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LAW, MORALITY AND RIGHTS

Edited by M. A. Stewart

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SERIES PREFACE

The Royal Institute of Philosophy has been sponsoring conferences in alternate years since 1969. These have from the start been intended to be of interest to persons who are not philosophers by profession. They have mainly focused on interdisciplinary areas such as the philosophies of psychology, education and the social sciences. The volumes arising from these conferences have included discussions between philosophers and distinguished practitioners of other disciplines relevant to the chosen topic.

Beginning with the 1979 conference on 'Law, Morality and Rights' and the 1981 conference on 'Space, Time and Causality' these volumes are now constituted as a series. It is hoped that this series will contribute to advancing philosophical understanding at the frontiers of philosophy and areas of interest to non-philosophers. It is hoped that it will do so by writing which reduces technicalities as much as the subject-matter permits. In this way the series is intended to demonstrate that philosophy can be clear and worthwhile in itself and at the same time relevant to the interests of lay people.

Honorary Assistant Director
Royal Institute of Philosophy

STUART BROWN

M. A. Stewart (ed.), Law, Morality and Rights, vii.

PREFACE

"I am afraid of Lord Kaims's Law Tracts," wrote David Hume, tongue in cheek, to Adam Smith in 1759. "A man might as well think of making a fine Sauce by a Mixture of Wormwood & Aloes as an agreeable Composition by joining Metaphysics & Scotch Law." In point of fact, the common interests of philosophers and jurists were as extensive then as now; and it is a pleasure to record that there was no shortage of Scots and other lawyers to mix with English and other metaphysicians at the University of Lancaster conference organized by the Royal Institute of Philosophy from 14 to 17 September 1979.

The meetings were devoted to commissioned symposia and a number of individual seminar papers submitted by participants. The symposia brought together distinguished philosophers and jurists, drawn from both sides of the Atlantic, addressing subjects of common professional concern. The topics were chosen so as to include both some questions of traditional jurisprudence and some issues of current social interest. They include the working of the judicial mind, and the concept of a "claim"; the present state of British, especially English, law on obscenity and duress; and problems of social justice and fair punishment within the context of the American Constitution.

It has not been possible, within the limits of this volume, to reproduce the fruitful and lively debate from the floor that attended most of these sessions. We print the opening papers by the protagonist and respondent for each symposium, and, where available, the chairman's commentary and some concluding comments by the first speaker; the concluding comments were written after the conference and some of the other papers have been revised, particularly in their topical documentation, before publication. There are two small deviations from this format: in Part VI

Lord Kilbrandon did not wish to exercise his right of reply and in Part VII Professor W. L. Twining's chairman's comments were not available for publication. We are grateful to two of the other participants in these debates, Mr Mackie and Dr Cottingham, for developing their remarks into short papers specially for this volume, to fill these spaces. Certain of the papers from Parts I, III, IV and VI of this volume have appeared in whole or in part in *Law and Philosophy* **1** (1982), by agreement between the Institute and the editor of that journal. Special permission was given to enable Professor Murphy to include an earlier text of his paper on 'Cruel and Unusual Punishments' in his own book *Retribution, Justice and Therapy* (Reidel, 1979) ahead of publication in the present volume.

We could not offer to print all of the individual seminar papers. Part II contains two of those submitted, selected because they bring to bear fresh philosophical perspectives (those of the philosopher of science and of Wittgensteinian philosophy) on the current debates on the theoretical understanding of the judicial process sparked off by the recent writings of H. L. A. Hart and R. M. Dworkin. Three other papers presented in seminars at the conference have been published elsewhere: R. A. Duff's 'Implied and Constructive Malice in Murder' has appeared in *Law Quarterly Review* **95** (1979): 418–444; Frederick Schauer's 'Free Speech and the Paradox of Tolerance' in *Values in Conflict*, edited by Burton M. Leiser (New York: Macmillan, 1981); and an early text of Frank Marsh's paper on 'Synthetic Competency' (co-authored with G. C. Graber under the title 'Ought a Defendant Be Drugged to Stand Trial?') in *Hastings Center Report* **9** (1979): 8–10.

The slight delay in publishing these proceedings is not the responsibility of any of the parties to this volume, and I am grateful both to the publishers and to the contributors for the speed, efficiency and good humour with which they have cooperated in dealing with the few problems that came to light after the signing of the publishing contract. The work of editing the volume for the press has occupied part of my time as a visiting fellow at the

Institute for Advanced Studies in the Humanities at the University of Edinburgh. I should like to record my thanks to Professors Neil MacCormick, Alan White and John Benson for their help in planning the original programme, and to all those whose attendance contributed to the great success of the meetings.

