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# DUTY TO SERVE THE COMMON GOOD†

LEWIS F. POWELL, JR.\*

Six years ago, in San Francisco, I talked at this breakfast. I am as uneasy today as I was then. Apart from a small teenage Sunday School class years ago, I have never addressed a religious gathering. But I try to do what Bill Spann asks me to do, and he emphasized that I was not expected to give a sermon.

This invitation to speak encouraged me to look back at what I said in San Francisco. I talked then about the diminishing influence in our society of what I called "humanizing institutions": the home, the church and the school. These priceless institutions have instilled in our young the values that until recently sustained western civilization. Among these values are duty, honor, loyalty, patriotism, belief in the work ethic and belief in the worthiness of religion.

I thought it might be of interest, as we meet here in New York, to talk about two native sons of this state whose lives exemplify these values: Charles Evans Hughes and Benjamin Nathan Cardozo. Since their remarkable careers of public service are well known to this audience, I will talk only about the influences that shaped and inspired their lives—primarily in the formative younger years. I also will emphasize their perception that *duty* is an essential value of a worthwhile and enduring society. Few men in our history have had a higher sense of duty than Chief Justice Hughes and Mr. Justice Cardozo. Both rejected personal gain as a goal, emphasizing throughout their careers devotion to the service of mankind.

Charles Evans Hughes was the only son of a Baptist minister and a loving and highly intelligent mother. Hoping that Charles would enter the ministry, his mother devoted most of her waking moments to his instruction. At three, young Hughes was reading; at five, he was familiar with the New Testament and had a nodding acquaintance with French and German primers. Under his mother's tutelage, he became proficient early in "mental arithmetic." His mother lovingly guided him through all that his father's large library had to offer. Perhaps Hughes' extraordinary intellect and self-discipline can be traced to this early training within the family.

Religious training also infused his early years. Even when riding his hobby-horse, young Hughes would take imaginary trips up and down the

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land of Palestine—a land he knew well from an illustrated book on Biblical lands. At an early age, he was taught that there is something greater than ourselves, something beyond individual desires, a greater good for which each man should strive.

At the age of 12, he graduated from the foremost public school of New York City and then attended Colgate (Madison College at that time) before transferring to Brown University at the start of his junior year. College, and the influences there of students, faculty and liberalizing sources, perceptibly broadened family-structured horizons. Thoughts of a career in the ministry were abandoned and doubts were instilled as to fundamentalist views of religion. The basic values derived from home and family, however, were never rejected. Indeed, those influences remained strong and vital throughout his life.

It is of interest that although scholarship remained his preeminent commitment in college, Hughes displayed new tastes which no doubt made him a more attractive companion. He took up whist, croquet and smoking and even commenced to date. He joined a fraternity and became a rabid baseball fan, watching as Brown used the newly-developed curve ball to defeat Harvard, Princeton and Yale.

After teaching Latin, Greek and mathematics at a private preparatory school, Hughes entered Columbia Law School in 1882, which then gave a 2-year course. The remarkable career that followed, one virtually unparalleled in our history, actually was nine careers rolled into one: eminently successful practicing lawyer, professor of law, crusading investigator of the utilities and insurance industries, brilliant reform Governor of New York, Associate Justice of the Supreme Court, Presidential candidate, Secretary of State, Judge of the World Court and a Chief Justice of the United States who truly led the Court. In each role, he performed with the same dignity, the same unquestioned integrity, the same single-minded pursuit of the common good — all products of years of molding by religious training, family devotion and education.

Hughes never sought any of the high offices he held. In each office, duty — not personal gain or glory — was the beacon that guided him. Speaking on Washington's Birthday in 1908, then Governor Hughes described George Washington (whom he always greatly admired) in a way that could have been an apt portrait of Hughes himself: "Success [never] undermined him [nor did] victory disturb his poise. Duty never made her imperious demands upon him in vain. [And] that he should turn an opportunity for service . . . to his personal gain, was to him unthinkable."

