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THE PRESENT STATE OF TRIAL ADVOCACY

TOM C. CLARK

Socrates' spirit remains with us, for his endless prodding and puncturing of smug human certainty is the essence of advocacy, the credo of the trial lawyer. The trial lawyer is today's gadfly.

JUDGE IRVING R. KAUFMAN

I HAVE long believed that the adversary system has a certain genius. It operates on the assumption that the adequate representation of opposing interests is a better lie detector than any machine. It is therefore the handmaiden of that concept of ordered liberty to which our system of justice aspires. There are two factors necessary to maintain a healthy advocacy. The first is a strong trial bar, and the second is an efficient judicial system. I wish to advise with you today as to the state of advocacy in America. I do this with you because I believe that the genius of that system is threatened. My case is placed in the DE PAUL LAW REVIEW because here it receives the attention of some of the most successful and knowledgeable advocates in the profession and the top law students as well. It was Edmund Burke who said that "evil grows because good men do nothing about it." I have an abiding faith that lawyers, judges, professors and law students are "good men." Equally strong within me is the feeling that they have the courage to do *something* about the present state of trial advocacy.

We first focus our attention on the art of advocacy. It is not only a highly individualized art but also one that is not adaptable to hard and fast formulas. Indeed what might be a good trial tactic in one case may be disastrous in another. Again effective techniques employed by one lawyer might not prove so for another. This article, however, does not attempt to pinpoint what makes a good advocate. Its thesis is

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simple: We must place more emphasis on trial advocacy. As my brother Harlan said when speaking before the New York State Bar Association back in 1957:

Let me close my remarks—call them a plea for the sometimes neglected art of advocacy, if you will. . . . It is always distressing to me to hear young law school graduates, who have the instincts for trying their hand at litigation and who seem to possess the earmarks of making good advocates, say that they have been told that this is a poor field of the law in which to make their careers. I suppose one hears this most frequently . . . from those who are entering the larger law offices, where litigation is sometimes regarded as uneconomic and the best young men are not encouraged to go into that branch of the office work. As a former New York practitioner and member of a large law firm, I know something of the problem of rearing up barristers from among the best men coming down from the law schools. It is a problem I think which deserves the best thought of all forward-looking lawyers and law firms in large cities, for after all it is in the large cities that much of the litigation of moment originates. It will be a sorry day for the profession if such communities as New York City are unable to contribute their fair share of the leading advocates of the next generation.

I say that it will be a “sorry day for the profession” unless we the judges, we the lawyers, we the law schools and we the law students do something about it—and quick! After twelve years on the United States District Court for the Southern District of New York, Judge Irving R. Kaufman put it this way:

I personally have witnessed, in more cases than I wish to recount, the sacrifice of many civil and criminal litigants upon the altar of their own lawyer's incompetence. [And he added that his position on the trial bench had afforded him] a unique opportunity to observe many young men engaged in trial practice. They are an atypical group. For I have gained the impression that recent graduates of our leading law schools have been discouraged from entering the trial forum. Perhaps the strong emphasis in the modern legal curriculum on the case system . . . whets the appetite more for armchair theorizing than the more vigorous challenge of the ‘court below.’ The function of the appellate judge is to search for error. I like to think that the function of the trial judge is to search for truth. And he must be assisted in his search by able trial lawyers who can confront the challenge provided by elusive facts and as often as not by elusive witnesses.

Let me add that in my view the trial bar is fast becoming a vanishing tribe. It would serve no useful purpose to enumerate the causes. I dare say that the main one is, as my brother Harlan indicates, that lawyers and students are told it is “uneconomic” and are encouraged to go into other areas of the practice. Another cause may be specialization. But just as law suits in the final analysis make the law, advocacy is a must in its successful practice. We must not, therefore, trust any field of law completely to the specialist. The advocate must of

course be able to recognize the latent difficulties in a case that may require the views of a specialist, just as the diagnostician turns to the pathologist. But the specialist, without experience of advocacy, cannot see the instrument he is drafting or test the recommendation he is making through the eyes of the judge or of the jury. Indeed, accuracy in the solution of legal problems comes only by relating them to courtroom experience, where fact conquers fiction. The wisdom of a lawyer depends upon his grasp of the basic principles of law, namely, the law involved as applied to particular cases. The ability to distinguish these cases—to moderate the tyranny of the theoretical—is the imperative essential for anyone holding himself out as the mediator or protector between man and man or man and government.

