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JUSTICE

by

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In the nineteenth century Law was the aristocrat of the three professions, Law, Medicine, and the Church. Now, however, it finds itself competing with an ever increasing number of professions in the midst of which it is in danger of becoming lost. Many lawyers, therefore, are asking why this has happened and what is to be done about it.¹

Cooper suggests that the decline of the profession of law in popular favor is due in part to the fact that while problems of social justice currently have assumed the highest place in the basic values of society the legal profession has, in some quarters, come to be regarded as the obsequious lackey of the *ancien regime*, chiefly engaged in helping property and privilege to rescue what little is left to them of their ancestral possessions.² He might also have added that elsewhere the profession has become the utter slave of the New Order.³

He notes further that the whole theory of law and civil government has undergone change. For the "separation of powers" theory, which gave lawyers a sphere of exclusive activity, has been substituted a "balance of power" theory, which may mean anything or nothing. Private law is declining in importance in relation to public law, and the lawyers' territory is seriously narrowed. The function of private law and of the legal profession as social agencies is less today, he feels, than at any time since the establishment of parliamentary democracy.⁴

Another explanation of the decline of the legal profession in popular favor is that the young lawyer is too prone to regard his highly competitive profession simply as a means of livelihood and to lose sight of the fact that the average citizen regards the legal profession simply and solely as the necessary channel through which the public can obtain justice. Whereas the lawyer tends to see the public only as potential clients, the public sees the lawyer as the vendor of justice—at a price.

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¹ See Rt. Hon. Ld. Cooper, *The Profession of the Law Today*, 66 *Scottish L. Rev.* 249-256; compare A. De Tocqueville, *Democracy in America*, trans. Bradley, Vol. 1, pp. 272-280.

² See Cooper, *art. cit.*

³ See C. Costamagna, *Faschismus: Entwicklung und Lehre*, 36 Beihefte zum Archiv fuer Rechts und Sozial-philosophie 317, 319-320; R. Hess, *Rede Anlaesslich der Eroeffnungsgesamtheit des deutschen Juristentages*, 1936, 6 *Deutsches Recht* 217; Smith, *The Legal System*, *The New Russia*, ed. Davis, 153-155.

⁴ See Cooper, *art. cit.*

Gardner suggests that it would be better for lawyers to spend their extra energy in building up again the prestige of the profession rather than in amassing wealth on which to pay increasingly heavy taxes.⁵

Building up the prestige of the profession, however, involves convincing the public that lawyers have something special to offer to society, something which cannot be offered by any other group. The procedure used so to convince the public may be negative or positive.

Negatively, lawyers have, thus far, drawn a line, told the world their side constitutes an area in which the lawyer has exclusive privileges, and have prosecuted and otherwise tried to discourage trespassers, unauthorized practitioners of law. They have buttressed their position by acts of the legislature, by decisions of courts, and by action by committees of the Bar associations, but the difficulty still exists.⁶ It would seem, then, that this negative solution is insufficient as a means to restore the profession to its former high place in public esteem.

A positive solution is to develop lawyers whose constant objective will be to see to it that the public obtains the justice for which it longs. Dean Griswold notes that as long as society grows and develops the structure of justice will never be complete, and points out that lawyers and legal educators must necessarily have justice as their constant objective. He suggests that they may well be conscious of that goal and undertake a consideration of the relation of the system of laws they administer to the ideals of justice they hold.⁷

He notes, too, that the twentieth century has given increasing recognition to the ethical and social elements in the continuing process of adjusting human relations. There is a dichotomy, he observes, between law and justice, though they are closely linked, and now more emphasis is placed on "justice" and less on the relatively rigid concepts inherent in the word "law." Justice, however, cannot exist apart from law. The goal is "equal justice under law," a blending of authority, implicit in law, and an ethical goal, which is the heart of justice.⁸

Another positive approach is to insist that the true lawyer today must know more than the law as recorded in the law books. He must be a specialist in human relations and in the solving of the problems that concern individuals and society. He must be equally versed in private

⁵ See E. S. Gardner, *Adventures in Justice: A Call to Arms*, 37 A. B. A. J. 5-8, 84-85 (1951).

