

The Legal Ethics of Fear: On the 1904 Report of the Committee on Legal Ethics of the Georgia Bar Association

by Thomas L. Shaffer*

The Georgia in which no departure from legal ethics occurred in 1904 was a state of two million people—half white, half black, eighteen per cent illiterate.

I suspect that Georgia in 1904 was a more cohesive community than it is now. Adult illiteracy in Georgia (as compared, say, with Atlantic states further north, which had by then large immigrant populations) was, for example, home grown; only half of one percent of Georgia's population was foreign born. In the 1904 presidential election, three out of four Georgians who voted chose for the Democratic candidate, Alton B. Parker. Half of the remaining Georgia votes went to the Populist candidate, Thomas E. Watson. The Republican candidate, incumbent President Theodore Roosevelt, won the election, no thanks to Georgia, even though President Roosevelt's mother was a Georgian. (His mother was Martha Bulloch, great-granddaughter of Governor Archibald Bulloch; President Roosevelt's parents were married in Roswell, Georgia). The Democratic candidate for governor of Georgia in 1904, Joseph M. Terrill, ran unopposed; after the election, the state senate had forty-three Democrats and one Republican.

* Robert E. and Marion D. Short Professor of Law, University of Notre Dame. University of Albuquerque (B.A., 1958); University of Notre Dame (J.D., 1961); St. Mary's University (LL.D., 1983). Member, Indiana State Bar.

I am grateful for the assistance of Mary M. Shaffer, who is a doctoral student in Italian literature at Johns Hopkins University, Anne Marie VanDevere, of the Notre Dame law class of 1991; and Professors Eduardo Saccone of Johns Hopkins and Renzo Bragantini of the University of Venice.

The year of this report was also the year the first Panama Canal treaty was ratified in the United States Senate, by a vote of sixty-six to fourteen, and the year the United States Supreme Court, in *Giles v. Harris*,¹ decided a challenge to a provision in the Alabama Constitution in such a way as to keep black people from voting in that state. There were devastating fires in Baltimore and Rochester and on the battleship Missouri. The Russian-Japanese War was prominent in the newspapers, as was the decision of Western Union to refuse service to pool halls (and thus inconvenience the bookmaking business). The government of France, in one of its episodes of excess, imposed a series of anticlerical decrees banning religious symbols and teaching by members of religious orders, and it withdrew its ambassador to the Vatican.

The popular living authors in America were O'Henry, Conrad, Hesse, Henry James, Saki, Shaw, and Yeats, but it is not clear how popular those authors were in Georgia. I suspect that most Georgians were as unmoved by these authors as they were by the first perfect game in major league baseball (Cy Young, Boston Red Sox), or the first appearance of the hamburger and the ice cream cone. But ordinary Georgians had no doubt heard of the flight of the Wright brothers' airplane in North Carolina a year earlier and marvelled at the fact the Guglielmo Marconi was able that year to send a wireless birthday greeting from President Roosevelt to King Edward VII of Great Britain. Facts such as those last two² set off entrepreneurial dreams, and it is evident that dreams of wealth and progress were as important in Georgia as they were elsewhere in the country, and that they were particularly important to lawyers. One of the hidden messages I find in Branham's report is the promise of new frontiers for the legal profession.

The etiquette section of the 1905 World Almanac, compiled in 1904, was limited to calling cards, invitations, men's dress, and personal correspondence. A second lieutenant in the United States Army was paid \$1,400 a year; there were 115,000 lawyers in the country, many of whom probably earned less income than a second lieutenant did. The new battleship *Georgia* cost the taxpayers \$3.5 million.

In 1904 the United States was third in the world in consumption of beer (forty-seven million barrels a year). Most of the consumption appears to have occurred in Northern cities. An alternative beverage, iced tea, was invented in 1904 and when distinctly sweet it has, I think, had more influence in Georgia than beer has had. Twenty-six states had some form of woman suffrage, but Georgia was not one of them; only one

1. 189 U.S. 475 (1903).

2. The facts in these paragraphs are from the 1904 and 1905 editions of *THE WORLD ALMANAC AND ENCYCLOPEDIA* (1904 and 1905) and from *WALTER G. COOPER, THE STORY OF GEORGIA*, Vol. III and Biographical Volume (1938).

Southern state was—Louisiana, which had begun in 1898 to permit women to vote on issues involving public expenditure. Georgia's economy was largely agricultural; the state was number two nationally in cotton production.

