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A PROFESSION NOT A SKILLED TRADE*

JUDGE JOHN J. PARKER**

The practice of the law is a profession — not a business or a skilled trade. While the elements of gain and service are present in both, the difference between a business and a profession is essentially this: the chief end of a trade or business is personal gain; the chief end of a profession is public service. Of the three learned professions, says Ruskin, it pertains to the minister to teach, to the physician to heal and to the lawyer to give peace and order to society. This is the function of the lawyer, his reason for existence — not primarily to make money or to assist other men in their personal struggles or difficulties, but to give peace and order to society — to paraphrase the language of Matthew Arnold, to bring wisdom and the will of God out of the heavens to direct the affairs of men. The practice of the profession involves a lawyer in three fundamental relationships: his relation to his client, his relation to the law and his relation to the community in which he lives. The standards of the profession grow out of these relationships.

The first relationship in which we envision the lawyer is that of attorney and client, a relationship of trust and confidence on the one hand, repaid almost universally by loyalty and devotion on the other. Notwithstanding the tendency on the part of wittlings to speak disparagingly of lawyers, there is no profession in the members of which the average man reposes greater confidence. Whatever he may say about lawyers generally, he will entrust his own lawyer with secrets that he would not trust with anyone else on earth, not even his physician or his minister, — secrets affecting his life, his fortune and his sacred honor. And after a long and busy life in which I have come in contact with lawyers all over this country as well as in foreign lands, I can say with pride in my profession that I can count on the fingers of a single hand the lawyers that I have known who would in any way betray that trust. The lawyer can be trusted and is trusted by his client, as is no other professional man on earth. I am proud that the history of the profession shows that he is worthy of that trust.

This is not to say, however, that it is not necessary to have canons of ethics relating to the relationship of attorney and client and to

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provide for their enforcement. While the great majority of lawyers are men of such a high sense of honor that they would live up to the highest standards of ethical conduct even if there were no code, there are some who without the restraining influence of the code would engage in practices which would bring discredit and shame on the entire profession. Some yield to the temptation to go after business, if not by direct solicitation, through lay connections, which make of the practice of law a mere business. Some yield to the temptation to charge exorbitant or excessive fees. A very few in some communities allow themselves to be used as a shield for violators of the law. It is to protect the profession and the public against these men, who would degrade the practice of law into a graft or racket and destroy the respect and confidence of the community in the profession as a whole, that a code of ethics must be formulated and enforced. The honorable members of the profession cannot escape the disgrace, which in the public mind is brought upon the whole bar by its unworthy members. If lawyers expect to retain public respect and confidence, they must purge the profession of the shyster and blot out the commercializing influences which would reduce it to a mere skilled trade.

One advantage of a discussion of legal ethics is to clear up some of the misconceptions that have crept into our thinking. The idea that the lawyer is not the keeper of his client's conscience, but is a mere advocate of his client's cause, is sometimes pushed too far. No man can be a good lawyer unless he is first of all a good man; and no man should allow his abilities to be used in the cause of injustice or wrong. As far back as 1307 in the reign of Edward II it was provided:

Every pleader is to be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge, but will fight for his client to the utmost of his ability; . . . he is to put on before the Court no false delays, nor false evidence, nor move nor offer any corruptions, deceits, tricks or false lies, nor consent to any such, but truly maintain the right of his client, so that it fail not through any folly, negligence or default in him.

As the lawyer must not use his abilities in the furtherance of injustice or wrong, he must not fail to use them when called upon to resist injustice or wrong. No more important duty rests upon the lawyer than to come to the defense of those unjustly accused, however unpopular their cause may be. I shall never forget an inspiring spec-

tacle which I witnessed in a court room over which I presided. Charles McHenry Howard was the unquestioned leader of the Maryland Bar. It was my privilege to see him use all of his great learning and power, without fee and without reward or hope of reward, in the defense of a poor and friendless man accused of crime against whom public sentiment had been arrayed. One of the sacred memories of our profession is that of the old French lawyer Malasherbes, who defended Louis XVI before the Convention of the Revolution, and who, when his friends remonstrated with him because of the danger, replied: "I was called to councils of my master when all the world thought it was an honor to serve him, and shall I not serve him now when all the world deems it is dangerous?" He lost his life through his fidelity, but he left the profession a priceless heritage in the memory of his heroism.

One more thing about the relationship of attorney and client. The lawyer should never forget that it is he and not the client who is in charge of the enterprise on which they are engaged. He is the pilot on the bridge of the ship, not the mechanic in the engine room. He should let it be clearly understood that he will use his skill and learning for his client's benefit but not at his client's direction. Above all else, he is not to allow his professional status to be used to throw an aura of respectability about doubtful schemes in which his client may engage, and of course he is not to allow his professional talents to be used in unlawful enterprises of his client.

