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THE INDEPENDENCE OF THE BAR: 
ITS MEANING AND ITS FUTURE

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held at the Mark Hopkins Hotel, San Francisco, California

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Members of the legal profession under the Anglo-American system of justice have been entrusted with dual and conflicting loyalties. They must be simultaneously both loyal to their client's interests and faithful to the maintainence of the integrity and independence of the courts of which they are officers. The complex dualism inherent in being both an advocate and an officer of the Court requires that the lawyer have a unique independence, - a detachment from any excessive adherence to his client's interests as well as a freedom from being inordinately attached to the rulings and interests of the judicial system.

History seems to demonstrate that lawyers in America during the past four generations have generally tended to develop such an attachment to their clients' interests and views that their devotion to the advancement of the judicial system and of basic justice has become subordinate to their role as private advocates. As a result of this imbalance the independence of the bar has been substituted or at least eroded by a dedication to the preservation of vested interests. The legal profession consequently, as James Willard Hurst makes clear in his perceptive book "The Growth of American Law" (Little Brown, 1950), has been ever since the late 1800's accurately adjudged to be the protector of the status quo.

The loss of independence of large segments of the legal profession was never more evident in American history than after the advent of the New Deal as an answer to the social upheaval of the depression of the thirties, - a depression which resulted from a legally unplanned and unregulated economy. As a consequence of the incapacity of the bar to adjust to the social revolution of the
Roosevelt era the National Lawyers' Guild was born in 1937. The Guild wrote into its constitution and by-laws an objective never really previously endorsed by any other bar association in America, - the harmonization of the law with the findings of the other social sciences.

The wording of the ideals of the Guild, as set forth in the Guild's basic policies enunciated in 1937, may appear today to be associated in our minds and emotions with the near-paralysis of the organized bar in confrontation with the socio-economic revolution that followed the depression. But the expressed ideals and purposes of the Guild, concededly conceived in the aftermath of the revelation of the sterility of the organized legal profession in America, have been more abidingly permanent than one could have expected for an organization born in a moment of crisis and destined to struggle against all the tyrannies of the national hysteria which obsessed America in the 1950's.

The core or essence of the Guild's purposes can fairly be said to be summed up in the phrase, - the restoration of the independence of the bar. It is this idea which, often expressed in other terms, is the central theme of the articles and comments in the twenty-one annual volumes of Lawyers' Guild Review and more recently in the five volumes of Law In Transition.

The independence of the bar does not mean, let us make it clear immediately, a state of non-commitment to truths or values. Indeed the independence of the bar presupposes and requires a commitment to many moral and spiritual values which must be served in whole or in part by America's legal institutions. The spiritual value indispensable for an independent bar to which the National Lawyers' Guild in a
particular way has lent its power and prestige is the basic injustice of permitting false accusations to be made by public bodies in the name of patriotism or loyalty to the nation.

The independence of the bar, like so many of the unarticulated characteristics of the legal profession, is difficult to define and analyze. Because of apathy, self-deception, an unconscious adherence to juridical positivism and for other reasons the legal profession has permitted a deprofessionalization and, - let us be candid, - a commercialization of the bar to obscure its vision of the heritage fashioned by courageous lawyers and judges who, through the several centuries of Anglo-American law, have courageously challenged tyranny and vindicated the rights of conscience. That heritage is both the cause and the effect of what has come to be called the independence of the bar.

In order to try to understand some of the enormously significant implications of the concept of the independence of the bar let us consider the following issues: -

1. The independence of lawyers from their own prepossessions and prejudices,

2. The independence of the bar from excessive adherence to judicial precedent or from unreasonable fear of the power of court personnel, and,

3. The independence of the legal profession from public opinion, both outside and within the legal profession.

I. THE INDEPENDENCE OF THE BAR FROM THEIR OWN PREPOSSSESSIONS AND PREJUDICES.
One of the most persistent challenges which America's law schools must always confront is the conservative, upper middle class, almost reactionary socio-economic attitudes which law students frequently bring with them into the study of law. The concept of the lawyer which entering law students have not infrequently tends to be that of an administrator or perhaps a social engineer. Seldom does the entering law student grasp the mission of the lawyer as the moral architect of society.

