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PRIVATE LAWYERS AND PUBLIC RESPONSIBILITIES

*Carl McGowan**

A half-century ago when this Law Quadrangle was conceived and constructed, it was surely an act of faith on the part of its wise and generous donor. So it was also of this University which undertook the challenge to make of his vision a reality — to provide, in the most magnificent plant for legal education this country has ever seen, instruction in the law and constant refinement of its ideals worthy of the most rigorous traditions of the higher learning.

It was a time when our national confidence was sorely shaken by a shattering economic collapse which opened up dismaying fissures of doubt as to what shape the social and legal organization of our society might take in the future. For those in positions of responsibility on this campus, there must have been serious uncertainties about the nature and purposes of the legal education to be purveyed in the new facility and, indeed, whether law itself as it had previously existed would play as significant a role in any new system of governance that might emerge from the widespread frustrations of popular expectations then visible on all sides.

For quite different reasons, the addition to the Law Quadrangle at this point in time of an impressive new library is itself a similar act of faith. When, some fifty years ago, the Sterling Memorial Library at Yale was being built, the Yale librarian of that era was discomfited by the attention seemingly being paid the new building to the exclusion of all else. It is said that he wished to put a sign over the front door reading: "This isn't the library. It is inside."

His primary concern at that time was obviously about the breadth and variety and completeness of the collections of books to be housed within the new walls. Today, bombarded as we are on all sides by the breath-taking claims being made for the unfolding information revolution, the concern must be with whether there will be any books inside, or only computer terminals, television screens, and electronic print-outs.

For one who, like myself, has always associated the acquisition of

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knowledge with the solitary student, reading and rereading the book he has taken from a library shelf, there is always the recollection of what Erasmus, visiting the sixteenth-century centers of learning, said of his stay in Oxford:

It is wonderful what a harvest of old volumes is flourishing here on every side; there is so much of erudition, not common and trivial, but recondite, accurate and ancient, both Greek and Latin, that I should not wish to visit Italy, except for the gratification of travelling.

It is thus somewhat disconcerting to me to read in the current annual report of a large American communications company that for the future "Ours is the business of information handling, the knowledge business," or a recent news story in the London *Economist* that a Dutch electronics company, thanks to the phenomenally expanding capacity of the silicon chip, within two years expects to sell, at a comparatively modest price, a computer that can store and instantly retrieve all of the information contained in the Library of Congress.

Putting to one side the question of whether the spread of information can always and invariably be equated with a growth in knowledge, it may well be, of course, that scientific developments of this nature will prove to be a useful enlargement of the resources of university libraries as we have known them, and not a substitute. For reassurance on this score, I have recently taken counsel with a distinguished scientist, and a great humanist as well, who has been working at the heart of the new technological developments in information handling, and also with a scholarly library expert whose job it is to provide advice and assistance to libraries faced with what he characterizes as both the opportunities and the dangers presented by the new technologies.

The general message from both, however, encourages me to believe that the book on the library shelf will continue, as far as the eye can see, to be an essential feature of the university library, although certain kinds of information may perhaps more effectively be stored in other forms. As is usual in times of change, it appears that what is helpful in the new world will be merged with what has been found to be essential in the old. Certainly I am told that "the new and costly systems, despite strongly made assertions to the contrary, will probably supplement rather than supplant printed books, scholarly journals and research libraries." I have no doubt that the building we dedicate today will house a library which will, to paraphrase one of my informants, "anchor the present" of this Law School to its

“past,” and provide the services that will “help fuel its thrusts into the future.”

It is, of course, for the Law School itself to determine what it believes should be the nature and objectives of those “thrusts.” A major event in its history, such as the one being recognized today, inevitably initiates a period of self-searching and reflection on this score. When the Law Quadrangle itself was first dedicated in June of 1934, the speaker on that occasion had no doubt as to what he thought was the most urgent item of business to which the university law schools should turn their attention. It was the restoration and strengthening of what he termed “the public influence of the bar.”

It was Justice Harlan Fiske Stone’s submission to that audience that there had been a serious decline in the leadership role of the private bar in public affairs, and that the consequences of that deterioration were peculiarly severe in the crisis condition of the economy then obtaining. A Wall Street lawyer himself, both early in life and for a period following upon his academic career prior to his being summoned to public office in Washington by his Amherst collegemate, Calvin Coolidge, he was especially perturbed by the preoccupation of too many lawyers with the frenzied finance of the late 1920s and their callousness to shocking violations by their clients of the fiduciary principle. He believed that the disclosures of these activities in the congressional investigations following the stock market collapse of 1929 had undermined the confidence of the lay public generally in the members of the bar, and thereby diminished their ability to provide the leadership to a struggling nation for which their abilities and training had qualified them.

