Justice: A Lady In Distress *

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Almost one hundred years ago a legal intellect, whose brilliance still illuminates the professional paths along which contemporary attorneys stumble, warned that there is little comprehension of how large a part of our law is open to reconsideration with but a slight change in the habit of the public mind.[1] It was clear in that era to the Great Dissenter, as it should be generally evident to us today but apparently is not, that unless the community at large submits to and permits itself to be governed by the law, then law and all its high priests can instantaneously be blown away by a typhoon of rebellion, followed by the spectacle of a society gasping for breath in a toxic anarchic atmosphere.[2]

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).
2. *Id.*

The depository of power is and always has been unpopular,[3] but the critical storm that is currently directed against our Lady of the Common Law seems to transcend the usual twinge of discomfort experienced by the weaker when gazing upon the stronger, however benevolent the seat of authority may be.[4] The vexatious and even insipid quality, if not the quantum, of community disenchantment may be appreciated by a perusal of some of the simplistic criticisms being hurled at our Lady. Some carping voices chorus that She is blindfolded because She cannot bear to witness the injustices perpetrated in Her name, while others claim that Her eyes are not merely covered but that She is completely blind to the machinations and manipulations of corrupt opportunists operating under Her very nose. Some idealists believe that Her sword is used to smite the wicked, while the antithetical viewpoint is simultaneously voiced that She uses Her cutlery only to skewer the common man and to protect monolithic vested interests. Legal abstractionists believe that She carries the scales to symbolize the balancing of policy interests and the weighing of evidence for the universal good. But bitter invective is also audible claiming that Her scales are used to direct judgments in favor of those who deposit the greatest amount of gold in the balance.[5]

In such a virulent atmosphere of dissent and rejection, the traditional, romanticized concepts of our Lady as a cool, poised, pure, golden, sympathetic, detached, and unbiased dispenser of applied justice make Her survivability as secure as a maid's virginity in a cloister invaded by the hordes of Ghengis Khan.[6] If, in the eyes of

3. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906); Reprinted 20 J. AM. JUD. SOC'Y 178 (1937). "Dissatisfaction with the administration of justice is as old as law. . . . In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice." *See also*, B. DISRAELI, CONINGSBY, bk. iv., ch. 11.

4. POUND, supra note 3, at 395. "But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today."

5. O. GOLDSMITH, THE TRAVELLER. "Laws grind the poor, and the rich men rule the law."

6. Letter from Edmund Burke to Hon. C.J. Fox, October 8, 1777. People crushed by law have no hopes but from power. If laws

any significant segment of society She is ineffective to protect them, to serve them in practice, whether or not such a belief is factual, then can She and Her acolytes afford to delude themselves into believing that the spittle aimed at Her is nothing more than a spring rain?[7,8] If the answer of the legal profession is in the affirmative, then I fear that that spittle will be the *aqua regia* that can dissolve even a golden goddess such as this Lady of ours.

In other words, when contemporary examinations of our legal system produce nothing more than recommendations for procedural reforms or inconsequential legislative modifications of the substantive law, then nothing more is being accomplished than the application of balm to the contusions of a Lady whose life is in danger, while simultaneously ignoring the diminution of Her vital signs. The Lady desperately needs treatment for a possibly fatal illness. Assuming that the minority which equates redress of grievances with violent redaction of the judicial system can be and will be converted or corralled, then the virus threatening Her very existence is apathy caused by a paucity of faith. Significant segments of our societal structure apparently no longer believe[9] that She can or will protect them from predators, provide them with redress for wrongs done to them, or vindicate them when they are unjustly accused.

Disrespect for the judicial system is "the dagger of national suicide" and, according to some, is evidenced by two major manifestations: first, by criticism that the courts are too lenient with criminals, placing their rights above those of society; and, second, by overt acts of disobedience, using coercion to enforce alleged rights and selectively obeying only "just" laws.[10] For example, Judge

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are their enemies, they will be enemies to laws; and those, who have much to hope and nothing to lose, will always be dangerous, more or less.

7. E. KAZAN, AMERICA, AMERICA (1961).

8. Limiting his analysis to civil justice, Dean Pound delineated four classifications of the causes of popular dissatisfaction with the administration of justice, *i.e.*, "(1) [c]auses for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure and (4) causes lying in the environment of our judicial administration." Four aphorisms were distilled from the first classification: "(1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint." 29 A.B.A. REP. 395 (1906).

