

## E. Harold Hallows Lecture Series

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E. Harold Hallows Lecture Series, Spring, 1969:

## IN THE KEEPING OF LAWYERS

WILLIAM T. GOSSETT\*

It is a high honor and privilege to participate in the Hallows Lecture Series of the Student Bar Association of this fine law school; and I am pleased, indeed, to share with you the pleasure of honoring your well known and widely respected chief justice, who is such a great credit to the judiciary of this state.

Let me report to you with pride that the Law Student Division of the American Bar Association continues to grow in service to the profession, as well as numerically. We hope to have 20,000 members by the end of this year.

Over the years, law students have been active in good causes: extension of legal services to the poor; developing legal education curricula reform; the use of law students in court proceedings under proper safeguards; urging the need for nationally administered bar examinations; and law reform. Those are but a few of your activities.

One of the amenities of our profession is that it is easy for one generation to talk with another. A common interest in the progress of the law and of the profession binds us together regardless of age or length of service. There are never any final answers in the law. Many of the things that disturbed me when I was a student must be a matter of concern to you today. And although I often thought that I had hit upon a new dilemma, I always found that generations before me had worried about many of the same things.

Some time ago I attended exercises commemorating the Seventy-fifth Anniversary of the founding of The Franklin Thomas Backus School of Law at Western Reserve University, in Cleveland. The principal speaker was Henry J. Friendly, Judge of the United States Court of Appeals for the Second Circuit.

Judge Friendly, who was graduated from Harvard Law School forty-one years ago last June with highest honors, made some provocative comments about the function of a law school. It is "essential," said Judge Friendly, "that the student acquire a legal mind;" and he then undertook to define that term. I was especially interested, because the only definition of a legal mind that I could recall was one attributed to Disraeli: "The legal mind," said Disraeli, "chiefly consists in illustrating the obvious, explaining the self-evident and expatiating on the commonplace."

But Judge Friendly was more favorably disposed towards lawyers,

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and he undertook to "note some characteristics," even though he said he could not "formulate a comprehensive definition." "The legal mind," Judge Friendly said, "is an inquiring mind; its favorite word is 'Why.' It is an analytical mind; it picks a problem apart so that the components can be seen and judged. It is a selective mind; it rejects characteristics that are not significant and focuses on those that are. . . . It is a classifying mind; it finds significant differences between cases that superficially seem similar and significant similarities between cases that at first seem different . . . . Learning to ask the right questions, not just the obvious ones, to have some notion of how to go about seeking the answers, and then to exercise the priceless quality of judgment—these are the prime skills the student of law must be helped to acquire so far as in him lies . . . ."

Having quoted Judge Friendly at some length, let me now assume that most of you will like the law; that each of you has found or will find that he has a legal mind; and that you will be graduated from this law school with the blessings of your professors. If so, what kind of a life can you expect as a lawyer and what will your obligations be as members of a noble profession?

Mr. Justice Harlan several years ago described three aspects of the lawyer's work and responsibilities:

It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.

Mr. Justice Harlan's first two functions of a lawyer refer, of course, to his individual aspirations and his conventional professional responsibilities. His individual aspirations begin with the immediate personal desire to achieve security—to make a good living for his family and himself through his professional earnings; and they extend to the desire to live a fully rounded life and, despite the commands of fate, to be true to his own standards and ideals.

But as Mr. Justice Harlan recognized, the obligations and life of a lawyer are broader and more fundamental than that; he has an obligation to participate actively in the process of bringing the law into accord with new realities, responsive to new needs and in league with new opportunities. Mr. Justice Frankfurter put it this way: "It is not hollow rhetoric to say that the comprehensive interests of man that are guaranteed by the constitutional protection given to 'life, liberty and property' are in the keeping of lawyers."

The legal profession in this country, from the days of the Founding Fathers, has played a major role in that process to which Mr. Justice Frankfurter referred. American lawyers have been both initiators and catalysts of actions directed toward the realization of the last best hope

for an orderly and tranquil nation and for a peaceful world—universal acceptance and application of the rule of law.

