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# A REPORT ON THE MORALS AND MANNERS OF ADVOCATES†

HENRY G. MILLER\*

May I start by telling a story. Some years ago, a young litigator by the name of Percy Slither was answering an important motion, running up many billable hours to the delight of his seniors. Percy had sought and obtained three extensive adjournments. He then delivered his answering papers, which were longer than "War and Peace," to his unsuspecting adversaries at 4:59 p.m. on the last day. When his adversaries asked for a week to answer, Percy said: "No, I don't give adjournments." Percy was, of course, overruled by his embarrassed boss who lamely said: "You know what young litigators are like."

Another time, Percy agreed to meet his opponent, Ms. Victim, in the chambers of Judge Crimson to discuss a stay of a deposition that was scheduled to be taken elsewhere at the same time. The Judge and Ms. Victim wondered why Percy would dare to be late, but he was. Apparently, Percy had first stopped to record a default against Ms. Victim for not being at the deposition although, I repeat, he had personally agreed to meet her at the judge's chambers at that very time to discuss a stay. Judge Crimson denounced Percy for chicanery, but Percy never even blinked.

Now, Percy is a partner and in charge of recruitment. The candidates tremble in his presence as he asks them: "I am very aggressive. Are you?" Percy Slither is now a leader at the Bar and recently wrote an article entitled *Litigation is War*.

I've been thinking a lot about Percy lately, so that when Dean Rohan

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extended the generous invitation to come home and deliver the *McNally Lecture*, I decided to report on the state of the manners and morals of advocates. Let's briefly look at some of the stages of litigation.

First, I will discuss depositions. An examination was scheduled for 10:00 a.m. Mr. Late, an attorney, and his client arrived at 10:45 a.m. They had been busy preparing and, since Mr. Rush, the attorney who was to conduct the examination, is known to have had a luncheon appointment, Mr. Late had hoped that Mr. Rush might hurry and miss a few questions. The questions begin, and for every question there was an objection. Mr. Rush protests: "Sir, all objections except as to form are waived until trial." Mr. Late observes: "That merely preserves the objections for trial, and your form is atrocious." "What is wrong with the form?" "Sir, this isn't law school. I'm not here to educate you." Blood pressure and tempers rise perceptibly. Mr. Rush retaliates with a series of inflammatory and irrelevant inquiries. Mr. Late instructs the witness not to answer. Mr. Rush insists that they go to the courthouse for a ruling. Mr. Late refuses, saying that nothing less than a written record with a right of appeal to the Supreme Court in Washington or to the Hague would do. Rush questions Late's competence to practice law. Late questions Rush's lineage and worthiness to be in the same room as human beings. The reporter, knowing he will be paid for every word in any event, throws up his hands and exclaims: "I can't get this when both of you are talking at the same time." Posterity will not suffer too greatly from the omission. Nastiness and incivility reign supreme. Instincts honed in the jungle of our primeval past prevail.

Then there are trials. The case of *Bang v. Hit* was conducted in Prince County, which is near Kings and Queens Counties. It pitted two legendary trial lawyers, Adelaide Hominem and J. Winston Craggy, in a classic duel. Some called them demons, but none denied their ability. Ms. Hominem specializes in objections. She uses them to deliver messages to the jury: "Objection, this isn't his first accident." She loves colloquy. "I didn't go to law school in Cambridge like some people," is particularly effective with some urban jurors. Ms. Hominem is at her best with the personal attack. At least once in every trial, in front of the jury, she indignantly accuses her dumbfounded opponent of taking her file and reading it.

However, Adelaide Hominem meets an equal in J. Winston Craggy, a survivor who has seen it all. Craggy knows just where to stand in the old Prince City courthouse when the jury is deliberating. Miraculously, he always seems to settle when the jury is against him and takes a verdict when they are for him. J. Winston Craggy is very mean. Once, the story goes, he would not consent to an adjournment when his opponent wanted to visit his gravely ill mother in the hospital. Craggy blamed it on his client. One notices that whenever Craggy is very mean he blames it on his

client. Craggy also makes a point of getting to the courthouse early in the morning to have coffee with the clerks and sometimes even the judge—always before his adversary arrives. In fact, the locals call him “Ex Parte Craggy.” Needless to say, Craggy only gives a copy of his brief to the court, never to the opposition. He says: “Let them do their own research.” The case of *Bang v. Hit* ended in a mistrial with both lawyers held in contempt.

