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## CONCERNING LAWYERS

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Most old men spend much time meditating, *de rerum natura*, and that has a very Baconian sound. Yet candid reflection will show that most of that elderly meditation is no more than seeking to make as important as possible the thinker's particular *res*; such thought is only a form of vanity, like most cogitation; and it calls to mind a line somewhere read of late that every man over sixty providentially regards *himself* as a subject of romance.

So I ought to be meditating about law, for of my sixty-six

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The accompanying appraisal of the legal profession by Judge Hough, written in 1924, forms the concluding chapter of his private memoirs, which by the courtesy of his son, Professor John N. Hough, of the Department of Classical Languages, Ohio State University, we are privileged to publish. Coming now when the legal profession both within the law schools and beyond in the practice, is taking stock of its own defects not only in technique but also in perspective, this evaluation by one of its own savants affords a worthy and thought-provoking diagnosis. The addendum by Professor Vanneman is an appreciative exemplification of Judge Hough at work.

THE EDITORS.

years, forty-five have been "devoted" (too solemn a word) to that subject. I have seen it from the angles of student, clerk, office manager, practitioner, arbitrator, judge, teacher, and juris consult—for I suppose that last portentous word covers such matters as spending the money of public-spirited private wealth in trying to better the law, and acting as delegate for the United States at an international legal congress.

My opportunities for observation have been considerably greater than come to most lawyers; and after enduring or enjoying them, what does one who anticipates no new professional experience, and has probably learned all he is capable of learning, think about it all? Think about it as a career, that is, something which, treated with intelligent and enlightened selfishness, advantages himself and others, broadens and deepens the mind, and serves the community?

I do not think that the law was approached by me with either prejudice or enthusiasm; I was a fair observer, and observed under most favorable conditions, for the private character and public repute of all the men to whom I "went to school"—officially or otherwise—was deservedly high.

Very early I learned, and still believe, that substantially everything most men socially enjoy

"Would be a rabbit in a wil' cat's paw,  
Ef 'twarn't fer that slow critter, 'stablished law."

So the noble importance of law as the cement of society may be taken for granted. Opinions may differ as to what kind of society we should want, or what kind of law should stick that society together, but there cannot be any social organization without some law that accounts for its being. Indeed, observation seems to show that the more theoretically free is a society, the more it abounds in laws—Soviet Russia is the obvious modern illustration, as the France of the Terror served for my American youth, and democratic America itself long seemed to Europe a dreadful instance.

Let law then, in a sort of abstract personification, or in

apotheosis, remain on its pedestal and be worshipped. The question remains as to the result of the cult upon the priesthood. What does the practice of the law do for the mind, morals and social attitude of the profession I have followed for so long?

Every steadily pursued round of action produces a mental effect, and the mental result of much practice of the law is sharpening, rather than broadening. No lawyer deemed by his peers worth the name ever forgets that his prime duty is to win his case, to advance his client's interests. Every mental attribute is utilized to that end; the practitioner becomes an intellectual duellist, whose skill is first displayed in looking for weak places in this opponent's defense; he is loath to show his own full strength until it is absolutely necessary. An action at law is a single combat, the counsel are the champions; and such fighters, however doughty and skilful with their weapons, are never strategists on a large scale.

Thus, mentally the lawyer tends to be quick and sharp, rather than broad and constructive; he will almost always be content to win, and it is far more pleasing to him to win on a point of practice that makes a fool of his opponent than to triumph by obtaining a ruling that affects the community; indeed, the typical or usual lawyer is rather alarmed by such a result—he feels as if, like the hero of the Arabian Nights' tale, he had released a djinn of unknown power.

The moral result of much legal practice is what might be expected from the insistent "will to win," instilled into all of us from our earliest student days. It is so very easy to justify the desire to win for your client. It is not exactly your own victory—at least that is the argument—and nobody has the right to win except in accordance with the rules of the game; so if you can play, under the rules, better than your opponent, your client *ought* to win. It is a singular sort of reasoning, but nearly universal and very professional.

The result is that most of us keep our own affairs and those of our clients in separate and watertight compartments; what

we do for our clients and would do for ourselves are totally different matters. I have known men without number, who in their private affairs were of the most delicate honor, selfless perhaps to Quixotism, who would for their clients do anything the rigor of the law permitted. Of course they would probably not accept a client they disapproved of, but, once retained, they would deem it moral to see the immoral one through—once anyhow.

Lawyers know this, and *summum jus summa injuria* is a very old maxim; but they will inflict the *injuria* in accordance with *jus* and never have a twinge of conscience if it is done for a client and not for themselves.