It is clear that law schools cannot be expected in a period of three years to change completely the pre-existing ideas which law students have brought with them to their legal education. And even if law schools could achieve such a miracle their young graduates would quickly be re-infected by the pervasive prejudices and prepossessions of so many of the attorneys with whom they associate.

A glaring and indeed a shocking example of the domination of the personal prejudices and prepossessions of members of the legal profession can be seen in the fact that the United States Supreme Court has been required in the recent past to elevate the standards of criminal justice in ways which, if the legal profession had not been blinded by its apathy and prejudice, would surely have merited condemnation and correction by the bar itself. *Gideon, Mapp, Escobedo* and similar landmark decisions must surely be listed as wounds self-inflicted by the bar. The lawyers of America to their everlasting shame allowed the Fourth, Fifth and Sixth Amendments to the Bill of Rights to become inapplicable to the indigent and to the poorly educated, - to the last, the lowest and the least citizens of history's wealthiest nation.
What else can explain the continuation of not a few institutionalized injustices in America except the lack of independence of the legal profession from its own prejudices? Why was it necessary to wait for decades for the Supreme Court to outlaw segregated schools, condemn unfairly apportioned voting districts or to reverse criminal convictions traceable to prejudicial pre-trial publicity? Is the bar so possessed by apathy or prejudice that it remains paralyzed in the face of situations which are patently unjust?

It may be that the greatest injustice in the world today is one on which the Supreme Court cannot act. That injustice is worldwide hunger and poverty, - a tragedy which results in poor nations afflicted by starvation dwelling as islands of poverty in a sea of affluence. If American lawyers truly believed in human equality would they not be compelled to work for an international tribunal or a world government capable of distributing the food and resources of mankind in an equitable way?

The lawyer whose mind is independent of the passions and prejudices of his own generation or his own century transcends the collective compromises of his own age and boldly challenges inequality in every form. The lawyers who formed and fashioned the American Republic had independence of mind and heart unparalleled by any subsequent generation of attorneys in America; their vision and their courage are the legacy of every lawyer in America. So few members of the bar recognize that legacy because, being the prisoners of the passions and prejudices of their own age, they have lost that independence of judgment without which a lawyer cannot really identify himself or the noble profession of which he is a member.
DeTocqueville, the famous French observer of American life, wrote that the legal profession in America "is qualified by its attributes and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas they are checked and stopped by the almost invisible influence of their legal counsellors...."

The National Lawyers' Guild in its 28 years of existence has carried out in a truly remarkable way the mission noted by DeTocqueville. To a degree unappreciated by many the Guild has steadfastly opposed loyalty oaths, public character assassination, racism in all its many forms and every other tyranny over the mind of man.

I submit, however, that even the unwavering independence of the members of the Guild in the past will not necessarily be adequate for the future. New social revolutions are ahead, - the most needed of which is probably a movement towards united world federalism, - a world government with power to distribute the food, wealth and resources of the world in ways which will lessen and eventually eliminate the scandalous and inhuman mal-distribution of these items that now prevails.

The work therefore of the National Lawyers' Guild, - and of the entire legal profession in America, - must quickly and resolutely undertake a task of monumental proportions, - the establishment of a world order where true equality for all men is really attainable. In order even to think about this inescapable task of the legal profession the bar must have an independence of judgment unclouded by the passions and prejudices of all those countless persons who
have been so imprisoned by their own limited view of reality that they have never really tried to apply the concept of equality to all of humanity.

The next 28 years in the life of the National Lawyers' Guild are therefore likely to be even more difficult than the Guild's first 28 years. For the world of 1993 - twenty eight years from now, will be shaped to an unbelievable degree by the attitude towards human equality taken by the free world. And the depths and the dimensions of equality in the free world will be known or ignored principally as a result of the activities and attitudes of the legal profession.

II. THE INDEPENDENCE OF THE BAR FROM JUDICIAL PRECEDENT AND FROM FEAR OF THE JUDICIARY

If a lawyer cannot really fulfill his self-identity or carry out his moral mission unless he is independent of the prejudices and passions of his own age he is similarly impeded unless he can discover and maintain an attitude of respectful independence from the judiciary.

