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Lawyers and Legislators

Percy Werner

St. Louis Bar Association

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LAWYERS AND LEGISLATORS.

In an address delivered last fall Lord Robert Cecil said:

“We are faced all over the world by an attack on what may be called the world order. * * * It is a time when democracy as a system of government and as a system of social organization is going to be tested to its uttermost, and the machinery which expresses democracy will be overhauled by no friendly critics to see whether it really does justify the claim it makes. In this country we have been for many years aware of a growing criticism of representative institutions as they actually exist. We know that some of our most cherished institutions no longer keep the position in public reputation that they did half a century ago. * * * It is a time when it behooves all of us who believe in democracy and in stability to look carefully at the foundations on which our institutions are based and to do our uttermost to see that they really are based on the only foundation on which democratic institutions can be based, namely, a true accord with the *expressed and determined* will of the people.”

The warning note here expressed has frequently been sounded in this country since the Great War. Lord Robert Cecil, in the address referred to, advocated Proportional Representation, or the granting of representation to minority

parties in legislative assemblies,—in my opinion the most important and valuable *structural* change in representative institutions which has been proposed. I desire here to inquire into the *function* of this fundamental institution in democratic governments, the legislative body which is vested with the law-making power, with a view to discovering how lawyers can best assist in perfecting democratic institutions.

A few years ago a young American, Mr. Richard S. Childs, by turning his attention to the real function of the electorate, demonstrated that we were giving that body an impossible and needless task in expecting it by popular vote to select expert administrators for our public offices. The result of his protest was the organization of the so-called Short Ballot movement, which logically pursued results in the conclusion that the office of representative in the legislative assembly is theoretically the only office that need be filled by popular vote. Similarly I would ask, by way of clearing the ground for the discussion of the proposition I have in mind, what is the real function of the legislative body, whether to actually *draft* statutes, or merely to adopt or enact them? And again: Is that function to declare the “expressed and determined” will of the constituencies represented in the assembly, as stated by Lord Cecil, or is it to generate from within itself policies and laws to be imposed upon the people? For myself I am free to say that I cannot believe that there can be any difference of opinion among lawyers on these questions, nor among those who understand the nature and spirit of the governmental institutions of a self-governing people. A legislative assemblage made up of representatives of different constituencies is a *policy-declaring* body whose members are chosen to declare the known will of their constituencies—and to enact it into law. Much of our legislation, however, consists of measures evolved out of the inner consciousness of the members, sprung upon the assembly, and adopted and imposed upon the people, without any consideration having been given by the various constituencies represented to the policy involved in the measure. The work of our legislatures is stead-

ily declining in public esteem. They are charged with being negligent, wasteful and corrupt. We hear much of log-rolling and lobbying. They are stigmatized as "bill factories," whose product is said to be bad in quality and absurd in quantity, and is provocative of much of the litigation which overwhelms our courts. Instead of law being the "expressed and determined" will of the people, hundreds of bills, it is charged, are passed "without any public hearing or semblance of discussion or debate." The words quoted are taken from a recent editorial in "The New Republic," in which it was said: "At the closing session (i.e. of the last New York State legislature) bills were passed at the rate of one every two minutes and few of the legislators could pretend to know the contents of the bills which were being railroaded into law." It has been estimated that 25,000 pages are added to our statute books annually; that as many as 60,000 statutes are introduced in a single session of all of our legislatures. At the session of the Missouri legislature which has just been concluded (1921) 1310 bills were introduced—755 in the House and 555 in the Senate. [Incidentally I may here remark, 321 of these were finally passed, of which 290 were signed by the Governor and 31 were vetoed, and 16 of those signed have been suspended by referendum petitions.] Frederick Mathews, in his work on "Taxation and the Distribution of Wealth," points out that out of 18,110 Public Acts of the English Parliament four-fifths had been totally or partially repealed, and that during the three years 1870-1872 there had been passed 3,532 Acts, of which, at the time he wrote, 2,759 had been totally repealed. It is only fair to say here that there has been a great improvement in the methods of the Mother of Parliaments, for we read that from 1899 to 1905, inclusive, the English Parliament passed only 46 General and 240 Special Laws. (See Beard's American Government and Politics, McMillan, 1915, Chap. 25, on "The State Legislature".) Grave concern for the future of our representative institutions has been expressed by publicists of our country because the people through the Initiative and Referendum

