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SHERWELL LECTURE: "IN THE KEEPING OF LAWYERS"

WILLIAM T. GOSSETT*

One of the amenities of our profession is that it is easy for one generation to talk with another. A common interest in the progress of the law and of the profession binds us together regardless of age or length of service. You will discover, I think, that there are never any final answers in the law. Many of the things that disturbed me when I was a student must be a matter of concern to you today. And although I often thought that I had hit upon a new dilemma, I always found that generations before me had worried about many of the same things.

Last year I attended exercises commemorating the seventy-fifth anniversary of the founding of The Franklin Thomas Backus School of Law at Western Reserve University, in Cleveland. The principal speaker was Henry J. Friendly, Judge of the United States Court of Appeals for the Second Circuit.

Judge Friendly, who was graduated from Harvard Law School forty-one years ago last June, with highest honors, made some provocative comments about the function of a law school. Said he, "the task of educating young men and women for becoming lawyers in three short years is one of incredible difficulty, since law students, in contrast to candidates for medical, engineering and other degrees, come to graduate school without any significant knowledge of or preparation for the law; and neither they nor their teachers know exactly what law is."

It is "essential," said Judge Friendly, "that the student acquire a legal mind;" and he then undertook to define that term. I was especially interested in the discussion, because the only definition of a legal mind that I could recall was one attributed to Disraeli: "The legal mind", said Disraeli, "chiefly consists in illustrating the obvious, explaining the self-evident and expatiating on the commonplace."¹

But Judge Friendly was more favorably disposed toward lawyers; and he undertook to "note some characteristics" of a legal mind, even though he said he could not "formulate a comprehensive definition."

* Address of William T. Gossett, President, American Bar Association, as the second Sherwell Lecture at the Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia, October 10, 1968.

1. Speech in House of Commons, June 3, 1862. II V. GREY, DISRAELI, ch. 7.

The legal mind [Judge Friendly said] is an inquiring mind; its favorite word is "Why." It is an analytical mind; it picks a problem apart so that the components can be seen and judged. It is a selective mind; it rejects characteristics that are not significant and focuses on those that are. . . . It is a classifying mind; it finds significant differences between cases that superficially seem similar and significant similarities between cases that at first seem different. It is a discriminating mind; it has a profound disbelief in what Professor Frankfurter used to call "the democracy of ideas." Learning to ask the right questions, not just the obvious ones, to have some notion of how to go about seeking the answers, and then to exercise the priceless quality of judgment—these are the prime skills the student of law must be helped to acquire so far as in him lies. . . .

Having quoted Judge Friendly at some length, let me now assume that all of you like the law; that each of you has found or will find that he has a legal mind; and that you will be graduated from this fine law school with the blessings of the Dean and the faculty. If so, what kind of a life can you expect as a lawyer; and what will your obligations be as members of a noble profession?

The life of a lawyer, as you know, frequently is not really a single career but a sequence of careers: practice in a public law office; private practice; teaching; government service (sometimes other than as a lawyer); staff or administrative responsibility in a private organization such as a corporation or labor union, and so on. The fact is that a growing number of legal careers reflect such a pattern. It involves, among other things, learning a series of new jobs, a series of new skills, and a series of new perspectives. Thus, a "career in the legal profession" offers a far more rewarding and more challenging set of responsibilities than even the rich mixture that it is conventionally conceived to be.

Mr. Justice Harlan, of the Supreme Court, several years ago described three aspects of the lawyer's work and responsibilities:

It is no less true than trite [he said] that lawyers must operate in a three-fold capacity, as self-employed businessmen, as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.²

Mr. Justice Harlan's first two functions of a lawyer refer, of course,

2. Mr. Justice Harlan, *Planning a Career at the Bar* Address at the Law School, University of Michigan, October 24, 1959.

to his individual aspirations and his conventional professional responsibilities. His individual aspirations begin with the immediate personal desire to achieve security, to make a good living for his family and himself through his professional earnings; and they extend to the desire to live a fully rounded life and, despite the commands of fate, to be true to his own standards and ideals.

