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Warren E. Burger

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Remarks of Warren E. Burger Chief Justice of the United States at the Dedication of Notre Dame London Law Centre:

The Role of the Lawyer Today

London, England
Friday, July 29, 1983

With this new London Law Centre, Notre Dame University engages in a unique teaching experience — unique at least in the annals of American law schools. It is not just the traditional summer study of comparative law, but a study of our own law with exposure for a full school year to the source of all common law legal institutions. This is more than an experiment. It has proven its value.

Since I have been on the bench, I have visited legal institutions throughout Europe and the Soviet Union to the East, and Japan and China to the West. Yet, most of my visits have been in the courts of England. I have had the rich experience of the periodic Anglo-American Legal Exchanges, long headed by Lord Diplock in England and now by Lord Bridge.

I think I have a better understanding of the richness of our common law heritage from my visits to England, sitting as a guest judge in the courts and in the Inns of Court — particularly of the Middle Temple. In more than the quarter of a century that I have been on the bench, my visits to courts wherever I traveled have given me a better understanding of how those systems work.

Observation of other systems is essential to improving any system of justice. The elimination of juries in most civil cases in England nearly a half century ago, for example, must have been influenced in some degree by observing that civil cases tried in courts on the Continent produced quite as fair results as those with juries in England. You may have noticed that beginning about ten years ago, the federal courts in the United States, without any legislation, but more in the common law tradition by way of local rules, moved to the use of six-member juries. Today, in all but a few of the 94 federal districts, this is our practice. This was a true common law innovation.

If Sir Thomas More's utopia were achieved, we would not need lawyers; and without lawyers perhaps we could survive without judges, or at least with fewer judges. In that ideal setting we would need even fewer physicians, I suspect, for the stresses that produce illness would be far less. In that happy state of Thomas More, the population would be made up of producers, consumers and teachers — teachers in the broadest sense of that term. There would be no lawyers, no judges, and no soldiers. But until that society of the Golden Rule and the Golden Day is achieved, lawyers and judges will be necessary wherever men and women are gathered in villages, towns, and cities, and rub shoulders, share boundaries, and deal with each other daily.

From time to time we should ask, "What is the role of lawyers?" In this setting, in Notre Dame's London Centre, this question takes on special significance.

In their highest role, lawyers should be the healers of conflicts and, as such, should help the diverse parts of a complex, pluralistic social order function with a minimum of friction. Lawsuits ought to be the last resort — like war. Learned Hand once said that except for death or serious illness, he most would fear a lawsuit. President Abraham Lincoln likewise counseled:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man.[1]

How do we change the trend toward total reliance on courts to resolve all conflicts? Other methods must be used to resolve disputes,[2] but to do that we must change the attitudes of a good many lawyers and law teachers. In my law school days it was constantly put to us that the best service a lawyer could perform was to keep clients out of courts.

Lawsuits, like wars, often occur because lawyers and statesmen fail in their role as healers and peacemakers. This healing function ought to be the primary role of the lawyer in the highest conception of our profession. Yet we know that members of our profession do

1 A. LINCOLN, *Notes for Law Lecture*, in II COMPLETE WORKS OF ABRAHAM LINCOLN 142 (J. Nicolay & J. Hay ed. 1894).

2 For further discussion, see *National Conference on Causes of Popular Dissatisfaction with the Administration of Justice*, in THE POUND CONFERENCE, PERSPECTIVES ON JUSTICE IN THE FUTURE (L. Levin & R. Wheeler ed. 1979).

not universally practice according to the highest of our great traditions. In our country, I am bound to say, the current generation of lawyers, or at least far too many of them, seem to act more like warriors eager to do battle than healers seeking peace. Our society is indeed a litigious one with more than 600,000 lawyers and over 25 million new lawsuits each year. That gives us one lawyer for every 381 people. With that concentration they can make a great deal of warfare in the courts. No other society has so many lawyers and so many lawsuits in relation to its population.

As I see it, several things must be done:

First, the moral basis of law must be emphasized, for without that foundation the law would be, or it would become, a set of sterile, mechanical rules, devoid of real meaning in terms of human values.

Second, and closely related, professional ethics must have far greater attention from the profession. This should begin on the first hour of the first day in the law school.

Third, standards of civility and decorum are as imperative at the negotiating table as in the courtroom. This too must begin in the law schools. Civility must be seen as the coolant of the excessive ardor of the adversary system. I regret to say that civility is in short supply in our courtrooms, and its importance is far too little mentioned in law schools.

Notre Dame has now carried on the work of a great university with concern for traditional values for nearly a century-and-a-half. The London branch of its school of law, with that inspiration and sponsorship, can lead the way to a more honorable and more effective profession.

