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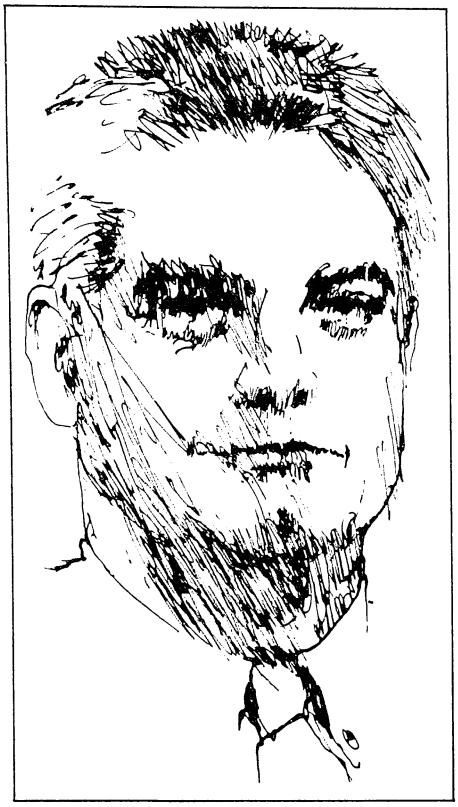

Could the Legal System Be More Humane?

As part of the BBC-Radio Third Program Series on the theme of "What's Wrong with the Law?" the following lecture was broadcast in Britain in December, 1968.

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To explore the question of "humaneness in the law" presents a fine challenge to a social psychiatrist. It requires the analysis of a social institution which deals with issues of morality and authority, and which engages the intellectual and emotional involvements of lay clients with professional lawyers and judges. Every aspect of this complicated situation lends itself to psychological scrutiny.

The lawyer with his concern for legal abstractions such as "justice," "liberty of the subject," "equity," as well as a multitude of others, by necessity sets himself at some distance apart from personal considerations. The "rule of law" and concepts like the doctrine of precedent, which provide stability and a reasonable predictability to the law, by their very nature tend toward human remoteness. At the same time, it is vital that the members of society governed by the rule of law have a deep conviction that the issues brought to law will be disposed of with justice. In Britain you have a lovely way of putting this which demonstrates high awareness of the emotional aspects of the problem. You say that "not only must justice be done, but it must appear to have been done." This pays close attention to the public's concerns and attitudes.

Laws and legal procedures by their very nature are so technically complex, that at best, laymen can only grope for their meanings. This of course is a characteristic of the work of *all* professionals. The professional person owes a special duty to make the client's best interests his primary concern, particularly because his professional activities are to a great extent performed behind the scenes, out of sight of the client, who is normally unable to evaluate the quality of the work done. *But,* the professional lawyer also has a duty as a member of the bar and the legal profession, to further client interests only *within the limits of the law.* We see at once that this produces a potential conflict of interests with the inevitable result that it may create emotional tension for both the client and the lawyer. An example of this occurs in a criminal trial where defense counsel may and should use every legitimate defense tactic for his client, though he is under an obligation as a member of the bar to avoid obstructing legitimate prosecution procedures. If this tension is not dealt with, the predictable result will be that the client will feel he has been dealt with unjustly, and the lawyer will feel he has not done his job well. A successful lawyer must therefore possess the psychological skill to help his clients resolve such tensions. Whether he be solicitor, barrister, or judge, it should be a matter of professional duty to make at least an attempt to do this. What tools do lawyers possess at the present time to carry out this difficult task?

In Britain, and for the most part in the United States, it is sheer chance if counsel possesses these skills. We can not readily "blame" them, however, for there is nothing in the formal training of lawyers to develop their potential capacity to

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deal with the psychological aspects of law practice. While great lawyers have this skill to an impressive degree, the vast majority seem to lack even what might be called commonsense awareness of their clients' emotions. This I attribute to a *negative* effect of legal education, as well as to some of the personality traits in those who choose to practice law. Lawyers are taught and urged to distrust and to eliminate emotions from their work—as if this were possible! They might as well attempt to fly with their hands.

In Britain, the division of the legal profession into barristers and solicitors provides an interesting potential for helping clients to understand and express themselves freely about what happened in the course of their contacts with the law. When an issue goes to trial, the aloof and intellectual barrister will carry out his function of advocacy according to law, insulated, as it were from the client. He can fulfill the community-oriented objectives of the law, leaving the task of restoring the equanimity and understanding of the litigents to the solicitors. This has the effect of forcing the solicitor to be a kind of diplomat-conciliator. His effectiveness in the community depends on his carrying this out, and his self-interest in keeping his clients happy provides the guarantee that he will do so. I have also gained the impression that the frequently differing social backgrounds of solicitors and barristers tends to fit them to carry out these different roles. Solicitors seem to be drawn from a sector of the community which makes them a bit more able to identify with, and be responsive to, the personal concerns of their clients. On the other hand, barristers, generally educated at the older universities and drawn from families more familiar with abstract social concerns, quite naturally fit into the more formal atmosphere of courtroom pleading and consultative work.

