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suggested that it make a study of our judicial system, generally, but, unfortunately, the committee has not functioned. I recommend that a new committee be appointed by the incoming President, with one member from each judicial district, to make such study and to report its findings to this Bar at its next annual meeting, and I further recommend that this meeting authorize the Board of Commissioners to take such action on adoption of the Canons of Judicial Ethics as it shall deem advisable, after study of the matter.

Ladies and gentlemen of The Wyoming Bar, with this meeting my official connection with this organization will terminate but my unofficial interest in it and its affairs never will. My personal conviction is that we face many new and perplexing problems in this turbulent and revolutionary time in which we are living, but I am confident that this Association will fearlessly confront and deal with those problems as they arise in our state. We are few in numbers but by working in unison we can be an even more potent force than we are now. Let us courageously face the future, resolved to preserve our American way of life, and determined to elevate our profession and benefit mankind.

## THE PROPER PLACE AND FUNCTION OF THE LAWYER IN SOCIETY—SOME REFLECTIONS

ERNEST WILKERSON\*

Nearly one hundred years ago, an Englishman determined to write a book. He wanted to set down lucidly and compellingly the principles which guided his life, and to dispel, as well as one man could, the half truths and the prejudices which he felt impeded a tolerant understanding of his beliefs. *He undertook the task prayerfully, and wrote with the clarity and discernment which is achieved only by those who are determined to assemble words in a manner which will reach the hearts of men. He wrote with an inner compulsion to say what he believed to be true and what he believed needed saying.* The result was a message, which, in its realm, is a masterpiece. The man was John Henry, Cardinal Newman; the book, *Apologia Pro Vita Sua*, Any one who reads the work and lays aside his preconceptions of dogma and dialectics acknowledges the genuineness and worth of Newman's efforts. The significant thing is not whether one adheres to Newman's creed; what is significant is that here was a man who had a deep-rooted belief in the meaning of his life and works and could explain it in comprehensible terms to his fellow men.

Newman, it happens, was a practitioner of religion. He could equally well have been a practitioner of medicine, of farming, or of

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law. In every profession, in every craft, and in even the most humble pursuits, there are men who believe in what they are doing and believe that what they are doing is important. A very few try to tell why; the majority do not. The latter may have the best of it. The few who are given to analysis of their place in the societal framework will feel inevitably the hopelessness which comes from trying to evaluate their work and daily activities in terms of the somewhat nebulous ideals which motivate them. It is disturbing to try to mesh the two, because to do so we must take our eyes off the shoulders of the man ahead and stand for a moment outside the line of march, trying to view the entire parade as one integrated, meaningful display. Being only man, we never do this with complete success.

A lawyer who is bent on writing about his place and function in society steers a perilous course. *He begins—and midway finds that he has outlined a comprehensive and boresome treatise which might appropriately be taught as "The Legal Profession—one credit hour."* *He begins again—and finds himself fathering a compendium of legal miscellany, setting down "How" and "What" in an edifying way, but forgetting to say "Why."* *Or he may struggle through a Hegelian quagmire for a few thousand words before he discovers that the "Why"—the philosophy of the law—can be translated only in terms of the "How" and "What" of the lawyer's everyday routine.* To strike a balance *here* is difficult. It is especially important that we not take too olympian a point of view, for the practicing lawyer, after all, is a fellow who has to sell himself and his wares to his non-lawyer neighbors, in order that he and his family may enjoy a measure of the same opportunities and comforts as they. It is true that what he has to sell is different from what they have. The skill of the surgeon is essentially a mechanical one, as is that of the bricklayer. Either the incision is deep enough or it is not; the building will either stand or fall. The lawyer's skill might be said to consist in his ability to transmute certain metaphysical concepts into practical and realistic guides for action and conduct. The "reasonable man" cannot be measured with calipers; the "holder in due course" does not come in a pattern; and "good custom and usage in the trade" cannot be weighed on the scales.

As lawyers, we deal with intangibles which we must make sensible to ourselves and to our clients through the highly imperfect medium of words. It is in this regard that the lawyer finds himself in sympathy with the minister. Both are trying to interpret and instill rules of conduct; rules which derive, in the one case, from the deliberation and councils of men, and in the other, from sources outside ourselves. The lawyer has a slightly firmer grip on reality here, for he can predict with somewhat more certitude what rewards or punishments will follow a given course of action. Consequently, he may not be so susceptible to soul-searching doubts as to whether or not he is

right. *Be that as it may*, it is not only ministers, not only the Newman's who should feel called upon to give an occasional accounting; lawyers, being members of perhaps one of the most maligned professions, should feel a particular impulse to reason out their place and function in society.

