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Lawyers and the Legislative Process

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If it is true, as Dean Harno has recently told us, that "the American public has a naive faith in the efficacy of legislation"¹ the attitude of the legal profession has been far from typical. Historically the American lawyer has been taught to regard enacted law as an excrescence which distorts and indeed deforms the beauty and symmetry of the body of decisions. To vary the figure, legislation has been thought of as an undue interference with the order of things, a monkey wrench cast into the cosmic machinery by inept and incompetent mechanics. Two examples will illustrate the point. "The popular estimate of the possibilities for good which may be realized through the enactment of law," said James C. Carter, a leader of the Boston bar, "is, in my opinion, greatly exaggerated."² When, about a hundred years ago, a commission on practice and pleadings in the state of New York suggested certain legislative reforms of the system of pleading in criminal cases they were denounced by the judiciary committee of the New York Assembly in these deathless words:³

"A system of criminal practice which has been moulded and illustrated by Foster, Hawkins and Hale, which has been amended and improved by the labors and decisions of Mansfield, Kenyon, Buller, Ellenborough, Blackstone and others equally illustrious in England; and by the ablest heads and purest hearts of our own country—a system which is engrafted with all our habits and which enters into all our ideas of criminal jurisprudence, is proposed to be abrogated and an entire new system substituted by those apparently carried away by an impetuous ardor for change, which they suppose to be reform . . . .

"There is no view in which we can regard this bold attempt to effect a social revolution in this State, without distrust and dismay."

It may be noted for the record that these revolutionists, of whom David Dudley Field was one, had recommended a simple

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¹ Address delivered to the Student Body of the College of Law, West Virginia University, April 24, 1952.
² Vice Chancellor and professor of law, University of Pittsburgh.
³ Report of the Judiciary Committee of the New York Assembly to Continue in Office the Commissioners on Practice and Pleadings 14, 15 (1849).
form of indictment which, over thirty years later and after its enactment by eighteen other states and territories, was finally adopted without a murmur by the New York legislature. But the attitude of the lawyers and judges who made up the judiciary committee was all too typical of that which then prevailed and which to a very considerable extent may still be found among members of the profession.

Of course it would be unjust to attribute this attitude to American lawyers exclusively, for they followed the best British tradition. At least from the time of Lord Coke the common law had been regarded as the perfection of human reason and obviously starting from that premise a dim view would be taken of legislative proposals to alter it. Indeed, on the theory that many a true word is spoken in jest, it may be said that the position of the common lawyer was epitomized in the lines of W. S. Gilbert:

"And while the House of Peers withholds
Its legislative hand,
And noble statesmen do not itch
To interfere with matters which
They do not understand,
As bright will shine Great Britain's rays
As in King George's glorious days."

The causes of the situation may be difficult to establish precisely but several can be suggested. Perhaps the most obvious is the vested interest of the legal practitioner in the body of knowledge which he has acquired through years of study and practice. When one has, for example, mastered the intricacies of pleading or the details of a common law conveyance, he does not view with equanimity the passage of laws which make it possible for the neophyte to compete with him on equal terms. Almost all "reform" legislation in the procedural field has encountered opposition based on no higher plane than this, although not often expressed in as blunt language. In addition, the prevailing philosophical notions of the nineteenth century which had great influence on those who until recently were leaders of the bar, tended to discount the efficacy of human effort in remedying social or economic situations. If one views the development of political institutions as merely the unfolding of history or the gradual evolution of custom, one is

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5 *Iolanthe*, Act II.
bound to regard legislative alterations as ephemeral and impertinent attempts to interfere with destiny. This idea, I regret to say, probably persisted in law schools longer than anywhere else. Although three decades of the twentieth century had passed by the time I finished law school I can well remember the repetition of what was even then the old law, "Don't bother to learn legislation, for if you do, tomorrow the legislature may repeal all you know." I have reason to believe that the point of view of which this is an expression has not entirely passed from the educational scene.

