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The Lawyers' Function Today

Nathaniel R. Howard*

IF TODAY'S STUDENTS OF THE LAW HAD engaged in their same study 600 years ago, the law then taught to them and believed by them would have included some principles, precedents, decrees, and even primary statutes which they have embraced in the year of Our Lord 1958.

Marriage . . . property . . . suppression of crime . . . social taboos . . . certain contracts . . . and other characteristics of today seemed much the same to the lawyers of 1358; and this is a similarity too, that there was eagerness within that group of 600 years ago to become great masters of jurisprudence. They dreamed of leading kings, nobles, churches, and courts to the arrival of the millennium by their skillful interpretation and application of what they had learned.

The lawyers of 1358 probably were in perfect harmony in accepting other law principles long since discarded. They favored the idea of the divine right of kings and queens, and their authority to extend this right to the nobility, but not to the ordinary person, the commoner. The term "citizen" was hardly distinguishable in law. Only "residents" in the law were recognized in these vague legal classes. The lower the individual in the social scale, the more limited his legal status was.

There had dawned, in 1358, a perplexing new theory that the nobility had a natural authority, whether extended by the throne or not. We can imagine the quiet furor with which the lawyers of the 14th century in France, Germany, Spain, England very cautiously examined the elements of this new vested right. It depended a good deal more on a lord's castles, soldiers, and royal in-laws than on any pure theory of law. I say "very cautiously" because it was easy then for a lawyer of too inquisitive mind to end his inquiry swinging from a gibbet or in some dark dungeon. Freedom of thought and speech, constantly

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menaced by thrones, church, nobility, and even the growing mercantile class, seemed a long way off in the future. Yet the lawyers of that day were about as critical of the world in which they lived and practiced as those of today. The practical lawyer reflected that this world, and very likely this society, were the only ones he would ever know. Almost without exception, he was ready to conform. If that was the way things were going to be, that was the way they were going to be.

In 1358 the lawyer could be glad that trial by ordeal had about disappeared, a "trial" in which plaintiff and defendant fought with sword and dagger before witnesses, or a man's private beliefs were tested by his walking across a red-hot plate or swimming for his life with an anvil tied around his neck. Royal and regional courts were establishing some rules of process, testimony, judgment, and precedent.

Most murderers—but not yet the ones of high station—were being detained and punished by society instead of by the victim's relatives. And the influence of the church, that early exponent of social law, was beginning to infuse into the primitive elements and pleadings of law some protection for the clergy, the weak, and the philanthropic.

On the other hand, it was the settled conviction of the upper class that all human beings were born evil and would behave evilly, and that the first function of law was to suppress and punish all evil. Here we hail one of the great differences in law over 600 years. As amoral as present-day societies may be, as much evil as is done by a much larger world population, at least we do not now subscribe to the conviction held in the 14th century that the law is meant primarily to detect the wickedness in every man, woman, and child. In civilized lands we now presume nearly the opposite—that the individual is born free of inherent crime and is guilty of nothing until it is proved. Perhaps this is the greatest single change in the conception of law.

In 1358 punishment was paramount; viewed as practically divinely ordained for all mortals up to the kings. It was the time of barbarous public torture and execution, carried out for example's sake and in order to support the status quo. The world had not yet accepted the idea of the sanctity or even the humane rights of the ordinary individual. This radical change of philosophy as law developed is all the more striking in how it has changed the concept of the agencies of the social contract; then it was royal power and the state that governed, today it is society and the individual.

The changes in the theory of law from that day to this came sometimes vicariously, sometimes accidentally, sometimes courageously, sometimes timidly, and only sometimes logically; just as explorers, who do not know exactly where they are, make their ways across uncharted seas or through trackless jungles. Ages and acts of revolution preceded or accompanied the greatest of these changes, but most of the revolutions were heedless of the theory of law's development. The barons at Runnymede, who wanted a brake on a lunatic king, were hardly legalists. Henry VIII of England forced his revolution not in order to reform law but to satisfy his personal motives.

The American Revolution was full of young lawyers eager to reform things, but they probably would never have been heard of without the economic necessity which lay behind the rebellion of the landowners, merchants, and traders. Before it was ready for statements in law about liberty and equality, the French Revolution promoted anarchy that was the very antithesis of law. Napoleon I needed new theories and concepts of legal authority in order to justify military conquest and usurpation.

Even the greatest British and American constitutional reforms stemmed from factional drives for advantage and spoils. But in all these revolutions, the inevitable desire for freedom progressed, and thus the tenets and principles came into being which bring us to today's political and social theories of equality and individual rights.

The new law of equality and freedom suffered from the counter-revolutions of the 19th and 20th centuries. The standing joke of one-hundred years about Latin American dictators pointed up the results of "liberation" in colonial countries. Some of the counter-revolutions however, did not inflict permanent setbacks. Louis Napoleon lasted less than twenty years in France (the constitutional fortunes of which nation we are, coincidentally, worrying about again). Mussolini was good for twenty years in Italy, and Hitler, at a terrible cost to the world, lasted only twelve years.

There was a theme of pessimism throughout all these counter-revolutions. It was employed in each one as authoritarianism excused its displacement of constitutionalism. Today we hear it while contemplating present changes in France and elsewhere—that the laws and foundations of freedom and equality are too vexing, too inept, too inefficient, too forbearing

and yet not forbearing enough, too easily thwarted, too useful to tyranny, and even too archaic to permit a nation to be great or its people to become as strong and as well rewarded as they deserve.

Louis Napoleon, Hitler, and Mussolini spent long preliminaries propagandizing their people about the wrongs and injustices inflicted on them by their systems of law and government. For a while, each fired up some response of support and agreement.