But as Mr. Justice Harlan recognized, the responsibilities and life of a lawyer are broader and more fundamental than that; he has an obligation to participate actively in the process of bringing the law into accord with new realities, responsive to new needs and in league with new opportunities.

We need to restate from time to time the social obligations of our profession, for their specific character changes even though the guiding principles have a longer history than the country itself.

Lawyers, with the clergy, were the learned men of the colonial community. When the First Continental Congress met in 1774 to define the great issues of that time, half the delegates were lawyers. When the Second Continental Congress adopted two years later the Declaration of Independence, of the fifty-six signers, thirty-two were lawyers or judges. And in 1787, when the Constitution was drafted, two-thirds of the delegates were lawyers.

For decades thereafter the legal profession represented the most influential of all callings in America. So distinct was the lawyer's position early in our national history that it was one of the most salient facts about the American community. The great French commentator, Alexis de Tocqueville—himself a lawyer and magistrate—writing in his monumental *Democracy in America*, reported at considerable length, as we all know, on the special and exceptional role of the lawyer in the early days of this nation.

. . . I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people. . . . If I were asked where I place the American aristocracy, I would reply without hesitation that . . . it occupies the judicial bench and the bar. . . . As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations . . . they consequently exercise a powerful influence upon the foundation of the law and upon its execution.³

3. A. DE TOCQUEVILLE, I *DEMOCRACY IN AMERICA*, 276-79 (Knopf ed. 1951).

But in the century and a quarter since de Tocqueville wrote, our entire social context has changed. We have grown, as you know, from a small homogeneous agricultural-mercantile community, bounded by the Atlantic and the Mississippi, to a heterogeneous industrial nation spanning a continent and with influence and responsibilities circling the globe. Accompanying this dramatic social evolution has been a corresponding transformation of the structure and organization of the legal profession that serves our society.

The practice of law today, to keep abreast of the inordinate demands made upon it by a fast changing society, requires paradoxically both a broader knowledge and a more specialized grasp of the law. The range of activities to which old laws are applicable, and in response to which new laws are enacted, grows almost daily. And so we are witnessing not only a radical social transformation but a parallel re-orientation of the whole legal profession.

Today, for example, individual practitioners, though still a mainstay of the profession, represent fewer than forty per cent of all lawyers, a decline in the past two decades alone of thirty-three per cent; and one of every three lawyers in private practice is a partner or associate in a law firm. At the same time, the proportion of lawyers devoting their careers to government service has risen to one out of every seven; and one lawyer in nine is employed full time by a private concern.

I remind you of these trends because they make the lawyer's task of specifying and fulfilling his public responsibility far more ambiguous than it has been in the past. Indeed, we of the legal profession should realize that some of the forces in modern life have raised some question as to whether we are wholly aware, to quote a recent statement, of "the role of the lawyer as that of trustee of the integrity of the forms of social order, in the sense both of guarding against deleterious activities and of exercising constant zeal to improve their operation."⁴ Nevertheless, the general terms of that responsibility still are perhaps easily stated. Mr. Justice Frankfurter put it this way: "It is not hollow rhetoric to say that the comprehensive interests of man that are guaranteed by the constitutional protection given to 'life, liberty and property' are in the keeping of lawyers."⁵

And more recently Mr. Justice Fortas said it no less accurately than it could have been stated a century and a half ago when he said:

4. V. COUNTRYMAN AND T. FINMAN, *THE LAWYER IN MODERN SOCIETY*, 508.

5. Letter of November 18, 1953, to Honorable Joseph A. Moynihan of Detroit, Michigan.

... [A] lawyer ... has a special role in our society. He is a professional. He is not merely a practitioner of a difficult, exacting and subtle art form. He is ... specially ordained to perform at the crisis time of the life of other people; and almost daily, to make moral judgments of great sensitivity. He is the principal laboratory worker in the mixing of government prescriptions. His is an important hand at the wheel of our economy because, as a lawyer, he has a profoundly important voice in business transactions. And, of course, he is the custodian of the flaming sword of individual justice and personal liberty, as well as of the public order.⁶

The rule of law is, of course, and always has been, an ideal something to be striven for and, as we are learning from recent events, never a reality wholly accomplished. And it is of the nature of ideals that they can only be approached—usually slowly and not always easily—and may very well never be completely attained.