Justice Stone ended on a more affirmative note. He thought that, with the university law school teachers taking the lead, both by precept and example, in “discharging the public duties which rest on the profession as a whole,” the bar would respond in a manner and to a degree certain to reinvigorate the traditions of an earlier time.

This concept of the academics as the key to the acceptance by the private bar of its public responsibilities was not a new departure for Stone in his dedication address in 1934. As long before as 1928 he had spelled it out in more informal terms in a letter, recently come to light, to Dean Young B. Smith of the Columbia Law School, who had invited Stone’s comments on his annual report.

Wrote Stone:

I am assuming that where you speak of the public service in law that this includes the private practice of law That always requires emphasis, especially in a school like Columbia, where attention is be-

ing concentrated on research and more scientific work. Of course, the fact is, all the law in christendom and all the research in it isn't worth a d—, except in so far as it serves its utilitarian purpose of securing social order and justice. It does that only as you train members of the bench and bar. It is because I believe that more scientific study and research make law more useful that I have always been for dealing with law in more scholarly fashion, but the men who are working with you who are not very closely in touch with the bar must be constantly reminded that their whole program comes to nothing if they do not sell it to the bar and get lawyers to take particular advantage of it.

In the longer view, it is very possible that Stone was voicing these concerns about the private bar at the point in our national history when they were most justified. The decade of Al Capone, prohibition, and a runaway stock market was not our finest hour, and law was not the only profession that strayed from its moorings. I like to think that because Stone spoke out as he did on this campus, and because the university law schools picked up the gage he flung down before them, the bar has gone far toward regaining its sensitivity to the public role it cannot escape, and to the responsibilities that accompany its privileges.

That did not happen overnight. I can remember in my early years as a lawyer and law teacher what a futile organization the American Bar Association appeared to be. The newcomers to the bar stayed away from it in droves, although neither did they rush to embrace the National Lawyers Guild which was set up as a counter-attraction. The ABA, in the years both before and after World War II, seemed to spend most of its time discussing amendments to the Constitution for such purposes as prohibiting the President from entering into executive agreements with foreign nations, and limiting the federal income tax to a maximum rate of twenty-five percent.

This was all dramatically changed some years ago when a veritable handful of ABA members of unimpeachable professional abilities decided to make a conscious effort, working from within and through the machinery in place, to upgrade the leadership and thereby to change the whole tone of the organization. They succeeded beyond their wildest dreams, and for many years now the ABA has been a useful and effective organization of dramatically increased strength. There is room for disagreement as to whether it always reaches the right answers, but it is generally regarded as addressing the right questions in terms of the public obligations of the legal profession.

When John F. Kennedy became President, he found himself facing a host of difficult problems growing out of the advances in con-

stitutional doctrine with respect to racial and other forms of discrimination. He concluded that he was entitled to have the active assistance of the private bar in seeing that the new law of the land was enforced. He invited a group of leaders of the organized bar to the White House, and bluntly told them that he thought they should respond to his call for help. The answer he got was the formation of the Lawyers' Committee for Civil Rights Under Law, which still functions and which, through volunteered time, money, and effort, has secured for many individuals the rights to which the Supreme Court had held they were entitled. This would not have happened in the organized bar of an earlier day, and how Justice Stone would have hailed this assumption by private lawyers of burdensome but vital public responsibilities.

When I first began my judicial service in the District of Columbia, I was amazed at the extent to which the private lawyers of Washington were carrying the load of representing indigents in the many criminal appeals we had at that time prior to D.C. court reorganization. With two and frequently three criminal appeals on the calendar each sitting day, many, indeed if not most, of which involved indigents, the amount of the wholly uncompensated legal representation then required was enormous. We would have patent lawyers and tax lawyers briefing and arguing criminal cases, and doing it very well indeed although they had to work very hard to handle the unfamiliar subject matter.

We began to have some apprehensions as to whether there might be a problem of reverse discrimination in that appellants with no money might be getting better representation than those who had just enough not to qualify for *in forma pauperis* treatment. The subsequent provision of publicly financed defender agencies has eased this load on the private bar, but it was cheerfully and ably carried for a long time, and still is to a considerable degree.

One of the most pressing needs for legal services has been in the civil area. When Congress first appropriated money for neighborhood legal offices, many of the private law offices at their own expense detailed legal associates and secretaries to serve successively for six months or longer in such offices. And a large amount of *pro bono* work in civil matters has been done by the law firms in the past several years.

Congress, of course, finally decided to regularize and stabilize these services by creating and funding a National Legal Services Corporation to which appropriations are made for supporting legal services at the local level. Most people would believe that this has

proved to be a desirable and efficient way to resolve the pressing problem of access by the poor and untutored to the legal counseling and assistance they need in common with all the rest of us. The organized bar supported this approach strongly, and the ABA in particular has forcefully resisted the suggestions made to Congress that it be either eliminated entirely or subjected to large decreases in funding. Here again it is hard to envisage the ABA of 1934 as casting itself in this role.

