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Bernard C. Gavit

Indiana University School of Law

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LEARNING IN THE LAW AND ADMISSION TO PRACTICE—A REPLY

By BERNARD C. GAVIT*

I.

Mr. Hurley's article expresses, as happily as they can be put, the arguments against the interpretation of Indiana's constitutional provision on admission to the bar heretofore presented by me.¹ The matter is of primary importance, and the question ought to be thrashed out. I shall attempt, therefore, to reply to Mr. Hurley's arguments.

We have before us now, in addition to the constitutional provision, a specific statute. The Bar Association Bill on admissions was enacted into law by the Legislature and approved by the Governor. It gives to the Supreme Court "exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules and regulations as it may prescribe."

I insist, with increasing confidence, that under this legislation the Supreme Court can, without doing any violence to the Constitution, adopt rules which make educational requirements a prerequisite for admission to the bar.

The fundamentally fallacious assumption on which Mr. Hurley bases his case is that "good moral character" is a simple, unambiguous phrase, which because it has generally been assumed to mean what he says it means, necessarily means that; that it is, too, devoid of legal content, and therefore of difficulty. He assumes that because he knows what it means that necessarily, that is both its true factual and its legal meaning in its constitutional sense. I assert, on the contrary, that Mr. Hurley's assumption as to what it means is irrelevant; that factually it does not preclude educational prerequisites, that it need not

* Professor of Law, Indiana University.

¹ 6 Ind. L. J. 67, 16 American B. A. J. 595, 743. During the past summer the Indiana University library has acquired a file of the *Cannelton Economist* which contains several articles by Samuel Frisbie, a delegate to the Constitutional Convention who was interested in the Constitutional Clause in question. There is nothing in any part of Mr. Frisbie's communications, however, which mentions the subject-matter; nor was anything published by this paper upon the subject.

be devoid of legal content; that the evidence and the accepted standards of constitutional law compel the conclusion that it does not prevent, but in fact sanctions and commands an educational standard as a condition for admission to the bar. Nor do I think that that result is a forced judicial construction of an invidious type; an accomplishment by indirection of what is impossible of accomplishment by direct means. But more as to that later, for the point is the substance of the dispute. Let us first notice several specific assertions Mr. Hurley makes. He argues that because it has been more or less generally assumed for some little time that the Constitution prohibits educational qualifications that the assumption is conclusive against any other interpretation.

II.

It is true that attempts to amend the Constitution have been thwarted; but the question presents itself, is it necessary to amend it? How solid after all are the assumptions upon which those people worked who sought to amend it? May not those people have been mistaken? Certainly their views are entitled to some consideration; but they are not conclusive. Any assumption is subject to proof of its invalidity. For some fifty years, for example, an Act of Congress which forbade the removal by the President of appointive officers without the consent of the Senate, was acquiesced in; and assumed to be valid. But when the validity of the Act was finally put to a test it was held unconstitutional in the face of that fact.²

For some *several hundred years* it has been quite uniformly assumed by the leading authorities on the subject, and the most competent of legal scholars, that the action of case owed its life to the statute of Westminster the Second (1290). But it has recently been proved by an overwhelming amount of evidence, that that assumption was erroneous, and that the statute had nothing to do with the action of case.³

A great many people have assumed that prosperity was in the immediate control of the Republican party; but it has recently been rather conclusively established that that, too, was erroneous.

² *Myers v. United States*, 272 U. S. 52 (1926).

³ *Plunckett Case and the Statute of Westminster II*, 31 *Columbia L. Rev.* 778 (1931).

In truth Mr. Hurley's assumption is entitled to no weight at all, because it is not based on evidence and reason, but solely on popular belief. So far as the evidence is concerned it does not rise above the status of a myth.

Now the beliefs of even large groups of people have no evidentiary weight. And in substance that is all that we have on the present subject; a rather common belief that the Constitution prohibited educational prerequisites for admission to the bar. It is nothing but a belief, because no one yet has produced any *proof* to support it. Certainly Mr. Hurley produces none.