have found a way, clumsy though it be, to control their representatives or agents, and yet a former United States Attorney General, calling attention to the recent decision of the United States Supreme Court in the so called emergency rent and Landlord and Tenant Laws, says: "in view of the *autocratic* powers now conceded to legislative bodies a greater responsibility for just enactments rests with law-makers" (The Police Power and the New York Emergency Rent Laws, by George W. Wickersham, University of Penn. Law Rev., May, 1921), and we may add with the people.

My special purpose here is not to examine critically into the function of the legislature, nor to criticise its work, nor to discuss the many remedies for legislative evils which have been proposed, but to examine into the relation of the lawyer to these law-making bodies.

In the Sixty-fifth Congress (March 4, 1917, to March 4, 1919) of the 96 Senators 75 were lawyers, or approximately 80%; of the 435 members of the House, 303 were lawyers, or approximately 70%. In the Sixty-sixth Congress (March 4, 1919, to March 4, 1921) of the 96 Senators 70 were lawyers, or approximately 73%; of the 434 members (one vacancy) of the House 293 were lawyers, or approximately 68%. The Directory for the Sixty-seventh Congress, with biographical sketches, is not yet published. Taking the legislature of the State of Missouri as an example of the State legislatures, we find that in the session of 1917 there sat in the Senate 18 lawyers out of a total of 34 members, and in the House 36 lawyers out of 142 members; in the 1919 Missouri legislature there were in the Senate 22 lawyers and in the House 47 lawyers. The Blue Book for 1921 has not at the time of writing appeared. Missouri has now two lawyers in the United States Senate, and out of 17 representatives sent from this State to the present Congress 14 are lawyers.

In an interview with the legislative agent at Jefferson City of the Federation of the Women Voters of Missouri, the writer asked her: "What do you think of the lawyer in the legislature?" To which she at once replied: "Oh, they are the whole

thing. All the farmers and bankers and everybody else defer to them.”

It seems to be a popular, and I believe entirely mistaken, theory of our American public that it is an essential part of the work of our legislatures to *draft* laws, and that as lawyers are, or may reasonably be supposed to be, experts in this work, therefore they should be given the preference in the choosing of representatives to sit in legislative assemblages. I hazard the opinion, on the contrary, that while the *drafting* of statutes is a matter for experts, and that competent lawyers may well and preferably be chosen for such work, the drafting of statutes is no indispensable part of the work of the legislative assemblage, and that *the candidacy of lawyers for membership in the assemblage tends to obscure from the public mind its true function, which is to voice the will and enact the policy of the people through the adoption or rejection of statutes, which statutes had far better be drafted by a body of experts outside of the legislative body.*

We have but about 120,000 lawyers in the United States, with a population of, roughly, 110,000,000, and an electorate of, say, 30,000,000. If the entire bar of the United States should constitute itself advisors to the electorate, rather than participants in the work of legislative assemblages, I think we lawyers, officers of the courts as we are, would come nearer to fulfilling our function as members of the judicial branch of our government, to the vast improvement of the work of our legislative bodies, and to the better understanding by our people of the real purpose and significance of those institutions. We read that the Judges in England sat in the Upper House of Parliament almost from the beginning of that body, but that their function became rather that of councillors, or assistants, than of ordinary members. “The presence of such a group of experts among a body of laymen, says one writer, would naturally cause deference to be paid to the opinion of the former wherever technical legal questions arose, and it was but a step further to seek such opinion in a formal manner.” (6 Amer. & Eng. Enc. of Law [2nd Ed.], p. 1065.) In

several of our States, notably Massachusetts, there are constitutional provisions for the State legislature to seek the advice of the Supreme Court of the State on legislative matters by the request for advisory opinions on important questions of constitutional law or in emergencies, and it is interesting to note that the Supreme Court of Massachusetts on one occasion declined to give a construction of a statute on request for an advisory opinion, where the only exigency requiring it was a difference of opinion among the members of the House of Representatives. (See 148 Mass. 623.)

