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Lawyers, Law and Civilization

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This school[1] is already, largely as a result of its recent accomplishments, an important center for the training of men and women who, in the words spoken at the commencements of my own alma mater,[2] will have a part in administering "the wise restraints that make men free."

A distinguished lawyer and diplomat, better known as the father of George Plimpton,[3] once observed that the history of civilization is the history of millions of solved conflicts. This, of course, is another way of saying that the history of civilization is the history of the contributions of thousands of smart lawyers. And yet it is also true, as indicated by the story told by the president of your graduating class, Mr. Biondolillo, that lawyers for some reason are not always held in the degree of public esteem we think we deserve. This, no doubt, is why lawyers are always the first to tell jokes at our own expense. But even in our most self-deprecating moods we are justified in assuming that most people regard us as a necessary evil — and here the operative word is "necessary."

In fact, our society is busily creating a bonanza for lawyers. And if, as Dean Braun[4] noted, finding a job is getting a little difficult for the graduates of some law schools — not, I'm glad to know, including this one — that is not because of any dearth of business but because the number of young men and women graduating from law schools has increased so enormously in the last decade or so.[5]

The fact that our society is rapidly becoming the most litigious in the history of the world is a phenomenon with mixed characteristics at

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1. Ambassador Richardson delivered the commencement address in May 1979 at the University of Dayton School of Law. The informality of the address is retained in this text.

2. Harvard University.

3. Ambassador Francis Plimpton was appointed Second Vice-President of the United Nations Administrative Tribunal in 1966.

4. Dean Richard Braun is the dean of the University of Dayton School of Law.

5. In 1965 the number of law graduates was 11,583; in 1976 the number of law graduates had increased to 32,293. STATISTICAL ABSTRACT OF THE UNITED STATES 168 (99th ed. 1978).

best. Professor Grant Gilmore of the Yale Law School, in one of his Storrs lectures a few years ago, observed that the better the society the less law there will be. And here we come to a point somewhat reminiscent of Mr. Biondolillo's story. "In Heaven," Professor Gilmore added, "there will be no law and the lion will lie down with the lamb . . . . In Hell there will be nothing but law, and due process will be meticulously observed."

If that is true, the United States is rapidly on the road to Hell. In every October Term of the Supreme Court we see new decisions handed down which impose some new requirement of due process.[6] Only a few years ago the Court decreed that henceforth students threatened with disciplinary suspension from high school are required to be given the benefit of a hearing and an opportunity to answer the charges against them.[7] Similar requirements have progressively been extended to changes in the level of welfare payments,[8] the granting of parole,[9] and other matters once regarded as acts of grace.

Notorious meanwhile, and a matter of both chronic complaint and increasing concern, is the cumulative burden of regulations being imposed upon more and more of the productive activities carried out in this country. There are, of course, many reasons for this. One is the inexorable growth in the complexity of our society — a process stemming from a whole set of separate trends like the increase of gross national product, the worsening of environmental pollution, urbanization, and the proliferation of consumer goods — all growing at exponential rates and all multiplied together. On top of this we have become increasingly conscious of the ways in which one set of problems impinges on another. A good illustration is the tangle we have gotten into in our attempt to sort out our energy priorities.

These developments compel, or seem to compel, governmental intervention, and in most instances the only way we know how to intervene is to create a new bureaucratic entity and direct it to proclaim a new array of rules, regulations, and reporting requirements. The result is an explosion in the demand for lawyers. We are called upon at every step of the way from writing the rules to enforcing them and defending those charged with their violation.

Another factor in the growing role of law and lawyers in this country is our society's increasing sensitivity to the legal implications of

6. *See, e.g.*, Barry v. Barchi, 99 S. Ct. 2642 (1979); Parham v. J.R., 99 S. Ct. 2493 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

7. Goss v. Lopez, 419 U.S. 565 (1975).

8. *See* Califano v. Yamasaki, 99 S. Ct. 2545 (1979).

