1907

The Nature of Law

Hugh Evander Willis

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Human Rights Law Commons, Law and Philosophy Commons, and the Law and Society Commons
THE student of law has before him for consideration two great collections of contending, conflicting phenomena—one representing the rights of the individual, individual initiative, the power of the separate wills of the myriads of human beings in the world; the other, the rights of society, social restraint, the power of law in its early forms and as administered in the law courts of to-day. In other words, he is busied over the problem of liberty, of striking the proper balance between the individual and his fellow men; for true liberty consists in the absolute freedom to do as one chooses so long as he does not interfere with the rights of other men or of nature. The individual is in constant activity, constantly in motion, constantly claiming more than his share of the advantages and privileges of nature, constantly invading the domains of the capabilities of others. He not only claims the rights of life, liberty, reputation, property, marriage, parentage, livelihood, all political, industrial, educational and religious rights for himself, but, what is vital to this discussion, he neglects to recognize these rights in other men.

Had men always lived according to and obeyed the moral law of their own constitution, had they always listened to the voice of conscience and been restrained by its sanctions, there might never have been any need for human laws; but, more than now, in primitive days, conscience spoke to the race in a voice so low, or the ears of primal barbarous man were so dull of hearing, that the moral law had very little control over him. Hence the problem: How should the majority, or dominant power, keep men from interfering with the rights of their fellow men? The manner in which society has attempted to accomplish this has been by enacting human law with penalties more severe than those of the moral law seemed to be.

What, then, is our question, has been the essential characteristic of this man-enacted law? In its real nature, is it positive or negative? Does it command man to do some things, or forbid his doing some things? Does it tell man what he must do, or what he must not do? Is its purpose to make men do right, or to prevent their doing wrong? Does it give men rights, or protect their rights? Is it creative, energizing, inspiring, or destructive, restraining, controlling? Does it tell men to be perfect, or simply punish certain of the worst imperfections? Does it give men freedom, or limit the exercise of his freedom?

At first it may be thought that such a question is not practical, but, even though it does not concern the every-day mat-
ters of the law, it does concern so funda-
mental a conception of the entire body of
the law that I think no one would deny
its importance. A sure and logical under-
standing of the primary and underlying
principles of the whole of any subject is
the best way to acquire a mastery of that
subject; and such knowledge, though
not used in any particular part, or ap-
lication, of it, will yet so shine through
and illuminate the parts that the posses-
sor will often exhibit a skill and strength
that otherwise would be impossible.

For an answer to this general question
we are not limited to abstract reasoning,
but there is a wealth of historical materi-
al at hand. We are able to go back to
almost the beginnings of human law and
trace its development step by step, dis-
covering its real nature at each step,
from the time it first began to be
formulated in rude simplicity down to the
present with its multifarious and com-
plicated variations, unfortunately not ly-
ing in one great system even in the com-
mon-law countries, but scattered through
the common law, constitutions, statutes
and ordinances in the wierdest confusion.

The earliest laws discoverable among
the different lawmaking nations of the
world all seem to have a tort aspect.
Laws always seem to follow natural
lines, and we see laws gradually coming
in to take the place of individual vio-
ence. The first attempt to restrain and
limit the conduct of others was purely
individual, and was due to the fact that
each person felt that he had a right to
life, health, reputation, property (at least
for his family), livelihood and the mar-
riage relation. While men felt that they
were entitled to all of these rights, they
did not realize that their fellow men were
titled to the same rights, but instead
did anything that they had the physical
strength to do. The principles of the
moral law exerted little control. As a
consequence the peace and safety of so-
ciety became exceedingly unstable. Mur-
ders were common. Robberies, assaults,
batteries and the many acts threatening
the marriage relation—than which noth-
ing could more intensely inflame the
passions of men—made society danger-
ous. No man could be sure of his life,
property, or other rights unless he was
able to secure them by the strength of
his own right arm, or the assistance of
his kindred. In such a state of society
the first laws began to take shape. Per-
haps the earliest laws were only the con-
sensus of opinion as to what a man ought
to be allowed to do to redress his own
wrongs. This soon took the form of
authorized vengeance. Successive ex-
ecutions of this public opinion finally
 crystalized into precedents. Precedents
were altered, added to, and preserved
in written ordinances, statutes and con-
stitutions, the number and character of
these varying as the dominant element
in society changed from the patriarch,
to the aristocracy, and finally to the
democratic majority. But for a long
period of time, whether the individual
had to look to himself or to the com-
munity for the redress and protection
of his rights, the only prohibitions
against acts were those against torts.
The laws seem to have been penal, but
the penal law of ancient communities
was not a true law of crimes—a punish-
ment of public wrongs—but a law of
torts, the dominant power (or State)
being merely the arbiter. So that, if
the criterion of a crime be that the State
and not the person is the one suffering
from the wrong, in the beginnings of
the law crimes were unknown; the sta-
bility and security of society, the adjust-
ment of the rights of men, freedom, de-
pended upon the prevention of private
wrongs rather than upon the prevention of wrongs against the State considered as an entity. The idea of a separate offense against the State, or aggregate community, was not conceived of until the State had redressed, or prevented, private wrongs so long that it came to consider that it had rights somewhat analogous to the individual man.

