

The American Lawyer by Dos Passos, John R. (John Randolph), 1844-1917. The American lawyer, as he was--as he is--as he can be (Kindle Locations 2288-2292). New York, The Banks law publishing co

- These views are further illustrated in reading the decisions of the Supreme Court of the United States, and those of the highest courts of the individual States—say for the last twenty-five years. Such a mass of bad reasoning, illogical conclusions, disregard of the rule of stare decisis, contradictory statements, and an ignorance or contempt of the history and spirit of the Constitution of the United States, and of the several States; such a lack of knowledge of elementary law, and of the principles of jurisprudence, hardly can be imagined to exist.
- Let anyone, for example, undertake to enter into the extensive field of decisions, created by the interpretation of the Commerce Clause of the Constitution, since the Civil War, and if he does not emerge with a mind scratched and bleeding from the thousand thorns there existing, it is because he has no intellectual perception. That simple enactment, whose history is so well known to students of the American Constitution, has been so twisted and turned by the judicial minds which have grappled with it, that it can be said of it, as was repeated of the "Year Books"—a precedent can be there found on any side, of any subject, which anyone chooses to espouse. Legislative, and judge-made law, have accumulated so fast and thick, that elementary principles, buried thousands of feet deep under mountains of precedents, rarely can be brought to the surface.
- Real eloquence, and a knowledge of sound elementary law, have almost disappeared, and the lawyer is burdened by the incubus of form and statutes and codes,
- The Civil War marks the commencement of an era of professional change—perhaps I am justified in saying, an intellectual decadence— in the Bar. There certainly was a transformation, from a profession to a business. Before that event, the position of a successful American advocate was regarded as the most honorable and splendid in civic life. It was the social Ultima Thule. It was the goal to which the intellectual and ambitious youths of the nation strove to reach by heroic efforts of study and self-abnegation.
- But the real orator has almost entirely disappeared from the legal stage. The scenes have shifted. The age of forensic eloquence has gone, with all of its attendant glories and attractions. The practical, brief, crisp, utterances of the modern lawyer have succeeded. Exordiums and perorations are abolished by rules of court, which establish the limit of legal oratory, from twenty minutes, to two hours. Every oral argument must be boiled down, to the actual bone of the contention, and the graces of rhetoric are necessarily banished. In proportion as legal oratory has been curtailed,
- I am endeavoring to show what a lawyer is to-day. The difference between what he is, and what he should be, is as wide as the ocean. What he should be, is the never to be realized ideal; what he is—the always existing actual. We must study both. Keeping them in open juxtaposition is the only real means to advancement and reform.
- To produce lawyers who can perform their duties, they should be taught to cultivate a moral sense; the nature and object of law; the nature and duties of citizenship; the nature and duties of a legislator; but above and beyond everything else, they should be taught the real mission of the lawyer—which includes professional ethics. These fundamental requisites to the making of a full lawyer are almost

entirely overlooked in all of the courses of education followed in law offices, law schools, and academies or colleges. As long as a course of study exists, which offers inducements for individuals to become members of the Bar, with a mere smattering of intellectual training, the profession will be filled to repletion.

