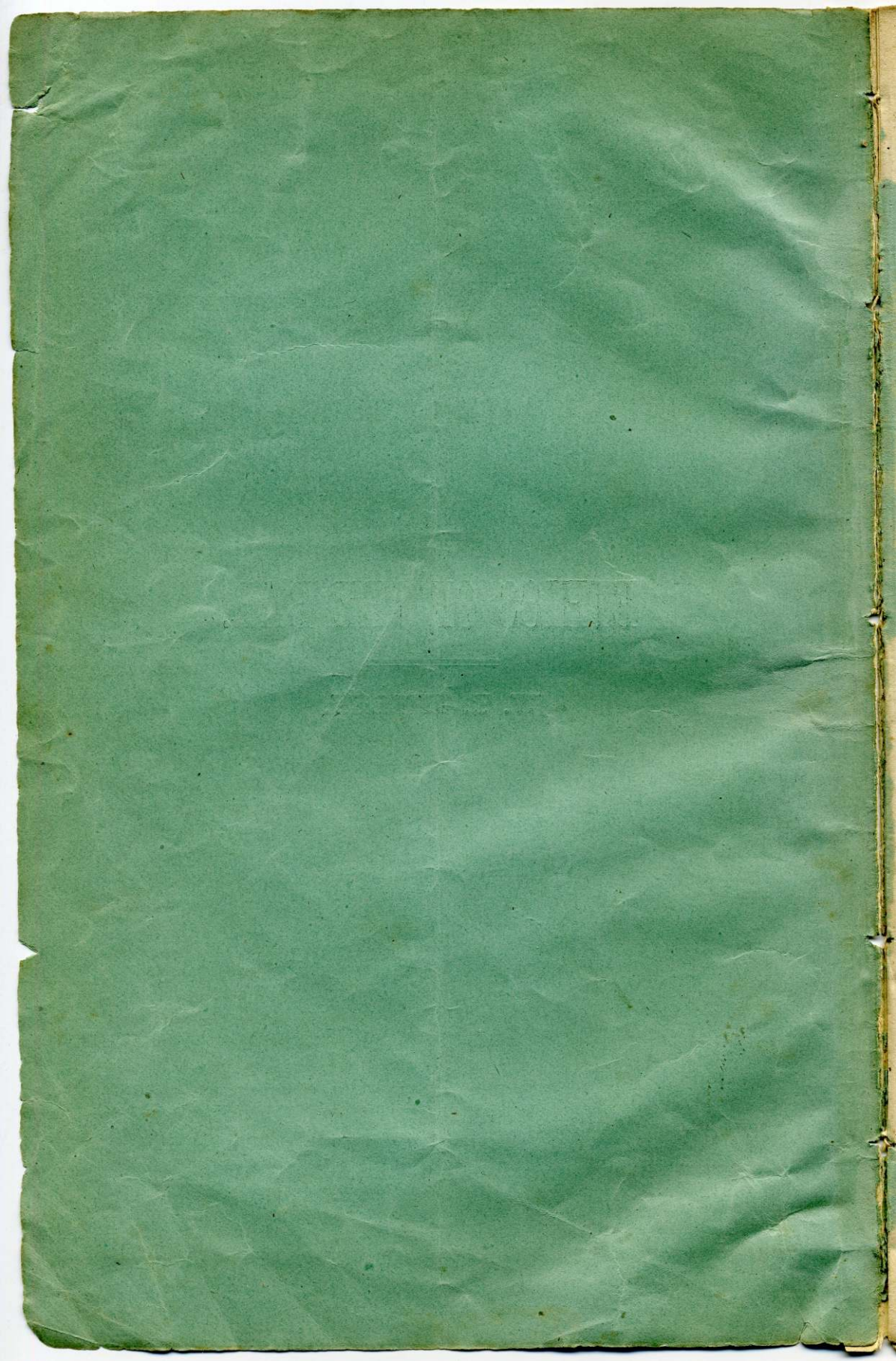


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ETHICS OF THE BAR.

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W. T. WILLEY.