9. Dean Pound's thesis indicates that a more accurate phrase would be "do not *yet* believe". *See* note 8, *supra*.

10. Address by Hon. Jack R. Levitt, Judge of the Superior Court of the

Levitt of the Superior Court of the County of San Diego, believes the former viewpoint to be rooted in emotionalism, and the latter in moral, rather than material, poverty. Dean Pound implied that the cause is practically congenital rather than being related to morality or emotionalism.

> Another necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation, with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchical or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed justice. "The unthinking sons of the sage brush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted, namely, the spirit of independence gone drunk." This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them.[11]

I submit that there exists a third and potentially more dangerous manifestation, namely, a general public ennui in the failures and successes of the administration of justice, a modern version of the ancient violin concerto in the midst of conflagration.[12] This community malaise stems from a feeling of exclusion from the legal process, an inability to partake in the cabalistic rituals of the professional initiates, and a suspicion that the public is merely required to pay the bill for the privilege of being the expendable pawns in a game designed by and for a continued legal aristocracy.[13] In short, pervasive public ignorance of the methods, the objectives, and

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State of California, County of San Diego, 12th Annual Pillars of American Freedom series reported in the San Diego Evening Tribune, April 19, 1972.

11. 29 A.B.A. REP. 395 (1906).

12. Berger, *Do the Courts Communicate?*, 55 JUDICATURE 318 (1972). *See also*, Wilson, *The Gulf Between the People and the Court*, 8 TR. JUDGES' J., 39 (1969).

13. "The first thing we do, let's kill all the lawyers." W. SHAKESPEARE, KING HENRY VI Part II, I. iii.

the continuing development of the judicial system in all of its many forms is the tap-root of indifference, hostility, and public desuetude. Karl Llewellyn was amazed in 1942, during a period which for Americans was the most traumatic and uncertain of the war years, that there was "no competitive demand in the armed services for law trained men" and "no fear among civilians that if the law men (were) drafted the community must settle down to suffer for the lack of them."[14]

Who is to bear the blame for this disaffection with the judicial system, a disaffection based upon ignorance of the system and which can be identified throughout the political spectrum from the ultra-left to the ultra-right, a societal jaundice whose bilious tinge tints the economic continuum from the ragged to the rich; an ennui which permeates all levels of intellectual experience from functional illiterates to research scientists?[15] The answer to this rhetorical question is complex and manifold but at least one facet of the problem requires that the major portion of the responsibility for the existence of this public attitude, and the primary responsibility for its eradication, must be shouldered by the Bench and the Bar. I refer not just to those few mavericks, found in every stratum of society and in every field of endeavour, who bring the entire legal profession into disrepute by sharp dealing, unethical conduct, and overt criminality, but also and primarily to those dedicated, eupractic legal professionals who regularly sacrifice personal pleasures to keep abreast of the law, to adequately prepare their cases, and who do their uttermost to protect their clients and to enhance the profession and the judicial system. The finest members of the legal profession are guilty of an act of omission, namely, a shattering silence by those most qualified to speak. Attorneys, for perfectly plausible reasons do not take time, do not *make* time, to explain to the layman what good the judicial system is doing for him, or why it is doing something unpleasant to him, or how or why it is all occurring. But, regardless of the validity of the reasons for this failure to inform, the judicial system can no longer afford the luxury of professional silence.[16]

14. Llewellyn, *The Crafts of Law Re-valued*, 28 A.B.A.J. 801, 802 (1942). He was shattered "to find that in the eyes of laymen high and low, military and civilian, our skills appear as badly worn spare tires, neither appealing nor reliable, and suited in the national need for the scrap pile to be remade into a make-shift something else."

15. *Id.* "That is one reason why our fellow Americans see us as useless, save as rear rank privates: they do not even know what our craft is, they do not dream of the value of the skilled law trouble-shooter in the welter of a national reorganization."

