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NORTH CAROLINA LAW REVIEW

Volume 43 | Number 1 Article 9

12-1-1964

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Recommended Citation

Daniel H. Pollitt, *Counsel for the Unpopular Cause: The Hazard of Being Undone*, 43 N.C. L. Rev. 9 (1964).
Available at: http://scholarship.law.unc.edu/nclr/vol43/iss1/9

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COUNSEL FOR THE UNPOPULAR CAUSE: THE "HAZARD OF BEING UNDONE"*

DANIEL H. POLLITT†

I do solemnly swear: I will support the Constitution of the United States. . . . I will never reject from any consideration personal to myself, the cause of the defenseless or oppressed.[1]

In 1650, John Lilburne was put to trial accused of treason for publishing three pamphlets critical of the Cromwell Parliament; he immediately asked that counsel be assigned him. He explained that because of the serious nature of the charge, "no eminent experienced lawyer dare well meddle with my business, no, nor so much as bestow a visit upon me, but he runs a hazard of being undone."[2]

This "hazard of being undone" followed the lawyer when he crossed the seas to the new colonies in America. In 1735, two defense attorneys in the trial of John Peter Zenger (the newspaper publisher accused of criminal libel) were disbarred for "having presumed" to sign and file a document questioning the legality of the Judges' Commission, "notwithstanding they were forewarned by the Court of their DISPLEASURE if they should do it . . . ."[3] John Adams, who with Josiah Quincy undertook the defense of the British soldiers involved in the Boston Massacre, wrote that "it is impossible to realize . . . the abuse heaped upon Mr. Quincy and myself. . . . We heard our names execrated in the most opprobrious terms whenever we appeared in the streets of Boston."[4]

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[1] Oath of admission to the bar recommended by the American Bar Association and adopted by a number of states.

[2] Quoted in Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 236 (1952).

[3] RUTHERFORD, JOHN PETER ZENGER 50 (reprint 1941); quoted by Mr. Justice Jackson in *In re Isserman*, 345 U.S. 286, 292 n.3 (1953).

[4] Quoted in Ernst & Schwartz, *The Right To Counsel and the "Unpopular Cause,"* 20 U. PITT. L. REV. 727, 728 (1959).

Today, 300 years after John Lilburne and 175 years after the enactment of a written Constitution which guarantees that the accused in all criminal prosecutions shall "have the Assistance of Counsel for his defense,"[5] there is still a "hazard of being undone" when the attorney volunteers defense of an unpopular client. The case of James Daniel Gilliland, North Carolina attorney, is illustrative.

Gilliland served with distinction in World War II, received a law degree from Wake Forest College in 1948, and returned to his home in Warren County to practice law. A vigorous, gregarious, and ambitious young man, he was soon commander of the local American Legion post, an officer in the Veterans of Foreign Wars, secretary of the Lions Club, master of the Masonic Lodge, and elected solicitor to prosecute cases in the local recorder's court. Then came two setbacks in quick succession. After the 1954 Supreme Court decision in the *School Desegregation Cases*,[6] he was asked to explain its significance to the Lions Club. He did, telling them he favored it and felt it should be obeyed. Then, he represented eleven alleged Communists before a Charlotte, North Carolina, session of the House Committee on Un-American Activities. Even worse, he suggested that the Committee leave his clients alone and turn its attention to school officials who evaded or ignored the 1954 Supreme Court school segregation decision.

The reaction in rural Warren County was immediate and explosive. Within a week, Gilliland was expelled from the Lions Club and the country club and was asked to resign as solicitor. The local Veterans of Foreign Wars chapter elected another man as president in spite of the fact that Gilliland, as senior vice commander, was in line for the post. Later that year, the State Bar Council brought disbarment proceedings, accusing him of irregularities in two divorce suits he had handled. Many local residents agreed that it was Gilliland's statement on racial issues which brought on his trouble. He was ordered disbarred by the State Bar Association, but was reinstated when, after appealing to the North Carolina Supreme Court, he received a jury trial[7] and was acquitted.[8]

Louis Lusky, a Louisville lawyer and former clerk to a Supreme

[5] U.S. CONST. amend. VI.
[6] Brown v. Board of Educ., 347 U.S. 483 (1954).
[7] *In re* Gilliland, 248 N.C. 517, 103 S.E.2d 807 (1958).
[8] Durham Morning Herald, Nov. 3, 1963, § B, p. 12, cols. 3-6.

Court justice, had a similar but less disastrous experience.[9] At the request of the American Civil Liberties Union, and without fee, he undertook the defense of a white "integrationist" charged with violation of the Kentucky sedition law. He won the case, but he lost a good part of his practice. "I don't mean to suggest that people here . . . think I am disloyal. Their attitude is, rather, that I am peculiar and that it may be better to put their affairs in the hands of a more normal sort of person,"[10] he said.

The prosecutor, who had made disparaging remarks about Mr. Lusky on several occasions during the trial, fared much better. The local bar association awarded him a plaque for the "efficiency" of his office, and elected him unanimously as its president—the first time the office had been filled without opposition.

These two illustrations are not isolated. The small band of southern attorneys who undertake "racial" litigation often find the common courtesies of the bench and bar denied them. One such Negro attorney reports that he shudders whenever a judge puts a "Mister" in front of his name, for he then knows he is about to lose his case.

But these courageous attorneys face more than discourtesies. Negro attorney R. Jess Brown of Jackson, Mississippi, represented five Negro plaintiffs in a suit to desegregate the schools of Leake County. Subsequently, one of the women litigants brought a complaint that she had not authorized her name to be used in the law suit. The Mississippi judge started "contempt" proceedings, which were ultimately dropped when the lawyer was able to locate a written retainer agreement. The judge still ordered attorney Brown to pay court costs (which were considerable) within five days or be denied permission to practice before the court.[11]

Tobias Simon, Miami attorney and general counsel of the Florida Civil Liberties Union, also has been charged with "contempt of Court." When Tallahassee lawyers refused to represent the 200 or more demonstrators jailed in that city in 1963, Simon went up from Miami to see what he could do. Trial for one young girl was set for a date in June, and Simon, who was tied up elsewhere on that

[9] See SACKS, DEFENDING THE UNPOPULAR CLIENT 18 (1961), identifying the lawyer only as Mr. Doe.

