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SOME DUTIES OF AMERICAN LAWYERS TO AMERICAN LAW.*

In this country of common opportunity for exceptional success, no career opens so many and such varied pathways to great usefulness and to fame and fortune as does that of the lawyer. The conditions precedent to a lawyer's success are severe. He must acquire sound learning; he must be trained to clear thinking and to simple and direct expression; he must be both intellectually and morally honest, and he must have the quality of loyalty to every cause in which he enlists. He should have the tact which comes from real sympathy with his fellow-men, and he will be far better for the saving grace of sense of humor, which brings with it sense of proportion and good judgment.

The lawyer who exercises these qualities is certain of professional emoluments greater than those received by the members of any other profession, old or new. But he is certain of far more than this. As he goes on in life, a multitude of personal relations grow up between him and his clients. Some of these clients are strong and able, and with them the relation is of mutual respect and helpfulness. Others are weak and dependent, and to them he furnishes not merely learning, but support and strength of character and moral fiber. The feeling of all is characterized by confidence and trust. The growth of his own character responds to the requirements of this esteem. In time other people come to feel and to adopt to a great

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degree the opinion and attitude of the clients who know him best. And so he rounds out his career in possession of that priceless solace of age—the respect and affection of the community which makes up his world.

The faculties of such a lawyer are exercised in a wide variety of affairs. To-day, preparation for the trial of a cause requires him to become familiar with the history and methods of a great manufactory, the sources and cost of its raw material, the markets for its finished product, the elements of its success or failure, the difficulties and hopes and fears and ways of thinking of its managers. Next week he may go through the same process with a railroad company, and the next with a banker, and the next with a merchant, or a ship owner, or a contractor, or a charitable institution, or a church. Men looking at life from all points of view and with all sorts of prejudices come to him in turn, and he has to put himself in their places and get their angles of vision in order to apply his own sense of proportion to their affairs and advise them justly. The lawyer thus naturally tends to avoid the running into a rut of narrow experience and activity, which makes so many men who are able in their own particular business worthless for anything else.

It frequently happens that the capacity cultivated by this variety of experience and the opportunity for its demonstration bring to the lawyer some prize of business life and take him out of the general practice of his profession altogether. Among the men whom the seniors of our bar remember as trying small causes many years ago are to be counted now heads of great banking houses of world-wide influence, of great railways, and of great mining and manufacturing and constructing enterprises.

More important is the adaptation for public office which results from the variety of a lawyer's experience and training. The study and exposition of existing laws, of course, tends to qualify men to be makers of law, and to a less degree to administer the law. The lawyer's habit of speaking and of thinking on his legs is useful in a legislative body. The capacity to get the sense of a document in the shortest possible time, and the faculty of rapid decision—both of which are so necessary in court—are useful in an administrative office. But I think the chief reason why so many lawyers tend naturally to public office is that every public office is quite different from any private business, and it is much easier and more natural for the lawyer, with his varied experience and his habit of

transplanting himself frequently from one set of interests and ideas to another, to meet the different requirements of public office, than it is for any other member of the community. For this reason, or for all these reasons put together, the people in our country turn more frequently to lawyers for the performance of public duties than to anyone else; and our government is largely carried on by them. The profession of law, therefore, affords the most promising route to high office, not merely upon the bench but in the legislative and executive branches of government.

In all these relations the lawyer can, if he will, exercise a powerful influence over the thought and sentiment of his community. His quasi-public employment makes him a conspicuous figure. Every interesting case in which he is engaged advertises his name, and it becomes known to the public. He can greatly aid all good causes, and do much to restrain or move public feeling and public judgment.

All these opportunities carry correlative obligations. The confidence of clients and of the community, the familiarity with affairs, the wide acquaintance with men, the knowledge of the law and its working and of the principles upon which it is based, the intimate connection with business enterprises, the large share in the government of the country, impose upon the members of the profession in America special responsibilities for the preservation and systematic development of the social and political system in which the legal profession plays so great a part.