It would not, however, be either fair or correct to suggest that the hostility of the common lawyer to legislation was based entirely either on selfishness or philosophical error. It is certainly true that much of the legislative output has been of such poor quality as to justify a lack of enthusiasm for it. The thousands of cases in the books dealing with statutory interpretation stand as monuments to inept and sometimes downright clumsy draftsmanship. The session laws of every state are repositories of experiments perhaps noble in purpose but certainly enacted without investigation or thoughtful consideration. Wisdom is no more the necessary companion of statute law than of the rules developed by judicial decision.

In spite of the hostility with which it has been regarded, and irrespective of the reasons for the attitude, legislation has, I believe, always been of much greater relative importance than extremists among the common lawyers have been willing to admit. Even in the nineteenth century, a substantial body of enacted law regulated large areas of human activity and surely in colonial days the bulk of legal rules was expressed in legislative rather than decisional form. The orthodox view that legislation was of negligible importance was departed from every day by the practitioner who had constantly to resort to the statute book in advising his clients. However, it is probably fair to say that in a relatively static period the need for legislation is relatively slight.

On the other hand as civilization grows more complex and as more and more seems to be demanded of government, legislation must assume an increasingly dominant character. Indeed, as T. E. Holland puts it, "Legislation tends with advancing civilization to become the nearly exclusive source of new law." This is due in part to changes in social policy so abrupt and drastic that they

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JURISPRUDENCE 62 (1st Am. ed. 1896).
cannot be accommodated by the gradual expansion of judicial precedent. One of many examples is to be found in the relation of master and servant where the common law of an earlier age was unable to align itself to the rapid economic and social changes of the industrial revolution. When rules which may have had merit in a home-industry, horse-and-buggy economy were applied by the courts to large industrial enterprises employing thousands of workers public opinion demanded a change and this change was effected through statutes rather than through judicial decision. Particularly was this true with respect to the recognition of the principle that industry should bear the cost of injuries to workers irrespective of fault, an idea which it might have taken generations for the common law to receive without legislative assistance.

The increase in legislation has also come about because of the concern of government with areas which were either unknown to the common law or dealt with in the most rudimentary fashion. We have become so accustomed to legal controls of social and economic relations that they may seem as familiar and time-worn as the most ancient rules of decision. And yet it is fair to say that within the professional lifetime of many who are still far from decrepit, a virtual revolution has been wrought in connection with accepted concepts of governmental functions. For example, programs of social security, including unemployment compensation, old age assistance, survivor insurance and minimum wage requirements have become established throughout the United States. The whole area of labor relations has become subject to regulation by public authority. Economic controls such as minimum and maximum price regulation, the limitation of production, the imposition of marketing quotas and the allocation of materials have become common. Trade practices, once limited only by rudimentary notions of common law fraud are now minutely regulated and public utilities are subject to extensive and continuous supervision by governmental agencies.

Whether we approve of all this is beside the point. Regardless of any desire we may have to return to the days of our forefathers, we may not too rashly assume that a substantial amount of governmental regulation is here to stay and that changes in the party in power will at the most bring about differences in emphasis rather than a complete reversal of trends. A society as complex as ours which at the same time is so much an economic unit can
scarcely hope to exist under a legal system designed for far different 
and more simple conditions.

If the foregoing statement is true, it is of profound significance 
to lawyers. Traditionally in America, as well as in other democratic 
nations, the lawyer has assumed a dominant position in the conduct 
of public affairs. The observation of de Toqueville, although it 
has become familiar through constant repetition, still should be 
brought to mind. You will recall that in his Democracy in 
America\(^8\) he says:

"The profession of the law is the only aristocratic element 
which can be amalgamated without violence with the natural 
elements of democracy . . . . I cannot believe that a republic 
could subsist if the influence of lawyers in public business did 
not increase in proportion to the power of the people."

I am not sure that the influence of lawyers has increased as 
de Toqueville imagined. In fact I sometimes believe that as a 
class, members of the legal profession are relatively less important 
than they were more than a century ago when the statement just 
quoted was made. Their innate conservatism has in my view 
blinded them to some of the opportunities and obligations which 
are rightfully theirs. This can be illustrated in part in purely 
economic terms. During the past half century members of the bar 
have passively surrendered vast areas of tax practice to so-called 
consultants whose background in accounting has given them some 
claim to competence in the field. Practice before many adminis-
trative bodies, notably in the area of transportation, is largely 
conducted by laymen with a degree of specialized knowledge. 
Another group of alleged experts is in the process of occupying the 
field of labor relations. Other examples will readily occur to you.

