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LAW AND MORALS—JURISPRUDENCE AND ETHICS

ROSCOE POUND*

I

PRELIMINARY:¹ MORALS AND MORALITY

The relation of law to morals was one of the three subjects chiefly debated by nineteenth-century jurists, the other two being the nature of law and the interpretation of legal history. Jhering said that it was the Cape Horn of jurisprudence. The juristic navigator who would overcome its perils ran no little risk of fatal shipwreck.² Commenting on this, Ahrens said that the question called for a good philosophical compass and strict logical method.³ But Jhering showed later that the root of the difficulty lay in juristic and ethical vocabulary. On the one side, there was a poverty of terms which required the one word which we translate as "law" to carry many meanings. On the other side, there was in German an abundance of words of different degrees of ethical connotation with meanings not always clearly differentiated.⁴ His full treatment of the words with which the jurist must carry on the discussion as to law and morals demonstrates that if the philosophical compass has often been untrustworthy, the linguistic charts have also been deceptive.⁵ He points out that the Greeks had but one word in this connection (*δίκη*). The Romans had two (*ius, mores*). German has three (*Recht, Sitte, Moral*).⁶ English has law, morality, morals. But morality and morals are not thoroughly distinguished in general usage. It is a useful distinction to use "morality" for a body of accepted conduct and morals for systems of precepts as to conduct organized by principles as ideal systems. So "morals" would apply to "the broad field of conduct evaluated in terms of its aims, ends, or results," while "morality" would refer to a body of conduct according to an accepted stand-

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¹ This article is a rewriting of Lecture XI of my lectures on jurisprudence. See my *OUTLINES OF LECTURES ON JURISPRUDENCE* (5 ed. 1943) 80-83. Much of the material of this lecture as it stood two decades ago was used in my McNair Lectures at the University of North Carolina in 1924. I expect to use this lecture in a book on Jurisprudence upon which I have long been at work.

On the whole subject see POUND, *LAW AND MORALS* (2 ed. 1926) with full bibliography down to that date.

² *2 GEIST DES RÖMISCHEN RECHTS* (1 ed. 1854) §26, p. 48.

³ *1 NATURRECHT ODER PHILOSOPHIE DES RECHTS UND DES STAATS* (6 ed. 1870) 308.

⁴ *2 DER ZWECK IM RECHT* (1883) 49-58.

⁵ *Ibid.*, 15-95.

⁶ *Ibid.*, 56.

ard. So conventional morality would be a body of conduct approved by the custom or habit of the group of which the individual is a member. Christian morality would be conduct approved by Christians as in accordance with the principles of Christianity. Confucian morality would be conduct approved by Confucius.⁷ In this way of putting it "morality would not be an ideal but an actual system." As jurists would say, it is "positive" while morals are "natural," i.e., according to an ideal not necessarily practiced nor backed by social pressure as to details. Systems of morals are likely to be in the main idealizings of the morality of the time and place.

There are four ways of approaching or looking at this subject: (1) historical, (2) philosophical, (3) analytical, and (4) sociological.

II

THE HISTORICAL VIEW⁸—THE APPROACH AND POINT OF VIEW OF THE HISTORICAL SCHOOL IN THE NINETEENTH CENTURY

From this standpoint law and morality have a common origin but diverge in their development.

In the first stage of the differentiation, morality is much more advanced than law. In the beginnings of Roman law not only do *fas* and *boni mores* do much of what becomes the task of *ius*, but such matters as good faith in transactions, keeping promises, performing agreements, are left to *fas* or *boni mores* rather than to *ius*.⁹ There is no law of contracts in Anglo-Saxon law. Compare also the enforcement of informal agreements by the church in the earlier Middle Ages.¹⁰ When a true legal development begins in the stage of the strict law, the law (in the sense of the body of authoritative grounds of decision) crystallizes under the pressure of a need for certainty, since remedies and actions exist but rights are not yet worked out, and rigid rules are the only check upon the magistrate. Law in this stage is outstripped presently by the development of moral ideas and has no means of sufficiently rapid growth to keep abreast. For example, interpretation of the XII Tables could not provide a better order of inheritance based on blood-relationship when succession of the agnates and of the *gentiles* was out of accord with moral ideas. There are no generalizations in the earlier stages of law and the premises are not broad enough to allow of growth

⁷ Lee, *Morals, Morality, and Ethics: Suggested Terminology* (1928) 38 INTER-NAT. J. OF ETHICS, 451, 452-453.

⁸ 1 CLARK, *ROMAN PRIVATE LAW: JURISPRUDENCE* (1914) §3; CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* (1907) lect. 6; LIGHTWOOD, *THE NATURE OF POSITIVE LAW* (1883) 362-368.

⁹ AULUS GELLIUS, vii, 18, 1, xx, 1, 39; CICERO, *DE OFFICIIS*, i, 7, 23, iii, 31, 11; LIVY, i, 21, 4; DION. HAL. i, 40. See 3 CLARK, *HISTORY OF ROMAN PRIVATE LAW* (1919) 618.

¹⁰ DECRET. GREG. i, 35, 1 and 3.

by interpretation beyond narrow limits. No development of common-law property ideas could give effect to the purely moral duty of the trustee. No development of the common-law writs could give equitable relief against fraud. On the other hand, in a later stage the law sometimes outstrips current morality, as in the case of the duty of disinterested benevolence exacted of directors and promoters of corporations by Anglo-American equity.

Four stages in the development of law with respect to morality and morals are generally recognized. First, is the stage of undifferentiated ethical customs, customs of popular action, religion, and law, what analytical jurists would call the pre-legal stage. Law is undifferentiated from morality.¹¹ Second, is the stage of strict law, codified or crystallized custom, which in time is outstripped by morality and does not possess sufficient power of growth to keep abreast. Third, there is a stage of infusion of morality into the law and of reshaping it by morals; what I have called in another connection the stage of equity and natural law. Fourth, there is the stage of conscious lawmaking, the maturity of law, in which it is said that morals and morality are for the lawmaker and that law alone is for the judge.

As soon as law and morality are differentiated (in the second stage) a progression begins from moral ideas to legal ideas, from morality to law.¹² Thus in Roman law by the strict law manumission could only be made by a fictitious legal proceeding, by entry on the censor's register, or by a formal provision in a will.¹³ An irregular manumission was void. The rise of ethical ideas as to slavery gave rise to equitable freedom in case of manumission by letter or by declaration before friends (i.e., witnesses) recognized and protected by the praetor. This was made a legal freedom by the *lex Iunia*.¹⁴ Again, in the common law, larceny was an offense against possession. Trespass de bonis and trover proceeded on taking from another's possession or converting to one's own use another's property which one had found. Moral ideas were taken up by equity and gave rise to the doctrine of constructive trusts. Or, to take a modern example, at common law easements could only be created by grant or by adverse user. The equitable enforcement of covenants gave rise to equitable easements or servitudes. At length zoning laws made restrictions of the sort legal.¹⁵

This progress goes on in all periods. In the third stage, however,

¹¹ This depends upon the definition of law. Malinowski does not admit it. INTRODUCTION TO HOGGIN, LAW AND ORDER IN POLYNESIA (1934). But see LLEWELLYN AND HOEBEL, THE CHEYENNE WAY (1941) 233-238.

¹² This is well put in MILLAR, HISTORICAL VIEW OF THE ENGLISH GOVERNMENT (1789) bk. ii, chap. 7.

¹³ GAIUS, i, §17.

¹⁴ *Ibid.*, §22; INSTITUTES, i, 5, §§1-3.

¹⁵ See Van Hecke, *Zoning Ordinances and Restrictions in Deeds* (1928) 37 YALE L. J. 407.

there is a wholesale taking over of purely moral notions under the idea that law and morals (more or less identified with morality) are identical. The historical jurist, therefore, considered that morality was potential law. That which started as a moral idea became an equitable principle and then a rule of law, or later became a definite precept of morality and then a precept of law.

In general, in the strict law the law is quite indifferent to morals; in the stage of equity and natural law it is sought to identify law with morals; in the maturity of law it is insisted that law and morals are to be kept apart sedulously. Morality and morals are conceived of as for the legislator or the student of legislation, the one making laws out of the raw materials of morality, the other studying how this is done and how it ought to be done; but it is considered that they are not matters for the judge or the jurist. It is held that the judge applies the rules which are given him, while the jurist studies these rules, analyzes and systematizes them, and works out their logical content. This assumes that law (in the second sense) is a body of rules—Austin's first assumption, taken from Bentham. Maine was often much influenced by Austin. The analytical jurist insists vigorously on this separation of law and morals.¹⁶ He is zealous, in the maturity of law, to point out that a legal right is not necessarily right in the ethical sense—that it is not necessarily accordant to our feelings of what ought to be. He is zealous to show that a man may have a legal right which is morally wrong, and to refute the proposition that a legal right is not a right unless it is right. This is sound enough as an analysis of legal systems in the maturity of law. Only, as will be seen presently, the sharp line between making or finding the law and applying the law, which the analytical jurist draws cannot be maintained in this connection. Whenever a legal precept has to be found in order to meet what used to be called a "gap in the law" it is found by choice of a starting point which is governed by considering how far application of the result reached from one or the other will comport with the received ideal. Thus morals are a matter for judge and jurist as well as for legislator. Yet it is necessary to sound thinking to perceive that moral principles are not law simply because they are moral principles.

On the other hand, the circumstance that "a right," and "law," and "right" (in the ethical sense) were expressed by the same word in Latin, and that "a right" and what is right (in the ethical sense) are expressed by the same word in English, has had not a little influence in the history of law in bringing rights and law into accord with ideas of right.

¹⁶ Kelsen, *REINE RECHTSLEHRE* (1934) 25-26. See Voegelin, *Kelsen's Pure Theory of Law* (1927) 42 *POLITICAL SCIENCE Q.* 268, 270.

III

THE PHILOSOPHICAL VIEW—THE APPROACH AND POINT OF VIEW OF
PHILOSOPHICAL JURISTS FROM THE SEVENTEENTH CENTURY
TO THE PRESENT¹⁷

In the nineteenth century, philosophical discussions of the relation of jurisprudence and ethics, of law to morality and morals, were much influenced by German discussions of the relation of *Recht* to *Sitte*. Neither of these words translates exactly into a single English word. *Recht* here does not mean "law" as the precepts which the courts recognize and enforce but more nearly that which the courts are seeking to reach through judicial decision. *Sitte* might be rendered as "ethical custom."¹⁸ So the question which German philosophers of the last century were debating came to this: Is what the courts are trying immediately to attain identical with morality or a portion of the broad field of morals, or is it something which may be set over against them?

Philosophical jurisprudence arises in the stage of equity and natural law. It arises in the stage of legal development in which attempt is made to treat legal precepts and moral precepts as identical; to make

¹⁷ GREEN, PRINCIPLES OF POLITICAL OBLIGATION (1911) §§11-31; KORKUNOV, GENERAL THEORY OF LAW (transl. by Hastings, 1909) §§5-7; LORIMER, INSTITUTES OF LAW (2 ed. 1880) 353-367; KOHLER, PHILOSOPHY OF LAW (transl. by Albrecht, 1914) 58-60; DEL VECCHIO, THE FORMAL BASES OF LAW (transl. by Lisle, 1914) §§96-111; MODERN FRENCH LEGAL PHILOSOPHY (7 MODERN LEGAL PHILOSOPHY SERIES, 1916) §§190, 206-207; Hocking, *Ways of Thinking About Rights: A New Theory of the Relation Between Law and Morals*, in II LAW: A CENTURY OF PROGRESS, 1835-1935 (1937) 242.

HEGEL, PHILOSOPHY OF RIGHT (transl. by Dyde, 1896) §§105-114; MILLER, LECTURES ON THE PHILOSOPHY OF LAW (1884) lect. 13; HASTIE, OUTLINES OF JURISPRUDENCE (1887) 17-20; MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY (transl. by Lisle, 1912) §§119-127; F. Cohen, *The Ethical Bases of Legal Criticism*, 41 YALE L. J. 201, reprinted in ETHICAL SYSTEMS AND LEGAL IDEALS (1933) chap. 1; Kocourek, *Subjective and Objective Elements in Law* (1927) 21 ILLINOIS L. REV. 689; H. Cohen, *Change of Position in Quasi-Contracts* (1932) 45 HARV. L. REV. 1333-1338, 1356. 2 JHERING, DER ZWECK IM RECHT (1883) 15-103, 135-351; JELLINEK, DIE SOZIALETHISCHE BEDEUTUNG VON RECHT, UNRECHT, UND STRAFE (1878, 2 ed. 1908) chap. 2; STAMMLER, THEORIE DER RECHTSWISSENSCHAFT (1911) 450-481; BINDER, RECHTSBEGRIFF UND RECHTSIDEE (1915) 214-229; PAGEL, BEITRÄGE ZUR PHILOSOPHISCHEN RECHTSLEHRE (1914) 60-81; Roeder, *Die Untrennbarkeit von Sittlichkeit und Recht* (1935) 29 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE, 29; PETRAZYCKI, INTRODUCTION TO LAW AND MORALS (3 ed. in Polish, 1930) well summarized by Gurvitch, *Une philosophie intuitionniste du droit* (1931). ARCHIVES DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE, 404, 407-413; RADBRUCH, RECHTSPHILOSOPHIE (3 ed. 1932) §6, well summarized in Gurvitch, *Une philosophie antinomique du droit—Gustav Radbruch*, in (1932) ARCHIVES DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE, 530, 531 ff.; and by Chroust (1944) 53 PHILOSOPHICAL REV. 23, 33-42; Edlin, *Rechtsphilosophische Scheinprobleme und der Dualismus im Recht* (1932) Beiheft no. 27 to 26 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE.

