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THE ETHICAL BASIS OF LEGAL CRITICISM

FELIX COHEN

That all valuations of law are moral judgments, that the major part of legal philosophy is a branch of ethics, that the problem which the judge faces is, in the strictest sense, a moral problem, and that the law has no valid end or purpose other than the maintenance of the good life are propositions which jurists are apt to resent with some acerbity. In the orthodox juristic tradition there is some sort of boundary between the realm of law and the realm of morality or ethics; legal philosophy deals with justice rather than with goodness; morality is at most an emergency consideration in the problem before a judge, and his decision of that problem will be right or wrong in some non-ethical sense; finally it is not the business of the law to make men good provided only it makes them act justly. It is submitted that these tenets of current juristic faith spring from an indefensible view of the nature and scope of ethics and tinge current legal criticism with a peculiar confusion.

Before examining the relation of law to ethics, it may be well to point out that those who deny the ethical responsibilities of law and legal science do not refrain from passing what we should ordinarily call ethical judgments upon the law. A historical school of law vehemently disclaims concern with ethics or natural law, but repeatedly invokes a Volksgeist or a Zeitgeist to decide what the law ought to be. An analytical school of jurisprudence

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This article forms an introductory chapter in a study of “Ethical Systems and Legal Ideals” to be published by the Vanguard Press.

2 See Maine, Early History of Institutions (7th ed. 1914) 370 and lectures 12 and 13 passim; Savigny, Ueber den Zweck dieser Zeitschrift (1815) 1 Zeitschrift für Geschicht. Rechtswissenschaft 4-5.

2 See Carter, The Proposed Codification of Our Common Law (1834) 86 et seq. (a paper prepared at the request of the committee of the Bar Association of the City of New York, appointed to oppose the measure). This pamphlet is largely based upon Savigny’s essay, Vom Beruf unsern Zeit für Gesetzgebung und Rechtswissenschaft (1831), translated by Hayward as The Vocation of Our Age for Legislation and Jurisprudence (1831), which was written under somewhat similar circumstances in answer to the demand for codification of German law (See Thibaut, Ueber
again dismisses questions of morality;³ and again decides what
the law ought to be by reference to a so-called logical ideal.⁴ Those who derive the law from the will of the sovereign usually
introduce without further justification the implication that it is
good to obey that will.⁵ And those who define law in terms of
prevailing social demands or interests frequently make use of an
undisclosed principle to the effect that these demands ought to
be satisfied.⁶

The objection, then, is not that jurists have renounced ethical
judgment, but that they have renounced ethical science. Ethical
science involves an analysis of ethical judgments, a clarification
of ethical premises. Among the current legal crypto-idealisms
there can be no edifying controversy since there is no recognition
of the moral issues to which their differences reduce. One looks
in vain in legal treatises and law review articles for legal criti-
cism conscious of its moral presuppositions. The vocabularies of
logic and aesthetics are freely drawn upon in the attempt to
avoid the disagreeable assertion that something or other is in-
trinsically better than something else. Particular decisions or
legal rules are “anomalous” or “illogical”, “incorrect” or “im-
practical”, “reactionary” or “liberal”, and unarguable ethical
innuendo takes the place of critical analysis.⁷ Little wonder then

³ See Amos, SCIENCE OF JURISPRUDENCE (1872) 18; Pollock, Essays in
Jurisprudence and Ethics (1882) C. 1 (The Nature of Jurisprudence)
18-32.
⁴ A good example of this ethical use of analysis is found in the develop-
ment of the prima facie theory of torts (see Pollock, LAW OF TORTS (1st ed.
1887) C. 1) which purports to be merely an analysis of what has always
been the law but actually gives the old law of conspiracy a new impetus
(see Note (1930) 30 CoL. L. REV. 510) and threatens to extend its vagaries
over the individual life.
⁵ “Legislatures and courts formulate or seek to formulate the will of all
of us as to the conduct of each of us in our relations with each other and
with all. That will ought to be wholly effective. That it fails of effect in
any degree is a misfortune.” Pound, Enforcement of Law (1908) 20 Green
Bag 401.
⁶ See Pound, Jurisprudence, in History and Prospects of the Social
Sciences (1925) 472, and Pound, Introduction to the Philosophy of Law
(1922) 95-99.
⁷ One might expect to find in the American Law Institute’s attempted
“Restatements” of various branches of the common law some attempt to
work out the meaning of controversial rules of law in terms of social con-
sequences and some indication of the moral standards which make the rule
laid down in Mississippi preferable to the rule laid down in Ohio. Instead,
one meets the pious fiction, implicit in the very title of the enterprise, that
that on a more abstract plane of thought the classification of ideas has taken the place of legal philosophy, while Hegelian pictures of inevitable trends are offered as substitutes for the delineation of the desirable.

It is probable that the dependence of jurisprudence upon ethics is partly obscured by the habit of smuggling ethical notions into one's definition of law. Blackstone could define law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." This is very much like the benevolent definition of a sou as a small coin to be given to the poor. Upon such a definition the question of whether law is good cannot be significant, and ethical questions the common law is a system within which intellectual inspection reveals a definite answer for every legal question. Decisions are hailed as "correct" or "incorrect" rather than "good" or "bad", and truth is obtained either in accordance with the mathematical precepts of the Valentinian Law of Citations (426 A.D.), or by projecting evolutionary "tendencies" found in the past decisions of courts, or by reacting aesthetically to the harmony or discord between a questioned rule and the rest of the legal "system." Cf. the strictures of Kantorowicz upon the German civil code, Rechtswissenschaft und Soziologie (1911) 8.