Higher even than the loyalty that the lawyer owes his client is the loyalty that he owes to the law. What is the law? It is not a musty collection of rules and forms and precedents. It is the life principle of society. Society is not a mere aggregation of individuals. Society is an organism and the law is the life principle of that organism. It is the categorical imperative, if you please, of organized society which prescribes the relationship of the individual to the state and of individuals to each other. It must be interpreted, of course, in terms of rules and the chief function of the lawyer is to make that interpretation — to lay down the rules by which men may live peaceably together and work together for the common good. Interpretation of the law in the form of rules and the application of those rules to the affairs of life is the work to which all lawyers, whether judges or practitioners are called; and it is to this calling that they owe their highest loyalty.

In common thought there is a great difference in the work of judges and lawyers; but as a matter of fact they are engaged in the same sort of work, the application of the rules of law to the settlement of

the controversies that arise out of the life of society. The judge makes the application where the power of the state must be applied, but for every controversy settled in court hundreds are settled by lawyers in their offices that the courts never hear of.

No one knows better than a judge how dependent the courts are upon members of the bar for the proper functioning of the courts in the administration of justice. The lawyer must see that the case is properly prepared for presentation to the court, that the proper evidence is produced, and that the attention of the court is properly called to the principles and authorities that are thought to be controlling in the case. And after the case is ended and the controversy has been decided it is the lawyers who must explain the decision to their clients and interpret it to the public. And even beyond this, I think it fair to say that the decisions of the courts, in so far as they declare the law, are but the crystallization of the best thought of the bar. Behind the decision in the *Dartmouth College* case was the great argument of Daniel Webster; behind the decision in *Ex Parte Milligan* was the eloquence of Jeremiah Black; and so on down the list of all the great decisions. Even in minor cases you can tell from the opinion of the courts those that were well briefed and argued and those that were not.

I shall not dwell upon the duty of the lawyer to deal honestly with the courts or upon the importance of upholding the law in his community. All of this should be obvious to any honest man. What I should like to do would be to call your attention to what I conceive to be the first duty of the lawyer today in his relation to the law. I mean his duty to improve the administration of justice in the courts. I have said that the chief duty of the lawyer is to interpret the law, the life principle of society, in terms of rules and standards that men can live by. As the conditions of life change, these rules and standards must be changed and it is the lawyer who must change them.

I think we lawyers have done a fairly good job in keeping the substantive law abreast of the times. Where we have failed has been in the realm of the adjective law, that which deals with the procedure and practices of the courts of justice. In most of our states legal procedure is woefully technical and antiquated and out of step with modern life; and for a long time it was almost impossible to get lawyers interested in doing anything about it. Things finally got so bad in the federal courts that something had to be done; and there we have done a first class job. Under the Rules Act of 1934 the Supreme Court of the United States appointed a committee of outstanding lawyers and law teachers charged with the duty of prepar-

ing a model code of practice. The report of that committee, which embodied the best thought of the bench and bar and the teaching profession of the country, was really an outstanding piece of work. The Federal Rules, based on that report, have been used in the federal courts now for seventeen years and I do not hesitate to say that they meet modern conditions and constitute undoubtedly the best code of practice ever evolved by any legal system—a code so simple that any lawyer of reasonable intelligence can get a fair understanding of it in a few hours' study, a code so comprehensive that the most important litigation can be tried under it without difficulty.

It is not in the federal courts, however, but in the state courts, that improvement in the administration of justice is of the greatest importance. It is in the state courts, not in the federal courts, that the great volume of litigation is tried. It is in the state courts, not in the federal courts, that the ordinary criminal laws are enforced. And it is from the action of the state courts, not the federal courts, that the average man gets his ideas as to how justice is administered by his government. A number of the states have adopted changes in their practice based on the federal rules but most of them cling to the outmoded practice of the past. As a result people have been losing confidence in the profession and in the courts and have been turning more and more to lay agencies for the settlement of their controversies. It is hard to interest the older members of the bar in the need for change. They are wedded to the practice with which they are familiar and fail to see the importance of doing things differently. The younger members of the bar see it, however, and to them we are looking to carry on the movement begun seventeen years ago under the administration of President Arthur Vanderbilt of the American Bar Association, a movement which is aimed not merely at modernizing the rules of evidence and trial practice and the procedure on appeal, but also in improving the methods of selecting judges and jurors, the methods of utilizing judicial manpower and supervising judicial administration, and the methods and practices of administrative agencies and tribunals.