[10] *Id.* at 20.

[11] Letter From Melvin L. Wulf, Legal Director of the American Civil Liberties Union, to the author, Oct. 28, 1963.

date, tried unsuccessfully to get another attorney to represent her. He called upon Judge Rudd for a postponement, a routine legal procedure. Judge Rudd refused, so a Legal Aid Society attorney was appointed in Simon's stead. The judge, however, refused to allow the appointed attorney to proceed and issued an order holding Simon in contempt. Former Florida Governor Fuller Warren agreed to represent Simon, and the judge dropped the charges.[12]

Benjamin Smith and Bruce Waltzer, New Orleans lawyers active with the Louisiana Civil Liberties Union, were arrested on October 4, 1963, in a widely publicized raid for allegedly violating that state's Subversive Activities Control Act. They were arrested in the middle of a conference of civil rights attorneys at the Hilton Inn at the New Orleans airport, the first integrated lawyers meeting ever held in that city.[13] Although all charges against the two arrested lawyers were subsequently dropped, such highly publicized raids cannot help but put silent pressure on other attorneys who might retreat into the safety of noninvolvement and thereby avoid the hazard of being undone.

The Brown incident in Mississippi, the Simon incident in Florida, and the Smith and Waltzer incident in Louisiana are but recent illustrations of the harassment suffered by civil rights attorneys in the South.

A few years back, white Georgia attorney James Venable (who represents the Ku Klux Klan) was arrested in Monroe, Louisiana, for car theft when he arrived to defend a member of the Black Muslim organization. Charges were dropped when he agreed to leave town.[14] A white Mississippi attorney who agreed to handle the appeal of a Negro rape defendant received disbarment charges for acceptance of a retainer from a "subversive organization" when the Civil Rights Congress provided funds to pay the cost of appeal. The charges were dropped when the attorney withdrew from the case.[15] Clyde Kennard, the first Negro applicant to all-white Mississippi Southern University, was subsequently convicted of stealing five sacks of chicken feed on the basis of rather tenuous evidence. His lawyer was charged with contempt of court for exclaiming to

[12] American Civil Liberties Union, Press Release, Oct. 17, 1963.
[13] *Ibid.*
[14] Louisiana v. Venable, 6 CIVIL LIBERTIES DOCKET 91 (1961).
[15] Conference on Threats to Independence of the Bar, *The Independence of the Bar*, 13 LAW GUILD REV. 158, 161 (1953).

the press that the sentence of seven years hard labor was a "mockery of justice."[16] North Carolina attorney James Walker was charged with "assault" when he shook his finger at a voting registrar during an argument concerning the way in which a literacy test was being given to his client, and it took an appeal to the North Carolina Supreme Court to reverse the conviction by the local jury.[17]

Virginia NAACP attorney S. W. Tucker faced disbarment charges: attempting to assist the prosecution of a white defendant charged with raping a Negro woman.[18] His brother Otto Tucker, also an NAACP attorney, received disbarment charges of "unethical solicitation of employment." The basis of this charge was that while attorney Tucker was interviewing some retained Negro clients in jail, he was informed that a white youth, one Buford Kibler, was a co-defendant. Tucker visited the white youth to round out the facts, and while they were conversing, Tucker asked Kibler if he had a lawyer. Kibler said no, because he could not afford one. Tucker offered to represent the white youth if his parents approved. The white youth agreed, and the parents gave initial approval. The Virginia State Bar found that this constituted "unethical solicitation of employment" and recommended that Tucker be disbarred. On appeal, Virginia's highest court reduced the punishment from disbarment to "official reprimand" because "the motive for solicitation was not so much personal gain, of which there was little hope, as a desire to serve his other clients efficiently."[19]

These judge-inspired "contempt" charges, these bar association "disbarment" proceedings, and these raids by state police all have a proliferating impact upon one another and upon the public misunderstanding that the lawyer who undertakes the defense of the unpopular client is somehow "peculiar" and that it is better to put their affairs in the hands of a more normal sort of person.

The white southern lawyer acknowledges this hazard by backing out of the situation. The Negro southern lawyer cannot take up the slack. He is either nonexistent or tremendously overburdened. In all of Mississippi, there are only four Negro attorneys[20]

[16] Mississippi v. Evers, 6 CIVIL LIBERTIES DOCKET 53 (1961).
[17] State v. Walker, 249 N.C. 35, 105 S.E.2d 101 (1958).
[18] A non-suit was entered by the County Circuit Court. Virginia v. Tucker, 6 CIVIL LIBERTIES DOCKET 30 (1961).
[19] Tucker v. Seventh Dist. Comm. of Virginia State Bar, 202 Va. 840, 843, 120 S.E.2d 366, 369 (1961).
[20] Time, June 5, 1964, p. 66. In 1961, there were only two. N.Y. Times, Oct. 30, 1961, p. 14, col. 4.

(one who will not involve himself), and they all live more than one hundred miles from the Delta counties where many civil rights arrests have occurred. In North Carolina, CORE attorney Floyd McKissick hurries from one court proceeding to the next with little or no time to prepare. Requests for continuances are routinely denied, and on one occasion he was fined for contempt when conflicting engagements delayed his scheduled court appearance. On another occasion, a local state judge referred his name to the bar association for possible disciplinary action when McKissick, on an out-of-state speaking engagement, sent his partner to represent a firm client in a routine civil action. In southeast Georgia, Negro attorney C. B. King is swamped with more than 2,000 cases arising out of the voting, bus, employment, and other protest demonstrations in Albany, Americus, and surrounding territory.[21]

