

“Public Service and Justice”

Randolph N. Stone ('75) is a Clinical Professor of Law at the University of Chicago Law School and former head of the 508-lawyer Cook County public defender office. In August he spoke to the incoming first-year class of law students at our annual Convocation. Professor Stone is also a member of the Board of Visitors of our Law School.

PROFESSOR RANDOLPH N. STONE
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I was quite thrilled and honored when Dean Bernstine called and asked me to consider addressing you in this convocation. However, after being advised that the two primary factors for the section of the speaker were: (1) that the speaker be brief and (2) that the speaker speak for free, I was slightly less honored, but I am still thrilled to be here and to have this opportunity to talk with you.

As I prepared my remarks, I tried to remember what was said to my class at the convocation. I searched my memory and even called a few classmates. Not only had we no recollection about what was said, we couldn't remember even who said it. Finally, I realized that it wasn't faulty memory, but that in fact in 1972 there was no convocation. Therefore, I have an empty tablet upon which to write.

The theme of my remarks centers around the issue of public service and within the context of a question that I have been often asked throughout my career. The question how can I represent my client, is usually asked in terms of how can I defend someone that I know is guilty; someone that I know has committed a serious or a violent crime and may do it again. Today that type of question is also being raised in other areas of the law. It's being asked of lawyers who represent



From left: Professor James E. Jones, Jr., Randolph Stone and Dean Daniel Bernstine

environmental polluters, cigarette and alcohol manufacturers, rich white-collar criminals or powerful corporations whose interests may be adverse to societal values. My focus is on representing the urban, typically poor, African-American or Hispanic youth charged with crime.

Barbara Babcock, in her excellent article “Defending the Guilty,” advances a number of reasons with labels. In summary, she lists the garbage collector's reason: Yes, it's dirty work but someone's got to do it. The adversary system can't work without advocates for both sides. The civil libertarian reason: In protecting the constitutional rights of criminal defendants we

are only protecting ourselves and the rights that we enjoy. Legalistic reason: There is a difference between legal and moral guilt. I have seen this dynamic in representing battered women who have killed their spouses in self-defense. These women often feel a tremendous sense of moral guilt but are not legally culpable for their actions. The political activist reason: The accused, especially the poor and minority, is usually also a victim of injustice. The social workers' reason, with an emphasis on human dignity: The accused are people entitled to receive the full panoply of constitutional rights. If poor and minority clients receive quality legal

services, it may help increase respect for the system and decrease anger and alienation. Humanitarian reason: We all have a duty to aid our fellow human beings in their times of great need. Finally, there's the egotist reason: Criminal defense work is interesting, exciting, intellectually challenging and winning is a great satisfaction given that the odds are always stacked heavily in favor of the State. In the D.C. Public Defender's office we had a battle cry of sorts: we said that the two sweetest words in the English language are not guilty.

Obviously, for me and for most of the lawyers that I know who are seriously involved in representing poor people accused of crime, there is a great deal of overlap. We are involved in this work for a combination of the reasons listed.

My mother has told me that she's not surprised that I represent the poor and the unpopular. She says that as a child I was always the friend of the stray cat and the underdog. My grandmother always wanted me to be a minister and at 85 I think she still has some hope that I may someday see the light. Actually, sometimes when I'm sitting in a jail or in a police station or in the bowels of a prison with a very desperate, scared and lonely client, I feel close to a spiritual experience.

My inclination is both personal and political. I have two teenagers, a son and a daughter, and I know that the number one cause of death for African-American men between the ages of 15 and 24 is murder. I know that one out of every four African-American men between the ages of 17 and 29 is either in jail, prison, on parole or on probation. According to a recent report, in Washington, D.C. on any given day 43 percent of the African-American men under age 35 in that city are either in jail, in prison, on parole or probation, or waiting trial in a criminal case. Today, we have over one million people locked up in jail and prisons in the United States of America. That's double the number in the last ten years and triple the number since 1975. Our incarceration rate leads the world. There are more African-American men in jails and prisons as we sit here today than there are in colleges and professional schools. The U.S. incarcerates Black men at a rate of four times

that of South Africa's rate for Black women. A pregnant African-American or Hispanic woman found with drugs in her system, in some jurisdictions today, is more likely to be prosecuted than treated.

