On Law School and the Law: Some Observations of a Practicing Lawyer

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“...You who have been trained at thinking big must learn to think small and smaller still: to focus closely...on what are sometimes ill-considered opinions written by often thoughtless individuals about trivia.”

It is a signal honor that your law school has paid me by inviting me to speak tonight to you in your first weeks here and to have joined you for some hours in your busy classrooms today. I appear before you as a practicing lawyer. I have taught on a once-a-week basis for the past several years (something your professors would undoubtedly, and with some justification, characterize as not “really” teaching). I have, as well, done some legal writing and, in recent months, some testifying before congressional committees. But all that is pleasure, diversion, fun—of some value, I hope, but surely not what I do most, or most importantly, or best. My full-time job—what my family would undoubtedly consider my more-than-full-time job—is that of a litigator, an advocate. And it is with that background and, in the main, from that perspective that I offer you some words of advice about law school and a word or two about the law that you will come to practice.

When I say that I come to you as a practicing lawyer, I recall an incident involving one of my favorite examples of that genre. It is of that superb lawyer, Edward Bennett Williams, perhaps the nation’s finest trial lawyer, after a speech at Yale Law School when I was a student there. When the speech (which had in passing referred to the Alger Hiss case) was over, I went up to Mr. Williams and asked him whether he believed Hiss was innocent or guilty. His answer has always seemed to me that of the quintessential litigator: “He should,” Williams responded, “have been gotten off.”

Let me start with a word or two of advice: law school, however it may sometimes seem, does have some purpose to it. I cannot tell you that law school is or will be painless. I recall, for example, after my sixth week or so of brutal verbal beatings by that great scholar and extraordinary man, Alexander Bickel (then younger than I am today and now, alas, no longer with us), I decided that I had to say something, do something, to pay him back for his abuse. And so, in those gentler days of the late 1950s, I did something. I wrote a letter to my kind and decent and caring undergraduate professor of constitutional law from Cornell, Dr. Robert E. Cushman. And I said something like “Professor Bickel is an adequate teacher, but commonplace as a thinker.” How Alex would have enjoyed my presumption—and my idiocy.

But enough of the grand old ’50s. The truth is that law school cannot be painless if it is to do any good. For what your professors must do is to turn a bunch of extremely talented writers of essays, takers of tests, overachievers all, into something quite different. Carlyle once said that the law sharpens the mind by narrowing it. That is not all the law does, but it is part. You who have been trained at thinking big must learn to think small and smaller still: to focus closely, more closely than you may sometimes think possible, on what are sometimes ill-considered opinions written by often thoughtless individuals about trivia. You may resent this; I did. But you will also come to read some of our greatest thinkers writing about some of our most significant and unending problems. And whether you read wise opinions or foolish, about great matters or trivial, you will be learning the methodology of the law and, with that methodology, the means of persuading judges and legislatures to shape and change the law.

At least as important as mastering the so-called “legal approach” is the need to learn legal language with just
as much diligence (and often just as much pain) as any other foreign language. If you want to be taken seriously in Paris, Tokyo, or Rio, you had best speak French, Japanese, or Portuguese. If you want to be taken seriously in court, you must learn the language of the law. Not, I wish to emphasize, so that you can sport a Latin phrase or two in court (except in direst need); not even so that you can comprehend those lawyers who drift into jargon as a substitute for thought. But to persuade, it is necessary to understand the attitude, moods, and premises of those to whom you are speaking. All these are reflected in the language you speak. Legal language tends to be cool, cautious, restrained, understated, consistent with a system that appears to change—so it might seem to a Martian—even so slightly from one case to another.

What marvelous deception it all is! But how desperately we need our language to cloak the enormous consequences of what we do! And so, when I appear in a First Amendment argument, say, to an appellate court which has not previously considered the issues raised in the case, I know that it is often difficult for the court to be asked to deviate from "ordinary" legal principles to the extraordinary otherworldliness of constitutional law. How to deal with this is suggested in a little noted passage in New York Times v. Sullivan. In Sullivan, Justice Brennan was in the midst of eloquently disposing of almost 200 years of American common law libel and establishing (contrary to all prior constitutional precedent and virtually all common-law precedent) the rule that there could be no recovery against the press for the publication of defamatory falsehoods about public officials unless the publication was made with what the Court would mischaracterize as "actual malice." It was, to understate the point, a massive (and, I believe, much needed) upheaval in the law, a grand and new interpretation of constitutional principles. And what did Justice Brennan do, after citing and quoting from Madison and Jefferson, Brandeis and Holmes as to the underlying purposes of the First Amendment? How did he reassure his readers that what he was doing, this major turnabout in the law, was not only consistent with underlying constitutional theory but—how shall I say?—nonthreatening? He did it by citing and discussing and adopting a Kansas Supreme Court case.

I do the Supreme Court of Kansas no injustice when I say that it is an unusual occurrence for a ruling of that court—or any other state court—to be so heavily relied upon by the United States Supreme Court. What Justice Brennan was doing in Sullivan is precisely what counsel must do all the time—to reassure and relax his reader or listener. And to do that one must know what the law is and what judges perceive the law to be in a wide range of areas. One must, as well, be able to express it in the language of the law.

