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Legal Ethics

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LEGAL ETHICS

THE CANONS OF THE AMERICAN BAR ASSOCIATION

MY purpose here is a discussion of (1) the meaning of "ethics" in a professional sense, and (2) the relation to the subject of the "Canons of Ethics" of the American Bar Association.

I have before me a valuable booklet[1] in which the author opposes, in one chapter, "Ethical Instruction in the Schools" and, in the other chapter, he favors "Moral Instruction in the Schools." In his use of words, "ethical" means theory, a science, while "moral" means habits, an art. He persuasively opposes, therefore, the "ethical" while contending for the "moral."

It is the author's nomenclature only that interests me at present. If by "ethics" is meant the science of conduct, and by Legal Ethics that science in its professional relations, I lose any large interest in the subject. Human conduct as a science, and Codes of Ethics and Systems of Philosophy have their place (one doubtless of large value) in a study of the history of philosophy.[2] Habits, memories of conduct, traditions, are the important matters for the professional man.

The more or less prevalent idea that Ethics is a learned science, which is of interest only to the scholar, has something to do with the absence of ethics in the professions.[3]

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[1] The author of this booklet was George Herbert Palmer, Alford Professor in Harvard University. It was published by the Houghton, Mifflin Company in 1910, as one of the Riverside Educational Monographs, with the title "Ethical and Moral Instruction in Schools." The book was written to counteract the tendency of some educational thinkers who believe "that in direct and systematic ethical teaching in the class room lies the best means of enlarging the moral influence of the school." The thesis of Professor Palmer's book is nowhere better demonstrated.

[2] I think that a reading of the names of courses offered in Ethics in any of our universities illustrates the text, and will especially impress one that philosophic learning is not necessarily an aid to right living.

The following are taken from a University Calendar of 1917:

(1) History of Ancient Philosophy from Thales to Aristotle.

(2) Kant, Hegel and Anglo-American Idealism after 1865.

(3) The Philosophy of Plato.

(4) German Pessimism in the 19th Century. A detailed study of the works of Schopenhauer, von Hartman, and Nietzche, with reference not only to their philosophical but also to their general literary and social significance.

(5) Pragmatism. A critical study of the contemporary movement in Anglo-American Philosophy, in its two main lines of development.

(6) Political Philosophy. A history of the theories of society, ancient and modern. Attention will be given especially to the contract theory of the seventeenth and eighteenth centuries.

(7) Contemporary Ethical Problems.

[3] A remarkable article, which in my judgment is here pertinent, appeared in the April, 1914, Atlantic Monthly. The author was H. Fielding-Hall. I understand that what he

As a science "Ethics" lacks inspiration. Limited to rules of conduct, the subject is dry and uninteresting. But human conduct (applied ethics) is life itself. With this meaning ethics covers the whole range of art, and is more interesting and instructive than history. The novel and the drama are but the reflection of human conduct; that is, ethics.

This is the meaning with which I use "Ethics" in my title. And there is much authority for this use of the word. I need refer only to the several books resulting from the Page Lecture Series at Yale. The purpose of the foundation was the "dealing with the question of right conduct in business matters." We are indebted to the Page Foundation for Taft's "Ethics in Service." Therein is quoted, attributed to Aristotle—

"It is the function of Ethics, to act; not only to theorize."

Very much as a community is admirable because of its ethical habits, its morals, rather than because of its wealth, or its advancement in scientific pursuits, so is a profession really distinguished by its ethics, its traditions, its memories of conduct, rather than by its intellectual attainments.

What a man does in action, and under temptation, is of more importance, and has more influence upon his fellows, than what he thinks or advises. We need mention only the name, Erskine, to realize the influence upon the English Bar, and upon history itself, resulting, not from Erskine's eloquence so much as from his fearless, nay, hazardous, conduct in maintaining the right as he saw it.

I am not sure but that the remarkable influence of Socrates through the ages has been due more to what he did than to what he taught.[4]

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writes is highly regarded where the English language is known, and especially in India and the Home Country. The title which he took, itself challenges attention: "The Fallacy of Ethics." I refrain from describing the author's argument, but in showing that no rule of conduct is of universal application (which he does very effectively), it appears to me that Fielding-Hall treats his subject from the same point of view as does Professor Palmer, namely, that by Ethics we mean a science. I am inclined to think that, with this meaning in mind, the title to the author's article is well taken. But if he had in mind, when he chose the title that the word Ethics connoted an art, or human conduct, his article would, in my judgment, not have been written.