Georgians no doubt remembered the Civil War. Lawyers too, no doubt remembered it, Branham among them, although his report seems at first to hide the memory behind a relentless determination to be pleasant. We are looking at Branham's rhetoric eighty-six years later. We look at it through memories and stories of violence, litigation, and public turmoil that has either resolved issues the Civil War left unresolved, or at any rate has changed the tenor of them. We are likely to think that Branham seems to be hiding something.

We know about turn-of-the-century Georgia from Griffin and DeMille, from "Birth of a Nation" and "Gone With the Wind." (We know anachronistically, of course, but I find that Georgia in 1904 was subtle; I find myself backing up to less ambiguous impressions). We see images of subjection of black people, of Klansmen, and share-croppers and lynchings for insults to southern white womanhood.

Commercial statistics give evident economic support to Branham's decision to accentuate the positive. Georgia had begun in the 1880s to market itself as revived and renewed by the Industrial Revolution. Perhaps Branham was not so much hiding injustice as picking up a brave commercial spirit from his business clients. Certainly Georgia needed commercial optimism. The generation that followed the Civil War in Georgia was materially and morally devastating. Hardly any progress was made toward economic recovery until the 1890s, by which time the white Bourbon class had regained political control and, as one anthology editor put it, "sought to revitalize the Southern economy through partnership with the North"³

Henry W. Grady, editor of the *Atlanta Constitution*, was a prominent marketer of revitalization. In speeches all over the North, Grady described Georgia as bustling with opportunity for business investment. He described the situation between the races in Georgia as a matter of unique "mortal stewardship." He did not so much offer excuse for what northerners thought they knew about the South as ask for patience and sympathy for Georgia's white stewards. He pointed the finger just a bit when he compared what white people in the South were likely to do about their duties with what white Americans had done to American Indians and Asians: "The red man was owner of the land, and the yellow man highly civilized and assimilable—but they hindered . . . and are

3. Henry W. Grady, *The New South*, in II *THE NEGRO IN AMERICAN HISTORY* 151 (1969).

gone!"⁴ The "resolute, clear-headed, broad-minded men of the South . . . realize, as you cannot . . .," he said in Boston, "what they owe to this kindly and dependent race, the measure of their debt to the world in whose despite they defended and maintained slavery."⁵ Such leaders would, he said, with help from northern investors, do their duty.⁶

It is a measure both of the task Grady set himself to and of the euphemism he tried to get away with in his sales talks that he provoked wrath as well as investment. The Rev. Joshua A. Brockett, pastor of St. Paul's A.M.E. Church in Cambridge, Massachusetts, said in response to Grady's Boston speech:

In every expression of every line in which the Negro is mentioned the old spirit of Negro hatred is manifest. The beautifully phrased compliments so charmingly paid the North are but a disguise to conceal the hand which once strove to stab it. That hand still holds the knife, kept bright and keen by disappointed hopes of twenty years and more.⁷

This was the world to which the Georgia Bar could report no infractions of legal ethics and in which it continued to recommend the old-fashioned way to be a lawyer and a good person: "in all legal intercourse and relations the lawyer should be a gentleman."⁸

Being a gentleman, Branham said, means being manly. We no longer use the word "manly" to summarize the practical virtues one needs in order to succeed without shame in the marketplace. (One reason, of course, is that there are women in the marketplace now, and we suppose they are not interested in admonitions to manliness). Its usage was common in Branham's day, though, particularly in Victorian novels, in which manliness meant, as it did in Branham's report, worldly good character.

Branham's admonition seems to make a distinction between manliness and a more general catalogue of the virtues of gentlemen: Worldly character is understood by reference to gentlemen who have it (as the man of practical wisdom in Aristotle is understood by reference to good men who are also men of affairs in Athens). Branham makes this sort of reference when he speaks of Justices Lochrane, Warner, and Lumpkin. (It may be instructive that he did not add to those names any names of practicing lawyers. We have the same hard time he did agreeing on moral models

4. *Id.* at 154.

5. *Id.* at 155.

6. *Id.* at 155-56.

7. Joshua A. Brockett, *Reply to Grady*, in II THE NEGRO IN AMERICAN HISTORY 166, 167 (1969).

8. *Report of the Committee on Legal Ethics*, in REPORTS OF THE TWENTY-FIRST ANNUAL MEETING OF THE GEORGIA BAR ASSOCIATION 174 (1904), reprinted in 41 MERCER L. REV. 561 (1990) [hereinafter 1904 Report].

who are plain vanilla legal practitioners; we give few honorary degrees to lawyers who are not something else).

Another way to explicate "manliness," and the usual way to explicate the ethics of gentlemen, is to dissect the impression of character into constituent dispositions—virtues. Branham's report thus speaks of the ideal Georgia lawyer as a person of honesty, self-respect, courage, firmness, gentleness, deference, civility, and tolerance.

