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## Are Citizens Justified in Being Suspicious of the Law and the Legal System?

WILLIAM J. BRENNAN, JR.\*

It's hard to describe the privilege I feel being able to address this audience. It includes, I know, so many lawyers and law students. What I'm going to say today, I address particularly to the law students because they are about to enter a profession which will require them to confront several very serious challenges: a shrinking body of legal services at a time when the need for them is rising; an increasing disparity between rich and poor, black and white, urban and rural, and union worker and unorganized worker; an unparalleled growth in new technologies and bureaucracies; and an increasing number of privacy invasions. Unfortunately, we also live in a time when many citizens are suspicious of the law and the legal system. It is a suspicion that takes two forms.

First, the law and the legal system are challenged as being basically inequitable to so many who are unable to participate fully in the economic, political, and social life of the nation. With rising vehemence, the disaffected point to what they regard as indefensible inequities in our criminal law and procedure, in our tax and welfare systems, and in other systems as well. They demand change now; "all deliberate speed"<sup>1</sup> will not suffice. The second suspicion is even more fundamental and has even more ominous portent, for it casts a cloud

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\* William J. Brennan, Jr. is an Associate Justice of the Supreme Court of the United States. Justice Brennan delivered this address at the fourth annual Robert B. Cole Lecture Series held at the University of Miami School of Law on Friday, January 27, 1989.

1. Chief Justice Warren coined the phrase "all deliberate speed" in *Brown v. Board of Education* (Brown II), 349 U.S. 294, 301 (1955), to describe the time frame for appropriate enforcement of the right to racially integrated public schools established by *Brown v. Board of Education* (Brown I), 347 U.S. 483 (1954). Nine years later, in *Griffin v. County School Board*, 377 U.S. 218 (1964), the Supreme Court, frustrated at the plodding pace of desegregation efforts, declared: "There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights [specified in *Brown I*]." *Id.* at 229.

over the very rule of law. Law is regarded as an obstacle to, rather than an instrument of, the creation of a just and generous society.

Well, how are we of the legal profession—lawyer, judge, and law student—to meet these challenges? It's easy and traditional to extol the virtues of the rule of law and to describe the horrors that would attend an anarchistic society, but we cannot content ourselves with an answer which relies on such abstractions. A philosophical disquisition on the virtues of the rule of law cannot justify inequities in our present legal system. Our first task therefore is to demonstrate that we recognize these inequities and are confronting them with a promise of solution. Only when we succeed in this task will it be time to glorify the rule of law.

The philosophy of government that emerged from the depression of the 1930's was our response, as a society, to that terrible crisis. That response, you remember, conceived of government as having an affirmative role, a positive duty to provide those things which give real substance to our cherished values of liberty, equality, and human dignity—jobs, social security, medical care, housing, and so forth. That duty was rather similar to the duty expressed in the Universal Declaration of Human Rights.<sup>2</sup> That declaration states certain economic and social rights: the rights to work,<sup>3</sup> to equal pay for equal work,<sup>4</sup> to rest and leisure,<sup>5</sup> to an adequate standard of living,<sup>6</sup> to education,<sup>7</sup> and to participation in the cultural life of the community.<sup>8</sup> Utopian though it may be, unratified by the United States as is still the case, and unfulfilled for most of the peoples of the world, the declaration nonetheless helps point the way in which law and society should be moving. Essentially, of course, the goals of the declaration recognize the necessity for, and the determination to achieve, equal rights for all, protection of the underdog, and respect for the dignity of man in a confusingly complex society. Society's ceaseless insistence upon these values inevitably means that law and legal institutions cannot eschew a role in perfecting the role of government as a social instrument.

It's been a truism, you'll remember, since de Tocqueville wrote so discerningly of American society in the Nineteenth Century,<sup>9</sup> that lawyers occupy a strategic role in the ordering of our society and have

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2. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

3. *Id.* art. 23, para. 1.

4. *Id.* art. 23, para. 2.

5. *Id.* art. 24.

6. *Id.* art. 25, para. 1.

7. *Id.* art. 26, para. 1.

8. *Id.* art. 27, para. 1.

9. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (H. Reeve trans. 1966).

done so from the beginning. That's not merely because the law trains one in habits of analysis which can be applied fruitfully throughout the range of social problems, nor because tradition has inclined to the law individuals disposed to follow a career in politics or public service—though these are doubtless important factors.

