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Lawyer as Conservative

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THE LAWYER AS CONSERVATIVE†

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Lawyers, we are often told, are naturally conservative. For example, when someone asks, "Why are the lawyers (along with the doctors) the only people left who have successfully resisted social security coverage?," the answer is apt to run something like this: "The lawyer's training and function necessarily incline him toward conservatism. His job is to conserve rights of property and person under established laws and precedents. His job is not to innovate and pioneer, but to stabilize and preserve."

My purpose tonight is to examine this assumption that lawyers are, and by nature should be, conservative, in order to discover what it means and what its implications are in a time when everything round us seems to be changing with increasing rapidity.

What is conservatism?

There is good conservatism, and bad conservatism. Or, if you like, there is true conservatism, and spurious conservatism.

The difference depends on what you set out to conserve. This difference is between ends and means.

True conservatism aims to preserve and foster the great ultimate ideals and values of our country and civilization, utilizing in any era the mechanisms that will best serve that purpose, and changing and adapting these mechanisms to the times whenever that is necessary to accomplish the main object.

False conservatism guards and cherishes the mechanisms of the past, and abhors new mechanisms, while iguoring what happens in the meantime to our traditional ideals and values. It worships the shell of the past, but lets the living substance die.

I would like to develop this distinction principally through the rather-

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* See Contributors' Section, Masthead, p. 326, for biographical data.

detailed analysis of a single example, drawn from this same field of social security and other income insurance.

I believe sincerely that any good conservative lawyer ought to favor the completion and perfection of our systems of social security, unemployment insurance, workmen's compensation, and sickness and disability insurance. Some lawyers seem to be perplexed by this statement. But when we apply the distinction between ultimate ideals and mere mechanisms, the reason for perplexity vanishes. These different income-insurance systems, (although they are novel in the sense that they are less than seventy years old), are only *mechanisms.*

But the ultimate objective, I affirm, is the truly conservative objective of furthering of the oldest and finest individual values in our American tradition.

What are these ends, the ideals, the values, that we think of as having made this country great, and that we are really trying to conserve in a turbulent world?

I would suggest three:

1. The *religious* conviction of the *divinity* of man.
2. The *political-legal* ideal of *freedom.*
3. The *economic* idea that the self-reliance and *initiative* of free men in a setting of private property and private enterprise is the mainspring of prosperity.

I would like to put a simple question to my friends in the legal world who still think it is the duty of a conservative to be faintly suspicious of income insurance. Let us suppose that income insurance had never been invented. You are assigned as a lawyer the following specific problem: devise a system which will adequately deal with the problem of wage-loss in a cash-wage economy, while at the same time preserving, to the maximum extent possible, the three great American traditions just listed.

How would you do it?

First you would analyze the nature of the mid-twentieth century wage-loss problem. You would discover that it was somewhat different from the same question when Benjamin Franklin was writing maxims or even when your grandfather was a boy on a farm in Wisconsin. The central fact now is that we live in a cash-wage economy, not an agrarian economy. This means that for the vast majority of Americans, when cash wages stop, stark disaster is not far away. They do not have hams and bacon stored in a smokehouse, nor a cellar full of turnips and apples; nor can they clothe themselves by spinning their own fleece; and, as for

shelter, there is no great rambling family house which can accommodate a wide range of generations and relatives. Food requires cash; clothing may be had only for cash; shelter is only for those who can pay rent in cash. And, by hypothesis, there is no cash, because the sole source of cash —wages—has been cut off.

You would next ask: what are the principal contingencies that cause this loss of wages. You would find four: economic unemployment; old age; sickness and disability; and death.

As to most of these, the essence of the problem is that they may occur at unexpected times, and, when they do occur, they require an unusually large sum of money.

Having reached this point, you would ask yourself: what device do we use in this country to provide a large sum of money for a man of moderate income in such a way that it will be available exactly when he needs it to meet some future contingency? The answer is, of course, insurance.

People can, and do, insure against almost anything in this country—triplets, rain on the Fourth of July, falling meteorites, damage to a "million dollar pair of legs," and so on. We are the most insurance-minded country on earth. It would be very natural, then, if you had to meet for the first time the question of what to do about future wage-loss, for you to seize upon the insurance pattern.

That is exactly what we have done. Small sums are paid by an employee or his employer while wages are steady, to the end that when wages stop there will be a right to be paid a portion of the lost wages.

