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Jack Foster

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stricts publication to reputable law lists or legal directories. The omission of the term "local custom" in the 1937 amendment "discloses an intent to withdraw the previous sanction of any local custom permitting such an obvious form of advertising."[23]

Biographical information now permitted to be published in reputable law lists is discussed in the second paragraph of the canon. Once the subject of much dispute, permissible items of information were listed in the amendment of 1940. The canon itself should be consulted in case of doubt.

# LAW AND ETHICS IN A WORLD AT WAR*

JACK FOSTER
*Editor, Rocky Mountain News*

*Ladies and Gentlemen of the Colorado Bar Association:*

May I call to your minds a picture from the past? Just a while ago—five, ten, forty, fifty years—a young man and a young woman stood before a bank of seven old gentlemen in somber black robes. Their cheeks were shining; their eye were burning with the blessed idealism of their years. Their lips were saying in hushed cadences:

> I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land . . .
>
> I will employ for the purpose of maintaining the causes confided in me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law . . .
>
> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or delay any man's cause for lucre or malice . . .

There was a silence in the panelled room when they had finished. There was a quiet in the faces of everyone present. For these young people had taken the oath to protect, as God gave them the strength to do, the body of law against the eternal conspiracy of men of evil purpose. They promised, at the same time, if given the chance, to add new toughness to the fiber of law, so that at least in their time and place the poor and oppressed might say: Here was our only protection!

Who were this young man and woman? They were you, Ladies and Gentlemen of the Colorado Bar Association . . . just a while ago.

I will not ask you at this pleasant luncheon in one of the most pleasant of hotels to examine yourself and ask: How far have I strayed? That might be embarrassing to you—and me. That might disturb your dreams. It might even be considered impolite.

[23] Opinion 182, p. 362.

* An address given before the 51st Annual Meeting of the Colorado Bar Association at Colorado Springs, October 14, 1950.

No one can compare the uncompromising ambitions of his youth with the settled realities of middle years, and come out very well. But it was ever thus, and I am not the Don Quixote to try to change it—at least, all in one speech.

I do have, however, a singleness of purpose in urging you to bring back to mind the day that you took the oath. I want you to try to relive the excitement, the sense of triumph, the horizonless hope for the future that you enjoyed the morning you were admitted to the bar. For the threat and challenge of the times in which we live ought, it seems to me, stir within you the same glorious sensations that you had then.

When I was invited, through the generosity of your program committee, to make this talk, my mind wandered over many fields. But always it came back to the same place. War. International conflict. Bleached bones on a pock-marked meadow. Wrangling in the dark halls of diplomacy. The thunder of guns and the cry of the wounded. And the people back home, waiting fearfully, praying for some surcease sometime.

This is the great sorrow of our time: That no matter where we go or what we do, we cannot ever escape the titanic struggle that dominates the age in which we live. The struggle began before 1914, and it has been mounting with increasing horror ever since. There were years when we thought we enjoyed a feverish kind of peace, dancing either with the jazz babies or the withered crones of the depression. But always we came back to the same rendezvous—the blood-soaked battle field.

But what, I asked myself, has this to do especially with the lawyers whom I am to address? And then the answer came, as it should have come sooner, that it has everything to do with you. For you, ladies and gentlemen of the bar, in many ways are the chief figures in this world-wide revolutionary conflict. The basic conflict lies between the human law of the Anglo-Saxon world that you represent and the cold and merciless law of the Soviet state. The fundamental battle is between the right of the individual to be tried, with a presumption of innocence, according to the magnitude of his alleged crime, and a system that proclaims that the extent of a man's crime depends solely on its probable effect on the state.

### Soviet Law As a Tool of the State

"Law is politics." That is what Lenin said when the Bolsheviks swept the tattered remnants of royalty from their palaces at Petrograd in 1917. And Soviet jurisprudence never has departed from this principle. Law is a tool of the state, an instrument of policy in the hands of the class which controls the state.

In preparing these notes—to contrast our laws with theirs—I am indebted to Cornell University's excellent handbook on Rus-

sia which quotes Andre Y. Vyshinski at length on the principles and procedures of Soviet jurisprudence. Vyshinski, you will remember, prosecuted the baffling treason trials in the late 30's and also represented the Soviets in the Nuremberg war criminal trials. Therefore, he is—or at least was at the last word—an authority on the subject. Said Vyshinski:

> Soviet law is a combination of the rules of behavior, established in the form of statutes by the workers' government, reflecting their will. In their application they are enforced by the entire coercive power of the socialist state, for the purpose of protecting, strengthening and developing relationships and procedures suitable and beneficial to the workers . . . for the purpose of completely and for all time destroying capitalism and its relics in economic life, social life and in the consciousness of mankind . . . for the purpose of building a communist society.

