

LAW AND ETHICS.

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The fundamental error in the present method of teaching law is that the student is made, or at least permitted, to start with a false conception of the very nature of the subject with which he is to deal, and of the end and purpose of his studies. He is given to understand that the law consists necessarily and entirely of certain fixed rules, prescribed by superior authority (whether that of the State alone, as some hold, or that of a divine Creator, supplemented by the State, according to other), which has determined not only their substance but also their exact form, and has thus made them independent of all change by the courts that administer them, and of all influences proceeding from the facts to which they may be applied. Even if the student finds, as he is apt to do, that courts differ as to the rules which have been so given, he can only conclude that one of the other is mistaken, and that there is a true rule somewhere if he can only find it! Hence the first and most important part of his task must be to learn these rules exactly as they are and fit their terms precisely in his memory, without wasting time and labor on their applications, or the intricate questions of fact that are constantly arising in the process.

Even if his own intuition or the advice of experienced friends teaches the beginner that behind these rules there must be principles on which they are based, and from which they spring, it is not easy for him to perceive the true nature of these principles. All the references made to them in the books, or in the language of bench and bar, are vague and often contradictory. Commonly he is led to suppose that they are merely a higher order of rules, "prescribed," and so forth, like laws, but at once more general and more exact than laws:—for he has not yet learned the inconsistency of these two characters. He is constantly trying therefore to formulate them in the shape of rules, and to commit them to memory; hoping thus to decide difficult questions better than by aid of the laws alone. But the task is an idle one.

Others who seek for principles, or the causes by which the law is made to be what it is, commonly err in confining their attention to what they call moral causes—the final causes of the old philosophy—as if every rule of law had been consciously and purposely made by some legislator, divine or human, to carry out a purpose that could be clearly perceived by finite intelligence from a study of the rule itself. The error is not unlike that of the pre-Baconian physicists, who sought to ex-

plain every phenomenon of nature directly by some ultimate end for which it was ordained, instead of contenting themselves with a slow and gradual induction from phenomena to truths of a lower order, and from these to higher, trusting in this way to reach eventually those highest truths that as yet are beyond our ken. Thus the so-called philosophical jurists have explained every rule of criminal law by its supposed operation upon the human conscience, the rules of property by the need of preventing strife, those of contract by the moral obligation to keep a promise, etc., etc., without perceiving that most of these rules had in the course of ages formed themselves, without the will or intention of any man, by mere deductions from the ideas and convictions of past ages; and that to explain their real final cause or moral purpose it would be necessary to rise above finite intelligence altogether, to the only mind that can comprehend man's entire history and ultimate destiny. The error has been fostered by the mistaken identification of law and morality, which makes it plausible to seek a direct passage in every case from the legal rule or institution to the ethical purpose which it was intended to serve.

Even among the laws of human legislators there are very few that can be traced directly to an ethical purpose which they were intended to serve; still fewer of those so intended that practically served the end at which they were aimed. The great majority of our acts of Congress, Session Laws, etc., are framed to serve some private interest of sufficient power to make its grievances heard: or to get rid of some practical hardship in the operations of government, that is felt in its consequences, financial or otherwise, altogether apart from ethical considerations. Few legislators are even intellectually qualified to foresee the moral results, for good or for evil, that will be produced by the measures in which they are most interested. How often do new laws, intended to effect a clear moral purpose, turn out to be the worst hindrances in the way—e. g., constitutional prohibition?

Now, if man is so incapable of predicting the effects of his own laws, of which the causes are within his grasp and the terms selected by himself, is it at all likely, *a priori*, that he will be able to read accurately the far-reaching chain of causes and effects upon which the rules and principles of the unwritten law depend? Can a judge foretell the remote effects of his own decision more accurately than the law-maker those of his own bill? Can he see the moral cause from which a series of precedents first sprang, any plainer than the legislator sees the first causes of existing institutions? Have the wisest of the race seized so

firmly the intricate threads of causation that run through the entire web of a nation's law, that they can follow any one of them back to its true origin, when they cannot foresee the outcome of their own tampering with a single one?

The chief work of a student of law must always consist in studying the logical connection between actual rules of law and the modes in which each of them is determined by others, while helping to determine them in its turn.

The true practical test of good law is its consistency with other contemporaneous rules, not its derivation from some moral truth that lies far back of it, or its effect in reaching some moral end in the future. Two rules that lead to inconsistent judgments in a single case cannot both be law; but a rule that seems, with our present light, to be of unjust origin, or to tend to an immoral effect, may be very good law all the time. Most rules, moreover, have no moral character whatever in themselves, no more than those of arithmetic or chemistry.

