Restoration of Our Legal Tradition

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PROBLEMS OF THE LEGAL PROFESSION*  

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By Karl N. Llewellyn**

I don't find on the program the topic which was assigned to me. I think I have been sold out when even as affable a gentleman as Dean Clements first straight-jackets you with a topic and then proceeds to deny that he has done so after he has got you straight-jacketed; there is ground for objection, sir and I am going to tell them what the topic was. The topic was "Problems of the Bar," or "Problems of the Law," and for my money that is going to turn into "Problems of the Bar." I come to that, I think, very naturally. The roots of this school go back spanning a full century, to the days when the great traditions of the practice of law, of legislation and of the judging functions were in full bloom in this country. And my belief is, and is very firm, to the effect that one of the major problems of the law today is the conscious and effective re-capture both by individuals and by the Bar and by the teaching crafts of law in our schools of that grand tradition of the common law.

I take it as fundamental and unchallengeable that you can not possibly expect to have in practice, and in life, in undiluted form that ideal which we so frequently speak of as a government of laws and not of men. I take it as fundamental that men enter into it, that it is vital that they should enter into it, and that their

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function is to add to anything that can be done by the way of the laws that element of skill, of uprightness and the touch of constant forward vision that never can be communicated except by the human mind through the work of the human hand. Hence, the recapture of the greatest of legal traditions, as I see it, becomes a problem of the law in the strictest sense and I would like, if you will indulge me, to spend a few minutes this afternoon indicating, as a reminder, what some of the things about that line of tradition were and how I think they are in process of being partly recovered, but still need conscious effort less we miss the boat.

I think, perhaps, as the first element in the grand tradition of our common law, of the constant revision of the premises in the light of current need as the work went on. Turn back, for example, to the opinions of the Supreme Court of New York in the period which I love best in the whole tradition of the New York Bench, the period between 1836 and 1844 when Isaac Cowen dominated the Supreme Court. Read those opinions and watch the careful attention to authority, but the constant attention to its reformulation and re-testing in the light of the needs of the day of action and the future—not merely in the light of the needs of the day when the authorities were first announced. Watch the feeling of principle as a living thing that formed the choice among a use of precedents. Watch the feeling of principle as something with life-meaning and sense, not merely the ordering of the rules of law. Watch the principles also as a constantly reformulated phrasing which gave new guidance to future cases.

I can't much better indicate what I am talking about than by asking you today, if you don't want to go back to what may seem like ancient history, to pick up one of the recent volumes of the Court of Appeals and read fifteen opinions of Loughran in a row and you will get a good deal of the flavor of what I am talking about. Loughran might have grown up in those days in terms of the way in which he is now handling his material. That, however, is only a piece on the craftsman's side.

Another piece which is to me no less important was the human dignity of the lawyer, who was a craftsman of that day, not only
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in regard to his view of himself but in regard to the view of him taken by his fellows outside the law. I think that no man can doubt that one of the fundamental factors in that self-respect and in the enjoyed respect of others which flowed to the craftsman of that day lay in the fact that law had not, inside the soul of the legal craftsman moved into any divorce at all from life and from the fundamentals of the finer life.

One thing that has struck me as a loss, and a tremendous loss, in the years that have happened since, has been the loss from a lawyer's living too often of the finer ideals which in his craftsman work he fights for. Look, for example, at our practice when we turn to what the rule of law on a point is, ever remembering where we picked up the phrasing, what the authority was. This rule was laid down by the Court of Appeals, perhaps even it was laid down in an opinion by and name the man as well. This other phrasing of the rule was laid down by Wigmore and we may have to check whether it is law in New York or not—and the like. But our conception is of what the correct rule is on a point, our professional practice tagged with the source. Can anything be more fruitful in dealing with any kind of alleged facts about anything in this world of opinion, rumor and untested belief in which we live today? Can a lawyer soundly in his daily life simply remember that—"I read it somewhere," or that—"I heard it somewhere," and salt it down as fact in the very fashion in which in his professional work he has learned never to do? We have a word for it when you deal with rules of law that way, and it isn't a nice word. We sneer and we say, "He practices law by ear." I find something of the same kind when we come to those fundamentals of our legal civilization which today are matters as they have not been for more than a hundred years of struggle for defense and therefore of necessary re-examination and understanding. When I grew up we weren't thinking very much about the fundamentals of our legal civilization. They were things you didn't have time to think about—you had done nothing to earn them, you had inherited them, you enjoyed them, you didn't bother to think about them. But, in the last twenty years these things have not become presuppositions any longer, that you can take for granted. They have become things that
one has to worry about, reaffirm faith in, and it is pretty impossible
to reaffirm faith without reaffirming understanding in these mat-
ters, and I am puzzled, at the same time, once again at the failure
of too many of us to carry over into the personal living the
lessons from our legal ideals and apply them so that the man be-
comes a unit whole that commands the respect of his neighbors.

