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# Lawyer and the Public

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# NOTRE DAME LAWYER

*"Law is the perfection of human reason"*

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## THE LAWYER AND THE PUBLIC\*

In this address, I am purposely omitting a discussion of the subject of "Delays in Litigation" as that matter was covered by the address of Judge Cain on last Monday. Cherishing the hope that my talk may bring about a better acquaintance with, and a better understanding of the lawyer, I propose to address myself to the general public, rather than to my professional brethren. If any of you have ever attended an annual bar-banquet and there heard the usual and orthodox address on the legal profession, you undoubtedly went home impressed with the idea—whether you believed it or not—that "law is the noblest of the professions." I am sure that every lawyer believes that, and I am equally sure that to members of other professions, this "doth seem like an handsome boast." But, boast as this may seem,—when we look at the part the lawyer plays in society, the duties and responsibilities he owes to society, and the need of his services by society,—there is a measure of truth in the boast. United States Judge Bourquin of Montana in a recent case, said: "Always the bar has been an indispensable, great, honorable and beneficent profession, embracing in its membership the choicest spirits and leaders of every age."<sup>1</sup> And Gladstone once said, "that

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\*This address was broadcast over station WFAM on February 24, 1932, by Dean Thomas F. Konop of the University of Notre Dame, College of Law.

<sup>1</sup> United States v. Frank, et al., 53 Fed. (2d) 128 (1931).

the members of the English Bar are inseparable from English national life and from the security of English institutions.”

In early times when society was primitive and governments were crude, controversies were simple and easily adjusted. But, as civilization advanced, society became more complex; rights and duties became more involved, and rules and laws necessarily multiplied. A great need arose for settled principles of law and settled forms of procedure, and with these arose a need for competent men to discharge the duties incident to the trial of cases. Thus sprang into existence the legal profession; and with increasing years, as the complexity of society grew, the more important to society the lawyer became. Forsyth said of lawyers: “They have become the organs whereby the complicated wants of mankind reach the ear of Themis.”

At first, the lawyers' work was limited to advocacy in the courts; but, our present civilization demands greater and broader service from the lawyer. Today he is not only an advocate in our courts, but he pleads the causes of clients before every department of government. He appears before our governors, before our legislatures and councils, before bureaus, commissions and other public functionaries. Nor are the lawyer's duties today limited to advocacy. He has become an adviser to every branch of society. His counsel is sought by men in every walk of life. He creates our business associations, settles our business disputes and negotiates our loans. Not only is he a counsellor of the business world; but our citizens entrust him with all their rights as members of our social organization. They consult him in business affairs; confide in him their family life and domestic affairs; and seek him to protect them in the exercise of their right of life, liberty and the pursuit of happiness.

The rights of life and liberty; the rights of free speech and free press; the freedom to worship God as conscience dictates, are rights as dear to the hearts of men today as they were a century and a half ago.

How oppressed we feel when we are denied any of these fundamental rights! How resentful we are when some one attacks the religion that was taught to us at our mother's knee! How the newspapers and their writers columnize about the freedom of the press! How readily they rush to the lawyer's office and seek out the best legal talent when this right is invaded! How vehemently they plead in our courts to protect them in this right! Two recent cases, one in Minnesota and one in Kentucky, are pointed examples. Yet, how frequently, and how unjustly, and sometimes with ridicule and sarcasm have the newspapers criticized, belittled and condemned the lawyers and courts!

But, who has preserved these fundamental rights? Who defends them now? When the accused has lost every friend on earth and sometimes clouds of mob violence are surrounding him, it is the protecting hand of the lawyer that guarantees him the due processes of law. When oppression, bigotry, hysteria and anarchy begin to stalk in the land, it is the lawyer who points and directs men to the constitution and laws for justice and civic order.

As law is necessary to society, so is the lawyer. Civilization and public order cannot exist without law nor can it exist without the lawyer. To the lawyer must of necessity be intrusted the drafting of the laws, their construction, their administration and their execution. Upon him necessarily rests the responsibility of maintaining and preserving an orderly government.

