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DISHONOR AT THE BAR

By WALTER R. ARNOLD

Are more than half the lawyers in these United States dishonest? A startling affirmation to that effect is made in Milton MacKaye's article in the Outlook and Independent for August 21st. If it be fact, we must needs become uneasy for the future administration of justice; the enactment of legislation; and the execution of the laws—aye, the very preservation of our institutions—because in the United States, lawyers occupy practically all of the judicial seats in our government; about half the legislative places (with an influence therein much greater than the proportion of their ratio); and to hold about twenty-five per cent of the executive offices in nation, state and municipality. This spacious assumption is not altogether new. Its expression has always appealed to those who like to hunt with the mob, and to bury the profession beneath a heal of barbed adjectives. But the conclusions, permaps deserve a word of analysis. It must be taken cum grano salis. Is it not the product of people possessed of an exuberant imagination?

The analysis contained in the article proceeds largely along the lines of the fallacious inference of casuality from the mere fact of accompaniment—cum-hoc ergo, propter hoc. To shun such sophistical conclusions is one of the first particulars of training of the lawyer. If he is not fore-armed to avoid it, he soon finds himself mired in a bog of egregious ineptitude. He is reminded that by such a course of reasoning Burgoyne and Cornwallis would receive the honors and adulation of America; statutes would be erected in commemoration of them, for, "did they not lose the war and make possible these United States?"

What are the facts? If they are inconsistent with the commonly accepted rumour, what has given rise to such malicious rumours? I have, as a lawyer, dealt with lawyers in every large city, and in a great many of the small cities and towns all over the nation, as well as with lawyers in foreign countries. As a member of grievance, standards, and disciplinary committees of local, state and national bar association, I have heard a great many complaints of misconduct lodged against members of the bar, some well justified, some based upon circumstances naturally arousing suspicion, some without foundation whatsoever By far the most fall in the third category. It is not, I believe, an exaggeration on the side of charity to say that three in every four of the complaints of unethical conduct made against barristers in this country (some of which never come formally before the grievance committees or the courts) are without substantial foundation whatever. Moreover, it is well to bear in mind, that not more than fifteen per cent of the lawyers, by and large, are ever made subject of serious complaint. Allowing for repetitive assertion against the same member and taking into consideration the surprislingly large number of charges without cause, one would not be far wrong in asserting, Mr. MacKaye, to the contrary notwithstanding, that dishonesty or dysethics is a justified cause of complaint only in the case of some one tenth of the members of the bar and that nine tenths of the lawyers on the basis of the canons of ethics of the bar to the governance of which they are subject, are honest and honorable. The canonical qualifications do not distract from usual conceptions of honesty and honor. On the contrary, if the lawyer's conduct were to be measured or tested by the touchstone of honor and honesty obtaining in the laity, the percentage of lawyers who could escape the bar sinister would be much greater—ninety per cent perhaps. He is bound to a far more rigid rule of conduct than the layman. In many instances, what is considered "good business" on the part of the layman, is considered "bad ethics" if the lawyers were to resort to the same expedients. Abnormal cynicism and, equally, unsophisticated sentimentality aside, what a utopian community it would be where we should find in rank and file, ninety-nine men in a hundred strictly honest, and honorable! Diogenes would have to trim his lamp considerably to

accomplish that feat.

What gives rise to the unfounded, but widely prevalent, but erroneous opinion of so general unscrupulousness and deceitfulness of lawyers as a class? Unqestionably the bar has itself to thank for a considerable share of this baseless libel. Not on direct accusation, without cause, of a fellow member—which seldom occurs—but in consciously or unconsciously seriously confirming his client in the belief that his adversary and the latter's counsel are tarred with the same stick. It is but human nature for nearly every litigant and contender against another, in his own mind and to his confidents to caricature his opponent as a vivious demon—a true offspring of Hell. It is also natural that this conception should be contagious. The young practitioner especially is quickly infected with the same misanthropic notion as to his client's antagonist. Seven league boots are not essential equipment to make the step from the subject of animadversion, to the espouser of his cause—his lawyer. For is not the attorney the mouth-piece of his client whose personality he reflects in the controversey?

Again, many lawyers feel the need to refrain from defending an unwholesome charge against a comrade at the bar, because they have the belief that the client might get the impression that they are in league with or sympathetic for the other. And silence on the part of one member of the bar, speaks consent to what is asserted of the other. Then, armed with this pseudo-confirmation, clients spread the tale abroad, and from mouth to mouth it travels—even unto the third generation—that Lawyer Brown "is crooked;" that Lawyer Jones is "in league with thieves;" that Lawyer Green "gets paid by crooked politicians to keep his mouth shut," etc., etc., ad nauseum. The whole profession suffers vicariously, just as a whole family must bear a stigma when one of its members is branded a thief.