I think, particularly, of what I have seen in meetings of lawyers,
in terms of a fair hearing. Notice the condemnation of a man
by mere association with a group label without an opportunity to
have the accusations stated and to answer, a few of the things,
which I take it, are fundamental to our ideals of court operations,
of police operations, of administrative operations. But in meet-
ings of lawyers I have too often heard characters assassinated
by a single whispered inuendo. In meetings of lawyers among
themselves, just among themselves, I have too often found the
very man who is occupied in insisting on behalf of a client on
each one of these precious pieces of our tradition, I have found
that same man believing likely, with no inquiry at all and even
doing his share to spread the interesting stuff, new inside dope,
about Smooze, and I don’t see how if the finer phases of our
legal ideals don’t carry over as matters of simple craft tradition
and of simple habit into the ways in which we live that we can
recapture that respect for the profession at large and for each
individual member of it, which was not only our pride but our
dessert in the days of the great tradition.

I will mention only one more of these matters which concerns
me along these lines. I will mention the care in statement which
has been one of the great privileges and duties of the legal crafts—
the zeal for accuracy, for precision, and only then for pungency.
That seems to me, too, to be a matter of the daily craft. I re-
member my old Chief, I had the good fortune to be trained under
as fine an oldster as ever trained a cub when I started out in
practice. I remember that he used to sit at his desk and when a
telephone call came in there was a little pad and when he got
done with his telephone call he never would go on with the busi-
ness that had been interrupted until he would first put down
the substance of the telephone call, right hot off the griddle.
Well, that was OK, and undoubtedly a sound line of practice
but it isn’t what I want to come to. What I want to come to is that once upon a time I got some of these telephone notes to read because they bore on something that had come up, and what I discovered was that as he made these little telephone memoranda in between two pieces of business, he would phrase them with the same careful, accurate pungency which was his practice in one of the most delicate pieces of advocacy or negotiation which he had come up against. He believed that you had to do it by habit and then it came by nature—and it worked and it will work but it is another example of the man and the craftsman merging into a single unit in which each profits by the other and the Country profits by both.

One other phase of the tradition, going now not to the man but to his services and effects in the community is typified by the work of old Shaw when he went on the Supreme Judicial Court in Massachusetts. It has to do with a phase of law which I think can only be recaptured by the conscious work of many of the craftsmen, although any one of us can do his small chunk toward it, and that is friendliness and intelligibility of the law to the people whose law it is to be. The advent of an industrial civilization superimposed upon a pre-industrial body of legal concepts has led to a terrific complexity in the law, as we all know, and to a terrific volume as well, although the volume is not nearly as scaresome in this connection as it would seem to be, because there isn’t too much law that really has much direct bearing on any particular individual citizen. In the main, most of the complexity can be by-passed by any one of us because he isn’t in that branch of life, he isn’t in that branch of business, he never is going to run into that type. But the law that does bear upon the particular man is something that has some value for that man to know and to meet. It can be a source of great power to a man and a source of great power to a nation. In my earlier days I used to teach at night in the American Bankers Institute which was attended by bank clerks who were trying to find out the legal meaning, significance and reason for a lot of the things that they were actually doing, and the joy that would spread over the face of a bank clerk when he discovered why it paid to have the partners individually endorse the partnership
note, that this was not routine but this made sense, it made lots of sense; the joy that would spread over the face, as I say, at this kind of little thing was a thing that persuaded you that here was a source of power, here was something that made people sounder, stronger and much more effective citizens. The pleasure that you and the clerks can both get out of working over those portions of the N. I. L. that explained what to do in the event of dishonor of a draft, and then after having worked them over, working over some of the forms of the bank that made it completely unnecessary to do any of these things in the case of a note, are things which I say make people feel somewhat worth their feeling. And then in the middle of my work on the Commercial Code, all these memories of my youth were called into the most vigorous vitality, the embattled warehousemen of America marched upon us in phalanx. What were we threatening to do? We were threatening to destroy the identity of the warehousemen's industry by changing the uniform warehouse receipts act, "our" act. Beautiful to watch them! They had a stake in the law of America. It was a fighting stake. It was a proud stake and it was good to work with them. This is the kind of thing, that law should mean all over the Country to all kinds of people. And it is the kind of thing that the individual lawyer in his individual recapture of the grand tradition can help largely to achieve. Every once in awhile the individual lawyer even gets into a position in which he can do something about it on a large scale.

