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ON BECOMING A LAWYER: SOME CHALLENGES FOR THE FUTURE*

Harry T. Edwards†

EDITOR'S NOTE

Professor Edwards has recently been sworn in as Judge for the United States Court of Appeals, D.C. Circuit. As he leaves the University of Michigan Law School, the Editorial Board of the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM bids him a fond farewell. We are certain that he will bring to the bench the same legal acuity and human compassion which he displayed in his teaching here. We are honored to have known him and learned from him.

This is probably the most difficult speech that I have ever had to make. I know this because I have agonized for weeks over it, pondering themes, writing and then discarding drafts, and occasionally rejecting the entire project as a fruitless endeavor. No doubt, some of you have experienced what I have been feeling when you have tried to put words to paper on a final exam, independent research project, or law review note. Nevertheless, my own reluctance to complete this task was baffling to me; after all, during the past decade, I have given well over fifty formal speeches and literally hundreds of lectures in class.

It finally dawned on me, while traveling last week, that my reluctance to deliver this graduation address merely mirrors my reluctance to leave Michigan. In a sense, the celebration of your graduation is a reminder to me of my own coming farewell to Michigan. My problem has been that I am much more reluctant about leaving than are you.

From a certain perspective, I guess that I should be as joyous as you about *our* graduation. You will soon experience an immense pleasure in knowing that you will never have to take another final examination; but I will soon enjoy at least as much

* Senior Day Address given at the University of Michigan Law School, Ann Arbor, Michigan, Dec. 7, 1979.

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pleasure in knowing that I will never have to grade another final examination! We will soon be leaving Ann Arbor to test our skills in new settings, to meet new friends, to face new — and hopefully more exciting — challenges. We are moving on to make our contribution to the legal profession; to see that justice is done, if you will. In this, our graduation is an occasion for rejoicing, a time to relish in good hopes and high expectations.

But for me, this graduation marks the loss of a life and time that I have cherished. My life as a teacher and legal scholar has been more rewarding than I ever could have imagined. It has allowed me to rethink old ideas and explore new ones; it has afforded me an opportunity to challenge bright minds like yours; it has given me a chance to speak out on issues of significance, with the hope that I might affect the direction of developing legal doctrines. Most importantly, however, it has meant time in Ann Arbor at the University of Michigan.

You will find — as I did when I graduated from here fifteen years ago — that Michigan has prepared you well to serve in the legal community. Think about some of your first-year professors and you will readily understand why you are so well prepared. Where else can you, in one semester, be exposed to the relentless drive and energy of a Yale Kamisar, the marvelous blend of practical and theoretical wisdom of an Allan Smith, and the subtle, but piercing, philosophical approach of a Phil Soper? When I commenced my studies at Michigan, I had an equally strong foundation laid for my legal learning experience with professors like Roger Crampton, now the dean at Cornell, Olin Browder, and Frank Allen. It is not just the brilliance of these teachers that sets them apart. Rather, it is that they are all so entirely different in styles, tones, and philosophies, yet each is equally devoted to the legal learning experience. You will soon recognize when you go out into practice that you have an almost blind faith in your ability to tackle most any legal problems. Rely on that faith. You have been exposed to a brilliant collage of teachers and fellow students at Michigan and I think that you will soon see that your experiences here have prepared you well to take the next step into practice.

When I tell you that you are ready to take the next step into the practice of law, I suppose that I am guilty of begging the hardest questions. All of you know that you can pass a bar examination; this is not the issue. The difficult question for you now, the one that will remain always, is: what does it really mean to be a *good* lawyer? How will you measure success? How will you handle situations when your own views of what is right and just differ from the views of the client that you are asked to represent?

As you leave here, most of you will be comforted by the fact that, at last, your formal schooling is done; you have a good job; you have the potential for good earnings and lifetime security; and you may feel the prestige that sometimes comes from working in an esteemed profession. Do not savour these feelings for too long. The profession that you are about to enter is not one without serious problems.

Jerold Auerbach, in *Unequal Justice*, wrote in 1976 that

Watergate was the most severe jolt to the integrity of legal authority. The mask that disguised lawlessness as law and order disappeared. The law-enforcers, lawyers all, were the law-breakers The question was not whether ethics should be taught (they already were), but which ethic should be taught: the ethic of the marketplace and client loyalty, or the ethic of equal justice.¹

Unfortunately for us, the stench of Watergate still pervades the legal profession. This is not to say that lawyers have continued Watergate-like practices. Rather, it is to observe that lawyers and the legal process are still viewed with mistrust by many in society.

