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BEWARE THE SOLUTIONS!*

THE HONORABLE H. LEE SAROKIN**

I assume law schools still teach that a good lawyer is one who recognizes the problem. But in this day and age I suggest that the current generation should beware the solutions to those problems.

Although there is some dispute as to the existence of the so-called litigation explosion, it cannot be denied that more and more people are turning to the courts. It is popular to suggest that increased litigation is caused by the growing number of lawyers and their need to feed, clothe and shelter themselves and their families; but I suggest that the real reason is a general loss of faith in the other branches of government to protect individual rights coupled with an abiding confidence in the courts to protect those rights. Despite the apparent low popularity rating of lawyers, more and more people are turning to them for assistance. Providing them this assistance is the challenge for this generation.

The real danger is not what the lawyers are doing, but what is being done to the law. The judicial system is blamed for crime, for drugs, for abortion, for increased insurance premiums, for illegal aliens, for excessive verdicts, for the collapse of religion (no small accusation), for reverse discrimination, for the spread of pornog-

* Address by The Honorable H. Lee Sarokin, Mid-Atlantic Conference of Law Reviews (Mar. 20, 1987).

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raphy and obscenity, and for freeing the guilty. We are only responsible for about half those things.

The judicial system was not meant to cure all the social ills of our society. It was created as a forum to resolve disputes in a fair way and to protect rights in civil and criminal matters. The system also serves to set standards of conduct. We tend to forget that one of the purposes of tort liability is deterrence — it discourages defective and shoddy workmanship and negligent and harmful conduct.

But look at the proposals - some of which have been adopted already: Put people in jail before they are convicted; let illegally obtained evidence be used if the officer meant well; require judges to impose certain jail sentences even though the particular case warrants otherwise; make lawyers disclose how much they were paid by their clients and make them give it back if the source was illegal; put a cap on tort awards irrespective of the injuries sustained; test everyone for drugs, even though they have never given any indication that they ever indulged; and most recently, do not tell the accused that they have constitutional rights because they might exercise them. The law schools and in particular the law reviews have a vital role to play in these areas.

There is a strange tension in the law. All cases are decided based upon precedent. That of course is necessary to the stability of the law. How can lawyers advise their clients if they cannot rely upon the continuity of the law? On the other hand, the law is constantly being expanded and even reversed. The news is filled every day with examples. The press rarely reports that a previous decision has been followed. Instead, the reports focus on changes, reinterpretations, and reversals.

Law reviews can serve us best if they analyze the changes that are proposed either through court decisions or legislation. Law review writers should make judgments as to whether the proposed solutions are necessary and, more importantly, whether they conflict with any of those guarantees which we cherish as a society.

If we want to live in a democracy, if we want freedom and individual rights, society must pay a price. Every generation must

decide whether the price is too high. Many of society's ills can be reduced or eliminated by a reduction in our individual rights. Somebody once asked the president of a famous car manufacturer why the industry did not make an automobile that was totally safe - one that could not injure the driver or passengers on impact. He said: "We have one. It's called a tank, but it would cost a million dollars to buy it."

There are many remedies to our problems, but they likewise are too expensive — not in terms of money, but in terms of freedom. The future leaders of the profession and its present spokespersons must decide and speak out as to whether the expense is worth the remedy.

Look at what is happening in the criminal area. We have pretrial detention of the accused in direct contradiction of the presumption of innocence. We have lawyers being forced to disclose the source of their fees and run the risk of forfeiture in direct opposition to the lawyer-client privilege and the right to effective assistance of counsel. Mandatory and uniform sentencing is in the wings depriving judges of the right to grant mercy in those instances in which the facts may cry out for it.

And now the Justice Department calls for a retreat from *Miranda*. What is the rationale? The Justice Department cannot abolish the fifth amendment, so it proposes not to tell the accused that privileges exist for fear that if an accused was made aware of his constitutional rights he might exercise them. Who will this affect? Certainly not the inside traders, the elected officials, or other white collar persons charged with crimes. Rather it will affect the poor and uneducated, and perhaps even the innocent.

So what we, as individuals and as members of the legal profession, must decide is whether discovering and convicting criminals is more important than the constitutional rights that were created to protect everyone. Crimes would certainly be solved more quickly, and possibly more convictions obtained if we did not have to worry about the fourth and fifth amendments. But is that a result worth achieving? Is the cost too great?

The same analysis is necessary in connection with the drug problem. Indeed, it is closely related to the growth of crime. What price

are we willing to pay in order to find out who is using drugs? Illegal handguns are used in robberies and murders every day. Would we think of searching every house and apartment in a large city to find and confiscate them? We probably would find a number of robbers and murderers in the process. The reason we do not do this is because the price is not worth it. As a free society, we have decided that it is more important to be protected in our property and persons than to find criminals. If we searched everyone or every house to find the guilty, we undoubtedly would be successful; but we cannot judge the worth of the Bill of Rights by considering what the benefits would be if its guarantees were not enforced. Those guarantees are invaluable, even though they may protect criminals and interfere with investigations and convictions.

Drugs are a menace. They are devastating our country. They cause crime, affect productivity, and seduce our children. We can help or discipline the users if we can identify them. So should we surrender our rights of privacy or our rights against unreasonable search and seizure and attack this cancer, or should we insist upon the preservation of our rights no matter how just the cause or great the need.

I suggest that the legal profession not look to public opinion for the answer. The will of the majority is not the guide here. The Bill of Rights is peculiarly necessary to protect minorities and minority viewpoints. The politicians can look to the polls for guidance; the legal profession should not and, indeed, cannot.

The greatness of our judicial system is that its decisions need not be popular. We could combat crime by concealing the fifth amendment from the accused. We could discover the drug user by invading his privacy. We could protect the public by keeping accused criminals incarcerated before trial despite the presumption of innocence. We could track ill-gotten gains by forcing lawyers to disclose the source of their fees, despite the effect on the lawyer-client privilege and an accused's right to counsel. We could limit recovery of injured parties even though it would deprive them of what they need to survive. We could use illegally obtained evidence to convict, if we no longer wished to deter police lawlessness.

All of these suggestions and solutions need exposition. They require a balancing of the highest order. My bias is reflected in the way that I phrase these questions, but it need not be yours. Re-examine what is old; and, if you believe that it is no longer valid, urge its change. Challenge what is new and proposed if you believe that it destroys rights and principles worth saving. Law reviews serve an important function when they summarize the law in a particular area, but they are at their best when they enhance the law or defend against its encroachment where necessary. Think of the valuable insight that can be given on pretrial detention, retention of the *Miranda* rule, mandatory sentencing, the legality of drug testing in the public and private sector, surrogate mothers, restrictions on advertising as now proposed regarding cigarettes, all of the ramifications of liability involving the cigarette industry, and tort reform in general.

When the law is changed by decisions or legislation so as to affect individual rights, our spirits should soar! We should not feel a gnawing doubt in the pit of our stomachs. If a change has occurred or is proposed with which you cannot agree, then use your training, your wisdom, your pens (or now more probably word processors) to speak out.

The law is under siege. Join with the revolutionaries if you think the attack is warranted but mount the bastions to defend it if you think it is not.