There is something rather wholesome in occasional introspective probings to see what makes us what we are and whether what we are is what we should be. Improvement is often born of inquiry. True, in so analyzing ourselves, we may fall gracelessly between two stools. We, in the legal profession, know our professional Jeremiahs, whose discourses intone our *mea culpea* and who assure us that in the brighter world to come there will be no place for higgling, niggling likes of us, and we are not completely unfamiliar with those at the other extreme whose mothers presumably were frightened by the Coue formula. Most of us would acknowledge that somewhere between the two poles, there lies a true analysis of what it is we lawyers have to offer to humanity that makes us worth our keep. What is it? What do we do? We do not heal the sick or build the buildings; we do not shoes the horses or pilot the planes; we do not ride the high wires or compose the songs. What do we do? Well, for one thing—

We distinguish the cases.

“Why may not that be the skull of a lawyer?  
Where be his quiddities now, his quidlets,  
his cases, his tenures, and his tricks?”

*Hamlet*, Act V, Scene I

Daily we lawyers are forced, often without our being conscious of it, to make nice analyses of fact situations and to compare them with this or that legal pattern. We deal with a mechanism, the law, which is not unlike the child's toy which has a number of dissimilar apertures which will receive from the grubby hands of our little ones only blocks of the same shape and dimension, and which we bring home with the belief that it may teach perception of the like and unlike to the child. We hope that eventually he may learn that a circular hole will not receive a square block. So it is with us, when we try to find the aperture to fit the problem which concerns us.

A popular song of a few years back assured us that “Everything's been done before,” but we begin to wonder in the law, particularly as we try to find what the law is in the case at hand. Often as our research progresses, we discover that the cases which made the law what it is are somehow different from our own. So we distinguish the cases and so we strike out to make the law of our case what we think it should be. This seems a prosaic enough exercise, and one which possibly does not deserve mention among all of the splendid and inspirational aspects of the profession. On closer analysis, though, there seems to be a significant principle behind “distinguish-

ing the cases" which we, as lawyers, should recognize and should carry forward for the benefit of our people and our society. Today one of the most dangerous of tendencies is the failure critically to analyze and to differentiate between things which may look, sound, and seem like other things, but which are really very different. It may be that only as we preserve our ability to distinguish and to perceive differences and similarities, can we hope to exist and mature as a civilized people.

In this time there is constant danger that we, who have the democratic right to do so, will not weigh and assay truly the genuine and the meretricious as it pours in on us from all sides. Through our phenomenal advances in science and communication, we have taken the problems of the whole world out of the chancellery and the G.H.Q. and pitched them into the front parlor and the corner drug-store. To have done so is a magnificent accomplishment, but one which is fraught with the inquiry, "Do we as a free people have the understanding and the insight to make the right decisions if we are given the truth?" Do we have the ability to "distinguish the cases?" Only as we do, will we know why foreign "isms" of whatever kind are not the answer for our people. Only as we do, will we know that out of the history and characteristics of every people is woven the pattern for its existence and survival. Only as we do, will we understand that because there are no cases "on all four's" in the realm of the struggle and achievements of whole peoples, there is no blanket panacea for their ills, no universal Baedeker for their economic, political and spiritual wanderings.

We lawyers know that even in the elemental realm of the relationship of one individual to another or of one individual to his state, we never find the ready-made answer. We know that in the infinite variety of human relationships through the centuries, there have never been two instances where the identical factors produced the identical results for the identical reasons. This is why we distinguish the cases, and this is why we know that it is important to do so. We should say to our lay friends, "Criticize us if you will for our quibbling and picayune ways, but never forget that it is only as we Americans differentiate the good and bad, false and true, Christ and anti-Christ that we may hope to escape the terror of barbaric despotism." This needs to be pointed out early, often, and with emphasis. Maybe the lawyers, because they believe it and practice it, should be the ones to be sure that it is. And this may well be one of the reasons why—

We go into politics.

"The profession of law is the only aristocratic element which can be amalgamated without violence into the natural elements of democracy and which can be advantageously and permanently combined with them."