The gentler art of negotiation has its own snares. When interviewing a prospective client, Mr. Puff loves to inflate the value of the case. He is no fool. He knows that he is in competition with other attorneys. He just outbids them, so to speak. That’s business. The problem arises when it’s time to settle. The client is shocked when Mr. Puff recommends acceptance of an offer which is approximately 10 percent of what he originally predicted. But Puff is a wonder at the art of explaining. The witness is bad. The jury is bad. The judge is bad. The system is bad. The weather is bad. In truth, it is Puff that is bad.

Mr. Gamble is a lawyer who has been featured in many headlines. He has copies of every headline on the wall of his office, on the wall of his home, in a scrapbook he keeps by his bedside and in a brochure sent to anyone whose address is published somewhere. He never settles. He works on the theory of “5.” Out of every five cases, two will have poor results and two will have good results. They balance each other out. However, one will have a sensational result, and he gloats: “I do very well with that one. Therefore, I never settle and it works gorgeously for me.” Mr. Gamble never worries that his client has but one case, yet for the same client, he sheds tears most copiously when the jury is watching. When an infant’s case cries out for settlement and Gamble refuses, some judges appoint a guardian to consider the settlement offer and Gamble howls about the loss of “professional independence.”

Let’s talk about motions. Mr. Fee specializes in motion practice and hourly billing. He is terrified of the new procedures under which judges meet early with counsel to eliminate motions. Eighty percent of his practice involves the making of motions, most of which could be avoided by a telephone call. Fee wouldn’t know how to write an affidavit without being nasty. If he couldn’t vent his spleen in those affidavits, he’d have to go for additional therapy. Fee never gives an accident report unless the appellate division orders it. Fee’s rule about X-rays is absolute—they are for his eyes only. He explains his failure to comply with court orders to produce them with some of the greatest American fiction ever written. His motto is: “Volunteer nothing.” To a request for witnesses and records in his control, he scowls: “Subpoena them.” Absent a court order, Fee will not consent to go to another county for a deposition to accommodate a witness who is an invalid or an elderly lawyer. He says that “courtesy is weakness.” But the genius of Fee is at its greatest when a jury slip is

given to counsel. He always disappears. At moments like this, not even the FBI could find him. His philosophy is that of the warrior: grind your opponent into the dust. Some of what he does is legitimate advocacy and some is cantankerously unprofessional.

Discovery rivals many a trial in ferocity. Mrs. Stonewall is a renowned litigator. The recruits in her firm call her "the D.I."—the discovery and inspection specialist. She doesn't believe in surrendering harmful records. She once made eight requests for a protective order against the same demand. Although she ultimately lost, she yielded the record buried in a truckful of documents which took her opponents months to sort. She is the mistress of the negative pregnant. "We don't have the records in Maine," she will swear, knowing full well that the records are in Vermont. "We cannot find the records," she will urge a young associate to swear, knowing full well that she barely looked for them.

Mrs. Stonewall is not alone. "We never received the order of preclusion," is often heard from lawyers desperately embarrassed by the threat of dismissal. Who can know the truth? Records have found their way into wastebaskets. One lawyer swore he didn't have the documents although they were secreted in his office closet. He was disbarred. In an adversary system, lawyers have no duty to volunteer damaging documents but, once legitimately required, the court's order must be obeyed.

Then there is the question of preparing witnesses. Much preparation is legitimate and proper. The language naturally used by the client may be better replaced with softer substitutes suggested by counsel. The word "crash" may become "contact." Truth has not been violated; the change is a mere refinement. If the witness has trouble recalling the scene, let her visit the scene with you. That may even serve truth by enhancing accuracy.

The advocate lives on a thin and perilous edge. It is easy to cross the line. Some preparation is improper and even reprehensible. Mr. Coach suggests: "Perhaps it was 6:00 p.m. when the snow stopped, and not 2:00 p.m.?" Mr. Coach carefully explains to his client the proof necessary to prevail: "It helps in these cases if there was wax on your shoes after the fall. Oh, you say that there was." Little manipulations lead to larger ones. "If only someone saw you leaving the store. Oh, your sister did see you from her window but just forgot to tell the police." Some law firms never seem to have trouble finding a witness.

