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## The Lawyer and the American System

Brendan F. Brown

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# DICTA

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## Calendar

March 3—Denver Bar Association regular monthly meeting, 12:15 P. M., Chamber of Commerce dining room. The speaker will be William W. Crowder, of St. Louis, Mo., one of the leaders in the adoption in Missouri of the non-partisan judicial selection plan in effect there.

April 7—Denver Bar Association regular monthly meeting, 12:15 P.M., Chamber of Commerce dining room.

## The Lawyer and The American System<sup>†</sup>

BRENDAN F. BROWN \*

A discussion of the relation of the lawyer to the American system will be of benefit to the legal profession, the public, and the historian of broad interests, concerned with the functional aspects of history. For the legal profession it should be a source of great inspiration toward future achievement, making its members aware of herculean participation of lawyers of other days in the momentous task of building the American system. Certainly the horizon opened up by such a subject should spur the American bar toward the goal of continuing to make the American system workable. Considered from a selfish point of view, the American legal profession would do well to dispel popular distrust against it by an educational program to show the importance of the lawyer in the establishment and

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<sup>†</sup> Reprinted by permission from *The North Carolina Law Review*, December, 1945. Material of a similar nature was presented in a radio broadcast over Station WINX on August 26, 1945, as a public service of the American Bar Association and WINX, in cooperation with the District of Columbia Bar Association. Members participating in the panel were:

Mr. William T. Hannan, Member of the District of Columbia Bar and former Chairman of the Junior Bar Conference of the American Bar Association of the District of Columbia;

Professor George A. Cassidy, Instructor in Commercial Law, Georgetown School of Foreign Service;

Mr. James F. Reilly, Commissioner of Public Utilities;

Dr. James J. Hayden, Dean, Columbus University Law School;

Mr. Joseph D. Bulman, Member of the District of Columbia Bar; and

Dr. Brendan F. Brown, Author of this article.

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expansion of the American system, and in its preservation and continued success. It is true that in every generation there have been lawyers who have deviated from the high traditional ideals of the profession in the sphere of public service by concentrating solely upon the narrow field of prediction of legal rights and liabilities, and partisan advocacy for gain. But it is the duty of the bar to correct distorted pictures of such exceptional deviations.

Sections of the American public are still not completely informed of the valuable services which have been and are being performed by the legal profession in the cause of maintaining the civic, political and economic life of the nation. There is need of publicizing the opportunities offered *gratis* to the indigent by an organized legal aid movement. The public will benefit, as well as the bar, by a well worked out program of efficient public relations, if properly presented by influential lawyers' organizations.

The story of the American system could well be related from points of view other than that of the lawyer. The functional aspects of the narrative can probably be best stressed, however, by placing the lawyer in the center of the panorama. The sciences of theology, philosophy, politics and economics, and those learned in these intellectual disciplines, contributed essential ingredients to the great experiment which resulted in the American system, but it remained for the lawyer to construct the formulas which preserved the balance between the various components of the American system, such as between national and local, political and economic authorities respectively, between popular sovereignty and the binding force of custom, and between individual and group rights and interests. Such formulas have always been reducible in ultimate analysis to rules of law.<sup>1</sup>

Precision of expression requires that definite meaning content be postulated for the expressions "lawyer" and "American system," since diverse usage has made these word-symbols amorphous. The choice of meaning has been dictated by the adoption of the largest generic sense consistent with commonly accepted usage. It has also been determined by a *priori* preferences based on what is significant in the American system and in the sphere of the legally skilled.

In this connection, the term "lawyer" will include judges and jurists, as well as lawyers in the narrow and technical sense of legal practitioners. The subcategories of "lawyer," namely, practitioner, judge and jurist are distinguishable but not exclusive. While practicing lawyers are fundamentally interested in winning cases by analytical recourse to law considered apart from morals and political and economic policy, jurists are primarily engaged, from a financially disinterested point of view, in the study and reform of a legal system or systems, surveyed from historical, philosophical, sociological, and institutional levels. Judges combine in the judicial process the elements

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<sup>1</sup> O'Mahoney, *The Lawyer, the Constitution, and the Modern World* (1944) 20 Ind. L. J. 1 at 3.

of adjudication of the specific rights of litigants with the broad environmental view of the jurist.

