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LEGAL SUCCESS AND LEGAL FAILURE

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Introductions that focus on my multiple claims to your attention remind me uncomfortably of an encounter I had with a wealthy, retired Greek shopkeeper on the tiny Dodecanese island of Simi. His attempts at gracious entertainment of my group (already made difficult by our need for an interpreter) were repeatedly interrupted by his newly adult nephew, recently back from many years of foreign studies, first in Munich and later in London. When the young man left at last, our interpreter praised the young man's extraordinary linguistic fluency. The old man raised his eyebrows, shrugged and said "Now he's ignorant in three languages."

We honor you today for your demonstrated fluency in an alien tongue. But my anecdote is not the theme—at least not the main theme—of my remarks today. In the 15 to 20 minutes I have been given, it would be pretentious to attempt to educate, edify, or subvert you. If my colleagues have failed to do these things in the last three years, it is surely too late now. I wish instead to comfort some of you and annoy others with an outsider's view of the lawyer's role. I say outsider because I am not a lawyer, merely a member of the guild by association.

My topic is "Legal Success and Legal Failure," but I shall talk chiefly about legal success. With the iceberg whose tip was Watergate so plainly in mind there is little chance of our forgetting legal failure. My principal point is that legal success or failure is not correlated with the individual lawyers success, financial or forensic. When I say not correlated I mean both that it is not correlated positively and that it is not correlated negatively.

I urge you to reject the view of a legal career as a choice between, on the one hand, honor without profits (perhaps in the form of the sack cloth of *pro bono* work) and, on the other hand, of profits without honor (in league perhaps with the firm of Cravath, Cutler, and Ellis). I do not denigrate the virtues of low-paid legal or public service, of *doing good instead of doing well* in Washington, in Ypsilanti, or in Hattiesburg, but I shall not focus on it now.

I want to suggest an economist's view of traditional legal employments. That view starts with the economist's view of the world. Economists have a small number of important insights. Two that I remember are: First, that *markets work*, and second, that *markets fail*. There is a vital role, albeit not the same role, for lawyers in each circumstance.

Market Success

Let's start with market success, whose ambit is the range of activities where private pursuit of selfish gain promotes the public welfare. Markets often do work, but I shall not today help you count the ways. The realm of market success is the realm of free competitive interchange and trade, and its praises have been often sung, never more eloquently than by an otherwise forgotten 19th century economist (Bascom) who described this world as "more provocative of virtue than virtue herself." In this world, however, Adam Smith's invisible hand is likely to be guiding the economy from within the lawyer's glove.

When economists speak of "gains from trade," they mean the gains from specialization that can not be realized unless efficient trade is there as well. The lawyers role here is facilitative: the contracts, the property rights, and the institutions that make exchange possible and efficient require negotiation, effectuation, and enforcement. Economists often speak of transactions costs—sometimes they speak of them as if they were an impediment to the transaction—and it may thus appear that the label "transaction cost" is pejorative. Not so; costs, here and generally,

are payments necessary for the use of factors of production, and factors of production are essential to the output produced. Such transactions costs, both that part incurred by private parties to the transactions and that paid by taxpayers as part of the institutional infrastructure in which the transactions occur, are payments for valuable services rendered. They are not one bit less worthy than the costs of raw materials, of factory labor, of machinery, or of quality control. To be sure, in a world without transactions costs one might not need lawyers, but so to say is no more interesting than to say that in a world without friction the wheel would exist only to amuse small children, and that we would not need energy to move goods and people from place to place. I can not emphasize this point enough: the services of lawyers, judges, process servers, are neither ornamental nor inherently wasteful—but vital to the workings of a market system. Obviously such costs, as any other class of costs, can be excessively high, but given reasonable choice and given competition, there is certainly at least a strong presumption that people not only pay for value received, but pay little more than is required.

Thus, even if you decline to wear a T-shirt saying "I am a transaction cost," relax. Be not dismayed if you are but the grease of commerce. You need not feel noble to be noble. Where markets work it is the alchemy of Adam Smith not altruism or self-abnegation that converts the long green to the true blue.

