

Fall 9-1-1958

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Recommended Citation

Arnold J. Toynbee, John J. McCloy, and Francis P. Gaines, *The Role Of The Lawyer In A Changing World*, 15 Wash. & Lee L. Rev. 188 (1958), <https://scholarlycommons.law.wlu.edu/wlulr/vol15/iss2/3>

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THE ROLE OF THE LAWYER IN A CHANGING WORLD

A Colloquy Between ARNOLD J. TOYNBEE* *and* JOHN J. MCCLOY†

Moderated by FRANCIS P. GAINES‡

DR. FRANCIS P. GAINES: In 1897, the Board of Trustees of Washington and Lee gave a one-year leave of absence to a young law professor. The year passed. Quite a few years later I came here as president. I found that nothing had been done about that leave of absence. It had not been extended; it had not been revoked; it had not been acknowledged. In 1947, I wrote a letter to that young professor, whose name was John W. Davis. I told him that I thought fifty years was long enough to go frolicking around the world and that he had better come back here and go to work. He wrote me a letter, as he frequently did, in rhyme, expressing his opinion of the academic world. The key thought in his mind was sloth and indolence, and he exhausted Roget's

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†See biographical note to *The Extracurricular Lawyer*, *supra* at p. 171.

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Thesaurus of all the synonyms for those words that he could find. Of course, I wrote him back expressing my opinion of the legal world. I remember that I started the letter in a historical vein, saying that this world was a paradise until a lawyer got into the Garden of Eden and gave Eve the first cross-examination, and that brought death and all our woes into the world!

I should like to begin this panel discussion with some good literary illustration, since that was my field. The only thing I seem to remember is Dickens' *Bleak House*, which is not complimentary to the legal profession. A law firm had a case and they had no intention of ever seeking a settlement because three or four generations of lawyers, as I recall it, had made their living off that case. Now, without further reference to the literary backgrounds of the law, I should like to ask Dr. Arnold Toynbee: What contemporary phases of the law in the extracurricular field can be considered a part of our heritage? Would you have something to say about that? This gentleman, as you all know, took over when Clio, the Muse of History, resigned.

DR. ARNOLD J. TOYNBEE: Well, I am, after all, a layman and not a lawyer, and come from a different common law country, England, not the United States. Some thoughts have been passing through my mind, as Dr. Gaines has been speaking, of the change, in one's own short lifetime, in the layman's picture of what the lawyer is. When a child, I thought of the lawyer as being the family lawyer, a kind of counterpart of the family doctor. He was a man who dealt with small legal business between private individuals. His chief duty was to induce his clients to make their wills. We all know that we hate to think that we are going to die, so we hate to make our wills. So, it was his duty to bring his clients to the point of making them. I suppose his staple income came from small fees for a very large number of wills, because among private individuals there was quite a large amount of money to bequeath in the pre-surtax days. It was on very rare occasions that these respectable clients fell into a lawsuit. He would look after such business, but essentially he was a man who dealt with small legal transactions between middle-class private individuals.

Two of my school fellows, who have been my closest lifelong friends, went into the law, but the kind of thing they have done in their lives is unrecognizably different from this picture of the family lawyer. One of them became what we call in England a parliamentary draftsman. For many years he drafted the budgets of the Government of the United Kingdom, and he would draft many of those very complicated

laws that have to be drafted when the detailed affairs of private individuals are scrutinized by the State, as they are in a Welfare State which has a Health Service and Insurance Service and other things that impinge on every individual man, woman, and child in the country. He was a draftsman in the employ of the Government, but, of course, opposite him there were many other equally able lawyers in the employ—not so often of private individuals, who could not afford to employ them—but of private firms who were working, not to *evade* taxes, of course—to evade taxes is a crime and puts you in prison—but if you know the law you can *avoid* taxes, which is perfectly respectable. The law is very obscure and, therefore, to know it is very expensive. You would have to employ a first-class lawyer to know the difference between the moral crime of evasion and the very respectable and different process of avoidance of taxes.

Then my other friend. What has he become? He has become the principal arbitrator between the Ministry of National Insurance in Britain and the insured persons. If there is a dispute between the Ministry and someone who claims compensation under the Insurance Law, the decision of the case will be a precedent, whichever way it is decided, involving perhaps hundreds of thousands of people and very large sums of money. So, there has to be an independent arbitrator—a distinguished lawyer—to decide between the Ministry on the one hand and these claimants on the other. And that is his job.