[4] Of course I am referring in the text especially to the death of Socrates. Plato's Dialogue, "The Crito," advises us of Socrates' attitude toward the matter. From history we know that he went to his death. He had been accused before the Athenian people on charges which seemed to his friends at that time, as they do to us, to have been unfounded, both in law and in fact, and yet, as we learn from Plato's dialogue, "The Apology," he had been condemned to death. It was only a day or two before his end that Crito visits Socrates early in the morning, and tries to persuade him to escape. There is no question but that the escape could have been safely effected. Socrates refuses to go, and he silences Crito's argument to the contrary, by showing that it was the duty of Socrates to obey the law, and that for him to escape after judgment had been passed

Rules, canons of ethics, alone, cannot determine the value of professional conduct. Except in flagrant cases, in an ethical sense, it is not the thing done, but rather the spirit prompting the act which is important.[5]

Human conduct, from the ethical point of view, is best, when it is intuitive; that is, when it is the unreasoned expression of fixed habits. On the other hand, it is weak and unconvincing (even if correct) when it waits upon reason or argument.

Not altogether dissimilar to our physical habits, such as walking or eating, is that of our ethical conduct.[6]

All of these matters are learned in early life, perhaps in infancy. They thereupon become habits, which, whether good or bad, are confirmed by daily repetition. They can rarely be changed after maturity.

I wish to make these general statements clear, and, to avoid misapprehension, I illustrate by reference to the lawyer's conduct in his relations with the Court.

What standard of ethics has the lawyer who will stop to reason with himself, or with a committee on professional ethics, as to how far he should be candid with the Court? Of course he should not lie to the Court, but is it not within the rule of ethics to refrain from explaining to the Court that a case in his brief has been overruled; or to omit to set the Judge right when, without the fault of the lawyer, the Court is under a misapprehension as to the contents of the record? That lawyer is sound ethically who has no occasion to reason with himself, and certainly not to consult authorities, when such a question arises. Having absorbed the highest

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upon him would be an act of disloyalty to Athens. At the present day this attitude towards courts, and the administration of justice, is perhaps what is most desired in the legal profession.

[5] The work of the Committee on Professional Ethics of the New York County Lawyers' Association illustrates to my mind the text. This Committee has done a remarkable work in its painstaking consideration of questions bearing upon professional conduct, and the one hundred and fifty, or thereabouts, Questions and Answers form a booklet of great value on Legal Ethics. I think one will notice, however, in examining the work of this Committee, a decided tendency (as the work of the Committee progressed), in answering a question, to include limitations upon the scope of the answer.

[6] Palmer's book, referred to in Note 1 above, contains, on page 11 thereof, and in illustration of his argument, which is not different from the text, the following nonsense verse:

> The centipede was happy, quite,
> Until the toad for fun
> Said, "Pray which leg comes after which?"
> This worked her mind to such a pitch
> She lay distracted in the ditch,
> Considering how to run.

There is more sense in this verse, and in the application of it to Ethics, than in many volumes devoted to Ethics considered as a science.

ideals of conduct in general from his early life (perhaps more than we appreciate by inheritance from his forbears), and later having acquired the best traditions of his profession, he acts as it were unconsciously, and he acts right, and refuses to be in any respect uncandid with the Court. Memories of conduct have made him what he is, not rules of ethics.

Therein lies, in my judgment, the peculiar value of the Early English legal education. The Inns of Court, and the contact between the benchers, representing the high ideals of the profession, and those who were preparing for the Bar, resulted not only in a knowledge by the benchers of the character of the men who were later to apply for admission to the Bar, but it also, unconsciously perhaps, imbued the student with the best traditions of the profession.

The American Colonial Bar was more largely indebted to the English Inns of Court than is generally understood. Previous to the Revolution about one hundred and fifty lawyers from the American Colonies had been admitted to the English Bar, upon completion of residence and other requirements, of the Inns of Court. A large proportion of these men were leaders in Revolutionary and other early American history.[7]

The Bar became the most influential body in the several States. In 1835 DeTocqueville had this to say of the profession and its relation to American life:

> "In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated circle of society. They have therefore nothing to gain by innovation which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply, without hesitation, that it is not composed of the rich, who are united by no common tie, but that it occupies the judicial bench and the bar."

