

ADDRESS

"FOUNDATIONS OF OUR UNREST"

By

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I appreciate the honor of speaking to fellow lawyers on this day of good fellowship and retrospection.

Last week lawyers had a laugh at the expense of their clients when the ever veracious Herald-Tribune front-paged the proceedings of the American Medical Association in the following language:

"Transformation of a man who was a failure in business into one who achieved outstanding success as a business man was achieved by removing part of his brain * * *.

"One of the remarkable features of the case of the man who was given the millionaire mentality by a brain operation was that his intelligence decreased constantly as his success in business increased."

The Yale Law School will not miss the significance of this substitution of surgery for pedagogy as a way to success. Future students may be put to sleep by anaesthetics instead of by the case method, and graduates may exhibit scars instead of diplomas. There remain of course questions to be settled by research. Cynical science will have to determine how much brain should be removed to put a lawyer in the front ranks, and how much more to make him a judge.

I

PUBLIC UNREST

As we look about at the society we are to serve, one of its significant intellectual characteristics is an inability to give sustained public attention to any problem. We view our government as from a train window. We would be incapable today of getting substantial public following of the entire proceedings of a constitutional convention and we could never

get a modern serial on government like the "Federalist" widely read. Most people's source of information concerning Supreme Court decisions, Executive policies, and Congressional enactments is confined to the headlines or the cartoons. The people want to take their government in sensational flashes and representatives hear from their constituents in the same way. This impatience with prolonged demands on public attention makes democratic government jerky and emotional, sustained by uninformed or half informed public opinion which alternates between tension and indifference.

The dominant political characteristic of the moment is expressed in social conflict and unrest. The struggle for ascendancy goes on, with the greater number too preoccupied to give consistent attention to the aims, the reasoning or the methods of contending groups by which our fate is being sealed.

Walter Lippman has described the extremes of our political battle front as follows:

"On the right the decent conservatives who wish to preserve property, but recognize that property must be used in the public interest are steadily and rapidly overwhelmed by reactionaries who want to make property absolute. In the end ordinary conservatives find themselves supporting and following men of Fascist temper. On the left the progressives who wish to modify the rights of property and remove privilege and make opportunity more equal, and to do all these things by democratic methods, find themselves compelled to go along with men of a revolutionary temper.

"When this happens the people of the middle are squeezed by the two extremes. If they wish to modify the rights of property but to preserve the institution of private property, the Fascists call them Communists, and the Communists call them Fascists. Caught between the two lunatic fringes, they have to make an impossible choice. They have to choose between the frying pan and the fire. The extreme right will not listen to plans to reform property. The extreme left will not listen to plans which preserve property."

If such a description is accurate, as I believe it to be in the main, it is important that the people do not delegate their thinking, nor their duty to become informed, entirely to editors, column writers or public officials. Nothing would contribute more to good government than the existence of an accurately informed constituency that would consistently and critically appraise public policies. We lawyers might begin today by a dispassionate examination of some of the foundations of our unrest and conflict.

II.

FOUNDATIONS OF OUR UNREST

As I see it, the cause of our confusion is that we are thinking in terms of one culture while we are living in ^{THE REALITY OF} another.

Our political institutions and our legal doctrine were largely matured by men trained in the world's oldest culture--agriculture. That experience produced its own philosophy, which profoundly influenced our doctrine of law and order.

Early American farm life established an equality among men as nearly perfect as any civilization has produced. Its economics, its society, and its politics were democratic and individualistic.

The agricultural labor system is, in large part, an exchange of work. Nearly every farmer is at times in the market to hire labor and at other times does labor for others. Children of a farmer not needed at home enter the family of a neighbor and become both employees and members of the family. Under such a system there is a fair equality of bargaining power, and all share the comforts and the hardships. Those who

prescribe labor conditions live under them. If the hired man starts work at 5 o'clock in the morning the farmer gets up at 4:30 to call him.

Moreover, there was social equality. Those who left their own homes to work for neighbors suffered no loss of social status. The hired man married his employer's daughter and nobody thought it inappropriate. To be a good workman was his best recommendation. The aged man found chores within his power and he could set his own pace. In such a system a man feels a dignity and a certain security, which keeps him from becoming bitter even if he becomes restless.

This was pretty nearly a perfect democracy. In an economic sense there was what might be called by today's standards an equality of poverty. But the personality of the individual was respected. The causes of his success or failure were visible and were related to his own efforts and capacity.

All of this has been violently changed by industrialization.

