, it is inexcusable that society stands ready to impute to the lawyer the misdeeds of his client.

> Nobody would identify a doctor who treated Eugene Dennis for heart trouble as being sympathetic to Marxism. Nobody would criticize a clergyman because he gave counsel to the worst sinner.
>
> But when a lawyer gives his counsel to someone who has won the condemnation of society, people point and say what a shocking thing that this lawyer should be giving his counsel and services to this man who is so scorned and degraded.[16]

Consequently, it is imperative that society be conditioned to reject these attitudes. Experience indicates that society's attitude as it relates to everything from politics to hairdressing can be molded and remolded by carefully chosen words and actions. It is submitted that words and actions calculated and properly directed can overcome the forces that challenge the lawyer as he rises to defend the unpopular. The public can be made to realize that it is in their best interest, as

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[14] Gideon v. Wainwright, 372 U.S. 335 (1963).

[15] See, Downs and Goldman, *The Obligation of Lawyers to Represent Unpopular Defendants*, 9 How. L. J. 49 (1963) for a comprehensive survey of the problem coupled with concrete proposals for its solution.

[16] New York Times, September 25, 1960, p. 54, col. 6.

a people enamored of liberty, to preserve the right to counsel for all criminal defendants and that a lawyer, like a doctor or clergyman, has a professional duty arising out of the very nature of our jurisprudential system to counsel the unpopular defendant in a criminal case regardless of what he may personally think of him.

Community leaders, elementary and secondary educators in social studies, and social scientists—all in a good position to do so—should spearhead a drive to educate the public. For example, a high school social studies teacher could develop an interesting curriculum underscoring the necessity of the right to counsel for all criminal defendants. The efficacy of this proposal has been recognized by the Civil Liberties Educational Foundation, Inc., which has drafted a program for the improvement of secondary school curriculums dealing with civil liberties.[17]

Public instruction through a judicious use of press, radio and television would doubtless be the most effective device that could be employed. Announcements, interviews, documentaries and panel discussions on the meaning and function of the right to counsel are examples. These communications should emphasize that, as Sir Hartley Shawcross has put it, "the advocate is not to be identified with his client. He is the representative but not the alter ego."[18] This mass media instruction could be jointly financed by the local chambers of commerce and the local bar associations. Hopefully, the radio and television media would cushion the financial burden by featuring these as public service announcements and the press would donate newspaper space as a public service.

The soundness of this proposal rests with the fact that it would not only benefit the individual attorney by freeing him from the oppressions of adverse public opinion, but it also would endow the public with a better understanding of our legal system and the legal profession—an understanding which inescapably would aid in restoring the profession to its former status as an honorable and noble one.

The American Bar Association, of course, should serve instrumentally in complementing the efforts of the local bar associations and community leaders in this public education project. The A.B.A. evidenced an awareness of this need in 1962 when it created a special fund for public education.[19] But three years have elapsed and its influence has been minimal at best. Certainly the American Bar Association's efforts must be intensified. It is suggested that a more

[17] New York Times, November 19, 1962, p. 1, col. 8.
[18] Pomeroy, *A Practitioner's View*, 20 U. Pitt. L. Rev. 741, 744 (1959).
[19] American Bar News, (January 15, 1962).

effective use of this fund would be to make these resources available to those local bar associations and chambers of commerce that have demonstrated their willingness to take the initiative in this public education program. Also, the fund's resources could be employed in developing an appealing and informative teaching aid which could be used in elementary and secondary social study courses. To be sure, the American Bar Association should wisely employ the use of the mass media in a manner comparable to that which was previously commended. Presumably the fund could be made adequate to underwrite these endeavors.

Public education is but one facet of the organized bar's[20] obligation in this matter. Clearly it must also impress upon its members the need to remove any stigma which they themselves have attributed to lawyers who represent unpopular clients, and, affirmatively to publicly extol the virtue of their colleagues who do counsel the unpopular. This would do much to erode the false concept of "guilt by association" and presumably in its place would grow an understanding of the professional, as opposed to the personal nature of such representation.

Efforts have already been undertaken by the American Bar Association and the Bar Associations of Maryland and the City of New York, which have publicly pledged their support to lawyers who undertake the defense of unpopular persons. It is hoped that similar pledges become widespread to the extent that every member of the Bar subscribes to them.

Additionally, bar associations should institute plans similar to what Goodrich has called the "Philadelphia Plan," whereby the local bar and prominent law firms cooperate by lending both their professional services and their prestige to the defense of the unpopular. The Philadelphia Bar Association appoints counsel from among its most prominent members to represent the unpopular, whereupon the larger law firms voluntarily assign various of their younger associates on a rotation basis to assist. As a result, a desirable balance between young men and experienced men is achieved.[21] Moreover, the esteem of the prominent lawyers and the large law firm does much to eradicate the scorn ascribed to lawyers who counsel the unpopular, thus encouraging the average attorney to participate in this kind of litigation.

As an aside, it would appear essential that every bar association, preliminary to its other efforts with respect to the unpopular, admit to its ranks bona-fide attorneys who have previously been excluded solely

[20] "Organized bar" includes both the American Bar Association and the local bar associations.

[21] Goodrich, *The Philadelphia Plan*, 20 U. Pitt. L. Rev. 733 (1959).

because they were socially unpopular. Segregated southern bar associations are intolerable unless hypocrisy is to be their watchword.