Dissatisfaction with the laws and the administration of justice (whether merited or not is for our purpose immaterial), was growing among our people and, due in part at least to the supposed special privileges enjoyed by lawyers, the profession was assailed. The people desired to have justice made so simple that every man might be his own lawyer. The wave of democracy which swept the

[7] The text at this point is largely derived from the remarkable book by Charles Warren upon the "History of the American Bar," which was published by Little, Brown & Co., in 1911.

civilized world between 1840 and 1850 (resulting in revolutions in Continental Europe), seems to have spent itself in this country upon laws and lawyers.

In New York, the Constitution of 1846, and legislation consequent upon its adoption, introduced revolutionary changes in the law. Affecting the legal profession directly were provisions making admission to the bar popular, and removing restraints (which time-honored traditions had created), upon the conduct of lawyers. These laws were adopted (in large part copied from New York), by other States.

In Michigan the Constitution of 1850 (Article VI, Sec. 24), contained the provision:

> "Any suitor in any Court of this State shall have the right to prosecute or defend his suit, either in his own proper person, or by an attorney or agent of his choice."

The opinion by Justice Marston, construing this clause, in *Cobb* v. *Judge of Superior Court,* 43 Mich 289, contained a clear, and, to us, convincing argument in favor of the conclusion of the Court that the words "attorney or agent" in this section of the Constitution, had no other meaning than the word "attorney."

The proper administration of justice and the protection of the public including the individual litigant compelled that interpretation.

The same language in the Indiana Constitution was there given the interpretation which the words alone seem to call for.

Champerty and Maintenance were regarded both by Legislatures and by Courts, as doctrines unsuited to conditions in this country, and, where not directly abolished, were rendered innocuous as restraints upon the profession.

The experience of ages, represented by traditions of the bar in every civilized country, was disregarded. The result of this tendency is expressed by John Brooks Leavitt, Esq., in his address in 1910 in "Every Day Ethics," one of the Page Lecture Series, as follows:

> "Fifty years ago in our State and in most other States this salutary rule was departed from, and because that departure was not properly safeguarded, the scandals now known as abuses of the contingent fee have sprung up, and our profession is grappling with their deteriorating influences, from which we must rescue ourselves or we shall become a perfect byword and scorn in the nation."

As a result of the foregoing, during the ensuing generation, individualism prevailed in the profession. The only sanction for

professional conduct was found in the Criminal law. For many reasons, few were the cases when lawyers were punished for acts prohibited by Statute. But the more weighty sanction for right conduct in professional relations lies in the enforcement by the profession of its accepted traditions.

The influence (stronger than penal laws), for right conduct exerted by the habits or ideals of a community, and the wish of the members thereof to conduct themselves, at least in good form according to the accepted ideals of the community,[8] is nowhere more convincingly stated and illustrated than in Lord Haldane's address on "Higher Nationality. A study in Law and Ethics," delivered before the American Bar Association in 1913 at Montreal (See Vol. XXXVIII, Reports A. B. A., pp. 393-417).

Conditions, especially in the larger cities, became intolerable. While it is usual, when reference is made to the loss of prestige suffered by the profession during the generation of which we have spoken, to dwell upon the lowering of intellectual standards, the more important matter was the loss in ethical habits and in professional memories or traditions. The public itself demanded more integrity among lawyers. The organization of the American Bar Association in 1878 marks, perhaps, the beginning of an effort by

[8] Of course a profession such as the law comes within the idea of a "community," as used in Lord Haldane's address. I have, as yet, been unable to secure a copy of the poem of Sir Alfred Lyall to which he refers in illustration of his line of thought. I quote from page 406 of the volume cited in the text:

"The poem is called 'Theology in Extremis,'" and it describes the feelings of an Englishman who had been taken prisoner by Mahometan rebels in the Indian mutiny. He is face to face with a cruel death. They offer him his life if he will repeat something from the Koran. If he complies no one is likely ever to hear of it, and he will be free to return to England and the woman he loves. Moreover, and here is the real point, he is not a believer in Christianity, so that it is no question of denying his Saviour. What ought he to do? Deliverance is easy and the relief and advantage would be unspeakably great. But he does not really hesitate, and every shadow of doubt disappears when he hears his fellow-prisoner, a half-caste, pattering eagerly the words demanded. He himself has no hope of heaven and he loves life:

'Yet for the honor of England's race
May I not live and endure disgrace.
Ay, but the word if I could have said it,
I by no terrors of hell perplext.
Hard to be silent and have no credit
From man in this world, or reward in the next,
None to bear witness and reckon the cost
Of the name that is saved by the life that is lost.
I must begone to the crowd untold
Of men by the cause which they served unknown,
Who moulder in myriad graves of old,
Never a story and never a stone
Tells of the martyrs who die like me
Just for the pride of the old countree."

lawyers, having a sense of professional obligation, to improve conditions. Only after another generation did this work bear fruit.

The adoption by the American Bar Association of its "Canons of Ethics" in 1908 was an event of first importance for the profession, but not because (as may sometimes have been claimed), this Code was a System of Ethics, by the adoption of which lawyers would be made good. Criminal laws failed, and professional codes are in themselves of no greater value.

The principal reason why the "Canons of Ethics" and their adoption by the American Bar Association is peculiarly noteworthy, lies in the fact that the lawyers of this Country had determined to renew the habits and to establish the traditions which have been the mark of the Bar wherever it has retained the respect of the public.

The Canons do not contain the whole ethical duty of the lawyer. They are confined to the simple rules of professional conduct to which all right minded lawyers would agree, and with which all high minded lawyers have squared their professional conduct.

The Committee of the American Bar Association, which prepared the "Code of Ethics" was composed of leaders of the Bar.[9] Among their number was David J. Brewer, a Justice of the United States Supreme Court. It was upon his suggestion that the Committee, in its work, limited the scope of the Canons to "A body of rules, few in number, clear and precise in their provisions, so that there can be no excuse for their violation."

The Canons of Ethics were adopted, at the session of the American Bar Association held at Seattle, Washington, in August, 1908, as proposed by the Committee, and without substantial criticism (See Vol. XXXIII, American Bar Association Reports, pp. 86 and 573), except as to one Canon, the language of which was modified.

By standing rule of the American Bar Association the Canons are printed in each Annual Volume of the Reports of the Association.

These Canons have received the approval of the Courts in at least one jurisdiction in this Country, and have been enforced,

[9] The names of the fourteen lawyers composing this Committee are found on page 573, A. B. A. Report 1908, being Vol. XXXIII,—not one of them but has distinguished himself at the American Bar. The final report of the Committee is found on pages 567 to 586 inclusive of the same volume. On page 570 is the reference to the suggestion of Justice Brewer, etc. The discussion in open meeting of the American Bar Association, when this report was introduced, on behalf of the Committee, by Hon. Jacob M. Dickinson, is found on pages 55 to 86 of the same volume. Of course the Canon which was the subject of criticism and discussion is that upon Contingent Fees, being Canon No. 13. In my judgment not everything, which perhaps from the professional point of view is important, has yet been said with reference to Canon No. 13.

notwithstanding respondent's claim that the Canon in question was not a part of the Statute Law of the State,

In the *Matter of Adolph M. Schwarz,*
161 N. Y. Supp. 1079.

I am content to close this article with the following brief quotations from members of the profession whose opinion is entitled to favorable consideration:

"The Canons of Ethics are not framed to awaken the conscience but to enlighten the understanding."

HON. CHARLES A. COLLIN,
of the New York Bar.

"A right spirit is the life of professional honor, and, to him who does not feel it rules are but words."

HON. JUDSON S. LANDON,
late Judge N. Y. Court of Appeals.

"Rules cannot make lawyers, men of intelligence or honor."

"The basis of all ethics is right impulses. If we make the sordid things of life our ideals, we shall never attain unto any degree of perfection. Money we may get, possibly high standing and temporary honor, but the professional ideals will find no place in our life."

HON. JOHN FRANKLIN FORT,
of the New Jersey Bar,
late Governor of his State.

CLARENCE A. LIGHTNER.

Detroit.