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## Law and Morality

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# JURISPRUDENCE

## LAW AND MORALITY

The purpose of this article is twofold: to determine the specific areas of relationship between law and morality; and to demonstrate (philosophically and pragmatically) that a complete dichotomy between law and morality is unsound. The classic advocate of a complete divorce of law and morality in American Jurisprudence is Mr. Justice Oliver W. Holmes. In his noted address to law students, Justice Holmes stated that a law student could gain a more perspicacious understanding of law if he would view the law from a "bad man's" point of view and thereby recognize a dichotomy between law and morality.<sup>1</sup> Holmes' purported motive was to achieve an understanding of law in terms of scope and content by emphasizing the idea that morality should not be equated with the contents of law because morality, *per se*, has no objective validity and moral terms, as used in law, lose their ethical meaning.<sup>2</sup> Elsewhere, considering law in terms of source, Holmes argued that the moral judgment of society (changing mores) is the ultimate source of law,<sup>3</sup> rejected the doctrine of the natural law,<sup>4</sup> termed morality "a body of imperfect social generalizations expressed in terms of emotion."<sup>5</sup> He defines law as "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."<sup>6</sup>

The procedure of this article will be to analyze the concept of law and morality; determine the specific areas of their relationship; and to determine the effect of this relationship.

### CONCEPT OF LAW

Every society comes into being for some purpose, i.e., a society is a unity of order determined by its last end and goal,<sup>7</sup> and different

<sup>1</sup> HOLMES, COLLECTED LEGAL PAPERS, *The Path of Law* 169 (1920).

<sup>2</sup> *Ibid.*, 170: "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law." Cf. 64 HARV. L. REV. 529, 929 (1951); 37 A.B.A. J. 809 (1951).

<sup>3</sup> HOLMES, THE COMMON LAW, 44 (1881): "—the rules of law are or should be based upon a morality which is generally accepted."

<sup>4</sup> HOLMES, COLLECTED LEGAL PAPERS, *The Natural Law*, 312 (1920): "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them, as something that must be accepted by all men every where."

<sup>5</sup> HOLMES, COLLECTED LEGAL PAPERS, *Ideals and Doubts*, 306 (1920).

<sup>6</sup> American Banana Co. vs. United Fruit Co., 213 U.S. 347, 356 (1908). Cf. *The Path of Law*, 173: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

<sup>7</sup> Cf. *De regimine principum ad regem Cypri*, I, 15.

societies are classified according to their different ends.<sup>8</sup> Thus societies are necessitated by the dignities and needs of the person: *homo homini amicus*.<sup>9</sup> But while society is a necessity, the form of the polity is left to man's free determination. Consequently, there is an essential relationship between political society and man's nature and purpose; and only in the order of the community can the individual welfare be secure. Laws are essential in any society because they are necessary means to attain the end of the State, and the goal to which all laws aim is the common good, i.e., the attainment of the end for which a society exists. In most societies, this goal is that of affording the individual an opportunity to live a full life. Hence, the immediate common good of a state is peace, while the ultimate common good of the state is the life of reason for the whole community,<sup>10</sup> i.e., the assurance of the opportunity to follow the law of reason to individual perfection.<sup>11</sup> It should be noted that the common good is not superior to the private good in a quantitative sense but rather differs and is superior in a formal sense,<sup>12</sup> i.e., a common good, as such, is communicable, while a private good is not.

The term "law" itself is complex and subject to many distinctions, but complexities necessitate distinctions and distinctions are the strings of understanding winding through the labyrinth of human affairs. All of the characteristics of law, in its generic sense, are contained in the classic definition: "Law is an ordination of reason for the common good by him who has care of the community and promulgated."<sup>13</sup> Because the types of law differ in their casuality, it can be seen that the term "law" is predicated analogously and not univocally of the types of law:<sup>14</sup> eternal, natural,<sup>15</sup> divine and positive; i.e., the term law is used in a variety of meanings having an essential similarity of meanings and not

<sup>8</sup> *Summa Theologica*, I, q. 11, a. 2.

<sup>9</sup> *Contra Gentiles*, III, 117, 125.

<sup>10</sup> Cf. JACQUES MARTAIN, *THE PERSON AND THE COMMON GOOD*, 42.

<sup>11</sup> In *Quaestiones Disputatae de Caritate*, a. 2, c: "The good of man is to be understood diversely, according as man is understood diversely. For the proper good of man as man is the good of reason, since to be man is to be rational. The good of man as an artist is the good of art, and so also according as he is a citizen, his good is the common good of the city."