I would like to leave with you two thoughts in this connection. The first is a selfish thought. If the lawyer expects to hold in the life of the future the important place that he has held in the life of the past, he has simply got to put his house in order. Because of his failure to do so to date, he has seen his business slipping away from him; and this process will continue unless the practice of law and the administration of justice are brought into harmony with modern conditions. The second thought is not selfish but patriotic. The improvement of

administration of justice is a matter of prime importance in the struggle between free government and the totalitarian state. It is as true in the realm of political economy as it is in the life of the jungle that only the fit survive. If we expect democracy to survive in the struggle with the totalitarian state, democracy must be made efficient; and nowhere is this efficiency of greater importance than in the basic matter of administering justice.

The third great duty owing by the lawyers is the duty that he owes to society at large, the duty of public leadership. A thing that we must never forget in a democracy like ours is that leadership is the *sine qua non* of good government. When we drive out those who force and compel we must raise up those who can lead, or national life becomes a mere wandering in the wilderness without purpose and without result. I once heard Newton D. Baker make this arresting statement: "Democracy can nowhere long endure unless there be adequate leadership and unless the people are willing to accept and follow it." To provide that leadership in a government which is based on law and not on arbitrary will is preeminently the duty of the lawyer; and throughout our history it has been the lawyers who have furnished that leadership. It was the lawyers who wrote the Declaration of Independence; it was the lawyers who wrote the Constitution of the United States; it was the lawyers who breathed the breath of life into the Constitution; and it has been the lawyers from that day to this who have guided the nation in every great crisis. I don't mean in the holding of office, although they have done this, but in the formulation and direction of that informed public opinion, which is the real guiding force in a democracy. Never, I think, has there been greater need for that leadership, than there is today. It is needed to meet the great challenge to liberty which has arisen both in domestic affairs and in our foreign relationships.

As a result of the great progress made by science and invention in the last half century we have literally moved into a new world and the relation of government to the economic life of the people has become one of transcendent importance. When the Constitution was adopted the threat to liberty came from the direction of political power. We have lived to see the threat come from the direction of economic power, and when political power has been combined with economic power we have seen liberty crushed by the totalitarian state. Our nation is the only great nation of the world which in recent years has not succumbed to some form of collectivism. Russia and her satellites and China have embraced Communism. Germany and Aus-

tria went for Naziism. Italy and Spain have become Fascist. Even staid old England fell for Fabian Socialism.

The leadership of the American lawyer is needed to use intelligently the power of the state for the regulation of economic life and the correction of economic evils without destroying our system of free enterprise or the fundamental liberties of our people. We might as well face the fact that government regulation of economic life cannot be avoided. *Laissez faire* is a thing of the past. The contest now is, not between *laissez faire* and regulation, but between regulation and some form of collectivism. The citizen finds himself surrounded by economic forces with which he is powerless to deal and the government is the only agency that he has that can deal with them, and free people will no more submit to economic tyranny than they will to political tyranny. In governmental regulation of economic life, however, we must avoid the combination of economic and political power which is the essence of the totalitarian state and which is everywhere so deadly to liberty. In other words, while using the power of the state to prevent abuses of economic power, we must avoid Socialism, which means government ownership and operation of business, and must preserve individual initiative and the spirit of free enterprise.

And the leadership of the lawyer is needed for an even more important purpose. Amid the expanding powers of government, we must preserve inviolate those sacred rights of the individual which have been built up through the centuries and which are imbedded in the Bill of Rights of our Constitution. What is it that makes America great? It is not the strength of army or navy or air force. It is not the wealth of field or forest or mine or factory. It is not the learning of our universities or the high standard of living we have attained. It is the fact that in her heart of hearts America believes in human freedom and in the sovereignty of the individual soul. Freedom of thought, freedom of speech, freedom of conscience — the right of men to be secure in their persons and in their homes against arbitrary exercise of power — the right of men deprived of liberty to have their imprisonment promptly investigated by the judiciary — the right of men not to be deprived of life or liberty or property but by the law of the land, the general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial — these are things that constitute the greatness of our country; and these are the things that the American lawyer must preserve, whether anything else is preserved or not.

That is the great challenge to the leadership of the lawyer in the domestic field. An even greater challenge comes in the field of

foreign affairs. Almost overnight the world has become, as it were, one great community. Any part of it can be reached from any other part in a few hours' time. Communication is a matter of seconds. A war breaking out anywhere is a threat to the safety of men everywhere. And, whether we like it or not, our nation has been charged with responsibility for the leadership of the free nations in this new and changed world. The future of human freedom depends upon the leadership of America; and the leadership of America depends upon the leadership of the lawyers of this country.

