OFFICERS OF THE COURT

BY HORACE A. DAVIS

Left to themselves, lawyers have always tended strongly to metaphysics. In medieval days they spent their chief energies elaborating doctrines of real estate, first wrapping estates so tightly in red tape that nobody could convey them, and then, by inventing fictitious persons and intricate processes, undoing a trifle of the mischief they had accomplished. Of so little value was their work that after perhaps a couple of centuries of legal tinkering, the whole complicated structure was swept away by statute. Again, no more than a hundred years ago, generations of later solicitors in England had evolved a system of pleading so elaborate, so intricate, so artificial, so cumbersome that the merits of a lawsuit were wholly subordinated to the manner of its presentation. Once more the whole structure had to be swept away by statute. In this country we have been less fortunate, for in many States procedure still exerts a stranglehold on litigation. In New York, for instance, he is a bungling craftsman who cannot so entangle the simplest case with motions and appeals as to string it out over three or four years, if not to smother it entirely. This situation, strange to say, is the outgrowth of a statute whose authors pronounced it so clear and simple as to need no interpretation! Thus the lawyer of today is as much engrossed in winding red tape and as expert at the art as his predecessor of the Sixteenth Century.

The reason for this is fundamental. It goes back to the character of mind possessed by men naturally attracted to the law. There are many kinds of mind in the world and they may be classified in many different ways. One rough cleavage is into practical minds and formal minds—those that concern themselves with substance and those that concern themselves with manner. The practical minds obviously have been of the greatest assistance in establishing man's physical welfare. They include the tillers of the soil, the builders, the merchants and carriers, the scientists. The formal minds have developed culture. Beginning with artists, they range downward through critics and teachers, clerks and bookkeepers to individuals so purely concerned with form that it is difficult to discover any real benefit they are capable of conferring on mankind—such as grammarians and bridge players. And sad to say, it is in this lowest category that belongs the dignified attorney at law.

For the law itself is nothing but a systemization of the rules of social life. In medieval times it was mostly an unwritten recognition of the customs of men in the limited contacts of that era. Now it is mostly a written codification of the rules of civic conduct in its ever more complex relations, still based chiefly on the customs of the day in commerce, property holding and personal relations. It is an abstraction, a formality. A man justifiably becomes a lawyer only because he has a mind so nicely adapted to these formal problems that it functions joyously when picking its devious way among contingent remainders and into the doctrine of *caveat emptor*. And so the lawyer, busying himself with the form of a formality, is twice removed from real life.

The attitude of mind that finds expression in such formalism is not only waste-

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ful; it is positively harmful. A man whose whole thought is engrossed with codes and problems of how to conform to them —or often, unfortunately, how to evade them—loses all sense of reality. Instead of searching for the substance of things and the meaning of events, he hunts for precedents; instead of trying to analyze, he tries to classify. Anything new bewilders and frightens him. Instinctively, he resents any phenomenon which does not fit in with his scheme of the universe. When new laws of nature are discovered he struggles to make them conform to the old—shapes steam to hand and horsepower, electricity to steam. What he will do with radio and the airplane remains to be seen, but it is certain that the conquest of the air will cause much anguish to minds accustomed to the medieval theory that the owner of a plot of ground has proprietary rights in the atmosphere above him.

When the novelty is a social instead of a natural phenomenon, the lawyer does not submit tamely. Instead he denounces and resists it. He resents a new economic force with a vigor equal only to that of the man of property whose privileges are being brushed away by the sweep of social development. He refuses to admit that the great changes produced by industrialism have new significance, that women and children in industry are any different from men, that labor may combine and demand a greater share in the output, that centralization of production follows an economic and not a statutory law. His world is the pastoral village of Queen Anne and his rules to govern it lie in the sacred pages of Blackstone.

