What Should Be the Relation of Morals to Law?: Panel Discussion

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of such systems has been the work of such recent minds as Nietzsche, his predecessor Schopenhauer, and his followers Gobineau, Sorel, Treitschke, Klages, Spengler, Sombart, Mussolini, Marinetti or Rosenberg.\footnote{Although with reservation, Bergson, Ruskin or Carlyle should also be mentioned in this connection. One should also not overlook the conditioning influence of Darwin, Dostoevski and Freud. None of them, perhaps not even Nietzsche, should be held responsible for their epigones.}

To the convinced believer in eirenic justice, the very application of the intellect to the elaboration of such systemic glorification of violence appears as treason against the spirit itself. But the fact remains that these systems have been developed and that there has long before them existed that attitude of which they are but articulations. In all these systems we find the glorification of "life" over reason, the depreciation of the intellect as sterile, the praise of passion, even violent passion, as creative, the contempt of peaceful harmony as dull and effeminate and the joyful acceptance of dangerous living in a world of continuous fight and struggle. To a consistent follower of the agonistic ideal the eirenic society and its law must appear not as just but unjust. How then can we postulate the justness of the eirenic law? Is there any standard by which we can determine the justice of these two \textit{ultimate social ideals}, similar to the standard which we have found within each one of these two ideals for the determination of the justice of a given legal system or law?

To this ultimate question the answer cannot be provided by reason, at least not if we define reason as dispassionate reflection about experience. Such reflection can, within the limits already indicated, help us determine the adequacy or inadequacy of the means by which we may try to achieve our ultimate end, but cannot aid us in the choice of these ends themselves. In that choice we are determined by other factors. Reason cannot help us in choosing between Wodan and Christ, between the spirit of the Gragas and that of the Sermon on the Mount. If we are materialistically inclined, we may say that this choice is determined by education, by environment, or by individual variations of inner secretion or other physiological factors. If we are religious, we shall find our choice determined by faith which, in Christian belief, has to find its basis in Grace.

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Appreciation of the moral phase of law is retarded by (1) its commonplaceness; \textit{e.g.}, the occasional observation of an impartial person that "this is the law, but not the justice of the case" con-
cerns a discordant decision or statute which arouses criticism because it is unexpected;

(2) the complexity of many moral problems, with consequent differences in opinion;

(3) the fact that some able scholars hold that law concerns only the clash of interests in which the parties camouflage their desires and emotions by employing a language of objective valuation.

For these and other reasons, until recently, in many academic circles the fact that the man on the street made sense of “right” and “wrong” merely reflected his naiveté. And arguments which implied theological positions could be categorically dismissed as dogma. In a word, it was fashionable to transform (and mutilate!) valuation into a factual datum.

The law schools received the products of this perspective. The publicized connivings of a few lawyers—but not the untold acts of unrewarded service of the majority—were accepted by students as the sort of thing the smart fellows do. Courses limited to the professional code of ethics and the exhortation of distinguished judges and lawyers were ineffective.

The last war raised basic challenges to this perspective in the minds of students who, as soldiers, had observed and experienced self-sacrifice. The battle of the experts, besides providing critiques of naturalistic theories, has made it evident that only the wilfully uninformed can still say that only religionists and “absolutists” defend objective valuation in law. And the rise of sustained interest in the functioning of law and in legal science has placed the problems of the ethics of law in new contexts. One principal gain of these recent developments is, if not the willingness of adherents to re-examine their old positions, at least a climate of opinion in which anyone may defend valuation without apology.

The theories of objective valuation in law cannot be discussed here.¹ But it is possible to suggest the significance of such valuation.

The paramount function of law is to give meaning to human life by expressing values and by maintaining conditions which facilitate value experience. The distinctiveness of law is found in its transcendence of the end of biological survival. Law is significant precisely in those qualities, including the use of coercion, which distinguish human history from biology and physics. This also distinguishes legal science and the practice of law from other disciplines. For example, the artist creates a personal account, unfettered by facts. And, at the other extreme, the theologian and prophet stand at the brink of eternity, viewing the human situation against the infinite. Intermediate are many disciplines,

¹ The writer has discussed the basic issues in his Living Law of Democratic Society (1949), especially in chapter 2.
descriptive or evaluative, which glimpse segments of community. Only law is both rational (in important degrees) and all-inclusive of the facts and problems of human life, limited to earth. It follows that the lawyer, to the extent to which he participates in the inclusive meaning of law, approaches the ideal which Plato designated the “true legislator.”

