

The Lawyer's Place in American Society

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The American public loves to joke about lawyers and it seems that everyone has his favorite lawyer joke. Some of those jokes are not very flattering.

And yet, surveys show that most people like their own lawyer.

Historians tell us that the development of the rule of law was Mankind's most important achievement of the last 1000 years.

What is going on here?

In considering this question, it can be useful to take a step back and look at the history of America and its laws and the history of American attitudes towards lawyers.¹ Viewed from this perspective, it is clear that our present situation is not unique.

I.

Some Thoughts on the Role of Lawyers In American History

For better or worse, and in fact probably for better *and* worse, lawyers have been of special importance in American history. Americans are, and throughout most of our history have been, ambivalent about lawyers. Lawyers are hated and revered, frequently at the same time. Americans have told tall tales of "Honest Abe" Lincoln, and Daniel Webster, both lawyers; and we have derided "ambulance chasers" and "sharks".

The exercise of legal power has always been viewed with mixed feelings in America. The things that lawyers do can have immediate, and often unexpected, impact upon the lives of all of us. Lawyers exercise a monopolist's stranglehold on the vital processes of dispute resolution, and they have a huge influence on all of the processes of democratic government. Lawyers speak in a highly technical and esoteric language. Yet lawyers have also effectively served democratic values by recognizing and correcting abuses of legal and governmental power and preserving individual liberties. Thus, Americans have turned repeatedly to lawyers, before all others, for solutions to the problems of everyday life in a rough-and-tumble and vigorous democracy.

Perhaps more than any other country, America is a creation of the law. France, for example, has maintained her national identity through several monarchies and

¹ Much of the historical material to follow was found in Lawrence M. Friedman, A History Of American Law (1973), hereinafter "Friedman".

republics. France, therefore, exists as an entity apart from any temporary expression of her nationhood. By contrast, the United States of America, in a sense, is nothing but a law. That law is our Constitution -- the United States has never existed separate and distinct from it. Thus, "the law" inhabits an especially exalted plane in the American soul -- a position which is probably not shared by the law of other countries.

Our history has placed lawyers at the center of practically everything that is good and bad in America. Our constitution is the handiwork of lawyers and legal theorists. But it displays a healthy suspicion of power that only men grounded in the law and legal theory could have. Its three-part system of checks and balances is a legalistic solution to prevent the abuse that would surely be encountered if a single hand, or set of hands, could control the making of law, the enforcement of law and the interpretation of law.

Our founding fathers understood the temptations and abuses of great legal power, and they sought to create a system in which legal power should always be fragmented. The deliberate fragmentation of legal power in all of its various guises is a recurring theme in American history. Thus, the constitution is a bit of a paradox, it places great faith in a legalistic solution to the problems inherent in the exercise of legal power.²

Many of our most revered forefathers were practicing attorneys and/ or philosophers of the law: Alexander Hamilton, John Jay, John Marshall and Thomas Jefferson. Conversely, some of the most reviled moral plunderers of our day are attorneys who are feared to profit excessively from the valuable social process of dispute resolution. Americans fear that, in the hands of the unscrupulous, law has too frequently been turned from dispute resolution into dispute amplification; from the discovery and

² The American experience with overbearing English governors implanted a deep mistrust of powerful executives that was pronounced in the early post-revolutionary period and is reflected in our state constitutions as well as in our national constitution. Thus, the earlier that a state constitution was adopted, the more likely it was to provide for a weak executive branch. See, Friedman, at p. 106 ff. In later years, Americans came to be concerned about legislatures dominated by wealthy special interests. Thus, state constitutions seized on the device of negative legislation. They inserted in constitutions provisions forbidding legislatures to act in certain areas or placing extreme procedural restraints on their capacity to do so. See, Friedman at 106-109. Louisiana lawyers are familiar with Louisiana's history of highly particularized and specific state constitutions as an extreme example of this phenomenon. Our current interests in term limitations and in referenda to address certain issues by direct popular vote are modern examples of our fear of the exercise of legal power by our representatives.