As to the terminology of ethics in this connection see Eckstein, *Die Entwertung ethischer Ausdrücke* (1929) 22 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE, 434.

¹⁸ See Haldane, *Higher Nationality: A Study in Law and Ethics* (1913) 38 REP. AM. BAR ASSN. 393, 403-405.

moral precepts, as such, legal precepts. Hence at first philosophers of law assume that jurisprudence is a branch of ethics and that legal precepts are only declaratory of moral precepts. They assume that a rule of decision in the courts cannot be a legal precept unless it is a moral precept; not merely that it ought not to be a legal precept if it runs counter to a moral precept. They assume also that moral precepts as such are legally obligatory. This is connected with the treatment of jurisprudence as a part of theology prior to the Reformation.

From the standpoint of seventeenth- and eighteenth-century jurisprudence, positive law gets its whole validity from being declaratory of natural law. But conceding that this theory that the validity of a legal precept as such is to be tested by its conformity to moral principles has done much service in the stage of equity and natural law in promoting liberalization through bringing law abreast of morality and seeking to conform it to ideals of morals, the theory is tolerable practically only at a time when absolute ideas of morals prevail. If all men or most men agree in their moral standards or agree in looking to some ultimate authority for decisive pronouncements on the content and application of moral principles, then the theory may be tolerable in practice. The eighteenth-century theory meant practically that each philosophical jurist made his own ethical views, largely an ideal form of the doctrines and institutions which he had been taught or with which he was familiar, the test of the validity of legal precepts. The only real value of the theory was that it led each jurist to work out ideal standards which could serve for a critique. Bentham, speaking of natural-law exponents of ethics, said: "The fairest and openest of them all is that sort of man who speaks out and says, I am of the number of the elect; now God Himself takes care to inform the elect what is right, and that with so good effect . . . they cannot help . . . knowing it. . . . If, therefore, a man wants to know what is right, he has nothing to do but come to me."¹⁹ An eighteenth-century jurist laying down natural law and Bentham's man who claims to be one of the elect are in the same position; each is giving us his personal views and assuming that those views must be binding on every one else. When and where there are absolute theories of morals upon the main features of which all are agreed,¹ it is possible to realize the condition of Bentham's man who was one of the elect. From such a source authoritative natural law may be drawn without impairing the general security. But when all absolute theories are discarded and no authorities are recognized, when moreover, classes with divergent interests hold diverse views on fundamental points, natural law in the eighteenth-century sense would mean that every man

¹⁹ AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Clarendon Press ed. 1876) 17 n. 3.

would be a law to himself. Accordingly, the historical jurists threw over ideals of law entirely and nineteenth-century metaphysical jurists sought to deduce natural law from some fundamental conception of right or justice given us independently and having an independent validity.

In the seventeenth and eighteenth centuries the relation of moral precepts and legal precepts was thought to be that the latter declared and promulgated the former. In the nineteenth century, the metaphysical school thought that both were deductions from a fundamental conception of right or of justice, but that they differed in that in the case of morals our deductions gave us a subjective science while in law they gave us an objective science. In morals our deductions had reference to the motives of conduct while in law they had reference to the outward results of conduct.²⁰ This treated them as coordinate deductions.

During the reign of natural law, coincident with the legislative movement and codifying tendency which led to an idea of positive law as an authoritatively imposed declaration of natural law by a superior reason and hence to an imperative theory of its obligation, Thomasiaus began to insist upon distinguishing law and morals.²¹ Kant made a clear distinction. He begins with a proposition that man, in endeavoring to bring his animal self and his rational self into harmony, is presented to himself in two aspects, an inner and an outer, so that his acts have a twofold aspect. On the one hand, they are external manifestations of his will. On the other hand, they are determinations of his will by motives. On the one hand, he is in relation to other beings like himself and to external things. On the other hand, he is alone with himself. The law has to do with his acts in the former aspect, morals have to do with them in the latter aspect. The task of the law is to keep conscious free-willing beings from interference with each other. It is so to order their conduct that each shall exercise his freedom in a way consistent with the freedom of all others, since all others are to be regarded equally as ends in themselves. But law has to do with outward acts. Hence it reaches no further than the possibility of outward compulsion. There is a right in a legal sense only to the extent that others may be compelled to respect it.²²

²⁰ 1 AHRENS, COURS DE DROIT NATUREL (8 ed. 1892) §21II. The fundamental principle from which Ahrens deduced both was Krause's theory of justice as "a principle of the free organization of the life of all moral beings, as the organic whole of all the conditions which are realized by God and by humanity in order that all reasonable creatures in the different spheres of life may attain their rational ends." *Ibid.*, 78.

²¹ FUNDAMENTA IURIS NATURAE ET GENTIUM (1705, 4 ed. 1718) I, 1, 4, §§89-91, I, 1, 5, §47, I, 1, 6, §§3, 32-43, 64-66, 74-75. Also INSTITUTIONES IURISPRUDENTIAE DIVINAE (6 ed. 1717) I, 2, §§63-100.

²² METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (1797) *Introduction*, §§B-D. See 2 CAIRD, THE CRITICAL PHILOSOPHY OF IMMANUEL KANT (2 ed. 1909) 294-300.

To use Kant's own words: "When it is said that a creditor has a right to exact payment from his debtor, it does not mean that he may put it to the debtor's conscience that the latter ought to pay. It means that in such a case payment may be compelled consistently with the freedom of every one and hence consistently with the debtor's own freedom according to a universal law."²³ This may happen sometimes even though from the internal aspect of demanding performance one ought not to do so. An example which he discusses brings this out. There was a much-controverted text in the Prussian Code dealing with the case where changes in the monetary system had taken place between the creation and the maturity of a debt. Was payment to be made according to the current value or the metallic value or the nominal value?²⁴ Kant answers, from the standpoint of the correspondence of the claim to compel with right: "When the currency in which it is covenanted that a debt should be paid has become depreciated in the interval between the covenant and the payment, the creditor may have an equitable claim to be reimbursed; but it is impossible that a judge should enforce it, seeing the creditor has got that for which he bargained and nothing was said in the contract of such a contingency."²⁵ Thus there is an equitable or moral claim which is not a right from the standpoint of an ideal legal order. Kant's answer is much in the spirit of the strict law and hence of the maturity of law, which has many affinities thereto. It should be noted that Anglo-American equity, which, in spite of nineteenth-century attempts to systematize it to the pattern of the strict law, has preserved much of the spirit of the seventeenth-century identification of law and morals, refuses to enforce hard bargains where they have become hard because of unforeseen changes in the value of money.²⁶ Kant's solution accords with the result generally reached by legal systems today.²⁷ In American law, although a promisee cannot enforce specific performance in such a case, he can recover the value of his bargain in an action at law.²⁸ Hence all that is achieved by the refusal of equity to give relief is that the promisee is left to what may often be a much less adequate remedy.

In maturity of law in the nineteenth century, the same circumstances which led analytical jurists to adopt the idea of distinguishing law

²³ METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (2 ed. 1798) xxxvi.

²⁴ I SAVIGNY, OBLIGATIONENRECHT (1851) §46; BROWN, EPITOME AND ANALYSIS OF SAVIGNY ON OBLIGATIONS (1872) 81-82.

²⁵ METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (2 ed. 1798) xxxix-xi, Caird's paraphrase transl. 2 CRITICAL PHILOSOPHY OF KANT, 299.

²⁶ Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501 (U. S. 1869).

²⁷ 3 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL (11 ed. 1928-1932) nos. 2067 bis, 424.

²⁸ This is the prevailing rule in the United States. 3 SEDGWICK, DAMAGES (9 ed. 1912) §§1002-1012.

and morals, led to philosophical attempts to express the relation between them by contrasting them. Thus Hegel represents the relation as that of successive steps in the dialectical development of liberty. According to his method of synthesis of opposites, he puts law and morals as an antithesis.²⁹ Right, i.e., *Recht*, that which we seek to attain through law, is the possibility of liberty; morals determine not what is externally possible but what internally ought to be. So law and morals are in contrast to each other as the possible of external realization and the internally obligatory. He holds that the opposition disappears in the highest unity of *Sittlichkeit*, the ethical social habit which obtains in an association such as the family or civil society.³⁰ This is a metaphysical way of putting what the sociological jurists put by saying that law and morals are agencies of social control. In the latter part of the nineteenth century, as abstract individualist theories begin to be replaced by theories which proceed not upon a first principle of individual independence but upon the basis of the social interdependence of men, these attempts to oppose or to contrast law and morals are given up, and we come upon a new phase of attempts to subordinate law to morals.

To look back at the development of ideas on this subject, in the beginnings of law morality and law are undifferentiated. We can hardly speak of morals at this stage. In the strict law no attention is paid to the moral aspects of things. Morality and morals are ignored. In the stage of equity and natural law, morals (i.e., an ideal of ethical values) alone are regarded. It is held that law must be brought into a condition of simply declaring moral precepts. So philosophical jurists think of legal precepts as one sort of moral precepts. Jurisprudence is subordinated to ethics. In the maturity of law, morality and morals are considered to be matters for the legislator only. So philosophical jurists contrast law and morals. The stage of socialization of law is developing many features which remind us of the stage of equity and natural law. So in philosophical jurisprudence, with the rise of the social philosophical school, theories of legal precepts as having for their end the realization of moral precepts, revive to some extent the old subordination of jurisprudence to ethics.

This begins with Jellinek as far back as 1878. Law, he said, was a minimum ethics. That is, the field of law was that part of the requirements of morals, observance of which is indispensable in the given stage of social development. By "law" here (*Recht*) he meant law

²⁹ This is an example of Hegel's tendency to treat contrasts as opposites. See CROCE, *WHAT IS LIVING AND WHAT IS DEAD OF THE PHILOSOPHY OF HEGEL* (transl. by Ainslee, 1915) chap. iv.

³⁰ GRUNDLINIEN DER PHILOSOPHIE DES RECHTS (1821) §§104-114. See REYBURN, *ETHICAL THEORY OF HEGEL* (1921) 118-121.

as we try to make it or in its idea. The actual body of legal precepts may fall short of or in places or at times may go beyond this ethical minimum. So regarded, law is only a part of morals. That is, the field of law is only a part of the field of ethical custom, namely, the part which has to do with the indispensable conditions of the social order.³¹ But in the narrower sense, as distinguished from law, morals include only the excess beyond the indispensable minimum. This excess, which is desirable but not indispensable, he terms an "ethical luxury." The minimum represents what we may expect to give effect through legal precepts.³² In a broader sense, morality is made to embrace the whole. But Jellinek's view has characteristic features of the nineteenth century. It assumes that the scope of law is to be held down to the smallest area possible. This was a postulate of metaphysical jurisprudence. Law was regarded as a systematic restriction of freedom in the interest of free individual self-assertion. It was necessary and yet was in some sort an evil, and was not to be suffered to extend itself beyond what was obviously necessary.³³

To look at the several types of social philosophical jurist of today, one comes first to the social utilitarians. To Jhering the immediate task of the law is to secure interests. Accordingly, we must choose what interests we will recognize, fix the limits within which we will recognize them, and must weigh or evaluate conflicting or overlapping interests in order to secure as much as we may with the least sacrifice. In making this choice and in weighing or evaluating interests, whether in legislation or in judicial decision or in juristic writing, whether we do it by lawmaking or in the application of law, it is said that we must turn to ethics for principles. Morals is an evaluation of interests. Law is or at least seeks to be a delimitation in accordance therewith.³⁴ Thus

³¹ Compare a like view held by MALINOWSKI, INTRODUCTION TO HOBGIN, LAW AND ORDER IN POLYNESIA (1934) xxv-xxvii.

³² DIE SOZIALETHISCHE BEDEUTUNG VON RECHT, UNRECHT, UND STRAFE (1878, 2 ed. 1908) chap. 2. See also DEMOGUE, LES NOTIONS FONDAMENTALES DU DROIT PRIVÉ, 13 ff. "The endeavor to find any other difference between law and morals, and especially between customary law and ethical custom, than a higher or lesser importance for the ordering of the common life, has not thus far proved successful." RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT (5-6 ed. 1925) 21.