There, in bold relief, stands an image of the true enemy. Back of the smoke and dirt of Korea, back of the iron pressure of Germany, back of the shadowy maneuverings of men in our midst stands the actual foe—the conception of Soviet law. There, if it should ever triumph over the world, stands death for us all, and black and bitter fear for the little people for ages to come.

Soviet law basically is concerned with one thing and one thing alone: Have the actions of this defendant hindered the increasing power of the proletariat state? Have his deeds revealed any doubt as to the divine truth of the principles of Marx, Engels, Lenin? Has he given comfort to the wicked world of capitalism?

## No Justice for Man As Individual

There is little concern in Soviet law with the Anglo-Saxon conception of justice for man as a human being. There is no regard for the principle of presumption of innocence, unique in English and American law. There is no expression of the right of any man accused to appear before his neighbors, to plead his case through counsel, to be tried solely and exclusively for the crime that he, as a man, allegedly has committed.

The Soviet code is specific and consistent in carrying out this political principle of law. The criminal laws are designed to protect the state from socially dangerous acts. Socially dangerous acts are defined as those that violate the order of things established by the proletarian dictatorship for the period of transition to a Communist regime. The intentions of the criminal are considered important, but acts are considered illegal which the doer considered harmless but which led to consequences that he should have foreseen.

Trial by jury is not provided for: There is no provision whatever for a man to appear before his neighbors, plead his case, be judged by them! And that, I suppose, when all else is shorn away, is the symbolic difference between their law and ours, their way from the cradle to the grave and ours.

Ever since I began making these occasional talks before groups such as yours, I have thought more and more deeply about the jury system and its importance today. And I always have come to the same conclusion, the conclusion reached by a committee of the American Bar Association a few years ago: " . . . trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community." There is no better. I do not pretend to know much about law. But I do know what gives me the most overwhelming satisfaction of them all in the slow blossoming of the democratic processes. That satisfaction comes from watching an American jury in action. It comes from the realization that there, sitting in twelve well-worn chairs, are the baker and mechanic, the banker and housewife, selected to judge the alleged offense of one of their neighbors against their community and his.

These people from our midst were the true enemies of Nazism and Fascism and are enemies now of an even more persistent force. For they have said and are saying: "We the multitude are capable of judging ourselves, and no power of superstate or steel-jawed dictator can ever match our quiet strength."

In twenty-five years as reporter and editor, I have talked with hundreds of jurors. I remember discussing this with a distinguished group of federal judges in Santa Fe one morning, and I remember telling how I had listened to the woes of these jurors, had heard them express their fears, had watched the troubled lines of regret cross their faces as their foreman handed in a verdict of first-degree murder.

Many of them were serving unwillingly. They deplored their loss of time and money. Many of them had pleaded fervently to be excused—on real and, in many cases, fictitious reasons. Many of them in their hearts opposed capital punishment. Yet they promised that they would reach their verdicts on the basis of the law involved.

## The Jury As a Democratic Bulwark

And yet I have found, from watchings of jurors in action, that, when they actually get down to the job of hearing a case, they are conscientious, solemn, deliberate and long-suffering citizens. They realize fully the seriousness of the assignment that they as citizens have. Despite the ineptitude and incomplete discussion of the high importance of jury service on the part of some judges, they seem to know that this is a great and fundamental privilege of all Americans. And, as a rule, I have found, they reach a verdict that is tolerant, reasonable, in keeping with the average thinking of the community.

And that is as it should be. The jury system is the means by which the law is kept from being the aloof and haughty thing

that it sometimes seeks to become. The jury system is the tie that anchors the law close to heart and mind of the people where it belongs. The jury system is the method by which evidence eventually is sifted, methods by which this evidence was obtained are challenged, and a man accused of crime is given as fair a deal as is possible under all the weaknesses and frailties of being human.

If it were not for the jury system how far the third degree might go I shudder to think. Cruelty of police questioning has been all too common as things are now. There was the Wisconsin policeman who beat a confession out of a man. There was the Michigan officer who hung a skeleton in a room to obtain a confession. There were the Florida authorities who chained a defendant overnight into a mosquito-infested cell and questioned him the next day with the scalp of a dead woman at his feet. There have been examples of black and horrible brutality in our own Colorado police headquarters.

But always these practices have been deplored. And the United States Supreme Court, ever mindful of the twelve men sitting in the jury box, has repeatedly said that cruelty is not law, that flogging and forced going without sleep and painful and blinding light have no part in our courts.

