THE INTRODUCTION OF CONCEPTS OF MORALITY INTO THE TEACHING OF BUSINESS LAW

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In a notable paper delivered before this group several years ago Professor Glen Wing admonished us that we must impress on our students the importance of ethics in the development of law, in order that our influence for good extend beyond the classroom. The place of morality in the making of business decisions is now the subject of seminars being held in many universities. Just the past month a deeply significant editorial in the Saturday Review decried the lack of personal morality in the disclosure that 40 per cent of the students in one of the larger universities did not believe that cheating in examinations is reprehensible. Such unmistakable portents show a renewal of interest in the importance of the subject. My humble effort here is not to establish why morality should be an essential ingredient of our courses, but to suggest how the subject may at least be integrated in the teaching of business law.

It has been wisely said that "the sparks of all sciences are raked up in the ashes of the law." If we wish to be more than mere pedagogic purveyors of the mechanical rules of law, then we must teach law in the "grand manner." An intellect, to win the prize, requires other food besides financial success. The remoter aspects of law, said Justice Holmes, are those which give it universal interest. It is in this way you connect, he suggested, your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law. Mr. Justice Cardozo, another great modern oracle of the common law who, in the manner of Lord Mansfield, molded our American law merchant into an instrumentality of justice to fit the present mercantile and industrial age, possessed a deep sense of ethics which permeated some of his finest decisions. He once told law students:

> "You think perhaps of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to the earth. You think that in stopping to pay court to her, when you should be hastening forward on your journey, you are loitering in by-paths and wasting precious hours . . . You think that there is nothing practical in theory that is concerned with ultimate conceptions . . . You may find in the end when you pass to higher problems that instead of its being true that the study of the ultimate is profitless, there is little that is profitable in the study of anything else."

Centuries ago Thomas Aquinas with profound insight observed: "The end of law is love, and there is no stinting about ends, but only the means." Law and morals share the same end, but they differ in the means they employ for the attainment of the end. Ihering used to call this "the Cape Horn of Jurisprudence" and I think that Thomas successfully rounded the cape.

In a recent report by Professor Harold Berman of a conference held some years ago at Harvard, where the need for introducing law in the liberal arts curriculum was proposed for the purpose of making students aware of law as one of the great freedom-creating traditions of Western thought and action, the relation of ethics and law occupied a prominent portion of the discussions. Charles P. Curtis, one of the participants, bluntly stated: "I do not see how the department of philosophy can teach ethics without some help from the law." Max Radin's famous observation was recalled: "One great function of the law is to leave a man free to be ethical."

Now, how can the business law professor, already frustrated as he is by the required breadth of coverage and the limitations of the time schedule, integrate ethics with law? It is to be assumed that the students entering business law classes have already been exposed to the humanities—to economics, philosophy, literature, and history. Did not one judge say that sometimes in the solution of a legal controversy a page of history was worth a volume of logic? Let me state my position clearly: no abandonment of the hard core of business law is being suggested. We seek not to enter disciplines of learning taught by more competent and better trained minds. The emphasis is merely one of implementation.

The textbooks we use contain many cases that enable us to point up the moral issue. We ought not to be smugly content with just a thorough recital of the facts, followed by a searching analysis of the reasoning of the court. If we are to teach in the "grand manner" and bring our influence to bear so that it will reach beyond the narrow confines of the classroom, we must not shrink from the responsibility which is the tradition of our profession. In his work, *The Nature of the Judicial Process,* Cardozo wrote:

> "Some relations in life impose a duty to act in accordance with the customary morality and nothing more. In those the customary morality must be the standard of the judge. Caveat Emptor is a maxim that will often have to be followed when the morality which it expresses is not that of sensitive souls. Other relations in life, as those of trustee and beneficiary, or principal and surety, impose a duty to act in accordance with the highest standards which a man of the most delicate conscience and the nicest sense of honor might impose upon himself. In such cases to enforce adherence to those standards becomes the duty of the judge."

If the law professor is to be something more than a mere conduit of legal rules, then he has as great a duty as the Judge, if not a greater one, to alert his students to righteous conduct.

Duties of a fiduciary have always been placed on a high moral pedestal by the courts. Here the professor is afforded a golden opportunity of bringing before his students, some of whom will some day act as trustees, executors, administrators, and most of whom will appear in the capacity of agents or even directors of

corporations, the high ethical responsibility which even the law demands of all fiduciaries.

Chief Justice Bowen drove home this idea in cryptic and graphic language in the *Archer Case,* 1892, 1 Ch. 341: "The director (of a corporation) is really a watch-dog, and the watch-dog has no right, without the knowledge of his master, to take a sop from a possible wolf."

Again we turn to Cardozo who expressed this high responsibility of fiduciaries in words of great cogency and beauty in *Meinhard v. Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546:

> "Many forms of conduct permissible in a work-a-day world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market-place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. (Citation.) Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court."

Need one adumbrate further in an exegesis of this masterful quotation? What a great opportunity this affords the professor in pointing out that courts can only speak of conduct of litigants in retrospect while the teacher can forewarn and point the way to right conduct. The young impressionable minds before us have not as yet fully experienced the dangers and temptations that will beset them in the business world. By precept and example we can show them that socially desirable conduct cannot replace the standards of the man of honor, who is not just content to ask whether this or that will hurt society or what people will think of his conduct, but whether it will hurt his own self-respect and whether it violates God's law.

