The Mid-20th Century Lawyer

Remarks

By

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This is a very happy occasion. It is a great pleasure to be here to honor the lawyers before Kiwanis. Each for decades has played a stellar role in the play of dynamic forces giving shape to America's way of life. Such was the identity of direction that it was written in the stars that one day the Kiwanis would want to talk on "The Lawyer."

A prime goal of each is to promote better citizenship and better social institutions. High on this agenda is an interest in the progress of the legal profession. Being a member of that profession I will stick to my last. My topic is, "The Mid-20th Century Lawyer."

I pass quickly over the many things concerning the lawyer that our friends and neighbors take for granted. For instance, the legally trained almost invariably are active and articulate participants in the economic and social life of town and country. Likely having served with distinction in one or both of the global conflicts, Mr. Average Lawyer, a civilian again, gives his time to charitable enterprises and religious affairs; and he exercises conscientiously his right to the ballot. He is part and parcel of a mature, vigilant and enlightened electorate. His debates, altercations and contentions, whether expressed in the courtroom, on the stump around the hustings or in the town meeting, help mold public opinion. Any school child knows that from one Esquire's clashes in the courtroom with his brother Esquire on the opposite side of a case, many of our basic truths have evolved, as translated by another brother-lawyer -- His Honor on the bench.

We have our cultural side, too. Noah Webster, one of those who later "agitated for the calling together of the Constitutional Convention," compiled his first speller, forerunner of the dictionary, as a means for supplementing his income as a lawyer. Boswell of Samuel Johson fame began the practice of law in Edinburgh as heir to a 10-mile manorial estate, predicting a brilliant future for himself. William Howard Taft, to name a more recent lawyer whose accomplishments, besides teaching me Federal Procedure in Law school, are to numerous to mention, wrote a very fine book entitled "The Chief Executive."

Still reflecting on the obvious, the economic facts of life may make legal services peculiarly available to the so-called entrenched interests. Yet traditionally there have always been those ready to afford advocacy to the underdog, testimony to our eternal vigilance in preserving our country's institutions. Of the fifty-five signers of the Declaration of Independence, drafted largely by 33-year-old lawyer Thomas Jefferson, twenty-six were lawyers, and among the 550 members of the French National Convention convening after the fall of the Bastille, 350 were lawyers. These undoubtedly represent the greatest efforts of all time to correlate abstract justice and the law. Their technique has been used since, but never before had men the faith or the ingenuity to direct pleas to so vast a jury. Those appeals were to the conscience of the world.

The legally trained are indispensable to a society where the welfare of the individual is paramount. Law is the only reasoned adjustment to human relations. It is the expression of the best

aspirations of humanity. How different is the march of the political philosophy which seeks to challenge our own. Its grotesque and brutish pattern is now familiar. First there is the campaign of false propaganda, then terrorism followed by rigged elections, jailing of the opposition, and, finally, after execution of one or more of the leaders, there emerges the old familiar government by men, rather than by law based upon principles and ideals of justice.

The lawyer's role as officer of the court is important in the administration of justice. The degree of freedom individuals must renounce in our complex society is decided by democratic processes. The lawyer, however, expressly undertakes to forego more than other segments of our citizenry. Essentially the trust thereby imposed in that he will do his part toward conducting actions in an orderly manner and free from political, racial and religious animosities, to the end that causes be tried and decided on their true merits.

Peter, the Great, as a 17th Century visitor to London, was amazed at the number of lawyers at Westminster Hall. Reports have it that he said there were but two lawyers in all his dominions, and that he had made up his mind to have one hanged when he got home. A past president of the Colorado Bar Association, no doubt, was relying on other and more recent evidence when he said, "The lawyer is the product of democracy. When dictators seize power, they liquidate the lawyers. They want no lawyers to be in the way by asserting the rights of citizens." Rightly called the "soldiers of our civil life" the contribution of the legally trained to the maintenance of democratic institutions has been

enormous. This influence has been important abroad as well. Past president Lashley of the American Bar Association two years ago made a trip to France, Italy and Germany to tender the understanding and aid of American lawyers to their brothers overseas, upon whom Europe must depend for preservation of these ideals.

