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THE AMERICAN LAWYER'S ROLE IN PROMOTING THE RULE OF LAW

ROSS L. MALONE*

I am honored by your invitation to participate in the significant program which has been arranged in celebration of the fiftieth anniversary of the establishment of the Law School of Marquette University.

In our profession we consider that when a lawyer has reached 50 years he has come to the full fruition of his powers. Certainly by that time his character and ability have been established and are known to his brothers of the profession. By age 50 he has clearly demonstrated either that he will be a success or a failure as a lawyer.

While the life span of an institution such as yours is not limited by the human frailties which curtail the professional life of a lawyer; when an institution such as this attains the maturity of 50 years, it too has established its character, has demonstrated whether there is justification for its existence and, through the quality of its graduates, it has established itself as either a success or a failure among law schools.

In some degree, the character of your University was established when the Society of Jesus which sponsors and conducts this great university named it for that resolute explorer of this area, Pere Marquette. His 3000 mile exploration of the area by birch canoe in 1673 still is one of the most remarkable stories in the history of the exploration of our country.

During the first fifty years following the opening of Saint Aloysius Academy, the predecessor of Marquette college and Marquette University, there was no law school available to its students. That a need for such a school existed is demonstrated by the distinguished history of this school since its founding in 1908.

Your Marquette Law Review is now in its 42nd volume and is an important professional journal recognized not only in your area but throughout the country. A former member of your faculty whose activities are inseparably connected with Marquette Law School, my friend Carl B. Rix, has served with distinction as president of the American Bar Association and in many other important positions of leadership in the organized bar. Your graduates have established themselves in the profession throughout the United States, and their success reflects credit upon the institution from which they received their professional training.

In viewing your first fifty years, in retrospect, you are entitled to take satisfaction in the character of the school which you have es-

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tablished and the contribution which it has made to the legal profession. I congratulate you upon an enviable record.

Quite appropriately, you have selected as the subject of this anniversary celebration the rule of law. My concern this evening is with the role of the lawyer in the United States in promoting the rule of law; the role which he has played during this first half of this 20th century and which he is playing today.

The rule of law did not have its inception in the mind of man even though law, as we usually think of that term, refers to man made laws enacted by legislative bodies and the common law as declared by courts. These are merely the means by which the law of God is made effective; the means by which it is applied to the conduct of man. They are comparable to the portion of a tree which is above ground and apparent to the eye of an observer. As in the case of the tree, however, it is the roots from which it draws its strength. The law, to be effective, must be rooted deep in the divine will, in the immutable rules of the natural law of God. Man made law, which is contrary to, or not supported by, the law of God will as surely wither and die as the tree which is not supported by a root structure.

Law, essentially, is the body of rules which govern the conduct of human beings. The rule of law makes those rules paramount to the will of any individual or group of individuals, regardless of how powerful the individual or how large the group. It is the antithesis of the concept that "might makes right." It is inherent in the rule of law that all men are equally subject to the law and that no man or group of men shall place himself above it.

Implicit in the rule of law is the sanctity of the individual and the protection of his rights against any person or group of persons who infringes upon them. This protection extends as well to action by persons exercising the power of government as to those acting individually. A Frenchman, Amoury de Riencourt, expressed this basic concept of the rule of law admirably when he said in his book "the coming Ceasars," "Freedom of the individual from arbitrary tyranny and the paramountcy of the law are inseparable."

The rule of law is a concept which has existed since Moses received the Ten Commandments upon Mount Sinai. It has survived autocracy, anarchy, tyranny and demagoguery and has come to its highest state of development in the democracy of the 20th century.

And what of the role of lawyers in the rule of law? Lawyers are the handmaidens of justice. Equally, as Mohammed Imur, the present chief justice of Pakistan, said recently, "Lawyers are the technicians of democracy."

When you prefer "handmaiden" or "technician" or some other designation as descriptive of their relationship to the rule of law in a

democracy, lawyers are essential to the implementation of the rule of law, if not to its very existence. Their numbers and importance in the society in which they exist is in direct proportion to the state of development of the rule of law in that society, and, hence, to the protection which that society affords to the rights of the individuals who compose it.

Contrast the 2000 lawyers who are in private practice in Moscow, a city of 5,000,000 people—roughly one lawyer to every 2500 people—with the 25,000 lawyers practicing in New York City providing one lawyer for every 310 people. Contrast the 10% to 15% of the members of the Supreme Soviet of the USSR who are lawyers with the 66 2/3% of the United States Senate and 56% of the members of the House of Representatives of the U. S. Congress who are members of the legal profession. Yet while I was in Russia last summer, Krushchev complained that there were too many lawyers and promptly took steps to reduce the enrollment of the law schools of the USSR.

Both comparisons, and many others that could be made, clearly support the premise that the number and importance of lawyers in a country is directly related to the rule of law and the protection afforded the rights of the individual in that country. A further tragic proof of the relationship between the incidence of lawyers in a society and the protection which it affords to the rights of individuals through the rule of law is afforded by recent developments in Hungary where, since the abortive counter-revolution and the disappearance of the last vestiges of individual freedom, the Communist regime has perpetrated a mass disbarment of lawyers.