In the progress of the science of government, in the development of self-government that has brought us to the present form of democracy, the lawyers have done more than any other group of society. It was the lawyer who defied the

early military tyrants, and who compelled despotic rulers to concede civil rights to their people. It was the lawyer who wrote the Civil Code, the Magna Charta, the Bill of Rights, the Constitution and the Emancipation Proclamation. And in our own country, when our ship of state was tossed upon a mountainous sea, it was a lawyer and a jurist John Marshall, a lawyer and an orator Daniel Webster, and a lawyer and a President Abraham Lincoln, that piloted it and preserved us as a nation.

To the lawyer is peculiarly entrusted the administration of the judicial department of Government. It is as a judge that the lawyer renders his greatest service to society. Under a government with a written constitution, the courts are the bulwarks of the nation. Whether our government is to endure depends upon the courts. The courts and the courts alone can save us from disorder and anarchy. They can compel Congress and legislatures to be guided by the constitution, the executives to be bound by it, and the people to obey it. As was said of our Supreme Court, "No one can be so high as to be above its authority, and no one can be so low as to be beneath its protection." Frequently unjust criticism is made of our courts. May they withstand the assaults made upon them? A chief justice of one of our states once expressed this sentiment about courts:

"When discord, violence and anarchy shall succeed law and order, when people and public officers shall depart from the constitution and desert the Ship of State, I have a hope that the last glimpse that will be caught of organized government will be the judiciary; that courts may be seen as long as any vestige of a state shall remain, still ready to direct, still speaking the law with an even mind, dispensing justice with an even hand, sitting serene and unmoved above the influence of fear and of faction, still abiding by that motto so peculiarly their own, 'Fiat, Justitia ruat coelum.' (Let justice be done though the heavens fall asunder.)"<sup>2</sup>

His successor on that same bench said this of the constitution and the courts:

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<sup>2</sup> 2 AUTOBIOGRAPHY OF ROUTJET D. MARSHALL, p. 542.

"The Constitution of our country, may it survive through the eternity of years,—so long as time shall last,—never losing its vitality, through the heart throbs of the Judiciary, to guard our birthrights; and may all come to, more fully than ever, appreciate its overshadowing, supreme importance to the public welfare!"<sup>3</sup>

With all this about the lawyer and his place in and his service to society, there has probably always existed and always will exist unjust criticism and slander of the legal profession. Way back in the fourteenth century after the death of St. Ives, the patron saint of the legal profession, the saying ran, "He was a lawyer, yet not a rascal. And the people were astonished."

It is probable that from this saying came the more recent story about the Irishman who when he read an inscription on a tombstone, "Here lies a lawyer, an honest man," remarked, "They have buried two men in one grave." Even Lord Erskine humorously referred to a lawyer as "a man who rescues your property from your enemies and keeps it." At certain periods in history the prejudice against the lawyer knew no bounds. In 1404 lawyers were excluded from the Parliament at Coventry called by Henry IV; and be it to the credit of the lawyer that that Parliament has been referred to as "The lawless and unlearned Parliament," and as the "Parliament of Dunces."

Why this prejudice against a profession that has taken such a prominent part in the affairs of society and has contributed so much to the progress of civilization? Why malign a profession whose services are so indispensable to society? I attribute this prejudice to three causes: First, the natural prejudice that usually exists against a person or a group that occupies a prominence in society; Second, a misunderstanding on the part of the public of the duties of a lawyer in a law suit; and Third, the conduct of some lawyers.

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<sup>3</sup> 2 AUTOBIOGRAPHY OF ROUTJET D. MARSHALL, *op. cit. supra* note 2.

The character of the legal profession is different from that of any other. While members of other professions are responsible for adequate and proper service to the person who employs them, the lawyer owes responsibility not only to his client but to the public as well. His conduct affects the public and is a matter of public concern. In a large measure he is responsible for society's order. He makes the law, he interprets it, he administers it, he executes it. The lawyer deals with mistakes of men and all the mistakes and ills of society are visited upon him. As it was tritely said, "The lawyer's mistakes are aired above the ground while those of the doctor are buried under the ground." I do not mean by this to criticize the medical profession.

