

stressed safety measures, but as relief for the parties litigant, either plaintiff or defendant, from a system which is notoriously uneconomic, they had not a word to offer. They simply stood pat on the position that the lawyer and the insurance company intensely dislike the idea of removing these personal injury cases from the accustomed tribunals. They appeared to believe that a negative vote on this occasion would squelch the entire plan. The public, then, would have to endure the costly, tedious, and highly speculative system now in vogue, which constitutes one of the largest sources of income for half or more of the profession and yields awards to a pitifully small proportion of the victims of accidents.

It was in anticipation of this outcome, we assume, that Robert H. Jackson, chairman of the Conference of Delegates, reserved his address until the evening session, that he shaped his address to utilize the afternoon's discussion for the light it sheds on the lawyer's perplexities, and that he invited Dean Green to present his ideas concerning the possibility of altering court organization and procedure to the end that it might recover for the judicial branch the numerous lost provinces. We publish Chairman Jackson's address with the comment that it shows greater courage, and a keener analysis of the present situation of the legal profession, than any address

yet published. It may be said, if Mr. Jackson seems too dubious of the profession's capacity to redeem itself, that he has devoted much of his time for the past three years to the work of the New York Commission on the Administration of Justice. He has studied judicial administration where it is at a lower ebb than anywhere else in the civilized world. He has witnessed the action of up-state associations in voting down the proposal for fractional verdicts, a procedure that has worked excellently in a number of other states over a long period; he has seen the up-state members of the State Bar Association stamp on the proposal for any improvement in the selection of judges.

He could well afford to leave to Dean Green the work of picturing a lawyer's millennium.

This extended comment is intended to introduce the reader to these pregnant addresses. They mark the beginning of a new and more comprehensive understanding of what law reform must include. The lawyer is much bedeviled. He has a right to protest against injustice. But he must understand that his predicament has been long deferred and that the bad medicine he is taking is no worse than the medicine which his clients have had to swallow. And he should start with the knowledge that he can save himself by good works.

The Lawyer; Leader or Mouthpiece?

BY ROBERT H. JACKSON*

"It is a matter of self-preservation, as well as of social duty, that the bar assumes leadership in overhauling our procedure to put the processes of the courts in the reach of the people, and to make justice available to disadvantaged men."

[For the privilege of first publication of Chairman Jackson's address to the Conference of Bar Association Delegates (Aug. 27, 1934), this Journal is indebted to the Editor of the American Bar Association Journal. The sub-heads and italics are supplied in the usual journalistic way, and should not be attributed to the author.—The Editor.]

The Conference of Bar Association Delegates has never feared a critical estimate of our profession or its organizations, nor has it shown the oriental reverence for tradition that has become a dominant characteristic of most bar associations.

For several years in this forum we have considered the causes of the declining prestige of the lawyer and the increasing demoralization of the bar. We have condemned our existing associations for failure to function, we have challenged the trust companies and lay agencies which are invading the law practice, we have reviewed the

low standards which have made admission to the bar meaningless in terms of character and education, we have pointed out the overlapping and conflicting activities of the few associations that indulge in any action at all, and pointed the way to a coordination of activities in a national bar program.

I have come to regard many of the things about which we complain as symptoms of an underlying weakness in the position of the profession itself, and in its method of work, rather than as causes of weakness. If our associations, by and large, are inanimate, incoherent and unrepresentative, if it be true that our neighbors prefer

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to trust bankers rather than lawyers to settle their estates, if law makers are taking judicial functions away from lawyer-dominated courts and turning them over to lay tribunals, if misconduct by a few shysters can bring a whole profession into public contempt, should we not look deeper to see what keeps us from effective organization, what weakness makes us subject to invasion, why public opinion judges all lawyers by the worst instead of by the best?

It would be unconventional but instructive, to search for the cause of our common loss of prestige not in the weakest of our organizations, but in the strongest ones, not in the worst of our members, but in the best, not in disbarred derelicts, but in successful bar leaders. Let us examine the methods, not of those who abuse the processes of the courts, but of those who make intelligent and conscientious use of our courts. It is hard to escape the conclusion that if the bar has lost its ancient prestige, it has not been lost by scoundrels and dunces who never had any part of it to lose, but by lawyers of substance, who lost it, not because they failed to observe the lawyers' code, but because the code itself had lost credit.

