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AMERICAN LAWYERS: GIDEON'S ARMY?*

Anthony Lewis†

The topic suggested for the talk from which this article is adapted was how I came to write a book on the *Gideon* case. In the narrow sense, that question is easily answered. Various persons had suggested over a long period that I write what they would call "a book on the Supreme Court." Of course the trouble with that idea was that it was not an idea at all. There have been innumerable books on the Supreme Court, and a worthwhile new one would have to have a fresh viewpoint. Then, one Monday in June of 1962, the Supreme Court handed down a most interesting order.¹ It granted certiorari in a case brought to the Court by a pauper and noted, in the order, that it wanted counsel to canvass whether the Court should now reconsider its 1942 decision in *Betts v. Brady*.² Like many lawyers and commentators, I had wondered for some time how long it would be before the court would overrule *Betts v. Brady*, which held that poor men charged with crime were entitled to free defense counsel in state courts only if they could demonstrate that they were the victims of some special circumstance such as mental deficiency. And now the moment seemed to be at hand for the demise of *Betts*.

I went directly from the courtroom that day to the clerk's office and got out the file on the case. It involved a man named Clarence Earl Gideon, and it came from Florida—that much appeared on the jacket of the file. When I looked inside, it turned out that the petition which the Court had granted had been written in pencil, on a prison form, by Mr. Gideon. That fascinated me; here the Supreme Court was about to overrule a leading case, as it seemed, and the vehicle for such a great event was to be a poor prisoner writing to the Court in pencil from his cell. And so, over a period of months, the idea took form for a book on the *Gideon* case.

I have really gone on too long with this personal account. And of course that is only the surface statement of how I came to write the book. The real reason, the underlying reason, was my feeling for law and lawyers and judges.

That feeling can only be described as one of awe. After some years

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¹ 370 U.S. 908 (1962).

² 316 U.S. 455 (1942).

of observing the law at work, the process still seems exciting and wonderful to me. I think not enough Americans appreciate the role of law in this country, and in the book I wanted to convey my feelings about it.

As a matter of fact, there are some American lawyers and judges who do not sufficiently appreciate the special, the unique role that their profession plays in this country. We are happy to model ourselves in many respects after Great Britain, but law and the courts play a much more limited part in the government of that society. To entrust great questions of policy to the courts, as we do, is simply unthinkable there, as it is for Britain's highest court to overrule itself. From time to time some observer praises the British approach as more "democratic," because the courts leave it to Parliament to deal with the changing conditions of society.³ But I wonder. So often Parliament, just like legislatures in this country, does not have time to deal with a question. The result is to leave in force some old precedent, relevant only to the conditions of another day, and I cannot see why it is more democratic for the people to suffer along under a doctrine that judges laid down a hundred years ago. In fact some wise English observers of the law have recently been urging their courts to take a broader view of their role, because the alternative seems to be stultification of the law.⁴

There is another reason, I think, for preferring the greater scope we give to lawyers and judges: It makes the profession so much more interesting. My impression is that in Britain lawyers are out of the mainstream of politics and social issues. I need hardly tell you how different it is here, where a lawyer preparing a brief may be helping to decide the nature of this country's race relations or of its corporate structure. It is common for American lawyers and judges to complain—I hear them

³ Lord Devlin provides a characteristic statement of the position: "Change is for the legislature. First, because in a democracy it is for the people to decide whether a law is good or bad, serviceable to them or not; and secondly because in the legislative process change comes after warning while in the judicial process it comes only after the litigant has acted on the faith of the existing law." Devlin, *Samples of Lawmaking* 22 (1962).

⁴ A leader in *The Guardian*, Oct. 1, 1963, p. 8, cols. 1-2, concluded: It is matter for concern that his training inclines the English judge to regard himself first as a guardian of the law and only secondarily as the dispenser of justice. The judges argue that when law and justice diverge it is the business of the legislature to set matters aright by changing the law. This is no doubt true when the existing law is so clear as altogether to preclude a just result. But few cases heard by the courts are so one-sided. Lawyers do not generally encourage the litigation of hopeless issues and most cases admit of a genuine possibility of choice for the judge. What is depressing is that even when faced with a choice many English Judges seem to be satisfied to apply logic or the precedents mechanically and without reference to the result.

Lord Devlin has said of English judges: "They have become too much like priests to whom alone the oracle speaks instead of ordinary workaday men whose business it is to fashion rules for the service of a community whose needs are subject to change; if they saw themselves only as craftsmen, they would make less fuss about discarding the outmoded." Devlin, *supra* note 3, at 21.

often—about the uncertainty of our law, the rapidity with which it is changing in so many fields. But uncertainty is the price our lawyers and judges pay for responsibility. They could not play so large a part in determining our destiny unless they did grapple with the forces of social change.

