Fall 1935

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THE SUPERIORITY OF LAWYERS

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I

One of the older of the wise-cracks is to the effect that "Socialism would be all right if it weren't for the Socialists." The effectiveness and the truth of the remark are not greatly altered by substituting any other movement or occupation and its adherents. Certain it is that it is the human element in all social undertakings which constitutes the grease on the pole of progress. Undoubtedly, therefore, it strikes a peculiarly responsive note to paraphrase the wise-crack to read, "Law would be all right if it weren't for the lawyers." Practically all lawyers are human, and they have an extremely difficult rôle to fulfill. Their failures are both conspicuous and significant.

The real significance of the lawyer's place in society deserves more publicity (outside of Bar Association meetings) than it has received. Most people do not appreciate their immediate interest in the training and character of lawyers. There is only a slight understanding of the truth that finally we have a government of judges.

It is perfectly obvious that in no strict sense can we have a government of law and not of men. Government must be run by men until our machine age reaches the delightful millennium when iron and steel can be endowed with brains and all of our problems solved without effort on our part.

The idea sought to be conveyed by that common dogma is that the men who run the government shall be guided not by their own peculiar notions of propriety, experience, and justice but by the accumulated experience of the past and the best thought and vision of
the present as it is embodied in constitutional utterances, accepted and published principles of law, and a judicious extension of them to meet changing needs. Ultimately under any governmental system there is government by men. That they should submit to restraints is obvious, but that there should finally be a superior tribunal with power to enforce the intended restraints is peculiarly and uniquely an invention of the American constitutional system of government.

There is a vast distinction between our system and most others. (In some of the newer republics our system has been copied.) In most governments there is the same division of governmental functions as in ours as between the executive, the legislature, and the judiciary. There are also constitutional restrictions on the exercise of governmental power in each field. But only under the American system is it established that there is one of the three departments of government which is finally superior to the others. Only under our system is it established that the final determination of private and public interests rests in the courts. For example, were Parliament and the Crown in England to set up a National Recovery Administration the only possible attacks upon it would be either revolution or repeal. Under such a system the majority is always right.

It is a curious paradox, therefore, that in a so-called Democracy we concede to our judiciary the power of thwarting even the majority. There is a review of all legislative and executive action in the calmness, the objectiveness, the quiet of a judicial tribunal before "trained" men. It has been thought, at least by the judges and lawyers, that if final review on legislative, executive, and judicial is to be given to anyone it could most properly be given to the judges. And, being in a position to decide the matter, they have so decided. The privilege of making a mistake is thus arrogated to the courts to the exclusion of the legislature and the executive. It is not a facetious statement but a provable truism that the judicial function is the power to make mistakes—to decide a matter finally, rightly or wrongly.

There is no logical and probably no practical compulsion to such a result. (Witness the many governments which operate without it.) Our doctrine of the supremacy of the courts has arisen out of the lawyer's acceptance at its face value of his belief in or opinion as to his own superiority. The matter which is continuously on trial is not the supremacy of the courts—that is established—but it is the superiority of the legal profession. Finally the former must rest on the latter, and it is just as valid, theoretically and practically, as the latter proves from day to day to be.
Those who are concerned with the maintenance of our present system of constitutional government are in the last analysis really concerned with the training and character of our lawyers. Even if one were to wish a change, until the change can be accomplished he too has an immediate interest in those matters.

It is true that the interest which all of us have in the training of lawyers in so far as it affects our private interests is rather obvious and has been sufficiently emphasized to need little reiteration. When the reader employs an attorney he wants one who is intelligent, learned, and honest. But if he is honest within the bonds of common decency, unfortunately the concern on that phase of his character ends. As an advocate for your interests you might reasonably and properly wish that he leave your adversary’s interests to his attorney and the judge.

But when the attorney becomes legislator and executive and finally judge, the concept of honesty and professional character broadens and properly he considers not only your interests but those of your adversary and society as a whole as well. He must not only be honest with you; he must be honest with your opponent and the general public. The judging process is one of the noblest and certainly the most difficult of human occupations, and it is perfectly apparent that under our constitutional set-up all of us have a direct and immediate interest in the learning and the character of our lawyers. The ultimate success or failure of our experiment in Democracy depends upon him to a very large extent. In government there is no substitute for learning, intelligence, and tolerance. Unless our lawyers possess those characteristics we shall fail, and to the extent that they do not have them we do fail.

