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THE PRACTICE OF LAW*

CHARLES M. LOVE**

I am conscious of the honor of addressing this Law School Alumni Association on this happy occasion twenty-eight years after this institution decided to confer upon me the degree of LL.B. and thirty years after receiving my A.B. degree.

I presume that every lawyer who has been in active practice for more than a quarter of a century frequently looks around at his contemporaries and says to himself with reference to the past, "there were giants in those days", those days meaning the time of his boyhood, preparation, admission to the bar, and his early practice. This kind of thing is, of course, not fair to the present bench and bar, because all of us are inclined in retrospect to magnify. Realizing this, I have spent some time trying to make as fair as possible a comparison between the present bench and bar and that of the past.

Realistic study of this kind will disclose that the lawyers and judges of today are at least as good workmen, technicians and mechanics as those of the past generation. I think this is particularly true in West Virginia where so far at least we have the common law and common law pleading, modified of course to some extent by statutes and court rules. I do not believe it is necessary to prove to this audience that West Virginia has had far more than its share of lawyers of national reputation and importance, and I attribute this not only to the force and power of the character and personality of these men, but also in a large degree to the fact that they understood common law pleading and the historical and logical background behind it. I am speaking of such judges as Brannon, Poffenbarger, Woods, Kenna, Holt, Haymond, Meredith, Kittle, Fisher, Ritz, Goff, Dayton, McClintic, Northcott, and others, all known to some of you, and of such lawyers as the names of Howard, Knight, Matthews, Mollohan, Price, Holt, Anderson, Campbell, Baker, Gilmer, Caldwell, Blue, Cornwell, Wyatt, Switzer, Gibson, Davis, Sanders, Dayton, St. Clair, Coniff, Osenten, Dillon, Lee, Hubbard, Byrne, Riley, Chilton, Nesbit, Ambler, Marcum, Bell, White, Steptoe, Faulkner, Scott, McCue, Hoffheimer, Jackson, Young, Ferguson, Hogg, Enslow and Willey, bring to mind, and a host of others.

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But nobody in considering even the incomplete list here would think of these men as being merely workmen, technicians and mechanics. Many of these men never attended a law school, and while they were good workmen and technicians, they were no better and probably not as good technicians as many of our contemporaries.

I am proud of the fact that I am a graduate of the College of Law of West Virginia University, and I know many of you share that feeling. What I am about to say is not in criticism of my alma mater or of any other class A law school, because I believe such schools are doing and doing well and perhaps better than was ever done before that which they are intended to do, that is to say, to teach the mechanics and technical aspects of law practice. Most law schools today also attempt to teach something of the historical background and ethics of our calling. But, speaking broadly, I think it is fair to say that the present emphasis in law school is to stress what the law is and how it may be found, and I expect this is as it should be. In other words, we are turning out fine solicitors, but not later developing many of them into barristers, as our English brothers use such terms.

I have never encouraged a younger person, including even my own son, to undertake the study of law. The practice of law is not a trade, and it is not a very good way to make a living when its monetary rewards are compared with those in other fields. On the contrary, it offers rich rewards in the satisfaction of accomplishment. For this reason, I have encouraged many young men who had already decided to study law to continue their studies to become lawyers. The best of these were young men whose paramount passion, in my opinion, was to find justice.

Any failure then is not with the law schools, in my opinion, but with the preparation prior to law school and the continuing education of lawyers after leaving law school. Taking these problems up in order, it seems to me that the minimum requirement for entrance to law school should be a baccalaureate degree in the arts and in which undergraduate work the emphasis should be upon English and other languages, history, mathematics and the rudimentary sciences.

It is obviously impossible for a lawyer to write a good contract about something he knows nothing about. Hence, his general preparation should be of the broadest possible scope. And, of course, he should know more about words and the use and meaning of words than the butcher and the baker and the candlestick maker,
because the lawyer's tools and materials are exclusively words. As Sir Walter Scott had Counsellor Pleydell say in "Guy Mannering" while pointing to his books: "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect."

