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## THE ETHICS OF URBAN LAW AND PRACTICE: A CHALLENGE FOR THE COMMON LAW

THOMAS G. KAVANAGH\*

WEBSTER'S New International Dictionary indicates that the word "ethics" is used in several senses, one definition being "moral principles, quality or practice; a system of moral principles."<sup>1</sup> It is in this sense, and from the perspective of an appellate bench, that this article will describe the "ethics"—that "system of moral principles"—which *should* apply to urban law and practice. In this regard it is particularly useful and appropriate to cast these "moral principles" in the light and terminology of the common law. Brief inquiry will be made into what ought to be done by those involved in the field of jurisprudence—what students and law professors should do; what practicing lawyers should do; and what judges should do—all in the tradition and spirit of the common law.

Law has been described as an unending colloque between the people. When this colloque has resulted in the ascertainment that decisions, even those buttressed by long lines of supporting cases, no longer have achieved justice because of changed circumstances, American courts have overruled them. And so it must be. As Justice Cardozo observed: "The inn that shelters for the night is not the journey's end. The law, like the traveler must be ready for the morrow. It must have the principle of growth."<sup>2</sup> The judicial process is a process of education, self-scrutiny, and self-correction—a process in which the courts, the legal profession and the public all participate.

Urban law and practice is certainly the scene of the action affecting most Americans today. Ninety percent of our population

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1. WEBSTER'S NEW INTERNATIONAL DICTIONARY 780 (3rd ed. 1961).
2. CARDOZO, THE GROWTH OF THE LAW 19-20 (1924).

currently lives in what may be termed urban areas. This very fact calls for changes in our rules for interpersonal relationships, that is, our laws. The problems faced by the city dweller are only remotely related to the problems faced by the rural resident. One who lives in the city must depend on others to supply his needs. His food, clothing, shelter and recreation are almost always supplied by others who themselves are conversely dependent upon urban dwellers. His police and fire protection, his family's education, and his water and waste disposal services are supplied by his local government. These suppliers, both private and governmental, form a large part of his existence, and his relations with them are of great and immediate concern to him. Rules regulating *these* relationships are known as "urban law." The old rules regulating conduct in an agrarian economy cannot efficiently and fairly order the life of a modern urban population; new rules must be formulated.

Knowing this, where should we focus our attention? What steps should be taken? First, both the students and professors in the law school should be encouraged to continue in their studies. We have only recently become aware of the great value of graduate study to our profession. For the first time, it seems, it is now perceived that the mass and complexity of legal materials require in-depth study. Graduate work is the surest beginning to mastery of a specialty. Graduate work is virtually a prerequisite for the development of advanced skills in most other fields. In non-legal fields, gifted students are encouraged and generally given financial assistance to carry on their work. This procedure contributes greatly to the educative process, and hence, advancement of the discipline.

Today's student of the law, with his growing awareness of the value and necessity of involvement and his heightening passion for justice will respond in similar fashion. The contribution which these students will make can transform our jurisprudence and save our social soul. These students and professors can also expand and improve inter-disciplinary studies and co-operative research in the natural and social sciences. The benefit to jurisprudence from this activity can be great. The success of this concerted effort will, of course, properly and primarily depend on lawyers since "the law comprehends the total range of human conduct and behavior." The ancient motto *nihil humani, a me alienum puto* (nothing of human

interest do I consider foreign to my kin) should have great meaning for the student of the law.

What should a *practicing* lawyer do? The view from an appellate bench indicates that most of the success the common law has enjoyed in meeting the changing needs of society from time to time has been the responsibility of the practicing bar. This is, in effect, stability in change: The unchanging insistence on the principles of justice and the application of right reason to the case at hand, which is the hallmark of the true lawyer, has given life and meaning to the common law. It has illumined the mind and moved the will—even of judges—to do justice. The true lawyer should and must keep on trying.<sup>3</sup>

What should judges do? *My* view from *my* bench—I cannot guarantee that this will be a majority opinion from my colleagues—is that judges should, first of all, *listen*. The lawyers who are presenting the case are hopefully better informed about the points of law involved, and it is their task to inform the court. It is the judge's duty to become informed. In this connection, it is well to recall the story of the English barrister who was arguing his case before a rather impatient judge. He had been going on for some time when the court interrupted to observe: "Counsel, you have been arguing for forty-five minutes and the court, I'm sorry to say, is not one bit wiser than when you started." The barrister courteously replied: "Not wiser, my lord, but hopefully better informed."

Secondly, judges must study. The tools of research and the improvement of the science of legal libraries have greatly facilitated the judge's task of becoming informed. The judge who does not keep abreast of the literature of law, as well as of other disciplines, is not doing a complete job. Ideally the common law judge should be the best informed person in the community when he renders his

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3. I have primary knowledge of what a lawyer's persistence can do about changing the application of an obsolete rule of law. Indeed, I know of two instances involving the same lawyer in two different cases; I sat on both as a member of the Michigan Court of Appeals. In the first case, I voted against his position, as did the majority, but the Supreme Court reversed our ruling. In the second, after the Supreme Court had by-passed our court, but split evenly on the question and then referred the matter to the appellate court; we sat *en banc* and voted six to three in favor of his position. I voted "right" this time. Careful study, meticulous preparation and indomitable determination on the part of this lawyer had brought our law a little more up to date in these two instances.

judgment—for that is implicit in his position.