16. *Id.* Referring to lack of communication between the profession and

Every attorney who has ever practiced can review the roster of past clients and find one for whom an acquittal was obtained in a criminal case or for whom a judgment or satisfactory disposition was procured in a civil case, but who had not the vaguest notion of the amount of preparation by the attorney required to achieve that result nor any appreciation of the years of personal training and experience and the learning of centuries which culminated in that vindication. He merely smiled, pleased but bewildered, as his advocate tore off down the courthouse corridor to the next legal confrontation. If the victors are confused, ruminate upon the state of mind of the other client, equally unenlightened, who lost his civil case or was convicted of a crime. What, in his miasma of ignorance, was his opinion of the judicial process?

To the layman, even to the legally semi-sophisticated venireman, an attorney's courtroom performance must appear to be an atavistic ritual of obeisance to obscure shibboleths.[17] Should not the layman who ultimately pays the bill for the judicial system in one form or another be allowed a clear view of the Ark of the Covenant? It appears that he is rapidly tiring of paying to see only the curtain which obscures it. There are many indications that he harbors serious doubts as to the utility of the Ark, if not possessed of a complete disbelief that it exists at all behind the shroud.

If this premise is correct, that is, that the epidemic of public disrespect for the judicial system is basically rooted in ignorance of it, then there are a number of relatively simple, though difficult, remedies for the illness which can be immediately implemented. These remedies can be categorized by reference to those segments of the profession which must carry them into effect: the Bench, the Bar and the Schools of Law. Let me briefly discuss them *seriatim*.

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the public, Llewellyn said: "They will never know it (that the legal profession practices a craft of doing and getting things done with the law, instead of exercising a mere monopoly of knowledge of the law) nor will nor can they draw the consequence, until (attorneys) first know it, then become articulate about it, then act on it."

17. *Id.* "Yet the idea that the essence (of the legal craft) lies in this peculiar knowledge of the law, that idea gives us a sort of standing, the standing of monopolists in a secret lore; and it may be we have discovered that the priests of any black art can make the uninitiate pay well for mystic service."

Members of the Bench, especially those who preside over courts of limited jurisdiction, occupy the most sensitive position within the entire judicial system since it is before these tribunals that most citizens unfortunate enough to ever have any direct dealings with the legal system are exposed to the judicial process. It is after his immersion in this milieu that the average citizen draws his conclusions as to the utility or futility of the entire legal process. As a result of over-burdened calendars, over-worked judges and the necessity to "keep it moving" and "clear the calendar", the average defendant is subjected, at best, to turnstile justice and is afforded little, if any, opportunity to tell what he considers in his layman's concept of justice to be "his side of the story." Consequently, he leaves the courthouse frustrated and frustration leads to hostility and hostility frequently results in violence. What an opportunity has been lost! Had the judge been so disposed and had he had the time, he could have heard the whole story, however irrelevant to the material issues, and then explained briefly the applicable legal doctrine and a fragmentary overview of the legal system to the parties, perhaps in the process creating staunch adherents to our system of justice rather than bitter detractors. But to dispose of relatively minor controversies in the suggested fashion costs money in the form of more judges, more courtrooms, more sensitivity and compassion and less computerized disposition of pending matters. It is anomalous that though Americans have given their lives for the ideal of justice, they will seldom leap forward to bear the economic cost of it. To overcome this fiscal reluctance an attempt might be made to calculate the financial cost to a society which seeks to create justice "on the cheap" or else, may the gods protect us, to abandon it entirely.

These views dictate the conclusion that judges presiding over courts of limited jurisdiction must be those who are the most carefully selected by appointment or by the elective process, not only for their legal expertise but also for their devotion to and knowledge of the judicial process and their empathy with those individuals drawn into it. Further, they must be willing to attempt within the limits of human endurance and must be allowed to settle controversies rather than to dispose of cases. Because of their daily contact with the average citizen, this segment of the Bench bears the greatest responsibility and has the greatest opportunity by the exercise of enlightened judicial craftsmanship for demonstrating to the community that justice not only exists but is also applied even-handedly to all, and in terms that both the victor and vanquished can understand and, hopefully, will accept.

