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Law Day Address

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Commentary

By Edward H. Levi*

Law Day Address†

This is a special day for law and for the legal profession. The day has added meaning for the Nebraska bar and the University of Nebraska-Lincoln College of Law. You have dedicated a new law school building to the service of the profession, a building where new attorneys will be introduced to what Sir Edward Coke called "the artificial Reason and Judgment of the law."¹ And as they master it, they will become members of a proud and great profession.

But Law Day is not solely a celebration of the legal profession. It is intended for our entire society because law by its virtues and by its defects affects all of us—the powerful and the weak, the learned and the unlearned. We recognize this universality of the law when we speak of the sovereignty of the rule of law under which we all live.

The law which is sovereign is not complete, and it is not perfect. If we measure law by justice, we find it wanting, for we know there are many injustices. Also there is great cynicism about the law now, as there has been at other times. Some see it as merely an instrument in the hands of the powerful for accomplishing their personal aims. Even if we think of law as a noble instrument of society for maintaining civility, we must pause at lack of success. Crime rates, a measure of our lack of civility, have been continuously on the rise. The Federal Bureau of Investigation's latest figures show that the rate of serious crime—murder, forcible rape, robbery, aggravated assault, burglary, larceny, and auto theft—was 17 percent higher in 1974 than in 1973.² The Bureau has been keep-

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† On May 1, 1975, Law Day, the new building for the College of Law at the University of Nebraska was dedicated. The culmination of the activities marking this event was the address given by The Honorable Edward H. Levi at a dinner held that evening. This speech is reprinted here as it was delivered.

1. C. BOWEN, *THE LION AND THE THRONE* 305 (1956).

2. These figures are in the FBI's Uniform Crime Reports for 1974.

ing those figures for 42 years, and it has never computed a greater annual increase than that. The FBI figures do not tell the whole story of crime, and the whole story is by no means more pleasing. A study by the Law Enforcement Assistance Administration³ has indicated that much crime still goes unreported; that is, it does not even appear in the figures I have cited. And the statistics do not accurately reflect the growing fear the increasing crime rate has inspired.

Of course, the law is imperfect. It is made by man. It reflects his failings, his human weaknesses. But it also reflects his powers and wisdom. It is made by man, and it must contend with the forces man sets against it. It must contend with our conflicting desires and ambitions for power and material goods. It exists in a human society where each man does not necessarily judge correctly in his own cause, where resources for which men compete cannot satisfy them all, where factionalism is probably the inevitable price of diversity.

It is not necessarily a reproach that our society has not fulfilled all its aspirations. In many ways we have progressed far beyond the dreams of the founders who set our law into motion—in our size and numbers, in the distribution of material advantages, in the access to education and in the cultivation of the arts. In many ways our aspirations have changed and will continue to change. Even the good society—perhaps because it is good—cannot ever be wholly satisfied. Indeed the good society must have ideals beyond its attainment. A vital society inevitably has problems which must be solved. It is the responsibility and the joy of the lawyer to try to solve them.

Our society and its law have difficult problems to face today. Not the least of the problems is the increasing resort to the law to settle differences among individuals and organizations once resolved by informal relations of trust and comity. The courts clog with lawsuits brought either because people do not believe they can make their grievance known any other way or because they don't want to give up a single chip in the process of bargaining for an advantageous settlement of their claim. The lawsuit is no longer the last resort. For those who think they are powerless in the face of impersonal and indifferent institutions, the lawsuit is the only resort. And for those who are well-schooled in the resolution of disputes, the lawsuit is a method, not so much for having a tribunal resolve an issue as for forcing a resolution out of court.

3. U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, CRIMINAL VICTIMIZATION SURVEYS IN THE NATION'S FIVE LARGEST CITIES (April 1975).

As the system of civil justice has become cluttered, the criminal justice system has fallen into incredible disrepair. The burden of increasing crime has put pressures upon the system which it is incapable of supporting. Criminals have learned to use the inefficiency of the system to their own advantage and the result is grave. An unpublished study⁴ conducted in one major American city showed that only four percent of the persons arrested for a felony were actually convicted of that felony. Even fewer ever went to prison. FBI statistics show that there are only 19 arrests for every 100 serious crimes reported. The lesson for potential criminals in this is clear: that they can use the law's weakness to avoid being punished. The deterrent force of the law falters upon that lesson. The crime problem spirals upon itself. If the criminal justice system weakens the deterrent force of the law, then there is more crime. And that extra crime puts its burden directly back on the already overwhelmed system.

