Kentucky Law Journal

Volume 52 | Issue 4 Article 6

1964

Modern Mettle: The Misconstrued Morality

William B. Martin
University of Kentucky

Notes

MODERN METTLE: THE MISCONSTRUED MORALITY

I. The Predicament

"Get away from me, you slimy pimp, you're guilty as hell," roared famous trial attorney Earl Rogers to the client he had just freed from a murder charge.[1] Rogers' pithy utterance illustrates a legal dilemma that to the popular mind is blatant immorality—the defense of a client whose cause is highly unpopular or whose guilt is seemingly obvious.

When James B. Donovan told his wife that he had been appointed counsel for Russian spy Rudolph Abel, his wife replied, "I talked to everyone I met about it. Most said, 'Why should anyone defend him.' "[2] A friend abused Donovan because he had spent hundreds of hours on Abel's defense—time, the friend said, he could have been devoting to something worthwhile, "like legal problems of American businessmen."[3] Nor was it only the non-lawyer who was indignant. Donovan reports that a lawyer said to him, "Here comes the million-dollar Commie lawyer."[4] And another lawyer asked him if his sense of guilt were not overwhelming.[5]

The teachings of utilitarianism have done much to influence popular Anglo-American thinking regarding the ethics of criminal defense. Said Jeremy Bentham, "[T]he lawyer who, knowing from confession of his client that such client has committed a felony, enables him by his counsel to avoid suffering the punishment to which he is condemned, is . . . an accessory to such felony: *viz.*, an accessory after the fact."[6] In America, Bentham's contemporary, David Hoffman of the Baltimore Bar, published a guide to young practitioners:

> I shall not hold myself privileged, much less obliged, to use my endeavors to arrest or impede the course of justice, by special resorts to ingenuity—to artifices of eloquence. . . . [Thus, those who use their talants] to screen such foul offenders from merited penalties, should be regarded by all (and certainly shall by me) as ministers at a holy altar full of high pretention and apparent sanctity, but inwardly base, unworthy, and hypocritical—dangerous in the precise ratio of their commanding talents and exalted learning.[7]

---

[1] St. Johns, Final Verdict 97 (1962).
[2] Lindemann, *He Defended A Soviet Spy*, Cornet, Oct. 1960, p. 46.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] G. Bentham, Rational of Judicial Evidence 474 (Bouring ed. 1850).
[7] Z. Hoffman, A Course of Legal Study 745, 751 (2d ed. 1836).

The 1960s are not free from confusion over this problem. Lawyers have undertaken and in turn been criticized for the defense of such unpopular clients as Caryl Chessman, James Hoffa, Jack Ruby and Adolf Eichmann. It is time that the principles related to the defense of the obviously guilty or an unpopular client be contemporarily restated.

II. THE STAGE

In order to arrive at a valid ethical judgment, we must first postulate the nature of the trial system in Anglo-American law. Ethics evolve from a system. If the system were changed, the ethics would also change. The Continental system, for example, is based on the assumption that truth will emerge through the independent inquiry of paid public officials owing no partisan allegiance to either side. Of utmost importance is the competence, thoroughness and fairness of the public inquisitor. Because of unpleasant experiences with the inquisitorial system—experiences summed up in the phrase "Star Chamber"—England evolved the criminal adversary system. Three other factors in English experience contributed to the development of the adversary system: the concept of the devil's advocate in religion; the ancient trial by battle; and the competition, self-interest, and individual initiative of the capitalist system of economic organization.[8]

The adversary system is based on the pragmatic assumption that the truth of any controversy has a better chance of being discovered if each side fights as hard as it can to see that all the evidence and rules of law favorable to its case are placed before the court.[9] Lord Macaulay went so far as to say that we obtain the fairest decision "when two men argue as unfairly as possible on opposite sides" for then "it is certain that no important consideration will altogether escape notice."[10]

The adversary system necessitates the keeping of the function of judge, jury, and advocate distinct. The decision of the case is for the judge, or for the judge and jury.

> [Before judge or jury can] gauge the full force of an argument, it must be presented . . . with partisan zeal by one not subject to the restraints of judicial officer. The judge [or jury] cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation. This is the function of the advocate. His task is not to decide but to persuade.[11]

---

[8] Barrett, *The Adversary System and The Ethics of Advocacy*, 37 Notre Dame Law. 480-481 (1962).