No body of men can do this sort of thing for generations without becoming warped; and nothing is more characteristic of the peculiar morals of the legal tribe, and nothing is more distasteful to the moral philosopher than the lazy table talk of a casually met professional body, for they are sure to “talk shop.” The best of them rarely boast, almost none will seriously debate knotty legal points; but they will endlessly swap stories, and in the majority of their tales some clever device of technical law, or suppression of what might have been evidence, has just “turned the odd trick” for a client. These are the episodes they remember and regard as the attic salt of easy conversation with their brethren. What a man remembers easiest and longest is what reveals the man, and this inexhaustible fund of tales of shrewdness (to use the most reputable name) marks the average practicing lawyer as one who learned young and never forgets to be clever and quick, and not too scrupulous—for his client.

The educational result of this mental training and professional tradition is equally obvious and distinctive. The typical lawyer is above all a ready and adaptable man. Talking for another is his trade, and most of us learn in time (and no long time) to talk with a borrowed personality. I have myself talked for navigators, merchants and scientists, not to speak of less reputable occupations, until I almost believed myself to be what my client said he was.

The ready counsel absorbs, or thinks he does, his client's story and desires, until he sincerely and unconsciously identifies himself with the client and speaks of what *we* want and did; and not infrequently he drops the plural and acts the client. No man who does this long has time—there are not enough hours in the day—to do more than hastily assume the part he is to play. He may do the play-acting very well—many of us are great actors—but it is a borrowed cloak and mask after all, a part to be played as quickly and forgotten for another *role* as soon as possible.

This is all a portion of the will to win, and win as economically as possible; and the economy extends to thought as well as action. The lawyer who cares to go back of, or higher than, a favorable precedent is a professional rarity. He loves *authority* in a way that no theologian ever can emulate, and is accordingly accused of all sorts of intellectual offences. Of at least one offence he is guilty—he is rarely original, is usually content to show that the same thing has been done before in a way that suits him, and before he passes middle age is positively resentful of novelty in either thought or action.

The absolute results of strict attention to legal business seem to me after all these years a sharp, narrow intellectuality, a sort of gymnasium-made mind, a double morality which even its possessors feel the need of justifying, and do so by arguments that never impress favorably the non-legal majority, and a lack of originality and dependence on precedent that irritates even a lawyer when he ceases to be a practitioner and becomes a judge or the like.

Intellectually this last quality is the most trying. For instance, most lawyers are astonished, contemptuous and angry, if any reason for a ruling is asked for other than a citation of authority. The common answer is that discussion of the matter is useless, they have *cessante ratione cessat et ipsa lex* on their lips, but only a minority ever remember it effectively. I know no more pitiful intellectual spectacle than counsel trying to

“distinguish” a precedent, without going to the foundation reason for the old ruling. Most of their efforts basically resemble the argument of an admiralty advocate who denied the application of the case cited because it related to the navigation of a schooner, while the matter at bar had to do with a brig!

The relative results of devotion to the law are interesting and at first mystifying.

The followers of other professions, medicine, theology, pedagogy, engineering, chemistry, and so on, through a long and increasing list that may now include chiropody, look upon us with dislike, because our *Learning* consists almost wholly in digesting what our predecessors have done; we are not creative. The laity, the general public who furnish clients, have for centuries lampooned and caricatured us for greed and immorality, with about as much justification as resides in most lampoons; they really resent our authority, we being the priests who enforce law, which every layman dislikes except when it serves his turn. The governing class regard us as servants, disliked but indispensable. When the governing class was marked by wealth or birth, or both, we were on the whole their retainers; now that the governing class is emphatically half-educated Rotarians or the like, and privileged trades-unions, plus organizations like Ku Klux and Knights of Columbus, we are on the whole *their* servants—yet this statement really means no more than that we have never had an independent existence apart from clients; we live by them and for them, and are and always have been thoroughly parasitic.

There are some practicing lawyers, possibly a hundred in the whole United States, who are not parasites, whose services to clients are regarded by the laity as a favor, and there are plenty of men who have studied law and know quite as much as the practitioner, who have no clients and do not want them. But the first class is too small, and the last too detached from the life of the bar to count. Nor do the judges make any differ-

ence, for they are overwhelmingly taken by popular election from the ranks of practitioners and are neither better nor worse than the ruck; the most active-minded of them often expect to return to practice after a judicial bath and rest, and even when they remain on the bench the practitioner's attitude has become second nature—they are too old to change when they cross the bar.