We know that lawyers have not always been well regarded by their contemporaries, and if we are to believe the polls that is still true today. The literature of the English speaking world is replete with slurs on lawyers. Typical is the proposal of William Shakespeare, who once gave performances on the balcony of the Middle Temple dining hall in London, to "kill all the lawyers" as a first step toward improving society.[3] We recall that Samuel Johnson's less direct appraisal was similar: Observing the behavior of a barrister, Johnson stated that, "he did not care to speak ill of any man behind his back, but he believed the gentleman was an attorney."[4]

We know, of course, that part of this attitude toward our profession flows from the fact that lawyers are most visible in the conflicts

3 W. SHAKESPEARE, HENRY VI, Part II, Act IV, scene ii, line 86.

4 S. JOHNSON, BOSWELL'S LIFE OF JOHNSON 126 (L. Powell ed. 1934).

that arise between other fallible human beings when they are resolved in the courts. There is a certain unfairness in this since lawyers are not the principals but only the agents of those who are in conflict. Lawyers become the scapegoats in the play. To a large extent, however, this attitude toward lawyers arises from the way in which some of them perform their functions, in and out of court. In the Royal Courts, I have seen some of the most vigorous and effective advocacy by the most strictly regulated advocates in any free society. There is nothing incompatible about great advocacy in a system in which the profession stringently regulates itself.

We lawyers often point with pride to the great achievements of the legal profession — the countless examples of courageous advocates supporting the claims of people who were subject to the abuse of governmental power. We remember how John Adams, for example, risked his career, and perhaps even more, to represent the British soldiers charged with murder in the so-called "Boston Massacre." Justice Robert Jackson once noted that in every vindication of individual rights and in every advance of human liberty in the history of free people, lawyers were key actors who were willing to risk their professional reputations and even their lives in the pursuit of justice. My colleague Justice Thurgood Marshall is a modern example.

With this new branch of its law school in this setting, Notre Dame has a rare opportunity to encourage a reexamination of the moral basis and the jurisprudential assumptions on which our legal system and our legal education are based. It can begin with the simple truth that the law is a tool, not an end, and that when a rule of law or procedure does not serve the ends of truth and justice, it should be changed.

Both truth and justice are essential to a system of law based on reason. We desperately need a generation of lawyers — and law teachers — who understand that access to justice does not invariably mean access to courtrooms. Primitive people who relied on clubs and stones and brute strength to settle differences can be forgiven for they were unable to grasp the idea of any other method of dispute resolution. But modern lawyers, educated in great universities and trained in the law, have no excuse for treating the judicial process as the primary mode of resolving conflicts. Long ago workers' compensation laws set patterns we have used far too little. No-fault insurance is struggling to establish a new frontier over the opposition of some segments of the legal profession.

There are, of course, assumptions underlying the law that are

fundamental and immutable, but others must be open to refinement and change. Lawyers should lead in making needed changes.

American law schools perform very well the task of training in the law and in legal analysis. But a system of legal education that teaches lawyers the skills of legal thinking and analysis, yet fails to teach them how to act with civility and according to high professional standards with a commitment to human values, has failed to perform its mission. Professors L. Ray Patterson and Elliott E. Cheatham make this observation:

> The essential feature of the adversary system is not the *law* which it applies, but the *way* in which it applies the law. . . . [L]awyers' standards are an integral part of the law itself.[5]

With the Bicentennial of our great Charter just four years away, our profession should turn back to the sources of our law and of our way of life as a free people with institutions and government of our own choice. In the Declaration of Independence, not less than four times, Thomas Jefferson acknowledged the moral basis of the law when expressing direct reliance on God as "The Supreme Judge." And the closing sentence of the Declaration calls for the protection of divine providence. We need to return to that well for fresh inspiration. Notre Dame's London Law Centre provides a unique opportunity for inquiry into moral concepts that serve as the basis of all law, even as it challenges long-accepted assumptions and traditions as to the way in which law is applied.

On our side of the Atlantic, for example, it is considered heresy by some to question the need for juries in civil cases. Even our modest step of moving to six-member juries in federal courts was challenged by some. It is almost blasphemy to raise questions about the validity of the adversary system as we practice it. There is no escape from the reality that the adversary system, and one of its parts, the lay jury, is not so much a matter of "the law" but rather "the way" in which the law is applied.

One important idea, long accepted on the English side of the Atlantic and gaining support on our side, is the taxing of costs to the losing party in litigation. American courts are flooded with thousands of cases that should not or need not be there, and cost shifting might help. Indeed, the volume of frivolous cases is astounding.

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5 L.R. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 109 (1971) (emphasis added).

I confess that 40 years ago, and earlier when I was a student, I would have thought some of these ideas were somewhat heretical. But as I traveled around the world and visited courts in many, many countries, questions began to arise in my mind, and I fear that I became more receptive to "alien" ideas than I was in my youth.

I do not advocate that we abandon the jury or that we abandon the adversary system, but I urge students to ask hard questions and to look at how other societies deal with these matters.