- To bribe a policeman to shut his eyes while crime is being committed; to corrupt a magistrate to permit a criminal to escape; to pay a lawyer to use his knowledge to defeat the law; what difference is there in these acts?
- In the performance of this work, the lawyer artfully puts forward the client. He insidiously fills the latter with false pleas and defenses, and he appears merely as the representative, whereas, in fact, he is often the principal actor. Is not this pure and simple dishonesty, and is not the lawyer as corrupt as any other officer who takes a direct bribe?
- It is believed that big fees will command the leaders of the bar everywhere. It is as well known as any other public
- When a lawyer cheats the law, the act is so insidious that it is almost undiscoverable. He works under the guise of his employment, which is protected all over by the sacred armor of the legal principle, that his dealings with his client are confidential, so confidential that he not only cannot be made to disclose what takes place between them, but he is absolutely prohibited from doing so. Therefore he works with perfect impunity. He is alone with his conscience. The client is not apt to disclose a secret, or plot, which is made for his own benefit, and the disclosure of which would result in getting him into difficulty. The lawyer, therefore, can arrange carefully and delicately the game which his client is to play, to defeat the law—and when the job is "put up" he can go into court, represent his client, place the whole business upon the latter's shoulders, and wrest from justice and the law,
- It may also be safely said that the prevailing popular idea of the lawyer, too often justified by facts, is, that his profession consists in thwarting the law instead of enforcing it. The modern idea of a great lawyer is one who can most successfully manipulate the law and the facts.
- It is the common belief, inside and outside of the profession, that the most brilliant and learned of the lawyers are employed to defeat or strangle justice. In fact, that the lawyers of all classes can be hired by the first comer, in any kind of a case, good, bad, or indifferent. In this view, every lawyer might be regarded as an intellectual prostitute, whose mind, whose time, whose experience, knowledge, and influence can be hired, and occupied, by any stranger, who desires to comply with his terms, as to fees. A successful lawyer, as thus understood, must necessarily be guilty in the course of his practice, of many dishonorable and disloyal acts to the State, unconsciously sometimes, but often willfully.
- If he be a man of fair natural, moral sense, or intuition, he must suffer some qualms of conscience, but by degrees these wear off—for it is the hand of little employment that hath the daintier sense—and he begins to regard it as his duty to accept all of the cases which are proffered to him. His acumen is sharpened, his devices become more numerous, and in time he begins to regard, with feelings of real triumph, the victories which he wrests from the law, at the sacrifice of justice and right. It is his highest glory to be able to say, "I won that case," and his air is more triumphant if it is a very bad one.

- There is nothing secret, or underhand, about this part of the lawyer's business. It has the approval of the people everywhere. No one has ever, successfully, assailed the right of a lawyer to accept a retainer and employment from any man, in any case. The flimsiest defenses, or pleas, are interposed by the leading lawyers—not by those in the middle rank of the profession. In fact, the community looks with perfect complacency and composure upon a transaction in which the leading lawyer sells his talent, his knowledge, his time and influence, to the most corrupt or infamous individual in the land; to promote or sustain illegal acts, civil or criminal; while, at the same time, condemning in the most unmeasured terms the client and his performances; condemning the author and his acts, and applauding the lawyer who shields and sustains him! To-day a multi-millionaire, can take his pick of the Bar, in any case.
- All these anomalies in law practice, these paradoxes in morals, are constantly witnessed. Yet if one contemplates the true position which the lawyer fills in the Government, as an auxiliary in the administration of justice, the evil that must result to society, when he transforms himself into an agent, for defeating the object which he is created to promote, becomes apparent. The idea of the Government licensing an army of legal agents to defeat or delay justice, the exact dispensation of which, is among the first purposes, for which society is organized, is most extraordinary and anomalous.
- So those qualities of fidelity to, and sacrifices for, the client, of which I have heretofore spoken, and which are so often illustrated by lawyers in their employment, and which, in the abstract, are virtues highly to be extolled, are no longer virtues, but become positive vices.
- If, in the actual working of any system of jurisprudence, a condition of things exists in which fidelity to the client and the duty to the court, to the law and society, are in opposition to each other, then it is a sure sign that the whole of that state of things, system, courts, lawyers, and public opinion, needs revising.
- The acts, of one lawyer may not be enough to affect the foundations of justice, the combined acts of a body of lawyers oft repeated, like an army of worms, silently and secretly gnawing at the foundation of a great and magnificent structure, will gradually but surely cause it to give way and tumble into ruins.
- Let anyone consider the effect of forty or fifty thousand legal agents spending their lives in distorting and prostituting the forms of justice, misapplying and perverting its principles, undermining the constitution and laws, and he can make fairly accurate calculations as to the longevity, of the system of government, under which they exist and thrive. If the philosopher or critic is looking for evidence of decay, let him carefully examine the methods of practice, and the moral and intellectual condition, of the legal profession—especially in this republican form of government, where the influence of the lawyer is so potent for good or for evil—and where in fact, every branch of government, is dominated and administered by him.
- If the lawyers comprehend these things; if a system of education is introduced, which brings before them a clear conception of their position in the government under which they live; if their consciences are educated and thus quickened; if the cultivation of a high moral sense is made a distinctive feature of their education, a different class of lawyers would soon appear, and many evils would gradually disappear.
- Lord Brougham, in his defense of Queen Caroline, which have done incalculable harm and damage to youthful, designing, or resourceful lawyers. In that celebrated trial, he said: "I once before took