The lawyer's duty brings him in close contact with society. He necessarily occupies a powerful and dominating influence in society. As his duties and responsibilities grow and multiply, his influence increases and naturally criticism becomes the badge of his profession. As stated before, the lawyer is not only the agent of a client but he is an officer of the court and as such he is a public officer. Upon his admission to the bar he is required to take an oath. Members of no other profession are required to do this. Let me recite to you this oath which is similar to and probably has its foundation in an ancient oath administered to the advocates of Geneva:

"I do solemnly swear:

I will support the constitution of the United States and the constitution of this state;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I honestly believe to be debatable under the law of the land;

I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God."<sup>4</sup>

The entire field of lawyer's duty is covered by this pledge. No more could be asked, no less should be demanded. Obedience to this pledge is consonant with morality and justice. The lawyer is but human and amenable to the moral code. The rules of morality and honesty that apply to the public, apply with equal force to the lawyer. As was said in a case decided by the Eighth Circuit Court of Appeals of the United States:

"Reputable members of the legal profession everywhere know, and all others must try to learn, that common honesty, as that quality is understood and appreciated by intelligent men, is the first requisite of an attorney and counsellor at law. One may fail in other requirements, but, at his peril, he must not fail in this."

Now I come to the second cause for the attacks upon the bar: *A Misunderstanding on the Part of the Public of the Duties of a Lawyer in a Law Suit*. As an officer of the court, it is the duty of the lawyer to guard the temple of justice from perjury and fraud and fairly present his client's cause so that justice may prevail. As an attorney for a client, the lawyer cannot and it is not his duty to decide the case. He cannot act the part of the newspaper reporter, the pseudo-moralist or the public-censor and decide the legal right and wrong of the case on rumor, hearsay or prejudice. The public frequently assumes and charges that in a lawsuit only truth and falsehood are involved and the lawyer will support the side of falsehood for a fee. No more erroneous assumption could ever be made, no more unjust charge could

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<sup>4</sup> 2 AUTOBIOGRAPHY OF ROUTJET D. MARSHALL, *op. cit. supra* note 2, at p. 515; WARVELLE, *LEGAL ETHICS*, 2nd ed., p. 32.

ever be laid. Lord Eldon is reported to have said that "laymen usually believe that all lawsuits are either black or white; whereas in truth the greater majority are neither, but rather are gray."

It is not only a question of truth against falsehood, but it is also a question of viewpoint of the litigants as to their legal rights. Let me illustrate this by an ordinary negligence case resulting from an automobile collision. There is usually no dispute about the happening. The plaintiff suing claims that the defendant acted carelessly. On the other hand, the defendant claims that the plaintiff's failure to exercise due care brought about the collision. In other words, the viewpoint of the plaintiff is that the defendant was careless and the viewpoint of the defendant is that the plaintiff was careless. What determines the viewpoint? It A's auto is struck by B's, A will say "he had no business to run into my car"; and B will say "A had no business to have his car there." It is not the duty of the lawyer to decide who is right. It is for the court and jury and not for the lawyer to determine the justice of the cause.

Let me add another illustration. A community is shocked by the commission of a grave crime. A man is shot on a public street in full view of a crowd of people. The perpetrator of the act is apprehended, indicted and is to be prosecuted for murder. The newspapers in flaring head-lines condemn the act and the perpetrator. The mind of the entire community is turned against the accused and the community is ready and eager to exact the "pound of flesh." Maybe, a howling mob is ready to wreak its vengeance and mete out its own justice. The enraged public has become the judge and the jury. In the mind of this public the accused has no defense nor rights. Has the accused any defense? Has he any rights? Might not the accused be wholly irresponsible under the law? Is there to be no

consideration of circumstances that may in law palliate or justify the accused's conduct?

