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William T. Coleman Jr.
University of Michigan Law School

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SOCIAL PROBLEMS AND LEGAL ANSWERS



by William T. Coleman, Jr.

Mr. Coleman delivered these remarks on the integration of public service and private practice of law at Law School Senior Day last spring. Mr. Coleman's own career is an eloquent testimonial to his argument that skilled and principled lawyers are uniquely qualified to serve their nation and society.

Now a senior partner in the law firm of O'Melveny & Myers, Mr. Coleman was Secretary of the U.S. Department of Transportation from March 1975 to January 1977. In addition to this post in President Ford's Cabinet, Mr. Coleman has held many national public service positions and has served in advisory or consultant positions to five former presidents.

He now serves on the board of directors of several major American corporations, notably IBM, American Can Company, Pepsico, and Pan American World Airways. He is a trustee of the Rand Corporation, the Brookings Institution, the Urban Institute, the Philadelphia Museum of Art, of which he is also Vice President, and a member of the Overseers of the University of Pennsylvania Law School.

Mr. Coleman has been a Distinguished Fellow at the Woodrow Wilson International Center for Scholars. He graduated summa cum laude from the University of Penn-

sylvania in 1941 and magna cum laude from Harvard Law School in 1946. While at Harvard Mr. Coleman was a member of the board of editors of the *Harvard Law Review* and received the Joseph E. Beale prize. Institutions including Yale University, Amherst College, Swarthmore College, Williams College, and Howard University have awarded Mr. Coleman honorary degrees, and the president of France has nominated him an officer of the National Order of the Legion of Honor.

An ardent defender of civil rights, Mr. Coleman was one of the authors of the legal brief that persuaded the Supreme Court in 1954 to outlaw segregation in public schools. In 1965 he was retained by former Governor William Scranton of Pennsylvania to assist in removing racial restrictions at Girard College in Philadelphia. He presently serves as Chairman of the Board of the NAACP Legal Defense and Education Fund.

In his lecture, Mr. Coleman draws on his various experiences to construct an argument for lawyers' vital contribution to many aspects of traditional American life. He urges this year's graduates to consider the particular challenges they will face in fulfilling the lawyer's professional responsibilities today.

Justice Holmes once said, "Your education begins when what is called your education is over." In my day, we got through law school without ever drawing or reading a contract or a will; we never tried a case and never negotiated a settlement in a room full of outraged and offended parties. Your professors will forgive me, although your parents and spouses, who paid your tuition, might think they have a cause of action for breach of contract, if I suggest that now that you have completed law school, you can no longer avoid beginning your legal education—preparing for what lawyers really do!

You have had a wonderful launching pad. This great law school was a pioneer in American legal education even before the Civil War. Its graduates, in this country and abroad, have a distinguished tradition of service to governments, courts, universities, corporations, and private law firms, including my own. Generations have been nurtured on the scholarly work of Cooley, Sunderland, Dawson, Simes and Judge Harry Edwards, who at a frightfully young age became a giant teacher in Labor Law and who is now adding grace, learning, and style to one of our most important federal appellate courts. You are fortunate to have as a recent addition to your faculty Judge Wade Hampton McCree who graced the state and then the federal courts in Michigan and thereafter served his country and the legal profession brilliantly as Solicitor General of the United States.

Justice Holmes gave many commencement addresses. (It is a chronic ailment for those of us above 60). He once remarked that the best thing an experienced traveler in the law could do was to report to those about to start on what was to be expected along the way. In 1897, when Justice Holmes spoke, he probably felt sure he could foresee the future of the law and legal practice. Today, I am less confident.

This afternoon let me simply share some thoughts about the role of lawyers in our economic and social system at the end of the twentieth century. You will notice I do not say *legal* system. For lawyers, by virtue of their education, their ability, their position in the community, and above all their profession, hold a special trust from society to direct their practice outward to society at large. Despite the bitter criticism that, recently, has been directed at the legal profession, lawyers perform a valuable—indeed an essential—role in preserving the diversity and innovation that uniquely characterize American culture and industry. The creative and constructive participation of lawyers is vital to assure the efficient and productive working of our economic and social system, and to continue the struggle for a more just, fair, open, and civilized society.

It is by no means assured, however, that lawyers in the last score years of the twentieth century will play a role that is positive, constructive, and productive. Whether lawyers will be part of the problem or part of the solution will depend completely on your view of the very essence of law and justice.

This essence, unfortunately, does not come stamped

on the diploma you receive today. It is not revealed in a shimmering light the day you pass the bar exam. It requires a lifelong commitment to political and cultural awareness and creative participation in one or many communities. It involves a recognition of the public responsibility that underlies every professional activity of the practicing lawyer. It demands persistent effort to help realize the promise of a just, open, and diverse society, the fragile form of which ultimately rests, in a democratic nation, on a system of laws and courageous human beings.