Who appreciate Dean Pound's unparalleled equipment in legal philosophy must hope that such taxonomic studies as Law and Morals (1924); The Scope and Purpose of Sociological Jurisprudence (1911) 24 Harv. L. Rev. 591, (1911-12) 25 Harv. L. Rev. 140, 489; The End of Law as Developed in Legal Rules and Doctrines (1914) 27 Harv. L. Rev. 105; The End of Law as Developed in Juristic Thought (1914) 27 Harv. L. Rev. 605, (1917) 30 Harv. L. Rev. 201 are preludes to some affirmative statement of valid legal standards or ideals.

Courts frequently rely or purport to rely not on actual decisions but on tendencies in series of past decisions. The fact that two earlier cases have each stretched a rule a little further than existing precedents in each case warranted is taken to indicate the desirability of stretching the rule still further in a third case. The assumption seems to be that all change is for the better and is infinitely capable of extension. The philosophical generalization of this type of argument is, of course, evolutionism. Dean Pound has frequently followed Hegel, Marx, and Spencer in putting forward evolutionary schemes of legal history in answer to strictly ethical questions. See Introduction to the Philosophy of Law (1922) 35-99; Justice According to Law (1913) 13 Col. L. Rev. 686, (1914) 14 Col. L. Rev. 1, 103, especially at 117-21; The Theory of Judicial Decision (1923) 36 Harv. L. Rev. 641, 805, 940, especially at 954-8. But this identification of the inevitable and the desirable under the banner of Progress is, as Huxley, Sidgwick, G. E. Moore, and M. R. Cohen have demonstrated, intellectually indefensible,—however gratifying emotionally it may be to feel that cheering for the winning side is the substance of morality.

Blackstone, Commentaries 54. That "right" and "wrong" in this definition are ethical rather than strictly legal terms is made clear in Blackstone's own exegesis upon his definition. 54-55. Much confusion in the reading and, it may be suspected, in the writing of continental legal philosophy arises from the fact that Recht, droit, diritto, etc. denote at the same time the positive concept of law and the normative notion of right, justice or ideal law.
are either evaded by denying the appellation law to certain enactments and courses of judicial decision or else settled by the complacent and preposterous assumption that whatever sovereigns have commanded is good. Law is law, whether it be good or bad, and only upon the admission of this truism can a meaningful discussion of the goodness and badness of law rest.

Upon any of the current positive definitions of law, e.g., "the body of rules according to which courts decide controversies," the indispensability of ethics in legal criticism is immediately obvious. Ethics involves all final applications of the terms good,

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11 This definition (see Keyser, On the Study of Legal Science (1929) 38 YALE L. J. 413) seems to me to avoid an unfortunate ambiguity in Gray's definition of law as "composed of the rules which the courts . . . lay down for the determination of legal rights and duties." Gray, Nature and Sources of the Law (1909) § 191. I do not think that Gray meant to equate law with rules enunciated by courts, but if he did Mr. Frank's criticism that such rules are often merely verbal and in any case subject to interpretation, with the result that they must be considered sources of law (like statutes) rather than law, is irrefutable. See Frank, Law and the Modern Mind (1930) 121-32. In any case, Gray failed to recognize with sufficient clarity that judges make law only in the way that electrons make physics and amoebae make biology. What is law, as that term is most commonly used by lawyers, is the way or pattern in which judges decide cases, and this way or pattern may be as remote from the mind of the judge as is the Gestalt psychology from Köhler's anthropoid subjects. As a matter of fact a lawyer looking for "the law" on a point will generally pay more attention to a wholly unofficial schematization of decided cases found in a legal treatise than to a judicial opinion which "lays down" the law. Where this is not the case, it is because of the scholarship of the particular judge rather than his authority.

12 In a recent article Professor Dickinson has attacked the realistic or positive definition of law on the ground that it does not fit the problem of the judge himself, who does not want to know what he is about to do. (Legal Rules: Their Function in the Process of Decision (1931) 79 U. of P. L. Rev. 833, 843-844). But this is to assume that a judge's duty is to find the law rather than to mold it, an assumption which no realist makes. In a similar vein Dickinson argues that if we should call judicial responsiveness to unworthy motives law, it would become "difficult . . . to find any proper standard for criticizing the behavior of the judge." (ibid. 838) Again by assuming without question the traditional premises which realists have been attacking, Dickinson arrives at an absurdity which he ascribes to his opponents. Unless one assumes that law is above ethical criticism, there is no difficulty in criticizing a judge for making or perpetuating bad law. The confusion becomes evident when Dickinson asserts that "a legal rule, even though derived by generalization from what has been done, is not a rule of isness because it either may or may not be applied in the next case, i.e., the case for which the rule is sought, depending on the volition of the judge." (ibid. 860, note 51) Obviously if a legal rule is a general formulation of judicial behavior, it must explain the next case as well as the last case. The existence of legal rules is not disturbed by judicial volition, since rules are simply descriptions of the way judicial volition works. And a description of judicial volition is a rule of isness. Dickinson has confused normative and descriptive science by failing to recognize that a description
bad, better, best, right, ought, and their derivatives. 12 We may decide whether law is good for strengthening social bonds or bad for the peace of mind of criminals, without any appeal to ethics, but when we come to the question of whether the strengthening of social bonds or the peace of mind of criminals is good, and whether law which has the described effects is good, we are in the realm of ethics. Thus every valuation of law, every formulation of the ideal object or end of law, must be either categorical and ethical, or conditional, in terms of some ulterior aim which can itself be valued ethically. In either case, there is no way of escaping the final responsibility of law to ethics, and, since the legal order is a complex of human activities, to morality.