This is not to deny that there are difficult distinctions to be drawn between legitimate preparation and excessive coaching. I am trying, however, to capture your attention on issues larger than the resolution of difficult ethical questions. I am trying to identify the kind of attitudes that advocates should have to serve as an example for the kind of society we want.

Take, for example, Mr. Decent. He is courteous and capable. He will

inform a judge of an adverse decision. Judges, who talk among themselves, hold Mr. Decent in high regard. He has even been known to urge the court to correct an error in the charge that was favorable to him. He regularly reduces fees because he feels his clients may need money more than he does. Mr. Decent is known as an advocate of impeccable honor. Even in defeat, he manages to be gracious with a handshake for a worthy adversary. A document that mistakenly is sent to him and meant for his adversary is read no further than necessary to learn of the mistake. He then stops reading. He need not be this careful. No one is watching. No one would ever know. But there is something in him that does not like cheating or reading what is not his to read. He never stoops to conquer.

What is the state of the manners and morals of most American advocates? In any group, all gradations of conduct will be found. No poll is possible on what is essentially a private attitude. Here is an impression—most are not to be found at the extremes of knavery or sainthood. While it is true that only some are heroic in their dedication to the public interest, it is equally true that scoundrels are scarce. Most go about their business keeping their word, not suborning, being civil, and keeping defeat and victory in perspective. But the problems are too persistent and pervasive to be ignored. Trends emphasizing the “bottom-line” and “mass-merchandising” of the law firm do not augur well for the ascendancy of integrity and graciousness.

The American Bar is the largest in the history of the world and threatens to grow larger by the turn of the century; there are 600,000 members now,<sup>1</sup> and perhaps there will be one million by then. Unlike the situation in England, all American lawyers are potential barristers. The quality of advocacy is a national as well as a professional concern.

What causes an advocate to fall from grace? We have been told that “winning isn’t everything, it’s the only thing.” However, the courtroom is not a stadium, and sometimes defeat is a just result. We have heard the maxim: “You better take care of number one because nobody else will.” Our society does not like failure, rather, it lionizes those celebrities who know how to succeed. Concern for the other fellow is all right as long as it requires no sacrifice. Some may complain that we shouldn’t mingle the questions of manners and morals. Yet, does not a lapse in either case derive from the same defect—disrespect for other human beings?

What can be done? We cannot pass a law imposing a rule of probity and politeness. We already have all the laws we need and then some. For our purposes, the Ten Commandments and the Judeo-Christian ethic will suffice. We need only obedience to the proscriptions we have. How do we

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<sup>1</sup> Brown, *The Decline of Lawyer's Professional Independence*, 55 N.Y. Sr. B.J. 11, 14 (1983).

compel submission to the dictates of decency? "The measure of a civilization is the degree of its obedience to the unenforceable."<sup>2</sup> This magnificent insight of Lord Moulton was quoted by Whitney North Seymour, Sr. over a decade ago. Mr. Seymour reminded us that no number of policemen can make us decent, loyal, or fair. These remarks were cited by Peter Megargee Brown in his splendid article, which appeared in the November 1983 issue of the New York State Bar Journal.<sup>3</sup> Mr. Brown concluded that the law profession most needs leadership and inspiration and that young people entering the Bar should be taught by example.<sup>4</sup> I agree and am grateful to him. This is my statement to those young people and I hope my deeds are not far behind.

The power of example is, indeed, awesome. It is what we practice, not what we preach. John Locke wrote: "It will be to no purpose for the tutor to talk of the restraint of the passions whilst any of his own are let loose; and he will in vain endeavor to reform any vice or indecency in his pupil which he allows in himself."<sup>5</sup> Woe to the seasoned advocate employing a young lawyer who by a nod of the head and a wink of the eye slyly suggests: "You're in the real world now. Clients want results."

Clients are entitled to much. They are entitled to dedication, diligent preparation, undivided loyalty, superb research, the most zealous advocacy, and even sleepless nights, but they are not entitled to the corruption of our souls. The answer is: no. We should practice saying that word. We do not lie, we do not cheat, we do not suborn, and we do not fabricate. We do not lie to clients and we do not lie for clients.