“We believe in [the rule of] law,” said Mr. Justice Jackson, “not only as a rule of conduct, but as an intellectual discipline capable of directing the thought and action of law-trained men and, through their leadership, of guiding men and masses away from violence, vengeance and force, and toward submission of all grievances to settlement by fair legal procedures.”

Mr. Justice Jackson thus gave expression simultaneously to a noble ideal and to the responsibility of lawyers in working toward it. The vast horizons of the challenge implicit in his statement are, in our rapidly changing times, broad and almost limitless. In the short space of this talk, all of those horizons cannot be explored. But we can touch upon two or three of the most pressing problems on the domestic scene.

We have here at home problems, unanticipated by the authors of our legal heritage, that daily impinge upon the dignity of our lives; and they tend to diminish those qualities of freedom and security that we justly associate with life under the rule of law. Technology, for example, has so advanced as to make possible invasions or reductions of the right of privacy that no man could have envisioned even so recently as in our parents' generation.

I refer not only to electronic eavesdropping, but also to the ability of the computer to store and make readily accessible detailed information about the activities of individuals. At the same time, our society has become so complex and its pace so quick that its best interests cannot be protected and advanced without the wise and judicious use of the new tools at our command.

To the legal profession should fall the obligation to bring about a proper balance between the use of new technology on the one hand and the protection of the privacy and freedom of the individual—the ultimate objective of all law—on the other. Lawyers must take the lead in resolving this thorny paradox between public good and private rights, all to the end that a sound, farsighted and equitable public policy may be reached in an area that promises to get more sensitive rather than less so.

Let me refer you to a related area, though less novel in its content. A distinguished Pennsylvania judge, Curtis Bok, once said:

In the whole history of law and order, the longest step forward was taken by primitive man, when, as if by common consent, the tribe sat down in a circle and allowed one man to speak at a time. An accused who is shouted down has no rights whatever.

The legal profession long ago developed a term to describe the ancient custom of allowing one person to speak at a time, of allowing the accused to speak without being shouted down. We call it “due

process of law." Due process represents procedural decency and fairness; it came down to us from the Magna Carta, through the common law, and it is embedded in the Constitution of this nation.

In the language of the Supreme Court, "[Due process] is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise."

Let me suggest to you, therefore, that without the decency of treatment that is the foundation of due process there is no freedom, doctrinal or practical, for the individual. And so if lawyers are crusaders at all, as they must be, they are first and foremost crusaders for due process.

There are many areas of life today that cry out for a sharpened sense of due process on the part of all of us. Equal access to the law is one. A person without legal advice because he cannot afford it is, because of that fact alone, deprived of due process. Unpopular people and those serving unpopular causes can be and often are, because of that fact alone, deprived of due process. An accused who is detained in ignorance of his rights or denied a prompt hearing, because of that fact alone, can be deprived of due process.

This matter of due process should be the concern of all Americans, but it is overwhelmingly the concern of lawyers. And the lawyer's continuing responsibility for diligent action in the affected areas goes beyond his professional functions and, indeed, beyond his sworn duty as an officer of the court. It reaches to the very core of his life and of his convictions. Even if every other individual and every institution in our society should forget or subvert due process as the cornerstone of our civilization, the lawyer—alone, if necessary; defiant, if challenged; resolute, if discouraged—should never yield on the right of any man, good or bad, rich or poor, revered or hated, to the benefits of due process; should never relax his efforts to enlighten the public about it; and should never silence his demands for it.

Another domestic problem of increasing urgency is that of rapidly proliferating conflicts of interest. Confidence in our government, our public institutions and our private enterprises—not to mention faith in the men who run them—cannot survive repeated attacks of doubt, suspicion and reproach upon the inter-relationships of private and public entities. The legal profession is in a uniquely advantageous position to clarify this whole area, in which a great deal more heat than light has been generated. New legislation and codes of ethics, however adequate the terminology, cannot alone do the job. We need to inculcate a firmer sense of responsibility and a more imaginative and prophetic discernment in the making of day-to-day decisions—many of which lawyers control or strongly influence.