Law, as a science, deals with the reason, not with the will. It leaves the will entirely free to obey or disobey as it pleases. It merely points out what the consequences will be in a given case; in either case. The consequences it imposes come after the choice is made,—sometimes by the effect of natural law, sometimes by provisions of the positive law. It is the office of the law to see that those consequences follow, and herein consists its power. These consequences are entirely different from the sanction of a command. Law furnishes motives to action, but does not direct action as ethics does. Hence law is consistent with freedom of human will; even furnishes the best possible school for the exercise and strengthening of that freedom. There could be no such freedom in a world of enforced morality:

Ethics and law are essentially distinct. The former addresses itself to the individual: the latter to the members of the State. The former directs the person addressed what he shall do or shall not do. The latter determines what one citizen may require another to do or not to do, or what the community as a whole shall require or forbid.

Ethics as a science is essentially directive. It addresses itself to the will, the conscience: it enlightens and instructs, but it does not compel. The only force it exerts is the moral force of conviction. It loses its essential character so soon as it compels obedience.

Law is essentially compulsory. Power is of its essence, as guidance is of the essence of ethics. But it is not power exerted by the law-giver over the person addressed, to compel him to do right or refrain

from wrong. It is power over one citizen at the instance of another, or of the entire body. Law that cannot be enforced is no law. Ethics enforced is not ethics.

Every legal proposition respecting human action contains a judgment of right or wrong,—in a legal sense at least, though not always in a moral sense,—and, therefore, implies freedom of action and moral responsibility on the subject of the law. But this involves a consideration of the intent or motive which goes with the action described by the term. We could not say that an action is lawful or unlawful, right or wrong, if it were not considered with relation to its causes and consequences,—the purpose with which it is done or the results which may be expected to flow from it.

The difficulty here is that positive laws cannot create a right; we must find some basis for it before the law itself. A general command or law, imposed by a superior having authority to direct the actions of persons subject to such law, of course imposes upon them the duty of obedience, irrespective of the benefit or harm they may find in the actions so commanded. Actions so commanded are right actions; actions so forbidden are wrong actions, and if the law imposes a penalty upon the latter, or gives a reward for the former, it adds a sanction in the modern sense of the term by which the law is said to become enforceable, or law in the strict sense as distinct from morality.

Blackstone holds that no such sanction is necessary to the natural and revealed part of the law; which is enforceable of itself by virtue of the Divine command; or in other words, ethics is a part of the common-law administered by the courts. But the human part of the law is only enforceable by virtue of the sanction.

This last is also the doctrine of Bentham and Austin; as they reject the notion that a divine command is of itself and *proprio vigore* enforceable in earthly courts, they make it applicable to the entire municipal law, and make the obligatory force of all such rules depend upon this sanction, without reference to their origin. Still they adhere to Blackstone's conception of rights and wrongs as consisting primarily in obedience to the law, or disobedience. Austin and some of his followers, like Stephen, carry this so far that they disregard entirely the question of the legislator's right to obedience; it is the command of the State which makes legal right, and that without reference to the origin of the rule which the State enforces.

But it is evident that we have as yet no sufficient conception of a legal right, as a power which the possessor may exercise or not at his

discretion; a control over the material world or over the actions of other men, which the law recognizes and enforces irrespective of its ethical character, or of the motives by which the owner of the right is governed in its exercise, so long as he keeps within its legal bounds. As between the law-giver and the subject, there can be no such right and no place for its exercise. The only right the latter has is to obey the law; all disobedience is wrong. Even in matters indifferent he is left free to act only because of the accidental omission of the law-giver to regulate them; an omission which may be supplied at any moment. Some of the most logical advocates of this theory even deny that there can be such a thing indifferent, or a permissive law. And it is difficult to see how an individual right of one subject against another can be based on such an omission. Where the law has imposed no rule, each one of the numerous subjects of the law would be left equally entitled to act on his own caprice.

To obtain a solid foundation for the conception of a legal right, we must revert to our first statement of the effect of a law, and add elements that as yet have not been considered, especially the power of one subject over the action of another, of which the theory gives no account, but which is essential to the notion of a legal right or duty, at least in private law. If right and wrong are distinguished merely by obedience to the law-giver, as Austin holds, what claim has any one but the law-giver himself to damages for wrong?—or to be heard on the subject, where he has perhaps broken other laws to an equal if not greater extent? The older writers would answer such an objection by saying that the Creator has made human sovereigns and magistrates his deputies to interpret His laws, and to impose penalties for their violation; but Austin has expressly excluded this hypothesis.

The interest of every subject in the obedience of other subjects to a law, depends not on the wrong character of the disobedience but on the harm done to himself or his interests thereby. It thus presupposes rights of person and property—rights of liberty, security and ownership not created first by the law but existing independently of it. (Whether it is correct to say that such rights exist before the law by which they are defined and protected, may be questioned; but there can be no doubt that their objects exist and the interest of individuals in those objects and the value they set upon them, i. e., all that makes the right precious and useful to the owner, except the additional security given by the law.)

It is not by the law alone, therefore, but by the operation of the law

upon these natural interests and affections of human beings, that legal rights arise. When we say that we have a legal right, we mean much more than merely that it is right for us to have the thing. Much of the confusion and ambiguity between moral and legal rights grow out of the neglect of this. To say that a thing is right tells us nothing besides of its character. It merely affirms this one quality of consistency with a law or standard of rightness. But to say it is a legal right, while it may mean less, as to this one quality, means much more as to its nature and relation to ordinary human motives. It tells us that it is something which men prize and set value on: that it has a price on the market or else is an essential part of our very existence. Nearly all legal rights are to the enjoyment of things in the possession of which all the happiness of earthly life consists.

