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UNLESS REQUIRED BY JUSTICE

UNIVERSITY OF DENVER COLLEGE OF LAW
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JOHN L. KANE, JR.*

Not too long ago a lawyer was called to testify in my court as an expert on attorney fees. As he was reciting the litany of his qualifications, he said, "I completed my legal education at the (XYZ) law school in 1985." As I listened to the rudderless rhetoric of his testimony, I concluded that his was indeed a correct assessment of his intellectual progress. Unlike the young writer in Thomas Wolfe's *Look Homeward, Angel*¹ who said that following his college days he was commencing to begin to start to write, the hapless pettifogger in my courtroom had added a whole new dimension to the concept of hubris. I had the impression that he would expect even the gods on Olympus to listen to him with rapt awe.

I should probably add that it is very tempting to sit on the federal bench and identify oneself with divinity. It is an occupational hazard that is not always corrected even by reversals from a court of second conjecture.

A major event, such as this graduation, is similar in at least one way to the prospect of being hanged; it works wonderfully to concentrate the mind.² It suggests to me some points and observations I want to share with you as you commence to begin to start your life in the law.

First, as my friend Peter Baird wrote to his son, who was about to be sworn in to the State Bar of Arizona, "Do no harm!"³ I pass Peter's wise

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1. THOMAS WOLFE, *LOOK HOMEWARD, ANGEL* (1957).
2. JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON* L.L.D. (1952).
3. Peter D. Baird, *A Lawyer's Letter to His Son*, *LITIG.*, Summer 1997, at 59, 59.

words on to you: Bear in mind that you have considerable power and that it should only be used with wisdom and compassion. Among others, you wield the power to destroy with a complaint or a motion what it took a lifetime or even generations to build. You will obtain information in transactions that if divulged improperly could result in disaster—not only for your client, but for you, your associates, and the public as well.

Very soon, after attending to that pesky little instrument of torture called a bar exam, you will take an oath that will bind you for life. Included in that oath is the provision that you will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which you are charged.

It is a curious irony that the three years of intensive training you have just completed have had little to do with the awesome responsibility of determining what, if anything, is required by justice. You have been taught to know or learn what is required by law and your professors have poignantly insisted during your studies that resort to a bleating cry for justice is not an acceptable excuse for sloppy analysis. But what is the justice of the cause with which you will be charged?

Whether consciously or unconsciously, our jurisprudence has been carried for the last hundred and fifty years or so on the assumption that law consists of an autonomous body of legal rules. By identifying the source, in terms of precedent, it is supposed that most, if not all, legal disputes can be resolved by testing the facts presented against that source. It follows from an acceptance of this process that the function of law is essentially not one of doing justice, but of determining, without reference to political or general morality, what result the rule revealed by the test yields in a particular dispute.

Sophisticated positivists acknowledge that there are areas of law in which this test does not yield a conclusive answer and that in these interstitial areas of uncertainty disputes may be resolved according to moral or other extralegal precepts. Lawyers, however, are trained to maintain a sharp line between law and morals and, by relegating the disputed areas of law to the outer periphery, to reduce to the vanishing point the areas of law in which good and bad can be considered relevant. Unfortunately, lawyers and judges become habituated by this process to present what are essentially morally based decisions as the products of a mechanical, value neutral process.

One result we bring upon ourselves by couching our thoughts in this mechanistic garb is the proliferation of lawyer jokes. These jokes demonstrate that people believe in justice and use a sort of “gallows humor” to point out how often the law and lawyers miss the mark in achieving it.

Another result is that what happens to people caught up in legal disputes seems neither good nor bad; it's just what happens. This is such a stunning concept that in recent years some vulgarians have felt it necessary to display their understanding of it with automobile bumper stickers attesting to the belief that this or that happens.

The illusion is that lawyers and judges have no justice function. Indeed, almost the only group of people who are suspicious about the concept of justice, who get very skittish even using the term, are those trained in the law to be advocates, teachers and judges.

This view that we have no justice function is clearly wrong. To say that we have an obligation to be amoral, to say that we should blindly apply legal rules, without determining whether a pragmatic application accomplishes justice, is to view law as a series of valueless computations.

The positivist notion that law is some sort of science is a canard which has already received more than its fair share of attention. Many years ago, Karl Llewellyn, a great legal educator and something of a positivist himself, said with a choice phrase well worth remembering, that in any case "doubtful enough to make litigation respectable," there are at least two authoritative premises between which the court must choose. I suggest to you that the only basis on which such choices can be made is to decide what is just. Given the positivist training implicit in your law school experience, you must now embark on a lifetime journey to discovery just that: What is just?

In 1954, Professor Lon L. Fuller described the challenge in these words:

The prevention of indecencies in the use of . . . power must depend ultimately on the pressures of public opinion, particularly the opinion of the legal profession. This opinion can be effective only if it is informed by a sound philosophy. It cannot be so informed when it accepts a view that treats . . . power as a brute datum and refuses to examine the rational and moral grounds of its justification and acceptance.⁴

To that I wish to add that there is nothing sacred about earlier decisions and there is no need to treat them as holy writ.

More to the point, the human condition is demonstrated in the lives of the people you will represent, those you will oppose, and those with whom you will work. The enduring conditions of those caught in the extremities of experience will compel your attention for the rest of your lives. That is precisely what you are trained to do: To guide people away from or through, if necessary, the exceptional circumstances of life.

4. Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 465 (1954).

You will live with injustice all of your life. It is an ineluctable element of the human condition. The problem, of course, is how to live with it and the greatest sin for you, once you take that oath, is indifference to it.

You must recognize the suffering of those who are subjected to injustice. To understand this, put yourself in their position. You will sense that whatever you undertake and do well—even excellently—the sense of admiration and envy derived from success will be to no avail. Behind every triumph or feeling of joy lurks the gnawing belief that it can be taken away, that it will be taken away and that you will be left in a vortex of emptiness and self-alienation.

To suffer from injustice is to live with the unspeakable horror that no matter what you do or try to do, there are those to whom your life has no importance or value. More to the point, there will be those who will insist that you recognize that your life has no importance. Injustice will come to the fore whenever the illusion of equality is shattered, whenever rules are applied differently for one than for another, whenever false statements are made with utter disregard for the truth, and whenever intent is bereft of compassion.

Justice, insofar as I understand it, is a safe harbor, a place of respite where the lingering sense of injustice, of deprivation, in the fullest sense of the word, is not tolerated, where the unsuspected and unchartered value of every human being is recognized. All else is vanity.

The legal profession exists, not to perform valueless computations, but to provide order in a living society where otherwise there is madness, to afford dignity where otherwise there is degradation, and to express our highest aspirations where otherwise there would be despair.

As Primo Levi, the Italian writer and eventual victim of the Holocaust once charged, it is the duty of righteous people to make war on all undeserved privilege, but one must not forget that this is a war without end.⁵ If for no other reason, this war without end means that as alumni you have a continuing obligation to support this institution so that it can prepare others to follow in your footsteps just as others have supported it to prepare you.

We lawyers are not the only people responsible for maintaining a free and just society, but certainly it will never exist without our constant commitment to do justice in every circumstance. That is the cause with which we are charged. In its pursuit I wish all of us well—and be careful out there.

5. PRIMO LEVI, *THE DROWNED AND THE SAVED* (1988).