De Tocqueville, *Democracy in America*,  
Vol. I, Chapter XVI

It is no accident that lawyers have been foremen in the construction of the great backdrop of government, before which has been played the drama of our democracy. The inherent promise of a free society is that man has the innate ability and integrity to judge public problems in their true light and to come to wise and timely decisions. This premise is fundamental in the operation of our legal system as well.

One of the aspects of our jurisprudence which has been subjected to the most severe academic criticism is our adversary system of procedure. Would it not be better, some say, that there might be a calm and dispassionate appraisal by disinterested persons, followed by a decision rendered in an aura of sweet reasonableness, rather than having a hammer and tong battle between special pleaders, given to excess in statement and overeagerness in forwarding their viewpoints? It is these observers (who deplore the pugnacious processes of the law) who are most surprised to see adversary attorneys "have at each other" for an hour and then link arms and walk away together. It is in that very phenomenon that there lies a meaningful kernel of significance, not only for lawyers, but for all of our people.

This nation is not a homogeneous mass of faceless people; it is a surging, colorful pattern of individuals, each of whom has the innate and basic human dignity recognized by our constitution and not one of whom may be scorned, oppressed, imprisoned or punished without the awareness and appraisal of the whole of the people. Having, thus, a nation of strong men and women who are led by stronger leaders, we do not lack for divergence of interests or opinions. Today the men of labor, the farmers, the industrialists have equally influential and capable spokesmen. These spokesmen forward with telling advocacy the special interests of their supporters for the consideration of the whole people, who, in a democracy, are the final court of appeal. There is apparent, thus, a close and interesting parallel between the processes of the law and the processes of government. The analogy, oversimplified, might be stated thus: in both realms, from a free interplay of excesses and biased viewpoints, we attempt to construct a fair, balanced and equitable solution. There are probably better ways of arriving at truth, but until we are blessed with a revelation as to what they are, we will have to continue to hammer out with our imperfect and brittle tools codes of conduct and ethics which we deem wise and just. We do not, as yet, receive predictable divine guidance in our activities in this regard, so we have to do the best we, as human beings, can do.

Thus in our society and the law carried on, and thus do we try to attain in both that precarious balance which we define as the greatest good for the greatest number. It is probably because lawyers are weaned, so to speak, on the principles that every man is entitled to his day in court, that every man should be heard, that there are

two sides to any question, and that equally honest, wise, and God-fearing men can hold diametrically opposed views on any given matter, that they find themselves so inevitably drawn from the practice of law into the larger arena of the practice of political science. Simply stated, the goal of both mechanisms, the law and the government, should be to compound, out of the facts truthfully stated and a comprehension of man's essential possibilities and limitations, a solution which is fair and workable. The lawyer, trained in the gentle and difficult art of compromise and negotiation, finds himself no stranger to the same processes as they are found in government. The lawyer, who pins his faith on "twelve good men and true" to reach the right answer in his case, will most likely be one to resist those who challenge the ability of these twelve men to think for themselves in society. The lawyer, who knows the intensity of effort required to prepare and plead his client's case can comprehend the sincerity of those whose views differ from his own. The law mirrors on its small surface the whole intricate pattern of the political system, and thus does the lawyer, initiated into the delicate mysteries of human action, reaction and interaction in his own profession, gravitate naturally into the larger game of politics.

We regard the equities.

"Mastering the lawless science of our law,  
That codeless myriad of precedent,  
That wilderness of single instances."

Tennyson, "Alymer's Field"

There is an elemental concept which underlies the Anglo-Saxon approach to the law-Fairness. What is the *fair* decision between two contesting parties or between groups of millions of citizens with disparate interests? It was this need for fairness which impelled us to introduce the great concept of equity into our legal system. We thereby induced a flexibility and humanity which immeasurably strengthened the system.

In all of society, we have a continuing need for the same sort of tolerant understanding of the wants and needs of various of our peoples. The dangers to our form of government do not arise out of the creation of a responsible state which will and can adapt itself with fluidity to changing social patterns and human needs. The dangers lie rather in the creation of an unbending and steel-jacketed series of concepts which are used with fine impartiality to thwart the just and the unjust and to block the needed changes along with the crack-pot scheme. The great architects of our democratic structure have had the same qualities as the great lawyers and judges of our legal system. Both have realized that laws and political mechanisms spring from the minds of men and that neither must be so deified as to become an instrument of oppression for one or for one million of our people. In the history of the human race, when a political

philosophy or a legal system has been allowed to atrophy to the point where fairness, which is another way of saying equity, is not its basic end, then the people have thrown it off, and through turmoil and bloodshed have brought forth another system which they believed fair.

