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THE UNPOPULAR CAUSE IN TIMES LIKE THESE*

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When Law Day was first being observed as a special day in our lives, it all too often provided a forum for lawyers to dwell retrospectively on the contributions the members of the legal profession have made to the founding and growth of our nation. The addresses emphasized the accomplishments of the lawyer of yesteryear. These were usually interesting word pictures of the lawyer's glorious heritage, studded with statistics on the number of lawyers who participated in the drafting of the Constitution and signers of the Declaration of Independence. And while the rhetoric was excellent and the reminiscences were inclined to raise our ego, I could not help but wonder about the application of the adage that "men of mark make poor runners because they are inclined to look back."

No longer is the narration of our heritage—proud as we are of it—the message Law Day conveys in current times. Lawyers today are mindful of the challenges directed at the rule of law, challenges as grave as any our legal system has ever faced. We live in rapidly changing times and as the changes are spawned so are new demands. Our prime responsibility as lawyers is to aid fairly and faithfully in weaving the fabric of law so that it will meet the needs of a free society dedicated to equality, justice and untrammeled freedom.

Whether our legal system will survive depends on how it will function in day-to-day operation—and how it will function will depend primarily on the attitude and dedication of the legal profession. If we honor the law by aiding it to serve as it was meant to serve, it will survive. If we dishonor it by overt action or by eroding indifference, it will surely be replaced, for our society will embrace the rule of law only so long as it promotes the cause of justice. How it must serve our society in

* Address presented at the St. Mary's University School of Law during Law Day ceremonies, April 13, 1972. Mr. Jaworski was honored by the School of Law and presented with the St. Thomas More award.

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one vital respect often misunderstood by the layman and almost as often disregarded by the lawyer, I wish to discuss with you. But before doing so, let me devote a few moments to the memory of Saint Thomas More.

By precept and example, Saint Thomas More breathed eternal life into one of the greatest of all obligations the lawyer bears—that of unswerving loyalty to the ends of justice. Not justice for the affluent and the powerful alone, not justice for the admired and the favored alone, not justice alone for those whose views and beliefs are shared, but justice for the weak, for the poor, and even for the hated.

Saint Thomas More is best known in history for his courageous and sacrificial resistance to the evil demands of his king, whom he served as Lord Chancellor. He placed his conscience above life itself. This account of his statesmanship has been depicted in print and on the screen and is by now rather well-known. Not so well-known is his work in Latin entitled *Utopia,* the account of an ideal society, with justice and equality for all citizens. This is the very aim of our society today and, if it is to be achieved, the lawyer must be a principal participant.

This goal is not easy to attain and may well never be attained, for as long as humans administer the process there will be fallibilities. But this human factor should not dissuade us from endeavoring to confine our mistakes to honest failures; it should not deter us from striving to eliminate unfair acts of commission as well as injustices that spring from inexcusable omissions.

Here I wish to digress to comment that no better basic system of criminal judicial process has yet been devised than ours which embraces the fundamental concepts of the common law. As administered today, we find it cumbersome at times, in need of overhauling in some places, and in still other places not the smoothly-operating legal machinery we envisioned. Nevertheless, it still keeps an ever so cautious eye on the rights of the accused—so much so that the question is frequently raised whether an imbalance has not been created by some court decisions between the rights of society and those of the individual. Along with Mr. Justice Lewis Powell, several of us posed this question when we served on the President's Commission on Law Enforcement and the Administration of Justice, commonly referred to as the President's Crime Commission.

In these days, when justice miscarries, we find it paraded in prominent headlines, and reformer-activists as well as those who seek an overthrow of our system (for which they have no substitute) talk ceaselessly about it—often dramatizing their comments so as to distort the

facts. Some of the more vocal belong to groups who think that they and they alone are interested in the due administration of justice. A book is written analyzing three cases—mind you, three—to demonstrate that our system is a failure. An errant judge is held up as a typical administrator of our process. These unfair characterizations ignore the innumerable trials daily held in which the cause of justice is served well. They ignore the innumerable dedicated judges who daily administer the law impartially and honorably.