The phrase, "American system." will refer to that distinctive plan of civilization, as well as to the consequent *mélange* of peculiar effects, which in turn have produced the characteristic features of the sociological situation existing in the United States today. These effects have followed from putting into practice a very definite political and juridical philosophy, a less specific, yet relatively definite body of economic concepts, and a congeries of remedial formulas, indigenous to the spirit and substance of the Anglo-American common law. From the birth of this system to its present stage of maturity, sub-ideals and minor techniques have varied from time to time. Indeed overwhelming crises have at times greatly changed its contours. But like all great institutions, the fundamental substance of the entity and its essential attributes have never changed.

The blueprint of the plan for the American system began to be drawn up with the Declaration of Independence in 1776. The Constitutional Convention of 1787 continued the work, which reached relative completion with the adoption of the Bill of Rights. The original principles which underlay these documents were drawn upon in the elaboration of the first stage of the American plan. Like any living organism, the American system has grown more complex with time. Its growth has resulted from the inclusion of amendments in to the Federal Constitution after the Bill of Rights, from the expansion of constitutional law, and from periods of re-examination of the question whether American society was adequately preserving a just and right relationship between the individual human being, and his political and economic government, his fellow man, and his Maker.<sup>2</sup>

In the process of establishing the American system, the role of the American lawyer was important and decisive. The American Revolution was essentially a battle between the American legal profession and the English crown.<sup>3</sup> The predominant part which lawyers played in framing the Declaration of Rights and Grievances in 1774, the Declaration of Independence two years later, and thereafter the federal constitution, is evident not only from the controlling percentage of lawyers who wrote these documents, but also from the nature of the specific doctrines therein incorporated, and the implementing institutions. Besides, the historical figure credited with being the father of the constitution was a lawyer.

In the first place, statistics disclose the numerical superiority of lawyers in the work of the great revolutionary instruments which initiated the American system. Of the fifty-six signers of the Declaration of Independence thirty-three were lawyers, or almost sixty percent. The names of Thomas

<sup>2</sup> Manion, *The American Philosophy of Law* (1943) 18 *Notre Dame Lawyer* 317 at 319-320.

<sup>3</sup> Bradway, *Legal Service for the Indigent* (1941) 16 *Tenn. L. Rev.* 691 at 692.

Jefferson of Virginia, John Adams of Massachusetts, James Wilson of Pennsylvania, and Charles Carroll of Maryland, are illustrative of some of the famous lawyer-signers of the Declaration of Independence. Of the fifty-five delegates who attended the convention which wrote the federal constitution, at least thirty-three were lawyers. Ten of these had served as state judges.<sup>4</sup> Of the thirty-nine signers of the constitution, twenty-two were lawyers, or almost fifty-six percent. Among the celebrated lawyers who signed the Constitution were Rufus King of Massachusetts, James Madison of Virginia, Alexandre Hamilton of New York, James Wilson and Gouverneur Morris of Pennsylvania, and John Rutledge and the Pinckneys of South Carolina.

Secondly, not only statistics, but also the character of the ideals, doctrines and ideas which were fused together in the historic documents involved in the genesis of the American system, reveals a lawyer origin. Thus a manifestly legal theory was invoked by the Continental Congress which drew up the Declaration of Rights and Grievances against the English Crown in 1774.<sup>5</sup> It proceeded on the argument that the actions of the crown were such as to deprive the colonists of rights to which they were entitled as Englishmen under the common law of England. Two years later, the lawyer-architects of the Declaration of Independence and their associates, realizing the futility of further legal argument, shifted to a normal contention, namely, the justification of revolution by recourse to the broad, juridical doctrine of natural law rights resting upon an immutable, objectively existent moral regime.<sup>6</sup> The capacity of the framers of the Declaration of Independence to achieve this transition is indicative of the breadth and depth of their juristic learning, and of their political and ethical wisdom.

In the federal constitution, as drawn up by the Convention of 1787, the hand of the lawyer is evident. The political doctrine of the separation of powers is worked out in a legal fashion in the first three articles. In the first article, the senate is given judicial authority in the matter of impeachments, and the limits of this authority are described. The legislative process of the Congress of the United States is prescribed as well as the extent of its jurisdiction. Suspension of the privilege of the Writ of Habeas Corpus is forbidden except in specific emergency. There is an injunction against the passage of Bills of Attainder and *ex post facto* laws. In the second article, the germ of executive justice may be seen, later given rule content, under the name of administrative law. In the third article, of course, where the judicial branch of the federal government is erected, benefit of legal counsel is unmistakable. The same may be said as to the fourth article, where for

<sup>4</sup> Warren, *The Making of the Constitution* (1937) 55.

