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MORALS AND SOME PHASES OF LEGAL LIABILITY

IT IS a commonplace in jurisprudence and in the decisions that with morals the law has nothing to do. Austin first elaborated the idea in his "Province of Jurisprudence Determined" and since then most writers upon formal law have accepted the principle, some boldly and others with misgivings and apologies. Markby, referring to Austin, has put the matter very strongly:

"He has admitted that law itself may be immoral, in which case it is our moral duty to disobey it; but it is nevertheless law and this disobedience, virtuous though it may be, is nothing less than rebellion."[1]

This may be accepted as the extreme, logical consequence of the theory. It is indeed startling to be told that the law bears within itself the seeds of its own destruction and that this judicial separation of law and morals also completely absolves him who wages war against his sovereign in the name of a law more moral than that to which he has sworn allegiance.

A theory with such a consequence may not be lightly regarded. There have been times when the ethical problems of allegiance have had an extremely practical importance. Tomorrow may bring occasion for new decisions. When ancient governments of the old world are displaced over night by strange and untried schemes of political organization, and there are many within our gates who openly threaten our social system with destruction, a principle of that kind fathered in such respectability, may easily be "twisted to make a trap for fools." The new day has its clever apologist; then the sophist, the wielder of spurious logic and the champion of theories at odds with all experience, gains each many believers. Straight thinking becomes dangerous. Courage, mon ami, le diable est mort!

Among lawyers the jurisprudence of Austin is not an esteemed science. They regard it as highly artificial and impossible of practical application. Not a little of it is in their opinion founded on ideas which are downrightly wrong and hence a source of

[1] Markby, Elements of Law, 2nd ed., p. 12. But see the words of Austin in Sec. 174 of Campbell's edition of the "Jurisprudence."

error and confusion in legal thinking. In this matter lawyers are likely to agree with the remark of Bentham: "In certain cases jurisprudence may be defined as the art of being methodically ignorant of what everybody knows."

The average practitioner thinks legal theory pragmatically. A principle that explains a great variety of instances of legal liability is true only because it works under practical application. What it accomplishes is the full compass of its verity. Such a point of view is entirely objective. It assumes no hypothetical major premise, but deals with the facts, i.e., the decisions as it finds them. That method of approach is the old and familiar habit of every lawyer.

Austin and his followers have not gone unchallenged and the whole burden of the attack against them has been the charge that dogma on the separation of law and morals runs counter to the actual facts. Nearly thirty years ago there was published a little book[2] written from the pragmatic standpoint, which boldly denounces the antithesis created by the formal jurists between law and morals. The conception is simple. If the law gives a right, then what it confers must be deemed righteous. If A is bound by the law to convey a house to B, then every principle of morality sanctions an enforcement by B of that obligation. The following excerpt puts the author's idea clearly:

"All rights are moral rights; and it is as much a contradiction in terms to speak of a right that is not a moral right as to speak of a square circle, or a four-sided triangle. It is thus that the term is universally received, except by a small clique of jurists, who find it impossible to reconcile their theory with this obvious meaning of the term, and in this sense is the proposition to be understood when we say that it is the function of the state to protect and enforce rights or to administer justice, which is but the observance of rights or the rendering to every man his right; by which is meant nothing else than rights and justice in the familiar and proper sense of the term."[3]

The authority for this view is ancient. It is, indeed, in part, a paraphase of the famous sentence of the Institutes: Justitia est constans et perpetua voluntas jus suum cuique tribuere[4]—a conception more Christian than is usually found in books of the

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[2]Law of Private Right, by George H. Smith, 1890. The Humboldt Publishing Co., New York.

[3]Ibid., pp. 14-15.

[4]Institutes, I, 1.

law. The Roman set the task of justice high, and would he serve her well, the lawyer must be expert in matters of conscience.

Since the late Dean Ames taught modern law from the Year Books, the words of many an old judge, well worth remembering, have been restored to us. In *Langbridge's Case* (1345)[5] the colloquy between Court and Counsel shows that even in that far off day the riddle had already been put and the same answers invented.

"Sharshulle, J. One has heard speak of that which Bereford and Herle [former judges] did in such a case, that is to say, when a remainder was limited in fee simple by fine they admitted the person in remainder to defend, and it was said by them that it would be otherwise if the limitation were by deed in pais; but nevertheless, no precedent is of such force as that which is right. . . .

Hillary, J. Demandant, will you say anything else to oust him from being admitted?

R. Thorpe. If it so seems to you, we are ready to say what is sufficient: and I think you will do as others have done in the same case, or else we do not know what the law is.

Hillary, J. It is the will of the Justices.

