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# On Law and Lawyers: A Creed (1963–68)

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It has been said that when you appear as counsel before an appellate tribunal consisting of more than one judge you should repeat every argument three times. You state the argument the first time in order that one of the judges may grasp your point. You repeat the argument a second time in order that, while you are repeating it, he may explain the point to his brethren. Then you repeat the argument a third time, in order to correct the erroneous impression which that judge has unfortunately conveyed.

[From "Address: Call to Bar Ceremonies," Winnipeg, June 1973]

**D**uring my time on the Court of Appeal, about an average of half a dozen times per year I would receive a communication, usually by telephone, asking for my advice or comments on some legal matter. I invariably had to tell them that this is not the role of a judge, but rather that of a lawyer. The Canadian judiciary, like the British, are forbidden from giving advice on legal matters. It is not a statutory bar, but one rooted in long tradition and practice. Judging by the letters and phone calls I received, the public does not have a proper understanding of this practice.

There is also a feeling that every judge, from the moment he is appointed to the Bench, moves steadily to the conviction that the practice of advocacy has sharply deteriorated from the days when he was at the Bar. That is not my view. But a judge does have a unique opportunity of assessing the gradations of ability amongst lawyers—gradations from what I might describe as uniform excellence at the top to something, shall I say, perceptibly below that.

Whenever I think of the good lawyer I think of an ancient legend concerning a stern, just king known for the rigorous impartiality with which he administered the laws of the land. One day this king's son was

charged with an offence, of which he was only technically guilty. It was a capital offence, the punishment for which took the form of having a huge rock thrown upon the convicted person's head. Everyone wondered whether the king would in this case set aside the law, particularly since the offence was entirely technical in its nature.

As the day of execution approached, the king's soul was torn with anguish. He finally came to his wise counsellor and put the problem before him. The counsellor said to the king, "Grind the rock into dust of finest powder, and let it fall gently upon his head."

Sometimes in court a case is presented in such a dull, heavy, ponderous way that the effect is indeed like the rock upon the head. What a delight it is, then, to hear the lawyer who says what should be said, who omits what should not be said, and who, without sacrificing any of the solid substance of his case, is able to present it so that it reaches the court in that welcome and agreeable way which is the hallmark of the great men of our profession.

In the 1960s the requests for speeches and appearances continued to flow constantly into Sam Freedman's Law Courts office, and for years to come he would use the phrase "inhumanly busy" over and over again in his invariably polite and usually prompt replies.

But he also loved to tell a story about the time he didn't even get the chance of turning down a request.

Some years ago in Winnipeg a ladies' organization was planning a bazaar, and for this bazaar they needed a master of ceremonies. The ladies met in executive session for the purpose of selecting this master of ceremonies. Someone proposed my name. "We could get Sam Freedman," she said. Someone else said, "Oh, he would never accept. It's not in his line."

The proposer said, "I'm not sure. I think he would accept it."

Those statements started a merry debate, with some of the women saying Freedman would accept, others saying he would not accept. Finally the chair—who knew her rules of order—said, "Girls, what are we arguing about? Let's put it to a vote. How many think he would accept? How many think he would not accept?"

The question was solemnly and formally put to the group. The majority decided that I would not accept, and I was not asked.

### CHALLENGES TO THE LEGAL PROFESSION

[Address, National Association of Attorneys General, 57th Annual Meeting, June 29–July 3, 1963]

In addressing myself to the theme, “Challenges to the Legal Profession,” I intend to suggest that one question the theme raises involves the need, in general, to develop the educated lawyer. And, more particularly, I intend to discuss some of the attributes of such an educated lawyer.

I take as the first of these attributes, the gift of communication: the ability by tongue or pen to communicate one’s thoughts and ideas with lucidity, with vigour, with grace. The educated lawyer is generally clear and precise. He dare not leave any doubt about his meaning, whether addressing the court or writing an opposing lawyer or drawing a conveyance or contract.

Involved in the gift of communication is an appreciation of the role of language and a reverence for the integrity of words. What do I mean by that? Well, perhaps I can explain it by approaching the matter negatively, by indicating what I do not mean. I do not mean pedantry, the arrogant display of scholarship, which is the mark of the intellectual snob. Sometimes in order to express an idea effectively, one may have to split an infinitive or end a sentence with a preposition.