It would be possible for me now to round off a courteous comment on the *1904 Report* with a disquisition on gentleman's ethics in the legal profession. That would have been a less novel thing to do in 1904 than it is now, but at either time it can be supposed to have been expected and, by and large, understood. But I think we can learn more from the *1904 Report* by taking a more contentious and somber look at Branham's words. I suggest that what the report shows is unpleasant, that the legal ethic recommended there to Georgia lawyers is an ethic of fear, an ethic for an exclusive elite—less an ethic, finally, than a way to hold on to undemocratic power.

What stands out in the *1904 Report*, if you compare it with American statements of gentleman's ethics for lawyers of, say, 1817, 1836, 1854, and 1880 (those being the years of David Hoffman's first and second whiggish declarations on lawyer "deportment," of Judge Sharswood's influential essay on legal ethics, and of the Alabama Code of Ethics for lawyers),⁹ is Branham's emphasis on *not giving offense*: "To preserve our own respect and retain the good will of others, we must listen and generally agree with them," his *1904 Report* says, as it recommends diffidence in exercise of the practical moral virtues—"courtesy, kindness . . . friendship." The more I ponder these words the more they seem to prescribe the practice of servility, an ethic for "one who does not esteem himself so highly as to be unmindful of the opinions of others, or become offensive or dogmatic in giving expression to his own . . . he avoids the vulnerable points of his brother and hides his faults."¹⁰

I will admit to love for the South and for the southern gentleman-lawyer.¹¹ Thus, at first, it seemed to me that Branham was describing the civic virtue of tolerance, as General Robert E. Lee described the circumstantial *noblesse oblige* he taught, after the war, to the sons of defeated southern families at Washington College. There is support for such a comparison in Branham's choice of judicial models for the gentleman-lawyer: his way of attaching the list of virtues to moral exemplars is to

9. All of these statements are reprinted in T. SHAFFER, *AMERICAN LEGAL ETHICS* (1985).

10. *1904 Report*, *supra* note 8, at 174.

11. I am a Mountain Westerner and a Hoosier lawyer, but my mother's family came from the South, one branch of it from Georgia; and I taught law for nine years (1979-1988) at Washington and Lee University.

refer to the history of Georgia case law—118 volumes of judicial opinions from the Georgia Supreme Court. The common law itself, he said, demonstrates the virtues of “learned and noble men,” men of moral excellence and of legal vision. General Lee spoke of his having had power, and of his students being trained for power in much the same way. Honor is not so much a matter of a gentleman’s being born to power as it is of how he uses power when he deals with others. “The gentleman does not needlessly . . . remind an offender of a wrong . . .,” General Lee said. “[H]e strives for that nobleness of self and mildness of character which impart sufficient strength to let the past be but the past. A true man of honor feels humbled himself when he cannot help humbling others.”¹²

Branham’s ideal, however, is even more relentlessly agreeable, and that makes me suspect it. He reads like the sort of lawyer who, in the relatively graceless Midwest, would make other lawyers wonder what he is up to. Branham’s interest in what he calls “angles” is an example. “Angles” are a gentleman’s vulnerable points; they are like “the ulnar nerve . . . embedded in a groove of the elbow and extending down the arm”¹³ They are the risk of unseemly reaction before which a gentleman is relatively defenseless, and, Branham says, no other gentleman should take advantage of them. I cannot help reading this rhetoric against the background of the legal ethics of service to the robber barons—captains of late nineteenth century industry who stole, cheated, and probably even murdered, and whose lawyers were parties to or tolerators of exploitation and abuse ranging from bribery to legal manipulations that were as ugly as anything our contemporary doom-sayers in the American Bar Association talk about.¹⁴

Most of the behavior of lawyers for the robber barons occurred, no doubt, in the North, but some little bit of it—or at least some interest in it—must have surfaced in Georgia; Branham and his colleagues hoped, no doubt, to attract similar commercial legal business in Georgia. If that is so, Branham is selective in his description of the ideal lawyer; not only does he not mention less admirable practitioners, he does not even mention how the noble lawyers are to come to terms with them and with the temptation to join them. There were no departures from the principles of legal ethics in Georgia in 1904.

I thought, when I read the *1904 Report*, of my daughter Mary’s work in Italian literature and of a seminar she took last year in an early compendium of worldly advice to those who advise and influence, who use power but rarely can claim title to it—Baldasare Castiglione’s *Book of the*

12. IV D. Freeman, Robert E. Lee 499 (1935).

13. *1904 Report*, *supra* note 8, at 177.