The fountain out of which perhaps flows the main stream of this poison is the universal misapprehension of court procedure and the lawyer's duty to his client and the cause entrusted him. Whenever the average layman reads a lurid account by a McKaye in his daily paper of how Loeb and Leopold escaped the hangman; how this man or that can slay his wife and be acquitted on

the ground of insanity, he invariably attributes the result not to the merits of the case, nor to the weakness of the jury, but to the "crooked lawyer," who was employed to defend. It appears to be a matter of difficulty for the layman to understand that a lawyer's ethics compels him, when undertaking a defense of one accused of crime, to bring forward in his defense every means known to the law of the land to spare him conviction. It is perhaps not out of place to quote the 5th canon of professional ethics of the Bar:

> "It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

A little reflection, with the perspective of judicial history and especially of the Star Chamber proceedings in the reign of Charles I, will impel ready assent to the virtue of this canon. But in the heat of controversy, when atrocious crime has been committed and the finger of accusation rests on one whom circumstances rests as rumoured and publishe in the press before trial, apparently convict, the public becomes restive and eager to wreak its vengeance. The picture is one against all, untill the lawyer—counsel for the defense—arrives on the scene. Then, as in the case of any other unpopular cause, the lawyer becomes one condemned with his client in the public mind. He is, unless there be some element of public sympathy for the accused, ostracized, at least for the nonce. If he procures a continuance for his client, the better to prepare his defense, the public, through its mouth-piece, the press, straining at the leash, ardent for revenge, deplores the law's delay and "crookedness of lawyers" who are able to persuade the court that delays should be granted. The public seems incapable of envisaging the defense counsel as engaged in the performance of a public duty—as a minister of the justice—often under compul-

sion from the bench without any compensation, or for compensation wholly inadequate for the labor involved and the odium he must suffer because of the discharge of his duty.

Suppose there were general assent to the proposition that where the circumstances of suspicion were strong against one accused, he should be deprived of any counsel. But that was exactly the philosophy of Lord Jeffreys at the Bloody Assizes, where hundreds were condemned to death without even the semblance of a fair trial. When the suspicion was strong, and demand by the royal party was for conviction, the accused was promptly convicted on the pretext that the preservation and safety of the Kingdom could suffer no public trial. Now, no one wishes a restoration of such conditions. Canon the 5th and appropriate legislation in each state effectually stand in the way of a revival of the Bloody Assizes. And it is common knowledge that with all the safe-guards thrown about a person accused of crime, perfectly innocent men have been convicted, spent years in prison, some were put to death, their wives widowed, their families disgraced, followed only years after the revelation that, in some cases no crime was committed at all, in other cases that the victim of the punishment was not guilty. These considerations should also be pondered before one joins the mob, in a cry for the guillotine for the accused and his lawyer.

With one phase of the article under review, nearly every lawyer will agree. What dishonor there is at the bar, is fostered and personified mostly by the ill-educated, ignorant, unprepared lawyer. His makeup and comprehension of duty approaches too near that of the average layman to enable him to make a success at the honorable practice of his profession. He starts out in deceit—misleads the public into believing he is a skilled practitioner, able by training and capacity to protect their rights and redress their wrongs in the forum; when, as a matter of fact, he does not and knows he does not possess the essentials to cope with abstruse principles of the law and his better prepared brethern. He will, to make up for the lack of intellectual equipment and training resort to unscrupulous means to procure, satisfy, and hold his clients. But in general he is soon eliminated. Not nesessarily by disbarment, but under the law of the survival of

the fittest. He is for a time a menace to the public and to his clientele, but just as nearly every dishonest or unfaithful employee, he is eventually found out, and then rapidly sinks into disrepute. To keep this annual crop of unfit and misfits from gaining a transitory foothold is and always will be one of the greatest concerns of the judiciary, the legislature and the bar associations. Much is being done to accomplish it, but the public seems to take slight interest in the effort. Witness the condition in Indiana (special meat for Mr. McKaye) on four distinct occasions through the untiring efforts of the Indiana Bar there has been put before the people of this state by plebicite the question of amending the Constitution so as to vest the legislatures with authority to require something more than moral character for an admittee to the bar, and each time it has failed. Is there any impropriety in pointing the finger of responsibility for the maintenance of this reprehensible condition?