The substance of his argument is solely that because people *have believed* that that is what it meant, *therefore* that it is what it does mean. But, it is, for example, well established in the law of Wills that the wildest of religious beliefs is no evidence of insanity. The reason is that insanity is irrationality, and a belief being confessedly based not on reason or evidence is no evidence of irrationality. It is only what it purports to be—a belief. So it is that we have never made a practice of accepting beliefs or myths as evidence. In fact it is only an *opinion* which can be received as evidence; and before *it* is given any weight it has to be supported by proveable facts and persuasive reasoning.

Therefore in attacking this problem we certainly are entitled to inquire into the validity of the common belief on the subject without being compelled to give any weight or credit to the belief as such. The belief creates no presumption that it is really supported by the facts, and we ought to be, and in truth are, free to face the problem unhampered by any unproved assumptions on the point.

And on that score let me call attention to the fact that the decisions of the court and the action of the Legislature which are closest to the Constitutional Convention give the lie to Mr. Hurley's belief. The Acts of 1852 provided that:

"Every person of good moral character, being a voter, on application shall be admitted to practice law in all the courts of justice. *Moral character may be proved by any evidence satisfactory to the court . . . but any court may, at any time, inquire into and determine for itself the moral character of any person practicing or offering to practice law in such court.*"⁴

⁴ Revised Stat. 1852, Art. 45, Secs. 766-7.

The Legislature here makes no attempt to define moral character against our interpretation, but in truth recognizes that its proper interpretation is a judicial question, and specifically gives the courts the widest discretion over the subject-matter. In the case of *Ex parte Walls*,⁵ decided in 1880 under the act just quoted and the subsequent provisions of the same act for disbarment, the Supreme Court explicitly construed "good moral character" in the sense we have contended for; that it, it means character as it affects ability to practice law. The court specifically refuted the belief expressed by Mr. Hurley; that is, that "moral character" here means only personal virtuous rectitude or physical morality. The attorney in that case was disbarred because he cheated his clients, and did not efficiently represent them and because those facts showed a bad moral character. It was conceded that if he had a "good moral character" he could continue to practice law; that is, that an attorney can only be disbarred for the same reasons he could originally be kept out. Now this man was not put out because of his specific misconduct; but because his misconduct (which was primarily mental) affirmatively showed a lack of moral character.

In the case of *McCracken v. State*,⁶ decided in 1867, it was held that a statute prohibiting a county recorder from practicing law was valid. In other words, even although one have a "good moral character" there is an additional valid requirement that he be not a recorder. That is, the constitutional provision here is not exclusive. If the Legislature could make not being a recorder an additional condition for admission to the bar, why cannot the Legislature, or court, make legal education an additional prerequisite, if we assume what Mr. Hurley asserts to be true; that legal education is no part of "good moral character?" In the case of *In re Petition of Leach*,⁷ decided in 1893, a woman, although not a voter was held to be entitled to practice. In other words, if one who is not a voter can be admitted, although the constitution requires him to be a voter; why cannot one who has a good moral character in Mr. Hurley's definition of the word, be kept out because he has no legal education? If the Constitution is really not exclusive as to the voting requirement, why is it exclusive as to the character requirement? Again, if

⁵ 73 Ind. 95.

⁶ 27 Ind. 491.

character and education are distinct concepts what is to prevent a requirement as to education? The truth is that in both of those cases the court construed the Constitution to mean exactly the opposite of what Mr. Hurley says it means, and the only possible interpretation of them is that the court could impose an additional requirement of legal education.

And even more persuasive than that we have the fact that in 1881 the Legislature enacted that

“every person of good moral character, being a voter, on application shall be admitted to practice law in all the courts of justice; but a jury may be demanded upon the question of character by any citizen of the county. Moral character may be proved by any evidence satisfactory to the court or jury trying the question; and any person desiring admission to the bar may, upon motion, *be examined* touching his learning in the law, by the judge or a committee of the bar whom the judge may select for that purpose. *If he shall be found, by reason of his learning, qualified* to practice the law, as well as otherwise qualified, he shall be admitted to the practice, which shall be entered of record.”⁷

Here is a statute which has been on the statute books for fifty years which gives the lie to the assumption that “moral character” is less than character as an attorney. Certainly in 1881 the proposition which is so clear to Mr. Hurley, was as clear the other way to the Legislature. The statute has never been judicially declared unconstitutional and in truth has been acted upon by some of the circuit courts of this state for fifty years.