Here is a personal example—one that failed but came pretty close to success. In a case called Herbert v. Lando, decided about a year ago by the Supreme Court, the question was whether in cases governed by New York Times v. Sullivan, there were any First Amendment limits on the scope of discovery into the so-called "state of mind" of journalists. On behalf of CBS, I had urged before the Court of Appeals for the Second Circuit that the requisite state of mind which Sullivan requires for liability to be imposed could be proved, on most occasions, from objective facts—what the journalist knew as opposed to what the journalist published. Questions as to why certain things were published and certain things unpublished, why one person was interviewed and another not, seemed to me to be unacceptable threats to First Amendment activities in much the same way official interrogations of journalists about those subjects would be. It was a difficult argument. I happen still to believe it and to believe that the Herbert ruling carries with it enormous potential for constitutional harm in the future, but there is no doubt of my argument's difficulty. And so, in making it, we quickly turned, by analogy, to many other areas of law involving protection of the "state of mind" of presidents and congressmen, of judges themselves. We cited, by analogy, the Freedom of Information Act, with its protection of the "mental processes" of authors of governmental documents. We turned to entirely different bodies of law—10 (b) (5) litigations, antitrust litigations, even criminal litigations—and urged upon the court that, in those cases, "state of mind" was routinely proved by comparing what a person did by what he knew, without requiring direct proof of what he thought. Indeed, we urged that the Fifth Amendment itself embodied recognition that to protect constitutional principles we were willing to forego critical "state of mind" evidence, notwithstanding the need to meet the strict standards of proof required of the state when it seeks to demonstrate the existence of criminal intent.

As I indicated, and as you may know, our effort was ultimately unsuccessful. But the moments of argument during which members of the court looked least skeptically at me (a test I urge upon you as one by which you may often judge the efficacy of your advocacy) was when I was discussing these other areas of law, not First Amendment areas. It may well be that that response was prompted by some perceived substantive weakness of our First Amendment arguments. Be that as it may, reliance on the law in other areas was indispensable to our advocacy.

And so you must learn both legal method and legal jargon even if, like yellow fever shots, it hurts a bit. As any masochist can tell you, hurting can be a good thing, at least when it's over.

I have a second piece of advice for you which is, I trust, more cheering. It is this: relax. Relax even if you think that you are misunderstood, underappreciated, even abused. For one thing, law school eventually ends. For another, your professors (learned as they are) often fail to communicate some basic truths about the practice of law. One is that most lawyers are not very good. And just as Blanche dubois could say that she relied upon the kindness of strangers, any practicing lawyer relies, on occasion, on the incompetence of his opponents. I promise you, you will have some. And you will be grateful for them.

Another reassuring note is that even if you do a dubious job or worse, you will sometimes win anyway. One of my favorite recollections of Supreme Court oral advocacy is that made by counsel to the State of Kentucky in the great case entitled Branzburg v. Hayes, the case which established, more or less, and by a five to four (or four and one-half to
four and one-half vote, that, under some circumstances, there was no privilege rooted in the First Amendment for journalists not to respond to questions about criminal activity which they had witnessed, notwithstanding that a pledge of confidentiality had been given by the journalists to their sources. When the oral argument on behalf of Judge Hayes began, Justice Douglas (who rarely asked questions from the bench) looked down at the young Assistant Prosecutor from Louisville, representing the judge who had ordered a journalist jailed, and said something like this: "In a case of this magnitude, do you not think it would have been more appropriate for you to have filed a brief of more than four pages and one which at least cited one case decided by this court?" To which the young lawyer responded, "Your Honor must realize, I am a very busy man." My point is simple: that lawyer walks the streets of Louisville having vanquished the press in Branzburg v. Hayes. He won.

Let me offer another example. In connection with a speech I gave on appellate advocacy last year at Yale Law School, I showed the entirety of a televised appellate argument. It was an argument of limited effectiveness on both sides. With me, the students laughed a bit at counsels' inability to articulate the legal principles that they were urging should govern and the difficulty they had in responding to predictable questions. When the televised argument (then awaiting decision) was over, I went on at some length as to what was, I thought, wrong with the argument. The students listened; the lecture ended. Three weeks later, the Court ruled in favor of one side by a unanimous vote. A number of students called me on the phone, saying, "How could that lawyer win that case?" To which I had to respond that I had forgotten to say that (a) both sides couldn't lose and (b) lawyers should not exaggerate their own importance. Advocacy counts, but judges do play some role in the decision-making process.

I turn now to another observation which I make with more seriousness. Too often, law students leave law schools with the view that the private practice of law is somehow ignoble, that it is little more, as Justice Holmes put it, than the "laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests." It is sometimes that but far less often than those who do not practice law would easily believe. It is, far more often, far more. Listen to Holmes' response to that charge to the undergraduate class at Harvard 94 years ago:

Gentlemen, I admit at once that these questions [about devoting one's professional life to such matters] are not futile, that they may prove unanswered, that they have often seemed to me unanswerable. And yet I believe there is an answer. They are the same questions that meet you in any form of practical life. If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world, but if he has the soul of an idealist, he will make-I do not say find-his world ideal. Of course, the law is not the place for the artist or the poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.1

If you leave here thinking that a man may not "live greatly in the law as well as elsewhere," your professors will have much to answer for. And so will you.