⁶ See J. S. Broadway, *A Better Mousetrap*, 33 J. Am. Jud. Soc. 17-23; G. E. Mathieu, *Unauthorized Practice of Law*, 24 Wash. L. Rev. 387-395.

⁷ See E. N. Griswold, *Law and Justice in Contemporary Society*, 28 Can. B. Rev. 120-128.

⁸ See Griswold, *art. cit.*

law and in public law. He must be well-rounded, gifted in understanding the problems of modern society and the relations of individuals thereto.⁹

A further suggestion is that Law Schools should not fail to teach the underlying theories of the subject matter. Legal theory does not exist in isolation. It describes historic institutions which have purposes to serve and which are to be seen as part of the structure of modern society. Ultimately, as everyone knows, the lawyer must advise on matters of policy. He must be able to translate issues of the present into probable issues of the future. He must be able to cut through the clichés and recognize the basic forces which may bring about changes. He must get a philosophy of law, of institutions in terms of the interests protected.¹⁰

Of the foregoing positive suggestions for enhancing the prestige of the legal profession that of Griswold and Gardner, that lawyers always have justice as their constant and conscious objective, though less detailed than those of Williams and Levi, seems most likely to strike a responsive chord both in the members of the profession and in the general public. It raises, however, the problem: What do we mean by "justice"?

We are all familiar with the classic definition of Ulpian:¹¹ Justice is the perpetual and constant will to render each his due,¹² which may be explained further by saying that rendering to every man his due is intended to make sure that neither party may gain by the other's loss.¹³ We also think of "natural justice" as the attempt of honorable men to do that which is fair,¹⁴ that which is founded in equity, in honesty, and right.¹⁵ We think of justice as the principle of rectitude and just dealing of men with each other, as conformity with that principle, as integrity and rectitude, as one of the cardinal virtues.¹⁶

We realize that, as Vattel says, justice is the basis of a state, that human society, far from being an intercourse of assistance and good offices, would be no longer anything but a vast scene of robbery, if there were no respect of this virtue, which secures to everyone his own.¹⁷

⁹ See G. H. Williams, *Arthur T. Vanderbilt and Legal Education*, 24 N. Y. U. L. Q. Rev. 1-21.

¹⁰ See E. H. Levi, *Legal Education Today*, 32 Chi. B. Rec. 151-155.

¹¹ D. 1. 1. 10.

¹² Compare *Collier v. Lindley*, 203 Cal. 641, 266 P. 526, 530 (1928).

¹³ *Livingston Oil Corp. v. Henson*, 90 Okl. 76, 215 P. 1057, 1059 (1923).

¹⁴ *Ralli v. Soc. Anon. di Navigazione a Vapore "G. L. Premuda"*, 222 Fed. 994, 1000 (S. D. N. Y. 1915).

¹⁵ *Kempsey v. Maginnis*, 2 Mich. N. P. 49, 55.

¹⁶ *Lamborn & Co. v. United States*, 65 F. Supp. 569, 576, 106 Ct. Cl. 703 (1946).

¹⁷ Quoted in Charge to Grand Jury, Neutrality Laws, 30 Fed. Cas. 1021, 1022; compare St. Augustine, *De Civitate Dei*, IV, c. 4: "Take away justice and what are realms but great robber bands?"