9. *See* Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 99 S. Ct. 2100 (1979).

respect for equal rights. And here we've encountered the age-old conflict over the question of distributive justice as distinguished from equality of opportunity. When does the individual have a legally enforceable right to health care? To what extent does the right to equality of opportunity apply to higher education? Does the Constitution compel a state to draw on its own tax base in order to overcome inequalities among local tax bases? As if these questions weren't enough, we are also caught in the middle of an acrimonious controversy over affirmative action and reverse discrimination.

As by-products of complexity and the vastness of scale of modern institutions, all of us as individuals have sensed the remoteness and indifference — the opaque and unseeing attitude — displayed by the ever-larger and more unwieldy bureaucracies, both public and private, that dominate our lives. In my view, it is this perception which, more perhaps than anything else, has brought about the erosion of trust in institutions once regarded with unquestioning respect as sources of authority. Lacking the means of compelling attention to ourselves as individuals, we have turned in frustration to movements and organizations — consumer groups and public-law firms — that can help us to make our voices heard and our impact felt.

Meanwhile, what we are seeing within the United States has its counterparts not only within other countries but across national boundaries. A few short years ago multi-national corporations operated in a virtual legal vacuum but for the constraints encountered within separate countries. There has meanwhile developed the belief that the multi-national giants must be made answerable to some kind of international code of conduct.

When I was at the Department of Commerce in 1976, I headed a Cabinet Committee on Questionable Corporate Payments Abroad whose function was to develop recommendations for combatting the problem of corporate bribes in other countries. We were aware that to the extent that we, the United States, unilaterally succeeded in cracking down on improper payments by our own corporations, we could be putting them at a competitive disadvantage. We therefore gave equal priority to the creation of international machinery under which the officers and representatives of other countries' corporations could be made to observe similar restraints. And there is in fact a UN committee on transnational corporations that has been dealing with this set of problems.

There are of course countless examples that I might cite of this global evolution in legal institutions. One concerns the field of marine pollution. I chaired a conference in England last fall on the question of

how to cope with the world-wide impact of the accumulation of noxious substances in the oceans, especially oil discharged from ships or leaking from wrecks like that of the *Amoco Cadiz*.[10] In response to this problem there has emerged a network of international agreements administered by an organization based in London called the Intergovernmental Maritime Consultative Organization, otherwise known as IMCO.[11] IMCO's future work, if the results of the Law of the Sea Conference[12] are ever embodied in a treaty, and perhaps to some degree even if they are not, will rest upon a universally accepted base of coastal-state, flag-state, and international organization powers to protect the marine environment.

Perhaps the most far-reaching and the most relevant of these Law of the Sea developments is a provision empowering individual states to bring legal actions to require other states to observe internationally established standards for the protection of the marine environment against land-based sources of pollution. This could mean that another country might sue the United States on the alleged ground that we haven't done a good enough job in restraining stream pollution by our papermills. And a similar suit might, of course, be brought by us against another country. An interesting prospect to say the least!

Some of this growth in reliance on law and lawyers has been excessive. Some of it has been undisciplined and undirected. But law need not compound complexity. It can also have a simplifying — a synthesizing — influence. The Administrative Procedure Act[13] and the Uniform Commercial Code are familiar examples. There is a comparable need for the achievement of simplicity and uniformity both in the substance and the procedures of the regulations governing business conduct. And in the international sphere a Law of the Sea treaty would serve a comparable function.

But surely Ambassador Plimpton[14] was right that the avoidance of conflict — the prevention of confrontation arising out of conflict — is

10. On March 16, 1978 the *Amoco Cadiz*, an oil supertanker carrying 220,000 tons of crude oil, washed aground on the Brittany Coast of France. The oil from the ship smothered beaches and estuaries along 130 miles of coastline. FORTUNE, April 23, 1979, at 78.

11. The Intergovernmental Maritime Consultative Organization is a specialized agency of the United Nations. Recent efforts by the organization include an international agreement specifying minimum requirements for masters and crews of merchant ships. N.Y. Times, July 8, 1978, at 3, col. 4.

