

"WHATEVER HAPPENED TO THE LAW"

By

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Presented to The St. Thomas Moore Society

June 15, 1995

"It is not proposed to enter into a discussion of the principles of jurisprudence, but the loose and indiscriminate manner in which the term "Law" is constantly employed, particularly by writers on moral philosophy, would seem to render necessary at least a passing allusion to that term in connection with morals." Geo. W. Warvelle, L.L.D., *Essays in Legal Ethics*; Rothman & Co., 1908.

DEFINITIONS

If you cannot define the Law you will never figure out what happened to it. Defining the Law has been attempted by the editors of dictionaries throughout the second half of this century.

The Fourth Edition of Black's Law Dictionary was published in 1957. The definition of the word "law" at that time filled a full page but can be summarized as:

"That which is laid down, ordained or established. . . That which must be obeyed and followed by citizens subject to sanctions or legal consequences."

The Sixth Edition of Black's Law Dictionary was published in 1990. Its definition of the word "law" takes up less space and adds to the above definition the following:

"Law is a solemn expression of the will of the supreme power of the State."

Webster's "New" Collegiate Dictionary was published in 1949 and modified periodically until 1961. It's definitions of the word Law and related phrases are as follows:

LAW:

1. A binding custom or practice of the community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.
2. The whole body of such customs, practices, or rules.

COMMON LAW:

1. The control brought about by the existence or enforcement of such law.

2. The action of laws considered as a means of redressing wrongs.

LITIGATION:

1. The agency of or an agent of established law.
2. A rule or order that it is advisable or obligatory to observe.
3. Something compatible with or enforceable by established law.

CONTROL AUTHORITY:

1. The revelation of the will of God set forth in the Old Testament.
2. The first part of the Jewish scriptures.
3. A rule of construction or procedure.
4. The whole body of laws relating to one subject.
5. The legal profession.
6. Law as a department of knowledge.

JURISPRUDENCE:

1. Legal knowledge.
2. A statement of an order or relation of phenomena that so far as is known is invariable under the given conditions.
3. A relation proved or assumed to hold between mathematical or logical expressions.
4. The observed regularity of nature.

AT LAW:

1. Under or within the provisions of the law.

LAWYER:

1. One whose profession is to conduct lawsuits for clients or to advise as to legal rights and obligations in other matters.

BUSINESS:

1. Purposeful activity.
2. An immediate task or objective.
3. A particular field of endeavor.
4. A usual commercial or mercantile activity engaged in as a means of livelihood.

BUSINESSMAN:

1. A man who transacts business; esp. a business executive.

BUSINESSWOMAN:

1. A woman active in business; esp. a female business executive.

HISTORY

For much of recorded history, such topics as government, politics, legislation, ethics, and other kindred abstractions, were classed together under the general name of philosophy. The word "law" had no definite and specific meaning. When used at all it denoted the observed relations of phenomena, of every kind and nature, as well as to indicate rules for the regulation of human actions, irrespective of origin or method of enforcement. See generally, Prof. R.J. Holland, S.J., *Natural Law and Legal Practice*.

For practicing lawyers, the "Law" is more than a metaphor, more than a figure of speech and certainly more than a theory. It is what we do. It is how we define ourselves. It is how we justify our position in society and how we think of one another.

In law school we were mystified by it but it energized us and gave us a sense of how little we knew about life and history. In our early years of practice it evaded us often, spoke to us rarely and, occasionally thrilled us. As we became thoroughly comfortable with it and used it daily, it became less ominous and more revealing. But, on the way to becoming skilled "in" the law, something happened. The law changed.

In modern jurisprudence the word "Law" has acquired a fixed and definite meaning. The old liberal arts dogma and classification have been rejected. Instead of an ascending scale of positive, natural and moral law, we now use the term "law," with no qualifying words whatever, as indicative of human action. It now refers only to external acts and is enforceable by a sovereign political authority.

My personal view is that the reason for rejecting the more complex philosophical view of the "law" is that our sovereign (all three branches of government) no longer has any pretense of perfecting the character of its citizens. It has as its single-minded object the regulation of the relations, which we, as citizens, sustain to each other and to the state.

THE PROBLEM

The modern definition and the approach of the sovereign does little to explain what happened to the law from the 1950's to the 1990's. What was widely proclaimed and accepted, as a "profession" in the middle of this century has become a "business" as the end of the century draws near.

The challenge facing all of us is not to retain our profession but to reclaim it.

We have not changed our minds about the Law. We have changed the way we practice Law. We still think we are a profession but we act like we are a business. We proclaim high fiduciary duty to our clients but we expect contractual rights from our customers. We claim to serve the people but we demand the right to charge interest on past due invoices. We do a lot of *pro bono* service but work even harder to make up for the loss in income it causes.

In one of the oldest and most respected ethical codes is found the following precept: "The laborer is worthy of his hire." No one

questions the ethical truth of this precept. But, those who value the law, as a profession ought to give some thought to why we practice: is it for money or to serve the Law?