For one of the grandest things the law can offer those who practice it is the chance to participate in its reshaping. I have already cited a number of constitutional cases to you. Let me offer a far more mundane one for your consideration. Some years ago, my firm represented a large industrial company in a suit it began in federal court in Alabama against the construction firm that had designed and built for it a new plant.

The defendant cross-claimed against one of its large suppliers; that party counter-claimed against the contractor and did so, as well, against my client. Is everything clear? A sues B; B claims against C; C claims against B and A.

The first problem was this: there was diversity jurisdiction between A and B—my client and its contractors; there was no diversity between B and C (the contractor and its supplier), but none was needed because of long-established principles of pend-ent jurisdiction. But there was also no diversity between C and A—the third-party defendant and my client. Was it needed? Professor Moore had one view, as expressed in his text; Professor Wright had the opposite view as expressed in his. There was no Supreme Court decision, no Court of Appeals decision, and six reported district court opinions (three each way). It was hardly a monumental issue. But it was an arresting one, as it might be in playing a rather in-volved form of "Risk" or "Dungeons and Dragons." It was fun. And so the parties briefed the issue, seriously, creatively, imaginatively. What then happened was, I must confess, a bit discouraging. After all the brief­ing, we went to Birmingham for oral argument—I, then a young associate in my firm, together with a partner in the firm who would make the argument. When he rose, the trial judge said "I want to thank you all for the most interesting briefing. I should say, however, that I have previ­ously decided this precise issue four times in unreported opinions, each time contrary to the position taken by you. Please proceed." I won't tell you who won. But it was fun anyway.

One more example: a few years ago, one of my senior partners and I represented certain underwater writers at Lloyds in a litigation against certain American insurers involving the question of which insurers should pay for the loss of an airplane. Does it sound mundane? The case was far from that. A Pan American plane had been hijacked in Amsterdam by Palestinian terrorists; it had been flown to Beirut and then to Cairo where the plane was blown up bare­ly after it landed. Our clients were so-called "war-risk" insurers—insurers against risks to the plane arising from war, revolution, rebellion, and the like. The other insurers were "all-risk" insurers—insurers against all risks to the plane except those due to war, revolution, and the like. And so our insurance case ranged across the meaning (in international and domestic­ic law) of war, the meaning of rev­olution, and the meaning of rebellion. It ranged into political areas, as well. Was the continuing war against Israel one of which the hijacking could properly be considered a part? And even so, what legal effect would such a characterization have? What legal effect, should be given the character­ization of such hijackings by our gov­ernment, by Arab states, by Israel?

I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a hundred cases. A thousand cases, many of them upon trifling or transitory matters, to re­present nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophical exposition, setting forth the whole corpus with its roots in history and its justifications of ex­pedience real or supposed!

Alas, gentlemen, that is life. I often imagine Shakespeare or Napo­leon summing himself up and think­ing: "Yes, I have written five thousand lines of solid gold and a good deal of padding—I, who would have covered the Milky way with words which outshine the stars!" "Yes, I beat the Austrians in Italy and elsewhere: I made a few brilliant campaigns, and I ended in middle life in a cul-de-sac—I, who had dreamed of a world monarchy and Asiatic power." We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done.

I come here tonight to affirm two things to you. First, it can be "nobil­ly done" in the law if you do your best at it. Second, Holmes' speech, glow­ing as it was, is that of a man recol­lecting past triumphs, musing about the meaning of it all. But two years later, at 61, Holmes was appointed to the United States Supreme Court, served there for 30 years, and put all of us and all our children and theirs in his continuing debt. There was for him, as I trust for you, ample time to accomplish all he could. I wish the same for you.

Holmes was, to be sure, a figure of Olympian stature and splendor. You may not meet or match or approach it. But whatever area of law you practice and whatever you do, you can, with what you learn here truly change the world. I wish you well in doing so.

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And ultimately most important what was the effect on the case of other in­surance then being sold—insurance against "forceful diversions," against "hijacking" or the like? Should the availability of such insurance, and the knowledge of insurers of such language, lead to the conclusion that the "all-risk" insurers were liable for not excluding such occurrences from their policy? I will not tell you the re­sult: it is to be found in the law books. I will simply say that I would be more pleased if you read that case than the previous one I mentioned. And that, win or lose, it was always a challenge.

I offer you a final theme in conclu­sion. It begins with another quota­tion from a speech of Oliver Wendell Holmes—then 59 years old and Chief Justice of the Supreme Judicial Court of Massachusetts. Reminiscing a bit about his then 18 years on the bench, his 35 years since graduating from Harvard, he said this:

"One of the grandest things the law can offer those who practice it is the chance to participate in its reshaping."

I ask myself, what is there to show for this half lifetime that has passed?

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