Take, for instance, the case of a workman injured in a factory. It was not the legal profession which evolved the modern doctrine that each industry must take care of its own wreckage. On the contrary, the lawyers and the courts exerted all their energy and acumen to prevent the discovery and application of that doctrine. They first applied the familiar rule of contributory negligence—that if the workman had any share in causing the accident he might not recover compensation for his injury; they next invented the highly artificial and unsound rule that if the accident was caused by some other workman —a fellow servant—the employer was not responsible; finally, when the state took the matter into its own hands by enacting laws for the compensation of the unfortunate victim through compulsory insurance, they attacked the statutes on the ground of unconstitutionality and in some States at least compelled amendments of the State constitutions in order to make them valid. All told, the lawyers were responsible for a delay of just about one hundred years in the solution of this pressing and highly important social problem.

The instance is typical. Every step in social progress has met the same resistance from lawyers—not because they hate their fellow men, but because they hate change. It is the inevitable reaction of the formal mind. At their best, lawyers are of just about as much value to society as an army of cross-word puzzle fans; at their all too frequent worst, they are a deadly drag on social progress.

This obstructive attitude of the legal profession has the greater significance because lawyers have always had a weight in the community far beyond their mental and social deserts. Their training as debaters makes it easy for them to take the lead wherever their fellow citizens gather, whether at the town-meeting or at the tavern; and the same qualification has given them a commanding influence in politics and a predominating share of political office of every description. Most of all have they increased their authority by constituting the select class from which judges must be chosen. In the theory of our government and in the hearts of a democratic people, judges occupy a most important and exalted position. They form one of the three great branches of the state, ranking equally with the executive and legislature. Thus, controlling exclusively one-third of the government and furnishing

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a large proportion of the personnel for the other two-thirds, lawyers have to an extraordinary degree dominated our whole government.

But just in so far as our Presidents, our Senators, our Congressmen, our Justices of the Supreme Court and all our host of State officials are lawyers, they are unfitted to be public servants. By nature and by training they are formalists. They look only at the shape of things. They are timid and conservative—not only uninterested in what is new, but prejudiced against it just because it is new. Such men are not what the nation needs as officials. It needs clear-sighted, open-minded men who examine into the substance of things, whose thoughts are directed to human values, and who welcome what is new for the good they can find in it. The lawyer has made himself a grave public question politically as well as economically,—so grave, in fact, that his very existence invites challenge as a public menace.

II

The question, then, is whether we can spare this great army of solicitors, proctors, advocates, barristers, counselors and attorneys, as they variously call themselves. That depends upon whether they render to the community any essential service. It would be an endless task to take up one by one the various activities to which lawyers devote themselves under the guise of professional work. The only practical way to answer our question is to drive straight at the heart of the matter by setting down in untechnical language such valuable service as a formal mind with legal training is really adapted to render to the community. It will be easy enough to check back later as far as patience will permit, and determine whether the classification is fair and complete.

Tested by this harshly practical criterion, the essential legal services prove to be singularly few. In fact, there are only four:

1. To ascertain estates in property;
2. To draft and interpret statutes;
3. To draw solemn documents;
4. To facilitate the just settlement of disputes.

There are no others. And these few are likely to diminish rather than increase in both number and importance.

1. *To ascertain estates in property.* Society is not yet ready for absolute simplicity of titles to property. In chattels, to use the legal term, there has never been much complexity of title. But in real estate there has been and still is infinite confusion. At first there was the feudal system, and scarcely were we well rid of that and all the complications it created when the unearned increment began to exert its subtle influence. The modern tendency to split up the ownership by leases and temporary estates, so that the immediate owner or his heirs may share in the prospective increase of value, is at the moment probably increasing the confusion of titles. Also there have always been and long will be trusts of various sorts, and mortgages. There is, to be sure, a slight tendency toward a simplification of estates, and from time to time some of the most grotesque tenures are abolished by statute, but progress in this direction is slow and uncertain. There is also some tendency toward simplifying transfers of land by requiring registration under public scrutiny and with official certification. Although vigorously opposed by the legal profession, this system of public registration, usually called the Torrens system, has taken root, in a mild, permissive form, in many States and is apparently growing steadily. Meanwhile, lawyers are needed to trace the devolution of land titles and ascertain the ownership of the various permissible estates. True, the most important part of this burden is carried now by title insurance companies, but they in turn are composed chiefly of lawyers.