Equally significant, however, is that governmental action, which in other societies is exclusively within the purview of administrators or legislators is, in our country, also subject to judicial or quasi-judicial scrutiny. We've been a legalistic society from the beginning. Lawyers were conspicuous in the vanguard of the revolutionary movement and in the drafting of the Constitution. Ever since, our society has framed urgent social, economic, and political questions in legal terms, placing great problems of social order in the hands of lawyers for their definition, and in the hands of judges for their ultimate resolution.

Now, the response of lawyers to the crisis of the Depression, the last period of great crisis to the profession, disappointed many. In 1934, Mr. Justice Stone delivered, in the words of his biographer, "[a]n unvarnished indictment of lawyers' neglect of public duties."<sup>10</sup> "Steadily," Justice Stone said, "the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance," with the consequence that "[a]t its worst it has made the learned profession of an earlier day the obsequious servant of business and tainted it with the morals and manners of the market place in its most anti-social manifestations."<sup>11</sup> Now, that's a severe and bitter charge, is it not? But can we deny that it is still true today?

What affirmative, responsible, and progressive actions can today's legal profession take to meet current problems and avert future crises? Today, after all, the focus has shifted away from the abuses of concentrated economic power and the vagaries of boom and bust cycles existing in Justice Stone's day. Society's overriding concern today is with providing freedom and equality of rights and opportunities, in a realistic and not merely formal sense, to all the people of this nation. Society is concerned with securing justice, equal and practical, to the poor, to the members of minority groups, to the criminally accused, to the displaced persons of the technological revolution, to the alienated youth, to the urban masses, and to the unrepresented consumers—to all, in short, who do not yet partake of the abundance of American life.

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10. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 377 (1956).

11. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

Involvement of lawyers in this quest is, I suggest, a moral imperative, for it seems to me unquestionable that the lawyer in America is uniquely situated to play a creative role in American social progress. Indeed, I boldly would suggest that the success with which the lawyer responds to the challenges of what, in an era of crises, is also a new era of promise in the life of our nation, may prove decisive in determining the outcome of this quest. To paraphrase the poet Shelley, great lawyers of our age must become the companions of forerunners of some unimagined change in our social condition through the opinions which they submit.<sup>12</sup>

The lawyers of a generation ago took some tentative steps toward meeting their professional responsibilities. Twenty years ago, the temporary burgeoning of legal aid, neighborhood legal services, and public defender activities was an encouraging beginning. Lawyers were starting to recognize that the assurance of equal rights and opportunities to all would require new techniques and involve new areas of law such as: consumer protection; landlord and tenant relations; and general welfare law, including public assistance, housing, education and training programs, child welfare services, and unemployment benefits. We were beginning to understand that many current problems would not yield to the traditional methods of solution found in counseling, negotiation, or judicial or administrative proceedings. Doubtless radical changes in our concepts and methods of the practice of the law would be required. These changes, in turn, would require radical changes in our concepts and methods of the teaching of the law. We would have to look to our law schools to produce the young lawyers who would be ready to undertake the very different and weighty responsibilities that our society thrusts upon them.

But sad to say, the rosy beginning has dimmed. Older lawyers have come to the complacent conclusion that the task of remedying the inequities in our law and legal system is the responsibility only of the younger members of the Bar. The idea that the public sector should be serviced by young lawyers while older and more experienced lawyers concern themselves only with lucrative private practice strikes me as pernicious. The talents and experience of the older practitioner are sorely needed in today's public sector. To rebuild our

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12. Percy Bysshe Shelley wrote:

The most unfailing herald, companion, and follower of the awakening of a great people to work a beneficial change in opinion or institution, is Poetry.

Shelley, *A Defence of Poetry*, in 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 794 (4th ed. 1979).

cities, for example, will require the assistance of tax, real estate, and corporation lawyers—men and women who know how to organize new businesses and plan new projects. The services of first-rate commercial lawyers are necessary if consumer fraud is to be combatted. If we are to restructure our criminal law system to ensure both public safety and rehabilitation of criminals, we will need the help of experienced district attorneys and defense lawyers. These tasks cannot be foisted solely on lawyers who are just out of law school.