# ETHICS OF THE BAR.

## ADDRESS

—OF—

### HON. WAITMAN T. WILLEY,

BEFORE THE

LAW CLASS OF WEST VIRGINIA UNIVERSITY,

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*Gentlemen of the Law Class* :—What is the proper significance of the legal profession? What does it imply?—What does it include? What, of mental culture? What, of moral character? Permit me to attempt a brief reply to these questions.

The legal profession has a better meaning now than formerly. In the earlier history of English jurisprudence, when Judges held their office at the pleasure of the crown, and were often selected to be the mere instruments of the executive will, the bar partook, less or more, of the consequent prevalent corruption. Even so eminent a jurist as Bacon was not above the reach of bribery; and "the greatest," became the "meanest of mankind." This demoralization, however, was not peculiar to the bench and bar; it infected all classes of society in the church and in

the state. Yet it was reserved for a great lawyer to be chiefly instrumental in rescuing the public welfare from this deplorable condition. Sir Edward Coke was the author of that great muniment of British liberty, "*The Petition of Right*;" and it was through his influence and exertions, mainly, that it became incorporated in the Constitution of England. It deprived the king of many of his most dangerous powers.—It substituted law in the place of the royal prerogative. It sealed up the greater fountains of public corruption. It laid more deeply and securely the foundations of civil and political liberty. It was reserved, too, for this eminent lawyer to give one of the finest exhibitions of moral and official courage and integrity which can be found in the history of mankind. I refer to that notable occasion when James the I sum-

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feel no delight when the Springtime clothes the orchards with bloom, or when the sunset skies reflect the smiles of the Creator—who are ready to charge nature with super-arrogation and folly, because there are flowers which “blush unseen and waste their fragrance on the desert air.” It would not be proper to say that there have been no great lawyers without literary accomplishments. There have been many such. But it is true that there have been few, if any, great and distinguished advocates who were deficient in literary culture. It was their high literary merit which gave such wonderful force and effect to the philippics of Demosthenes. It was the same kind of excellence which preserved the orations of Cicero from the common oblivion which has befallen the forensic efforts of his cotemporaries. It contributed, largely, to make Erskine the foremost advocate of the English bar. It was this which gave to Wirt the charm and power which distinguished his professional career. Mr. Everett noted the fact, that when he visited Mr. Webster on the night before he made his great constitutional argument in reply to Hayne, he was surprised to find him reading Shakespeare. But the retort he made the next day in the Senate showed what effective weapons of forensic warfare may be found outside of the law-books—a retort which made his adversaries quail with a trepidation equal to that which terrified the guilty Macbeth. And to what is the world indebted for the immortal peroration to the same great speech? To Milton's *Paradise Lost*, unquestionably; where the poet describes the embattled hosts of heaven—

“Who forthwith from the glittering staff unfurled  
The imperial ensign, which full high advanced,  
Shone like a meteor streaming to the wind.”

What then, I repeat, is the true significance of such a profession?

*First*, I answer, it implies thorough elementary preparation. It repudiates all empiricism. It includes a longer and broader course of preliminary reading than usually prevails in this country. The ambition of too many of our young men reaches only to admission to the bar. They forget that license to practice law is merely an introduction into the ante-chamber of the temple of jurisprudence, whose inner chambers, vast halls, galleries, turrets and towers are still to be explored. Properly comprehended, the profession of law means unremitting industry, ceaseless, life-long research. It continually aspires. It stands, ever more, with open angles toward all the avenues of knowledge.

*Second*: It implies unity of pursuit, and concentration of effort. He who expects to excel as a lawyer must be married to his profession; and he will have found a jealous bride, who will tolerate no rival, and who will exact not only an undivided, but also an ardent love. Especially will she repel the advances of that great seducer of young members of the bar—ambition—for political preferment and distinction. This infatuation has been the prolific parent of third-rate lawyers, and of third-rate statesmen as well. It has marred and minified many a brilliant genius, and stamped with the seal of mediocrity those who should have risen to the foremost ranks of professional eminence. There are, indeed, a few instances where men have excelled both at the bar and in the Senate. But in all such cases it will be found that they had become good lawyers before they engaged in public affairs; and, doubtless, their acquirements were hindered and diminished in the one capacity in proportion to the time and attention devoted to the other.