³³ E.g., "Reduced to these terms the difference between morality and right (*diritto*—right and law) is a difference in degree and not of essence. Yet it is a very important difference, as it reduces the power of coercion to what is absolutely necessary for the harmonious co-existence of the individual with the whole." 1 LLOY, PHILOSOPHY OF LAW (transl. by Hastie, 1891) 121. See also BEUDANT, LE DROIT INDIVIDUEL ET L'ÉTAT (1891, 3 ed. 1920) 148.

³⁴ This is well put by KORKUNOV, GENERAL THEORY OF LAW (transl. by Hastings, 1909) 52. "The idea of value is, therefore, the basal conception of ethics. No other term, such as duty, law, or right, is final for thought; each logically demands the idea of value as the foundation upon which it finally rests. One may ask, when facing some apparent claim of morality, 'why is this my duty, why must I obey this law, or why regard this course of action as right?' The answer to any of these questions consists in showing that the requirements of duty, law, and right tend in each case to promote human welfare, to yield what men do actually find to be of value." EVERETT, MORAL VALUES, 7.

we are brought back in substance to a conception of jurisprudence as on one side a branch of applied ethics.³⁵

Again, as Stammler, the leader of the Neo-Kantians, put it we seek justice through law. But to attain justice through law we must formulate the social ideal of the epoch and endeavor to insure that law is made to advance and secure it in action. These ideals are developed outside of the law. They are moral ideals, and so jurisprudence is dependent upon ethics in so far as ethics has to do with these goals which we seek to attain and with reference to which we measure legal precepts and doctrines, and institutions, in the endeavor to make them agencies of progress toward the goals, while jurisprudence has to do rather with the means of attaining them.³⁶ Although he insists on separation of philosophical jurisprudence from ethics and that each must have an independent method,³⁷ he comes finally to the proposition that "just law has need of ethical doctrine for its complete realization."³⁸

As Kohler, the leader of the Neo-Hegelians put it, government, law, and morality are forces working toward the attainment of an ideal of civilization. So jurisprudence, he says, "must appreciate these ideal ends toward which society strives."³⁹ Perhaps he alone of the leaders of philosophical jurisprudence in the fore part of the present century did not more or less avowedly go back in some degree to subordination of jurisprudence to ethics. His view was evolutionary. Law and morals express and also further a progressive civilization.⁴⁰ Hence jurisprudence and ethics are both subordinated to a universal history of civilization from which we determine the course of development of civilization and to a philosophy of right and of economics from which we determine the jural postulates—the presuppositions as to right conduct—of the civilization of the time and place.⁴¹ More than one recent book on ethics, however, presupposes very nearly what he called for⁴² and the practical result is to make jurisprudence more or less dependent on a science which a modern type of ethical philosophers would be likely to claim as theirs.⁴³

Gény, the leader of the Neo-scholastic jurists, as might be expected,

³⁵ 2 JHERING, *DER ZWECK IM RECHT* (1883) 95-134. Bentham's utilitarianism was a theory of ethics as a basis for legislation. Jhering's social utilitarianism is directed toward lawmaking in the same way.

³⁶ WIRTSCHAFT UND RECHT (1895) §§102-103.

³⁷ LEHRE VON DEM RICHTIGEN RECHTE (1 ed. 1902) bk. I, pt. 2, pp. 52-92. The second edition (1926) is much altered.

³⁸ *Ibid.*, 87.

³⁹ MODERNE RECHTSPROBLEME (1907) §§1-7; *Rechtsphilosophie und Universalrechtsgeschichte*, in I HOLTZENDORFF, *ENCYCLOPÄDIE DER RECHTSWISSENSCHAFT* (6 ed. 1904) §9.

⁴⁰ LEHRBUCH DER RECHTSPHILOSOPHIE (1 ed. 1909) 2.

⁴¹ RECHTSPHILOSOPHIE UND UNIVERSALRECHTSGESCHICHTE, §2.

⁴² *E.g.*, DEWEY AND TUFTS, *ETHICS* (1908).

⁴³ *E.g.*, LÉVY-BRUHL, *LA MORALE ET LA SCIENCE DES MOEURS* (5 ed. 1913).

declares for "the unavoidable necessity of a minimum of natural law."⁴⁴ He says: "An investigation of natural law, carried on both by reason and by intuition scrutinizing experience as a whole, is indispensable, before any other elaboration, to prepare the deep foundations of a positive juridical organization."⁴⁵

Perhaps what the tendency in the fore part of the present century came to is that jurisprudence cannot be separated from the science of legislation by any hard and fast line and that they both to some extent presuppose ethics.

After the first World War, the dominance of Neo-Kantian thinking and stress upon methodology led to a revival of the nineteenth-century contrasting of law and morals and complete cutting off of ethics from jurisprudence. Thus Radbruch holds that law and morals are "an irreducible antinomy";⁴⁶ that legal precepts and moral precepts "coincide only by chance,"⁴⁷ and that the problem of values is wholly outside the science of law. Jurisprudence is not concerned with the value of a rule but only with its existence.⁴⁸ Kelsen, in the same way, and from a Neo-Kantian philosophical starting point, holds that all we have to consider is "that it is laid down in a rule of law, as a condition of a specific result, that the positive legal order react to that behavior with an act of coercion."⁴⁹

Before passing any opinion on these newer tendencies, let us see what analytical jurisprudence has had to say on the subject.

IV

THE ANALYTICAL VIEW⁵⁰—THE APPROACH AND POINT OF VIEW OF THE ANALYTICAL JURISTS

Nineteenth-century analytical views of the relation of law and morals were strongly influenced by the assumption of the separation of powers as fundamental for juristic thinking, not merely a constitutional device. Accordingly, assuming an exact, logically defined separation of powers, the analytical jurist contended that law and morals were distinct and unrelated and that he was concerned only with law.⁵¹ If he saw that

⁴⁴ 2 SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF (1915) 419.

⁴⁵ *Ibid.*, 421.

⁴⁶ RECHTSPHILOSOPHIE (3 ed. 1932) §9.

⁴⁷ *Ibid.*, §6.

⁴⁸ *Ibid.*, §10.

⁴⁹ REINE RECHTSLEHRE (1934) 26.

⁵⁰ 1 AUSTIN, JURISPRUDENCE (5 ed. 1885) lect. 5; BENTHAM, THEORY OF LEGISLATION, PRINCIPLES OF LEGISLATION (Ogden's ed. 1931) chap. 5; POLLOCK, FIRST BOOK OF JURISPRUDENCE (1896, 6 ed. 1929) pt. I, chap. 2; GRAY, NATURE AND SOURCES OF THE LAW (1 ed. 1909) §§642-657; WOODROW WILSON, THE STATE (1889) §§1449-1456; Winfield, *Ethics in English Case Law* (1931) 45 HARV. L. REV. 112; KELSEN, REINE RECHTSLEHRE (1934) 12-18.

⁵¹ 2 AUSTIN, JURISPRUDENCE (5 ed. 1885) 1072-1073.

their sphere came in contact or even overlapped in practice, he assumed that it was because, although in a theoretically fully developed legal system, judicial and legislative functions are fully separated, this separation has not been realized to its full extent in practice. He would say: So far as and where this separation is still incomplete, there is still confusion of or overlapping of law and morality and morals. From his standpoint there were four such points of contact: (1) in judicial law-making, (2) in interpretation of legal precepts, (3) in application of standards, and (4) in judicial discretion. At these four points he conceived there was a border zone where the separation of powers was not complete. So far as the separation of judicial and legislative functions was complete, law was for courts, morals and morality were for legislators; legal precepts were for jurisprudence, moral principles were for ethics. But so far as the separation was not yet complete and in what he took to be the continually narrowing field in which judges must make as well as administer legal precepts, morality had to stand for the law which ought to but did not exist as the rule of judicial determination.⁵²

It was not unnatural that Austin should have thought of judicial decision as turning precepts of "positive morality" into legal precepts since English barristers of his time knew how some such process actually took place in the work of the Judicial Committee of the Privy Council in appeals from newly settled areas in which the British were setting up courts for the first time.⁵³ Such a situation arose later in a case where a succession was governed neither by English nor by Hindu nor by Mohammedan law. Lord Westbury said that it must be determined "by the principles of natural justice."⁵⁴

With such cases before them we may understand how the first Eng-

⁵² As to the points of contact, see 1 AUSTIN, JURISPRUDENCE (5 ed. 1885) lects. 37, 38, and note on interpretation, 2 *ibid.*, 989-1001; AMOS, SCIENCE OF LAW (1874) 34-42. Austin argued for a codification which should be "a complete and exclusive body of statute law." 2 JURISPRUDENCE (5 ed. 1885) 660. He held that the "incognoscibility" of "judiciary law" was due to the legislator's negligence. *Ibid.*, 654. Until such a code, the judges, in the absence of legislation, "impress rules of positive morality with the character of law through decision of causes." 1 *ibid.*, 36. See also MARKBY, ELEMENTS OF LAW (6 ed. 1905) §§25-30. "As the development of law goes on, the function of the judge is confined within ever narrowing limits; the main source of modifications in legal relations comes to be more and more exclusively the legislature." SIDGWICK, ELEMENTS OF POLITICS (2 ed. 1897) 203.

⁵³ Thus at Penang, when newly settled, there was a mixed population and no native law for the whole since people had come in from different parts from which they were often refugees and had brought no law with them. The home government recommended to the judge on the spot that where the parties were of different native laws, decisions be made according to "the laws of universal and natural justice." See introduction to 1 KYSHE'S REP. (Straits Settlements) ix (1885); *Palangee v. Tye Ang*, 1 Kyshe, xix (1803).

⁵⁴ *Barlow v. Orde*, L. R. 3 P. C. 164, 167 (1870). Natural justice proved to require something very like the English law as to wills and succession. *Ibid.*, 189. Also in *Palangee v. Tye Ang*, *supra* note 53, natural justice called for wills and probate and letters of administration.

lish analytical jurists like the historical jurists thought that judicial finding or making of law was no more than a reaching out for precepts of positive morality and in the absence of authoritative grounds of decision giving them the guinea stamp of precedent. But the view of the nineteenth-century analytical jurists that morals are to be looked to only in an immature stage of legal development before the separation of powers is complete, involves two other false assumptions, one, the possibility of a complete analytical separation of powers, the other, the possibility of a complete body of legal precepts which will require no supplementing and no development by judicial action.

Granting, however, that these two assumptions are not well taken, we do not entirely dispose of the contention of the analytical school. For although we admit that legislator and judge each make and shape and develop and extend or restrict legal precepts, there is a difference of the first moment between legislative lawmaking and judicial lawmaking. The legislative lawmaker is laying down a rule for the future.⁵⁵ Hence the general security does not require him to proceed on predetermined premises or along predetermined lines. He can take his premises from whencesoever expediency or his wisdom dictates and proceed along the lines that seem best to him. On the other hand, the judicial lawmaker is not merely making a rule for the future. He is laying down a legal precept which will apply to the transactions of the past as well as to the future, and he is doing so immediately with reference to a controversy arising in the past.⁵⁶ Hence the social interest in the general security requires that he should not have the same freedom as the legislative lawmaker. It requires that instead of finding his premises where he will or where expediency appears to him to dictate, he find them in the authoritatively recognized legal materials or by a process recognized by the legal system. It requires that instead of

⁵⁵ Unless constitutions forbid, he may lay down rules by which the past is to be judged. But such legislation is universally reprobated, and has been forbidden in formulations of fundamental law from the Twelve Tables to modern constitutions. The FRENCH CIVIL CODE, art. 2, provides: "The enacted rule only makes dispositions for the future; it has no retroactive effect." Baudry-Lacantinerie says of this: "In a well organized society individuals ought not to be exposed to having their condition or fortune compromised by a change of legislation. There must be some security in transactions; but there is none if laws may operate retroactively, for the right I have acquired today in conformity to the provisions of the existing law may be taken from me tomorrow by a law which I could not have taken into account since it was impossible to foresee it." 1 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL (12 ed. 1919) no. 46. See XII TAB. ix, 1 (1 BRUNS, FONTES IURIS ROMANI ANTIQUI, 7 ed. 1909) 34; CLARK, AUSTRALIAN CONSTITUTIONAL LAW (1901) 28 ff.; CONST. BRAZIL, arts. 15, 791; 1 DODD, MODERN CONSTITUTIONS (1909) 153, 176.

