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Law as a Source of Morality and Ethics

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EDITORIAL

OUR LOSS AND A REFLECTION

At the forepart of this REVIEW appears a brief expression by a Friend in appreciation of the contribution of Dean Max Schoetz, Jr., to life before he was suddenly taken from it. The Friend is one whom the dean highly respected and dearly loved—one with whom he worked and one with whom he sought the self-same principles of justice and right—Justice Franz C. Eschweiler.

In the short time of a month we lost another person who taught us the law and to be lawyers. Professor A. C. Umbreit followed Dean Schoetz closely, as was his departure after the close of the law banquet in May, 1927, at the Hotel Pfister, close upon the memorable address

of Justice Eschweiler on the place of friends through life. James Taugher, a former student of Professor Umbreit, recalls some of his many contributions to his students.

Law as a Source of Morality and Ethics

> The fundamental article of my political creed is that despotism or unlimited sovereignty or absolute power is the same in a majority of a popular assembly, an aristocratical council, an oligarchical junto, and a single emperor—equally arbitrary, cruel, bloody and in every respect, diabolical.—John Adams: *Letter to Thomas Jefferson* (November 13, 1815)

In a consideration of theories of the function of law one finds evidence of a change that is taking place in the United States, not only as to the nature and origin, but also as to the *uses* of law. Instead of being a medium for the establishment of justice and peace between individuals and of being particularly a reflection of custom and experience, it is being used to force upon the public individual notions of ethics and morality and to standardize, formalize, and set limited forms of individual action which had better be left to individual discretion and determination according to the circumstances of each case. There are many attempts to make public nuisances of those that are merely private. This situation represents an innovation in principle, the presence and extension of which is charged with great danger to individual liberty and freedom.

The standardizing and limiting tendency represented by the syndicalist laws and those of similar tenor may, it is hoped, be only shadows of the supposed necessity of a wartime situation. It need be earnestly regretted if we find them a permanent inheritance. While a future public political reaction may wipe them out, they may also prove difficult of removal because of their supposed utility in industrial controversies.

The second and primarily post-war tendency is that which in principle injects individual ethics and morality into the law. In some of its particulars it was strengthened by arguments as to the necessity of war—but the war is over; in other particulars it represents a misdirected attempt to strengthen the morals and ethics of the individual by standards set by law.

In an analysis of the second tendency and its consequences one must necessarily consider from a social viewpoint that social institution of the United States that has traditionally been separate from the State and that from its many sources maintains our morality and ethics—the standards of morality guiding us as to what is to be avoided and those of ethics pointing to that which we should do—one restraining, the other activating us.

Inasmuch as the premises of the following conclusions may be based on the writer's personal philosophy, to that extent must his discussion bear a personal mark and be treated indulgently by the reader.

The individual in society achieves his quantum and standards of morality and ethics from two sources—from within himself and from without. While that which arises from within may be the more valid, yet from its nature it is weaker and less influential in each individual case than the standards and the influence and knowledge thereof that he receives from external sources. What we are taught by lesson, precept, habit, social restraint, and experience controls the great masses of individuals much more thoroughly than do those individual unassisted attempts at philosophizing that each person is capable of for his own guidance. The individual is also more inclined to be influenced by his own particular circumstances and might be very inclined to be unmindful of society's relation to him and of his dependence upon it.

Of the sources of morality and ethics external the individual we have primarily the influences of the home, the schools, the press and movies, the law, the restraint of the social presence, innate human goodness or the absence of innate human badness, and the church. Of these some are sources of standards and some merely reflect given standards, as springs and the streams of which they are the fountain heads both give moisture to the life along their banks. It is well recognized that standards of morality and ethics are of consequence in proportion to their general acceptance and have force to the extent that they are recognized as valid standards. The separate agencies mentioned secure their standards either from conscious individual intuition and natural tendencies, from willed standards which are adopted or forced upon one's attention as under the Nietzschean conception of morality, or from the past or from philosophical conviction or an authoritative source, as is represented in modern religions—broadly designated by the term church and applying to Christian, Mohammedan, etc., communities.

While the Constitution of the Federal Government and of the several states gives the right to legislate for the "general welfare" under the police power, in the exercise of that power due restraint should be exercised to observe the great American institution of the separation of church and state. The same restraint should be exercised in enacting constitutional amendments. The power and will to do does not insure that that power will be exercised for the best, and proper consideration should be given to the fundamental theory of law before its application is sought either by enactment or judicial construction. Of late there has been an altogether shocking exhibition of particular religious groups interfering in affairs of state which does not augur well for the American institution of toleration and religious freedom. Nor has this inter-

ference gone uncondemned. The church is necessary to society and it is deplorable that some branches of it should further weaken its already lessened effect upon the public mind by such unwarranted encroachments upon ground outside of its sphere.