Now let us look at the only other public way of handling this problem, and see which of the two best serves the ideals of individual dignity, freedom, and initiative. This other method is public relief. It is the older mechanism, since it dates from the reign of Elizabeth the First.

The opponents of income insurance almost invariably end by saying that the most efficient way to handle the whole problem is simply to let public relief take care of those who are genuinely suffering because of wage loss. False conservatism fastens upon this ancient mechanism and rejects the new mechanism of income insurance, quite forgetting what happens in the process to the conserving of our ancient ideals. Let us see what happens.

As to the divinity, self-respect and pride of the individual, the contrast is sharpest, for the principal reason income-insurance was invented was to get away from the humiliation that has always attended public relief. The recipient of social security feels no mortification, and there is no

reason why he should. He feels, and is intended to feel, that the benefits he collects are his, paid for by contributions made by him or on his behalf. After all, he probably knows that the retired corporation president in his town is also collecting social security and feeling none the worse for it.

And what of freedom? The recipient of relief loses first his freedom to keep his financial affairs to himself, since he must submit to a thorough examination into his means and resources. He next loses his freedom to move about, since he obviously cannot take his relief payments with him from Elmira, New York, to Fort Lauderdale, Florida, if he happens to want to quit shovelling coal and move to a warmer climate. And, finally, he loses his freedom to spend his money as he pleases and live his life as he pleases. For people will talk, you know, if a relief recipient is seen buying a carton of beer or a 1937 Plymouth or a fifteen-cent cigar. He might be seen by some taxpayer who never pays more than a dime for a cigar, and who drives a 1936 Chevrolet. By contrast, the recipient of social security or other income-insurance can spend his own money as he pleases, and accounts to no one. He can spend it all on Christian missions or jig-saw puzzles or dog food or Patagonian stamps and it is nobody's business but his own. He can go wherever he pleases, and his rights and payments will follow him. His freedom of privacy, of movement and of living as he chooses, is not impaired in the slightest.

As to incentive and initiative, there is no reason why an income-insurance system, properly adjusted, should not be a spur rather than an impediment to ambition and productivity. I stress the "properly adjusted," because there are some kinds of systems in other countries which do at times have a tendency to encourage idleness or malingering. One important detail of our system is that the ultimate size of your benefits almost always depends upon the size of your wages—by contrast, for example, with the British system in which benefits are uniform for everyone, and by contrast with public assistance, which you get on the basis of need without much relation to your past efforts. Another general requisite in a public system is that the size of benefits must never be so close to the size of wages that a normal worker may prefer the smaller sum plus his leisure to the full wages plus his work. With the system thus properly adjusted, most people now agree that a workman is a better workman when he is free of the dread of poverty and of the fear of going on relief. The old idea that a man will work harder and better if tortured by fear of starving might have been appropriate for the slaves of the Pharaohs—we will never know; but it seems to me that it is a shameful libel when applied to proud, free American workmen.

And so, in this comparison of the old device of relief and the new mechanism of income-insurance, we are forced to conclude that the true conservative lawyer who wishes to conserve the great ideals of self-respect, freedom and initiative has no choice but to favor the expansion and perfection of income insurance to the point where public assistance is reduced to the absolute minimum.

Someone may ask: why isn't the solution to all this merely to have people save their money, as Benjamin Franklin said they should?

I have two comments on this suggestion.

One is that we are attempting to deal with a very real human and economic problem, not with an abstract exercise in the principles of human conduct. We have to accept, as good lawyers, the given facts of our assignment, and one of them is the known fact that the vast majority of Americans simply can not or will not put enough money in the savings bank to take care of these emergencies. The capital sum necessary to produce the annual income of the average full-time American worker would be $100,000. Even the present cash value of an annuity equal to a typical social security benefit would be $10,000 or $20,000. We don't seriously expect the majority of American wage-earners to have that kind of money in the bank. And, after all, what would you as a lawyer tell the man who is afraid that some day he might have a liability of $30,000 to a pedestrian because of an automobile accident? Would you tell him to be sure to put $30,000 in the bank as soon as possible so as to be able to meet this obligation? Of course not. You would tell him to take out liability insurance. Why then should we not tell the man who is faced with the possibility of wage-loss to meet it in the same modern way?