Although the criticism of elements of the legal order is ethical, it does not exhaust the realm of ethics, for ethical judgments can certainly be passed upon other things than law, and even upon things which law can in no wise affect. To delimit the realm of ethics which is relevant to law is merely to outline the body of ethically justiciable facts which law can comprehend or affect. And that body of facts, of course, is something which will vary with the level of commercial, industrial, and military development reached in a given society, with the temper of a people and their political-ethical beliefs, and with all other factors that go to determine the balance of powers and desires upon which law enforcement rests. To neglect, for instance, the influence of the machine gun in strengthening the forces behind law against rebellious populations and thus making it possible for the state to legislate in fields once closed to it is simply to make legal ideals of ancient facts. There is no realm of human conduct that we can hold eternally absolved from the possibility of judicial con-

of purposive behavior is not itself purposive. He has said nothing which reveals the impossibility or undesirability of a descriptive science of judicial conduct. He has offered no reason for believing that law as the realists understand the term is not a more precise concept (his own criterion of definition) than the amorphous Something which is neither a description of what courts actually do nor a formulation of what they ought to do (ibid. 861-862) but a jumble of the two notions whose only merit is faithfulness to the fundamental confusions in modern juristic thought.

13 I follow G. E. Moore in this use of the word ethics to cover all problems of goodness and its related concepts, whether or not concerned with human conduct, leaving the term morality to designate the narrower field of value judgments of voluntary human acts. This use of the term ethics is, I think, too well substantiated historically to require apology. “Axiology” or “theory of values” may be more accurate appellations for our subject from a philological point of view, since they avoid the suggestion of a particular reference to human conduct. But both names are much too clumsy for consistent usage, and the latter at least carries its own aura of ambiguity, being extended in application to values other than goodness (e. g., truth and beauty), while frequently restricted, from the viewpoint of method, to a particular naturalistic philosophy.
trol and the need of juristic attention. The only permanent restriction that we can fix upon the realm of ethical goods in terms of which law must be judged is found in the proposition that law can affect only human activities and such other happenings as depend upon human activities. The good life is the final and indispensable standard of legal criticism.

This proposition is commonly attacked on two grounds. In the first place, it is claimed, we do not know what the effects of law will be. And in the second place, we do not know what the good life is.

Both of these objections are true in a certain sense, but in that sense they do not contradict our conclusion. It is certainly true that we cannot calculate all the effects of law or of anything else. And it is equally obvious that our knowledge of ethics and of human nature is not great enough to permit us to describe completely and in detail what constitutes the good life for each person or even for the abstract man. But if there is any such thing as human knowledge, we certainly have a fair degree of it upon both these subjects. And, as a great French jurist, M. Pierre Tourtoulon, has said, "There is no need to throw to the dogs everything that is not fit for the altars of the gods." A recognition of the inadequacy of our knowledge in these fields can bring a sweet scepticism into our political beliefs, but it cannot deny them. To quote again from Tourtoulon, "The greatest jurist has only very vague ideas concerning the services that the laws which he expounds and explains render to society ... The first step toward wisdom is the knowledge that we are ignorant of nearly all the functions of our laws, or of the evil or the good which they may bring us." 17

The inadequacy of human knowledge, we may conclude, does not destroy the usefulness of our form of evaluation. In fact, a judgment of ethical values whose truth is recognized to be partially dependent upon the accuracy of human scientific knowledge seems to be far more useful than the sort of judgment which assumes that however uncertain the physical results of an act may

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14 Possible intrinsic goods in the legal order, e. g., the happiness of judges and the aesthetic satisfactions of lawyers, are themselves elements in lives affected by law. Non-human goods achievable by law, e. g., the well-being of domestic animals, may be accounted for in the instrumental valuation of the human lives through which they are attained.

15 In speaking of the good life I do not, of course, mean to imply that different sorts of living may not be equally valuable. The good life is simply a concept common, though applying in varying degrees, to all lives worth living.

16 See ARISTOTLE, POLITICS, Bk. 7, c. 1; NICHOMAchaEN ETHICS, Bk. 1, c. 2; RUSSELL, POLITICAL IDEALS (1917) 4.

17 TOURTOULON, LES PRINCIPES PHILOSOPHIQUES DE L'HISTOIRE DU DROIT (1908) translated in 13 MODERN LEGAL PHILOSOPHY SERIES (1922) 24.
be, we can know clearly in advance whether they will be good or bad.

Suppose, however, that this is erroneous, and that our actual judgments of law in terms of the good life are wholly unreliable and useless. Still it does not follow that the theory which makes legal values dependent upon such causal efficacy is false. Great confusion has been caused in ethical controversy by the belief that knowing and publishing the truth is always good, and that it is therefore unnecessary to distinguish between the goodness or usefulness of an ethical theory and its truth. The judgment that the value of law depends upon the law's efficacy in promoting the good life would be true even if it were wholly useless in legal criticism. But I believe that this judgment is far from useless, for although it offers no material measure of legal values, it provides a logical base upon which all significant discussion of the subject can rest. In this field of the valuation of law, as in most other domains of thought, confusion is a more potent source of evil than is error. A formal principle of this sort cannot insure against error, but it can bring light to the foundations of our thinking. It can bring our traditional legal controversies into the fertilizing context of ethical science. It can free legal criticism from blind deduction from obsolete moral postulates. It can illumine "social engineering" by inducing a critical attitude towards the social interests that the law is asked to protect.