[9] Frank, Courts on Trial 80 (1949).

[10] *Ibid.*

[11] Talks on American Law 31 (Berman ed. 1961).

As the adversary system evolved, certain nascent principles became fundamental rules.

> Under our system of government the process of adjudication is surrounded by safeguards evolved from centuries of experience. These safeguards are not designed merely to lend formality and decorum to the trial of causes. They are predicated on the assumption that to secure for any controversy a truly informed and dispassionate decision is a difficult thing, requiring for its achievement a special summoning and organization of human effort and the adoption of measures to exclude the biases and prejudgments that have free play outside the courtroom.[12]

One of these safeguards is the legal presumption that an accused is innocent until he has been found guilty by due process of law. The responsibility is on the state to establish the guilt of an accused. No man is bound to accuse himself, and his advocate must do nothing inconsistent with the fundamental presumption of innocence. Earl Rogers explained it this way:

> [T]he presumption of innocence is the best thing in the jury system. Having acted with full power to find the guilty man, we will now lean over backwards to be fair to him. We will act as though he was innocent, we will take upon ourselves the burden of proving he is guilty beyond any reasonable doubt in the minds of twelve others who are his equals. . . . [B]etter a hundred guilty men go free than that one innocent man be unjustly executed.[13]

Although a revered legal maxim, the presumption of innocence is neither socially accepted nor fully understood. According to Clarence Darrow, "It is all well enough to say that a man is presumed innocent until he is proven guilty, but those who seriously make the statement know nothing about psychology. As a matter of fact, most persons who are accused are presumed guilty, and if a jury finds them not guilty it is thought a miscarriage of justice."[14]

The public generally first hears of the crime by way of the news media. The fact of the crime and the announcement of the apprehension and arraignment mesh in the mind of the public. If the crime is sufficiently atrocious to arouse public indignation, there is an unconscious community desire to see the law swiftly punish the accused, thus restoring the community balance. That many people believe the law would not arrest unless the party arrested were guilty is aptly expressed by Kafka in *The Trial.* Mr. K., when aroused from sleep

---

[12] Report of the Joint Conference on Professional Responsibility of the Association of American Law Schools and The American Bar Association. (Approved by the AALS in 1958 and by the House of Delegates of the ABA in 1959) [Hereinafter cited as Report].

[13] St. Johns, *op. cit. supra* note 1, at 17-18.

[14] Darrow, The Story of My Life 203 (Universal ed. 1932).

one morning to find himself arrested, protested his innocence to the arresting warders. Answered the warders, "Our officials . . . never go hunting for crime in the populace, but, as the Law decrees, are drawn towards the guilty and must then send out us warders. That is the law."[15]

Yet the adversary system is considered by legal minds to be the most just. It is a system that has evolved; it is experimental and has developed to meet the demands of each age. Justice can be contemplated on several levels. The modern age no longer demands justice in terms of utopia as, for instance, Plato did in *The Republic.* Justice has been found to be a human term which must be interpreted and applied in human situations. Thus, any system of justice will have inherently certain flaws just as mankind itself is hardly a creature of ultimate perfection. Given the initial safeguards, one of which is the presumption of innocence and the distinct functions of judge, advocate, and jury, the Anglo-American legal system has found that:

> . . . from the struggle between the litigants aided by their advocates, each with ardor presenting one side of the case and each with the utmost skill attempting to detect the weaknesses of his adversary's evidence or points of law, the jury which must choose between the conflicting versions of the truth, and the court which is to select the applicable rules of law, will have before them, more often than not, the relevant material from which to fashion by their joint efforts a just decision.[16]

III. THE PLAYERS

The status of the criminal practitioner today must be discussed before we make an ethical judgment as to the defense of the guilty or unpopular client. The attitude of law schools is the initial contributor to the image of criminal law today. Samuel Leibowitz feels that:

> . . . no real effort has been made by the [law] school to prepare the student to actually practice his profession—certainly not to step into either a civil or criminal trial courtroom. In fact, the whisper has filtered out of the faculty rooms of many leading law schools that criminal law (except for the few law lectures which the professor delivers during the two-or three-day-per-week, one-semester course) is to be avoided and the criminal courts shunned as one would a pestilence.[17]

