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FORUM JURIDICUM

THE AMERICAN LAWYER — DECLINE OF LEADERSHIP*

*George W. Hardy, Jr.***

It is meet and proper that I express my sincerest appreciation of the honor which has been conferred upon me. I am keenly aware of its distinction and sensitive to the responsibility which is placed upon the recipient of such an award. For me this ceremony does not mark an end by reason of the achievement of a long-cherished goal. It is the beginning of a challenge to renewed effort and diligence by which I may prove myself more worthy of the honor and more fit to walk in the company of those true scholars of the law who have been in the past, and will be in the future, admitted to membership in this Order. To say that I am somewhat overwhelmed would be true. To say that I am rendered speechless — however desirable — would be false.

The notification of my selection for induction as an honorary member of this Order advised that I was expected to prepare and present a paper on some topic of professional significance. Shortly thereafter I was helpfully informed, from another source, that the paper should be scholarly in preparation and presentation. The use of this adjective aroused a feeling of considerable concern, indeed, of trepidation. Before taking the drastic, but clearly indicated, action of withdrawing my acceptance of the honor, I repaired to the dictionary. "*Mirabile dictu!*" I found, as one of the definitions of the word "scholar," the following pronouncement:

"A literate person — specifically one who can read and write."

Let this at once constitute my authority and my apology, for who am I to argue with Webster?

I am further heartened by the knowledge that others, far more worthy of honor, have expressed the same fears under com-

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parable circumstances. This reaction was appropriately phrased by Adlai Stevenson upon the occasion of his acceptance of an honorary degree from McGill University in 1959 when he said:

“I find honorary degrees always tempting, and often bad for me: tempting because we all — even ex-politicians — hope to be mistaken for scholars, and bad because if you then make a speech the mistake is quickly exposed.”

The next difficulty that presented itself was the selection of a subject of professional significance. It appears that there are two customarily approved types of approach — either an academic consideration of some important problem of law or a discussion of some facet of the judicial process. In rejecting both of these sanctioned patterns I have been influenced not by an innate dislike of orthodox conformity to custom but by an impelling belief that we, who are disciples of the law, should make a considered examination of our own consciences in order to determine whether we are fulfilling the responsibilities imposed. In common with many others I feel the increasing conviction that the American lawyer is on the verge, because of neglect or lack of understanding and appreciation, of abdicating the position of leadership and influence, in matters affecting the public interest, which has been exercised throughout the history of the American people. Doubtless, the content of this address will prove to be provocative. It is so intended.

In the beginning, and for the purpose of developing this idea, it is essential that we understand the obligations of our profession to extend beyond mere compliance with duty. Our primary professional duty is perhaps best summarized in the injunction imposed upon every lawyer in article XV of the American Bar Association Canons of Professional Ethics, which declares:

“No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty.”

But it is a premise of this discussion that the fulfillment of our responsibility is not delimited by the performance of duty. Of the three learned professions, that of law offers the greatest opportunity for service to mankind, for it is not circumscribed by doctrinal adherences nor by completely positive scientific restrictions which are peculiar characteristics lying within the respective professional fields of theology and medicine.

Perhaps my major premise is that no man can truly love the law unless he be dedicated to the cause of justice, and none can serve justice unless he be consecrated to the welfare of mankind. It follows that the potential contribution of the lawyer is but partially and imperfectly fulfilled by his technical perfection in the grasp and solution of legal problems and a single-purposed devotion to the practice of law. By tradition, beginning in the earliest colonial period, those who are to be considered as our fathers and forefathers, by relationship through devotion to the profession of law as well as by the relationship of blood, have devoted themselves to every field of interest and action which affected the common welfare. As a consequence, we are become the trustees of the rich inheritance which has been bequeathed to the common welfare of our nation and its people. The areas of government, political science, economics, human relations and the social order fall within the jurisdiction of the influence and leadership which should be exerted by the American lawyer.

The importance of the influence of the lawyer was noted by de Toqueville as early as 1835. In his work "De La Democratie en Amerique" — written after his return to France from a mission to the United States — he observed :

"I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."

This is certainly a time and a forum in which we may dare to face truth, however unpleasant; assay the worth of our own response to obligations; acknowledge our sins of omission; and, finally, pass judgment upon ourselves.

In the area of the performance of professional duty, there is little criticism, save in rare instances, which may be directed to the conduct of the American lawyer. In the vast majority of causes clients are represented with zeal and ability by their counsel. But what of the many cases in which persons cannot procure representation by counsel; in respect to civil actions because the value of the claim is disproportionate to the amount of effort and time required in its prosecution; in criminal actions in which an indigent accused is unable to adequately compensate counsel, or in those cases in which the alleged crime is so revolting or so contrary to majority sentiment that a court of public opinion, arrogating to itself the authority vested in

courts of law, renders judgment without the formality of trial and without full knowledge of the facts.