While there may be differences of opinion as to the fundamental nature of law, if we believed that law is a reflection of custom, that legislation is an emanation from order, and that government is not primarily a cause, but an effect, we have a good set of general principles to test the propriety of proposed legislative and judicial legislation. From these premises we can crystallize the reasons for opposing the present tendency to set up the State as a creator of standards which are reflections of individual desires rather than well established custom, and we can determine which laws present and proposed really ought not be law and to that extent an unwarranted imposition upon American citizens and an improper limitation of these liberties and rights. This discussion will not view law as some essential principle separate from the people but rather consider it that set of declared principles intended to secure justice for the individual and to promote peace and provide for the general welfare of the community, i.e., to show that certain types of legislation may be unwise legislation. The principle is well established that "the scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative consideration in dealing with the matter of policy."[1] It is with particular reference to legislative policy that this discussion is directed. It includes the judiciary, however, to the extent that judicial legislation is amenable to the individual viewpoint.

On the foregoing premises one finds the legislative tendency noted above subject to several lines of attack which force the conclusion that the policy they involve and the principles they give substance to are fundamentally dangerous to individual rights, contrary to American traditions, and unwise legislative policy. In spirit one is minded to say that such legislation is beyond the power of the legislature and the courts but the current pragmatic theory of law renders that view untenable for practical purposes.

The first weakness of legislating morals and ethics is that to be effective morals and ethics represent the supposed ideal in action and law should represent the customary, seeking to secure conformity thereto. To the extent that laws legislate on crimes and have an element of morality in them they should represent crimes *per se* recognized at common law, representing a breach of custom; criminal laws which regulate morals should have as their aim the prevention of a violation of customary action—one wrong by general consent—and should not at-

[1] 219 U. S. 549,569, Mr. Justice Hughes

tempt to secure what might be considered a public good by a great many—as the prevention of the consumption of intoxicating liquor when intoxication alone received general customary condemnation and which is the exception rather than the rule. Morals and ethical standards to be effective must be both high, reasonable, and authoritative. They must be tolerant in individual application. To the individual they must be acceptable and thus binding on the conscience, they must actively work from *within* the individual to be effective. Acute observation has concluded that the less restraint there is within the individual the more there must be from without, and, conversely, the more the individual comes to rely upon and expect from outside force the less does he expect of and develop his inside forces of restraint and ideals. This shifts restraint from the particular individual primarily involved to some outside agency only secondarily interested in conformity with set standards. Common sense demonstrates which of these prospects is the more desirable, effective, best, and, consequently, deserving of support. Inasmuch as the law works from without and represents in the obedience thereto, a fear or respect for force, and as ethical and moral standards represent a control from within, there can be no doubt as to which is preferable.

Standards, to incline one to aim high since no definite certainty can be had as to anything except what is customary and generally accepted, except as they are based on general custom are undesirable and harmful. As to the ability of ethical and moral standards set up by law to capture the emotions and imagination of the social and individual mind, as the broad institution of Religion and the Church as used above is capable there is great doubt and danger. Law should be custom—not above custom.

Secondly, the principle and spirit of the innovation under consideration is contrary to the American Institution of Toleration, Religious Toleration, and Freedom, and of the separation of Church and State. The crimes for which one is punishable should be those which are recognized as violations of universally accepted custom and not those over which there reasonably may be and is a reasonable difference of opinion and practice. When the law attempts to compel or prevent some action which is not a matter of general custom or a proper variation of it to meet new situations and is to that extent generally acceptable, the law is attempting to force upon the public actions which are the reflections of particular individuals or groups of individuals who thus legislate either by the law making or law construing branches of our government to secure what they think ought to be the custom—by force if necessary. The perils of this course to individual liberty and freedom are self evident. The *power* to do does not justify before American

institutions the *will* to do, when it results in what is thus nothing less than contemptible and regrettable intolerance and ignorance of that principle which is designed to safeguard American liberty and freedom. To disregard this distinction is to disregard the principle that ours is a government of laws instead of one of men. When groups by one form of power or another are able to force their will in this manner, ours ceases to be a government of laws and takes on the potentialities of all forms of despotism. With the apparent lessening influences of the Church compared with its thoroughgoing influence from an historic viewpoint, there is developing as a result thereof and as a means of solving the problems caused thereby a desire to secure conformity to desired moral and ethical standards by legislating them. The remedy, if we are to avoid the perils of the type herein pointed out, lies in strengthening the institutions which give us our ethics and morals or to create new branches of this institution to meet the changing times, but to avoid doing so by means of the forms and power of legislation.

