# ETHICS AND THE LAW*

The considerations which I propose bringing forward in this paper are of such a nature that any conclusions derived from them must take the form, not so much of definite propositions as of a rather large and indefinite problem. Two conceptions—ethics and the law—which embody different, but intimately related, forces and types of human development are to be compared, and something attempted by way of estimating their interdependence. The problem consists in determining what is likely to be the precise application to the law of our own land, in the near or more distant future, of the principles which render it dependent for its development upon the development of the moral consciousness of the people of the land. Thus, the title of the paper, which suggests the constant interaction of social forces between the law and ethics, between legality and morality, both furnishes a theme for historical and philosophical treatment, and also excites the spirit of prophecy.

It would doubtless contribute to brevity and precision if we could give at once a concise and universally accepted definition to the conceptions covered by the words, ethics and the law. But, as is the case with all the greater interests of man in his historical development, this ideal of perfect definition is not easily attained. As a layman in the law, I am willing to accept any one of several somewhat variant conceptions. Let us say, then, with Mr. Justice Holmes,[1] that by the law we understand "a body of reports, treatises, and statutes, in this country and in England, extending back for 600 years, and now increasing annually by hundreds." Or, if this definition seems somewhat too deficient in spirit, substantiality and life, because, in the words of Sir Frederick Pollock, "Law is not an affair of bare literal precepts, as the mechanical school would have it, but is the sense of justice taking form in peoples and races." we will rather say that "the law" is a comprehensive term for the collective rules of conduct which are accepted and enforced by the sovereign author-

*Lecture delivered before the Yale Law School on March 10, 1909.

[1] See his lecture, *The Path of the Law*, in the *Harvard Law Review*, X, p. 457.

ity;[2] and with us this authority is lodged, either in the local government, or in that of the State, or of the nation at large. As to the conception covered by the word "ethics," I will venture to give my own definition:[3] "Ethics is the science of human conduct —its sources, its development, its sanctions, and its most general principles—as related to a rational ideal." Or, to define more strictly this science, in order to bring it into closer relations with the science and practice of law, by ethics we mean the collective sentiments, judgments, and approved practices of the body of the people, with respect to what is deemed right and wrong in conduct, as measured by a certain ideal standard of character—in a word, the public conscience or moral consciousness.

The next consideration to notice is that both ethics and the law, the public morality and the body of legal rules, at every epoch in history, and in all lands, are of necessity subject to development. All systems of law are this. But especially is our law, with its accumulations of decisions and statutes enacted by legislative bodies, and grafted upon the common law as derived from England, and expanded and adapted in this country, one of the most notable and complete examples of a true development which the race affords. For nearly a thousand years there has been no interruption, in the form of a revolution, no substantial break, such as has several times occurred in the history of the development of Roman Law in Southern Europe, to the growth of the law of England and the United States.

According to Sir Frederick Pollock, for six and a half centuries in England there was no measure introduced so revolutionary in character as was the introduction of code-pleading in New York and other American states. But this does not prevent the same authority from speaking of the law of both countries as "our law," the common law;" or from insisting upon the "organic unity of our legal institutions and science." In the interests of this free and untrammelled, national—and may we not say, racial?—development, the English courts and English parliament repeatedly repulsed all interference from the canonical law of the Roman Catholic Church. They also declined to lean upon the *Corpus Juris,* even when quoting it, under the impression that

[2] Comp. *The Expansion of the Common Law,* Sir Frederick Pollock, Bart., D. C. L. (Boston), 1904, p. 4.

[3] See the author's *Philosophy of Conduct* (Chas. Scribners' Sons), p. 14.

the Roman Law, as prevalent on the continent, was of a genius somewhat foreign to the Anglo Saxon race. And nothing connected with our own national policy and national prosperity has been more jealously guarded against foreign influences, or revolutionary attacks than this our development of statutes, reports, and decisions, which constitute the law of the land.

That the public morality—the judgments, sentiments, and approved practices, respecting matters of the right and wrong of conduct—is also a matter of development, is the complex resultant of changing psychological and historical forces, needs no argument. I am one of those who hold that there are, indeed, certain aspects or elements of morality which are universal and abiding. The essential nature of the moral judgment, the character of the feeling which motives the action, and the fundamental forms of conduct corresponding to the type of a personal ideal, do not change as do the practices of men under varying economical, social, and religious influences and conditions. But that complex, for which we are entitled to use the confessedly vague terms, the "public conscience," or, the "public morality," is undoubtedly subject to a continuous process of development. It is ceaselessly changing in some of its manifestations; it is always appreciating or depreciating in the scale that measures moral values.