At the same time, when I look at the legal profession, I am concerned that of the 800,000 or so lawyers in the United States, less than 8 percent are concerned

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with criminal law and less than 1 percent represent the indigent accused. Moreover, many of our legal institutions have failed to recognize and act on the need to diversify. For example, of the 700 partners in the top five law firms in Chicago less than a half dozen are African-American. Further, many of our major law schools have been less than successful in diversifying their faculties. At Chicago, I am the first and only African-American permanent faculty member in over 40 years. In contrast, I am proud of the strides that the University of Wisconsin has taken. This Law School is now a leader among all the major law schools in the country in terms of its commitment as well as action in attracting faculty members of color.

My point in discussing the criminal justice system and the legal profession is that I want to see my son and daughter and others like them to have a better chance for entry and success in the legal profession or any other profession than to be murdered, prosecuted or incarcerated. Although my comments may suggest some criticism of the legal profession, I want you to know that I love the legal

profession because of the opportunities and possibilities of change that exist through the law. Opportunities to change the course of human events and equally as important, the opportunity of making a difference in one person's life.

About 10 years ago or more I was involved in a death penalty case in Chicago where two African-American men were accused of the murder of two white businessmen on the northside of the city. The case went to trial and the jury deliberated for several days but could not reach a verdict. It turned out that the jury was hung, eleven for guilty and one not guilty. The juror who had held out for not guilty was the only African-American on the jury; an elderly man, who tracked me down some weeks after the trial to tell me he felt that there was something that just wasn't right about the case. He didn't know what it was but he just couldn't be convinced to vote guilty. He talked about how the jury deliberation process was so emotional and about the racist comments made during the process. A few months later the case went to trial a second time. This time we got lucky and had a much more diverse panel, but again the jury could not reach a verdict. I learned that the vote was 7 to 5 for acquittal, there were four African-Americans on the jury. At the third trial, the prosecutors excluded each and every minority member from the jury pool, we wound up with an all-white jury and both defendants were convicted and sentenced to death.

During the jury selection process at the third trial, I had objected to the prosecutorial exclusion of blacks from the jury pool, but this was prior to the U.S. Supreme Court's decision in *Batson*, holding that exclusion of African-Americans on the basis of race from jury service was unconstitutional. In responding to my argument, the trial judge noted that the law did not require him to limit the prosecutor's use of race as a basis of exclusion. And I, of course, replied that the law is not static but living and breathing and subject to change. In any event, he overruled my motion, but on appeal the convictions were reversed on other grounds by the Illinois Supreme Court. The defendants were tried a fourth time, I was not involved in the fourth trial, again a hung

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jury; finally at the fifth trial, new evidence surfaced and a courageous judge acquitted both the defendants. They had been imprisoned a total of seven years, almost half on death row. But they are both out now and living productive lives. One is a minister and counsels prison inmates and those recently released from prison.

Of course the issue of race and the death penalty is one that I am sure many of you are aware. There are now over 2,400 people on death row in the United States, 40 percent are African-American men, despite being less than 6 percent of the population in the United States. All the studies suggest that the primary criteria for determining who is sentenced to death is the race of the victim. In other words, if the victim is white and the defendant is black, the odds of being sentenced to death are quite high. Parenthetically, a Stanford Law Review article catalogued some 350 cases of individuals convicted of capital crimes, later proved innocent or with new evidence reversing their convic-

tions or modifying the sentences. For some, the proof came too late.

A few years ago in Washington, I tried what the judge kept telling me was a simple case, and I suppose in some sense, it was a simple case. My client was charged with the unlawful use of a weapon. He had been arrested inside a small convenience store with a revolver in his hand. The clerk observed him walking down the aisle with this gun and called the police. The police arrived quickly and arrested him as he was standing near the counter with the gun. Several lawyers worked on the case and the client had insisted on going to trial. Other lawyers had urged him to take a plea bargain: he had been offered probation with a short period of incarceration in exchange for a plea of guilty. The client, as a matter of principle, would not accept the plea offer and insisted that the case go to trial. Somehow I wound up with the case. After talking to the client and investigating the situation, we agreed to go to trial.

The client's story was that he had been in a fight, somebody had pulled a gun on him, he had grabbed the gun and run into the store, hoping to convince the proprietor to call the police. Of course there were problems with the case: there were no witnesses to the fight, the client had a prior record, he was inarticulate, nervous, in fact, scared to death. It was doubtful whether he would make a good witness in his own behalf. We filed several pre-trial motions, spent a lot of time with the client, selected a jury and proceeded to trial. At the close of all the evidence, the jury went out to deliberate. The judge called me to the bench and proceeded to critique my conduct during the trial. He chided me, stating again that although this was a simple case, I had treated it as though it was a death penalty case. He thought I was taking the matter far too seriously, given that he had many more important cases on his calendar. He felt I had wasted valuable courtroom time and was very disturbed that I would devote so much energy to this case when he also knew that I had what he perceived to be much more serious matters in my caseload. Little did he know that I treated his critique as a supreme compliment.