12. The Third Law of the Sea Conference, with 158 countries participating, was organized through the United Nations in 1973 to fashion a comprehensive treaty concerning the use of the oceans. 204 SCI., April 6, 1979, at 34.

13. 5 U.S.C.A. §§ 551-59, 701-06 (West 1977).

14. *See* note 3 *supra*.

not only an achievement but an objective of civilization. In the context of global interdependence, we really have no course, if we seek to maintain a peaceful world, but to expand the role of law as the means both of invoking established precedents for the resolution of old conflicts and developing new principles for the resolution of new conflicts.

How far we have come in giving primacy to the goal of conflict avoidance is manifested by the behavior of the two superpowers — the USSR and the United States of America. Both countires are of course by far the world's most militarily powerful. And although the economic strength of the Soviet Union still lags far behind that of the United States, it is second only to ours. Both countries, nevertheless, to borrow a phrase made famous by one of my former bosses, are to a large degree pitiful, helpless giants. We no longer live in an era when an expeditionary force of marines or the exercise of gunboat diplomacy is a readily available means of advancing or protecting national interests. We have massive military and economic muscles, but the situations in which sheer strength can be brought to bear are comparatively few. We obviously cannot threaten, much less carry out, nuclear devastation merely because we don't much like the way another government has behaved.

Awareness of this transformation in the uses of power was demonstrated in the recent debate over the Panama treaties,[15] which are needed in large part because the preservation of good relations between ourselves and Caribbean and Latin American countries is more important to our national security, for the balance of this decade and beyond, than the preservation of rights conferred by a 75 year old piece of paper. The prevention of turbulence is worth more to us today than the letter of a deal negotiated in an era when gunboat diplomacy was a routine method of doing international business.

Against this background, the important objectives of the Law of the Sea Conference can be seen as directed toward conflict avoidance. Both the USSR and the United States, for example, badly need clear rules guaranteeing freedom of navigation and overflight within the 200 mile exclusive economic zones being established as the result of consensus already reached at the Conference. Neither we nor the Soviet Union wish to have to use or threaten force in order to establish our

15. On March 16, 1978 the Senate ratified the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Executive N, 95th Congress, 1st Session. 124 CONG. REC. S3857 (daily ed. Mar. 16, 1978). On April 18, 1978 the Senate ratified the Panama Canal Treaty, Executive N, 95th Congress, 1st Session, Calendar No. 2, which provides for the transfer of jurisdiction and control of the Panama Canal and Canal Zone from the United States to the Republic of Panama. 124 CONG. REC. S5796 (daily ed. Apr. 18, 1978).

right to enter the Mediterranean through the Strait of Gibraltar. The same set of considerations applies to navigation through the waters of such archipelagic states as Indonesia or the Philippines.

In these and many other contexts, including the regime governing access to deep seabed minerals — the copper, nickel, cobalt, and manganese contained in manganese nodules on the bottom of the ocean floor — the definition of jurisdiction over the vast reserves of oil and gas in the continental shelf, and the management of fisheries resources, we have a strong interest in establishing universally accepted laws, principles, and rules. A comprehensive Law of the Sea treaty is the only practicable means of achieving such universality for the rule of law in ocean space.

Appreciation of what the rule of the law can mean to the gradual strengthening of the world community's capacity to deal with the resolution of conflicting claims in a manner that prevents recourse to violence goes a long way toward accounting for the nobility that we feel properly belongs to our profession. We know that the law is a great calling because of what it contributes to a better life in our own communities, in our nation, and in the world as a whole. You in your own future careers, together with contemporaries who have had their legal training in other universities, will in your turn be among those who, throughout history, have contributed to the growth of civilization through adding to an ever increasing body of solved conflicts.

Whatever else you do and whatever rewards you may seek, you will, I know, discover that this kind of contribution brings satisfaction of the enduring sort that no one else can give and nothing can take away. I wish you much joy in the opportunities that lie ahead. Godspeed.