We have retained the political forms of that democracy. But much of the underlying substance of economic and social democracy has been lost. To sustain democratic political institutions, on a basis of an essentially undemocratic industrial economy and society, puts statesmanship to a new and fearful strain.

Notwithstanding that our industrial system has given most men life on easier terms, and provided a greater distribution of comforts than any society has ever seen before, it has imposed conditions which deprive masses of men of their individuality and the dignity of their

personality. Most men have no access to the means of production except through the employment office of a corporation and the conditions of labor are laid down by men who, however conscientious, do not share the conditions they create. Many reap without a seed time and many sow but gather no harvest. The individual feels no identity with society and his position seems determined by forces beyond his control.

Whatever advancement has come to us collectively, there is an unbearable indifference to the well being of the individual. Many seek to compensate the inferiority of their individual positions by identifying themselves with a crowd, a trade union or other organized groups. Their struggle to retrieve their lost identity and personality accounts for much of the stress under which our present institutions groan.

Let us look at the rise of a dominant industry in a community. A well managed plant, officered by reasonably considerate persons, begins to prosper and to pay good wages. Its repute spreads through the countryside and the youth are drained from the farm to the city at the call of good pay. They marry and locate there to raise families. They buy lots, which creates a real estate boom, and they build homes, with the aid of that invention of the devil known as a second mortgage. The city is obliged to extend municipal services such as sewer, light, water and paved streets, and goes into debt anticipating increases in revenues from taxation of the homes. So the circle moves. The managers of the enterprizes are held out as men who built the community. They are widely praised for giving employment to others and their neighbors join with them in demanding that the government keep hands off their business.

Suddenly orders for the product cease. No one knows why or for how long. Men are laid off. They have no reserves. They get behind with the butcher, the baker, the milk man and that breaks him. They default in their taxes and in their interest. Then in a few weeks they require relief. At the same time that burdens are thrown on the city they fail to pay their taxes, and tax sale and foreclosure start driving down real estate values and making tax collections impossible. The crash exposes abuses in financing or in management, it reveals great inequalities and deep resentments are born.

The development of the enterprize was made possible by two elements: One group put in their money or left in their earnings and another -- a much larger group--uprooted their way of life and put their lives at the disposal of the enterprize.

But is it not plain that there is another party to this bargain between horsepower and man power? Is it not plain that the community has an interest in the management, the labor policy, the financial policy of the employer that it did not have under a simpler life? Is not the whole relation of government to the relation of master and servant a changed one?

Does not this present a problem of readjustment that challenges government, industry, and most of all our lawyers and judges?

III
"LIBERAL" AND "CONSERVATIVE"

Differing reactions to this problem of adjustment divide the Bar into what we may call, for the want of better terms, the "conservative" and the "liberal" elements.

In the struggle for mastery, the contribution of the Bar and of the courts to the balance of social forces is always predominantly on the conservative side. This is the result of education quite as much as of interest. Not only does the lawyer deal largely with property rights, but property asserts its claims by settled and conventional methods and seldom shocks our sense of order, even if it does offend our sense of ethics.

If labor, on the other hand, urges its claims with moderation they are usually ignored, and if it urges its claims with passion they are denounced as dangerous. Lawyers generally do not want to be identified either with weak causes or threatening causes, and, since labor is forced to be one or the other, the overwhelming force of the Bar is on the side of conservatism.

Notwithstanding this, the liberal lawyer--I venture to say--is devoted to our democratic fundamental institutions equally with the conservative. Nothing is more clear than the need to preserve our democracy, and if there were any doubt about it a look at the distressing alternatives which other people have chosen would convince us.

Both conservative and liberal lawyers believe in adjudication and election as substitutes for force. In order to preserve these fundamental ways to peace, both groups should recognize the necessity of keeping the distance between the two extremes of purpose in public affairs narrow enough so that they can be compromised and arbitrated. Both know that democratic processes can function only to settle problems where the extremes are within a compromisable area. No class or group will submit to arbitration its right

to live or its right to those things which make life worth while.

Ballots and court decisions will not settle controversies which strike so deeply that resistance will not yield to an adverse decision.

Both conservative and liberal lawyers must know too that we must avoid the development of great emotional tensions in our public affairs, and must seek every means to avoid those events which place great stress on our institutions. It may well be questioned whether our liberties could outlast American participation in another European war, or whether property rights, as we have known them, could survive the resentments of another great depression. Hysteria or panic in any cause, however good, is a menace to democracy, and conflicting hysterias in different classes are fatal to it.

