

Book Reviews

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Book Reviews

A Lawyer When Needed. By Elliott Evans Cheatham. Columbia University Press: New York and London, 1963. Pp. xi, 128. \$4.50.

In recent years, the increasing range and complexity of our legal order have multiplied the need for legal services. Every instance where such a need, recognized or not, is unmet, or is less than competently met, is a failure of the legal profession. Some measure of such failure is inevitable, but, on the whole, the legal profession must justify itself by doing a reasonably good job of supplying competent legal services when and where needed.

This highly polished and delightfully literate little book, comprising the 1963 Carpentier Lectures delivered by Professor Cheatham at Columbia University, is a welcome general survey of the major problems in the way of providing competent legal services to all in need of them. After a general introduction, five situations are considered in which "renewed efforts are needed to meet the need for counsel"; they involve the hated, the poor, the middle classes, specialized legal services, and the protection of the public interest under our adversary system.

The record of achievement of bar and bench in providing competent representation for the unpopular defendant generally has been a proud one. Much progress has been made in educating the public to the understanding that any accused, however unpopular, is entitled to a zealous defense, and in countering the tendency to hate the lawyer merely because he represents an unpopular client. The courts have assigned able counsel¹; they have permitted the volunteering of needed legal assistance, which might otherwise have been difficult to obtain²; they have reversed convictions obtained by appeals to passion and prejudice³, and they have given counsel for the unpopular

¹ See, *e.g.*, the defense of Anthony Cramer by Judge Medina on the charge of treason (Cramer v. U.S., 325 U.S. 1 (1945)). Compare the successful — and back-breaking — defense by appointed counsel in the District of Maryland. U.S. v. Provo, 17 F.R.D. 183 (1955).

² See *In Re Ades*, 6 F. Supp. 467 (D. Md. 1934); *N.A.A.C.P. v. Patty*, 159 F. Supp. 503, 532 (E.D. Va. 1958). The Supreme Court has recently held that statutory restrictions on solicitation of business by the bar conflicts with the constitutional rights of the N.A.A.C.P. to use litigation as a means of achieving social and political objectives. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

³ See, *e.g.*, *Viereck v. U.S.*, 318 U.S. 236 (1943).

defendant particular leeway to encourage zealous and fearless representation⁴. However, continued effort and vigilance are necessary, particularly in cases involving racial discrimination or national security.

As to the poor, Professor Cheatham evaluates the various methods of legal aid: voluntary services of individual lawyers; private legal aid organizations, including autonomous corporations, law school clinics, bar association or social agency programs; the assigned counsel system; the public defender system; the armed services program for legal services to military personnel; and the provision of legal assistance by certain types of administrative agencies. The discussion includes an instructive review of the English system under which legal aid is subsidized by the state but administered, without governmental interference, by the Law Society.⁵ Surprisingly, Professor Cheatham does not mention the contingent fee, which appears to merit treatment in this survey. The Supreme Court decision in *Gideon v. Wainwright*,⁶ handed down after these lectures, requires that the need of the indigent for counsel be met in criminal prosecutions, and steps are being taken to comply.⁷

The middle classes represent the most significant failure in the distribution of legal services. They are the largest reservoir of unmet demand, but the canons of ethics have made it difficult to meet their legitimate needs. The result has been the growth of unauthorized lay prac-

⁴ Compare *Sacher v. U.S.*, 343 U.S. 1 (1952) with *Sacher v. Association of the Bar of the City of New York*, 347 U.S. 388 (1954) and *In Re Isserman*, 345 U.S. 286 (1953).

⁵ The great success of the English system is due in large part to the effective publicity which the program has received. The operation of the system is thus summarized by Matthews, *Lawyer Referral, the English Equivalent*, THE LAWYER REFERRAL BULLETIN, A.B.A. COMMITTEE ON LAWYER REFERRAL SERVICE, Nos. 1, 2-3 (1963) (quoted by Professor Cheatham): "Whether or not to take part in the Schemes is a matter for each lawyer — those who are willing to do so have their names entered on panels which are printed and made available to the public. Practically every firm of solicitors and virtually all barristers in the country have joined panels. . . . The majority of the population are within the financial limits for Legal Aid and well over half of all cases in the Courts are conducted under the Scheme. Half of all those assisted have a sufficient income to pay a contribution, the average amount being about £50 — between a half and a third of the total fee received by the solicitor and barrister."

⁶ 372 U.S. 335 (1963), noted 23 Md. L. Rev. 332 (1963).