Judge Goodrich, in a case of unfair trade practice, observed, "We are in a field where the tendency of the law has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade. The tendency still persists." (2-*Tips, Inc. v. Johnson et al.* (1953) 206 F2d 144 at 145).

In the law of contracts the subjects of consideration, statute of limitations, Statute of Frauds and discharge in bankruptcy are pregnant with opportunities for integrating moral conduct with law. I suppose the simplest answer to enforceability of all promises is that of the intuitionists, who insist that promises are sacred per se, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate repudiation of promises. We know, however, that no legal system does or can attempt to enforce all promises, and there are circumstances where it might not even be moral to require strict enforcement of the promise, unsupported by consideration.

Occasionally students are troubled where there is a substantial disparity of values in the exchange. We may offer them the usual answer of the law, which is that given by the Supreme Court in the case of *United States v. Bethlehem Steel*

Corp., 315 U.S. 289, where it was held that a 22% profit on shipbuilding contracts, totaling over $109 million, did not render the contract unenforceable. But is it not equally important to point out that Mr. Justice Frankfurter, in his dissent, admonished that courts should not permit themselves to be used as collection agencies on "unconscionable contracts"?

Moral principles have often been at work to find exceptions to relieve from the harshness of the Statute of Frauds and of limitations. Even in these situations a new promise or payment on account stops the tolling of the statute and revives the debt. The same is true where an insolvent is discharged in bankruptcy. Here too the courts have flatly held that it is the moral consideration that supports any subsequent promise to pay the debt. Judge Hall put it in this fashion in the case of *Pittman v. Elder,* 76 Ga. 371: "and if he promises to pay the debt, which *is only what an honest man ought to do,* he is then bound by the law to perform it." Many courts also emphasize that the statute of limitations and discharge in bankruptcy do not destroy the "right" but merely remove the "remedy."

The Court's decision in *S.E.C. v. Chenery,* 318 U.S. 80, and 332 U.S. 194, cuts deeply into legal, equitable and moral principles. The S.E.C. refused to permit certain entrepreneurs who were not shown to have abused their position and were not guilty of active or constructive wrongdoing from participating on a parity with other shareholders, basing its final order neither on legal nor on equitable grounds, but upon the ground that there existed the potentiality of abuse. The Supreme Court of the United States, after some hesitation, finally upheld the action of the Commission. Such cases in corporate reorganizations present an excellent opportunity for the law professor to bring out the legal, equitable and especially the ethical problems involved in business relations.

To show the deep philosophical and theological conundrums that lie back of the law Dean Knickerbocker of the University of Tennessee made a proposal for prelegal education that might well apply to business law students. Since human conduct frequently involves moral choices and the conflict of good and evil is implicit in all branches of the law, the Dean suggested that there may be a deeply imbedded feeling lurking in the human heart that no man is guilty of anything, and, of course, there is the opposite extreme that he is guilty of everything, having acquired his guilt at birth. The doctrine of free will also has a bearing here with human failings, however, judged not too harshly by applying in appropriate cases that rare quality of mercy that "droppeth like the gentle dew from heaven." The Dean suggested that the student might be asked to comment on a few stanzas of Robert Browning's "Apparent Failure." The poet had been strolling on the banks of the Seine River and had come upon a morgue conveniently located to receive the bodies of those Parisians who had found in the river a soft exit from this world. Standing behind a glass screen, the poet muses upon

> " . . . . . the sermon's text
> The three men who did most abhor
> Their life in Paris yesterday,
> So killed themselves. And now, enthroned
> Each on his copper couch, they lay
> Fronting me, waiting to be owned,
> I thought, and think, their sins atoned."

These sins can be narrowed to three—overweening personal ambition, dedicated socioeconomic ambition, and just plain lust.

> "How did it happen, my poor boy?
> You wanted to be Bonaparte
> And have the Tuileries for toy
> And could not so it broke your heart?
> You, old one by his side, I judge,
> A leveller! Does the Empire grudge
> You've gained what no Republic missed,
> Be quiet, and unclinch your fist!
> And this—why, he was red in vain,
> Or black,—poor fellow that is blue!
> What fancy was it turned your brain?
> Oh, women were the prize for you!
> Money gets women, cards and dice
> Get money, and ill-luck gets just
> The copper couch and one clear nice
> Cool squirt of water o'er your bust,
> The right thing to extinguish lust!"

The poet then becomes counsellor for the defense. These men have been admitted failures. But of what sort: immediate or ultimate? As defense attorney, the poet pleads:

> "It's wiser being good than bad
> It's safer being meek than fierce:
> It's fitter being sane than mad.
> My own hope is, a sun will pierce
> The thickest cloud earth ever stretched;
> That, after Last, returns the First,
> Though a wide compass round be fetched;
> That what began best, can't end worst,
> Nor what god blessed once, prove accurst."

Somewhere in all this is the hand of the Creator, and the poet seems to suggest that what He blessed once cannot prove accurst. If this is not theologically or even legally sound, nevertheless, I hope I have demonstrated that our work in the classroom affords many opportunities for pointing out the moral implications of the law. They should not be overlooked if we expect to teach law in the "grand manner." I am convinced the great legal lights of the Common Law system, both past and present, would want us to teach it in this way. Let us not fail them, and, above all, let us not fail our students.