If I have a romantic view of lawyers, as I think I do, then it is also true that I suffer more than most people at their shortcomings. I have an elevated standard for the profession, and it is painful when the ideal is not met. Perhaps what I am saying is that one in love is the more shocked when he looks up close and discovers that his beloved does, after all, have pores.

A current example that distresses me is the Federal salary increase bill just passed by Congress.⁵ It provides a pay raise of \$7,500 for Congressmen and for every Federal judge in the country—except nine. The nine justices of the Supreme Court are given an increase of only \$4,500. The reason for this difference is the small-minded desire of some members of Congress to punish our highest Court for doing its constitutional duty—that is, deciding cases the way it sees them. These little men decided that if Supreme Court justices would not behave, the thing to do was to dock their pay.⁶ Can you imagine such a thing happening in a civilized country? It is a gesture worthy of some two-bit dictatorship where the judges are fired when they decide cases the wrong way.

The reason I mention this sordid episode is that I have been puzzled at where the bar of this country was while it went on. Let me say first that not all lawyers were silent. Walter Craig, the president of the American Bar Association, and Bernard G. Segal, the former chairman of its Federal Judiciary Committee, worked hard behind the scenes to stop the foolishness. But where was the national outcry that one might expect from lawyers at this calculated insult to the idea of an independent judiciary? Can you imagine the English bar sitting by while Parliament

⁵ Public Law 426, 88th Cong. (1964). The bill number was H.R. 11049.

⁶ Senator Gordon Allott, Republican of Colorado, introduced an amendment to the pay bill providing for an increase of \$2,500 for Supreme Court justices instead of \$7,500. 110 Cong. Rec. 15312 (daily ed. July 2, 1964). The amendment was approved that day, 46 to 40, 110 Cong. Rec. 15314 (daily ed. July 2, 1964), and the final figure of \$4,500 was worked out in conference with the House. In the brief Senate debate the arguments for the reduction were transparently disingenuous. Senator Allott, for example, suggested that Supreme Court justices were not entitled to so large an increase because they had life tenure and could retire in due course on full salary—arguments of course applicable to all other Federal judges, to whom his amendment was not addressed. 110 Cong. Rec. 15312 (daily ed. July 2, 1964). Senator Sam J. Ervin, Democrat of North Carolina, said of the justices that "automobiles are furnished them at the expense of the Government"—a statement untrue except in the case of the Chief Justice. 110 Cong. Rec. 15313 (daily ed. July 2, 1964). Senator Allott was in fact outraged at the Supreme Court's decision in the Colorado legislative apportionment case, *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964), and Senator Ervin has long been a critic of the Court's decisions on racial questions and other matters.

tampered with the salaries of judges whose views it disliked? The whole affair is saddening.

More serious than the salary pinprick is the proposal pending before the Senate this very day, offered by Senator Dirksen, to make the courts withhold action from two to four years in all lawsuits brought to require reapportionment of state legislatures.⁷ Now some lawyers like and some lawyers dislike the decisions of the Supreme Court on apportionment. But surely every lawyer who thinks about it should recognize the terrible precedent that would be set by the Dirksen proposal. The net of it is to say, without amending the Constitution, that for a period of time American citizens should not be able to enforce a declared constitutional right in the courts. This year it is the right to equality of representation; next year it may be the right to be free of racial discrimination, or the right to just compensation when the Government takes your property.

Now I ask again: Where is the voice of the American bar on this proposal? Yesterday a group of distinguished law professors condemned it for what it was, a radical, a revolutionary attack on the integrity of our constitutional system.⁸ But that is the only voice I have heard. Granted that the threat has arisen suddenly: The more reason for a swift and powerful response from the leaders of the bar. Surely it is a dispiriting thing to see American lawyers standing silently by while the institution they supposedly cherish—the right to enforce one's constitutional rights in the courts—is subjected to a devious and deadly assault.

The great problem of race relations in this country is another on which the record of the American bar is less luminous than it might be. The American Bar Association now has before it a committee report making what it calls "a clarion call for law and order" in race relations. The report goes on to say that "there would be chaos and anarchy if each citizen were free to choose which laws he would obey."⁹ These are wise views, and it is good to have them expressed by the organized bar. My only question is whether they are not just a little tardy.