We lawyers, nurtured as we are in the importance of precedent, must, of course, give respectful and mature consideration to what has been said by other men in other times. We must find there, if we can, the decision in our case, in order that we may serve the end of predictability in the law, but we must,—and here we will surely play false to ourselves and those we speak for if we do not—have the courage and the innate and indestructable faith in ourselves to discard those precepts, these precedents, if they are outworn, and ourselves blaze a new trail if need be to assure that fairness will lie at the end of our labors. If we do this in our profession for our clients, can we do less as citizens when we detect an oppressive and unjust economic or political situation?

We in America are engaged in a great continuing defiance of history. All the manifold chapters of men's courageous effort to mold and direct his political and economic destiny have closed with a sorry postlude of despotism, disillusion and despair. It has ever been the lot of men to create governmental machines, which, though nobly conceived, eventually toppled because of their inflexible and immutable processes which failed to change as human wants and needs changed. When this has happened, a Khan, a Caesar, a Bonaparte, or a Hitler has always been ready to lay the scourge of dictatorial oppression on the individual citizen because he had failed to keep his government fair and free. Is it not particularly necessary that we have men and women in our state and society in whom the concept of "looking at the equities" is ingrained? It was by looking at the equities that we lawyers tempered the rigidity and the harshness of the common law centuries ago, and thereby saved it from certain destruction at the hands of the people who created it but who could no longer be sure of being treated fairly under it. Oppression in law is merely a small counterpart of oppression in society. Equity in law should and must find its greater counterpart in equity in society. Lawyers, who know best the vital and irreplaceable part equity plays in law, must be sure that so long as they can be heard, equity will have its place in our government and in the thinking of our people.

But mainly we practice law.

"The popular attitude toward the legal profession, never particularly favorable, has recently grown even more cynical. The general futility of litigation has given rise to the view that the principal benefit derived from a law suit is that the controversy is ended, rather than that justice is done . . . Despite this, there is a public respect for the mental versatility and ability of the bar. Its genius for getting results, and its peculiar facility for tackling and untangling complex



situations are almost summed up in the popular assumption that a lawyer can do anything, although the process is expensive."

A. A. Berle, Jr., writing in *Encyclopedia of Social Sciences*, Vol. IX, Page 344, "Legal Profession and Legal Education."

Not too long ago there was a uniformity of interest and activity among our lawyers. In the days when the gangling Abe Lincoln rode circuit, the lawyer of New York would have felt at home in North Carolina, and a young aspirant "reading law" in Maine could, with equal ease, have packed his bindle to Massachusetts or Missouri. In retrospect, there seems a pleasant simplicity about those days. The unqualified edicts of Blackstone make our present writers seem a lot of nambly-pambies, and the fervor and colorful phraseology which our predecessors used in "pleading their cases" make our current court room work drab by comparison.

Tastes, of course, have changed. Today we are motivated by inquiry and skepticism. None of our judges or writers is safe from the "legal realists" and as for "pleading the case," we are all so wary of appearing unsophisticated that we hesitate to invoke the fiery phrase and purple passage (which may be all to the good).

All of which is by way of saying that the practice of the law, like most other things, is not what it once was. Today, the attorney who is administering a railroad in receivership is practicing law as much as is the attorney replevying a horse. The fact is that "the law" has grown into such a tremendous factor in all our lives that there is no one and no thing unaffected and unmotivated by some of its ramifications. The reason for this is simple—laws are created by men to govern their relationships and contacts with each other. As those relationships and contacts become more numerous, complex, and subtle, so must the laws. As the laws become more numerous, complex, and subtle, we observe a splintering of the practice of the law into specialties. Today's lawyer who would be a general practitioner must make up his mind that he will never equal the skill of the legal specialist in the specialist's field. The other side of this coin, of course, is that the legal specialist must resign himself to the fact that he will never have the broad ability to compose a solution to his problems by using the full scale of concepts and ideas which the general practitioner draws on.

