The Challenge of the Courtroom: Reflections on the Adversary System

By Morris B. Abram, JD’40

Mr. Abram’s lecture was delivered to the entering students of the Law School, and to the Visiting Committee and Alumni Board, on the opening day of the academic year, October 1, 1963. Mr. Abram, who had been a Rhodes Scholar, and a member of the American staff at the Nuremberg Trials, was for more than twenty years a distinguished member of the trial Bar of Atlanta. He recently became a partner in the New York firm of Paul, Weiss, Rifkind, Wharton and Garrison. He has served also as General Counsel of the Peace Corps, and is a member of the boards of the Twentieth Century Fund and of the Field Foundation.

Despite the multiplication of the specialties and sub-specialties of the Bar, lawyers today may still be classified as doing office or trial work. Some do both. Since 1870 the number of office practitioners has vastly increased and the relative number in the trial bar has diminished and continues to do so. I have heard a leader of the New York Bar say recently that there are fewer

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The Class of 1966

The student body of the Law School continues to be national in nature, both with respect to colleges attended and the home states from which the students come. On the basis of college grades and aptitude tests scores, it also continues to be of remarkably high quality.

Members of the class entering in October, 1963 had an average Law School Admission Test score falling in the 92nd percentile of all students in the nation taking the test. The 143 members of the class were selected from among more than 950 applications for admission.

They hold degrees from seventy-three different colleges and universities, divided as follows:

- Albion College .......................... 1
- Amherst College ......................... 3
- Antioch College ........................ 1
- Bates College ............................ 1
- Bowdoin College ....................... 2
- Brandeis University ..................... 1
- Brigham Young University ............. 1
- Brown University ....................... 1
- Bucknell University ..................... 1
- University of California (Riverside) 1
- Carleton College ....................... 1
- University of Chicago ................ 1
- City College of New York ............. 1
- Colby College ............................ 1
- Colgate University ..................... 1
- Columbia University ................... 1
- Cornell College ........................ 1

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The International Moot Court Competition, sponsored by the American Law Student Association and held in the Weymouth Kirkland Courtroom.
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than a dozen advocates he could suggest today to handle a great case in the courts of that community. That is not to say that there are not others who are qualified but the trial bar has its fashions no less than Paris, and the models of the litigation bar have grown quite restricted in a relatively declining specialty. Yet in our legal system the trial with its opposing advocates is the ultimate place for the resolution of all unsettled disputes, and all prudent office lawyers do their work with one eye on what a court might say or do to their work product. As Justice Holmes remarked, to a lawyer the law, realistically speaking, is a prediction of what a court may do.

The latest edition of a popular encyclopedia says a lawyer “is a man or woman who represents members of the public in a court of law.” I suspect that if you are like other freshman law students most of you were probably drawn to this profession by the magnetic attraction of this image. However, unless you make some decisive efforts to resist, the law of probability will pull you from this magnetic field into that constellation in which most lawyers today orbit and practice.

Judge Learned Hand has said: “... in my own city the best minds of the profession are scarcely lawyers at all. They may be something much better, or much worse; but they are not that. With courts they have no dealings whatever and would hardly know what to do in one if they came there.”

I have not come here to belittle or demean the other branches of the profession. Of my 29 partners, 22 do not practice in the common law courts. These men are, however, responsibly engaged in this profession, and without the efforts of men like them our present economic and social system could not function. They are often bold, imaginative and creative. As David Riesman wrote:

Only lawyers had in the post-Civil War period the particular gift for the framing of corporate charters, security issues, and all the rest; the particular courage to work ahead of the cases and statutes in order to give powers to corporations which had never been tested (and have never yet been tested) in court; the particular tradition to give body to such decisive inventions as the fiction of the corporation as a “person.”

Though Sir Henry Maine did not live to know the modern corporate practitioner, he surely would have included his effort as a prime contribution to social progress in the context in which he wrote: “The movement of the progressive societies has hitherto been a movement from status to contract.”

