# LAW AND MORALS

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SECOND EDITION


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## PREFACE TO THE FIRST EDITION

Three subjects stand out in the juristic writing of the last century—the nature of law, the relation of law to morals, and the interpretation of legal history. The first was debated by the three nineteenth-century schools down to the end of the century. The second was debated by the analytical and the historical jurists, as against the eighteenth-century identification of the legal with the moral, and by the several types of the philosophical school, as between theories of subordination of jurisprudence to ethics and different theories of contrasting or opposing them. The third did not concern the analytical school. It was discussed by historical and by metaphysical jurists with reference to ethical and political interpretations. Later the mechanical sociologists argued for different types of ethnological and biological interpretation, while others, especially the economic realists, urged some form of economic interpretation. Both the controversies as to the nature of law and the interpretations of legal history are intimately related to the controversies as to the relation of law to morals. In a sense that relation was but one phase of the problem of the nature of law. Moreover the nature of law was involved in all interpretation of its development.

Today discussion of the nature of law is coming to be replaced by consideration of the end or purpose of law. Likewise the older discussions as to law and morals are coming to be merged in broader consideration of the place of law in the whole process of social control. And interpretation of legal history is ceasing to be debated on the hypothesis that there is some one simple idea upon which all the phenomena of law and of the history of law may be strung for every purpose and for all time. Yet the nineteenth-century discussions are far from having lost importance. We must work with the legal materials and with the juristic tools that are at hand, and we shall not understand those materials and their possibilities, nor shall we know the possibilities of those tools, except by critical study of the juristic thought of the immediate past.

Thus a history of juristic thought in the last century must precede an effective science of law for today; and one part of that history must be an account of juristic thought with respect to the relation of law to morals. But it must be remembered that this is only part of a larger story. When presented as such, it must be to some extent a piece torn out of its setting in the whole. Nevertheless, if it is to be presented within the compass of a brief series of lectures, one must essay this tearing out process. And it is worth while to attempt to do so. For no small part of the task of the jurist of today is to appraise the

value for present purposes of the science of law as it was in the last century. The first step in this appraisal must be to understand thoroughly the theories he is to appraise, and to do this he must apprehend the needs for which they were devised and their relation to the juristic problems of their time.

A complete treatment of the relation of law and morals would go into the social-philosophical and sociological theories of today no less elaborately than I have sought to go into the historical and analytical and metaphysical theories of the last century. But the limits of the series forbade. Moreover, the lesser task, to which alone the present lectures address themselves, is a necessary forerunner of adequate treatment of current theories.

R. P.

HARVARD LAW SCHOOL,
*March 31, 1923.*

## PREFACE TO THE SECOND EDITION

I have taken advantage of the call for a new edition to make some corrections and explanations and some additions to the notes and to the bibliography. To those who have complained that I have not set forth a theory of my own, except as one may be gathered from the critique of nineteenth-century theories, may I not repeat what is said in the last paragraph of the preface to the first edition? As I see it, the question immediately is one of an ideal element in the law—of a received ideal of the end of law and a body of received ideals of what legal precepts should be and what they should achieve, which form a part of the authentic materials by which justice is administered. Ultimately it is a question of a theory of values, as related to law making and to judicial finding, interpreting, and applying of legal precepts. In the adjustment, or, if one prefers, the integration, of conflicting or overlapping claims, what shall be recognized, and how the recognized claims shall be delimited and secured, depends upon a theory or a scheme of values. But adequate treatment of this subject would require a separate and much larger book.

R. P.

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# I

## THE HISTORICAL VIEW

If we compare the juristic writing and judicial decision of the end of the eighteenth century with juristic writing and judicial decision at the end of the nineteenth century, the entire change of front with respect to the nature of law, with respect to the source of the obligation of legal precepts, and with respect to the relation of law and morals and consequent relation of jurisprudence and ethics, challenges attention. Thus Blackstone[1] speaks of "ethics or natural law" as synonymous, and of natural law as the ultimate measure of obligation by which all legal precepts must be tried and from which they derive their whole force and authority.[2] Again Wilson's lectures on law (delivered in 1790-1791 by one of the framers of the federal constitution and a justice of the Supreme Court of the United States) begin with a lecture on the moral basis of legal obligation and a lecture on the law of nature or the universal moral principles of which positive laws are but declaratory.[3] In contrast, the insti-

[1] 1 Bl. *Comm.* 41.