One of the results of our creation of this tremendous and intricately contrived code of legal conduct has been the formation of the great law firms of the nation, whose numerous members process a legal problem in much the same fashion that Ford makes a motor car. This is an expensive proposition, and perforce the client who can afford this sort of thing is not the ribbon clerk, but the corporation which manufactures the ribbon. This is something we should scrut-

inize carefully. Legal services, because they explore and adjudicate rights and moral responsibilities, cannot always be sold to the highest bidder, as can a case of toothpaste. In ratio as our profession allows itself to become the handmaiden of "bigness," it will surely undermine the foundation on which it rests—the consent and good will of the whole people. We lawyers have erred in this direction in the past. We may be eternally grateful, however, that we have had individual lawyers, and law firms as well, with discernment, who have realized the great and peculiar responsibilities laid on them, and who have given their utmost in behalf of the "millions who, humble and nameless, the straight, hard pathway plod."

There has been no perceptible clamor in America for "socializing the lawyer." We may, in all candor, compliment ourselves on this, because the conclusion we may draw from it is that in one hundred fifty years of free practice of law in America there have not been many who have been turned back without representation, not many who, because they lacked funds, lacked a friend in court or a word of counsel. This situation, let us hope, will continue. We lawyers must not evaluate our efforts or those of our colleagues in terms of how much money we make and keep; rather, our respect and affection must be saved for those lawyers and law firms who are on the firing line day in and day out, bringing justice and understanding to those of our people who are in trouble, doubt, and distress.

There are two fine old designations for members of our profession which regrettably have very largely passed into disuse. They are "counsellor at law" and "advocate." These names have significance because of their being *descriptive*. Taken together, they pretty well sum up the dual aspect of our profession and provide a handy, thumbnail description of what our job is.

To be a counsellor of one's friends and neighbors in the multifarious problems that confront them is a great responsibility. At times, it seems these days that life's carrousel turns so fast that we no longer hear the music and enjoy the ride, but must use all of our strength just to keep from being pitched off. Today there is the inevitable cultural lag in the mental and spiritual adaptation by our people to their accelerated material and scientific culture. Our people are, consequently, uneasy and unsure at times. They need the counsel of honest men whose principles are rooted in fundamental truths. It does not matter whether these men be lawyers or doctors or bartenders. So long as they have inherent good sense and a steady belief in basic principles, they are eligible. In our own field, counseling is a process we should foster and encourage. It is, in a sense, "preventative law." We should try to make our clients understand that they can get help from us more effectively and more cheaply before they are in trouble, before the contract is broken, or the wheel flies off. This is the place of the counsellor at law. Whether we call ourselves lawyers, attorneys,

barristers, or what-have-you, let us train and equip ourselves to counsel, for therein lies the greatest opportunity to hold our fellow men to a steady course amidst the distractions and confusions of today.

Finally—something about our place as “advocates.” In the epic volumes of man’s history, the most bitter and fruitless pages have been those in which the mass of mankind wanted, needed, but failed to find advocates to fan into flame the sparks of inspiration and grandeur which smoldered among the people. The greatest, most noble achievements of man have resulted because of the presence of advocates; not, assuredly, because they were artificers who could formulate philosophies and doctrines and impose them upon the people, but rather because they could phrase and render tangible the yearnings and aspirations of the people and could present them in a fashion which the people recognized as their own creation. Thus was created the Magna Carta, thus arose the great protestant religions, and thus was born our own Declaration of Independence and Constitution. These achievements are advocacy on a grand scale. We should not let their heroic dimensions blind us to the fact that the identical intellectual and spiritual processes created them as create our pleas for justice, compassion and fairness in our daily practice.

If we in the legal profession find through the years to come that we must relinquish any of our prerogatives, that we are forced to abandon some of the outposts which we have captured for ourselves in the economic and social structure, let us defend to the utmost that great doctrine that every man, every cause, every faith shall receive adequate and just advocacy at our hands. If we surrender this, we lose one of the greatest principles on which we have built this nation—that our people deserve to know all the facts all the time, in order that they may use their God-given minds and souls to reach the right decision.

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These things then, among others, comprise the lawyers list of things to do today and tomorrow. Oliver Wendell Holmes, Jr., shortly before his death reflected that, “The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voices of friends and to say to oneself, ‘The work is done.’ But just as one says that, the answer comes, ‘The race is over, but the work is never done while the power to work remains.’ The canter that brings you to a standstill need not be only coming to rest. It cannot be while you still live, for to live is to function. That is all there is to living.”

Do the things we have talked about help solve the problem as to the lawyer’s place and function in society? Possibly not, but they do represent something to work at—something to live for. If we genuinely hold and honestly practice these principles, we will leave a legacy to those who will follow us of a humane and vital jurisprudence in a nation which is strong and free.