“We believe in law,” said Mr. Justice Jackson, “not only as a rule of conduct, but as an intellectual discipline capable of directing the thought and action of law-trained men and, through their leadership, of guiding men and masses away from violence, vengeance and force, and toward submission of all grievances to settlement by fair legal procedures.”⁷ Mr. Justice Jackson thus gave expression simultaneously to a noble ideal and to the responsibility of lawyers in working towards it. The vast horizons of the challenge implicit in his statement are, in our rapidly changing times, broad and almost limitless. In the short space of this lecture, all of those horizons cannot be explored. But we can touch upon two or three of the most pressing problems on the domestic scene.

We have here at home problems, unanticipated by the authors of our legal heritage, that might impinge upon the dignity of our lives; and they tend to diminish those qualities of freedom and security that we justly associate with life under the rule of law. Technology, for example, has so advanced as to make possible invasions or reductions of the right of privacy that no man could have envisioned even so recently as in your parents' generation. I refer not only to electronic eavesdropping, but also to the ability of the computer to store and make readily accessible detailed information about the activities of indi-

6. Mr. Justice Fortas, *The Training of the Practitioner*, Dedicatory Address, Rutgers University School of Law, September 10, 1966.

7. Mr. Justice Jackson, Address at the American Bar Center Cornerstone Ceremony, Chicago, November 2, 1953.

viduals. At the same time, our society has become so complex and its pace so quick that its best interests cannot be protected and advanced without the wise and judicious use of the new tools at our command.

To the legal profession should fall the obligation to bring about a proper balance between the use of new technology on the one hand and the protection of the privacy and freedom of the individual—the ultimate objective of all law—on the other. Lawyers must take the lead in resolving this thorny paradox between public good and private rights. That great realist of the American Bar, Harlan Fiske Stone, defined the problem several years ago: “The conflict between individual freedom and the private interest which it envisages, with the public interest, is never-ending. The line of battle shifts and will inevitably continue to shift as civilization becomes more complex and the interest of the whole becomes increasingly sensitive to the mistake or misdeeds of the few.”⁸

Let me refer you to a related area, though less novel in its content. A distinguished Pennsylvania judge, Curtis Bok,⁹ once said:

In the whole history of law and order, the longest step forward was taken by primitive man, when, as if by common consent, the tribe sat down in a circle and allowed one man to speak at a time. An accused who is shouted down has no rights whatever.

The legal profession long ago developed a term to describe the ancient custom of allowing one person to speak at a time, of allowing the accused to speak without being shouted down. As you know, we call it “due process of law”. Due process represents procedural decency and fairness; it came down to us from the Magna Carta, through the common law; and it is embedded in the Constitution of this nation.

In the language of the Supreme Court: “[Due process] is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise.”¹⁰ Without the decency of treatment that is the foundation of due process, there is no freedom, doctrinal or practical, for the individual. Consequently, if lawyers are crusaders at all, as they must be, they are first and foremost crusaders for due process. And if lawyers are public teachers, as they are and must be, they have a continuing

8. A. MASON, HARLAN FISKE STONE, 373 (1956).

9. Associate Justice, Supreme Court of Pennsylvania.

10. In re Gault, 387 U.S. 1, 20 (1967).

responsibility to enlighten the public on the necessity and utility of decency in the law's attitude toward the individual.

People in positions of authority, especially, must be well instructed in the right of every individual to due process and to his day in court. Public administrators, government agencies, college trustees and administrators—even school boards and police officers—should understand due process and respect it as the very cornerstone of the rule of law, without which all the rest of our legal structure would come crashing down. It should be a constant part of the mission of lawyers to remind our fellow citizens that, however emotional the atmosphere and however impatient public attitudes, not only the person under attack but all society suffers if we are tempted by the stresses and strains of the moment to take short cuts in dealing with the fundamental rights of the individual.

