Wyoming Law Journal

Volume 12 | Number 1 Article 2

December 2019

Whence Come These Sinews

John R. Brown

Follow this and additional works at: https://scholarship.law.uwyo.edu/wlj

Recommended Citation
John R. Brown, *Whence Come These Sinews*, 12 WYO. L.J. 22 (1957)
Available at: https://scholarship.law.uwyo.edu/wlj/vol12/iss1/2

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

WHENCE COME THESE SINEWS?

JOHN R. BROWN*

This subject, WHENCE COME THESE SINEWS?, came to me while listening to the paper delivered by one of our most brilliant United States District Judges at the Annual Judicial Conference of all the Judges of the Fifth Circuit this last May. The general theme of the Conference was "A Fair Trial and a Free Press" in which many Judges and lawyers, radio, television and newspaper people discussed this complex subject. Under the title "The Shrinking Contempt Power of the Trial Judge as Affected by the First Amendment," this Judge, with his characteristic brilliance and scholarship, was outspokenly critical, with Mr. Justice Black as one of his listeners, of decisions of the Supreme Court, including the celebrated *Craig v. Harney*,[1] the effect of which has sharply reduced, if not obliterated, the power of contempt for asserted interference with the administration of justice by newspaper publication. Now I am not here arguing the matter one way or the other, although in contrast to the subjects I generally pick on, the controversy is pretty uncontroversial. The importance of that paper is that, as I heard him, his basic theme was that the power of contempt was indispensable because it is the strength of the law. He expressed it this way:

> "The power of contempt is equated with due process of law, because this power lies at the core of the judicial process. In this power, and I emphasize the power, not its frequent exercise, of contempt, is the very sanction, the army, the strength behind any and every order of the Court, it is of the essence of the authority that makes a Court a place of law rather than a disordered forum. Every Trial Judge . . . knows that it is largely this reserve power that enables him to keep order in court and generally assure litigants a fair trial of their cases. . . ."

And criticizing *Craig v. Harney* and others in this light, he further said:

> "Indeed, it seems to me the Supreme Court in this particular is beset by a psychological quirk in the nature of a collective superiority complex. The Supreme Court seems to feel that our judiciary is so strong and abidingly respected that it may dispense with its defensive armament. It would be a happy thought that our courts could do without any strength other than the power of their words and the purity of their motives, but recent history records that at some times and places . . . courts do need this contempt power in pending cases. . . ."

Now in deference to this very, very learned, careful Trial Judge, I want to indicate my difference, not in the conclusions he was espousing

* A.B., University of Nebraska; J.D., University of Michigan. United States Circuit Judge, Fifth Circuit. The subject of this article is a speech given by Judge Brown on July 5, 1957 at the Texas State Bar Annual Convention, Fort Worth, Texas.

1. 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

about the exercise of the contempt power, but this underlying theme that the power of the law is finally the power of the bailiff's arm; that the rule of law rests upon the fear of those governed that if they do not obey, they will be punished; that the law as a ruling force in our daily lives depends upon coercive punitive sanctions.

It is not merely to disagree with this Judge, my good and warm friend, that, as a paradox, makes me indebted to him for what inspiration this speech may have. It is because, thinking that the power of law comes from something much more noble, there may be some place for a critical re-examination by us as Judges, and by lawyers too, on how well Courts and justice are responding to these lofty claims.

Is not the real strength of the law, the real power of the Judge, the vital influence of the Court, due to the innate public respect for law, Judges, and Courts? And is this not because law as an institution, Judges and the Courts, are a part of a system of Government *willingly* assumed by the people as they undertake to govern themselves. Is it not because free men, in a free society, freely believe that to remain free, there must be the means of peaceably resolving controversies, and so believing, anxiously and indispensably place themselves under the rule of law and those who administer it?

Would one think that the strength of the Government as such is the lurking power of the policeman? Are legislative bodies respected merely because they have, or thought they had, some vague punitive power to protect the legislative process? Are agents of the Executive, administering law, respected merely because, in very limited circumstances, there may be criminal sanctions protecting the person of those agents while in the performance of their duties? Is the citizen in his daily living in this great country of ours generally conscious that what he does or does not do is because of the threat of traditional punishment?