This responsibility for leadership arises out of conditions which we cannot and dare not ignore. The civilization of Europe was very nearly destroyed as a result of the last war and we are the only nation with sufficient wealth and strength to help the nations of that continent get on their feet again. An economic and sociological revolution on a world wide scale is in progress, and underprivileged peoples all over the world are looking for guidance and we are the only one of the free nations in a position to furnish them the leadership that they need. There has been a greater shift in world power during the last generation than has occurred since the fall of Rome. Across the ruins of kingdoms and empires the sinister figure of Soviet Russia has arisen clinging to the false philosophy of Communism and ruled by a selfish oligarchy which is planning nothing less than the plunder and domination of the world, and we are the only one of the free nations that can undertake with success the formation of an alliance to stop Russian aggression. We in the United States had as well realize that the leadership of civilization which was Britain's task for a hundred years has devolved upon us, and that for us to fail to accept it is to turn the free world over to Russia and to slavery.

It is the lawyers of this country who must furnish to our people the leadership which they need in this hour of our country's peril. First of all you must lead us in making ourselves strong — strong militarily, strong economically, strong spiritually and intellectually — strong enough to stand against any aggregation of power that may attack us — so strong that no aggregation of power will dare make the attack. You must lead us in achieving unity. Napoleon once said, "Wars have been won by good generals. Wars have been won by bad generals. But no war ever yet was won by a debating society". Politics should end at the water's edge. We should present a solid front to the adversary. You must lead us in accepting the responsibility of world leadership. That means we must stand by those whom we expect to follow us. This is the *sine qua non* of leadership.

If we are unwilling to go to the defense of our allies when they are attacked, there is no sense in talking about forming an alliance against Russia. Finally, you must lead us in leading the world in the right direction. Britain exercised world leadership by building a great world empire. We cannot do that. A republic cannot build an empire. We must and can exercise leadership by building a world organization based on the great free principles upon which our own government is founded. That is essentially a task for lawyers, and the lawyers of America have been going ahead with that task. At Dumbarton Oaks, at San Francisco, in accepting the compulsory jurisdiction of the International Court of Justice, in setting up the International Military Tribunal at Nurnberg, in going to the defense of Korea, this has been our ultimate objective.

The future of our country in a very real sense depends upon the leadership of the bar. The leadership of the bar depends upon the confidence of the people in the profession; and the people will have confidence in us only if we deserve their confidence. To deserve it we must clean house. We must drive from the profession those who abuse its privileges; and we must set up standards which will make membership in the profession a guaranty of probity and a recognized dedication to the public service.

There is no one so well qualified for public leadership as is the lawyer. The merchant has too direct and personal an interest in business problems. The doctor is too much engrossed in the scientific problems of medicine. The minister and college professor lack, in most cases, sufficient experience in practical affairs. The lawyer, on the other hand, has given his life to the study of law and government. He knows business in its details as well as the business man, and he knows it in its larger aspects as the business man does not know it. He is removed, moreover, from the direct personal interest in business problems which the business man has and the pressure and temptation resulting therefrom which leads the business man to take a position looking to the immediate welfare of his business rather than one based on sound principles of public policy. The practice of his profession keeps him in constant contact with the problems of state and nation; and he alone of his fellow citizens possesses the wealth of specialized knowledge, the practical grasp of detail and the detachment from the processes of business, which are essential to deal with these problems effectively. All of this is recognized by the people of the country, and all that the lawyer need do to exercise leadership is to interest himself, as he should do, in the public business of his fellow citizens. As was well said by Mr. Justice Harlan a half century ago:

If the lawyers stand, as one man, firmly and courageously for law and order, for equal and exact justice, for the rights of all as established by law, and for cleanliness in public and business life, the people will heed their counsel, and follow the ways of right and truth and justice worked out by them.

I would like to close with two quotations from the Holy Scriptures. One is: "Let him that thinketh he standeth beware lest he fall". The other is: "To whom much is given of him much also is required". Our profession has occupied a great place in the history of this country. In our relation to our clients, in our relation to the law, in our relation to society and the leadership with which the people have entrusted us, the legal profession has reason for real pride. The obligation rests upon us, however, to merit the heritage which is ours and to deserve the confidence which the people repose in us. We must make sure that commercialism is not allowed to debase the relationship of attorney and client; we must attack courageously the problem of improving the administration of justice in the courts; and, above all, in this hour of our country's danger, we must give to the people that leadership in public affairs for which they have always looked to our profession. This is a time for greatness. If through selfishness, through cowardice or through lack of vision we fail in our responsibilities, history will never forgive us. But we shall not fail. America is entering courageously a new era in the history of the world; and the American lawyer, as a leader in the establishment of government by law, is destined to play a greater part than ever in the life of our people.