<sup>12</sup> Cf. *Summa Theol.*, II-II, q. 58, a. 7.

<sup>13</sup> *Summa Theol.*, I-II, q. 90, a. 4.

<sup>14</sup> M. T. ADLER, *A Question About Law* in *ESSAY IN THOMISM*.

<sup>15</sup> A distinction should be noted in natural law—namely, natural physical law and natural moral law. Natural law is the participation by things in the Eternal Law in which each thing is directed according to its nature. This participation will be commensurate with the nature of the thing: passive or active. If passive, as in non-rational beings, it will follow necessary physical laws; but natural physical laws as known to man are merely scientific hypothesis attempting to explain phenomena and are thus "laws" by equivocation. Cf. W. H. WERKMEISTER, *A PHILOSOPHY OF SCIENCE*. If active, as in rational creatures, whose natures are moral and free, it will be in the natural dictate of human reason—i.e., the natural moral law.

as having one meaning only, because the sources and applications differ. The natural law,<sup>16</sup> in the order of the common good, prescribes the end of justice and the *jus gentium*<sup>17</sup> which (approximates international law) prescribes the means of justice—but both constitute the end and means in a universal sense and hence there exists a need for a norm or law on the particular and practical order of concrete acts: the positive law. Thus positive law declares and supplements<sup>18</sup> natural law by more definite determinations and its chief function is to implement natural law in different civilizations and cultures. However, positive law is subject to error because it treats the contingent rather than the necessary; and therefore, since the matter of positive law is mostly determination and hence opinion, positive law may, *per accidens*, be contrary to the common good, yet, *per se*, it is directed to the common good.

#### CONCEPT OF MORALITY

Morality may be equated with order and has as its object human actions that are ordered to one another and to some end. The idea of value (good or end) is the crux of any moral system since the concept of value is a primary concept in the order of our practical concepts, i.e., ultimate in its genus.<sup>19</sup> The value of anything rests primarily in its perfection and in its act, i.e., in the full development of its peculiar nature and the attainment of its own peculiar perfection. Hence the concept of value is the beginning of morality, a thing takes on the appearance of an end because it is good and the end is the form which a thing assumes when it enters into relation with an appetite. Therefore, the reason why an object becomes the object of an appetite lies in its goodness and value,<sup>20</sup> and every appetite is directed towards the perfection of the subject. Hence the moral act is a combination of the subject that makes the act (rational and free act) and the object that is intended (objective goods and values that result from this activity); objectively the moral act is made up of three elements—the object, the end and the circumstance.<sup>21</sup> The moral act derives its quality from its agreement with some

<sup>16</sup> Cf. J. Maritain, *The Natural Law*, Commonweal, May 15, 1942, p. 84—"This means that there exists, by the very reason of human nature, an order or a pattern which human nature can discover and according to which the human will must act in order to attain itself to the necessary ends of the human being." RYAN AND BOLAND, *CATHOLIC PRINCIPLES OF POLITICS* 4 (1941): "The natural law may be defined as: a necessary rule of action, determined by rational nature, imposed by God as author of nature, and perceived intuitively." NATURAL LAW INSTITUTE PROCEEDINGS, Vol. 1-4 (1950).

<sup>17</sup> 9 THE CATHOLIC ENCYCLOPEDIA, 73, 76 (1910).

<sup>18</sup> Cf. *Summa Theol.*, I-II, q. 95, a. 2. The modes of derivation from the natural law found in the human law are declarative (derived from the common principles of the natural law by way of conclusions—i.e., declaratory of natural law) and determinative (derived from the natural law by way of determination).

<sup>19</sup> I *Ethica Nicomachea*, 1, 1094a.

<sup>20</sup> *Summa Theol.*, I-II, q. 8, a. 1.

<sup>21</sup> *De Malo*, II, 4, ad 11.

norm and since man has the seal of Divine Intelligence inscribed on "his heart" in the form of general principles of action by which the ends of his strivings are measured,<sup>22</sup> then the proximate norm will be human reason and the ultimate norm will be the eternal law. Therefore rational human nature is the norm of morality, and morality is the transformation of a known order of values. To put it quite succinctly, morality is nothing more than conformity with the rule which regulates human life: namely, the rule of reason. Thus the essence of morality is man's approach to his goal; man's particular goal is the perfection of his spiritual and moral nature and his ultimate goal is union with God.