I think definitely none of these things is true. And I think, moreover, that it lowers the Government of which we are a part and reduces the citizen to a mere subject, rather than a joint and self-ruler, to ascribe to him any such motivation and put the power of organized Government, which encompasses the judiciary, on the plane of force.

As we think this thing through, since the judicial system is a necessary part of Government, is there any reason for supposing that it came into being or owes its existence or power to forces and motives different than those which brought about Government as a whole? Intrigued as I have been as this has turned over in my mind, it has been refreshing to return to early political philosophers to whom the modern world owes so much. From them we soon see that we are what we are, that we are the United States of America because we *want* to be, that the whole system of Government is one resting upon the *willing*, enthusiastic act of each citizen making himself subject to the general will.

Rousseau in his "Social Contract" put it:

"If then we discard from the social compact what is not of its essence, we shall find that it reduces itself to the following terms:

"Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."[2]

And again:

"The undertakings which bind us to the social body are obligatory only because they are mutual; and their nature is such that in fulfilling them we cannot work for others without working for ourselves. . . ."[3]

Thomas Hobbes, in the Leviathan, stated:

"The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby . . . live contentedly, is to confer all their power and strength upon . . . one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: . . . This *is more than consent, or concord; it is a real unity of them all in* one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man: I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up thy right to him, and authorize all his actions in like manner. . . ."[4]

And John Locke put it thus:

"Men being, . . . by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe and peaceable living. . . . And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; . . ."

And, in this day of apprehension of the so-called foreign philosophies, we need not declare how much or what part of these and similar utterances we may accept. For Americans translated these things not only into action but into American words which here bear repeating.

Listen to the climax of the Declaration of Independence:

"We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the *consent* of the governed; . . ."

2. Rousseau, Social Contract, Book 1, Chap. 6.
3. Rousseau, Social Contract, Book 2, Chap. 4.
4. Hobbes, Leviathan, Chap. 17.

And these few words from the Preamble of the Constitution itself reflect the voluntary submission to the rule of law:

> "We, the *people* of the United States . . . to . . . establish justice . . . and secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America."

Surely the judiciary is not the only part of Government, nor is it the only branch which finally has a vital impact upon the daily actions and conduct of the citizens. Government in all of its awesome comprehension controls and guides, impedes, permits, encourages, forbids, the countless acts of this multitudinous people. Now the point I am trying to make is simply this: *if* the Government itself came into being, and now exists, because of the willing acceptance of it by the citizens as a conscious, moral agreement to abide the will of the people as long as he is one of those people enabled to participate in the decisions affecting others; *if* that is the origin of our organized Governmental society; *if* it is this voluntary assent to be subjected to the rule of one's fellows, then, and here is the real question, what ground is there for thinking that for a limited part of that very Government, the judiciary, the strength lay not in the consent of those subjected to it, but in the naked threat, assertion, or capacity of forceable restraint or punishment?

We know, of course, that amongst 170,000,000 people in the United States and some 40,000,000 in England where the aim of a free government is so parallel, a peaceable existence continues because people *want* to live in accordance with the laws which they themselves have enacted. They obey and respect law because they have *agreed* to do it, and without their agreement to abide, it becomes tyrannical power exerted by one who has no right. In a less abstract sense, we know, for example, that there are simply not enough policemen in Texas, in Houston, in New York City, in the United States as a whole to police the action of every citizen every day. We know as well that most laws, the spirit or the policy of them, become a part of the accepted life of the community with never the slightest show of punitive coercive sanctions in the usual sense.

It is here that this becomes something more than an academic inquiry into the engaging philosophies of a free government of a free people. For while we can conceive of the founders of our country entering into this compact, we are all born in it, and our freedom of choice is probably that of the freedom to leave or secure enough persons of like views if we want a change. So as each new generation absorbs governmental advantages and assumes governmental responsibilities, it is because it *respects* government and all of its branches as the means best suited to assure liberty and freedom. The strength of the community is in the continued acceptance, almost as though we were continuously making a new compact, of the idea of a willing consent to live under the reasonable restraints imposed on ourselves, by ourselves.