The example I received as a young lawyer holds me yet in good stead. Intensely wanting to succeed and to win every case, defeat seemed unbearable to me. My mentor, a man never unduly impressed by this world's riches, told me: "Do not worry about winning. Just do your very best and let justice be done." He lived that way. His deeds fit his words and he set many a young advocate upon a righteous path.

Good examples early on are blessings that must withstand the long future facing the young advocate. Temptations will be many. Anxious to gain a big reputation and an even bigger fee, the young lawyer may undertake a trial totally beyond his or her ability and experience. The seasoned lawyer, anxious to win a big fee and an even bigger reputation, may fail to communicate a significant settlement offer to a client and perhaps may lose the case. This is unethical conduct brought about at the urging of our ever-present companions, Mr. Greed and Mr. Vanity.

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<sup>2</sup> Seymour, *The Obligations of the Lawyer to His Profession*, 23 REC. 311, 334-35 (1968).

<sup>3</sup> See Brown, *supra* note 1, at 18 n.25.

<sup>4</sup> *Id.*

<sup>5</sup> Locke, *Some Thoughts Concerning Education*, in THE EDUCATIONAL WRITINGS OF JOHN LOCKE § 89 (J. Axtell ed. 1968).

It is hard to understand the successful lawyers who live splendidly and never want for food or shelter, and then are convicted of bribing solicitors to bring them more cases. We are at a loss to comprehend those famous advocates who take in so many cases from all over the country that they can not even recall what is in their office, let alone the names or needs of their clients. Some offices are sinking in an avalanche of motions to dismiss for failure to prosecute. What are we to say of those who are too busy and too indifferent to return phone calls? Forgetting the breach of common courtesy and the lack of professionalism, may not a client's call remind the advocate of a task not done or bring new information that might enhance the client's cause?

Some lawyers never seem to have enough. What do they want? We can only wear one suit at a time, live in one room at a time, and eat one meal at a time. Why do they want more? Perhaps Mr. Greed has been whispering again: "You can never have enough."

What do we say to those successful advocates who enjoy reputations of unquestioned competence but who can no longer tolerate defeat? Mr. Rich, an accomplished advocate, sees the verdict slipping away for want of a witness. He believes in doing whatever is necessary. Miraculously, Mr. Surprise is found to testify. Mr. Rich chuckles quietly in the privacy of his den: "My cause was just and sin is justified if it brings an insurance company to its knees."

Even the great advocates are not above temptation. One reads with distress an account that strongly suggests that many years ago one of America's legendary trial lawyers bribed a juror in pursuit of victory. Perhaps Mr. Vanity had been murmuring in his ear: "You are the greatest! What would they think if you lost a case?"

Can we rid our profession of those who succumb to these temptations? Hardly. Perhaps, if we could reconstitute human nature. Are we therefore powerless? I think not. We should dream of broad horizons. We can do better. We can appeal to the army of young advocates engulfing the profession in unprecedented waves. They are the majority. Most lawyers have practiced less than a decade. They are anxious to know which path is to be taken. They are the battlefield. They are the prizes. It is to them that we speak.

Of course, Mr. Worldly will be a worthy opponent. He will invite the young advocates to join him for a drink in the Tavern of Realists. The young advocates will sink into luxurious leather chairs and be told: "There are rewards. Everyone does it. Don't be a child. It's like an expense account or a tax return. Don't be holier than thou. If you want to get along, go along."

We might begin our reply by being a bit worldly ourselves. Some of the cynics who sneer at the very concept of goodness have found themselves before the appellate division for reasons other than arguing an ap-

peal. Others have had enforced vacations at government expense during which they were free to further contemplate the metaphysical nature of good and evil.

A most unforgettable memory of Watergate is the picture of those handsome young lawyers, all of whom had brilliant futures, being led away to jail in a daze because no one had the moral fiber to say "no."