#### CONCLUSIONS AS TO SPECIFIC RELATIONSHIP

The precise areas of relationship between law and morality can be stated in the following manner:

1) Law is related to morality in the setting forth of those virtues that are related to the common good. This does not mean that positive human law should prohibit all vices nor command all virtues: rather it prohibits only the grosser failings of mankind which threaten the very survival of society and commands those virtues which can be ordained by human means to the common good.<sup>23</sup>

2) Law is related to morality by the moral obligation imposed, i.e., by the necessity of an act in relation to a necessary end—since law as the command of practical reason necessarily implies an obligation. Thus obligation flows from the essential notion of law as an effective dictate of practical reason, i.e., a connection of some necessity between the act commanded and the end for which that act is commanded. However, positive human laws' obligation is not in that same manner as morality's obligation.<sup>24</sup>

3) Law is related to morality inasmuch as law is subject to and cannot contradict moral principles, i.e., natural moral law.<sup>25</sup>

4) Law is related to morality inasmuch as both stem and are directed by the same source: practical reason or prudence. A keener

<sup>22</sup> *Summa Theol.*, I-II, q. 91, a. 2. Cf. *Commonweal* 36: 83-5, May 15, 1942: "It is written, some say, in men's hearts. True enough, but in the hidden depths, as much hidden to us as our very hearts themselves. This very figure of speech has often been disastrous, leading men to conceive the natural law as a ready made code neatly packaged in each man's consciousness, and which each as only to unwrap—and whereof all men should by nature have equal knowledge—Men know it with greater or less ease, and in different degree, and here, as elsewhere, they run the risk of error. The only practical knowledge which all men naturally and infallibly share in common is that one must do good and avoid evil.—That every sort of error and aberration should be possible in our determination of these things merely goes to show that our insight is weak and that innumerable accidents can pervert our judgment."

<sup>23</sup> *Summa Theol.*, I-II, q. 96, a. 3.

<sup>24</sup> *Summa Theol.*, I-II, q. 96, a. 5.

<sup>25</sup> *Summa Theol.*, I-II, q. 92, a. 1.

insight into this particular relationship can be ascertained by determining the nature of politics; politics is a human work of art,<sup>26</sup> i.e., a work of experience and prudence—and as prudence, politics is intrinsically related to ethics.<sup>27</sup>

5) Law is related to morality inasmuch as justice is a moral concept which is meaningless outside the area of morality. Essentially, justice consists in the creation of an equality.<sup>28</sup>

#### PRAGMATIC ILLUSTRATIONS

A pragmatic illustration of the specific relationship between law and morality is found in two areas of law:

1) One example is the problem of the legal effect, in absence of statute, of homicide upon the title claimed by the slayer as heir, devisee, or joint tenant to the property of the deceased.<sup>29</sup> Courts have reached three different results in solving this question:

- a) Some courts held that title (legal or equitable) passes to the criminal.<sup>30</sup>
- b) Some courts held that no title passes.<sup>31</sup>
- c) Some courts hold that legal title passes but equity will compel the wrongdoer to hold as a constructive trustee.<sup>32</sup>

The basis for the rule on which courts hold that title passes is founded on the various statutes of descent and constitutions: no conviction should work a corruption of blood nor should property be forfeited because of a crime. However, in the Ohio case of *Deem v. Milliken*,<sup>33</sup> the court pointed out that even if the title passes, yet the constitutional prohibition would be inapplicable if the court held that no title vested. The basis for the rule in which courts hold that no title passes is that the statute of descent did not abrogate the common law rule that a man cannot benefit from his crime and title never vested, consequently there is no infringement of constitutional provisions. The rationale of the constructive trustee doctrine is the equitable principle which impresses a trust upon the *res* acquired by a wrongdoer for the benefit of the injured party.<sup>34</sup>

The co-tangency of all the specific areas of relationship are involved in these cases, especially the regulation of certain actions (e.g. murder)

<sup>26</sup> *Summa Theol.*, I-II, q. 21, a. 1.

<sup>27</sup> *Summa Theol.*, I, q. 79, a. 9.

<sup>28</sup> *Summa Theol.*, II-II, q. 157, a. 3.

<sup>29</sup> Cf. 98 A.L.R. 773; 12 OHIO ST. L. J. 1 (1951).

<sup>30</sup> See *e.g.*, Wall vs. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914); Welsh vs. James, 408 Ill. 18, 94 N.E. 2d 872 (1951); Wilson vs. Randolph, 50 Neb. 371, 261 Pac. 654 (1927).

<sup>31</sup> See *e.g.*, Garwols vs. Bankers Trust Co., 251 Mich. 420, 232 N.W. 239 (1930); Estate of Wilkins, 192 Wis. 111, 211 N.W. 652 (1927); In re King's Estate, 261 Wis. 266, 52 N.W. 2d 885 (1952).