Are we willing to give up some amount of economic gain to regain the respect we have lost? Are we going to continue to insist on changes that better our bank accounts at the expense of our reputations?

In the 1950's we were both well paid and respected. We could not advertise, we did not sue our clients, we absorbed our overhead expenses and we rarely moved our practice from one place to another or one firm to another.

In the 1990's we are still well paid but rarely respected. However, we can advertise; we sue clients who do not pay; we charge them for all kinds of overhead; and, we change firms every few years. In mid-1995 we were given the legal right to sue our clients when they discharge us in a "discriminatory" way.

A PARTIAL SOLUTION

A part of the answer to these questions can be found in a remarkable new book entitled "The Soul of the Law" by Benjamin Sells. (Published by Element Inc., 42 Broadway, Rockport, MA 01966; 1994). Mr. Sells is an accomplished lawyer, psychotherapist and philosopher. He avoids the tempting but wrong questions and inquires sensitively into the current weakened condition of the soul of the law.

The foreword to the book mentions some of the wrong questions: Why is this happening now? What are we doing wrong? What historical or evolutionary development is the cause of our trouble? They are the wrong questions because they do not go deep enough. They are narcissistic, assuming as they do that we are the center of this universe in entropy.

The soul of the law can be restored to all practicing lawyers "Only when deep vision has been restored, when imagination revivifies and when we allow ourselves to feel the soul's complaints so that we can find our way back to necessary sensitivities." (Thomas Moore, author of "Care of the Soul" in his foreword to "The Soul of the Law.")

In his book, Mr. Sells asks the reader to conduct the following experiment: Imagine you are a psychotherapist. A person comes to your office without an appointment but in apparent need of counseling. When you open your office doors you see a person standing there when you have never seen before, but who bears a certain distant familiarity.

"Hello," says the person, "I'm the Law. I want to talk to you about some things." "I'm sorry to show up without an appointment but I never really thought about seeking counseling until a few minutes ago."

Mr. Sells presents four kinds of questions for you to ask of the Law. It might be interesting for the members of The St. Thomas Society to participate in this imagined counseling session with the law. I will try to play the role of the counselor and will keep track of the collective answers. Some time soon I will give all of you a follow-up report on the collective answers.

Maybe your collective answers will ease some of the burden on our legal souls. Maybe this little experiment will help us to cope with our changing profession and its emphasis on the good economic life.

The imaginary questions are attached along with some of Mr. Sell's observations on answers given by other lawyers.

HELPFUL ADVICE

Before engaging in the experimental counseling session I want to recommend to you the wisdom of Mr. John Mortimer. Many of you know him as the author of a series of books and television scripts featuring "*Rumpoyle of the Bailey*." Mr. Mortimer's autobiographical sketch entitled "Clinging to the Wreckage" commences with this little homily:

"A man with a bristling gray beard came and sat next to me at lunch. He had very pale blue eyes and an aggressive way of speaking.

He began, at once and without any preliminary introduction, to talk about yachting in the English Channel.

`But isn't it very dangerous, your sport of

yachting?'

`Not dangerous at all, provided you don't learn to swim. I made up my mind, when I bought my first boat, never to learn to swim.'

`Why was that?'

`When you're in a spot of trouble, if you can swim you try to strike out for the shore. You invariably drown. As I can't swim, I cling to the wreckage and they send a helicopter out for me. That's my tip, if you ever find yourself in trouble, cling to the wreckage!'"

That is advice we all need to take from time to time.

Imaginary Interview With The Law

QUESTION ONE: What does the person look like who has just walked into your office?

Be precise and try to imagine this person in detail.

Is the Law male or female?

Old, young, middle aged?

How is the Law dressed?

Is the Law carrying anything?

Does the Law prefer coffee or tea?

How does the Law speak, move, and sit?

Can you see the Law's eyes? What are they like?

In group experiments, most people, men and women alike, say the Law is an older man, gray-haired and distinguished looking. There is disagreement about how he is dressed. Often the law is carrying a briefcase, sometimes a newspaper or some books.

Almost everyone says the Law is a coffee drinker, usually black with no sugar.

On rare occasions, lawyers will say the Law is female.

Recurring details include that the Law is brisk of movement, as if it had somewhere important to go.

The Law speaks with a measured and careful voice.

Some people say that the law has steady, piercing eyes while others see them as tired and bedraggled, the eyes of a person who has seen too much.]

QUESTION TWO: What does the Law say?

What's bothering the Law?

There are apparently strong similarities in lawyer's responses to this question. Often the Law says it is misunderstood and overworked.

When pressed about deeper concerns, lawyers often imagine the Law saying it is "troubled" sometimes going so far as to use words such as alienated, isolated, anxious, depressed, besieged and lonely.

