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## Mayer: The Lawyers

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THE LAWYERS. By *Martin Mayer*. New York: Harper & Row. 1967. Pp. xvii, 586. \$8.95.

Is stagnation a necessary and unavoidable concomitant of professionalism? Do carefully prescribed prerequisites for entry into a calling preclude widespread dissatisfaction with norms which have been studied and grown accustomed to, but which have outlived their usefulness? Must the preparation essential for admission to the bar infuse an individual with hostility to change and a predisposition favorable to the existing order? Is it impossible for lawyers to feel at ease when they are asked to espouse concepts which require them to abandon familiar techniques and principles? There

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is a growing awareness within the legal profession that societal demands today require a negative response to each of these questions.

Many who have undertaken to probe the psyche of members of the bar have discerned a generally negative attitude toward innovation.<sup>1</sup> Lawyers who display satisfaction with the current *modus vivendi* appear to outnumber those who seek to trigger a broadly based metamorphosis. Absent careful scrutiny and analysis, complacency may at times pass for satisfaction and a feeling of helplessness may be erroneously equated with disinterest. An investigator may be led to the conclusion that there is a natural and immutable correlation between bar membership and a desire to cling to the status quo. Numerous exceptions, however, belie the present validity of such a generalization. While many lawyers look askance at change per se, there are those who do not. There are members of the profession who do not shy away from painful questions about what should be altered or obliterated, and how rapidly the new can replace the old. For the well-being of the nation, our legal system, and the bar, it is essential that the doers prevail against the clingers, and the sooner, the better.

Those dissatisfied with the contemporary bar and the content of our law can look for sustenance to a healthy movement that is now afoot.<sup>2</sup> The search for a meaningful interchange and ultimate agreement between those deeply involved with the law and those who look at law from afar has attracted a growing number of protagonists within the last decade.<sup>3</sup> Members of the judiciary have joined the fray. Legislators are now found among the leaders of those who urge that a multitude of diverse precedents and procedures be discarded, and that fundamental as well as peripheral alterations be initiated. Both sides have shown concern and commitment in an arena which too often has taken on the semblance of a chasm with those intimately dealing with the law entrenched on one side and those removed from it perched on the other. Attempting to span the chasm now seems less foreboding; the challenge of concocting

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1. See, e.g., Ernst, *Too Little Progress*, in *THE LIFE OF THE LAW* 418-27 (1964); J. BENNETT, *OUTLAWS IN SWIVEL CHAIRS* 40 (1958): "Along with the rest of us, lawyers resist change. Archaic and clumsy as they are, the rules of court procedure and administration are something lawyers know and they find comfort in that knowledge. In resisting change lawyers oftentimes argue that there is really no need for reform."

2. Arthur T. Vanderbilt, while serving as Chief Justice of the Supreme Court of New Jersey declared: "It is not to our credit that where legal reforms have occurred they generally have occurred under the impetus of a popular revolt of laymen against the quaint professional notion that courts exist primarily for the benefit of judges and lawyers and only incidentally for the benefit of the litigants and the state." J. BENNETT, *supra* note 1, at 40-41.

3. Erwin N. Griswold, alluding to the need of laymen and lawyers to band together to bring about change, has pointed out that lawyers are oftentimes thwarted by "the restraint of the canons barring advertising, representation of conflicting interests, and lay intermediaries." E. GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* 37 (1965).

formulae that will successfully bring the antagonists together is presently an inviting one.<sup>4</sup>

It was with a degree of trepidation that this reviewer read the title page of *The Lawyers*. Having studied, practiced, and taught law, I was fearful that I was about to begin a painful plodding through an extensive diatribe against lawyers and the law. I was certain that I was about to find myself immersed in the usual blood-letting which occurs when a layman summarizes his findings following his study of a particular profession. My fear waned as I read the author's dedication: "For Henry Mayer and Ruby P. Mayer of the New York Bar." A brief hiatus and some quick digging revealed that Henry and Ruby P. Mayer were the author's parents. I hypothesized: A son of two lawyers who dedicated his observations about lawyers to his parents could not help but present his report with integrity and care. I found comfort in my assumptions that the author would not be tempted to inject vague and unkind generalizations, to overemphasize exceptions enticing to the reader, or to leave in the wake of his work freshly kindled flames of animosity toward lawyers and the law.<sup>5</sup>

Five hundred sixty-five delightful, readable, and informative pages later, I shared the author's sense of fulfillment. My hypotheses were sustained. *The Lawyers* is a lucid, searching, and fair critique of the legal profession written by an informed, alert, and perceptive author. His overview of our legal system—which he discusses under the heading of *Infrastructure*—is intelligent and penetrating. The author's insistence that there is a need to alter some aspects of currently prescribed norms of professionalism is convincing. On the whole, his arguments calling for changes in the content of our procedural and substantive rules of law are also persuasive.

