

¶License, not learning makes the lawyer.

## WHY THE LAWYER IS INCOMPETENT

LITTLE is clear and understandable about the lawyer if his political nature, as well as his quasi-supernatural origin, is not discerned. Physicians, like lawyers, it is true, operate under political authority. But it is not the license that makes a man a physician. The license is an afterthought, a purely regulatory measure. With the lawyer, however, it is his license rather than his supposed learning that confers competency upon him. No matter how much one may know about law one is not, by any means, a lawyer without a license to practice issued by the bench upon the certification of the bar examiners. But with license in hand any lawyer's application in court has full force, in some jurisdictions whether he has studied a few months in a law office or holds a doctorate in jurisprudence. Lawyers, by the way, do not, like doctors, have to serve a period of supervised internship upon leaving law school. The entire body politic is their training clinic—with deplorable consequences for society.

It may be urged that a doctor would not be admitted to a hospital without a license. But a surgeon in New York is just as much as a surgeon in London, Bangkok, or Capetown. Similarly with the engineer, the pianist, the chemist, the economist, the novelist, the soldier, and the actor. But the lawyer, once he leaves the political division of his professional origin, is a lawyer only by courtesy. What he knows professionally is no longer of objective force and effect. In order for him to be restored to full professional capacity abroad he must be relicensed, which usually requires that he forswear his previous nationality, since members of the bar in most Western jurisdictions, unlike other professionals, must be citizens.

The extent to which the immunities and privileges that make a man a lawyer depend upon the state rather than upon any ability innate in himself is brought to light most readily perhaps by imagining that a lawyer is on a cruise ship going round the world. When

the ship leaves the home port the lawyer is no longer a lawyer except in retrospect and in anticipation of his return. Yet all other professionals on the ship are fully competent at any stage of the voyage, irrespective of any political jurisdiction that may be encountered, to perform their professional duties.

If the state itself is removed, as by revolution, all of the lawyer's professional attainments, all of his privileges and immunities, fall away from him, and are restored only if the new state relicenses him. In Soviet Russia the bar was destroyed entirely as an instrument of the old regime. Whatever Tzarist Russian lawyers had known was swept out of existence. Yet all other Russian professionals, including clergy and soldiers, retained their full powers although the clergy too lost political status and for a time had to practice their profession in secret.

Professor Llewellyn of the Columbia Law School says of this creature: "The fact is that a third or more of the lawyers now in practice in metropolitan areas are incompetent. Law school faculties give degrees to men to whom the faculty would under no condition entrust their personal business.

Bar examiners find no way to keep such men out of the Bar."

This high percentage of technical incompetence could scarcely be duplicated in any other professional field. Incompetence in professional spheres outside of law and theology—all clergymen's prayers presumably having equal force in heaven—is soon found out, and an automatic elimination tends to occur. But the lawyer, whether technically incompetent or not, retains status and function. Technical competence of course has little relation to popular repute. Bluff and the maintenance of a bold front play a larger role in the legal profession than in any other. The most inflated reputations at the bar are the result of self-dramatization before copy-hungry journalists.

But behind the big reputations, behind the legal dervishes, there may often be a great deal of technical competence—but it is not their own. Such theatrical figures are supported in their work by what is known as "the lawyer's lawyer," an adept who for a special fee or as an invisible partner in a law firm straightens out the technical difficulties for his spectacular brethren at the bar who spend much of the time gunning

for clients or dining out. The "front men" of the leading law firms, the men the public sees and hears about most often, are usually chosen as film stars are chosen—for their glamour or histrionic abilities, or both. Indeed, the functions within the bar are specialized along lines very similar to those of the theatrical profession: the bar has its actors, its playwrights, its play doctors, its managers, and its directors.

The real knowledge within the profession, the broad play of intellect, is to be found in "the lawyer's lawyer" and in the members of the faculties of the leading law schools. Technical competence of a sort is to be found as well among lawyers who specialize in certain narrow fields, but here competence seems to derive from repetition of the same tasks more often than from any creative ability or original insight.

But technical incompetence aside, it may be said that the entire legal profession is fundamentally incompetent, its experts along with its fakers, in so far as it fails to attain for society the general end toward which it is avowedly working and which gives it social sanction: justice. In this respect the legal profession in the demo-

cratic countries is the most incompetent of all the professions. It will not, for instance, bear comparison with the medical and teaching professions. The incidence of ill health and disease has been clearly on the decline in an era of great population growth. The percentage of illiteracy is falling steadily and the level of technical competence in all fields of specialization (except the law) is rising. But justice gets forward no faster.

Being a professional implies skill, an ability to perform expertly a certain operation or series of operations. A pianist is not asked before being qualified to appear in public to answer questions on how he will play certain compositions; he is simply requested to play. A surgeon is not required except in the elementary stages of his training to answer questions about the performance of an operation; after a period of internship he is told to operate. The novelist is not expected to answer a series of questions propounded by a publisher about the writing of a novel; he is merely required to write a novel. In the lawyer the technic of which he has command comes down, *in a majority of cases*, not to a demonstrated ability to procure justice, but merely to an abil-

ity to open a book and read, to open his mouth and talk. The competent lawyer reads more discriminatingly and talks more oppositely than the incompetent lawyer; that is all.

The lawyer is also unique among professionals in that his technic—his reading and talking—is by itself impotent. It attains efficiency only as part of a collective enterprise in concert with an opposing lawyer, a judge, and a jury. Furthermore, all the collective talking, reading, and listening, which adds up to argumentation, has meaning only as it is invested with meaning by the state. The school of realistic jurisprudence appears to be very iconoclastic when it says that law is what a judge says it is. But law is much more than this. It is what the judge says it is *by virtue of the authority vested in him by the state, an authority procured for him by dominant or ascendant social groups that have contrived his election or appointment.*

The work of all other professionals, however, is individually significant, and, as far as technic is concerned, is not dependent upon the intervention of the state or of social groups. Individually the

lawyer is the most impotent of professionals. The end in view of his work is not, again, justice, but power, and if he finds himself challenging a stronger power on behalf of a weaker he encounters the judge.

In every division of law, Dr. Cohen finds, the profession and the courts evade positive fact whenever possible by taking refuge in metaphysical concepts not susceptible of empirical verification. A few such concepts, which cannot be examined or tested as real existents, are *corporate entity, property rights, fair value, title, contract, conspiracy, malice, proximate cause*, and others like *property, good faith, bad faith, and possession.*

The problems of our day, like those of yesterday and the day before, are being discussed and "solved" in terms of legal verbiage. In other words, the problems are not being solved but simply are moved from one dialectical plane to another. The legal profession, working in this theological confusion, obscures rather than clarifies social problems.—*Ferdinand Lundberg, condensed from Harper's Magazine.*