The consequence is that often the constitutionally guaranteed right to counsel goes by default. There is either no counsel or inadequate counsel (because of the volume). Mack Lee Parker, accused of rape and later lynched from a Mississippi jail, was refused counsel by local white attorneys.[22] When white lawyers do represent Negro defendants in ordinary criminal matters, they rarely raise the issue when the constitutional rights of their clients run counter to the social mores of the region. In 1959, the Court of Appeals for the Fifth Circuit announced that "as judges of a Circuit comprising six states in the deep South, we think it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."[23] A large majority of southern state judges and lawyers polled by the *Yale Law Journal*[24] agreed with the validity of this observation, although many practical reasons were advanced, *e.g.*, "If I accepted a Negro for jury duty and put him on with 11 white men I would prejudice the white men against me and my client."[25]

The problem of providing counsel for the southern Negro who insists upon his constitutional right to escape a segregated educa-

[21] Harvard Law Record, Oct. 3, 1963, p. 7, col. 1.
[22] Tuttle, *Our Special Responsibility*, Wis. B. Bull., June 1959, pp. 46, 50.
[23] United States *ex rel.* Goldsby v. Marpole, 263 F.2d 71, 82 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959).
[24] Note, *Negro Defendants and Southern Lawyers*, 72 YALE L.J. 559 (1963).
[25] *Id.* at 565 n.25.

tion was brought to the Supreme Court last year in a suit[26] testing the Virginia "barratry law" which seemed designed to further hamstring the civil rights attorney. Holding this statute unconstitutional, the Court noted that "the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community,"[27] and that there is "an apparent dearth of lawyers who are willing to undertake such litigation."[28] This situation has long been known to organizations intimately involved. The American Civil Liberties Union reports that:

> We have devoted a large part of our time to seeking commitments from Southern attorneys to represent persons in the South who are involved in civil liberties matters . . . . While there are some such courageous lawyers, the over-all effort has been notably unsuccessful.[29]

CORE reports in similar vein: "During the Jackson, Mississippi, sit-in litigation, CORE was unable to get any local white lawyers to represent the defendants and there were not enough local Negro attorneys available to handle the cases."[30] Leslie W. Dunbar of the Southern Regional Council, Inc., in Atlanta comments that "the accused in a murder trial is often better able than a sit-in demonstrator to obtain qualified local counsel."[31] "Meanwhile," reports the *New York Times,* "Deep South states are spending hundreds of thousands of dollars every year to employ skilled lawyers to defend segregation."[32]

This lopsided imbalance in legal assistance gives grave concern to the Department of Justice—"from a belief that the problem may discourage Negroes from pressing for their rights in voting, education and transportation."[33] By way of contrast, Byron de La Beckwith appeared in court with not one but three defense attorneys to face the charge of killing Medgar Evers by shooting down the Mississippi NAACP leader from ambush.[34]

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[26] NAACP v. Button, 371 U.S. 415 (1963).
[27] *Id.* at 435.
[28] *Id.* at 443.
[29] Letter From Ernest Angell, Chairman of the Board, American Civil Liberties Union, to the Editor, *New York Times,* in N.Y. Times, Nov. 26, 1961, § 4 (Editorials), p. 8, col. 5.
[30] Letter From Carl Rachlin, Counsel of CORE, to the author, March 26, 1962.
[31] N.Y. Times, Oct. 30, 1961, p. 1, col. 8.
[32] *Id.* at p. 14, col. 3.
[33] *Ibid.*
[34] Atlanta Constitution, July 9, 1963, p. 2, col. 3.

The bar associations have been derelict in combating the attitude and atmosphere wherein the individual lawyer runs the "hazard of being undone" when he defends the unpopular client. Since the 1954 Supreme Court decision[35] ending compulsory segregated public education, there has been a far-ranging public debate which goes to the very fundamentals of judicial supremacy and judicial review. This debate has lacked a voice from a most concerned group. The ministerial alliances, the PTA groups, even labor unions have sought to defend the Supreme Court from its critics, but the organized bar has largely been silent.

Attorney General Robert Kennedy publicly deplored the failure of lawyers to support the government's action to enforce the court order admitting James Meredith to the University of Mississippi.[36] The organized bar stood mute when legal order was under attack.

In like vein, Ralph McGill, publisher of the *Atlanta Constitution,* told a 1961 meeting of the Harvard Law School Alumni Association that:

> To this day, insofar as I can determine, not a single southern state bar association has gone on record with a resolution or declaration of court support which would have provided the people with an alternative to the peddlers of defiance. . . .
>
> While the bar associations in the South were silent, individual attorneys described glowingly by the segregationist press as "constitutional authorities" were publicly and slanderously denouncing the federal judiciary . . . .
>
> That this stroked the fires of violence is unquestioned . . . .
>
> Only one city bar association in the South (Atlanta's) has made a public statement affirming the validity of court orders as they apply to schools . . . .[37]

Finally in Birmingham, after a series of dynamitings and the massacre of young Sunday School children, fifty-three Alabama attorneys released a joint statement. The crucial paragraph of the statement reads:

> The law as announced in decisions of the courts is sometimes unpopular. In America the public has the right, protected by our courts, to criticize court decisions. Each of us has, on occasion, felt that a particular case should have been decided differ-

[35] Brown v. Board of Educ., 347 U.S. 483 (1954).
[36] N.Y. Times, Sept. 30, 1962, p. 69, Col. 3.
[37] Quoted in Atlanta Constitution, June 15, 1961, p. 20, col. 4.

ently. But whether we agree or disagree with the result in any case, the Court's decision is the law and must be obeyed.[38]

It took courage to sign this statement, innocuous as it appears to the eyes of the northern liberal. Birmingham lawyers who have spoken out on the racial issue have not fared well. They can expect, minimally in the words of one such attorney, "numerous crank telephone calls, ranging from the caller who simply hangs up to one who uses abusive or threatening language."[39] Charles Morgan, Jr., perhaps the most outspoken white attorney in Birmingham, recently left that city. A friend reports that lawyer Morgan was partially motivated by threats of harm to his family.[40] David Vann, another young Birmingham attorney, severed his connections with the largest law firm in Alabama because he wished to participate in the resolution of racial issues in that city and recognized that "his activities might be disapproved by members of his firm and might harm his firm in some way."[41] Vernon Patrick, a Harvard-educated Alabamian, left the same firm at the same time "because of his desire to participate in activities and make statements that he believed might bring injury to that law firm."[42] It bears repeating that this law firm is the largest and one of the most influential in the state. It is also significant that the three Alabama members of the Lawyers Committee for Civil Rights, formed at the White House Conference of Lawyers in June, 1963, are Paul Johnston, who is independently wealthy, Jerome Cooper, who principally represents labor unions, and Erskine Smith, a young lawyer of unusual ability and courage.