The inherent capacity of the common law for growth and change is its most significant feature; its development has been determined by the social needs of the community which it serves. The common law is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society. It is adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the nation. The fact that no case remotely resembling the one at issue is uncovered does not paralyze the common law system, which is endowed with judicial inventiveness to meet new situations. It is said that public policy is the dominant factor in the molding and remolding of common law principles so they may soundly serve the public welfare and the true interests of justice. Furthermore, the social and economic mutations need not be purely evolutionary changes in customs, usages, and industrial practices; they may spring from legislation which has given direction to that social development, though in the beginning such enactments were not designed to supplant the common law outside the range of their specific application. Statutes, including those of recent origin, play a part in the formation of the common law, and, like court decisions that are not strictly analogous, sometimes point the way into virgin territory.

The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make certain that the conditions and needs of the times have not so changed as to make further application the instrument of injustice. Whenever an old rule is found unsuited to present conditions or unsound in itself, it should be set aside, and a rule declared which is in harmony with those conditions and meets the demands of justice. What can the common law accomplish in the urban law setting?

Let us explore the possibilities the common law offers to solve our urban problems, not as a check-list leading toward a single solution—one answer good for all time—but rather as a reminder that change and adaptation is the condition of living man. What I urge is the reaffirmation of an attitude of intolerance of injustice, and of impatience with temporizing—an attitude of receptiveness to reasonable proposals for solutions. The answer is found in the recent trends in our courts, as seen in their decisions and interpretations of

new legislation, which show the interplay and effect of law on our urban society. As our governments—city, state and national—spread, and as their action touched more people more often and more intimately, the courts found it necessary to strike down the shield of governmental immunity. As corporations reached goliath size, they became more like government than like the “mythical private person” once envisaged. Their collective wealth and strength became felt in more ways in more areas of life. The law’s response to this growth has been to provide more and more legislation and decisions designed to control this creature. The impact of the growth of private as well as municipal corporations has evoked great social response. The organization of labor and the statutes permitting, controlling and relating to it—workman’s compensation, social security, unemployment compensation, the Federal Employees Liability Act, the National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws and many others—are all responses to the corporate development which largely industrialized society.

Our concern with corporations does not end with their structure. Industries build towns, produce products, and, in the process, vitally affect our society and environment. Products liability, municipal responsibility, and ecological pollution are areas posing current problems which our courts are asked to solve. Think of the profound effect that even one product of this corporate industry, the automobile, has had on our society. The automobile moves us faster, kills more people, and has made more fortunes than any machine in history. Its use has made the population so mobile that old doctrines, such as *lex loci* and contributory negligence, appear to be ready for discard as no longer properly serving society.

Another area, that of the social sciences, is often overlooked when we talk of the common law, but it has had immeasurable impact on our urban society. Entirely apart from the criminal law as developed pursuant to constitutional guidelines laid down by the United States Supreme Court is the intelligent application of common law principles in *Brown v. Board of Education*,<sup>4</sup> which became a lesson for us all. In that case the Court did make use of the learning of our nation’s social scientists. By applying this learning to juris-

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4. 347 U.S. 438 (1954).

prudence, the common law became expressive of and responsive to the needs of society. When we look at our cities themselves we see them growing and decaying: they are drab, yet exciting; secure, yet threatening; enriching, yet impoverishing. Such as they are, they are the stages upon which the drama of our daily lives is enacted. The script must be constantly rewritten to give meaningful participation to the new members of the *dramatis personnae*. This is the purpose of the common law.

Thus far this article has focused on what each of us—the student, the professor, the lawyer, and the judge—must do in general, and I have tried to describe what I perceive to be the proper working of our common law system. But now, perhaps because of the problems of my own position, I want to mention some other considerations. I do not specifically know how other states deal with the problem of superintending the administration of justice, but in Michigan, the constitution specifically charges the Michigan Supreme Court with the responsibility for general superintending control over the courts, which are all divisions of our one court of justice. This then places on us the duty of making the courts available to the people. Courts must not become unavailable because of the cost of litigation; but this is what is happening today because of the immense backlog of cases which is now so prevalent. It is said: "Justice delayed is justice denied." I say that "justice delayed" is a contradiction in terms. Justice delayed is no justice at all. When it takes over three years to obtain a hearing on a claim for damages, it cannot be said that an injured man has justice. While in Michigan the immediate responsibility for rectifying this situation is upon the Supreme Court, a failure of justice anywhere diminishes us all. Teachers must continue to remind their students that whatever technical skills and tactics they may employ in furtherance of their client's interest, they must keep in mind that the common obligation to the profession is to achieve justice. Delay as a tactic may not always *properly* be available. Students must learn this lesson well in order that when they engage in practice they will discharge their responsibility as an officer of the court with pride and efficiency. And judges must rededicate themselves to the accomplishment of the task of their high calling—administering justice.

I have presumed to exhort you and to express my views on the

work of each of us—students, professors, practitioners and judges. I do so not in the fancy that I contribute some original thought<sup>5</sup> or clever advancement or that I have a greater dedication to our profession. I do so out of a conviction that our beautiful system will be destroyed if we do not use it. Unless our legal system is relevant to our times and our system of administering justice is effective, it will and should be replaced. In my view—from my bench—these are the times for which our system was *intended*; it has the flexibility to meet the challenge—we must vow to properly exercise that flexibility.

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5. I wish to acknowledge my gratitude to G. F. Curtis, Dean of the University of British Columbia, for contributing a number of the ideas herein espoused.