M. A. S.

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ROBERT S. SUMMERS

WORKING CONCEPTIONS OF "THE LAW"

1. PREFATORY NOTE

This exploratory essay is an admixture of amateur psychology, moral theory, and jurisprudence. It grows out of seminars I have given for judges, and reflects that focus.[1] Co-theorists will now see some of what I have been telling practitioners. And error in my story may be exposed. But one can have no qualms about this. It is especially important to have things put right for judges.

2. INTRODUCTION

I will consider the work of judges in civil law cases, and will begin with one of *many* possible examples. In 1809, English judges decided a now famous case, one with extraordinarily wide-ranging influence. The full original report of the case reads as follows:

Butterfield v. *Forrester*
(1809) 11 East 60 (KB)

This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before *Bayley J.* at *Derby*, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in *August*, when

[1] Several ideas in this essay were presented in June 1978 to judges in seminars at Madison, Wisconsin, and at the Harvard Law School. I am indebted to these judges for comments. I am grateful to Professors David Lyons and Roger C. Cramton for helpful criticism. I also wish to thank Mr Leigh Kelley and Mr Erik M. Jensen, Cornell Law School classes of 1980 and 1979, respectively, for valuable research and editorial assistance.

M. A. Stewart (ed.), Law, Morality and Rights, 3–29.

they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it: the plaintiff however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence *Bayley J.* directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did. [The plaintiff moved for a new trial.]

Bayley J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of *Derby*. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

Lord Ellenborough C. J. A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. [New trial denied.]

As interpreted by most subsequent judges (though not without some license), the foregoing precedent stands for the so-called "complete bar" rule to the effect that if a plaintiff is contributorily negligent, he may not recover *any* compensation from a defendant whose negligent act or omission also contributed to the plaintiff's loss. (There are qualifications but we need not go into them here.)

Now consider a second case (my summary of the report):

Maki v. *Frelk*
Supreme Court of Illinois, 1968
239 N.E.2d 445

Decedent was killed in an auto collision at an intersection. The plaintiff was administratrix of the decedent's estate and was suing the defendant, driver of the other car, for wrongful death. In counts one and two of the complaint,

the plaintiff alleged that the decedent exercised due care for his own safety (was *not* contributorily negligent), and that the defendant negligently caused the accident by driving too fast, failing to keep a proper lookout, failing to keep his car under control, and operating a car without adequate brakes. In the third count, the plaintiff did not allege the decedent's own freedom from contributory negligence, but did allege the defendant's negligence, and alleged that if there was any negligence on the part of the decedent, the plaintiff could still win because the decedent's negligence, if any, "was less than the negligence of the defendant, when compared."

The trial judge granted the defendant's motion to strike this third count on the basis of Illinois case law following *Butterfield* v. *Forrester*. The intermediate court of appeals reversed, and thus repudiated *Butterfield* v. *Forrester*. However, on appeal to the highest court of Illinois, the trial judge's ruling was affirmed.

Thus, in 1968, a majority of judges of the Illinois Supreme Court in *Maki* v. *Frelk* purported to follow *Butterfield* v. *Forrester* and its progeny faithfully.[2] Yet one of the acknowledged leaders among American scholars of tort law had already called the "complete bar" rule the "harshest doctrine known to the common law,"[3] a characterization that may be justified especially since the doctrine precludes even a slightly negligent plaintiff from recovering anything from a grossly negligent defendant. In 1945 the English had abandoned this precedent by a statute apportioning recoverable damages in accord with estimates of each negligent party's share of responsibility for the loss.[4] By 1968, several American state legislatures had followed suit.[5] Subsequently, the highest state courts of a few American states (e.g. Florida, 1973

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[2] One justification the judges offered for this course of action was that, in their view, any change should come from the legislature. I cannot go into this complex issue here.

[3] L. Green, 'Illinois Negligence Law', *Illinois Law Review* 39 (1944): 36.

[4] See generally Glanville L. Williams, 'The Law Reform (Contributory Negligence) Act, 1945', *Modern Law Review* 9 (1946): 105–186.

[5] Victor E. Schwartz, *Comparative Negligence* (Indianapolis: Allen Smith, 1974), pp. 12–15.

and California, 1975) acted on their own to abandon the complete bar rule.[6]

What explains *Maki* v. *Frelk*? The various factors that influence judges are numerous and complex, and they vary somewhat from judge to judge. For my purposes, however, it is not necessary to try to offer a comprehensive account. There are at least four possible explanations for the Illinois court's refusal in *Maki* v. *Frelk* to abandon the "harshest doctrine known to the common law": (1) the judges believed (what, in my view, would be mistaken) that only the Illinois legislature had power to modify the "complete bar" rule, or (2) the judges simply failed to reason through the conflicting considerations as they should have and decided against the plaintiff, even though, according to the allegations, the defendant was partly responsible, or (3) the judges, in deciding the case, were unduly influenced by a particular *working conception* of "the law," and this led them to uphold the harsh doctrine, or (4) some combination of the foregoing.

