

## OUR LADY OF THE COMMON LAW\*

*In respectful memory of Justice Benjamin N. Cardozo, jurist, philosopher, humanitarian and man of letters, we republish his inspiring address to our first graduating class in 1928. No words can honor him so adequately as his own. No eulogy can proclaim his position among the immortals so eloquently and so convincingly as his tribute to our Lady of the Common Law. As words of wisdom are eternal so in like manner is the memory of their gifted author.*

OUR Lady of the Common Law has indeed no lack of wooers.

Three years ago the word went forth that there was to be opened a new shrine to be devoted to her cult. She would not show her face to any who failed to prove their worth. She would not be won by amorous glances or soulful prayers or threats or sighs or groans. Comely looks would be lost upon her, and so would riches and birth and all the accidents of fortune. Nothing would avail except service in her cause, service not for a day or a month, but for three long years of vigil and devotion. Behold a marvel happened! Hardly had the word gone forth before a band of worshippers had gathered. They were eight hundred strong the first year. With each succeeding year, the volume swelled. Now the triennial term has ended; and here in this hall, the faithful have been brought together to claim the guerdon of their toil, the privilege of enrollment among our Lady's well beloved, the servants of her law.

I speak of it as a service not ended, but persisting. If you have fancied it was ended, you have been a victim of the Lady's wiles. Like other flirts and beauties, she can speak with a double meaning, and is not above playing a sly trick on those whose sighs and service are offered at her feet. I

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give you warning now lest you become dupes of her caprice. Do not think for a moment that the three years of devotion that have been given for the bare and meagre privilege of being numbered on her roll,—do not think that these exhaust the measure of your sacrifice. What has been endured is merely a novitiate, a term of test and trial, a period of probation in which slackers may fall aside, and the strong and brave and earnest be left within the ranks. The truth is that our Lady is growing more exacting with the years. When I was placed upon her roll these many years ago, she was content with very little. The barest rudiments of law sufficed to give to the acolyte of those days the privilege to kiss the hem of her flowing and unspotted robe. But it is otherwise in this year of grace. Our Lady of the Common Law—I say it with the humility that is due from an old and faithful servant—our Lady in these days is no longer an easy one to please. She has become insatiate in her demands. Not law alone, but almost every branch of human knowledge, has been brought within her ken, and so within the range of sacrifice exacted of her votaries. Those who would earn her best rewards must make their knowledge as deep as the science and as broad and universal as the culture of their day. She will not be satisfied with less.

I was reading the other day a very interesting document, the report for the academic year of 1926-27 made to the Overseers of Harvard University by the President of the University, Dr. A. Lawrence Lowell. He speaks of a new educational concept, the concept, as he calls it, of the continuity of knowledge. The idea is taking root that the subdivisions of education like those of time itself have been treated too often as absolute and genuine,—that there is need to recognize them more fully as mere figments of the brain, mere labor-saving devices, helps to thinking, but, like other helps to thinking, misleading if their origin is neglected or forgotten. Thus it is that the physicist is learning from the chemist, the zoologist from the botanist, the economist from the statesman and the student of social science, the physician from the psychologist, and so on interchangeably and indefinitely. "The sharp severance," we are told, "is giving way, and we perceive that all subjects pass imperceptibly into others previously distinct." Something of this same concept of the continuity of knowledge is making its way into the

law. In my own court at a recent session, we had one case where a wise decision called for the wisdom of a chemist; another for that of one skilled in the science of mechanics; another for that of the student of biology and medicine, and so on through the list. I do not say we were able to supply this fund of wisdom out of the resources of our knowledge, yet, in theory at least, the litigants before us were entitled to expect it, and our efficiency as judges would be so much the greater, the quality of the output so much the sounder and richer, in proportion to our ability to make the theory one with fact. Of course, complete knowledge of the body of organized learning is an unrealized achievement. So vain an aspiration is not to fret our waking hours. We cannot sound the depths; there will be strain enough upon our energies if we do so much as skim the surface. Even to do this, however, there is need for an equipment of learning fuller by far and richer than any that was exacted of the bar of simpler days. Few of us can hope to solve for ourselves the problems that perplex the historian or the economist or the physician or the chemist. We shall have to look to the expert for a definitive answer to the queries that are proper to his chosen field. The point is, however, that without a full and rich background of knowledge and culture in fields foreign to the law itself, we shall never reach the perception of the problems to be solved. We shall never see it in its true relation to the lives of those about us, and missing its relation to life, we shall miss its relation to the law, which is to give the rule of life. One must know the method of approach if one would hope to gain the goal. The concept of the continuity of knowledge is teaching us day by day the need for an enriched equipment, and is pointing the path to be followed by the lawyer of tomorrow.