Think of that glorious lad of the Treasury—don't say there are no glorious lads in the Treasury—who conceived the idea of the little short form income tax return. Think of the gratitude he has earned for the Government from millions of American citizens. Think of the guy at O. P. A.—don't say there are no good guys at O. P. A.—who conceived the idea of writing regulations in the second person and simple enough so that the guys addressed could read them and understand them without resort to Counsel—this is what you do—this is what you don't do. Here is the ideal of Chief Justice Shaw made real in the modern, complex world of today. Here is law made friendly. Here is sense in law made clear. Here is Government neither
as a milch cow nor as an enemy, and it is just as bad in either aspect these days. Done by the craftsmanship of craftsmen who have recaptured the glorious days of our craft. And if you will turn to the Appellate Bench today anywhere in the Country, you will find a tremendous move in this direction—lawyers who think that the doctrine of precedent is being shot to hell by the judges today are lawyers who don't know anything at all about the doctrine of precedent. What is happening is that the greatest days of our doctrine of precedent are being slowly recaptured and recaptured fastest by the best of our judges. In no court is this more apparent than in the Court of Appeals in New York where the process has been going on for a little over thirty years and is now in full swing, and it is a kind of a recapture of the finest phases of our common law tradition which an intelligent fellow practicing can guide himself by much better than by what he used to think the doctrine of precedent was, which consisted of putting the nickle in the slot and grinding the machine out and bringing out a blind answer without regard to the sense of the case.

That, I have no time to develop. I have a limited time. I simply say it is so. I say it has been tested to be so. I would love to demonstrate it, which is very easy to do but, after all, there is a limit to your patience, a limit to the length of the afternoon, and doings coming up.

I have got one last thing to suggest to you, again along the line of the grand tradition of our common law. It is summed up by a proverb, which I think comes from Scripture, but I do not know, "Where there is no vision the people perish." And if that isn't Scripture, it ought to be. The function of the lawyer in the old tradition was a function of providing vision when vision was not otherwise provided; of leading with vision into action, when leadership with vision into action was not being otherwise provided. He was a minute man at all times in regard to the crises and emergencies of his Country's history. I look now upon a world in which the one most striking thing of absence is vision; I look upon divided camps that remind you of the impossible days of suspicion, hatred, fear and despair
which followed the successful outcome of the American Revolu-
tion; I look, thus far in vain, for sustained leadership on the
part of lawyers in finding ways out that remotely compare with
the amazing performance known as the Constitution of the
United State and the Bill of Rights. I am reminded that it
was not only dominantly lawyers who thought, then argued,
then planned, then drafted those things out, but I am reminded
of such names as Madison and Hamilton as the people who
sold the results to a suspicious, distrustful, fear-ridden people.
Truly the great tradition of our craft weighs upon us. All you
have to do is to look around to see that we are getting it back.
A Centennial is a time to look forward to the next century. We
will get it back. Let's not be too long about it.