My thesis starts with the young man just licensed to practice law. He no longer goes with hat in hand to seek a job. The law firms go to him if he is high in his class. In order to get him they pay a top salary, many times the \$50.00 a month I received 40 years ago. This employment is the beginning of the most important years in a lawyer's professional life. He has, we will assume, a fine legal education along with a controlled and disciplined mind. But he has only begun his training. He must learn how to apply the basic principles of the law to specific cases. His law school does not claim to have taught him this and, if he is smart, he knows it. But what comes next in this young man's life? It does seem that some conscious effort should have been given to his transition from student to lawyer but the sad fact is that neither the bar, the law schools, nor the courts have faced up to it. As a result, when this young man steps from the law school he often has never seen a lawyer at work nor a court in session.

If he goes into a large law office, as my brother Harlan indicates, he is quickly assigned to tasks other than trial work. The truth is that all too few of these firms actively engage in trial work. It may be that the young lawyer handles some facets of protracted cases but rarely in court. If he is in a small office, his experience depends upon the exigencies of the practice, including exposure to a court trial occasionally. In either instance, the litigation of the firm is, of course, handled by an experienced senior. As a result, real experience in courtroom work, if ever, opens up later for him—most of the time too late. Specialization has engulfed him. By that time he often has "buck fever" and stays a safe distance from the rough and tumble of the courtroom.

This is not to say that the present system has not produced some great lawyers. I could give you a host of examples but this does not in

itself justify the practice. Trial advocacy requires training and experience sufficient to develop skill and confidence. This should be obtained by youngsters early in their careers if they are to be independent and stand on their own feet. Independence is a function of youth which, if taught early in their professional careers, brings that confidence which leads on to success for themselves and glory to the profession. (And it needs independence badly, especially from clients.) In short, we know, as Judge Kaufman says, "that people are deprived of physical liberty or are subjected to serious or occasionally disastrous financial loss because an incompetent trial lawyer failed properly to prepare or present his client's case in the trial tribunal." Still, the law schools have not worked out any program to take care of the transition of the student to the lawyer. And the profession—to which the task has fallen largely by default—handles it in a hit-or-miss fashion. The lawyer's license in the hands of the inept is an invitation to pettifoggery which often is accepted by force of economic necessity.

In this connection the tribe of trial advocates is not only vanishing but from the records I see there are definite signals of inadequacy in the ranks. Each of these symptoms is to me disturbing. In most of the trial courts in metropolitan areas the majority of the litigation is handled by a handful of lawyers. I know of one general court with over fifty judges where less than 100 lawyers handle all of the litigation. This is not a healthy sign for the profession or for the courts. The courts depend to a large extent upon the advocates, and when the litigation is so concentrated the result is not only that trials are delayed but the cases are ill-prepared. Most of the cases that come to the Supreme Court have gone off below on some procedural point that could have been avoided. Conditions in the "criminal bar" are worse. In most of our cities the number of capable criminal lawyers can be counted on the fingers of one hand—and in some places you might not need a finger or so at that. This situation has a most serious impact on the administration of criminal justice. Especially disappointing is the failure of the trial bar generally to clean up the mess. For example, because of a woeful shortage of lawyers willing to take on criminal work, a layman with a criminal record recently masqueraded as a lawyer in Washington. He appeared in the District Court under the name of a non-resident licensed lawyer. He tried several important criminal cases. This went on for over a year when a national magazine ran a picture of the culprit and he was recognized as a former convict. Naturally the local bar's face was red.

On the indigent side of the court docket Dean Rostow, in his article, *The Lawyer and His Client* in the February 1962 issue of the AMERICAN BAR JOURNAL, had this to say:

The provision of legal services to the poor, both in civil and in criminal matters, is in most communities of the nation scandalously inadequate. And for that failure we of the Bar are primarily responsible. There are outstanding Legal Aid bureaus here and there, and some effective Public Defender programs. But their strength only highlights our general failure to meet a real social need. The poor man cheated of a few hundred dollars by his landlord or his finance company, the boy swept up by mistake in a police raid, suffer losses and indignities quite as important to them and to society as those incident to lapses of the law which touch larger interests. Here, as in other fields of social welfare, we may be sure that if private and professional organizations fail to act, government will sooner or later take the initiative.