Students, in the main, receive only introduction to the criminal law in their class work. Moreover, the student receives little in the way of meaningful experience and training in the art of advocacy and

---

[15] Kafka, The Trial 9-10 (1937).
[16] Barrett, *supra* note 8, at 481.
[17] Reynolds, Courtroom 39–391 (Popular Library ed. 1957).

trial technique.[18] As Mr. Justice Clark has stated, many law schools assign criminal law and procedure to the " 'junk' heap."[19]

Numerically, the criminal defense lawyer is the legal jack-of-all-trades; while the criminal specialists are found in the large cities.[20] There are three types of criminal attorneys in the modern megapolis. First, handling the prostitution, gambling, drunken driving, disorderly conduct, and similar cases is the lawyer whose law comes not from the books but from practical experience. He more than likely has not seen the inside of a law book since leaving law school. Often he will have no office. His ability lies in knowing the temper of each judge and prosecutor, and his counsel is a matter of personality juggling, favors, and timing. He is a legal salesman, and, of the three types, he handles the greatest number of cases. The second type is similar to the regular part-time criminal lawyer known as the general practitioner. The third type is the handler of the "white-collar" crimes—the subtleties of business competition.[21] Since the criminal lawyers are the poorest paid members of their profession, only the big city criminal specialist will have the requisite financial and social freedom to handle highly unpopular cases.[22] All of them will have both greater temptations to unethical conduct and more difficulty with their clients than other lawyers.

Two other practical considerations are important here. Most lawyers try to avoid going into court. Many lawyers therefore are not equipped by training and experience to assume the role of trial defender. Most general practitioners are particularly reluctant to defend when popular opinion or the instincts of the business community—the same opinion and instinct which are the source of the lawyer's bread and butter—are against the accused. Moreover, one partner in a firm "may be fired by a sense of injustice to accept a brief that offers little hope of reward in fee or reputation, but the thought that he may be taking bread from the mouths of his partners is often a sharp deterrent to his Quixotic instincts."[23]

These factors led the *Economist* (London) to report that "the level of professional competence and ethics at the criminal bar in the United States is a cause for grave concern both among lawyers and

---

[18] *Id.* at 392.

[19] Clark, *Utopia and Tomorrow's Lawyer*, Student Lawyer, June 1963, p. 8: "I say first that the law school should put more emphasis on the teaching of criminal law and procedure. Rather than assigning it to the 'junk' heap, it deserves number one preferred treatment."

[20] Steinberg, *Professional Careers For the Defense Lawyer*, Student Lawyer, Apr. 1962, pp. 7-8.

[21] *Ibid.*; *Cf.* Carlin, Lawyers on Their Own 105-109 (1962).

[22] Steinberg, *supra* note 20, at 9.

[23] Sacks, Defending the Unpopular Client 8 (1961).

laymen."[24] The legal-ethical dilemma can best be summarized by the following comparison:

> The change in the character of the criminal Bar in the United States over the last hundred years is almost as great as the distance between Abraham Lincoln and Mr. Murray Chotiner. Lincoln began life as a prairie lawyer whose varied practice included the defense of men accused of murder and the representation of major railroads. Mr. Chotiner, who has helped to manage Vice President Nixon's meteoric rise has had his career as a politician cut short by the discovery that he represented several clients reputed to be big racketeers. It is not clear whether Mr. Chotiner has been ostracized by the Republican high command because of the character of his clients, or the nature of his representation of them, but it is quite evident that few prospective candidates for political office in the United States today would have the hardihood to attempt to make their career at the criminal Bar, except as a public prosecutor.[25]

IV. THE LINES

Having examined the adversary system and the criminal defense attorney, we must now examine the ethical standards which support the system. Let us follow Attorney *X* through a mythical case. Defendant, charged with an atrocious murder, seeks *X*'s services. Because of an "overload of work," *X* declines to take the case. According to Canon 31 of the American Bar Association's "Canons of Professional Ethics," *X* has every right to so decide.[26]

Although the individual lawyer does not have a responsibility to represent every case, the bar association as a whole must see that every accused receives counsel.[27] Defendant requests that the court assign counsel. *X* is assigned. *X* goes before the judge and explains that, although his work-load has decreased, the unpopularity of the atrocious slaying has caused extreme enmity and that his practice will suffer if he has to take the case. The judge refuses to revoke the assignment. *X* now has the task of defending a man whose guilt appears apparent and whose cause is most unpopular. What are the ethical considerations involved here?