<sup>32</sup> See *e.g.*, Bryant vs. Bryant; 193 N.C. 372, 127 S.E. 188 (1927).

<sup>33</sup> 53 Ohio St. 668, 44 N.E. 1134 (1895).

<sup>34</sup> Cf. AMES, LECTURES ON LEGAL HISTORY 310-322 (1913).

for the common good, the concept of justice, and practical reason. Murder (the unjustified taking of another's life) is prohibited as a grosser failing of mankind by law, thus clearly embodying a moral principle in this specific area of relationship: but more specific determination of the consequences of this forbidden moral act is contingent on the concept of justice as interpreted by practical reason calling for a value judgment—i.e., whether the courts will, in applying the positive law to this fact situation, further delineate the moral contents of the law or proceed from this embodied moral principle in a "legalistic form," will depend upon the particular courts conception of the doctrine of judicial objectivity. Thus there is a distinction between a law containing a moral element and the consideration of this moral element by courts in reaching their results. Considering the problem exclusively in the area of morality, the proper moral judgment would be, using a joint tenancy as an illustration, that each co-tenant is entitled to his share of contribution: courts, on the whole, have not reached this result (see dissent in *In re King's Estate*, 261 Wis. 266, 52 N.W. 2d 885) because they have been chary of indulging in value judgments; which chariness, as illustrated by some of these cases, has resulted in a manifest violation of justice as determined by a known order of values. But the hesitancy of courts to further refine the moral principles does not refute their embodiment in the positive law, no more than a mistake in adding a column of figures refutes mathematics.

2) The second example will be found in the distinction between positive acts, negative acts, and negative acts where there is an affirmative duty. Thus the basis for affirmative duties in the law of torts is frequently said to be a benefit principle, i.e., affirmative duties are imposed where the actor brings himself into a certain relation with another from which he expects or obtains benefits:

"The law fastens upon certain social relationships certain corresponding responsibilities, and when the relationship is important enough to require its safeguarding by legal rights and liabilities, legal duties are attached thereto. Perhaps one of the most significant factors which has affected the development of the law here is the element of advantage in the relationship for the person upon whom affirmative obligations are imposed. No such duty is imposed except in cases wherein the relationship is presumably of an advantageous or beneficial nature."<sup>35</sup>

Consequently, legal duties are distinguished from moral duties by relating both to "benefit" and if there is no "benefit" there is no duty to act.<sup>36</sup> Thus:

<sup>35</sup> HARPER, TORTS, 197 (1933).

<sup>36</sup> Cf. *Buch v. Armory Mfg. Co.*, 69 N.H. 257, 44 Atl. 809 (1898); *Hurley v. Eddinfield*, 156 Ind. 416, 59 N.E. 1058 (1901); *Osterland v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928); *Allen v. Hoxson*, 111 Ga. 460, 36 S.E. 810 (1900).

"For years there has been a dogma of the books that in the absence of a special duty of protection, one may stand by with indifference and see another perish, by drowning, say, or fire, though there would be no peril in a rescue. A rule so divorced from morals was sure to breed misgivings."<sup>37</sup>

But there is an increasing tendency by courts to expand liability for negative conduct (failure to control) in the area of negative acts by finding an affirmative duty—i.e., shifting the basis of liability from what is done (conduct) to what ought to be done (duty).<sup>38</sup> Thus, bearing in mind the distinction between morality and changing mores, courts seem to have a propensity to consider those moral duties, which are related to the common good, as legal duties with a concomitant liability for their breach.

#### EFFECT OF RELATIONSHIP

Although there are specific areas of relationship between law and morality, it does not follow that courts will consider moral elements in the application of the positive civil law. The extent of the weight of moral consideration in the application of the positive law will be contingent upon many factors: particular weight is given to moral considerations in the expansion of legal rights and in the interpretation of constitutions and statutes.<sup>39</sup>

A curious and rather candid illustration of the weight of moral consideration in the application of the positive law is found in a story told by Justice Caton on the way in which the justices of the Illinois Supreme Court arrived at their decision in *Shackleford v. Hall*:<sup>40</sup>

"The testator having devised the estate in his will precisely as the statute would have cast it in the absence of a will, imposed the subsequent condition that if either of his children should marry before attaining the age of twenty-one years, he or she should forfeit the estate thus bequeathed. Mrs. Shackleford did not choose to wait until she was twenty-one years old, and so was married before that time. Her brother, Henry H. Hall, then filed a bill to declare the forfeiture, which, upon hearing in the Circuit Court, was dismissed, and thence was brought to the Supreme Court. Upon the arguments for the complainant, the plaintiff in error, the violation of the condition subsequent was relied upon, and really that was about all he had to say in the opening. For the defense it was claimed that the condition was in restraint of marriage, and therefore void; but to this a conclusive answer was given that a reasonable restraint was not only proper but commendable, and that a restraint to the age of twenty-one years, or

<sup>37</sup> CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 25 (1928).