<sup>5</sup> See Pound, *The Spirit of the Common Law* (1921) 100-101; *Lawyers Who Signed the Constitution* (1935) 13 *The Law Student* 29-30.

<sup>6</sup> Brown, Brendan F., *The Bar and the Democratic Process* (1939) 13 *Temp. L. Q.* 287 at 290. See U. S. Const. Art I §§1-9.

example, the full faith and credit and the privileges and immunities clauses are to be found.

It is well known that a number of the states ratified the constitution, with the assurance that Congress, at its first session, would adopt a Bill of Rights to guarantee the liberty of the individual against arbitrary government. by the newly erected federal authority.<sup>7</sup> The Bill of Rights contained two factors, namely, the enumeration of specific rights, liberties, and immunities, which were regarded as essential implications from the philosophy that the sovereign was legally omnipotent, but not morally, and that the sovereign ruled, but was restrained by the laws of God and nature, and the expressed choice of precise legal tools, to make workable these rights, liberties and immunities in court and legislature. Both the ideals and techniques of the Bill of Rights were distinctively legalistic and juristic. Lawyers realized that it would have been idle, from a practical point of view, merely to have recognized in *vacuo* the intrinsic dignity of human personality, and the submission of the will of the sovereign to an objective juridical and moral order, but not to have specified the ways in which abstract ideals were to be translated into action by legalistic methodology. Other legal means might have been chosen, but the ones in question have proved adequate to make effective the principle that law is much more than a command of the sovereign, based on physical power.

The legal techniques which lawyers wrote into the Bill of Rights, as distinguished from the rights therein recognized, included among others due process of law, in reference to life, liberty and property.<sup>8</sup> Curbs were erected to prevent excessive bail and excessive fines and cruel and unusual punishments.<sup>9</sup> The requirement of a presentment or indictment of a grand jury, except in clearly defined emergencies, before a person could be held to answer for a capital or otherwise infamous crime, was established.<sup>10</sup> The rules of the common law were to control with respect to the re-examination of a fact in a federal court, after that fact had been tried by a jury.<sup>11</sup> The contributions of lawyers to the writing of the Bill of Rights are particularly evident in the Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

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<sup>7</sup> Warren, Congress, The Constitution and The Supreme Court (1935) 82 ff.

<sup>8</sup> U. S. Const. Art. V.

<sup>9</sup> Id. Art. VIII.

<sup>10</sup> Id. Art. V.

<sup>11</sup> Id. Art. VII.

It is true that the legal forms which lawyers incorporated into the Bill of Rights were largely derived from many intellectual, normative, and experiential elements, borrowed from historical sources, both legal and non-legal. But creative genius was at work in the activity of assembling these elements and in inter-relating them, so as to provide an enduring system, with qualities of both stability and change, adequate to meet the constantly expanding social needs of a growing population, on the verge of developing the resources of a mighty continent. In this process the role of the American lawyer was most influential. The techniques of the Bill of Rights were inspired by the experience of English constitutional law, and were adaptations of juridical implements which were being built from Magna Carta in 1215, down through the period of Coke, and thereafter in the seventeenth and early part of the eighteenth century.<sup>12</sup> These techniques, however, had never before been formulated with precision, in an orderly unit.

In the third place James Madison, lawyer and legal philosopher, is universally recognized as the father of the federal constitution.<sup>13</sup> There are various reasons for this appellation. Thus, he unquestionably exercised the most controlling influence upon the delegates at the Constitutional Convention.<sup>14</sup> There the Virginia plan was presented and was later in substance molded and developed into what became known as the federal constitution.<sup>15</sup> Madison was one of the framers of the Virginia plan, and was a leader in the work of modifying it at the convention.<sup>16</sup>

In general, the political and legal philosophy of Madison was acceptable to the convention in preference to numerous competing philosophies.<sup>17</sup> This philosophy favored the creation of a national, as distinguished from a federal, government. He successfully advocated the political theory of the separation of powers, the election of the President by the people rather than by the legislative branch of government, the creation of a two house legislature, at least one of which was to be elected by the people, the prevention of en-

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<sup>12</sup> Warren, *op. cit. supra* note 7, at 16, 17. See *The Federalist*, No 4: "Is it not the glory of the people of America, that whilst they have paid a decent respect to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience."