First, there is the nature of the attorney-client relationship.

> Counsel and client are not confederate in *pari delicto*, nor is counsel even the agent of his client. . . . The sole function of counsel in any court is that of an advocate: he is to plead his client's case on the record

---

[24] *Ibid.*

[25] *Id.* at 9.

[26] American Bar Association's Canons of Professional Ethics, Canon 31:
> No lawyer is obliged to act either as advisor 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. . . . He cannot escape it by urging as an excuse that he is only following his client's instructions.

[27] Report, *supra* note 12.

> before the Court. To a degree, therefore, the relation of a lawyer to his client is not inaptly suggested by the sobriquet 'mouthpiece' . . . however . . . counsel has a higher duty than to be the mere conduit pipe between his client and the Court. He is not bound to put forward his client's case, which is acquittal . . . since counsel speaks for the accused, it follows that what he says in court on behalf of his client is not, and should not be taken to be his own opinion or the expression of his own mind. . . . It follows that there can be no question of a lawyer's being an accessory of his client whether before or after the fact.[28]

Also, it is not the attorney's ethical duty to pass on the guilt or innocence of the accused. Says Canon 5, "It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused."[29] The attorney has offered himself as an expert on legal rights, not as an expert on moral obligations. In reality, the lawyer may know far less of moral rights than his client. Morality is an elusive concept. Even the so-called basics or universals are not agreed upon. It is not the lawyer's function to pass judgment on his client in the nebulous realm of morals. "A client is entitled to say to his counsel, 'I want your advocacy, not your judgment, I prefer the judgment of the Court.'" Charles P. Curtis, Boston attorney, had this point brought vividly home to him while talking one morning with Arthur Hill who had handled the appeal of Sacco and Vanzetti.

> One morning I was stupid enough to ask him an indiscreet question. I had expressed my own opinion on the guilt or innocence of Sacco and Vanzetti. I said I thought that on the whole it seemed to me probable that they had been guilty, and I asked Arthur what he thought. Arthur looked at me, it was years later, twenty years later, and he smiled and said, 'I have never said, and I cannot say, what I think on that subject because, you see, Charlie, I was their counsel.'[30]

Semantically, it is impossible for a lawyer to know that his client is guilty. "Guilty" is a decision upon an indictment brought by a competent court of law after a trial or guilty plea. For a lawyer to know that his client is guilty the client must have already been convicted. The essential question revolves around the matter of proof in a court of law. Proof is seldom a black or white matter. The fact that defendant may have done a particular act has no probative force until a thousand and one extenuating factors are also established. Quentin Reynolds wrote in the *Courtroom* this about attorney Samuel S. Leibowitz:

> The fact that a man pulled the trigger and was found standing over the body of his victim with the gun in his hand did not make him guilty

[28] Orkin, *Defense of One Known to Be Guilty*, 1 Crim. L. Q. 170-171 (1958).
[29] American Bar Association's Canons of Professional Ethics.
[30] Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 17 (1951).

> *per se* in the eyes of Leibowitz. He asked himself a hundred questions. What was the provocation? What was the mental state of the defendant at the time he committed the act? What were his early family background, his education, his medical history? . . . District attorneys, smarting under the lash of defeats administered to them by Leibowitz, were understandably discomfited. They often said bitterly that because of him murderers were walking the streets, free to kill or rob again. Leibowitz always answered such criticism by reminding them that only in inefficient, bungling prosecution would allow a guilty man to escape the consequences of his crime.[31]

Indeed, Earl Rogers felt that it was every criminal lawyer's desire to defend a man innocent in fact, but that clearly innocent men more often than not do not come to trial.[32] Under our laws, our expert investigation, our highly trained personnel, and our grand juries, not many innocent men are falsely arrested and indicted, thought Earl Rogers.[33]

It is doubtful, though, that many lawyers share the following views on "guilt":

> In my vocabulary there is no such word as 'guilt' and no such thing as moral wrong. Believing that the law of cause and effect reaches through every part of the universe—believing that men and women do what was set down for them to do and what was indestructibly woven through the whole warp and woof of life, I come to but one conclusion—no one deserves wither praise or blame. In my defense of men and women I have sought to bring courts and juries to understand the philosophy which I think is largely responsible for what success I have had. Often my clients did not do the things with which they were charged; sometimes they did do them, and then I tried to make courts and juries understand the reasons why.[34]

Certainly, the factors of heredity and environment must be given a proper place in the scheme of causation but it is not necessary to believe in complete determinism to correctly approach "guilt."