*Third*: The profession of the law includes all the characteristics of the most exalted personal character. The truly accomplished lawyer must be a gentleman in the proper and original

meaning of that term. Nothing mean or grovelling can find any place in his mind or his manners. For instance—he will always be courteous—courteous to the court, to opposing counsel, to the parties litigant, and to the witnesses.—He will avoid bravado. He will never “browbeat.” He will never forget the dignity of his profession. If justice requires it, he will denounce the wrong, with fidelity to the truth, in terms of adequate severity; but never in a manner that will compromise his self respect, or sink the barrister into the blackguard. The lawyer who measures up to the full stature of professional manhood, will always be distinguished by a high sense of honor. His professional life will be a practical reply to Wordsworth’s inquiry :

“Say, what is honor? ’Tis the finest sense  
Of justice which the human mind can frame,  
Intent each lurking frailty to disclaim,  
And guard the way of life from all offense  
Suffered or done.”

So will every conscientious member of the bar guard his way. He will never deceive his client by inspiring hopes of his case, not warranted by the premises. He will be faithful to his trust, shirking no labor, and neglecting no duty which such trust requires. The wealth and personal standing of the parties will have no influence upon his fidelity as counsel. If there be any preference it will be to see that the humble and obscure client shall receive no detriment from the superior social position and power of his antagonist.—Moreover, he will never intentionally confuse an honest witness to prevent him from telling the truth, or to cause him to unwittingly testify to a falsehood, a practice which Archbishop Whately denounces as “the most base and depraved of all possible employments of intellectual power.” He will never attempt to impose upon the court by false citation of authorities; nor garble or distort evidence before the jury; nor

seek to pervert judgment or justice by chicanery and sophistry.

These reflections bring us to a point where we may properly discuss a question, which, I am sorry to say, still remains undetermined: How far can an advocate conscientiously engage in a “bad case?”

There are some preliminary considerations which, I think, will help us to find an answer to this question.

There is, I know, a vulgar, but ignorant prejudice against the legal profession, going so far as to deny that there is any necessity for its existence, and that justice would be better administered without it. But it is obvious that all governments of law require more or less of ministerial agency for the wise, just and equal administration of the laws. No department of civil government is more vitally connected with the peace, security and general welfare of society than this. And experience has demonstrated, what sound sense would have suggested without it, that an intelligent bar, learned in the law, is an indispensable adjunct of the judiciary. Our courts would be a failure, if not a farce, without it. Efforts have been made to dispense with the bar.—Arbitration has been resorted to; but instead of simplyfying and lessening litigation it has confused and multiplied it, and increased the costs, and found the presence and aid of legal counsel more necessary than in the courts.—Why, who shall prepare cases for trial? Who shall reduce the matter of controversy to a definite issue? Who shall arrange the evidence, excluding all extraneous and irrelevant matter? Who shall guide the parties through the formalities and complex system of legal procedure, which the multifarious interests and exigencies of an advanced civilization make it necessary to observe? If suitors were left to themselves, how unequal the contest would often be!—The weak would be trodden upon by the strong; the unwary and guileless

would be outwitted by the cunning and corrupt; and our courts would degenerate into mere chroniclers of wrong done to the humble and defenseless classes of society. I repeat it, a learned and conscientious bar is essential to the proper administration of justice. Without it there cannot be equality before the law between suitors.

But the question still recurs: How far, and when, may a lawyer engage in "a bad case?" I answer: He may never initiate a suit, or engage in the prosecution of a case which he knows is unjust. To do so would be to make himself not only the voluntary and mercenary instrument of the fraud intended, but morally, *particeps criminis*.—He who suffers himself to become the mere proxy of fraud and injustice is more contemptible than the party he represents. But counsel may be deceived by his clients, as he sometimes is, and the fraud may not become apparent until, in the progress of a trial, the evidence discloses it. What then? In my opinion there is but one proper course to pursue. The deception imposed upon the counsel has absolved him from all further obligation to his client, and he should retire from the case, or, at the least, allow it to quietly pass off as if by default.