For nearly two centuries, lawyers have furnished initiative and leadership to combat forces that have from time to time threatened to weaken the fabric of American life. That fabric is now threatened by a frightening rise in crime in our cities and by a restless ferment on college campuses and in urban areas where there is a pressing need for new adjustments in community life. Moreover, our values and institutions are under attack; deeply rooted and widespread movements of social protest are questioning the efficacy of the law as an instrument of social justice.

The critical problems thus presented are not going to disappear of their own accord; indeed, if uncorrected, they may get even worse. And so the legal profession, as a catalyst, as an adjuster of social relations, should be an architect of social peace and social progress, as it has been from colonial times.

First of all, we need to work on the problems created by rising crime and violence. As lawyers, we know that the tough, hard, complex problem of preventing and controlling crime cannot be solved by shouting slogans and denouncing the courts, the police, and other scapegoats. We know that there is nothing easy or cheap about providing better equipment, training and higher compensation for the police, strengthening court procedures, reforming our system of correction or combatting organized crime.

Back in 1964, the leaders of the American Bar Association, conscious of the need for improvement in the standards of criminal procedure, created a committee of experts to propose minimum standards for the administration of criminal justice. The committee has prepared a series of reports, nineteen of them, all but one of which will have been received by the House of Delegates by next August; and the Section of Criminal Law is now engaged in a program to bring the proposed new standards to life in the various states. Those standards, by facilitating and importing precision into the trial of criminal cases, may have the effect of preventing or lowering the incidence of crime; certainly they will serve to stabilize the administration of criminal justice.

But we know that although our criminal justice system is moderately well equipped to deal with individual instances of crime, it was not designed to eliminate the conditions that spawn criminal conduct. It needs help. And so we have created also a Special Committee on Crime Prevention and Control, for the purpose of directing the work of the ABA in this field and of stimulating state and local bar organizations to similar efforts. The central mission of the Committee will be to bring about the prompt implementation across the country of the 200 well-supported recommendations of the President's Crime Commission. That work is to be financed by a large grant from The Ford Foundation.

At the same time, the ABA is collaborating with others in the creation of an organization that will endeavor to enlist nationwide citizen support in the effort to prevent and control crime. As President Nixon has said, "What has to be done, has to be done by the people together." The organization, known as Citizens for Justice and Order, has been created and incorporated to work with multiple national groups, both lay and professional, to marshal massive nationwide citizen involvement in the effort. This will be done by intensifying national awareness of the magnitude and significance of crime, and by providing a single umbrella fund-raising apparatus to finance the activities of participating organizations within their particular areas of expertise. Other professional organizations that will be involved in the program include the International Association of Chiefs of Police, the National Council on Crime and Delinquency, the National District Attorneys Association and the National Legal Aid and Defender Association.

The umbrella organization (CJO) will be headed by a man of great and national stature—yet to be selected—and we are hopeful that President Nixon and the new Administration will lend their full support and encouragement to this effort.

As you know, the ABA has been active in many other areas through its twenty-one Sections and sixty-three Committees: electoral college reform; automobile accident reparations; group legal services; prepaid legal cost insurance; fair trial—free press; substantive tax reform; judicial selection, tenure and compensation; and many others.

As a lawyer and as an American, I am proud of the program of the American Bar Association, to only a small portion of which I have referred. But let me remind you that much of the lawyer's social responsibility still can be fulfilled only by his acting as an individual. In some cases the responsibility necessarily relates to the lawyer as an individual rather than to the profession as a whole.