"The wrack and the torture chamber may not be substituted for the witness stand." These are the words of the late Chief Justice Hughes. And in *McNabb v. U. S.* you ladies and gentlemen will remember that the third degree has been called by the Supreme Court, with an expression of contempt, for what it actually is: "An easy but self-defeating way for brains as an instrument of crime detection."

Thus it has been in the British Isles and America since the days of James II. "Putting the question" it was called then with malicious humor. A turn of the screw. The question. A turn of the screw. The question. A turn of the screw. The question. With scribes sitting around to note the tortured words of the victim. That was the last period in our history in which brutality was an accepted part of the judicial processes.

### No Protection Against Coerced Confessions

Not so under Soviet law. Search as I did, I could not find a single restriction placed on the use of force to obtain confessions, and even with the meager information that trickles through the rusty holes in the iron curtain, we can come to only one conclusion: That many means are countenanced to obtain a confession. Certainly there is an appalling difference between the heroic defiance of the great Cardinal Mindzenty before he was arrested and the weak and empty skeleton he was in the courtroom. The sorrow of the thousands of smaller people whisked away in the dead of night lay on his face.

It is for them and him—the thousands of people of our times—denied the protective arm of justice under law—that you, as lawyers, must be fighting in this titanic struggle that has engulfed our world. It is of them that you must think every day that you enter the courtroom, every time you face a jury. And you should rejoice in the role that history has given you. It is the last and the best struggle of them all. For you are defending human law against the law of the barbarian; you are giving meaning on earth to the soul that God breathed into life at birth.

What is our law? Our Anglo-Saxon law that we call human? Long ago, as I wandered the streets of Santa Fe, immersed in the ancient history of the city, I reached a definition that to me, at least, is a portrait. May I repeat it to you?

> Law is a measuring stick of conduct. It is the rule established by men of good will to produce the greatest contentment to the greatest number in a world that otherwise would have no order. But it is not an end unto itself. It is rather an expression of principles that change as history changes, that shift as the need for mercy and charity increase.
>
> Brought into being by the mind of man, the law has all of man's frailties. Therefore, being strong in one generation and inadequate in another, as the races of men are, it must be subject to perpetually changing interpretations. But, throughout these changes in interpretation, it must always have as its indestructible goal the burning resolve that the lowliest of men can come before it and be judged without prejudice, without malice, without contempt. The law is—or should be—and must be—the unassailable faith of a free people who voluntarily have accepted these restraints so that none of their number need go to the grave with the black belief that life was set against him.

There are many among you, I am sure, who would add to or detract from that definition. There are many among you who know more, write better, certainly speak more eloquently than I. But all of us will agree, I think, that the basic purpose of law is to give mankind as an individual a chance to live in happiness, in security, in an atmosphere of achievement, in freedom of mind during the few years he has on earth.

### Branding Aggressive War As a Crime

Since the time I wrote those sentences another phase of the Great War has come to a close. And in that space another—and, I believe, even more glorious—pronouncement has come in the slow evolution of law. For the first time in history the nations of the world have joined together, at Nuremberg, and branded the waging of aggressive war as a crime punishable by death. It is a policy of stupendous implications: For six thousand years one nation has attacked another, leaving in the wake of the sword, bloody and swollen corpses, ravished families, burning homes and shattered dreams of artists, devastation, despair and chaos. It

has always been the greatest of all crimes. Yet never before have the nations of the world said that the men who start these wars must be indicted, arrested, tried on evidence and punished as is the common murderer. Even though they themselves may never have fired a canon or dropped a bomb, they are guilty because they conspired against humanity, and if found guilty must be thrown to the suffocating muscles of the noose.

Even before the war ended military teams of four nations—including perhaps some of you—gathered evidence, questioned prisoners, prepared indictments, so that when the shooting ended, law was given the opportunity to take over. At the same time, the prosecuting nations were drawing up the principles of jurisprudence and outlining the crimes to be punished. These were:

1. Crimes against peace. These principally were involved in the waging of aggressive war.

2. War crimes. These consisted largely of violation of the customs of war, ill-treatment of prisoners, deportation of prisoners to slave labor camps.

3. Crimes against humanity. These consisted, for the most part, of torture to and extermination of civilian populations, persecutions on racial, religious and political grounds . . . of which no war has even seen more sickening examples.

During the latter stages of that war, when preparations were being made for these trials, it was argued by some that we ought to wait until the shooting had ended before establishing the rules. It was argued by others that we were writing the law to fit the crime after the crimes had already been committed. It was complained by Goering, who eventually died by a pill from his own poisoned hand, that the victor always determines the rules, and that is not law.