Judges have also been widely mistrusted at times in American history. Restrictions on the instructions and comments that a judge can make, before a jury, grew out of this mistrust. The law of evidence, as it evolved in America, reflects a system of checks and balances of its own:

"The modern European law of evidence is fairly simple and rational; the law of evidence lets most everything in and trusts the judge to separate the good from bad. But American law distrusts the judge; it gives the jury full fact-finding power, and in criminal cases, the final word on innocence or guilt. Yet the law has distrusted the jury almost as much as it has distrusted the judge and the laws of evidence grew up as a countervailing force."

implementation of shared values to the evasion of values behind clouds of rhetoric; from the provision of needed services to the extraction of huge economic reward from a valid social process.

Still, in the face of all of these concerns, America looks to lawyers for solutions to her most vexing problems. The expression of many Americans' dissatisfaction with any particular state of affairs is: "There oughta be a law"

America's early history reflects the fact that revolutionary and utopian regimes have generally been hostile to lawyers -- the lawyers of an old regime are part of a status quo that is discredited in the early phases of abrupt change, and a new regime seeks to start over with new laws and new habits. America had more than her share of revolutionary and utopian regimes in the early years of the settling of the New World. Many colonists who had been oppressed in Europe brought to America a strong distrust of all servants of government including, of course, lawyers. The utopian colonies founded in the New World sought to build a government dispensed from the top in accordance with deeply held and widely shared religious and social values. In such "top-down" utopian communities, privileged lawyers who dealt in esoteric concepts and language seemed to be obstacles to efficient functioning. The Quakers, for example, wanted peace in their societies and were generally opposed to adversary systems.

Additionally, lawyers are among the socially visible middlemen of society, along with government officials, moneylenders and merchants. As such, they are frequently the objects of popular ire during periods of rapid social change and social unrest.³ This wrath has been a constant of American life since there have been few periods in American history in which high rates of social change and movement of populations were not present. Economic under-currents affect attitudes as well. Clamor against lawyers has risen and fallen with the business cycle throughout much of American history.⁴

Lawyers were widely unloved in the 17th century in America.⁵ The first lawyer who arrived in the Plymouth colony in 1624 or 1625 is said to have been jailed and then expelled from the colony for scandalous behavior. For a time, the *Bodies of Liberties* (1641) of the Massachusetts Bay Colony prohibited "pleading for hire"; Virginia excluded lawyers from her Courts in 1645; Connecticut also prohibited them. *The Fundamental Constitutions of the Carolinas* (1669) said it was a "base and vile thing to plead for money or reward". William Penn had a Quaker's distaste for lawyers and formal laws. In 1682, his laws provided for the appointment of three "peacemakers" in each precinct whose "arbitrations" were to stand as legal judgments.⁶ Thus, in Pennsylvania, it was said: "They have no lawyers. Everyone is to tell his own case, or

3 Friedman, p. 83.

4 Friedman, p. 265.

5 Friedman, pp. 81 ff.

6 Friedman, p. 39.

some friend for him. . . . 'Tis a happy country."⁷ Resentment of lawyers continued into the revolutionary period and beyond -- occasional riotous uprisings against lawyers were reported in New Jersey in 1769 and 1770.⁸

Ultimately, though, as life in the colonies became more established and more complex, lawyers became an essential, if not always loved, part of American society. Lawyers have since established themselves everywhere in our society.

II.

The Expanded Role of American Lawyers in the Second Half of the Twentieth Century:

Unlike the legal profession in England, which remained small and elitist, the legal profession in America grew large and attracted persons from nearly every social class and group. Two things distinguish American lawyers: (1) there are so many of them and (2) they have insinuated themselves so completely into nearly every area of American life.

A prominent characteristic of modern American law is its all-pervasive character. Where the common law once affected the prosperous and generally left alone most members of society, everyone now finds that the law frequently impinges upon daily life. Incorporation, divorce, personal injury actions, consumer class actions, product recalls and taxation administered by public agencies are among the hundreds of ways in which everyone comes in frequent and intimate contact with lawyers and the legal system.

