

Geoffrey C. Hazard, Jr. and Douglas W. Pinto, Jr.

Moral Foundations of American Law

no other God but me
thou shalt love thy neighbor as thyself
render unto Caesar ...
the People of the United States
Republic if you can keep it
her slavery nor involuntary servitude



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MORAL FOUNDATIONS OF AMERICAN LAW

Faith, Virtue and *Mores*

Geoffrey C. HAZARD, Jr.
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MORAL FOUNDATIONS OF AMERICAN LAW

To Elizabeth O'Hara Hazard

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CHAPTER 1

INTRODUCTION

This book is about relationships between law and morality as it developed in the United States. It is a tour for the general reader and perhaps of interest to professional scholars.

Law is a set of formally stated rules that include prohibitions, restrictions, and authorizations. It is pronounced and applied by government authorities including legislatures, courts, and government agencies. The government through its rules specifies the relationship among levels of authority that make these pronouncements, going up to the Supreme Court or to Parliament, as the case may be. In the ancient tradition of the Hebrew Bible the Law was the pronouncement of God, as in the Ten Commandments. In modern society law consists of pronouncements of the secular regimes of nation states.

Morality, by contrast, is an unofficial and less organized cluster of norms of proper conduct. It includes standards derived from religious authority, such as the biblical commandment “Thou shalt not kill.” It includes “ethics,” such as the norms and practice recognized by a profession or the by-laws of an organization. And it includes *mores*, which are ideas of proper conduct that prevail in a specific community. Some ethics rules are codified, for example in the code of a profession. Some are written but less formally, for example in advice, commentary and discourses in moral philosophy. Most community morality is transmitted orally – “Be kind to your parents,” for example – and by demonstration – “See, it is to be done this way.” The transmission of community morality is conventionally called acculturation, a concept that involves both continuity and gradual change.

The long and complex process of acculturation results in what the noted economist Oliver Williamson has called “social embeddedness.” He observes that it includes “informal institutions, customs, traditions, norms, religion,” that “institutions at this level change very slowly,” and that in any given era these elements are generally taken as given.¹ Our structure in exposition therefore is mostly historical. This sequence has a coherence because everyone has a sense of time, but it is not “logical” in terms of

¹ Oliver Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 *J. Econ.Lit.* 595, 596–597 (2000).

categories because there are cross-currents in all human experience. History nevertheless can be a source of wisdom, recalling institutions, ideas and ideals that are worth preserving.

WHAT IS MORALITY GOOD FOR?

Morality sustains shared expectations within the community, allowing cooperation and hence security, peace, and possibly prosperity. As Professor Albert Hirschman said in his introduction to *Exit, Voice and Loyalty*:

Under any economic, social, or political system, individuals, business firms, and organizations in general are subject to lapses from efficient, rational, law-abiding, virtuous, or otherwise functional behavior. No matter how well a society's basic institutions are devised, failures of some actors to live up to the behavior which is expected of them are bound to occur. [But] society must be able to marshal from within itself forces which will make as many of the faltering actors as possible revert to the behavior required for its proper functioning.²

Moral standards are given effect through the "force" of individual self-control and through group action in the form of example, admonition and ostracizing offenders. In well-functioning communities, ordinary behavior is generally consistent with and supportive of its peaceful order. For example, most citizens drive fairly carefully and pay their taxes. In some societies, however, the standards actually observed are subversive of community order, the result being corruption, civil strife and chaos.

MORALITY AS A SOURCE OF LAW

A community's morality is absorbed into its law. As the distinguished English legal theorist Professor H.L.A. Hart has said:

The development of the law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social

² Albert Hirschman, *Exit, Voice and Loyalty* (Cambridge, MA: Harvard Univ. Press, 1970), 1.

groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.³

The influence of morality on law was similarly described by Oliver Wendell Holmes, later Justice Holmes. As he famously said:

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 ... In order to know what it is, we must know what it has been, and what it tends to become ... [The law] is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off.⁴

In practice, law is brought to bear only episodically, responding to serious violations and making examples of seriously deviant conduct. Law therefore functions primarily as reinforcement of community morality. At the same time, the public sentiment reflected in a community's morality usually reinforces its law. It is coherent to say that legal officials – people empowered by law to act *ex officio* – also have moral obligations.⁵ Any official action involves some element of discretion or judgment and exercise of judgment involves an element of morality. The same holds for an individual's decision about how close to approach the law's boundary of legality. The relationship between law and morality is therefore interpenetration rather than simple parallelism or overlap.