occasion to remind your Lordships, which was unnecessary, but there are many who may be needful to remind, that an advocate by the sacred duty which he owes his Client, knows in the discharge of that office but one person in the world, that Client and none other. To save that Client by all expedient means, to protect that Client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a parent from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his Client's protection."

- There perhaps never was language written, or spoken, which contained worse doctrine than that which I have just quoted, of Brougham, and yet it has been relied on over and over again by lawyers, to cover all kinds of dishonest practices and defenses, and the great name of Lord Brougham is still used, to sustain many ridiculous and false positions of advocates,
- In every civilized government, rules are adopted in the body of the criminal jurisprudence, to punish, severely, all persons who aid, or abet, in the commission of crime, or who, after its commission, aid, or abet, a criminal to escape detection, capture, or punishment. An accessory before, or after the fact, is recognized as almost as bad as the principal criminal.
- An accessory after the fact is a person who knows a felony to have been committed, and who relieves, comforts, or assists the felon. Therefore, to make an accessory ex post facto, it is in the first place requisite that he knows of the felony committed. And generally any assistance whatever, given to a felon to hinder his apprehension, trial or punishment makes the assistor an accessory,—as, furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence, to rescue or protect him. And so strict is the law, where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or relieve one another.
- If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories ex post facto. A married woman, however, does not come within this rule, because she is presumed to act under the coercion of her husband. We see, therefore, for the maintenance of society, with what strictness and severity, the hand of the law is uplifted against those who aid, or shelter, or assist, criminals to escape their just and necessary punishment.
- But the lawyer's duty is not to aid or assist the guilty to escape—although that may be the result of his efforts—but it is to see that the forms of the law are maintained. To do this he can employ his knowledge and experience, and all of the arts of advocacy in his attempts to acquit clients, without a resort to dishonest and covert means and practices. If these views be correct, it would seem to follow, that the lawyer's duty, to defend a person in those cases where he has a belief, or a moral conviction, of the guilt of his client, is quite clear.
- With a full conception of the general nature of his duties, it is with the lawyer himself to determine,

whether he will aid, or defeat, justice. No special rules can be laid down, for all kinds of conditions constantly confront him. Keeping in view that he is an officer of the court in the real meaning of the term, that a court is a place where justice is judicially administered, and the remarks of an eminent Equity Judge, Lord Langdale, 1 that "lawyers are ministers of justice, acting in aid of the Judge before whom they practice"—the lawyer cannot go far astray, in the discharge of his duty. In the complete performance of the latter, the lawyer becomes the most useful and important member of the community—a true patriot of his country, a faithful and intelligent representative of his client, and a useful officer of the court.