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4. Encouraging efforts can be seen; in particular, extensive probing by sociologists is to be commended. Individuals trained in this discipline have undertaken to study and analyze the make-up of the legal profession. By so doing, sociologists have served a dual purpose: They have made available to the general public materials depicting the inner workings of the legal profession, and their exposure of the foibles of the law and lawyers has precipitated an extensive introspective examination among members of the bar. A significant contribution to the literature in this area is E. SMIGEL, *THE WALL STREET LAWYER* (1964). Another interesting discourse on the legal profession is Freund, *The Legal Profession*, in *THE PROFESSIONS IN AMERICA* 35 (1965).

5. Hostility toward lawyers can be traced to the colonial period. See, e.g., O. BARCK & H. LEFLER, *COLONIAL AMERICA* 423 (1958):

A book about Pennsylvania and New Jersey, published in 1698, stated: Of Lawyers and Physicians I shall say nothing, because this country is peaceable and healthy. Long may it continue and never have occasion for the tongue of the one nor the pen of the other—both equally destructive of men's estates and lives." In the second quarter of the next century, Georgia was described as "a happy flourishing colony—free from that pest and scourge of mankind called lawyers."

A more recent denunciation is typical: "Every thoughtful citizen who looks at the condition of law in America, the administration of justice, and the state of the legal profession, will find much cause for discouragement and some cause for alarm." M. GISNET, *A LAWYER TELLS THE TRUTH* 11 (1931).

This volume is a valuable supplement to the growing body of literature which supports many of the arguments presented by the proponents of changes in the law and the legal profession.

The author captures the tone of American life in the 1960's by alluding to Frankfurter's assertion that "[o]ur society . . . now more than ever, is a legal state in the sense that almost everything that takes place will sooner or later raise legal questions" (p. 13). Mayer links this statement with the fact that in 1967 there were approximately 300,000 lawyers in the United States—"one for every 250 of the labor force" (p. 13). The first chapter is filled with myriad statistics about the profession. For example, in an attempt to dispel the belief that most lawyers are to be found clustered in large metropolitan areas, Mayer writes that about one-half of the practicing attorneys work in or out of offices located in cities and towns populated by 200,000 persons or less. He also calls attention to the diminishing role of the private practitioner, a phenomenon not unique to the legal profession.<sup>6</sup>

Mayer's central theme reveals his refusal to deal with his subject in a superficial fashion. Repeatedly, he returns to the query: "What is law, what is justice, are they the same?" No single chapter is set aside for an exploration of this polemic, but no chapter escapes the author's insistence that the reader remain aware of the ever-present possibility of a dichotomy. The deleterious consequences of a significant disparity between law and justice are examined from the diverse vantage points of the individual and society. Mayer declares that, as far as an individual plaintiff or defendant is concerned, a result is just if he or she wins and unjust if he or she loses. Few if any practitioners will fail to concur with this observation. Individuals can seldom draw neat lines between justice, law, and their own interests. Society, on the other hand, may indulge in the use of a less biased measuring rod. Law, in the positivist sense of the term, is composed of those norms which are enforced by the courts. When, in the opinion of a nondisputant, a court's utilization of a norm has the effect of conferring a benefit upon one not entitled to receive it, the law may be said to be at odds with justice. Using a collective base for his definition, the author states that "[j]ustice is the visceral reaction of informed people" (p. 545). On the basis of this definition, he differentiates lawful from just results.

To his credit, Mayer successfully avoids the attractive proposition that courts are universally obliged to use only the threads of justice as they weave their judgments. He succinctly calls attention to the danger of excessive concern with ad hoc, poorly reasoned reworking of existing court-enforced norms in order to attain "justice" in par-

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6. For a discussion of the manner in which private practitioners conduct their practice in a large metropolis, see J. CARLIN, *LAWYERS ON THEIR OWN* (1962).

particular cases by pointing out that "justice dies with its beneficiaries, while law remains" (p. 545). Somberly, he writes that individuals may have to be sacrificed in a particular case if one seeks to preserve "the stability and rationality of the law" (p. 545). The author suggests no formula which would insure in every case a suitable accommodation between the competing demands of justice and an orderly legal system.

Three of the book's fifteen chapters focus on troubled sectors of the profession: two chapters deal with the criminal lawyer and one with the negligence bar. In probing the conduct of the criminal bar, other commentators have punctured the euphoria of professionalism that surrounds the practice of the law.<sup>7</sup> Mayer also does this, and for those who have never had the opportunity to observe criminal proceedings in the nation's largest cities, his vivid portrayal of how judges, lawyers, and district attorneys conduct themselves as they go about their tasks within the confines of the New York City criminal courts will be enlightening, distasteful, upsetting, and at times humorous. Unfortunately, the humor is the type which reflects the repulsiveness of particular aspects of the status quo.