The acceptance of this principle of legislating on ethics and morals to the extent that such legislation does not reflect custom is to legislate to adopt intolerance, to foster despotism and to further limit our already greatly curtailed individual liberty. To accept this change in principle as the basis of our laws—to justify the *power* to do as the policy and will to do, will in principle reunite Church and State. And despotism and intolerance by any other name is still despotism and intolerance.

Thirdly, the most evident attempt to foster this intolerance and despotism at the present time is suggested in the passage of prohibition, vaccination, and sterilization laws. These the highest court in the land has held to be constitutional. A social concept has been developed in the United States, and in law it has its support in the police power to be used for the public welfare. And, of course, this power can be used for good or for evil. The greatest danger lies in the field of sociological philosophy. In our industrial civilization the individual is measured in terms of economic efficiency and, accordingly, what some persons think renders that individual less efficient or more efficient becomes for them a matter to be regulated so as to net the seemingly desirable social good. The concept of social good is overthrowing the concept of individual liberty and freedom.

As representative of the more clamorous thought of the age on heredity and militant science, I quote from one of the best sellers of the last few years, A. E. Wiggam's *New Decalogue of Science*. Addressing himself to politicians and statesmen, he begins:

> Statesmanship, as you are fully aware, is the art—and we hope, may some day be the science—of the control of life. . . . . The second warning of biology to statesmanship is brief and simple: that heredity and not environment is the chief maker of men. . . . . The social and political import of this warning is that

nearly all the happiness and nearly all the misery of the world are due, not to environment, but to heredity; that the differences among men are, in the main, due to the differences in the germ cells from which they are born; that social classes, therefore, which you seek to abolish by law, are ordained by nature; that it is, in the large statistical sum of things, not the slums which make slum people, but the slum people who make the slums. . . . . You are opposed to this belief, you believe you can make a silk purse out of a sow's ear, get blood out of turnips, find Lincolns in every log cabin by looking hard enough, and get genius out of fools. . . . . Your childlike democratic faith that genius is ubiquitous and leadership potential under the most empty pate, waiting only to be called forth by God or a majority vote, dominated three-fourths of your legislative gestures. The "cult of the incompetent," the belief that incompetency is merely repressed genius, constitutes your credo.

This type of social thought which is giving a basis in belief for class distinctions in American life also is clamoring for the rule of the intellectualist, the scientist, the wise man in American life—the man of limited specialism. The social concept is his weapon and his vehicle. In the *American Mercury* for December, 1927, in an article entitled, "Philosophers as Kings," Louis Le Fevre very succinctly states the tendency of such social intervention:

I see no reason to think that an all-powerful Eugenic Tribunal, operating in the name of science, would show greater wisdom or restraint. (Than the Holy Inquisition, which was operated for centuries by men who were often highly intellectual, and who had the loftiest of good intentions.) It might begin with the sterilization of friendless unfortunates, but it would doubtless end with the elimination of anybody who disagreed with the learned members as to the merits of Shaw's plays or the proper design of girls' bathing suits. For anyone who differs from an omniscient tribunal is, by definition, wrong, and a menace to society. And no tribunal long escapes the irresistible conclusion that it is omniscient.

Furthermore, if the ablest men run the government and impose their ideal way of life on the whole population, any important changes will meet the strongest possible opposition. The rulers, like all governing classes, will identify their own prestige and self-esteem with the regulations they have made. Any attempt to modify the ordained law of diet or of marriage, for example, will be treated as an assault on the very foundation of the state. Not only liberty but progress will be impossible except through a revolution.

Instead of making our philosophers into kings, therefore, let them continue to philosophize.

In America class distinctions are ever crystallizing, but they are coming from above from a super-conceited egotistical group which is conscious of its power of wealth. It is seeking self-expression for its overconceit by creating in its own mind and attempting to convey to others the idea of its super-importance—merely a reflection of its own exaggerated and artificially created notion of self-importance and self-satisfaction. By no means is the possession of wealth synonymous with this notion in individuals, but it is increasingly present in the younger generations so endowed.