1 An interesting example of the attempt to prove propositions by showing the disastrous effects of disbelief is provided in a recent volume by Professor Brumbaugh which bears the promising title Legal Reasoning and Briefing: "Thus all things made legal are at the same time made legally ethical because it is law, and the law must be deemed ethical, or the system itself must perish." (p. 7).

2 The responsibility of law and juristic science to pure ethics, which is analysed in this article, does not exhaust the significance of this principle. The relevance of sociological data to law, which is the converse aspect of this formula (What are the effects of law upon human life?), is developed in Pound, The Scope and Purpose of Sociological Jurisprudence, supra note 8, especially at 512.

20 The current notion that the function of the jurist is simply to secure adequate enforcement for the expressed demands of society (see L. K. Frank, Institutional Analysis of the Law (1924) 24 Col. L. Rev. 460, 497-8 for an interesting reductio ad absurdum of this view) derives from a dangerous metaphor. Society is not vocal. The expressed demands of society are the demands of vocally organized groups, and a discreet deference to the power of such groups should not lead us to confuse their demands with "social welfare." Cf. Judge Hough's criticism of this confusion in his review of Dean Pound's Spirit of the Common Law (1922), in (1922) 22 Col. L. Rev. 385: "The present lecturer can and does sum up the judicial duty of decision by saying that the jurists of today (and judges are presumable jurists) are content to seek the jural postulates of the civilization of the time—a phrase extremely easy of translation into keeping one's ear to the ground to hear the tramp of insistent crowds."
can bring legal scholarship into a more intimate contact with practical legal problems by reminding jurists that logical, historical, and sociological analyses of law are merely necessary introductions to the argument: This decision or statute is desirable because in some way it promotes the good life.

II

That the valuation of law is thus dependent upon our concept of the good life is perhaps a truism, but it is certainly not a commonplace. The ignoring or tacit rejection of this dependence is extremely general in juristic literature, although few legal writers have made their disavowal explicit. To M. Leon Duguit we may profitably appeal for a statement of the typical position that the field of law is independent of ethics and morality. To show the inadequacy of this doctrine is to point to the error upon which a vast amount of legal philosophizing is based.

Law, according to Duguit, has for its sole purpose, social solidarity. Solidarity, he insists, is a fact, not a rule of conduct. "It is not an imperative." 21 Duguit shows inductively that law makes for social solidarity and that such solidarity is a feature of all societies. But, as with so many other jurists, this inductive generalization suffers a gradual metamorphosis 22 and is finally used as the sole basis for such commands or ethical judgments as the following: "Respect every act of individual will determined by an end of social solidarity;" 23 "every individual ought to abstain from any act that would be determined by an end contrary to social solidarity;" 24 "it is a crime to preach the struggle of classes." 25 Since it is impossible to derive the goodness of an act from its frequency or universality, Duguit's judgments can be true only if the doctrine of solidarity is, in

22 Professor Husik, in a review of TOURTOULON'S PHILOSOPHY IN THE DEVELOPMENT OF LAW in (1923) 71 U. OF P. LAW REV. 416 thus summarizes the procedure: "... one starts with the proposition, 'Men live in society', which is perfectly true, and ends up with the statement, 'The aim of the life of the individual is to contribute to the development of the social body', which is far from being a scientific statement and may easily be denied. Moreover if the last proposition is intended as imposing an obligation, it can never be logically derived from the statement of a fact. Most, if not all, of the books dealing with natural law by advocates of that doctrine, such as Thomas Aquinas, Grotius, Lorimer, are guilty of this fallacy." (pp. 418, 419).
23 DUGUIT, op. cit. supra note 21, at 290.
24 Ibid. 292.
25 DUGUIT, LES TRANSFORMATIONS GENERALES DU DROIT PRIVE DEPUIS LE CODE NAPOLEON (1920) § 48. Translated in 11 CONTINENTAL LEGAL HISTORY SERIES, 135.
contradiction to his own claims, an ethical imperative. It seems fair to characterize such a position as crypto-idealism. Duguit has not gotten rid of ethics at all, as he proposes to do, but he has agreed not to use the word "ethics" lest his extremely shaky ethical system be challenged.26

Although Duguit's aversion to the concepts of ethics is not very widely shared outside the realm of jurisprudence, he can claim the support of many philosophers for the faulty method by which he actually builds up his ethical system. Bertrand Russell thus analyzes the method:

"It may be laid down that every ethical system is based upon a certain non sequitur. The philosopher first invents a false theory as to the nature of things, and then deduces that wicked actions are those which show that his theory is false. To begin with the traditional Christian: he argues that, since everything always obeys the will of God, wickedness consists in disobedience to the will of God. We then come on to the Hegelian, who argues that the universe consists of parts which harmonize in a perfect organism, and therefore wickedness consists of behavior which diminishes the harmony—though it is difficult to see how such behavior is possible, since complete harmony is metaphysically necessary. Bergson . . . shows that human beings never behave mechanically, and then, in his book on Laughter, he argues that what makes us laugh is to see a person behaving mechanically—i.e., you are ridiculous when you do something that shows Bergson's philosophy to be false, and only then. These examples have, I hope, made it plain that a metaphysic can never have ethical consequences except in virtue of its falsehood; if it were true, the acts which it defines as sin would be impossible."27