Let me implement what the good Dean says about indigent criminal cases by some statistics from our Clerk. During my first Term, October 1949, 449 petitions for certiorari were filed *in forma pauperis*. Last Term, thirteen years later, there were 1139 petitions, two and one-half times as many. In 1949 only seven of the petitions were granted (2%). In 1961, 38 were heard (3.2%). Two-thirds of the cases came from state courts. A spot check indicates that about one in ten of the petitioners had a lawyer. This means that over a thousand of the petitions were *pro se*. This places an almost insurmountable burden on the average indigent petitioner. Granted that some of the petitions are well prepared, possibly by inmates, the fact remains that the overwhelming number are entirely inadequate, some even unintelligible. The Court is therefore really in the dark as to many of the cases. We know from the filings that many of the petitioners do not have the intelligence to present their claims properly but we have no facilities to supply them with counsel. Still we require the Courts of Appeals to:

provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' [under 28 U.S.C. § 1915] is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed. *Coppedge v. United States*, 369 U.S. 438, 446 (1962), citing *Johnson v. United States*, 352 U.S. 565, 566 (1957), and other cases cited.

Likewise we have placed the requirement on state courts of equating the treatment afforded indigent litigants with that available to the non-indigent. *Griffin v. Illinois*, 351 U.S. 12 (1956), as to transcript of records and *Burns v. Ohio*, 360 U.S. 252 (1959), as to fees of court.

The next step is a request presently pending in *Gideon v. Cochran, Jr.*,* Director, No. 155, to reconsider this Court's holding in *Betts v. Brady*, 316 U.S. 455 (1942). There the Court held that refusal to appoint counsel for Betts, charged with a non-capital case, was not a denial of due process. If the Court overrules *Betts*, holding that due process requires the appointment of counsel in non-capital state cases, this will require a considerably enlarged criminal trial bar or the use of public defenders in state cases. In addition it will require some help from the Bar for this Court to furnish counsel for the thousand odd cases presently coming here each Term. I note that the Congress is considering legislation with reference to the establishment of a public defender system in the federal courts. See H.R. 1027. In any event, if the hallmark of our society is to continue to be our fair trial safeguards afforded every accused, we must enlist the assistance of more lawyers at the trial level. Consequently, the need for education in trial advocacy is the more imperative.

At this juncture let me revert to the question of the competence of trial counsel. More and more often petitions seeking reversal here are based on the ineffectiveness of counsel at the trial. And of late, claims are asserted that counsel have not urged a defense—such as discrimination in the selection of the jury—because of fear of suffering ignominy. As of yet, the Court has not reversed a case on such grounds. An examination of the papers does indicate in some of the cases that the rights of the accused could have been more carefully guarded. Sad to relate, many of the cases have gone off on a failure of counsel to raise an obvious legal point—or to object to erroneous rulings or instructions of the trial court. Indeed, I believe, a goodly per cent of the cases reaching the Court are controlled by some failure of trial counsel. It may be that what appears now to be ineptness was at trial a technique which counsel deliberately selected in the hope that it would be more effective for the accused. In any event, most judges will tell you that there is considerable room for improvement at the trial bar. The question is precisely how this can be effected. I do not profess to have the answers but permit me to make a few suggestions:

1. In the metropolitan areas it appears to me that the large law firms might immediately create within their firms a tutorship in trial work for the young men coming from the law schools. A senior trial man would take the new associate under his wing and teach him the fundamentals of trial practice through actual experience. It would be not

* *Gideon v. Wainwright*, 83 S. Ct. 792 (1963) [editor's note].

as detailed nor as enduring but of the order of an internship in medicine. This is not to say that the newcomer would be a briefcase carrier. He must be in the fray along with the experienced senior so that ultimately, according to capability, the responsibility of trials would rest with him. This would not only be of great value to the law firm but also to the law graduate. Moreover, it would be well if the firms made short assignments of these young men from time to time to legal aid societies or public defenders on a *pro bono publico* basis. This would tend to create more confidence in the profession and would be of inestimable value to the courts.

2. The law schools of the country should expand their program of instruction in criminal law and trial advocacy. I believe that the law schools would admit that they have downgraded both these fields of law. In my day there was a one-year course in Criminal Law. That was 40 years ago; still, most schools have but one course in that subject. Indeed, in all of my 26 years on the national scene in public life—and though for a year and a half I headed up the Criminal Division of the Department of Justice—only two students out of the thousands that I have met ever inquired about the practice of criminal law. And those two inquiries were during the last two years—one on the West Coast and one in Chicago—after my addresses at the law schools. There must be something wrong with an educational system that does not excite the interest of more students in such an important legal field. If the rights of our people are to be protected, there must be more capable lawyers in the criminal bar. Today, it must be admitted that it is second class! The law schools and the profession should put on a determined campaign to make it first!