Let me not seem to stress the element of knowledge to the exclusion of all else. Knowledge is indeed an important part of our equipment, yet knowledge is not the whole. At an hour like this, the fitting thing perhaps is to lay the weight of emphasis on other strains and elements that unite to form the blend. I was told when I was asked to talk to you today that this was to be a sort of uplift meeting to bring home to us all, and, in particular to the fledglings of the bar,—to bring home in a vivid way the dignity and glory of the profession of the law, its capacities realized and unrealized

for service to mankind. I gathered that somehow or other it was my duty to talk at such a time, however great my dread of speeches, and my resistance was broken down by the covert suggestion that if I failed to talk today—however silent I might be through the other days of the year—if I failed to talk today, I should be recusant to the great trust that has been laid upon me as the titular chief—though chief in no other way—of the judicial system of the state.

—So I come before you here charged with a duty to rehearse the ancient platitudes. I do not mean by that epithet to cheapen or deride them. We are wont to call things platitudes when we know them to be truths, but have a disagreeable sense that we have failed to live up to them altogether in the conduct of our lives. Perhaps it will be easier, if only we call them platitudes, to silence or forget them. We have a nameless feeling of irritation and discomfort, as if there were a challenge to our virtue, when they are ding-donged in our ears with provocative iteration. Not for me today are these hesitations and misgivings. Today I am commissioned to be as stale and unoriginal as I please, and to count the yawns of my audience as proof of duty done.

So, of course, they often are. The bores of the hour have often been the heroes of the future. Socrates was voted by the Athenians to be a horrid old bore who deserved nothing better than his hemlock. He has been rewarded for his boredom by an immortality which even we may miss. Boswell was a bore who was snubbed for his pains by the man he was exalting. He has had his reward in winning immortality for himself and incidentally perhaps for the snubber too. I suppose judges, or nearly all of them, are bores. Outside of the pages of Judge Holmes, who is in a class by himself, I am not aware that men resort to the opinions of the courts as a spiritual elixir in hours of depression. So I console myself with the thought that if I preach sterile truths, I shall be playing true to form.

I suppose the traditional thing to say to the young men of the bar with the future yet before them is that what counts above all else is character. That is a tiresome thing to say because it has been said so often, and I wouldn't say it now if I hadn't received a license to make myself a bore. With this license afforded to me, I feel I must say it because it happens to be true. Character includes many things, industry and

fidelity as well as conscience and honor. At the one end of the scale are the Poor Richard maxims of frugality and diligence and on the other the sacrifice and devotion and idealism of saints and heroes. Those who fancy that success comes by chance might learn something from the life of Lord Cairns, who became Lord Chancellor of England, and one of the most famous of English judges. His biographer records the fact that when Cairns was called to the bar, he set himself to practice with all his solemn earnestness. "No reason or excuse did he allow himself to leave the precincts of the law while a barrister might be expected to remain there." It was this circumstance, we are told, that gave him an early start. Let the week-end golfers of our day take heed! "He had declined an invitation for a Saturday, though he had no work to do, and was sitting in his chambers close on four in the afternoon when the unexpected happened. An eminent advocate, Mr. Gregory of Bedford Row, had a sudden occasion to consult counsel. He tried many chambers only to find them closed. "At last," says the biographer, "he came to the address where Cairns was keeping his lonely vigil and found, not merely a barrister, but the barrister for whom solicitors are looking—a young man of ripe learning and sound judgment. From that day Mr. Gregory's firm were constant clients." Here is a good instance of the rewards that come to the faithful and steady practice of those qualities of sobriety and diligence which I placed at the lower end of the scale of virtues appropriate to beginners at the bar. But there are shining instances too of rewards, more splendid even and enduring, that attend the practice of other virtues, the virtues at the upper end of this great chromatic scale. Think of the glory that is still shed upon our judicial history by the example of Lord Mansfield, and the fame of his unyielding honor. I like to retell the tale, so often told before, of his conduct during the anti-papist riots of 1780. The mob, instigated by Lord George Gordon, destroyed his house, looted its contents, and ruined his law library, the law books which he had annotated with jealous care. Such was his reputation for judicial impartiality that the leader of the mob elected to be tried before him, and not before some other judge. When it was over, there was no challenge, even from the prisoner, of the fairness of the trial. Character had triumphed over prejudice and passion.

I take comfort in memories like these when I am told, as I often am, that lawyers and judges are brakes, and old-fashioned ones at that upon the forward movement of the race. I was reading not long ago,—it happened to be New Year's Eve, when I was preparing the usual stock of resolutions for the future—I was reading an indictment of the legal mind in the days of Voltaire, which expanded itself into one of the legal mind generally. "Reverence," said the author, "for precedent, attachment to the letter of the law, the effort to bend changed ways of life to obsolete statutes, habits of chop-logic, pedantry and cynicism masquerading as austerity, habitual distrust of human nature and of generous impulses, professional vanity, all these render members of the legal profession liable to fanatical reaction, to frigid cruelty, to oppressive injustice in an often honest passion for social order."