2. *To draft and interpret statutes.* It is a curious fact that so little have lawyers appreciated their close and vital connection with statute law that our principal

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law-schools have given but slight and desultory instruction in the interpretation of statutes, and none at all in drafting. Until within the last dozen years we have taken it for granted that any man could draw a statute and we have suffered from the effects of clumsy, unintelligent and at times even dishonest legislation. Of late years some States, notably Wisconsin, have awakened to the fact that the drafting of statutes requires wide knowledge and expert training and have provided the machinery to furnish such assistance. Naturally, those best fitted for the job are lawyers. To lawyers also falls the task of telling the simple-minded citizen what all the great mass of statute law means. With codes at every corner and the Legislatures of forty-eight States and the Federal government pouring out new laws by the thousand every year, society cannot escape the duty of delegating to some members of the community the task of keeping track of legislation and advising individuals how they are affected.

3. *To draw solemn documents.* Comparatively few people have the gift of clear expression. Lawyers are trained directly to clear thinking and the accurate use of language; and their advice to persons who desire to set down some thought in writing is a proper social function. The common legal documents are wills, deeds and contracts. All of these tend to become standardized. There are forms at every stationer's for wills, conveyances, leases, mortgages, and contracts of sale. Certificates of incorporation can also be purchased in blank, while such documents as insurance policies and bills of lading are absolutely rigid in all their formal parts. The chief function of the lawyer in his documentary work consists in making an accurate and intelligible record of the agreement of two persons attempting to engage in some joint enterprise.

4. *To facilitate the just settlement of disputes.* The settlement of disputes has always been and always will be an important function of the state. In all civilized communities it has been in charge of a judicial department headed by judges recruited from the legal profession. In so far as a lawyer's training teaches him to think clearly, it is good preparation for a judgeship; but in so far as it teaches him formalism, it is the worst possible. To select judges without legal training would, however, be too much of an experiment at present, and for the future it will probably be easier to change our law-schools than our judicial system. We may grant, then, that judges are a useful product of the legal profession. Attorneys also are a necessary part of the judicial machinery in any but the most primitive courts. They have the task of preliminary investigation and orderly presentation of the controversy.

III

This brief list completes the tale of essential services rendered by the lawyer to the community. Of course it covers only a small part of the average practitioner's business; but his other activities will be found on analysis to be non-legal, non-essential or anti-social. The settlement and management of estates, for instance, is a lucrative branch of the average lawyer's practice, but it requires only the functions of an accountant and a banker and is rapidly being absorbed by the trust companies. The organization and reorganization of corporations is strictly a business affair. And incidentally it may be noted that the men who make a great financial success in the law almost without exception earn their fees by giving advice on commercial and industrial problems. The little law they require is supplied by clerks who consider themselves well paid at $3500 a year. Among the other members of the bar who do not really practice law are the patent solicitors. Their status is that of scientific experts who describe in technical language the inventor's device and its mechanical, electrical or chemical operation. Trial lawyers and the great group of counsel who write briefs and

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argue cases on appeal are for the most part engaged in anti-social work, and so with many minor groups, such as the specialists in taxation. The reason why their activities are anti-social will more clearly appear if we pause for a moment to consider the lawyer at his theoretical best.

In their most exalted moments lawyers are wont to refer to themselves as officers of the court. Rather an empty phrase nowadays, unfortunately; but with a genuine and most important implication, for lawyers at their best are and ought to be precisely that—officers of the court, with their first and only allegiance to the state. Officers of the court are public officials and as such should be devoted to their country as exclusively and loyally as a major-general or an ambassador. Their sole aim should be to promote the public welfare. Accuracy in workmanship, justice as between conflicting interests, tolerance and common sense in all social questions, no matter in what direction they may tend;—these should be their standards of service.

Suppose we take lawyers at their word, make them officers of the court and deprive them of all other functions. Under this system the lawyer will have no clients. He will act impartially for whomsoever seeks his advice, usually for both parties to a contract and often for both parties to a controversy. He will accept no retainer, no fee. The person seeking advice will pay the state a fixed fee and the state will pay the lawyer a salary. In this way the lawyer will avoid prejudice and entanglement in private schemes; he will have no private relations with his customers. Receiving no fees, he will have no personal interest in the solution of any question submitted to him and will be able to give it that disinterested consideration required in order to live up to the high ideals expected of him.

