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CONVOCATION ADDRESS

*William J. Brennan, Jr.**

This one hundredth anniversary is an occasion so rich in history of accomplishment that this fine law school might well have contented itself with the nostalgia, congratulations and rosy prognosis traditional to centennial celebrations. But this is not a year in the life of any law school or, for that matter, in the life of the nation, that invites such a traditional approach. Thus the perception characteristic of this school has produced this Symposium on the most burning issue of our society. The theme of human rights and the law is peculiarly fitting, not only because this law school has traditionally been concerned with the moral and human dimensions of the law, but because this theme encompasses the crucial issues which the school and indeed the entire legal profession must confront in the years ahead.



Justice William Brennan

Unfortunately I was not able to attend the discussions which followed the delivery of the three learned papers by the three pre-eminently distinguished commentators on the provocative subjects of the moral basis of human rights, of violence and of education. The significant fact for our profession, however, is that all of these papers, and my own, reflect the realization that the law and the legal system are under heavy attack by disaffected groups in our society. This attack takes two forms.

The law and the legal system as they exist today are challenged as basically inequitable to all those who have been unable to participate fully in the economic and political life of the nation. With rising vehemence, the disaffected point to, among other examples, the blatant inequities in our criminal law and procedure, in our tax and welfare systems, in our selective service system. They demand change now: all deliberate speed is no longer enough.

The second challenge to law and the legal order is even more fundamental — and has even more ominous portent. It brings under attack the rule of law itself. As Mr. Wofford so eloquently emphasized, to the disaffected law is an obstacle to, rather than an instrument of, the creation of a just and generous society. Recently, the Yale Law School had a colloquium entitled “Law and the Urban Problem.” No sooner had the discussions begun than a local community leader rushed to the podium to assert that “law is the urban problem.” This response is typical of those who contend that the rule of law is inconsistent with the concept of a truly just society.

How are we to meet these challenges? It is easy and traditional to extol the virtues of the rule of law and to describe the horrors that would attend an

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anarchistic society. But we cannot content ourselves with an answer which relies on such abstractions. A philosophical disquisition on the virtues of the rule of law cannot justify inequities in our present legal system. Our first task, therefore, is to demonstrate that we recognize these inequities and are confronting them with a promise of solution. Only if we succeed in this task will it be appropriate to glorify the rule of law.

Our framework is the activist philosophy of government that emerged from the depression of the 1930's. Our governmental response to that great crisis marked our beginnings as what has been called a "Positive State."¹ The positive state conceives of government as having an affirmative role — a positive duty to make provisions for jobs, social security, medical care, housing and thereby give real substance to our cherished values of liberty, equality and dignity. If I may adapt the suggestion of one commentator, Arthur Selwyn Miller, this is a duty

rather similar to that expressed in the Universal Declaration of Human Rights In that Declaration, certain economic and social rights are stated. For example, the rights to work, to equal pay for equal work, to rest and leisure, to an adequate standard of living, to education, to participate in the cultural life of the community. Utopian though it may be, unratified by the United States as it is, unfulfilled for most of the peoples of the world, the Declaration nonetheless helps point the way in which law and, I hope, society are moving.²

Essentially, of course, these goals recognize the necessity for, and determination to achieve, equal rights for all, protection of the underdog and respect for the dignity of man in a confusingly complex society. The ceaseless insistence of the disaffected upon their right to share these values means that law and lawyers can no longer eschew a role in perfecting the use of government as a social instrument.

It has been a truism since de Tocqueville wrote so discerningly of American society in the nineteenth century that lawyers occupy a strategic role in the ordering of our society. This is not merely because the law trains one in habits of analysis which can be applied fruitfully throughout the range of social problems, or that tradition has inclined to the law individuals disposed to follow a career in politics or public service — though these are doubtless important factors. Equally significant is the fact that governmental action which in other societies is exclusively the purview of administrators or legislators is, in America, subject also to judicial or quasi-judicial scrutiny. We have been a legalistic society from the beginning. Lawyers were conspicuous in the vanguard of the revolutionary movement and in the drafting of the Constitution, and ever since our society has framed urgent social, economic and political questions in legal terms, placing great problems of social order in the hands of lawyers for their definition, and in the hands of judges for their ultimate resolution.