Collateral to the question of keeping the ignorant and unfit lawyer from the practice, is that of restricting the proportion of lawyers to the population, regardless of qualifications. It is the popular idea that the lawyer is eager to save himself a monopoly in which to ply his craft, and that it is this selfish motive which actuates him to move for more rigorous measures of restriction to be heaped against the aspirant to practice. The well-qualified lawyer does not fear; he welcomes well-qualified additions to the profession. As addition is made of better qualified youngsters, the unscrupulous are unable to withstand the economic pressure, the lack of sufficient honorable, qualified lawyers is the only excuse for the ignorant shyster to exist, just as the lack of sufficient well-trained physicians furnishes the host of parasites, quacks, or the lack of well-trained tradesmen invites the unskillful to break into a trade they know little about. The self-respecting lawyer, welcomes with eager arms vast additions of thoroughly trained, soundly moral, natively apt new-comers to the bar. They constitute the first line of reinforcements to put out of the running the dishonoable element that is in it now. Is it not ancient philosophy of ethnology that an increase of the numbers of the strong will drive out the weak? But in this desire the bar associations are not obtaining the support from the public and press to which they are entitled. If and when the field

becomes overcrowded—and that is in the dim vista of future generations, not our's—the lawyer's training and education has not been misspent. A well trained lawyer can fit any executive position and master the details with much greater facility than one who does not possess his legal education. It is necessary to cite examples of law trained executives in almost every great business and industry. It is common knowledge. Furthermore, and we shall give it a little more detailed consideration hereinafter, every office-holer in a position of major importance should be law trained. There are far too many in legislative and executive public office who go wrong because of their ignorance of the law which they are called upon to administer or formulate. While law-trained officials are incumbent of about three-fourths of the major offices, the percentage should be substantially larger, and should reach further down the scale into minor offices. A lawyer office-holder rarely goes corrupt; he has too much equilibrium.

No discussion of this problem is complete without considering the judiciary, recruited, as it is, from the bar. A morally sound, well-equipped advocate does not always make a good judge; on the other hand, a poorly trained, indolent lawyer with weak morals, can never body forth into a good judge. But, alas! we have some such weaklings on the bench. Why! I shall leave the dear Public to answer, because, with the exception of the federal judiciary (which, with very few exceptions, are sans reproache) the people select their own judges, and they seldom lack for upright, concientious and well-qualified candidates. However, so long as they permit the politicians to dictate their candidates, they will get political judges and not judicial judges. The professional politician will hardly support a candidate for judicial office who is not pliable—who is unusable. That is contrary to his code. The candidate to receive such support must be amenable to political rule of the party and the heads of the party who put him into power. There are, of course, exceptions, but such only prove the rule. The high-grade lawyer cannot stomach the professional politician, and will not stoop to receive from him the accolade and swear fealty. Take the judiciary out of politics, and politicians will be out of the judiciary and the well-qualified judges will be the rule not the exception. Demonstration of the

merit of this theory is not wanting. Any number of states and cities, which have cast off the yoke of politically ruled judicial candidates, and accepted those recommended by some committee, league or association which had no private, but only public, motives to get the best there was for this important branch of government, have paid tremendous dividends in cleaner government and prompt, effective and efficient dispatch of the business of its courts.

Theoretically the most direct means of accomplishing this laudable end is, of course, appointment by an impartial appointing power which is not in any degree governed or influenced by political considerations. Unhappily such a power, whether it be a single public functionary or a group or body—legislative or administrative—cannot meet that qualification. Such powers are, themselves, politically generated, be it legislature or executive. In the federal governmnt such a systm has a chance of success, because the executive is not likely to name a man for a position on the bench unless he is quite certain to receive the consent of the senate, with the least possible criticism of the nominee in closed session, and Presidents of this great Republic are not generally common clay. Some state judges should remain elective, but why make a "peoples' choice" necessary for every bench? No better judges of qualification of candidates for the judiciary exist than the judiciary itself. In nearly every state, the personnel of the supreme court or other court of last resort, is elected from different districts of the state. The membership are fairly well acquainted with the personnel of the bar in their respective districts, and especially become so after some years of practice in their tribunals of review. The highest court in the state should have the power of appointment to inferior courts, with the right to transfer and promote the incumbents, and, after a hearing to demote or remove an incompetent judge. He should be chosen from the district, circuit, or municipality over which he is to preside, but subject to assignement elsewhere to help out with congested dockets. His initial appointment should be probationary for say, three or four years, and at its end if he has served well, he should receive a permanent life appointment subject to demotion or removal by the appointing power after a fair hearing. It should not be necessary to invoke

the cumbersome machinery of legislative impeachment to get rid of an incompetent or dishonest judge. Neither should it be easy to remove a competent, honest judge for trivial or transient reason. Permancy in office would be one of the greatest inducements to the seasoned lawyer to accept elevation to the bench. Campaigning every four or six years, with a reckoning of its cost in money and personal feeling, besides the uncertainty of political fortunes keeps most good men from aspiring to judicial office.