The mechanism by which society makes choices and accommodates conflicting social interests has always been preeminently the law, embracing by that amorphous term not simply the courts, but more broadly, all the ways in which citizens structure the relationships that constitute society. Thus every lawyer, no matter how well-established and regardless of his or her specialty, can, and I suggest must, contribute to the elimination of inequities that justify the suspicions of the disaffected. No, I have no illusion that the task is an easy one. The social and legal problems of the disadvantaged and outcast groups and individuals are novel and complex for the practicing Bar, not in the least because they involve precisely those in our society who traditionally have not been the clients of the legal profession.

Moreover, our profession's contribution must not be limited to strictly professional activities. Each of us has a moral obligation to do even more. The role to be played by the lawyer as citizen is at least equally important. As members of the establishment, particularly the legal establishment, our every action has an impact on the public's assessment and acceptance of the law and the legal system. If the credibility and integrity of our legal system are impugned by the actions and omissions of lawyer-citizens, there will be no general respect for the law. Over too many years, for example, we, as lawyers and as citizens, stood idly by while minority citizens were deprived of their most basic legal rights. How can we expect much respect for the law from someone who has seen how readily even lawyer-citizens tolerated such legal inequities? Why was it that when legal change finally came, it was not initiated by lawyers, but was forced upon the profession by the rebellion of thousands of young students and by the zeal of religious leaders like Martin Luther King, Jr.? Can we honestly say that the profession is redeeming its past mistakes? Can we deny that too many of us still perpetuate and compound prior errors? Surely, lawyers must be the last to condemn the disaffected for wanting no part of our legal system, if we of the law act in ways which repel, not instill, faith in it.

Legislators and the courts also share the blame. The widespread

cynicism among the disaffected that progress cannot be achieved under law also has roots in the not unfounded conviction that present legislation and court decisions fall short of effecting meaningful change in the life patterns of the expected beneficiaries. Seeing no tangible results, those who dwell in urban tenements and rural shacks, as well as their sympathizers, ask what good are laws and court decisions. Thus we too must recognize that past legislation and decisions have hardly begun to eliminate the legal inequities in our society. We must redouble our own efforts, not merely by giving effect to civil rights laws already on the books, but by leading the effort for new legislation to achieve real equality. Certainly, we as lawyers know the difference between formal and real equality, and must therefore lead the fight to close the gap between the two. Legislation to date has had little more than formal value because, quite frankly, it has cost us, the establishment, almost nothing. Real equality will cost us something. For example, are we willing to pay the substantially higher taxes necessary to make up for past legal deprivations and to create a truly just and equitable society? Are we willing to permit public housing or rent subsidy in our neighborhoods? Are we willing to let our sons bear the same risk in time of war that the sons of the poor and the deprived bear? If not, all our good works in legal assistance programs, public defender offices, and the like are meaningless tinkering which do little more than salve our own consciences.

The lesson the legal world must learn from the events of the past several decades is that constant pressure must be applied to overcome the problems that confront our society. Lawyers, before any other group, must continue to point out how the system is really working—how it actually affects real people. They must constantly demonstrate to courts and legislatures alike the tragic results of legal nonintervention. They must highlight how legal doctrines no longer bear any relation to reality, whether in landlord and tenant law, holder in due course law, or any other law. In sum, lawyers must bring real morality into the legal consciousness. Moral arguments backed by the hard facts about discrimination and deprivation are still the most potent force in the world, whether in the courtroom, in the legislatures, or in the cities. There are still large segments of our population who would keep the country's problems out of sight. The result is that disaffected groups feel they must escalate their protests in order to be heard. Some use these very protests as a smoke screen to hide underlying problems. But we cannot focus public attention on the lawlessness in the streets and avoid its causes—poverty and prejudice.

If this vicious circle is to be ended, if this society is to be recalled

to its moral senses, if this society is to grow up and not blow up, lawyers must shoulder a far greater burden of responsibility than our profession has been willing to accept in the past. Never was there a set of problems for which truly competent, able lawyers were more needed than they are today. The complexity of the problems we face require far more sharply honed talents than ever before. Rarely has the challenge to the legal profession been greater.

Certainly, we may be sure that the challenge posed by the rising tide of disaffection with our law and legal system can be met. But lecturing the disaffected, or merely reacting to them, will not suffice. We must truly seek to lead. The only way to demonstrate that the rule of law is consonant with a just and equitable society is to adapt the legal process to create such a society. That process will not fail us if we try. But I submit: we may delay no longer. Let us begin.