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NOTES

COMMENTS ON "LAWYERS AND LEGISLATORS."

In the August issue, 1921, of the *St. Louis Law Review*, the writer published an article under the above title (republished in the *American Law Review*, July-August, 1922), in which he reached the following conclusions:

1. The American public labors under the misapprehension that the function of the legislative body is to draft as well as to enact laws, and consequently, in the belief that lawyers are the best fitted for the technical work of drafting laws, elect lawyers as their representatives. The truth is that the technical work of drafting statutes is no necessary part of the work of the legislative body, which is a policy-declaring body, in which the prevailing policy, as expressed and determined by the people and made known through their representatives, after having been put into proper statutory form, and after full discussions and deliberation, is adopted.

2. The lawyers of the country, to a great extent probably, have not been guiltless of a similar misapprehension. Believing that the question for the electorate was the selection of the best *legislators*, they have in good faith offered themselves as candidates for the legislative body, thinking that they would make better legislators than the farmer, the banker, the mechanic, or the clerk. The truth is that the question for the electorate is not how to get the best legislators considered of themselves, but how to get the best legislators considered as representatives of the people. This distinction reaches to the very heart of a democracy.

3. The misapprehension on the part of the people with reference to the true function of the legislative body is in a fair way of being cleared up through the institution of Legislative Reference Libraries and ultimately we hope of permanent Legislative Drafting Bureaus.

4. The lawyer will best serve the public outside of the legislative body as advisor to the electorate and to various voluntary organizations of citizens in all that pertains to law-making.

5. The creation of permanent Legislative Bureaus, composed of our best lawyers, and accorded a dignity as political tribunals equal to our law courts, with lawyers acting in an advisory capacity to organizations formed within the electorate, and appearing in professional capacity before such Bureaus, will tend to relieve our courts of a vast mass of perhaps the most difficult and vexatious and time-consuming work which they now have, to-wit, that which grows out of hasty, ill-considered, defectively drafted, statutes and ordinances, many of which have so short a life that they are repealed before the legal questions to which they have given rise, but which must nevertheless be adjudicated, have been passed upon by our courts. Such a tribunal will also tend to minimize the danger we have sometimes seen of our courts interfering with legislation by the exercise of what has been termed the "judicial veto."

6. Emphasis must be put upon arousing the social conscience of the people, rather than upon multiplying statutes. Nothing is better calculated to do this than the discussion among the people of legislative policies. Proportional representation will prove a great aid to this. So long as the people elect representatives to the legislative body without a proper understanding of the true function of that body, or of their representatives sitting in the body, so long as they care little, and know less, as to what is being done in their legislative

assembly, their social conscience is not active, they lose the educative value of self-government, and are self-governing only in theory. The great function of the lawyer in our society is to bring our people to understand their responsibility and privilege in the matter of law-making.

He knew when he published the article that he was running counter to the preconceived notions and prejudices of the bar of the country, but he had, and still has, the courage of his convictions. Needless to say, the bar has not risen up to proclaim him a prophet. The editor of one journal, to whom he sent a copy, writes, thanking him and says: "I think that your profession owes you a great debt for this service. The trouble about such debts is that while they are always paid, the payment usually comes long after the creditor's lifetime. But I suppose that you have made up your mind to that, as a good philosopher should." And he proceeded to postpone the recognition of his obligation by ignoring it editorially.