The application of this analysis has been modestly under-estimated by Mr. Russell. For all ethical theories which are extracted from positive thought, scientific as well as metaphysical, show a similar weakness. Everything obeys the law of evolution. Therefore those societies that do not obey the law of evolution are inferior. All men act instinctively. Therefore those who repress their instincts are bad. All commercial transactions take place in accordance with the laws of supply and demand. Therefore every interference with the laws of supply and demand is undesirable. All law springs from the national spirit. Therefore law which does not spring from this spirit (code law, etc.) is bad.28

26 M. Duguit naively confesses to having experienced some disquietude with his ultimate appeal to social fact when Germany was destroying Belgium. But the final punishment of Germany apparently convinced him that social force is its own justification. Duguit, Objective Law (1921) 20 Col. L. Rev. 817, (1921) 21 Col. L. Rev. 17, 126, 242, especially 254-56.
27 RUSSELL, SCEPTICAL ESSAYS (1928) c. 7 (Behaviorism and Values) 94.
28 It is only with the aid of this fallacy that the historical, analytical,
It is unnecessary to multiply examples.

The abduction of law from the domain of morality is defended by Professor E. M. Morgan in a slightly different manner. He writes:

"It must be remembered that the law does not have the same purpose as religion or ethics or morals. It is not concerned with developing the spiritual or moral character of the individual but with regulating his objective conduct toward his fellows. Consequently courts will have to formulate and apply some rules which have no relation at all to morals, some which have to place a loss upon one of two equally blameless persons, some which impose liability regardless of fault and some which refuse to penalize conduct denounced by even the morally blind. It must be apparent that the moral law has no mandate upon the content of the rules of the road..."

This passage is so clearly typical of a view widely maintained (particularly in our American law schools) that we may profitably subject it to a closer criticism than its position in a student's handbook might otherwise warrant. In the first sentence we are told that law does not have the same purpose as religion or ethics or morals. It is upon the ambiguity of this word that the specious force of the rest of the argument depends. If the word refers to the state of mind of judges or legislators, the assertion that this differs from the state of mind of moralists, ethical philosophers, and religious leaders is perhaps true but is completely irrelevant to Professor Morgan's ethical conclusions as to what the law ought to do. If by the "purpose" of law is meant that at which law ought to aim, the statement is relevant, indeed basic, to his further conclusions, but obviously false. For the law ought to secure the good life, which is the ideal purpose of moral and religious rules as well.

In the second sentence of this excerpt we are told that law is not concerned with certain noble ends. Again the same basic ambiguity. If the law is not actually concerned with man's spiritual

"metaphysical, and sociological schools of jurisprudence are able to wage civil war. Were the interests of these schools properly confined to the history, the internal analysis, the metaphysical status, and the sociological functioning of law, respectively, conflict would be impossible and we should see, instead, simply a salutary division of labor. But each school has smuggled an ethics into its positive studies. To the argument of the historicists that since law is a product of national custom, the Rechtsgefühl, or the Volksgeist, it ought to follow these lines, the analytical school replies that since law is the command of the sovereign or the ruling of the courts, it ought to obey these latter masters. Jurists of metaphysical and sociological persuasion add to the heat of the fray with equally invalid brands of crypto-idealism.

29 MORGAN, INTRODUCTION TO THE STUDY OF LAW (1926) 32-33.
or moral character, that is an unfortunate fact which we ought to remedy. But if this assertion means that the law ought not to be determined with reference to such factors, it is simply false. Man's moral life is fundamentally molded by rules of property law, family law, etc., and the refusal to follow the meaning of such legal rules into their ultimate moral or spiritual implications is the essence of legalistic obscurantism.

In the third sentence we are told that consequently courts have to formulate rules which have no relation at all to morals, and here the confusion between the is and the ought bears its first fruits. Thus far Professor Morgan's statements can be justified if given a non-ethical interpretation, but if such an interpretation be given, the inference of have to (apparently ethical) from does and is is clearly fallacious. Here an ethical interpretation of the preceding sentences is required, and that, we have seen, results in error.

Thus Professor Morgan's conclusions are, if valid, based upon false premises, and, if based upon true premises, invalid. Their truth, as distinguished from the validity of their inference, can be defended, but only upon the assumption that the word morality is severed from reference to objective conduct and even to such problems of “inner belief” as are involved in the distribution of liabilities apart from fault, etc. Of course, if any one wishes to use the words morality and ethics in this milk-and-watery significance, no logical objection can be raised. But when such a use of terms results in, or springs from, the belief that judgments of good and evil can legitimately be applied only to man's secret intentions, we are called upon to point out that this is an indefensible theory of morality.

A great many other jurists have attempted in one way or another to discover an “end of law” independent of ethics or morality. Korkunov writes, “Morality furnishes the criterion for the proper evaluation of our interests; law marks out the limits within which they ought to be confined.” But it is obvious that the law does not actually do this, and if the reply is made that at least law ought to do this, then we must turn to morality for the basis and significance of this ought. Vinogradoff writes, “Law is clearly distinguishable from morality. The object of law is the submission of the individual to the will of organized society, while the tendency of morality is to subject the individual to the dictates of his own conscience.” Berolzheimer supplies the following argument, based, it seems, upon the unpleasant connotations of the idea of expediency: “If all law has

30 KORKUNOV, GENERAL THEORY OF LAW (1909), translated from the Russian in MODERN LEGAL PHILOSOPHY SERIES (1909) 62.
31 VINOGRAKOFF, COMMON SENSE IN LAW (1914) 58.
in view the welfare of society, then law abdicates in favor of administration; the ideal of political expediency displaces the idea of right." But it is impossible to exhaust the instances of this juristic attempt to abduct law from the domain of ethics and morality. Suffice it to say that the writers who make the ideal end of law independent of morality never refrain from passing ethical or moral judgments upon law. They have simply rejected particular moral theories, such as that of the infallibility of conscience (Vinogradoff), believing, correctly for the most part, that these doctrines are useless for jurisprudence, and incorrectly assuming that they are the whole of morality. A more or less unconscious moral standard is made the basis of their valuations of law, and while such a morality has frequently been more correct than the current ethical theory which was rejected, the resulting confusions of thought have been atrocious.