The real truth is that all of the early cases and the early legislation are quite conclusive against the belief which Mr. Hurley espouses. Apparently the belief is of rather recent origin.

Throughout his paper, and particularly the latter portion of it, Mr. Hurley asserts that because a person has a constitutional right to practice law if he is of good moral character; that (if our views prevail) his moral character changes from good to bad when he presents himself for admission, although without any knowledge of the law; that that latter fact *can only* be ascertained by examination, and that if the applicant stands on his constitutional right, he must be admitted, and the fact cannot be proved.

⁷ 134 Ind. 665.

⁸ Acts 1881, Sec. 831; Sec. 1033, Burns' Ann. Ind. Stat., 1926.

But Mr. Hurley is deciding the case, and not arguing it. He assumes the answer (as the courts often do, when no better way out presents itself) and then proves his result by irresistible logic. He says only—this man has a constitutional right to practice law; educational qualifications can not be limitations on it; therefore he has a constitutional right to practice law without educational qualifications. The premises and the result are exactly the same. He could prove that black was white by the same method. That is, by asserting his unproved premise that black is white; this is black; therefore it is white. But I would challenge his authority to *decide* the case; he is merely supposed to be arguing it. And I still challenge his premise; to wit, that the man has a constitutional right to practice law without educational qualifications. If he has one he got it from the Constitution, and that turns on a fair interpretation of that instrument, rather than upon any unsupported preconceptions or assumptions on the subject.

Earlier in his paper Mr. Hurley falls into the common error, which assumes (in this same connection) that there is a general principle involved, and not a specific case. He assumes that "good moral character" as a matter of constitutional law means something *abstractly*; just as he says voter means something *abstractly*. But in the law we deal not in abstractions (although we sometimes play as if we do) but in specific situations. One for example, who was not an applicant for admission to the bar could not secure a declaration from any court in the state as to what "good moral character" means. Neither Mr. Hurley nor myself could get any court to tell us. The court, however, would tell a *bona fide* applicant; just as it would tell him whether or not he was a voter. There is nothing to be gained by arguing about the matter abstractly. We must take a specific case, and by Mr. Hurley's own admission the decision of a specific case is much harder than the assumption of a general principle. He says: "It is freely granted that whether a particular person is of good or bad moral character may present its difficulties in a stated case; but that is not involved here." But *it is* the only thing which is involved here. We have, supposedly, a young man who knows no law, or very little law; who, in other words, will not make a competent practicing attorney; he is physically a virtuous young man, and legally a voter; and he makes application to be admitted to the bar. In other words, he wants the

State of Indiana to grant him a license *as an attorney at law*. He wants the State to hold *him* out as learned in the law; he wants to hold himself out as learned in the law. Does he have a "good moral character" in the sense in which that phrase is used in the Constitution? Mr. Hurley says, categorically, yes. But not on the merits; purely on the unproved assumption that "good moral character" was here used as meaning solely "physically virtuous." How does he know that? Where is the evidence to prove and warrant that interpretation of the phrase? It is wholly lacking.

As Mr. Hurley suggests "voter" does not cause much real difficulty as to its content (although he admits that in a given case the application of the word might be difficult), but the reason for that is that we have statutes which define in rather specific terms the various elements of a "legal voter." We have, however, no constitutional or statutory definition of "good moral character." The definition of that phrase is purely, therefore, a judicial matter. It is not, as Mr. Hurley assumes, to be defined by common belief.

