

Judicial Ethics

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My role in this symposium is a modest one: it is to clear the ring for the feature fight of the program between Dean Brown and Professor Hartman. I am to sweep away some of the rubbish in the ring that often gets in the way of a clean battle on issues of ethics. I think the most serious rubbish that needs to be swept away is the widely prevailing notion that ethics is something off in the clouds, or off in some never-never land of Utopia, something uncertain and subjective, whereas the law is something that is very definite, clear, hard, here and now. Of course, if that were true, there would be no point in trying to apply ethical doctrines to actual cases.

That the teachings of ethics can and should be applied to actual cases is not a novel idea. It was urged years ago by an illustrious law teacher and judge. Speaking of ethical doctrine, he commented:

It is not in heaven, that thou shouldest say, Who shall go up for us to heaven, and bring it unto us, and make us to hear it, that we may do it? Neither is it beyond the sea, that thou shouldest say, Who shall go over the sea for us, and bring it unto us, and make us to hear it, that we may do it? But the word is very nigh unto thee, in thy mouth, and in thy heart, that thou mayest do it.

In line with this admonition of the illustrious teacher whose words I quote, the participants in this symposium have agreed to talk about things that are here, in our hearts, before us, and close at hand, and not entirely in some Utopia or heaven of abstractions. We all agree on one basic point: that whatever else the theory of value or ethics may be, it should at least be a criticism of things that happen day after day in our courts and in our legislatures, as well as in the privacy of our own thoughts.

The case of *Oleff v. Hodapp*,¹ provides us with a fair test of this hypothesis of the universal applicability of ethical judgments or ethical values. In that case a man named Tego Miovanis had a joint bank account with his uncle, Apostol Miovanis. Each depositor had unlimited authority to withdraw funds. Apparently Tego was afraid that this unlimited authority might be abused by his uncle, and so he removed the uncle from this mortal scene. The Ohio Court had to decide whether as a result of the murder, the joint deposit now belonged exclusively to the murderer, or whether the heirs or representatives of the murderee continued to

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¹ 129 Ohio St. 432, 195 N.E. 838 (1935).

have an interest in the joint deposit. The court decided, by a majority vote, that after the murder the bank account belonged completely and exclusively to the murderer. Passing over for the moment the question of the correctness or incorrectness of that decision, let us try to understand what it was that the court thought it was doing when it reached that decision. I quote from what the Court said it was doing:

We are not subscribing to the righteousness of Tego's legal status; but this is a court of law and not a theological institution. . . . Property cannot be taken from an individual who is legally entitled to it because he violates a public policy.² Property rights are too sacred to be subjected to a danger of that character. We experience no satisfaction in holding that Tego is entitled to this account; but that is the law, and we must so find.³

There are two things about this opinion that are particularly interesting. One is the Court's statement that "this is a court of law and not a theological institution." The second is the court's statement that "property rights are too sacred" to be subjected to certain dangers that would follow if the courts allowed considerations of "righteousness" or "public policy" to influence decisions on property rights. Property rights, we are told are too sacred. Apparently, if property rights were less sacred, or if the right to life were more sacred, the court might have decided the case against the murderer Tego and in favor of the representatives of the murdered uncle.

This question of the comparative sacredness or holiness of different rights is, I think, one of the most important questions that theological institutions have been considering for a good many years. It seems to me that this question of whether one property right, or civil right, or human right is more or less sacred than another is a very important part of theology. Why, then, should the Ohio Supreme Court insist that it is not a theological institution when it passes upon the relative sacredness of different rights?

Before we consider that question further, a few words are in order about a case very similar to the *Oleff* case, disposed of about two hundred years ago, the so-called *Highwaymen's Case*. Modern research has shown that this case was not invented by a law professor who wanted to keep his students on the straight and narrow path, but apparently was a real case.⁴ In this case, one highwayman brought suit against his associate for a fair division of the booty. The case was very skillfully pleaded; the bill of complaint does not recite that the plaintiff was a highwayman, but

² Note the delicacy of the court's reference to murder.

³ 129 Ohio St. at 438, 195 N.E. at 841.

⁴ See *Everet v. Williams* (1725), 9 L. Q. Rev. 197 (1893).

merely alleges that there was a mutual partnership, that "the plaintiff was skilled in dealing in several sorts of commodities," that the parties had, "proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch," and then further recounts how they dealt with several other gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things of the value of about 2,000 pounds. Finally the complaint recites that the defendant refused to abide by the partnership agreement to divide the swag evenly.