All of these laws of torts, not only in the beginning, but even to-day, are negative in character. Men are not told what they must do but what they must not do. In general men have been allowed to do anything that they wanted to do, to be absolute judges of whether they should or should not do a certain thing. It has been only when they attempted to violate certain rights of others that they have felt the restraining power of the dominant element in society acting for society as a whole for the purpose of controlling the conduct of the offender for the protection and benefit of the many. The possibilities of human action and the difficulties in the way of controlling it were too great for society to leave the task to individual defense, or for society to attempt anything but the minimum of regulation. Hence it said nothing about the great mass of human acts, but concerning a few which it considered the most heinous it said "thou shalt not," and punished the disregard of the command, at first, with the most severe punishments, generally death in one way or another. Even these prohibitions were generally found only in the punishments prescribed. Modern punishments are less severe because of the fact that the law of torts has split up into crimes and torts, and the former has taken all the severe penalties of the early law, and the latter is confined to damages, the progeny of the primitive surrender of the offending thing and the buying off of the avenger. Men are told: "Thou shalt not" assault thy neighbor, nor falsely imprison him, nor maliciously prosecute him, nor slander or libel him, nor trespass upon his property, nor commit waste of his property, nor convert it, nor erect a nuisance, nor, under certain circumstances, be guilty of negligence; but nowhere is there a catalogue of the things they must do.

It is true that many of these laws, instead of following the moral law, have been the clearest perversions of it, but those who have enacted them have apparently had their ideals, although they have seen darkly, and great as has been the suffering caused by cruel and unjust laws they have been as nothing to what they would have been had not legislators confined their laws to prohibitions. This thought is well expressed and summarized in the words of Justice Wilson: "In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress not those limits which are assigned to him by the law of nature; in a state of civil liberty, he is allowed to act according to his inclination, provided he transgress not those limits which are assigned to him by the municipal law. True it is, that, by the municipal law, some things may be prohibited which are not prohibited by the law of nature; but equally true it is, that, under a government which is wise and good, every citizen will gain more liberty than he can lose by these prohibitions. He will gain more by the limitation of other men's freedom than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances than he can lose by the restriction of it in a few."
This is the manner in which humanity has found the equilibrium between the rights of the individual and his fellow men so far as those private rights which fall within the realm of torts are concerned. We will now trace the history of crimes and contracts in order to discover the method employed in those realms. We have seen how the law of torts has kept in touch with the natural instincts of men and how by building up one prohibition after another the present extent of the law of torts was finally reached. The work on criminal law and the law of contracts was not begun until a later time, and it has been only after long years of toil that they have been brought to their present state, of perfection or imperfection.

The early law of torts was civil but with a criminal aspect; it satisfied the private party and at the same time afforded protection to the community, and now and always the general principles of criminal and civil liberty are the same. In the separation of the law of crimes from the law of torts the indictment has taken the place of the appeal; the presentment is the successor of fresh pursuit and lynch law. Ignorance of the law (the rights of others) is no excuse for the individual because he has to be sacrificed for the general good. Little by little society began to feel that it had rights to be safeguarded, and as this idea grew stronger and became localized they passed from the realm of private into the realm of public law. One by one laws have been built up to restrain the conduct of men so far as various public matters are concerned, and these constitute our criminal law. Yet, here again the object of criminal laws has not been to force men to do certain specific things, not to shape and mold their lives—they have been left free; but to restrain them from invading the coequal rights of others. Consequently these laws have been in the nature of prohibitions. They have set limits to the movements of human wills. They have been banks to the current of human will power. There are some acts so dangerous to society in general that the latter cannot permit them to be done. Such are homicides, mayhems, assaults and batteries, robberies, libels, rape, seduction, abortion, adultery, arson, burglary, forgery, larceny (all crimes against some person), and there are also some acts which are crimes against the government itself, which is organized for the purpose of preventing the first named wrongs. For the commission of any of these crimes the law punishes the criminal with severe punishments, varying in severity with the crime. But here the punishments stop. Men are not fined and imprisoned for neglecting to do positive acts commanded by the law, with a few modern exceptions, does not utter any such commands.