He is a poor-spirited fellow who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with his best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come. If he fail in loyalty to this cause; if he have not the earnestness and sincerity which come from a strong desire to maintain the reign of law; his voice will ring false in the courts and will fail to carry conviction to judicial minds.

The institutions upon which the lawyer's opportunities are based have not come of themselves; they are the product of the

convictions, the efforts and the devotion of our predecessors. They are not indestructible; they are liable to pass away as many times before human institutions have passed away, to be known only in history. They will continue only so long as they have the faith and loyalty of the people who live under them and believe in them and are willing to conform to them because they believe in them. The real force of law as a continuing rule of action is derived from the assent of the people for whom the rule of action is prescribed. Without real assent on their part to the justice and expediency of the law it soon becomes powerless and ineffective. It is a matter of common observation that statutes which run counter to the deliberate sense of the community for which they are provided fail of execution and fall into disuse—as, for example, the laws relating to the sale of intoxicants in some of our large cities; that when in the course of time the moral standards of a community change, laws which have once satisfied the moral sense of the people but have come to be no longer in conformity to the changed standard, become obsolete and impossible of execution—as, for example, the so-called "blue laws" of Connecticut; that when laws do not conform to the judgment of a community as to what is a just and reasonable regulation of the conduct of its members toward each other, there is a constant tendency toward the establishment and enforcement of new and different regulations, even without formal legal sanction, to take the place of the formal but rejected and ineffective rules—as in the case of the treatment of the crime of horse stealing upon our western frontiers, and in the case of the marriage laws of Cuba and Porto Rico, which resulted in a large part of the population living in marital relations not sanctioned by the law prescribed by the sovereign, but sanctioned by customary law of the people under which without reproach the home was maintained and the family was reared under marital fidelity and parental responsibility.

No doubt is thrown upon this principle by the fact that very bad and oppressive laws have been for long periods enforced by superior power among peoples who had not yet conceived the idea that they themselves were the true source of authority. The assent of such people to the right of superior authority to impose laws upon them is in effect an assent to the law which is imposed by that authority, however much it may differ from their judgment and wish.

It is of little consequence that any particular law fails of

effect for want of public assent, except that each instance of disregard of law tends to weaken respect for law in general. But the same inexorable rule applies to the fundamental principles which underlie systems of law. If they come to be without the genuine assent of the people to their justice and expediency, they also will fail of effect; a system founded upon them will fail, and a general structural and institutional change will take place. If our people were to revert to the views of individual liberty which prevailed in Spain under the rule of Philip II on the one hand, or were to give their adherence to the opinions concerning the right of property preached by Carl Marx and Lasalle on the other hand, the constitutions which express the principles underlying our institutions and our laws would become dry husks with no more life in them than the laws of the Medes and the Persians. We believe that those principles are founded in eternal justice, and that in the development of civilization the whole tendency is toward them and not away from them; but communities, like individual men, often wander. The path of departure from true principles always proceeds by gradual and unobtrusive divergence. There are comparatively few who appreciate the value and importance of a rule, as distinguished from justice in a particular case. The great rules of right established in our constitutions were of impersonal and impartial origin. As Ulysses bound himself to the mast while still without the influence of the sirens' song, our fathers bound themselves and their successors by constitutional limitations against future temptation to violate principles of justice under the pressure of special occasion. Like Ulysses, when the temptation comes we struggle against the restraining bands. Now some sudden gust of popular feeling, now widespread and insidious appeals by some great private interest, now the requirements of immediate political party exigency, press against the limitations. Then some men say, and more men think: Why should the criminal go unpunished because of the technical form of old rules? Why should profitable and fair action be hindered by the fine spun theories of old lawyers? No legislative body meets in this country which does not give at least its theoretical assent to the principles of the constitution; but it is probably safe to say that not a legislature meets which does not spend much of its time in trying to evade those principles. Always that great part of the people who are dissatisfied with their lot, those who assume that all the ills of life can be remedied by law, and those who resent the differences

of condition which result from differences of individual capacity, continually question the justice of the system under which others seem to be richer, happier, more privileged than they.