Where are the men of the law when persons accused of serious offenses, convicted by public opinion, seek in vain for able professional representation; when broken-spirited, impecunious individuals cannot obtain the service of lawyers in the enforcement of small, but, nonetheless, just, claims?

Time was when the American lawyer expected and accepted, as a part of his professional responsibility, the burden of asserting or defending claims of little intrinsic worth without expectation of more than token, if any, compensation. Time was when an accused, no matter the nature of the charge, unable by reason of poverty to retain counsel, was represented by the foremost leaders of the Bar. Time was — and the historical annals of the profession support this not only in America, but, indeed, among all Anglo-Saxon peoples — when the most prominent practitioners volunteered their services, without fear of the consequences to fame, fortune, or reputation.

Excuses may be given, disguised as reasons. It may be urged that time has become such a priceless ingredient that it can no longer be sacrificed to the requirements of trivial claims and apparently hopeless defenses; that a lawyer, owing his first duty to his regular clients, cannot jeopardize their interests by incurring the opposition of overwhelming public sentiment. These and other rationalizations do not satisfy the promise of the protection of individual rights provided by the letter of law, much less do they comport with its spirit. The rights which are under the protection of law and justice are measured neither by the value of a claim nor the nature and degree of an offense.

It is comforting to know that these and other related problems are under examination by individuals and groups. Partial resolution of some of these difficulties is to be found in the establishment and operation of legal aid offices and public defender systems. Nevertheless, the hard fact remains that there are vast areas which cannot be served by legal aid offices, and the public defender system is largely in a state of experimentation or unresolved controversy.

An authorized committee in our own state is working diligently in the preparation of remedial legislation which will supply some of the requirements for criminal appeals of indi-

gent accused, at the expense of the state. This is a necessary and worthy undertaking. There remains the necessity for the personal devotion of time, labor, and ability to the service of the cause of justice.

Perhaps at this point it is pertinent to observe that many of us who bitterly complain of government interference are among the first to turn to governmental agencies for such service and support as will save us personal inconvenience and expense.

Passing to other fields, the decline of participation in the operation and administration of government is obvious. This phenomenon is not so much to be observed at the federal level as it is with relation to state and community affairs.

Where are the men of the law when unjust and discriminatory legislation, patently unconstitutional or ineffective, is enacted for no better reason than that such laws conform to political expediency or satisfy currently popular demands?

Using figures compiled as the result of research by the staff of the Louisiana State University Law Library, we find that lawyers in the Senate and House of the Legislature of Louisiana constituted 44% and 31%, respectively, of the membership of these bodies in the period 1908 to 1912; 44% and 30% in the period 1920 to 1922; 46% and 33% in 1931. These figures declined to 31% and 23% in 1952 and to 26% and 25% in 1960 and 1964. If there is any branch of government service to which the ability and training of members of the legal profession should be particularly adapted it is the legislative branch. Admittedly, the tremendous increase in the burdens of legislators has made their tasks extremely arduous, and it must further be conceded that the compensation is not commensurate with the requisite expenditure of time and effort involved. But it would seem that the spirit of adverse criticism which pervades the membership of the Bar with reference to superfluous and imperfect legislation might inspire a willingness to offer some personal sacrifice by qualified individuals.

In these areas of government and public service it is not necessary that lawyers actively participate, but it is essential that they renounce the attitude of passive acquiescence, if not acceptance, of injustice.

Where are the men of the law when legislative bodies engage in the conduct of inquisitions under the pretext of the prepara-

tion and consideration of proposed legislation? Before TV cameras, batteries of microphones, and eager representatives of the press, these groups make Roman holiday by subjecting unfortunate witnesses to a strange ordeal. The threatening declaration — “I hold in my hand a list of names —” and impossible questions of the “have-you-stopped-beating-your-wife” type are calculated and designed to rouse fear in the heart of a hapless victim. And, if a witness resorts to the invocation of the constitutional protection provided against such rank injustice, he brings upon his head a storm of cynical condemnation.

Where are the men of the law when individuals are harassed, heckled, and hounded because they venture to express private opinions that are opposed to public sentiment; when the presentation of these sincerely-held beliefs is embarrassed, interrupted, and sometimes completely terminated, by conduct more to be expected at the bull ring than before audiences of supposedly normal, reasonable adults assembled in a public forum? The greater pity is that this reprehensible conduct is emulated by college, high school, and even grammar school students.