It remains to deal with the selection of the proposed selectors of our inferior court judges. The membership of the highest judical tribunal, if to be vested with such great power, should be chosen by the people. But such selection should be at district non-partisian elections stripped as much as possible of all politics. The first term of the incumbent should be comparatively brief—four to six years. His second election if he survives, should be for life or retirement age, unless impeached. Bar associations have always sought this ideal—the selection of judges at elections separate from general elections and without regard to partisanship. The politicians have been utterly opposed to it, for obvious reasons. The people have followed the politician. Will they ever follow the lawyer?

Another imagined ground of most unjust criticism levelled at the bar, is its apparent opposition to the formulation of simplified rules of practice and the espousal thereof to success by way of legislative enactment. Pray, where do you suppose all the criticism of outworn and obsolete procedural rules originates? Do you suppose that the layman—who knows so little about such matters—would undertake to intelligently criticise what he so little understands? No, these urgings for reform come from the heads and leadership of bench and bar, where the problem is fully understood from such leaders as Chief Justice Taft, Elihu Root, Silas H. Strawn, all former presidents of the American Bar Association; James M. Beck, Dean Wigmore, Simeon E. Baldwin, John Bassett Moore, Dean Roscoe Pound, and a long line of other brilliant lawyers and judges, ad infintum. The noteworthy persons of the laity who raise their voices in criticism do but re-echo what the leadership of the bar has preached for many years; e. g., President Hoover. The criticism that

comes from press and layity is that the lawyer is doing nothing about it; that he is over-conservative and, having created of the profession a hierarchy for his tribe and become steeped in mystical and mythical symbolism, designs, by opposing change and innovation to keep prying eyes out of his business. These are the observations of the supposed experts who weigh out by milligrams the mint, annis and cumin of responsibilty for conditions. Their scales play them false. Every bar association, state and national, has sedulously worked for reform in procedure. Whatever reforms we have of the old, cumbersome common-law methods of bringing a law case to hearing, were fostered and fought for by the bar. Put your finger on the legislatures of the several states. The guilty you will find there.

Voice is given to the thought that the membership of legislatures, as heretofore stated, is more law trained than lay. Very well, that is admitted, but there is not a majority of lawyers. The majority of law-trained members of state legislatures are fresh from school. They are recommended to a session in the legislature as a sort of interne-ship—a post-graduate course for their training. It is not frequent one finds in a state legislature a seasoned member of the bar; and the young law-trained legislator, having tasted the fruits of loyalty to the politician, will, on the latter's suggestion or command, become a formidable opponent to legislation for procedural reform. There is also a certain natural jealousy of power and authority nourished in legislatures. Especially is this true of the layman legislator, who suspects that the judiciary and bar are seeking to deprive him of his power, is ready to vote against any attempted grant of further authority to the judiciary. The politician whose power rests largely on his ability tosecure special favors to his lieutenants or hirelings in circumstances as they are, with characteristic dubiety of maintaining his status quo under law reform, employs all his resources at his command to block it.

Every proposed reform centers largely around the system obtaining in England. The heart-roots of our system of law come from England. The English Parliament many years ago substituted for highly technical legislative rule of procedure the rules established by the Royal Bench, and there followed rapid

and persistent reform. When one argues this historical fact by way of comparison and commendation, the spread-eagle, red-corpuscled American legislator lets out a blood-curdling yell and prophesies that the lawyer will next demand a title of nobility, undemocratic trappings, wigs, gowns, etc. So, unless we either induce the seasoned lawyer to people our legislative halls, or bring about a change for the better and eliminate such bigotry in the average person we send to our state assemblies to represent us, we shall meet with very little success in reforming our ancient and coumbersome rules of procedure. Of the five bills for law reform recommended and introduced at the behest of the Association of the Bar of the City of New York in the New York Assembly for 1926, but one was adopted, and that only after debilitating amendments; of the six offered by the association in 1927, but one was adopted. Massachusetts Bar Associations met similar indifference on the part of the legislature. So in nearly all the states. However, the lawyer keeps on the job eternally. He meets rebuff and defeat in his valiant efforts at reform, but still lives in hope that some day the legislature may see the utility of vesting the highest court in the state with the power to prescribe simple forms of procedure and thereby abolish delay-provoking practices.