14. See Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

Courtier.¹⁵ Castiglione, like Branham, recommended "a gentle and agreeable manner" as more useful than either ethical principle or abrasive social virtues for dealing in a world in which "no two people . . . are of identical mind."¹⁶

"Talk little and do much," Castiglione said. "Exploit good qualities . . . without exciting envy . . . be kind, modest, reticent, and anxious above all to avoid ostentation or the kind of outrageous self-glorification by which a man always arouses loathing and disgust among those who have to listen to him."¹⁷

The ethic of the *1904 Report* is like the ethic of the courtier. Each is an ethic of (1) qualification over integrity; (2) power over character; and (3) influence over truthfulness. I need to say that my agenda here is ethical reasoning not moral behavior. I do not claim to describe the morals of Georgia lawyers, nor the morals of Branham. What I claim is that the *1904 Report*, as ethics, is collective, professional, fraternal self-deception; I have made elsewhere a similar argument with respect to the modern adversary ethic,¹⁸ and with respect to the current attempt by the American Bar Association to revive the gentleman's ethic without taking responsibility for its complicity with injustice.¹⁹ I have argued, in those cases, that the ethic I criticize does not describe the morality of American lawyers.

Castiglione's ethic is an ethic of honor. Honor is not a virtue because it depends, in success (praise) and in failure (blame), on the approval of members of a group to which the moral actor belongs, rather than to indices of a good life (such as happiness, well-being, or holiness). Honor works in a closed system in which fitting into the group is the goal of the moral life; it is usually accompanied by the conviction that members of the group are gifted or elected, or both, and are therefore morally superior to other people, and it often teaches that members of the group have an obligation to see to the morals of lesser people, or that lesser people need them for some other purpose. Lesser people also and always seem to earn less, to own less, and to hold lower rank). Honor has, frequently in our history, North and South, as in Italy's history, become an ethic of oppression, violence, and conformity.

Gentlemen have sometimes realized all of this and have sometimes concluded that an ethic of honor is—even at its best—not adequate. John Henry Newman told his English contemporaries, who thought being a

15. CASTIGLIONE, *BOOK OF THE COURTIER* (1528).

16. *Id.*

17. *Id.*

18. See Shaffer, *supra* note 14.

19. *Lichtenstein Lecture, Professionalism as a Moral Value*, Hofstra University, Oct. 31, 1989 (publication pending).

gentleman and being a Christian were the same thing, that they might as well moor their vessels with threads of silk or quarry granite with a razor.²⁰

The courtier develops the skills he needs to, as Castiglione put it, "advise" the prince. Advice is how the courtier (and the lawyer) uses power he has not been given; so the skills involved are skills of manipulation, and the relevant virtue is ambition. It is particularly important in such a system not to arouse dysfunctional rancor—to avoid "angles," as Branham put it—and, when rancor is inevitable, to assume contrition as quickly as the business of the day will allow. The irony is that in this servile way the humble "advisor" becomes an agent of fear. (That may seem a startling thing to say of a lawyer, but, as the late Professor Robert Cover taught us before he died, any and all uses of the law are uses of fear.²¹ We lawyers invoke the guns of the state, as the South knows all too well; the courtier had to get by on his wits).

Castiglione appropriated Aristotle's way of identifying virtues—the way of the middle way. Every virtue (courage, for example) is opposed to two vices (cowardice and recklessness, for example). The way of virtue avoids the excessive and the deficient. The key virtue for Castiglione, using this Aristotelian procedure, was *sprezzatura*, a word (Mary tells me) Castiglione invented, from the verb *disprezzare*, to disdain or take the value out of. The sense of the word is nonchalance (and some translators use nonchalance for *sprezzatura*), or, perhaps, diffidence. The essence of the idea is that one's professional behavior is calculated. The skills for practice are feigned artlessness, apparent spontaneity.²²

The deficiency is lack of grace, lack of accomplishment—lack of calculation—*candor*, in other words. The excess is affectation. Castiglione said the perfect courtier was disgusted by affectation and, if you read the *1904 Report* carefully, so was Branham. In Castiglione's case the argument against affectation was that other courtiers could tell it when they saw it and would dismiss the courtier who practiced it. I am not sure about Branham's Georgia lawyers.

20. See Shaffer, *The Gentleman in Professional Ethics*, 10 *QUEEN'S L.J.* 1, 12 (1984) (discussing Newman's Critique).

21. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983); Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

22. Saccone, *Grazia, Sprezzatura, Affettazione in the Courtier*, in *CASTIGLIONE: THE IDEAL & THE REAL IN RENAISSANCE CULTURE* 45, 59-64 (R. Hanning & D. Rosand eds. 1983).