There are many areas of life today that cry out for a sharpened sense of due process on the part of all of us. Equal access to the law is one. A person without legal advice because he cannot afford it is, because of that fact alone, deprived of due process. Unpopular people and those serving unpopular causes can be and often are, because of that fact alone, deprived of due process. An accused who is detained in ignorance of his rights or denied a prompt hearing or the right to counsel, because of that fact alone, can be deprived of due process.

There are some notable examples, as you know: You will recall that a lawyer who was a signer of the Declaration of Independence, and who became the second President of the United States, served an unpopular cause and risked ostracism when he defended British soldiers accused of killing several inhabitants of Boston in what became known as the Boston Massacre. John Adams devoted a year of his life to that case. Early in our own century, a lawyer who had been Governor of New York and Republican nominee for the Presidency of the United States, courageously defended the right of duly-elected members of the Socialist Party to take their seats in the New York State Legislature. And more recently, lawyers in Connecticut, in Colorado and in Ohio provided financial and professional aid to defend alleged Communists who claimed they had no money to pay for counsel, even though in one case the state attorney general characterized the lawyers involved as "dupes of Communist Party strategy."

This matter of due process should be the concern of all Americans, but it is overwhelmingly the concern of lawyers. And the lawyer's continuing responsibility for diligent action in the affected areas goes

beyond his professional functions and, indeed, beyond his sworn duty as an officer of the court. It reaches to the very core of his life and of his convictions. Even if every other individual and every institution in our society should forget or subvert process as the cornerstone of our civilization, the lawyer—alone, if necessary; defiant, if challenged; resolute, if discouraged—should never yield on the right of any man, good or bad, rich or poor, revered or hated, to the benefits of due process; should never relax his efforts to enlighten the public about it; and should never silence his demands for it.¹¹

The lawyer also has another responsibility for the decency of the law, to see to its continuous reform. We live in an imperfect world. The laws of no nation have ever achieved the degree of perfection to which a conscientious Bar and an enlightened people aspire. And historically, when laws have been imperfect and ineffectual, it has been the responsibility of lawyers to improve them. In the words of Mr. Justice Jackson, “[a]ny legal doctrine that fails to enlist the support of well-regarded lawyers will have no real sway in this country.”

Another domestic problem of increasing urgency is that of rapidly proliferating conflicts of interest. In a more and more intricate society, this problem itself gets more and more intricate; and we must seek solutions, not by *ex post facto* moralizing, but by arriving at principles of conduct rooted in common justice and articulated with common sense. Confidence in our government, our public institutions and our private enterprises, not to mention faith in the men who run them, cannot survive repeated attacks of doubt, suspicion and reproach upon the inter-relationships of private and public entities. The legal profession is in a uniquely advantageous position to clarify this whole area, in which a great deal more heat than light has been generated. New legislation and codes of ethics, however adequate the terminology, cannot alone do the job. We need to inculcate a firmer sense of responsibility and a more imaginative and prophetic discernment in the making of day-to-day decisions, many of which lawyers control or strongly influence.

For nearly two centuries, lawyers have furnished initiative and leadership to combat forces that have from time to time threatened to weaken the fabric of American life. That fabric is now threatened by a

11. Indeed, the lawyer's obligation to defend due process is embedded in the tenets of his profession, one of which is "never to reject, from any consideration personal to myself, the cause of the defenseless or oppressed." See Malone, *The Lawyer and His Professional Responsibilities*, 27 WASH. & LEE L. REV. 191 (1960).

frightening rise in crime in many of our cities and by a restless ferment in areas where there is a high concentration of social ills and a pressing need for new adjustments in community life. The critical problems thus presented are not going to disappear of their own accord. Far from getting better, they are bound to get even worse if they continue uncorrected.

Lawyers must be deeply concerned, therefore, with the overwhelming realities of the riots that have occurred in our cities and on college campuses. Mob uprisings, whether on the campus or in the ghetto, are negations of justice, and of all that civilized man has striven for over the centuries. As such, they must be dealt with, calmly and with restraint, but with absolute clarity that criminal methods will not go unpunished and that blackmail and violence will not be tolerated.