Members of the Bench presiding over courts of general jurisdiction, because they deal with a different cross-section of society as a result of the subject-matter jurisdiction of these courts, must exercise this duty of public education in a different manner. Litigants in these tribunals are normally represented by competent counsel, and hence it should be the parties' counsel and not the court's primary duty to explain the judicial process to the parties appearing in these arenas. However, judges of courts of general jurisdiction can and should assume the role of community educators by clarifying controversial judicial holdings and also by defining the objectives and mysteries of the judicial system to the communications media and hence to the public.[18] Unfortunately for a variety of reasons, the record of the Bench in this crucial endeavour is spotty at best. If justice delayed is justice denied, then justice misunderstood is justice misplaced. Some judges loathe to comment on judicial decisions because of a restrictive viewpoint of the requirements of judicial ethics. Others fear to influence cases which may be further appealed, while still others refuse enlightening comment due to a desire to avoid creating personal public antagonism. But a jurist need not express personal opinions as to the propriety of a decision while explaining its ramifications and the process by which the decision itself was reached. Is it really a breach of judicial ethics for a judge to allay public fear of mass releases of criminals on "technical" grounds[19] by explaining constitutionally protected rights, the purpose of the exclusionary rules of evidence, or the policy determination to prevent convictions of innocent defendants found in suspicious circumstances? Can judicial silence in the face of hysterical headlines and disgust with the administration of justice be justified upon *any* rational, professional, or ethical basis? Not only can it not be so justified, but the profession can no longer afford, if it ever could, the implied snobbery of such alleged professional detachment.

The second remedial category involves the practicing members of the Bar who, as well as members of the Bench, are also officers of

18. Articles cited note 12 *supra.*
19. *E.g.,* People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); Miranda v. Arizona, 384 U.S. 436 (1965); *In re* Gault, 387 U.S. 1 (1966).

the court,[20] a title frequently mouthed but infrequently utilized as a basis for action. Members of the Bar bear as great a responsibility for education of the public as do members of the Bench. Many, if not most, practitioners devote tremendous effort and time which cannot easily be spared to the authoring of scholarly articles for professional journals, to serving as members of public panels, to setting up Law Day and similar activities designed to educate the public, and to speaking before citizens groups. But in the macroscopic panorama these activities, considering their impact upon public education, are microscopic. The most effective student-faculty ratio which any legal education program can achieve is one-to-one; every time an attorney cooperates with a client that ratio is established.

With such an opportunity presented to him, the attorney should assume the role of legal educator at some moment during the initial interview and prepare his client for the latter's entry into the legal process by enumerating the steps which will be taken, why they are necessary, how they will be initiated, the probable and the possible outcome at each procedural milestone, and what should be and also what could be the ultimate result. This sounds like a very time-consuming process and hence something in which the ordinary practitioner simply cannot afford to engage with the ordinary client. No one will deny that medical practitioners are as pressed for time, if not more so, than legal practitioners, but each doctor to a varying degree, engages in a similar educational process with each patient. They, however, call it applying the "bed-side manner". A layman, medically well but legally ill, seeking an attorney, is usually just as fearful, uncertain, and ignorant of the consequences of his situation as is a medical patient. Does he not have just as much right and perhaps as much need to be reassured as far as is possible by his attorney's explanation of his situation and his probable status, present and future? If a client is properly prepared for his encounter with the judicial process, is he not more likely to accept, if not agree with, the final result?

Members of the practicing Bar are remiss in another area of public education, a neglect to act where action is even more imperative. If our legal institutions, based as they are upon freedom of judges to decide according to the law as they perceive it, are to survive the ignorant hysteria which frequently follows hard upon the heels of unpopular judicial decisions,[21] then it is the duty of the Bar to voci-

20. 48 A.B.A.J. 25 *et seq.* (1962).
21. Cases cited note 19 *supra.*

ferously defend the right and duty of the Bench to decide controversies free of pressure from any source, and to protect the Bench from personal attack. The Bar need not meekly accept every tenet, legal or otherwise, served up by the Bench, but it is certainly the duty of the Bar to explain to the public the function of the courts in creating case law and to vehemently defend the jurists, who usually will not or cannot publicly answer in their own behalf,[22] against imputations of ignorance, revenge, prejudice, weakness, stupidity, political pressure, lack of patriotism, integrity, and mental competence and also suspicious parental origins.