The bench and bar of America are aware of the shortcomings that do exist. Inadequacies in some respects, failures in other respects, are not situations that erupted in this decade or during the last one. They have been with us so long as we have had our system of law. Recently, I reviewed the comments and concerns of Presidents of the American Bar Association at the turn of the century and for two decades thereafter. They dwelled primarily on the problems of administering justice and essentially they were then no different than those of today, notwithstanding all the improvements that have been promulgated in the interim. The explanation is self-evident; changing times bring on new demands. Today the American Bar Association is devoting one of its main thrusts toward the implementation of the standards of criminal justice in the various states. This is a monumental work, reflecting the architecture of numerous legal luminaries over a several year period and which is destined, once adopted by the states of our nation, more efficiently and more fairly to serve the interests of society as well as those of the individual. It will interest you to know that at the present time the American Bar Association, now comprised of over 156,000 members, is devoting approximately ninety per cent of its funds on projects and improvements in the public interest.

So much for the predicate. The American Bar Association, the American College of Trial Lawyers and other organizations to which lawyers belong remind us in their codes that a lawyer should not decline to undertake the defense of a person accused of a crime or the representation of a litigant in a civil cause because his conduct, his reputation or the position he happens to occupy, may be the subject of public unpopularity or clamor. These and other organizations tell the members of the legal profession that in the discharge of the duty a lawyer owes his client, the lawyer should not be deterred by any real or fancied fear of falling into disfavor with others or suffering public unpopularity.

The root of the problem, the reason lawyers are sometimes deterred,

is the public's misconception of the role of the lawyer. Throughout my years of practice, I have found laymen assuming that it is the lawyer's responsibility to pass judgment on the client's rights and that if he suspects the client may be in the wrong the lawyer should not represent him. This false assumption is allowed to exist without much effort on the part of anyone to correct it.

Erskine, in his famous defense of Thomas Paine in 1792, made the point in these eloquent words: "From the moment that any advocate can be permitted to say that he *will*, or will *not*, stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what *he may think* of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment."

In 1871, the Court of Exchequer of England observed: "A man's rights are to be determined by the court, and not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers saying that they will advocate a case against their own opinion. A client is entitled to say to his counsel 'I want your advocacy and not your judgment. I prefer the judgment of the court.' "

Examples of public misunderstanding in our land of the lawyer's duty to represent unpopular clients and causes—and the willingness of lawyers to ignore clamor while they go ahead and do their job—even antedate the American Revolution. In the Boston Massacre of 1770 several Americans were killed by British soldiers. Tempers raged in Boston. Americans claimed that this was cold-blooded murder; that Captain Preston of the British Army had ordered his troops to fire. Local feeling ran high against the British soldiers involved and especially against Captain Preston. There was great clamor for his trial and execution.

A friend of the Captain came to John Adams, attorney and leader in the American cause. The friend said that the Captain's life was in great danger. He insisted that, in fact, Captain Preston had not ordered his troops to fire. A group of a hundred or more Americans had gathered and threw clubs and brickbats at the soldiers. A soldier fired his musket accidentally and, in the melee and excitement that followed, other soldiers fired too.

Soon, indignant Americans crowded at the entrance to Adams' office demanding that he tell them whether he would represent Captain Preston. Amid threats against him, John Adams replied that he not only

expected to defend the Captain but the soldiers charged as well. With that, he slammed the door to his office and went to work preparing his case. Captain Preston was acquitted and so were some of the soldiers.

One account tells how, when Adams made his argument to the jury, he said: "The law no passion can disturb. 'Tis void of desire and fear, lust and anger.' " Then, moving closer to the jury, he argued: "The law on the one hand is inexorable to the cries and lamentations of the prisoners. On the other hand, it is deaf, deaf as an adder, to the clamors of the populace."[1]

When asked why he defended these British soldiers, Adams answered: "If I can but be the instrument of preserving one life, his blessing and tears of transport shall be a sufficient consolation for me for the contempt of all mankind."[2]

This stout-hearted lawyer was criticized, shunned, and threatened, but, after the popular outcry subsided and men's thoughts returned to reason, Adams was elected to the House of Representatives of the Commonwealth of Massachusetts. Afterward, he was the first Vice President and then second President of the United States.