These two forms of human development can never be kept apart. They can never avoid a ceaseless process of action and reaction, of interdependence and interaction. The necessity for this is bedded in the nature of man, in the nature of society, and in all manner of social institutions—in the very nature of the universe itself. That the law constantly and profoundly influences the public conscience, the moral sentiments and judgments, and all the incidents and phases of conduct, is so patent to those who are accustomed to take the highest point of view, that the statement requires no proof and little illustration. Good laws, enforced justly and wisely, not only conserve, but also elevate the public morality. Bad laws, whether broken or kept, degrade or hinder the moral progress of the people. Confessedly all laws, whether regarded as good or bad from the most advanced ethical point of view, if treated with indifference by the people or habitually broken without enforcement of penalty, debilitate and enervate the public conscience. And some statutes there are which come near to enforcing the most heinous and injurious breaches of the

moral law. Such, for example, are the laws at present regulating the taxation of personal property in the State of Ohio, where, as one of her own lawyers said to the writer: "You must either cheat or be cheated, and the truly conscientious man often does not know which he ought to do." But as regarded from the wider outlook, and in the large historical way, we are justly proud of the enormous educative force over the moral development of hundreds of millions, which our law has had, and is still having, not only in England and America, but also in India, and other remote places of the world. Nor do we need to do more than refer to the moral influence of the same legal system over the vast crowds of foreigners that either come here to visit or remain to become citizens.

It is the converse of this proposition, however, which interests us more especially at the present time. The most ardent advocate of the supereminent rationality of "our law" could not claim that it is the "perfection of reason." Just because it is a human institution, which, like all things human, must undergo a ceaseless process of change, that may be either improvement or deterioration, the law of the land is destined never to become perfectly reasonable. Therefore, we may conclude these two truths—first, a wide margin must be left for mistakes, imperfections, injustices, even as in the sight of each generation; and, second, in order to approximate perfection, the law must change by adapting itself to the changed conditions—economic, social and moral—of each succeeding generation. Now all these changing conditions are, in the wider but legitimate meaning of the term, also ethical; that is, they determine the rules of the people's conduct in relation to an ethical ideal.

This intimate dependence of the law upon the moral judgments, sentiments, and conduct of the people whose law it is, we find to be further evinced by the very discussion of the distinction between ethics and the law. Such a distinction is confessedly difficult. Writers on law and jurisprudence differ and argue about the distinction. In his work on the *Elements of Jurisprudence* (p. 24), Holland confesses to embarrassment in the attempt to distinguish sharply the term law as it is used in jurisprudence from the same term in the other practical sciences. All the so-called "practical sciences," however, have the common characteristic that, as the very word "practical" signifies, they fall within the sphere of ethics, or the science of conduct. With the authority

just cited: "Ethic is the science of the conformity of human character to a type;" "Nomology is the science of the conformity of action to rules." Jurisprudence is a branch of nomology. It requires only a superficial analysis to show that this definition really blends rather than sharply distinguishes the spheres of ethics and nomology.

The same view of ethics and the law is further confirmed and illustrated by the language of the law, which is to an expressive extent taken from the vocabulary of the popular morals. Words of this sort are such as "rights," "duties," "malice," "intent," "negligence," etc. Especially is the prevalent use of the idea attaching itself to the word "reasonable" in pleadings at law, and in courts of justice, suggestive in this connection. For example, every man must take *reasonable* care not even without malice to injure another; and he has the right to assume that the other will take *reasonable* care not to injure him. This is ethical, and at the same time good law. For the possession of a man's reason obligates the possessor to use the reason of a man. Charges for public service must be *reasonable;* contracts must have "reason" in them; a *reasonable* time must be allowed for their fulfilment; and only compensatory or reasonable damages can be allowed for injuries done by one to another. In the determination of what is reasonable, and, therefore, must be declared as already legal, or to become legal, references to ethical authority were traditionally allowed in the English courts, whose decisions were such a controlling influence in shaping the common law. To prove what actually did in the particular case correspond to the Roman conception, *aequum et bonum,* it was proper to quote from the Scriptures, from Aristotle, and Cicero, and from the *Corpus Juris.* And, although our lawyers do not at present freely use these authorities in equity—being, we may assume for the most part, unfamiliar with them—they are constantly citing judgments of previous courts, which, in a long and unbroken series of traditions, have been profoundly influenced by the same authorities. Indeed, I have little doubt that Justice Holmes states a defensible historical truth when he exhorts the students of law to "read the great German jurists and see how much more the world is governed to-day by Kant than by Napoleon."[4] But this is nearly or quite the equivalent of saying that the actions of men in the modern world, as brought under control by English and

[4] *The Path of the Law, Harvard Law Review,* X, p. 478.

