

THE PROFESSION OF LAW

L. RAY PATTERSON
ELLIOTT E. CHEATHAM

University Textbook Series

THE PROFESSION OF LAW

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Foreword

WARREN E. BURGER

Chief Justice of the United States

“Lawyers’ Standards Are An Integral
Part of Law Itself”

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FOREWORD

The American system for the administration of law is structured like a tripod: the process requires three participants, the contending lawyers and the neutral judge or triers. If any of these three supports of the adversary tripod is missing, the process fails. If any "leg" of this tripod is disproportionately weak, the structure as a whole is weakened.

One great weakness, now being corrected, has been the lack of counsel for the large number of people who could not afford the cost of counsel and especially was this true of the accused in criminal cases. The half century of private development of legal aid and public defender programs are a tribute to the legal profession as the trail blazer for the recent developments of the legal right to counsel and of legislative appropriations for legal aid that have done so much to meet this lack. The bar and the courts are now freer to direct their attention to other aspects of the processes of justice. The most recent activities of the organized bar include the ABA criminal justice project to formulate Standards for the Administration of Criminal Justice, the Code of Professional Responsibility, the new Canons of Judicial Ethics, and efforts in many states to improve the methods and the personnel of law administration. A significant and additional set of standards for the function of the trial judge are now being developed by the ABA. A book, searching for the basic responsibilities and standards of the profession, as does this one, comes at a good time. "Lawyers' standards of conduct and performance are," indeed, "an integral part of the law itself."

Our complex governmental structure, with the federal system and the principle of separation of powers, raises difficult questions on "the authoritative sources" of standards. A most important standard is respect for the dignity of the participants and respect for the system; both are essential to the integrity of the process. Chief Justice Hughes and Justice Holmes were agreed that one of the two most important qualities of the lawyer is tact in the performance of his function. Put in another way, manners and decorum, especially in the courtroom, are the indispensable lubricant to the inherently contentious adversary process. At every stage of the administration of justice good manners contribute enormously. As our English friends have shown, the changes in the tone of their courtrooms a century ago from bullying and posturing of both the lawyers and judges, to the now firmly established tradition of courtesy with firmness,

FOREWORD

improves and speeds up the work of the courts. Civility is not merely a necessity, it is indispensable to the adversary process. It is of utmost importance that the individual dignity of every accused person be respected. If he leaves the court with a realization that he has been accorded fairness, understanding and respect, he will be the better for it, no matter what the outcome.

The whole system of criminal and civil justice needs reexamination at every level. The projects of the great legal associations must be continued and expanded. In criminal justice, especially, there is need to go beyond the conspicuous part of the criminal law process, the trial, to the least seen and most neglected—imprisonment. Over the years I have visited the Scandinavian countries and The Netherlands to observe their correctional methods. We can learn much from them in wisdom as well as compassion in the treatment of prisoners.

“Change places with the judge,” was the excellent advice John W. Davis gave to his fellow advocates. “Change places with the prisoner,” is a good starting point in considering correctional methods. Let more and more Americans place themselves in the shoes of the prisoners, and come to know the dehumanizing conditions that prevail in most prisons. Let them think in terms of what a man loses when he is confined even under optimum conditions. Then we will sense that loss of liberty alone is a crushing punishment that needs no added burdens to carry its message. Confinement must be only the beginning—the condition—in which we make every effort to improve those who are committed for their crimes.

WARREN E. BURGER

The Supreme Court Building
Washington, D. C.
April, 1971

PREFACE

The American lawyer, with his work and opportunities, and his consequent responsibilities and standards, is the subject of this book.

Law is society's primary method of advancing the common good as well as its principal means of reconciling the competing desires of men. It is a series of processes within the society of which it is a part. Law is not a set of self-sufficient rules, nor is it self-operative. To give it reality there is need for lawyers. They can apply and utilize it in individual matters and they develop it to meet new conditions. The availability in fact of legal services for all is essential to equal justice under law.

The conditions of the lawyer's work are difficult. He is a participant in the adversary system of the administration of law within the larger competitive economic system. He represents private clients in what is essentially the public function of the administration of law. He has competing loyalties to the client, to the opponent, to the unseen persons also affected by his clients' actions, to the court, and to himself. In the United States the lawyer has special complexities as to himself to resolve arising out of our federal system of government, and out of the division of powers among the legislative, the executive, and the judicial branches of government. To add further to the complexities there are changing conditions and rising demands on government and law.

The recurring inquiries in this book are what standards and what organizations will best enable the profession to carry forward its varied responsibilities. Answers in the affirmative are sought. Limitations and restrictions on the lawyer should find their justification as aids to the affirmative.

The line of our discussion is indicated in Chapter I. In the citations preference is given to annotated cases and to decisions of the Supreme Court of the United States: to the former because the annotations open up related topics with which the book in its limited space cannot deal; to the latter because of the increasing importance of federal law as the authoritative source of the standards of the profession.

We are happy to acknowledge our indebtedness to many people: to our collaborators in a casebook on the subject, Dean Samuel D. Thurman and Professor (now President) Ellis L. Phillips, Jr.; to our Vanderbilt colleagues, Dean John W. Wade,

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Professor Robert N. Covington, Professor Frank Maloney, and Professor Theodore Smedley; to our colleagues in the subject in other universities, especially Professor John Bradway and Professor Robert Mathews who have often shared their ideas with us; to our students in law schools who have wrestled with us over the problems; to our aid, Mr. Justin P. Wilson of the Tennessee and New York bars who contributed so much toward the end of our work that we greatly regret we did not have his participation earlier; to Messrs. Larry T. Thrailkill and Bland W. Cannon, Jr. who aided us much with their ideas, and with the manuscript.

L. RAY PATTERSON
ELLIOTT E. CHEATHAM

April, 1971

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THE PROFESSION OF LAW

Chapter I

THIS BOOK: THE RANGE AND LINE OF DISCUSSION

The reader of this book might naturally turn at once to the topic of his immediate interest. Yet the book, as law itself, is not a set of independent fragments glued together. In the consideration of the profession it inquires, first, into fundamental ideas on the roles and responsibilities of the lawyer in our government under law. It seeks then for the principles and rules derived from the fundamental ideas which should apply in particular matters. To aid the reader, and the writers at their work as well, to keep always in mind the larger factors from which the particulars are derived, the book does two things. At many places it repeats mention of the fundamental factors and thus makes the discussion of each topic fairly self-contained. And in this chapter it sketches the framework of the whole book so the reader may at a glance perceive the relation of his topic to the other subjects, and the forest will not be obscured by the trees.

Our discussion of the profession is in five Parts. The First Part emphasizes the Fundamentals from which all else derives. Part Two considers the lawyer at work in the public and private legal processes. It deals as well with special settings under which his activities may be carried on, as lawyer for the state and in the legislative and administrative processes. Part Three treats of the other principal man of law, the judge. Part Four is given over to the lawyer and the client. Part Five concerns the structure of the profession.

Part I. The Fundamentals. The roles of the lawyer and the harsh realities under which he carries on his work, especially in the United States, are the starting point in a consideration of the fundamentals. The development of the profession in England and the United States, and the shaping forces which will continue to bear on the profession, are the next subject of inquiry.