The average lawyer hesitates to participate in the controversial issues of his time. He wonders what his other clients might think. He wonders about the social consequences to himself, his wife, and his family. And he listens to the enemy within. This enemy speaks in a thousand voices, now whispering caution and then whining fear, now pleading in reasonable accents for practicality and self-interests, and then shouting direful predictions of disaster. But above all the voice says wait: wait until your prestige is secure, your voice more powerful; wait for the right time, for the right

[38] A PUBLIC STATEMENT BY BIRMINGHAM LAWYERS (undated).
[39] Letter From attorney Erskine Smith to the author, Oct. 19, 1963.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*

case. But the right case at the right time seldom comes. And while the lawyer waits, the voice of the demogogue is unanswered and the unpopular client's right to counsel goes by default.

The problem is not regional. How many northern liberal attorneys, especially those with an eye on political rewards, would represent a southern state seeking to maintain a segregated school system?[43] The plight of the southern civil rights litigants is only the most recent—and perhaps the most scandalous—large-scale example of a continuing and growing problem. The victim of McCarthyism a few years back fared no better.

Mr. Justice William O. Douglas wrote a 1952 *New York Times Magazine* article on the "Black Silence of Fear" that strikes the lawyer contemplating the defense of a person accused of Communist activity or association:

> Lawyers have talked to me about it. Many are worried. Some could not volunteer their services, for if they did they would lose clients and their firms would suffer. Others could not volunteer because if they did they would be dubbed "subversive" by their community and put in the same category as those they would defend. This is a dark tragedy.[44]

Carl Shipley, a Republican Party official and prominent Washington, D. C., attorney, gave candid support to Mr. Justice Douglas's observation:

> I've had a number of people who've been fired from the government [on loyalty grounds] come in to me and ask me to take their cases. They always say the accusations are lies. . . . Some of them were terrible hardship cases. But I couldn't take them. They asked me to recommend other lawyers, but I wouldn't be caught dead sending them on to another lawyer—for fear he would think I think he's a Communist, or something. I know that's bad, but most lawyers feel the same way.[45]

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[43] Supreme Court authority Eugene Gressman was cautioned by well-meaning Washington, D.C., friends when he represented the state of South Carolina in an appeal from the decision ordering the admission of Negro students to Clemson College. Their concern heightened when he appeared on the Supreme Court brief contesting the deportation of former Venezuelan dictator Perez Jiminez; and many of his lawyer friends could not understand why Gressman, the son of a protestant minister, should challenge the Oregon denial of books and supplies to students in the local Catholic parochial schools. Three such cases in short time, they warned, might drive away potential clients of a more conventional nature.

[44] Douglas, *The Black Silence of Fear,* N.Y. Times, Jan. 13, 1952, § 6 (Magazine), pp. 7, 37-38.

[45] Washington Daily News, Jan. 14, 1954, p. 17, col. 2.

Mr. Shipley was not alone in refusing to represent those caught in the toils of that period. A true story is told of a highly publicized figure who was seeking an attorney to represent him in public hearings before the Senate Committee on Internal Security. An intermediary approached a large New York law firm and was told a junior member of the firm would take the case—for a $5,000 fee. "But that's outrageous," said the intermediary. "Not when you consider the dirt that might rub off on us," was the reply. The individual in question eventually found a lawyer whose "dirt compensation" was a little lower, but still at a figure beyond the reach of most persons subpoenaed to testify before congressional committees.

The "dirt" does rub off. Judge John Bigelow, after his retirement from the New Jersey bench, agreed to represent a school teacher fired from her job for invoking the privilege against self-incrimination before a congressional committee. For this reason his appointment as trustee to Rutgers University was rejected by the New Jersey Senate, and confirmed only after a storm of public protest.[46]

Illustrations can be multiplied. When James B. Donovan (of Cuban exchange fame) accepted the court appointment to represent Soviet spy Col. Rudolf Abel, "it wasn't long before vindictive personal attacks upon the lawyer and his family began. There was a steady stream of crank letters and threatening phone calls. Finally, Donovan ordered the phone cut off."[47] Attacks came from within the legal profession. He was greeted by one lawyer with the comment, not intended humorously: "Here comes the million-dollar Commie lawyer."[48] At a meeting of the bar association, a fellow Catholic lawyer asked if his sense of guilt was not "overwhelming."[49] His reward came when Chief Justice Warren told him from the Bench during Supreme Court argument that "I think I can say that in my time on this court no man has undertaken a more arduous, more self-sacrificing task."[50]

If the lawyers themselves do not understand the necessity for a co-lawyer's acceptance of a court appointment to represent a Soviet

[46] SACKS, *op. cit. supra* note 9, at 7.
[47] Lindeman, *He Defended A Soviet Spy,* Coronet, Oct. 1960, pp. 46, 48-49.
[48] *Id.* at 49.
[49] *Ibid.*
[50] *Id.* at 51.

spy, how can the lay public be blamed when it associates the lawyer with his client as part and parcel of the same package? And this misunderstanding is common. It is reported that Frank Costello, turned down by a score of lawyers who feared association with his racketeer reputation, and advised to seek the assistance of the noted Washington attorney Edward Bennett Williams, was reluctant because, as he put it, "didn't Williams represent Senator McCarthy?"[51]

These isolated case studies take on added interest from a survey of Pittsburg lawyers. Fifty per cent of those who had represented unpopular clients reported adverse community publicity and pressure from the press, from other members of the bar, and from social contacts; and twenty per cent reported that their practices had suffered.[52]

Adverse community reaction is understandable when the lawyer defends the unpopular client. An attorney can well represent a client charged with murder. But how can a lawyer represent a student demonstrator charged with "trespass" without attacking the institution of segregation, a defendant charged with contempt of Congress without attacking the power of congressional investigation, a defendant charged with sale of *Lady Chatterley's Lover* without challenging society's right to impose a literary censorship? In short, the attorney, if he is to be successful, must defend the client's cause as well as the client.