This independence from the judiciary should prompt lawyers to feel free to criticize judicial decisions consistently and courageously. This criticism should not be confined to the higher courts but should be applicable to every tribunal whose opinions are deficient in inherent logic and clear consistency.

The bench must also, of course, preserve its independence but the independence of the bench cannot be maintained without the independence of the bar. Mutual constructive criticism therefore between the bench and the bar is essential for the independence of each.
The lawyer who is a truly independent man is able not only to criticize judicial precedent but also to speak out against the tyranny of careless and prejudiced judges. The attorney who has attained real independence is so detached from financial considerations that he is able to denounce injustice in the judiciary, without fear and without hesitation.

The independent lawyer has such a passion for justice that he feels compelled to criticize unjust judicial decisions and unfair attitudes on the part of judges. At the same time the independent lawyer is diligent in carrying out his duty to help maintain public confidence in the courts and public compliance with their decisions.

If the bar in America today were truly independent it would condemn those blatant assaults on the judiciary which in recent years have attained a new level of effrontery and arrogance. Would a truly independent bar, a bar that was profoundly devoted to the rule of law, fail to protest vigorously and effectively the defamatory demands for the impeachment of the Chief Justice of the United States displayed on billboards and circulated to countless individuals along with the other calumnies of the John Birch Society? Does constitutionally protected freedom of speech or freedom of the press give immunity for slander and public defamation of the nation's highest tribunal? And by what principle can an independent bar justify its inaction towards those who, by calumny and libel, impugn the motives of judges and undermine the very essence of every civilized society - the rule of law?

The bench generally speaking cannot be expected to rise above the level of the bar. A bar that is subservient and servile to the bench will tend to corrupt both the bench and the bar. A courageous
and independent bar will have an impact on the bench far greater than
may at first appear. For courage is infectious and one bold decision
of one tribunal may easily become the starting-point of a revolution,
- and a revolution, we should always remember, was at one time only
one idea in the mind of one man.

The independence of the legal profession therefore requires
that lawyers attain such an attitude of detachment both from their
duties as advocates and their role as officers of the court that
they can act objectively and dispassionately, - as neither solely
the servants of their clients nor as exclusively the ministers of
the courts.

III. THE INDEPENDENCE OF THE BAR FROM PUBLIC OPINION, \textit{both} OUTSIDE AND INSIDE THE LEGAL PROFESSION

Despite the fact that Americans are among the best informed
people in the world public opinion on legal-moral matters in this
country is a treacherous and highly unreliable commodity. Collect-
ive moods sometimes emerge abruptly and, unless quickly checked, can
result in a permanent change in public opinion. What strange mood,
for example, prompted Congress to enact in a precipitous way a law
making it a Federal crime to burn one's draft card? - And by what
rational test can the nation justify a Federal law which requires
every college student to take a loyalty oath before he can borrow
money for his education?

Other examples of the legal institutionalization of public
moods or collective irrationality are numerous. A truly independent
bar would protest against the excesses of public opinion and would
seek to prevent the intrusion of irrational or extremist views into
public policy.
With respect to American public opinion regarding the international order the legal profession in America has a difficult but unavoidable task. The profoundly emotional isolationism of so many Americans and the frighteningly widespread hostility to the United Nations are surely attitudes prominent in public opinion which an independent bar must continually seek to correct and change. Such attitudes are clearly inconsistent with the basic presuppositions of Anglo-American jurisprudence and are consequently a threat not merely to the solidarity of the family of nations but to the very rule of law in America itself.

It seems obvious that the extension of the rule of law to the world community of nations must take priority over almost any other task facing the bar in America. But the legal profession will be able to undertake this task only if it is independent of the dominance of that irrational, super-patriotic and nationalistic element in public opinion which, by urging a restriction of America's participation in the family of nations, in effect denies the central principle of our jurisprudence, - human equality.

The independent lawyer, however, must rise above not merely public opinion in the nation at large but also above what is often the dominant opinion in his own profession. The contamination of opinion within the legal profession by the poisonous fall-out of prejudice from public opinion at large can be graphically illustrated by the current paralysis of thought among lawyers with regard to retributive justice for the Negro.