⁷ The Supreme Court decision has also created a host of additional problems. See, e.g., *Proceedings of the New England Defenders Conference*, 47 J. AM. JUDIC. SOC. 159-98 (1964) and the discussion of the Criminal Justice Bill of 1963 in Kennedy, *The Department of Justice and the Indigent Accused*, 47 AM. JUDIC. SOC. 182 (1964). See also Sachs, *Book Review*, 23 Md. L. Rev. 378 (1963). For a survey and earlier statutory proposals, see Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579 (1963).

tice of law and the growth of forms of practice by lawyers, which, like bootlegging, are deplored but not so suppressed as to deny the parched public.

We must make it possible for the bar to serve faithfully the large number, able to pay, who have no personal contact with lawyers, and no understanding of how lawyers can help them, or of the cost of legal services. The bar has responded with a public relations program of institutional advertising (which has been remarkably ineffective, particularly in comparison with the English program) and with the lawyer referral plan. A vast area is still untouched. Professor Cheatham suggests experimenting with non-profit legal service offices maintained under bar auspices and law school facilities, and group practice under appropriate standards and supervision, where services are performed by lawyers procured for the client by an organization of which the client is a member. Professor Cheatham urges that the primary duty of the legal profession is to serve the public and the limiting strictures of professional ethics should not leave legitimate needs unmet but "should be accessory to the bar's affirmative role." A very recent decision of the Supreme Court, holding a type of group practice entitled to First Amendment protection, may be a major step in unblocking creative action along these lines.⁸

The chapter on specialized legal services is a valuable introduction to a serious problem. The "giants" who took all the law for their province are fast disappearing, the solo practitioners are declining, and the cream of legal practice is being funneled to specialized offices or to larger firms where lawyers pool their special skills to render "total client service".

Professor Cheatham seems unduly complacent about the prospects for a continuing supply of a sufficient number of competent "generalists" — lawyers who can see a situation whole, and (where necessary with the help of specialists) negotiate a deal, try a case and steer a course. The solo practitioner and the small firm do not necessarily develop the broad skills of effective representation. In far too many instances, legal problems in such offices are unseen or dimly understood. A specialist, whose services

⁸ *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, ... U.S. ... , 32 U.S. LAW WEEK 4374 (1964), holding unconstitutional a Virginia anti-solicitation statute as applied to the Brotherhood's "Legal Aid Plan" whereby the Brotherhood arranged to refer its members to selected lawyers in accident cases. An earlier form of the plan had been held, in *Hildebrand v. State Bar*, 36 Cal. 2d 504, 225 P. 2d 508 (1950), to violate the rules of professional conduct of the State Bar of California.

would be most helpful, is often not called in because the general practitioner is afraid of client-stealing. The existing continuing legal education program and the establishment of the A.B.A. section on general practice are at best a small start on a large problem.

There has been an encouraging effort on the part of the larger firms to encourage the development of generalists, or, at least, less narrow specialists, who do not panic at the thought of trying a case or become tongue-tied before an appellate court. The steps taken include rotation of associates so as to provide an internship in a broad range of practice, and encouraging a period of service with the Attorney General, the U.S. Attorney, legal aid, or an office with similar opportunities for variety of assignments and court appearances. The recently instituted Georgetown University Law School fellowships under which a group of young graduate practicing lawyers conduct a substantial number of court cases under supervision could profitably be copied in other law schools, and could be of substantial help in meeting the expanded demand for representation in criminal cases.

Professor Cheatham gives major attention in his discussion of specialization to what the organized bar needs to do to coordinate "the three parties to the professional triangle: the client, the generalist, and the specialist". If specialization is to be fruitfully developed, and the small general practitioner not extinguished, the general practitioner must be able to recommend consultation without losing face, or his client; the client must be protected against excessive fees; areas of specialization and standards of proficiency must be established; the identity of qualified specialists must be made known, at least to the bar, and the dangers of skipping the initial contact with the general practitioner must be minimized. The work of the organized bar in this direction has been sketchy, tentative, halting and ineffective.

In the final chapter, "In the Public Interest", Professor Cheatham discusses the difficulties arising from the fact that the public interest is often without a spokesman in litigation or negotiations between the paid advocates of competing individuals or groups. It is questionable whether the problem is really serious. It is doubtful whether the legal system can provide for "the public interest" a direct and faithful spokesman in the way it can for a poor or unpopular defendant; even the government has certain institutional interests of its own which may bias its view

of the public interest. The law has managed to provide a remarkable array of methods designed to prevent the public interest from being lost in litigation between private parties. These include: the right of the Attorney General or similar public official to notice and intervention in litigation raising Constitutional questions⁹; the class action and particularly the taxpayers' suit; the *amicus curiae* device; permissive intervention of the interested public groups; the prosecutor's special obligation of fairness; the administrative process; and the development of the role of the Solicitor General's office as only half a partisan advocate and half arbiter of the public interest. The difficulty of providing direct representation of the public interest is illustrated by the fact that many of the spokesmen allowed to speak under one or another of the foregoing devices may speak with conflicting voices in any particular case.