Few attorneys have lost a case, meekly accepted the decision, and still believed that the court was totally correct. But every member of the Bar should know that it is far better to have a judge who incorrectly but pressure-free decided a case, than to have a judge who placed not only the law and the evidence but also his public image and/or personal welfare in the decisional scales.[23] Assuming a competent, unbiased judge subjected to public abuse, then the Bar, if only as a matter of professional self-interest, should rush to the defense of the Bench's right and duty to deliver unpopular decisions, however much the members of the Bar may disagree with the opinion and the determination. The Bar can hardly be described as quixotic in such cases. As a result, the public has unjustly maligned individual judges and tribunals at the drop of a cliché, even though the impetus for these attacks is frequently instigated by demagogues who are always only too eager to reap the benefits of popular dissent.

The final category involves members of the profession who have directed their talents into the field of Legal Education. This category should, perhaps, be expanded to include all Educators rather than merely those who are legally trained, since it is a forlorn hope to expect the successful inculcation into the mind of a young adult law student a respect for, if not a devotion to, a philosophical tradition to which the individual has had little if any exposure since kindergarten. Students must be educated from the instant that they are pried from their mother's nipple through the years spent in

22. CALIFORNIA RULES OF COURT, APPENDIX DIVISION 2, CANONS OF JUDICIAL ETHICS, RULES 4, 12, 15 and 16.
23. CANONS OF JUDICIAL ETHICS, RULE 12.

institutions of legal education, in the manner in which our legal system operates, the torturous and sometimes blood-spattered routes of its development, its strengths and weaknesses. Too often is the puissance of our legal system palliated, if it is mentioned at all by Educators.[24] Educators appear to be subject to a neurotic fascination with the weakness of the legal system or what are perceived to be weaknesses. But every student is entitled to be exposed to the complete picture, that is, our American system's origin, development, strengths, weaknesses, trends, reform movements, and comparisons of it with other legal systems, and then be allowed to personally judge the utility or futility of the juridical structure that has been erected. Even in the training of law students there has been a failure to do this as a result of the contemporary method of emphasizing legal rules and analytical skills and ignoring the examination of law as a living process.[25] Fortunately, the current trend in legal education is toward teaching law as such a process, rather than merely as a fabric of rules in the abstract, but this teaching technique must begin with the basics and far earlier in the educational process than the law school. To achieve this end, I am assuming that the non-legally trained Educators themselves have some knowledge and understanding of our legal institutions, an assumption which may be nothing more than a chimera.

Finally, even though these opinions may seem to indicate that I believe that our present legal system is perfect and that education is the panacea for restoring public faith in that system, I would be the first to admit that inequities do exist and that reforms are needed now and will constantly be needed in the future as our societal values change and develop. But as has been reiterated since the time of the azure-tinted, troglodytic inhabitants of that embattled island which was the womb and birth place of our legal system, the beauty of the common law is that it always has been and still is flexible and amorphous and capable of absorbing changing conditions and standards. Paraphrasing Winston Churchill, our own legal system may be the worst form of dispensing justice—except for all of the others. In order to save this system of applied justice from destruction we must constantly explain it to the citizenry it was designed to serve, and be certain that the legal profession itself is ready, willing, and able to police its members

24. It is here assumed, but not decided, that most Educators believe that our legal system is basically just and moral.

25. 28 A.B.A.J. 801, 802 (1942), "It comes at a price . . . of turning out of law school prospective lawyers who know nothing but the law, and have no simplest smattering of how to *lawyer*." (Emphasis in the original).

and eliminate injustice within the system, whenever and wherever it is found.[26,27]

26. The concepts presented here are obviously not solely those of the author. However, the problem still exists and is perhaps becoming exacerbated despite reiterated pleas for remedial action. *See, e.g., President's Column,* American Trial Lawyers Association Newsletter, Vol. 15, No. 2, at 49.

27. "Justice has been conceived historically in two separate ways: as a supramundane eternal ideal which is independent of man, and as a temporal man-made social idea. The two meanings illustrate the difference between contemplation and action, philosophical reflection and practical conduct." M. FORKOSCH, *Justice*, in the forthcoming DICTIONARY OF THE HISTORY OF IDEAS (Scribners Sons, New York, 1972), 5 vols. All references to the concept of justice in this article are meant to connote the latter meaning in Professor Forkosch's statement.