Even if the lawyer were charged with the responsibility for determining the defendant's innocence as a prerequisite to handling the case, the tools available for investigation are inadequate and impractical. Each lawyer would have to do large amounts of original research; he would have to spend hours in costly investigation. In essence, he would then have to become investigator, prosecutor, defense counselor, and twelve jurors rolled into one, and all before the case was accepted or rejected. It is true that any good defense counselor plays all these roles in preparing his case. But even with the relatively comprehensive procedures available today, the attorney

---

[31] Reynolds, *op. cit. supra* note 18 at 39-40.
[32] St. Johns, *op. cit. supra* note 1, at 68.
[33] *Ibid.*
[34] Darrow, *op. cit. supra* note 14, at 425.

can never be entirely certain about his client's guilt in fact. Serjeant Robinson illustrated the, at best, provisional nature of a pre-trial value-judgment on the guilt of a client:

> I have frequently been engaged in a case for the defense which, on a perusal of the brief, I have thought to be utterly hopeless, and have believed my client to be not quite so honest as he should be; but afterwards, on the facts being thoroughly sifted before a judge and jury, I have been just as firmly convinced that my first impression was utterly erroneous.[35]

Earle Stanley Gardner states that it is the function of the defense counsel to "help protect the innocent, particularly where the circumstances pointing toward guilt seem overwhelming."[36] In a leaflet distributed to the Chicago Bar Association, Mr. Gardner detailed a few experiences he had had with guilty men—imprisoned men—who were later, through various circumstances found to be not guilty after all.[37]

Even in situations where the defendant has confessed his guilt, the actual guilt of the defendant, is far from certain. Sometimes confessions are the product of various types of coercion and, therefore, may not be reliable. Sometimes the innocent's confessions are the result of a deep-seated guilt complex. Police records are amply full of confessions by individuals who had absolutely nothing to do with the confessed crime. Behind the obvious and logical lies a dark abyss of irrational subleties.

Another practical factor to consider here is the attitude of the criminal defense attorneys toward their job. One characteristic that runs through the personality of defense lawyers is a revulsion against outside pressure, the stubborn resistance to arbitrary assertion of authority. Most defense attorneys understand and deplore the caprice of the masses. In a sense, the criminal defense lawyer is a symbol of independence and a safety valve for dissent.[38]

Earl Rogers was asked why he had defended with such vigor Charlie Mootry—a man he felt to be guilty.

> He had felt sorry for Mootry, much as he despised him, because he said he had been spawned in hell and grown under a rock and society had no right to let a man grow under a rock and then condemn him because he came out crippled, with a brain as flat as a snake's. Men driven beyond the breaking point, the man who cannot fight because he has no words and no character. . . .[39]

---

[35] Robinson, Bench & Bar Reminiscences 116 (1889).

[36] Gardner, The Case of the "Guilty Client," (A leaflet published by the Chicago Bar Ass'n).

[37] *Ibid.*; For extensive collections of cases involving erroneous convictions of innocent persons whose guilt seemed clear, see Gardner, The Court of Last Resort (Cardinal ed. 1957).

[38] Steinberg, *supra* note 20, at 23.

[39] St. Johns, *op. cit. supra* note 1, at 155.