There is one other argument used by Mr. Hurley which requires notice. He says that a client has no business being deceived by an incompetent attorney's misrepresentation as to his legal ability, because "he is presumed to know the law," and to know, therefore, that under the Constitution his attorney may not know any law but may still be an attorney (legally, but not in fact, of course). (In other words, one who knows the law goes to one who does not know it to find out what it is!) (And here Mr. Hurley admits the real point in issue, to wit: that one who seeks to act as an attorney without any knowledge of the law does in fact deceive the public.) He resurrects another erroneous assumption, which innumerable times has been repudiated. There never was, and there is now, no general presumption that everyone knows the law. The maxim originally was that "ignorance of the law excuseth no man," and it was used primarily in criminal actions.⁹ But to disprove Mr. Hurley's presumption it is only necessary to call attention to the great groups of cases where a mistake of law gives quasi-contractual relief,¹⁰ and where a misrepresentation as to what the

⁹ 10 R. C. L., p. 873, Sec. 17.

¹⁰ Woodward, Quasi-Contracts, Secs. 35-44 (1913).

law is gives ground for an action of deceit.¹¹ If we had a conclusive presumption that those plaintiffs knew the law they could not be mistaken as to it; nor could they be deceived as to it.

III.

When we come to the merits of the controversy there are four or five angles of approach. It may well be, for example, that on authority the constitutional provision in question could be properly construed to set only minimum standards, and mean only that if one has the qualifications set out that he could not be kept out for *those* reasons. The early cases take this view; and the later cases do not overrule them; they go off on the question of the adoption of specific constitutional amendments on the subject. A court could today with entire propriety follow those early cases, and it would be unnecessary to decide what moral character means. Assume that an applicant has a good moral character; he is not being kept out for that reason, but for the reason that he has no knowledge of the law, and the action is proper.

It was suggested in one of the early cases that the constitution created a right to practice law. But even so it would be subject to reasonable regulation. Those propositions have been argued before¹² and there is no need of adding anything to what was there said.

Whatever interpretation we take—other than the one first suggested—there is left open the *judicial* question as to what constitutes good moral character, as that phrase is used in the Constitution.

But before going to that it is necessary to note another of Mr. Hurley's arguments as to one of those possible interpretations. It was suggested heretofore that the substitution of the phrase "entitled to admission to practice" for the phrase "have a right to practice," and the Constitutional Convention refusal to make a resubstitution indicated that a proper interpretation

¹¹ *Ingalls v. Miller*, 121 Ind. 188 (1889). See, also, Throckmorton's *Cooley on Torts*, Sec. 297 (1930).

¹² 6 Ind. L. J. 67, 80-88. See, however, *Weisenberger v. State*, 175 N. E. 239, 240: "A constitutional personal liberty clause, or the right to pursue any proper avocation, is regarded as an inalienable right, *and a privilege not to be restricted except for good cause.*" Per Myers, C. J. (Italics mine.)

of the phrase would be that a person with the constitutional qualifications was only "entitled to seek admission;" or "entitled to be examined for admission." Mr. Hurley regards this as a clear case of facetiousness. But again he produces no evidence to support his conclusion. While I would again call attention to the fact that the *only evidence* from the recorded proceedings of the Constitutional Convention which is of any value whatever supports that interpretation. The only two members of the convention who expressed a view as to what the constitutional section meant, both said it meant exactly that. Mr. Kelso (a member of the committee which drafted it, and a lawyer) said: "The section contemplates that there shall be an examination." And he moved to strike out the words "to admission." And the motion was never specifically acted upon by the convention; although by its refusal to act on it there is a record against the motion. Mr. Borden (who was chairman of the committee, and who, if committees then were what they are now, really drafted the provision in question) asked whether certain proposed action, which inferentially was based on Mr. Hurley's assumption (but which, note well, was lost, also), contemplated that one who had no legal education could be admitted. I submit again that those two expressions of opinion are the only ones in the entire proceedings which give any real inkling as to what any member of the convention thought on the subject; and they both expressly support the interpretation of the phrase which Mr. Hurley says is facetious!