While we are being a bit cynical, we may also remember the old saying that there are many ways to conquer temptation, but one of the best is cowardice. Who but a fool would place himself in the power of another? No matter how cleverly you urge a witness to lie, that witness owns you. There may be a falling out. Montaigne advises: "Anyone who does not feel sufficiently strong in memory should not meddle with lying."<sup>6</sup>

In passing, we should also caution those clients who seek out aggressive lawyers, the ones who know how to get things done. Some members of the public, while bemoaning the low moral state of advocates, will only retain those lawyers who swing a large sword, not caring whether the sword is swung above or below the belt. These clients should remember that an advocate who will steal from an adversary will also steal from a client. If they do not believe me, I will show them the records of the Client's Security Fund.

But tonight we talk, not to clients, but to those young lawyers who would be advocates. They may think that the American legal profession has grown so rapidly that intimacy is no longer possible and, therefore, that all practitioners are anonymous. This is not true. We trial lawyers practice in the small villages of our courthouses, even when in the largest of cities. We know each other. We know each other's verdicts. We know each other's habits. Even our mannerisms are the "stuff" of which daily gossip is made. We know best which lawyers keep their word and which do not. The community of advocates is small and intimate. Mr. Weakly, a young plaintiff's lawyer, assures Mr. Trust that he will say nothing harmful about Trust's client in his summation. In a moment of weakness and fear, Mr. Weakly betrays his word and sums up against Mr. Trust's client. Mr. Weakly has summed up last. All the lawyers in the case know what has happened. It will take years to undo the bad reputation engendered by that treachery. Young advocates are quickly marked. It behooves them to establish their integrity quickly.

Young lawyers, allow me a pleasure permitted older practitioners—the giving of advice. Develop a reputation for staunchness on moral issues. Be scrupulous. Be a bit yielding. Be difficult. Be intimidating. Let people think you are on the Grievance Committee. No one will then dare to approach you with an impropriety. That's a reputation worth

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<sup>6</sup> Montaigne, *Of Liars*, in *THE COMPLETE WORKS OF MONTAIGNE* 23 (D. Frame ed. 1948).

cultivating.

We chuckle at the clumsy advocacy of those manipulators who can plead a case only when they travel the crooked road. They consider every avenue but the truth. Mr. Brandy falls to the train tracks dead drunk and is struck by a train rapidly entering the station. Mr. Devious, plaintiff's counsel, denies that Mr. Brandy was drunk. Devious disputes hospital records, doctors' testimony, and eyewitnesses. As if from heaven, he finds witnesses who testify that, at most, Brandy had one or two glasses of cider. The jury is not amused and turns away from Devious in disdain. Now listen to Mr. Decent plead the same case: "Brandy was drunk, but that train was moving fast, faster than the limit. Brandy was laying there helpless, too drunk to move, and who more than a drunken man needs a careful motorman when there is one last clear chance to save him?" Imagination rather than dishonesty.

Advocacy consists of learning the facts and arguing the most favorable position they afford. We adjust our theory to the facts. We do not adjust the facts to our theory. Young lawyers, success is preordained for many of you. The only question is—what kind of a human being will you be?

Let me share a secret. Good ethics mean good business. Clients sense the fairness with which they are treated. They feel comfortable and may refer a friend. Adversaries treat you better when they are persuaded that you are an honest opponent. They will go to the wall with Mr. Devious. They want to see and feel his merchandise before talking money. Those anxious for earthly success should seriously consider the ethical approach.

Yet, these are only worldly considerations. We must also admit that some cases are won on lies. Virtue does not always triumph. Many who are guilty of transgressions are never apprehended. Many transgressions that demean our profession are not even punishable by law. Indecency and incivility are not criminal offenses. We seek obedience to those goodly virtues that are enforceable by no law except conscience.

We must move beyond reputation and tactics. Character is needed. Character seeks no rewards, not even the applause of one's peers. Character alone permits the advocate to subdue vanity. It seeks justice, not victory. Character reminds us that there is more to life than just winning. Character is faithful to that inner ideal of conduct that determines what kind of person we strive to be. Character is the highest attribute of an advocate. Cicero was right: "The perfect orator must be a perfect man."<sup>7</sup>

Yet, the ultimate question still needs an answer. Why live a life of virtue? Some need no response, but others want earthly answers. I offer, in response, that the advocate who pursues a life of rectitude will enjoy

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<sup>7</sup> M. CICERO, DE ORATONE.

satisfactions beyond words. By intensely dedicating yourself to the well-being of your client, you will win as sweet a gratitude as was ever dreamed. Not all clients will be fair, but those who are will know that you were faithful to your trust. Collect and cherish the thank-you letters of clients—they may bring as much comfort as any fee. Inner serenity, rather than anxiety, is a further stipend for an upright life. The virtuous advocate has a philosophy that enjoys each day and agrees with Montaigne that what matters is not the arrival, but the journey.