Moreover, the law schools should take a more practical approach toward instruction in trial techniques and effective case presentation. The moot courts are not effective in this regard. Being mostly on the appellate level, they contribute no more than the old collegiate debate contests. I am happy to say that under the leadership of the American Association of Law Schools new vistas in advocacy are being explored. Professor Walter Gellhorn, Chairman of the American Association of Law Schools, has appointed three professors, Maurice Rosenberg, of Columbia, William Sacks, of Harvard, and Fleming James, of Yale, to work with a subcommittee of three judges appointed by the Joint Committee for the Effective Administration of Justice. The Chairman of this *ad hoc* committee is Mr. Justice Brennan. It held its first meeting last month and indications are that it will come up with

a series of recommendations. Among those being considered is a joint venture with state and federal trial judges, legal aid societies and public defenders to work top law students into actual trial work in indigent cases. The plan envisages that the student, under the guidance of his professor, will work with the legal aid society or public defenders where available. They will interrogate witnesses, do research, draw up suggested trial briefs and actually attend the trial of the cases upon which they work. In those sections of the country where no legal aid or public defenders are available the student would, through the good offices of the trial judge, be assigned to trial counsel in indigent cases. The student would participate with the assigned counsel in the same manner. The plan has been utilized in a few isolated instances with success. I believe that it deserves a thorough trial and hope the committee will inaugurate a pilot project for this purpose. If successful, it might become a required subject.

In addition, I suggest that in cities where state and federal prisons are located that indigent inmates be afforded legal service. The law school, the local bar association, and the warden might establish a legal aid office in the institution. Through it indigent inmates might be afforded legal counsel. Meritorious cases might be handled, habeas corpus petitions drawn, witnesses interviewed, etc. Through such a program inmates would be afforded an opportunity to talk over their problems with counsel and even though no results were obtained a greater respect for legal processes results. In many instances explanations might well change the inmate's entire view toward society. Likewise the plan would be a great morale builder and in this regard would be of assistance to the custodians. It would also be of the greatest assistance to the courts and I believe would appreciably reduce the number of frivolous petitions. In my opinion it would cut down our "*in forma*" cases by half. At the same time those filed would present more intelligently the legal points involved and would save us much time and effort in sifting out the meritorious cases.

3. At the University of Michigan Law School Professor Charles Joiner conducts a closed TV circuit program on the art of advocacy. The proceedings in Judge James Breakey's Circuit Court at Ann Arbor are broadcast live through this closed circuit to a classroom at the law school. Professor Joiner and Judge Breakey tell me that the project has been highly successful; that it affords instruction in actual courtroom trials and produces increased interest on the part of the students in trial advocacy. For some time now I have been trying to get my

legal fraternity to undertake a program to put a like installation in other law schools. The initial cost is not insurmountable and the service most nominal as it requires no attendant. I still have hopes of interesting some group who, believing in the importance of trial advocacy, will support such a program. Meanwhile, other law schools, such as my own (Texas), are investigating it with a view of establishing a trial run. It has great potential.

4. It is only during the last decade that resort has been made to research on the procedural side of the judicial docket. Except for a study at Johns Hopkins' Institute of Law during the early thirties and a personal injury project at Columbia in 1932, there was none save that of the American Bar Association under Arthur Vanderbilt (Minimum Standards of Judicial Administration) and the work of the Department of Justice and committees of the Supreme Court incident to the adoption of the Civil and of the Criminal Rules of Procedure in the late thirties and early forties. Today the climate is entirely different. There has been a tremendous upsurge of not only interest but of activity in the problems of practice and procedures. This seems to have been brought about during the past five years through the work of the Conference of State Trial Judges, the Judicial Conference of the United States, the Judicature Society, the Institute of Judicial Administration and, of course, the Section of Judicial Administration of the American Bar Association. Another group directly responsible, I believe, during the past eighteen months is the Joint Committee for the Effective Administration of Justice. It is composed of representatives of some fifteen national organizations engaged in the judicial administration field. During this short year and a half it has conducted 22 seminars in the various states. These seminars have reached the trial judges of some thirty states. Only this week a meeting of metropolitan court judges from Los Angeles, New York, Detroit and Philadelphia met in Chicago with judges of that city. The purpose was to exchange techniques in the trial of cases, particularly those involving personal injury claims. The law schools and their students also are part of the program, assisting in the research of the legal problems covered by the seminars. Likewise, professors of law act as reporters at the conference and top students are utilized as legal clerks. This brings the law schools closer to the courts. During the coming year the Joint Committee intends to enlarge its program through the utilization of additional lawyers from the private practice.