For instance, Winston Churchill, himself the possessor in a unique and remarkable way of the grace of words, once was criticized because one of his sentences ended with a preposition. His answer has become a classic. He said, “This is the kind of errant pedantry up with which I will not put.”...

The second is a sense of humility. Generally, of course, but more specifically, the humility to appreciate the role played by members of the profession who serve in spheres different from one’s own. That brings us face to face with the various branches of the Bar—the courtroom lawyer, on the civil and criminal sides; the solicitor or attorney giving advice to clients in his office and protecting their interests and rights; the professional law teacher helping to prepare the lawyer of tomorrow while often, in legal writing, making valuable comment on the law of today.

A third attribute of the educated lawyer is the ability to recognize the organic character of the common law. The educated advocate will be able to reconcile the claims of the past and those of the present. Here we confront a

recurring problem which the educated person in each generation has had to face. How much value shall we ascribe to the lessons and the experiences of the past? To what extent shall these lessons be overborne by the demands of the present? Was Napoleon right when he said, "History is the only true philosophy"?

These questions have application in every sphere of society, but they are particularly meaningful to those of us who serve the law. Law tends to pay homage to the past, to look backward to precedent and to the leading case. An English judge said that in law and among lawyers nothing is regarded as good or sound unless it was said before; and if it was said two hundred years ago it is regarded as all the better and the sounder.

I don't speak against the past, and I don't want to hold it under suspicion. But we should not regard the past as necessarily sacrosanct. There are many great principles that have come down to us as the treasured experiences of bygone days—principles which have stood the test of time, such as the presumption of innocence, the right to notice, the right to be heard. But the danger is that in the name of security and stability, law may sometimes fail to keep pace with the demands of a new society....

Certainly an ultimate court of appeal is entitled to some latitude in assessing the value of earlier decisions in the light of current requirements. The Supreme Court of the United States, for instance, does not consider itself rigidly obliged to follow its earlier decisions. The British House of Lords has also announced that it will no longer regard itself as rigidly bound by its own decisions. The educated advocate will welcome such a development. It attests to a recognition of the organic character of the common law and to the necessity of making the judicial process responsive to the needs of a changing society.

**A CREED FOR LAWYERS: A Presentation of Four Objectives  
Which Might Be Pursued by Members of the Bar**  
[Address, Annual Meeting of the New York County Lawyers'  
Association, May 18, 1967, New York]

In a world of change, when ideas and values are in conflict, what beliefs shall we cling to, what ideals espouse, what principles pursue? Many are the answers that might be given to these questions. Here I would like to offer the answer of one person, an answer in the nature of a fourfold creed, or perhaps a fourfold catalogue of objectives....

I take as the first article of this creed—or the first in this catalogue of objectives—an appreciation of the role played by members of the profession who serve in spheres different from one's own .... These "others" include, for instance, the minorities of the legal profession such as those engaged in criminal law.

There is one situation in which the lawyer cannot avoid criminal law—namely, if he is appointed to the Bench. It is from the leaders of the Bar—and that means predominantly the leaders of the civil Bar—that members of the Bench are likely to be recruited. And when the day of elevation comes, and when the new judge is presiding in the criminal court, when he has to perform what I regard as the subtlest and most intricate part of a trial judge's task—to charge a jury on short notice in a complicated case—when he has to deal with accomplices, with corroboration, with statements admissible only as against one of two accused, never overlooking any possible element of defence that emerges from the evidence even though not then relied upon by counsel, and putting the case and the issues fairly both for the prosecution and for the defence—on that day and in that hour he will give silent thanks that these things are not strange or alien to him because he did not disdain the practice of criminal law.

Another minority of the profession is the professional law teacher. I know that sometimes the active Bar looks upon him as an impractical, academic theorist. That is a view I am not prepared to accept....

Professing as I do a wholesome respect for the professional law teachers, I do at the same time offer to them a word of friendly advice. It is this: that they should not refer to their brethren of the practising Bar by the term "technician". There is a lesson in semantics there, I suggest. In the manner in which it is used, in the context from which it arises, it appears to be a narrowing designation—to suggest more technical know-how—and nothing beyond.

Are then the members of the practising Bar mere technicians? I offer no definition of technician. I have none. Unless the lawyer acting in a complicated merger of two companies, drawing numerous documents with care and skill, and always with an eye to the prospective liability for corporate or personal taxation—unless that kind of person is a technician.