There is little basis for believing that our present plight is due to faulty standards of education. True, the lawyer no longer shares with a few other professions a monopoly of learning. Education has become general and is no longer a distinction as it was when the lawyers conducted the first "brain trust" on this continent, the Constitutional Convention of 1789, and promulgated a great experiment in government and the last one that most of the members of the bar have ever favored. The public bases its criticism of lawyers more on the use they make of their learning, than upon their lack of learning.

During the past year lawyers have written volumes to express their views of the criminal. The criminal has made better economy of language, and has compressed into a single word his contemptuous estimate of us. Every lawyer, even the one he relies upon and trusts, is known to the criminal as a "mouthpiece". The word summarizes his opinion of the lawyers' position in society, one that others in some degree share but that only the picturesque and realistic vocabulary of the underworld is adequate to express.

The public questions our disinterestedness, and our intellectual integrity and our independence as a class. Does a lawyer have any unpurchasable convictions on any subject, especially if he has, or hopes for, clients who have an interest in that subject? Does he lead an independent mental life or is he nourished solely by retainers? Does the trail lead from most of his activities in private and in public life back to the sources of his practice?

Let us trace the effect of this public attitude in relation to the crime problem and to economic

problems, in which we ought to have a large measure of leadership.

The public is bewildered in the midst of crime. No group has dealt so long or so intimately with all aspects of crime and of criminals, as the bar. Last year the American Bar Association made an effort to assert leadership of public sentiment in favor of criminal law enforcement through a national bar program. Some new statutes were passed by congress, due largely to the aggressive leadership of Attorney General Cummings. Personally, I am sorry to say, I have seen no general response by either laymen or lawyers to the program. Why does our concerted and well designed plan to lead, in a field in which we are best qualified, make so little progress?

Does the Lawyer Abhor Crime?

One reason is that, while we are strongly opposed to crime in the abstract, we will never give organized support to any specific proposal to suppress it. We will not abolish the numerous motions which delay criminal trials, or lessen the appeals and stays which delay execution of sentence after trial. From no group can opposition to reformed codes of criminal procedure be counted upon with such certainty as from the bar. It will uphold every refuge of the criminal, such as the privilege against self incrimination, and the absurd practice of setting aside convictions if the prosecutor mentions that the defendant did not take the stand, although every juror knows it, and also knows that the instinct of an innocent man is to deny a false accusation. I am not arguing the merits of these proposals but the bar is generally opposed to all of them, and consistently obstructs legislative efforts to make criminal enforcement effective.

Our public zeal for suppression of crime is discounted because of our private willingness to defend any criminal for any offense. Of course not all lawyers accept criminal cases. We have a petty larceny bar and a grand larceny bar. Some will defend bandits who rob banks from the outside, and others will defend directors who rob them from the inside. Every Jack in crime has a Jill at the bar waiting to defend him.

Every miscarriage of justice which releases a criminal is caused by a lawyer and permitted by a judge. H. L. Mencken states a common view of law enforcement with uncommon emphasis, when he says:

"What stands in the way of their execution is simply the almost incredible imbecility and lack of conscience of so many American judges and lawyers. A murder trial in most states is no longer an orderly effort to discover the guilty man and bring him to punishment. It is, instead, a gaudy public combat between two gangs of prima donna lawyers, with a decayed ex-lawyer on the bench to act as referee. As likely as not the chief lawyer for the defense is a professional jury fixer, with no more respect for the law than the prisoner in the dock. And almost certainly the chief lawyer for

the prosecution is a political hack seeking publicity, and hopeful of higher office."

While he admits that there are exceptions, he insists that in characterizing lawyers as shysters and judges as "elderly vacuums" he has been fair to the average. Whether fair or not, I think it is a fair cross section of public opinion.

Mencken urges that the lawyers and judges are responsible for failure to execute the laws and that all that is needed is "the simple experiment of executing those laws as they stand." He illustrates his argument with murder cases, but killings are notoriously involved with community and individual passions, prejudices and sympathies. I prefer to test his assertion by less spectacular crimes.

Chief Moran, of the United States Treasury Secret Service is charged with suppression of counterfeiting and is an effective and vigilant protector of "sound money". He recently pointed out the increase in counterfeiting, and complained of the impossibility of getting offenders adequately punished in the federal courts. The record of the way lawyers, on and off the bench, dispose of these cases, supports Mr. Mencken's accusation, if not all of his adjectives.