This division of labor facilitates a deliberate approach to the dual task of helping the community *understand* the law, at the same time as the *rule* of law is maintained in relatively remote, but logical verbal abstractions. The two kinds of lawyers can carry out these different goals. If at some future time the profession should alter its present structure, for example by unifying its two branches, these distinct functions will still need to be handled, and their importance recognized, by appropriate training measures.

Of course we must acknowledge that most Englishmen's experience with the law takes place in the magistrates' courts and the county courts. Here there is less of the magical aura cast by the professional lawyers than in the higher courts. In fact, litigants in the magistrates' court are usually not even represented by counsel. The atmosphere there is more informal. There seems to be a recent trend of appointing members of the magistrates' bench from a broader spectrum of society which should improve the rapport between the community and the law. It is a commendable trend. Nothing better improves community acceptance and understanding of the law than the reality of involvement, as for example, in the obligation to serve on a jury. I might note in passing that such involvement in community activities is to me one of the impressive characteristics of British society.

Another aspect of British legal procedure which is psychologically important and which deserves extension and emulation is the concept of making most of the elements which enter into the court's decision-making highly visible to the observer. Everything the judge uses and considers is heard in open court. There are no written arguments for judges to evaluate in private. This promotes community participation and evaluation, even though not as extensively as one would wish. This effect could be heightened through further clarification of some of the more abstruse legal issues as they arise in the courtroom. Thus, judges might view themselves as having an educative role as well as being interpreters of the law. The distance between interpretation and education is small. Ways should be found for making their views on important public matters more widely known. Today's communication media should make wide dissemination of important decisions a relatively simple task.

I suppose one would have to say that to most of the community, law and lawyers are viewed as being related to matters Olympian, or as contemporary remnants of a society dominated by the upper classes. Most laymen do not fully, or even partially, understand the well-tuned beauty of legal processes and the way in which they protect the hard-earned cultural gains of a society. They do not appreciate the subtle checks and balances of legal procedures which make law the relatively effective social instrument it is, notwithstanding a multitude of deficiencies. Rather it is seen as a mysterious and threatening apparatus, ever hovering just out of sight, ready to envelop and punish one for real or imagined misconduct. It speaks with Jovian wrath, ready to smite Evil and uphold Good. Such imagery is similar to the imagery of a child's conscience and as such it works to impede the rational development of the law both in terms of public acceptance as well as in the behavior of many who work in the legal profession. It is just this kind of imagery which stands in antithesis to a "humane legal system."

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recent legal systems the principle of an eye-for-an-eye, tooth-for-a-tooth was viewed as just. Even today, when we are greatly frightened by some heinous crime, such as the Shephard's Bush shooting of three policemen in 1967, there is an immediate impulse to revive the death penalty and other severe punishments. This response is "explained" as an effort to deter those vicious characters among us who would commit such crimes. In our more rational moments, however, we can often recognize such retributive impulses as merely the biological responses to fear. They do not prevent such crimes and indeed many people realize that persons who commit such violent acts seem to have something grossly wrong with them. This kind of awareness on a broad social scale has gradually produced the feeling and belief that to punish there must be evidence of a "guilty state of mind," what lawyers call *mens rea.* The introduction of this idea into the law has been a step in the "humanizing" of the law. It is closely akin to the moral belief of "turning the other cheek" and reflects a stage in the evolution of a humane law and a humanistic society. In other words, humaneness includes the psychological need to understand *why* a crime is committed and it reflects a trend in society's belief that only those who freely *choose* to behave criminally should be subjected to a retributive counter-assault by society. This evolving awareness of the nature of man's inner psychological behavior and its relationship to social control brings in its wake a conflict between the *biological* attribute of self-protective vengeance, and the *social* insights that there are some whom punishment will not deter, and that carrying out punishment on them often makes the punisher feel bad. This conflict lies at the heart of a multitude of social and legal problems which may be resolved rationally only through application of the insights of modern psychological and social theories.