We may, however, reduce the sphere of justice to the mere keeping of valid covenants,¹⁸ or to nothing more than a unifying conception in which desired objects are all embraced according to the supreme law for individual desires, i.e. that they be guided by the idea of perfect harmony with all other will contents.¹⁹ We may even make it merely a class name for all sorts of definite working values in legal experience, values which are ultimately nothing but acceptable wants.²⁰ We may consider it simply as a sentiment, excluding any conception of a superior principle.²¹

More practically, we may, with J. S. Mill, call justice a word implying something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right.²²

Not infrequently we may consider justice as a term for rectitude in the broadest sense, both internal and external. Plato thus considers it when he discusses the inner rectitude from which outer rectitude flows. Justice, he says, is concerned

not with the outward man, but with the inward, which is the true self and concernment of man: for the just man does not permit the several elements within him to interfere with one another, or any of them to do the work of others—he sets in order his own inner life, and is his own master and his own law, and at peace with himself; and when he has bound together the three principles within him, which may be compared to the higher, lower, and middle notes of the scale, and the intermediate intervals—when he has bound all these together, and is no longer many, but has become one entirely temperate and perfectly adjusted nature, then he proceeds to act, if he has to act, whether in a matter of property, or in the treatment of the body, or in some affair of politics or private business; always thinking and calling that which preserves and cooperates with this harmonious condition just and good action, and the knowledge which presides over it wisdom, and that which at any time impairs this condition he will call unjust action, and the opinion which presides over it ignorance.²³

To have, however, a more workable idea of justice we must distinguish it from other virtues. It may well be the greatest of the natural virtues and may direct the others, to some extent, but it does not supplant them all. Primarily, justice is concerned with the regulation of man's external activities whereby he comes in contact with his neighbor, whereas the other virtues are concerned with man's control of himself,

¹⁸ See T. Hobbes, *Leviathan*, ed. Waller, pp. 97-100.

¹⁹ See R. Stammler, *Fundamental Tendencies in Modern Jurisprudence*, 21 Mich. L. Rev. 862 (1923); for criticism of Stammler's theories see H. A. Rommen, *The Natural Law*, 136.

²⁰ See F. V. Harper, *Some Implications of Juristic Pragmatism*, 39 Int. J. of Ethics, 269, 281. This seems to make the importance of the legal profession less than that of the other sciences upon which lawyers must, according to this theory, depend.

²¹ See L. Duguit, *Objective Law*, 21 Col. L. Rev. 17, 30-31 (1921); for criticism of Duguit's theories, see Rommen, *op. cit.*, 143-144.

²² See J. S. Mill, *Utilitarianism*, 46.

²³ See Plato, *Republic*, IV, ed. Jowett, 134.

whether in the form of temperance or in the form of courage in facing difficulties.

Justice is the outstanding one among the moral virtues because it looks to the welfare of others rather than to one's own welfare. Among the various kinds of justice that which looks to the welfare of the community, general (legal) justice, is greater than that which looks to the welfare of the individual.²⁴

Man has his internal drives which may or may not be regulated reasonably. He acts under the impulse of these drives and so deals with external things. In dealing with these external things, engaging in these external activities, he comes in contact with others.

Basically, justice is not concerned with regulating man's internal drives. They are the concern of other virtues, e.g. temperance and fortitude.²⁵ It is only when these internal drives have some external effect in man's activities that they come, to some extent, under the control of justice.²⁶

Justice, then, is concerned not so much with the inner attitudes of a man—unless it be taken in the very broad sense in which Plato spoke of it—as with his activities with regard to others. People consider these activities good or bad in themselves, quite apart from the attitude of the one who performs them. The goodness or badness is considered on the basis of the relation of these activities to other persons. The fundamental point which people consider in determining the goodness or badness of the activities is the idea of "debt," i.e. whether the one engaging in the activity renders to the other with whom he comes in contact what is somehow "owed" to that other. Justice is the virtue, the habitually good way of acting, which controls in these matters.²⁷

The "other" party with whom a man comes in contact when he engages in an external activity may be either the community as a whole or another individual person. Consequently, the virtue of justice can be distinguished according to its general and its special, or particular, aspects.²⁸

The general welfare of the community is that toward which the operations of the individual persons who make up the community are to tend, just as the welfare of any whole is that toward which the parts

²⁴ See St. Thomas Aquinas, *Summa Theologica*, II-II, q. 58, a. 12.