Counterfeiting is an offense never committed by accident, nor in ignorance, nor in heat of passion, nor in extremity of poverty. It is a crime, expertly designed, by one who possesses technical skill and lays out substantial sums for equipment. It is a crime not excused by the fact "that everybody is doing it." Counterfeiters are few and are not amateur criminals. It is not a crime of courage. It is a sneaking offense. It is a crime against the sovereignty, and it also cheats small tradesmen and unsuspecting people who have not the skill or experience to detect the imitation. Moreover, it gets no encouragement from any official laxity of enforcement. Treasury vigilance is never relaxed. No counterfeiters have long evaded apprehension. Conviction or plea of guilty is general. There is nothing left but the penalty.

Compilations of penalties for a year, in all federal judicial districts show that, while there were 746 pleas of guilty and 88 convictions, 143 offenders were released on probation. One and one-half times as many were released on probation as were convicted upon trial, and about 18 percent of all those convicted or pleading guilty were at once released, unpunished. Sentences of from one day to ninety days are as common as those over one year.

If the enforcement we have studied is typical of those we have not studied, there is ground for the charge that our profession is failing in its plain duty. Perhaps the best service we could render would be to make up our minds whether imposition of penalties is an effective method of law enforcement. If so, let us give it a trial. If, on the other hand, we feel that penalties after the offense are not effective and that the way to combat crime is to remove causes that produce

criminals, let us get out of the way of the social groups who want to experiment with such methods. Holding to the litigation and penalty method without the penalties, except in occasional and accidental cases, does not give a fair opportunity to the public to test either route to crime abolition.

The public looks upon the lawyer as being in the same equivocal attitude when he attempts leadership in the field of public law, or of economics.

The contribution of the bar to the balance of social forces is likely always to be on the conservative side. Legal training emphasizes the older and established values, and the price other generations have paid for existing institutions. Prudent regard for his professional reputation and for his client's safety make it the attorney's habit to proceed along well beaten paths and to shun the unknown and the experimental. Since society is not lacking other groups to supply opposing view points, I see no objection to the bar being in the position of conservator in so far as it acts from independent conviction.

The bar frequently appears to be more reactionary than it really is. It is by no means wanting in representatives of the liberal school of thought. Indeed, many of the most eminent and influential of liberals are lawyers. But they are seldom represented on our bar programs or found among our officers. In our bar associations we generally pyramid conservatism until at the top of the structures our bar association officers are as conservative as cemetery trustees.

Does the Lawyer Own Himself?

In public leadership the bar is handicapped by the suspicion that its conservatism is not always the result of conviction, but is a "mouthpiece" part. We suspect it of each other, and after a bar speech, or a report of a bar committee one often hears it asked, "Whom does he represent?" Bar and press know that certain proposals of the government will produce certain undertones and overtones from the bar. They know that the elements stirred by any proposal are those stirred by the private interest involved more often than those stirred by the general welfare.

This may be the inevitable result of our professional position. More than any other class, our opinions, as well as our services and talents, are on the auction block. Notable examples of independence, where lawyers have sacrificed their retainers to their convictions, emphasize the exceptional character of such devotion to principle. We must accept the weakness of our position, we cannot claim leadership which demands an unpurchasable sincerity, and at the same time offer ourselves in the market place.

Perhaps explanation of the loss of prestige of the bar lies largely in the loss of independence by the lawyer. In the early days of the Republic, the counselor was a dominating factor in his community. The rise of the banker, the industrialist

and the press had not yet subordinated him. He might be retained, but he was likely to govern the policy of the client in the affairs committed to his hands. Nothing has so much accelerated the decline of the bar as the tendency of lawyers to have jobs instead of practices. At least half of the business in court is only nominally in the control of the attorney and the real control is in an insurance claim agent or a corporation executive. When our lawyers become salaried servants, like office boys, it marks the end of the pleasing fiction that we are officers of the court.

Hope of the bar for public leadership must rest with individual lawyers, not with the profession as a whole. To hold public confidence in his sincerity he must be bigger than his retainers and broader than his clients. That is too much to hope from the whole profession, but it is not impossible for outstanding lawyers whose sense of value places independence above income.

Public Distrusts Procedural Methods

The most serious challenge to the lawyer is growing public disapproval of the litigation methods of settling controversies and the increasing tendency to substitute the administrative method for litigation and the administrative tribunal for the court.

The committee on administrative law of the American Bar Association, recently published a report, widely headlined as an attack by this Association upon the "New Deal", in which these tendencies were commented upon as "serious dangers threatening the whole machinery of justice."