⁵⁶ "It must be observed that a judicial decision *primae impressionis*, or a judgment by which a new point of law is for the first time decided, is always an *ex post facto* law." 1 AUSTIN, JURISPRUDENCE (5 ed. 1885) 487.

proceeding along the lines that seem best to him, he proceed by using the authoritative legal technique upon authoritative legal materials.⁵⁷

Thus the proposition that a judicial decision is only evidence of the law, the doctrine that judges find the law and do not make it, are not purposeless dogmatic fictions.⁵⁸ If they are dogmatic fictions, they do more than enable us to arrange the phenomena of the administration of justice in a convenient, logically consistent scheme. They express a sound instinct of judges and lawyers for maintaining a paramount social interest. They serve to safeguard the general security by requiring the grounds of judicial decision to be as definite as is compatible with the attainment of justice in results. They serve to make judicial action predictable so far as may be. They serve to hold down the personality of the magistrate. They constrain him to look at causes objectively, and try them by reasoned development of legal materials which had taken shape prior to and independent of the cause in hand. Hence where rules are laid down for the future only the lawmaker is given entire freedom, subject in America to a few reservations in bills of rights. Where, as in judicial lawmaking, rules are laid down for past as well as for future situations, the lawmaker is held to traditional premises or traditional legal materials and to traditional lines and modes of development to the end that those who know the tradition and are experienced in the technique may be able within reasonable limits to forecast his action.

Revived natural law in the present century is a formulation of ideals for legislation, for choice of starting points for legal reasoning in judicial law-finding or lawmaking, for interpretation, for application of standards, and for exercise of judicial discretion. But it must recognize the limitations upon judicial creative activity and not seek to make the judge as free to pursue his own ideals in his own way as the legislator is. This must be urged strongly upon lay critics of the courts. As a rule, they overlook the important difference between the process of legislative lawmaking and the process of incidental selection of legal materials and giving them shape as legal precepts which is involved in

⁵⁷ "The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled." Greene, C. J., in *Hodges v. New England Screw Co.*, 1 R. I. 312, 356 (1850).

⁵⁸ "The legislative process of making law and the judicial process of making law are, of course, very different. Both are subject to like constitutional and legal restraints, but there are other and different constitutional and legal restraints peculiar to the judicial process and especially peculiar to it in the United States. . . . When you say judges only declare pre-existing law, and do not make new law, you emphasize those restraints and keep them fresh in the memory better than when you say judges make law." 1 SCHOFIELD, *ESSAYS ON CONSTITUTIONAL LAW AND EQUITY* (1921) 42-43.

not a little of judicial decision. The social interest in the general security requires us to maintain this distinction.

A second point of contact between law and morals is to be found in interpretation.⁵⁹ Interpretation has been thought of as including the process of finding or making rules for new cases, or reshaping them for unusual cases, which has just been considered. This is called "interpretation" by a dogmatic fiction because in the analytical theory of the last century the law was complete and all cases were at least covered by the logical implications of pre-existing rules or the logical content of legal principles. Austin set it off under the name of "spurious interpretation."⁶⁰ Here the contact between law and morals is obvious, since the process is within limits one of lawmaking. But in what Austin called "genuine interpretation"⁶¹—search for the actual meaning of those who prescribed a rule admittedly governing the case in hand—the final criterion, when literal meaning and context fail to yield a satisfactory construction, is found in the "intrinsic merit" of the various possible meanings.⁶² The court or the jurist assumes that the lawmaker's ideas of what is just and those of the tribunal or the writer are in substantial accord; that each holds to substantially the same ideal pattern of law or ideal picture of society and of the end of law as determined thereby. However much the analytical theory of "genuine interpretation" may purport to exclude the moral ideas of the judge, and to insure a wholly mechanical logical exposition of a logically implied content of legal precepts, two doors are left open. The court must determine whether the criteria of the literal meaning of the words and of the text read with the context yield a "satisfactory" solution.⁶³ If the court finds they do not, it must inquire into the "intrinsic merit" of the competing interpretations. In practice, "satisfactory" will almost always mean morally satisfactory. "Intrinsic merit" will always tend to mean intrinsic moral merit.⁶⁴

⁵⁹ See POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* (5 ed. 1943) 120.

⁶⁰ 2 *JURISPRUDENCE* (5 ed. 1885) 991-995.

⁶¹ *Ibid.*, 989-991.

⁶² 1 SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* (1840) §§34, 37; CLARK, *PRACTICAL JURISPRUDENCE* (1883) 234-235. Among the five means of genuine interpretation in French law, the fourth is to "weigh the consequences which the legal precept would produce according to whether one understood it in the one sense or in the other." 1 BAUDRY-LACANTINERIE, *PRÉCIS DE DROIT CIVIL* (12 ed. 1919), no. 103, p. 56.

⁶³ This is obvious in extreme cases like the statute for rebuilding of the Chelmsford jail, SERJEANT ROBINSON, *BENCH AND BAR: REMINISCENCES OF ONE OF AN ANCIENT RACE* (3 ed. 1891) 229, or the statute against discharging firearms upon the highway, POUND, *A Hundred Years of American Law*, in 1 *LAW: A CENTURY OF PROGRESS, 1835-1935*, 8. It may be seen, however, in everyday cases in the courts.

⁶⁴ See, e.g., Brett, M. R., in *Plumstead Board of Works v. Spackman*, 13 Q. B. D. 878, 886-887 (1884); *River Wear Commissioners v. Adamson*, 2 A. C. 743 (1877), opinions of Lord O'Hagan (757-759, 761) and Lord Blackburn (770-

Another point of contact is in the application of standards.⁶⁵ Analytical jurists have liked to think of the application of legal precepts as a purely mechanical process. Such things as the margin of discretion in the application of equitable remedies, the appeal to the ethical in the maxims of equity, and the ethical element in such equitable doctrines as those with respect to hard bargains, mistake coupled with sharp practice, and the like, were distasteful to them. Partly under their influence and partly from the same spirit of the maturity of law that led to the analytical way of thinking, in the last quarter of the nineteenth century some American courts sought to eliminate, or at least minimize, the scope of these doctrines, and to make equitable relief, once jurisdiction was established, as much a matter of course as damages at law.⁶⁶ But this equitable or individualized application of legal precepts is called for more and more in the law of today. It is the life of administration, whether executive or judicial. The lack of power of individualization in judicial administration in the nineteenth century has contributed to a multiplication of administrative agencies and administrative tribunals and a transfer to them of matters formerly of judicial cognizance which is sufficient testimony to the futility of the attempt in the last century to make the courts into judicial slot machines.⁶⁷

In fact, the ethical element in application of law was never excluded from the actual administration of justice.⁶⁸ It will suffice to note two aspects of application of law in which the ethical element has always been decisive: The application of legal standards and judicial exercise of discretion. A great and increasing part of the administration of justice is achieved through legal standards. These standards begin to come into the law in the stage of infusion of morals through theories of natural law.⁶⁹ They have to do with conduct and have a large moral element. The standard of due care in our law of negligence, the stand-

772); Blandford, J., in *Lombard v. Trustees*, 73 Ga. 322, 324 (1884); *Flint River Co. v. Foster*, 5 Ga. 194, 201-202 (1848); Parsons, C. J., in *Richards v. Dagget*, 4 Mass. 534, 537 (1808); Graves, J., in *Perry v. Strawbridge*, 209 Mo. 621, 628-629, 108 S. W. 641, 16 L. R. A. (N. S.) 244 (1907); *Ham v. McClaws*, 1 Bay (1 S. C. Law) 93, 96 (1789); *Griffin v. Interurban St. R. Co.*, 179 N. Y. 438, 449, 72 N. E. 513 (1904). See also the remarks of Lord Watson as to the "intention of the legislature," *Salomon v. Salomon & Co.* [1897] A. C. 22, 38.

⁶⁵ As to application of legal precepts generally, see POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* (5 ed. 1943) 140-143.

⁶⁶ See, e.g., 4 POMEROY, *EQUITY JURISPRUDENCE* (3 ed. 1905) §1404 and note 2. The book was first published in 1881-1882. Compare the arbitrary rule as to "mutuality" of equitable relief which developed in nineteenth-century American decisions with the remarks of Cardozo, J., in *Epstein v. Gluckin*, 233 N. Y. 490, 494, 135 N. E. 861 (1922).

⁶⁷ See Pound, *Justice According to Law—Executive Justice* (1913) 14 *COL. L. REV.* 12.

⁶⁸ DILLON, *LAW AND JURISPRUDENCE OF ENGLAND AND AMERICA* (1894) 17. See also FRY, *MEMOIR OF SIR EDWARD FRY* (1921) 67.

⁶⁹ For their origin in Roman law in the formula in actions *bonae fidei*, see GAIUS, iv, §47; INST. iv, 6, §§28, 30; CICERO, *DE OFFICIIS*, iii, 17, 70.

ard of fair competition, the standard of fair conduct of a fiduciary, the Roman standard of what good faith demands in a particular transaction, the Roman standard of use by a prudent usufructuary, and of how a prudent and diligent head of a household (i.e., person *sui iuris*) would act under the given circumstances, all involve an idea of fairness or reasonableness. Also, like all moral precepts they are individualized in their application. They are not applied mechanically to a set of facts looked at in the abstract. They are applied according to the circumstances of each case, and within wide limits are applied through an intuition of what is just and fair, involving a moral judgment upon the particular item of conduct in question.⁷⁰

No less clearly there is a point of contact between law and morals in those matters which are left to the discretion of the judge. In cases where there is a margin of discretion in the application of legal precepts, as in applying or molding equitable remedies, we speak of "judicial discretion." Here there are principles (i.e., starting points for reasoning) governing judicial action within the discretionary margin of application, although at bottom there is not a little room for per-

⁷⁰ "Negligence is the failure to observe for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such person suffers injury." COOLEY, *TORTS* (1879) 630.

That application of the standard of due care involves a moral judgment but is not a purely moral judgment, see HOLMES, *THE COMMON LAW* (1881) 107 ff.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telephone, telegraph, or cable . . . or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. . . ."

"And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe and enforce just and reasonable classifications . . . and just and reasonable regulations and practices . . . and every . . . unjust and unreasonable classification, regulation, and practice with reference to commerce between the states or with foreign countries is prohibited and declared to be unlawful." Act to Regulate Commerce (1887) §1, 3 U. S. CODE (1940 ed.) tit. 49, §§5-6, p. 4283.

"Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful." Federal Trade Commission Act (1914) §5, 1 U. S. CODE (1940 ed.) tit. 15, §45, p. 1024.

As to application of these standards, see Pound, *Administrative Application of Legal Standards* (1919) 44 *REP. AM. BAR ASSN.* 445, 456.

"[In case of a transaction between attorney and client] the burthen of establishing its perfect fairness, adequacy and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other." 1 STORY, *EQUITY JURISPRUDENCE* (13 ed. 1886) §311.

In Roman law, in actions arising out of guardianship, partnership, fiduciary pledge, mandate, sale, letting and hiring, to which others were added later, "the judge had a larger discretion, and the standard set before him was what was fairly to be expected from businesslike men dealing with one another in good faith." 2 ROBY, *ROMAN PRIVATE LAW* (1902) 89. See CICERO, *DE OFFICIIS*, iii, 17, 70; CICERO, *DE NATURA DEORUM*, iii, 30, 74; GAIUS, iv, §62; *INSTITUTES*, iv, 6, §30.

sonal moral judgment.⁷¹ There are many situations, however, where the course of judicial action is left to be determined wholly by the judge's individual sense of what is right and just.⁷² Thus in imposition of sentences, within certain legally fixed limits; in suspension of sentence, where it is allowed; in the summary jurisdiction of courts to prevent abuse of procedural rules; in the tribunals which have been set up from time to time for petty causes; in awarding the custody of children in some jurisdictions; in the choice of trustees or guardians or receivers—in these and like cases judicial action must proceed largely on personal feelings as to what is right. The objections to any considerable scope for this element in the judicial process are obvious.⁷³ It has been said that at best it is the "law of tyrants."⁷⁴ But hard as we tried in the last century to reduce it to the vanishing point, there has proved to be a point beyond which rule and mechanical application are impotent, and the tendency of the day is to extend rather than to restrict its scope. We must find how to make it tolerable. The history of equity shows that the way to do this is to develop by experience principles of exercise of discretion and to recognize that because there is no rule in the strict sense it does not follow that the tribunal has unlimited power of doing what it chooses on any grounds or on no grounds. It is to reach a reasoned decision in the light of those principles. If we are in the domain of ethics, yet ethics, too, is a science and is not without principles.

Whereas the general security calls especially for certainty and uniformity of judicial action, the writer on ethics likes to think of the law as a body of fixed pre-determined precepts mechanically applied. So,

⁷¹ "Because the matter is left in the discretion of the court, it does not mean that the court is free to do exactly what it chooses, to indulge in sympathies or to invent some new equitable doctrine between the parties. It means that discretion is to be exercised upon judicial grounds in accordance with the principles that have been recognized in this court. I have, therefore, to approach this case from the point of view of judicial discretion, and see whether it is right that judicial discretion should be exercised in favor of Mrs. Greenwood after thirty years of delay." Langton, J., in *Greenwood v. Greenwood* [1937] P. 157, 164.

⁷² See Isaacs, *The Limits of Judicial Discretion* (1923) 32 YALE L. J. 339.