In the same way (although because of the greater artificiality and formality of contracts the principle is not so easily seen), by reason of the fact that the breaches of agreements are often not only exasperating but disastrous and the moral law seems too weak to prevent them, little by little men have extended the wall of prohibition from the region of torts along a part of the domain of agreements. The beginnings of this work are found in the early customs that grew out of the demands and necessities of the business world. At first the only breaches of agreements punished were those of the most simple "real" contracts and other unilateral contracts, including formal conveyances, but the punishment has been extended to the breach of the consensual contract. Nothing posi-
tive has been commanded. Only a small part of the territory of agreements even has been touched, most agreements being controlled only by the moral law. And, in order to be a contract, whose breach is forbidden by human law, at first the agreement had to rest upon a duty imposed by law because of delivery of property or the most ceremonious formalities; and at the present time it must be a complete offer and acceptance, rest upon a valuable (?) consideration, or be under seal, in certain cases be in the proper written form, and be free from fraud, duress, undue influence, mistake, immorality, or other vitiating circumstances—all of which shows the relationship of contracts to torts and the moral law. If an agreement possesses all of these prerequisites, that is, is a valid contract, if a person breaks it, in addition to the penalties of the moral law, he must pay the penalty prescribed by the majority in the State, as the punishment for the wrong to the individual with whom he has been dealing—for not keeping within the wall of limitation established; which punishment, as in the case of torts, is generally the payment of damages to the party wronged. This is the minimum of regulation for society to exercise, and not to exercise this would lead into society the same evils that existed in the region of private vengeance before the law stepped in and took the weapon of vengeance out of the hand of private persons. Even now, the law does not order men to make these valid contracts, but, having made them, the law forbids their breaking them on penalty of payment of damages for such breach, or, in quasi contracts, forbids one person to unjustly enrich himself at the expense of another.

This method of development and this nature of the law seem to be characteristic of all the nations that have generated systems of laws of their own, including the Babylonian, Hebrew, Greek, Roman and English. The Hebrew system may be considered typical. This system, which modern scholars have discovered is the result of a slow growth, was first adapted to nomadic life, then to agricultural, and last to commercial. The earliest laws are only one step removed from the code of private vengeance; they begin with authorized vengeance. Animate and inanimate things are punished alike for injuries received. Progress continues until the laws are executed by properly constituted magistrates. But these penalties are to be inflicted, not for failure to do something commanded, but, except in the case of a few religious matters and in their late history public matters, only for doing something which their Mosaic code had solemnly forbidden. The thought underlying their legal system seems to have been that there are certain acts which human beings are liable to commit, which are so dangerous, or destructive, or demoralizing, that they should be prohibited; and, therefore, its commands, whether thundering forth from Sinai or issuing from the quiet retreats of prophets and priests in their hiding places in the land of Palestine, all seem to have as their fundamental principle this negative idea. They are "thou shalt nots." There are a few things that must not be done. The Hebrews are told that they must not worship idols and heathen gods, desecrate the Sabbath, kill, steal, commit adultery, or an assault, or incest, etc., on pain of the severest punishments.

This exposition might be carried farther so as to embrace the working of the principle in all the subdivisions of the law, by showing how infants, insane, corporations and other persons, natural and
artificial, have greater restrictions placed upon them than the average person, and by showing how the principle underlies the subjects of wills, property, all contract subjects, almost all the subjects known to the law and the statutes passed by legislative bodies; but I think enough has been said to show that the real nature of human law is negative and not positive. Of course there are some laws positive in character, but these have to do with administrative and remedial matters, are a late development, form only a small part of the body of the law, and all of them appear to exist for the purpose of enforcing those primary laws which are negative in character and in which we must expect to find the true nature of law. However, because of this fact, some legal writers, notably Mr. Holland, have insisted that, in nature, law is not merely negative but imposes positive obligations; but it seems to me their position is not correct historically in that it does not show the real nature of law in the past and so far as it has yet developed, and Mr. Pollock's remark that Mr. Holland has unduly emphasized the right of the individual over his duty to others, or the rights of others, is a just criticism.

Practice Work in the Law Colleges.

By PHILIP T. VAN ZILE,
Dean Detroit College of Law.

My only excuse for producing this article, which necessarily must be more or less personal, if excuse should be made, is that it is the result of compliance with a request of the editor of the "Review" that I should give to the public the work of "The School of Practice" under my supervision in the "Detroit College of Law."

My consent to do so, however, was given upon the condition that I might notice some of the current criticisms of Law School work generally indulged in by some of the several Law Associations.

It has, indeed, been interesting to note the growing interest of the bar for the last ten years in the work of the Law Colleges, and particularly the interest shown in the last five or six years by the Bar Associations of the country, I note the time of this developing interest, because prior to ten, or possibly fifteen, years ago there was no apparent interest exhibited by the bar or the Bar Associations on this subject. Fifteen years ago, and in portions of the country very much less, the young lawyer was largely the product of the law office, getting his knowledge of the law in a sort of catch as catch can way, without any especial attention from his so-called preceptor, except now and then, when called upon to hunt up a witness or copy and serve a pleading, or, in some country offices, to sweep out the office and build the fires; the greater portion of the time of the student in the office being taken up in perusing some law book undirected and alone, and after a year or so of such like work the student applied to the Court for ad-