The plaintiff was not successful in the case. Apparently the property rights and contract rights of the plaintiff enjoyed a lesser degree of sacredness in the Court of Exchequer in 1725 than they would enjoy before the courts of Ohio today. At any rate, the Court of Exchequer ordered the tipstaff to attach the bodies of the plaintiff's solicitors. They were fined 50 pounds each and committed to the custody of the Warden of the Fleet pending payment of the fines. One of the solicitors was thereafter transported, and apparently founded one of the First Families of Virginia. At that, he did rather better than did the defendant and the plaintiff, who were both hanged. I suppose that the Ohio Supreme Court would consider that this was a rather theological disposition of the case.

These two decisions are both significant because they indicate two different approaches to the question of how far a court of law may properly look into questions of ethics, or public policy, or theology.

The approaches that are reflected in these two cases are further illuminated in the third case on our agenda, the case of the *Northwest Shoshone*.⁵ It seems that before the talented but unfortunate solicitor in the Highwayman's Case was transported to North America, this country was claimed by Indians who thought they owned it. Ever since the arrival of the first white immigrants, they have been devoting some of their finest legal talents to discovering defects in these Indian titles and, in that way, devising justifications for the removal of land, minerals, and timber from Indian ownership to white ownership, in the interest of progress. One of the most brilliant and ingenious justifications of this process is that which is given by Justice Jackson in his concurring opinion in this *Northwest Shoshone* case. He advances the theory that Indians were really communists, who did not understand or appreciate property rights. Ownership of land, he says, "meant no more to them than . . . sunlight and the west wind, and the feel of spring in the air. Acquisitiveness, which develops a law of real

⁵ *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).

property, is an accomplishment only of the civilized." It follows, then, that the United States being civilized, is under no legal obligation to pay Indians when it takes away their homes, their timber, their fisheries, their water power, or anything else that might be needed for railroads, canneries, pulp companies or other progressive organizations that appreciate property rights. In advancing this theory that civilized people have the right to relieve less civilized people of their possessions, Justice Jackson insists that the moral and the legal have nothing to do with each other. He says specifically, referring to moral deserts and legal rights, ". . . we do not mean to leave the impression the two have any relation to each other."⁶ Justice Jackson might very well have said what the Ohio Supreme Court said in the *Oleff* case: "This is a court of law and not a theological institution."

In fact, however, the same question that Justice Jackson was considering had been referred by government officials some years earlier to a theological institution. The question whether Indian titles were good against the government was referred to a professor of moral theology at the University of Salamanca in 1532 by the Spanish Crown, which was naturally concerned about the relative rights of the Crown and the Indians with respect to lands of the New World.

Professor Vitoria considered the sociological facts of the situation. He considered the sinfulness of the life of the Indians prior to the coming of the Spaniards. He considered the fact that Spain had discovered and explored the New World under a special grant of the Pope. He considered all the general facts that Justice Jackson considered, and came to the conclusion that the relative ignorance and sinfulness of the Indians could not impair their title to their property. He concluded that the Spaniards' discovery of the Indians did not give the Spaniards any right to Indian property any more than the Indians' discovery of the Spaniards gave the Indians a right to Spanish property. And finally he reached the conclusion, a rather courageous conclusion for a professor of moral theology in the University of Salamanca to reach, that since the Pope's authority was purely spiritual, and limited to those that acknowledged his spiritual jurisdiction, the Pope could not, even if he wanted to, bestow any title to land upon the Spanish Crown or any other crown, and the only title to land that could be acquired by the Crown would have to be by way of agreement or treaty with the Indians concerned.⁷

If this question of the right of the powerful to take from the

⁶ *Id* at 358

⁷ Cf. F. S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 *Geo. L. J.* 1 (1942).

weak was properly a theological question (as I think it was), was it not just as theological when Justice Jackson answered it in his way as it was when Professor Francisco Vitoria answered it 400 years earlier, in his way?

All through the cases that have been mentioned so far runs the basic question whether the acquisition of wealth by superior force establishes a right to legal protection of such acquisitions. Whichever way you answer this question, whether you answer that might makes right, or answer it the other way, you are answering a basic question of ethics, or theology, or whatever else you want to call the study of values, of good and bad.

Let us pursue this analysis a bit further with the cases of the minimum wage and the flag salute.⁸

We all recall the *Adkins* case, involving the constitutionality of the minimum wage statute in the District of Columbia, as the case in which Justice Sutherland said that changes in the status of women culminating in the 19th amendment had brought the difference between the sexes, "almost, if not quite, to the vanishing point," and Justice Holmes replied: "It will need more than the 19th amendment to convince me that there are no differences between men and women."