Much plaint is made about the enormous fees lawyers receive in receiverships and bankruptcies. There are, of course, occasion when the power to compensate attorneys for services rendered in pending estate is abused by the judge of the court in which the estate is pending. The court has control of the allowance of such fees and too often grasps the opportunity to pay a political or other debt by the use of the trust funds in its control. It is regrettable that such perfidious judges exist. The judge not the lawyer should be accountable for such conduct. The latter usually takes all he can get the judge to allow. This is not corruption on the part of the lawyer. He may overvalue his services, but seldom can he be found padding the roll. What is not generally understood in estate cases of large proportions, is the fact that the lawyer usually manages th eestate. The receiver or trustee is customarily a layman who depends upon the lawyer to manage his business. When this fact is considered, and the further fact that a five-million dollar enterprise not in-

frequently pays its president $100,000.00 a year salary, it is not necessarily inordinate to see a lawyer (and his whole staff costing him $15,000 to $20,000 per year) to be paid $50,000 or even $100,000 for a year's management of the affairs of an insolvent twenty-million dollar corporation, conducting ramifying litigation during its administration. The fact that the lawyer puts at the disposal of his client not only his own services, but his offices, his costly library, his clerks, his stenographers and bookkeepers, and cannot charge separately for such items is but seldom considered.

A final word about disciplinary measures against the unprofessional legal practitioner. An integrated autonomous state bar, after the English fashion, and now partially in vogue in California, North Dakota, Alabama, Idaho, New Mexico, and Nevada, will do much to bring about more effective punishment and expulsion of professionally delinquent members. But until there has been a shift of jurisdiction over such matter from the local to a more distant tribunal, composed of strangers to all principals involved, there will be continued difficulty and embarrassment in dealing with the situation. My own experience on disciplinary committees and boards convinces me that disciplinary problems cannot be satisfactorily handled by the local bars or committees composed of local members. Public sympathy, when a member of the bear is being prosecuted for misconduct, seems to shift to the member. He is usually a young man, and more than one glib tounge will slide along the information that the older members of the bar are persecuting a youngster because they fear his formidableness as an atogonist in event he is permitted to give his talents full play in the community. Where trial is permitted by jury, as in Indiana, it takes a very flagrant case, indeed, to secure a disbarment or suspension. The cut and dried appeal is usually made on behalf of the defendant that here is a young barrister, in the flower of manhood, who has stinted and sacrificed to prepare himself by education to follow his profession, and who, now that he has made some slight misstep, is sought to be eliminated from his chosen profession for life, his whole future to be blasted, whether he be merely suspended, or completely disbarred, and who will then turn his talents and skill to less honorable purposes. With due regard to the emotions of a big-

hearted jury it is pointed out that the accused has been punished enough by the odium which is cast upon him by the proceedings, etc., etc. The average jury-man is entirely too narrow-minded to perceive that many other young men will by example of conviction be kept straight, and as no particular harm has apparently come to anyone in particular, why should they not turn him loose with a reprimand. The abstract public is given terrifically little consideration in the jury-box. The remedy is for two or more commisions, each having jurisdiction to investigate, try, and discipline members from such part of the state furtherest removed rom the domicile of its members. But when such a commission is proposed by the bar associations, it is asked "why cannot you lawyers take care of your own bar? It is a matter of local concern that you have a clean bar, and if you have not the pride and courage to clean it up, do not expect the state to delve into its treasury to help you. If my children do not behave, I punish them on the spot, I do not go miles off to get someone who knows knothing about my children to find out if they should be punished and to mete out the punishment so prescribed." The legislature does not consider the many and devious lines of influence that are wielded locally in behalf of the one under scrutiny; the various methods used to curry sympathy and alienate support for sterness; all he envisages is his paternal autocracy at home, not the democracy about town, when he makes such an answer.

No, there is no need to harbor the fear that too many young men and women are obtaining legal education. Only one in ten who studies for the profession will ever make a sucessful lawyer, because of the lack of certain characteristics that mere education cannot supply. But the education of the others shall by no means be wasted. They will have acquired facility in reasoning and in orderly thinking and expression that scarce any other course can provide them with. It is the best thing that ever happened to America. The more that law is studied by more people, the easier it would be to have and sustain a law-abiding community. Every leader of American man-hood and woman-hood should have a legal training, whether he or she expects to practice the profession or not. It will never be wasted, provided it is a thorough training. Elementary principles of law as an

elective should be taught in every highschool and should be made required in every college course in the land. More and more capable lawyers and law-trained laymen is what we need as a prophylactic against the shyster lawyer and the political judge. It is pleasing to the lawyer to see so many with worthy attainments leaving the law schools each year. Their march into the land is in step with the tocsin sounded to mark the demise of the black sheep who prey upon the public and bring dishonor at the bar.