<sup>13</sup> Farrand, *The Framing of the Constitution of the United States* (1913) 196; Warren, *op. cit. supra* note 4 at 57. It is there stated that Madison had studied theology, and the theory, history, and practice of government.

<sup>14</sup> Farrand, *op. cit. supra* note 13 at 197 ff.

<sup>15</sup> *Id.* at 68.

<sup>16</sup> Burns, *James Madison, Philosopher of the Constitution* (1938) 12; Farrand, *op. cit. supra* note 13 at 68; Warren, *op. cit. supra* note 4 at 797-804; *Writings of James Madison* (Hunt's ed. 1833) IX, 502, Madison to John Tyler.

<sup>17</sup> Burns, *James Madison, Philosopher of the Constitution* (1938) 64 ff.

croachments by the states upon the federal government, and the protection of each state from encroachments by others.<sup>18</sup>

After the adjournment of the Constitutional Convention, the draft of the constitution was submitted to the Continental Congress, which presented it to ratifying conventions in the several states.<sup>19</sup> Madison continued to father the constitution by joining with Hamilton and Jay, in a series of newspaper letters, known as "The Federalist," to influence public opinion in favor of adoption. Madison is credited with having written twenty-six of the eighty-five letters, in whole or in part.<sup>20</sup>

Twelve amendments to the constitution were proposed to the legislatures of the several states by the first Congress, which met in New York, in 1789.<sup>21</sup> The first and second of these proposed twelve amendments were rejected by the States, but the others were approved and became known as a Bill of Rights.<sup>22</sup> The twelve amendments were based on about a score of amendments offered in the House of Representatives by Madison.<sup>23</sup> These in turn were preceded by the Virginia Declaration of Rights of 1776.<sup>24</sup> Madison was chiefly responsible for the formulation of the religious freedom clause of this declaration.<sup>25</sup>

Finally, the chief account of the proceedings of the convention, adequately recorded and preserved, was reconstructed from a private diary kept by Madison.<sup>26</sup> His legal mind was reflected by his ability to preserve the relevant and significant and by the great value which he attached to written proceedings which would enable future generations of lawyers to have the benefit of the views of the delegates of the convention for purposes of interpretation and ascertaining intention. His record was carefully anticipated, faithfully executed, and meticulously preserved.

Lawyers had a considerable hand, therefore, in fashioning the federal constitution, with its Bill of Rights, keystone of the political, economic and juridical structure of the American system. But their devotion and contributions to that system did not terminate there. They continued to guide the subsequent growth of Constitutional law down to the present time. They made the constitution work.<sup>27</sup>

<sup>18</sup> Farrand, *The Framing of the Constitution of the United States* (1913) 76; Haines, *The Constitution of the United States* (1932) 94, 98, 186.

<sup>19</sup> Warren, *The Making of the Constitution* (1937) 744.

<sup>20</sup> Warren, *The Making of the Constitution* (1937) 788-791; Burns, James Madison, *Philosopher of the Constitution* (1938) 14.

<sup>21</sup> Brant, *James Madison* (1941) 249 ff.

<sup>22</sup> *Idem*.

<sup>23</sup> See 1st Cong., 1st sess. June 8, 1789; I *Annals of Congress* 433-36; Brant, *James Madison* (1941) 249.

<sup>24</sup> Burns, James Madison, *Philosopher of the Constitution* (1938) 119 ff.; Helderman, *The Virginia Bill of Rights* (1942) 3 *W. & L. L. Rev.* 225-245.

<sup>25</sup> Hunt, *The Life of James Madison* (1902) 12.

<sup>26</sup> Warren, *The Making of the Constitution* (1937) 125.

<sup>27</sup> Haines, *The Constitution of the United States* (1932) 213-252.