In a series of lectures at Yale in 1910, Hughes expanded upon the character of the type of citizens upon which society must depend. I quote several sentences from these lectures, as they illuminate Hughes' character and the values that guided his life:

No one can properly discharge his duties as a citizen who simply has a good-natured feeling towards all. . . . [One] must learn to make his personal decisions, as well as to define his public attitude, in light of the inter-

ests of the community, and not simply with respect to the opportunities for individual gain. No allurements of high salary or of social advantage, no promise of assistance to obtain public office, should be permitted to obscure [one's] duty of absolute loyalty to the public interest. It is well to advise young men to vote and to take an active part in political affairs, but it is just as important, indeed more important, that they should understand that their first duty is so to conduct themselves in pursuing the aims of their individual careers that they will never prove false to their allegiance to the community.

This perception of duty is not born in a man or woman, nor will it appear suddenly as one approaches maturity. It is cultivated in the gardens which, in recent years, increasingly seem to be subordinated: I refer to the home, the church and the school. Charles Evans Hughes—his character and his values—was the product of these gardens.

And so it was with Benjamin Cardozo. The Cardozo family had a long and distinguished history in the United States, dating from 1752. In that year, his great-grandfather arrived in the colonies. The family originally had lived in Portugal, but had fled to Holland with the expulsion of the Jews. From Holland, the family emigrated to England.

Many of Cardozo's ancestors fought in the Revolution. Emma Lazarus, whose inscription graces the Lady in the Harbor here, was his cousin. His father was a brilliant justice of the Supreme Court of New York, as well as an intensely religious man and devoted father.

Cardozo, his brother and four sisters all received their education in the home, and Benjamin's tutor was none other than Horatio Alger. The family was closely knit — attached to, and constant companions of, one another. Within the family, no detail of the ancient customs of the Jewish religion was neglected. They were taught early to recite the words of the prophet Micah: "to do justice, to love kindness, and to walk humbly with thy God." Family members also were enjoined to be "good citizens and seek the welfare of the community in which you dwell."

Despite his uprightness, Cardozo's father fell from honor in a way that contributed much to his son's desire to excel and to serve. In 1873, when Cardozo was only three, his father resigned from the bench in disgrace, accused of improperly having bestowed receiverships on the nephew and son of "Boss" Tweed. Though Cardozo rarely mentioned his father's dishonor, he revealed to a classmate at Columbia his burning resolve to erase the black mark against the family name. This was a duty he undertook with total dedication.

As he approached manhood, Cardozo, like Hughes, rejected the more rigid, formalistic aspects of his religious training. But, again like Hughes, he never lost the sense that there is a higher good, something outside the individual, which each of us should seek to achieve.

Although indifferent to the formalism of religious services, Cardozo was a devout person in the fullest sense. In a commencement address to a group of young rabbis at the Jewish Institute of Religion, he urged the "submergence of self in the pursuit of ideals" and emphasized that "the

readiness to spend oneself without measure . . . for something intuitively apprehended as great and noble . . . is what religion means."

Cardozo did indeed "spend himself without measure" for the nobility and greatness of the law. And, once more like Hughes, these ideals of duty led Cardozo to the heights of professional, intellectual and spiritual attainment. His scholarly writings were widely acclaimed. As Chief Judge of the New York Court of Appeals, and as an Associate Justice of the Supreme Court, he was recognized as one of the country's truly great jurists and legal philosophers.

So much for the briefest of vignettes of these towering figures of our profession. Hughes retired as Chief Justice in 1941, at age 79, and lived in good health until he died in 1948. Cardozo retired from the bench in 1938 and died in the same year. In the third of a century since the passing of these giants of the law, a great deal has happened to mankind and to our country. A score of speeches could be built around the tides of history that, in this short span of time, have altered society and perceptions of both the role of government and of the individual citizen. But I shall undertake no such broad excursions. My focus generally is on the influences of the home, the church and the school. In particular, I want you to think with me, for a few minutes, about the apparent weakening of these influences on our sense of duty and the obligations of citizenship.