III

But there are further objections to our fundamental principle. Even those who admit, in general, the ultimate responsibility of law to morality sometimes suggest that there is at least a large body of law in the criticism of which ethics must be quite irrelevant. The boundaries of this non-moral realm may be variously drawn and may be either of a substantive character or of an adjectival or functional significance. In either view, such a claim is fatal to the soundness of our theory, which denies the ultimate validity of all legal criticism which is not ethical. It is our task, then, to examine and, if possible, to refute these objections.

There is, in the first place, a comparatively trivial interpretation which may be given them, in terms of which no incompatibility with our basic contentions can arise. By non-moral domains in the law we may mean sets of equally valuable alternatives. In this sense of the term, law, like every other aspect of human life, may be non-moral, but in these domains there can be no appeal from morality to a non-moral principle (precedent, custom, etc.) to decide which alternative is better than the other. By the very formulation of our problem we have denied that any alternative is better than the others. It is only the claim that in certain domains of law valid problems of what ought to be done may be solved without any appeal to the concept of the good life that we are concerned to refute.

Such a claim is presented by the theory that a large part of civil law, especially commercial law, constitutes a domain in which some principles other than those of morality must be our

32 BEROLZHEIMER, RECHTSPHILOSOPHISCHE STUDIEN (1903) c. 6, § 22, at 143.
What jurists frequently mean, I suppose, when they speak of the existence and necessity of non-moral law, is that there are many questions of conduct which would be morally indifferent if there were no law, but which become morally significant under the reign of law, and in regard to which it is morally imperative that the law take some definite stand. While the application of this proposition is often greatly exaggerated, its truth cannot be denied. The fact that something is affected by legal sanctions adds certain moral considerations to any problem of conduct. The possibility of being punished and of causing consequent harm to friends and dependents, the possibility of harming those who rely upon the law, the possibility of destroying social order, which in some degree is a necessary condition of the good life, all these are pertinent facts in a moral judgment, which may appear only after law is created. All this, however, offers no ground for supposing that a rule of law which sanctions or condemns a previously indifferent act is itself a non-moral rule in the sense of being immune to moral appraisal. The demand that I save a friend’s life and the act by which this is accomplished do not cease to be moral if there are a number of slightly different ways of attaining this result, among some of which my choice is morally indifferent. So when a legislature chooses between a rule keeping traffic to the left and one keeping it to the right, if it is ever the case that physiological peculiarities or social habits do not make one of the contemplated rules less dangerous than the other, the demand that the law enact one of the two possible rules is no less a moral demand because of the indeterminateness of the alternative. It is upon such a moral demand that the justification of so-called non-moral law must rest, and such a demand may easily so outweigh all the other factors in the situation that it would be good, say, to keep to the right, that being the law, even though the law ought to have been made, originally, the other way.

A second claim of exemption from the domain of morality is commonly advanced on behalf of the judicial function. The question which a judge faces in coming to a decision, it is argued, is purely legal, not moral. Legislatures may endeavor to decide what the law ought to be, but it is for the judge to decide what, in any particular case, the law is. It is apparently in this vein that Maine, distinguishing the philosophy of law from the philosophy of legislation, says, “The jurist, properly so called, has noth-

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33 The argument is particularly directed to such rules as those determining the age of majority, the interpretation of standard phrases in deeds and wills, etc.

34 For example as in Hobbes' doctrine that morality first arises under the reign of law.
ing to do with any ideal standard of law or morals." 35 And in the same vein Dean Pound has said, "The utilitarian theory of Bentham was a theory of legislation. The social theory of the present is a theory of legal science." 39 So, in the general philosophy of the Anglo-American bench and bar, "public policy" (the legal equivalent for "morality") seems to be relevant to the decision of a case only when precedents and statutes fail and the function of the judge becomes "legislative."

Now it is clearly true that the nature of the good does not determine the decisions of judges. Such a determination, as Santayana remarks, is the essence of magic. It is also true that judges generally come to decisions without thinking about moral principles. 37 But it is not true that the goodness or rightness of a decision can be measured except in moral terms.