How the scheme would work in detail can best be described by reviewing our list of proper legal functions—and perhaps some improper ones:

1. *To ascertain estates in property.* The new scheme will fit the Torrens system perfectly. To have land titles approved by public officials will in itself make them a matter of public concern and pave the way naturally for public registration. Inevitably it will tend to a healthy simplification of estates, for without the spur of a conflict of interests with a large fee rewarding the successful attorney, the lawyer will lack incentive to waste his time discussing whether a possibility of reverter may be devised. However, while the title business is controlled by insurance companies, it may be necessary to let them employ a staff of experts who, though trained as lawyers, will not form part of the official corps.

2. *To draft and interpret statutes.* Already the lawyers regularly engaged in drafting statutes are public servants in the employ of the Legislature or of some State institution. The new plan will make no change. For those engaged in interpreting statutes the change will be fundamental. The lawyer will primarily represent the state. It will be his duty to regard the spirit as well as the letter of the law, and when the business man seeks advice on a plan of action condemned by statute, to warn him that what he proposes is illegal and that he must conform to public policy. No longer will big business boast that it hires the best legal brains in the country to drive holes through the law so that it can accomplish what the Legislature tries to forbid. No longer will attorneys advise how to evade taxation, or where to incorporate with the least obligation, or how to get the easiest divorce. It may be argued that our statutes are often unsound and unduly restrictive;—that it is for the best interests of the community that they should not be strictly followed. But the answer is that in no case should they be evaded. They should be obeyed (or in some cases openly defied), and relief from an unhealthy condition sought at the hands of the Legislature which created it. And moreover, it is not too much to hope

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that when honest devotion to the public interest prevails in both the drafting and the interpreting of statutes, the quality of our legislation will greatly improve.

3. *To draw solemn documents.* In drafting wills, declarations of trust and other documents, the entire policy of which is dictated by one individual, the official lawyer will function like his brother of today, except that he will not advise his customer how to evade death duties and other obligations to the state. In contracts he will require the presence of all parties in interest, will ascertain from careful questioning their exact purpose and whether they are in accord on all essential points, and will then reduce their agreement to the plainest possible language. He will call attention to the contingencies likely to arise in the proposed undertaking, so far as his experience and learning enable him to, and will see that the parties agree what shall be done in such event or are satisfied to make no provision for it; but he will not allow either party to gain an advantage over the other by slipping in a joker, or by leaving out some obligation which ought to be expressed. His functions in this branch of his duties will closely resemble those of the French *notaire.*

4. *To facilitate the just settlement of disputes.* In the handling of disputes, including criminal charges, the official lawyer will again differ most radically from the privately retained attorney. His first aim will not be so different in theory, for it will be to learn the facts; but even here his search will practically take a somewhat different slant, since he will be concerned only with the ultimate truth, and not with what facts best support his customer's claim. When in possession of the truth his duty will be to urge a just settlement, first on the parties, and then, if they are still unreconciled, on the court. Whether the case be civil or criminal, he will have no incentive to help one side rather than the other to win. He will not achieve glory or political preferment by framing a murder case against an innocent man; he will not get an extra large fee or some new business by cajoling the jury or misleading the judge into an unfair decision. Especially will the endless rigmarole of motions and proceedings disappear, the burden of the courts will be enormously lightened by dispensing with unnecessary papers and arguments, and cases will take hardly more days to settle than they now take years. Appeals will not be permitted except in extraordinary cases. The whole system of intermediate appellate courts will be wiped out and the final appeals will be few and far between.

All this may be predicted with confidence because, in the first place, when the lawyers are solely concerned with rendering justice, they will do everything possible to bring the parties to an amicable agreement. If that is not possible, then the litigants can come promptly before the court with the lawyer for each side bending every effort to prove the truth and each equally intent on finding the just settlement. In every case, civil or criminal, the lawyer will act in a semi-judicial capacity. By the time the question is ready for judgment it will have been virtually passed on by three judges. With no effort to delay and no incentive to entangle the case, there will simply be no need for motions and proceedings; and unless the judge himself is in doubt or some important question of public policy is involved there will be no need of appeal.