In the *Adkins* case, Justice Sutherland could not see any moral issue, because, he said, the morals of rich women were no better than the morals of poor women. From this he concluded that questions of morality had nothing to do with the case. Indeed he went further and commented on the brief that had been submitted by Professor (not yet Justice) Frankfurter, showing what actually happens when women have to work long hours for inadequate wages. Speaking for a majority of the Court, Justice Sutherland said of these facts:

These are all proper enough for the consideration of the law-making bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide.

The decision that Justice Sutherland announced in the *Adkins* case is dead and decently buried by the Supreme Court's decision 14 years later in the *West Coast Hotel Company* case.⁹ But we still have with us the approach and spirit of Justice Sutherland's majority opinion in that case, the insistence that considerations which establish the desirability or undesirability of legislation throw "no legitimate light" on its constitutionality. And very curiously, one finds Justice Frankfurter, in the *Barnette* case,¹⁰

⁸ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

⁹ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁰ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

using the same club that Justice Sutherland used against him, but this time using it against his brethren, the majority of the Court. In his dissenting opinion in the *Barnette* case, Justice Frankfurter declares: ". . . law is concerned with external behavior and not with the inner life of man." Contrast that with the opinion of Justice Murphy, who, siding with the majority, affirms that the highest judicial duty is "to uphold spiritual freedom to its farthest reaches." Or contrast Justice Frankfurter's attempt to exclude from judicial consideration the effect of the West Virginia statute on "the inner life of man," with the rationale of the majority opinion, delivered by Justice Jackson. ". . . the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." Such action, the court held, invades the sphere of intellect and spirit, which it is the purpose of the First Amendment to our Constitution to preserve from all official control.

By way of answer to that argument, Justice Frankfurter warns his brethren: ". . . if the considerations governing constitutional construction are to be substantially those that underlie legislation then, indeed, judges should not have life tenure." And again, in his dissent, Justice Frankfurter warns against the very dire danger not only to the life-time jobs of his brethren on the bench, but to the entire nation, if, as he says, "we unwarrantably enter social and political domains wholly outside our concern", almost the very words of Justice Sutherland's opinion disposing of Mr. Frankfurter's brief in the *Adkins* case.

Again I skip the ethical question: Which of these decisions is right and which of these decisions is wrong? What is of concern for the moment, is a very much simpler question: What was it that our judges thought they were doing in the *Oleff* case, the *Northwestern Shoshone* case, the *Adkins* case, and some of the flag salute opinions when they said that questions of righteousness, or morality, or theology, or social policy or "the inner life of man" could not be considered by a court of law?

I rather think that these cases throw a good deal of light on the prevailing attitude of courts to questions of ethics. Perhaps the most obvious fact, when we consider these and other cases, is that, generally speaking, judges think they are doing the right thing when they come to the decisions that they do come to. At least I have never known a judge who admitted, or even thought that he was doing what was wrong. I am quite willing to leave to the psychologists the question whether judges make the decisions they do make because they think they are right, or whether they think the decisions are right because they have made them. If you believe the former you are labeled an idealist; if you believe the latter you are labeled a cynic. Not caring for either label, I leave

that issue to Dean Brown and Professor Hartman. But whichever way you answer that question, one thing remains pretty clear, and that is that judges decide cases pretty much along the lines of their own conceptions of what is, for them, right, decent, just, and proper. And judges' ideas of what is right and decent about their own behavior are inevitably tied up with their ideas of what is right and decent about the behavior of other people. This means that if you understand the ethical patterns, the value patterns, of a judge, you are better able to predict what he is going to do, when your client asks you for advice. You are likewise better able to improve or enlighten the ethical systems of judges if you know what they are. And that brings me to my final question: How are we going to discover the ethical views of Justice White or Justice Black? Or, more importantly, how are we going to discover the ethical views of the Roosevelt contingent in the Federal judiciary or of the Truman contingent?

One thing that makes it especially hard to answer this question is the judicial decorum that requires judges to conceal their ethical assumptions behind their large black flowing robes. In fact a major part of the judicial ritual consists of forms of magic whereby ethical opinions are exorcized from the judicial chambers.