⁷³ "A loose and unfettered discretion of this sort upon matters of such grave import, is a dangerous weapon to entrust to any court, still more so to a single judge. Its exercise is likely to be the refuge of vagueness in decision, and the harbour of half-formed thought. Under cover of the word 'discretion' a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favourable or otherwise, to the person whose conduct is under review, which the course of the evidence has evoked. Upon such materials so used two minds will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism, and shakes public confidence in the justice of the tribunal." Lord Penzance in *Morgan v. Morgan*, L. R. 1 P. & D. 644, 647 (1869).

⁷⁴ Lord Camden, quoted by FEARNE, *CONTINGENT REMAINDERS* (10 ed. 1844) 534, note t. It need not be said that the law of property is not a suitable field for discretion.

it might be suggested, in the spots where the social interest in the individual life calls especially for individualization, the writer on jurisprudence would like to believe in a science of ethics which would give definiteness to judicial action. But granting that ethics can no more give a detailed chart for the exercise of discretion than the law can cover the whole field of the administration of justice with hard and fast precepts, yet we may make judges conscious that they are by no means wholly at large in judicial individualization. We can remind them that there is an organized body of knowledge dealing with such things and affording principles to which they may refer their action; and that a reasoned critique of their proposed action with reference to such principles will make their results more intelligent and give them more consistency. Undoubtedly the writings of the theologians were used in this way in the beginnings of English equity,⁷⁶ and Stoic philosophy was so used when moral duty was being made into legal duty in Roman law.⁷⁶

In Roman and modern Roman law, another point of contact of law and morals may be seen in *existimationis minutio*—impairment of civic honor. This might be *infamia*, legal *existimationis minutio*, or *turpitude*, de facto *existimationis minutio*.⁷⁷ *Infamia* was loss of civic honor. It had its origin in the power of the censor in the Roman republic to note persons as infamous where their conduct or mode of life was out of accord with good morals. In other words, *boni mores* were an agency of social control preserved and given effect by censorian power. In Roman law it might result from notation by the censor or from the praetor's edict. It involved loss of the *ius suffragii* (right to vote), *ius honorum* (right to hold office) and *postulatio* (right to be an agent for litigation—to practice law as an attorney), and incapacity to be a witness. Praetorian *infamia* was also a device for enforcing equitable duties.⁷⁸ *Turpitude* means that one is in fact unworthy of civic honor, so that this circumstance is to be taken into account in the exercise of discretion, for example, in the appointment of a guardian. To think of this as a legal institution at all represents, on the one hand, the attempt of natural law to identify the legal with the moral and, on the other hand, the attempt of the maturity of law to reduce all exercise of discretion to legal rules or conceptions. As Kelsen points out, when a legal precept leaves some matter to discretion, if the ground of decision lies outside of the body of authoritative guides to decision (law in the

⁷⁶ This is well brought out in DOCTOR AND STUDENT. See WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY (1925) 321-323.

⁷⁶ See 1 PERNICE, LABEO (1873) 16-17.

⁷⁷ 1 WINDSCHEID, PANDEKTEN (9 ed. 1906) §56, 2 and note 2.

⁷⁸ XII TAB. 8, 22 (1 BRUNS, FONTES IURIS ROMANI ANTIQVI, 7 ed. 1909, 33); DIG. I, 13, 5; DIG. III, 2, 1.

second sense) it is not outside of the legal order (law in the first sense).⁷⁹

In the analytical account of the points of contact between law and morals the matter is put as if there were three or four restricted areas in which exceptionally such contact may take place. As it was put, occasionally it may happen that a case arises for which there is no applicable legal precept and the court must work one out for the case from the legal materials at hand by a certain traditional technique of analogical development of the precedents.⁸⁰ Occasionally, too, it may happen that an authoritatively established legal precept is so ill-expressed that genuine interpretation becomes necessary. In that process it may happen that as a last resort the court must pass upon the relative merit of the several possible interpretations from an ethical standpoint. Also, in those exceptional cases for which ordinary legal remedies are not adequate, a court of equity may have a certain margin of power to go upon the moral aspects of the case in granting or denying extraordinary relief. In a few matters there are "mixed questions of law and fact" where the trier of fact, in adjusting a legal standard to the facts of a particular case, may find opportunity for an incidental moral judgment. Finally, a few matters of administration must be left more or less to the court's personal sense of what is right. All this looks as if in its everyday course judicial justice was quite divorced from ideas of right and moral justice, with intrusion of morals into the legal domain only in a residuum of cases for which adequate legal provision had not been made, or in which an administrative element still lingered in the courts instead of being committed to the executive. But this plausible explanation represents juristic desire for a certain, uniform, predictable justice much more than it represents the judicial process in action. In our appellate tribunals the difficulty that brings the cause up for review is usually that legal rules and legal conceptions have to be applied by analogy to causes that depart from the type for which the precept was devised or given shape. Such departures vary infinitely. Hence choice from among competing analogies and choice from among competing modes of analogical development are the staple of judicial opinions.⁸¹ The line between "genuine" and "spurious" interpretation

⁷⁹ REINE RECHTSLEHRE (1934) 99.

⁸⁰ 2 AUSTIN, JURISPRUDENCE (5 ed. 1885) 638-641.

⁸¹ To take six significant cases in the law of torts, note how each of them involves choice between two possible lines of analogical reasoning and sets the law on some point in a path leading from some one analogy rather than from another. Thus in *Pasley v. Freeman*, 3 T. R. 51 (1789) as between an analogy of warranty or of relation and one of assault, as between a contractual or relational and a delictal analogy, the court chose the latter and established a liability for intentional deceit although the defendant had not profited by the deceit and was under no contract duty and was party to no relation which called on him to speak. Thus we get a principle of liability for aggression upon another. In

can be drawn only for typical cases. They shade into one another, and a wide zone between them is the field in which a great part of appellate decision must take place.⁸² Likewise the extraordinary relief given by courts of equity has become the everyday form of justice for large classes of controversies and legislation has been adding new classes.⁸³ Moreover, transition to an urban industrial society has called increasingly for administrative justice and tribunals with flexible procedure and wide powers of discretionary action have been set up everywhere in increasing number. In truth, there are continual points of contact with morals at every turn in the ordinary course of the judicial process. A theory which ignores them, or pictures them as few and of little significance, is not a theory of the actual law in action.⁸⁴

Morals are more than potential material for the legislative law-maker. Ethics can serve us more than as a critique of proposed measures of lawmaking as they are presented to the legislator. To that extent the analytical jurist was wrong. But in another respect, and to a certain extent, he was right. When we have found a moral principal, we cannot stop at that. We have more to do than formulate it in a legal rule. We must ask how far it has to do with things that may be governed by legal rules. We must ask how far legal machinery of rule and remedy is adapted to the claims which it recognizes and would secure. We must ask how far, if we formulate a precept in terms of our moral principle, it may be made effective in action.⁸⁵ Even more we must consider how far it is possible to give the moral principle

Lumley v. Gye, 2 E. & B. 216 (1853), the court chose the analogy of injury to tangible property and so applied the same principle to intentional interference with advantageous relations. In *Brown v. Kendall*, 6 Cush. 292 (Mass. 1850) the court chose decisively between substantive conceptions, on the one hand, and procedural distinctions, on the other hand, as the basis of liability for injuries due to culpable carrying out of a course of conduct not involving aggression. *Heaven v. Pender*, 11 Q. B. D. 103 (1883), the opinion of Brett, J., gives us a thoroughgoing rational exposition of the resulting principle. *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868) involved choice between the analogy of liability for culpable conduct and the analogy of liability (regardless of culpability) for the resulting damage. *Davies v. Mann*, 10 M. & W. 546 (1842) involved a choice between a procedural analogy of a bar to recovery and a substantive analogy of liability for culpably caused injury.

⁸² "And the judges themselves do play the chancellor's part upon statutes, making construction of them according to equity, varying from the rules and grounds of law, and enlarging them *pro bono publico*, against the letter and intent of the makers, whereof our books have many hundreds of cases." Lord Ellesmere, Chancellor, in *Earl of Oxford's Case* (1616) 2 WHITE AND TUDOR, LEADING CASES IN EQUITY (8 ed. 1910-1912) 773, 779.

⁸³ See 1 CHAFEE AND SIMPSON, CASES ON EQUITY (1934) 222-237.

⁸⁴ This is well put by a practitioner and judge of long experience: "Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live." DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA (1894) 17.

⁸⁵ Pound, *The Limits of Effective Legal Action* (1917) 3 AM. BAR. ASSN. J. 55, 27 INT. JOURN. OF ETHICS, 150.

legal recognition and legal efficacy by judicial decision or juristic reasoning, on the basis of the received legal materials and with the received legal technique, without impairing the general security by unsettling the legal system as a whole.⁸⁶ As the fifteenth-century lawyer said in the Year Books, some things are for the law of the land, and some things are for the chancellor, and some things are between a man and his confessor.⁸⁷

Assuming that their provinces are neither identical nor wholly distinct, what is it that sets off the domain of law and that of morals? If there are two forms or modes of social control, each covering much of the same ground, yet each having ground that is peculiarly its own, what determines the boundary between them? Is it a distinction in subject matter or in application of legal precepts, on the one hand, and moral principles, on the other, or is it both? Analytical jurists maintain that it is both. In the last century they insisted much on the distinction in respect of subject matter and on the distinction in respect of application.

With respect to subject matter, it is said that morals have to do with thought and feeling, while the law has to do only with acts; that in ethics we aim at perfecting the individual character of men, while law seeks only to regulate the relations of individuals with each other and with the state. It is said that morals look to what is behind acts, rather than to acts as such. Law, on the other hand, looks to acts, and only to thoughts and feelings so far as they indicate the character of acts and determine the threat to the general security which they involve.⁸⁸ The act with malice or *dolus* is more anti-social than the one with mere stupidity or a slow reaction time behind it. Hence, for example, the criminal law calls for a guilty mind. But in a crowded community where mechanical agencies of danger to the general security are in everyday use, and many sorts of business activity incidentally involve potential injury to society, thoughtlessness and want of care, or stupidity, or even neglect to supervise one's agent at his peril, may be as anti-social as a guilty mind, and so a group of legal offenses may develop which take no account of intent.⁸⁹

⁸⁶ See Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 940, 942-949.

⁸⁷ Fineux, *arguendo*, in Anonymous, Y. B. Hil. 4 Hen. 7, pl. 8, fol. 5 (1490).

⁸⁸ "The object of the law is not to punish sins, but is to prevent certain external results." Holmes, J., in *Com. v. Kennedy*, 170 Mass. 18, 20 (1897). "Now the state, that complains in criminal causes, does not suffer from the mere imaginings of men. To entitle it to complain, therefore, some illegal act must have followed the unlawful thought." This doctrine is fundamental and in a general way universal. 1 BISHOP, CRIMINAL LAW (9 ed. 1923) §204. Compare 4 BLACKSTONE, COMMENTARIES, 21. See also: AMOS, THE SCIENCE OF LAW (2 ed. 1874) 32; STONE, LAW AND ITS ADMINISTRATION (1915) 33-35; 2 TISSOT, INTRODUCTION PHILOSOPHIQUE A L'ÉTUDE DU DROIT (1874) 252-255.

⁸⁹ "Public policy may require that in the prohibition or punishment of par-

Next, it is said that as between external and internal observance of the dictates of morals the law has to do with the former only. Thou shalt not covet thy neighbor's ox is a moral rule. But unless the covetousness takes outward form, e.g., in larceny, the law does not and indeed cannot deal with it.⁹⁰ Not that the law necessarily and wholly closes its eyes to the internal. But law operates through sanctions; through punishment, substitutional redress, specific redress, or forcible prevention. Hence it must have something tangible upon which to go. The story of the schoolmaster who said, "Boys be pure in heart or I'll flog you," is in point.⁹¹ Purity in speech and act is the most the penalty of flogging can insure. Because of the practical limitations involved in application and administration, this point made by the analytical jurist is well taken. The lawmaker must have in mind these practical limitations and must not suppose that he can bring about an ideal moral order by law if only he can hit upon the appropriate moral principles and develop them properly by legislation.

But nineteenth-century jurists were inclined to carry this too far and to ignore moral considerations merely as such—to ignore those which the law can and should take into account and to assume that they might do so simply on the ground of the distinction between the legal and the moral. Because it is impracticable to make the moral duty of gratitude into a legal duty, it does not follow that the law is to deal only with affirmative action and not seek to enforce tangible moral duties not involving affirmative action even though affirmative action is practicable.