Pending at the present time in the Congress are a number of bills which seek to deprive the Supreme Court, or the lower federal courts, of jurisdiction to consider certain specific issues, such as school prayers and busing, abortion, and the all-male draft. As it did when similar steps were sought to be taken twenty years ago by groups hostile to decisions of the Warren Court, the organized bar, led by the ABA, has acted promptly and vigorously to assert their unqualified opposition to the displacement of the Supreme Court as the final interpreter of the Constitution or the prevention of its decisions from being followed and enforced by the lower courts.

Justice Stone, whose court in 1937 successfully weathered the court-packing proposal of Franklin D. Roosevelt with the overwhelming support of the private bar and a little effectively timed self-help by Chief Justice Hughes, would surely regard these responses by the bar as in the great tradition of lawyer leadership on public issues, particularly in areas where their professional knowledge qualifies them to speak with special authority.

Judge Harold Medina, of the Second Circuit, who studied law under Dean Stone in the second decade of this century, has spoken of how interested his teacher invariably was in the ethical problems of counsel which he was quick to identify in the cases being considered in his classes. And certainly it is true that these problems were still heavily on his mind when he said here in 1934 that "The problems to which the machine and the corporation give rise have outstripped the ideology and values of an earlier day. The future demands that we undergo a corresponding moral adjustment."

Sensitive as he invariably was to issues of moral conduct arising in the private practice of law, Stone is reputed to have been very skeptical of the utility of broad general formulations of ethical principles in the form of canons or codes. Thus he would presumably have welcomed the present effort of the ABA to scrap its existing Code of Professional Responsibility and its accompanying — and confusing — canons, statements of ethical considerations, and disciplinary rules. The jargon of ethical principles is abandoned, and the

proposed Model Rules of Professional Conduct aspire to the precision of statutes declaring and defining rules to be observed in the practice of the law, with disciplinary sanctions to be imposed for noncompliance.

The final draft of the proposed Rules is awaiting final consideration by the ABA House of Delegates next year, but it has set off a prolonged period of intense re-examination by the bar at large of what is right and what is wrong for lawyers to do in advising clients and trying cases. Some of those long-established assumptions have already been demolished by recent Supreme Court decisions, employing both the first amendment and the antitrust laws to strike down minimum fee schedules and restrictions upon lawyer advertising and group legal services. But much more needs to be done, and the proposed Rules represent great strides in that direction.

Professor Geoffrey Hazard, Jr., the Reporter for the ABA Committee having this matter in its charge, has pointed out the extent to which the bar has, in its ethical reflections over the years, been almost exclusively preoccupied with the criminal law and the defense of criminal defendants. In this area it was assumed that the lawyer's first and only duty was to his client, and the same principle somehow managed to project itself as the starting point for ethical guidance in other, and wholly dissimilar, areas of private law practice. But, as Professor Hazard correctly concludes, "[T]he ethical foundation sustaining the narrow function of the criminal defense lawyer simply cannot carry the system of ethics for the whole range of functions that American lawyers now perform." It is upon this premise that the proposed Rules have been founded, and their ultimate adoption will, if achieved, be an important milestone in the coming of age by the private bar in the recognition of its public responsibilities.

This is not to say that there have not been notable acceptances of such responsibilities in the past. When I first came to the bar in New York City as the decade of the 1930s was ending, Wall Street was astounded by the splitting up of one of its major law firms because its head could not countenance the action of one of his partners in incorporating the private yachts of some of his wealthy clients and thereby securing for them income tax deductions then arguably possible under a loophole in the tax laws. And, within the past few years, the Detroit Bar Association asked a prominent Michigan attorney to undertake the *pro bono* representation of the District Court for the Eastern District of Michigan, against which the Attorney General had brought a writ of mandamus. In the United States Supreme Court, the attorney successfully asserted the correctness of

the district court's decision invalidating the use of warrantless wire-tapping in internal security investigations — a practice which threatened the constitutionally protected privacy rights of the guilty and innocent alike.

In interviewing applicants for law clerkships, I frequently ask the perhaps not very meaningful question as to what use the applicant anticipates that he or she will make of the legal training when the time comes to settle down for the longer pull. During the days of student unrest a few years back, the answer almost invariably came back: "Well, Judge, I can tell you one thing I'm not going to do, and that is to work for a big law firm and spend my time serving the interests of the big corporations."