²⁵ See *S. Th.*, II-II, q. 58, a. 8.

²⁶ See *S. Th.*, I-II, q. 60, a. 3.

²⁷ See *S. Th.*, I-II, q. 60, a. 2.

²⁸ See *S. Th.*, I-II, q. 60, a. 3 ad 2.

thereof are to tend, e.g. as the parts of a machine are to work toward the completeness and smooth running of the whole machine. The welfare, however, of one individual person is not the reason for the existence of the other individual person. Consequently, general justice, which is directed to the general welfare, can extend further to internal impulses, whereby man is somehow disposed in himself, than can particular justice, which is directed to the welfare of another individual person. General justice, however, when it does touch upon internal impulses, which are properly the object of other virtues, does so to the extent that they influence a man's external operations, i.e. insofar as it commands a member of the community to do great things, and those which pertain to the temperate man and the kind man, as Aristotle says.²⁹

The general welfare of the community and the individual welfare of one person differ not only in degree but also formally. The idea of the general welfare of the community is one thing and the idea of individual welfare is another, just as the idea of the whole is one thing and that of the part is another. Therefore, Aristotle³⁰ says that they do not speak properly who say that the state and the household, and other such things differ only by reason of size and not specifically.³¹ The general aspect, therefore, of justice is different from its particular aspect.

Justice in its general aspect, as it provides for the general welfare of the community guiding the activities of a man as he is a member of that community, even his internal impulses insofar as they affect his activities with regard to the community, we expect to find first of all in him or in those who govern the community. Secondly, we expect to find this virtue in the members of the community subject to that government insofar as they carry out the just dispositions of the government. This general justice, however, is of the same species whether it is considered in the government or in the citizens, for it looks, in each case, to the same formal object, i.e. the general welfare.³²

Justice in its particular aspect concerns the welfare not of the community but of the individual. It is concerned with seeing that to the individual is rendered what is due to him. It can be subdivided on the basis of the person or persons who owe this debt to the individual, for the debt may be owned by another individual or by the community as a whole.

Commutative justice is that virtue whose object it is to render to everyone what belongs to him, as nearly as may be, or that which governs contracts. The term has been compared with "distributive justice" and it has been said that to render commutative justice the judge

²⁹ See Aristotle, *Ethics*, V, c. 2; *S. Th.*, II-II, q. 58, a. 9 ad 3.

³⁰ See Aristotle, *Politics*, I, c. 1.

³¹ See *S. Th.*, II-II, q. 58, a. 7 ad 2.

³² See *S. Th.*, II-II, q. 58, a. 6.

must make an equality between the parties, that no one may be a gainer by another's loss.³³

Distributive justice, on the other hand, is that virtue the object of which is to distribute rewards and punishment to each one according to his merits, observing a just proportion by comparing one person or fact with another.³⁴

Distributive and commutative justice are distinguished not only according to "one" and "many," i.e. by the fact that commutative justice regards the debt due from one and distributive the debt due from many, but according to the different reason for the debt. That which is common property, to be distributed, is due in one way to an individual, and that which is individual property, to be handed over, is due in another.³⁵

Aristotle points out, further, that in dealing with the relations between individuals we must consider that not all appear as *sui juris*. He distinguishes within the domestic group the relationships to be found between husband and wife, parent and child, and master and servant. In the case of these individuals, one is, as it were, a part of the other. Therefore, he concludes, toward such persons we do not speak of justice in its usual sense, but rather of "economic," household, justice.³⁶

If we consider, next, the relationship which exists between law and the virtue of justice we should observe that human law is directed to the civil community, which is that of men with each other. Men, however, are directed toward each other through external actions, whereby men communicate with each other. Such a communication pertains to the idea of justice which is properly directive of the human community. Therefore, human law does not lay down precepts save concerning the activities of justice, and if it commands acts of other virtues, e.g. temperance, courage, kindness, mercy, this it does only insofar as they take on the character of justice.³⁷ In other words, morals can be determined by human law only insofar as they concern justice,³⁸ though, as was said, law can command more for the general welfare of the community than it can as between individuals.