On the long view, lawyers in modern America are a group that has been extraordinarily successful, despite the strong undercurrents of mistrust and suspicion that a democracy necessarily harbors towards the successful and the influential. The twentieth century is perhaps the era of lawyers' greatest success. Yet it is a time when lawyers experience deep concerns about their role in society. It is a time when the society that experiences such astonishing changes wonders whether lawyers are doing something to the rest of us that we do not like. It is a time when success threatens to create new problems.

One of the principal successes of American lawyers in the second half of the twentieth century was the civil rights movement. Its roots are found in the Declaration of Independence (itself a great statement of legal philosophy) and the constitutional amendments of the 19th century. The movement gathered enormous momentum in the 1950's and 1960's and led to profound social change. It must stand as one of the great examples of legally-directed change in history. It provides a case-in-point of how Americans have come to expect so much from their lawyers. Its success suggests that lawyers, like no other group in American history, have been triumphant.

⁷ Friedman, p. 81.

⁸ Friedman, p. 82-83.

The civil rights movement gave new voice to a widely shared belief in equality of opportunity. It found its uniquely legalistic twentieth-century expression because American courts, unlike legislatures, are institutions in which properly-framed questions cannot be put off and in which properly-defined disputes must be resolved. Constitutional litigation gave the movement a way around obstructionist legislatures (which had given undue influence to the opponents of civil rights). The nineteenth century's amendments to the Constitution gave the lawyers in the civil rights movement a vehicle for framing civil rights disputes in ways that brought difficult social problems into the federal courts. Malleable tools like due process and equal protection of the laws were equal to the task. So, American trial lawyers and judges achieved a great and lasting, and uniquely legalistic, success.

As a people, we tend to take such triumphs and seek to replicate them in other areas of our public lives, where support may not be so broad, where success may be less likely and where disillusionment may be likely to set in. In the second half of the twentieth century, many Americans pursued social or legal reform through the coercive mechanisms of litigation. Groups interested in particular changes or reforms pursued their agenda in court without first building supportive legislative coalitions. It soon became clear that Americans were capable of finding an attorney to take almost any conceivable position on almost any point and forcing that position to a public trial that could have consequences for us all.

The courts' power to circumvent irritatingly slow legislatures and dictate to executive branches was not balanced by a countervailing ability to identify, organize and implement public consensus. In our constitutional system of fragmented legal power, the courts' ability to push forward posed the risk that the litigation system could exceed its social mandate. Everyone has a story of litigation run amok. No matter, it seems, is beyond assertion by some lawyer, or acceptance by some judge, somewhere. No value, it seems, is beyond being put up for grabs by somebody's lawyer.

The success of lawyers in America has created a new set of problems. Our proficiency at creating and identifying new rights is a potentially toxic side effect of lawyers' success, given the modern proliferation of litigious solutions to disputes. Once created, rights are less likely to become the subjects of political compromise and more likely to become the subjects of litigation. Perhaps we are coming to see that legal "rights" are not free goods. Their exercise can impose substantial costs on us all, perhaps especially on lawyers, who have always drawn the ire of the losers in the dispute process.

III.

Great Expectations and Some of Their Consequences

“The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law

there will be. In Hell there will be nothing but law and due process will be meticulously observed."

Grant Gilmore

Many attorneys who were admitted to the bar in the 1960's will recall the feelings of respect and admiration many Americans felt for lawyers. The drive for social change to which law responded, and which law seemed to direct into the orchestrated arena of the courtroom, had two effects. The legalisms of the civil rights movement redirected a movement that, in less legalistic cultures, could have turned very bloody indeed. And it produced a steady progression of measured decisional law in which non-discrimination was revealed to be the law of the land.

In those heady days, it seemed clear that a few thousand lawyers bringing a few thousand class actions could create the Heavenly City that had eluded the eighteenth century philosophers. But, somewhere along the line, courts and legislatures recognized and extended, and those thousands of lawyers enforced, many new rights. Many Americans were less than enchanted with the results. Some of the newly-recognized rights seemed valuable enough, but other rights were less obviously beneficial. For example, native Americans (with tenuous and often entirely untraceable connections to ancient populations) were granted, and exercised, veto rights to keep the remains of pre-Columbian populations outside the reach of important scientific research. Other "rights" gave rise to expressions of outrage from many quarters: the widely-reported award of great wealth to an aggrieved Alabama dentist whose BMW had been repainted by the manufacturer prior to being sold, and a huge personal injury award given to a lady who suffered the predictable consequences of driving away from a Mc Donald's restaurant with a cup of hot coffee in her lap.⁹ At times it has seemed as if common sense had been abandoned by the legal system.