- I proceed now to classify the existing conditions and their causes, and to suggest remedies, which, in my opinion, will essentially mitigate, if not exterminate, existing evils.
- FIRST: THE FIRST CRITICISM IS THAT THERE ARE GENERAL DEFICIENCIES, IMPERFECTIONS, AND LOOSENESS IN THE PRELIMINARY, ELEMENTARY, AND LEGAL EDUCATION OF LAW STUDENTS.
- SECOND: the existing state of the law and LAWYERS ARISES, PRINCIPALLY, FROM CODIFICATION, SO CALLED, BY WHICH THE PRACTICE OF THE LAW IS CONCENTRATED UPON FORM, RATHER THAN SUBSTANCE, INVITING AND CREATING WHOLESAL TRICKERY AND SHARP PRACTICES, ALL PRODUCING THREE OF THE WORST ENEMIES OF JUSTICE AND JURISPRUDENCE, I. E., (1) DELAYS, (2) COSTLINESS, AND (3) UNCERTAINTY; TO SAY NOTHING OF ITS BALEFUL INFLUENCE UPON THE LAWYERS. The multiplication of precedents, has invited and encourages technical, narrow, illogical, sophistical, and unjust distinctions and arguments, in efforts to defeat real justice.
- THIRD: THE EXCESSIVE NUMBER OF LAWYERS, IS DETRIMENTAL, BOTH TO THE COMMUNITY AND THE MORALE, OF THE PROFESSION. It creates, encourages, and continues illegal, unfounded, and fraudulent practices, demands, and litigation, because necessarily many of the lawyers depend, not upon professional knowledge and accomplishments, but upon sharpness and cunning. In the effort to sustain themselves, much unnecessary and unfounded litigation is inaugurated, and many disgraceful practices engendered. For example, how many lawyers' offices does an individual need to visit, to procure an attorney to make a defense to a suit, where there exists no meritorious or substantial answer?
- FOURTH: the general lack of manners, AND THE ALMOST TOTAL LOSS OF AN espHt de COrpS, AMONG THE MEMBERS OF THE BAR.
- FIFTH: THE ADVENT OF WEALTH, AS THE SOLE CRITERION, OF ARISTOCRATIC, OR SOCIAL, POSITION AND DISTINCTION, TO THE EXCLUSION OF INTELLECTUALITY, REFINEMENT, AND LITERARY, CULTURE.
- SIXTH: THE RADICAL CHANGES WHICH HAVE OCCURRED IN ALL PROFESSIONS AND BUSINESS AND COMMERCIAL OCCUPATIONS AND RELATIONS, RESULTING, INTER ALIA, IN THE FOLLOWING: Changing law into a business.
- SEVENTH: the increase of litigation HAS CAUSED (PERHAPS, IN JUSTICE TO THE BENCH, I SHOULD SAY "FORCED"), THE ADOPTION BY THE COURTS, OF RULES, WHICH FURTHER LIMIT THE TRUE SCOPE OF THE LAWYER'S FUNCTIONS. These rules, make the occupation of a lawyer, one of pure commercial business.

- EIGHTH: the existence of an undefined FEELING AND SENTIMENT THAT JUDGES IN CERTAIN LOCALITIES ARE, TO A GREATER OR LESS DEGREE, SUSCEPTIBLE TO POLITICAL, OR OTHER SOCIAL, FRIENDLY, OR EVEN CORRUPT, INFLUENCES IN THE PERFORMANCE OF THEIR DUTIES.
- NINTH: THE ENORMOUS EXTENSION OP THE PRACTICE OF CONTINGENT COMPENSATION, HAS UNDOUBTEDLY AFFECTED THE CONDITION OF THE BAR, TO SOME EXTENT. HOW GREAT, IT IS NOT POSSIBLE, EXACTLY, TO SAY.
- TENTH: the non-existence of a division of the bar into two classes: 1st, attorneys or solicitors; and, 2d, counselors or barristers. No matter how this question might have been decided many years ago, the vast changes in, and increase of, business, require the profession to be divided into two classes. I have already alluded to this subject. 1 I think I have said that this division would, alone, stop many causeless suits which are now begun.
- Here I shall end. I hope it is unnecessary to say that I love the profession, and have at heart the best interests of its members. Apart from his individual employment, where his mind is naturally affected by the bias of an advocate, the lawyer is a character which the community should be interested in maintaining and not depreciating. His mind and training incline him to free and pure thought and independent judgment. That judgment is constantly called into exercise in every description of domestic and personal concern. Trained in the knowledge of human nature, when he enters the field of jurisprudence and politics, his acts and opinions should be of the greatest value to the people. I would build up a race of pure lawyers, as far removed from commercialism as possible.

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