The working conception most likely figuring here in an explanation of the third possible kind is easy enough to identify: "The law" governing an issue to be decided consists of a pre-existing rule[7] – the "complete bar" rule of *Butterfield* v. *Forrester*. Judges unduly influenced by this working conception would vote to uphold the harshest doctrine known to the common law. Of course, such a working conception does not itself *require* this result. It is only a *working* conception, and judges not obsessed with it would not give it an undue or disproportionate place in their thinking. Instead, they would vote to overrule a case like *Butterfield* v. *Forrester* (unless they rightly believed that the matter should be left only to the legislature). In voting to overrule,

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[6] *Li* v. *Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); *Hoffman* v. *Jones*, 280 So.2d 431 (Fla. 1973).

[7] The most influential of American Judges, Oliver Wendell Holmes, Jr., once put it this way: "My job is to play the game according to the rules." (L. Hand, 'Address', in *Continuing Legal Education for Professional Competence and Responsibility* (Philadelphia: Joint Committee on Continuing Legal Education, 1959), p. 119.)

these judges would be abandoning, for this case, "the law" that their working conception had put them on to and would be turning to other normative phenomena of "the law" that should here have primacy. These other phenomena include (1) the law's commitment to the reassessment of precedent in light of reason and (2) the discretionary power of common law judges to overrule unsound precedent.

In this essay, I will concentrate on the roles of working conceptions in judicial decisions. I will not try to prove that this factor actually helps explain the decision in *Maki* v. *Frelk*. Nor, of course, will I try to establish the general extent to which judges are influenced by their working conceptions. But from my reading of opinions over many years, and from numerous discussions with judges, I have concluded that such conceptions do play important roles, both for good and for ill. They can facilitate sound decision making. Indeed, one would hope that this is the usual result. Some judges, however, become preoccupied with their working ideas of "the law." And there is evidence that this sometimes affects outcomes. These conclusions should surprise no one. Working conceptions are useful (in ways I will try to explain). Indeed, they are pragmatic necessities for most judges. That some proportion of judges will become preoccupied with such conceptions seems more or less inevitable.

It would help if judges were more conscious of the possible adverse effects of becoming preoccupied with a working conception of "the law," and I offer this essay partly to that end. Judges conscious of the limits of their working conceptions will be far less likely to become imprisoned in them. I also offer this essay as a partial account of what it is for a judge to have a philosophy of law. But my main purpose here is to explore whether there is an alternative working conception that might be better than the influential notion that law consists of pre-existing rules – better in that (1) it would be a more serviceable working conception as such; or (2) its normative effects would be preferable; or (3) the consequences of judicial obsession with it would be less untoward; or (4) some combination of the foregoing. I believe there is a

better alternative working conception, and it is one in which morality plays a major part.

3. THE NATURE OF A WORKING CONCEPTION

I must first discuss what I take a working conception to be, and I will continue to use the notion of "law as pre-existing rule" for illustrative purposes.

As I conceive it, a working conception is not the same as what Professor Hart has called a "criterion of legal validity."[8] Such a conception might specify a feature required for a form of law to be valid within a system, but it need not. Thus a criterion of legal validity within a society might, for example, be that the law, whatever form it happens to take, must be promulgated by Rex. And judges might have a working conception of the law as "rules made by Rex." Yet judges in this society might hold a working conception of the law devoid of any reference to Rex, too. Virtually all all of them might conceive of "the law" simply as pre-existing rules (and there might be few other social rules). Furthermore, as I conceive it, a working notion of the law is not as such *binding* upon a judge, whereas a true criterion of legal validity is.

A working conception is not the same as a working hypothesis as to the likely actual substantive content of relevant law.[9] Rather, it is "prior" to any such hypothesis. It is a kind of conceptual schema, and it *may* be one that can accommodate almost any particular substantive content.

Nor is a working notion necessarily the same as an "ideal type" of law.[10] It is possible to imagine, for example, an ideal type of a

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[8] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), chapter 6.

[9] Similarly, it is not the same as a "hunch" as to the right result in a case. See Joseph C. Hutcheson, Jr., 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision', *Cornell Law Quarterly* 14 (1928/9): 274–288.

[10] I refer here to Weber's notion of an "ideal type." See his 'Religious Rejections of the World and their Directions', in *From Max Weber: Essays in*