It may be the case, again, that the professional disavowal of "moral" considerations refers only to the "conscience" theory of morality exemplified in Professor Morgan's dichotomy between "moral character" and "objective conduct." As such it is a valuable defense against the sentimental theory of justice, now increasingly fashionable, 38 which abstracts from the elements of a case everything but the interests of the two parties, and weighs these by an intuitive application of the judge's code of "fairness." But in its actual use, the theory we are attacking goes far beyond this repudiation of sentimentalism. Its actual effect is to exclude the conscious consideration of ethical issues from the judicial mind and to lend weight to the unconscious and uncriticized value standards by which judges decide what they ought to do. Fundamentally it attempts to set up as a standard of legal criticism truth or consistency rather than goodness. But neither truth nor consistency can be rivals to goodness, in legal criticism or anywhere else. Truth and consistency are categories which apply to propositions or to sets of propositions, not to

35 Maine, Early History of Institutions (7th ed. 1914) 370 and lectures 12 and 13 passim.
36 Pound, Mechanical Jurisprudence (1908) 8 Col. L. Rev. 605, 613; and see Pound, The Scope and Purpose of Sociological Jurisprudence, op. cit. supra note 8, at 140 n. 4.
37 The judge, of course, makes all sorts of moral assumptions, not only in choosing among competing doctrines but as well in the supposedly logical processes of generalization, classification, and construction by which respectable "rules" are drawn from precedent and statute. In difficult cases such moral assumptions frequently become explicit and may even invite analysis. But the question to which the judge's critical faculties are regularly restricted is: "What decision would an intelligent lawyer familiar with statutes and past decisions expect in this situation?" or, more politely, "What is the law?"
actions or events. A judicial decision is a command, not an assertion. Even if any sense could be found in the characterization of a decision as true or false (or, in the non-ethical sense of the terms, right or wrong, correct or erroneous), such truth or falsity could not determine what decision, in any case, ought to be given. That is a question of conduct and only the categories of ethics can apply to it. In answering such a question, the ethical value of certainty and predictability in law may outweigh more immediate ethical values, but this is no denial of the ethical nature of the problem. Consistency, like truth, is relevant to such a problem only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical. The question, then, of how far one ought to consider precedent and statute in coming to a legal decision is purely ethical. The proposition that courts ought always to decide "in accordance with precedent or statute" is an ethical proposition the truth of which can be demonstrated only by showing that in every case the following of precedent or statute does less harm than any possible alternative.

The ethical responsibilities of the judge have so often been obscured by the supposed duty to be logically consistent in the decision of different cases that it may be pertinent to ask whether any legal decision can ever be logically inconsistent with any other decision. In order to find such an inconsistency we must have two judgments, one for the plaintiff and one for the defendant. But this means that we must have two cases, since a second judgment in the same case would supersede the first judgment. And between the facts of any two cases there must be some difference, so that it will always be logically possible to frame a single legal rule requiring both decisions, given the facts of the two cases. Of course such a rule will seem absurd if the difference between the two cases is unimportant (e.g., in the names or heights of the two defendants). But whether the difference is important or unimportant is a problem not of logic but of ethics, and one to which the opposing counsel in the later case may propose opposite answers without becoming involved in self-contradiction.

The confusion arises when we think of a judicial decision as implying a rule from which, given the facts of the case, the decision may be derived (the logical fallacy of affirming the consequent). That logically startling deduction of the "law of
precedents" from judicial precedents, Black's *Handbook of the Law of Judicial Precedents*, thus sums up the matter:

“Even if the opinion of the court should be concerned with unnecessary considerations, or should state the proposition of law imperfectly or incorrectly, yet there is a proposition necessarily involved in the decision and without which the judgment in the case could not have been given; and it is this proposition which is established by the decision (so far as it goes) and for which alone the case may be cited as an authority.” 40

But elementary logic teaches us that every legal decision and every finite set of decisions can be subsumed under an infinite number of different general rules, just as an infinite number of different curves may be traced through any point or finite collection of points. Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case. Logic provides the springboard but it does not guarantee the success of any particular dive.

If the doctrine of *stare decisis* means anything, and one can hardly maintain the contrary despite the infelicitous formulations which have been given to the doctrine, the consistency which it demands cannot be a logical consistency. The consistency in question is more akin to that quality of dough which is necessary for the fixing of a durable shape. Decisions are fluid

40 Loc. cit. supra note 39.
until they are given "morals." It is often important to conserve with new obeisance the morals which lawyers and laymen have read into past decisions and in reliance upon which they have acted. We do not deny that importance when we recognize that with equal logical justification lawyers and laymen might have attached other morals to the old cases had their habits of legal classification or their general social premises been different. But we do shift the focus of our vision from a stage where social and professional prejudices wear the terrible armor of Pure Reason to an arena where human hopes and expectations wrestle naked for supremacy.

No doubt the doctrine of stare decisis and the argument for consistency have a significance which is not exhausted by the social usefulness of predictable law. Even in fields where past court decisions play a negligible role in molding expectations, courts may be justified in looking to former rulings for guidance. The time of judges is more limited than the boundaries of injustice. At some risk the results of past deliberation in a case similar to the case at bar must be accepted. But again we invite fatal confusion if we think of this similarity as a logical rather than an ethical relation. To the cold eyes of logic the difference between the names of the parties in the two decisions bulks as large as the difference between care and negligence. The question before the judge is, "Granted that there are differences between the cited precedent and the case at bar, and assuming that the decision in the earlier case was a desirable one, is it desirable to attach legal weight to any of the factual differences between the instant case and the earlier case?" Obviously this is an ethical question. Should a rich woman accused of larceny receive the same treatment as a poor woman? Should a rich man who has accidentally injured another come under the same obligations as a poor man? Should a group of persons, c. g., an unincorporated labor union, be privileged to make all statements that an individual may lawfully make? Neither the ringing hexameters of Barbara Celarent nor the logic machine of Jevons nor the true-false patterns of Wittgenstein will produce answers to these questions.