More fuel has been added to the fire with the recent publication of *The Brethren*,² described by one reviewer as "a scalding . . . worm's-eye view of the Supreme Court." George Will, in his commentary in *Newsweek* this week, observed that "'The Brethren' rips the first great gash in the Court's privacy and shows that the Court often is neither judicious nor judicial. It shows that the key question is not whether this is a 'liberal' or 'conservative' Court, but whether, at times, it is a court at all."³ Based upon the few excerpts that I have seen of *The Brethren*, I am inclined to agree with the *New York Times* review of December 7, 1979, which observes that *The Brethren* "fails to substantiate any of the mind-reading" offered by the authors and concludes that "[i]f 'The Brethren' were a high school term paper, any teacher in New York would give it an 'F.'"⁴

I am also inclined to agree with George Will's observation that

[t]he purpose of government is to produce justice, which sometimes is served by secrecy and discretion Those who are eager to burn the mists of myths from the

¹ J. AUERBACH, *UNEQUAL JUSTICE* 301 (1976).

² R. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979).

³ Will, *The Injudicial Justices*, *NEWSWEEK*, Dec. 10, 1979, at 140.

⁴ Leonard, *Books of the Times*, *N.Y. Times*, Dec. 7, 1979, §C, at 29.

public mind should pause to consider what may fill the void. And it is not adequate to simply say: "The truth shall make us free."⁵

James Reston recently wrote that one of the worst effects of a book like *The Brethren* is "that the successes of the last generation are ignored, and the future of the next generation minimized."⁶

No matter. The main point for us is that, so far as public image is concerned, the tarnish has yet to be polished off of the legal profession. This is especially important for this generation of law graduates to understand. Your response to these public outcries will determine the course of the legal profession as we enter the twenty-first century. It is you who will be leading us in twenty years.

Your task is going to be a difficult one. You have already been accused by many as being the "Silent Generation" of law students, more concerned with vocational training and jobs than with politics, justice, or equality. Your burden has been made heavy because you are constantly compared with your older brothers and sisters who graduated from law school during the late 1960's and early 1970's. Auerbach claims that these graduates from a decade ago made demands in the name of "individual responsibility and social accountability"; they also insisted that law firms should "assess the social implications of the activities of those seeking its services,' . . . understanding that the failure to evaluate social consequences did not automatically imply professional neutrality."⁷ Notwithstanding Watergate, the efforts of your predecessors have had a marked and positive influence on the profession. Their shoes will be difficult to fill, but you cannot ignore the challenge.

Your burden has also been made heavy because you will be asked to offer solutions to heal the wounds that still appear from the social revolt of the 1960's. Legal historian Lawrence Friedman highlights your burden by reference to Max Weber's concept of "Rationalism." In *A History of American Law*, Friedman observes that

[e]verything must pass the utilitarian test, however crudely or thoughtlessly. Individuals ask, what is in it for me, or my group? Governments and whole societies ask a

⁵ Will, *supra* note 3, at 140.

⁶ Reston, *The Age of Destruction*, N.Y. Times, Dec. 7, 1979, § A, at 31, col. 2.

⁷ J. AUERBACH, *supra* note 1, at 279.

similar question. Nothing is given or fixed. The consequences of rationalism are colossal; they have not yet fully played themselves out on the stage of time. Political democracy has been one consequence. Another has been the rise of the welfare state. Still a third is modern science. A fourth is the idea of equality before the law. The fifth is the — more recent — demand for equality of opportunity, which follows when formal equality fails in its purposes (from the standpoint of an oppressed or subordinate group).