To the State legislature is given the power to regulate the practice in the established courts of the State, to create the offices of the courts and to prescribe their functions, as well as to prescribe the terms for the admission, rejection and expulsion of attorneys. Where lawyers are in the majority in a State legislative body, it is obvious that they have under their own absolute control all of these matters. Indeed, where they do not constitute the numerical majority, it is more than likely that in technical matters of this kind they would be allowed full sway by the non-professional members. It is of doubtful propriety whether lawyers should allow themselves to be put in this position. Professor Sharswood, in his essay on "Professional Ethics", says:

"Scarce a session of one of our legislatures passes without rash and ill-conceived alterations in the civil code, vitally affecting private rights and relations. Such laws are frequently urged by men, having causes pending, who dare not boldly ask that a law should be made for their particular case, but who do not hesitate to impose upon the legislature by plausible arguments the adoption of some general rule, which by a retrospective construction will have the same operation. It is a practice which lawyers are bound by the true spirit of their oath of office, and by a comprehensive view of their duty to the Constitution and laws, which they bear so large a part as well in making as administering, to discountenance and prevent. It is to be feared, that sometimes it is the counsel of

the party who recommends and carefully frames the bill, which, when enacted into a law, is legislatively to decide the cause. It is time that a resort to such a measure should be regarded in public estimation as a flagrant case of professional infidelity and misconduct." * * * "How great is the influence of the lawyers as a class upon legislation! Let any man look upon all that has been done in this department and trace it to its sources. He will acknowledge that legislation, good or bad, springs from the Bar." [pp. 24. 25]

The greatest advance which has thus far been made in improving the work of our legislative bodies is that which followed the establishment by certain legislatures of Legislative Libraries or Reference Bureaus (most effectively in the State of Wisconsin since 1901 through the influence of the late Charles McCarthy), and the employment in such libraries of lawyer assistants to assist *during the session* of the legislature "and two months prior thereto" in drafting statutes. (See Statutes of Wisconsin, 1913, Sec. 373 f, p. 215. Similar departments have been established in Alabama, California, Connecticut, Indiana, Iowa, Kansas, Massachusetts, Michigan, Montana, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Texas and Washington; and the cities of St. Louis, Baltimore, Kansas City and Milwaukee have established Municipal Reference Libraries.)

The Supreme Court of Wisconsin has testified to the value of this in diminishing the number of cases brought before it involving constitutional questions and questions of construction of legislative acts. This is certainly a step in the right direction, and it may well be considered whether this movement should not be carried further until in all States, as well as for the National Congress, we shall have *permanent* legislative Drafting Bureaus, or political tribunals, made up of Commissioners, who shall be lawyers of the greatest eminence in their profession, who are specially qualified for the difficult technical work of drafting statutes, and of advising the legislative body. The official rank of such Commissioners should

equal in dignity that of our Supreme Court judges, and they might well be appointed by the Governor of the State on the recommendation of the Bar Associations of which they are members. Such Bureaus should be accessible at all times to citizens and organizations of citizens who desire to be advised concerning, or to recommend legislation. All proposed bills should be required to be submitted to this Bureau a definite time, say thirty or sixty days, before they can be introduced into the legislature, and all proposed amendments should be referred back to it. With such a Bureau all excuse for the selection of lawyers, because they are lawyers, as representatives of the people in legislative bodies would disappear and leave to lawyers the question as to where their undeniably high talents, learning and experience can best be employed in the service of the public. The American Bar Association has since 1913 had a Special Committee at work upon a proposed legislative manual for the use of legislative bodies, which Committee is expected to submit its final report at the annual meeting to be held this year. (See Journal American Bar Association, July 1920, p. 503.) It is an astonishing fact, pointed out by this Committee that there exists no scientific text book on this all important subject of the technique of statute drafting. The fear expressed by some that a drafting bureau might be used by propagandists was considered by this Special Committee of the American Bar Association, and in their report submitted to the Association in 1915 they indicate what might well be taken as the attitude of the entire bar towards legislation, saying:

“A drafting bureau, the members of which would so far forget their duties as to seek to *promote* legislation, must quickly lose public confidence. This fact and the fact that those engaged in the work rapidly acquire, even if they do not possess at the start, *a professional code of ethics which regards the promotion of legislation as the one cardinal sin*, form a great practical safeguard against any abuse on the part of the members of an official drafting bureau of their

position as expert advisors in the technique of legislative drafting.”