Every segment of our society is proclaiming that it desires to extend to all Negroes every opportunity which white persons enjoy. This bland assertion, however, really means little because the real
question is this: How can society give to the Negro some compensatory or preferential or retributive advantages so that he can overcome the disabilities of more than a century? The moment, however, that one raises this question massive public opinion reacts automatically and vehemently by self-righteously denouncing "discrimination-in-reverse".

This inability even to explore the reasons why anti-discrimination laws and policies are not sufficient carries over into the legal profession where the fixation against alleged "discrimination-in-reverse" is given a legal justification as if it were one of the sacred pillars of the Republic.

The lawyer with independent judgment, however, will be able to see that American society has crippled the Negro and that as a result the socio-economic gap between the white person and the Negro is not narrowing but rather widening. Some method of restitution or reparation or indemnification for the Negro is therefore necessary before we can expect to witness substantial improvement in the economic conditions of the "other America."

Lawyers on previous occasions have devised formulas for compensation or for changes in seniority rights to be granted on a retroactive basis. Is it beyond the power of the legal profession to formulate a policy which will be simultaneously "color-blind" and "color-conscious" in order to effectuate true equality for Americans of African descent?

It may be that the appallingly low number of Negroes who have entered the legal profession is an indication that Negroes are not sure that the bar of America will be the instrumentality by which the civil rights revolution will triumph. Less than one percent of all the lawyers in America are Negro and in the academic year
1964-65 there was a total of only 472 Negro law students out of 58,000 students of law in America, - a number less than one percent!

The independent lawyer therefore must be critical and even skeptical of not a few of the viewpoints held by a majority of the bar. While there are many great victories for human rights attributable to the legal profession in America in this century it is distressing to note that the bar has not been conspicuous as the originator of the great creative moral ideas about society which dominate the mind of modern man. For the bar this century has not been the best of times nor the worst of times. But every indication suggests that the ideals of the bar will be tested as never before by the global revolutions brought about by the emergence from the ashes of colonialism of the new nations of Africa and Asia.

Post-revolutionary eras do not always bring days of prosperity for the legal profession. The entire legal profession was virtually abolished after the French and Russian revolutions. The middle years of the last century, moreover, - the post-Revolutionary era in America, - produced a deprofessionalization and even a decadence of the bar from which the profession in America has not as yet fully recovered.

What will the post-revolutionary era in the world of 1980 and thereafter think of the legal profession in America? Will the leaders of the world in that generation look back upon the bar of America and see a class of able advocates devoted to the short-range interests of their clients but without any clear vision of the world revolution which was taking place around them? Or will the leaders and opinion-makers of the world in the next generation be able to look back at a group of creative and independent moulders of the moral fabric of a just and peaceful international order?
The answers to these questions are by no means foreclosed. There is a restlessness and a ferment among lawyers today about the professional responsibility of the bar which is new, profound and dynamic. This ferment is more universal than it may appear and it is more urgent among younger lawyers and law students than at any time within living memory. It is a conviction of conscience seeking clarification and methods of implementation. In the concrete it becomes visible in legal studies regarding bail procedures, lawyers going South to work on civil rights cases or bar associations working with new legal aid programs financed by anti-poverty funds. But the ferment over professional responsibility and the anguish of lawyers over their moral role in society are deeper than any of their visible manifestations which have as yet appeared.

It was this restlessness, anguish and ferment over professional responsibility which created the National Lawyers' Guild in 1937. That deep concern for professional responsibility in 1937 and the same anxiety over this issue today is fundamentally a desire and a determination by lawyers to be independent men, - men who, though they plead for private interests, are never so attached to these private goods that they work against the attainment of basic justice or the maximizing of personal freedom.

The words of Justice Brandeis, concurring in Whitney v California, express in a remarkable way the purposes of the National Lawyers' Guild and the real meaning of the independence of the bar. Justice Brandeis wrote: -

"Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative
forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth...."

Justice Brandeis in the same opinion noted that those who won our independence also felt that

"it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government...."

If the lawyers of America appreciated and embraced these sentiments we would witness the full flowering of the indispensable element of a truly free society - an independent bench and an independent bar.