Our morality is determined by the scope of our considerations. Those who only consider themselves have a standard that seems logical to them. Those who also consider their clients reach different conclusions. Those who care for the well-being of all persons will, of necessity, develop a more magnanimous ethical system. The ultimate justification for morality is belief in the value of every human life. The most moral person is thus the most compassionate.

The advocate who leads a moral life holds the inner self in readiness. Such an advocate saves something for the challenge that may come. Goodness has not been leaked away in days too dull to be distinguished one from the other. Think of the writer Zola. His life was spent training and waiting for Dreyfus. Zola, at the risk of everything, was not found wanting.

We help ourselves keep to the moral life by joining with those of our peers who share our assumptions. We break bread with those we respect. That is how the unenforceable is enforced. We would be embarrassed to break faith. We meet collegially in our professional associations, as men have for centuries met in the Inns of Court.

One must wonder whether the young lawyers coming into advocacy will approve of these comments. Some might reject them as being out of step with the modern temper. I will still speak them, however, because truth should be spoken and the young should make their own decisions. I am optimistic that these words will find attentive ears among the young. There is a new ethic being born. The young are running the race differently. One need not be first. Just be the best you can.

Young advocates have the wit to seek out good example. I know that I was very wise in selecting a mother and father of modest means whose honesty was unspoken and unshakeable. I was also very wise at the age of 6 in deciding to attend St. Brigid's grammar school in the Ridgewood section of Brooklyn. There I later met Sisters Mary Lucille and Damien who joyfully lived their lives of poverty for what they believed, thus presenting me with an unforgettable example of advocacy. Another good example was presented to me at St. John's, where Father Tinnelly taught us Ethics and practiced it long before it was fashionable to include it in the curriculum.

As the years of your career pass by with a speed that will startle you,

remember to read widely. It will help to protect and enhance your decency and integrity. Narrow technical education is not for the advocate. For the working advocate, Dickens is even better than the Codes of Ethics and Evidence. Dickens is the Bible for the moral lawyer and for all those who need reminding of our common humanity. Study the murderous folly of Mr. Merdle,<sup>8</sup> who wasted his life hoarding, accumulating, dominating, and amassing beyond all need and reason but who never smiled, or danced, or knew the exquisite joy of righteousness and charity. As your career matures, you will become the good example and thus pass the torch. You, as is inevitable for us all, will soon enough come to your deathbed. Hopefully, it will not be too late and you will have passed the test.

I have been hesitant in giving this lecture because I have not brought to you the scholarship and erudition of my predecessors; yet I have tried to create, no matter how imperfectly, from the smithy of my soul, my view of an advocate's credo. No one knows better than I the long distance between the ideal and my own conduct. Yet, if we wait for a speaker without stain, there only will be silence. I say to you, should you deviate, should you fall from grace, start again. Do not be discouraged. Remember we are merely humankind—sleeping, eating, generating, surviving humankind—only recently emerged from the caves and slavery; yet somehow, despite our common frailty, we are capable of something wondrous and redeeming—a poem, a noble gesture, an act of kindness.

Thus, let us dare to be idealists, putting client before self, truth before client, and justice before all. We, as lawyers, may not build bridges, but we can help build a better society. We can protect the delicate existence of integrity and graciousness, without which civilized discourse cannot take place. The choice and the future are ours. We can choose the abyss in which advocates, ill-natured and inconsiderate, will be hired mercenaries, serving no master but their own selfish pursuit, until a joyless death does them part. Or, we can have a vision of a true advocate, courteous and accommodating, yet fierce in the championing of a client's cause, balanced by a sincere regard for the well-being and the rights of all human beings. Upon that rock, the morals and manners of an advocate are founded.

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<sup>8</sup> See C. DICKENS, *LITTLE DORRIT* (1855).