In passing from the representation of the public interest in litigation to the protection of such interest in negotiations between interested groups, Professor Cheatham takes a highly controversial position: "The public interest is deeply involved in what were long thought of as private matters to be left to private determination"; and as there should be no taxation without representation, so there must be "representation of the public interest in the process by which the two contending powers make their decision on any important element of the cost of the product to the public". The discussion, however, is rather far afield from the pressing practical problems within the direct responsibility of the organized bar which are dealt with in the rest of the volume, and somehow seems to strike a false note, which happily is the only one in the volume.

The recent constitutional amendment adopted in Arizona by a vote of approximately four to one, giving realtors the right to prepare certain contracts and legal documents in connection with the sale of real estate, and the increased lay participation in the institutions of medical practice, resulting from the inability of the traditional methods of private medicine to meet the needs for medical services, should stand as a warning and a challenge to the bar to take seriously the call of these fine lectures.

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⁹ 28 U.S.C. § 2403; 3 Md. Code art. 31A, § 11 (1957).

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Justice And The Supreme Court. By Rocco J. Tresolini, J. B. Lippincott Company, Philadelphia: 1963. Pp. 153. \$3.50.

This small, readable volume presents, as did two other volumes of recent vintage (*DEATH AND THE SUPREME COURT*,¹ *THE THIRD BRANCH OF GOVERNMENT*²), an approach to the study of Supreme Court decisions that is alien to the formalistic case book approach prevalent in the study of law. Whereas the traditional casebook focuses on the opinions of the Court to expose the developmental paths of constitutional decisions and reasoning, these volumes stress the factual context of the cases to illuminate the writer's particular thesis. These volumes show the reader that there is much more to a law suit, especially when a constitutional question is involved, than is apparent from the opinions of the Court. These volumes are, in a manner of speaking, merely a new version of a casebook. *DEATH AND THE SUPREME COURT* stressed the compassion prevalent when the Court faces an argument for reversal of a death sentence. *THE THIRD BRANCH OF GOVERNMENT*, which is prefaced by an introduction by Professors C. Herman Pritchett and Alan F. Westin, is a collection of essays by generally heretofore unpublished authors who treated a recent significant Court decision by establishing in detail the factual background of the case and the process by which arguments for presentation to the Court were developed.

Professor Tresolini's³ approach expounds libertarian principles by presenting a synopsis of a single Justice's life and then presenting his libertarian performance in a particular case. The jurists selected — Chief Justices Roger B. Taney, Morrison R. Waite and Charles Evans Hughes, and Justices John M. Harlan (the first), Oliver Wendell Holmes, Hugo Black, Wiley B. Rutledge and Frank Murphy — present an imposing array, but to cast some of them, especially the Chief Justices selected, in a liberal, humanitarian mold on the basis of their performance in a particular case causes pause and illuminates the dangers inherent in viewing a judge's performance through the constricted vision of a single case, even if we grant that someone has the ability to select *the* proper case.

The Chapter on Charles Evans Hughes exemplifies the difficulties inherent in this approach as the attempt is

¹ Prettyman, *DEATH AND THE SUPREME COURT* (1961).

² Pritchett and Westin, ed., *THE THIRD BRANCH OF GOVERNMENT* (1963).

³ Professor Tresolini is Head, Department of Government, Lehigh University.

made to dispel any notion that that eminent jurist was a champion of property rights who lacked concern for humanitarian values. The vehicle for the Chief Justice's display of liberalism in his dissent in *United States v. Macintosh*,⁴ which surely is articulate and was eventually vindicated.⁵ However, *Macintosh* involved the denial of citizenship to a Baptist minister, turned Yale professor, who refused to declare unconditionally that he would bear arms in future wars of the United States. Thus, *Macintosh* demonstrates no clash between property interests and liberty and hardly "proved false the many who regarded [Hughes] as the 'greatest champion of property rights', with no concern for human rights." The dissent surely displays a concern for human rights but does not dispel any theory of Hughes' property proclivities which might better have been tested outside the area of civil liberties and in the context of the New Deal struggle.