It has been often declared that our diplomatic service is a social oligarchy now. The tendency toward bureaucracy in our Federal and State governments is indicative of a trend, and the social conception is going to be the source of further attempts to enforce the will of the individual groups upon the masses by law. The dangers of this course of departing from law based on custom is ever present. All these social tendencies should be kept separate from the government to the extent that it is sought to compel compliance and adoption of the particular advantages claimed for the reforms attempted.

The multitude of fads which will be sought to be foisted upon an unwilling public in the future will be innumerable. As science analyzes all the branches of the social life there will be the ever present group of reformers seeking to benefit the people by forcing the changes upon them by law instead of making the people's benefit therefrom to be in proportion to their voluntary acceptance thereof either on their own volition or by voluntary governmental endowment.

Furthermore, the intervention of government into the details of life will require an ever increasing bureaucracy which for efficiency, as was experienced in Rome, will need centralized control and an experienced and constant personnel unresponsive to popular vote and electoral criticism and control. This will further endanger democracy because it will make the enforcers of the law unresponsive to democratic control. They will force the changes and not be guided by custom.

Lastly, assuming that the law attempts to create standards of morality and ethics, to make those standards effective, general acceptance of them would be necessary. Since they would be laws, the duty of construing them would fall to the courts and the lawyers. The casuistry that would manifest itself along with the presently acclaimed doctrine of behaviorism and self-interest would tend to nullify the general acceptance of the standards because the applications thereof would be so uncertain. Lawyers in representing their clients represent self-interest and not primarily that of the State. While law seeks to secure justice and promote the general welfare, laws must be wise and just to do so, but if they are not to contest them is expensive—oftentimes to the extent of amounting to a denial of justice.

The theory of government that is ours in ideal should conform in practice with our traditional democratic desires and institutions. Among the democratic doctrines are the following:

"Government should not needlessly interfere with the customs, habits and affairs of the people and the people should not needlessly call upon the government to conduct or direct essentially private concerns.

"The question should not be, 'What can the government do for the people,' but rather should it be, 'What may the people do to sustain a government pledged to the protection of each citizen in his essential rights?'

"It is far more baneful in its consequences for the sovereign power, residing in the people to perform acts of injustice or tyranny or usurpation, than for kings, emperors, czars, and rulers of whatever name, to exercise despotic power.

"The true function of legislators is to declare and enforce only our national rights and duties and take none of them from us.

"That government is best which governs least.

"Our institutions are the result of the age-long struggle against the tyranny of sovereigns and the sovereignty of tyrants.

"Man, when least governed is greatest, and while all the agencies of government should exercise their proper function, after all, what men want, what they hunger for, what they will one day have the courage to demand and take, is less organic government—not more; a freer manhood and fewer shackles; a more cordial liberty; a lighter fetter of form and a more spontaneous virtue.

"The most fruitful sources of social disruption, political corruption and governmental break-down is disregard of, and indifference to these principles."

As illustrative of the legislative policy that we should pursue in our laws, it is well to return to first principles, as enunciated by that great student of legal theory, Professor James C. Carter, as found in his book, *Lectures on Law: Its Origin, Growth and Function:*

A complete study of the law would embrace three successive efforts.

. . . . . .

The third and final effort would be to explore the realms of science which lie beyond the immediate boundaries of the law, and ascertain its origin, its essential nature, the method of its development, the function it fills in human society, and the place it occupies in the general system of human knowledge; in other words, to learn what is termed the Philosophy of Law.

. . . . . .

If proof be needed of the immediate practical utility of such knowledge it may be found in abundance in the present condition of legislation. I speak of this country, but without meaning to imply that it is worse here than elsewhere. There are a vast number of laws on the statute-books of the several states which are never enforced, and generally for the reason that they are unacceptable to the people. There are great numbers of others, the enforcement of which, or attempts to enforce which, are productive of bribery, perjury, subornation of perjury, animosity and hate among citizens, useless expenditure, and many other public evils. All these are fruits of the common notion, to correct which, but little effort is anywhere made, that a legislative enactment is necessarily a *law,* and will certainly bring about, or help to bring about, the good intended by it, whereas, such an enactment, when never enforced, does not deserve the name of law at all, and when the attempted enforcement of it is productive of the mischiefs above mentioned, it is not so much law as it is tyranny. Among the evils which oppress society, there are few greater than that caused by legislative expedients undertaken in ignorance of what the true nature and function of law are.

H. WILLIAM IHRIG

WISCONSIN BAR ASSOCIATION CONVENTION

The thirty-fourth meeting of the State Bar Association of Wisconsin, held in the forty-ninth year of its organization, took place at Green