
2-1928

The Lawyer and the Public Welfare

Samuel Rubin
Baltimore Bar

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Legal Profession Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Rubin, Samuel (1928) "The Lawyer and the Public Welfare," *Indiana Law Journal*: Vol. 3 : Iss. 5 , Article 4.
Available at: <https://www.repository.law.indiana.edu/ilj/vol3/iss5/4>

This Comment is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

THE LAWYER AND THE PUBLIC WELFARE

In recent months there has been considerable criticism of the legal profession. It appears that some people think of lawyers somewhat along the line of the story told of a certain Dean of Ely. It is said that at a dinner, just as the cloth was being removed, the subject of discussion happened to be the extraordinary mortality among lawyers. "We have lost," said a gentleman, "not less than seven eminent barristers in as many months." The Dean, who was very deaf arose, at the conclusion of this remark, and gave the company grace, saying, "for this and other mercies make us devotedly thankful."

The legal profession is affected by changed modern conditions, as are other vocations and professions. But taking into consideration all phases of the situation, it is undoubtedly the most high-minded of all the so-called learned professions, with the possible exception of the ministry. This, regardless of the fact that there are occasional black sheep in the fold. The integrity and loyalty of the profession to the trusts and confidences reposed in it demonstrate its worthiness. It has been said, and probably truthfully, that every thirty or thirty-five years, interests equal in value to all the real and personal property in the United States pass through the hands of the legal profession, and are entrusted to its care, either in the way of litigation, succession, transfer or through the management of capital. This vast sum depends upon the skill and integrity of lawyers for its proper disposition, and does not take into consideration the services of lawyers in the protection of life and liberty.

No matter where one goes in this vast country, from the smallest hamlet to the great cities, one will find large numbers of lawyers whose characters are above reproach, and whose integrity and judgment are above question. You go to your lawyer for advice when you are in all kinds of difficulties, and you tell him secrets of every kind and nature, business, domestic, social and personal. These secrets you very rarely trust to any other ear. Many instances occur in which advantage may be taken by attorneys of those who are weak, ignorant and in legal difficulty. But very rarely indeed, is this confidence found unworthy. Certainly, no secular profession is entrusted with greater responsibility. Undoubtedly, there have been a certain number of lawyers who have engaged in questionable enter-

prises, and who in character and ability have not measured up to the professional standard. We do not pretend there has been no occasion for complaint. There are quack physicians, and dishonest merchants. There are ministers who betray their trusts, and there are pettifogers who betray their clients; but are these the tests upon which a whole profession is to be judged? Everybody knows that there are members of all classes who are unfit and unworthy. It always has been so. Whatever criticism may be made against lawyers may be made against all other classes.

But lawyers have not ceased to be high-minded and patriotic because some of their number have failed in their duty, or because some have taken questionable employment. In the law, however, the pettifogger and imposter is more easily known than in other callings, for the reason that the lawyer is under constant public observation, and the doings of the profession are discussed by people generally, and commented upon in the public press. It is a comparatively easy matter to learn the standing and character of any member of the legal profession. Reasonable people however, do not pass hasty judgment because a few fall. They do not consider any class of people as being either angels or reprobates. People average up pretty evenly when due allowances are made for opportunities and temptations.

Chief Justice Sharwood has wisely said: "There is no profession in which moral character is so soon fixed as in the law. There is none in which it is subjected to more severe scrutiny by the public. It is well that it is so. The things we hold dearest on earth—our fortunes, reputations, domestic peace, the future of those dearest to us, nay our liberty and life itself, we confide to the integrity of the legal counsellors and advocates. Their character must not only be without stain, but without suspicion. In short, there is, perhaps, no profession, after that of the sacred ministry, in which a high tone morality is more imperatively necessary than that of the law."

Because a person of doubtful character resides in a given neighborhood is it right to infer that all persons residing in the same neighborhood are of the same class? Because a certain family contains a notorious black sheep is the whole family to be branded the same? Let us not forget the character of the lawyer is pretty much what the laity make it. The character of the bar is but a reflex of the character of the community. An unscrupulous bar could not exist in a high-minded community.

