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The Role of the Lawyer in Modern Society

Warren E. Burger

In the ideal society toward which the human race has been working for 2,000 years, lawyers and judges would hardly be necessary in the sense that they function in our society today. Possibly in that ideal setting we would need even fewer physicians than we now have for there would be far fewer of the stresses that tend to make us ill. In that happy setting the base population would be made up of producers and teachers in the broadest sense of those two terms.

But until that society of the Golden Rule is achieved, lawyers and judges will be necessary components wherever men and women are gathered together in villages, towns, and cities where they must rub shoulders, share boundaries, and deal with each other daily. Lawyers will be necessary because, in their highest role, they are the healers of conflicts and they can provide the lubricants that permit the diverse parts of a social order to function with a minimum of friction. I emphasize that this is the role of the lawyer in the highest conception of our profession, but we know that members of our profession do not universally practice according to these great traditions and with due regard for the moral basis of much of our law. Yet laymen must try to remember that the process of resolving the balance of a lawyer's duty to his client with the public good presents problems of great difficulty at times.

Here at Provo you have carried on the work of a great university for a century, and it is good that you have now added a school of law to carry on the training of lawyers in keeping with the standards that made this institution one of the great centers of learning in America, privately sustained and conducted in conformity with Christian teaching. A school of law with such inspiration and sponsorship fills a significant need in the legal education of this country—a need not met

Address delivered at the convocation for the dedication of the J. Reuben Clark Law School, Brigham Young University, 5 September 1975.

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by all law schools today. Guided by these standards, it is safe to predict that this law school will become one of the foremost in the country.

For centuries lawyers have not been well regarded by the people, and if we are to believe the polls, that is still true today. The literature of the English-speaking world is replete with slurs on lawyers. Typical is the statement that the first step in creating a decent society is "to kill all the lawyers." But in fairness to lawyers we must see that their most visible activities are in the conflicts that arise between people, particularly those conflicts that are finally resolved in the courts. In the courts, however, the lawyers are not the principals but only the agents of those who are in conflict. It is inevitable that lawyers to some extent become the scapegoat in the play. Obviously, if all people lived by the Golden Rule and adjusted all their personal and business conflicts, there would be no lawyers to castigate.

Although critical analysis of all our institutions and professions has real value, we should also remember on the affirmative side the countless examples of courageous lawyers supporting the claims of people who were subject to operation or abuse of governmental power. Mr. Justice Jackson once commented that in every vindication of the rights of individuals and in every advance in human liberty in our history, key figures were lawyers who were willing to risk their professional reputations and their futures in pursuit of an ideal.

A new law school such as yours has a rare opportunity available to few others. It can engage in a reexamination of the basic assumptions on which our system of justice functions, always remembering that some are fundamental and immutable and some are open to change. We begin, of course, with the Constitution that implemented the ideals of the Declaration of Independence, and few better foundations could be conceived. In this 200th year of independence we will do well to look again at both those documents. We see that in the Declaration itself not fewer than four times the authors expressed direct reliance on God as "the Supreme Judge," as "the Creator," and in the closing sentence they call for the protection of Divine Providence. The uniqueness of this law school is, in part, that your basic charter exemplifies these concepts of the Declaration of 1776.

It is not always popular, even in the presumably rational setting of a law school or a university, to challenge or question long accepted parts of our system of law and justice. It is sometimes regarded as heresy to question the validity of the adversary system as it prevails in this country. It is sometimes thought even more heretical to ask whether the full panoply of courts and the contentiousness inherent in

the adversary system are indeed the best method to resolve the myriad human conflicts that today reach every courthouse in the nation.

If the idea of a university is to be maintained, however, these are examples of the kinds of questions that ought to be asked and examined in the pursuit of perfection. Certain aspects of law and procedure are not immutable truths but simply tools to get at the truth. Perhaps the most penetrating inquiry by our best minds will lead us to conclude that, with all its infirmities, our system is indeed sound. But if our system of justice cannot stand up under such inquiry, the flaws may call for change. To make such inquiry is to do no more than to apply the techniques of the adversary system to an examination of our institutions. Lawyers schooled in and dedicated to the adversary process should not object to using that process in a continuing self-examination of our institutions.