Again, however, I am of the opinion that those expressions of opinion are not necessarily fastened on the convention; and that there is no evidence at all from the proceedings of the convention from which it is possible to gain any conclusive light as to the actual intention of the convention. Had the matter been argued fully; had a majority of the members expressed an opinion we would have some material for interpreting the section on the basis of its actual intention. As it is it seems quite impossible to adopt any view other than that the actual intention of the convention is not discoverable; and the question must be decided on a fair interpretation of the language used. Although again I should still insist that a court could reasonably say that the substitution of the phrase "entitled to admission" for the phrase "have a right" indicated a conscious effort to make it certain that a person was to be entitled to seek admis-

sion, and no more. The Constitution could reasonably be construed not only to sanction a legal examination, but in truth expressly to require it.

IV.

But I am still willing to prove that "good moral character" includes educational qualifications. There are two possible approaches to the problem. First, as a factual concept that is true; second, as a legal concept it could be said to be true, and therefore to *be* true as a matter of law.

We must remember that "it is a constitution we are construing." Its proper interpretation is a judicial question, and not a common question. And we must remember, too, that language often has a double meaning. It means one thing to the ordinary layman; it means another to the lawyer. The first I speak of as being its factual or common content; the second as being its legal content. For example, "possession" in fact is something quite different from "possession" in law; "valuable consideration;" "ownership," "necessaries," "fraud," "intention," "benefit," "detriment," all have a legal content at variance with their factual content. In other words they mean more to the lawyer than they do to the layman. When we come to the constitutional words and phrases the same thing is true; and the discrepancy between the layman's definition and the lawyer's is even more marked. "Due process of law;" "interstate commerce;" "bankruptcy;" "Republican form of government;" "double jeopardy;" "just compensation;" "jury trial;" "justice freely and without purchase, speedily and without delay;" "all laws shall be general" have, at best, a very vague and varying factual or common content both to the layman and lawyer, but to the latter they do have an understandable content which will be quite different from the content a layman would give the words and phrases.

So the truth is that "good moral character" may well mean two things. But if we take the first; the factual or common meaning, it is easy to prove that it includes educational qualifications.

Mr. Hurley's assumption to the contrary is based on the obvious untruth that "good moral character" in fact means only "physical morality." The actual fact that moral character is

made up of something more than that is overlooked. It disregards the *fact* that mental honesty is as much a part of good character as is physical morality; and as far as an attorney is concerned it is really a more important part. It is entirely conceivable that a person who had little physical morality would make a fairly capable attorney; but it is inconceivable that a person who had no mental character could make a respectable or capable attorney. Actually it seems preposterous that anyone should assume that "good moral character" is purely a physical concept; and that it does not include those other elements of character which include honesty, integrity, mental ability and the very ordinary virtue of kindness to and consideration for others.

Mr. Hurley will find no accepted definition of "moral character" which agrees with his. Webster's New International Dictionary defines "moral" as follows: "Characterized by *practical excellence*, or springing from or pertaining to man's natural sense of what is right and proper." The word "ethical" is given as its synonym; and there is no intimation that the word is limited in its meaning to "physical virtue." "Character" is defined as "The sum of qualities or features, by which a person or thing is distinguished from others; the aggregate of distinctive *mental* and moral qualities belonging to an individual."¹⁴

But why argue the point? It is settled for us by the case of *Ex parte Walls*,¹⁵ for in that case the Supreme Court specifically decided that mental honesty and ability are a part of "good moral character." And truly the decision is in accord with a purely factual or common interpretation of the word.

To substantiate that assertion we have the special verdict of at least one jury in this state which so decides.¹⁶ And if one

¹³ 6 Ind. L. J. 67, 76-77.

¹⁴ The matter is so obvious that the teachers and writers on the subject of Ethics assume it. One will look through all of the published books on the subject without finding any suggestion which would support Mr. Hurley's definition of the phrase. In fact Teacher's College at Columbia University has been conducting a series of character studies, and quite recently published a large volume on "Deceit" as a part of the series.

¹⁵ *Supra*, No. 5.