On the other hand, a party is to be prosecuted for a crime or misdemeanor. He applies to counsel to defend him, who, upon investigation, has reason to believe that he is guilty of the offense charged. May such counsel rightfully engage in the defence of such a case? I answer, yes, unhesitatingly. The party will be tried, whether he is defended or not; and he is entitled to a fair trial, according to the laws of his country. Public policy, the public safety, no less than justice to every person accused of a crime demand a fair trial; that the forms of law should be strictly observed; that the rules of evidence be correctly applied; and the punishment of offences should not transcend the

limitations of law. Undefended by competent counsel, injustice might be done, even to the guilty in all these respects. It is, therefore, not only morally right to engage in the defence of such cases, but there is a professional obligation resting upon every member of the bar to do so—to secure for his client a fair trial and to prevent any injustice from being done. His obligation extends no further.

And so it is in civil actions. Counsel may properly engage in the defense of a "bad cause" to the extent of securing a fair hearing according to law, and of preventing unjust recoveries. There, again, their obligation and their duty cease.

So much—as lawyers are apt to say—so much upon principle. Now for authority. The first I shall cite would seem to militate against the position I have assumed, and tolerate a wider latitude of discretion on the part of the advocate than I have prescribed. It is the authority of one of the most intellectual men of the 18th century. Nor was he less distinguished for the lofty integrity of his moral character. It is not surprising, therefore, that his utterances should have exerted large influence upon the ethical conscience of the bar in Great Britain. I refer to the celebrated Dr. Johnson.

In that inimitable biography, *The Life of Johnson*, by Boswell, the following conversation is related:

"We talked of the practice of the law. Sir William Forbes said he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. 'Sir,' said Johnson, 'a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. Consider, sir, what is the purpose of courts of justice. It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what

he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and the judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself if he could.

\* \* \* If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim."

It is well known that Dr. Johnson, in his conversational contests, sometimes, supported propositions which he did not really believe to be tenable, merely for the entertainment of his auditors, and to display his extraordinary powers of casuistry. I cannot but think these utterances were so inspired. They are, in fact, inconsistent with themselves; and inconsistent with the moral tenor of the whole life and conduct of the great philosopher. It is not a matter of surprise that a celebrated advocate of the British bar (Jack Lee) who had justified his extreme zeal for his clients by this very conversation of Dr. Johnson, should, afterwards, upon better consideration, and more solemn reflection, have questioned whether a practice at the bar, regulated by such principles, "could be supported," and "would bring peace at last."

Against these precepts, however, I present a great example of a great lawyer, afterwards a great judge: "Sir Matthew Hale, whenever he was convinced of the injustice of any cause, would engage no more in it than to explain to his client the grounds of that conviction; he abhorred the practice of

misreciting evidence, quoting precedents in books falsely or unfairly, so as to deceive ignorant juries or inattentive judges; and he adhered to the same scrupulous sincerity in his pleadings, which he observed in the other transactions of his life. It was as great a dishonor as a man was capable of, that for a little money he was hired to say otherwise than he thought." What more despicable character can there be than the hireling chicaner and mercenary agent of fraud? It seems to me that the denunciations of the old prophet are peculiarly applicable to him: "Woe unto them who call evil good, and good evil; that put darkness for light, and light for darkness; \* \* \* which justify the wicked for reward, and take away the righteousness of the righteous from him."

Against the latitudinous professional ethics of Dr. Johnson, I cite the authority of another great conversationalist, scholar and moral philosopher. Coleridge, in his "Table Talk," states the principles of legal practice with greater precision, and, as I think, with greater propriety. "There is," he said, "undoubtedly a limit to the exertions of an advocate for his client. He has a right, it is his bounden duty, to do everything which his client might honestly do, and to do it with all the zeal which any exercise of skill, talent and knowledge of his own may be able to produce. But an advocate has no right, nor is it his duty to do that for his client, which his client in *foro conscientie* has no right to do for himself."

It is with great satisfaction that I am able to enforce this view of the subject by high American authority. In Hoffman's "Course of Legal Study," that eminent jurist has formulated fifty rules of professional deportment, from which I beg leave to make an extract or two.