No mere *vis inertiæ* of the statute book will resist this pressure. No indifferent and unbelieving people will maintain these great rules of right in living force. They can be maintained only by a people who believe in them, and who hold them to be the bulwarks of their possessions, of their liberty, and of their individual opportunity, who esteem them above all private interest, and are earnestly determined to enforce them.

To preserve and foster such a living faith of the people in the supreme value of the great impersonal rules of right which underlie our system of law, is the highest and ever-present duty of the American lawyer.

The features of our system of law which it is specially important to preserve inviolate are not to be found in the general body of municipal law which regulates the relation of members of the community to each other. The oft-quoted declaration of Lord Coke that "the common law is the perfection of reason" leaves the student of the law as it was in that famous judge's time still at liberty to question the perfection of human reason. It is so in our own time. We have no just ground for arrogating to ourselves any special superiority over the other civilized nations of the earth, either in the system of rules which declare and regulate the rights and obligations and the conduct of men towards each other, or in the methods of procedure by which those rules are enforced. Substantially the same principles of right conduct and fair dealing among men obtain in all civilized nations, and each country has produced a system of law, more or less original to itself, suitable for the application of these principles, to the customs, habits, modes of living, and business ways of its own people. The utmost that we can say with confidence regarding the system which has grown up in England and America is, that it is better adapted to our ideas and our ways of thinking and acting than any other system.

No part of the duties imposed upon the Government of the United States in the exercise of authority over the islands yielded or ceded by the Treaty of Paris, with their millions of inhabitants, called for more study and consideration than the solution of the question how far and in what direction the system of laws under which the people of the islands had lived should be changed or modified under the new authority. There were those who thought it our duty immediately to give to the

people of Cuba, of Porto Rico and the Philippines, the blessings of the common law. A careful study of the subject, however, soon led to the conclusion that these people already had in force an admirable body of municipal law, regulating their rights and obligations, and far better adapted to their needs than the system of rules which we prize so highly for the guidance of our own conduct. Certain constitutional principles needed to be established: the laws relating to crimes and punishments, and the methods of criminal procedure which had been adopted and had been used for purposes of oppression, needed to be changed; but the great body of municipal law which regulated the relation of people to each other was far better for them than anything we could produce out of our experience; and it was left, and properly left, substantially unchanged. Practically the same course was followed by the very able group of men who undertook the task of adapting the laws of Louisiana to the new conditions following the cession of that territory to the United States by Spain. A similar course was followed after the acquisition of Lower Canada by the English in 1763. That province had been governed by the laws and ordinances of France and the custom of Paris—a mingled system of Roman and Frankish law. By the statute of 14, George III, the English law was introduced in criminal matters, and the civil law was left undisturbed.

The rules which constitute such a body of law change from age to age with changing conditions and opinions. Much that was deemed essential in Coke's time seems to us now artificial and absurd. Much that we deem essential now will doubtless become obsolete and be brushed aside by our successors.

There is no part of our system of procedure to which we adhere, with a greater degree of intolerance of the different methods followed in other countries, than the rules governing the production of evidence in the trial of causes. Yet in a recent case involving the effect to be given to a foreign judgment, a very learned and able Federal judge made the following observation:

"The methods of investigations in different countries are adjusted to the conceptions of expediency and propriety that prevail in each, and it would be mere bigotry to assert that, upon the whole, the truth of disputed facts is not as well ascertained in France or Holland or Germany as it is in England or the United States. Our law of evidence is largely a series of negations, sedulously framed, to exclude from consideration all *indicia* of the truth which do not fall within the class of those it

regards as competent and safe, while in continental countries a larger latitude of investigation is indulged. In matters of evidence and procedure, to say nothing about the weightier matters of law, the wisdom of yesterday is the folly of to-day; and it is doubtful whether our present methods do not differ as greatly from those of the recent period, when parties were not permitted to testify, as they do from the methods of continental countries. Who can say with reason that our system of investigation is more infallible than that of France; or that a French citizen sued here could not as justly complain of our rules of evidence as one of our citizens sued in a French court could of the methods of procedure there?"