Defects in preparation, however, can be made up by studying and reading. This was done by President Lincoln, John G. Johnson and Martin W. Littleton, to mention a few lawyers of national reputation, and by such West Virginians as Fred O. Blue, W. E. R. Byrne, and others who were as familiar with good literature and especially with Shakespeare and the King James Version of the Bible as most of us are with our own tax returns, and who were as much at home among books as a stableboy is among horses. But the great lawyers last named never attended either a college or a law school.

Let us then proceed to the more serious defect, that of the lack of continuing education of the lawyer after graduation from law school. The good work of the continuing legal education committees of the state and national bar associations is an effort toward solving the problem to which these remarks are directed, but perhaps more effort toward improving techniques.

In dedicating the New York University Law School, Mr. Justice Arthur T. Vanderbilt said, "it is blithely assumed with disastrous results that every student is a born Webster or Choate."

Speaking at the dedication of the new Stanford University Law School in July, 1950, Mr. Justice Robert Jackson observed that "the unsolved problem of legal education is how to equip the law student for work at the bar of the court. . . ." Practice court at West Virginia is an attempt at solving this problem. This matter is pointed up strikingly in Lloyd Paul Stryker's recent book, The Art of Advocacy, which every law student and most lawyers should read. What Mr. Stryker calls "the art of advocacy" is of great importance. But I go farther. A great lawyer should be a great advocate if endowed by the Creator with appropriate qualities, and he should be more. He should be respected as a man and his conduct should be such as will reflect credit upon our profession in his every contact with others.

It is true that a lawyer works for fees, but his work is for others. As an officer of the court, and otherwise, he often works for others without hope of fees. In either instance, however, he is working for others, and he owes to such others his loyalty and
his best efforts to establish and maintain justice. He must have the interest of his client and society primarily in mind at all times, with the purpose of bringing about a reasonable and equitable conclusion as the result of fair play. Otherwise he is following a trade, not a profession.

I think I should also mention that I have never known a lawyer of much consequence who did not give some of his time and talents to the religious and civic work of his community. This is just another phase of his work, it is work for others, which training in the law has prepared him to perform.

It has been my experience in West Virginia that the bench and bar have sought justice generally speaking and have established it. We are not afflicted in West Virginia with congested dockets resulting in delay of trials, which may amount to denial of justice and is just ground for complaint in other jurisdictions. Hence, a change in pleading procedures might be of assistance to lawyers but would, in my opinion, pass unnoticed by the public, as our present system of procedure is dispatching the business of the courts as rapidly as can be conveniently done.

Almost every community in West Virginia has been blessed with a good bench and bar. Of course, there are exceptions and our public relations have deteriorated in the last few years. One of the leading columnists on the national scene has described us thus: "The law is a foul trade because the nature of the law and the tricks of court practice compel a lawyer with decent instincts to try to out-shyster the worst lest he forego a dirty but legal advantage."

All of us have heard lawyers referred to as parasites on the body politic. No doubt some lawyers are. So are some of every calling. But they are the insignificant few in relation to our profession. However, we are sometimes judged by the actions of the few. The professional conduct of an ethical lawyer is no more newsworthy to the public press than the conduct of a virtuous woman. For some reason, however, any dalliance along the primrose path by a woman or unethical conduct by a member of the bench or bar is a matter of great public interest, human nature being what it is. It would, therefore, seem to behoove us to take stock and see if perchance there is room for improvement.

I want to suggest that, inadvertently perhaps, we have overlooked in the preparation and training of our applicants the obvious, in our quest for less important improvements. I make this statement advisedly, because we now require three years' study
of books (in law school), whereas in the era which produced the
great lawyers of the Revolution, lawyers could not have studied
more than 48 books if they had available every legal treatise
printed prior to 1774, or so Dean Pound says.¹ Dean Pound refers
to James, A List of Legal Treatises Printed in the British Colonies
and the American States before 1801, and quotes Professor James
as saying:

"In the hundred years between the publication in 1687
of William Penn's gleanings from Lord Coke and the issuance
of the American editions of Buller's Nisi Prius and Gilbert's
Evidence in 1788, not a single book that could be called a
treatise intended for the use of professional lawyers was pub-
lished in the British Colonies and the American States."²

And Dean Pound adds, "Even as late as 1781 students' notes might
have to be used for important English decisions."