The most direct way this might be done is to transport some of this knowledge about human behavior into the training of lawyers. It is ironical and even deplorable that those who have so much to do with the shaping of law and legal institutions have so little formal contact with this knowledge. It is tantamount to training an engineer without the use of mathematics, yet this is what is done in most countries. Ideally, every lawyer's education should include at least a grounding in human psychology. He should learn what we know about interviewing skills. What happens when a client sits down with an authority figure such as his lawyer? What are the psychological forces operating between the parties to such a conversation that may obscure issues and produce failures of communication? How can a sensitive interviewer avoid these risks or dispel them when they exist? The answer to such questions is to be found in the substance of the psychological sciences; before long, we should view it as a matter of neglect if they are not included in the routine training of all lawyers.

Another place where modern psychological knowledge could and should be used to make law more humane is in relation to the procedures of the law. For example, we *know* that a person confronted with the massive power of the State may do things that appear suspicious or as evidence of guilt, even when he has done no wrong. Concern about psychological reactions to such situations would help to promote interest in ways of avoiding or at least minimizing the danger that the system may make mistakes because of such misleading behavior. This is especially worrying in criminal cases. The legal rules protecting defendants against self-incrimination were intuitive responses developed by the Common Law hundreds of years ago to take account of the psychological phenomenon. We are now in a position to improve upon these procedural rules, to increase the level of understanding of what is going on in legal proceedings, civil as well as criminal.

Another place where there is room for more sensitivity to the human aspects of legal procedure is to be found in defended divorce cases. If these proceedings were made more informal, it would help the parties to understand more fully what is happening to them. They could ask questions right then and there which would help to eliminate subsequent confusion and especially to avoid further agony between the warring parties. This kind of procedural method should be explored and tried out.

Another sort of use for psychological knowledge in legal procedures may be seen in relation to such questions as eye-witness reliability. The widely accepted hunch that emotions can seriously distort the accuracy of eye-witness evidence has now been scientifically proved. Such data should be used to improve the efficiency of legal fact-finding. A need to believe in the accuracy of the facts used in legal procedures is not only connected with the community's sense of justice, it promotes humaneness as well.

Under present rules of procedure, the parties to an action are ordinarily the passive recipients of the results. Often they are left with many unsettled questions, and indeed delusions, as to what happened to them in court. It should always be borne in mind that it is relatively unimportant that the *lawyers* believe that everything has been clarified and settled if the parties do not. So far as they are concerned, the matter has *not* been justly settled. Means must be found for using the formidable power and authority of the court setting to improve and facilitate the communication between the litigating parties. While such changes might prolong the proceedings somewhat, the over-all social efficiency would be greatly increased. Such considerations are another example of how psychological knowledge about people might be used to make the proceedings and imagery of the law more humane.

I have been much impressed with the image of dignity and justice

which is present in the British High Courts. Even the wigs and robes foster this. Side-by-side, however, there is often a kind of icy aloofness which does not foster effective communication. We now know a great deal about the effects of gestures, voice inflection, and body postures on communication. In fact, such non-verbal means of communication are probably at least as important as the words used. It should be possible for judges to learn this new knowledge about the processes of communication, as well as how their own personalities affect the ease of witnesses, the impact of their words on juries, and their effectiveness in communication generally. This could help to make clear that they are humanly in touch with the people before them. Some judges already have this proficiency and it does not appear to erode their judicial authority or objectiveness. Perhaps ways can be found for fostering changes in this direction, through such means as the recent development both in America and in your country of judicial training conferences. Surely it is not disrespectful to suggest that there are some special skills needed by judges which they will not automatically have gained through their previous work as barristers.

Finally the legal profession should utilize its prestige to educate the public in the ways of justice. As I remarked earlier, few laymen understand the nature of the judicial process. They will give away valuable liberties by inadvertence and ignorance, even as they believe that they are making gains for their own security. I would say that lawyers are the possessors of some very heady and exciting knowledge. They should make a greater effort to help us know what they are doing and how they do it. Some few have already done this in books, plays, and public lectures, but it is far from enough. With all of the capability of modern communications media, lawyers should share the excitement of their concerns with us. Let us see, too, how deeply concerned they are with our welfare. This will automatically make the law more humane, because it will make it more understandable.

. . . One of the psychological paradoxes about the law is that in all of our society there is no other group more concerned than lawyers about basic human values. Yet because of the technical complexity which surrounds it this concern all too often remains largely invisible to the public. Thus lawyers and judges do not get full credit for their efforts and are widely misunderstood. May I suggest that we would all benefit from vigorous attention to this matter by the legal profession. We the public would feel more secure with our legal institutions, while the members of the legal profession would receive the satisfying reward of public admiration in return for their efforts.

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