The business lawyer has been the midwife of the emergence of self-determining separate individual and business and other legal forms from the network of family and other group status ties. Not only that. The modern corporate lawyer who does not set foot in a courtroom does more actual law enforcement than all the judges and prosecutors in the country combined. When counsel to a business tells a client not to issue a security, he enforces the Securities and Exchange Act, or a Blue Sky law; when he advises against merger, he enforces the antitrust statutes; when he consents for his client to a decree, he imposes more effective control than the marshall of the court. Without a responsible bar of office lawyers, there would not be enough government lawyers or courts to execute the statutes now on the books.

Let no one say, therefore, that the office lawyer serves only his client and himself. He is an officer of the court in which he never appears and plays a vital role in the legal and social system in ways which he seldom has time to stop to contemplate.

But I am not here to extol the business, corporate and estate bar. I came to tell you of another life in the law—that of the advocate in the adversary legal system. The reason I or any other chooses this practice is, to be candid, a matter of temperament. The plain truth is I would find any other practice a bore.

I do not claim any comprehensive knowledge of the Tax Code. I do not want to acquire the expertise to advise a client on the intricacies of corporate law which affect a merger or reorganization. But I enjoy immensely the detailed study of any legal issue isolated as it must be, at the point of legal controversy. I have therefore never found a dull tax case, or real estate case, or any other litigation. It is the dispute which draws my interest, stirs my reason, charges my adrenals, and consumes me so that I am unaware of the passage of time. And frankly, when I have digested the facts and studied all the law bearing on the dispute, I have always been sure that I was on the side of right, whatever my misgivings were at first. I am engaged in the practice of all branches of the law when the issues are sufficiently narrow to negotiate a settlement or to fight them out in a legal forum. I am a generalist in the law and a specialist only in procedure and drama. The principles of my branch of the profession are drawn not only from the cases but from Machiavelli and Clausewitz.

As an advocate I am enmeshed in the adversary system which settles disputes by setting contending parties to fighting through their respective lawyers. These in the courtroom sometimes refer to one another as “my brother” or “counsel opposite,” or by name. At times we refer to one another as “my adversary,” and that is what we all are in the courtroom. Mark that well. The courtroom is a cockpit in which the legal rules and formalities shape and control but do not obscure the basic fact that battles are fought there.

Many law students will come to realize this instinctive and withdraw their initial interest in litigation. For the courtroom is often a cruel test for lawyers as well as clients. One enters to win but as often one loses, and the losses cannot be concealed. On the scoreboard of the
courtroom a lawyer will be considered to have done everything well in retrospect—if his client wins. If his client loses, he will seldom receive much credit for the numerous skirmishes which he won during the trial, many of which the client will have remarked upon enthusiastically at the time.

An old practitioner once put it to me this way: "When I win a case, then I have done everything right; when I lose, I have done nothing well."

Not everyone is emotionally suited to play for such stakes. This circumstance naturally and properly discourages many from the trial bar.

Others, however, after tentative and sometimes even rhapsodic expressions of interest in court practice, announce other plans, assigning as the reason a disenchantment with the adversary system itself.

Often this is merely an excuse to cover an emotional unsuitability; but many people sincerely adhere to this position which is widely shared by intelligent members of the lay public. I believe it is a mistaken view and decisions based upon it are in my judgment ill-advised and sometimes mischievous.

The most fundamental defense of the adversary system is that there is none better for the resolution of most disputes which cannot be settled by negotiation. Basically the adversary system supposes an impartial judge of the law and impartial finders of fact before whom contending parties lay their claims. The ultimate decision is based upon the facts brought forth during the trial by the contestants and permitted to be received by the Judge. The issues in any such proceeding are carefully controlled and the evidence admitted circumscribed by more or less established rules. Logicians can demonstrate without much effort that all the relevant facts are seldom permitted to be received in a courtroom, and every trial lawyer knows that many relevant and admissible facts are withheld, and ethically so, by trial counsel. In theory, the adversary system presents more facts through the competitive efforts of the contending lawyers than would be developed by an investigation conducted by a neutral. In part, this attitude may reflect a stubborn belief of the free enterprise society that competitive efforts of individuals produce more work product and perforce more social benefits than effort from some other motive.

Whatever your economic theories may be, I would suggest that in most cases the adversary system does work better than any system, which is predicated upon an investigation and decision by a neutral.