Now, those two jobs are quite unlike anything I should have thought of as being the job of a lawyer, when I was a child. And the point is, I think that these two friends of mind are typical, perhaps, of a modern lawyer. They stand not between one small individual and another; they stand between an individual or a private corporation and the all-powerful State, either in the service of the State, or in the service of a corporation, or in the arbitral position between the two. That is a big change in one lifetime.

GAINES: Mr. McCloy, could you embroider a little on the expanding function of the lawyer in this complex world we know?

MR. JOHN J. McCLOY: Well, the lawyer's role has certainly changed. The subject of this panel is "The Role of the Lawyer in a Changing World." Maybe the role is that which was suggested by Jack Cade in the first plank of his constitution: "Kill all the lawyers!" And maybe this is just the sort of change we need.

The role of the lawyer in Britain has certainly changed, as Dr. Toynbee has pointed out, and so it has changed here. Before the turn

of the century we had this family lawyer concept and a close personal relationship, and it is only really since 1900 that the corporate lawyer, so-called—the financial lawyer, the business lawyer—has become part of our commercial system.

The real challenge, I suppose, to the lawyer today, as it is indeed to all of us, is to cope with this tremendous menace that we have hovering over our whole society. That is a menace of another war, and a war in which it is almost certain that absolute weapons will be used. The role of the lawyer has always been to uphold the law. He is an officer of the court. He has participated in the development of many communities in this country which started out as very rough, violent areas indeed, and he certainly has assisted, along with the better citizens, in the development of the legal system and the avoidance of violence. Now our respective states are pretty well organized, but we are running into this terrific threat—not really running into it, for we have had it for centuries and centuries, but we never dealt with it with the sense of urgency that we have now. I am very much intrigued with what the lawyer can do to bring about a more rational method of solving our international disputes, with what he can do by reason of his extensive representation in the life of the community, whether it be business or whether it be government. And perhaps by reason of his experience in human contacts, developed when he was trained as a personal advisor and counselor, and now being used as an advisor and counselor in the commercial and business framework of our society, he has become increasingly active in government. He ought to be able—and we should demand of him—that he bring something to bear on this great problem that we face.

GAINES: Do you see promise in that direction, Dr. Toynbee?

TOYNBEE: Well, the layman often has some harsh things to say about the law, but he has to admit that going to law is always better than fighting—however unsatisfactory the results of going to law may be. I do feel that this applies to the situation which Mr. McCloy has put before us. And perhaps the fact that lawyers are now having much more to do with government and governmental affairs will lead them towards international governmental affairs—finding a substitute for fighting on the international level.

GAINES: We have had in this institution, as my colleagues know, International Law, taught from two different points of view: in the Academic School it has been taught as a part of the cultural story of our race; in the Law School it has been taught as preparation for the

actual practice of law. But Mr. McCloy and Dr. Toynbee have brought us an even broader concept of International Law. If you were sitting in a seminar with a group of lawyers. Mr. McCloy, on this matter of the lawyer and the world situation, what would you say to them?

McCLOY: I would say that they are molders of public opinion. By and large, I hope I do not give the lawyers too much credit, but certainly the good lawyer in a community is a person who is looked up to as having opinions that are worthy of respect. He is a formulator of public opinion. I believe that there has to be great formulation of public opinion throughout the nation, across the seas, throughout the world, in order to have people generally realize the futile consequences—not merely futile, the fatal consequences—of our resorting in these days to the arbitrament of war.

Clemenceau said, "War is too serious a business to leave to the generals." Now war has become too serious a business to leave either to the generals or to the politicians, or to both of them put together—or, indeed, to anybody but the people themselves who would be so much involved in the destruction that would result from a nuclear war today.

I do not speak exclusively for the lawyer. I would warn this seminar not to be too arrogant about the lawyer's role in this thing. They should sit down with other members of their community—the scientists, the businessmen, the engineers—but, being as articulate as I hope they would be, they would perhaps be a little better able to formulate some of the issues that divide our international society. They could interpret some of the forces that are playing around the world to the community which they are in and guide that community toward an objective: a knowledgeable approach toward thinking that is necessary for us to have throughout the world, and a development of tolerance in order to deflect this menace that hovers over us. The lawyer's services can be especially valuable because he is knowledgeable, he is tolerant, he is practiced in taking several points of view into account while at the same time realizing the importance of maintaining stability in our society. The lawyer has the same instinct that Bacon, in paraphrasing the Biblical quotation, had when he said, "Cursed be he who moves the landmark." So, he can hold on to the rich landmarks of our lives at the same time that he can be observant and appreciative and interpretive of the great forces that are playing around the world and to which we all have to adjust ourselves. Now, these were just generalities, which, as Justice Holmes said, "Aren't worth a damn."