Where are the men of the law when courts are castigated and judges excoriated by those unversed in law and influenced solely by self interest? Do we subscribe to the popular method of evaluating the worth of judicial decrees — the standards by which the judgment of a court is condemned if our ox is gored and praised if our sacred cow is protected?

Where are the men of the law when not only public officials but the very institutions upon which our republican form of government is founded are attacked, made suspect, and exposed to public scorn and condemnation by irresponsible and slanderous charges?

Where are the men of the law when the public is being instructed in involved questions of constitutional law and that most difficult of legal subjects — the conflict of laws — by ex-FBI agents, by ministers without pulpits, by teachers without classrooms, and by news media commentators more influenced by sensationalism than sense?

Where are the men of the law when patriotism is measured in decibels generated by the volume of public proclamation shouted from the housetops and voiced in the market place,

rather than by the quiet, unassuming devotion which has erstwhile been accepted as a common attribute of this virtue?

Do those who are terrified by the possible development of a police state, recognize the equal basis of fear resulting from the excessive, oppressive, and, sometimes, brutal, use of police power? Can we justify the use of force to effect our own "righteous" purposes and condemn the same instrument when it is employed by those who uphold opposed opinions? Is the right of free speech the exclusive possession of those who advocate majority beliefs? Are lawyers whose professed purpose is the pursuit of truth, willing to accept assertions of fact without examination and verification, motivated to such acceptance solely by the weight of personal desires and predilections?

Where are the men of the law when treason is a facile charge, uttered without fear of consequence or necessity for proof?

Are those who fear destruction of our nation aware that the most powerful and effective weapon of an enemy is expressed in the cry "divide and conquer," and that destruction comes more surely from internal divisions attendant upon prejudice, hatred, anger, and intolerance than from any external source?

Where are the men of the law? The withdrawal to ivory towers of seclusion and contemplation has been the insinuation of many who have decried the alleged self-imposed isolation of academicians from reality. It is more than passing strange that in time of crisis and concern, when our hallowed institutions are under attack, when our rights are jeopardized, it is most frequently the voice of the academician that is raised in fearless protest.

Where are the men of the law? Have they withdrawn behind the golden screens of personal counting houses where are stored the material evidences of what men accept as success; do they seek seclusion in private clubs or other places of recreation and entertainment where acoustical miracles shut out the moans of the oppressed and the cries of those in need? Where are the men of the law?

Is it true, as has been charged by a practicing lawyer that:

" . . . lawyers, despite their addiction to conflict, share in

common with the rest of mankind a natural resistance to involving themselves in situations fraught with grave consequences to their pocketbooks, their reputation and their peace of mind."

Is it true that the unforgivable sin is the risk of offending a client, by holding opinions and asserting beliefs which do not accord with his ideas?

Is it true that we are content to satisfy ourselves with "small aims" and torture our souls with "large fears"? Is it true that we are willing to sacrifice the pursuit of ideals in the interest of practical benefits?

Time was, in urban centers and rural settlements, when lawyers were trusted counsellors whose opinions in all affairs were freely given and received with respectful consideration. They served as arbitrators of small disputes, as advisors with respect to innumerable problems, and their only fees were the thanks of their friends and neighbors.

The ratio of members of bench and bar to population in the continental United States is approximately 1 to 600. If we choose to exert a proportionate effort it will have a substantial effect which could lead to a solution of many of our problems.

The power of reason, highly developed by every process of education, training and experience, is a lawyer's most valuable possession. The first duty of a lawyer is to exercise this faculty and attempt to work out a satisfactory basis of agreement between a client and his adversary. One of the proudest titles worn by Solon of Athens was that of Mediator. Through the use of reason the leadership of the lawyer may become a powerful factor, and his skill in mediation can do much to quench the fires of passion which distort, and eventually destroy, reason itself. In his first inaugural address Thomas Jefferson declared:

"Error of opinion may be tolerated where reason is left free to combat it."

It may be that we are losing ourselves in a labyrinth of legal distinctions and technicalities; that we have become so steeped in matters of law, so immersed in our own interests that we have neglected to perceive the existence and recognize the magnitude of the problems of life. It is a mistake to so disassociate

ourselves from reality. We cannot eliminate the problems of poverty, illness, old age, the rights of minorities, by denying their existence or by failing to accept responsibility for their alleviation. The ills, the needs of mankind are our concern. The poor, the needy, the mentally and physically ill, the criminally accused, the aged and the infirm, these and other substantial segments of our population have no retained agents, no paid lobbyists to represent their interests. Where shall they look for help? To whom can they turn for leadership?

