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PROFESSIONAL COMMENT

ADVOCACY—AN URGENT NEED*

EMILE ZOLA BERMAN**

Advocacy is the ultimate weapon of justice, the essence of human freedom. The courtroom is the arena essential to the preservation of the dignity of man—without it he would descend to the barbarous battleground where might makes right, where the mace prevails over honor and where the mailed fist crushes truth. It is in the courtroom—and only in the courtroom—where the noble work of the Barons of Runnymede and the inspiring legacy of our founding fathers at Philadelphia are made the vital guardians of the sublime rights with which man came into the world and with which he must leave it. Far more than the conference room where the anti-trust specialists work out the complicated details of a corporate merger, far more than the luncheon table where a tax expert explains the intricate refinements of a personal holding company, the courtroom is civilization's monument to order, to dignity and to justice.

What a pity it is that advocacy—the art of the courtroom—is the most ignored specialty in modern law schools. Is it any wonder that it is, therefore, the least chosen specialty of law graduates?

This is not a problem of exclusive concern to our law schools. Judges and practitioners are equally charged with responsibility for its correction. Charles E. Whittaker, Associate Justice, Supreme Court of the United States (retired) writing recently in an article published in the *Kansas Law Review* observed:

What a sad paradox—and what an embarrassing one to the law schools and the Bar—would result if the courts are ever compelled to reverse any substantial number of convictions because the degree of “competence” of trial “Counsel” failed to meet the standards of due process. Yet, that result may be in prospect and surely will become even more foreboding unless we promptly reverse the waning trend in Advocacy.

All of us must have observed the stark impracticality of substituting a busy law office for the calm, far-ranging, deliberate law school course as an educational forum. Judges must observe almost every week how their own work is increased and their own function misdirected by the

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inept practitioner without training or experience. The burden is on us to make advocacy the absolute essential specialty to be taught and the attractive rewarding practice, which it is.

This is not a super-human burden by any means. There is much to commend advocacy as a career and one need be only analytical, not apologetic, in encouraging such a career.

First of all, almost every trial is aimed at determining man's rights—whether against the state or against his fellow man. There is one word to describe this target: *justice*. It seems to me that no young lawyer can find a richer reward in his entire career than in taking advantage of the opportunity to contribute to justice and to the ennobling tradition of justice which is the hallowed hallmark of our civilization. The feeling that comes with a job well done is one thing—the soaring spirit that elevates us with a hard won triumph of right is quite another. I think Terence Rattigan in his play, "The Winslow Boy," has captured this spirit well. The lawyer who has pushed and shoved, dragged and tugged a young lad through a morass of bureaucratic indifference, over a barricade of parliamentary pressure and beyond the numbing influences of administrative presumptions and governmental favors at a trial, to emerge at the end with the boy's honesty upheld and his honor vindicated—is a man who, in one great moment of his life, has explored the very pinnacle of the human spirit and has known the transcendent joy of real human achievement. Such an experience, even if only once enjoyed, is no mean accomplishment in life.

Secondly, the material which a trial lawyer uses and develops is the stuff of life itself, ideals and ambitions, disorders and disagreements, passions and integrity, honesty and chicanery, the entire ambit of human nature at its sublime best and degraded worst. No science, no art, no trade provides its craftsmen with such stimulating tools. The trial lawyer sees life, beyond his own experience, every day. He is an actor in real life dramas of infinite variety. He is constantly in touch with the outraged innocent, the devious fraud, the upright citizen, the pathological liar, the passionate perjurer. He is always confronted with the task of sifting through the thin crusted veneer of superficial humanity to find the real truth. His task is thus made a lively, diverting adventure. Such adventures never fail to improve his skill, and from his own point of view, they cannot but help him to make his own life more fruitful, more enjoyable and more helpful.

Thirdly, the challenge of trial practice to the young law school graduate is enormous. Trial practice is a highly specialized and highly developed art. Familiarity with rules of evidence, experience in dealing with people, knowledge of developments in the behavioral sciences, facility in fact finding, command of the language—these are some of the basic

skills which a successful trial practice demands. In addition, no practitioner will go far in the Trial Court without an analytical intelligence which can apprehend every detail in relation to the whole and can, even while pursuing the most obscure tangents, keep the whole case within the range of his mind. Not the least of his aptitudes is the practitioner's courage and fighting heart—courage to make a decision and instantly to act on it and a fighting heart to believe in a cause and tenaciously to cling to that belief. Finally, the trial lawyer, whose sincere belief in his case and genuine willingness to put that belief at stake at all times are evident, is one who cannot fail to make a good impression of himself and of his client on the triers of the facts.