IV

The time of the courts today is about nine-tenths occupied with rulings on questions of evidence. Note that: not the proof of the claim, but *how* to prove it. This is all a mere matter of form. The French, without any rules of evidence, approximate justice quite as nearly as we do. With both sides intent on getting at the truth, we also should need no rules of evidence. Disputes would resolve themselves into very few classes—those where there was fraud on one side, where there was an honest difference of opinion, and where the question

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was how much weight should be given to one set of circumstances as against another. Cases founded on fraud would soon disappear, because the claimant's own lawyer would be as keen to uncover it as would the opposing parties. So, also, fictitious defences and dilatory tactics—perfectly reputable today, though essentially fraudulent—would no longer avail.

Honest difference of opinion does not lead to much litigation unless it is accompanied by bad feeling. When the opposing parties respect each other it is usually easy to arbitrate their differences. When the opposition is accompanied by suspicion or malice, the court must get all the information it can, and no matter how much ill feeling there may be, there should be no reason for not accepting the trial judge's decision as final. So where there has been an accident, an unforeseen occurrence or even a violation of somebody's rights, the question, Who should bear the loss? often requires judicial decision. There is no reason in any of these cases why the proceedings should be cluttered up with rulings on evidence and appeals. With lawyers and court all engaged in the search for truth and justice, a speedy, untechnical hearing and decision should and ordinarily would be satisfactory to both parties. Even if a disappointed litigant wished to nurse his grievance, there is no reason why the community should encourage him. When trials are no longer regarded as sporting events he could not insist that he had not had a run for his money. Above all, the proposed plan would abolish the pernicious system of contingent fees—a system which gives the lawyer of today a financial motive to instigate litigation and to complicate it in every possible manner in order to frighten or weary the defendant, regardless of justice, into some settlement in which the plaintiff's attorney shares.

The radical change in the lawyer's attitude would inevitably result in a vast decrease in litigation. In this country court calendars are always clogged, cases take years to reach trial, and more years to be disposed of on appeal; and yet our only remedy is to appoint more judges. We should not need one-tenth of the judges we now have if the officers of the court were all engaged solely in the quest of truth and justice. The criminal courts as well as the civil would be less and less crowded as the community adjusted itself to the fact that speedy conviction of crime would follow in regular course, for rich as well as poor, when no attorney could be privately retained to outwit the state or throw sand into the gears of the judicial machinery.

An apparent objection to turning all lawyers into salaried state officials is that it would cost too much. But make no mistake about this: society is today paying the upkeep of the great army of lawyers, and incidentally getting little or nothing in return. The corporation with its legal staff, the business man with his annual allowance for legal expenses, recognize their burden and pass it along to the public in the increased price of merchandise. The lawyer produces nothing. He lives at the expense of the community just as certainly as though he were paid a salary by the state and you and I were taxed to supply the public funds. The expense of the proposed plan would be no objection even if the community were obliged to support as many officers of the court as it now supports lawyers. But it is easy to foresee that the expense will in fact be much less.

The first effect of nationalizing the profession will be to drive frankly over into business that great army of so-called lawyers whose real occupation is giving business advice. The exodus will include many of the most distinguished members of the bar, whose advance in the profession has been marked by a steady decrease in legal activity and an ever-increasing attention to problems of commerce and industry, especially finance. At the other extreme, the shyster and the tax specialist will be out of jobs. It will be cheaper for the state to pension them in some Lawyers' Snug Harbor than to pay the toll it now pays in mischievous litigation and evasion

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of the law. Practically, however, some could be put to work in the various white-collar jobs of the government, even if not strictly legal. Clearly the number of officers of the court needed to perform the strictly legal functions required by society would be very small. It is a matter of guesswork to say how few would suffice; but as we should inevitably start with more than we needed, having on our hands so many members of the bar unfit for other occupation, we could safely limit the number to one for every twenty thousand of population until the present generation of lawyers was disposed of and we had a chance to estimate our needs on the basis of experience. In other words, all we need do now is to cut off the supply of new recruits for fifteen or twenty years.