The lawyer seeking to promote justice can, therefore, consider it first in its broadest sense, as did Plato, and strive for an inner rectitude, a completeness of all virtue, which will overflow into all his external actions, thus quietly setting an example for his fellow-men to lead them to greater justice, and at the same time gaining for himself their respect for him as a man.

³³ *Bowman v. McLaughlin*, 45 Miss. 461, 465 (1871); compare *S. Tb.* II-II, q. 61, a. 1.

³⁴ *Ibid.*

³⁵ See *S. Tb.*, II-II, q. 61, a. 1 ad 5.

³⁶ See Aristotle, *Politics*, I, c. 3; *Ethics*, V, c. 6; see also *S. Tb.*, II-II, q. 58, a. 7 ad 3.

³⁷ See *S. Tb.*, I-II, q. 100, a. 2.

³⁸ See *S. Tb.*, I-II, q. 99, a. 5 ad 1.

He can also promote justice in the stricter sense mentioned whether he acts as a professional man, as a legislator, a judge, an administrative official, or as a private citizen. As a professional man he will naturally be concerned first of all, if it is a question of the rights of his client with respect to another individual, with the requirements of commutative justice. He will not, however, forget that both his client and the other individual are members of a community the welfare of which must be safeguarded. He will, therefore, in seeking commutative justice for his client not overlook the effect of his action upon the general welfare of the community. In this way he will tend to effect that "social justice" which lawyers are sometimes charged with neglecting.

If he acts as a legislator he will be primarily concerned with the general welfare of the community, but he will not forget that something may also be owed to the individuals who compose the community. This may require him to consider the distribution of burdens, e.g. taxes, or of favors, e.g. exemptions, or it may require him to make proper dispositions directed toward securing equality in the treatment of one member of the community by another. He will realize, too, that in problems of "household" justice, as Aristotle calls it, the different situation of the persons involved requires a treatment different from that which they would have were they entirely *sui juris*.

If he acts as a judge, especially of a bench whose decision will constitute a precedent to be followed for the future, he will have in mind the requirements of general justice, for he is then acting somewhat as a legislator. He will also have in mind the requirements of commutative justice between the parties, or of "household" justice, as the case may be. He will also, in certain cases, take into consideration the requirements of distributive justice.

If the lawyer acts as an administrative official he will, in drafting his rules, consider the requirements of general justice as well as of commutative justice between the parties who may have disputes to present to his agency. To the extent that he is in a position to distribute the burdens or favors of the community to individuals, he will have before his mind the requirements of distributive justice. In this latter case, as Aquinas wisely remarks, moderation is required.³⁹

Acting, finally, as a private citizen, the lawyer can observe the requirements of commutative justice in his dealings with his fellow-men. He can observe the requirements of distributive justice by being content with a just distribution and not seeking to overreach others.⁴⁰ He can observe the requirements of general justice by carrying out the duties

³⁹ See *S. Th.*, II-II, q. 61, a. 1 ad 1.

⁴⁰ See *S. Th.*, II-II, q. 61, a. 1 ad 3.

which are imposed upon him for the general welfare by the law-making bodies in the community. In his capacity as a member of the people, who by constitutional theory are the final repository of sovereignty, he can exercise, in keeping with his individual and professional capabilities, a general supervision over the dispositions which are made for the general welfare and over the distributions which are made of common property as well as over the administration of justice between individual and individual.

Regulating thus his external activities which bring him into contact with others in accordance with the requirements of justice as they may apply to the various possible situations in which he may find himself, it would seem that the individual member of the legal profession can demonstrate to the public by actions, which are always more effective than words, that his constant and conscious goal is justice. The public, in turn, which is seeking justice and expects to find it at the hands of the legal profession will then not be disappointed, but will rather come to see that lawyers have a definite function to perform in society, i.e. the procurement of justice whether for the community as a whole or for the individuals therein.