[2] "This law of nature, being co-eval with mankind and dictated by God himself, is, of course, superior to any other. It is binding all over the globe, in all countries and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their validity mediately or immediately from this original." *Ibid.*

[3] 1 Wilson's Works (Andrews' ed.) 49-127.

tutional book of widest use in English-speaking lands at the end of the nineteenth century begins with an elaborate setting off of law from "all rules which, like the principles of morality . . . are enforced by an indeterminate authority" and conceives that natural law is wholly outside of the author's province.[4] Likewise Mr. Justice Miller, lecturing upon the constitution in 1889-1890, finds no occasion to speak of natural law nor of ethics but puts a political and historical foundation where Mr. Justice Wilson had put an ethical and philosophical foundation.[5] The same contrast appears, no less strikingly, if we compare eighteenth-century decisions on quasi contract or on the granting of new trials or on the interpretation of statutes with nineteenth-century decisions on the same subjects.[6] Yet the nine-

[4] Holland, *Elements of Jurisprudence,* chaps. 3-4. Also compare with Blackstone the books now in use in England: Odgers, *The Common Law of England* (2 ed.) I, 2-3; Stephen, *Commentaries on the Laws of England* (16 ed. by Jenks) I, 11 ff.

[5] Miller, *Lectures on the Constitution of the United States,* lect. 2, particularly pp. 82 ff.

[6] Compare the insistence upon honor and conscience in the old decisions on quasi contract—e.g., De Grey, C. J., in *Farmer v. Arundel,* 2 Wm. Bl. 824; Lord Mansfield, C. J., in *Bize v. Dickason,* 1 T. R. 285; De Grey, C. J., in *Jaques v. Golightly,* 2 Wm. Bl. 273 (not followed today); Lord Mansfield, C. J., in *Moses v. Macferlan,* 2 Burr. 1005 (the result not law today); Lord Loughborough, C. J., in *Jenkins v. Taylor,* 1 H. Bl. 90—with the complacent mechanical working out of an unjust result in *Baylis v. Bishop of London* [1913] 1 Ch. 127.

As to the granting of new trials, compare *Deerly v. Duchess of Mazarine,* 2 Salk. 646; *Farewell v. Chaffey,* 1 Burr. 54; *Burton v. Thompson,* 2 Burr. 664, 665, with *Reg. v. Gibson,* 18 Q. B. D. 537, 540; *Waldron v. Waldron,* 156 U. S. 361, 380.

In *Deerly* v. *The Duchess of Mazarine* "the jury found for the plaintiff, though the Duchess gave good evidence of her cover-

teenth-century doctrines as to the nature of law, the obligation of legal precepts, and the relation of law and morals are intimately connected with the seventeenth and eighteenth-century doctrines on these points, in part as developments of different phases thereof, and in part as different forms of reaction therefrom; and in turn the natural-law doctrines have a like relation to theories that

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ture; and the court would not grant a new trial because there was no reason why the Duchess, who lived here as a feme sole, should set up coverture to avoid the payment of her just debts."

In *Reg. v. Gibson,* Lord Coleridge, C. J., says: "Until the passing of the Judicature Acts the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial, because the courts said that they would not weigh evidence. When, therefore, such evidence had gone to the jury a new trial was granted as a matter of right." So in *Waldron v. Waldron,* White, J., says: "It is elementary that the admission of illegal evidence, over objection, necessitates reversal."

As to the statute of limitations, compare *Trueman v. Fenton,* Cowp. 548, *Quantock v. England,* 5 Burr. 2630, with *Shapley v. Abbott,* 42 N. Y. 443. Undoubtedly in the two cases first cited Lord Mansfield carried his moral objections to the statute too far, ignoring other considerations that even a purely ethical view should not overlook. But at the other extreme the nineteenth-century decision is needlessly callous toward ethical considerations and proceeds upon a logical deduction from a form of words.