Sympathy, empathy, whatever you want to call it, is a most important factor in the criminal attorney's defense of the apparently guilty or the unpopular. Certainly in a society that has grown so complex and impersonal, in a world that is harried by the thought of nuclear holocaust, and in a world where the majority of men begin life on the wrong foot, sympathy should have a place in the law. Darrow said of his efforts that he hoped he had "done something to help human understanding, to temper justice with mercy, to overcome hate with love."[40]

Let us return to our hypothetical of Attorney *X* and the defendant charged with the atrocious slaying. What if Attorney *X* had found conclusive proof that the defendant had done that for which he was charged, and the defendant readily admitted it with a contemptuous, "I did it and I am glad"? All of the evidence was circumstantial; Attorney *X* knew that he could thoroughly discredit prosecution's evidence. Also, Attorney *X* had discovered in defendant's record a series of similar charges for all of which defendant had escaped conviction through technicalities. Is it not true that Attorney *X*, besides having a duty to his client and a duty to the court, has a duty to society by virue of being a member of society? As a citizen, is it not Attorney *X*'s responsibility, since defendant's guilt is so certain and his past record so ignominious, to see to it that defendant does not escape punishment for this crime? The Canons are not at all clear in answering this particular question. Canon 15 reads in part:

> In the judicial form the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.[41]

Canon 5 reads in part:

> Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.[42]

Additionally, in the Oath of Admission recommended by the American Bar Association are these words: "I will not counsel or maintain any suit or proceeding which shall appear to me to be

[40] Darrow; Attorney For the Damned 87 (Weinberg, Simon & Shuster, ed. 1957).
[41] American Bar Association's Canons of Professional Ethics.
[42] *Ibid.*

unjust, nor any defense except such as I believe to be honestly debatable under the law of the land."[43]

The only thing that is clear in these phrases is that the language is sufficiently ambiguous for a rationalization either way. Apparently the answer lies outside the exact words of the canons and oath. The answer is found again in the nature of the adversary system. The potential criminal defense attorney must ask himself if he believes in the adversary system, its basic procedures and safeguards. If not, then he must either refrain from criminal defense work or strive to have the system converted to one which he considers more nearly approximates justice. In the meantime, he must follow the essential guidelines of the system. As we have said, the presumption of innocence until proven guilty beyond a reasonable doubt and the concomitant right to an adequate defense are two of the basic principles of the adversary system. The third fundamental is the distinct roles played by advocate, judge, and jury. Attorney *X* is not only defending the rights of a client, he is also upholding the Anglo-American system of justice. Once he stands before the criminal bar, Attorney *X* must guarantee in reality each client his basic rights.

V. THE FINAL ACT—JUSTICE COMES TO THE SUPERMARKET

The crux of the ethical problem revolves around the ultimate purpose of the rule that even the "guilty" and the unpopular deserve the best defense possible.

> The purpose of the rule is to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member. . . .
>
> It marks society's determination to keep unsoiled and beyond suspicion the procedures by which men are condemned for a violation of its laws. . . .
>
> The lawyer appearing on behalf of an accused person is not present in court merely to represent his client. He represents a vital interest of society itself, he plays an essential role in one of the fundamental processes of an ordered community.[44]

Certainly the bar associations have immense responsibility to clear up the misunderstandings existing in their own ranks and in the general public. If an individual lawyer assumes the task of defending the apparently guilty or the unpopular:

> The legal profession should in any event strive to promote and maintain a moral atmosphere in which he may render this service without tuinous cost to himself. No member of the bar should indulge in public criticism of another lawyer because he has undertaken the representation

[43] Drinker, Legal Ethics 147 (1953).
[44] Talks on American Law, *op. cit. supra* note 12, at 35, 37.

> of causes in general disfavor. Every member of the profession should, on the contrary, do what he can to promote a public understanding of the services rendered by the advocate in such situations.[45]

William M. Kunstler, a New York attorney, has written a "profiles in courage" for the defense attorney. In *The Case For Courage*,[46] he lists a few of America's great defenses: Andrew Hamilton's defense of John Peter Zenger who in 1735 was charged with printing libel about the Governor of New York; John Adams' defense of nine British soldiers tried in 1770 for killing five colonists in Boston; William Seward's introduction of the insanity plea on behalf of William Freeman, a Negro on trial for murder in 1846; Senator Reverdy Johnson's defense of Mrs. Mary Surratt at the court martial trial following Lincoln's assassination; Clarence Darrow's representation of Eugene Debs at the latter's conspiracy trial for leading the Pullman strike in 1895; William G. Thompson's appellate arguments on behalf of Sacco and Vanzetti between 1924 and 1927; and Harold Medina's defense of Anthony Cramer at the latter's treason trial in 1942 involving aid to Nazi saboteurs who had landed in America. Although there have been many more famous and deserving defenses, these examples do form a basis for a scrutiny of a few of those lawyers who have defended the "guilty" and the unpopular. It is true that each lawyer was criticized for undertaking the defense, and, in some cases, was bitterly denounced in the press. Most of the lawyers were aware that their practices or political prospects might be injured. But the ultimate success of most of these men indicates that such defenses were not destructive to their careers. Adams became President; Seward became Secretary of State; Johnson became ambassador to Great Britain; Darrow was immortalized; Medina became a federal judge.