One of the first duties of the lawyer to himself and to the community is honesty. I do not refer simply to common honesty, but to the uncommon kind. I realize that lawyers have often been accused of dishonesty and sharp practice by the ignorant and unthinking. The fact nevertheless remains, that the legal standard of honesty is higher than that which ordinarily prevails in other vocations and professions. As a class lawyers are much more honest than merchants who misrepresent and lie; than physicians who have no faith in their cures; or clergymen who preach what they do not believe, or of editors who change their opinions according to the exigencies of the occasion. As we look upon society today, do we not see corruption in high and low places; do we not see big business asking for dishonest concessions, and criminals pursuing their calling methodically and boldly and in defiance of law and of the public welfare? With these things in mind does it not speak well for the lawyer that there are only occasional lapses from rectitude by members of the legal profession? As has been said the very kernel of the legal profession is in theory, and should be in practice, honor and courage, in a word, character—that makes a man and moves the world.

Abraham Lincoln, in one of his addresses remarks:

“There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honor are reposed in and conferred upon lawyers by the people, it appears impossible that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. If we cannot be honest lawyers we had better be honest without being lawyers.

In this connection the following story of Lincoln is illustrative. A stranger desired Lincoln's services. After hearing his story Lincoln told him that he could not take his case because the prospective client was in the wrong. “That is none of your business, if I have the money and pay you for taking the case,” retorted the client. “Not my business?” exclaimed Lincoln. “My business is never to defend wrong.” “Well, you can make trouble for the fellow;” added the applicant. “Yes,” replied Lincoln, fully aroused, “There is no doubt I can gain the case for you, and set a whole neighborhood at logger-heads. I can distress a widowed mother and her six fatherless children, and thereby get for you \$600.00, which as rightfully belongs to the woman and her children as it does to you. But I will not do it. You must remember that some things which are legally right

are not morally right. I would advise you to make \$600.00 some other way."

"Many good men," says Parry in his volume, *The Seven Lamps of Advocacy*," are troubled with the thought that advocacy implied a certain want of honesty," and he then goes on and states that Boswell, the biographer of Doctor Johnson, asked the doctor whether he did not think that the practice of law in some degree hurts the nice feelings of honesty. The doctor replied, "Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion. You are not to tell lies to the judge."¹

Let us remember that regardless of what the lawyer may think of the equity and justice of the case, it is his duty simply to present his side. The opposing counsel presents his, and the judge weighs the conflicting claims and decides. It should also be borne in mind that the lawyer argues his case and submits his facts by honorable means, and a reputable lawyer would sooner lose than employ dishonorable means for victory. Law-

¹ Mr. Boswell then goes on to relate the following conversation:

BOSWELL: "But what do you think of supporting a cause which you know to be bad?"

JOHNSON: "Sir, you do not know it to be good or bad till the Judge determine. I have said you are to state facts fairly; so that your thinking or what you call knowing, a cause to be bad must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why, then, sir, you are wrong, and he is right. It is his business to judge; and you are not to be confirmed in your opinion that a cause is bad, but to say all you can for your client, and then have the Judge's opinion.

BOSWELL: "But, sir, does not affecting warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?"

JOHNSON: "Why, no, sir; everybody knows you are paid for affecting a warmth for your clients, and it is, therefore, properly no dissimulation; the moment you come from the bar you resume your usual behavior. Sir, a man will no more carry the artifice of the bar into the common intercourse of society than a man who is paid for tumbling on his hands will continue to tumble upon his hands when he should walk on his feet."

Mr. Parsons continues: "I like the rough English common sense of this; but the Irishman in the dock had an inspired vision of the same truth when, in answer to the clerk of the Crown, who called upon him with the familiar interrogatory, "Guilty or Not Guilty?" he replied with a winning smile: "And how can I tell until I hear the evidence?"

yers are simply the mouthpieces of their clients, presenting their causes for what they are worth, and leaving the responsibility of decision with the proper tribunals. The lawyer generally believes he is right and that his client is right, and he cannot know whether he is wrong or not until he hears the evidence on both sides, and even then it is his duty to see that the court does not apply a wrong rule of construction or discretion. As counsel for a corporation or as an advocate before departments or legislative bodies the lawyer stands upon the same ethical plane as the lawyer in the court-room. Truthfulness and integrity are as essential in the one place as in the other.