American law, are more profoundly affected by the Kantian philosophy than by the influences emanating from the Napoleonic wars and the Napoleonic code. Kant was preeminently a teacher of ethics.

This same truth of the dependence of the law for its development upon the public moral consciousness, is proved by a study of the sources of the law. These are given by Holland as chiefly the following:[5] Usage, religion, adjudication, scientific discussion, equity, and legislation. Each one of these sources has its roots in the moral sentiments, judgments and practices of the people. This is preeminently true of our law, as distinguished from the law of lands that have a less democratic form of government. It is this public moral consciousness which largely determines usage; and when the courts maintain that usage, however long established, must be made reasonable, they are only appealing to this same moral consciousness for a more deliberate and enlightened judgment. According to the most trustworthy authorities, religion is the most important primal source of the prevalent moral ideas and sentiments of mankind. Adjudication and legislation are expected to make constant reference to what is right and wrong from the moral point of view, in order to render the judgment commendable, the legislation just, in the eye of moral reason. And equity, although it is sometimes, as Selden says in his *Table Talk,* a "roguish thing," according to its very definition consists "in reality of such principles of received morality as are applicable to legal questions, and commend themselves to the functionary in question." If this particular functionary in any given case does not seem really equitable in his notions of equity, there is somehow the chance for an appeal to the higher and wider field of what is *aequum et bonum.*

There are, moreover, certain large and vague, and, therefore, debatable conceptions, which are in themselves essentially or chiefly ethical, but which are certain to influence the making of laws, the decisions of the courts, and the efficient enforcement of all law. Two of these have already been referred to under the terms "law of reason" and "equity," or the conception of that which is fair and just. Another, even more indefinite, but scarcely less influential in the past, is the conception covered by the term, "the law of nature." This conception includes those rules of living in social relations with others which are thought to be

[5] *Elements of Jurisprudence,* p. 53.

just, because they are conceived of as controlling the actions of men in a manner dependent upon a power, not of man's willing or choice, but a Power-not-ourselves. Under theological influences or ecclesiastical domination, the law of nature is made the equivalent of the law of God; for nature—so the theory runs—is the revelation, within certain limits, of the Divine Will. To it appeal has been taken for the commission of many crimes, adjudged such by the law of the land, and even for the right to upset, in the name of nature or of God, the existing system of law as enforced by the sovereign authority of the state. Nevertheless, the conception which has been so influential in our systems of statute laws as well as of common laws, abides and will abide, however vague at all times, and at some times injurious. But the conception is, fundamentally considered, an ethical conception. In the same connection we may note the fact that judges are always considered as in duty bound—a binding obligation, not to an abstract conception called law, but to God and to the people—to guide themselves by "justice, equity, and good conscience," when administering the law. "I think," said Lord Coltenham, "that it is the duty of this court to adapt its practice and course of proceedings to the existing state of society, and not, by too strict an adherence to law, to decline to administer justice, and to enforce rights for which there is no other remedy." This conviction that there is something above the law, to which the law must be subordinated and subjected, in its origin, administration and development, explains the history of the great English Court of Chancery. Founded to fight "obstinate oppressors of the poor and deniers of rights," by aiming at too strict perfection of legality it came to delay and thwart the ends of essential justice. And then its mission was ended, its death made reasonable and sure. Here we may also observe that considerable portions of the law have in modern times sprung out of the judgments and practices of certain classes, determining what seemed ethically just and fair to them, in the solution of the problems of their particular forms of economic and social relations. Such are the "law merchant," the "law of nations," and many forms of the law as equity.