For example, take the case of damage to one which is clearly attributable to wilful and morally inexcusable inaction of another. Suppose a case where there is no relation between the two except that they are both human beings. If the one is drowning and the other is at hand and sees a rope and a life belt in reach and is inert, if he sits on the bank and smokes when he could act without the least danger, the law has refused to impose liability. As Ames puts it: "He took away nothing from a person in jeopardy, he simply failed to confer a benefit upon a stranger. . . . The law does not compel active benevolence be-

ticular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in his defense good faith or ignorance." *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 70, 30 Sup. Ct. 663, 54 L. ed. 930 (1910). See also *Hobbs v. Winchester Corporation* [1910] 2 K. B. 471; *State v. Quinn*, 131 La. 490, 495, 59 So. 913 (1912); *Wells Fargo Express v. State*, 79 Ark. 349, 352, 96 S. W. 189 (1906); *Welch v. State*, 145 Wis. 86, 129 N. W. 656, 32 L. R. A. (N. S.) 746 (1911); *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922).

⁹⁰ POLLOCK, *FIRST BOOK OF JURISPRUDENCE* (6 ed. 1929) 46-47.

⁹¹ *Ibid.*, 47, note 1.

tween man and man. It is left to one's conscience whether he will be the good Samaritan or not."⁹²

What difficulties are there here to make legislatures and courts and jurists hesitate? To some extent there are difficulties of proof. We must be sure that the one we hold culpable was not dazed by the emergency.⁹³ Again, he who fails to act may assert some claim which must be weighed against the claim of him whom he failed to help. In the good Samaritan case⁹⁴ the priest and the Levite may have had good cause to fear robbers if they tarried on the way and were not at the inn before sunset. Also it may often be difficult to say upon whom the legal duty of being the good Samaritan shall devolve. If a woman has a fit in a bank, does the duty fall upon the bank as a corporation or on the bank officers and employees present, as individuals, or on the bystanders? Or, take the case where a man was severely injured, without fault of the employees of a railroad company, while attempting to cross ahead of a moving car pushed by an engine.⁹⁵ Why should the moral duty of being good Samaritans fall upon the employees as servants of the company rather than upon them as individuals? But the case of an athletic young man with a rope and life belt at hand who sits on a bench in a park along a river bank and sees a child drown, does not present these difficulties. Yet the law makes no distinction. Practical difficulties are not always or necessarily in the way. In the case put there is nothing intrinsic in the moral principle which should prevent legal recognition of it and the working out of appropriate legal rules to give it effect. Indeed, a cautious movement in this direction is to be seen in recent American decisions. In most of the cases there was a relation—husband and wife,⁹⁶ employer and employee,⁹⁷ or carrier and passenger.⁹⁸ One case, master or owner and seamen, has been

⁹² Ames, *Law and Morals* (1908) 22 HARV. L. REV. 97, 112. See Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. OF PA. L. REV. 217, 316; Bruce, *Humanity and the Law* (1911) 73 CENTRAL L. J. 335; *Osterlind v. Hill*, 263 Mass. 73, 160 N. E. 301, 56 A. L. R. 1123 (1928).

⁹³ See RIVERS, *INSTINCT AND THE UNCONSCIOUS* (1920) 55.

⁹⁴ LUKE 10:30-36.

⁹⁵ *Union Pac. Ry. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513 (1903). See the duty of salvage of life at sea prescribed by U. S. Salvage Act 1912, chap. 268, §2, 37 STAT. 242, 3 U. S. CODE, tit. 46, §728, p. 3977. The duty is imposed upon "the master or person in charge of a vessel" and subjects him to liability to fine or imprisonment.

⁹⁶ *Territory v. Manton*, 8 Mont. 95, 14 Pac. 387 (1888). See *Rex v. Russell* [1933] Vict. L. R. 59.

⁹⁷ *Ohio R. Co. v. Early*, 141 Ind. 73, 40 N. E. 257 (1894); *Carey v. Davis*, 190 Ia. 720, 180 N. W. 889, 12 A. L. R. 904 (1921); *Raasch v. Elite Laundry Co.*, 98 Minn. 357, 108 N. W. 477, 7 L. R. A. (n. s.) 940 (1906); *Hunicke v. Meramec Quarry Co.*, 262 Mo. 560, 172 S. W. 43 (1914); *Salter v. Nebraska Tel. Co.*, 79 Neb. 373, 112 N. W. 600, 13 L. R. A. (n. s.) 545 (1907).

⁹⁸ *Yazoo & M. V. R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286 (1906); *Birmingham Electric Co. v. Driver*, 232 Ala. 36, 166 So. 701 (1936); *Middleton v. Whitridge*, 213 N. Y. 499, 108 N. E. 192 (1915); *Layne v. Chicago R. Co.*, 175 Mo. App. 34, 41, 157 S. W. 850 (1913).

settled from of old in the sea law.⁹⁹ But there are cases in which there was no relation.¹⁰⁰ We must reject the opposition of law and morals when pushed so far as to justify ignoring the moral aspects of these cases where no practical difficulty is in the way. The cases which make the notion of a necessary opposition between law and morals appear well founded are cases in which the practical limits of effective legal action, the exigencies of enforcement through the judicial process, precluded not so much legal recognition as legal sanctioning of particular moral precepts.¹⁰¹

As to application of moral principles and legal precepts respectively, it is said that moral principles are of individual and relative application; they are to be applied with reference to circumstances and individuals, whereas legal rules are of general and absolute application. Hence it is said, on the one hand, every moral principle is tested and described by the circumstances which surround its application. Also, in morals, it must rest with every man at the crisis of action to determine his own course of conduct. On the other hand, it is said, law, that is, judicial application of a legal precept, must act in gross and to a greater or less extent in the rough. Also the law, so far as possible, seeks to leave nothing to doubt with respect to the lawfulness or unlawfulness of a course of conduct. If legal doubts exist at the crisis of action, it is considered a proof of defects in the law of the time and place. In the same spirit it is said that attempts to turn moral principles into detailed logical propositions lead to casuistry, while attempts to individualize the application of legal rules lead to arbitrary magisterial action and thus to oppression.¹⁰²

We are not so sure of this opposition of law and morals with respect to application as we were in the nineteenth century. Thus, in illustrating the distinction, Sheldon Amos says: "The same penalty for

⁹⁹ *The Iroquois*, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. ed. 955 (1903); *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 53 Sup. Ct. 173, 77 L. ed. 368 (1932); *United States v. Knowles*, 4 Sawy. 517 (U. S. 1864); *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796 (1887).

¹⁰⁰ *Southern Ry. Co. v. Sewell*, 18 Ga. App. 544, 90 S. E. 94 (1916); *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1 (1907); *Whitesides v. Southern R. Co.*, 128 N. C. 229, 38 S. E. 878 (1901).

¹⁰¹ On the whole subject see: NETHERLANDS PENAL CODE, art. 450; GERMAN CIVIL CODE, §826; STAMMLER, *LEHRE VON DEM RICHTIGEN RECHTE* (2 ed. 1926, 302, Husik's transl. 1925, THEORY OF JUSTICE, 380-382); 2 PLANCK, *BÜRGERLICHES GESETZBUCH* (3 ed. 1903-1908) 995 (§826, note e); LISZT, *DIE DELIKTSOBLIGATIONEN IM SYSTEM DES BÜRGERLICHEN GESETZBUCHS* (1898) 72; BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Clarendon Press Reprint, 1876) 322-323; *id.*, *THEORY OF LEGISLATION* (transl. by Hildreth, 5 ed. 1887) 65-66; 2 LIVINGSTON, *COMPLETE WORKS ON CRIMINAL JURISPRUDENCE (DRAFT CODE OF CRIMES AND PUNISHMENTS FOR THE STATE OF LOUISIANA, 1873)* 126-127; MACAULAY, *NOTES TO DRAFT OF INDIAN PENAL CODE*, chap. xviii, §294 and note M, pp. 53-56 (7 COMPLETE WORKS, 1875 ed. 493-497); AMERICAN LAW INSTITUTE, *I RESTATEMENT OF THE LAW OF TORTS*, §314 (1934).

¹⁰² AMOS, *THE SCIENCE OF LAW* (2 ed. 1874) 33-34.

a broken law is exacted from persons of an indefinite number of shades of moral guilt."¹⁰³ He says this as if it showed conclusively that law would not take cognizance of the shades which morals would recognize. No doubt Amos's generation took the statement that the law does not recognize shades of guilt as axiomatic. But today through probation, administrative agencies and more enlightened penal treatment the legal order is coming more and more to fit the treatment to the criminal and to do for individual offenders what had been assumed to be beyond the competency of legal administration of justice.¹⁰⁴ We have always had some degree of individualized application of legal precepts in courts of equity, as a remnant from the stage of infusion of morals. Today the rise of administrative tribunals and the tendency to commit subjects to them that were once committed to the courts bear witness to the demand for individualized application at many new points. The administrative process is not outside of the legal order and can be and should be carried on so that its individualized applications none the less apply and give effect to the body of precepts which is commonly meant by the term "law."¹⁰⁵

Nineteenth-century science of law assumed that all legal precepts were potentially in the jurist's head, and were discovered by a purely logical process. With the breakdown of this notion of the finality of legal premises and logical existence of all legal precepts from the beginning, much of the significance of the distinction in application between legal precepts and moral principles disappears. Rules of property, rules as to commercial transactions, the rules which maintain the security of acquisitions and security of transactions in a society of complex economic organization, may be and should be of general and absolute application. But such rules are not the whole of the law nor may they be taken for the type of all legal precepts as the analytical jurist sought to do. Precepts for human conduct, precepts determining for what conduct one shall respond in civil proceedings and how he shall respond, may admit of a very wide margin of individualized application. Indeed, in this connection the law often employs standards rather than rules. In case of negligence the law applies the standard of the conduct of a reasonable, prudent man under the circumstances and puts it to a jury, in effect as a moral proposition, to decide (within reasonable limits) on their individual notions of what is fair and reasonable in the particular case. So in Roman law, where a standard of what a prudent

¹⁰³ *Ibid.*, 34. Cf. PAULSEN, *ETHICS* (Thilly's transl. 1899) 629-630.

¹⁰⁴ See SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* (3 ed. 1939) 380-408, 524-553, 613-634.

¹⁰⁵ Note the review of sentences by the English Court of Criminal Appeal and the individualization with reference to the offender which goes on there. *E.g.*, Thomas, 28 *CRIMINAL APP. REP.* 21 (1941); Burton, *id.* 89 (1941); Duerden, *id.* 125 (1942); Betteridge, *id.* 171 (1942); Billington, *id.* 180 (1942).

husbandman would do is applied to a usufructuary, or a standard of the conduct of a prudent and diligent head of a household is applied to the parties to a transaction of good faith. The opposition between law and morals with respect to application is significant only in the law of property and in commercial law, subjects which were to the fore in the nineteenth century, and tends to disappear in the law as to civil liability for action injurious to others, the subject in which growth is going on today.

It is equally a mistake wholly to divorce law and morals, as the analytical jurists sought to do, and wholly to identify them as the natural-law jurists sought to do. For, granting all that has been said as to the analytical distinction between law and morals with respect to subject matter and application, there remain three points at which ethical theory can be of little help to the jurist and with respect to which important areas in the law will have at least a non-moral character. In the first place, in order to maintain the social interest in the general security, to prevent conflict, and to maintain a legal order in the place of private war, the law must deal with many things which are morally indifferent. In many cases in the law of property and in the law of commercial transactions the law might require either of two alternative courses of action with equal justice, but must choose one and prescribe it in order to insure certainty and uniformity. In such cases developed legal systems often exhibit the greatest diversity of detail. Usually the only moral element here is the moral obligation attaching to the legal precept merely as such because of the social interest in the security of social institutions, of which law is one of the most fundamental.

Aristotle pointed this out in his distinction between that which is just by nature or just in its idea and that which derives its sole title to be just from convention or enactment. The latter, he tells us, can be just only with respect to those things which by nature are indifferent.¹⁰⁶ This distinction, handed down to modern legal science by Thomas Aquinas, has become a commonplace of the philosophy of law.¹⁰⁷ But we put it to grave misuse in our differentiation of *mala in se* from *mala prohibita*; a doubtful distinction between the traditionally anti-social, recognized and penalized as such in our historically given legal materials, and recently penalized infringements of newly or partially recognized social interests. Aristotle gives as an example a law setting up an eponym for a Greek city-state.¹⁰⁸ Recording acts, rules

¹⁰⁶ NICOMACHAEAN ETHICS, v, 7.

¹⁰⁷ THOMAS AQUINAS, SUMMA THEOLOGICA, ii, 2, q. 57, art. 2; 1 BLACKSTONE, COMMENTARIES, 43. See POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 25-26.

¹⁰⁸ NICOMACHAEAN ETHICS, v, 7, 1.

as to the number of witnesses required for a will, as to the words necessary to create estates in land, as to the making, sealing, and delivery of deeds, and the like, where the real desideratum is to have a rule and to have it promulgated and, as Bentham would say, "cognoscible"—such legal provisions justify Aristotle's distinction. It is not a matter of morals whether we require one witness to a will or three witnesses. All that morals call for is that we have a certain, known rule and adhere to it.