The law has also outgrown many of its traditional categories as we have called upon it to solve complex, technological problems. For example, while once the law of nuisance served as the bulwark of environmental protection, today its easy maxims are not nearly enough. The law is now called upon to discover what may harm us, strike a subtle balance of harms and benefits, and recognize that the conduct of any one of us may be trivial individually but devastating in the aggregate. The law must concern itself with events so great as an accidental burn-out at a nuclear power plant and so small as the tiny bursts of vapor from the nozzles of aerosol cans. Of course, the law has always been general, has always applied to the great and the small. But the burden put upon our law by scientific knowledge about the consequences of our acts and the technological advances that raise ever more complicated questions of control cause some to yearn for the return of innocence. They might wish for the return of an era in which the threat to our environment might again be as obvious as a chimney belching black smoke now seems to us. But that era will not return. Rather what we must now reach for is a much more delicate balance of interest.

There are problems, indeed, and it is because of these problems, not in spite of them, that the rule of law is so central in maintaining progress. For the rule of law requires that we meet these problems by applying to them our deepest human values. What then is the rule of law?

4. These figures came from a study by the VERA Institute in New York City. They have not been published.

It is often said upon solemn occasions such as this that ours is a system of laws and not of men. The idea of the rule of law developed in the Middle Ages in an other-worldly context that could distinguish laws from men. In the 13th century in England Bracton argued that since a universal law rules the world, even kings and rulers were subject to the law.⁵ British history gave content to Bracton's abstract argument, and by the 16th century the medieval idea that a universal law governed the world supported the growing belief in the supremacy of the common law.

That belief is really quite extraordinary. Its development was hardly irresistible. Lord Coke himself resisted it while Attorney General only to advance it powerfully when he became a judge.⁶ On a Sunday late in 1608, at Whitehall Palace, Coke, then Chief Justice of Common Pleas, stood before King James I as the King assured him that the King would "ever protect the common law." But Coke replied, you will recall, "The common law protecteth the King," and James flew into a rage, calling Coke's argument traitorous for it set law above the monarch. By Coke's own report, the King proclaimed that since the law was founded upon reason, the King's reason could be the final source of law. To that Coke replied that the King had natural reason as well as any man but that "his Majesty was not learned in the Laws of his Realm of England; and abuses which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects are not to be decided by natural Reason but by the artificial Reason and Judgment of the Law, which requires long Study and Experience before that a man can attain to the cognizance of it."

The King's reply was explosive. He threatened to strike the Chief Justice, and Coke fell prostrate before the King's majestic wrath.

But the next day, from the Bench, Lord Coke issued an order under his seal which again asserted the supremacy of the common law.

Over time Coke's views as to the supremacy of law prevailed and even the Crown's prerogatives became so circumscribed by Parliamentary and judicial limitations that those which remained could only be described as existing as an aspect of the common law exercised by the Crown only because the law allowed it. What does the rule of law mean today? It cannot mean that the law operates independently of men. It must mean that there is some common

5. E. WADE & G. PHILLIPS, *CONSTITUTIONAL LAW* 49 (5th Ed. 1931).

6. See BOWEN, *supra* note 1, at 302.

center of agreement that informs the conduct of all men who work with the law. Sometimes the rule of law is taken to prohibit discretion in the application of government power. But the law works through words, and words themselves invite discretion in their application. The rule of law, if it means anything in this regard, refers to the disciplined application of words or ideas to the situations they are called upon to influence. No rule is automatic in its application. To a greater or lesser degree the step of determination is always required.

As I said at the outset, the idea of the sovereignty of the rule of law recognizes the universality of the law's effect. It also recognizes the universality of the manner in which law develops. Law is not only the product of lawyers. The whole society uses and interprets the law. And because of that, the law expresses something deep and important about the values we hold as a people. It expresses our strongest commitments and the highest aspirations. Law is not everything in society. The law is only one of a number of institutions through which we express ourselves and which in turn influence us, maintain our customs and change our habits. Thus law takes a place along with family structures, religious beliefs, the expressions of art and the explanations of science. Law embodies the values common to many of those institutions. Law, as the custodian of the historic rights mankind has developed for itself, must never be regarded as the tool of the power of the moment.

The public, the press, the academic community, the artists, all by their assertions and conduct inform and develop the law. As new human values and ideas make their way into common acceptance, they also make their way into the law which translates them into words by which common conduct may be governed. By guiding common conduct, by speaking in words, the law has its own power to educate, to alter commonly held views, to shape the thinking of the public whose thinking in turn shapes the law.