I mention these facts only to show that great men became great
lawyers without the great libraries of the present, and to emphasize
the fact that the great libraries and the wealth of printed matter
which we now regard as indispensable will not alone, even when
used industriously by the neophyte, suffice to make him a great
lawyer. I appreciate, of course, that under modern conditions a
lawyer unfamiliar with the use of the aids of great publishing
houses could not hope to compete. My point is that books and
book learning are not sufficient in themselves.

In this connection it is also interesting to note that 25 of the
56 signers of the Declaration of Independence in 1776 were lawyers,
and so were 31 of the 55 members of the Constitutional Convention.³

Some of these lawyers, of course, prepared by study and resi-
dence at the Inns of Court, but more of them by study in the office
of an older practitioner. As recently as my admission to the bar
in 1926, there were some applicants studying in law offices and
many of the leaders of the bar had not attended law schools. Of
course, many of them had, but it is difficult to discount such leaders
of the Charleston bar as E. W. Knight, Judge Poffenbarger, Fred
O. Blue, W. E. R. Byrne, and many others, who did not attend
a law school and yet attained an eminence at the bar which most
of us look toward wistfully.

¹POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 133n. (1953).
²Ibid.
³This is all the more remarkable when we remember, as pointed out by
Dean Pound, that "Unhappily, a large number of the older and stronger lawyers
were loyalists and left the country or ceased to practice." Id. at 178.
Also, prior to the concentrations of our population in the larger centers, promptly followed by a concentration of lawyers in the same centers, it was customary for all lawyers, both young and old, to attend the circuit court when it met three or four times a year. I do not mean that they attended the calling of the docket on the first day of the term. They attended every day, and of course the less business a young lawyer had at such term, the more time he had to sit in court and watch the older lawyers practice. In addition, the senior members were always available for help and advice, and I think this latter characteristic of the bar is still extant and a matter of which the bar may be justifiably proud.

The law schools became stronger and better, and I now know of no person anywhere preparing for the bar except by way of law school. In fact, in West Virginia I believe three years' attendance at law school is a prerequisite to taking the bar examination. In doing all this good for the law schools and with the law schools and by the law schools, we somehow forgot or overlooked the obvious, that in some manner a young man, knowing either more or less law, had no way to learn about the practice of law, and what was expected of him by the bench, by his brother lawyers and by the public from which he hoped to gain clients and make a living. Add to this the hard facts of economic necessity, particularly with respect to those young men coming to the bar who were already married, which class greatly increased after the second world war and the late police action in Korea, and you have our present situation with respect to some of our younger practitioners. They are well trained in the use of law books, they are serious students, their opportunity for practice is limited, they want to practice law, and they must somehow make a living.

Add to this situation sometimes an inept or inexperienced judge, and you will have before you the situations which are causing concern to the bench and bar and public in some communities of this state. We have in West Virginia lawyers well trained in the use of law books who do not know how to practice law. To allow this condition to exist indefinitely reflects as much upon the bench as upon the bar, because as the late Judge H. H. Rose used to say, "The bench reflects the bar and is ordinarily no better and no worse than the bar which practices before it." This is a serious situation because in a democracy the lawyers have always furnished a large part of the leadership in public affairs, and this is necessarily so and must continue to be so, in my opinion. Without the respect of the public we will lose this leadership.
Shakespeare knew this as far back as the Elizabethan era when he has Dick the butcher say to Jack Cade, when the latter was preparing to overthrow Henry the Sixth and make himself an absolute monarch, "The first thing we do, let's kill all the lawyers."

Of course, a government such as envisioned by Jack Cade and his associates could not exist if lawyers were permitted to live. I suggest that Jack Cade's method is not the only way to destroy the bar.