It is no wonder, then, that Sir Frederick Pollock says[6] of the law as equity, that it must combine the rational and the historical elements; that it must have a philosophy; and that this philosophy

[6] Comp. Pollock, *The Expansion of the Common Law*, p. 115.

must be *ethical* in the larger meaning of the latter word. Nor can we well differ from Justice Holmes [7] when he affirms that our law is the "witness and external deposit of our moral life"; and that in general, "its history is the history of the development of the race." For the relation between our legal system and the moral judgments, sentiments and external conduct of the people who live under the law is intimate, pervasive, necessary, and while changing in form, in essential character enduring.

The establishing of this principle of the dependence of law upon ethics raises at once in our minds—and logically so—a problem of the most complicated character and momentous interest. The problem is this: What and how radical must be the changes in our law, to be recommended at once or sure to be demanded in the near future, in order to adapt it the better to the changed moral judgments, sentiments and practices of the people living under the law? Three considerations, one of which has always influenced the development of the legal system under which we are living, and the other two of which have a special importance at the present time, will undoubtedly combine to form the actual solution of the problem. The first of these reminds us that the development of our law, both in England and America, has never been anything like a strictly logical affair. It has been kept close to experience, and either amended, neglected, or broken, according to the prevailing opinion as to its practical results. Therefore, as says Mr, Justice Holmes, "We do not realize how large a part of our law is open to reconsideration upon a slight change in the public mind." When the same authority proceeds to advocate less regard for strict conformity to the traditions of the law, and more regard to a rational treatment of cases in accordance with our changed notions of the public good, he is virtually pleading

[7] *The Path of the Law, Harvard Law Review*, X, p. 459. Ibid., p. 466. Elsewhere the same authority says: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed." (See *The Common Law*, p. 1, Boston, 1881.) About the truth of this observation there can be no manner of doubt. But while it is true in large degree of all human institutions, laws and customs deemed equitable included, it certainly is true in pre-eminently great degree of English and American common law. It would seem that even our legislation takes little enough account of sound logic.

that the popular ethics, the moral judgments and sentiments of the body of the people, ought more thoroughly to permeate and even to dominate the legal system of the land.

The second of these considerations concerns the part which legislation is playing in the enactment and even in the enforcement of the existing laws. More and more are the countless enactments which are poured forth annually from the legislative halls of the nation, the state, and the municipality, becoming the sources of the developing, or at any rate of the rapidly changing, law of the land. Where, as in some of the states, and all of the municipalities, and even in the national legislative bodies, much of the law-making is directed toward the promotion of private interests rather than to the conservation of either the legal or the moral order, and the social good, we have ceaseless complication, confusion, and even upsetting of supposedly established principles of justice and equity, for a by no means impossible result. I take it that this would have to be admitted even by those who sympathize less than some of us are inclined to do with the poet statesman, Milton, who hesitated not to denounce much of the legislation of his own day as "hatching lies with the heat of jurisdiction."

The third consideration is even more influential. The unprecedentedly rapid changes which the modern applied sciences have brought about in the physical conditions of human life and human intercourse, together with equally obvious or more obscure changes in social conditions which these physical changes have either themselves produced, or are now serving, tend to complicate and make more difficult of either theoretical or practical solution, the problem which I have proposed under the theme, "Ethics and the Law." This, added to the preceding considerations, would seem to make it clear that more important and radical changes will be demanded in the near future than have ever been demanded before in the centuries of the development of English and American law. Nor does there seem to be any power that can regulate and unify these demands as did the king's judges when, at and after the time of Edward First, the common law of England emerged out of divergences of custom and undefined varieties of usage, in different districts of the country, as the resultant of their decisions.

It is well known that a large and growing body of the people, under the varying shades of opinion and scheming, which are either proclaimed or concealed by the term "Socialism," are be-

coming profoundly dissatisfied with both the Constitution and the administration of the law of the land. It is not well known, however, and probably cannot easily be discovered, how large a proportion of those to whom the name of "intellectuals" has been given in Russia share with more or less of sympathy in these opinions; and would gladly further some of these plans. Nor can this attitude toward the law, in my judgment, be deemed by any means wholy unreasonable. It is certainly a fair question whether as respects the right to acquire, hold, enjoy the usufruct of, and to give away or bequeath property, both personal and real, the economic, political and social conditions of modern life in this country are not now so radically changed as to make imperative in the near future very radical changes in the law. It is even a fair question whether certain laws and judicial decisions respecting these rights, which were originally intended and adapted to protect the great body of the people against the powerful few, are not now the rather adapted and employed to protect those few against what the people are coming to feel are their rights on moral grounds. The belief is indeed vague, difficult to define, dangerous to cherish and enforce so far as the integrity of the legal system is concerned; but it is not the less insistent, enduring and powerful. I think that there can be no question that in our lower courts, especially in our police courts, which come into closest contact with the poorest and socially lowest of the people, what our English and American ancestors conceived of as the most fundamental of personal rights are constantly being violated under the aegis of the law.