Another area deserves examination. It is a proud boast we often make that our system derives from British law that has been tested and found good for over three centuries, and indeed this is basically true. Yet when we lay the two alongside one another under the microscope of objective analysis, we will swiftly see that there are enormous differences in actual operation. The British Bar—by which we mean the barristers who have the exclusive right to appear in courts of general jurisdiction and in serious criminal cases is a small band of 3,000 men and women. I believe that any unbiased observer will agree that nowhere in the world is there more fearless, more vigorous, and more independent advocacy than that found in Britain's courts. Yet British lawyers are probably the most rigidly regulated and disciplined lawyers in the world, and that regulation and discipline comes not from the coercive force of the government or of the judges but from self-imposed standards established and enforced by the legal profession itself. The qualities of independence and courage of the British bar trace back to great figures in the law like Sir Edward Coke, who forfeited his position as Lord Chief Justice rather than yield to the King, and Sir Thomas More, who forfeited both his position and his head in the exercise of that independence.

The tradition of independence of the bar in England and the corollary of accountability for the exercise of that independence flow from the system of training. After basic education in the theory and principles of law, the training for advocacy in the courts of Britain is probably the most intensive to be found anywhere. At the core of their training is the inculcation of strict standards of civility and decorum and, more important, in high standards of ethical conduct. That aspect

of the training begins the very first day of the education of the advocate and is pervasive throughout the training. They do not wait, as we tend to do, until the law graduate enters into practice and assumes that the ethical standards which must always guide the use of the unique power we place on lawyers will be absorbed in some way through the pores of the mind. Of course, lawyers continue to learn as they practice, but the student advocate in England sits in the courts observing trials and hears lectures given by the leading barristers and judges so that the study of ethics and behavior permeates the entire educational experience.

When it is suggested from time to time that we apply some of the methods and procedures used in England, a few shrill voices are raised that this will destroy the independence of the profession in its pursuit of justice. Far from it! Precisely because the adversary system is inherently contentious and pregnant with abrasive conflicts, the British long ago elected to regulate the forms employed in the clash of contending advocates. They do this by insisting that advocacy must be vigorous but always within the framework of a system regulated by fixed rules of personal conduct and civility between the contending advocates and with the court. Far from impairing the quality of advocacy, their system enriches the force and skill of the debate. Violations of these standards occur rarely because the profession polices itself sternly, and members of the bar accept the necessity for civility and rules of decorum as a means to keep the conduct of a trial from returning to the ancient clash of trial by combat—or worse yet, something resembling a barroom brawl.

It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually nonexistent in most of the fifty states. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous twenty-five years. That program demands more impetus and the moral support of the law school community, and of course the support of judges.

The law school at Brigham Young University has a unique opportunity in at least two respects: it is totally independent, and it is free to emphasize that there is indeed a moral basis for our fundamental law; and it is free to examine and explore whether it is sound educational policy to train people first in the skills of a

professional monopoly and leave it to some vague, undetermined, unregulated, undefined future to learn the moral and ethical precepts that ought to guide the exercise of such an important monopoly in a civilized society.

The operation of a law school is itself a high trust and, as with every fiduciary function, it must be treated as a stewardship for which there is an accountability. That accountability is to the public, to the concept of the rule of law, to the highest principles of justice, and in the last analysis, to a conscience responsive to the basic ideals of Western civilization.

As you enter the third year of your school of law, my wish for you is that the teaching here will always be guided by the need for lawyers who will understand their mission in terms of the great traditions of our profession. That tradition is to serve people's needs, to act as the healers of the inevitable conflicts that are bound to arise in our complex, competitive, modern society; that the lawyers you train be participants at all times in the affairs of community and nation, and that they execute their trust in keeping with the traditions of Western civilization, with the ideals of the Declaration of 1776 and the Constitution—always guided, as the authors of those great documents were guided, by a Divine Providence. This is indeed a large mission for any school or university, but the background of 100 years of Brigham Young University assures that it will be accomplished.