Again, the law does not approve many things which it does not expressly condemn.¹⁰⁹ Many injuries are out of its reach. They are not susceptible of proof or they are inflicted by means too subtle or too intangible for the legal machinery of rule and sanction. Many interests must be left unsecured in whole or in part because they require too fine lines in their delimitation, or they are infringed by acts too intangible to admit of securing them by legal means. Such things as the long hesitation of American courts to deal adequately with nervous illness caused by negligence without any bodily impact, using language of the past which is belied at every point by modern physiology and psychology,¹¹⁰ or the reluctance of some courts to give adequate legal security to personality, especially to the individual claim to privacy,¹¹¹ demonstrate the practical importance of insisting that our science of law shall not ignore morals. So long as for good reasons we cannot deal with such things legally, we must rest content. But we must not allow an analytical distinction between law and morals to blind us to the need of legal treatment of such cases whenever the onward march of human knowledge puts it in our power to deal with them effectively.

Thirdly, law has to deal with incidence of loss where both parties are morally blameless.¹¹² In such cases it may allow the loss to remain where it falls or it may seek to secure some social interest by changing the incidence of the loss. A large part of the legal difficulty arises from the very circumstance that the parties are equally blameless.¹¹³

¹⁰⁹ See AMOS, *THE SCIENCE OF LAW* (2 ed. 1874) 30; POLLOCK, *FIRST BOOK OF JURISPRUDENCE* (6 ed. 1929) 51-54.

¹¹⁰ See Goodrich, *Emotional Disturbance as Legal Damage* (1922) 20 MICH. L. REV. 497.

¹¹¹ See Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 362-364.

¹¹² See Ballantine, *A Compensation Plan for Railway Accident Claims* (1916) 29 HARV. L. REV. 705; Marx, *Compulsory Compensation Insurance* (1925) 25 COL. L. REV. 164; *Report of the Committee to Study Compensation for Automobile Accidents*, Columbia University Council for Research in the Social Sciences (1932) and review by Thurston (1933) 43 YALE L. J. 160.

¹¹³ See, e.g., the compulsory pilotage cases. "Their Lordships are not insensible to the great hardship which is occasioned to persons in the position of the owners of [the ship injured in a collision] who . . . lose their remedy against the owners of the [colliding ship] and have only a remedy, which is of course of very little value, against the pilot. . . . It is for the legislature to determine . . . upon which of two innocent persons the loss in such cases should fall, whether upon

This is notable in what was at one time called the "insurance theory" of liability; a theory that we all of us should bear the losses incident to the operation of civilized society, instead of leaving it to be borne by the one who happens to be injured. Hence the law is to pass the burden back to all of us by imposing legal liability upon some one who is in a position to bear it in the first instance and impose it ultimately in the form of charges for services rendered. Since the Workmen's Compensation Acts there has been a growing tendency in this direction. But juristically these liabilities thus far have been incident to some relation. Also the legislative reasons for imposing them have been primarily economic. Very likely the juristic and economic considerations may be given an ethical formulation. Nevertheless, one may suspect that in this case ethics has followed jurisprudence, and that ethical theory does not help us here beyond recognizing the moral quality of obedience to the legal rule. Thus, *respondeat superior* is not a universal moral rule.¹¹⁴ Shifting of the burden to the employer, no matter how careful and diligent he may have been and how free from fault, proceeds on the basis of the social interest in the general security, which is maintained best by holding those who conduct enterprises in which others are employed to an absolute liability for what their servants do in the course of the enterprise. Such, at any rate, was the reason formerly given. But with the coming of collective bargaining, closed shops, and employee control of conditions, this reason is ceasing to obtain. Evidently the basis of liability will have to be found in the so-called insurance theory.

Such cases require definite rules in order to prevent arbitrary action by the magistrate. They differ from cases, such as negligence, where the moral quality of acts is to be judged with reference to a legally fixed standard applied to the particular circumstances. In the latter, within wide limits, each trier of fact may have his own ideas. In the former, this could not be tolerated. The most we may ask in the former is that our measure for maintaining the general security be not ethically objectionable. Whenever we make a rule for a case of the former type, we are not unlikely to provide a legal rule which is not a moral rule.

A closely related situation, which has given much difficulty, arises where both parties to a controversy have been at fault and the law must fix the incidence of loss in view of the culpability of each. It might be allowed to rest where it falls (contributory negligence)¹¹⁵ or the whole

those who are compelled to take a pilot whom they have no power of selecting, or upon those who are injured by the ship which has that pilot on board." *The Ocean Wave*, L. R. 3 P. C. 205, 211 (1870).

¹¹⁴ The various speculative justifications of the doctrine are criticized in *BATY, VICARIOUS LIABILITY* (1916) chap. viii ("Justification in Ethics").

¹¹⁵ *Neal v. Gillett*, 23 Conn. 437 (1855).

might be cast on the one more culpable (comparative negligence)¹¹⁶ or on the one last culpable (last clear chance)¹¹⁷ or the loss may be divided¹¹⁸ or apportioned¹¹⁹ (as in the civil law and in admiralty) or recovery may be abated in view of the negligence of the complaining party,¹²⁰ or, without regard to contributory negligence of the injured person, the whole burden may be put upon an enterprise conducted for public advantage which is in a position to pass the loss on to the public at large.¹²¹ If we had any machinery for the accurate quantitative or qualitative measurement of liability in such cases, the rule of the civil law would be required on ethical grounds. It is because all apportionment in such cases is theoretical, and at best arbitrary, that the law is troubled what to do.¹²² The fact that seven doctrines have obtained on this subject speaks for itself.¹²³

In addition there is one general characteristic of law that makes for a certain opposition or at least contrast between the legal and the moral. The very conception of law, whether as legal order or as a body of laws or as the judicial process, involves ideas of uniformity, regularity, and predictability. In other words, it involves rule, using that word in the wide sense. Administration of justice according to law is administration of justice in accordance with legal precepts and largely by rules in the strict sense. But even the most flexible of mechanisms will operate more or less mechanically, and it is not easy to make legal machinery flexible and at the same time adequate to the general security. The requirements of particular cases must yield more or less to the requirements of generality and certainty in legal precepts and of uniformity and equality in their application. Hence even though in general the

¹¹⁶ Cooper, J., in *Louisville R. Co. v. Fleming*, 82 Tenn. (14 Lea) 128, 135 (1884); 1 SHEARMAN AND REDFIELD, *LAW OF NEGLIGENCE* (6 ed. 1913) §102, 103.

¹¹⁷ *Davies v. Mann*, 10 M. & W. 546 (1842).

¹¹⁸ *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586 (1890).

¹¹⁹ Scott, *Collisions at Sea Where Both Ships Are in Fault* (1897) 13 L. Q. REV. 17.

¹²⁰ *Cameron v. Union Automobile Ins. Co.*, 210 Wis. 659, 246 N. W. 420 (1933) —statutory.

¹²¹ The "humanitarian doctrine." *Hutchinson v. St. Louis & M. R. R. Co.*, 88 Mo. App. 376 (1901). *British Maritime Conventions Act, 1911*, §1.

¹²² See the reasons stated in *Needham v. San Francisco R. Co.*, 37 Calif. 409, 419 (1869); *Kerwhacker v. Cleveland R. Co.*, 3 Ohio St. 172, 188 (1854); *Heil v. Glanding*, 42 Pa. St. 493, 498 (1862).

¹²³ Compare the different solutions of the questions involved in union of materials of different owners and expenditure of labor on the materials of another. The Roman jurists of the classical era were not agreed and Justinian adopted a solution differing from that of either school. DIG. xli, 1, 7, §7; *id.* x, 4, 12, §3; INST. ii, 1, §§25, 26. The modern codes do not agree with the Roman law nor with each other. FRENCH CIVIL CODE, arts. 561-572, 576. GERMAN CIVIL CODE, §§950, 951. The common law does not agree wholly with the Roman law nor with any modern code, nor do the common-law authorities agree with each other. 2 BLACKSTONE, COMMENTARIES, 404; *Betts v. Lee*, 5 Johns. (N. Y.) 348 (1810); *Wetherbee v. Green*, 22 Mich. 311 (1871); *Silbury v. McCoon*, 3 N. Y. 379 (1850). No rule has ever proved wholly satisfactory. But titles cannot be left in uncertainty. There must be a rule in each jurisdiction.

law tends to bring about results accordant with the moral sense of the community, the necessarily mechanical operation of legal rules will in particular cases produce situations where the legal result and the result demanded by the moral sense of the community are out of accord.¹²⁴ When such things happen it is often because of the survival of legal precepts which have only a historical basis. But to a certain extent they are an inevitable by-product of justice according to law.

So much must be conceded to the analytical jurist. Yet we must not omit to note that in the last century he pressed these points too far. Thus a writer on ethics, who shows in marked degree the effects of analytical jurisprudence, says: "The law protects contracts which were made in legitimate business without regard to whether their provisions still conform to justice or not. Owing to unforeseen circumstances things may have so changed as to cause the ruin of one of the contracting parties without substantially benefitting the other party. The law is not concerned with that."¹²⁵ The proposition is true of the strict law, although in practice it might not be easy to find a jury which would give an adequate value to the bargain in an action for damages. But when the promisee went into a court of equity for his only effective and adequate remedy (specific performance) he would encounter the chancellor's margin of discretion in the application of that remedy and the doctrine that supervening circumstances may make a bargain so hard that the court will refuse to enforce it.¹²⁶ The passage quoted sounds very like the pronouncements of lawyers in the stage of the strict law, when the line between legal and moral was drawn so sharply.¹²⁷ Something of this spirit is to be seen in the maturity of law. But in the present, administrative moratoria in the civil law and limitations on the powers of creditors to exact satisfaction both in civil-law systems and in the common-law world, mitigate the enforcement of hard bargains.¹²⁸ The law in action is not as harsh as the author would have us believe.

Yet there are too many points, such, for example, as the law with respect to promises made in the course of business but without a technical consideration, where the last century did not exert itself, as it

¹²⁴ I have treated this point more fully in a paper, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906) 29 REP. AM. BAR ASSN. 395, 397-398.

¹²⁵ PAULSEN, *ETHICS* (Thilly's transl. 1899) 629. The influence of Jhering on Paulsen's views as to the relation of law and morals is manifest. Hence his position is substantially that of the analytical jurists. *ETHICS* (Thilly's transl.) 624-637.

¹²⁶ *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501 (U. S. 1869).

¹²⁷ See the *Replication of a Serjeant to Doctor and Student*, HARGRAVE, *LAW TRACTS* (1787) 323.

¹²⁸ See Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 HARV. L. REV. 195, 231-233. For references since that article was written see POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* (5 ed. 1943) 45-46.

should have done, to bring the legal and the moral into accord.¹²⁹ The philosophical jurist was too prone to find ingenious philosophical justification for rules and doctrines and institutions which had outlived the conditions for which they arose and had ceased to yield just results. The historical jurist was too prone to find a justification for an arbitrary rule in showing that it was the culmination of a historical development. The analytical jurist banished all ethical considerations, all criticism of legal precepts with reference to morals, from the law books. If a precept could be fitted logically into a logically consistent legal system, it was enough. Such things are intelligible as a reaction from extravagances of the law-of-nature school. They are intelligible also in a stage of legal development, following a period of growth, when it was expedient for a time to assimilate and systematize the results of creative judicial and juristic activity. But they cannot be more than temporary; they cannot be suffered to become permanent features of a science of law.

At the end of the eighteenth century natural-law jurists had much to say about a "right of revolution," or, if one is to use juristic terminology, for a political idea, a liberty of revolution.¹³⁰ Analytical jurists, on the other hand, have been zealous to point out that resistance to a law may be moral but cannot be legal. The "right of revolution" depends upon the natural-law idea that the obligation of a legal precept depends upon its conformity to a moral precept; upon the political juristic theory that the individual conscience is the ultimate moral and hence legal arbiter. This way of thinking belongs to the extreme abstract individualism of the end of the eighteenth century which took no account of the social interest in the security of political institutions as social institutions. It made the individual the final judge of his legal as well as of his moral duty to yield obedience to political authority. Here the question was obscured by *ius* and *droit* as compared with "law." The analytical view is well put in Hobbes's saying: "Authority not truth makes the law."¹³¹ The analytical jurist would say: Resistance to a law may sometimes be a moral duty, but it cannot be a legal liberty. This question was much argued in the United States on the eve of the Civil War in connection with the Fugitive Slave Law.¹³² It may sometimes be a moral duty to disobey a flagrantly unjust law.

¹²⁹ See POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) lect. 6, especially pp. 267-284.

¹³⁰ 1 WILSON'S WORKS (Andrews' ed. 1896) 18; 1 ANDREWS, AMERICAN LAW (1900) §103.

¹³¹ LEVIATHAN (1651) pt. 2, chap. 26, 8, 3 ENGLISH WORKS, MOLESWORTH'S ed. 263.

¹³² See *In re Booth*, 3 Wis. 1 (1854); *Ex parte Booth*, *id.* 145; *In re Booth* and *Rycraft*, *id.* 157; *Ableman v. Booth*, 11 *id.* 498 (1860); *Ableman v. Booth*, 21 How, 506, 16 L. ed. 169 (U. S. 1858).