One of the simplest forms of magic is word magic. When the Greeks were much bothered by the bad winds and storms on the Black Sea, they gave the sea the name "Euxine", the "Sea of Good Winds". And when the Viking explorers, some centuries later were troubled at finding 7,000 foot layers of ice on one of their newly discovered colonies, being the world's most successful real estate operators, they called their new colony "Greenland", thus establishing a pattern which suburban real estate developments follow to the present day. In the same way, when we are worried about the dangers of political corruption, recognizing, with Lord Acton, that power corrupts and absolute power corrupts absolutely, if we are particularly worried about the harm that an official may do we call him "Honorable", or if he is very, very powerful, and therefore very, very corruptible, we call him "Justice". I don't know how much effect the name "Euxine" had on the wind velocity of the Black Sea, or how much effect the name Greenland had on the melting point of ice in that area, or how much effect the title "Justice" had when applied to Mr. Sutherland or Mr. Tom Clark. But at least these honorific words tell us something about the people who use them and about their hopes and aspirations. And all this paraphernalia,—the oath of office, and the robes, the titles, the elevation of the place where judges sit above the place where they stood when they were lawyers—all these elements of ritual express certain widespread human hopes that men in

certain sects will utter words of justice as uniform as their robes, and of a higher quality than the words spoken a few inches lower by mere lawyers.

According to the prevailing idea, views of ethics are highly uncertain, shifting and variable, while rules of justice and law are certain, stable, and unchanging. When we realize this, we can begin to understand why the Ohio Supreme Court in the *Oleff* case, when it considered the degree of sacredness of the rights of joint depositors, felt compelled to exorcise theology, and why Justice Jackson in the *Shoshone* case, and Justice Sutherland in the *Adkins* case, and Justice Frankfurter in the *Barnette* case all sought to exorcise morality from decisions in which they might find moral scrutiny embarrassing.

Actually, judges are inclined to regard as theological only those theologies that they do not share themselves. The Ohio Supreme Court regarded its own opinions as to the sacredness of certain property rights as not theological but as obvious truths; the contrary views of unsuccessful counsel as to the sacredness of rights of life are dismissed as theological. So, too, courts are generally inclined to regard as moral theories only those moral theories that they do not accept themselves without question. Justice Sutherland was inclined to regard defenses of minimum wage legislation for women as moral theory, whereas the denial of validity to such legislation he regarded as biological truth, or logic, or eternal justice, or constitutional law. Such terms, then, as *theological* and *moral* become very good negative indicators of judicial views on theology and ethics. It is a pretty safe rule that whenever a judge says, "This is a court of law," and then goes on to say that he cannot be guided by moral or theological considerations, he is actually being guided by moral or theological considerations without knowing it. Perhaps in saying this I am only repeating, in a clumsy way, what Justice Holmes said many years ago:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious.¹¹

Of course, in all this, judges are merely behaving like human beings. We are all victims of the egocentric predicament. We can all see other people's eyes, but our own eyes we never do see. We all see other people's prejudices and moral assumptions; our own prejudices and moral assumptions appear to us in the guise of life's experience and wisdom. In fact, Descartes once said that

¹¹ Holmes, *The Path of the Law*, 10 Harv. L. Rev. 456, 467 (1897).

of all God's gifts the most fairly distributed was good sense, seeing that everyone was satisfied that he had received his fair share.

In days when orthodoxy was a term of praise, somebody coined the remark "Orthodoxy is my doxy, heterodoxy is the other fellow's doxy". I think we may all say that religion is what I, and those who believe like me, think about the unseen world, and superstition is what the other fellow believes. Idolatry is the other fellow's attitude toward the material things that enter into religious experience; our own attitudes towards such material objects we characterize more circumspectly as reverence for religious symbolism. Theories we agree with we call facts; facts we disagree with we call theories. Other people's conceptions of the universe we call metaphysics. Our own conceptions we call good, hard, common sense. Generally speaking, common sense is the metaphysics of 500 years ago slightly decayed.

Bertrand Russell has drawn attention to the relativity of our every-day speech in what may be called the conjugation of irregular adjectives of which he offers this example:

First person: "I am firm."

Second person: "You are obstinate."

Third person: "He is a pigheaded fool."

Or consider another example, offered by one of Russell's followers:

First person: "I am righteously indignant."

Second person: "You are annoyed."

Third person: "He is making a fuss about nothing."

Or consider this example offered by a lady logician:

First person: "I have about me something of the subtle, haunting, mysterious fragrance of the Orient."

Second person: "You rather overdo it, dear."