And upon this proposition he had the subsequent approval of the Supreme Court of the United States.

In all this field of the law regulating the relations of citizens to each other, the proper function of the lawyer is to promote rational progress; to maintain stability against all fads and crude innovations and at the same time to keep the development of the law moving with equal step abreast of the progress of the age, satisfying the moral sense of the time and meeting the changing conditions of human life and activity. Lessons are to be learned from other countries. Practical common sense is to be applied to outworn rules. Wrong constantly assumes new forms and adopts new methods, and the spirit of the law must answer with new expression and remedy. The law always tends to become fossilized; procedure always tends to become technical and complicated; eternal vigilance and ever recurring reform are the price of efficiency. The obligation to lead in these, rests first upon the lawyer.

When, however, we turn to the American law which regulates the relations of government and the agents of government to the private citizen, we find a class of rules which it is essential to preserve inviolate in full force and vigor; and as to these we cannot for a moment admit superiority or equality of merit in any system which does not embody them and make them effective.

We need not concern ourselves especially about the mere declarations of the general principles of justice and liberty. Most nations profess adherence to those principles. The first French Republic easily led the world in fine words about liberty, equality and fraternity, accompanied by the most appalling violation of every human right. The most sadly misgoverned republics of South and Central America live under constitutions which have copied, with various improvements of

style, the most admirable passages of the Bill of Rights. The most flagrant usurpations of power, and the most despotic denials of private right in modern times have been accomplished in avowed furtherance of the same general principles of liberty which we profess.

But we have a class of secondary provisions designed to give to the private citizen the practical benefit of the general principles of liberty and justice, and that we should hold to these is all important and essential. These provisions seldom themselves declare the principles to which they are designed to give effect. They secure to the individual citizen certain specified statutory rights, the reason for which is not always apparent on the surface; and it frequently happens in individual cases that the assertion of these specified rights appears to the public to be technical and contrary to the justice of the case. Yet unless rules of law securing these specified rights are maintained inviolate, the general principles which we profess are not practically available for the protection of any citizen. The declaration of a principle in favor of liberty is no protection to your liberty and mine without the secondary provision requiring judicial officers to allow writs of *habeas corpus* or some equivalent specified definite right in the course of procedure. Spain professes as high a regard for the principles of liberty as we do. Yet in 1899 we found hundreds of prisoners in the jails of Cuba who had been imprisoned for years without trial for want of some definite and certain way in which they could avail themselves practically of the principle. One of these wretches had been imprisoned for eleven years theoretically awaiting trial. General declarations in favor of fair, impartial and speedy trial for persons accused of crime, are worthless without specific provisions enabling the accused to require that he be brought to trial or set free; that he be acquainted with the evidence against him; that he be confronted with the witnesses against him; that he have process for the production of his own witnesses; that he be protected in refusing to testify against himself, and that he have counsel for his defense. General declarations of the inviolability of contracts are worthless without specific provisions enabling the individual citizen to bring to the test of judicial determination the question whether legislative acts do impair the obligation of contracts in which he is interested, and requiring all courts and public officers to treat as nullities legislative acts which are adjudged to impair such obligation. This class of specific and definite provisions of a secondary