Stonore, C. J. No; law is that which is right."[6]

That conversation epitomizes a whole literature. Hillary is an ancient precursor of Austin. In his mind the law is the arbitrary will of the State as expressed by the court. He does not even admit that it is controlled by precedent. Judgment is given for the ethical view by a divided court. But the words of the chief justice ought to be as famous as the refusal of the barons at Merton to alter the law of England and legitimize by adoption a canon of Gratian.[7]

In a true sense every legal problem is an ethical problem. But those who have to do with the practical administration of justice do not always proceed from that point of view. They solemnly

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[5]Reported Year Book 19 Edw. III 375. Also in part in J. H. Beale's Cases on Legal Liability, p. 1, from which book the English version is taken.

[6]The original text reads: "Nanyl; ley est resoun." The negative is doubly emphatic. All may not agree with the rendering of "resoun." Does the old judge mean anything other than is expressed in the maxim "cessante ratione legis cessat et ipsa lex"? Of course, right and reason were one to the mediaeval lawyer. The only question is how much of a moral quality we are to attach to the word. In Coke reason is contrasted with inconvenience. See Blackstone, 1 Commentaries 70.

[7]Nolumus leges Angliae mutare. For the whole account see Pollock and Maitland, History of English Law, I, pp. 131, 188.

claim to move in accordance with rules which are more or less fixed and which may or may not coincide with those other principles of conduct which are sanctioned by the general customs of society; and whether or not they do agree is immaterial. Criticism of a rule of law from the ethical standpoint is seldom welcomed in a court. There is always the familiar answer that with the law ethics has nothing to do, or that, if the law be bad, then it is for the legislature to change the law.

This independence of the law which has so often been declared is by no means so absolute as it has been made to appear. In the commonly recurrent cases of legal liability, the law gives an action for damages or grants specific relief against a defendant either because his wilful or negligent act is the proximate cause of the injury, or because he has broken a promise given on good consideration, or to prevent unjust enrichment. This is an ordinary and familiar classification. It is certainly not exhaustive nor are the groups mutually exclusive. But it serves to rationalize in a rough way a good deal of law.

There are, however, many instances where the law imposes a liability or creates rights which may not be referred to any of the grounds before mentioned, and it is in cases of this kind that the basis of the juristic result becomes exceedingly interesting, because of the very fact that familiar legal concepts are inadequate to afford an explanation.

Stare decisis[8] lays the ghosts of many inconsistencies, but where it cannot be invoked to conjure a decision,—What then, Horatio? A decision must be rendered on some ground, for our law demands that every court of competent jurisdiction must always hear the parties before it and give judgment on the very right of the matter. No court was ever heard to reject a controversy because of its novelty. We know that in such difficulties the judge does not decide as the die is cast. His judgment is not an arbitrary unreasoned thing. In such a situation he sits as a man learned in the law, knowing the rules which have guided his predecessors in other cases, and if these fail, then he must perforce rely for his instruction upon that never failing source of inspiration, the example of the good and upright man. This ideal gentleman will, however, be a modern specimen of righteousness, a composite of all opinions and tendencies, economic, social, moral, and religious, which must be integrated into the sum total of all law.

[8]The whole maxim is stare decisis et non quieta movere.

Our court, then, may upon occasion become in a broad sense a professor of ethics, and, being the oracle of the law, he speaks with a greater authority upon that subject than any university or ecclesiastical foundation even can confer. Thus it is that moral principles become rules of positive law. Who can mark the boundaries of their several sovereignties? The question was answered in part long ago in the old dialogue of Doctor and Student and answered well: ". . . . in every law positive well made is somewhat of the law of reason and of the law of God; and to discern the law of God and the law of reason from the law positive is very hard."[9]

The growth of the law is largely a legalizing of moral opinion.[10] When a new decision introduces a departure from a principle of wide application, it ought always to be viewed

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[9] St. Germain, Doctor and Student, Dial. I, Chap. 4. Compare the words of the Chancellor in Y. B. 4 Hen. VII, 5: "I know that every law is or ought to be according to the law of God. And the law of God is that an executor who is badly disposed shall not waste all the goods, etc.; and I know well that if he does so and does not make amends, if he has the power, unless he repents he shall be damned in hell." See Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harv. Law Rev. 195, 213, note 74.

It is, of course, unnecessary to say that the phrase "law of God" as used in the Dialogue and by the Chancellor means something more than "morals" or the "moral law." It did not mean less than the moral law with a divine imprimatur and it had at times meant the foundation of Papal supremacy. The theocracy of Innocent III never became an accomplished fact in England, but the authority of that conception dominated men's thinking long after Empire and Papacy ceased to be the political masters of Europe. The release of jurisprudence from theology is almost a modern event. See Pound, The End of Law as Developed in Juristic Thought, 27 Harv. Law Rev. 605, 612.

[10] All the decisions are contra: Parke, J., in Mirehouse v. Rennell, (1883) 1 Cl. & F. 527, 546, 7 Bli. N. S. 241, 8 Bing. 490, 6 Eng. Reprint 1015, 1022:

"The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any court; nor is there to be found any opinion upon them of any of our judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

with a liberal mind. It should be regarded as an experiment in the administration of justice, an event in that constant process by which the law is ever approaching a moral ideal. And the rule of stare decisis makes an unsuccessful experiment dangerous. It perpetuates the ignominy of a mistake, and in case the new rule is a distinct improvement it converts a discovery into a thing commonly obvious. A lone decision unattended by a train of subsequent authority may therefore be a mark of courage, originality, and independent thinking on the part of the court that rendered it.