Tyrants throughout history have recognized in lawyers a constant threat to their tyranny. But this threat has not been a threat of corporate action of the legal profession as such. There is no instance in history of the legal profession as such rising against a tyrant. It was the barons, not the legal profession, who exacted the Magna Charter from King John. It has been the Patrick Henrys, the John Adamses, the Thomas Jeffersons, the Benito Juarezs who have provided individual leadership in opposition to tyranny and in demanding the establishment of the rule of law.

It is the cumulative effort of some 175,000 lawyers in private practice in the United States today which is the greatest bulwark supporting the rule of law in this country.

In times past this support primarily has taken two forms first, the contribution of individual lawyers to the effective administration of justice by our courts; and, second, the protection by individual lawyers of the rights of individual clients against infringement by government or individuals in both criminal and civil cases.

As the twentieth century has unfolded, however, there has matured

a third means of support of the rule of law by the legal profession; one which theretofore had been of relatively minor significance. It is corporate action of the legal profession through bar associations.

True, bar associations are not creatures of the twentieth century. Various organizations of the members of the bar of some of the courts had existed before the revolution, but Dean Pound, in his "the lawyer from antiquity to modern times," recognizes the Philadelphia Bar Association, founded in 1802, as the oldest bar association in continuous existence in the country and suggests that the rise of bar associations, as we know them, began in the 1870s.

I suggest that bar associations have come of age in the 50 years during which your law school has been in existence, and that in their present form they provide one of the most important bulwarks of the rule of law in this country today—a bulwark provided by lawyers, to be sure, but lawyers acting collectively rather than individually. In this respect it seems to me that the American lawyer's role in promoting the rule of law has undergone a change, which makes his role an even more important one than that which he has occupied in the past.

In support of the premise that bar associations have attained maturity during the last fifty years, I cite the fact that integration of the bar which first occurred in North Dakota in 1921 has now extended to 26 states, the latest your state of Wisconsin in which an integrated bar became a reality on January 1, 1957. State bar organizations by this process have been converted from relatively impotent voluntary associations frequently consisting of a minority of the lawyers in a jurisdiction, to all inclusive organizations with official status, increased resources and much increased power and prestige.

I would further cite the evolution of the American Bar Association in the past 50 years from a small voluntary, largely social organization of 3716 lawyers in 1908, to its position in 1958 as the recognized national voice of the legal profession of the United States, composed of over 95,000 members having a house of delegates representative not merely of those 95,000 members but of the entire legal profession of the country which is represented in it.

The mere increase in numbers and strength of organizations composing the organized bar of the United States will not ipso facto effect a change in the lawyer's role in promoting the rule of law in this country. The inquiry naturally follows: How has this new found strength been used? How, if at all, is it contributing to the promotion of the rule of law in the United States?

The answer to this question could be the subject of this entire series of lectures in itself because it encompasses everything that bar associations are doing today in the discharge of the public responsibili-

ties of the bar. It extends from the improvement of legal education and standards of admission to the bar on the one hand to its attack upon court congestion throughout the United States, on the other; from its disciplinary activities on the one hand to the report of its federal judiciary committee upon the professional qualifications of proposed appointees to the supreme court on the other.

I know of no one who has attempted to catalogue the activities of the American Bar Association to determine the portion of its activities which are directed toward benefit to the members of the profession, as compared to the portion which are in discharge of the public responsibility of the bar, for the benefit of the public and the country at large. I would estimate, however, that 2/3 of its activities are more closely allied to the public good than to the private interest of lawyers.

To the extent that the functions and objectives of bar associations, state and national, are in the public interest, as distinguished from the interest of the profession itself, they directly or indirectly contribute to the promotion of the rule of law, just as any activity which is directed toward the improvement of the administration of justice promotes and strengthens the rule of law in this country.

The greatest threat to the rule of law in any democracy is the danger that the people will become dissatisfied with the functioning of their system of justice and do irreparable injury to it, without realizing that by so doing they are destroying the very foundation of the rule of law in their society. That danger imposes a continuing obligation upon the members of our profession as individuals and through bar associations, to interpret to the public the action of our judicial bodies in an effort to insure that lack of understanding will not become the basis of unwise public action.

This obligation—to support the courts as institutions of government—is one which has assumed increased importance recently as decisions of the supreme court of the United States in highly controversial areas have become public issues by which deep-rooted loyalties and prejudices have been stirred. The application of the obligation of a lawyer to such a situation is not always easy. As in most cases of intense controversy, there is an area which is clearly white, another which is clearly black and an area in between which is gray—and quite extensive.

The standard on the basis of which the propriety of a lawyer's conduct in relation to controversial court decisions will be judged is provided by the oath of admission and the canons of professional ethics. The first obligation assumed by the oath of admission is to support the Constitution of the United States and of the state in which admitted. The second obligation is this:

I will maintain the respect due to courts of justice and judicial officers.