There was an element of egocentricity in their defenses since they were defending celebrated causes. Some were bored with regular practice, and some saw the causes as means of advancing their own ideological views. And, they rightly felt that such action—if the case were large enough—usually earns esteem of their peers at the bar with the passing of time. Yet all was not milk and honey. Most of the lawyers were young, without clientele, and without reputation. Only in this light do these men have relevance to the modern criminal practitioner whose professional lives are not so luminous as the timeless greats. For the responsibility of the lawyer's defense of the "guilty" and the unpopular to have any true meaning as a principle, it must be viewed in light of those lawyers whose careers do

[45] Report, *supra* note 12.
[46] Kunstler, The Case For Courage (1961).

not lead to the presidency or to fame but to the merely unheralded and oft times non-lucrative defense of a series of accused. Given the state of criminal defense practice today, the men exampled by Mr. Kunstler have one message. COURAGE. Not the "courage" that is avoided in real life by that siren rationale of the average lawyer, "I'll build my practice first, and when I am a senior figure beyond reproach, then I'll defend the unpopular," but the courage of the young—without a vast clientele or reputation—who believe in the importance and nobility of their profession and undertake the defense of the "guilty" and the unpopular.

It is ironic that the term "courage" should be applied to those who merely fulfill the ethics of their profession. The law student is constantly reminded by some of the hoary members of the bar that law is basically a business which must show a profit at the end of the year. As Professor Llewellyn stated, "There is a brand of lawyer for whom law *is* the making of a livelihood. . . . Coin is success, coin is prestige, and coin is power. . . . Coin is, in this society, the measure of the man."[47] Strong is the temptation to avoid risks when the compensation is inadequate. The slighting of the numerous indigents and clients who can pay only a token fee, by the failure of individual lawyers and the bar associations to exercise due diligence and fervor, presents a serious gap in criminal justice, and "equal justice under law" becomes a Disneyland reality. To those of the limited, monetary view, it is the duty of the more responsible members of the bar to establish a proper balance between bread and dreams by exhorting the long and lofty tradition of public service inherent in the law.

We live in the age of the supermarket. The watchwords are efficiency, speed, and impersonality. It is an age of "organization men"[48] using "hidden persuaders"[49] on a "lonely crowd"[50] that has been classified "a nation of sheep."[51] Intellectuals write of a generation that is "growing up absurd,"[52] or of a mass feeling of "alienations."[53] Perhaps in this context of contemporary chaos, the legal profession's significant contribution will be an uncommon respect for the individual and a steadfast perseverance in the defense of the individual's rights regardless of the apparent "guilt" or the unpopularity of the accused. If justice is to prevail in the supermarket, modern mettle must be exercised. Indeed, the lawyer has a personal stake in the

[47] Llewellyn, The Bramble Bush 119 (1951).
[48] Whyte, The Organization Man (Anchor ed. 1956).
[49] Packard, The Hidden Persuaders (Anchor ed. 1958).
[50] Riesman, The Lonely Crowd (1953).
[51] Lederer, Nation of Sheep (1950).
[52] Goodman, Growing Up Absurd (Vintage Books ed. 1962).
[53] Jaspers, Man in The Modern Age (Anchor ed. 1957).

outcome. As Al Dewlen, in the *Twilight of Honor*, has one of his characters say:

> Jack made one of the most incisive speeches on criminal law I've ever heard. . . . I'll never forget it. He was talking about the necessary, knowing defense of the guilty. It can be destructive of the defender, he said, unless he's a man of two philosophies, two souls. The single-minded man, he said, can fall into a neither world, a place, Jack spoke of as 'the twilight of honor,' and once there, he's unlikely to emerge.[54]

William B. Martin

---

[54] Dewlen, Twilight of Honor 189 (Signet ed. 1963).