The time is here when the whole body of the law is being reëxamined by investigators, who test by new standards. With them internal consistency and symmetry of the law as a system are of only collateral importance. Their prime object is to gauge the law by what it actually accomplishes in the protection and enforcement of a new category of rights which the modern sciences of economics and sociology have discovered and championed.

The new demand is for a socialized justice. We used to hear a great deal about the freedom of the individual, his inalienable rights in property and liberty of contract and to carry on as he desired. Due process and equal protection of the law were constitutional restraints invented to secure these rights against aggression by the state. The political ideal demanded the widest possible field for the exploits of human activity subject only to a minimum of restraint required for the maintenance of the State, which governed best when it governed least. In the era

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Brett, M. R., in Munster v. Lamb, (1883) 11 Q. B. D. 588, 599, 52 L. J. Q. B. 726, 49 L. T. 252, 32 Wkly. Rep. 243:

"The judges cannot make new law by new decisions; they do not assume a power of that kind; they only endeavor to declare what the common law is and has been from the time when it first existed. But inasmuch as new circumstances, and new complications of fact, and even new facts, are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be laying down a new law, whereas they are merely applying old principles to a new state of facts."

See Blackstone, 1 Commentaries 69. The question is, do the courts legislate? No judge speaking ex-cathedra was ever heard to admit that he did. The view expressed in these opinions is a fiction. The fact is that courts make new law and unmake old law. The law is not something that has an immortal existence from everlasting to everlasting—"unwritten and unfailing mandates which are not of to-day or yesterday but ever live and no one knows their birthtide." (The Antigone.)

See Dicey, The Relation between Law and Public Opinion in England, Chap. XI; and Gray, The Nature and Sources of the Law, Secs. 215-231 and 465-512.

in which we now are, a new force is operating. The vested interest of the individual finds itself opposed by the social interest. Each must struggle to maintain itself against the other.[11] Inasmuch as rights claimed for the protection of the social interest are new, they sustain an unequal combat with the old rights of the individual. The latter are vested in the sense that they have won recognition from the law and are fortified against disestablishment by constitutional guarantees.

The last quarter of a century has seen a flood of legislation enacted for the sole purpose of vindicating and creating rights for the protection of the social interest. We have statutes regulating the hours of labor, conditions of employment, and the tariff of wages paid in a particular industry and the method of payment. Then, too, there are statutes prohibiting certain business practises by large combinations of capital. The methods of conducting the business of insurance have within the last ten years become so thoroughly fixed by statute that about the only field in which originality or initiative may be shown by the managers is in the discovery of new ways in expediting the payment of losses. Then lately we have had the country-wide enactment of Workmen's Compensation Acts, some compulsory and some pseudo-elective.

In each and every instance these new laws trench upon the liberty of the individual. His freedom becomes burdened with a servitude in favor of the State, a kind of profit à prendre by which society takes to itself certain elements of the citizen's liberty for the purpose of administering all such deforced rights for the benefit of the whole. Hence the individual is placed under a disability and becomes a ward of the State in respect to those matters in which the law has declared him incompetent to act. All this proceeds upon the theory that it is better for society as a whole and therefore to the advantage of the individual that he should forego his unlimited freedom of action and submit to the restraints imposed so that a larger and a fairer justice may be done. It is not based upon any sheer utilitarian

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[11] Mr. Justice Peckham, in Lochner v. New York, (1905) 198 U. S. 45, 49 L. Ed. 937, 25 S. C. R. 539, 3 Ann. Cas. 1133: "It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract." The contrast between the majority opinion and the dissenting opinion of Justice Holmes sets in clear relief the contest being waged between the new and the old ideas.

ground nor is expediency the only argument. The whole idea is the product of a strong moral purpose and a genuine belief that the new conception of justice gives to each a larger measure of his right than would otherwise be the case in these times.

It would of course be a mistake to say that social interests are now for the first time finding recognition in the law. That began as early as the Statute of Quia Emptores. Usury laws are old, and the later statutes regulating Sunday work, giving sanctuary in bankruptcy to debtors, and exempting certain classes of property from sale under execution are all instances where the law yielded long ago to social pressure. When Chancery first invented the equity of redemption it was serving something more than individual justice. It is only in late years, however, that the thing has received a great impetus.

The categories of our law are of relationships. And it is in the relationship of Master and Servant that the processes of social justice have been most observable. Into other fields its effects have not thus far penetrated to so great an extent. The ethical problems there presented are therefore in a large degree unaffected by this new social interest. They are not, however, less difficult or of less importance, and especially is this the case where a ready explanation is not afforded by the familiar grounds of legal liability. The discussion of these matters is reserved for another paper.

(To be concluded.)

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