On September 25 of this year Lord Denning, Master of the Rolls of Great Britain, issued his report on the Profumo scandal. He said: "... in carrying out the inquiry I have had to be detective, inquisitor, advocate and judge, and it has been difficult to combine them."

Indeed it would be. One who sets out to seek a certain fact usually finds it, or what to him passes for it. The
have done away with the whole criminal and civil legal system as we know it.

I will admit that the present-day adversary system is not a good forum for resolving certain kinds of cases. It is the best we know for bringing to an end certain kinds of controversies—principally those in which the important issues are narrow enough to be thrashed out in a courtroom within a reasonable length of time. Did Smith strike Jones' car from the rear while Jones was stopped for a red light, or did Jones make a pass at his girl friend and suddenly brake his machine without warning? You may be sure that a trial of this issue will elicit the main facts that bear on the issue. The courtroom in such a case is a screen on which is flashed a reconstructed photograph of the events in the 30 seconds important to the judgment of the case. The trial may consume two days but the photograph will fall into focus.

On the other hand, the issues in a divorce case involving a couple married for 25 years, with children and property complications, cannot really be fairly adjudicated by a debate over the instances of "cruelty" alleged in the petition. Moreover, the adversary proceeding itself serves to create new issues, inhibits the chances of reconciliation, digs into old scars, and always leaves new sores. There is, however, something to be said for the adversary trial in the matrimonial case. I mention it only to illustrate a principle of wider application. Our legal system is, as I have suggested, a successor to an old tradition of private remedy often involving personal violence. This is the institutional history; but some of our substantive law has also developed from the same traditions. Justice Holmes in his Common Law pointed out that the law of negligence was in part derived from the substitution of damages for personal retribution. As Holmes explained, the natural reaction of a person injured even by an inanimate object as, for example, a door, is to kick the door when it pinches the finger. The discharge of resentment and anger is a prophylactic measure for personal emotional health, but the control of the discharge is a social necessity. The adversary courtroom is the approved forum for the acting out of pent-up resentments. After a good hard trial, even the loser sometimes feels better. He has at least had his say and he may substitute now his resentments against the faceless jury for his foe. Like the patient who has his operation to talk about, the client now has had his trial and he may enjoy considerably embroidering fact with fancy as he decries against courts, judges, juries, and lawyers—maybe even his own.

The jury is a part of the adversary system but such a system does not by definition require a jury. Recently Justice Desmond of my state called for the limitation of the jury system in civil cases, as was done in England during and since the last war. I well understand the shortcomings of the jury system, but I agree with Lord Simons, the late Lord Chancellor of Great Britain, who opposed the English limitation of the civil jury. Writing in 1947 Lord Simons said:

To restore and even to extend the pre-war practice of empaneling a jury for civil as well as criminal cases would have the real advantage of bringing the average citizen in greater numbers into touch with the law. That jury service is often a burden is true: perhaps it should be better rewarded. But let it be thought some reward if the jurymen can say that in him English justice is embodied and expressed.

I have never sympathized with the complaint that the jury system clogs court calendars and prevents the prompt trial of cases. Of course it does take less time to try a case before a judge without a jury. But if the jury system has inherent advantages, as I believe it has in most cases, then surely this country can afford the relatively insignificant cost of sufficient judges, jury panels and courtrooms to administer justice expeditiously.

I believe in juries because of some of the judges I have known; I believe in juries because within a framework of strict law, they arrive generally at equity; I believe in juries because they enable and control the point of view of a single judge who is always human. It may surprise you but in my experience judges are typed by lawyers who know them well; there are plaintiff-minded judges, defendant-minded judges, merciful judges and hanging judges. Don't forget that in most jurisdictions there is but a single judge. Consider the plight of the lawyer and his client who must always go before this single man to try every case on the facts as well as the law. I do not trust any single man enough to make of him the sole dispenser of justice within a community.

I spoke to an intelligent lay friend the other day about this engagement. He said: "Tell them the jury system stinks. I know for I have sat on many." He went on to say: "The only purpose of the jury system is to keep the judge honest." May I submit that this would be a worthy and sufficient purpose, and even more so if one adds: "and to keep one man from inflicting his own predilections on a community for years."

There are of course tyrannical judges but these are rare. But all judges are human. I would usually not agree to try a criminal case without a jury before a judge who has been a prosecutor unless the issue could almost certainly be predicted to turn on a question of law.