Are the fields of law and morality separate and distinct, or coincident? The question cannot be answered in either sense without qualification, although both answers will be found in the books. Nothing, perhaps, has done more to cloud the doctrines than the attempt to define so compels a relation in the simple terms applicable primarily to space. Law and morality are quite distinct things, and yet to a very great extent they overlap or coincide, yet without losing their separate identities. Both deal with human conduct, the actions, rights and duties of responsible free agents. Morality governs these as they present themselves to each actor individually in the forum of his own conscience. Law governs those rights and duties which are reciprocally enforceable between men. It is the ordering of the social life of mankind.

Law is not morality, but it presupposes morality and again reacts upon it. No free agent can place himself outside of the pale of moral responsibility for a moment, any more than he can outside of the atmosphere in which he lives and was formed to live. Hence we cannot determine what a man's legal rights and duties are without taking into account his moral nature: and again every man is governed by the laws of morality in the use he makes of his legal rights and in the performance of his legal obligations. But it does not follow from this, as has sometimes been erroneously held, that moral obligations are of themselves legal ones, or that they can be converted into legal ones by the addition or subtraction of elements. With all their intimate relations to each other law and morality are yet entirely and fundamentally distinct.

This however has not always been recognized. The current doctrine in the middle ages,—by no means universally discarded even now,—

was that law was only enforceable morality and that all good and true government consisted in making men good by external motives. The divine right of kings,—as really held by its ablest supporters, not as misstated and caricatured by opponents,—was a logical part of the same theory. The power of the magistrate, by whatsoever name he might be called, was a delegation from God, and it was his office to enforce God's laws, and to supplement them in things indifferent, to the end that virtue might prevail and vice be punished. The canon law throughout embodies this doctrine, but it is found also in all systems of municipal law. No error has done more to confuse the science of law—perhaps none has produced more human unhappiness directly and indirectly, than this. The social contract theory was a direct revolt against it.

It is, perhaps, the greatest advance in ethical science made by modern thought, to perceive that law and morality are different sciences, and that the reasons for holding a thing to be morally right not only are insufficient to make a law of it, but are often irrelevant, and of no force in the determination of the jural problems.

Down even to the time of Blackstone it was otherwise. No writer of any accepted school would have ventured to say that the laws of morality were not law, for the very conception of law was that it forbade what was wrong and commanded what was right. The fallacy in assuming that this was the law which our courts administered and that they had no power to enforce any rule which was not directly or indirectly prescribed by some superior.

We now see differently, and hold that the law is not intended to enforce the doing of moral right—nay, we see that it cannot enforce moral right. What is right, is one thing; what we can compel our fellow-men to do, is quite a different thing, here broader, there far less broad. The practical distinction between ethics and law, so far as their judgment in a given case is concerned, is that in ethics we must take into account every circumstance, every feature of the act or omission we are judging. The character of each party involved, their relations to each other, their previous transactions, even their mental states and expectations for the future are all necessary parts of the act we are to pass upon, and may properly influence the decision. Every ethical judgment is of necessity a special one.

In law, on the other hand, because it is law, and proceeds on general rules, we must abstract largely before we are ready to judge. If we

should bring in the individuals and their circumstances the application of a general rule would be impossible. Every such rule implies uniformity of character in the persons and things within its purview. This can only be attained by disregarding all but the necessary marks of the uniform character.

In morals the question what is to be done,—the second term in the sequence,—is always to be determined on all the facts antecedent, because every detail and circumstance may be of account in its bearing on the right or wrong of the action. But in law this is excluded by the very conception of a fixed rule, a definite relation between one term and the other. To obtain the legal conclusion we must know what is the legal condition, what facts are to be taken into account.

This is a necessary result of the fact that there is a law, a settled rule between the parties which can only exist when its terms are ascertained. We cannot say that the law is so and so in a given case until we have determined exactly what the case is, and such determination involves the exclusion of certain elements of fact, not only because it is of necessity a general term, but also because there can never be found a precedent for every circumstance of any human action. Without a precedent (or a statute) there could be no fixed law known to the parties.

This may be reduced to the following rule: ethical duty is measured by the facts of each case in all their details, so that the fact B, with all its particulars, must follow from fact A, with all its particulars, as a logical consequence or net result.

(This supposes the facts to be entirely known. Practically it is affected by the imperfection of the human mind, which can neither know the facts precedent perfectly, nor judge the facts consequent in all their results. But this does not affect the present question.)

Legal duty on the other hand implies a rule: and this as a general rule cannot take account of all the elements of any particular fact. These must be reduced to general terms: i. e., must be determined by certain marks with abstraction of all others: must be the ultimate, not the evidential facts.