In 1819, in his native state of Maryland, Roger Brooke Taney defended a Mr. Gruber, a Methodist preacher from Pennsylvania, who had been indicted for inciting slaves to insurrection. Gruber was charged after he preached a sermon to a congregation comprised of several hundred Negroes as well as whites. The part of his sermon that got him into trouble was: "Are there not slaves in our country? Do not sweat and blood and tears say there are? The voice of my brother crieth blood. Is it not a reproach to a man to hold articles of liberty and independence in one hand and a bloody whip in the other, while a Negro stands and trembles before him with his back cut and bleeding?"[3]

Taney was born and reared in the slave-holding state of Maryland, and the jury to which he argued had Maryland slaveholders on it, but Taney's eloquent defense won Reverend Gruber an acquittal.

Taney's friends told him not to take the case. They said he would be scorned by his fellow Marylanders. But in time he earned respect for his devotion to duty. Later he succeeded John Marshall as Chief Justice of the United States.

In March 1846, William Freeman, a Negro and recently a convict, entered the house of a well-known white farmer, stabbed four people

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1 C. BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 401 (1950).
2 WILLARD'S LIFE 133.
3 IV GREAT AMERICAN LAWYERS 91 (1908).

to death, and wounded several others. Freeman was soon captured and identified. Local citizens, excited and bent on revenge, tried to lynch him and the authorities had to go to extraordinary lengths to save him.

In fact, Freeman was insane and William Henry Seward unflinchingly proceeded to prove insanity as a defense. He was a lawyer of great courage and faith, and his argument to the jury is a classic. Here are excerpts: "I plead not for a murderer. I have no inducement, no motive to do so. I have addressed my fellow-citizens in many various relations, when rewards of wealth and fame awaited me. I have been cheered on other occasions by manifestations of popular approbation and sympathy; and where there was no such encouragement, I have at least had the gratitude of him whose cause I defended. But I speak now in the hearing of a people who have prejudged the prisoner and condemned me for pleading his behalf . . . ."

"In due time, gentlemen of the jury, when I shall have paid the debt of Nature, my remains will rest here in your midst, with those of my kindred and neighbors. It is very possible they may be unhonored, neglected, spurned! But perhaps, years hence, when the passion and excitement which now agitate this community shall have passed away, some wandering stranger, some lone exile, some Indian, some Negro, may erect over them an humble stone, and thereon this epitaph, 'He was faithful.' "[4]

Seward's biographer says: "The Freeman case, which, while it was going on, seemed to be leading Seward to ruin, was now bringing him appreciative friends and clients. Applications for copies of his speech were coming in from all quarters."[5]

William Henry Seward was elected to the United States Senate in later years, and served as Abraham Lincoln's Secretary of State.

Judge Harold Medina, while a practicing attorney, was appointed to defend a man charged with treason during World War II. Our country was in a death struggle with the Nazi tyranny. The defendant, a German-born naturalized American citizen, was charged with aiding German saboteurs who had slipped ashore on Long Island in 1942 from a submarine. It is difficult to conceive of a more despised person to defend, in the midst of a ferocious war.

There was a serious question of the man's guilt. The Constitution requires specific proof, including two witnesses to the overt act, to convict a person of treason, and Medina made certain that the law was

4 1 F. BANCROFT, THE LIFE OF WILLIAM H. SEWARD 176-79 (1900).
5 *Id.* at 179.

meticulously applied. We are told by Judge Medina's biographer: "Throughout the trial people sometimes shrank from contact with Medina as he entered court, as if they feared contamination, and once, as he made his way through the crowded courtroom toward the counsel table, a man leaned toward him and deliberately spat in his face."[6]

In his summation to the jury, Medina minutely covered every detail of the case, and used almost twenty thousand words. When both the defense and the prosecution rested and the judge had charged the jury, he turned to Medina. Judge Goddard praised him generously for his willing performance during the trial and for doing so at the court's request, without pay. Medina stood thoughtfully through this praise, and then did what was perhaps the hardest thing he ever had to do.