My second comment on the question, "Why not meet the problem by saving?," would be simply that income insurance *is* saving. It is a new kind of saving, but it is still saving. I am quite sure that a study would prove that the volume of present saving, if you count home ownership, insurance—both public and private, various company benefit plans, investments, and conventional savings, runs far beyond the savings of earlier generations whose maxims and wise sayings about saving are constantly being held up to reproach us free-spenders of the twentieth century. Though the form is new and unfamiliar, the ancient virtue of thrift is still there. And we have adopted the new form, not out of caprice or love of novelty for its own sake, but because the Great Depression of the 'thirties demonstrated once and for all that private savings in the old-fashioned sense were a completely inadequate bulwark against the savage onslaught of a modern business crash. Thousands upon

thousands of people who had lived by maxims about "rainy days" and "pennies saved" found their savings wiped out almost overnight. Plainly, a method of saving suited to the needs of our complex industrial economy was needed, and income insurance has been provided to fill that need.

I would like to sum up what I have said so far by telling you a story about the guards of the Bank of England.

Travellers to England used to be perplexed to see two gorgeously uniformed guards marching up and down in front of an old building in the City of London. The building seemed to have no particular reason for being so honored. Upon inquiry, the travellers would be told the real explanation. The Bank of England used to be housed in that building many years before. Then, one day, they moved the Bank to Threadneedle Street. But somehow no one had ever told the guards to stop guarding the vacated building. So they continued their faithful guard, in their splendid uniforms, over the shell of a building from whence the treasure had long since departed.

I will not belabor the analogy. But I hope it will help to keep vivid in your minds the equal folly of marshalling the full panoply and armament of conservatism to stand guard over the hollow husk of some outworn device or method, while the real treasure of our traditional values has moved with the moving times, and must be guarded in other places by other means.

Now I would like to apply all this to my original question about lawyers as conservatives.

If conservatism is understood to mean the true conservatism I have described, then I agree that lawyers are the most conservative group in our society, and have every reason to be proud of it. For the very individual ideals and values that I listed at the start are also the foundation-stones of Anglo-American legal tradition.

Nothing is more characteristic of this tradition than the sanctity of the individual. All men are equal before the law. Every man is entitled to his day in court. I suppose the point might best be made by referring to the extreme solicitude of the law for the integrity of the person, in such matters as the definition of battery. This tort, which sounds as though it must consist at least of a sharp left cross to the chin, may also be committed, as every first-year law student knows, by "offensive touching," which causes no physical damage at all, but does interfere with the legal right of every person in the Anglo-American world to be free from this kind of invasion of the sanctity of his person.

The same is true of liberty. Here again we may illustrate the point

by a fine old tort, that of false imprisonment. You learn very early that stone walls and steel bars are not necessary to false imprisonment; it can just as well be the polite but firm floor manager unreasonably detaining the little boy he suspects of shoplifting. Freedom runs throughout the whole length and breadth of our law, from this irate little boy in the grip of the floor manager to the accused felon surrounded by dozens of constitutional and legal safeguards all dedicated to saving him as far as possible from any unjust loss of freedom.

Our third traditional value, initiative and self-reliance, is an especial concern of the law, through its guarantee of the fruits of labor and enterprise in the form of private property, which can be enjoyed by the owner, disposed of as he pleases, and passed on to his heirs. This same concern is shown in the law's readiness to provide and protect the most useful and convenient vehicles of commerce, such as business organizations, negotiable instruments and all the rest.

Very plainly, then, the lawyer of all people is the most conservative in his consecration to the protection of our ideals of individual integrity and morality, liberty, equality before the law, and productive enterprise.

But must the lawyer also be "conservative" in the spurious sense of clinging to old forms, devices and methods? Here is the crux of the matter.

The answer is no.

The reason is that a very large part of the lawyer's job in modern times is not to shore up some traditional rule or institution, but to contrive new devices, arrangements, statutes, institutions, and concepts which will help us realize more fully than ever before our ancient aspirations.

Many law students and others have a completely inaccurate mental picture of what law practice is. Some seem to think that what the lawyer does all day is get legal questions presented to him, for which he then provides the answers out of dusty precedents; and from that time on his function is to contend valiantly for those old precedents. If he loses, or if the precedents let him down, then supposedly he ruefully informs his client that the matter is hopeless, charges the client a staggering fee, and send him on his way.

Just a few days ago, one of the most brilliant men in the country outside of the legal profession was discussing with me whether a certain function in government should be performed by lawyers. He didn't think so. "Wasn't it true," he asked, "that the lawyer's job is essentially just to apply and interpret the law as he finds it?" I rather surprised him by saying "no."