The record of the American legal profession in the sphere of public and governmental service may be illustrated by recalling that seventy-five percent of the Presidents of the United States have been lawyers, i.e., twenty-four out of thirty-two.<sup>28</sup> Beginning with the first Congress, there has been an overwhelming number of lawyers, certainly a plurality, in Congress, and the state legislatures. Well known indeed is the work of the judges of the Supreme Court, particularly in the earliest period of the republic, in putting content into such clauses as due process, equal protection, and law of the land. In fact, lawyers have had a virtual monopoly of the judicial department of the government. In no other country in the world, no excepting England, have lawyers exercised such influence in public affairs as they have in the United States.<sup>29</sup>

This nation has survived war, economic depression of vast proportions, financial panic, hard times and many perilous periods of crisis. In each case the philosophy of the constitution has been adjusted by lawyers, to constantly changing sociological conditions, by the invention of ingenious legal forms and procedures, which have enabled the democratic process to survive. This is in sharp contrast with the history of the constitutional systems of certain other countries, which have broken down under the weight of political and economic pressure.<sup>30</sup>

Lawyers did much, therefore, to establish and maintain American political democracy. Their participation in laying the groundwork of the American economic order, and in coordinating it with the legal order is also outstanding. The American society for which the federal constitution was written postulated an economic system, built upon a capitalistic structure of private property, and protected by a jural regime, which encouraged free enterprise and safeguarded the individual from the state, and from other individuals through rules and precepts of law. Emphasis was upon the sanctity of the property rights of the individual in the acquisition and transfer of property, in keeping with the pioneer conditions of eighteenth and nineteenth century America.<sup>31</sup>

The conceptions of capitalism in the sense of a social policy of allowing individuals and private corporations to hazard money and wealth in constructive enterprises, to produce more money and wealth, and little or no governmental regulation, were not the creations of lawyers, but rather of the national mind. But when in the course of time, public opinion realized the necessity of a moral, as distinguished from an amoral capitalism, of substituting a socialized idea of private property, in place of the previously existing individualized notion, and of reasonably regulating certain types of

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<sup>28</sup> Rose, *The Bar as a Governing Caste* (1942) 48 W. Va. L. Q. 87 at 88.

<sup>29</sup> *Id.* at 89.

<sup>30</sup> Dodd, *The Constitution—1787 and Today* (1944) 20 Ind. L. J. 55 at 59 ff.

<sup>31</sup> Cole, *Some Observations on the Significance of the American Bill of Rights* (1943) 18 Wash. L. Rev. 90-102.

business activity, lawyers were prepared to readjust the legal order. They did this in many ways, principally by the formulation of administrative law and by preserving a balance in the legal sphere between uniformity and certainty on the one side, and flexibility and discretion on the other.

Administrative law was an important contribution, made by lawyers, to the task of modifying an obsolete economic order. This phenomenon arose in consequence of changing social conditions, which rendered archaic the traditional techniques of the established court system. Executive justice began as soon as it was conclusively demonstrated that adequate judicial justice was not possible in certain types of cases, involving such socially necessary activities as public utilities, railroads, and the like.

In the creation of administrative bodies and agencies, the art of the lawyer has contributed much to the law applicable and the means followed. There has been and probably will continue to be disagreement among lawyers as to the extent of the discretion which should be allowed those making decisions in the field of administrative law. But there has always been a common area of agreement as to the necessity of executive justice and of preserving an equilibrium between it and the philosophy of the federal constitution, which manifestly aimed to create a government of laws and not of men.

Despite the adoption of a rather socialized view of private property, and of the policy of a reasonably regulated capitalism, American public opinion has never veered far from the postulate of a fairly competitive economic order. The American system from its foundation can be characterized, among other ways, by its recognition of the principle that political democracy is impossible without a relatively large amount of certainty in the law of the land, to sustain this competitive regime.<sup>32</sup> For business to thrive and function adequately, business men must be able to predict with considerable certainty the behavior of the State, as represented by its executive officers, and by its courts and legislatures. American lawyers, carrying forward the tradition of the legal profession and of the Anglo-American common law, have given business this certainty and uniformity.<sup>33</sup>

Examples in the Roman, English and American law, showing the orientation of the legal system toward certainty and uniformity in the light of guiding concepts supplied by the merchant, trader, business man, and capitalist are numerous. Thus these qualities resulted when commercial ideas were absorbed by the Roman legal order, beginning with the creation of the *Jus Gentium*, in the third century B. C. approximately.<sup>34</sup> A somewhat paralleling

<sup>32</sup> Barker, *Economic Interpretation of the Constitution* (1944) 28 *Tex. L. Rev.* 373-391; O'Mahoney, *The Lawyer, The Constitution, and the Modern World* (1944) 20 *Ind. L. J.* 1 at 10.

<sup>33</sup> See Adler, *Law and the Modern Mind; A Symposium, Legal Certainty* (1931) 31 *Col. L. Rev.* 91.