See Willes, J., in *Miller v. Taylor,* 4 Burr. 2303, 2312 (1769) saying that "justice, moral fitness and public convenience . . . when applied to a new subject, make common law without a precedent," and compare Lord Macnaghten in *Blackburn v. Vigors,* 12 App. Cas. 531, 543 (1887).

See also the comment of Stephen, *History of the Criminal Law of England,* II, 213, on *Foster's Crown Law* (1762); and compare Anon., *Foster's Crown Law* (3 ed.) 439, where, under a statute against possession of government stores, marked as such, without a certificate as to how they were obtained, it is said to be "contrary to natural justice" to convict, "if there was no fraud or misbehaviour," with *Winchester Corporation v. Hobbs* [1910] 2 K.B. 471, 483. In the latter case, Kennedy, L. J., says: "I think there is a clear balance of authority that in construing a modern statute this presumption as to *mens rea* does not exist."

had developed prior to the sixteenth century when jurisprudence was but a branch or an application of philosophical theology. Indeed the theological basis of jurisprudence continued to be urged till well into the nineteenth century.[7]

All discussion of the relation of law to morals, of the relation of jurisprudence to ethics, goes back to the Greek thinkers of the fifth century before Christ, who enquired whether the right or the just was right and just by nature or only by convention and enactment. In the Greek city-state law was differentiating from a general social control as the normal and most efficacious form thereof. Thus it attracted the attention of thinkers as requiring a surer basis of obligation than the mere habit of obedience or the mere will of those who controlled political machinery for the time being. The Greek philosopher noted that while the phenomena of nature were uniform, the sun rose and set, fire burned and water flowed in Greece, in Persia and at Carthage, on the other hand human laws and customs and observances were as diverse as possible, not only as between Greeks and other people, but as between the several Greek cities themselves, and even in the same city at different times.[8] Also he saw that this well known fact, tending to produce

[7] 1 Bl. *Comm.* 40 ff.; 1 Wilson's Works (Andrews' ed.) 105 ff.; 1 Kent, *Comm.* 2; 1 Minor, *Institutes of Common and Statute Law,* Intr. sect. ii.

[8] Pseudo-Plato, *Minos,* 315 B, 315 C, 316 A; Aristotle, *Nicomachaean Ethics,* v, 7; Plato, *Protagoras,* 337 D; Archelaus, ap. Diog Laert. ii, 16. Cf. Cicero, *De Republica,* iii.

doubt as to the binding force of legal precepts, and to make them appear something subject to the arbitrary power of oligarchy or of demos, according as the one or the other was politically dominant for the moment, endangered the general security. The old-time explanations that law was the gift of a god,[9] or the teaching of the wise men who knew the good old customs acceptable to the gods,[10] or the more modern explanation that it was something to which all the citizens had agreed, binding therefore with the sanctity of a formal promise,[11] did not satisfy in the contests between the aristocracy and the mass of the low born, in the struggles of the demos to hold in check masterful god-descended individuals with scant respect for humanly imposed restrictions upon their god-given powers, and in the competition between the remnants of a class tradition and the tendency to substitute arbitrary enactments established by legislative fiat at the instance of a demagogue.[12] Hence the philosopher sought to find a foundation for assured security of the social order through the analogy of the constancy

[9] Demosthenes, *Against Aristogeiton*, 774; Cicero, *Philippic.* xi, 12, 28. Compare Heraclitus on law, Diels, *Fragmente der Vorsokratiker*, fr. 44.

[10] Demosthenes, *Against Aristogeiton*, 774. Or that it was a body of tried customs of immemorial antiquity. Pseudo-Plato, *Minos*, 321 B, 321 C; Plato, *Laws*, 797 D.

[11] Demosthenes, *Against Aristogeiton*, 774; Plato, *Crito*, 50 C, 51 D, 52 D; Pseudo-Plato, *Minos*, 314 C; Xenophon, *Memorabilia*, 1, 2, § 43; Anaximenes, quoted by Aristotle, *Rhetoric to Alexander*, i.