And the uninformed lay public finds it difficult to distinguish between a lawyer's personal conviction and his professional obligation. It reasons that a lawyer who defends the right of free speech for Communists must himself be a Marxist, that the lawyer in a "school prayer" or a "Bible reading" case must be an atheist. Why else would he attack the power of a school board to require the recitation of a simple prayer?

The attorney who undertakes the defense of an unpopular client may seek to insulate himself from his client's unpopular cause. He may refuse a fee, reasoning that refusal to accept "tainted" money will focus public attention on the important constitutional and social issues underlying the trial. Not too many lawyers can afford this position, however, and all too often it backfires. Louis Lusky repre-

[51] Ernst & Schwartz, *supra* note 4, at 729.

[52] Alexander, *The Right to Counsel for the Politically Unpopular*, 22 LAW IN TRANSITION 19, 32 (1962).

sented an unpopular Louisville "integrationist" defendant without charge, and he subsequently wrote that the community belief seems to be that a lawyer "who takes an unpopular case without demanding a fee must be motivated by sympathy with his client's substantive position. . . . But when a lawyer takes an unpopular case for money, this inference is less likely to be drawn."[53]

The lawyer who seeks to insulate himself from his client's cause may describe it as "rubbish" or "abhorrent" and then proceed with all his might to defend the client's right to proselytize. He may disassociate himself from the allegedly "obscene" movie on trial, say that he would not permit his own children to see it, but then attack the institution of censorship as an historical fallacy.

There is some question whether this lawyer gives adequate representation. Judge Medina, who presided at the first Smith Act[54] trial of the top echelon Communist Party leaders, has told a story of his younger years at the bar. He was assigned to represent an American Nazi charged with treason during World War II. At the trial's end, the judge praised Medina for his fine work in representing the defendant without pay and despite his personal feelings. About this praise Judge Medina has written:

> This was all very fine, but I had made up my mind that I would not say a word to the jury about being assigned counsel, feeling that my client was entitled to the advantage of everything that went with the fact that I was his lawyer. I felt that it would be a stab in the back if I even mentioned the circumstances of my assignment. . . . And yet there I was standing up there and receiving all this praise, while I could not help thinking that this was prejudicial to my client. And so I told Judge Goddard that I did not wish to seem ungracious but that I must respectfully except to his statement, adding that I thought he had no right to mention this fact to the jury. . . . Both in the Supreme Court and in the Circuit Court of Appeals I urged as a basis for reversal the exception to which I have referred.[55]

Unfortunately, there are not enough Medinas to supply the growing need of counsel for the unpopular defendant. A Pittsburgh lawyer charged with "communism" had his "disbarment" case postponed for eight months until a fellow lawyer agreed to represent

[53] SACKS, *op. cit. supra* note 9, at 20, identifying the lawyer only as Mr. Doe.

[54] 18 U.S.C. § 2385 (Supp. V, 1964).

[55] Medina, *Courage and Independence at the Bar,* 25 OHIO BAR 381 (1952).

him.[56] A Baltimore lawyer charged with violation of the Smith Act[57] had to go to trial without counsel when his fellow lawyers refused his appeal for aid.[58] And lawyers, above all others, appreciate Abraham Lincoln's comment that an attorney who represents himself has a fool for a client.

What, meanwhile, have the local and national bar associations done in the face of this threat to the basic functioning of courts and aim of justice? What have organized groups of lawyers (without the public's excuse of ignorance) done to assure the right to counsel and to combat the public misunderstanding that a lawyer is to be judged by the clients he represents? What have the bar associations done to encourage lawyers to brave the "hazard of being undone"?

Supreme Court Justice Hugo Black said the bar associations have done little to assure that "lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar."[59] He fears a self-imposed tendency "to force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals . . . ."[60] He sees this tendency in a series of cases brought to the Supreme Court where the organized bar associations sought to exclude or expel persons from the practice of law for a variety of reasons: because of long-past and repudiated membership in the Communist Party (a New Mexico case);[61] because of association with a person "generally considered to be a member of the communist party" (a Texas case);[62] because the lawyer invoked his constitutional right against self-incrimination (a New York case);[63] because the lawyer spoke out at a public meeting against the prosecutor's conduct in a Smith Act proceeding (an Hawaiian case);[64] because the applicants for reasons of conscience refused to tell the Bar examining committee whether they were members of Communist, facist, Republican or any other types of organizations (cases

[56] See *In re* Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961).
[57] 18 U.S.C. § 2385 (Supp. V, 1964).
[58] Conference on Threats to Independence of the Bar, *The Independence of the Bar*, 13 LAW. GUILD REV. 158, 164 (1953).
[59] Konigsberg v. State Bar, 353 U.S. 252, 273 (1957).
[60] *In re* Anastaplo, 366 U.S. 82, 115-16 (1961) (dissenting opinion).
[61] Schare v. Board of Bar Examiners, 353 U.S. 232 (1957).
[62] Application of Levy, 214 F.2d 331, 332 (5th Cir. 1954), *rev'd per curiam*, 348 U.S. 978 (1955).
[63] Cohen v. Hurley, 366 U.S. 117 (1961).
[64] *In re* Sawyer, 360 U.S. 622 (1959).

from Illinois[65] and California);[66] and because the applicants, for reasons of religious training, refused to swear they would bear arms in the event of armed invasion (cases from Illinois[67] and Washington).[68]