Just as some parasites conclude existence by holding up the tree to which they are attached, so many lawyers in late life seem to be props and mainstays of whole families; as trustees, agents and executors they appear very independent and important. But the appearance is unreal, for at most and best they have so absorbed the life of their *cestuis que trustent* that they have no independent existence; they think, move and have their being as substitutes for their clients.

The parasitic nature of legal practice becomes the more evident the more numerous and wealthy are the *res* (business and estates) to which attachment can be made; young men see that, and more and more the best of the young crop have in my day turned away from the bar. It seems to me that the reason for this is that young men are for the most part not mercenary; they want wealth of course, but it is not an end, they far more desire power, which they express to themselves in terms of a free, influential, and enjoyable life; and when they perceive that the rewards of the bar very largely consist in being anchored to a few corporations—perhaps only one—as a sort of shield, the prospect seems one of slavery, not freedom. They see that in a world ordered in classes—each class suspicious of if not hostile to the others—they must join a class, and they naturally prefer to go in (they hope) as a principal, not as a hired soldier. This is perhaps not well reasoned, but they do rank a division superintendent ahead of a chief attorney; and it is true that during my life the career of Samuel Dodd, whom no one knew unless he encountered the Standard Oil Company in a hostile manner, has represented a larger measure of pro-

fessional success than can fall to the lot of any but the possible hundred lawyers I have before alluded to.

In the last fifty years, the bar has lost one attraction it held for a century at least; one which rendered, in America at all events, the practice of the law a pathway to political hegemony, if not to statesmanship. That Hamilton, Webster, Clay, Lincoln, and even Jackson, were lawyers seemed a natural and excellent preparation for and aid in their political careers. All lawyers were and are taught that they are officers of government, who early promised to uphold and advance the Constitution and laws of their country, and were therefore the fittest to be the leaders upon whom fell the duty of making and enforcing those laws. And such men as I have mentioned were real lawyers, with real clients, and all sorts of clients. Within my recollection Evarts was the outstanding example of the politico-legal leader both at the bar and in public life. Every one knew, and all seemed to approve, of his having represented rich and poor, persons and corporations, but more of course the rich, because long before my day he had joined the ranks of the century of lawyers I have selected as leaders. His professional activities helped, never harmed, his political aspirations to both elective and appointive offices.

But for most of my forty years of activity, Evarts' prominence as counsel for the powerful in business would have been a hindrance, if not a bar, to elective office at least. While I write, Coolidge's insignificance as a lawyer is a political asset; while Davis, who is just joining my century of lawyers, is quite busy excusing himself for being able and successful in his profession; and LaFollette is proclaiming his legal as well as personal virtue in representing as a lawyer only the class of which he boasts himself a member.

In the slang of the day, the young men have a "hunch" that these things are true, and the higher walks of political and public life are not as open to lawyers of good training and good clientele as they were in the generation before mine. Indeed,

in my time Hughes is the one real leader of the bar who has maintained the old tradition, and he went up like a rocket because the luck of a retainer made him the cross-examiner in the life insurance investigation of a quarter-century ago. Since 1908 his offices have been appointive. Pepper, of Pennsylvania, is the only other man of this kind among my contemporaries, and he is a poor second. The fact that men of the lower type mentally and professionally, who seek to rise by pleasing the mob, are usually lawyers, only emphasizes the overwhelming truth about the practitioners of law—that they are merely the mouthpieces of their clients, and depend for all their effectiveness on having another man's cause to plead, and being paid in money or offices for a vehement and successful pleading.

Very largely because of this disappearance of real lawyers, who can get and have gotten good business, from the ranks of political leaders, the bar collectively has sunk in the estimation of the public during the last forty years or so. We are more and more engaged in business as private as that of a chemist—perhaps more so, for we naturally never make discoveries that may lead to El Dorado.

In proportion as we disappear from public life (I do not mean office-holding for the salary's sake) we more and more become servient not dominant, and servient in relation to our clients. That is so true now that it is a common thing to hear that so and so is restrained from aspiring to place or public power because he would, by so doing, offend his well-known and profitable clients. The dominance of the client class, *i.e.*, the business community, has increased all my time, and now seems to me complete. It is natural enough, for they are the paymasters; and though the bar has always depended for sustenance on fees paid, the course of commerce has so concentrated legal business of all kinds in the cities that the paymaster class is able to watch its servants better than was possible when litigation was more evenly distributed geographically. That practitioner is in hard case who becomes distinctly *persona ingrata*

to a merchants' association, a title company, a Chamber of Commerce or perhaps even a Rotary club; unless he can make a business of attacking them on behalf of those whom these organizations view with disapproval, *i.e.*, the less reputable elements of the community. This course is legitimate legal practice, according to all the canons of the day.