<sup>34</sup> Brown, Brendan F., *The Jurisprudential Basis of Roman Law* (1937) 12 *Notre Dame Lawyer* 361 at 363 ff. See 1 Voigt, *Das Jus Naturale, aequum et bonum und Jus Gentium de Römer*, §§315, 42, 43, 79-88, 103.

result occurred when the commercial customs, which were called the Law Merchant, were made a part of the English Common law by Lord Mansfield, during the middle of the eighteenth century.<sup>35</sup> Later the Law Merchant was codified by the English Bills of Exchange Act in 1882. It has been adopted in more than forty of the English colonies and independencies.<sup>36</sup> Today one of the aims of the Law Revision Committee in England is the attainment of uniformity.

In the United States lawyers have worked with business men and bankers, for over fifty years, through the National Conference on Uniform State Laws in the interests of uniformity and certainty. In 1890, the American Bar Association recommended the appointment by each state of commissioners who would draft and recommend uniform state laws. The first meeting of the commissioners took place in 1892.<sup>37</sup> All the states eventually joined the movement, so that now the governor of each state appoints three commissioners.<sup>38</sup>

In 1895, a committee appointed by the Commissioners on Uniform State Laws drafted a bill to codify the law of negotiable instruments, which was adopted by the commissioners the following year.<sup>39</sup> This law, namely, the Negotiable Instruments Law, has been adopted by all of the fifty-three American legislative jurisdictions.<sup>40</sup> The Commissioners have worked out a series of uniform laws, which include, in addition to the Negotiable Instrument Law, such Acts as the Uniform Partnership Act, the Warehouse Receipt Act, the Uniform Sales Act, and many others.<sup>41</sup> Not all of the legislative jurisdictions have accepted all of these laws, but the extent to which they have been adopted is considerable.

Principles of statutory interpretation have been worked out, in the matter of uniform state laws, so as to achieve a maximum uniformity. There is a provision in all save the earliest of these laws that the law "shall be so interpreted and construed as to effectuate its general purpose of making uniform the laws of those states which enact it."<sup>42</sup> The aim of this provision is to influence the courts of one state to follow the interpretation of other states. Courts of a state may revise their own interpretations if they differ from the prevalent view taken by the other states.

<sup>35</sup> Lawson, *Uniformity of Laws, A Suggestion* (1944) 26 J. Comp. Leg. & Int. L. 16 at 17-18; *Negotiable Instruments Law* §§1-50.

<sup>36</sup> *Idem*.

<sup>37</sup> Lawson, *Uniformity of Laws, A Suggestion* (1944) 26 J. Comp. Leg. & Int. L. 16 at 20.

<sup>38</sup> *Idem*.

<sup>39</sup> Brannan, *Negotiable Instrument Laws Annotated* (6th ed., Beutel) Preface to First Edition.

<sup>40</sup> *Negotiable Instruments Law* §§1-50.

<sup>41</sup> *Idem* pp. I-II.

<sup>42</sup> Thus this clause appears in the *Uniform Sales Act* §74; See Lawson, *Uniformity of Laws, A Suggestion* (1944) 26 J. Comp. Leg. & Int. L. 16-27.

Lawyers have achieved certainty and uniformity also through the medium of the principle of *stare decisis*, i. e., by strict adherence to precedent. According to this principle, the same remedies are always applied to the same situations of facts. Certainty has resulted from the restatements of important segments of the law by the American Law Institute. The elements of certainty and uniformity now present in the common law are survivals from the period of the strict law and the era of the maturity of law.<sup>43</sup>

While the legal profession has recognized the necessity of certainty and uniformity in law for the benefit of business, it has also admitted the claims of those whose rights depend upon elasticity in the law. Hence in the fields of torts, equity, trusts, administrative law, and the like, which involve a high degree of the normative, the common law has departed from the element of certainty. But such divergence has been regarded by business as consonant with important basic sociological interests.<sup>44</sup>

The legal order has incorporated many commercial concepts, such as negotiability, the presumption of good faith, and certain notions of what constitutes property.<sup>45</sup> But conversely, numerous legal concepts have been prescribed by lawyers for the business world, and have been accepted without protest by the economic order. Builders of that order have taken over such relatively arbitrary legal notions as the Statute of Frauds, requiring certain transactions to be in writing if they are to be given legal effect, Statutes of Limitations, barring the legal enforcement of rights, the peculiar common law doctrine of consideration which does not exist in systems derived from the Roman law, and the anomalous distinctions which have been drawn by the common law, between personalty and realty.<sup>46</sup> Illustrative of the action and interaction which have gone on between the legal and business orders are the exceptions which have been made to the notion of common law consideration, and the building of the doctrine of promissory estoppel.