It is hardly necessary to remind you that the legal profession, and individual lawyers as well, must be deeply concerned with the overwhelming realities of the riots that have occurred in our cities and on college campuses. Mob uprisings, whether on the campus or in the ghetto, are negations of justice—of all that civilized man has striven for over the centuries. As such, they must be dealt with, calmly and with restraint, but with absolute clarity that criminal methods will not go unpunished and that blackmail and violence will not be tolerated.

We all know that the tactics of some students in campus uprisings are so disreputable as to overshadow whatever idealistic goals supposedly motivate their actions. For in attempting to impose their views upon others by force, they have adopted totalitarian methods; they have assumed the absolute and final truth of their perspective; they have denied any possibility of error; and they have nullified for

others the fundamental right to dissent. Thus they have done violence to the most fundamental conception of a university—a place for the confrontation of issues by reason and discourse, not as a place for dogma, denunciation and the use of force.

If the people of this nation ever conclude that flouting the law is a right to be exercised at the discretion of everyone or to be governed only by the intensity of his cause, then as a free society we are finished—and brute force will take over.

At the same time, our vision of the law must not be limited to its prohibitory aspects—nor even dominated by them. It is uncongenial to any forward-moving, free society to cast the law wholly or primarily into the negative role of stopping socially undesirable actions by either individuals or institutions. In a democracy, the law has an affirmative function to advance human rights, not merely to stabilize them, to help develop the human personality, not merely to protect it, and to make society a better servant of the individual and not merely to reconcile conflicts between the two.

In those areas of our nation where there has been clear evidence that the law has not been effective as a constructive force, we must move to substantive reforms. And we must foster a commonly shared view in our society that change *within* the system is ultimately possible.

If we are to promote trust in the lawful society as the straightest and broadest avenue to a better society—if we are to avoid violence—we must be skillful in employing all the machinery of the law—from its application by the city policeman to its codification of economic morality in business. We must convince the dissident members of our society by what we do—not just what we say—that the law is on their side—not against them. We must so employ it that they will not see the law as rigged to serve others in enforcing rights against them; they must see it as an instrument to protect them against injustice—the corrupt landlord, for example, or the cheating installment seller. Let us remember that laws were instituted among men intent on a better society, in the first place, for the common good of all men—not just the most, not just the strongest and not just the uncomplaining.

Finally, perhaps central to a nation truly living under the rule of law is the need to maintain respect for the courts and for the judicial process. If this respect is gone or is steadily weakened, no law can save us as a society or the values that we have built over the years. Yet today we are going through an ugly and hazardous period when wide and sometimes thoughtless resentment of court decisions and judicial processes has motivated vituperative and violent attacks, not upon the decisions, but upon the very heart of the rule of law—the courts. As officers of the court, lawyers—whatever their views of controversial decisions—must inspire respect for the judiciary, and espe-

cially the Supreme Court, as an institution essential to freedom.

This does not mean, of course, that the machinery of our courts or their decisions are beyond criticism. Fair criticism has led to the overruling of unwise decisions; and court machinery must be improved; but lawyers themselves have a primary obligation to help conceive and execute movements to modernize the archaic mechanism of the courts and to bring them into gear with the quickened needs and opportunities of the turbulent times in which we live.

Perhaps I can summarize in a few words what I have said to you: as lawyers, you will always be living, in a good and noble sense, a double life. On a day-to-day level, in one capacity or another you will be providing professional services in a vital and practical area—the resolution of human conflicts. At the same time, you will be called upon, as officers of the court and as members of the community of professional men and women, to bear a special responsibility for the advancement of mankind towards the ideals, including justice, that motivate the good society. This overriding duty and privilege will always be with you—whatever your choice among the specific professional paths open to you, whether it be trial work, counseling, teaching, or governmental, institutional or private practice.

Ladies and gentlemen, let me suggest that we are living in a period of great promise. It is a propitious and exciting time to be engaged in the study and practice of law; and it should encourage the best that is in us and in our profession. I sincerely hope that we will make the best of our opportunities.