Other rights were sought for movements whose time appeared not to have come: movements sprang up to seek new and expanded rights to be protected from slights affecting the fat, the short and the nearsighted. To the distress of many, the law seemed to pioneer new frontiers of victimhood for us all.

Also Americans appear to have become confused about the very nature of what it is that lawyers do. For centuries, civil litigation was regarded as the resolution of disputes. Disputes were once undesirable things that threatened the civic peace and were, therefore, first and foremost, to be brought to an end. Somewhere along the line in the 20th century's migration to new legalistic frontiers, a civil lawsuit came to be conceived almost as a desirable thing. In the eyes of many, "legal services" -- once avoided where possible -- became something to be desired by, and made available to, nearly everyone, like health care.

⁹ Many widely reported absurdities that arise in our legal system are recognized and corrected in the legal system, through appeal, settlement or otherwise, but the corrective process is often not as widely reported.

We used to wonder why legal disputes seemed invariably expensive and unhappy experiences for those involved. We wondered why people railed at the law's delay. To some of us, however, it seemed clear that things were meant to be this way. If legal disputes were swiftly, satisfyingly and remuneratively resolved, many of us might be tempted to file suits for entertainment. No legal system can allow that. The truth is that lawyers, as litigators, sell an inherently unattractive and socially undesirable product. A lawsuit is a fight; it is not a dance. Fighting inevitably carries financial, social and political costs. The lawyer is often the bearer of these sad tidings.

New disciplines of scientific study and new types of scientific instrumentation make it possible to detect, to claim and to prove ever smaller and more remote forms of legal injury. Injury has ceased to be something directly experienced and has become, on occasion, an incrementally increased tendency towards higher rates of a not-yet-experienced disease in a large population exposed to an environmental irritant. Everyone could claim to be a member of such populations, even the lawyers who defended their clients against such claims. The class action became a vehicle to assert ever more tenuous forms of injury. In some class actions which sought recovery of minuscule damages, in the names of thousands and even millions of individuals, the only significant net benefit seemed to run to the lawyers involved.

In the past, one of the streams that fed our legal system was the sense that law was an expression of, and a search for, moral values. Concepts like fault or negligence were used not only as devices for apportioning blame but also as principles by which we would govern our conduct -- and as "safe harbors" in which we were, if we were not "at fault", sheltered from attack. If we acted as "the average reasonable man", we had done what was expected of us and would be exonerated by the legal system.

Insurance changed much of that in the twentieth century. Our tort system is often less a device for setting standards and assigning blame and more a device for spreading the risks of new and not-yet-fully-understood technologies among the shareholders of a large corporation which developed a technology, or upon the shareholders of an insurance company who insured that manufacturer, rather than upon the injured person or upon the population at large. In many instances, the search is no longer for the pocket of a culpable wrongdoer, but for a "deep pocket" instead which is, in truth, a pocket ultimately shared by us all. Nevertheless, such loss-shifting or risk-spreading activity continued to be pursued in the language of fault and morality. Many lay people came to perceive lawyers and judges as semantic vampires sucking the meaning out of words like "fraud" and "intent", leaving them as empty shells to be manipulated to a desired end.

The scientific bias of the modern world created a preoccupation with the gathering of scientific and other evidence. The Federal Rules of Civil Procedure, and their progeny, incorporated a semi-scientific faith that legal facts were like scientific data: more data, in the form of more evidence, would lead to more valid conclusions. If a few dozen documents were useful, more information, we hoped, would be even better. Technology has caught up with, and perhaps outstripped, that faith. Today, millions of

documents dredged up in wide-ranging discovery can be gathered and stored on computerized databases or copied onto CD-ROM disks. And the cost of medium-sized and large legal proceedings has risen exponentially.