It summarizes, as follows:

"Having in mind these tendencies to attempt to remove large fields of legal controversy from the jurisdiction of the courts and to place them under administrative machinery, to deprive administrative tribunals of safeguards necessary to the exercise of judicial functions, to reduce and so far as possible to eliminate effective judicial or independent review, and to employ indirect methods of adjudication, the committee believes that it is not going too far to state that the judicial branch of the Federal Government is being rapidly and seriously undermined and, if the tendencies are permitted to develop unchecked, is in danger of meeting a measure of the fate of the Merovingian kings. The committee naturally concludes that, so far as possible, the decision of controversies of a judicial character must be brought back into the judicial system."

Now if judicial function must be "brought back" into the judicial system, it might be proper to inquire when, why, and by whose motion, these judicial functions got out of the judicial system.

The report treats the loss of judicial function as a current political development, and singles out for criticism the period beginning March, 1933, or in other words, the Roosevelt administration. As a matter of fact it was a completed process, introduced by other administrations, and approved judicially, long before Mr. Roosevelt took office.

The litigation method of settling controversies

has for years been steadily superseded by the administrative method as the numerous works of such eminent scholars as the late Ernst Freund, make abundantly clear. Controversies now settled in courts of general jurisdiction are of small magnitude compared to the values being adjudicated in the tribunals of special jurisdiction such as the interstate commerce commission, utility commissions, trade commissions, "blue sky" commissions, workmen's compensation commissions, zoning and building commissions and scores of others, federal, state and municipal. And such tribunals multiply in number and in power.

More finality is given to these special tribunals than to our judges. Few and trivial are the decisions of a judge of original jurisdiction that are not subject to full review on both law and fact. But many of the administrative bodies, by statute, fully sustained by the supreme court, have been granted power to make final findings of fact which no court can review.

The legal profession may well be apprehensive of a decline in the prestige of our law courts if they can only announce scholarly abstractions while a lay commission grants orders that mean prosperity or failure and make awards that must be paid in cash.

Even courts of last resort may entertain only limited questions and must in many cases accept the premises prepared by the administrative body.

The administrative method of settling controversies has made progress against the strongest opposition of the bar.

But if the lawyer's animosity against the administrative method is well grounded, why does it make progress each year? We lawyers place emphasis upon a traditional set of values such as the separation of powers of government, the supremacy of an independent judiciary, proof of every allegation according to time-tried rules of evidence, testing each witness by cross examination, deliberation, jury trial and the appeal. We know the price we pay is delay, technicality and expense. However, the public is placing its insistence upon a different set of values. It seeks speedy settlement, finality and freedom from the procedural contentions it pays for, but does not understand.

Promptness of Decision Held Vital

The philosophy upon which classes of controversies are being withdrawn from litigation and turned over to administrative determination was stated (*Crowell vs Benson*, Feb. 23, 1932) by Chief Justice Hughes:

"The findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

And in the dissenting opinion in the same case by Mr. Justice Brandeis:

"With a view to obviating the delays incident to judicial proceedings the act substitutes an administrative tribunal for the court. * * *

"The purpose of these administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal."

The reason is stated by Judge Crane of the New York Court of Appeals as follows:

"When, therefore, we pass fact-finding from the courts to the commissions of all kinds and leave to them the final determination of the facts unhindered by our technical rules of evidence, we have demonstrated in a very practical way the popular discontent with the ordinary method of determining much of our litigation. * * * The way is left open for the determination of many matters by departments or commissions, or the administrative bodies."

The bar must recognize that the administrative method is a recent but established competitor with our judicial method of fact-finding.

We must recognize that in the competition our favorite is severely and needlessly handicapped by a load of delays, costs, formality, technicality and uncertainty, which win it nothing but public suspicion and hostility.

We must recognize that responsibility for training our legal system down to fighting weight and sweating out its excess cost and formality, and speeding it up so as to have a fair chance to compete for its life is definitely that of the organized bar. The possibility of preserving the judicial or litigation method of settling controversies over facts depends on the bar abandoning its traditional hostility to progress, its cynical opposition to reform. We fall into a pit of our own digging.

The development of a body of administrative law in this country as a substitute for, or supplement to, the common law, has passed almost unnoticed by the bar associations. Individuals like Dean Pound, William D. Guthrie and Thomas D. Thacher have lent the force of their names to a warning against it. A few lesser warnings, such as my own (American Bar Association Journal, June 1932) were uttered. But it is not until two years after the supreme court has finally said that the horse was legally taken, that we find the organized bar bestirring itself to lock the stables.