The legally trained are keenly aware of the ethical responsibility which the public trust imposes. Hence, the continuous sharpening and refinement in the selection process among candidates for a career in law has more than kept pace with [illegible] of standards in the other professions. Though advocates were a standing order in England prior to 1255, and barristers as early as 1291, they were the creation of custom, not statute. Early in the 15th Century, Parliament provided that none but "good and virtuous" men, "learned, and of good fame," should be examined, sworn and registered as attorneys, and that any such found in default thereafter "shall forswear the court." The substance of this British statute had its origin in French and Roman law but it came to the New World as part and parcel of the Common Law which served as the foundation of our American Law.

The number of lawyers in the States at the close of the Revolution has been variously estimated at from 300 to 700. By the middle 1880's the profession numbered 70,000 strong. Efforts of the profession itself, through the bar associations and the law schools, in gradually revising upward our standards have met with general public approval. In a very real sense the graduates of today's law schools have the requisite technical training to admit them to this finest profession in the land.

Every lawyer c... maintain the high standards which the public has come to expect. All of us need an outlet broader than our day's work. Participation in the activities of civic organizations like Kiwanis and of local, State and National bar associations affords him friendly accociation and a medium for the exchange of ideas. Especially, the local association affords a channel in which to blow off steam. Such exchanges of ideas can go far toward divesting us of that characteristic which Mr. Justice Holmes attributed to judges and which Mr. Justice Douglas said lawyers incline to as well, by being "more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."

Our friend and neighbors evince varying degrees of interest in lawyer-brothers of the practitioners and judges. I refer to the lawyers who sometimes head and help to staff the state and federal governmental agencies created largely ... the last three decades of expansion in use of the administrative process. These commissions and boards have been created to protect rights and to interpose obstacles to wrong doing. Because a particular decision or adjudication involvi..., close ... ting the application of public policy may affect the aspirations or asserted rights of innumerable interested parties, these decisions, on occasion, may become the subjects of widespread public discussion. However, the administrative agency is designed to insure continuity and uniformity in the application of law through competency derived from specialized experience and concentrated study. As a legal

institution it has so stood the test of war and peace that its place in our jurisprudence seems to be assured.

In the field of administrative law, certain sections of the Administrative Procedure Act tend toward bridging the gap between the general practitioner and the specialist in practice before many federal agencies. Its influence likely will spread to state agencies. International law is still a frontier, but the future of all law well may depend upon how well that frontier is fortified and defended against the opposing idealogy of force. Despite the oft told story of a 19th Century Commissioner of Patents who resigned because everything possible of invention had been patented, that field remains bright, and far-reaching changes have been made in the field of trade-mark law.

One contemporary problem is as old as jurisprudence itself. Justice delayed is Justice denied; but summary judgment is no panacea. The 20th Century practitioner and his clients are the beneficiaries of substantial progress that has been made in the direction of speedy trial or hearing, on the one hand, and the full protection of the rights of litigants, on the other. Especially is this being achieved through increased emphasis on opportunity for pretrial conferences and settlements. The availability of the former is encouraged also by the Administrative Procedure Act of 1946. The Act, I believe, is a landmark in the evolution of federal administrative law. As you know, it deals comprehensively with all phases of the administrative processes, including separation of prosecuting and deciding functions, evidence, rule making, appeal, and public information.

I had enviable opportunity to observe the impact of this legislation on the Federal Trade Commission where I have had the honor of serving as Commissioner for more than thirteen years and from which I resigned recently as Chairman in order to resume the practice of law.