If in conjunction with a system of permanent State Legislative Bureaus our lawyers, alive to their functions and to the ethics of their profession, should decline to offer themselves as legislators, but should offer to assist in an advisory and professional capacity, if they so choose, voluntary organizations of citizens in their respective communities, the people of this country generally will commence to appreciate their own responsibility and their great privilege in the matter of self-government, without which democracy is a mere name. I am not unmindful that many lawyers are and have long been doing just this thing, but I think we may all ponder with benefit the words of Hon. Andrew Alexander Bruce, Associate Justice of the Supreme Court of North Dakota, who has well said:

“For every offense that is prevented by the fear of a criminal punishment, there are a thousand which are prevented by the social conscience of the people themselves. For every contract that is enforced by the courts, there are a hundred thousand that are lived up to because of the sense of honor that exists among business men.” * * * “What we really need, in this latter-day of democracy, are not more laws or more political machinery, but a social conscience. Its lack alone makes the inspector, the policeman, and the statute necessary. We need to reform the lawyer more than we need to reform the law.” [“Property and Society”, pp. 138, 140. McClurg & Co., Chicago 1916]

If this be true, and it undoubtedly is, then our great advance in democracy must come from the stimulation of the social conscience in the people, and it is precisely this, if I mistake not, which will be accomplished by the encouragement of discussion among the people of legislative policies.

Our legislative bodies are engaged in the building of the future democratic State and in the molding of the social and

economic structure of society. Their powers are sovereign within the constitutional limitations. The life, liberty and property of every citizen is at the mercy of these bodies. "With the growing complexity of the social structure, legislation has come to affect more and more the private and pecuniary interests of individuals and as a consequence, selfish motives prompt more than ever to interfere with and influence political action." So points out Hon. Frederick W. Lehmann in urging upon the lawyer that "in or about legislative halls, his country is his client." (The Lawyer in American History, 3 Neb. State Bar Assoc. Proc., 145, 162.) The office of representative is the most solemnly important of any office under our republican form of government. Lawyers and judges have a far easier task than has the legislator. We interpret and apply the acts of the legislature, and are specially trained for this work by long study and experience. The legislator, though without such training, says what the law shall be; we lawyers say what the law is. The legislator turns his face to the future, we lawyers look to the past. We reason from generals to particulars—deductively; the legislator from particulars to generals—inductively. The legislature makes, the executive executes, the judiciary construes and applies. The departments of government are separate and distinct. In the social organism the legislative department represents the will, the judicial department the understanding, the executive department the act. (See Practical Citizenship, by A. Roeder, Blanchard & Co., New York, 1908, Chap. III on the Governmental Trine.) Lawyers are officers of the courts and as such a part of the judicial branch of our government. The distinction between judicial and political questions is clear cut, though sometimes apparently lost sight of as most tellingly shown by Mr. Brooks Adams in his "Theory of Social Revolutions." It is no part of our function as *lawyers* to pronounce upon the policy of adopting proposed laws. It has happened numberless times in the practice of my profession that clients conducting large industrial establishments have been con-

fronted with claims by injured employees, fruitful of litigation, where my advice has been sought as to settlements. I have invariably explained the law, pointed to precedents, discussed the ordinary course of litigation, the cost and expense thereof and the chances of favorable results therefrom, the effect on other or future claimants of a settlement made to avoid litigation, etc., etc., but in the end I have always said that so far as the question of litigation or settlement was a pure question of policy, the responsibility for that was up to the management. I cannot see why, as lawyer, dealing with questions of policy in matters of public concern, my attitude should not be the same. *We must understand that the question is not how to get the best legislators considered of themselves, but how to get the best legislators considered as representatives of the people.* The objection to lawyers as representatives is not to them as lawyers, but to their selection on a false basis of understanding. I should make the same objection to a white-robed angel from heaven.