The cases in which a lawyer can or ought to see at the outset that his client is wrong are extremely few. In the great majority of litigated cases, even after hearing of both sides, it is extremely difficult to say on which side the legal right lies. As far as questions of law are concerned it is extravagance to say that anyone is ever palpably in the wrong; as even the courts do not agree with each other upon many legal questions. It is only when the facts are thoroughly sifted, and then only, have we a right to render an opinion on the merits of the case. Macauley has well said, "Scarcely any quarrel ever happens that in which the right and wrong are so exquisitely balanced that all the right lies on the one side and all the wrong on the other."

It is said of Sir Matthew Hale: "If he saw a cause was unjust he for a while would not meddle with it, but would give his advice that it was so. If the parties after that would go on they were to seek another counsellor, for he would assist none in acts of injustice. If he found the case doubtful or weak in point of law he always advised his clients to agree their business. Yet afterward he abated much of the scrupulosity he had about causes that appeared at first unjust. Upon one occasion there were two causes brought to him which, because of ignorance of the party or their attorney, were so ill represented to him that they seemed very bad. But he, inquiring more closely into them, found they were really good and just, so that after this he slackened much of his former strictness of refusing to meddle in cases which seemed at first blush bad."

In nine cases out of ten the failure of justice is not due to technicalities, but to the insufficiency of evidence, or of its contradictory character; and also of the fact that we are all human and therefore fallable. It has been said that "legal technicalities sometimes so strongly condemned by the ignorant and unthink-

ing, though often abused, yet are merciful expressions of the in-born desire of the human conscience for justice, and have often been the only means of protecting the innocent from tyrannical Neros operating in the fair name of justice."

The delays of trials are mostly the result of absent witnesses. Many people migrate from one state to another, and it often happens that most important witnesses are beyond the reach of the court's process. Shall we under the circumstances force a man to go to trial without regard to the presence of material witnesses? Is the abuse of this rule a reason for its change?

The fact that the rule of conduct is easy of abuse, and in many instances has been abused, cannot be permitted to destroy it, or to encourage its disregard. "Society," said Justice David J. Brewer of the United States Supreme Court, "owes to every one of its members justice. But society seeking justice can never ask for wrongdoing to accomplish it . . . It does not call upon the lawyer to be dishonest . . . in order to secure to his client vindication and justice. Sometimes in passion the public demands unjust punishment, and then the lawyer defending his client apparently acts against his obligations to the public. But really he is most loyally discharging his duty to society, for he is striving to exact from it that which it rightfully owes—justice to the individual."

The duty of the lawyer was clearly defined in a celebrated speech of Erskine in his defense of Thomas Paine, indicted in 1792 for publishing the "Rights of Man." The public was aroused and indignant, and Erskine was very unpopular for his courage in his defense of his client. In his speech he stated:

"In every place where business or pleasure collects the public together, day after day, my name and character have been the topics of injurious reflection. And for what? Only for not having shrunk from the discharge of a duty which no personal advantage recommended, and which a thousand difficulties repelled. . . Little, indeed, did they know me, who thought that such calumnies would influence my conduct: I WILL FOREVER, AT ALL HAZARDS, ASSERT THE DIGNITY, INDEPENDENCE AND INTEGRITY OF THE ENGLISH BAR: WITHOUT WHICH IMPARTIAL JUSTICE, THE MOST VALUABLE PART OF THE ENGLISH CONSTITUTION, CAN HAVE NO EXISTENCE. From the moment that an advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in court where he daily sits to practice—from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or defense, he assumes the character of a judge; nay, he assumes it before the hour of judgment; and, in proportion to his task and reputation, puts the heavy influence of perhaps mistaken opinion into the scales against the

accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

The state condemns no man unheard. "Strike, but hear me," was the phrase of Themistocles to the angry Greeks. Every criminal however depraved is entitled to a hearing in open court, as well as the claim upon the services of counsel. As it is the minister's duty to help the fallen; as it is the physician's duty, like an angel of mercy, to relieve the sick and helpless, so it is the lawyer's duty to his client, to the court and to the general community to defend a human being accused of a crime, and to see that the punishment, if guilty, is apportioned to the crime.

SAMUEL RUBIN.

Of the Baltimore Bar.