nature is the sole protection of the individual citizen against the arbitrary exercise of the tremendous powers with which the agents of government are invested. The fact that this power of government is derived from the people is no certain protection for the individual. In conspicuous cases to which public attention is attracted, public opinion may compel a just exercise of power; but in the rush and complication of our crowded life the affairs of the poor and humble, who most need protection, are but little noted, and injustice visited upon them brings no immediate penalty. Because of the fact that these secondary rules do not themselves declare a principle, that many of them appear to be technical, that many of them appear to be mere rules of procedure and of evidence, that occasionally their assertion does not appear to promote the justice of the particular case—they are often regarded with disfavor by the thoughtless. But if the agents of government are permitted to override these rules when they think justice in the particular case requires it—if the rule is not to be maintained as a rule inviolate in every case, then there is nothing left but the judgment of the officer in every case, and the protection of all citizens alike against arbitrary power is swept away. One of the great Chicago daily newspapers a few weeks ago published the fact that a defendant in a criminal prosecution had secured a writ of *habeas corpus*, and observed that he would doubtless continue to obstruct the proceeding by similar technicalities. If the editor of that journal were unjustly accused of crime and kept *incommunicado* for a few weeks he would change his opinion regarding the character of the writ of *habeas corpus*. Yet in carrying to the minds of his readers the idea that he expressed concerning that great writ of right, he was weakening the safeguards of his own liberty, and of the liberty of his children after him.

In no country and in no age have the practical provisions of law designed to secure to the private citizen the application of the principles of liberty and justice for his protection against official power, been made so broad, so effective and adequate as in the countries following the course of the common law and inspired by the Anglo-Saxon ideas of personal liberty and property rights. These practical rules are the most invaluable part of our national inheritance, and in some most important respects they have been made more adequate and secure here than in any other country. Upon their preservation in living force depends the whole structure of our free government. They can be preserved only by intelligent appreciation of their

value on the part of the people of the United States. It is the duty and the privilege of the lawyers of the United States to promote such an appreciation among all our people; to educate each successive generation to a knowledge of the reasons why these provisions were adopted and why they should be jealously guarded against all assault.

There is one general characteristic of our system of government which is essential and which it is the special duty of lawyers to guard with care—that is, the observance of limitations of official power. This observance can be secured only by keeping alive in the public mind a sense of its vital importance. There is a constant tendency to ignore such limitations and condone the transgression of them by public officers, provided the thing done is done with good motives from a desire to serve the public. Such a process, if general, is most injurious. If continued long enough, it results in an attitude of personal superiority on the part of great officers which is inconsistent with our institutions, a destruction of responsibility and independent judgment on the part of lower officers, and a neglect of the habit of asserting legal rights on the part of the people. The more frequently men who hold great power in office are permitted to override the limitations imposed by law upon their powers, the more difficult it becomes to question anything they do; and the people, each one weak in himself and unable to cope with powerful officers who regard any questioning of their acts as an affront, gradually lose the habit of holding such officers accountable, and ultimately practically surrender the right to hold them accountable. The countries which have been governed by Spain as colonies, or have derived their systems of law from Spain, have afforded many examples of the injurious effect of such a process. It has been a common practice in those countries to provide against failure of duties on the part of subordinate and local officers not by holding these officers directly responsible to the people or the sovereign, but by vesting in the officers of higher grade rights of "supervision, intervention and control," to be exercised when necessary; and the result in such cases has been practically unlimited control by the superior officer exercising the power at will. The ultimate effect upon the people governed is a concession to the superior officer of the general right to control their conduct and an absence of the idea of personal independence. The people of a Philippine township assume as a matter of course that they are bound to do what the presidente of the town tells them to do. They sub-