"My client's conscience," he says, "and my own, are distinct entities; and though my vocation may sometimes justify my maintaining, as facts or

principles in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In *civil* cases, if I am satisfied from the evidence that the *fact* is against my client, he must excuse me if I do not see as he does, and do not press it; and should the *principle* also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that would bring death to my cause of the succeeding day."

Again: "When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavors to impede the course of justice, by special resorts to ingenuity, &c. \* \* \* Persons of atrocious character, who have violated the law of God and man, are entitled to no such special exertions from any member of our pure and honorable profession; and, indeed, to no intervention, beyond securing to them a fair and dispassionate investigation of their cause, and a due application of the law; all beyond this is unprofessional, and proceeds either from a mistaken view of the relation of client and counsel, or from some unworthy or selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community. Such an inordinate ambition I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station."

Gentlemen, whatever of doubt there may be in some of the propositions of the Darwinian theory of evolution, there can be no question, I think, of the survival of the fittest in the intellectual and moral world. Only the true and the right can survive. Error and wrong

must ultimately perish. Truth and virtue must finally prevail. To say otherwise would be to impeach the divine sovereignty of the universe. The fluctuating fortunes of the battle between the forces of truth and error, virtue and vice, may, sometimes, apparently contradict this assertion. But whatever the pessimists may say, every succeeding age is, in a less or greater degree, correcting the defaults of the past; and the world is wiser and better to-day than it ever was before. It was not merely with the license of the poet, but by the authority of God, that Bryant wrote:

"Truth crushed to earth shall rise again,  
The eternal years of God are hers;  
And error, wounded, writhes in pain,  
And dies among his worshippers."

No sophistry, no degree of moral indifference, no ingenuity of special pleading, will be able to evade this irreversible decree of the divine government. Ultimate detriment and dishonor await every departure from the path of moral rectitude of life and conduct as surely as God lives and reigns. The bar must recognize this great truth professionally, as well as personally, before it can reach its true ideal. Even if there were no such moral law—no such inevitable retribution—one hour of genuine self-respect is to be preferred to a whole life of the most successful wrong-doing; for what is that life worth which is perpetually shadowed by a consciousness of dishonor!

But without further multiplying authorities on this point, I beg leave to commend to your thoughtful consideration the advice given to those just commencing their professional career, by the most learned lawyer of the age in which he lived. I cite Sir Edward Coke again:

"For thy comfort and encouragement, cast thine eyes upon the sages of the law that have been before thee, and never shalt thou find any that have



excelled in the knowledge of the laws, but have sucked from the breasts of that divine knowledge, honesty, gravity and integrity, and by the goodness of God, hath obtained a greater blessing and ornament than any other profession to their family and posterity. It is an undoubted truth that the just shall flourish as the palm tree, and spread abroad as the cedars of Lebanon. Hitherto, I never saw a man of loose and lawless life attain to any sound and perfect knowledge of the said laws; and I never saw a man of excellent judgment in the laws but was withal (being taught by such a master) honest, faithful and just."

I hope I shall be excused for detaining you with these rather numerous citations. Conscious of how little weight my personal opinion would carry with it, I have sought to fortify the positions I have taken by the authority of the great names I have quoted, and thus to vindicate one of the noblest of all the professions from the obloquy sometimes cast upon it by prejudice and stupidity, to the effect that the practice of the law necessarily impairs the moral sense, and that to succeed lawyers must be otherwise than honest men.—That there are chicaners and unworthy members of the bar no more proves that all lawyers are unworthy than the fact that there are hypocrites in the church proves that Christianity is "a cunningly devised fable."