II

It is probably the judgment of those best qualified to express an opinion on the subject that our doctrine of the supremacy of the courts has worked reasonably well. There are notable instances where, however, the courts have blocked the path to social progress. In such instances the judges demonstrated their inferiority. They wrote in bold letters their incapacity to deal with some legal problems. This has been particularly true in those instances where the case presented an assertion of social interests as against the then prevailing (and therefore past) judicial concept of property interests.

It is not difficult to discover the reasons for the failures. The prevailing legal philosophy for several hundred years has been a curious
mixture of metaphysics, rationalism, theology, and dogmatism. Those cases were prejudged when those judges were trained. Taught philosophy is tough philosophy, and few judges and lawyers trained prior to the modern era escaped from the pattern set by their schooling.

Lawyers have been taught to accept a number of supposed truths which will not bear up under anything which resembles a critical analysis. An element of sadness must attend us here, because the acceptance has been so complacent.

Thus although the law frequently is called upon to distinguish between a belief, an opinion, and knowledge, and the decision of some cases actually turns upon the distinctions between them, lawyer philosophy commonly fails to make the distinctions. It is true that in common language the three terms are used somewhat synonymously. But there is something to be gained by marking the differences which a careful use of language does make.

One expresses a belief when he acts without regard to the facts. He makes no pretense that what he says can in any sense be proved by empirical evidence. An opinion, however, is a reasoned conclusion or prediction from the available facts. It is worth just as much as the evidence upon which it is based and the integrity and the intelligence of the person expressing the opinion are worth. Knowledge, however, presupposes that one is discussing observable facts and that the personality of the author of the knowledge is eliminated in so far as that is possible. I suppose that we may define a dogmatist as one who expresses his beliefs and opinions in terms of "knowledge." How numerous are the things which all of us "know" which are not so!

Even lawyers, too, make the common mistake of accepting concepts as things. Thus "the constitution" is an existing thing, when in truth it is the sum total of the past and permissible future concepts embodied in constitutional law. Likewise property, and even Democracy itself, are regarded in the same light. Such a philosophy necessarily calls for a static social order, because reference is made to the past experience as if it were the concept. Those people forget that the concept of property may be made anything we wish to make it, and that its formulation should be as objective as possible. We might recall that it is an historical fact that the inhabitants of Cape Cod resisted the erection of a lighthouse there on the ground that it would injure the wrecking business. One can appreciate their concern for their existing business—but it is an obvious judgment that the inter-
ests of shipowners, sailors, shippers, and passengers very considerably outweighed those of the ship-wreckers.

Those people forget too that Democracy after all is simply an attempt—and it should be an intelligent one and not a haphazard one—to chart and steer a course somewhere between anarchy and tyranny. Any acceptance of past experience as being Democracy itself is a fatal mistake. It is at best simply a manifestation of that experience, and the concept of Democracy is not wedded to it.

It is not surprising that large groups of people err in those respects. Common philosophy and mental attainment cannot be expected to reach a considerable height. But a lawyer lives and works in the realm of concepts and has learned something of the lessons taught by the experiences of the past. Nevertheless it probably is true that a considerable number of lawyers believe in a constitution, in a property and a Democracy each of which is static, because they are dealing with things and not ideas, or they have never escaped from the dogmatic content of the common law. They have accepted at its face value the vicious dogma that “a lawyer should be conservative, else he is no lawyer.” Nothing could be more untrue. Rather he should accept the late Will Rogers’ dictum to the effect that “It takes a wise man to differ with me.” If the lawyer ought to expend all of his energies in defense of the status quo, then by the same sign so ought the doctor, the chemist, and all scientists.