In his widely publicized June, 1978, address at Harvard, Alexander Solzhenitsyn took as his thesis the decadence of western civilization.<sup>1</sup> He no longer thinks that our civilization, with its present characteristics, is a model to be copied elsewhere. He views with alarm the consequences of the unprecedented economic and technological development in the west and particularly in our country. He thinks these have created a degree of prosperity, and an overemphasis on leisure and personal gratification, that have weakened the moral and spiritual fiber of our people.<sup>2</sup> The pursuit of selfish materialism, he believes, has undermined our national will and courage, as well as respect for our own institutions.

These are indeed melancholy thoughts. I repeat them here without endorsement. But they represent the views of perhaps the wisest philosopher and social historian of this century. It would be imprudent to reject them out of hand. One of Solzhenitsyn's criticisms has special relevance to my subject this morning and to the legal profession. He thinks our system places excessive emphasis on "rights." I quote his words:

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<sup>1</sup> Solzhenitsyn did not suggest that socialism — whether the Communism variety or some less autocratic form — is less decadent. He quite explicitly stated that "socialism, of any type and shade, lends [itself] to a total destruction of the human spirit, and to a leveling of mankind unto death."

<sup>2</sup> In terms of worldwide competition between the Soviet Union and the United States, Solzhenitsyn compares the easy and self-indulgent life here with the comparatively hard and spartan life of Russian citizens. He thinks, as did the founders of our country, that toil, responsibility, duty and even hardship develop, and here I quote, "stronger, deeper and more interesting characters than those generated by standardized western well-being."

The defense of individual rights has reached such extremes as to make society as a whole defenseless against certain individuals.

And in emphasizing our neglect of duty, Solzhenitsyn said:

It is time, in the West, to defend not so much human rights as human obligations.

It would be difficult for a lawyer or judge trained in our tradition and with our reverence for the Bill of Rights to accept the view that we are overly concerned with human freedom and the rights that the Constitution guarantees. None of us would accept that criticism standing alone. If, however, Solzhenitsyn had made his point differently, many would agree. A society in which there were only rights and no duties would not long survive. Indeed, the rule of law assumes that rights and duties are correlative. A first duty is to obey the law, and without general obedience there would be no rights.

Solzhenitsyn was not speaking as a lawyer familiar with our system.<sup>3</sup> Rather, he was describing a state of mind: one that places self-interest, self-gratification and freedom to do as one chooses (without violating a specific law) ahead of any duty to one's fellow man, to society generally and even to one's country. The latter and broader concept of duty of a citizen's responsibility was exemplified strikingly by Hughes and Cardozo.

The ideal of service should motivate lawyers, of all people. Thomas Jefferson once wrote:

There is a debt of service due from every man to his country, proportioned to the bounties which nature and fortune have measured to him.

The "bounties" bestowed upon lawyers in our country are measured large. We have received an exceptional education. We have a virtual monopoly on one of the three branches of government. We also are abundantly represented in the other two. As DeTocqueville observed:

The government of democracy is favorable to the power [and influence] of lawyers.<sup>4</sup>

Lawyers thus are privileged persons in our society. Although never ranking high in popularity polls, we occupy a place of influence that is unique. But we have no divine right to enjoy that place. We must continue constantly to merit it by effective leadership both in making our system of justice serve our people and in providing responsible leadership as citizens.

To be sure, we have a special duty to protect the liberties guaranteed by the Bill of Rights. I suggest, however, that, as the careers of Charles

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<sup>3</sup> Our legal system provides essentially a negative concept of duty. The criminal code, for example, is a compendium of "thou shalt nots." But even the legal system, apart from the general duty to obey the law, recognizes duties, *e.g.*, the tort law duty of reasonable care. The more meaningful and complete concept of duty — the one that I emphasize — recognizes societal obligations beyond legal ones.

<sup>4</sup> 1 A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (1848).

Evans Hughes and Benjamin Nathan Cardozo teach us, we also have an equal responsibility to inspire by example a sense of duty to serve the common good.