Further, with regard to details, it is scarcely safe for a layman to go. But if he is thoughtful, patriotic and acquainted with the main outlines of the ethical and social development of the race, he cannot fail to take an attitude of inquiry, and of solicitous and anxious inquiry, toward the portentious problem, with its threatening future, which these fundamental and unchanging relations between ethics and the law propound. England, from which we derived our law, and which we look upon as relatively undemocratic, and more conservative of legal precedent and tradition, has recently gone further in some of its concessions to these socialistic demands for quite radical changes in the existing legal status of the people, than we have as yet ventured to go.

It is to the profession of the law, far more than to any other class of citizens, that the country must look for the practical and

peaceful solution of this problem—if its solution is to be both practical and peaceful. For out of this profession come those interpreters of the Constitution, with reference to whom the late Professor E. J. Phelps declared:[8] "It is upon the entrusting to the judicial department of the whole subject of the constitutional law, for all purposes, that our government rests." And if it is to rest securely, and in freedom of development without revolution, this body of judges must, on the one hand, judge without influence from the directing or threatening arm of either the legislative or the executive forces; and on the other hand, they must always guide themselves by "justice, equity, and good conscience;" and I am ready to add, "by the love of the people and in the fear of God."

From the same profession of law come the vast majority of the judges in all the lower courts, and also of the legislative bodies, both national and state. And here is where the best of the public conscience can be brought to bear upon the moulding of the law at the very beginning. Yet, as I have traveled over various parts of the world, I have found everywhere a growing contempt and distrust of legislative bodies. However well or ill founded, this attitude of the public judgment is foreboding. Laws procured otherwise than in accordance with the dictates of the prevailing moral sentiments, and tending to produce rules of practice, enforced by the sovereignty of the state, which the people of the state do not regard as equitable and just, are the supreme dangers of our modern system of law. Who can doubt that, if all the lawyers of the land were of one mind and fixed moral purpose to prevent such laws, they could in due time bring about a more friendly relation of acceptance and cheerful obedience between the law of the land and the better conscience of the people of the land? For, to quote several sentences from Judge Dillon's lectures on the "Laws and Jurisprudence of England and America:" "Law is not ethics, it is true, but except so far as laws are arbitrary or conventional regulations, or are mere usages or customs not having a moral quality, * * * if there be any such, * * * they have an ethical foundation." Again, in somewhat vague but emphatic language, he speaks of the law of the land as being by "essential nature" the "enlightened, ethical, permanent justice of the state." "Ethical considerations," he declares, "can no more be excluded from the administration of justice, which is the end

[8] *Orations and Essays*, p. 41 f (New York, 1901).

and purpose of civil laws, than one can exclude the vital air from his room and live."

In conclusion, it is not in my own name, but only in the name and words of one of the most highly honored members of the American bench, that I venture to express the belief that, "if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate, when now they are confident, and see that really they were taking sides upon debatable and burning questions." To this I will add by way of interpretation, that "considering the social advantage" is the very essential nature of that morality which controls legality, if in the long run the essential principles of our law, as at present constituted, are to remain the law of our land.

From the point of view of one who is a layman and so interested chiefly in the moral aspects of our problem, the following considerations which bear upon its solution, seem undoubtedly to be true: First, very important and even radical changes in the existing system of laws are demanded, and will be insisted upon in the near future by the public conscience of the body of the people then living under the law. Second, the tendency to invade and restrict the territory of individual rights—uniformly in the alleged interests of the whole people, but far too often, in ways either ignorant, if altruistic, or skillfully and designedly planned to promote the interests of a corporation or a class—must either reach its natural limit or else be checked by legal methods. And, third, and above all else, these changes in legislation and in the enforcement of the laws by the courts must secure to the minority their rights as against the majority, and to the humblest and poorest individual his rights as against the richest and most powerful corporation. Only in this way can the truest and highest social good under the law be realized and maintained; and only thus can the essence of our Constitution and of our hitherto existing system of law be preserved, in the good conscience and respectful obedience of the people of the land.

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