There is another failing which is peculiarly lawyer-like. It is assumed that logic is the controlling factor in the decision of legal problems. But logic is really the vice of the law. Logic may properly be used in either of two ways. First it is a valid process in building up a doctrine from past experience. It is used to produce a generalization, and the latter, logically, can be no better than the evidence upon which it is based. Unfortunately it is not always so used by lawyers. Many of their doctrines and conceptions are purely imaginative, and there is a conservative reaction against their examination on the merits. In the second place, logic is a valid process in fitting the present case into or out of accepted doctrine. The lawyer’s function here is simply to find a general or specific precedent. That, of course, is a valid beginning, but it is far from a valid termination of the quest. Logic is only a real aid if we are satisfied both with the assumptions which form the beginning of the logical processes and the result which forms their ending. It is ultimately a formal rationalization of the result, but unfortunately some lawyers accept it as the substance of the judicial process. The simple previous ex-
pression of an idea thus occupies too large a place in the lawyer's world.

The truth is that with few exceptions ideas, as men, approach their death with increasing age. One of the saddest facts of human existence, however, is that the great law of inertia applies to the human mind, and nothing is so hard for most people as the mental feat of accepting a new idea. But it is literally true that life is change and is not static and that social existence and governmental functions cannot be based on any principle of inertia. It is indeed surprising that there are those who would surrender to a philosophy of fatalism in government; who would concede that natural and social forces are beyond the control of human intelligence; that government cannot direct, but only retard and prohibit, or do nothing.

If necessary we must compel ourselves to shed many of our acquired ideas in order to meet adequately a changing civilization. Except a man forsake his Father's and Mother's ideas he cannot be a disciple of Democracy. He may make a good aristocrat, but he cannot really accept Democracy for what it is—a social attempt at orderly progress. Progress, of course, is at best a prediction to be tried by experimentation. We "know," and can "know," no more as to what constitutes "progress" than we can know any other thing necessarily based on future experience.

III

Lawyers, too, like others, are commonly committed to the dogma that we acquire wisdom with age or experience. The latter, however, is only really directly valuable if the identical or very nearly identical problem again presents itself for solution. This seldom, if ever, happens and the qualities most needed (especially in times like these) are not wisdom, so called, and past experiences. Those in themselves are obviously inadequate, however valuable they may be as precedents or analogies or points of departure. What we need are the qualities of vision, tolerance, and courageous experiment. "To the extent that we are reluctant or unwilling to resort to judicious social experiments to that extent we postpone social progress and perpetuate our ignorance." We must abandon the notion that we are wise enough to manufacture a workable social scheme purely out of our mental processes and in total disregard of present experience, or that "things will take care of themselves." Our beliefs and opinions are a very insecure basis upon which to rest ultimately the social welfare, particularly in the face of indisputable evidence that they are invalid.
Lawyers, like others, also are easily alarmed. They do not hesitate to disinter the time-worn argument of alarm, "Where does this lead us?" The short answer is that it leads us just as far as we wish to go and no further. Edmund Burke said: "We stop very short of the principles upon which we support any given part of our constitution or even of the whole of it together. This is but what is natural and proper. All government, indeed every human benefit, every virtue, and every prudent act is founded on compromise and barter. We balance inconvenience, we give and take and we remit some rights that we may enjoy others; we choose rather to be happy citizens than subtle disputants."

It doesn't follow that because we do this, we must do something further. We never have really governed our lives by logic (although we make a pretense of doing so), and there is no need to fear that we shall start doing so at this late date. "Man acts from adequate motives relative to his own interest and not on metaphysical speculations."

Again it should not be particularly distressing if we conclude that many people, if not indeed most people, accept those various errors and dogmas as "fundamental truths." We may well shudder, however, when we find among those people many lawyers. Because, mind you, lawyers are superior people! At least we have a constitutional doctrine to that effect.

IV

It must be remembered, however, that after all the rôle which the lawyer has called upon himself to fill is difficult. The standard he has set for himself is high. It may be that it is impossible of consistent attainment. Indeed he must struggle even against those who are the most prone to emphasize his failures.

But lawyers believe, at least, that their occupation is a profession, and the only possible distinction between a business and a profession is that the first is individualistic while the second is socially minded. A business man has only to look to his profits and let his competitors and all others look to their interests. A professional man measures his conduct not only by his own individual needs and ambitions but by the social consequences of his action. Professional men are constantly called upon to sacrifice personal interest for the common good, and perhaps we have reached the point where others can safely be called upon to follow.
The common disaster lies in the obvious difficulty of acting socially (professionally) in an individualistic society. A lawyer's ideals are in very truth at complete odds with his environment. Those who criticize him the most, who make the most of his frequent failures, are those who add to his already impossible situation by their own inconsistent demands that their own individual interests are beyond social control.