This was salutary reading for New Year's Eve, if a penitential state of mind might be expected to yield a fair crop of goodly resolutions for the year about to start. Sobering as the indictment was, I found another book more chastening, more provocative of thought and introspection and humility. You will find a series of essays, gathered together under the title *Historical Trials*, the work of the late Sir John MacDonnell, who in his life was King's Remembrancer and senior Master of the Supreme Court of Judicature. His theme is one that is never stale, the correspondence between law and justice, the extent to which courts do in very truth fulfill the function of their being, and this not in fair weather, but in foul, in times of stress and strain, when the legal mechanism should hold good against passion and prejudice and cruelty, and show what it can do. I admit that the record is not a soil for smooth and joyous gratulation. It is a challenge to one and all of us. Remember, if you please, that the author is no muckraker, but a skilled and scholarly lawyer, and himself a cog in the law machine of a progressive and enlightened country. Here gathered together in a slender volume are the trials of Socrates, the Knights Templars, Jeanne d'Arc, Giordano Bruno, Mary Queen of Scots, Galileo, Servetus, Katharine of Aragon, Sir Walter Raleigh, the witchcraft trials and others. "A trial," says our author, "a trial is in substance a struggle, a battle in a closed arena. It is a shock of contending forces, a contest which may

arouse the fiercest passions. The issues involved in the trial, say of Socrates, of Jeanne d'Arc, of Bruno, or Calas, or Dreyfus, are among the deepest and greatest known to humanity. I would not, even if I could, deal with them. They are above my task. They are for the philosopher, the historian, the moralist. I approach these trials," he continues, "solely as a lawyer examining the documents as a lawyer; trying to find answers to questions which a lawyer must put, necessarily passing over many of the greatest aspects of such trials, but also perhaps adverting to some apt to be ignored. I want to look at these cases just as if they were about to come into court, or had just been decided; to view them as legal phenomena, part of the legal history of men, not the least part of the long story of the evolution of the human conscience."

Take the first trial that he gives us, the trial of Socrates; will its lessons ever fade?

"I come to the questions," says Sir John, "which twenty centuries have reiterated and which are still fresh. Was it a fair trial? Was Socrates guilty? Was the defense a long sophism? Did he corrupt the youth? Was the result a judicial error or a judicial murder? I do not believe that to these questions there ever will be one answer. There will always be those who prize order, the interests of the community, above all else; who make the safety of the State the supreme law; and they will answer, as did Hegel, as many others have done since, 'It was a good deed' a necessary deed; 'Socrates must die that the people might live and be strong.' That was the opinion of the majority of his fellow citizens; and there is no reason to believe that they repented, at all events until long afterwards. \* \* \* If the prosecution and condemnation of Socrates were acts of State, they were at least done decently and in order, and with no desire to stifle the voice of the victim, and there are none of the circumstances of brutality which I shall often have to note in medieval and modern trials. That is one view of the trial still often expressed. But there will always be others who prizing individual freedom and the inner life above all things, thinking much of the invisible and imponderable things about us, will regard the result as a crime, the victim as the first and greatest martyr for true freedom and true progress. In the presence of these antinomies among the

irreconcilable things of life, the mere lawyer cannot give much assistance. But he will try to put himself in the position of the judges, and seek to understand the law which they administered; he will apply to their conduct the tests, not of our time, but of their own. And he will also put to himself the question: would the results have differed if Socrates had been tried elsewhere and at some other time?"

Sir John's answer to the question is not one to kindle the pride of our profession. Socrates put on trial elsewhere and at some other time might have fared, in Sir John's judgment, no better, perhaps worse. Later days would have brought torture, and still later days contempt and ostracism and misunderstanding and belittlement. The indictment would have been cast in other moulds and the penalty would have been less than death; but law would still have been used to sanctify the prejudices and hatreds of the hour, and to crush the weakling who resists them. With impressive force our author sums up the lesson to be drawn from his studies; and the lesson is one of the corroding power of fear—fear of the unknown and the strange and the prejudice that goes with fear. "Fear," he says, "brings back the primitive conception of the function of courts; not necessarily, or indeed often, personal fear, but fear of changes; fear on the part of the upholders of the old order; fear of the effects of the discoveries of new truths; fear of emerging into the full light. Where such fear is, justice cannot be; a court becomes an instrument of power; judges are soldiers putting down rebellion; a so-called trial is a punitive expedition or a ceremonial execution—its victim a Bruno, a Galileo, or a Dreyfus."