mit themselves to his orders, and the idea that within certain definite limits prescribed by law he has authority and that beyond those limits he has none and they are not bound to obey, has no reality for them. They will require a long course of education and training to enable them to grasp and act upon such an idea. The absence of this conception is the chief obstacle to the attainment of capacity for self-government by the Filipinos. No community which has not that conception in force and effect can maintain the type of independent manhood necessary to self-government. Another illustration of not insisting upon limitations of official power is to be found in the frequent irresponsible dictatorships in Central and South America. The practice of providing against local disturbances by conferring upon the executive authority to suspend constitutional guaranties, has time without number resulted in those countries in the executive sweeping away at will all limitations upon his power and becoming an absolute dictator. Constitutional limitations upon legal power in such countries come to be regarded as but formal matters to receive attention only when it suits the will of the officer upon whom the ineffective and illusory limitations are imposed. A few years ago a South American republic elected a president and a vice-president under a constitution which provided that when the president was absent from the capital the vice-president should fill his place, and which further provided that when public order was disturbed the president might proclaim that fact and should thereupon have power to issue decrees having the force of legislative enactments. The vice-president soon became tired of being only vice-president, and securing the adherence of the soliders in the vicinity, he seized the person of the president and put him in jail a few miles from the capital. Thereupon he proclaimed that, the president being absent from the capital, he (the vice-president) assumed executive functions. Having thus attained the presidency, he issued a further proclamation that public order was disturbed (as indeed it had been by his own act), and thereupon he assumed as chief executive the exercise of legislative functions. For years the people of that country, which called itself a republic, submitted to be governed by this usurper who had thus followed the forms and violated the spirit of their constitution. The people had grown accustomed to official disregard of the limitations imposed by law upon official power. It is not in this way that liberty can be preserved. Constant accountability of public officers for strict observance of

the limits imposed by law upon the exercise of the great powers vested in them, and customary and undoubting assertion of the private right of the citizen to have no power exercised over him except in strict accordance with the letter and the spirit of the law—these are the essential conditions of free government and personal independence. The exercise of power not conferred by law may in a particular case destroy no man's property nor restrain his liberty; but it weakens the title of every man's property and injures every man's liberty, because it is one step in a process which, if continued, would be destructive of our free institutions.

Abundant evidence that our people have not become indifferent to these necessary limitations is furnished by the frequency with which political opponents impute disregard of them to public officers. The charge is often unfounded and often made upon slight foundation with great exaggeration. But the fact that it is made shows that political leaders, who make a business of studying public sentiment, recognize that if they can make the people of the country believe that a public officer has usurped power which does not belong to him, he will be condemned without regard to the motives of his action. The cry of emperor, czar, and man-on-horseback, are but extravagant appeals to an instinct which ought to exist and happily does exist among us, against submission to unlawful authority, however trifling may be its exercise and however beneficent its despotism.

The extravagance and lack of foundation for many of these appeals, however, involve a danger which should not be ignored. It is, lest the cry of wolf should be heard so often that men will become incredulous and indifferent and turn a deaf ear to statements and proofs of real encroachments, made with moderation and not for political effect, and that thus, as so frequently happens, indiscriminate and unfounded charges against the innocent shall serve as a protection to the really guilty.

No one is so well fitted as the lawyer to ascertain the true limits of official authority, and no one can do so much as he, to form public opinion regarding this class of questions, upon the lines not of partisan political advantage, but of independent and impartial judgment. Upon the exercise of this kind of judgment by the people depends that effective service by public officers which comes from the feeling that they will be sustained in the full and courageous discharge of their duties within the limits of their authority, and the preservation of the inde-

pendent spirit which will always, without violence or conscious effort, hold officers to strict accountability whenever they transgress those limits.

You gentlemen who are about entering upon the profession of the law will argue many causes to be recorded in judicial reports. You will construe and apply and take part in making many statutes. You will assert personal rights and protect individual liberty and individual property. Many of you will hold public office. Some of you will play a conspicuous part in the government of your country. Do not, I beg you, forget that all the statutes and the constitutions upon which they are based, all the judicial reports and the judgments which they record, are worthless, are but empty and meaningless form, without efficacy for peace or order or justice or liberty, except as constitutions and laws and judgments truly interpret the judgment and moral sense of the whole people who govern and are governed. You will strive for your clients in many courts; but it will be your high privilege to strive also for the law itself, in the great forum of public judgment. There you may use all your opportunity, all your learning, all your experience, in pleading with the people of your country for the perpetual life of the great rules for the protection of property and liberty, which underlie our institutions, and which only the governing people can keep alive in our land.

Elihu Root.