I give you two concrete examples of my own experience, although in another area of the administration of justice. As I visited courts and law schools in other countries, I also visited their prisons. On a visit to the Soviet Union, I was compelled to conclude that the only correctional institution I was invited to see — a juvenile institution — had training programs in advance over anything I had seen in other countries. Around the other side of the world, I found that the prisons we visited in the Peoples' Republic of China were literally factories with fences around them. The prisoners were trained in marketable skills by learning to produce goods to help pay for their incarceration. That surely makes them more likely to become useful citizens. It is clear to me that there is much that we can learn from the experiences of other systems of justice and other countries.

If our system of justice cannot stand up under inquiry into the validity of its methods, it may be too fragile to survive the stresses of the 21st century. Surely we, who are schooled in the adversary process, should not resist submitting the system itself to adversary examination. Indeed, we lawyers should lead the way.

Some of my criticisms of legal education have met with the response from professors: "We are not running trade schools." Of course, I do not suggest law deans run "trade schools" in the sense of training plumbers, electricians, or bricklayers. But I have difficulty in understanding why a law school should not in many respects parallel the medical school training of physicians and surgeons. Surely a medical school does not become a "trade school" by teaching the elements of diagnosis and of surgical procedures.

Lawyers, whether counselors or advocates in the courtroom, should not have their first exposure to the "nuts and bolts" of the real world — the law of evidence, for example, or the rules of decorum — after they leave law school. Happily, in the past five or ten years, our law schools have begun to move in the direction of providing students with more exposure to the practical side of the law in the world they will encounter.

That the future will bring changes in Notre Dame's London Law Centre Program, I have no doubt. But the innovative leadership that created it will continue to enlarge and extend it. I would hope there would be, for example, opportunities for the students to cross the channel and observe how justice is administered on the Continent, less than an hour's air travel time from London.

Every law school should inculcate in its students some understanding of the organization and regulation of the profession so they can challenge and improve that structure. There are serious issues to be addressed. Our laws strictly regulate monopolies in the private sector, and our legal profession, which is a monopoly, must be regulated.[6] The choice, and we may be confronted with that choice before too long, is whether we will continue regulation of the bar by the profession and our courts, or whether regulation will be imposed by legislative action. Here again, England's experience and procedures offer an excellent guide. In England the profession regulates itself. Admittedly, in England it is a far simpler matter because England is not subject to a federal system with more than 50 jurisdictions establishing standards for legal education, admission, and regulation of the profession. The Notre Dame London Law Centre should study the organization of the legal profession of England.

In no other free country I know of are advocates more rigidly regulated and disciplined than in England. Yet, that regulation and discipline comes not from the coercive powers of government, nor from judges, but from self-imposed standards established and enforced by the profession itself. It is surely not necessary to recall the qualities of independence, courage, and superb advocacy of the British bar that traces its history back to great figures in the law. Lord Coke forfeited his position and gambled his head rather than yield on principles; and Sir Thomas More forfeited both his office and his head for principle.

To accomplish the kind of legal education I speak of, there must be a fundamental change in the attitude of some legal educators with respect to the use of judges and practicing lawyers in the teaching process. American legal education suffers less today, but still too much, from a "trade union" attitude that is not entirely hospitable to the presence in the classroom of members of the practicing bar and judges.

It is now more than ten years since the Committee of the American Bar Association, chaired by my distinguished late colleague Jus-

6 *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

tice Tom C. Clark, reported that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers in the United States was virtually nonexistent. The Bar Association has labored to correct this, and there are some small signs of progress. Here our law schools can make a contribution, for we cannot meet Justice Clark's indictment by any one segment of our profession acting independently. It must be done in a working partnership of law teachers, practitioners, and judges.

In a volume of essays published in 1901 entitled *A Century of Law Reform*, reviewing changes in England from 1800 to 1900, one of the accounts relates to the profession itself in which Blake Odgers tells us this:

> Of all the mighty changes that have taken place in the nineteenth century, the greatest change has been in the tone of the administration of both the civil and the criminal law. The manners of our law courts have marvelously improved. Formerly judges browbeat the prisoners, jeered at their efforts to defend themselves, and censured juries who honestly did their duty. . . . [C]ounsel bullied the witnesses and perverted what they said. Now the attitude and temper of Her Majesty's judges towards parties, witnesses, and prisoners alike has wholly changed, and the Bar too behave like gentlemen. . . . [T]hey no longer seek to obtain a temporary victory by unfair means: they remember that it is their duty to assist the Court in eliciting the truth. This is due partly to the improved education of the Bar; partly no doubt to the influence of an omnipresent press; but still more to Her Majesty's judges. If counsel for the prosecution presses the case too vehemently against a prisoner; if counsel cross-examining in a civil case pries unnecessarily into the private concerns of the witness; a word, or even a look, from the presiding judge will at once check indiscretion.[7]

Is it too much to hope that, on our side, we will be able to make a comparable assessment of the 20th century seventeen years hence?

With this new link to the source of all our law, Notre Dame has an unparalleled challenge to lead the way.

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7 Odgers, *Changes in the Common Law and in the Law of Persons, in the Legal Profession, and in Legal Education*, in A CENTURY OF LAW REFORM 41-42 (1901).