For centuries men have struggled. They have fought and countless numbers have died for principles that safeguard justice and are the very essence of our rights and liberties. That every man is entitled to due process of law; the right to a trial by a jury of his peers; the right to meet his accusers face to face; and the right to be represented by counsel, are rights imbedded in the Constitution of our nation and in the Bills of Rights of the states of this union. Not only that, but there are statutes in many of our states that provide for expenditure of money out of the public treasury for the defense of indigent accused. Then too, the lawyer's oath and his code of ethics demand of him free service for the poor. Should the lawyer be condemned for the defense of such an accused person? As it is not for the public to judge, so it is not the duty of the lawyer to judge. Again, it is for the judge and the jury to determine the guilt or innocence of the accused—to do justice in the case. And after all what is just between man and man? Who after all may judge what justice is? George Elliot in her *Romola* says: "Who can put his finger on an act and say it is justice? Justice is like the Kingdom of God. It is not without us as a fact but within us as a great yearning."

There is a traditional practice of the English Bar, that it is a breach of ethics and a breach of barrister's duty to decline a retainer. Lord Eldon thus points out this duty:

"A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the court in which he practices. If a barrister was permitted to exercise any discretion as to the client for whom he will plead, the course of justice would be interrupted by prejudice to the suitor and the exclusion of integrity from the profession."

This practice does not prevail in our country. Under Canon 30 of the American Bar Association

"No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must

decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will defend for defendants."

Undoubtedly this canon was adopted by the American Bar to appease a public criticism of lawyers and it is my opinion that it has failed in that respect. It occurs to me that the American Bar is drifting away from sound practices and sound traditions and is finding out that expediences will not suppress unjust attacks and criticism.

There are other practices of the Bar in America that are destructive of professional dignity and professional honor. Our industrial and material progress has not only brought about gigantic institutions of production, but has had a rather unfortunate effect upon professions. It is "business-izing" our professions. It is destroying that personal confidence and trust and that fidelity that the public has in the professional man. It is destroying that personal and professional responsibility that the professional man owes to his client. In place of the family doctor, whom we knew, and who knew us, and to whom we entrusted the health of our family, we now have the clinic made up of specialists whom we never saw. In place of the lawyer upon whose knowledge and integrity we relied to draft our wills and deeds and trusts; upon whom we depended to protect our lives, liberty and property; we now have corporations, trust companies and legal departments practicing law, and the responsibility for service is placed upon a legal entity without a soul.

Let me quote Justice Fead of the Supreme Court of Michigan on this matter of changing a profession into a business:

"It has been suggested that the default of the profession in this respect arises out of the fact that the law has changed from a profession into a business and the lawyer has lost his independence. Perhaps it is true that some lawyers have as their goal the conduct of a law shop where legal opinions and other goods of the attorney even to trial of suits, are sold over the counter by hired clerks. Perhaps it is also true that many modern lawyers own a few shares of stock, are filled with fear for them, want some more, and harken to their master's

voice. If these things be true, the profession has sadly retrograded and the world would lose nothing by a return to the old-time lawyer who acknowledged no master, not even his client, and who was independent even though his financial independence arose out of the fact that he owed everybody in town and was execution proof.”<sup>5</sup>

Some may say that this is another development in our efficiency and what we term progress. I say it is a tendency toward the destruction of professional honor, professional responsibility, and professional integrity. It is my opinion that the American public will pay dearly for the passing of the professions, for the making of them mere businesses for dividends and profit.

Lawyers, too, sometimes misunderstand their responsibility in a law suit. Some lawyers graduate their responsibility by the fee they are able to exact, or by the amount involved. Some even guarantee success in a law suit. This is a violation of professional ethics and professional responsibility. Rights and liberties of the poor are as dear as rights and liberties of the rich. Rights and liberties should not be bartered for in that way. As United States District Judge of the Western District of Missouri said in a recent case:

“The lawyer is not responsible for the outcome of the case. His responsibility is measured by his duty, and his duty in a case in which a question of law only is involved is to fully and clearly present the law which supports his contention. When he has done that, he has done all that he has any right to do and all that honorably he can do.