The American public is not well informed as to the efforts of lawyers to provide legal aid for the poor and the indigent, as a means toward the end of increasing the usefulness of a legal system, which in the Occidental tradition constitutes an essential of any social civilization. The tradition of the American legal profession in this respect was preceded by that of Roman and English lawyers.<sup>47</sup> The ultimate reason and motive for this gratuitous service has varied according to time and place. Thus civic duty led the lawyers of ancient Rome to engage in legal aid work, which they regarded as a privilege.<sup>48</sup> In the Middle Ages, the ecclesiastical bar assumed the duty

<sup>43</sup> See Pound, *The Decadence of Equity* (1905) 5 Col. L. Rev. 20 at 23 ff.

<sup>44</sup> *Idem.*

<sup>45</sup> 8 Holdsworth, *A History of English Law* (ed. 1926) 113 ff.

<sup>46</sup> See, 2 Simes, *The Law of Future Interests* (1936) 545 ff.

<sup>47</sup> Bradway, *Legal Service for the Indigent* (1941) 16 Tenn. L. Rev. 691-699.

<sup>48</sup> *Idem.*

of eliminating injustices arising from poverty as a matter of applied Christianity. St. Ives, who died about 1300, and St. Thomas More, who was martyred in 1535, patron saint of lawyers, were celebrated for their charitable legal work.<sup>49</sup> In 1494 a Statute of Henry VII aimed to help those too poor to avail themselves of legal counsel.<sup>50</sup>

After the Middle Ages, the idea gradually came to the front that, in England, legal aid work was fundamentally a professional obligation.<sup>51</sup> This was part of the general idea which has traditionally permeated the Anglo-American legal profession, namely, that its members should work primarily for the public good, and only secondarily for the financial gain of the individual lawyer. It is true of course that at times lawyers have reversed this order. By and large, however, the concept has survived that the lawyer is a member of a learned profession, which must never ignore its public responsibilities and leadership. Moved by its faith in the need of preserving the American system by the practical protection of constitutional and legal rights of substance and personality, lawyers have been active in providing able counsel for the poor and indigent, in both civil and criminal matters, and have given unstinted service to voluntary civic groups and associations.

After legal aid had developed into a professional tradition, the transition was from unorganized to organized legal aid. Several types of organized legal aid subsequently evolved. These included the creation of bar association committees, and the like. The American Bar Association has a standing committee on legal aid. There is the National Association of Legal Aid Organizations.<sup>52</sup>

Organized legal aid has taken the form of legal aid clinics, municipal bureaus, and departments of a social agency. The American legal profession has created legal aid bureaus and societies at many key points of the nation. This assistance parallels that rendered by doctors' hospitals and clinics for the poor. These bureaus have protected the public in many ways, such as from trade rackets.<sup>53</sup> The legal aid work in New York and Washington may be regarded as typical.

According to Harrison Tweed, President of the Legal Aid Society of New York, in the sixty-ninth annual report of that society, for the year 1944:

“. . . The Legal Aid Society exists in order to give to the poor of

<sup>49</sup> *Idem*.

<sup>50</sup> See Egerton, *Historical Aspects of Legal Aid* (1945) 61 L. Q. Rev. 87 ff.

<sup>51</sup> See Bradley, *Law, Its Nature and Office as the Bond and Basis of Civil Society* (1884) 47; Bradway, *Legal Service for the Indigent* (1941) 16 Tenn. L. Rev. 691-699.

<sup>52</sup> Smith, R. H., *Legal Aid During the War and After* (1945) 31 A. B. A. J. 18 at 19 ff.; Bradway, *The Challenge to Organized Legal Aid* (1944) 22 Tex. L. Rev. 327-344.

<sup>53</sup> Smith, R. H., *Legal Aid During the War and After* (1945) 31 A. B. A. J. 18.