Similar is the practice in some southern states to ensure conformity by asking bar applicants about membership in the NAACP and activities in interracial affairs.[69] And there is the practice in some northern and western states to ensure conformity by asking bar applicants for an opinion on the use of the fifth amendment, about the "pinkish" character of the Americans for Democratic Action,[70] and even about labor union activities. A growing practice is to require bar applicants to answer questions similar to the one in the Hawaii bar application form:

> If you were to be listed as "Communist" in the records of any federal investigative agency, what past actions or organizational affiliations of yours not already listed by you might be used by such investigative agency to support its conclusion?[71]

As pervasive, and perhaps more troublesome than the efforts of the bar to assure conformity within its own ranks, have been the efforts of the organization to ensure conformity throughout the nation. When in 1950 President Truman courageously vetoed the Internal Security Act as a violation of the Bill of Rights, the American Bar Association immediately demanded an overriding of the veto. The pattern has continued. On issue after issue requiring a delicate balancing of individual rights and national security, the brief and prestige of the American Bar Association is inevitably found allied with the state against the individual. Pennsylvania's Dean Jefferson Fordham commented to the Association of the Bar of the City of New York in 1957 that:

> In the post-war years attention has been drawn so strongly to security matters that an exaggerated imbalance has been observable.

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[65] *In re* Anastaplo, 366 U.S. 82 (1961).
[66] Konigsberg v. State Bar, 366 U.S. 36 (1961).
[67] *In re* Summers, 325 U.S. 561 (1945).
[68] In the matter of Brooks, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961).
[69] Letter From Conrad O. Pearson, Durham, N.C., attorney, to the author, Aug. 8, 1963.
[70] Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 494 (1952).
[71] Quoted in *id.* at 491-92.

> During this time the national organization has, on occasion, ranged itself with the Philistines . . . .
>
> . . . What the organized Bar needs is not its own witch-hunting department but units dedicated to the guardianship of human rights. A ceremonial interest in the Bill of Rights will not supply the need.[72]

All too often a "ceremonial interest" is all that exists. A white student was arrested not too long ago in McComb, Mississippi, in connection with his Negro "voter registration" activities. He wrote to forty white lawyers in the state, including the then president of the American Bar Association, to handle his case. Each refused, many with comments that the defendant (and his kind) were doing the state a disservice.[73]

The refusal of the American lawyer to take up the cudgels for the unpopular minority is a phenomenon without parallel in the English speaking world. Elsewhere, a barrister is likened to the cabman on the rank: it is his duty to place himself at the disposal of the first person who hails him. This duty permits a citizen to have his case presented in court, however unpopular or unworthy he may be; it also protects the advocate, for the court and public know the case he is arguing is not of his own choosing.

The general principle in England and its origin were discussed by the Rt. Hon. Sir Hartley Shawcross in a 1953 speech:

> I have recently heard it said, that certain members of the Bar in one of her Majesty's colonies refused to accept a brief to defend an African, accused of offenses of a quasi-political nature against public order. The suggestion is that these barristers made excuses and declined to act, their true reason being that they thought that their popularity or reputation might be detri-

[72] Fordham, *The Legal Profession and American Constitutionalism*, 12 RECORD OF N.Y.C.B.A. 518, 540-41 (1957).

[73] Letter From Leslie W. Dunbar, Executive Director of the Southern Regional Council, Inc., to the author, Sept. 17, 1963. Subsequent to this, on July 15, 1964, the Mississippi State Bar appointed a Special Committee to ensure competent counsel and a fair trial to "every person of high or low estate, resident or non-resident, rich or poor, popular or unpopular, respected or despised, and regardless of race, color, creed or national origin." Former American Bar Association President John C. Satterfield of Yazoo City, Mississippi, was instrumental in setting up the meeting that led to this resolution, and it has been implemented on at least two occasions. In one of these cases, the mere announcement that a respected attorney would represent a Negro minister resulted in an end to the prosecution. The minister, a civil rights worker, had been facing indictment on a spurious bad check charge. Washington Post, Aug. 14, 1964, p. 10, col. 5.

mentally affected by appearing for the defense in such a case. For the prosecution they might appear, but not for the defense.

If this report were true it would disclose a wholly deplorable departure from the great traditions of our law and one which, if substantiated, both the Attorney General and the Bar Council would have to deal with in the severest possible way.

Among laymen on both sides of politics there are some foolish and short-sighted enough to think that a barrister may and should pick and choose the cases in which he is prepared to appear.

It would be well if those people remembered how the present rule—that a barrister must accept a brief on behalf of any client who wishes to retain him—was finally established. It arose in 1792 over the prosecution of Tom Paine for publishing the second part of his Rights of Man. The great advocate, Erskine, who accepted the retainer to defend Paine, and was deprived of his office as Attorney General to the Prince of Wales for doing so, said—and said truly—in a famous speech: "From the moment that any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end."[74]

Not only in England, but in the former English colonies as well, no one lacks counsel because his cause is unpopular. Listen to the firsthand report of Supreme Court Justice William O. Douglas a few years back:

Last year I visited Burma, torn by civil war for the last five years. I visited courts and talked with lawyers and judges. . . .

I say Malaya under siege. Up in central Malaya at Ipoh, the capital of Perak, I saw criminal trials. The accused were desperate guerillas dedicated to the Communist cause. Yet the court assigned each one a lawyer for his defense. The Bar of Ipoh—some 30 in number—were doing valiant work. Lawyers were assigned in rotation; and their defenses did credit to the highest tradition of the Bar. . . . This was in the heart of jungle land where armed Communists worked night and day in guerilla warfare to destroy the government. But there was no hysteria, no atmosphere of passion, no photographers, no pressure of the press demanding convictions. . . .

These experiences brought, of course, a swelling pride in my heart at the glories of due process transplanted by the British in Asia. But what I saw has greater significance. Burma is winning her battle for Burmese hearts and minds, and Malaya is turning the tide against Communism by the use of more than

[74] Quoted in SACKS, DEFENDING THE UNPOPULAR CLIENT 38 (1961).