GAINES: I should like to ask for Dr. Toynbee's judgment on that very point. With your knowledge of history, Doctor, and considering all the tribes and the races and the fashions and the prejudices and the arrogance and the greed in all the little divisions of our human race, but knowing that some progress has been made, do you see any reasonable hope that law can supplant this frightful condition in which we find ourselves, of forever arming to the utmost with the result that some little accident may set off a conflagration of the world? Do you think law will take the place of this tension of the military force that now seems our only reliance?

TOYNBEE: I do think that in the past constructive-minded lawyers played a great part in persuading public opinion to enlarge its loyalties. It is obvious in the history of this country that an enlargement of loyalty from the States to the Union was largely brought along by the imaginative genius of a number of great lawyers. They did not achieve it themselves; they helped the public achieve it. I think that is Mr. McCloy's point.

Look at the history of your neighbors to the south, the Spanish-American countries. Was it not lawyers that established the authority of the Spanish Crown as against the chaotic civil war that followed the original Spanish conquest? Look at the history of England. Was it not the lawyers who built up the power of the Crown, and therefore the united national state, as against the local feudal people? Can we not therefore hope the lawyers may succeed in doing something of the same kind for the World Community? Mr. McCloy has put his finger on the point that is in all our minds all the time now: today for the first time the continued existence of the human race is in question and in danger. If the human race disappears, everything disappears. Every state and nation and ideology and cause that any human being can have disappears with the human race as a whole. Does not this mean that we have to make this difficult transfer of paramount loyalty from particular parts of the human race to the human race as a whole? We have got to care more about being human beings than about being Americans, or British, or Russians, or whatever our local loyalty is, because, unless human beings do keep on existing, there will not be any American human beings or any English human beings or any Russian human beings to go on existing. We have to be human beings first.

That is a big transfer of loyalty. It is not a hopeless thing because there have been such transfers in the past. And it is here that the lawyers may help. Fortunately, the Russians, I believe, are rather legal-minded. That makes them very difficult to negotiate with. They

are really stubborn negotiators over details. But I think it is true to say that once they have made an agreement they are likely to abide by it according to their interpretation of it—which is the most you can say of any legal-minded people, perhaps. I am, therefore, not too despondent about being able to come to some common ground with the Russians on legal terms, and I hope that this new agreement between the American and the Russian governments, for the interchange of American and Russian citizens in various walks of life, will include a very strong contingent of lawyers. I think that if Russian and American lawyers could get to know each other personally and understand the way their legal minds work, helped by the strong professional bond, as happens with people of all professions, that might be a real step toward exorcising this nightmare that we all have in our minds.

GAINES: Mr. McCloy, at what stage is that program now, the interchange to which Dr. Toynbee referred?

MCCLOY: It has now begun. We have a cultural agreement, which is a big step forward. I think it is highly desirable. I do feel that there is a common language that the scientists, for example, speak. They have a camaraderie. Heretofore, before we got into this atmosphere of mutual suspicion, it was the normal course for a scientist in his laboratory—I guess you call it “lab-or-a-tory,” Dr. Toynbee—to transmit his findings throughout the world. He would write a paper on it and distribute it all over. To a very large degree that is all stopped now. That is unfortunate, and I think we ought to have these exchanges not only among scientists, but among lawyers as well, as a sort of camaraderie in their profession, too. I have a feeling that the Russians are subject to enlightenment, public impression, public opinion. They are deeply suspicious people, I find from my experience in negotiating with them, and they can be awfully exasperating and stubborn, almost as exasperating and stubborn as some American lawyers. But they are somewhat sensitive to public opinion. And we, on our side too, can realize that these people have fingers and toes and breathe in very much the same way we do.

Another goal that I think important is bringing the public opinion and the influence of neutrals to bear on the Soviet Union. Not only neutrals, but, indeed, some of the satellites. For that reason, I think the Ford Foundation, for example, has done the right thing by breaking into Poland the way it has. You find people there that talk the same language you do. That will get back gradually into Moscow, and perhaps, after a certain period of these interchanges, the suspicions will

be lowered. At least this is the hope, and without hope we cannot live. I would assume then that this would lead to some understanding on the part of the Russians which would bring about withdrawals from, let us say, Germany. And if we are not too belligerent and too demanding ourselves, some good might well develop out of a period of exchanges where we could get to know each other and our thoughts better.