* * *

By the 1950's, the economy had moved so far so fast that some had conveniently put out of mind that there were underclasses in America Into this Panglossian dream world, the black revolt, followed by brown, yellow, red, and women's revolts, burst like a bombshell. Lyndon Johnson's war against poverty had been conceived of as a mopping-up exercise. It turned into more of a war than its proponents had bargained for. In a sense, Pandora's box was now open; hate, class struggle, backlash, and dependency rose like stenches to poison the national air. These were the 1960's: restlessness of almost earthquake proportions; riots in the streets; fires burning on campus; the sense of oncoming ecological catastrophe; a government paranoid with fear of its subjects; crime, or the sense of crime, walking in the streets like the [plague]. Every group or class that had been dependent, that had been put down, or put away, or taken for granted, now showed its fangs: blacks, prisoners, poor people, students, homosexuals, nuns. There was no respect for the slots in which society had placed any group.⁸

You are stepping into the aftermath of this monumental social revolt. It will be easy for you to turn away from the problems that remain, but I urge you to resist the temptation. In *The Bramble Bush*, Karl Llewellyn wrote that "[t]he best talent of the bar will always muster to keep Ins in and to man the barricade against the Outs."⁹ According to Llewellyn, "lawyers mirror undistorted the very society" that accuses them of social irreponsibility. This is a depressing thought when one considers real life situations of the sort described by Professor Auerbach in *Unequal Justice*. For example, Auerbach reminds us that

⁸ L. FRIEDMAN, A HISTORY OF AMERICAN LAW 574-76 (1973).

⁹ K. LLEWELLYN, THE BRAMBLE BUSH 144-45 (1951).

[f]or at least a decade after the *Brown* desegregation decision, Southern lawyers persisted in their defense of "Nordic, White Protestant, Anglo-Saxon Christian values." Few dared to defend advocates of racial equality. Daring was costly: it prompted harassment by courts, legislatures, vigilantes, and fellow professionals (while the American Bar Association shrugged aside the problem as a "political" issue beyond its purview). In Mississippi, the president of the ABA (along with forty other lawyers) refused to represent a civil rights advocate. One white lawyer in the state, one of a mere handful who demonstrated the courage of his professional convictions, was disbarred. A black lawyer engaged in desegregation litigation was harassed by a federal judge whose behavior, according to an appellate court, contributed to the "humiliation, anxiety, and possible intimidation of . . . a reputable member of the bar." The result, not only in Mississippi but throughout the South, was "timid lawyers and neglected clients."¹⁰

But to recall these tales is also to be reminded of the strength and courage of the many lawyers who resisted the system and fought to achieve equality. As Llewellyn tells us:

The essential attribute of law is to conserve, to jam new conditions into old boxes, whether they will fit or not; not to change, readjust, or cure. This need not hold of every law, or every lawyer. Lawyers have sometimes been the leaders of reform. Law has [been] the instrument of change."

There are many worthy studies, such as Morton Horowitz's *The Transformation of American Law*¹² and Robert Cover's *Justice Accused*,¹³ to prove the point that lawyers and judges in America often have been co-opted by some of the worst elements in society or persuaded by principles that were wholly lacking in moral justification. But past history need not repeat itself. It may be true, as Lawrence Friedman tells us, that "the law is a mirror held up against life"; however, I do not believe that it follows from this that lawyers must always be obstacles to reform or instruments of oppression.

¹⁰ J. AUERBACH, *supra* note 1, at 264-65.

¹¹ K. LLEWELLYN, *supra* note 9, at 144.

¹² M. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

¹³ R. COVER, *JUSTICE ACCUSED* (1975).

I guess that my message to you today is that social consciousness is not inconsistent with effective advocacy. A lawyer need not be blind to a client's purpose and he or she may always question that purpose if it appears to be unfair or unjust. Everyone in society is entitled to legal representation, but this does not mean that the legal process should be clogged with bad cases. When I first started practicing, I was told by a senior partner to "counsel" with a client before deciding to litigate. When I asked him what he meant, he told me that clients often had a tunnel vision of their case and that, if I took the time and used some imagination, I might be able to suggest some *just* solutions which could be reached without resort to litigation or the adversary process. This was important advice; it made me understand that lawyers are more than just "hired guns" and that law firms do care about more than just making a profit.

I would agree with Judge Rifkind's observations that, despite the fact that the adversary process has often suffered because of human frailties, it has more often than not "been good for liberty, good for peaceful progress and good enough to have the public accept that system's capacity to resolve controversies and, generally, to acquiesce in the results."¹⁴ I think that the system has been made stronger because lawyers are now more willing to consider the social consequences of their behavior.