In our federal courts many district judges have been government attorneys. Moreover, it is natural that these judges, housed in the same building as the district attorneys, keep friendly relations with the prosecution, often socializing and lunching with them. There is nothing venal about this but I submit that this circumstance cannot but influence any human's point of view. Thus I said the other day to a distinguished lawyer: "Some day I am going to run for Congress on a single platform:
the United States judges shall not be housed in the same building as the United States attorneys." He replied: "Go ahead, and when you bring your bill before the Committee of Congress, I will tell you some witnesses you should call. They would be secretaries to district judges who could furnish you with some right good ammunition."

It is furthermore natural that a district judge, even though enjoying life tenure, may wish to be a circuit judge or may even dream of higher things. In our country the Attorney General is chief federal prosecutor, the administrator of the Department of Justice and the initiator of judicial appointments. What ambitious man wishes to deliberately offend the source of future preferment in a matter that could reasonably be decided either way? And I defy anyone to show me many legal issues on which a good rationalizer cannot at least make a creditable case.

Now mind you, my clients and I have had the short end of a jury's deliberations. From experience I can and still say that the jury system fails in a small community where one cannot possibly summon a panel which does not already know the participants and its version of the facts. It fails when called upon to deal with issues on which there exist a strong community prejudice. I regret to add, however, that judges also fail frequently under such conditions. I recently spoke to a State court judge in the South who told me that though 50 per cent of the citizens of his county were Negroes, the name of not one had ever been in the jury box. He went on to say that he knew this was wrong and that he intended to do something about it but he added: "Now isn't the time." By and large, the jury which does not know the participants nor the facts before trial, guided by an able judge in a trial of reasonable length, gives not only the appearance of justice but substantial justice as well.

It is almost impossible, however, for a jury to do justice in the three-ring circus which the modern federal conspiracy trial has become in which a score of defendants are tried together in cases lasting for months. After all, who could really recollect the evidence of a six months trial involving many defendants? Who could remember which evidence was admitted as against which defendant and excluded as to others? I maintain that this country can afford enough judges and juries to permit proper and speedy trials without the deprivation of due process. There is no reason why the institutions of justice should be manipulated in the interest of expediency. This country does not have to try a host of men, whoever they may be, in tandem.

You may have concluded that I do not share the TV point of view of criminal law—one which separates the cops and the robbers, the cowboys and the Indians, the good guys and the bums. You are right. Criminal law and procedure is a stagnant pool which cries out for reform. But there is no reform and for a good reason.

How can a society reform in a field in which it has no philosophy and no consistent point of view? I was chairman of the Atlanta Citizens Crime Committee for three years. There I came to realize that no one knows what purpose the criminal law is to serve—neither the legislators, the judges, nor the citizens. Is it the purpose of criminal law to deter crime by punishment? That is hardly its effect as statistics show that those who have been punished most continue to do the most horrendous crimes. Is the purpose to rehabilitate? Hardly so inasmuch as we know that most prisoners have few, if any, resources for that purpose, and particularly in view of the fact that the Director of the United States Bureau of Prisons has publicly said that he knows of few persons who have been reformed in a prisoner who could not have been reformed better on the outside. Is the purpose to separate dangerous men from society? Then why do we release dangerous men from prison after having served a set term? Is it to satisfy our primitive desire for revenge? Probably, but this would be denied most vehemently by the system's chief supporters. Unfortunately, most lawyers and the most influential officers of the bar have had no contact with the criminal law and could not care less. Men who would not permit the law of trust to remain unpurposeful and ineffective have given little or no thought to this field of great social significance. The trouble with the criminal law in this country does not derive from use of the jury system, but from a lack of overall philosophy and purpose, from a failure to coordinate ends with means or even to think what the ends are or should be. It is tragic that the criminal law of this country remains a game played on a hit or miss basis. No one knows this better than the criminal trial bar, including the public prosecutors who have adapted to play the game rather than exert the effort to make it a serious business to others than those who play and lose.

Now I come to a most important point. This country is experiencing a great spiritual, legal and social change. This has been too long delayed. Much of it originated in the work of the United States Supreme Court of the last two decades. Today that court is not a body of encrusted legal technicians but a vital third branch of the government, interpreting and defending the constitution and moralizing through law to other courts, public officials and private citizens on the principles of our political heritage.