Another appreciative correspondent writes as follows: "It seems to me to go to the root of the problem of democratic government. It is more important in that particular than equality of economic privilege. For if we had perfect economic conditions, we might soon lose them if the herd were still driven, as they would be if they relinquished their own civic responsibilities to the management of their clerks. The lawyers of our time are the civic priests of the people. Let them be turned back, as you propose, to the due execution of their own clerical functions, so that the people may feel their own obligations as to policies. I think you have struck bottom here, so far as governmental democracy is concerned; and you have done the work convincingly. I hope it may set two lines of political thought agoing: Official drafting clerks for all legislative bodies, and a tendency toward the exclusion of lawyers from the legislatures on the ground that the place for honorable lawyers in the public service is in the judicial construction of laws or in their administrative enforcement. If it were unprofessional for lawyers to sit in legislatures, but

honorable for them to draft and construe and administer laws technically drawn to carry out the public will, we should have democracy. I wish it were possible for legislatures to vote for a popularly desired principle, requiring their drafters to put it into technical shape, and then enact the measure in technical shape but with the principle as a preamble, so that courts and administrators would always have in the preamble a statement of the legislative will to control interpretations."

Another writes: "I like the point you make about keeping the lawyers out of the legislatures at least as lawyers. My contact and experience with lawyers and legislators entirely bears out your contention. Lawyers as lawyers understand form and technique. They are woefully deficient in the underlying principles that govern human relations. A knowledge of the statutes and court procedure no more fits a man to understand the philosophy of law than an understanding of shoe-making qualifies the cobbler for tanning hides. Besides, there are the conflicting interests you so well point out of the practicing lawyer and the people's representative. I like the position you take in this matter both in this paper and in your address before the bar. The country is sadly in need of this instruction, and I trust you will exploit it to the utmost."

Another writes: "I found it (the article) extremely interesting and valuable. I am not optimistic enough, however, to think that you will persuade the lawyers to give up politics. Publicity will no doubt have some effect and it is worth continuing the effort to create public opinion in this matter."

A member elect to the Missouri Constitutional Convention now assembled in Jefferson City, who publicly called attention to the fact that some 55 of the 83 members were lawyers, wrote the writer that he had read the article and that it had confirmed his own views. His letter plainly indicated a lack of appreciation of the difference between a legislative assembly and a constitutional convention. The writer called his attention to the difference between a representative in a legislative body and a delegate to a constitutional convention, and

reminded him that the article in question was concerned only with representatives in legislative bodies, and with the attitude of the bar towards the electorate, and with the true function of the legislative body.

The most interesting communication on the subject was received from a young woman of the new type. In the course of a very bright and stimulating letter, she says:

“To me the mere statement of the proportion of lawyer members constituting recent federal and state legislatures was tremendously impressive. The single fact that they are so greatly in the majority makes ridiculous the statement or belief that such assemblies are representative—quite aside from their (lawyers’) special fitness. I thoroughly agree with you that ‘the question is how to get the best legislators considered as representatives of the people.’ * * * I am cynical enough to fear that, as a lawyer, you are rather lonely in your idealism and the possession of a social conscience. * * * My quarrel with your article is that it is too mild and modest—addressed to an audience very small and selfishly interested. It is too technical and conservative. Let me earnestly urge you to rewrite it in the popular language—or ‘jargon,’ if you prefer—of the newspaper or magazine and offer it for publication where it will do the most good. * * * I chafe because I feel that like so many ‘highbrows’ with ideas and opinions of the utmost public value, you are hiding your light under a bushel—a bushel of technical terms and smooth phrases and politeness and conservatism, and scholarly, gentlemanly reserve. The public is ignorant and vulgar and politics is vulgar, and to touch them, to reach them at all, ideas must be presented with vulgar blare. Mighty few persons know or remember the statesmanship and accomplishment of Patrick Henry, but every school boy learns with a thrill his gorgeous, theatric gesture—‘Give me liberty or give me death.’”

Possibly this feminine correspondent’s remarks may be of value to law writers and editors of law journals. Her letter

reminded the writer forcibly of the following taken from Sinclair Lewis' "Main Street":

"There's one attack you can make on it, perhaps the only kind that accomplishes much anywhere; you can keep on looking at one thing after another in your home and church and bank, and ask why it is, and who first laid down the law that it had to be that way. If enough of us do this impolitely enough, then we'll become civilized in merely twenty thousand years or so, instead of having to wait the two hundred thousand years that my cynical anthropologist friends allow."

PERCY WERNER.