The Joint Committee has agreed upon a charter on which it predi-

cates its seminars in effective justice. It is a 153 word statement which reads as follows:

Justice is effective when:

- (1) Administered Without Undue Delay
With trials being held within sixty days in criminal cases and one year in civil matters, excepting under unusual circumstances and with adequate representation for those charged with crime;
- (2) By Competent Judges
Selected through non-partisan, non-political methods
Who are adequately compensated
With fair retirement benefits
And with an expeditious method to remove judges for cause;
- (3) Operating in a Modern Court System
Simplified in structure—eliminating any overlapping of jurisdiction
With a sufficient number of judges to carry the load
With practical methods for equalizing case loads
And with trial judges relieved of non-judicial burdens and details by a competent administrative staff, and with
- (4) Improved Rules for Procedure and Practice
Designed to improve advance trial preparation, reduce the elements of surprise and bring about an effective administration of justice
And with an annual conference of the judges for the purpose of appraising, developing and improving judicial techniques and administration.

The Brennan Committee has already implemented some of the Joint Committee projects. For example, the Conference of State Trial Judges under the auspices of the Joint Committee is editing a Judges' Handbook. The A.A.L.S. will furnish the Joint Committee expert reviews of the first drafts of this handbook and will offer criticisms and suggestions with reference thereto. The Brennan group has also arranged for the appointment of a panel of professors to work with the Joint Committee on its seminars and other projects. Another most progressive suggestion which has the support of my Brother Brennan as well as the other judges and professors on his Committee is the creation of a College of Trial Judges and Lawyers. It would offer institutes in judicial skills and techniques for lawyers and judges. The college would meet each summer at a selected law school under a faculty of judges, professors and trial lawyers. The college would first be organized on a national basis with a view of extension to the individual States if the national college proved successful. Such an organization would bring together the law school, the courts and the profession in a united effort to improve judicial procedures and techniques. It was only last fall that my Brother Harlan recommended a like venture to the New York Law School in his dedicatory address at that law school when he said:

I can think of no more worth-while service that this Law School could undertake than to establish a special school for the training of trial and appellate lawyers. By this I mean something much beyond moot courts or spot courses or lectures in procedure or in trial or appellate practice, already included, I believe, in this School's curriculum. I have in mind an integrated program in all aspects of the art of advocacy. In short, what might be called a school for barristers staffed with its own faculty and open only to graduate students and those already admitted to the bar, both chosen on a highly selective basis. So far as I know there is presently no such school in the United States.

It is my hope that this article may spark additional interest in the criminal law and in the art of advocacy. They say that financially one may not gain as much but, as I reminisce, well do I remember during my day in court one lawyer who received a million dollar fee in a criminal case. And as I look around the bar in Washington today, I note that one of the most successful and highly respected practitioners specializes in criminal law. Besides, if financial gain is the primary motive of one entering our profession, he should exploit his talents in the business not the legal world. The practice of law is freighted with a public interest and success is not measured in dollars and cents. The true compensation of a lawyer is the satisfaction coming from achievement in the strengthening of our society through the representation of causes. Many of these may not be popular, but in espousing them the lawyer is performing service in the highest tradition of the profession. The human rights and dignities that we enjoy through constitutional protection may become but paper, unless they are protected and enforced with equal vigor as to every person. The real lawyer is, therefore, not the one who measures the ardor of his representation by the amount of his fee. On the contrary, he gives of his talents just as generously and effectively to the protection of the indigent as he does to the paying client. In a system of government such as ours it is, therefore, indispensable that there exists a class of trained advocates possessing knowledge of the law, skill in the orderly presentation of facts, ability in the adaptation of legal principles thereto, cogency in reasoning and that fairness and moderation so necessary to effective adjudication. We the profession owe no less to our fellow citizens and to our country.

A century and a half ago Washington Irving said that "young lawyers attend the courts, not because they have business there, but because they have no business anywhere else." Today let us say that every lawyer has business at the courthouse; that it is his most important business, the fruition of years of study and application; that

through court room presence, the most dependable of all teachers, he will develop that expertise in the use of procedural tools now fashioned or to be fashioned (of which there is great need) which will make certain that, rather than a game of chance, truth and justice will prevail in every man's case. Such a situation would transform into reality the hope of a distinguished jurist who said:

It was the boast of Augustus . . . that he found Rome of brick, and left it of marble. . . . But how much nobler [would be your boast if you were able to say that you] found law dear, and left it cheap; found it a sealed book—left it a living letter; found it the patrimony of the rich—left it the inheritance of the poor; found it the two-edged sword of craft and oppression—left it the staff of honesty and the shield of innocence.

Speech of Henry Brougham (later Lord Chancellor Brougham) when a member of the House of Commons, Feb. 7, 1828. (Published by Henry Colburn, London, New Burlington-Street, 2d Ed., 1828, p. 119.)