Now, just as this cannot exist, it cannot continue unless there be great respect for Government. And that means, what is so crucial here, respect for the judicial process, for Judges, Courts and the administration of justice. It means that in the final analysis the power of contempt, the so-called residual power of the Court through punitive coercive orders, is itself ineffectual unless the people are willing to obey, are willing to accept, and are willing to be bound. The moment that that prestige is lost, the instant that the people from one reason or another lose respect for the rule of law, the machinery by which it is dispensed, the processes through which it goes, and the product it produces, then free government will fail.

We cannot isolate the judiciary from Government as a whole or from life itself. We need constantly to be reminded that freedom through the rule of law does not depend upon the Constitution as such, upon the laws enacted or upon the judgments and opinions pronounced, that these will be mere historical documents and will, as will their votaries, the Judges, fail as living instruments for freedom unless the people believe in them and believing make such belief a ruling passion of their lives.

This has never been better put than by Justice Jackson in his little book "The Supreme Court in the American System of Government" where he points out that we cannot look to the judiciary as the savior:

> ". . . I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions. The Dred Scott decision did not settle the question of the power to end slavery, and I very much doubt that had Mr. Justice McLean not dissented in that case it would have done any more to avoid war. No Court can support a reactionary regime and no Court can innovate or implement a new one. I doubt that any Court, whatever its powers, could have saved Louis XVI or Marie Antoinette. None could have stopped its excesses, and none could have prevented its culmination in the dictatorship of Napoleon. In Germany a courageous Court refused to convict those whom the Nazi government sought to make the scapegoats for the Reichstag fire, clandestinely set by the Nazis themselves . . . and other Courts decreed both the Nazi and Communist parties to be illegal under German law. Those judgments fell on deaf ears and became dead letters because the political forces of the time were against them.
>
> "It is not idle speculation to inquire which comes first, either in time or importance, an independent and enlightened judiciary or a free and tolerant society. While each undoubtedly is a support for the other, and the two are frequently found together, it is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions."

It has been differently said but with equal vigor in two editorials of the American Bar Association Journal, one of which says:

> "A recent development in constitutional law which has been borne in upon all friends of freedom to their disquietude is the fact that constitutions do not defend and uphold themselves. An essential for constitutional rights is a staunch people who revere freedom and whose watch over the ramparts is ceaseless."[5]

And what is the significance of all of this? Is it not the simple answer: the Bench and the Bar must administer justice, must operate the judicial machinery in a way that inspires, encourages, enhances the willing acceptance of law by the people and increases their vital respect for these institutions.

The shortness of time which is now available spares me from the temptation of sounding more provocative suggestions on how it is we Judges should perform to encourage and maintain this respect. In the brief time left, I can only suggest some areas.

First, we must realize that the public has a genuine interest in what we do. I am one who believes that Courts are the proper subjects for criticism. My own feeble efforts in opinion writing and adjudication demonstrate to me too well how the law can only grow and recover from its mistakes as the light of criticism, sometimes intemperate criticism, plays upon it. I do not think that criticism should come alone from the Bar, although it is appropriate there and can and ought to be the most constructive from that quarter since lawyers, professionally familiar with our problems, can be accurate and fair without losing advocacy. But the people as well are able to offer criticism.

Now when I suggest that Courts should welcome criticism, you Judges and lawyers here know that I am not advocating popular justice in the popular sense, that is, a sort of informal straw ballot by which judgment is determined by popular acclaim, a Roper poll, or the like. But I do believe fervently that the system of justice and the product of its machinery, justice dispensed, must be for the day and time in which it is delivered. This is not to abdicate to the will of the temporary, transitory point of view. Nor to discard constitutional fundamentals which are for today, for yesterday, and for tomorrow. But if judgment and decision does not in the eyes of an informed public opinion reasonably meet the needs of our constantly changing society, then the people will of necessity lose their enthusiasm for, perhaps their respect for, this law by adjudication and will necessarily turn elsewhere. It is the genius of the Anglo-American common law that it is in a ceaseless process of change and growth, for law is life or it is not law. Wherever and to whatever extent law does not reasonably keep apace with the needs and demands of our shifting civilization, we are failing in an obligation and it should not be too surprising if the consequence is a loss of acceptance, a lessening of the enthusiastic submission as a matter of consent and a lowering in prestige and respect.