Market Failure

I turn to market failure. There are many kinds of well-defined market failure. Monopoly is one. Presence of externalities (third party effects) that, being outside the market, are improperly considered is another. Perhaps most important of all is the existence of so-called collective consumption goods, including not only national defense and hurricane warning systems but also more ephemeral things like justice, for which there is no effective economic market in which to register demands or to induce supply.

In coping with each of these forms of market failure, lawyers play central roles. A major reason is that correction of market failure typically requires government activity, and lawyers dominate governmental processes, not only the

judiciary, but the legislatures, the regulatory agencies, and the top administrative positions. The reasons for the domain of the lawyer being much greater than is strictly necessary are of some importance to my thesis. A popular but cynical explanation is that "it takes one to know one" and that only lawyers are evil-minded enough to cope with anti-social behavior. This is superficial, and thus likely wrong. I would not, however, go so far as to reject wholly the maxim of Stanley Surrey (when he was reforming taxes at the Treasury) that while politicians, economists, and law professors might be trusted to tell him what to do, only expensive private tax lawyers were competent to tell him how to do it.

There is a more fundamental reason for legal dominance of the correction of market failure. It is that in the area where markets fail, virtually every decision is redistributive—one group cannot usually be made better off without making another worse off. Hence, one cannot avoid the quicksand of interpersonal equity. It is necessary to decide not only *what*, but *who*. Who shall gain and who shall lose? Economists, obsessed by allocation, tend to be impatient with the questions of distribution: inefficiency not inequity is their *bete noir*. As the distinguished Jamaican economist W. Arthur Lewis put it: "Equity is the mother of confusion."

Reformers, lobbyists, and true believers ignore the problem of redistribution, while economists label it "2nd order," which is our technical phrase for something we are about to neglect. Lawyers embrace redistribution; they revel and cavort in the quicksand where others sink. Why do the rest of us tolerate it, indeed foster it? It is not (as you may have believed) because of your innate godlike qualities, nor because of your wisdom, or your purity of heart and purpose. Nor even because of your certification by a Committee on Character and Fitness. It is instead the general (if only implicitly perceived) acceptance of the key legal (but non-economic) value: process is vital to the integrity of outcome. One can reasonably decide *who* only by exquisite attention to procedure. How is a matter decided, how reviewed, how appealed? Decisions in the non-market sector are inherently adversarial. Decisions are made legitimately—sometimes badly, sometimes well—only if there is opportunity for ardent advocacy. Because of this, both the deciders and the pleaders must know how to use and (surely no less) how to disabuse the tricks and traps and rules of advocacy.

There is reinforcing additional factor in the lawyer's role: a central question that is prelude to policy action is the actual existence (as distinct from the theoretical possibility) of market failure, and it is a question likely to be in dispute. The identification of market failure of familiar and of novel kinds, the difficult tasks of distinguishing between market failure and market success in the activities of giant firms and petty tradesmen, of public agencies and private groups, each requires disputation, advocacy and, ultimately, resolution in *procedurally acceptable ways*. These ways, which alone confer legitimacy, are the special domain of the legal process. Here, neither more nor less than in the area of facilitating market function, these activities are for the public welfare not because of the motives of the advocates or their clients—which may be venal or crass as often as noble—but because of the process. Process cannot assure integrity of outcome, but it alone can make it possible.

Legal Success

Legal success, in my sense, arises both where markets work and where markets fail by making efficient, fair, and even wise decisions possible. That this has relatively little to do with the efficiency, fairness, or wisdom of the advocate is (perhaps surprisingly) a matter of some comfort. These are attributes in short and uncertain supply, and it would be unfortunate if we had to depend upon them.

Legal systems fail, not when lawyers become venal or rich by using the arts of advocacy to the fullest, but only when they subvert the process. A skilled advocate can become a dangerous despot. It can happen here.

I've delayed the awarding of your honors long enough. I congratulate you collectively but none the less warmly. I hope that you may prove to deserve the honors. You will if you contribute to the success of the legal system and/or expose its failures.