We know that our legal system, as now organized, loads the dice in favor of a defendant in a criminal trial. We know that in civil matters it tends to operate in favor of him who has the resources and the incentive necessary to effective assertion of his rights by litigation or protracted negotiation. Probably no system will ever wholly overcome this tendency. But it is our own profession which best knows the system, its weakness, its strength and its possibilities of improvement. Newspapers, such as the Hearst and Scripps

Howard chains, that are powerful forces in making public opinion are severely demanding that we be held responsible for the condition of the judicial machinery and the press generally, even if more mildly, reminds the public of our duty and of our default. Our juggling of criminal work loses public faith and our dilatory, costly and legalistic treatment of civil litigation loses business. It is a matter of self-preservation, as well as of social duty, that the bar assumes leadership in overhauling our procedure to put the processes of the courts in the reach of the people, and to make justice available to disadvantaged men.

If our adherence to tradition and our slow motion performance, has cost us prestige in the field of criminal law and of private civil law, it has been even more costly, and the prospect is even more threatening, in the field of government and public law.

The fate of the legal profession depends much upon the importance of the position that legalism will hold in the prevailing philosophy of government, and to the respect that will be paid to the judiciary as the high priests of that philosophy.

Every one of us, by membership in the legal profession and probably also by conviction, is committed to the maintenance of the judicial branch as a corrective force in our system. Its disposition of a private litigation may annul, or modify nearly any governmental policy. If we are to continue to have government by adjudication, must not the final judgments be rendered in *the same era* that raised the questions and in the light of the conditions of that era?

Legislation, and administration, cannot await the interminable delays of the courts. Congress and the executive departments are compelled to outrun the judiciary.

Juristic Controls Are Collapsing

This is always true, but the past two years have given the most dramatic and challenging examples. Not even the most ardent champion of judicial supremacy would claim that the administration could halt its policies dealing with the banking emergency, unemployment relief, gold as the basis of our currency, or many other problems, while the judicial view was slowly made available through the tedious and often devious process of private litigation. It would require, not one decision, but a cluster of decisions to settle the judicial attitude on any one of these policies.

And now, business and the life of the country has for two years adapted itself to the measures which congress and the executive were compelled to formulate alone, because the views of the judicial department could only be expressed in private litigation. Having, because of the self-imposed restrictions of our present legalism, withheld its views when they were most needed to be constructive and corrective, can the judicial department now intervene except as a force for the mischief of confusion?

Can we adhere to a legal philosophy that denies

the benefit of our judicial department's wisdom and neutral views to our policy-making departments, except as they may, after a lapse of years be revealed piece-meal through opinion on private litigation? If the highest authority on legal philosophy is going thus to reserve itself, can we as lawyers complain if the processes of legislation and administration must go on meanwhile? And if legislation and administration must proceed in ignorance of the judicial view, is it not inevitable that it will proceed with some indifference to it? And if the great affairs that interest and affect our people must actually go on to effect and accomplish, with the legal philosophy merely hovering over in suspense, like a cloud of threatening but uncertain meaning, can we complain if our legal philosophy is given less and less place in the actual affairs of state? To answer in terms of ancient precedents begs the question; it is the validity of the ancient theory that is challenged by the modern event.

Ruined by Our Own Legalism

At the risk of losing your goodwill by too great frankness, and I value the opinion of my professional brethren above that of all other groups, I must say that the attitude of the bar sounds too much like whining. We act as though some sinister and deliberate conspiracy were afoot among law makers, government executives and laymen generally, to rob the judiciary of its functions and the bar of its revenues.

The distressing changes which have been taking place have been due to far deeper and impersonal forces. We are loaded with surplus formalism and are tangled up in our excess equipment. Our processes are not simple, direct and businesslike. We are being smothered by our own legalisms.

The task that faces the bar is not one of mere striking out at phantom enemies. It is one of constructive statesmanship. It calls for independent and open minds in its leaders. It means review of our entire philosophy, to find its place in this modern era. We are carrying over into an age of industrialism, the philosophy of an agricultural age, and into an age of mass production of litigation, the equipment and methods of a hand craftsman.

Yet there are qualities in our philosophy that no doctrines of commercialism and opportunism can supply, there are ethical values in our legalism, that no trader's code can supersede. We must save the substance though the form disappear.

Will our bar leadership, in and out of our association equal the opportunity, and raise above the level of the megaphone? Will the bar itself respond to the leadership if it is offered? Notwithstanding discouraging examples, I still cling to the hope that we will yet see a leadership of such vision and courage that the underworld's scornful estimate of the lawyer as "the mouthpiece", will no longer find confirmation in the public attitudes of the bar.