It is a truism that the population of a nation can reach a point of hunger, fatigue, and despair at which any social overturn, bloodshed, or death seems preferable. But some historians point out that the population of a given nation also can reach this desperate state without mass hunger and despair, through social boredom and induced self-pity. That inducement to believe that existing laws are unfriendly is a short cut to social discontent based on envy and greed.

When Jack Cade shouted to his rebel followers in 1450, "We'll hang all the lawyers!" he voiced an insidious appeal to the atavistic cells deep in every human brain, which urge us not to be content with the limitations of the greatest good for the greatest number, but to think with violent self-interest.

There was one counter-revolution begun in 1918 that has not yet completed its damage to the philosophy of the law of freedom and equality. It was born in anarchy in a land of historic oppression, where one revolution in the direction of equality had already taken place. The populace was so demoralized by centuries of ignorance and barbaric tyranny that it was possible for Nikolai Lenin and Leon Trotsky to offer the practical abolition of all law as a glittering goal, and to present rewards of confiscation, seizure, rapine, expropriation, and a sort of proletarian right of eminent domain.

In these times of shadowed explorations of negotiations in a "strange cold war," I do not think it is remembered often enough—in the free countries—that the Bolshevik revolution which chartered present day Russia was a realistic revolt against all law known to the world up to that time, and that its appeal was deliberately lawless.

Almost the very foundation of law is an agreement that some one's word, somewhere, is good. The Russian revolutionaries fiercely attacked this theory. They were specific that a nation did not have to be bound by any such consideration, and the

entire Russian political history since that day has been of a country whose word has not been good nationally or internationally.

Even most of the proletarian purposes of the 1918 revolution has been rubbed off by the subsequent series of purely gangster hierarchies. The proletarians of Russia have no rights, no privileges, and no protection in law, any more than any other kinds of Russians. Legally and philosophically, the people of Russia are locked into an enslavement. Its greatest mockery is the so-called system of constitutions, statutes, tribunals, and written precedents, any and all of which vanish from the books and from popular discussion, at the whim of the small ruling junta.

If ever a country has retreated from the philosophy of law, it is Russia.

The most sorrowful results of that counter-revolution against freedom and equality are the many thousands of victims of this successful enslavement conspiracy who believe, benightedly, that there are great social benefits from having been deprived of the theory of legal protection in a free society. Undoubtedly it affords some of them comfort to have banished law—and free lawyers—from their world, even at the loss of all their inherent freedoms.

Now, this is the frightening thing. At this point, our world is too old and experienced to have to re-examine the elemental truths of humanity, religion, and virtue that are our heritage from the time of Moses and Socrates and to re-assess the development of men and women into free and equal individuals. Yet here are we, the provable, identified heirs of all this spiritual progress, knowing the truth,—confronted by an element of the same human race which is saying to us: “We do not care for your truths. We can live without your law. We have more Sputniks in orbit than you have—we have missiles beyond your discovery—and we are strong.”

To my mind this makes every current bar examination in the free world a ceremony of enlisting and commissioning new free lawyers, not merely enthusiastic young minds setting out on individual careers for material rewards, but men and women to be our exponents and defenders and interpreters of the system of the law of freedom and equality. From this group, twenty-five years from now will come the judges, the top trial lawyers, the sought-after legal minds of the next generation.

More important, with these new students of the law will have to come numbers of exemplars of what our form of society stands for, the leaders of the less understanding, the less courageous, or the more intransigent citizens who need to be indoctrinated as to the meaning of and necessity for free and equal societies. These are the first-line warriors and protectors of contract and property right, family laws, and freedom of thought.

To whom else can we turn if not to the lawyers of the years ahead, for exposition of how men can live together united by their freedom and their responsibilities to each other?

It is a solemn thing now to be a lawyer. It is a solemn thing to be setting forth today in any of the professions, or even in the unstandardized fields of endeavor. The careless confidence of yesterday has been turned into a realization of how dangerous our world can be. The standards for personal performance have gone up since my generation set out. They have responded to the way in which time and place and tense conditions have crowded in on all people of good will. If more is demanded of the new lawyers of today, if more counsel is given these new professionals about their "duty" and their "responsibilities," and less about the glorious adventures of opportunity, the compensating reflection is that the American people will be learning to watch and follow leadership as they did not tend to do yesterday.

One can only hope that, without a terrible holocaust of war to implement them, that in twenty-five years the programs for our survival in freedom and democracy will be comparatively perfected. In twenty-five years too, the development of the structure of law will go on, for law has ever been fluid as people grow in experience and maturity. In the next twenty-five years, all free lawyers should improve in character and effectiveness, just as every generation of professionals has improved over its predecessors.

The hope of our time is that these forms of human progress will not come too slowly or too late. So much that is done in application of our law of freedom and equality will have to determine this velocity—I almost said "survival." It has been my faith through forty years of watching the affairs of our law that, in the main, the lawyers of today genuinely believe that they are the officers of our courts, and not merely the suppliants and the traders. Now is the hour for every lawyer to be an example to all those of us who are not lawyers, to assume the

roles of leadership which are to an extraordinary degree reserved for the bar, to become the distinguished crusaders for the truths of the laws of free people.

Tested idealism, the belief in a high destiny for people who will not be animals or slaves, does march forward. We have come close to proving the worth of that fine insight expressed by Sir Thomas More, so many centuries ago, when he said: "All laws are promulgated for this one end, that every man may know his duty." Nineteen-hundred fifty-eight, for all its dangers, sees a far more enlightened and brave world than thirteen-hundred fifty-eight ever knew. The lawyers of today face a great challenge, one they cannot and will not fail to accept.