NEW YORK LAW SCHOOL

NYLS Law Review

Volume 32 | Issue 1 Article 2

January 1987

Ninety-Fourth Commencement Address

William J. Brennan Jr.

NEW YORK LAW SCHOOL LAW REVIEW

VOLUME XXXII NUMBER 1 1987

NINETY-FOURTH COMMENCEMENT ADDRESS

*WILLIAM J. BRENNAN, JR.**

It is a pleasure to meet with the family and friends of the Class of 1986. I also warmly congratulate the graduates on their achievement of reaching this day. I shall also respect their hope that these remarks will be short, brief, and wholly empty of platitudes—you have had your fill of advice and counsel and need none from me.

I do not think you feel much differently than I did fifty-five years ago when I sat where you now sit. What was on my mind was where I was going to get a job and, when I did find one, whether I could handle it. If the commencement speaker addressed that problem and suggested answers, I was prepared to listen to him all afternoon. Otherwise, forget it—the sooner he stopped, the better.

Last year Dean Vorenberg of Harvard grasped the nettle and—pithily—gave this encouraging and sound advice to the graduating class:

> It has been suggested that too many talented people are going into law. I disagree. If clients are to trust attorneys with their most important affairs, they are entitled to the services of lawyers of outstanding ability and with the finest training. I believe that for the tasks that need to be done society needs all the intellectual ability, compassion, moral sense, and skills that this class possesses. These tasks include dealing with the difficulties faced by less privileged members of society seeking housing, welfare benefits, health care, and protection against discrimination, as well as the complex problems of the corporate world. And they include acting as protectors of human rights around the world, often in countries where the law itself is used to stifle these rights, as well as advising clients in trade

* Associate Justice, United States Supreme Court.

> and investment abroad. No lawyers starting their careers are more in control of their futures than you are. There is no universal "right" way to lead a life in the profession. Whether your work is in government, private practice, international human rights, legal services, public interest, or elsewhere, you have an obligation to use the special opportunities you have had for the benefit of others. How you meet that obligation will depend on your own inclinations, imagination, and energy. There are many ways of working on the side of the angels. I hope you will have the self-confidence and the honesty to recognize that the kind of life you lead in the law will be what you make of it. Your future was not foreordained at the Law School and depends less on chance than on your own decisions.[1]

I would like to embellish upon Dean Vorenberg's comment. I begin with the observation—a truism since de Tocqueville wrote so discerningly of American society in the nineteenth century[2]—that lawyers occupy a strategic role in the ordering of our society.[3] Why is this? It is not merely that the law trains one in habits of analysis which can be applied fruitfully throughout the range of social problems, or that tradition has inclined to the law individuals disposed to follow also a career in politics or public service—though these are doubtless important factors. Equally significant is the fact that governmental action, that in other societies is exclusively the purview of administrators or legislators, is in America subject also to judicial or quasi-judicial scrutiny.[4] We have been a legalistic society from the beginning. Lawyers were conspicuous in the vanguard of the revolutionary movement and in the drafting of the Constitution.[5] The diversity of our people, combined

---

1. Comments from Dean James Vorenberg's address at the Harvard Law School's commencement ceremony (June 6, 1985), *reprinted in* HARV. L. SCH. BULL., Fall 1985, at 1.

2. Alexis de Tocqueville was sent, in 1831, by the French government to the United States to study the American penitentiary system. The resulting account of his travels, *Democracy in America,* has become a classic description of American political systems and institutions. *See* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (abr. ed. 1956) (1st ed. London 1835).

3. The more we reflect upon all that occurs in the United States, the more shall we be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country, we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government.

Id. at 126.

4. As was stated in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), "it is emphatically the province of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule." *Id.* at 177.

5. A majority of the 39 delegates who signed the Constitution had pursued legal ca-

with their ingrained sense of justice and moral duty, has caused the society to frame urgent social, economic, and political questions in legal terms, to place great problems of social order in the hands of lawyers for their definition and in the hands of judges for their ultimate resolution.

Today, the lawyer is still the indispensable middleman of our social progress. To him men turn for advice and assistance in their private affairs, for representation in the courts and agencies of government, and for leadership in public life. In truth, the lawyer's role is more important today than ever. The complexities of modern society are not confined to the technological and scientific spheres; they infect all phases of social organization. The intricacy and pervasiveness of the webbing of statutes, regulations, and common law rules in this country which surrounds every contemporary social endeavor of consequence give lawyers a peculiar advantage in coming to grips with our social problems. They alone—or so it sometimes seems—are equipped to penetrate directly and incisively to the core of a problem through the cloud of statutes, rules, regulations, and rulings which invariably obscure it to the lay eye; I need but remind you of the high complexity of, for example, the federal civil rights, urban renewal, poverty, and social security statutes.

In threading this maze, the lawyer has inherent advantages not merely of specialized training and experience, but of detachment. He is not involved as principal in the problems that he is asked to mediate and advise on, but as an agent, and as such can afford, emotionally and intellectually, to take a broader long-term view of his clients' needs—whether the client be a private corporation, an individual, or a government agency—than can the client him/herself.