You will note that in each of these fields the basic law is statu-
tory and the basic practice is before administrative tribunals rather 
than courts. I suggest to you that the historical attitude of the 
common lawyer toward legislation and the legislative process has 
tended to blind many members of the profession to the realities 
of modern society and has in turn tended to deprive society of the 
benefits which the trained lawyer can confer. Although from the 
standpoint of the lawyer's immediate self-interest this is most 
apparent in the area of counseling and litigation, I believe that it 
is of primary significance with respect to the formulation of legis-
lation and it is this aspect of the matter that I propose to discuss.

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\(^8\) Vol. 1, c. 16.
At the risk of unnecessary repetition, let me state some premises which are implicit in what has been said thus far. The complexity and economic unity of society have created social problems which demand the intervention of government for their solution. Governmental action in a democracy is ordinarily founded on enacted law. It is therefore inevitable that our age should be characterized by an increase in the amount and scope of legislation. This legislation to a considerable degree has displaced the common law as the framework of social organization.

I am now going to make a statement which will impress you with its novelty and daring. It is this. A legislative program should not be undertaken unless someone has thought about it. Furthermore, when policy decisions have been made and are ready to be translated into statutes, those statutes should be drafted in the English language and prepared by persons who not only have attained competence in the use of the mother tongue but who also are aware of the implications of what is being done in terms of its effect on the legal structure as a whole. In short, the preparation of legislation is a task which requires knowledge and specialized skill far beyond that which is often available. But if anyone can furnish the knowledge and the skill it is the lawyer who is aware at once of the opportunity and the obligation which await him.

Much might be said simply of the arduous task of the draftsman who attempts only to frame in appropriate language the ideas and policies of others. It is enough perhaps at the moment to point out that we have now fairly well accepted the idea that the art of statutory drafting is a specialized one requiring skills beyond those of the ordinary practitioner. In the federal government and in some of the states specialists are retained on a full time basis to prepare legislation in this sense of the word and it is probably fair to say that the quality of our statutory output has improved appreciably within the last quarter of a century. Although the situation is still far from perfect it is definitely true that the techniques of drafting are being subjected to constant study and criticism and that the place of the professional draftsman has been made secure.

But, important as this may be, there is a more significant area which has scarcely been explored. This is the area of scientific, organized research leading to the enactment of thoroughly considered and objectively valid measures for the betterment of man-
kind. Here the role of the lawyer, as yet vaguely defined and only partially realized, can be of the most profound importance.

It is a generally accepted and probably valid proposition that in our present society progress in the so-called natural sciences has far outstripped that in other areas. The social scientist, confronted, for example, with the achievements of those who have released the energy of the atom and have made theoretically possible the destruction of the entire human race, can only blush in shame. We have not organized society with the same grim efficiency with which our colleagues have marshalled the forces of nature. A civilization completely equipped with television, automatic washing machines and juke boxes is also characterized by social maladjustments, frustrations and neuroses. We have conquered nature without mastering ourselves.

Of course constructive work in the social sciences involves difficulties which are not always understood by those who criticize our lack of progress in the area. Man is the most complex of beings and the task of dealing with men in the mass is infinitely more difficult even than that of dealing with man as an individual. In spite of centuries of study our knowledge of the forces which motivate and control human behavior continues to be rudimentary. And even though knowledge may be extended, the task of making it effective in directing the conduct of men and women who cannot be placed in test tubes or required to arrange themselves in neat rows is in itself one of almost insuperable difficulty. Particularly is this true in a democracy where the people are rightfully jealous of their freedom and resentful of attempts to impose restrictions upon it.