If morality is abstracted from law (and pro tanto from the human drama), what remains of control that is not found in the beehive or the wolf pack? (The question is not meant to be rhetorical but, instead, to point to vital human problems which cannot be blinked.) Human life loses the best of its significance when its value dimension is ignored—and law makes an essential contribution to human values.

If law is significant because it represents and implements a community's moral way of life, the job of the professionals is understandable—they are specialists whose skills and interests are subordinated to the social ends of law. Thus, it requires a high order of sophistication or a sense of low humor to set the interests of the profession in opposition to those of the legal order.

One can best appreciate the quality of law when he participates in the functioning of law in society. Perhaps the quickest professional, i.e., vicarious, way to an appreciation of the value phase of law is in the trial of cases which involve the elementary harms of criminal law, torts, or the basic family relations. The testimony of the injured, the victimized, and the betrayed raises simple moral issues that form the central themes of dramatic trials. What is obvious here is present in all legal transactions.

Office lawyers, draftsmen, and counselors who devote themselves exclusively to intricate regulations are remote from the functional meanings of the rules with which they work. The difference is not merely one of degree. For, although in analysis one must distinguish the rational from the emotional side of value experience, in fact the two are inseparable. The modern lawyer is often the victim of specialized intellectualism. Inexperienced in the living law, the morality of law becomes for him, at best, a speculation in ideas. Only by persistent, imaginative following-through of the paper plans into the conduct of, and consequence for, the human beings who, as managers, stockholders, employees, consumers, and so on, actualize the formulas, can he apprehend the moral connotations of the office work. That is why the science of law is not merely relevant to the ethics of law; it is essential to a thorough appreciation of that dimension of law. The effort to understand functioning law and legal institutions in operation includes grappling with the relevant, inevitable moral issues.

Implicit in what is stated above is the thesis that, at least for scientific purposes, the term “law” must be limited to power norms which are defensible on ethical grounds. This thesis rests on the premise that
the actual controls of known societies place unavoidable restrictions upon the use of the word "law" by those interested in a science of law. In the practice of law a looser use of the word is permissible and, indeed, the criteria of law are different. But the science of law must take account of all the significant essential characteristics of the potential subject matter of law; i.e., the nature and objectives of legal science determine the relevant criteria of law. The data thus selected, including the immanent values, have their impact upon the professionals and guide the direction of their creative efforts.

In sum:

(1) The functioning of law in society is the place to go for the experience and illustration of valuation in law.

(2) Legal science, focusing on permanent, significant attributes of functioning controls, must include valuation among its criteria of law.

(3) The practice of law is often remote from the functioning of law, and thus becomes insensitive to legal values.

(4) Some implications have been indicated for schools desirous of inculcating a genuine appreciation of the ethical aspects of law, and for practitioners who wish to experience valuation in law more vividly than technical practice allows.

Morris L. Ernst*

I approach the problem of the relation of morals to law with a profound conviction that most of the folkways which we bracket under the heading of moralities are in fact only a part of the changing conventions of man and woman. This would seem to be most strikingly true in the area of so-called sexual morals where law and prevalent preachments have little to do with life as it is being lived. In our own mores, hypocrisies are more readily maintained by the use of moral descriptions, a practice resting in part on our confused Puritan-Irish background. Thus, for example, books are suppressed in Puritan-Irish Catholic sections and not, for example, in Catholic-Latin New Orleans. Seldom in any part of our land has the law in the field of sex morals spoken with clarity—because our "moral" fears rejected science. Conventions bend to science while so-called morals resist facts and science.

As one example, take the word "obscenity" and the idle repetitive synonyms which are usually piled on top of that word in the state and federal statutes aimed at censoring the literary intake of man. The average man might well believe that obscenity is one area where morals and law must always have had at least a speaking acquaintanceship, but even cursory research testifies that for about a century our nation

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