> military tactics. Due process, as well as bullets, helps win those wars against Communism.[75]

Here at home we revel on Law Day and other formal occasions in the stories of the profession's great names—men like Malsherbes, who came from retirement to represent Louis XVI against the Revolutionary government of France and paid for it with his life; like Andrew Hamilton, who defended the radical newspaper publisher John Peter Zenger and thereby did much to establish freedom of the press; like John Adams, who defended the British soldiers involved in the Boston Massacre; like Charles Evans Hughes, who stood up for the constitutional right of Socialists when the New York Legislature sought to expel six members because of their party affiliation; like Wendell Wilkie and Whitney North Seymour who defended Communists during the 1930's; like Harold Medina and Kenneth Royal who fought with might and main to defend Nazis during the inflammatory period of World War II; like Thurman Arnold, Joseph L. Rauh, Jr., Telford Taylor, James B. Donovan, Edward Bennett Williams, and other contemporaries who can be counted on to step forward to make sure that everyone, no matter his station or crime, has a day in court with competent counsel.

How can the spirit of these Law Day speeches be translated into an everyday reality? A series of actions, some already started, can in combination do much to achieve this goal.

First, the lawyer individually and through his professional organization must participate in the dialogue on national, state, and local issues: problems of segregated schools, housing, and jobs; relations of church and state; gerrymandering; literary, film, and political censorship; capital punishment and penology; illegal "dragnet" arrests, wire-tapping, and other elements of procedural due process including the right to counsel for the indigent and the social outcast. As a citizen, the lawyer is qualified by education, professional training, experience, and skills to play a leading role in community life. He can best explain the significance of court decisions and legislative proposals. He is trained in negotiation, fact-finding, and persuasion, and is the logical leader in local efforts to get racial strife off the streets and into a room where bi-racial committees can probe current problems in depth and with compassionate appre-

[75] Address by Mr. Justice Douglas, The American Law Institute, May 20, 1953.

ciation. He, above all others in the community, can best explain the reasons underlying the doctrine of judicial supremacy and the constitutional significance of defiance of court decisions. He can defend the unpopular decisions of the local judiciary and answer the inaccurate legal commentary by public officials.

The lay person looks to the lawyer for comment and advice, and when his voice is stilled, the vacuum is often filled by the clamorous bias of the demagogue. The recent joint statement by the fifty-three attorneys in Birmingham urging compliance with the school-desegration decisions,[76] the recent proclamation by southern law professors explaining the need for judicial supremacy in all areas,[77] and the recent resolution by the American Bar Association condemning proposed constitutional amendments that would impair the constitutional structure of judicial review[78] are all useful precepts and, hopefully, a prologue. The creation of standing committees within each bar association to report on current issues within the special competence of the attorney would do much to increase this kind of activity.

Second, the bar associations at all levels should organize groups and panels of lawyers for the defense of the unpopular or indigent clients, as it did in Washington when government employees were unable to secure counsel in connection with charges under the Loyalty-Security program, as it did in St. Louis when witnesses subpoenaed by the House Committee on Un-American Activities were unable to secure counsel, as it did in Denver, in Cleveland, in Philadelphia, and in Connecticut when Communists indicted under the Smith Act were unable to secure counsel,[79] as it did in Pittsburgh when lawyers faced with disbarment because of Communist charges were unable to secure counsel,[80] and as it did in the 1930's when a

[76] See text accompanying note 38 *supra*.

[77] The proclamation was initiated by Professor Elliott Cheatham of the Vanderbilt Law School, Nashville, Tennessee, and made public in June, 1963.

[78] N.Y. Times, May 23, 1963, p. 1, col. 7.

[79] Address by Professor Howard R. Sacks, Northwestern University School of Law, Dedication of the University of Denver Law Center, Sept. 28, 1961.

[80] *In re* Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961). Chief Justice Alvin Jones commented that

> as a result of respondent's supplication of the Allegheny County Bar Association . . . a group of attorneys agreed to act as counsel for respondent under appointment by the Court of Common Pleas; and, on June 1, 1956, eight capable and highly regarded lawyers . . . were appointed by the Court of Common Pleas to represent the

National Lawyers Committee was formed by the Liberty League to offer counsel to those who complained that the New Deal legislation infringed constitutional rights.[81]

The National Lawyers Guild, long concerned with civil rights and civil liberties, sponsored a two-pronged program this past summer in connection with the voter registration drive in Mississippi. Almost a hundred lawyers spent all or part of their summer vacations there, handling emergency legal issues; even more agreed to accept an assigned Mississippi case for preparation in their own offices.

The Lawyers' Committee for Civil Rights Under Law (formed at the request of President Kennedy at a White House Conference of lawyers) is now acting to secure counsel for the integrationist movement when the local bar is indifferent or otherwise unwilling to give representation.[82] Operating behind the shield of a bar association committee, the individual lawyer is relatively immunized from public opproprium; the establishment of such a panel gives opportunity to educate the profession and the public on the rights and duties of a lawyer in representing any client who seeks legal aid.

Third, the legal organizations should rally to the defense of any lawyer attacked because of his representation of the unpopular client. In 1953, the Special Committee of the American Bar Association on Individual Rights issued a report saying:

> [C]ounsel of outstanding reputations . . . in several recent cases involving Communists or persons accused of being Communists, which they took out of a sense of public duty, have been

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respondent. Since then, the services of these attorneys . . . have been in the finest tradition of the profession, *e.g.*, that legal representation shall not be denied anyone called to answer a charge against himself in an American court of justice.

Id. at 590-91, 172 A.2d at 837.

[81] NAACP v. Button, 371 U.S. 415, 430 n.13 (1963).

[82] N.Y. Times, Feb. 18, 1964, p. 20, col. 4. The story reads:

> A committee that includes some of the most prominent American lawyers announced today a broad program to put the legal profession on the firing line in civil rights disputes. . . . In general, the panel will try to supplement the role of civil rights and religious groups, especially in the South, by appealing to lawyers to live up to the professional ideal of representing unpopular causes and persons and offering to back them up with tangible help when they do.