“Certainly his duty does not differ in quality as the amount involved in a case increases. Perhaps his anxiety will increase with the amount involved and perhaps that increased anxiety will make more difficult the work he does, but here also the rising curve of possible anxiety soon reaches its highest point, and after that an increase in the amount involved does not bring with it a corresponding increase in the burden carried. It is very much to be doubted if the anxiety a lawyer feels (call it responsibility if you will) is greater in a case involving \$4,000,000 than in a case involving \$500,000.”<sup>6</sup>

I now come to the third cause for the prevalent attacks upon the legal profession, *The Conduct of Some Lawyers*.

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<sup>5</sup> 6 BRIEF CASE (Detroit College of Law) No. 2, p. 1 (Jan. 1932).

<sup>6</sup> Irwin v. Swinny, 45 Fed. (2d) 890 (1930).

The profession is primarily and the public is partly responsible for this conduct. It is the toleration on the part of the profession, and the maintenance on the part of the public of a class of so-called lawyers who are not only dishonoring the profession but preying upon the public. They are the self-praisers, the self-advertisers, the business solicitors, the ambulance-chasers, that have foisted themselves not only upon the profession but upon the unsuspecting public.

They are usually called by the opprobrious terms, petty-foggers and shysters. Chief Justice Ryan thus scathingly denounced them in an address to the graduates of the Wisconsin Law School, on June 16, 1873:

“Behold the pettifogger, the blackleg of the law. He is, as his name imports, a stirrer-up of small litigation . . . . He has great cunning. He mistakes it for intelligence. He pushes himself everywhere, and is self-important wherever he goes . . . . Generally he is loquacious, demonstrative of his small eloquence . . . . By his own account he is full of law and overflowing . . . . He knows all things. Nothing is new to him. Nothing surprises him. Nothing puzzles him. But it is in law that his omniscience shows best. His talk is of law incessantly. He has a chronic flux of law among his followers. He prates law mercilessly to everyone, except lawyers. He discourses of his practice and his success, to the janitor of his office and the charwoman who washes his windows. He revels in demonstrative absurdity and boasts of all he never did. He is the guide, philosopher and friend of vicious ignorance . . . . He is the oracle of dullness.

“And still the wonder grows  
That one small head can carry all he knows.”

And to the shyster the Chief Justice referred as

“A still lower specimen, the petty-fogger petty-fogged upon; a troglodyte who penetrates depths of still deeper darkness . . . . He prowls around the purlieus of jails and penitentiaries, seeking clients, inventing defenses, organizing perjury, tampering with turnkeys, and tolling prisoners. He levies blackmail on all hands. His effrontery is beyond all shame. He thinks all lawyers are as he, but not so smart. He believes in the integrity of no man; in the virtue of no woman. He loves vice better than virtue. He enjoys darkness rather than light. His habits of life lead him to the back lanes and dark ways of the world. He is the counsel of guilt. He is the Attorney-General of Crime.”

To a like effect spoke Mr. R. L. Harmon in addressing the Alabama Bar Association in 1897:

"The pettifogger, as a lawyer, is an unlearned, little, mean character, lacking in ability, sound judgment or good common sense, while the shyster may be possessed of much learning, great ability or an abundance of shrewdness and cunning, but he is a trickster and a dishonest schemer; he is a fomenter of litigation, strife and discord in the community; he is a manufacturer of evidence, a fosterer of perjury and a promoter of bribery; he is a cunning thief who conceals his perfidy and rascality under the cloak of the law; he cunningly abuses the profession to which he has been admitted as a weapon of offense in deeds of unjust oppression, scheming knavery and the procurement of confidence and the repose of trust, which he basely abuses when there is opportunity to profit by so doing."<sup>7</sup>

As is usual, it is the conduct of the few that casts a reflection on the whole. But it is primarily the duty of the bar and the courts to clean house. Quoting Judge Bourquin again in the same case:

"For this grave evil the bench and bar have the remedy in their control, viz, vigorous discipline which may be a fine, suspension or disbarment . . . They must remember that, 'They, too, are officers of the courts, administrators of justice, oath-bound servants of society; that their first duty is not to their clients, as many suppose, but is to the administration of justice; that to this their clients' success is wholly subordinate; that their conduct ought to and must be scrupulously observant of law and ethics; and to the extent that they fail therein, they injure themselves, wrong their brothers at the bar, bring reproach upon an honorable profession, betray the courts, and defeat justice.'"<sup>8</sup>

What may the public do to rid the community of these so-called lawyers who are disgracing a profession and preying upon the public? First, the public can aid the profession in driving them out of the ranks; and Second, aid the profession in the struggle for higher standards of education for the bar.

In Indiana, disbarment proceedings are still triable by a jury while in other jurisdictions, unworthy lawyers are disbarred by the courts. It is my judgment that the latter

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<sup>7</sup> WARVELLE, *op. cit. supra* note 4, at p. 67.

<sup>8</sup> United States v. Frank, et al., *op. cit. supra* note 1.

method is more efficient and more just. Under the present method, it is practically impossible to disbar an unworthy lawyer in Indiana. The usual and fallacious defense "that there are others who are unethical" invariably succeeds. The lawyer as officer of the court should have his conduct judged by the court. The courts who know the ethics of the profession are best qualified to properly discipline the lawyer.

The minimum standards for admission to the bar as set out by the American Bar Association are two years of Academic College Work and three years of study in a law school. Is five years of college study too exacting? In many states, six years of college study and internship besides, are required to qualify for the practice of medicine and surgery. When we consider the position of the lawyer as a member of our society, his duties and his responsibilities, and his service and leadership in public affairs, certainly, no one can contend that the lawyer should not be well equipped for such service and leadership. Five years of college study appears rather a modest requirement.

Law is a science and a knowledge of it cannot be acquired in a fortnight. Edmund Burke, the statesman, said: "Law is a science which with all its defects, redundancies and errors is the collected reason of ages combining principles of eternal justice between man and man."

Our modern civilization is making law more and more complicated, thus requiring better and better preparation. The late Chief Justice Taft said: "Never in the history of the world is the profession of the law to play a greater part in the century to follow this great upheaval of fundamental elements of society." Ignorance of the constitution and laws of our country is the cause of more discontent, more intolerance, more danger to our institutions than all other causes combined.

In Indiana the constitution still provides that "every person of good moral character, being a voter, shall be entitled

to admission to practice law in all the courts of justice." Can anyone claim that this is a sufficient qualification for the practice of law? Is there any citizen of this State that is willing to entrust the most important affairs of the public, the most important affairs of his business and private life into the hands of a lawyer with qualifications only as prescribed by the state constitution?

I have high regard for the legal profession in Indiana. Within its ranks are found not only men of good character and voters, but men of high legal attainment; but, the lawyers of Indiana have been subject to ridicule, to jibes and sneers by citizens of other states. They have been jokingly referred to as "Constitutional lawyers," not in the sense that they are experts in constitutional law, but made lawyers by this constitutional provision. The existence of this provision in the constitution has been an invitation to flunkers in the bar examinations of other states. It has also enabled the flunkers of our law schools to get admitted to the bar. The repeal of this provision will not only keep out of the state the failures in other states but it will raise the quality of law students' work in our own law schools. Feeble efforts have been made to repeal this provision of the state constitution. In the next election in Indiana the question will again be submitted to the voters. May I not appeal to the bar and the public of Indiana for a united interest and a united effort for the repeal of this provision in the state constitution?

In Indiana shall we demand expert knowledge of this important science, or, shall we drift along and continue to invite the failures from other states? A repeal of this provision in the constitution will mean a better and a more serviceable bar. It will bring to the public a legal service such as it needs, and it will bring to the profession in Indiana that honor and respect which it justly deserves.