Greater New York who have legal troubles (and they number over 30,000 each year) the help they need to solve these troubles just as the free hospitals exist to give the sick the care they need to cure their ills."<sup>54</sup>

From this report, it appears that contributions to this society from lawyers, prior to the year 1944, amounted to more than sixty thousand dollars, as compared with less than ten thousand dollars from all other sources. The report states that "Applicants who come to the Society from the armed services continue to be about one fourth of the total number of applicants." In New York City there is a group of volunteer lawyers who act as an appeals committee to advise as to the taking of appeals from lower court decisions, especially those of the criminal courts.<sup>55</sup>

In the District of Columbia a Legal Aid Bureau, a charitable corporation, was founded in 1932, under the auspices of the Council of Social agencies to provide legal aid and assistance to those unable to pay therefor. This bureau became a separate member agency of the Community Chest in 1934. The Bar Association of the District of Columbia has operated a legal aid desk, since 1937, in the office of the Clerk of the Municipal Court.<sup>56</sup>

The principal type of legal matter handled by these legal aid bureaus in the past related to domestic relations, particularly marriage and divorce and *habeas corpus* proceedings for children; disputes growing out of the landlord and tenant relation; contracts, especially with installment sellers; and proceedings to effectuate a change of name.<sup>57</sup> With impending demobilization, reconversion, and readjustment, problems in these fields will be multiplied and others will be added. Following its very creditable tradition of public service, the American legal profession may be expected to fulfill its enlarged obligations in the years which lie ahead.

Legal aid societies have been supplemented by legal aid clinics. The avowed purpose of the former is to render public service by aiding the poor, of the latter to benefit students, as well as the poor. Some of the law schools have joined in the legal aid movement by offering their facilities and the energies of a part of their student body to assist the indigent. The Legal Aid Clinic of Duke University is an example.<sup>58</sup>

Lawyers have made available legal assistance, often despite considerable financial sacrifice, in pursuance of the Sixth Amendment of the Federal Constitution, which guarantees counsel for defense in all criminal prose-

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<sup>54</sup> Id at 4.

<sup>55</sup> Id. at 5.

<sup>56</sup> See Seventh Annual Report of the Director, Legal Aid Bureau of the District of Columbia (1939).

<sup>57</sup> See Report of the President, Sixty-ninth Annual Report of The Legal Aid Society of New York (1944) at 4.

<sup>58</sup> Bradway, Legal Aid Clinics Train Young Advocates (1942) 26 J. Am. Jud. Soc. 14 ff.; Elliott, Legal Clinic versus Legal Aid Society (1936) 8 Am. L. School Rev. 410 ff.

cutions and of "the equal protection clause" of the Fourteenth amendment.<sup>59</sup> The rather recent mass sedition trial, held in the national capital, is an example of how counsel was made available *gratis* to the criminally accused. Despite the raging of war and the involvement of highly explosive political factors, the Sixth Amendment was faithfully given effect through the donation of professional services, in some instances leading to great personal hardship. Even those accused of the most heinous crimes receive benefit of counsel, appointed by the Court, if they are financially unable to employ counsel.

The future responsibilities of the bar in the maintenance and extension of the American system, both at home and abroad, are measurable in terms of the increasing pressure of forces which constantly strive to substitute opposing modes of social life, radically different civilizations, and above all, solely materialistic conceptions of the nature of man, and the purpose of his existence. It is indeed a gratifying sight to observe how the American system was used as a guide, approximately speaking, when the representatives of the United Nations met in San Francisco, to draw up the World Charter and the Statute of the International Court of Justice. The keeping of world peace has always been the responsibility of lawyers, the designers of international law and of those juridical institutions which afford the means by which that law may be translated into action. May American lawyers ever seek to extend the blessings of the American system to the whole world.

## The Lawyer and the Community<sup>†</sup>

By CARL D. FRIEBOLIN, Cleveland\*

If you think for a minute that I'm going to apologize for the triteness of my subject, you're right. The subject was not of my choosing—nor the speaker, either. If he had not introduced me with such eloquent praise, I would name the man who is to blame. I can't suppose any subject could be more vague and less restricted and less definite.

After he had suggested the subject to me, I became curious to learn just how many times that, or a similar topic had been discussed at Bar Association Meetings. I suspected there were very many. So I examined the records for 12 years back. It was quite a task. But I had a lot of time. As most of you know the Bankruptcy Court has not been busy lately. It has become the Court that nobody knows. Apparently everybody has money and nobody

<sup>59</sup>Bradway, *The Challenge to Organized Legal Aid* (1944) 22 *Tex. L. Rev.* 327-344.

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