So far from expense being an objection, the economy in legal outlay to the community would in itself be a strong argument in favor of the change, for there would be a saving all along the line—in the decreased number of lawyers, in the reduced legal machinery, and in less wasteful litigation. Officers of the court without clients and without fees! Surely something worth striving for! Instead of an army of wasters whose vocation it is to teach us how to live and die with the least return to the community, we should have a small group of officials devoted to seeking truth, justice and the public welfare.

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AMERICANA

CALIFORNIA

PROSE pastel from the celebrated Los Angeles *Times:*

> There never has been a greater nor a higher civilization than that which now stands proudly upon the soil of the United States, and no civilization has ever been more faithfully typified in its best works than by some of our great films. . . . There is nowhere on earth a more Christian civilization with the precepts of love, charity and generosity to mankind underlying its official and social life. There is not a more scientific civilization, nor ever has been, and science is just a measure of man's success in interpreting God's handiwork. No nation has ever held a civilization with equal genius, proportionate energy, or comparable democracy of social wealth and justice—and the film center's work as a whole is symbolical of this greatest and highest of world civilizations.

THE Methodist Board of Temperance, Prohibition and Public Morals captures the movies:

> Profanity, ridicule of the clergy and all sneers at the Federal Constitution, particularly the Prohibition Amendment, have been banned from films produced by members of the Association of Motion Picture Producers, Inc.

LEGAL news from the charming town of Orange:

> The Rev. N. F. Jensen, former pastor of the Emanuel Evangelical Lutheran Church at Orange, and his friend and organist at the church, Mrs. Matilda Grote, wife of a prominent Orange merchant, charged with "indiscretions," have been freed of all blame after a three-day trial in the county court. Mrs. Jennie Jensen, in her court action, charged her husband with "taking several bites from Mrs. Grote's sandwich at a picnic party while refusing to take even one from hers."

GEORGIA

TROUBLES of the golfers in the grand old town of Columbus:

> *To The Honorable Board of*
> *County Commissioners,*
> *Muscogee County, Ga.*
>
> GENTLEMEN: By direction of the Governing Board of the Country Club of Columbus, I would call your attention to better police protection, if possible, of the property of the Club.
>
> As the cost of enclosing the 120 acres of property is prohibitive, the Club property is an inviting place for disorderly trespassers, who drive over the Golf course, use the woods for immoral purposes and create disorder around the club house. More recently, drunken parties have gone in naked in our swimming pool, after midnight, causing us to change the water at great expense.
>
> Your consideration of the situation is respectfully invited with the hope that we can have some practical aid.
>
> *Very truly yours,*
> F. B. GORDON, *Pres't.*

EDITOR W. B. TOWNSEND in the celebrated Dahlonega *Nugget:*

> It is reported that a few months ago when it was believed that a certain man in this county was on his death bed, another person who he was owing thirty-five cents, sent after the money. Such is life.

AUTHORITATIVE theological news in the eminent Macon *Telegraph:*

> *To the Editor of The Telegraph:*
>
> Tuesday of this week, very early in the morning between midnight and day, after and in the midst of prayer and thanksgiving and apparently under high inspiration and part of the time seemingly under the control of the Spirit, these, among other things, were spoken through me:
>
> (*I. God is Love*)
>
> "I am love. I am the God of infinite and everlasting love. I am the King of pity and compassion. I love the whole creation. I love everything. I am deeply in love with my people.
>
> (*II. God, the Holy One and the Healing One*)
>
> "I am the Healing One. I am the Holy One. I am the Holy One of the holy people. I am good, I am King of kings and Lord of lords. I am all and in all. I am everything.
>
> (*III. Pouring out of the Spirit upon all flesh*)
>
> "I am pouring out my Spirit upon all flesh. I am giving the keys to my people. I am giving the Holy places to my people. I am giving everything to my people.
>
> (*IV. The Lord's Coming*)
>
> "I am to come in my people. I am to come in everything. I am coming in the clouds of glory.

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