[12] Plato, *Laws*, 797 D.

and universality of the everyday phenomena of physical nature, exactly as the positivist sociologists today seek to find general laws of social phenomena of the same sort, and to be discovered in the same way, as the laws of physics or of astronomy.[13] But the time was not ripe for a natural science of the social and legal order in the modern sense of "natural," and the attempt to distinguish between the permanent and the transitory in social control could be made only from the standpoint of a metaphysical ethics.

In the hands of Roman lawyers, the Greek theories of what was right by nature and what was right by convention or enactment gave rise to a distinction between law by nature and law by custom or enactment. For the growing point of Roman law, when it came in contact with Greek philosophy, was in the opinions and writings of the jurisconsults, who had no formal lawmaking authority. Their opinions had to maintain themselves on the basis of their intrinsic reasonableness. As the Greeks would have put it, they were law, if at all, by nature rather than by custom or enactment. The right or the just by nature became law by nature or natural law, and thus be-

[13] "Now that the human mind has grasped celestial and terrestrial physics—mechanical and chemical; organic physics, both vegetable and animal—there remains one science to fill up the series of sciences of observation,—social physics." Comte, *Positive Philosophy*, transl. by Martineau (American ed.) 30. See also Durkheim, *Les règles de la méthode sociologique* (6 ed.) 176-179; Lévy-Bruhl, *La morale et la science des mœurs* (5 ed.) 285 ff.

gins the identification of the legal with the moral that has been characteristic of natural-law thinking ever since.[14]

To the later Middle Ages Aristotle and Justinian were authorities to be interpreted only.[15] Hence the doctrine of natural law, set forth by these authorities, was received, without any reception of the creative method or critical measuring of legal precepts by moral standards which it implied. For the Middle Ages did not need a creative theory as such. On the one hand, there was need of a stabilizing theory, after centuries of disorder. On the other hand, there was need of a general law to supersede, or to eke out and give a new start and better guidance to, the local laws and customs which were proving inadequate in the progress of society. Authority—the inevitable logical development of unchallengeable texts—supplied the one need; so-called interpretation of Roman law supplied the other. Natural law was proclaimed by the authoritative books and so was received. But a philosophical-theological foundation was put under it. It proceeded im-

[14] Note how Cicero seeks to expound the concrete content of natural law. E.g., *De officiis,* i, 7, 20-23; i, 10, 32; i, 13; i, 41, 148; iii, 13-17; iii, 25. Note also the way in which the ethical conception of a moral duty was taken over into the law as a duty of good faith in view of the nature of one's undertaking and thus became a legal duty. E.g., compare Cicero, *De officiis,* iii, 17, 70, and Cicero, *De natura deorum,* iii, 30, 74, with Gaius, iv, § 62 and *Inst.* iv. 6, § 30.

[15] This does not mean that in each case the "interpretation" might not give something new. See De Wulf, *Scholasticism Old and New,* transl. by Coffey, § 45, pp. 75-77.

mediately from reason but ultimately from God. It was a reflection of the "reason of the divine wisdom governing the whole universe."[16] Thus natural law for a season was used as a prop to authority rather than as a means of shaking it.[17]

In the revolt against authority at the Reformation, the Protestant jurist-theologians eliminated the theological side of medieval natural law and sought to put it once more squarely on the basis of reason. But Grotius, starting out by adopting this divorce of jurisprudence from theology,[18] reverts to the theological and puts the natural law from which the law of the state derives all its force and validity upon two bases: (1) eternal reason, and (2) the will of God who wills only reason.[19] The same twofold basis may be seen

[16] "A rule of law is nothing else than a dictate of practical reason in the ruler who governs a perfect society. But supposing that the world is ruled by divine Providence, it is manifest that the whole society of the universe is governed by divine reason. Hence the plan of governing things as it exists in God the ruler of the universe, has the character of law. . . . This manner of law must be called eternal. . . . Since all things subject to divine Providence are ruled and measured by the eternal law, it is manifest that they all participate in the eternal law to some extent. . . . But . . . the rational creature is subject to divine Providence in a more excellent way, being itself a partaker in Providence. Hence it has a participation in the eternal law. . . . Such participation in the eternal law on the part of a rational creature is called natural law." Thomas Aquinas, *Summa Theologiae*, i-ii, qu. 91, art. 1-2. See id. qu. 93, art. 1-3, 6.