You graduate from law school in an era filled with uncertainty. International tensions are increasing. We live with the ghastly threat of nuclear or chemical warfare. Our economy is in the worst shape it has been in since the 1930s. Here in Michigan, which built so many things for America, a true depression is at hand. The problem is not just a sluggish economy. We seem to have lost the innovation and leadership that once characterized American industry.

We could name a dozen scapegoats: government regulation, a "national malaise," either political party (depending upon which you are in), the insidious influence of television. And some would add: lawyers.

Lawyers are undeniably unpopular in our country. One reason is their sheer numbers. Japan, as you know, has only one lawyer for every 10,000 citizens; Western Europe averages one lawyer for every 1,500 people. The United States has one lawyer for every 450 people. One in every 200 working Americans is a lawyer.

Another major reason for the unpopularity of lawyers is that, in this century, the law has grown increasingly complex. As laws become more numerous, more intrusive, and more oppressive, lawyers become increasingly necessary to untangle the law's impact on the lives of everyday citizens. People's dependence on lawyers makes them understandably uneasy, especially when our Chief Justice charges half the litigation bar with incompetence.

Some condemn the growth of the law outright; but the sincere critics should first explore *why* the law has become so complex. In the United States, the law is the instrument that we have chosen to express, to protect, and to execute our national ideals. It is a path to our highest aspirations. Those aspirations have recently grown even more ambitious as we try to preserve the capitalistic system and as we endeavor to ensure to all individuals our national ideals of equality and liberty. In part, the complexity of the law reflects the ambitiousness of our goal.

Yet we, as lawyers, must be aware of a central dilemma in our system of law. That system holds the potential for achieving great heights. If, however, the law grows too complex and too unwieldy, it threatens to strangle the society it serves. Indeed, even when the law is pursued with righteous motivation and all diligence, it may be enormously inefficient and counterproductive.

Alexis de Tocqueville, a shrewd observer of the

United States, understood the dilemma posed by our legal system. In *Democracy in America*, he was particularly perceptive, although not always flattering, about the role of American lawyers. Tocqueville felt lawyers were indispensable to a free society. Indeed, he classified lawyers as one of the American institutions that mitigates tyranny. "I cannot believe," he wrote, "that a republic could hope to exist . . . if the influence of lawyers in public business did not increase in proportion to the power of the people."

Tocqueville also observed that political issues in the United States are almost always resolved into judicial or legal questions. I might add that social and even ethical questions also find resolution in our courts. This is because our executive and our legislators often do not have the political courage to resolve potentially divisive social issues. It is also because our executive and legislators often purposely leave statutes unclear so that one of the courts can resolve the controversy. Moreover, the Bill of Rights and the Thirteenth, Fourteenth, and Fifteenth Amendments affirm our faith in the law's capacity to ensure to all individuals our ideals of equality and liberty. We have not always succeeded in, but we have never abandoned, the struggle toward those ideals.

When Tocqueville wrote, however, he was speaking of a society far different from our own. That society was remarkably homogeneous, rural, sparsely populated, and shared a more singular vision of America. Its moral foundation was plain and simple. Today, our society is heterogeneous, pluralistic, and increasingly aware of the limited nature of its physical and social resources. Today, moral assumptions are contradictory and contested.

Our Constitution, forged for one type of society, has admirably served our own very different society. This is the surest proof of that document's grandeur and the vision of our founding fathers. Yet as the complexity of the social needs addressed by the law has grown, so has the complexity of the law itself.

Today the law must mediate among and adjust the inevitable conflicts that arise in a pluralistic society. In the past, the law has performed brilliantly. The law—and lawyers—gave us the decisions in *United States v. Darby* (Congress could prohibit the interstate shipment of goods made by workers paid less than the federal minimum wage), *Gideon v. Wainwright* (the State was required to furnish the indigent at the State's cost counsel even in a non-capital case), and *Brown v. Board of Education* (racial segregation was impermissible in education). Lawyers, working through the courts and the legislatures, have made significant contributions to the quality of our nation's environment, to safety in the work place, to the safety of consumer products.

Even about the historical role of lawyers, Tocqueville was not always correct. He wrongly felt lawyers were, by and large, defenders of the establishment. In fact, however, lawyers have repeatedly challenged, to use John Hart Ely's theme, the actual

and pervasive traditions of our society which fall far short of the theoretical traditions and promise of our Constitution. Lawyers attacked the citadels of McCarthyism, of racial segregation; they challenged the extremes of poverty, the deficiencies of our voting system, and sex discrimination. They have been ready warriors in the struggle to define and improve our society and to realize our national ideals.