## Tribunal Established Despite Objections

But all these objections were cast aside in the fervent belief of the free peoples of the earth that sometime the law of war must be declared—and that it must be done now. It might not be a perfect law, but at least it would be a statement to all the world that hereafter the war makers will not escape but will be brought to the judgment seat and face the finger of prosecuting humanity.

I want to turn to the magnificent opening statement of Justice Robert L. Jackson, prosecutor for the United States, in the gabled courthouse of bomb-torn Nuremberg. For his words have burning significance to us all in the troublesome days that lie darkly ahead of us. They are words that should be read, as you would read a prayer book, to every one of you. They grew out of the bloody dust of buried wars. They offer the only hope, under law, for the peace of tomorrow.

Justice Jackson recognized the fact that as he said: "Never before in legal history has an effort been made to bring within

the scope of a single litigation the developments of a decade, covering a whole Continent and involving a score of nations, countless individuals and innumerable events."

He admitted the charge that new law was being created to meet these circumstances. "But," he said, "if it be thought that the Charter . . . does contain new law, I still do not shrink from demanding its strict application by this Tribunal . . . I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty lives."

All law, he agreed, is a process of evolution, and International Law today is in that stage during which humanity is seeking to drag itself from the mud of eternal battle to the dry, warm shore of peace. "The fact is," he said, "That when the law evolves by the case method, as did the Common Law and as International Law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error."

Those 20 broken old men, almost forgotten now, whose evil machinations virtually wiped out a generation, were the ones who had guessed wrongly. Yet, despite their record that was open as the bruised and bleeding face of Europe, they must be tried, Justice Jackson said, only on a presumption of innocence. For, he added, in language that reaches back to the spiritual magnitude of Shakespeare: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."

### Civilization the Complainant at Bar

And finally, in a plea that ranks, I think, among the golden eloquence of our language, Justice Jackson, insisting that civilization was the real complaining party at the bar, brought his argument to a conclusion:

> It is not necessary among the ruins of this ancient and beautiful city, with untold members of its civilian inhabitants still buried in its rubble, to argue the proposition that to start an agressive war has the moral qualities of the worst of crimes. The refuge of the defendants can be only their hope that International Law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.
>
> Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you make war impossible. It does expect that your judicial action will put the forces of International Law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will in all countries may have 'leave to live by no man's leave, underneath the law.'

Thus Justice Jackson put before this first tribunal the case of

the *People of the World v. the Murderers of the World,* and they were tried, found guilty and in ignominy put away.

And now, ladies and gentlemen of the bar, we are engaged in another phase of that Great War. Once again—less than five years after these 20 broken old men were cast to the dust or the jail cell—an aggressive nation has challenged the peoples of the world by war. By today's dispatches it looks as if within a few weeks the armies of the United Nations will have destroyed the military power of North Korea and have occupied the entire country—for this time, at least.

Then once again, wearily and perhaps cynically, the Tribunal of Nations will leave their farms and cities, gather again at some Nuremberg to try the men who plotted this conspiracy—the men men who gave the orders to fire on hand-bound prisoners, to destroy civilian populations in their mad pursuit. There will be a feverish outcry in some quarters against this procedure. There will be those who will say that this was only a police action, and not really a war. Such a trial, they will say in fear, would disturb the balance of what they call peace, and lead rather to conflict than to order. The issue will be complicated by the fact that unquestionably one of the four trial nations at Nuremberg will not participate in the action. Indeed, Russia with all her grim stubbornness will oppose the trial, and will seek to line up member states of the United Nations on her side.

### International Law Only Approach to World Sanity

It will not be easy. It will be hard to track the guilty down. But the Tribunal of Nations, once having declared that aggressive war is a crime and the perpetrators shall be tried under law, must not—and cannot—fail to act. Then, as never before, the forces of those who believe that International Law is the only possible approach to world sanity will need sympathy, support and belligerent faith on the part of our people.

And especially they will need this from you, the ladies and gentlemen of the bar. For you are the ones who pledged just a while ago—five, ten, forty, fifty years—that you would accept law, not men, as the only true guiding light of mankind on earth. Now, within not many weeks, you will have your chance to prove, on the largest possible scale, whether that oath you took was merely a few empty words said by rote to help you make a living.

An ancient Roman, old Caius Marius, once said a long time ago: "The law speaks too softly to be heard amidst the din of arms." And that unfortunately too often has been true. But I hope that in Colorado at least the voice of law will speak loudly and with fervent faith when the cause of world punishment and world justice comes before the bar. For, after all, there is always another kind of law waiting malignantly in the shadows.