[17] See Figgis, *Studies of Political Thought from Gerson to Grotius*, 7-8.

[18] *De jure belli ac pacis, prolegomena*, § 11.

[19] Id. § 12. This amounts to a theory of "a God set side by side with other sources of morality, or set above them as a superfluous source for the sources." Croce, *The Philosophy of Giambattista Vico*, transl. by Collingwood, 94.

in Blackstone.[20] Yet with all these writers the real foundation is manifestly rational. As Hemmingsen put it, reason may show us the whole of their scheme of natural law "without the prophetic and apostolic voice."[21] Accordingly Mr. Justice Wilson tells us, by way of explanation, that God "is under the glorious necessity of not contradicting himself"[22] and thus of conforming to the exigencies of human reason. As the scholastic theologians had set out to convince and convert the infidel and the heretic by sheer force of reason, the natural-law jurists, in an age of scepticism, were eager to convince all men upon an unimpeachable basis of reason and thus secure a general adherence to the precepts of the legal order.

In the nineteenth-century the matter came to be put in a wholly different way. Down to Kant at the end of the eighteenth century, positive law or conventional right, on the one hand, had been contrasted with a body of ideal moral and hence legal precepts—natural law—on the other hand. Kant instead set over against positive law the immutable principles of positive legislation—the

[20] 1 Bl. *Comm.* 42.

[21] *De lege naturae apodictica methodus,* last paragraph 1566 ed., Q 7; Kaltenborn, *Die Vorläufer des Hugo Grotius,* II, 43.

[22] 1 Wilson's Works (Andrews' ed.) 124. This doctrine of self-limitation, going back to Aquinas *ad Gentiles,* may be found in Grotius. Erdmann, *History of Philosophy,* transl. by Hough, I, 427; Grotius, ii, 11, 4, § 1. Transferred to politics, it appears as the doctrine of self-limitation of the sovereign. Groce, *The Philosophy of Giambattista Vico,* transl. by Collingwood, 95; Jellinek, *Allgemeine Staatslehre* (2 ed.) 461-470.

principles of making positive law.[23] This is not natural law in the seventeenth and eighteenth-century sense. It is not a body of moral and hence legal precepts which is law in the same sense as the positive law only in a higher form. He thinks rather of certain eternal, immutable principles governing the making of law, by which law and lawmaking must be judged. Kant wrote before the historical school, at a time when legal institutions and systems of positive law as well as single legal rules and doctrines were regarded as products of human wisdom.[24] But his is not in truth a creative theory. It belongs rather to the next century in which more and more law was thought of, not as a product of wisdom, but as a spontaneous evolution. It is a critical theory. He does not find an ultimate pattern code of rules with reference whereto we may make new positive precepts with confidence. He finds ultimate principles of criticism by which we may criticize what we have already. All that he has in common with the philosophical jurisprudence

[23] "*Rechtslehre* is the aggregate of the rules of right for which an external lawmaking is possible. . . . *Rechtswissenschaft* means the systematic knowledge of natural *Rechtslehre.* It is from this science that the immutable principles of all positive legislation must be derived by practical jurists and lawgivers." Kant, *Metaphysische Anfangsgründe der Rechtslehre,* Introduction, § A (1797).

[24] E.g., Dr. Johnson said that "the law is the last result of human wisdom acting upon human experience for the benefit of the public." Boswell, *Life of Johnson* (Croker ed., 1859) II, 258. Compare Hale's view as to the statutory origin of the common law, *History of the Common Law,* 3-4, 67-68. See also Croce, *Storia della storiografia Italiana nel secolo decimonono,* I, 22-23.