We have also seen the use of law and the work of lawyers put to the very purpose Tocqueville noted—the resolution of increasingly complicated political and social problems. Yet the very success of that process has led to the "over lawyering" of society—too many laws and too many lawyers. This is a central dilemma that will occupy your practice in the last decade of this century and the first decades of the next.

People's dependence on lawyers makes them understandably uneasy, especially when our Chief Justice charges half the litigation bar with incompetence.

What can you as an individual lawyer offer that is valuable and distinctive to society?

First, the excellent lawyer is, above all else, a detached observer. The lawyer approaches particular cases with a broad base of experience and a long-range perspective. The excellent lawyer can counsel settlement to an individual intent on litigation. He or she can suggest a solution that participants, engrossed in a matter, might not see. The discipline of rational reason is often the leaven that persuades a contender that what he seeks is irrational. To perform this function well, however, a lawyer must be a person of broad vision, with an appreciation for trends in art, culture, economics, poetry, and history, and a profound knowledge of the business, political, and social events in the country.

Let me give you an example. I had litigated several matters for what was then the largest home builder in the United States, a man who built cities and towns which still bear his name. Because our firm had been able to help this company in the past on problems of zoning, public utilities, and tax, his company brought another matter to us. They wanted us to help them resist the sale of houses to Blacks in the cities and towns they were building. At that stage in our nation's history, the company won in the federal district court and perhaps would have prevailed in the appellate court on a strict view of the law. In 1952 however, signs suggested that things would change.

So I went to the president of the company and convinced him that his position was wrong. Not only that it was morally wrong, and eventually would be legally wrong as well, but that it would hurt his company financially. He listened to me and his company did very well by making housing available to all races long before he was required to by law. The wisdom of his judgment was confirmed by the Fair Housing Act of 1964, by the Supreme Court's decision in *Jones v. Mayer*, and by President Johnson's appointment of Robert Weaver, the first Black cabinet officer, as Secretary of HUD.

In a sense, the craft of an excellent lawyer is very like the craft of a painter. A painter must pay meticulous attention to detail and must achieve technical mastery, both in an individual painting and in his or her art as a whole. The painter never loses sight of the broad picture—in the most literal sense. From time to time, the painter steps back from the canvas and looks at the work. Every brush stroke is controlled and directed to some conscious end, quite apart from the skill that controls the brush.

If you will allow me to push this metaphor a step further, please observe that no two acclaimed painters have the same style. Each portrays his or her subject in a unique and individualistic way. Each lawyer must bring this individual view to each matter he or she undertakes. Not every lawyer or law firm will deal with a problem in the same way. The law needs both its Rembrandts and its Chagalls.

Second, I think that lawyers are valuable because they help our heterogeneous, pluralistic society manage its conflicts. A society that buries its conflicts stifles its people and builds intolerable burdens for the future. A society that lets its conflict explode suffers divisiveness and civil war. When conflict is handled responsibly, the whole society benefits.

We have advanced beyond the stage when champions determined the truth of competing claims with physical combat. However, we cannot escape the fact that our legal system is built on the conflict of adversaries. For more than 700 years, the common law has worked on the principle that opposing two points of view led most surely to a just result.

In the United States, we have carried that idea much farther. Our society values and demands diversity, candor, change, freedom of expression. Inevitably, this ideal generates conflict. This conflict is one of the pillars of our liberty, the ferment from which creativity, individual choice, and progress emerge.

To our legal system we have entrusted the task of managing and mediating these necessary conflicts. This is one reason we need more lawyers than do the Japanese, who value conciliation above the need to assert a variety of points of view or ideas.

Yet conflict unfettered could lead to disaster. In practice you will meet lawyers who will break a deal over the use of "that" or "which." The answer, however, is not less use of the law for resolving social conflicts, but rather more responsible use of it.

In a vast number of cases, the lawyer's role is to reach a satisfactory conclusion without litigation. Nine out of ten civil cases filed are eventually settled out of court. Many other cases are settled before reaching court. As an architect of settlement, a lawyer has a unique opportunity to create constructive and useful solutions to problems. This creative resolution of conflicting interests is one of the highest forms of the lawyer's craft.

Excellent lawyers thus are valuable to society because they provide a detached perspective and because they help preserve the diversity and energy of our society through the mediation of conflict.

Third, and most important, excellent lawyers are valuable to society because they are public persons. The law offers unique opportunities for individual lawyers to participate in a wide variety of service. In my own firm, for example, lawyers frequently take time away from their practices to work in governments, universities, corporations, or other fields before returning to practice. Indeed, I am pleased to note that one member is currently serving on the faculty of this law school. Practice and public service follow naturally upon one another.