The truth is, that the nature and scope of the duties of the practicing lawyer necessarily better develop the faculty of moral discrimination than any other profession. He is constantly brought into sharp and direct contact with distinct issues between truth and error—between the wrong and the right. *Audi alteram partem*. He hears both sides of the question. He must weigh and apply the evidence on both sides of the question, and then he hears the impartial arbitraments of enlightened judges, and is instructed by their

wisdom and reason. The whole course of his life is one constant school of judicial discipline. He becomes expert in detecting fraud and sophistry. His judgment becomes deliberate. His character is not apt to be warped by vulgar prejudices. He is seldom a bigot—seldom found among inquisitors and persecutors. And I do, therefore, unhesitatingly aver that according to the extent of my observation, it is true, that for a high sense of honor, clear apprehension of the principles of moral rectitude, and the practice of the cardinal virtues of life, public and private, the legal profession may confidently challenge comparison with any other secular pursuit. I am not, therefore, apologizing for the profession. But I desire to magnify its claims to still higher respect and confidence—to elevate and signalise its idea of excellence.

I have noticed, with pleasure, a proposition to organize a State Bar Association. I hope it may succeed. It might be made beneficial in many ways—not the least among which would be the inspiration of what the French call an *esprit de corps* among members of the bar, which would exalt both the scientific and ethical character of the profession. And why might it not be organized here, to become a kind of adjunct and patron of the Law Department of the State University? Its annual meetings here on Commencement Day, with the legal alumni of the University, would be attended with not only all the pleasure of such a social reunion, but would be mutually beneficial to the bar and to the institution.—Science, literature, law—*tres, juncti in uno*. So let it be.

In conclusion, "Who shall ascend into the hill of the Lord? and who shall stand in His holy place? He that hath clean hands and a pure heart, who hath not lifted up his soul to vanity, nor sworn deceitfully."

And so now, I think, it would not be

inappropriate, to ask here, in this land of ours, where, next to God himself, the laws should be of sacred and supreme authority: Who shall bear the ark of our covenant? Who shall enter our tabernacles and temples of justice? Who shall minister at her altars? Who shall stand there for the maintenance of the right and for the suppression of the wrong? Who shall be entrusted with the widow's plea, and the orphan's defence? Upon whom may the humble and helpless rely to avenge "the oppressor's wrong," and to resent "the proud man's contumely?" Who shall rescue the victims of fraud from the toils of speculation?—the patrimony of the failing debtor from the clutches of usury and extortion?—the fair fame of the innocent and the pure, from the foul aspersions of the slanderer?—Not pettifoggers—not the professional scavenger—not the mere money-changer and fee-monger who pursues his profession simply for its perquisites. Surely it ought to be men of "clean hands" and "pure hearts"—not drones, and drivellers—not hornbook lawyers, who never advance beyond the threshold of the profession—nor yet the indolent sons of genius, who, confiding in the spontaneous inspiration of the occasion, depend upon the powers of their natural, uninstructed faculties; but the student, the faithful, persistent, untiring student, who, from all the wide domain of jurisprudence, science, art, literature and history, has garnered resources for every emergency. And upon these more important and perilous

occasions which often occur in the history of communities and nations, especially under republican forms of government, when popular excitement and partizan zeal, transported beyond the bounds of reason and patriotism, seek to throw off the restraints of the law, to accomplish their passionate purposes, who shall hold up the hands of the Judiciary in its great office of guarding and preserving the defences of the constitution and maintaining orderly government? I must answer again: Not the mere special pleader, and superficial pretender; not those whose opinions take color from the fees paid to obtain them; not the courtier and parasite of place and power, whose advice is conformed to the wishes of the authority which requires it; but to men, not only learned in the law, acquainted with its history and imbued with its philosophy, but whose minds and comprehension have been enlarged by its wisdom, and whose characters have been formed and established upon its underlying principles of everlasting truth and justice—men versed in the lore which made the Hales, and Cokes, and Blackstones of England, and the Kents, and Storys, and Marshalls of America.

Gentlemen: You will, perhaps, say that I have presented a lofty professional ideal. If I have not done so, I have failed to do what I intended. I believe, however, that you will not, on due consideration, regard it as too high. I am sure none of us will think so, when he comes to realize the truth which Shakespeare makes the remorseful king of Denmark so penitently utter—

"In the corrupted currents of this world,  
Offence's gilded hand may shove by justice;  
And oft 'tis seen the wicked prize itself  
Buys out the law; but 'tis not so above:  
There is no shuffling, there the action lies  
In his true nature; and we ourselves compelled,  
Even to the teeth and forehead of our faults  
To give in evidence."