This is a time of conflict marked by the development of new problems, but we err when we fail to recognize the historical fact that each generation of man is faced with conflicts and problems, some inherited from the past and some of its own making.

Indeed, this is a time of war. A war not waged with lethal weapons designed to destroy life but one in which subtle and dangerous artifices are used in the effort to control and subjugate the human mind. Our efforts to combat the brainwashing tactics of foreign enemies will be futile if we submit to the same procedures employed by one or another of the many divisive groups among our own people, each of which strives to impose its own opinion and denies even the right of expression to those who sincerely hold other views.

Where are the men of the law when self-appointed censors, acting as individuals or representatives of racial, religious, and national groups, are busying themselves in altering and amending text books, proscribing literary works, condemning teachers?

Are we so fearful of opposed opinions and beliefs that we will suppress their expression rather than debate their validity? Opinions are rarely entirely right or completely wrong. It is in the white heat of controversy that we may forge the shining sword of truth, the instrument which will free us from the bonds of arrogant pride and blind prejudice, from the selfish designs of caste, class, and mass.

Through passive acquiescence we are permitting the development of a strange and dangerous creed of belief which may be phrased:

"You may pray, O, Priest, if you pray *my* prayer to *my* God; you may teach, O, Teacher, if you teach *my* lesson and *my*

interpretation; you may decide, O, Judge, if your judgment accords with *my* interest; you may govern, O, Minister, if you belong to *my* party; you may think, O, Man, if you think *my* thoughts; you may speak if you voice *my* opinion."

All implications of slanted news are strenuously denied by all agencies of communication, yet it is significant that many of these agencies themselves attack their rivals, in the same or related fields, on the ground of distortion or suppression of fact. It is entirely likely that the greater danger is implicit in the iterated emphasis that is placed upon our divisions. Every incident that points up a conflict of political principles, religious faiths, racial discrimination, economic disputes, is magnified, and the conclusions drawn from such incidents are subject to divers interpretations dependent upon the sentiment of geographical areas or the predominating force of local public opinion.

Who is more able, who should be more willing, to assert the right not solely of freedom of speech but freedom of thought and opinion than the American lawyer? It is time for us to join in the oath of Thomas Jefferson which is struck in bold relief about the base of his memorial monument in the capital of our nation:

"I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."

Are we so intoxicated with the evanescent perfume of material success, so deluded by the mirage of fame, so possessed by the vanity of position that we are become timid, fearful, and unwilling to risk these shining baubles upon the turn of the wheel of life?

One of the most courageous acts in history was the publication of the American Declaration of Independence. Of the 56 signers of this immortal document, 25 were lawyers. In the face of overwhelming odds this little band of valiant souls pledged the devotion of their lives, their fortunes, and their sacred honor in the joinder of a combat which could lead into the darkness of death upon the gibbet or into the light of freedom from tyranny.

There are notable exceptions to the general course of lethargic *laissez-faire* we appear to follow. One of the shining examples of community leadership is exemplified by recent de-

velopments in this very city. An outstanding leader of the Bar displayed rare foresight, wisdom, and courage in firmly grasping the stinging nettle of a potentially explosive and highly controversial problem. His efforts, and those of the associates whom he enlisted in this cause, prevented the spread of the poison of civic violence.

Another of the hopeful signs of a reawakening of interest in our problems is noted in the growing tendency of law reviews and legal journals to reach beyond the scope of technical legal problems and touch the greater expanse of public responsibility in the numerous areas of human relationships.

The questions in recurrent waves roll from the sea of human experience upon the beach of consciousness. They will erode our smug self-satisfaction; they will demand an answer.

What is the answer? There is none that any one of us may give for another. Let us surrender the luxury of shifting the burden of blame to the shoulders of our fellows; abandon the protestation of time-worn excuses; strip ourselves of every vestige of hypocritical righteousness under which we have sought to hide our own insufficiencies.

There is no prophet, like unto Nathan of old, to point the finger of denunciation and cry "Thou art the man!" Each of us must stand and answer before the judge, whose name is Conscience, who holds court in the chambers of our own hearts.

In the end, like Cyrano, we will recognize our old enemies, Compromises, Prejudices, Cowardice, and Folly. Against these, even in the face of Death, let us lift the sword of Truth in defense of the plume of Honor. And this above all: let us

"Mourn not the dead, that in the cool earth lie,
Dust unto dust;
The calm, sweet earth, that mothers all who die,
As all men must.
But rather mourn the apathetic throng,
The cowed and meek,
Who see the world's great anguish and its wrong,
And dare not speak!"