It is not sufficient to say that the legal profession offers opportunities for public service. More accurately, the legal profession demands public service. Mr. Justice Potter Stewart recently observed in a tribute to Washington superlawyer Lloyd Cutler:

In the early years of the Nation's history, it was almost impossible to find a person of superior ability and education who did not take an active part in public life. Then came the dreary years, when far too many such people devoted their careers to storing up possessions, personal privilege and personal power. . . . [There is, however, a] distinguished company of Americans who have believed that a superior education and superior ability bring to a person not alone an opportunity to build a citadel of personal privilege, but an obligation to build a life of public service.

Many law students and lawyers have too narrow an interpretation of the kinds of public service that are open to lawyers. The proposed revisions to the Code of Professional Responsibility, for example, specify that so-called mandatory pro bono work must be discharged in the area of poverty law, civil rights law, public rights law, charitable organization representation, or the administration of justice and availability of legal services.

It is essential, of course, that the private bar, with its vast store of energy, ability, and knowledge, fulfill its duty to make legal services available to those who cannot afford the legal help they require. This duty goes back to the origins of the legal profession itself and the roots of our Western heritage. It is particularly perverse for a lawyer in the 1980s to limit his or her concept of pro bono publico to a few hours a month of free legal

services. All legal work ought to be performed for the public good, or it ought not to be performed. This is just as true whether you are preparing a contract, deposing a witness, writing a Supreme Court brief, or investigating a tort claim. Without an organized society, law and the lawyers would not exist. In a society, moreover, that transforms its political and social problems into legal questions, the lawyer receives an important trust. It is a breach of that trust not to discharge professional responsibilities with the polestar of the public good constantly in mind.

American lawyers have taken on and overcome many hard public problems in the past. Two of the great public problems of your generation are economic stagnation and international conflict. Your generation is challenged to apply the indigenous ingenuity and creativity of the American bar to these issues. We must lick the problem of the national budget, but not by anything so foolish as a Constitutional Amendment. It is vital that we shift our economic focus from the short-term issues of the moment, from the monthly unemployment figures, the quarterly report of corporate earnings, and find new mechanisms for long-term planning for growth. It is equally vital that we learn to manage our international relations with the skill that we apply to our domestic conflicts. For the Western democracies, and indeed the nations of the world have only two choices: creativity together or destruction apart.

In this task, American lawyers have much to teach the world. For we, without war or violence, have transformed our society from one divided by race to one increasingly free of race. For we, without war or violence, have transformed our society from one where it was a crime for two employees to join to seek better wages to one where workers could strike for better employment conditions at the height of the Korean War without the threat of a jail sentence. For we, without war or violence, were able to remove through law and an outraged public opinion an elected President who had broken faith with the American people.

It is especially hard for young lawyers to turn their practice outward. They have their own careers to worry about. They have to "make partner." They have to pay the bills. Yet a public practice is especially vital in the early stages of a lawyer's career. As Justice Holmes said:

Happiness . . . cannot be won simply by being counsel for great corporations and having an income of \$50,000 [or today, \$500,000.] An intellect great enough to win the prize needs other food besides success.

You have given me the rare honor of addressing an audience of young lawyers who are among the brightest and most able young men and women in the country today. Our society is well served if so many talented individuals have chosen the law.

Recently, however, a number of articles and com-

mentators have questioned the wisdom of devoting so many of the brightest young minds in this country to the law. I do not share the pessimism of those who feel our brightest minds are wasted in law. For the law is the instrument with which we seek to achieve our social goals. The law encompasses not only legal issues, but also the fundamental political and social concerns of our time. The law, and lawyers, perform vital services. These include lawyers' function as detached counselors, their role as managers of conflict, their role as public persons, their role as innovators, and their obligation—indeed their solemn duty—to put to each generation the question of how we approach nearer to the ideals enshrined in our Constitution and to our heritage as free women and men.

The law does present a curious dilemma, however: The tendency of our society to transform social or

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political controversies to legal questions can lead to strangulation by law, in which the outflow of law and regulation costs society more than the benefits it creates.

Some have charged that our society is overlawyered; but as long as lawyers seek to make the private enterprise system serve the needs of the customer, the shareholder, the worker, and the nation, they are vital actors in the struggle against those who would destroy the system. As long as lawyers seek justice and equality, they are vital actors in the struggle against injustice and inequality. A skilled and devoted bar provides leadership, energy—and hope—to our efforts to attain our national goals.

We extend that conviction and obligation into your competent hands, to this graduating class of the Law School of The University of Michigan, to this great class of 1982.