The Chapter on Chief Justice Morrison R. Waite reveals the failing of many biographers — attempting to "justify" the subject through praise of peripheral and miniscule matters where the verdict of performance does not support greatness. One can accept Waite's honesty, "kindliness", and administrative competence without conferring high judicial competence. The author's struggle to do that conferring causes this Chapter to clumsily contradict itself. For example, the author writes "[Waite's] opinions are . . . terse, clear and to the point. They furnish a 'silent rebuke to the rambling treatises to which we are obliged to listen.' In addition, Waite's opinions, although sometimes clumsy and opaque, are characterized by common sense, moderation and candor."⁶ It is not evident to the reviewer how a man's writing can be at the same time, on the one hand, clear and terse, and, on the other hand, clumsy and opaque.

The author's struggle to confer high judicial competence on Waite further leads him to the thought provoking statement: "[Waite] was satisfied to be a lawyer — a craftsman who adhered to the 'conventional canons of judicial review.'"⁷ One must ponder whether it is enough for a judge, especially a Justice on the United States Supreme Court, and most especially the Chief Justice, to be merely a lawyer in his approach to his judicial tasks. Of course, one would expect, in a judge as well as in a

⁴ 283 U.S. 605 (1931).

⁵ *Girouard v. United States*, 328 U.S. 61 (1946).

⁶ Tresolini, *JUSTICE AND THE SUPREME COURT* (1963) 34.

⁷ *Ibid.*

lawyer, analytical competence, legal acumen and cultivated intelligence. But the immense role as part of the nation's final arbiter would appear to demand more of a Justice, especially a Chief Justice, of the United States Supreme Court. In addition to possessing a lawyer's talents, one would hope that a jurist would also be a statesman and historian, and possess an ear for the pulse beat of the nation as well as a sense of humility and humanity.⁸

Perhaps the most flagrant violation perpetrated by this volume appears in its closing pages. In denouncing with typical liberal zest the "military mind" and its impact on the trial, execution and memory of Japanese General Yamashita, and in denouncing the opinion and motives of Chief Justice Harlan Stone in that case, the author perhaps lost touch with historical truth and with his duty of calm analysis, for he ventured this comment: "Moreover, the Supreme Court has *never* shown great courage in protecting civil liberties *during or immediately after* a war."⁹ One must blink at such a patent overstatement. *Ex Parte McCardle*¹⁰ and *Korematsu*¹¹ support the tone of this indictment, but a number of decisions impinge its veracity. A roll call of cases, protecting individual liberties in war time or immediately after, would include *West Virginia Board of Education v. Barnette*,¹² *Ex Parte Milligan*,¹³ and *Terminello v. Chicago*.¹⁴ Perhaps *Youngstown Sheet and Tube Co. v. Sawyer*¹⁵ would also qualify, for it surely divested the Executive of unrestricted war powers. All of these cases were decided during or immediately after a war. The grant of excusal from participation in flag salute exercises in *Barnette* is particularly significant in light of the author's implied attack on Chief Justice Stone, for it was

⁸ Of course, there is no reason why a lawyer cannot possess these "judicial traits." Some would, of necessity, need to fit the mold if those elevated to the Bench are to meet the standard. Surely, there are some prominent attorneys who possess judicial character who never reach the Bench. Yet this does not make the reviewer believe that a description of a judge as satisfied to be a lawyer does more than damn him by faint praise.

⁹ *Supra*, n. 6, 148. (Emphasis added.)

¹⁰ 7 Wall. 506 (1869). Note that the statute which constricted the scope of judicial review in this case was the handiwork of the Reconstruction Congress which was annoyed at the Court's interference with the subjugation of the conquered rebels.

¹¹ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹² 319 U.S. 624 (1943).

¹³ 4 Wall. 2 (1866).

¹⁴ 337 U.S. 1 (1949). The author's own first chapter stands in contradiction to this statement, for he there reviews the performance of Chief Justice Taney in *Ex Parte Merryman*, 17 Fed. Cas. 9487 (1861). See also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

¹⁵ 343 U.S. 579 (1952).

his stinging dissent in *Minersville School District v. Gobitis*¹⁶ that foreshadowed *Barnette*. Stone's many significant contributions to constitutional law and civil liberties are, of course, hardly dimmed by this one opinion in *Yamashita*.¹⁷

This reviewer has grave doubts about trying to learn much about a jurist from a single decision. This feature of the author's approach undermines the merits of this volume, which are substantial. As a primer for the study of civil liberties, this volume certainly should stimulate the reader's interest in this important field of constitutional law. This volume will appeal, as it apparently was designed to,¹⁸ to laymen and students just whetting their mental appetites in the marvelous field of constitutional law. For the lawyer, it will make pleasant reading; it will not be a source book.

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¹⁶ 310 U.S. 586 (1940).

¹⁷ In re *Yamashita*, 327 U.S. 1 (1946). Stone's life and contributions are considered in Mason, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

¹⁸ *Supra*, n. 6, 2-3.

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