The author scores when he forces the reader to come to grips with the moral dilemma most criminal lawyers prefer to skirt: How can one accommodate his own standards of propriety and society-oriented predilections while devoting his working hours to serving those who are bent upon engaging in antisocial conduct? Is it fair to assume that one whose sole task is defending those accused of having committed crimes personally espouses norms of conduct that fall short of the norms demanded by society? The author hints that the response to this inquiry may be a vigorous "yes." Ordinarily, criminal lawyers are not paid fees for their services; they extract them. Mayer notes that the success of a criminal lawyer is usually intertwined with the effectiveness of his "chasing network."<sup>8</sup> It is not surprising to find that the author lauds legal aid, the public defender system, and neighborhood law offices established under poverty programs.

In terms of the content of the criminal law, the author astutely suggests that society is obliged to reconsider the kind of human conduct which may appropriately be labeled "criminal." Should an alcoholic, one who smokes marijuana, a narcotics addict, or a homosexual be treated as a criminal? Mayer insists that legislators consider whether every "thou shalt" and "thou shalt not" ought to be treated as an adjunct of the criminal law. He suggests that in some areas of

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7. The relationship between a lawyer's conduct, his clientele, and the environment in which he performs his tasks is carefully examined in J. CARLIN, *LAWYERS' ETHICS* 66-83, 119-31 (1966).

8. For a forceful presentation of the "grubbing" tactics of some members of the criminal bar see J. CARLIN, *supra* note 6, at 108-09.

the criminal law fewer "thou shalt's" and "thou shalt not's" are in order.

The content of tort law and the conduct of attorneys who prosecute and defend against tort claims are also critically examined. Dilatory practices of defense counsel, delays, inadequate compensation, the climbing costs of liability insurance, and its unavailability to segments of the population have given impetus to an unprecedented concern about tort law at state and federal levels of government. A candid appraisal of the current state of tort law cannot be made unless one takes into account the many questionable—if not illegal—stratagems employed by some attorneys who practice in this field. To remedy the disorder, numerous proposals have been put before the bar, the judiciary, legislatures, and the general public.<sup>9</sup> The author, always the realist, loses no time in pointing out the inherent difficulty facing the profession as its members undertake to resolve the dilemma *inter se*: he asserts that approximately twenty-five per cent of the fees earned by the bar as a whole represents income for services rendered in the processing of personal injury and property damage claims. Mayer concedes that lawyers labor diligently to earn these fees. Nevertheless, the consensus of the bar is that the sudden loss of a substantial part of this revenue would be catastrophic. Suggested alternatives to the present system which may diminish the earnings of attorneys understandably draw the fire of the negligence practitioners, and many other members of the bar are ready to stand alongside them to defend the banner of financial solvency. The banner, to be sure, remains in the background, out of sight of the casual observer.<sup>10</sup>

9. A plan for effecting reform in the procedure those injured in automobile accidents must follow in order to secure compensation is detailed in R. KEETON & J. O'CONNELL, *AFTER CARS CRASH* (1967).

10. The complex structure of our monetary society forces lawyers to admit candidly that they, like those engaged in other professional or nonprofessional activities, are obliged to guide themselves in order to earn the kind of monetary rewards that would permit them to satisfy their needs as well as reasonable aspirations. Within the last decade members of the legal profession have been urged to recognize that if they are "to maintain their status in society, lawyers must increase their earnings." SPECIAL COMM. ON ECONOMICS OF LAW PRACTICE OF THE ABA, *THE 1958 LAWYER AND HIS 1938 DOLLAR* 5 (1958). It has been suggested that "the lawyer is an entrepreneur and thus must find indirect means of advancing his interests." J. CAVANAUGH, *THE LAWYER IN SOCIETY* 3 (1963). Cavanaugh insists that a lawyer's standard of living and his professional standing are keyed to his ability as an entrepreneur. Attorneys may properly think in terms of "profit making" to the extent that they seek to attain "a level of earnings" which are "comparable" to those earned in other professions, but are obliged not to compromise the prescribed standards of ethics. SPECIAL COMM. ON ECONOMICS OF LAW PRACTICE OF THE ABA, *LAWYERS' ECONOMIC PROBLEMS AND SOME BAR ASSOCIATION SOLUTIONS* 15 (1959). It has been asserted that professionalism and conducting one's activities so as to earn a suitable living are not mutually exclusive:

Zealous of maintaining professional ideals, lawyers hesitate to utilize techniques that smack of commercial enterprise. However, without compromise, we can learn much from our business brothers in these days of increasing complexity and rising costs. In the interest of professional service, lawyers must free themselves of the inefficiency and lack of planning notable in the business aspects of practice.