What, then, is the lawyer's job in modern times?

J. P. Morgan once answered that question, and drew down upon himself a good deal of righteous indignation; but, rightly understood, his conception of the lawyer's job was not too wide of the mark. He used to say that he didn't hire a lawyer to tell him what he couldn't do, but to tell him how he could do what he proposed to do.

In the best sense, that is the major function of the lawyer today, not only in private practice, but even more so in business, government, and labor. In a business negotiation, the parties will bargain and compromise until they are agreed on the end result they want; at that point, they heave a great sigh of relief, turn to the lawyer, and say, "Now you write up the contract." It may be a stock-purchase plan in a closed corporation, in which one of the parties furnishes the money, another the brains, and another half of each; they want the voting power divided in one proportion, the dividends to come out in another proportion, the security of the business to be applied in a still different proportion, the rights of management safeguarded so that nobody can double-cross anybody; and on the death of any party, the corporation is to get his stock, except that one man has a boy he wants to enter the business (*if* the boy wants to) when he becomes twenty-one, and another party has an insane wife he wants provided for out of the business if anything happens to him, and so on and on. All they have to do is wave to the lawyer and say, "You write it up." It's no good at such a time to quote cases and say you can't do this or that; you won't get far in corporate practice with that approach. It's up to you, if necessary, to invent new kinds of stock or voting rights or management devices, since your basic job is to figure out how to give effect to the wishes and agreement of your client.

Exactly the same thing happens in government. The policy-makers and the operating people will argue and struggle over what should be done in a certain area. Eventually they will decide on what they would like to see accomplished, at which point they lean back, light up cigarettes, and say to the Solicitor, "Get us up a draft on that." It might be a statute, a regulation, an order, a new organization, a new procedure, or a combination of these. His success as a lawyer in government will depend, not on his devotion to old cases, but on his ability to bring about needed new results and upon his imagination in tilling the soil of the law as he finds it.

Of course, you have to know the law as it is before you can make it work for you in this fashion. But a lawyer who gets no further than reproducing and interpreting the law as he reads it in the books will not be of much use nowadays in either business or government.

Let me illustrate more specifically what I mean by this. Suppose you brief the law on a business matter of interest to your client, and find the law to be entirely unfavorable. Do you stop there? Certainly not. A good lawyer is one who is so deeply grounded in the history, principles, and directions of the law that he can sense when the time is ripe to get a decision reversed. A man like Professor Whiteside here at Cornell, for example, has exercised a great creative influence on the trust law of this state by getting Court of Appeals precedents changed.

But suppose you carry your case through to the court of last resort, and you lose, in spite of the justice of your cause and the unanswerable force of your argument. Are you through with the matter? Some lawyers would say "yes." There are no more courts to go to. The law is settled. Might as well console the client, collect the fee, and hope for better luck on the next case. But if you are a lawyer entrusted with the continuing job of protecting the client's general business interests, it is quite possible your job is not yet fully done. The same situation may recur. How can you prevent a recurrence of the same loss? Perhaps you will recommend a reorganization of his corporation, or a change in his business practices, or an amendment of the language of his contracts or insurance policies or leases. But above all, do not forget the one additional possibility that lawyers are most prone to forget: perhaps you can even get the law changed by statutory amendment. A good lawyer who has found the law to be against his client should immediately address himself to the question of whether an appropriate statutory amendment should be drawn and introduced. To do this, (and I am sure Professor MacDonald will back me up in this) he obviously must be familiar not only with the techniques of draftsmanship but also with the way to get bills passed in a legislature or Congress.

This, as you can see, is quite a different concept of law practice from "taking the law as you find it."

The job of the lawyer, then, since in both business and government he has traditionally had the responsibility for figuring out *how* the law can meet the needs of changing times, is the very antithesis of conserving old mechanisms. He is, indeed, in this respect the inventor and pioneer and innovator, and always has been. Who, if not lawyers, invented shifting and springing uses? Easements? Stock corporations? Mortgages? Title insurance? Workmen's compensation? Voting trusts? Government corporations? Juvenile courts? Consent decrees? Mechanics' liens? Corporate "spin-offs"? No-par stock? The tax-offset device to start up state unemployment insurance?