In past periods of acute national need the response of lawyers as members

1 Miller, *Toward a Concept of Constitutional Duty*, in 1968 THE SUPREME COURT REVIEW 199, 201 (P. Kurland ed. 1968) (footnote omitted).

2 *Id.* at 245-46 (footnote omitted).

of the legal profession has fallen disappointingly short. In 1934, the then Mr. Justice Stone returned, in the words of his biographer, "an unvarnished indictment of lawyers' neglect of public duties."³ "Steadily," Justice Stone said, "the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance" with the consequence that "at its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations."⁴ The record of the profession was not, of course, entirely a blemished one in that era. Yet, the lesson which Mr. Justice Stone rightly, I think, drew was that a more affirmative, responsible and progressive attitude on the part of the profession as a whole might have averted the crisis of the 1930's.

What affirmative, responsible and progressive actions can the legal profession take to meet current problems and avert future crises? Today the focus has shifted from the abuses of concentrated economic power and the vagaries of cycles of boom and bust. Society's overriding concern today is with providing freedom and equality of rights and opportunities, in a realistic and not merely formal sense, to all the people of this nation: justice, equal and practical, to the poor, to the members of minority groups, to the criminally accused, to the displaced persons of the technological revolution, to alienated youth, to the urban masses, to the unrepresented consumers — to all, in short, who do not partake of the abundance of American life.

Involvement of lawyers in that quest is a moral imperative, for it seems to me unquestionable that the lawyer in America is uniquely situated to play a creative role in American social progress. Indeed, I would make bold to suggest that the success with which he responds to the challenges of what, if an era of crises, is also a new era of promise in the life of our nation, may prove decisive in determining the outcome of this struggle.

Lawyers have only taken the first tentative steps toward meeting their professional responsibilities. The recent burgeoning of legal aid, neighborhood legal services, and public defender activities is an encouraging beginning. Lawyers are starting to recognize that the assurance of equal rights and opportunities to all will require new techniques and involve new areas of law, such as consumer protection, landlord-tenant relations and general welfare law including public assistance, housing, education and training programs, child welfare services and unemployment. We are beginning to understand that many current problems will not yield to the traditional methods of solution through counselling, negotiation, or judicial or administrative proceedings. Doubtless radical changes in our concepts and methods of the practice of the law will be required. And, as Professor Pasley has so ably pointed out, these changes will in turn require radical changes in our concepts and methods of the teaching of the law.⁵ We must look to our law schools to produce the young lawyers who will be ready to undertake the very different and weighty responsibilities

3 A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 377 (1956).

4 STONE, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

5 Pasley, *The Moral Basis of Legal Education as It Relates to Human Rights*, 44 NOTRE DAME LAWYER 1053, 1063-67 (1969).

our society thrusts upon them. We must not, however, reach the complacent conclusion that the task of remedying the inequities in our law and legal system is the responsibility only of the young members of the bar. The idea that the public sector should be serviced by young lawyers while older, more experienced lawyers concern themselves only with more lucrative private practice is a pernicious one. The talents and experience of the older practitioner are sorely needed in the public sector. To rebuild our cities, for example, will require the assistance of tax, real estate, and corporation lawyers — men who know how to organize new businesses and plan new projects. The services of first-rate commercial lawyers are necessary if consumer fraud is to be combatted. If we are to restructure our criminal law system to ensure both public safety and rehabilitation of criminals we will need the help of experienced district attorneys and defense lawyers. These tasks cannot be left solely to men just out of law school.