For all these reasons, it seems to me unquestionable that the lawyer in America is uniquely situated to play a creative role in American social progress. Indeed, I would make bold to suggest that the success with which he responds to the challenges of what is plainly a new era of crisis and of promise in the life of our Nation may prove decisive in determining the outcome of the social experiments on which we are embarked.

In past periods of acute national need, the response of the profession has fallen disappointingly short. Thus did Mr. Justice Stone (as

---

reers. In addition, of the prominent delegates to the Philadelphia Convention of 1787, lawyers James Madison, John Jay, Alexander Hamilton, James Wilson, Rufus King, Edmund Randolph, and Gouverneur Morris had served either in the army of the Revolution, or as officers or congressmen of the government formed under the Articles of Confederation.

Similarly, no fewer than 32 of the 56 signers of the Declaration of Independence were lawyers, including Thomas Jefferson, John Adams, and Samuel Chase. *See generally* WHO WAS WHO IN AMERICA, HISTORICAL VOLUME 1607-1896 (rev. ed. 1967).

he then was) on a similar occasion in 1934 return—in the words of his biographer—"[a]n unvarnished indictment of lawyers' neglect of public duties."[6] "Steadily," Justice Stone said, "the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance" with the consequence that "[a]t its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most antisocial manifestations."[7] The lesson which Mr. Justice Stone rightly, I think, drew was that a more affirmative, responsible, and progressive attitude on the part of the profession as a whole might have averted the crisis which evoked those measures.

The lesson remains timely, although the critical problems today are quite different. The focus has shifted from the abuses of concentrated economic power and the vagaries of cycles of boom and bust. Society's overriding concern today is with providing freedom and equality of rights and opportunities, in a realistic and not merely formal sense, to all the people of this Nation: justice, equal and practical, to the poor, to the members of minority groups, to the criminally accused, to the displaced persons of the technological revolution, to alienated youth, to the urban masses, to the unrepresented consumers—to all, in short, who do no partake of the abundance of American life. To be sure, it is our very success in overriding the cruder privations and injustices of an earlier day—massive unemployment, rural backwardness, institutional segregation, overt police brutality—that has brought to the fore the current problems. But that they were formerly obscured by even greater wrongs does not make the remaining issues of injustice and inequality trivial or tractable. Who will deny that despite the great progress we have made in recent decades toward universal equality, freedom, and prosperity, the goal is far from won and ugly inequities continue to mar the national promise? Much, surely, remains to be done. Lawyers obviously cannot do it all, but their potential contribution is great.

Let us have no illusions that the task will be an easy one. The social and legal problems of disadvantaged and outcast groups and individuals are novel and complex for the practicing bar, not least because they involve precisely those in our society who traditionally have *not* been the clients of the legal profession as such. Moreover, the legal aid and representation that are required transcends that constitutionally mandated for the indigent in the criminal and juvenile courts, which has the most traditional sort of legal coloration, rooted as it is in rights guaranteed by the Federal Constitution. Assurance of equal rights and opportunities to all will require new techniques and involve,

6. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 377 (1956).
7. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

for many successful practitioners, new areas of private law, such as consumer protection, landlord-tenant relations, and general welfare law including public assistance, housing, education and training programs, child welfare services, and unemployment insurance. Many of these problems will not yield to the traditional methods of solution through counseling, negotiation, or judicial or administrative proceedings. Their solution will demand the formulation of public policy in every area of life where lawyers apply their abilities, in all branches of government, with the responsibility at each level to see at the very least that all classes of men and women are effectively represented by lawyer-spokesmen.

"What we need," Dean Griswold has said, "are not narrow-minded, single-track poverty lawyers." "A fine corporate lawyer," he added, "has the background and breadth of understanding to recognize the scope of the poverty problem."[8] I agree that the challenge will not be well met by the development of narrow-minded, single-track poverty lawyers. Even less, however, will it be met by the development—perhaps I should say, the continued development—of narrow-minded, single-track corporation lawyers.[9] Fine corporation lawyers of breadth and background will not emerge in a system that erects steel bulkheads between private and public practice, and even if they do, their value to the public sector will be academic unless they can be involved concretely in its problems and struggles. Poverty lawyers and corporation lawyers will both remain unduly narrow-minded and single-track so long as career patterns in our profession make it very difficult to switch from one track to the other.

I reject the easy solution which concentrates on the public-service opportunities open to practicing lawyers on the traditional type of spare-time basis.[10] Poverty and civil rights law, and most other impor-

---

8. Harv. L. Rec. No. 7, at 7 (March 23, 1967).

9. Counter to the attitude that "the business of business is business," corporate lawyers need to be reminded that, unlike other corporate employees, they have an obligation to do pro bono work and that providing services to the poor and letting them know they have access to the legal system is actually good business. Reskin, *Lawyers Fall Short of Self-Imposed Pro Bono Standards,* A.B.A. J., Nov. 1, 1985, at 42.