Or the lawyer negotiating a settlement for his client, possessing that knowledge, reinforced by experience, which gives him the vital answer to the question just when he should stop; or that equips him with the knowledge to understand that in certain cases and for certain clients the best settlement is no settlement at all, and nothing but a day in court will suffice—unless perhaps he is a technician.

Or the lawyer acting for the defence in a criminal case, having to meet and dispose of a host of problems—whether to call the accused or to rely on his statement to the police; how far to go in trying to break down the evidence of a child witness—and then having the skill to put the case to the jury with clarity, with simplicity, with effectiveness—unless perhaps he too may be called a technician.

Or the lawyer in a civil case, bringing to the task of cross-examination a full knowledge of the facts of the case, the ability to put his questions directly and adroitly, and to adjust in a flash to an unexpected reply and to meet it by a new approach—unless he too may be described as a technician.

Law is a many-splendoured thing, and we can serve it in many different ways. We should guard against the view that:

“We are God’s chosen few.  
All others will be damned.  
There is no place in Heaven for you.  
We can’t have Heaven crammed.”

So, as the first article of this creed for lawyers—or the first in this catalogue of objectives—I suggest an appreciation of the role played by members of the profession who serve in spheres different from our own.

Let me turn to a second. I would describe it as an awareness of and an intelligent interest in problems challenging our profession.

Change is a rule of life and its manifestations are visible within the sphere of law just as elsewhere. In recent years a host of issues and problems has emerged to confront the Bench and Bar. They demand consideration; and the thinking lawyer will turn his attention to them. Let me refer very briefly to one or two of these problems.

(a) There is, first of all, the controversy surrounding the true relationship between law and morals. To what extent is it the function of the law to enforce morality? In Great Britain, just a decade ago, the question was given a new urgency and prominence by the Report of the Wolfenden Committee on Homosexual Offences and Prostitution. That report asserted the principle, “There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.” In line with that principle the report recommended, among other things, that homosexual acts between consenting adults in private should no longer be a crime.

This question of where morality ends and law begins has provoked a sharp debate among thoughtful people. Two of the leading protagonists in the

controversy are Lord Devlin on one side and Professor H.L.A. Hart, Professor of Jurisprudence at Oxford University, on the other. Lord Devlin, a former judge of the House of Lords, insists that private acts cannot be viewed in isolation from their effect on the moral code. A breach of a moral principle is an offence against society as a whole; hence "the suppression of vice is as much the law's business as the suppression of subversive activities." Professor Hart, on the other hand, accepts the philosophical view which the Wolfenden Report enunciated (a view earlier asserted by the American Law Institute in 1955 in its draft Model Penal Code), namely, that "every individual is entitled to protection against state interference in his personal affairs when he is not hurting others."

There, then, are two philosophies in conflict. I do not suggest that there is wisdom only on one side and error exclusively on the other. What I do say, however, is that the lawyer should be alive to the existence of the controversy, should ponder its implications, and try to think his way through to a rational conclusion upon it.

(b) Surely another issue confronting us arises from recent decisions of the Supreme Court of the United States relating to the admissibility of confessions made by accused persons to the police. These decisions touch on matters that are fundamental in the administration of criminal justice. Indeed they bring us face to face with basic questions of moral values, not least of which is where to draw the line between the claims of the individual and the claims of the state. Decisions like *Escobedo vs. Illinois* and *Miranda vs. Arizona* have to a significant degree changed the complexion of the criminal law. Their effect has been to limit the police power of interrogation by imposing on law enforcement officials the duty of informing the accused that, among other things, he has the right to remain silent and the further right to consult counsel before and during interrogation. Some have raised the question: Did the court go too far?

Let it be said at once that the philosophical motivation for these decisions is altogether praiseworthy. It derives from a genuine respect for human dignity and a deep concern for individual rights. As such it deserves nothing but commendation, and for that I too would add my applause....

The thinking lawyer will be concerned with these issues. He will recognize that in these landmark decisions your Supreme Court has enunciated a new philosophy concerning the roles of law and government in relation to human rights. Recognizing that as a fact, the thoughtful lawyer may still wish to address himself to a further problem, namely, whether the safeguards demanded by the Supreme Court are necessary and reasonable, having regard

to the rights of the individual on the one hand, and the welfare of the state on the other.