The mechanism by which society makes choices and accommodates conflicting social interests has always been pre-eminently the law, embracing by that amorphous term not simply the courts but more broadly all the ways in which man structures the relationships that constitute society. Thus, every lawyer, no matter how well-established and regardless of his specialty, can and must contribute to the elimination of inequities now under such vehement attack by the disaffected. Let us have no illusions that the task is an easy one. The social and legal problems of the disadvantaged and outcast groups and individuals are novel and complex for the practicing bar, not least because they involve precisely those in our society who traditionally have not been the clients of the legal profession as such. Moreover, our profession's contribution must not be limited to strictly professional activities. Each of us is morally obligated to do even more. The role to be played by the lawyer as citizen is at least equally important. As members of the establishment, particularly the legal establishment, our every action has an impact on the public's assessment and acceptance of the law and the legal system. If the credibility and integrity of our legal system are impugned by the actions and omissions of lawyer-citizens, there will be no general respect for the law. For example, over too many years we as lawyers and as citizens stood idly by while minority citizens were deprived of their most basic legal rights. How can we expect much respect for the law in one who has seen how readily even lawyer-citizens tolerated such legal inequities? Why was it that when legal change finally came it was not initiated by lawyers but was forced upon the profession by the rebellion of thousands of young students and the zeal of religious leaders like Martin Luther King, Jr.? Can we in honesty say that the profession is yet redeeming its past mistakes? Can we deny that too many of us still perpetuate and compound prior errors? Surely lawyers must be the last to condemn the disaffected for wanting no part of our legal system if we of the law act in ways which repel, not instill, faith in it.

The widespread cynicism among the disaffected that progress cannot be achieved under law also has roots in the not unfounded conviction that present legislation and court decisions fall short of effecting meaningful change in the life patterns of the expected beneficiaries. Those who dwell in urban tenements and rural shacks, as well as their sympathizers, seeing no tangible results, ask

what good are laws and court decisions. It is at this point that faith in progress under law disappears, and apostles of violence and revolution begin to make headway. Thus, we, too, must recognize that past legislation and decisions have hardly begun to eliminate the legal inequities in our society. We must redouble our own efforts not merely by giving effect to those laws already on the books but by leading the effort for new legislation to achieve real equity. Certainly, we as lawyers know the difference between formal and real equality, and therefore we must lead the fight to close the gap between the two. Legislation to date has had little more than formal value because quite frankly it has cost us, the establishment, almost nothing. Real equality will cost us something. For example, are we willing to pay the substantially higher taxes necessary to make up for past legal deprivations and create a truly just and equitable society? Are we willing to permit public housing or rent subsidy in our neighborhoods? Are we willing to let our sons bear the same risk in time of war as the sons of the poor and the deprived? If not, all our good works in legal assistance programs, public defender offices, and the like, are meaningless tinkering which do little more than salve our own consciences. The lesson the legal world must learn from the events of the past two decades is that constant pressure must be applied to overcome the problems that confront our society. Lawyers before any other group must continue to point out how the system is really working — how it really affects real people. They must constantly demonstrate to courts and legislatures alike the tragic results of legal non-intervention. They must show up how legal doctrines no longer bear any relation to reality, whether in landlord-tenant, holder-in-due course law, or what not. In sum, lawyers must bring real morality into the legal consciousness. Moral arguments backed by the hard facts about discrimination and deprivation are still the most potent force in the world, in the courtroom, in the legislatures, in the cities. There are still large segments of our population who would keep the country's problems out of sight. The result is that disaffected groups feel they must escalate their protests in order to be heard. Then some use these very protests as a smoke screen to hide the underlying problems. But as Mayor Alioto said, we cannot focus public attention on the lawlessness in the streets, and not on its causes — poverty and prejudice.⁶

If this vicious circle is to be ended — if this society is to be recalled to its moral senses — if this society is to grow up and not blow up — lawyers must shoulder a far greater burden of responsibility than our profession has been willing to accept in the past. Never was there a set of problems for which truly competent, able lawyers were more needed. The complexity of the problems we face requires far more sharply honed talents than ever before. Rarely has the challenge to legal education been greater.

The papers presented by Mr. Wofford, Mayor Alioto and Professor Pasley expose the raw nerve. This challenge can be met. But lecturing the disaffected or merely reacting to them will not suffice. We must truly seek to lead. The only way to demonstrate that the rule of law is consonant with a just and equitable society is to adopt the legal process to create such a society. That process will not fail us if we try. But let us delay no longer. Let us begin.

6 Alioto, *Moral Basis of Violence*, 44 NOTRE DAME LAWYER, 1045 (1969).