An extremely forceful weapon, and one urged by Dean Rostow with precedent to support him, is for the bar associations to appear as amicus curiae or as counsel of record.[22] The merit of this suggestion rests with the prospect that it marshalls the full weight of the bar's prestige in the struggle to preserve the right ot counsel for even the most unpopular.

In addition, the organized bar should persuade schools of journalism that during the course of a student journalist's training he should be alerted to the need for counsel in a criminal trial and to the professional duty of lawyers to satisfy this need. For the practicing journalist, the organized bar should institute lawyer-journalist conferences which would provide the necessary vehicle through which the journalist could acquire a greater understanding of legal procedure. Hopefully these measures would encourage the press, when reporting a case involving an unpopular person, to temper their sensationalism with a cautionary remark regarding the lawyer's professional duty to counsel as well as the right of even the most unpopular to such assistance. It is also hoped these measures would encourage the writing of timely newspaper editorials on the subject.

Perhaps the most effective tool to ensure the right to counsel for the unpopular would be for the American Bar Association to eliminate some of the disparity between the English and American ethical standards. Under the present English system, it is considered a breach of professional etiquette to refuse to counsel a defendant on any ground other than lack of available time.[23] Yet, the American practitioner pursuant to canon 31[24] apparently is at liberty to select his clients at will. The canon reads as follows:

> No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what causes he will contest in Court for defendants.

It is submitted that canon 31 should be revised. The revision should allow for a dichotomy between criminal and civil cases. Concerning the latter, the present discretionary language of the canon should be preserved; however, with regard to criminal defendants seeking counsel, the canon should be couched in mandatory terms allowing an

[22] Rostow, *supra* note 9, at 150.
[23] Stryker, The Art of Advocacy 274-75 (1954).
[24] American Bar Association Canons of Professional Ethics (1957 ed.).

attorney to decline representation only when in good faith he does not have the available time. Realistically, although unlike the British etiquette, an attorney also should be ethically at liberty to decline representation when the criminal defendant, not court assigned due to indigence, has not proffered a reasonable fee.

The American Bar Association could ensure that this proposed amendment upon adoption receives widespread publicity. This would have the double-barrelled effect of alerting both attorneys and the public to this newly ordained ethical duty, which in turn should help allay any future lay or professional criticism of any attorney appearing in an unpopular cause.

Legal education must also play a significant role in solving the problem of obtaining counsel for the unpopular. It is submitted that law schools have been remiss in this area. They have not and do not employ sufficient care in admitting students, and once the student has been admitted, law schools express little or no concern for the needs of the unpopular client and place little or no emphasis on the professional duty of lawyers to satisfy this need.

In the main, law schools train employees not professional people. An educated guess is that nearly fifty per cent of the people admitted to the law schools have neither the desire nor the capacity to look beyond the fee part of the profession. This lamentable fact is abetted by the requirements for admission—intellect plus no criminal record. No attempt whatever is made to determine an applicant's potential as a professional person. Of course, no instrument to date has been devised to make conclusive determinations along these lines, but certainly, as industry has discovered, there are tests available of sufficient value to furnish guidelines as to one's suitability for a particular task. Since it is clear that brain alone is not the full measure of what it takes to be a creditable lawyer, it is submitted that an applicant's undergraduate record need not be augmented by another brain-testing device, such as the Law School Admissions Test, but instead, tests revealing the psychological and philosophical "inner self" seem desirable. Also, personal interviews prior to admission could be a valuable aid in determining whether the applicant has sufficient character to discharge his professional responsibilities—one of which is the duty to counsel the unpopular.

Furthermore, after admission, law students should find themselves exposed to curricula focusing ample attention on such areas as individual rights and professional responsibilities. Some courses or seminars dealing with these topics should be offered. The American Bar Association's National Council on Legal Clinics recently produced

a motion picture entitled "Defending the Unpopular Client." This audio-visual aid and others like it could be put to good use in legal ethics and legal profession courses. Perhaps the most dramatic method of impressing upon the student lawyer his professional duty to counsel the unpopular, as well as the indigent, would be for law schools more actively to promote participation in the local legal aid and defenders groups.[25]

Not until law schools begin to conscientiously inculcate their graduates with a sense of professional responsibility, not the least of which is the duty to counsel the unpopular, can the legal profession hope to be supplied with those who will do it credit.

It is frustratingly clear that, even should all the foregoing proposals be effectuated, the basic problem would still remain. It is the individual lawyer who must ultimately make the decision whether or not to abide by his professional and ethical responsibility. For the necessary courage and strength to do so, an attorney must look into his own soul. But while looking he would be well advised to ponder the words of Justice Louis Brandeis, who, when asked by a colleague whether he should refuse a retainer from an extremely unpopular person, replied: "Before you reject this cause, I suggest you consider resigning from the Bar. On further consideration, you might even resign from the human race."[26]

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[25] See generally, Stevens, *Legal Education for Practice: What the Law Schools Can Do and Are Doing*, 40 A.B.A.J. 211 (1954).

[26] Ernst and Schwartz, *The Right to Counsel and the "Unpopular Cause,"* 20 U. Pitt L. Rev. 727, 731 (1959).