(c) Another problem faces our profession. It grows out of the challenge of crime in a free society. That question, as you know, has been the subject of a Report by the President's Commission on Law Enforcement and Administration of Justice, a commission headed by Mr. Katzenbach. I do not propose to deal with its valuable and comprehensive report. Rather, I wish to touch on a related matter which has arisen in my own country. Just last month [April 1967] the Canadian Association of Police Chiefs submitted a brief to a federal inquiry on the administration of justice. In that brief they called attention to the increase in crime and to the need for effective measures to deal with it. There can be no quarrel with that objective. But what did the chiefs request? More police power, including, among other things, these powers: entry without warrant, arrest without warrant, and detention without charge. These are matters that would make things easier for the police—an ideal which is excellent only in a police state. Arbitrary power in the hands of officials is not the answer. It constitutes a denial of the principles on which our society is based, principles going all the way back to the *Magna Carta*. I suggest that here too—as indeed on the whole question of striking a proper balance between individual liberty and national security—there is a place for the thinking lawyer's interest and active concern.

Let me turn to a third objective in this catalogue, a third article in this creed for lawyers. It is a recognition that life is not always grim, that it has its moments of lightness and gaiety, that there is a lighter side to the law, and that to savour those moments can relieve many dark hours of stress. In short, I counsel the development of a sense of humour.

Man differs from other beasts, it has been said, in that he is the laughing animal. But not all men. Some men seem to be destined to be solemn from the cradle to the grave. Others seem to see the comical situation in every event. Indeed, sometimes the event is not quite as funny as they themselves see it. Something within themselves invests the surrounding circumstances with a quality of gaiety.

Although our profession is essentially a serious one, in which the prevailing colour is grey, occasionally we do encounter something that is a bit brighter. Admittedly one does not normally go to the law for humour. It would be hard to extract the comic element from a mortgage under the *Real Property Act* or from an indenture of lease, and I am sure there are gayer things



by far than a warrant of committal for gaol. But the law does have its lighter moments, and I would like to refer to some of them at this time.

I recall the experience of the lawyer who practised in a small town in Missouri. He was an informal type—and indeed he prided himself on the fact that he appeared in court without a jacket, in his shirt sleeves, with braces or calluses visibly showing. One day this lawyer had an appeal which was to be argued before the Supreme Court of the state in Jefferson City. Friends warned him that he would be required to dress more formally in Jefferson City than he did in his home town. But the old Adam dies hard. This was a rugged individualist who insisted on appearing in Jefferson City in precisely the same way as he did at home. So he did—and he lost the appeal.

A short time later one of the judges who had heard the appeal came to his town. The lawyer said to the judge, "Did I lose that case because I appeared in court in my shirtsleeves, with my braces showing?" The judge replied, "Oh no, that wasn't the reason." The lawyer then said, "Well, it was a darned sight better reason than the one you gave."

I am sure that most members of the legal profession are familiar with the phrase "The glorious uncertainty of the law." I am sure that the best example of it is the case of the Englishman, sued by his wife for being impotent, and by the maid for being the father of her child—and, alas, losing both cases.

Perhaps you recall the story of Sergeant Sullivan (the last of the sergeants), to whom the trial judge said, "Surely your client is familiar with the maxim '*volenti non fit injuria*.'" Sergeant Sullivan replied, "My Lord, in County Kerry where my client lives, they talk of little else."

Dare I remind you of the lady who startled the entire court by bluntly saying from the witness box, "I didn't think it was adultery in the daytime."

A reference to the lighter moments of the law should include the famous exchange of incivilities between Frederick Edwin Smith, later Lord Birkenhead, and Judge Willis. Smith was acting for a tramway company which was a defendant in a civil suit being tried by Judge Willis and a jury. The infant plaintiff was a lad of about six years of age who, it was alleged, had become blinded as a result of the accident in question. Just as the case was about to start, the very sympathetic judge looked at the boy and, in the presence of the jury, said, "Blind, poor boy, blind. Lift him up so that the members of the jury can see him." This was very damaging to Mr. Smith's cause and he retorted immediately, "Yes, pass him from hand to hand."

A silence. Then the judge said, "Mr. Smith, that was a most improper observation."

Mr. Smith said, "My Lord, it was provoked by a most improper suggestion."

Another silence. Then the judge said, “Mr. Smith, are you familiar with the saying by Bacon—the great Bacon—that youth and discretion are ill-wedded companions?”