GAINES: Thank you, Mr. McCloy. Has anything been done of significance in the study of International Law itself, as that law might be affected by this "changing world" or by this situation of fright? For example, what about the legal authority of the United Nations? Is that being explored?

McCLOY: May I speak of that? Grenville Clark, the very distinguished lawyer, is completely convinced of the futility and the horrendous consequences of further wars. He has dedicated himself for the remainder of his life, to working out, as best he knows how, a system that will avoid war. He has gathered about him in Vermont a group of two or three brilliant young fellows, and they have tried to amend the United Nations Charter in such a way as to put teeth in it, in terms of its being the unit that would command the only forces, aside from police forces, in the world. All nations would abolish their national armies and navies and air forces. He would set up the United Nations Air Force and he would change the mechanics now provided by the United Nations Constitution. Whether you agree with that or not, this is a man who has a keen mind and who has been through the process of preparation. No greater patriot lives than Grenville Clark. This is an example of what a lawyer can do when no longer burdened by day-to-day practice. It would pay for lawyers to read Clark's new book, outlining the plan.¹ He is trying to break some entirely new ground. As fantastic as it perhaps may seem to many of you when you hear it for the first time, it has the germ of a concept that is worth exploring.

GAINES: Dr. Toynbee can bring us the viewpoint of a nation that is not Russia and not America and not in this last lap of the desperate armament race. What would the other nations think of yielding their sovereignty in behalf of some such code as the United Nations might develop in order to get a legalistic world instead of a militaristic world?

¹EDITOR'S NOTE: The book referred to by Mr. McCloy is Clark and Sohn, *World Peace Through World Law*, published by Harvard University Press, Cambridge, Mass., in 1958. The price is \$7.50.

TOYNBEE: I was really interested in what Mr. McCloy said about Grenville Clark, because here is a very able and effective lawyer who has done just what we have been talking about—a lawyer who has played a great part in getting public opinion to adjust to a new situation. He apparently is now trying to develop a public opinion favorable to transferring armaments from national hands into international hands.

Now the human race is in danger and our first loyalty must go to the human race. It is just no good to have a loyalty to any smaller units if the human race disappears. My country is very divided about this, as you saw at the time of the invasion of Egypt in the Fall of '56, when families were split right down the middle. There are some people who look backwards as some do in France, and regret the fact that we have ceased to be a great power and that our Empire is slipping away from us. But there are other people who think, "Well, that's just a fact, why pine about it, why not make the most of the new position that you have, just when you cease to become powerful in the material sense."

Interesting at the moment in Britain is the movement led by Bertrand Russell, in which my son is playing rather an active part, for unilateral disarmament, feeling that someone has to take the lead and somebody has to take a risk. If we could limit atomic armaments to the two great powers, the United States and Russia, perhaps that would be quite a useful step toward helping them, through negotiation, to scale down their own atomic armaments and perhaps to abolish them.

Also there is a moral side. We just do not like to handle these weapons; it is a crime against the human race to use them and to make them and even to have the possibility of firing them off. I do not know what is going to happen about Russell's movement. I fancy it will not swing the whole country, but I fancy it will very much put the fear of God into the politicians of all parties. It will make them go much further in the direction of national disarmament and the handing over of armaments to the United Nations than if this movement had never existed. I am amused to see what a great conservative Bevan turns out to be when he comes to this question.

I think the Bertrand Russell movement is doing one great service. It is going to force us in Britain, probably in the Western World as a whole, maybe in Russia as well, to think out what our relative values really are, what are the first priorities. What Russell has in effect said to the British people is this: "Which do you mind more—perhaps

coming under the subjection of the Communist World, the Communist Russians, for perhaps generations or several centuries, or the prospect that your children and your grandchildren, unlike yourselves, will have no grandchildren?" Now, for the very first time in the world, it is very uncertain that any of our children and grandchildren will themselves have grandchildren. Some people smile. This is a perfectly serious question. It has never faced us before and it may not alter our values. We may say we prefer to wind up the existence of the human race rather than to allow us and our descendants to come under the Communist rule. We have to face that. Which really is the lesser or the greater evil? All of us have to face that question, and I think that, until we have faced it and gotten some kind of common answer in the West, there is great danger that we shall be divided in the face of the Russians. And, no doubt, the Russians have been divided over this question, too. The Russians do not want to be extinguished. They want to convert the world. And you cannot convert the world if you are extinguished.