As the law is the custodian of historical value, the legal profession has a special role as the trustee of the law. But what is the nature of the legal profession? It has many different roles.

If one reaches back into legal history the difference between courts and legislatures was much less marked than it is today. Parliament still functions as a high court, a reminder of the time when the distinct functions of legislatures and courts were seen as one. Today the courts and the legislatures operate quite differently, representing separate aspects of the legal system. Nevertheless, the distinction between judging and legislating is quite old. Even though legislatures do sometimes merely restate the law and even

though judges sometimes change it, there is a central difference between applying the law as a judge and changing it in the public interest as a legislator. The legislators are guided, of course, by their vision of the Constitution's meaning and by a sense of duty to lead and to speak for their constituents as the constituents would speak were they present to be informed by debate in the public forum. The question of change is before the legislator and the fashioning of the public will must be their goal. Legislatures in large part are the forum for public involvement in its most immediate, changing and diverse form.

Courts recently have on occasion been places of high public drama, and modern procedures allow great diversity of interest to be represented in cases which would at one time have included only the two primary parties in dispute. Still the courts have a different goal than legislatures. Theirs is not primarily to shape the public will although they do this somewhat. And they must display a different sort of reasoning to support their judgment. The power of judges to resolve disputes and speak the law depends in large part upon the unique tone in which they render their judgments. More than any other lawgivers, they derive their power from the acquiescence of others in their judgments. Confronted with the duty of resolving a particular dispute based upon a particular set of facts, the judges must meet the duty by applying resonant rules of general and lasting application so that their decisions will be seen as legitimate. Thus they determine finally the rule of law as it applies among the parties before it, but they state the law knowing that their statement will bear heavily in resolution of future disputes. Though the courts use the language of principle, principles change over time as society reassesses its values and comes to accept new ways of looking at its problems.

Because they phrase their judgments in terms of the reasoned application of principle, too often what courts say has been mistaken for the single voice of the law. Lately the practice has been to go to the judges when legislators and officials of the executive branch fail to live up to their responsibilities. The apportionment of legislatures, the operation of public schools, even the conduct of the war in Vietnam have all been brought to courts by those who would have the judges state the single rule of law. Sometimes the judges have wisely declined to comment. Sometimes they have not. In any case, the appeal to the judges as the only spokesmen of justice results from a failure to recognize the more subtle nature of the rule of law in this nation.

Throughout the history of Anglo-American law there has been a debate over the meaning of justice and its relationship with the

law. The two have been seen as, in some ways, distinct. Justice has many forms. Justice is one of the virtues, to be sure, but in some sense it is all of the human virtues viewed collectively. Justice is the name we give our values, and as such it is the source all members of the legal profession must draw upon.

The lawyer's job is to translate these values into rules. It is to make those rules consistent one with the other in a craftsmanlike manner. It is to try to clarify the ambiguity of words, to use language in the service of values. The legislator has an enormous responsibility in this regard. The effort by Senator Hruska and his staff to revise the federal criminal code demonstrates how that responsibility can be met. Consider the reason why the revision was undertaken.

Over the years the federal criminal law has expanded and changed—partly because Congress has passed new laws and partly because courts, responding to the arguments of private individuals and their attorneys along with those of prosecutors, have interpreted the words written by Congress and set the principled limitations within which Congress could act. The accretion of judicial decisions, congressional statements and patterns of practice by the executive and by private parties, has made the criminal laws unduly complicated, redundant in some instances and flatly contradictory in others.

Senator Hruska has been a leader in the response to the need for revision. It is in part a technical job—fitting the pieces of the code together that they might be consistent and bear a reasonable relationship one with another. But it has been more than a technical task. It has been an effort to go deep into the reservoir of our values and take the measure of the rules that are supposed to embody them. It has been an effort to translate values into law. It has been an example of the highest calling of the legal profession.

It is an enormous responsibility a lawyer bears—to face the most complex and demanding problems that our society faces, to treat them dispassionately but not without feeling, to work with words which demand constant interpretation. Yet it is also his pleasure to do so. It is what distinguished him from others in the system of law he shares with everyone.

The purpose of this day is to honor the law, and the purpose of the law is to try to create the conditions for the just society, for the continual re-examination of our values and the way they are reflected in our actions. It is to the aspirations of the law that, whatever its inevitable current failings and weakness, we may rightly and unhesitatingly pay tribute today.