<sup>38</sup> Cf. *Brown v. Milwaukee Terminal R.R.*, 199 Wis. 575, 227 N.W. 385 (1929); *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W. 2d 843 (1948); *Tamesa v. United States*, 325 U.S. 868 (1945); *Yamashita v. Styer*, 327 U.S. 1 (1946).

<sup>39</sup> Cf. 6 VAND. L. REV. 41 (1952).

<sup>40</sup> 19 Ill. 212 (1857).



even a greater age, was not unreasonable, and upon this the case was submitted. So soon as we reached the conference room with the record, Breese broke out and said: "That brother is a mean fellow; yes, he's a great rascal, and we must beat him if possible. Now, Caton, how can it be done?" I replied that the law referred to on the argument was certainly all in his favor, and I didn't remember any law to controvert that, and Judge Walker was equally at a loss to find any way to get around it. I then stated that during the argument there seemed to be, as if it were floating in the atmosphere, some intangible, undefined idea that I had seen something, somewhere, some idea, derived from something I had read sometime, probably when I was a student, when reading some text book, that might have some bearing on the case, but what it was I could not say. It was but a vague, indefinite impression, and seemed rather like a fleeting dream than a tangible idea; that I felt confident that I had never seen a case from which that thought had arisen, and that I felt no assurance that there was any principle laid down in the books, in any way qualifying the decisions which seemed to be so directly in point, holding that this condition subsequent was valid.

"Breese then picked up the record from my desk, placed it in my hands, and said: 'You take this record and hang on to the tail of that idea till you follow it up to its head, until you find some law to beat this unnatural rascal, who would cheat his sister out of her inheritance just because she wanted to get married a few months before the time fixed by the old man.'

"I took the record home with me, and after I had finished writing opinions in all my other cases I took up this. I examined carefully all the Digests in the library, and went through the English reports. I sought thoroughly, without finding a single word bearing in any way upon the case, still believing that there was something somewhere that would throw some light upon it on one side or the other. I took down Jarman on Wills, and went home determined to read every text book in the library on that subject before I would give up the search, and commenced reading at the very beginning, and then proceeded very deliberately page by page until I had got, perhaps, two-thirds of the way through the book, when I read a short paragraph which did not at first attract my attention particularly, and I passed on; but before I had finished the next paragraph the previous one began to impress itself upon me, and I looked back and read it again, and the more I studied it the more I thought it contained something to the purpose. It referred to several old English cases, the reference to which I took down, and made my way to the library as soon as possible, impatient to see what these references would develop. In less than an hour, I found the law to be as well settled as any other well recognized principle of law, that where a testator devises an estate to his heir accompanied with a condition or forfeiture, a breach of that condition shall not work the forfeiture, unless its existence is brought home to the knowledge of the heir, and this rule applies as well to con-

veyances by deed as by devise. I still think it a little remarkable that these cases, although few and most of them very old, are not found referred to in any of the Digests which I have consulted, and that no such case appears ever to have arisen in any of the courts of the United States, or in later times in England, and it is probable that today this case stands alone in American reports.

"When I read my opinion at next conference Judge Breese especially manifested great satisfaction at the result of my investigations, and walked across the room and patted me on the back, saying, 'Well done, my good boy,' and seemed not less pleased at the strictures I had expressed in the latter part of the opinion upon the conduct of the hard-hearted brother, as he termed him, and in this expression we all concurred."<sup>41</sup>

#### CONCLUSIONS

Thus, in terms of contents, morality is intrinsically related to law in specified areas and can be a controlling factor in a specific fact situation. Consequently, a complete divorce will not make for a better understanding and this can be seen by the pragmatic difference it will make as to which view a lawyer embraces in his practice:

- 1) He may utilize in his arguments the further recognition or embodiment of moral principles.
- 2) He will, assuming a conflict of authorities so that an application to a specific fact situation will produce different results, be able to utilize moral principles in his arguments.
- 3) He may utilize moral principles in constitutional or statutory construction.

ARTHUR SCHELLER, JR.

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<sup>41</sup> EARLY BENCH AND BAR OF ILLINOIS 200-203, as quoted in KALES, FUTURE INTERESTS 869 note (2d ed.).