But the necessities of business, Government and everyday life which gave rise to these devices have by no means ceased to clamor for new inventions. Emerson said,

> "Every law and usage was a man's expedient to meet a particular case; . . . they are all imitable, all alterable; we may make as good, we may make better."

The "particular cases" that confront you and me in these times are such as to present illimitable scope to the creative ingenuity of every lawyer we can produce. Who, for example, will give us a system which will compensate efficiently the victims of highway accidents without sacrificing individual responsibility for negligence? A way to get the advantages of bigness and strength in business and labor without slighting the individual rights of members and without stifling the beneficial effects of free competition? A world government that will really work and yet not rely upon force and conquest? Who will invent a simple income tax? A method of handling juvenile delinquents that is tough enough yet recognizes the special problem of youth? A way to ensure that the experts on administrative tribunals are really as expert as the law presumes? A way to protect the security of the Government, and still protect the rights of suspected persons? Who will be the first to contrive laws that will protect the privacy, solitude and peace of us all in an age of candid cameras, inquiring reporters and telephone canvasses? Or laws that will conserve all the commercial benefits of advertising while sparing us its occasional infuriating vulgarity? Can anyone devise a way to ensure decent medical care for all without interfering with the traditional doctor-patient relation and the independence of the healing professions? A way to provide speedy justice, civil and criminal, with full safeguards but without delay? A method to introduce accepted principles and techniques of psychiatry to modernize our systems of criminal punishment? The effective ending of racial discrimination everywhere without undue interference with local government? A way to preserve the right to strike while avoiding disastrous national emergencies from strikes in certain crucial industries?

The world for which our laws were tailored has changed so rapidly that even some of the revolutionary changes of the 'thirties are now being left behind. The statutes regulating corporate securities and securities exchanges were passed at a time when publicly held securities were the major source of current business capital. Today public issues are third in order of importance, having been surpassed by the great insurance, pension and trust company funds, and also by withheld earnings. Simi-

larly, our income-insurance system was mostly born of the Depression in 1935; we have long since moved away from this Depression, but our system still shows the effects of this origin, in such matters as its failure to do anything about sickness and disability, and its emphasis on measures that would have a direct effect on combatting depression, such as unemployment insurance and pensions to encourage older workers to retire from the labor force. The whole field of personal injury litigation is changing rapidly in directions now difficult to predict; the basic legal concept is that of two individuals fighting out a private wrong, with resulting personal financial liability or loss; on this, the passage of time has superimposed liability insurance, but we have never yet adapted the system to take account of the new fact that there often really isn't much element of personal liability after all; and then, further time passes, and just about the time we are ready to catch up with the last change, the facts are switched again; for now, in an increasing number of cases, there *is* individual liability. The jury assumes there is insurance; verdicts nowadays are running much higher than they used to; so we increasingly see the spectacle of a man with a 5-10 policy getting saddled with a $30,000 verdict by a beneficent jury which was quite sure that an insurance company would pay it all anyway.

Plainly, with such challenges and such changes all about us, it is no time to cling blindly to past mechanisms. But it is more than ever a time to cling to past ideals.

The implications of all this for legal education are important and far-reaching.

It means a greatly increased emphasis on some newer subjects and techniques. For example, it means that a knowledge of both the legislative and the administrative process is becoming virtually indispensable. It also means that the problem method, which was pioneered and developed here at Coruell under Dean Stevens, should have wider acceptance and greater use, since problem-solving calls forth the kind of creative and constructive thought that is the main job of the lawyer.

But this view of the lawyer's function also means greater attention to subjects sometimes thought a little old-fashioned, particularly jurisprudence and legal history, since imaginative and sound solutions for contemporary difficulties will soonest be found by the man who can draw upon the deep wells of the philosophical, moral and religious thought and experience of the past.

I should like to close with a quotation from a Syrian poet and philosopher, Kahlil Gibran, which in colorful imagery depicts the distinction

which has been the theme of my remarks—the distinction between devotion to the dead forms of the past and devotion to its shining ideals. At the beginning of the passage, he seems to be speaking of my "spurious conservatives":

> "What shall I say of these save that they too stand in the sunlight, but with their backs to the sun?
>
> They see only their shadows, and their shadows are their laws.
>
> And what is the sun to them but a caster of shadows?
>
> And what is it to acknowledge the laws but to stoop down and trace their shadows upon the earth?
>
> But you who walk facing the sun, what images drawn on the earth can hold you?"