In 1951, Charles Curtis, a member of the Boston bar, published an article entitled "The Ethics of Advocacy" in the *Stanford Law Review*.¹⁵ I want to quote a short excerpt from Curtis' piece so that you can understand why it is that lawyers have often been viewed with such disdain. Mr. Curtis stated that

I don't know any other career that offers ampler opportunity for both the enjoyment of virtue and the exercise of vice, or, if you please, the exercise of virtue and the enjoyment of vice, except possibly the ancient rituals which were performed in some temples by vestal virgins, in others by sacred prostitutes.

* * *

Nor is the practice of law a characteristically Christian pursuit. The practice of law is vicarious, not altruistic, and the lawyer must go back of Christianity to Stoicism

¹⁴ Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 *THE RECORD OF THE N.Y. BAR ASS'N* 537 (1975).

¹⁵ Curtis, *The Ethics of Advocacy*, 4 *STAN. L. REV.* 3 (1951). Cf. Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 *STAN. L. REV.* 349 (1952).

for the vicarious detachment which will permit him to serve his client.¹⁶

Curtis then quoted with approval a passage from Montaigne, as follows:

“There’s no reason why a lawyer . . . should not recognize the knavery that is part of his vocation. An honest man is not responsible for the vices or the stupidity of his calling, and need not refuse to practise them. A man must live in the world and avail himself of what he finds there.”¹⁷

This is the stuff that Watergate was made of. I hope that you will make sure that views such as those expressed by Curtis never again find a place in the legal profession.

I think that I have more reason to be hopeful about your class than I did about my own. Although my Class of ‘65 has done amazingly well, given the traditions which we inherited, I suspect that we really did belong to the “Silent Generation,” or at least represented the last vestiges of that generation. Since my time in school, however, legal learning has improved as we have moved away from Langdell’s rigid notions about law as a “science.” The so-called “case method” became the predominant form of law teaching beginning in the 1870’s. Dean Langdell, who first introduced the case method at Harvard, simultaneously purged from the curriculum whatever touched directly on economic and political questions. As Lawrence Friedman so aptly notes, the problem with Langdell’s perception of law learning was that, although the case method “exalted the prestige of law and legal learning,” it “severed the cords . . . that tied the study of law to the main body of American scholarship and American life” and it “affirmed that legal science stood apart, as an independent entity distinct from . . . the man on the street.”¹⁸ Fortunately, our modern day law school curriculum incorporates a less parochial vision of legal learning. Your exposures here have been wide and varied, albeit not complete. You have not been trained how to draft a motion, or file a pleading, or prepare a lawyer’s bill; although lawyers do these things on a regular basis, they require skills that can be easily acquired with a minimum of practical experience. Such matters have been of little moment during your period of legal learning here at Michigan. Rather, you have been asked to

¹⁶ Curtis, *supra* note 15, at 18-19.

¹⁷ *Id.* at 20 (footnote omitted).

¹⁸ L. FRIEDMAN, *supra* note 8, at 535.

think about important questions dealing with right and wrong; with issues pertaining to legislative and judicial reform; with questions having to do with equal access to the judicial process and equal rights under law; and with issues affecting the current and future status of law and the legal process. Do not ever stop thinking about these issues; once you do, you will become merely a "hired gun," not a *good* lawyer.

CONCLUSION

There is only one more thing that I will offer, possibly as a word of advice. When you came to law school, each one of you possessed some unique talents and interesting personal traits having nothing whatsoever to do with your legal training. Hang on to these personal possessions. These are the things that make you special. Hang on to your baseball cards; keep on playing or listening to Beethoven; paint your pictures; sail your boats; climb your mountains. In other words, stay in touch with life and with the people around you other than just lawyers.

The one thing that my fifteen years as a lawyer has taught me is that we lawyers are often too inbred, too self-involved. In our haste to prepare another case, we sometimes forget to share a kind word or to touch loved ones. I can only tell you (for you will have to learn for yourselves) that in the end analysis, your relationships with your spouse, children, close friends, and parents, will prove to be much more significant than any case that you ever try. I do not tell you this to suggest that you should be inattentive to your work; rather, I am merely urging you to keep a balanced perspective on life.

I thank you for inviting me to speak to you today. This is a special time for me, too, I am pleased to have the opportunity to "graduate" with you here today. If I do finally get confirmed, I will miss Michigan and Ann Arbor terribly. I thank my former students and colleagues here for giving me such special memories. Good luck, best wishes, and God-speed.