But it is always a legal duty to obey every law. This is only another way of putting the doctrine of the analytical jurists and of Kelsen, that law is imposed, not something containing in itself the ground of its authority. The sociologists, like the historical jurists, object to the idea of law as imposed, insisting that it arises from within a social group. But that is not wholly the same question. It may arise within a politically organized society and yet not get its authority from within those subject to it.

A view of the relation between law and morals, coming to much the same result as that of the analytical approach, is reached by Radbruch from a Neo-Kantian starting point. He tells us that there is an irreducible antinomy between law and morals. He thinks of justice as the ideal relation among men; of morals as the ideal development of the individual; of the legal order as maintained security. No one of these, he says, can be carried out logically except at the expense of one or both of the others. As no logical line can be drawn, and logical development of any one of them negates the others, he considers that it follows that justice has to do with the formal notion of law, the end with measuring the value of the content of law, security with the binding force of law. Law will draw its own lines as to where and how far, if at all, to recognize the other two. This is an example of Neo-Kantian logicism, putting logic much where the eighteenth century put reason. Hence, given Kantian definitions of justice, morals, and law, the next step is to develop each logically. But when this is done each conflicts with the others. Hence each must go its own path. There is no logical way of reconciling them.¹³³

Kant considered that we should start with the conscious ego as something not open to challenge. The ideal relation between such egos was the one permitting each the most freedom of will consistent with the like freedom of will of the others. The ideal development of each was the one which permitted that freedom. Law was the maintaining of that relation and its development by universal rule. But if we hold that no ultimate starting point can be proved logically, we have nothing to go on but the three, which cannot be carried out logically consistently with each other.

For example: The ideal relation between men would hold them liable to each other only for undertaking or for fault. But security requires us to impose liabilities without fault—crimes without *mens rea*, liability of the owner for injury by a borrowed automobile negligently operated by the borrower, and the like. Again, the ideal development of the individual calls for free self-determination, e.g., liberty of contract. But the ideal relation of equality may require limitation of free contract.

¹³³ RECHTSPHILOSOPHIE (1932) §10.

The law must determine for itself which of these directions to take. Again, security carried to a full logical development might require us to condemn criminals without hearing, or to extort confessions by the third degree, or to procure evidence against criminals by unreasonable searches and seizures. Thus each one, if it is carried out logically, is independent of the others. Kelsen, also from a Neo-Kantian standpoint, makes this the basis of a complete ignoring of morals in a pure science of law.¹³⁴ I have endeavored to show in other connections how these ideas are to be reconciled.¹³⁵

V

THE SOCIOLOGICAL VIEW—THE APPROACH AND POINT OF VIEW OF THE SOCIOLOGISTS¹³⁶

In sociological jurisprudence all social control, taken as a whole is looked at functionally. So law in the lawyer's sense and morality are forms of social control; simply different levels of social control or of what the sociologist calls law in its widest sense. This is a development in the light of sociology of the doctrine of the historical school in the nineteenth century. But it has been chiefly a development in sociology rather than in jurisprudence and so is not wholly satisfying from a juristic standpoint. Recent sociologists have drawn their juristic ideas from the historical jurists and so have left out of account the overlappings and points of contact in some connections and the distinct fields in others which have been brought out in analytical jurisprudence. Max Weber follows Vinogradoff, much more historian than jurist, as to law and "custom," i.e., ethical custom or morality.¹³⁷ The latter, however, is speaking of the Middle Ages and of the words used in the languages

¹³⁴ REINE RECHTSLEHRE (1934) 12-18, 21; Silving, *Analytical Limits of the Pure Theory of Law* (1942) 23 IOWA L. REV. 1, 7-13.

¹³⁵ POUND, THE SPIRIT OF THE COMMON LAW (1921) 91-93, 197-203; *id.* INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 90, 96; *id.* INTERPRETATIONS OF LEGAL HISTORY (1923) 158-164; *id.* SOCIAL CONTROL THROUGH LAW (1942) 63-80; *id.* A Survey of Social Interests (1943) 57 HARV. L. REV. 1.

¹³⁶ CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) lect. 3; EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS (1913) chap. 4 (Moll's transl. as FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW, 1936, pp. 39-60); POUND, SOCIAL CONTROL THROUGH LAW (1942) lect. 1; KORNFELD, SOZIALE MACHTVERHÄLTNISSE (1911) §16; WURZEL, DAS JURISTISCHE DENKEN (1904) 62-66 (transl. in *Science of Legal Method*, 9 MODERN LEGAL PHILOSOPHY SERIES, 371-377); GURVITCH, L'IDÉE DU DROIT SOCIAL (1932) 95-113; *id.*, SOCIOLOGY OF LAW (1942) 298-301; HORVÁTH, RECHTSZOLOGIE (1934) 213-214; TIMASHEFF, INTRODUCTION TO THE SOCIOLOGY OF LAW (1939) 143-146, 159-167; Petrazycki, *Methodologie der Theorien des Rechts und der Moral* (1933) in OPERA ACADEMIAE UNIVERSALIS JURISPRUDENTIAE COMPARATIVAE, Series 2, STUDIA, fasc. 2; *id.* UEBER DIE MOTIVE DES HANDELNS UND ÜBER DAS WESEN DER MORAL UND DES RECHTS (transl. from Russian by Balson, 1907).

¹³⁷ WIRTSCHAFT UND GESELLSCHAFT IN GRUNDRISS DER SOZIALÖKONOMIK (2 ed. 1925).

of Continental Europe derived from the Middle Ages and the religious-ethical ideas of that time. Hence, he tells us of "the derivation of law from moral habits"¹³⁸ rejecting, along with Ehrlich, Maine's theory that the judge precedes the law.¹³⁹ He points out how this is connected with the words used to express the medieval conceptions; words which go back to an undifferentiated or little differentiated social control. *Recht* "means what is right in social relations, what should be established and supported as right by social organizations."¹⁴⁰ *Droit* (Latin *dextrum*) is "the direction of social relations in the right way. *Pravo*, in the languages of the Slavonic group stands for both *iustum* and *dextrum*."¹⁴¹ He adds: "All these terms and notions are not simply juridical, they belong also to the domain of morals, and the expressions pointing to right are clearly allied to words used to designate moral habits."¹⁴² Furthermore, he proceeds, "In the term *right* itself the moral and the juridical connotations are indissolubly connected; both personal claim [subjective right] and social order [objective right] have their root in moral sense—in the ethics of social intercourse."¹⁴³ Accordingly, sociologists in writing on law usually adopt the view of the historical jurists as to sanction.¹⁴⁴ Ehrlich distinguishes norms for decision from rules for conduct, the latter including morality.¹⁴⁵ Tönnies distinguishes true moral precepts—rules of behavior recognized and imposed by social groups, i.e., law and positive morality as Austin would put it—from individual ideas of what should be moral precepts, individual, ethical theories, i.e., morals.¹⁴⁶ To show how far this may be carried, what Jhering calls customary rules of politeness,¹⁴⁷ Petrazycki calls "rules of unofficial law."¹⁴⁸ It is significant that while Jhering distinguishes law and morality, although seeing their relation, sociologists have commonly used the discussion of morality in the second volume of *Der Zweck im Recht* as the basis of discussion of law as something

¹³⁸ 2 COLLECTED PAPERS (1928) 467.

¹³⁹ EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (transl. by Moll, 1936) 37-38. Cf. MAINE, ANCIENT LAW (1861) chap. I. But see the vindication of Maine's view, LEWELLYN AND HOEBEL, THE CHEYENNE WAY (1941) 276-283.

¹⁴⁰ 2 VINOGRADOFF, COLLECTED PAPERS (1928) 466.

¹⁴¹ *Ibid.*, note 3.

¹⁴² *Ibid.*, 467.

¹⁴³ *Ibid.*

¹⁴⁴ E.g., EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (transl. by Moll, 1936) chap. IV. "The conception of law as a coercive order . . . is based upon the fact that its exponents have one-sidedly taken into consideration only those portions of the law which derive their force solely from the state." *Ibid.*, 75.

¹⁴⁵ *Ibid.*, 81.

¹⁴⁶ TÖNNIES, THOMAS HOBBS (3 ed. 1925) 205.

¹⁴⁷ 2 ZWECK IM RECHT (3 ed. 1893-1898) 480-559.

¹⁴⁸ *Vide*, TIMASHEFF, INTRODUCTION TO THE SOCIOLOGY OF LAW (1939) 149, note 2.

including both.¹⁴⁹ By making the term "law" so all inclusive, sociologists revert to much of the confusion in the books on the law of nature from which analytical jurists reacted to the other extreme.¹⁵⁰ If Austin and Kelsen have gone too far, it has not been without provocation. How confusion can result from the words used is well brought out by Llewellyn.¹⁵¹

It is to more purpose that Timasheff points out three stages or levels in social control: first, morality or ethical custom, with diffuse sanctions, second, law, organized power with organized sanctions, but not necessarily sanctions of a politically organized society, and third, morals, developed religious and philosophical theories.¹⁵² It is important for the jurist to bear in mind, what the sociologists insist upon, that the inner order of groups and associations other than the political organization of a society, and religious and philosophical ideals play a large and often controlling part in the ordering of society in comparison with law in the lawyer's sense.¹⁵³ Yet Ehrlich gives us a needed caution as to morals, "a preachment or teaching," as compared with morality within a group, and vouches the treatment of natives by the whites in every part of the world where they have come in contact, as showing "the depths to which the morality of modern man may sink where there are no associational bonds."¹⁵⁴ Conflicts between morals and law in the lawyer's sense are an old theme.¹⁵⁵ It is an old observation that law in the lawyer's sense commonly lags behind morality and morals. Morals grow ahead of both law and morality and this growth is an important factor in bringing about changes in law. As Gurvitch puts it, morals are "more dynamic, more revolutionary, more mobile, more directed towards the future . . . than is the law. The latter is more attached to traditional practices than to acts of innovation, more dependent on intellectual representations and the balance of forces than is morality."¹⁵⁶ Yet, he goes on to say, there have been cases where "an advanced law" has overcome current morality so that law has become a factor in moral change. This is exceptional during revolutions or major reform movements, when legislation or intuitive development of an inner order behind it, goes forward at a bound beyond the old

¹⁴⁹ See *ibid.*, 149 ff.

¹⁵⁰ See the review of Salmond, *First Principles of Jurisprudence* (1894) 10 L. Q. REV. 89.

¹⁵¹ LLEWELLYN AND HOEBEL, *THE CHEYENNE WAY* (1941) 275-276.

¹⁵² INTRODUCTION TO THE SOCIOLOGY OF LAW (1939) 143. See also GURVITCH, *SOCIOLOGY OF LAW* (1942) 299.

¹⁵³ EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (transl. by Moll, 1936) 64-71.

¹⁵⁴ *Ibid.*, 75.

¹⁵⁵ See TUFTS, *AMERICA'S SOCIAL MORALITY* (1933).

¹⁵⁶ *SOCIOLOGY OF LAW* (1942) 300.

law and the morality it expressed.¹⁵⁷ Such advanced lawmaking, however, has difficulty in maintaining itself.

In conclusion, following Radbruch, in the making of rules of law and finding grounds of decision, in interpreting rules, in applying rules and grounds of decision, and in exercise of discretion in the judicial and in the administrative process, there are three things to be regarded: (1) justice, the ideal relation between men; (2) morals, the ideal development of individual character; and (3) security. These three have to be kept in balance. The answer to the proposition that there is here an irreducible antinomy is that we cannot ignore any one of them and we cannot proceed on the basis of any one of them at the expense of the others.¹⁵⁸ Morals, which give us an ideal, morality, in which justice and morals are reflected in the time and place, are not to be left out of account in any of the four tasks. But in no one of them will morals or morality suffice of themselves. Security has also to be kept in mind, and if its dictates have to be tempered by morals and morality, theirs have to be tempered by those of security and measured by what is practicable in a legal order. The practical limitations on effective achievement of results by the judicial or the administrative process require us not to attempt too much by means of law (in the lawyer's sense) but to bear in mind that there are other agencies of social control that may sometimes do better what morals and morality require. Yet we should not be too patient under lag of the law behind morality and morals. Beyond reasonable regard for security, any manifest lag should be corrected. By excluding all questions of improvement of the law (in the sense of the body of authoritative guides to determination) and of the judicial and administrative processes, a science of law may be more teachable and logically satisfying to students. But jurisprudence is a practical science. As such, it must consider the end of law, the measure of valuing interests, and the adaptability of systematic application of the force of a politically organized society to achieving the end, and apprehending and applying the measure of values. It cannot dispense with ethics. It cannot depend wholly upon ethics.

¹⁵⁷ *Ibid.*, 300-301.

¹⁵⁸ RECHTSPHILOSOPHIE (1932) §9.