My response was to say that perhaps this was too quick a writing off of a career alternative, pointing out that there are broad-gauged lawyers as well as narrow-gauged lawyers, and it is for the individual to make of himself the one or the other. I went on to say that in my time in practice I had seen broad-gauged lawyers who, because of the respect their legal abilities and good judgment had earned for them from their corporate clients, had enormous influence on the business decisions and policies of those clients. Their views on such matters were actively solicited, given great weight, and often prevailed.

This influence extended to areas affecting large numbers of people, both within and without the corporation, in respect of labor relations, nondiscriminatory personnel practices, environmental impacts, social problems of their communities, charitable contributions, full disclosure to their stockholders and their customers, avoidance of restrictive practices, and nongrudging compliance with applicable laws. Indeed, I concluded, I could think of some private lawyers who were, in their quiet and unpublicized way, doing more to bring about advances in areas the applicant was presumably interested in than some of his professed heroes in public office, the academy, or general militancy.

Of course, in the Viet Nam era, this was all greeted by my hearers with a polite reserve eloquently indicating disbelief. But the times have changed, and my latter-day interviewees do not give the automatic answer to my question that was formerly forthcoming. They now exhibit a willingness to be convinced. That willingness, in my judgment, offers both a challenge and an opportunity to a private bar that demonstrates a disposition to be ever mindful of the public responsibilities that are the hallmark of all truly learned professions, and which are peculiarly characteristic of the law. If that challenge

is met, and that opportunity fully realized, it will be because the practice of the legal profession is being carried on in the spirit of the same university tradition that embraces the teaching of law at university law schools like this one.

The purposes of a true university have been variously defined. Daniel C. Gilman, when inaugurated as the first president of The John Hopkins University in 1876, included among his hopes that it would be a place of great usefulness in promoting sound ideas of good government. President Eliot of Harvard, greeting the newcomer on that occasion, observed that "universities, wisely directed, store up the intellectual capital of the race, and become fountains of spiritual and moral power."

There has been uniform acceptance of the mission of a university as extending to the identification and espousal of those values that strengthen the social order by endowing it with the quintessential quality of justice. It is the direct relationship of the law to this particular purpose that has brought this and other distinguished law schools within a university framework, with all that that implies in terms of the purity and elevation of educational objectives and their enrichment by ready access to other intellectual disciplines.

There have been of late many expressions of concern about the technical competence of the practicing bar, escalating into the claim that the university law schools in particular have neglected practical instruction in favor of that of a more theoretical nature. I have paid my respects on earlier occasions both to the accuracy of the diagnosis as well as to the efficacy of the remedies proposed, and I do not now pursue that question further than to note that legal competence customarily tends to be defined too narrowly. It is possible for great technical competence to coexist with abysmal ignorance of, or lack of interest in, the larger ends which law seeks to attain.

Of two lawyers of equally high technical competence, one may have that extra dimension of understanding of the purposes of law which makes him sensitive to the requirements of a just and orderly society, and to currents of change. He it is that makes a wise and reliable counselor for harried corporation heads who have learned the hard way how to distinguish the broad- from the narrow-gauged lawyer. The point has been effectively made by Professor Francis Allen, of this faculty, who has recently written:

Concern with values is thus far from being merely of academic interest. On the contrary, it goes to the very essence of technical professional competence. These facts have long been understood by the best legal

practitioners. It is important that we do not forget what our best lawyers discovered long ago.

It is not without significance in this context that the Symposium held as part of these dedicatory activities has been addressed to the subject of "The Legalization of American Society." The consensus would appear to be that such a process has been going on apace, and shows few signs of abating.

There has been a weakening of the influence of institutions like the family, the school, and the church; and the law has tended to flow into the resulting vacuums. This is also true of employer-employee relations where disputes and tensions once worked out within the office or the plant now speedily become the subject of lawsuits. Even the present-day counterparts of the medieval guilds of tradesmen speak with lessening authority, both to their members and to the community at large. Organizational values which once were operative and exerted a stabilizing and solvent effect seem to have lost their former force.

In the field of public affairs, special — and, indeed, single — interest groups have proliferated, and political power has simultaneously tended towards fragmentation. Building the coalitions of agreement which enable governments to function gets harder and harder as the discordant voices become larger in number and shriller in tone.

All of these circumstances bid fair in the years ahead to make of law and lawyers a major component of the glue holding our society together. If they are to have any chance of fulfilling this critical function, it will be because the law is receptive to values deriving from other intellectual disciplines, and because lawyers, bringing to bear their special training in relevance and rationality, take all knowledge for their province in making and applying rules for human conduct.

Viewed in this way, it is plain to see why the private bar has public responsibilities far transcending its individual concerns, and why the education of lawyers in the university tradition is of critical importance. The advent of a great new library in a university setting is dramatically symbolic of this fact, and provides an appropriate occasion for both bench and bar to say to this Law School and this University, in the words of the Psalmist: "In your light we see light."