10. The American Bar Association recommends that a lawyer render public interest legal service. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1987) ("The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer."); *id.* EC 8-3 ("Those persons unable to pay for legal services should be provided needed services."); *id.* EC 8-9 ("lawyers should encourage and should aid in making needed changes and improvements"). However, in recent years there have been proposals to impose an enforceable obligation on lawyers to perform legal services pro bono publico. *See, e.g.,* Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 N.Y.U. L. REV. 735 (1980). Currently, more than 76,000 attorneys nationwide provide legal services to the poor through organized pro bono programs. Falsgraf, *Access to Justice in 1986,* A.B.A. J., Feb. 1, 1986, at 8. Six years ago there were

tant forms of public service, are as specialized and demanding as private practice, so that what Justice Stone described as "those occasional and brief intervals when the busy lawyer secures some respite from the pressing demands of clients to participate in the festivities of bar association meetings"[11] are wholly inadequate to bridge the gap. What we primarily need, rather, are more and better ways to combine, within a legal career, consecutive periods of full-time private and public service.

As for the problem of devising more and better ways for lawyers to serve the public interest even while they remain fully engaged in private practice, I start from the premise that the occasional dabblings of the busy private practitioner are inadequate.[12] Nor is it enough for a law firm to take the position that its partners and associates are perfectly free to spend as much as they like of their spare time—that is, time beyond what they ordinarily devote to the firm's business—on projects devoted to the public interest. Such inadequacy in public service exists even if it is made clear—and I fear it often is not—that the lawyer may use firm facilities such as daytime stenographic help and duplicating equipment for these projects so long as he still puts in his accustomed number of billable hours on firm business. The rub is that in the real world the busy lawyer does not have those extra hours left over after completion of firm business;[13] or, if he does, either he is then too tired to devote them to a separate project, or he finds it difficult to find a project that can be satisfactorily pursued in the random extra hours he has available, usually in the evening. It is almost impossible to meet clients, conduct litigation, telephone public offices, and so forth, in the evening.

---

fewer than 50 organized private bar-sponsored programs in this country. *Id.* Today there are more than 400. *Id.*

11. Stone, *supra* note 7, at 11.

12. According to a poll conducted for the ABA Journal in April 1985, 75% of the 600 lawyers polled thought all lawyers had an obligation to do pro bono work, but only 60% provided services and only 52% did so in 1984. Reskin, *supra* note 9, at 42. Only one in four wanted to get more involved in pro bono work. *Id.* In 1984, lawyers contributed an average of 28.3 hours to pro bono work, falling short of their self-imposed standard of 39 to 56 hours a year. *Id.*

13. Fifty-six percent of a random sample of 600 lawyers claimed time constraints prevented them from becoming more involved in pro bono work. *Id.* Two percent said they did not want to get involved, one percent said they lacked interest, and eighteen percent said they could not afford it. *Id.* But J. Chrys Dougherty of the ABA Committee on Lawyers' Public Service Responsibility insists lawyers do have the time if they get themselves and their firms organized. *Id.* Dougherty also thinks that contributing money is a poor substitute for contributing personally. *Id.* For more information on fund raising efforts by lawyers and firms to benefit public-interest groups, see Legal Times, Jan. 5, 1987, at 4, col. 2 (Arnold & Porter, a 230-lawyer firm in Washington, D.C., allowed associates to solicit contributions on behalf of the Alliance for Justice on firm time and with firm resources); N.Y.L.J., May 30, 1986, at 1, col. 2 (nearly 3,500 associates from 135 firms and companies contributed $302,854 to the Legal Aid Society).

It is preeminently true, with respect to spare-time public-service work by practicing lawyers, that if such work is to have any significant existence at all, the firm must not only tolerate it but also affirmatively encourage it.[14] Some large firms have, in recent years, inaugurated such a policy of encouragement with respect to associates desiring to spend several weeks working for one of the civil rights organizations in the Deep South. The firms have allowed extra weeks of vacation for this purpose or have otherwise made concessions without which, however public-spirited the associates might have been and however tolerant the firm, the probability is that nothing would have happened.

Apart from the various techniques that might help to construct bridges between private practice and the public sector of the profession, it is obvious that bridges are of no use unless traffic flows over them. In the final analysis, the obligation rests on the individual lawyer, whatever may currently be his position within the profession, whether he is in a large or small firm or is an individual practitioner, to devote himself, however it may be possible, to some project involving the public interest. Every lawyer should have at any given time, I think, at least one public-service project to which he is in some manner actively devoting his professional ability.

With that I close. I envy you the golden opportunities that lie ahead for each of you in our exciting and challenging profession. I join enthusiastically with your dear ones and this distinguished school in wishing you happiness and success.

14. Only seven percent of the 600 lawyers polled for the ABA Journal in April 1985 said their firms did not encourage pro bono work; two percent said their firms actually discouraged pro bono work. Reskin, *supra* note 9, at 42.