Another difficulty lies in the attitude with which we approach research in the social sciences. After centuries of struggle we have probably reached the point where no one objects to the search by a natural scientist for the truth or to his right to publish the results of his inquiries. This has not always been the case. From time to time in the history of scientific thought men have been denounced, abused and in some instances punished for denying such apparently self-evident propositions as, "the world is flat," "yellow fever is transmitted by the night air," "diseases are best cured by blood letting" and "micro-organisms do not exist." It was only after science became definitely committed to the experi-
mental approach that it progressed much beyond the point to which it had been developed by the Greeks of classical antiquity.

There are, of course, obvious reasons why the techniques of the laboratory do not lend themselves to sociological experimentation. Some of them have just been mentioned. But the difficulty which the social scientist encounters is not primarily one of technique but something which goes far deeper. Basically it involves a refusal or at least a reluctance on the part of society to recognize the fundamental importance of free inquiry and free discussion in areas of social and economic controversy. This is particularly true when questions are raised regarding the forms and methods of government, especially at the present time when the test of patriotism seems to be merely a willingness to participate in a ritualistic protestation of adherence to accepted beliefs.

If the difficulties to which I have referred are insuperable there would, of course, be no point in continuing the struggle and even less point in my continuing these remarks. There are, I believe, indications that at least in limited areas the public is ready to encourage a thoughtful investigation of social problems and an attempt to solve them through the enactment of appropriate legislation. Significantly these areas are often those in which the contributions of the natural sciences can be utilized. This is notably the case in the field of public health and industrial medicine. Beginnings are perhaps being made in connection with the problem of the sexual psychopath and in the more general area of juvenile delinquency. It may be true that the stage is set for a more general recognition of the scientific approach to the solution of social problems.

Such recognition, if it comes, is, however, only the beginning of the answer. As I implied a few moments ago, knowledge in the areas which we have been considering can be useful only to the extent that it can be translated into a coherent charter for effective action. This means that someone must undertake the job of reducing the conclusions of scientific experts to statutory language. That person is the lawyer.

I am now touching on a matter which is one of my pet enthusiasms and with which I have bored audiences like this on numerous occasions. But since you have asked me to come here you have assumed the risk of listening to a story which may be new to you although it is becoming old to me. My thesis, briefly, is
this. Lawyers are experts in at least three things apart from the substantive law. The first is assimilating and explaining the technical knowledge of other professions. The second is the adjustment of human relations. The third is the use of language to convey as well as to obscure meaning.

If, then, a problem arises which demands technical knowledge and governmental action for its solution it seems obvious that the skills of the lawyer must be brought to bear upon it. He must, however, be a special kind of lawyer. I should say, first, that he must be trained in the technical aspects of legislation in the sense that he must know something of the rules of drafting and must understand the particular constitutional problems of his jurisdiction. But this is only the beginning. Above all else he must be sympathetic with the purposes of the program in which he is called upon to participate. He must have a least a modicum of respect for the wisdom and judgment of the other professional men with whom he works. He must have patience enough to convince them that constitutional requirements, particularly those of definiteness and certainty, actually mean something and that it is important to express ideas with clarity and precision. He must be critical enough to help the experts to think through their own problems but tactful enough to avoid discouraging them.

A final question remains. Are the law schools producing lawyers with these characteristics? If they are, I fear it is by accident rather than by design, for there are few if any institutions which have stressed the matters which I have been discussing. Perhaps the qualities to which I have referred come with maturity and experience rather than through instruction. In a sense this is true of all professional competence. But some things can be taught and I think that at least a beginning can be made in helping law students to develop in the direction which has been indicated.

Is it worth while for law schools to make the attempt? I think it is, even though the number of graduates who will follow the career of the draftsman may be small. Almost all lawyers have occasion now and then to participate in legislative programs either as representatives of private interests or on behalf of civic groups. Indeed the prestige which the legal profession has enjoyed has been due in no small part to the willingness of lawyers to devote themselves to the public interest without expectation of direct financial reward. If that prestige has lessened, if the position of the
legal profession has deteriorated, part of the reason may be that we have neglected to develop the knowledge and skill which we need to fulfill the obligation which we owe to our communities, our states and the nation. Law schools, in encouraging their students to gain that knowledge and skill, can do their part toward restoring the legal profession to the pre-eminent position which it ought to hold.