What appears to be an irreconcilable conflict, however, finally reduces itself to a battle which is won or lost only after the conflict has been actually met by the empirical test of action. There are many irreconcilable conflicts in nature, the one between free will and determinism being a most illuminating example. Both principles are in truth valid, although in the test of action one or the other must be a decisive force.

So it is here. The professional ideal is simply tested, and the battle won or lost in the field of everyday action. The character of lawyers is finally the determining factor as to whether or not the conflict is won or lost. Is superiority a fancy or a reality? Assuming that we are committed to a doctrine of lawyer supremacy, what elements insure its practical success?

The start surely is with a decent concept of professional character. Then if the concept be sufficient, the determining factor certainly is the successful development of professional character.

There is little dissent, at least among lawyers, upon the concept of professional character. It may be even that it has been idealized a little too much. But it is settled by judicial decision that character in an attorney is something far beyond mere physical morality. Attorneys have been disbarred because of ignorance where clients have been harmed by their actions. The standard of intellectual attainment is not high and it is very narrow, but it is there.

When one gets out into the fields where lawyers execute the doctrine of judicial supremacy, either as advocate or judge, the concept of professional character certainly broadens. Common decency and some intellectual attainment are assumed. But the additional requirements have not been so obvious. The principal requirement has indeed been overlooked if not even repudiated. Professional character really is the sum total of ordinary decent character plus a deep and broad learning, plus a scientific attitude, a social viewpoint. Only with that equipment can a lawyer maintain his superiority as the directing genius of our experiment in social democracy. That is true even in the cases where on the face of it the attorney is dealing
only with his client's interests. There can no longer be even in theory a clear-cut dividing line between individual interests and public interests. Each is limited by the other.

V

The development of a professional character which will stand the test of action in modern life must obviously be delegated to the law schools. Practically all lawyers are trained in law schools. Character is set during the school period. If the school fails there is no second chance.

The kind of school and the form and substance of legal education are of controlling importance. On the first score the commercial law school is doomed. It is physically impossible to keep one's head and heart in the atmosphere of idealism and in the cash register at the same time. The latter too often measures the former, and inevitably so.

Assuming a law school whose policies are not dictated by financial expediency, there are immense problems left. The form of professional conduct is of relatively little importance. Little time need be given then to the teaching of "legal ethics" in the sense in which that phrase has previously been used. The form and substance of the instruction as to law and the judicial process are the determining factors in the result.

Much legal education in the past has been entirely formalistic, even ritualistic. Lawyers learned much which was not so. Law teachers were dogmatists, with the result that lawyers were far from anything else—for "taught law is tough law." It is true that law cannot be scientific in the same sense that chemistry or physics is scientific. Those can measure "truth" by experience because they seek to explain nature and man. Law attempts to regulate man and not to explain him. Legal rules cannot be "proved" or "disproved." But that experience—the success and failure of legal rules—should have a vast influence on the formulation and administration of legal rules is obvious. Legal rules are thus experiments and not finalities. The past is important but inconclusive. I repeat that we must abandon the notion that we can manufacture a satisfactory legal and social order simply out of our past and our mental processes without regard to present experience (including present ideas and ideals). An attempt, therefore, must be made to train lawyers with a broad-minded tolerance toward life and law. When that is done we shall have pro-
fessional character which will really make the lawyer superior. Only then will he be able properly to fulfill his rôle of constitutional supremacy.

Such a lawyer will have learned that there are distinctions between his beliefs, his opinions, and his knowledge. He will have learned that his usefulness is in an inverse ratio to the number of things he "knows" which are not so. He will be more than a "subtle disputant," aware of the fact that the "vice of the law is logic." All this simply because he will have some appreciation of the significance of social existence and his proper place in it, and because finally he will have learned that tolerance is the highest of the virtues, particularly in public affairs. Law will have become a "science" in the only sense in which it can be a science.

This is no revolution. It is simply an added emphasis on what all liberally and constructively minded lawyers and citizens have always accepted as desirable. But it is certain that little real progress can be made, if indeed the present position even can be maintained, unless there is accorded the law schools the active sympathy and support of the general public, which after all has a very real, immediate, and constitutional interest in the problems of legal education.