The first canon of professional ethics provides:

It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

Neither the oath nor the canon prohibit criticism of decisions of the courts. Such criticism is healthful, and when constructive, is to be encouraged. Clearly, however, it must be limited to criticism of the decisions and opinions themselves and must not extend to impugning the motives of a court.

Since the purpose of the quoted portion of the oath and the canon is the support and maintenance of courts as institutions of government, personal criticism of individual members of a court which tends to destroy confidence in the court as an institution is at best of questionable propriety—at worst a violation of the canons.

Of one thing there can be no question. Members of the bar having taken the oath of admission and assumed the obligation imposed by the canons of ethics of the profession are subject to restraints which do not exist in the case of laymen. The lawyer's obligation in this regard was well stated recently by Dean Griswold in his Morrison lecture when he said:

With such a hue and cry being raised, one should be very careful that he does not join it, and that he does not create the impression that he is joining it. This is an especial responsibility for lawyers, who should be expected to have an understanding of the actual issues involved in these matters and to whom the public can rightly look for sound and thoughtful leadership on questions of such fundamental public importance.

There is no aspect of the lawyer's role in preserving the rule of law which is of greater importance than the preservation of the courts themselves, without which the rule of law cannot exist. The right to criticize decisions is an important aspect in the preservation of the courts, and I would not want to be understood as in any manner discouraging criticism so long as it is within the bounds of propriety as established by our oath and canons. I do, however, want to emphasize the fact that the extent of your or my disagreement with

a decision is not the criterion by which the character of our criticism is to be judged, nor does the number of decisions with which we may disagree alter the boundaries of propriety.

Returning now to the corporate action of lawyers through bar associations, I have suggested that it has become an increasingly important aspect of their promotion of the rule of law in this country. There are two instances of action by the American Bar Association during this period of emergence of bar associations, each of which constituted important and effective action by lawyers in the promotion of the rule of law. You are familiar with both. Each resulted from controversies involving the supreme court of the United States. Had either been unsuccessful, the rule of law in the United States would have suffered irreparable injury. I refer to the so-called court-packing plan of 1937 and the Jenner Bill of 1958.

In both instances the court was under attack by other branches of the federal government because of dissatisfaction with certain decisions in areas of great current controversy. In 1937 the attack was by the executive branch; in 1958 by the legislative branch. In the earlier situation the means by which opponents of the court sought to accomplish their desires was through increasing the number of justices. In the latter case it was by depriving the court of appellate jurisdiction in cases involving the questions as to which its decisions were in disfavor.

Had the legislation proposed in either instance been enacted, the position of the court as the final guardian of the rights guaranteed by the Constitution would have suffered—and with it the rule of law in this country. In the case of the court-packing plan, the attack on the court was from the left. On the case of the Jenner Bill it was from the right. In both cases the decisions involved were the subjects of bitter controversy.

It is a great tribute to the organized bar, composed as it is of lawyers of all schools of thought that in both cases, acting through the American Bar Association, it rallied to the support of the court and effectively opposed the proposed legislation. Both cases are instances of effective corporate action by lawyers in support of the rule of law.

In the case of the Jenner Bill, and no doubt in the case of the court-packing plan as well, many members of the House of Delegates of the American Bar Association who voted in favor of the resolution were in disagreement with the decisions of the court which triggered the legislation. Nonetheless, recognizing the threat to the integrity of our judicial system and to the independence of the judiciary, they voted overwhelmingly to oppose the legislation, and thereby, in a very real respect, promoted the rule of law.

There are many other examples which I would cite of corporate

action by lawyers, through bar associations, supporting the rule of law in the United States. They are available in every field of bar association activity. The progress of the past 25 years in the improvement of the administration of justice is attributable, in a very large degree, to such action. It constitutes a vital contribution to the support of the rule of law.

The comparatively newly developed strength and influence of the bar associations of the United States is a source of added responsibility for every American lawyer. As a member of that profession he has a proportionately greater duty to see that this strength and influence is exercised dispassionately, intelligently and in the public interest. The question of whether or not he shall join his bar association and participate in its deliberations is no longer to be decided in the light of his own selfish interest. It must be considered as a means of discharging an important part of the obligation which he assumed when he became a member of the profession.

The law schools have a vital role in insuring his appreciation of this obligation. It is equally—if not more—important that a new law graduate appreciate his public responsibility and the part being played by bar associations in the discharge of that obligation of the profession as that he know the substantive law on any subject. It should be one of the primary objectives of a legal education.

I am confident that your school has provided that important ingredient of legal education for its graduates. In the light of the constantly increasing significance of the corporate action of lawyers, I commend it to you as a subject worthy of increasing emphasis during your next 50 years.

May I conclude with the observation that it was American lawyers who conceived the rule of law as it is embodied in our Constitution and Bill of Rights. Their successors effectuated it and delivered it to our generation strengthened and revered. I am confident that the legal profession will continue to be worthy in all respects of its trust as the custodian of this, the secret of our nation's greatness.