"Judge Goddard," he replied, "I do not wish to appear ungracious, but I must respectfully except to what you have said. I do not believe that you had any right to tell the jury that I have been defending this man as assigned counsel."[7]

The case went to the United States Supreme Court on appeal twice. The second time, the Court's ruling caused the charge of treason to be dismissed.

I observed with admiration the work of American officers—lawyers in civilian life—appointed to defend accused in war crimes trials held in Germany following World War II. Some of the crimes they were charged with were more barbarous than any in history. Yet American lawyers, to their everlasting credit, fought vigorously and tenaciously—but with propriety and dignity—to make certain that the accused had fair trials.

These instances I have mentioned are but a few of the many in which American trial lawyers have proved themselves worthy of their traditions, turning a deaf ear to intimidation and criticism, and defending unpopular causes courageously. Nor need we turn the pages of history to a century ago, or decades ago, for striking illustrations of the conduct of lawyers in similar situations. It occurs to me, however, that it is the better part of discretion for me to omit references to lawyers of contemporary times. Their deeds will be recorded too.

Note the eventual course of these men I have mentioned by name who zealously defended the unpopular causes we have discussed. John Adams became President of the United States. Roger Taney became Chief Justice of the United States. Henry Seward became a United

[6] D. HAWTHORNE, JUDGE MEDINA: A BIOGRAPHY 189 (1952).
[7] *Id.* at 189.

States Senator and a great statesman. And Harold Medina served as a great jurist on both United States District and Circuit Courts. This justifies the conclusion that, although criticism and denunciation may be severe and painful at the time the unpopular side is represented, it is only temporary. Eventually, popular passion gives way to sober thinking and cool reflection, and the lawyer is admired for his courage and devotion to duty.

Have you noticed, too, the dignified, decorous manner in which these great lawyers demeaned themselves—as indicated by their arguments—without sacrificing dedication, fervor or zeal? To represent their clients' rights, they did not find it necessary to denounce the judicial system—to stoop to intemperate tirades directed at the judge and his rulings. On today's scene, there are those who pose as stalwart defenders of the rights of individuals accused of crime whose chief performance is to engage in courtroom outbursts and vitriolic conduct, indignities toward the judges and scurrilous attacks on our legal institutions. One wonders, for what purpose? If the rights of the accused and his freedom from conviction are the chief concern of an advocate, as they should be, he has by his demeanor forsaken them in favor of satisfying his quest for political notoriety and his zest for adulation by others of his ilk.

Thus, not to be confused with the conscientious lawyer serving an unpopular cause, is the opportunist who is obsessed with designs of his own. He does not seek to serve his unfortunate client; rather, he seeks to serve an objective of his own and, in the process, usually commits a disservice to society. Because of his interest in publicizing his actions, rather than pursuing a studious and conscientious representation of his client's rights should his client's cause be lost, he climbs on the stump to lambast our system of justice.

Let me add, too, that the accolade here intended by me for the lawyer who represents fearlessly those held in public scorn implies that he will resort only to ethical and legitimate means in the course of the representation. John Adams illustrated this point when he was solicited to defend Captain Preston. His words of caution were direct and unmistakeable when he said that Captain Preston must expect from him "No art or address, no sophistry or prevarication . . . nor anything more than fact, evidence and law would justify."[8]

I had occasion to write on this subject a number of years ago. I have spoken on it on a few occasions. Others too have made it the central theme of their comments and writings. But it remains a problem today,

[8] THE DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 293 (1961).

perhaps more so than it was at the turn of the century, perhaps more so than it was a decade ago. It is disquieting to observe in these days a growing tendency of some of the most capable members of the Bar to shun the acceptance of representation of those in public disfavor. Quickly forgotten or lightly taken appears to be the oath of the lawyer. When entering the profession, a lawyer does not engage in a popularity contest, but he does assume a special creed—as the late Mr. Justice Jackson put it—"to safeguard every man's right to a fair trial."

The greatest reward that flows to a lawyer is not measured in riches, social position or popularity. Rather, it comes as an unseen, intangible inner satisfaction that emanates from the faithful discharge of duty. This is truly the lawyer's highest form of compensation.