Ibid. This committee was successful in urging the Mississippi State Bar to undertake the resolution and subsequent action described in note 73 *supra*.

> subjected to severe personal vilification and abuse. . . . The bar must throw its weight against such things.[83]

There are at least two notable instances when this was done. When the Cleveland Bar Association undertook to provide representation for Communist Party officials standing trial, a senior official of the Department of Justice attacked the association in a public address on the ground that it had been "duped." Within a week the President of the Bar Association had called on the Attorney General, and the Assistant Attorney General in question "denied" having made the statement.[84] And during a California hearing of the House Committee on Un-American Activities, a witness was repeatedly asked if his attorney was a Communist. The Board of Governors of the State Bar of California immediately issued a statement condemning the proceedings of the committee.[85]

Prompt reaction of this type to all slanderous attacks will impress upon the public that the "right to counsel" requires acceptance of the correlative rights of a lawyer to represent any client without having imputed to him his client's reputation, views, or character.

Fourth, the bar association should encourage the individual lawyer to undertake the defense of the unpopular client by giving a suitable annual award to that attorney in each state, county, and city who has demonstrated a fearless respect for the spirit reflected by John Adams's defense of the British soldiers involved in the Boston Massacre. A national award, upon nomination by the state organizations, could be given at the annual American Bar Association meeting. The publicity attendant upon such presentations would give credit where credit is due and further educate the public regarding the constitutional "right to counsel."

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[83] Special Committee on Individual Rights as Affected by National Security, *Report*, 78 A.B.A. REP. 304, 307 (1953).

[84] See SACKS, *op. cit. supra* note 74, at 7-8.

[85] The Board of Governors commented that

> the right to be represented by counsel necessarily involves freedom of choice on the part of the client. Conduct on the part of any tribunal before whom a lawyer is entitled or permitted to appear, which attacks a lawyer's reputation or otherwise subjects him to obnoxious personal consequences, inevitably deters lawyers from accepting employment to appear before such tribunals. Thus the right to independent counsel of the client's own choice is seriously impaired.

Ball, *Freedom of the Bar*, 32 J. STATE B. CALIF. 109, 117 (1957).

Fifth, the law schools should participate in this effort by strengthening the curriculums in criminal law, professional ethics, and legal history, and by establishing legal aid and legal research bureaus where the student may enjoy the experience of the "practical" case in a setting which induces further public concern.

On the fiftieth anniversary of the Harvard Legal Aid Bureau, Supreme Court Justice William Brennan praised the work of such societies as teaching one important lesson: "that contributing one's legal services to an unpopular or unremunerative cause need not be dirty, or nasty, or opprobrious . . . [and that] . . . many fascinating and challenging problems fall under the rubric of criminal law."[86] Pennsylvania and Northwestern long have had graduate fellowship programs in the area of criminal law and penology; at Georgetown the graduate fellows actively participate in the defense of criminal defendants.

Within recent months, Columbia, Harvard, Yale, Georgetown, Howard, George Washington, and New York University have formed chapters of a Law Student's Civil Rights Research Council. During the school months, the student members work on research projects—state apportionment problems at Columbia, miscengenation at Harvard, "insurrection" statutes at Yale, etc. During the summer vacation, the student volunteers are assigned to local counsel. A group of Georgetown students, for example, helped prepare the legal papers in connection with the mass arrests of student demonstrators in Danville, Virginia.[87]

Above all, however, the law schools can help solve the problems of inadequate or no counsel for the unpopular client by precept and example—by encouraging the faculty members to take an occasional trial or appeal on behalf of the unpopular client.

F. D. G. Ribble, former dean of the University of Virginia law school, regularly accepts the defense assignment of an indigent or unpopular case and seeks student assistance in the preparation of the appellate brief. Yale professor Louis Pollak is often on the Supreme Court brief of the Negro appellant challenging state segregation laws. Columbia professor Walter Gellhorn has argued the

[86] Address by Honorable William J. Brennan, Jr., Golden Anniversary of the Harvard Legal Aid Bureau, in Occasional Pamphlet No. Seven, Harvard Law School (1963).

[87] Columbia Law School News, Oct. 28, 1963, p. 4, col. 2; Harvard Law Record, Oct. 3, 1963, p. 7, col. 2.

Supreme Court case of the convicted felon who feels that he has been denied some right available to others more fortunate in social, racial, or economic circumstances. Students learn by what the instructor does, as well as by what he says, and where the professor leads, the student may sooner or later follow.

Sixth, the bar associations might consider the possibility of sponsoring a domestic peace corps type of operation. Most graduate law students now spend an apprenticeship period in private law firms briefing the tax, corporate, and commercial problems of well-to-do clients. In some states, the graduating lawyer is required to spend a "proctorship" of a year or more in a private law office before he can practice on his own. Why should not the young lawyer rather serve his internship in a legal aid bureau or in the office of a public defender? This practice would provide the manpower necessary to ensure counsel for all indigents and unpopular clients, and the experiences there shared with the client—professional, practical, and human—would be invaluable insights as the lawyer takes his place as a practicing citizen in a democratic society.

Seventh, and finally, when all is said and done, the fact remains that it is up to the individual lawyer to effectuate the constitutional right to counsel. If he fails, the Constitution is a dead letter; if he undertakes the defense of all—"without consideration personal to himself"—the Constitution becomes a vital, living document. Every professional undertaking on behalf of the unpopular client is a leap into the dark. No one can foretell what new evidence may turn up, what vagaries of chance may occur, or what undiscovered traits of character this or that major participant may exhibit under pressure. There is a "hazard of being undone." But if the lawyer stays close by the campfire and never ventures forth, the circle of safety and freedom will diminish and contract. And ultimately one dark night the fire will go out. The highest wisdom is to dare, and the beacon when venturing forth is the comforting comment of the late Mr. Justice Cardozo that "there is more in membership in the Bar than a license to sign a brief or intone a prosy argument."[88]

[88] Quoted in Kaufman, *Representation by Counsel: A Threatened Right*, 40 A.B.A.J. 299, 301 (1954).