We may well, however, and should, assist in drafting such laws and in advising the electorate with reference to the history of previous legislative efforts, in special directions, and as to all that pertains to law-making. In this we will be within our high function. We lawyers are often told that on us rests, to quote from a recent editorial of the Central Law Journal, the "solemn responsibility and rare opportunity to lead a people out of the wilderness of communism, socialism and governmental destruction of natural rights, opportunity and independence." And we may well, consistently with all that is here said, use our best endeavors to obtain or prevent the passage of legislation according as we may be given to see the best interests of the social body of which we form a part, but our chief responsibility I believe is to bring the electorate of our country to an ever clearer understanding of the true function of the representatives they elect, and of their own responsibility in the matter of law-making, and I believe we can discharge this duty better outside of, than as members of, legislative bodies. Until that responsibility is understood, assumed, and

discharged by our people, we shall not have self-government.

Let us encourage our people to have a will in the matter of legislation, to determine and express that will, to grant to minority parties representation, to send representatives to their legislatures *not* with full powers of attorney or *cartes blanches* to initiate and pass laws at their own sweet will, but to carry out the "known and expressed" policies of their constituencies by the enactment in form of law, after full discussion and deliberation, of the dominant policy. Under such a view political parties will be stimulated to do the only real work which justifies their existence: not the carrying of offices at popular elections, but the adoption and promotion of principles and policies, and the formation and education of public opinion, which is the very life of democratic institutions and the motive power of all our public machinery. So we may hope to put an end to the deluge of experimental statutes devised and enacted by so called representatives whose constituencies care little and know less about them.

It is perhaps too much to expect that the bar of this country will with any great unanimity hail the proposal for political self abnegation here proposed, but we must remember that the law is a jealous mistress. Of this there can be no question: the matter of the propriety of lawyers sitting in legislative bodies does go to the "foundations on which our institutions are based", and we had better raise the question ourselves than wait to have it thrust upon us. Surely it is one upon which we may hope for professional solidarity. As said by Mr. Warvelle, we are "not simply members of a learned profession, but a distinct order of society, established by civic authority, constituting a fraternity with settled rules and usages. In the flow of time and the changing conditions of society many of the ancient characteristics have been lost, but this essential idea has remained intact and the bar is still known, both among its own members and the public, as the 'legal fraternity.' It follows, therefore, that the relations subsisting between the members of the bar are, or should be, those of amity, good will, and mutual esteem. Notwithstanding that

they are often arrayed against each other as champions of opposing forces, their intercourse should be friendly, *and as partakers in a common enterprise, the honor and reputation of every member should be the cause of all.*" (Essays on Legal Ethics, Callaghan & Co., 1902, p. 194)

Our "common enterprise" is justice through law. Democracy is self-government by law. The ultimate power of sovereignty is in the people. Our foundation belief is that the people will do right every time if they know; that the laws and institutions which they evolve from themselves, if not the best abstractly, will fit best. Our concept of law is no longer the coercive force, or *might*, behind it, but the conviction gradually developed in the minds of the people that justice embodied in law, or *right*, will prevail. The responsibility of our profession in a democracy is tremendous. The will of the people is, in ultimates, the law. Translated by the legislature it becomes law. We as a profession owe it as such the profoundest respect. To assist the people to a proper understanding of the true nature and purposes of our governmental institutions is where our profession owes its great public duty.

On another occasion, in an address on Voluntary Tribunals, I sought to show how our courts may be rid of the great mass of litigation over private differences which give rise to civil suits, with great gain, as I believe, in the efficient administration of justice between individuals. I have pointed out here how, by means of a permanent scientific Legislative Drafting Bureau, our courts may be rid of a mass of needless litigation arising from defectively drawn and ill considered legislation. We must make our courts temples of justice in matters of public concern, and not wrangling arenas for the settlement of private disputes, before our people shall have that respect for the sovereign law which is essential to the stability of our institutions. We lawyers must place ourselves at the public service in our special field as advisers in progressive legislation, to the end that our people may appreciate their responsibility and may learn the art of self-government, that those institutions may grow and develop in the orderly

manner in which all true law unfolds, if we would help preserve democracy.

Permit me to sum up the conclusions reached in the foregoing:

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 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.

PERCY WERNER.