Third person: "She stinks."¹²

Once we recognize the personal distortions that affect each of us, whether we are judges or non-judges, once we recognize the blind spots that we each have in things that come close to us emotionally, we have taken the first steps toward mutual understanding on questions of right and wrong. Perhaps an analogy from physics may be illuminating. Modern physics, thanks to Einstein, has developed a theoretical basis for predicting that what is a straight line to observation post A will be an ellipse to observation post B, or that events which are seconds apart at observation post C will be simultaneous at observation post D. In this way, by systematizing the relativity of the observation post, Einstein has made it possible to correlate and coordinate all observations in physics. It has eliminated relativity as a distorting factor. I think we seri-

¹² Quoted in HAYAKAWA, *LANGUAGE IN THOUGHT AND ACTION*, p. 96 (1949). And see THOULESS, *HOW TO THINK STRAIGHT*, p. 4 (1948).

ously need such a theory, a field theory we might call it,¹³ in ethics and especially in those fields of ethics that have a particular bearing on our legal problems. Given such a theory we might be able to eliminate moral relativity as a distorting factor and thus achieve the same kind of mutual understanding translation between systems in the field of ethics that we have achieved in physics.

Given such an approach, we might be able to understand some things that are otherwise very puzzling. For example, how is it possible for two lawyers, in their briefs on appeal in the same case, to give such completely different accounts of the facts in the case as you generally find in a pair of appellant's and appellee's briefs? Or how is it possible for two opinions in the same Supreme Court case to give such completely different accounts of the facts and the issues? Or how is it possible for two lawyers or two judges of equal intelligence to disagree so completely as to whether one case is a precedent for another case?

The hypothesis that I want to submit for dissection by the other participants in this discussion is that public policy is not an emergency factor that you bring in as a lawyer when the cases are against you, or that you invoke as a judge when you have been sufficiently confused by advice of counsel. Public policy, or social ethics or whatever else you want to call your analysis of values is not an emergency third-string substitute that you send out on the field when the regular players and the second string "subs" are all used up. Rather, public policy is the field itself. It is what gives pattern and significance to every play in the game, to every citation of precedent, to every statement of facts, to every assertion of causal efficacy. What facts in a case are important depends upon the value screens through which you look at the facts of a case. Whether the differences between two cases are important or unimportant does not depend on logic. The differences are important or unimportant because of a theory of importance. A theory of importance, I submit, is a theory of value. Whenever we deal with such questions as whether the defendant exercised due care, or whether the plaintiff received just compensation, or when we consider what is fair comment in a libel case, or unfair competition, or fair value, these key words, "due," "just," "fair," "reasonable," do not have self-sufficient meanings in themselves. These legal ideals have meaning only in the context of whole patterns of social values, what we might call, in old-fashioned language, ethical systems.

For most judges, for most lawyers, for most human beings, we are as unconscious of our value patterns as we are of the oxygen that we breathe. To bring these unconscious, uncriticized val-

¹³ Cf. F. S. Cohen, *Field Theory and Judicial Logic*, 59 *YALE L. J.* 238 (1950).

ue patterns into the light of day is, I think, the most important task that faces our generation today in the field of law, a task that requires cooperation among many schools and many disciplines.

I do not mean to suggest that increased attention to the implicit hidden value judgments in our legal decisions and our statutes is going to bring us swift remedies for all of the ancient legal diseases. But it is encouraging to find an increased sensitivity to moral issues in every-day cases. There are many signs today, in the law schools and on the bench, of that increased sensitivity. The holding of this symposium is only one of many signs of an increased sensitivity to these problems on the part of practicing lawyers. This increased sensitivity may help us to break down an attitude that is just as potent a source of evil today as it was 3500 years ago, the attitude that morality and ethics have to do with something up in the heavens, or in some far-off land, and not with the here-and-now of daily life. There are not as many teachers today in the law schools as there used to be who insist that students forget about the ethical issues in a case, forget about social policy considerations, and stick to "the law", as if there ever were any law that did not involve issues of ethics, as if there ever were a court judgment that did not reflect somebody's views of social policy, as if there ever were a case that did not depend for its meaning and its precedent-value upon value-judgments of judges and of the people that make judges and unmake judges. Those who have faith in democracy and human reason know that consciousness of these questions is the first step towards intelligent mastery of our course and our destiny as a free people. We have been told that without such vision the people perish. And we know that without such vision, constitutional safeguards and promises of freedom are only words on old pages crumbling to dust.

All of us who face the obligations that our democracy attaches to the study and the practice of law have a responsibility towards our fellow citizens, that is a greater responsibility than those in other fields and professions. Ours is the responsibility for deepening public consciousness of the hopes, the ideals, and the values that are written into our constitutions and our laws. We have a responsibility for broadening the consciousness of the ways in which we fail to meet those hopes and those ideals. Our society, by and large, has marked out its aspirations in the books of the law, for those who can read them; and we who are charged with the reading of those books have a special responsibility for keeping alive the vision of our country's highest hopes and deepest aspirations.