The acquisition of these skills and the development of these characteristics is the great challenge which the young lawyer faces in this field. He can avoid the challenge, of course, and thereby hold himself out to be what he is not. On the other hand, he can pick up the gauntlet with relish, determination, and ambition. He can work, study, practice and apply himself. He can, in a word, succeed and thereby do credit to his profession and his specialty.

Fourthly, the tangible rewards of a career in trial practice are not small. There can be no doubt of the fact that a deserved reputation as a trial specialist brings with it adequate pecuniary returns not always available to members of our profession.

The real problem is created by those students who regard trial practice as undignified, unremunerative, unworthy of their talents or even worse, may be affected by the insidious, invidious concept of guilt by client. These are the young men and women who turn their backs upon the specialty of advocacy.

Sad to say, our law schools today are not doing very much to lull these siren songs with a vigorous, imaginative, informative program designed to demonstrate to students the great opportunities and challenges of a career in the courtroom. It is up to us, therefore, to provide the schools with the ideas and talent for such programs. Seminars and courses in evidence are not enough; moot courts only scratch the surface. Year long courses utilizing the methodology of lectures, clinical approaches, demonstrations and exercises are required to teach principles, tactics, techniques and strategy.

The late Chief Judge Vanderbilt of New Jersey and Associate Justice Jackson of the Supreme Court are two of the many lawyers and jurists who have bemoaned the present state of advocacy. Judge Vanderbilt wrote:

Advocacy is not a gift of the gods. In its trial as well as in its appellate aspects it involves several distinct arts, each of which

must be studied and mastered. Yet no law school in the country as far as I know pays the slightest attention to them. It is blithely assumed, with disastrous results, that every student is born a Webster or Choate.

It is no reflection on a lawyer that he has not specialized in the art of trying cases, that he is not a trial lawyer, but it is a discredit upon him and to the Bar if he attempts to try cases being grounded in the science and principles of law but having ignored and being ignorant of the art and principles of trials. Mr. Justice Jackson said, "It seems to me that while the scholarship of the Bar has been improving, the art of advocacy has been declining."

The art of advocacy need not remain in the state described. We have available to us the tools with which to revitalize it. We have eager young men and women every year gracing the Bar with new and fresh distinction. It is up to us to see that while still in their formative stages these young people are thoroughly acquainted with the purposes, rewards, challenges and opportunities of an advocate's career.

The law school deans and administrators have frequently taken the position that in the present law school curriculum there is not enough time to teach advocacy, and that their faculties are not possessed of the competence and training to conduct such courses. I should suggest in this connection that there is nothing sacrosanct about a three year course, and we have only to point to our brethren schooling in the discipline of medicine as an example. Moreover, it is worthy of examination, to discover whether or not eight week courses during two consecutive summers might not be the answer to the problem of lack of time. With respect to lack of adequately trained teachers, I am certain that an effort to enlist trained trial lawyers from the ranks of the American College of Trial Lawyers, The International Academy of Trial Lawyers, and other specialty trial lawyer groups, would meet not alone with cooperation, but with hearty enthusiasm. It is my firm conviction too that the members of the judiciary would be more than willing to cooperate in such a needed educational endeavor.

In the final analysis the hardpressed litigant or the innocent accused who is deprived of his rights, through poor advice or inadequate representation must be a specter haunting the whole law society. It is indeed a violation of Learned Hand's reminder of the Bar's commandment, "Thou shalt not ration justice." Able advocates and adequate training in advocacy will dissipate such a specter.

It was Webster who said, "Justice is the most important interest of men on earth." In a country governed under law and glorified by a heritage of human freedom derived from the nature of man himself, there can be no higher dedication than that of achieving justice. In all the fields of

human endeavor there is no achievement quite as sublime as a human right preserved. History may not record it—his bank balance may not show it—his contemporaries may not recognize it—but the lawyer who prevails against injustice and crushes despotism adds a lustre to his time and civilization which no power on earth can shroud. Justice is man's great work and the courtroom its most productive laboratory. In my judgment there can be no better testimonial to a lawyer than that, in a mad, volatile, materialistic world about him, with the demands of his family and his profession constantly pressing in on him, he has devoted himself with passionate zeal to the ideal expressed in those deeply significant words of the Old English Petition of Right: "Let Right Be Done."

Our democracy bottomed on government under law requires trial lawyers. It is essential that the Bar and the law schools stimulate, teach and afford opportunities in advocacy.