The Commission, may I state in passing, is not a body determining disputes between litigants, but its primary duty is to preserve free and fair competition by preventing the use of predatory business practices in interstate commerce. Through the years following its creation in 1914 it had developed a procedure affording parties full opportunity to be heard and had published its rules of practice, together with certain general policies by which it was guided. Hence, the Act brought no real revolutionary change. It made, however, certain revisions, most of which referred to practices and procedures long in use but never reduced to writing. It caused us to analyze and evaluate most carefully such procedures and then express them in greater detail for the benefit both of counsel for respondents and applicants and for our own attorneys. Among others there were changes as to the form in which officers presiding at hearings were required to present their reports. Long prior to the Act the Commission had effected an administrative divorcement of its prosecuting and deciding functions. Necessary revisions in other respects were made as rapidly as possible, but some had to be postponed until effective date of the Act when legal authority thereunder was conferred.

There persists among lawyers of my age the same fond and fatherly interest which the elders of my law school days dis-

played toward me and my contemporaries, as just prior to World War No. I, we were completing the academic phase of this indoctrination course we call the study of law. The more mature braves delight in reminding newcomers that, unlike the ceremony of great dignity by which young American Indians of proved worth were accorded the status of the Brave and forever after shared in the responsibility of tribal councils, no magic transformation occurs through survival of the trial by ordeal inherent in bar examinations. Presumably, older warriors believe that the young lawyer's prime function is to grow older, and that, like the law, he is but a process, and not the completed product. Additional testimony is that of an English barrister, rich in maturity, achievement, and clientele, who observed that, when young, he lost cases he should have won; and, when older, he won cases he should have lost; and summed it up by indicating that, thus, on the average, justice had been done.

The coals in the pipe of peace and friendship sometimes burn low in the tense atmosphere of court or hearing room. Although it has happened but rarely during oral arguments before the Federal Trade Commission, all judicial or quasi-judicial officers at one time or another have viewed the awe-inspiring phenomenon that is an angry lawyer engaged in denouncing the social or economic objectives underlying a particular legislative enactment, or in challenging the more liberal rules of evidence that prevail in administrative proceedings. These grounds are being urged less and less frequently on appeal, as more lawyers become familiar with this field of the practice.

Commenting on some practitioners whose participation in this field had been only occasional and who, therefore, had used the appellate court room for relief of resentment or tension rather than for factual and legal recitals, former appellate Judge Justin Miller said that:

> "Perhaps it would make them happy to know that we have heard many times, and from many experts, about 'star chamber procedure', the 'dictatorship of the bureaucracy,' and the passing of 'the rule of law'. If we could stipulate with counsel that we take judicial notice of all these arguments, it would save us an occasional earache and save such counsel much time for oral argument."

As to the shape of things to come, I believe that increased public confidence and respect will inure to our legal institutions, provided we lawyers steer our course on the beacon of as officers of the court, avoiding shoals of crass commercialism, a commercialism so aptly illustrated by a humorous comment made two years ago at the American Bar Association meeting in Cleveland by my British barrister friend, Member of Parliament, and former Counselor of the British Embassy in Washington, Brigadier John Foster. He had for his topic the subject, "The Barrister in Parliament" and he stated that there were not many of them in Parliament, perhaps because, too often, too many people passing the Inns of Court on a warm day, might have overheard one barrister, in conference with another, say, "What, settle the case and see the estate frittered away among the beneficiaries"?

Further on the subject of things to come, I believe that lawyers will continue to enjoy the abundant life, the greatest

blessings of which are as abstract as the ideals of their jealous mistress, the law. Rich in fellowship, too, are lawyers, as Shakespeare observed centuries ago:

"And do as adversaries do in law
Strive mightily, but eat and drink as friends."

Far from being a thing separate and apart, the bar, as a matter of fact, is a splendid index to public virtue. Corruption of its standards inevitably would infect the whole body politic. I shall conclude with a reference to our trust, so well spelled out by former Chief Justice Hughes, (with whom I once had the honor to cross legal swords) when he described, as follows, democracy's stake in the bar:

> "With a sound, courageous, and independent bar, a foe of demagogy but a friend to rational imporvement, vindicating its expert leadership by intelligent conception of the interests of the community, and by its zeal for the better administration of justice which is its especial care, democracy will not essay its tasks in vain."