For example, at the turn of the century, the then-unprecedentedly large Standard Oil antitrust case was decided on a record that would seem small today. In Standard Oil Company of New Jersey v. United States, 221 U. S. 1, 31 S. Ct. 502 at 504 (1911) the United States Supreme Court observed:

" . . . The record is inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about 12,000 pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex and varied business transactions, extending over a period of nearly forty years."

Today, even medium-sized business cases involve comparable documentation and large cases involve warehouses full of material.

Yet one wonders whether the accuracy, predictability or fairness of outcomes has been materially enhanced. In the final analysis, it is worth remembering that a "judgment", unlike a scientific proof, involves the reaching of conclusions on the basis of information that is always and necessarily incomplete. Lawsuits are not scientific inquiries -- they are highly individualized, and therefore non-repeatable, experiments best resolved by analogical reasoning. More data do not necessarily improve the analogies.¹⁰

Even if each of us has approved of one or more of these trends, most of us disapprove of the effects of at least one of them and the adverse impact it has had on our own interests or the interests of someone close to us.

At the beginning of the twenty-first century, we are faced with a monumental intersectional collision of high technology and high expectations. Lawyers have become the bearers of often unexpected and sometimes absurd tidings, with very expensive consequences, for us all. Almost everyone can come to feel, sooner or later, that he or she is on the receiving end of a humorless court or a humorless lawyer. It is no wonder that many lawyers feel increasingly pressured to justify their professional existence to

¹⁰ An excellent discussion of the possible limits to the bases on which law and science can profitably interact can be found in Michael O. Wise, *"Antitrust's newest 'new learning' returns the law to its roots: chaos and adaptation as new metaphors for competition policy"*, *The Antitrust Bulletin* (Winter 1995) at p. 713 ff. Wise points out that, although lawyers have traditionally milked science to obtain useful concepts to use in legal argument, we must not confuse the methods of science with the methods of law. The reasoning methods of law and science are quite different. Unlike science:

[l]aw is a system for controlling behavior, a medium for expressing and contesting values, and a framework for exercising power. * * * Social and individual values are [not arrived at by the methods of science but rather are] sustained by moral stories that connect values to experiences. Their importance is in the principles they teach, not in their details' historical or technical veracity.
* * * Law needs the image of a determinate answer. " *Id.* at 770 - 774.

themselves and to others. Studies reflect that lawyers are working harder and enjoying it less. Burnout and other symptoms of alienation and dissatisfaction are increasing. At the same time, we hear increasing reports of surliness, nastiness and outright unlawful behavior on the part of attorneys towards one another.

Yet history shows us that the practice of law has always been difficult and viewed with suspicion by many. Judge Learned Hand, perhaps America's greatest jurist, remarked in the 1920's that "As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Many of us envision Judge Hand's era as a golden age to which we might return to find high levels of competence, civility and success on the part of lawyers. But history shows that was not the case. Those who envision golden ages, it is said, have never lived through them.

Yet there is reason to believe that the plight of today's lawyer is somewhat different from the plight of yesterday's. It is probably true that legal systems function best when they are applying commonly accepted values. Thus, litigation to enforce a promissory note can still be pursued effectively and economically. It is also probably safe to say that the areas in which legal values are simply and unambiguously well-established are smaller now than they have been at some other times in our history. Today's a trial lawyer must often discover and define the values which inform his or her case. Those values may be the subject of deep controversy.

Our highly pluralistic society seems to have great difficulty in arriving at a consensus as to what values should be enforced, and according to which priorities. This suggests that the neutral concept of law, defined as an apolitical application of accepted standards, has its limits in resolving our current legal malaise. Perhaps a major preoccupation of the first quarter of the twenty-first century will involve the underlying social process of arriving at a new consensus as to exactly what it is appropriate for courts, lawyers and clients to do.

Given the enormous rate and scope of the changes which have affected our legal system, it would be a wonder if many lawyers, and the American public, did not feel disoriented and concerned. But it is helpful to understand that the debate is not new. We can expect that a new social accommodation of the role of lawyers will ultimately be arrived at. It is a process to which all lawyers can contribute.