---

5. 38 A.B.A.J. 1028 (1952).

We have, of course, seen these past few years with the terribly complex problem of segregation a flood of criticism of the United States Supreme Court. Many think it a unique thing, but anyone who examines the history of that great tribunal and who will but read Warren's history of the United States Supreme Court, will see that as the Court inevitably finds itself in the center of the deepest and most trying controversies, it is itself the subject of equal contention.

If we can criticize our national supreme tribunal, and I think we can, although we must lead the people to do it in a way that does not destroy the institution as an essential part of Government, I think local Courts, trial and appellate, civil and criminal, state and federal, are likewise the proper subject of criticism.

This I think is public relations in its proper sense. Courts have no business in popularizing themselves merely for the sake of popularity. On the other hand, Courts have a proper function in doing their work in such a way, and doing work that intrinsically inspires public enthusiastic acceptance.

A corollary to being the subject of criticism is that Courts must be able to take criticism. Here, I think we have made great progress. For until the adoption of the Federal Rules of Civil Procedure in 1938 which set in train like movements of procedural reform throughout the states, it was too much an unfortunate fact that improvement had come from laymen, not lawyers or Judges, indeed, frequently in spite of them. I hope we have outlived the age in which Courts and Judges too often assume an almost hostile defensive attitude toward the suggestion for change. We must stay alive so that never again can it rightly be said of Courts, Judges and lawyers what Chief Justice Vanderbilt of the Supreme Court of New Jersey, whose handiwork will long be remembered in that state, said:

> " All of the deficiencies of present day judicial administration . . . are readily curable–and by remarkable simple means–that are well known and tested by experience elsewhere. All we need to do is to overcome our professional apathy and put them into practice. Professional apathy, I must say from experience, is merely an euphemism for judicial and professional unwillingness to learn anything new, however simple it may be. To be blunt, it is unadulterated selfishness, and gross disregard of the public welfare, in an area where we are charged with primary responsibility."[6]

In this phase of being able to take criticism, as Judges, we should remember that as public opinion indicates its response to what we do, and is occasionally moved through its legislative representatives to make change, we ought to have a decent respect for such change and not, as we too often do, perpetuate the unsatisfactory status quo by niggardly interpretations of a law meant to change. I am constantly distressed in reading

6. Nims, The Bar: A Sleeping Giant, 41 A.B.A.J. 908 (1955).

opinions where legislation is so narrowly interpreted that relief from the prior unsatisfactory judge-made law, whether procedural or substantive, is thwarted or denied. This is a form either of a closed-mindedness or an overbearing egotism or both and, whether consciously identified as such, is a form also of an unwillingness to accept and act upon criticism made by authoritative sources.

These, of course, are mere illustrations of how these broad principles might work as we Judges, dedicated to the common purpose of administering justice and thereby advancing the rule of law, can not only maintain, but encourage and expand even further, in the public mind and heart, this willing acceptance of the rule of the Judge as a part of Government.

And so we return to where we began: WHENCE COME THESE SINEWS? They come from the people. The instrument of law is in the hands of lawyers and Judges where it rightfully belongs. It is a paradox, however, that it can have strength only as the *people* give it strength. Our strength as Judges, our strength as Courts, our strength of law comes from those who are to be ruled. Unless they give us strength, we are weak indeed. Unless we are strong in the stuff which encourages them to give us strength, they too will lack the power to pass it on to us. If we are to have strength, we, and the lawyers who are an indispensable part of our machine, must give strength.

For without it, Chief Justice Hughes makes plain that our freedom is in peril, that without it we have no sinews:

> "Whether that system [of constitutional government] shall continue does not rest with this Court but with the people who have created that system. As Chief Justice Marshall said, 'The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.' "