This means dealing with such uprisings promptly, effectively and with determination, and it means bringing to the bar of justice those who have defied the law. A lawful society has no acceptable alternative. No civilization can live in constant tumult and violence. We will either have civil order, or sooner or later we will have massive repressive measures comparable to those of a police state, which would be a catastrophe for all of us. For if this nation, or the institutions, public or private, that have made it, for all its imperfections, "the last best hope on earth," ever concludes that flouting the law is a right to be exercised at the discretion of everyone or to be governed only by the intensity of his cause, then as a free society we are finished and brute force will take over.

At the same time, our vision of the law must not be limited to its prohibitory provisions nor even dominated by them. It is uncongenial to any forward-moving, free society to cast the law wholly or primarily into the negative role of stopping socially undesirable actions by either individuals or institutions. In a democracy, the law has an affirmative function to advance human rights, not merely to stabilize them, to help develop the human personality, not merely to protect it, and to make society a better servant of the individual, not merely to reconcile conflicts between the two.

In those areas of our nation where there has been clear evidence that this constructive effect of the law has not been felt, we must move to substantive reforms: for example, in laws governing union practices that restrict job opportunities; laws covering building codes and practices; laws governing relationships between consumers and installment sellers; and many others. A lawful society cannot achieve a better

society if it is ever content with the legal *status quo*. It cannot fail to achieve a better society if it is always alert to its own imperfections and swift to remedy them.

If we are to promote trust in the lawful society as the straightest and broadest avenue to a better society, we must be skillful in employing all the machinery of the law, from its application by the city policeman to its codification of economic morality. We must convince the dissident and deprived members of our society by what we do, not just what we say, that the law is on their side, not against them. We must so employ it that they will not see the law as rigged to serve others in enforcing rights against them; they must see it as an instrument to protect them against injustice, from the corrupt landlord, for example, or the cheating installment seller, or the impetuous policeman. Let us remember that laws were instituted among men intent on a better society, in the first place, for the common good of all men, not just the most, not just the strongest, and not just the uncomplaining.

Finally, and perhaps central to a nation truly living under the rule of law, is the need to maintain respect for the courts and for the judicial process. If this respect is gone or is steadily weakened, no law can save us as a society or the values that we have built over the years. Yet today we are going through an ugly and hazardous period when wide and sometimes thoughtless resentment of court decisions has motivated vituperative and violent attacks, not upon the decisions, but upon the very heart of the rule of law, the courts. As officers of the court, lawyers, whatever their views on controversial decisions, must inspire respect for the judiciary, and especially for the Supreme Court as an institution essential to freedom. And we must be prompt to recognize and repudiate any unjust attack upon the courts as an attack upon the rule of law and the society that it serves.

This does not mean, of course, that the machinery of our courts or their decisions are beyond criticism. Fair criticism had led to the overruling of unwise decisions. Not only must court machinery be improved to eliminate congestion and reduce delays, often so flagrant as to amount to a denial of justice, but lawyers themselves have a primary obligation to help conceive and execute movements to modernize the archaic mechanism of the courts and to bring them into gear with the quickened needs and opportunities of the turbulent times in which we live.

The social responsibilities implied in what I have said are gigantic and sweeping. But the heritage of our profession has not been the as-

sumption of small burdens. Carrying out that responsibility is not a price we pay but a privilege we enjoy for membership in a disciplined and noble profession whose social horizons are the horizons of democracy itself. And as democracy moves on, our vision of our public responsibility must broaden.

Perhaps I can summarize in a few words what I have said to you: As lawyers you will always be living, in a good and noble sense, a double life. On a day-to-day level, in one capacity or another, you will be providing professional services in a vital and practical area, the resolution of human conflicts. At the same time, you will be called upon, as officers of the court and as members of the community of professional men and women, to bear a special responsibility for the advancement of humankind towards the ideals, including justice, that motivate the good society. This overriding duty and privilege will always be with you, whatever your choice among the specific professional paths open to you, whether it be trial work, counseling, teaching, or governmental, institutional or private practice.

Ladies and gentlemen, let me suggest that we are living in a period of great opportunity. It is a propitious and exciting time to be engaged in the study and practice of law, and it should encourage the best that is in us and in our profession. I sincerely hope that we all will make the best of our opportunities.