The rising tide of Negro protest and demonstration has been widely described as a revolution. If it is a revolution, it is the most peculiar one the world has ever witnessed. Most revolutions are efforts to overturn the constitutional form of government; to subvert the established principles of society; to achieve by force and violence an overturning of legally established government. The Negro protest has a contrary purpose and thrust. It strives to support the constitution and to enforce its terms generally and completely; it demands that sub-govern-
ments and the agencies of society generally obey and implement the ideals of the Republic and the stated purposes of the instruments on which our national life was established. The Negro protest movement is a revolution only in the sense that it attempts to achieve finally the original purposes of the revolution which began in 1775. It is a movement to support the Constitution, not to subvert it.

As one who was less than a year ago a Southerner, I assure you that the rights of the Negro, nay the rights of every man under the Constitution, can when they are purposefully denied, usually be restored only in litigation. The impetus which first denied such rights is ordinarily powerful and persistent. These rights can only be wrung from the oppressor in the courtroom. This is no task for the summer patriot nor the corporate draftsman. The only forum for the re-establishment of the rights guaranteed by the first ten Amendments and the 14th and 15th Amendments to the Federal Constitution and the corresponding provisions of State constitutions is the courtroom.

When I was a teenager in college I decided I wanted to rid my native state of the county unit system of election. This was a method of electoral unit voting in which it took 100 votes in Atlanta to equal that of one person in another county. Since this object was reasonable, I thought it could be accomplished by reason, and certainly through education and accompanying political action. I was wrong. Then 15 years ago I started legal attacks on the system. An older lawyer, Stevens Mitchell, brother of Margaret Mitchell, said to me: "Morris, I am all for it. I hate the unit system but you will never get rid of it by lawsuits. The unit system is a damnable outrage and I am willing to go to the barricades to fight over it. But I cannot get other people to join me. People never get their rights if they are unwilling to fight for them, so it is a hopeless cause." Well, we finally destroyed the county unit system through the courts and Georgia is a changed state. Stevens Mitchell was right about one thing: the systems of malapportionment could never be rectified by persuasion. He was wrong about another: in America the courts are the safety valves which permit justified revolution without the violence of the barricades.

The architect of the continuing American revolution is the trial lawyer—the product and the instrument of the adversary system. The trial lawyer tends to be an individualist. He is generally not as dependent on retainers as others and therefore is freer than most. For this he pays a price. His income is variable; he leaves part of his body in every courtroom; he is constantly subjected to grave temptations and frequently accused falsely of succumbing to them. He risks the obloquy of contempt citations; he is tortured by mistakes which hindsight points up after every day of trial. The trial lawyer in short lives dangerously; but he lives.

Special Events

As the Record goes to press, the Conferences and special lectures listed below were definitely scheduled for the Autumn Quarter; more will be added. All except the final Conference will have taken place by the time this issue reaches its readers.

October 1—Welcome to entering students. Morris B. Abram, JD'40, will deliver the featured lecture, on the subject of "The Challenge of the Courtroom; Some Reflections on the Adversary System." Mr. Abram is a distinguished trial lawyer with the New York firm of Paul, Weiss, Rifkind, Wharton and Garrison.

October 13-15—Institute on Religious Freedom and Public Affairs. Sponsored jointly by the School, and the National Conference of Christians and Jews, this Institute is a closed, working conference for participants only, except for one public session. On the evening of Monday, October 14, the Honorable Abraham A. Ribicoff, JD'33, U.S. Senator from Connecticut, will deliver a public speech on "School Financing and the Religious Controversy."

October 23-25—The Sixteenth Annual Federal Tax Conference. Held in the Auditorium of the Prudential Building, in downtown Chicago, this Conference will again be presented in six sessions for an audience of about 450.

November 22-23—Conference on Discrimination and the Law, jointly sponsored by the School and the Anti-Defamation League of B’Nai B’Rith. Attendance at most of the sessions of this conference will be restricted to participants.

Our valued neighbors to the east, the American Bar Association and American Bar Foundation, dedicate two new wings added to the American Bar Center.