It is questionable whether the prize for least common sense should go to the extreme liberal or the extreme reactionary. The reformer is always imperiling progress by attempting more than he can administer. The conservative is always opposing any progress because he claims each experiment is imperfect. The demand for only perfect legislation/^{to} support is as absurd as to expect the modern motor car to have been created without the history of experiment, of trial and error, that goes to the creation of everything worth while in mechanics in legislation or in art. The silly liberal who thinks he has a perfect plan is at one in uselessness with the silly conservative who refuses to support any plan until a perfect one is brought forth. A true liberal distrusts all political oracles that speak with unctuous finality for he knows that events will make their own terms with the best of theories. He sees democracy function by a

series of compromises, none permanent. Each statute is merely a point at which contending social forces come for the moment to equilibrium. He wants the right to experiment kept free and every avenue to compromise left open.

A true liberal is likewise distrustful of force. He knows that our legal system rests fundamentally on a sense of order and a spirit of fair play and that legal policy can only occasionally and locally and temporarily rest on force. He places no superstitious trust in written words, or legal documents, or court decisions. Slavery was not settled by the Dred Scott decision, child labor by the child labor decision, industrial problems by the N.R.A. decision, nor the farm problems by the A.A.A. decision. He knows that mere authority will fall where reasonableness fails and he distrusts all arbitrary authority, even his own.

IV.

THE CONTRIBUTION OF THE BAR

What contribution can the bar make to the peaceful solution of our problems?

A group that is so generally enlisted on one side of a conflict is obviously handicapped in providing solutions. No one today thinks of the organized bar as possessing neutrality or even temperance in its partisanship. It is plain that contending forces in society will not leave the readjustment to the legal profession on the bench or off.

This I believe is not so much due to the fact that people distrust the motives or the honor of the bar, as it is to their distrust of the lawyer's way of thinking. This is a problem for legal educators to ponder. This is not a class prejudice alone for, while labor and farmers are suspicious of the lawyer mind, I also find business men quite generally contemptuous of the legalism even of their own lawyers.

We are generally charged with an artificial thinking which does not find root in the practical conditions of life. We are delayed in keeping up with society by a great baggage of precedent and tradition that weights our talk and litters our minds. We are accused of fighting feigned issues over conflicting legal theories in our courts while the issues that touch flesh and blood are but the spring board for our theorizing. True or false? Frankly now?

We lawyers have ever been lovers of fictions. "Divine right of Kings" and the "King can do no wrong" are gems of olden legal talent. It took convulsions in our political life to get rid of the fiction of "assumed risk" and the "fellow servant" doctrine in dealing with industrial accident. The courts even thought they were part of our constitutions. We have shed some false doctrine but we cling to other fictions with an oriental devotion.

We still hear the "Freedom of Contract" doctrine applied to each man in a line of necessitous unemployed seeking work at the employment gate of a great industry. Who except lawyers or judges would hold those men free to bargain terms of a contract?

"Equal rights before the law" we still accept, though we know that there can be only a theoretical equality of rights unless there is an equality

of resources to assert those rights, to meet the high cost of competent advocacy and to survive the delay in getting the fateful day in court. A constitutional guarantee of due process of law has uncertain value to one who can not afford to hire a lawyer. Anatole France made a sharp observation on equality before the law when he said that the law in its majesty equally forbade both rich and poor to beg in the streets, sleep under bridges or steal bread.

Our best judges and lawyers go on acting upon the belief that a corporation is a being with an entity and existence, a motive and a volition of its own. Laymen think of their companies as simply methods or means by which they themselves reach certain ends. We carry fiction so far that the problem of "finding" a corporation to sue it, as distinct from finding all those who comprise it, becomes a metaphysical inquiry of complete unreality. These "beings" in our legal thinking wander about like lost souls; sometimes the corporation becomes incarnate in one officer in one place, sometimes it transmigrates to another. More ghosts haunt our courts than live in the catacombs. The lawyer's fictions have made the realistic task of enforcing corporation obligations a game of hide-and-seek played with dancing shadows.

These examples illustrate what the layman distrusts as being artificial and pedantic in the lawyers approach to practical questions. I must disclaim the scholarship to appraise their value in the development of the law but I know they have little relation to the merits of many cases in which they are invoked for the purpose of reaching a decision.

The lawyer's contribution to adjustment of society would best be made, not by mere restatements of the old law, but by continually overhauling

our legal doctrines and reexamining our traditions to make them meet the problems of living men.

That is the challenge which the lay world throws at the Bench, the Bar and the Law School.