SPECIAL COMM. ON ECONOMICS OF LAW PRACTICE, *supra*, at 6.

Continuing reassessment of the nation's resources and goals should lead to a beneficial scrutiny of the content and procedural aspects of the law of torts at various levels inside and outside of government. Nuances will be introduced; proposals that portend abrupt changes will be avoided. The altering process has already begun, and Mayer considers a number of proposed changes.

Numerous and extensive studies have been made of the various divisions of American education, ranging from pre-kindergarten through graduate training. Some sacred cows have been sacrificed at the altar of hoped-for efficiency. An example of innovation at the graduate level is the establishment of the Master of Philosophy degree by Yale University. In this age of conscious searching for techniques and tools to enhance the prospective utility of a student's education, law professors have been keenly aware of the complexity of preparing young men and women to engage in the practice of law. Legal educators have sought answers to the following questions: Will the 1999 lawyer be equipped to carry on his calling if he is trained in the tradition made famous by Langdell? Is the Socratic method a suitable technique to teach those who will have to cope with problems foreign to the teachers?<sup>11</sup>

Mayer devotes a chapter to an examination of the nation's law schools and current means of imparting knowledge of the law. He focuses his attention on the manner in which law schools are seeking to make legal training a more effective as well as a more meaningful experience. The author feels that law professors ordinarily view their charge in the following terms: Shape the mental processes of your students so that they will think like lawyers when they have completed law school. He discerns a shift from the case-based teaching technique to what might be called a clinical, or problem-solving, format. The latter form of pedagogy requires the student to engage in realistic legal thinking in a realistic setting. The study of the law under the "problem" approach is enmeshed with a search for answers where the law currently offers none, or at best unworkable solutions. "Problem" teaching subordinates the importance of precedent and the reading of cases; social problems and legislative mandates are emphasized.

Mayer's discussion of the operation of the legal profession is analytical. He fragments the total output of the profession into four functional categories: counseling, negotiating, advocating, and drafting. He is not convinced that lawyers are per se qualified to counsel in a wide area of diverse subjects, although they ordinarily do so; nor does the author believe that one trained in the law will invariably possess the talent and capacity to excel in negotiation. Advocacy, he insists, may at times best be left to those who are *not* lawyers, since

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11. Perspectives of possible future patterns of legal education appear in A. SUTHERLAND, *THE LAW AT HARVARD* 360-69 (1967).

reliance on lawyers may render the resolution of a dispute more difficult than it otherwise would have been. In Mayer's opinion, the reason for the existence of lawyers is to be found in the fourth category—the drafting of instruments. “The one necessary societal function of the lawyer—the reason why it is necessary to license lawyers and to demand that all entrants to the profession pass a bar examination—is that the lawyer writes enforceable contracts” (p. 42). He contends that “pieces of paper—wills, trusts, agreements, mortgages, deeds, certificates of incorporation, leases, agreements to purchase or sell, warrants and so forth—must stand up. The lawyer assures that they will” (p. 42).

Is the author's “glorification” of the drafting aspect of legal practice realistic? Can lawyers really be certain that documents will “stand up” as the content of the law and public policy changes? In our shifting milieu, time and again one finds that for good reason, at least as far as a court is concerned, words go for naught and contracts are construed in an unanticipated fashion.<sup>12</sup> The Uniform Commercial Code proscribes unconscionable contracts and emphasizes business practices in construing contracts.<sup>13</sup> Courts often read “good faith” requirements into contracts which make no reference to “good faith.”<sup>14</sup> Here one readily perceives the pertinence of the author's concern with the difference between law and justice; unfortunately, he fails to pay sufficient attention to this aspect of his thinking in the portion of his book dealing with the lawyer as a draftsman.

Mayer has made available to individuals not trained in the law a captivating book that will permit such persons intelligently to criticize a profession that is not known for its willingness to expose its inner workings to the general public. The author has done an outstanding job in handling a difficult subject in depth; his journalistic style makes reading this work a sheer pleasure. Indeed, the book may rank as one of the more significant factors contributing to the catharsis now taking place within the legal profession.

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12. A contrary view is presented in J. FRANK, *COURTS ON TRIAL* (1949). Frank contends that judges do not simply go about enforcing agreements as written. Frank also writes: “The judge, at his best, is an arbitrator, a ‘sound man’ who strives to do justice to the parties by exercising a wise discretion with reference to the particular circumstances of this case.” J. FRANK, *LAW AND THE MODERN MIND* 178 (1930).

13. UNIFORM COMMERCIAL CODE [UCC] § 2-302.

14. The UCC similarly injects the obligation of “good faith” in certain kinds of contractual agreements; *e.g.*, § 1-208 provides:

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.