So one always gets back to the basic proposition regarding my profession; it is our trade, and we make our living by serving another man's turn. Talking for a client seems so thoroughly bone of our bone that lawyers talking for themselves have long seemed to me a subject of laughter.

The bar associations of all kinds do what they can, and there are always some bold spirits who would like to do and try to do a great deal; but most lawyers are timid to the last degree in doing anything that may be unpopular, and a large number (I never feel sure of the proportion) are wholly without interest in public or even professional matters until they feel sure that there is a winning side. For these reasons, the general body of lawyers are perfectly worthless even in choosing judges; and when it comes to changes in procedural law, the way of the reformer is hard indeed, for the majority of practicing lawyers want no changes at all; they behave as if they were afraid of being sent to school again, and develop a conservatism that produces both despair and laughter. I assisted a year or so ago in taking a vote on a question thus presented: the law of New York forbids the introduction in evidence of most statements by one deceased who, if living, would be a party or privy to the litigation; that of Massachusetts admits such statements if and when the court deems them calculated to further justice; while the law of Connecticut opens wide the door and lets all such statements in. A representative number of lawyers practicing in each state voted as to what ought to be the law, and a substantial majority of the men from each state professed belief that their own state rule was best. *Omne ignotum pro horrifico* ought to be the openly adopted motto of

the bar. A more local instance is the history of the New York Code of Civil Procedure, which became law just before my time. For more than thirty years I never heard a good word spoken for that scheme of doing business by any New York lawyer. Finally the movement for reform or simplification procured a hearing, and while the Practice Act resulted, the unwillingness of the bar to make any change that involved the labor of learning new matter prevented most of the reforms which the best men wished and worked for. This, coming at the end of my time and after my generation had daily cursed the Code, is perfectly typical.

The same inability independently to function in accord with private professional opinion is most strikingly shown by the history of the 17th, 18th, and 19th amendments. Publicly, few matters have been viewed with more accord by legally trained minds than the popular election of senators, national prohibition, and women's voting. Each scheme has privately been viewed with disapproval, distrust and even disgust. There were probably enough lawyers in all the legislatures of all the states to prevent the adoption of any of these amendments, but I have never observed or heard of any professional joint effort to defeat any of them—nor would a student of his fellow lawyers have expected anything of the kind. They had no retainer to fight for, they preferred to yield to the popular will, and felt no impulse to obey their professional instinct, opinion or conscience, if nobody hired them to use it.

The authority is good enough for holding that a lawyer without literature is but a base mechanic; but when even a friendly critic looks for evidence of literature, culture, or broad learning of any kind among actively practicing lawyers, who must dominate the profession because they live by it and with it, he finds not near enough to leaven a lump of any size, much less a body of nearly an hundred thousand men.

From whatever angle I have looked at the profession, the evidence is overwhelming that it is dominated by and the tone

is given by what so many observers from the outside have called the "attorney mind," which is what I mean by the mentality that is roused to shrewdest activity only by being employed to do somebody else's business. It is never auto-dynamic; it seems as static as a copper wire until the current of a retainer flows through—then it is active enough, and even dangerous, for many of the most skilful lawyers seem as unaware of the effect of their vigor as is the current-carrying wire.

The conclusion pressed upon me by long observation from many points of view is that the *practice* of the law, as it is pursued in America or any other country seen or read of by me, does not furnish a career broadening to the mind or ennobling to the character; on the contrary, its tendency is to make a sharp hireling whose mentality is absorbed if he is "learned," in acquiring an extensive knowledge of what the courts have done aforetime, *i.e.*, how other shrewd fellows have fared in their arguments; and if he is not studious in the books, his unhired time is engaged in extending acquaintance—which is another name for enlarging knowledge of human nature. But whether he devotes himself to the "books" or the *res humana*, the practitioner is almost always illiterate in respect to what used to be called "*litterae humaniores*."

Of course, there are many exceptions, but of the hundreds—perhaps thousands—of real and active lawyers I have known not over ten per cent—and I prefer five—are literate in any real sense, and a considerable part of that percentage have escaped practice and found rest on the bench.

Many, I think most, lawyers as they get old know, or rather feel, something of what I have written; and the time honored excuse is that the law is a jealous mistress. It is no excuse; all mistresses, both human and abstract, are jealous. The real question, whether the relation be amatory or professional, is: Who is the master? And the exceptional lawyers I have known, or known of on unimpeachable authority, were always men who had mastered the law sufficiently for their purposes, used it as

a tool, and did not worship it as a mistress or (much the same thing) as an idol.