¹⁶ In cause No. 7971½, Vanderburgh Circuit Court, *In the Matter of the Application of William H. Axton for Admission to the Bar*, disposed of in 1926.

takes the trouble to ask an intelligent layman what he thinks, as I have on several occasions, he will get the unanimous opinion that moral character in an attorney includes educational qualifications. For is it not actually true that one who wants to defraud and misrepresent people has no character as an attorney? How can one who is possessed of the virtue of kindness and consideration for others which is so obviously a part of character impose upon others by purporting to represent them as an attorney when he has no knowledge of the law? The answer is that he cannot; the only reason he can do that is because he has no character.

Mr. Hurley misapprehends the situation. He continually talks of legal education as being good moral character. Of course it is not; it is here only indicative of it or an element in it in a specific situation. One who knows no law and makes no attempt to practice law obviously has not by his mere ignorance of the law exhibited a lack of character. It is the lack of knowledge of the law, and the affirmative act of an applicant in seeking a license to practice law, which shows the lack of character. If he does practice law and defrauds and misrepresents a person the law authorizes his disbarment because he has demonstrated his lack of character. But the law and the fact always have been that an attempt to commit a wrong was as culpable as was the commission of the wrong. The heavy foot of equity has often been placed on the neck of one whose sole wrongdoing so far had been the intention or threat to misbehave. The law never was that we had to wait until a man caused an irreparable injury before he could be reached by legal processes. The most important recent development in jurisprudence is the progress made in the field of preventive justice. A man's intention is often the measure of his guilt, and he can be sent to the penitentiary because of it. All we argue for here is that instead of the state and the courts assisting the man with a dishonest mind and character to the commission of his deceit that the law ought to refuse to be a party to it.

That the public is deceived is self-evident. No one ought to be *licensed* to practice law until he has demonstrated that he can actually practice law instead of deceiving innocent people.

V.

Even if we accept Mr. Hurley's definition of "good moral character;" he certainly would urge that it is only a factual and not a legal definition. Certainly he cites no decision to the latter effect. So if we do accept it it is no bar to a legal definition of the phrase to the contrary.

As has been pointed out above many phrases have been given legal content. This is particularly true of constitutional language. One of the accepted means of legal progress is the redefinition of words. So it is that a Constitution may change in its factual and legal meaning by the simple expedient of what we call constitutional interpretation, which after all is the redefinition of words to meet new situations and to keep the Constitution up-to-date. No lawyer at least ought to hesitate over the fact, and we might as well admit it in open court, whatever apologetics we offer to the public to explain the change.

If we must argue the point, however, how does it come that state regulation of interstate rates was originally a valid exercise of the state police power; and later it was not (even before Congress acted); how does it happen that a state quarantine law which prohibits interstate commerce is valid because it is not a regulation of interstate commerce "in the constitutional sense," whereas a congressional quarantine is valid because it is; how does it happen that two or three states formerly could tax personal property because it had a *situs* in each, whereas today only one state may tax it? But there is no use multiplying examples. Case after case gives point to the proposition that a written constitution is written in form only and that its substance, meaning and content, being judicial questions are subject to change without notice, to keep pace with the moral, economic and political progress of the race.

So certainly a court has the power here, if necessary, to give a legal content to the phrase "good moral character;" to re-define it, if necessary, to meet the present needs of the situation. I would still assert that it is unnecessary, because its factual content always was and today certainly is in keeping with the views here expressed. If it be admitted that it is not it would be no usurpation of power, but strictly in accord with accepted principles and practices of the judicial function and power to

bring the Constitution up-to-date by giving legal content to the phrase.

Finally, it might be urged that if the question is one of fact it is not a judicial question. But the answer to that is that questions of fact often become judicial question. Just as the court has said that one who is injured at an open railroad crossing is guilty of contributory negligence as a matter of law, so here the Court could easily say that "good moral character" is of such settled factual significance that the fact and law are co-extensive.

And is not that the result? The evidence on our side is; that all of the definitions of moral character include mental honesty as an element; the only decision of the Supreme Court on the point includes it; a jury has specifically included it; the average intelligent layman includes it; the early cases and legislation in this state included it; some trial courts in this state have been including it for years without opposition and with the sanction and acquiescence of all concerned. What is the evidence on the other side? None. All I ask is that the question be decided on the evidence and not on a mythical basis.