Some people, especially lawyers, balk at such questions finding them offensive or perhaps suspecting they conceal a hidden agenda of some sort. Mr. Sells finds this reaction telling and notes that it is a recurring theme in getting to the root cause of the loss of soul in the Law.

Q. "What do you mean when you say you are misunderstood?"

A. "Well, people don't understand what I'm trying to do for them."

Q. "Do you mean they don't understand intellectually or they don't appreciate you?"

A. "Both. They don't understand how I work, or how hard, and they don't appreciate how important I am. Perhaps that sounds arrogant to you, the fact of the matter is that I don't know what might happen to the world without me."

QUESTION THREE: What does the Law want?

How would the Law change things?

Mr. Sells notes that The Law usually responds that everyone bitches about me all the time.

I mean I'm OK as long as I apply to someone else but as soon as I prohibit somebody's own pet behavior they go crazy. It's like I'm only supposed to apply to the other guy.

Look at how people talk about my representatives. Representatives? Yes, the lawyers. All this lawyer bashing tries to make everything the lawyer's fault. That is just a roundabout way of attacking me: The Law.

Some people claim to be for "Law & Order" and want me to crack down on the bad guys but they hate me when I try to keep them in line. It's like the Law was a giant toxic waste dump: vital and necessary but not in my back yard.

I don't want much. If people would just listen to what I tell them and obey me, show a little respect that would be enough.

Q. Why do you want to be obeyed?

A. That is what the Law is for, isn't it?

QUESTION FOUR: What is the law for?

The group consensus noted in Mr. Sells Book is as follows:

Q. You say you want people to obey you, but they don't. Where does that leave you?

A. There is only one thing to do when people get unruly and that's to force them to comply. Society can't exist without Law; people have to be made to respect and obey me.

People respect strength. I know people don't like to be forced to do something, but it's for their own good. Over time, they will see I am right.

Q. What do you think would happen to society without you?

A. Anarchy, plain and simple. Society needs me.

Q. Why exactly does absence of the Law lead to anarchy?

A. Because human nature has to be restrained. Without an orderly way of organizing society, of resolving disputes and of ensuring that people do the right thing, we would have people killing each other over the slightest disagreement. Without me people would shrink their responsibilities. They would start making up their own ways of dealing with disputes. A lawless society cannot endure.

Q. But some people say that's pretty much how things are now, even with all the laws on the books.

A. That's just my point. The laws are on the books but people aren't obeying them. People are ignoring me. They are lawless.

Q. So what do you want to do about it?

A. There's only one thing you can do when people disobey the Law. You must enforce the Law. Make them obey. Lock them up if necessary, fine them, and take their rights away, whatever it takes.

The only way to maintain order is through the Law.

CONCLUSION

Our bar and our judicial system are largely patterned after the English method of advocacy. But in medieval times the French advocate, unlike his brother in England, was not left entirely to his own discretion in matters of professional morality.

The French advocate was regulated by frequent royal edicts, and conformity was enforced by disbarment. These edicts eventually were shaped into a code. It remained in force until the revolution of 1790, when the Order of Advocates, along with other institutions was abolished.

Among the prohibitions and restraints to which the old French lawyer was subjected are the following:

"1. He was not to undertake just and unjust causes alike, without distinction; not maintain such as he undertook with trickery, fallacies, and misquotations of authorities.

2. He was not in his pleading to indulge in abuse of the opposite party or his counsel.

3. He was not to compromise the interests of his clients, by absence from court when the cause in which he was retained was called on.

4. He was not to violate the respect due to the Court, by either improper expressions or unbecoming gestures.

5. He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

7. He was not to lead a dissipated life, or one contrary to the modesty and gravity of his calling.

8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed." [See, Appendix B. Chivalry of Advocacy; Warvelle's Essays in Legal Ethics, Fred B. Rothman & Co. 1902]

These eight French rules of conduct, along with most French lawyers, were severed ala the guillotine two hundred years ago when anarchy became Law.

Did it suffer its fate because the French bar lost its soul? Did the French lawyer in the 1790's complain that too many had lost the Code?

Were they guilty of "abuse of the opposite party or his counsel"? Were they disrespectful to the Court by "improper expressions or unbecoming gestures"?

Did they "exhibit a sordid avidity of gain by putting too high a price upon their services"? Were they making bargain with their clients "for a share in the fruits of the judgments recovered"?

Were they leading "dissipated lives"? Were they acting contrary to the "modesty and gravity of their calling"?

Are we? Do we face a similar fate?

With respect, I submit that the soul of the Law in Arizona is troubled but not lost. It (we) will learn anew that economic interests cannot be substituted for professional obligations.

It (we) cannot allow the client's desire to win to trump our duty to search for the truth. It will continue to encourage us to lead lives that are not "dissipated or contrary to the modesty and gravity of our calling."

With the help of The St. Thomas Moore Society we might even avoid the public spectacle of having our heads chopped off in Patriots Square when the Law is replaced with Anarchy.

Gary L. Stuart
June 15, 1995