Such, even before my active day, were Sharswood, C. J., of Pennsylvania; William Allen Butler and James Coolidge Carter of New York; and, among my contemporaries, Wickersham and George Wharton Pepper of the same states—they pursued letters; Addison Brown, D. J., who used the law most skilfully to enable himself to botanize, and Judge Robert Grant of Massachusetts, who is as good a lawyer as he is novelist. But half the names that come easily to mind were or are judges, and all of them could have been, had they wished for that sort of retirement.

These men, as men have sometimes during all time, rose superior to their environment; such self-elevation is recognized in every time, country and walk of life, but what is not recognized and is true is that the lawyer's surroundings do not constitute an elevating environment. Nor is it true that the names I have given are merely those of very excellent lawyers who were also good men in the humdrum sense; Charles O'Connor, Rufus Choate, Jeremiah Mason and John G. Johnson were equally excellent lawyers—the last is in my opinion the greatest practitioner and best all round lawyer America ever produced (an assertion incapable of categorical proof)—but they were all mastered by the law, gave up everything for it, and never used a mastery *of* the law to prevent tyranny of mind *by* the law. They were strong enough, but had no desire to cultivate any garden but that which lay within the walls that Coke had reared—a man who was a sort of legal leviathan, yet so ignorant of everything but the *common* law that his marriage was a Canon law crime. That old story is perfectly illustrative of the mere lawyer.

I started with the assumption that the law—that is, an organization for whatever kind of society is wanted by the majority, and especially by the majority of thinkers—is a noble thing, worthy of study and meriting admiration. I have found

it so, and the difference between the study and exposition of the law and the practice thereof is no more than the result of client-seeking, and mastery by those whom lawyers seek.

The study and teaching of law, the impartial consideration of customs stiffening into positive enactment, and the international application or adjustment of what each set of nationals incline to think obvious or fundamental, is a process continually instructive and eternally enlivening; but it is not practice. If I could begin again, and with a better brain pursue the law, I would teach. For one uncontaminated by practice that is even better than judging, which is pleasant enough, but three-fourths of that labor is what a judge of my youth called "making the facts," namely, adjusting the differences of false witnesses, most of whom are unconscious of any lying.

What is attractive, broadening, inspiring and always amusing about law is the fact that *nihil humanum* is alien thereto. That flavor survives client-seeking and pettyfoggery, and makes even out of the general run of practitioners (who never will really master any part of legal science, and prefer to get their own clients and hire other lawyers' brains) the pleasantest lot of shop talkers and best companions I have ever met. I have known well the shop of soldiers, something of the clerical and academic shops, and (in American lingo) have "met up with" all sorts of other professions and traders; but the legal shop furnishes more, and more various, things to talk about than any other, because of the application of *nihil humanum* to legal labor.

If it were possible to practice law without being enslaved by clients, and acquiring the attorney mind, which is essentially a slavish mind, practice would be perfect; but, as that cannot be, my conclusion is that any lawyer may enjoy independence in thought and social action, if he will refrain from client serving; but few of them can, and still fewer try; so that most of the tribe are, long have been, and probably will remain, a clever, agreeable, servient class, not overscrupulous about winning

cases, quite pleasantly careless about their own affairs, jacks of many trades and usually masters of none—not even their own. A curious compound which I can not approve nor urge upon others; yet for myself I have enjoyed it all, remembering *video meliora*, and acknowledging *deteriora sequor*.

August, 1924.

## ADDENDUM

The foregoing article manifests a boldness and an independence of thought which challenges many of the principles on which the members of the legal profession have been wont to base their professional attitudes. It is believed that much the same boldness and independence pervade Judge Hough's judicial opinions. Obviously, it is possible to present here only a few examples, and they selected after a very inadequate sampling of his opinions. During his ten years as district judge he wrote 1,809 opinions and in his eleven years service as a member of the Circuit Court of Appeals he participated in 2,047 cases, writing the opinion of the court in 675. Something in the quality and character of these judicial utterances gave to this judge the enviable reputation of being one of the half dozen really great judges of the Federal Bench.

Immediately following the World War housing shortage was very acute in many urban centers. To remedy this situation the New York Housing Laws of 1920 were passed. By them the existing rental of resident property in Metropolitan New York was stabilized at the rental of the previous September for a period of two years. The constitutionality of these laws came before Judge Hough's court and the following is from his opinion in *Marcus Brown Holding Co. v. Feldman*, 269 F. 306 (1920).

“But, no matter how astonishing the legislation appears to the citizen, it has been so many times said that the wisdom, expediency or sincerity of the Legislature is not open to judicial inquiry, that citation is superfluous. Judicial review is, and