I recalled an event shortly after I had

graduated from law school and was working in an experimental public defender office in Chicago. I had gone home for the weekend and had met an old close friend who asked me what kind of work I was doing. I told him I had just started practicing and was handling some very small cases, minor misdemeanors, etc. He replied very dramatically, that he was disappointed in me; he told me that there are no small cases, there are only small lawyers. And, of course he was right, because to the accused each case and each day in court is very important, sometimes having a profound impact on the rest of their lives.

When the jury came back in the gun case with a not guilty verdict, my client broke down and cried in open court. The judge called me back to the bench and apologized for his remarks. I knew my friend would appreciate the time and energy devoted to a "very simple" case.

Perhaps Clarence Darrow said it best:

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Strange it may seem, I grew to like to defend men and women charged with crime. It soon came to be something more than the winning or losing of a case. I sought to learn why one goes one way and another takes an entirely different road. I became vitally interested in the causes of human conduct. This meant more than the quibbling with lawyers and juries, to get or keep money for a client so that I could take part of what I won or saved for him. I was dealing with life, with its hopes and fears, its aspirations and despairs. With me it was going to be the foundation for motive and conduct and adjustments for human beings, instead of blindly talking of hatred and vengeance, and that subtle, indefinable quality that men call "justice" and of which nothing really is known.

Speaking of Clarence Darrow, when you think of great lawyers, who comes to your mind? I think of Thurgood Marshall, a lawyer devoted to the pursuit of justice and equality. I think of Archibald Cox, a lawyer who placed principle first, I think of Nelson Mandela, I think of Marion Wright Edelman, I think of Clarence Darrow, all lawyers with a social conscience, lawyers searching for the meaning and implementation of justice. Today, there is no shortage of challenges for those of us in the legal profession. I believe it was Oliver Wendell Holmes who stated that: "Those of you who aspire to greatness in the profession, must involve yourselves in the agonies of the times."

Now, I am not suggesting that you all rush out and become criminal defense lawyers or prosecutors or civil rights lawyers, legal services lawyers, or lawyers for the poor. Certainly I hope that some of you will, but this is not my point. We desperately need lawyers in corporations, in private practice, with solo, small and big firms, in government service, in the judiciary and in legal education, with a social conscience—lawyers committed to social justice. The issue, then, is not who you represent, or where you work, or how much money you make, but rather what are your values and whether or not you

are searching for the connection between your values and the practice of law. It is important for all of us to continue to

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search for that connection. You are fortunate to have excellent examples and role models right here on your faculty: Frank Remington, Louise Trubek, Linda Greene, Herman Goldstein, Shirley Abrahamson and many others. And of course, the Godfather: Professor James Jones.

Judge Harry T. Edwards, in his thoughtful essay, "A Lawyers' Duty To Serve The Public Good," noted that for many law students today, the view of the legal profession as a dual responsibility to both serve the client and the public good is often confused by the time of graduation. He stated that many graduates view their degrees as if they were M.B.A.'s as

opposed to J.D.'s. He suggests that the obligation to serve the public should impel a lawyer to participate meaningfully in the formulation of societal decisions and that because of a lawyer's special skills and status, opportunities for such participation are easy to find: with bar associations, legal aid groups, school boards, in politics, legislative activity, and even with your influential clients. Therefore, outside the work place as well as inside, lawyers owe to society more than just billable hours.

Finally, I would like to close with a short reading from Judge Leon Higginbothams' "Open Letter to Justice Clarence Thomas." I encourage you to read the entire letter published in the University of Pennsylvania Law Review. He ends the letter by stating:

"You, however, must try to remember that the fundamental problems of women, minorities, and powerless have not all been solved simply because you have 'moved on up' from Pin Point, Georgia, to the Supreme Court. ...You were born into injustice, tempered by the hard reality of what it means to be poor and black. You have found a door newly cracked open and you escaped. I trust you shall not forget that many who preceded you and many who follow you have found, and will find, the door of equal opportunity slammed in their faces through no fault of their own. And I also know that time and the tides of history often call out of men and women qualities that even they did not know lay within them. And so, with hope to balance my apprehensions, I wish you well as a thoughtful and worthy successor to Justice Marshall in the ever ongoing struggle to assure equal justice under law for all persons."

To those of you for whom the door to legal education has been opened either through merit, privilege, luck, or through the efforts of others—the struggle awaits you and I am confident you will rise to the occasion.

Thank you.