Today the issue of law and order is raised most acutely by Negro violence in the streets of great Northern cities. But for much of the last

⁷ For Senator Dirksen's original apportionment proposal, see 110 Cong. Rec. 17189 (daily ed. Aug. 3, 1964). A second draft was prepared in compromise with Senator Mansfield of Montana, the Democratic leader, 110 Cong. Rec. 18559, text at 18567-68 (daily ed. Aug. 12, 1964). After lengthy and inconclusive debate Senator Mansfield offered a much weaker substitute of his own, 110 Cong. Rec. 21865-66 (daily ed. Sept. 23, 1964), and this was approved by vote of 44 to 38, 110 Cong. Rec. 22051 (daily ed. Sept. 24, 1964). Eventually the whole amendment was dropped in conference; see remarks of Senator Simpson, 110 Cong. Rec. 22768 (daily ed. Oct. 2, 1964).

⁸ "15 Jurists Decry Districting Delay," *N.Y. Times*, Aug. 10, 1964, p. 36, col. 1.

⁹ The report is summarized at 50 A.B.A.J. 975 (1964).

ten years the same issue has been raised by lawlessness in the South, and this has not been mere misbehavior by private individuals but calculated corruption of the law by officials sworn to uphold it. I refer to the voting registrars who have disqualified Negro college graduates as illiterate, to the policemen and sheriffs who have beaten quiet young men and women for exercising their constitutional rights, to the judges who have cynically attempted to slip around higher court decisions in the effort to maintain white supremacy. These are not a majority of officials in the South, but they are a significant number. An example may be more compelling than generalizations.

There was the case of the Georgia prosecutor who brought a charge of insurrection against four student civil rights workers in Americus, Georgia. This was a capital charge, and so the students were held without bail—for months. Finally a hearing was held in Federal court on the case.¹⁰ This prosecutor then admitted that he had not expected to obtain a conviction that would stick, because the Georgia insurrection statute had been held unconstitutional in 1937. His idea instead was to intimidate the defendants. He said, "The basic reason for bringing these charges was to deny the defendants, or to ask the court to deny them bond. We were in hopes that by holding these men, we would be able to talk to their lawyers and talk to their people and convince them that this type of activity . . . is not the right way to go about it."¹¹ In short, keep them in jail on an admittedly worthless charge until they agreed to stop exercising their rights.

It could not happen here. But it did. And where was the voice of the bar?

Again I want to make clear that I intend no wholesale condemnation of lawyers or the profession. The Committee for Civil Rights Under Law, headed by Harrison Tweed and Bernard Segal, has done magnificent work in the last two years. If it had not been for that committee, for example, those students in the Americus, Ga. case might still be in jail. I say only that the response of the bar to the crisis of respect for law in the field of race relations has been too little and much too late.

Last year and again this year the American Bar committee has called for law and order; it says now that only chaos can result "if each citizen were free to choose which laws he would obey." But where was the bar during the years when United States Senators were solemnly avowing that decisions of the Supreme Court were not binding and need not be

¹⁰ The federal court enjoined the state prosecution. *Aelony v. Pace*, 32 U.S.L. Week 2215 (M.D. Ga., Nov. 1, 1963).

¹¹ "Court in Americus, Ga., Told of Police Beatings," *N.Y. Times*, Nov. 1, 1963, p. 19, cols. 2-4.

obeyed, when Governors used armed force to prevent compliance with the orders of the Federal courts? We are paying a terrible price for those examples of lawlessness, and the bar shares some of the responsibility.

To me the most disheartening failure has been in the simple duty of a lawyer to represent unpopular clients—a duty proclaimed by every bar worth its name. Of course we all know courageous examples of lawyers who have sacrificed themselves for the principle of every man's right to legal assistance. But for an example to the contrary we need only look again to the racial field. Let me say it shortly: At least until recently not a single white lawyer in Mississippi would represent anyone involved in civil rights activities. In the entire state there are only four Negro lawyers who will do so. And I repeat: not a single white lawyer. The Mississippi bar has just passed a resolution affirming the obligation to represent all citizens, and one hopes that there will be concrete results. But for the longest time not one of the prominent lawyers of that state has had the courage to demonstrate his belief in a basic preconception of our legal system, that all are entitled to representation. Not even lawyers in the most impregnable position of public esteem. Not even, I must say sadly, a Mississippi lawyer who was president of the American Bar Association.

What I have said may seem harsh, but it has not been said in any spirit of disrespect. On the contrary, it was said because I have the greatest respect for lawyers. If I am acutely disappointed at their failures, it is because I know from the example of so many that it is possible to live greatly in the law.