Smith replied, “My Lord, I am. And is Your Lordship familiar with the saying of Bacon—the great Bacon—that a much-talking judge is like an ill-tuned cymbal?”

The judge said, “Mr. Smith, you are impertinent.”

And Smith replied, “My Lord, we both are—I because I wish to be, and Your Lordship because you cannot help it.”

Humour aside, at least for the moment, I want to refer to a fourth and final article of the creed. The lawyer should strive for possession of learning beyond the law. To be learned in the law is a good thing. To be learned in and beyond the law is even better.

This is a point which deserves to be made because of the tendency in certain quarters to disparage the man of learning and the function he performs. The assault upon the intellectual takes many forms. It has occurred at various periods of society. In the 1930s the term “braintruster” was used. The apparent flattery was simply at the surface. Just below the surface the slur and the abuse were present. Today we speak of “eggheads,” meaning the scholars and the intellectuals—but surely implying the useless and impractical men. It was said, for instance, that in the U.S. presidential election of 1956, Democratic candidate Adlai Stevenson, all too well known as an intellectual, had a special assistant on his staff whose particular function it was to tone down the cerebral quality of his utterances—perhaps to split an infinitive here or dangle a participle there—all with the avowed purpose of showing that the candidate was not so different from the ordinary person.

Men of the legal profession who are worth their salt will resist the attacks upon learning, will not ask indulgence for it but will resolutely proclaim its sovereignty.

I should like to think that from broad knowledge, from a familiarity with other areas of learning, with other disciplines will come a better sense of values, one which will insist upon high standards in all things, both in the profession and outside of it. One of the curses of this materialistic age is the tendency to be content with false values, the tendency to equate grandeur with worth. And that evil is only one step removed from another kind of mischief, the willingness to be content with the shoddy, the second-rate, the just-as-good.

In an ancient Greek story the Spartan Agesilaus was invited by a friend of his to go to the theatre, where, as this friend said, there was a performer who

could imitate the nightingale admirably. Agesilaus refused because, as he said, he had heard the nightingale itself.

Perhaps it may be felt that breadth of learning may be purchased at too high a price, that the lawyer who succeeds in acquiring broad knowledge may pay the price of a lack of professional competence. I am by no means sure that this is the case—that the lawyer whose learning is characterized by breadth will be less equipped for the fulfilment of his professional tasks than the lawyer whose learning is deep but narrow. But even if it were so, I still would adhere to my thesis. For even if breadth of knowledge does not constitute a formula for the acquisition of material gains and material wealth, I should like to think that it may still produce enrichments of a different kind, and that the educated lawyer will be conscious of the worth of these treasures.

I think in this regard of the ancient Hebraic tale of the man who was interested only in the acquisition of material things, the miser in the community, the man who as a result of such pursuits found himself completely disliked by everyone in the community. He came to the rabbi and asked the rabbi why it was that he was so unpopular. The rabbi said to him, "Look out of the window and tell me what you see." The man looked out the window and said, "I see a man and a woman walking in the distance. I see children playing far away." And the rabbi said to him, "Now look into this mirror and tell me what you see." The man looked into the mirror and said, "I see myself." And the rabbi said to him, "In the window there is glass and in the mirror there is glass. But the moment that you add to one of them a little silver, you cease to see others and see only yourself."

Remembering the great words of Plato that the essence of education is to learn to like the right things, I dare to hope that the members of our profession will refuse to worship the great God Mammon in place of sweetness and light.

Here then, are four articles of a creed for lawyers: an appreciation of the role played by members of our profession who serve in spheres different from our own; an awareness of and an intelligent interest in problems challenging our profession; a recognition that law has its lighter side and that an appreciation of that lighter side can relieve many hours of stress; and finally, a determination to strive for the possession of learning beyond the law.

Is this a counsel of perfection? Am I pointing to the intangible Shangri-la that lies beyond the horizon? Well, for most of us, probably so. But even for those of us to whom these objectives can only be an ideal and not an attainment I suggest there is still value in high aims, in remembering with Browning that "a man's reach should exceed his grasp, or what's a heaven for?" But to the eternal credit and glory of our profession there have always

been within its ranks shining examples of men who have attained these objectives in a distinguished and unchallengeable way. Theirs is a unique and imperishable treasure. Under the influence and inspiration of their example, all of us whose allegiance is given to the law can strive to follow honourably where they have led, so that each of us, within the limits of our abilities, can become a minister of justice and a servant of light.