What then shall we think of attempts to frame practical legal issues as conflicts between morality, common sense, history or sociology, and logic (logic playing regularly the Satanic role)? One hesitates to convict the foremost jurists on the American bench of elementary logical error. It is more likely that they have simply used the word "logic" in peculiar ways, as to which they may find many precedents in the current logic textbooks.\footnote{See M. R. Cohen, The Subject Matter of Formal Logic (1918) 15 Jour. of Phil. 673.}
Bertrand Russell has warned us:

"When it is said, for example, that the French are 'logical', what is meant is that, when they accept a premise, they also accept everything that a person totally devoid of logical subtlety would erroneously suppose to follow from that premise... Logic was, formerly, the art of drawing inferences; it has now become the art of abstaining from inferences, since it has appeared that the inferences we feel naturally inclined to make are hardly ever valid." 42

If we construe the word "logic" in the light of this warning, we may readily agree with Mr. Justice Holmes when he asserts that "the whole outline of the law is the resultant of a conflict at every point between logic [viz. hasty generalization] and good sense", 43 and find some meaning in the statement of Judge Cardozo that "the logic of one principle" prevails over the logic of another 44 or in his pride that "We in the United States have been readier to subordinate logic to utility." 45

42 Russell, Skeptical Essays (1928) c. 7 (Behaviorism and Values) 99.
43 Holmes, Collected Legal Papers (1920) (Agency) 49, 50.
44 Cardozo, Nature of the Judicial Process, (1921) c. 1 (Introduction. The Method of Philosophy) 41. Judge Cardozo illustrates (op. cit. 38-39) the method of logic or philosophy, which is distinguished from the methods of history or evolution, of custom or tradition, and of sociology, with the rule that one who contracts to purchase real property must pay for it even though, before the sale is actually completed, the property is substantially destroyed. This, he maintains, is the projection to its logical outcome of the principle that "equity treats that as done which ought to be done," a principle which does not apply to the sale of chattels which did not come under the jurisdiction of Chancery. But what sort of principle is this? It is certainly not a logical principle, i.e., a proposition certifiable on logical grounds alone, since it is obviously false. If it were true no plaintiff in equity could ever obtain a judgment since he could never in the face of such a rule show that the defendant had not done what he ought to have done. Would it not be quite as logical for a court to say "equity does not treat that as done which has not been done"? If a rule is undesirable we do not make it less undesirable by deducing it from another rule too vague to be liked or disliked and then concentrating our attention on the process of inference rather than the premise. What is in question in the case proposed is not a logical problem or a choice of judicial methods but a conflict of social interests, and there is much that may be said in favor of throwing upon the party who contemplates future enjoyment of a definite piece of real property the risk of its destruction and the necessity of insurance. But what may thus be said bears no peculiar imprimatur of logic. See also Cardozo, The Growth of the Law (1924) 79-80.

45 Cardozo, The Growth of the Law (1924) 77. This is said with regard to the tendency in recent decisions (of which Judge Cardozo's opinion in MacPherson v. Buick Mfg. Co., 217 N. Y. 382, 111 N. E. 1050 (1916) is a noteworthy landmark) to extend the scope of a manufacturer's obligations to the ultimate consumer with regard to the quality of the product.
We may have to interpret the word "logical" as synonymous with "aesthetically satisfying" in order to understand the statement of Mr. Justice Brandeis and Mr. Warren that a distinction between cases where "substantial mental suffering would be the natural and probable result" of an act and cases "where no mental suffering would ordinarily result" is not logical though very practical. Such an identification of the rules of logic with those of intellectual aesthetics seems to be assumed at times by Judge Cardozo as well.47

No verbal definition is intrinsically objectionable. But it seems fair to suggest that the use of the word "logic" in the senses exemplified in these typical passages seriously lowers the probability of clear thinking on the relation between law and ethics. Most of us think of logic as the most general and formal of the sciences.48 Upon that basis we may say, paraphrasing a remark of Mr. Justice Holmes, that conformity with logic is only a necessity and not a duty. The bad judge is no more able to violate the laws of logic than he is to violate the laws of gravitation. He may, of course, ignore both. It is not our purpose to deny that there would be less judicial stumbling were courts more constantly aware of the logical relations between particular and universal, between premise and conclusion, between form and content.

IV

The theory which denies ethical justiciability to law, in whole or in part, cannot be maintained. Its superficial plausibility
arises from the narrow connotation given to the terms ethics and morality when they are extruded from the field of legal criticism. The falsity of the theory arises from the fact that, along with the promptings of "conscience", the principal values of life are banished from the juristic consciousness and an inadequate "practical" ethics substituted. The invalidity of the inference by which this theory is established arises from the fallacy (quaternio terminorum) by which the extrusion from legal criticism of "ethics" in its broadest sense is inferred from a denial of its legal importance in its narrower connotation. Finally, the confusion of the theory lies in the indeterminate character of the system of values substituted by our jurists for what they call "ethics" and "morality."

Law is just as much a part of the domain of morality as any other phase of human custom and conduct. It has no special purpose, end, or function, no restriction of moral scope, other than that variable restriction which its positive and practical nature may impose in the way of limitations of efficacy and applicability. We may, if we like, call the good which law can achieve "justice." But if "justice" means anything less than that total, it is not a valid basis of legal criticism. To say that something or other is beyond the "proper scope" of law is either to say that law on that subject will bring about more harm than good or it is to indulge in meaningless verbiage. The evaluation of law must be made in terms of the good life, and to demonstrate the nature of this standard is the task of ethics, and more particularly, of morality. Difficult as that task is and uncertain as its conclusions have been, it is a vicious illusion to suppose that the task of statesman or judge is less difficult, or that his conclusions can be more certain.