FOUNDATIONS OF WESTERN MORALITY

Standards of real world conduct in the West have been derived from the Hebrew Bible, then Christianity as authoritatively voiced by the Roman Catholic Church, and still later in the secular “humanist” outlook that emerged in the 14th century onward. Greek philosophy was absorbed along the way, in discord because it was not founded on Judeo-Christian belief. Greek philosophy, particularly that of Aristotle, has thus been a concurrent source of skepticism.

³ H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994), 185.

⁴ Oliver Wendell Holmes, *The Common Law* (New York: Dover Publications, 1991), 1, 36.

⁵ See Stephen Sheppard, *I Do Solemnly Swear: The Moral Obligations of Legal Officials* (New York: Cambridge U. Press, 2009).

According to biblical sources, God created and is forever attentive to the world, and has ordained proper conduct through religious teachings. Christianity, generally adhering to these beliefs, promised eternal life to the faithful. In and after the Renaissance, however, belief in God yielded to doubt, particularly in the minds of many members of the educated classes. Doubt resulted in uncertainty and conflict about the basis of morality and as well the legitimacy of law. While the Renaissance has conventionally been assigned a date somewhere between 1300 to 1700 C.E., viewed in longer perspective it has been a complex cultural transformation that began earlier and still continues.

MORALITY AND EPISTEMOLOGY

“Epistemology” is the philosophic term for the problem of human knowledge – what “is.” The dilution of religious faith has been accompanied by a transformation in concepts of knowledge and indeed in the very concept of existence. The Earth formerly was believed to be the center of the universe but is now generally recognized as a small fragment of an almost infinite universe. Eternal life, a foundational belief in Christianity, is thought by many to be at best a dubious prospect. The authoritative source of worldly knowledge for many is no longer faith but science and practical knowledge.

Science generates provisionally reliable theories about reality but not absolute certainties, and practical knowledge is notoriously fallible. These constraints on mundane knowledge carry with them difficulties in morality. What *should* be done in a situation – the appropriate standard of conduct – depends on what the situation *is*. As Bernard Williams has suggested, human consciousness is a combination of “what the world is like (for instance, by how someone has behaved), and yet, at the same time, a certain valuation of the situation.”⁶ The security of a moral judgment is only as strong as the perceptions on which it is based.⁷

Moreover, identification of what *is* takes place “inside” the subjective world of actors and observers, so that actors and observers are an integral part of morally problematic situations. As Stuart Hampshire has said, “we

⁶ Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard Univ. Press, 1985), 129.

⁷ Morton White, *What Is and What Ought to Be Done: An Essay on Ethics and Epistemology* (New York: Oxford Univ. Press, 1981).

should not represent human beings as observers standing outside the world.”⁸

To the extent these constraints are accepted, the basis of a community’s *mores* – its standards of conduct – becomes correspondingly problematic. In some regimes, political dogmatism replaces what had been regarded as God’s work. In open societies the basis of community *mores* is uneasy faith in “social contract” of some sort: A written Constitution in the United States; strongly held traditions as in England; a self-generated history as in France. We have sadly learned that all of these are fallible and subject to corruption – that contracts of any kind are fragile, vulnerable to opportunism, and often broken without remorse. Fallible though contracts are, some kind of social contract is all we have in the modern era.

LEARNING MORALITY

This book primarily addresses the substance of moral ideas and not how those ideas are learned. Moral philosophy has long been hampered by erroneous assumptions about learning, particularly how the brain works. As late as the 18th century, it was generally assumed that learning – “experience” – was a transfer of pictographic observations of the world into identical impressions in the mind. It was only toward the end of the 19th century that William James and others made headway in understanding the complexity of brain functions: That perception itself was a highly complex chain of mental interactions.⁹ It has been only in the “brain science” of recent decades that the extraordinary complexity of perception and comprehension has come to be appreciated.¹⁰

⁸ Stuart Hampshire, *Thought and Action* (Notre Dame, IN: Univ. Notre Dame Press, 1982), 66.

⁹ See William James, “The Functions of the Brain,” in *Psychology: Briefer Course*, in *William James: Writings 1878–1899*, ed. Gerald Myers (New York: Library Classics, 1992), 98–124.

¹⁰ Gerald Edelman, *Second Nature: Brain Science and Human Knowledge* (New Haven, CT: Yale Univ. Press, 2006); Eric Kandel, *In Search of Memory: The Emergence of a New Science of Mind* (New York: Norton, 2006); Steven Pinker, *How the Mind Works* (New York: Norton, 1997); Steve Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (New York: Viking, 2007); Stanislas Dehaene, *Reading in the Brain: The Science and Evolution of a Human Invention* (New York: Viking, 2009).