It is my opinion that with all its faults we enjoy the best system of government ever devised by man with the help of God. I also believe that the form of government we enjoy would have been impossible before the advent of Christ, and it is significant that it did not come into being until the resurgence of the American bar just prior to the Revolution. "Lawyers as a class were very unpopular in the earlier colonial history."

And the phenomenon of the attempt to administer justice without lawyers, a feature of all Utopias, a feature of all revolutions from Jack Cade's rebellion to the French revolution, to the Russian revolution, is universal and was to be expected in colonial times, and may be facing us again.

Mark you, I do not claim that the lawyers invented the idea that individuals are more important than states and that a state only exists for the benefit of its subjects. But I do say that lawyers spelled it out in the Declaration of Independence and in the Constitution and in the Bill of Rights and elsewhere, so that it cannot be taken away from us by duly constituted officials.

I am sure that you have noted, with regret, as I have, the lessening of participation by lawyers in negotiations on every plane from international conferences down to labor contract negotiations. This is said without any intended criticism of business men and military leaders. I am merely pointing out the fact that from the Revolution to the end of the first quarter of the twentieth century such negotiations were largely handled by the members of our profession, who should be qualified by training and experience to handle such matters.

Now, as I have pointed out, our government was largely moulded by lawyers, and if it is to endure I think it will have to be with the help of lawyers, and hence I am bold enough to say, brothers, we are about the business of the king, or we should be, and the first business of the king is to establish justice. The Pre-
amble to the Federal Constitution so states. "We, the People of the United States, in order to form a more perfect Union, establish Justice . . . ."

Domestic tranquility, common defense, general welfare and other matters follow this. But the first purpose stated by the framers of that document after the formation of the Union is to "establish Justice". I cannot believe that the consecrated men who wrote and approved the Constitution and its Preamble did not do this advisedly and because they recognized it as first in importance and second only to the formation of the Union itself. If I am right about this, if this is our business, if we are officers of the court to establish justice, then to such extent we are set apart from other men who may have important business but not the first business of the state, such as we have, to establish justice.

I have said these things which you all know in order to remind you of the importance of our calling, while I make some suggestions which I hope may be well received. First, I want to recommend that we seriously consider the abolishment of the so-called diploma privilege. Only four other states yet retain this perquisite for the graduates of their respective state colleges of law. I think a law student who has the advantage of study here, and particularly Pleading and Practice under Mr. Carlin, has perhaps more advantage than he is entitled to over graduates of other schools anyway. Certainly a graduate of this college should have no trouble with the state bar examination, and this artificial distinction should probably be removed.

Second, and of more importance, I want to suggest, in order to make up for the lack of law office training and court experience from which applicants for admission to the bar now suffer, a short apprenticeship.

I find at least five states of the union now require an apprenticeship. New Jersey requires a nine-months' clerkship in the office of a practicing lawyer prior to admission, and Delaware, Pennsylvania, Rhode Island and Vermont each require a six-months' clerkship. At least one of them permits such clerkship to be served during the summer vacations while attending law school.

I admit this is a feeble start toward actual training in the practice of law, but it would be a beginning in the right direction and preclude the oddity of a lawyer arriving at the bar, as some-

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6 Alabama, Florida, Mississippi and South Dakota.
7 RULES FOR ADMISSION TO THE BAR (1953).
times happens, without having any prior contact with either the courts or an experienced lawyer.

After saying all this, I suddenly realized that what I am talking about is the spirit of the law, and that somehow, some way, all applicants, and not just a majority of them, must be taught this, and that what I am trying to say was said in one sentence by a student of Gamaliel almost two thousand years ago. I am, of course, referring to Paul when he said, "For the letter killeth, but the spirit giveth life." 8

And to paraphrase only slightly, I am sure we would all say with the psalmist, "For a day in thy courts is better than a thousand." 9

8 II Cor. 3:6
9 Eighty-fourth Psalm, King James Version.