I do not know whether it can ever be different, or so at least I say in hours of depression. Perhaps this is what law means. It is the medium, the instrument, by which society represses conduct which awakens fear of such intensity as to make tolerance impossible. We shall rationalize law only when we rationalize our fears—our fears and our wishes, the counterpart of our fears. I heard a distinguished physician say the other day that psychologists were coming over to the view that the fruitful method of education is not so much to control the behavior of men as to direct their desires—their impulses and desires. He put it in such a way as to challenge my interest and attention, but the thought is now becoming a commonplace of the schools. There is a lesson in all this

for the law and for those who follow the law as judges and as advocates. In directing desires—in rationalizing hopes and fears—in shaping and guiding character, we shall be doing something more, we shall be rationalizing law.

So the problem, as I said at the beginning, is one of character, which turns out in the end to be the key to behavior and so to social order. How does it stand with us today, with us of the legal profession, with us whose business it is to see that law is rational? How have we fulfilled our task? Has fear, unworthy fear, been cast out of our juristic methods? Is law the instrument of the passion or the guile or the craftiness of the hour, or of its serenity and peace and order? Has it been purged and sanctified and dignified so that Socrates and Raleigh and the witches—the ugly, the alien, the unpopular, the bothersome—would fare better at its hands today? It is what you and I are making it. That is the heavy burden of our calling, but that is also its unfading glory. That is the strain and the woe of it, leaving creases and scars in the faces of the veterans, but that is also the heartening appeal of it, reflecting light and joy and hope in the faces of the new recruits, eager to join the fray and fill the thinning ranks. Here is the age-long battle, worthy of the best that we or they can offer. Here is the combat and the travail, but beyond are the sunlit hills to be gained at any cost of blood and sweat and agony. For "the path of the just is as the shining light, that shineth more and more unto the perfect day."

Sometimes secreted in ancient forms and ceremonies one finds the inner life and meaning of an institution revealed in all its essence. I felt this not long ago while reading the form of oath administered even now in all its ancient beauty to the grand jurors of the county. You will find it in the Code of Criminal Procedure; but one not greatly different is in use by our English brethren in their home across the seas, and Sir Frederick Pollock has traced it back, in germ at least, to the days of the Saxon kings. In fitness and beauty and impressiveness it rivals the famous Hippocratic oath, the glory and the pride of our brethren, the physicians. Here is its form as it has endured through all the changing centuries:

"You shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge; the counsel of the people of this state,

your fellows' and your own, you shall keep secret; you shall present no person from envy, hatred or malice; nor shall you leave any one unrepresented through fear, favor, affection, or reward, or hope thereof; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God!"

Like the tones of a mighty bell, these echoing notes of adjuration bring back our straying thoughts to sanctity and service. I cannot listen to them without a thrill. Here, I say to myself, here indeed, secreted in this solemn formula, is the true spirit of the law, which knows no fear nor favor. Not all her ministers have been true to the ideal which she has held aloft for them to follow. But here, imperishably preserved amid the grime and dust of centuries, the word has been proclaimed, to steady us when we seem to falter, to strengthen us when we seem to weaken, to tell us that with all the failings and backslidings, with all the fears and all the prejudice, the spirit is still pure.

So today, as preacher of the ancient platitudes, I summon you, the new recruits, to do your part in this unending struggle, the charge on the redoubts of fear and hatred and prejudice and passion, and the injustice that is born of them. You will need to know much more than the piffle-paffle of procedure. You will need to know much more than law, or rather till you know many other things not often ranked as law, you will find that law itself is in reality unknown. As in any other fight, you will hear the call for patience and skill and courage and firmness and endurance. I have faith you will not fail us. As I look into your faces, I figure to myself what it will mean, in days to come, to the profession of the law if you and those to follow you out of this school will think worthily and highly of this great vocation of your choice. What a spiritual power you will then be in the age-old fellowship into which you are to enter! What a leavening force you will become in this great conglomerate bar of ours, moved as it is, at times, by the ferment of high thoughts and fine ideals, and yet at times in danger of becoming sodden and inert by reason of that very mass which might make it so irresistible a power for good! How it lies with you to uplift what is low, to erase what is false, to redeem what has been

lost, till all the world shall see, and seeing shall understand, that union of the scholar's thought, the mystic's yearning, the knight's ardor, and the hero's passion, which is still, in truest moments of self-expression, the spirit of the bar! You will not fail us, I am sure. After all, the main thing is to dare. "As at the Olympic games," says Aristotle, "as at the Olympic games, it is not the finest and strongest men who are crowned, but they who enter the lists, for out of these the prisemen are selected; so, too, in life, of the honorable and the good, it is they who act who rightly win the prizes." The bugle call is heard, and its echoes wake the hills.

Like Socrates and other bores, I have earned the draft of hemlock if you choose to pass the cup.