What Should be the Relation of Morals to Law

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What has been said applies more obviously to the lawmaker than to the administrator or adjudicator of the law. But the administrator or adjudicator, though in duty bound to valid law as it comes to him, should be guided by the same principles to the extent they can be applied to his special responsibilities. He too must remember that the foundation of our society is the natural and revealed law, in the light of which positive law must be interpreted and applied. To the extent this is not possible then the particular law is a bad law.

The matter may be stated in another way. In both the natural and the supernatural order the State is an instrument for the achievement by man of his last end. Whether this end be expressed in terms of life, liberty and the pursuit of happiness, or in terms of life everlasting in its most exalted sense, it is susceptible of successful achievement only in a manner which is consistent with morality. This is not only the teaching of history but of reason and of revelation. Law is one of the great facets of such a State and should further its purpose by making the relationship between law and morals in reality as close as possible to the ideal, that is, to coincidence.

Needless to say every law does not partake of this character, but such departures as there are do not establish the relationship which should exist.

Rules of law are rules of conduct, and therefore they are necessarily surrounded by an atmosphere of morality: with the Greeks the connexion between ethics and the administration of justice was especially close and productive of direct results.5

Surely no less should be the connection between morals and the law of our day and of our future.

MAX RHEINSTEIN*

I

Man craves for opposites: liberty and order. While loath to limit his own freedom of unpredictable action, he is constantly striving for security through predictability. He speculates about, or inquires into, the secrets of nature in order to predict, or even to manipulate, its course. He seeks to reduce the insecurity threatening from his fellow human beings by predicting or “regulating” their behavior. Civiliza-

5 2 VINogrADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 265 (1922).

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tion implies social order. This social order, which is forever threatened by the individual’s urge for freedom, is based upon regularities of human behavior grounded in man’s biological nature. It is predictable that, at certain intervals, man will have to eat, drink and sleep, that he will engage in sexual activities or that he will seek shelter and clothing. It is predictable that he will seek to satisfy his psychological need for recognition. Another wide range of predictability is provided by man’s tendency to imitate the behavior of others, especially of those to whom he ascribes exemplariness and authority, and, even more strongly, by his tendency to follow established habits and traditions. Finally, human behavior is made predictable by man’s creation of norms, by the existence within his mind of ideas that certain lines of behavior are demanded of him, that he ought or ought not to conduct himself in certain ways. These contents of the mind are productive of the behavior demanded by the idea of an “or else.” The norm is characterized by its sanction. Among normative ideas, four types are noteworthy because of their eminent importance for the achievement of social order, four types which are distinguished not by the nature of the conduct demanded but solely by the sanction taking place or expected to take place in the case of failure to obey.

The first of these norm systems, that of social convention,¹ is characterized by the unorganized disapproval by our fellow human beings which may range all the way from mild censure hardly expressed at all to ridicule or social ostracism. There are, second, the norms of morality, which have their sanction in our minds, in the pangs of conscience which will disturb us in the case of transgression, in the shame we feel and the sense of insufficiency by which are plagued. It is beyond our present task to investigate whence these feelings originate. Certain it is that among their causes ideas of our fellow human beings are playing an important role, a role so important, indeed, that the very term “norms of morality” (or ethics) has a double meaning. Even though in the case of certain conduct an individual may be entirely devoid of self-reproach or shame, his fellow men may judge that “he ought to be ashamed” and subject him to their unorganized disapproval. When understood in this sense as the mores of the community, the norms of morality constitute a part of the norm system of social etiquette, the very existence of which is one of the factors productive of those norms of morality for which there is no judge other than each man himself and in his own heart.

¹ A better name would be desirable. What is meant is more than norms regulating dress, salutations or the proper conduct of a wedding. The term social convention covers the entire realm of conduct expected of us and approved by our fellow citizens. For instance, marriage, i.e., the type of sexual conduct which is approved in a given society and thus distinguished from all other, disapproved manners of sexual conduct, is as much an institution of “social convention” as property, inheritance or grammar.
Thirdly, there are the norms of religion, which have their sanction in the idea of disapproval by the deity, the wrath of the gods or some other detriment supernaturally incurred.

Finally, there are, at least in so-called higher society, the norms which are sanctioned by the action of some special functionary or politically organized society. We may call them, for the moment, the governmental norms. The sanction guaranteeing the behavior demanded is the infliction of some painful experience by the public executioner, the gaoler, the sheriff and his deputies, or some similar official.

In their totality these norm systems are to a high degree conducive to social order. If certain normative ideas are generally present within the minds of the members of a given society, behavior according to the norms can be predicted with a high degree of probability. It has already been observed that the classification of a norm as belonging to one or the other system does not depend upon its content but solely upon its sanction. Thus, one and the same norm can belong to more than one system. The norm forbidding to kill a fellow human being is sanctioned in our society by unorganized social disapproval, by individual self-reproach (at least in the normal case), by the notion of God's disapproval (at least on the part of the believer) and by the action of policemen, state's attorneys, judges, gaolers or the executioner. One or the other of the four sanctions may, indeed, be absent in the case of one or the other particular norm, but the case of some particular behavior being demanded by one norm system alone constitutes the exception rather than the rule. It happens in the case of certain religious norms, certain norms of social etiquette, as, for instance those prescribing the modes of dress or the formalities of politeness; it also happens in the case of norms of morality addressed to himself by a man of peculiarly refined conscience. By and large, it may be said, however, that the transgression of a religious norm will also bring about the sanction of social disapproval, or that the violation of a norm of etiquette may produce self-reproach, especially if there has been implied an expression of disrespect for another. Quite particularly can it be said that, at least normally, there hardly exists a governmental norm which is not also a norm of social etiquette. The governmental rule, as it were, is constituted by the addition of the governmental sanction to the informal sanction where the latter is believed to be insufficient to secure general compliance.

Contrary to an opinion widely held, it is asserted here that there is no particular type of conduct which could not have sought to be guaranteed by any one of the four sanctions. The sanctions of a supernatural detriment or of informal social disapproval may be attached to a traffic rule just as the governmental sanction may and has been used for the purpose of achieving certain uniform lines of thought, of religious belief or even of feeling. The insight that there is no special
domain of content of the governmental rule has in recent years been emphasized quite particularly by Max Radin. He concedes, it is true, that there exists a peculiar sphere of the governmental rules consisting of those rules which regulate the very procedure of the governmental functionaries and agencies, especially the courts. However, these rules of procedure are of an auxiliary nature. Although they are of the utmost importance for the proper functioning of the social order, they are not meant to motivate the conduct of the members of the society in their relations to one another; their purpose is primarily that of limiting the powers which society has found itself compelled to entrust to its political functionaries and to equalize the position of adversaries of whom one is seeking to call these political functionaries into action against the other. The sanction of the procedural rule is either the imposition of some detriment upon one functionary of government by another, or a deterioration in the relative position of one adversary in his dispute with another before a governmental functionary.

II

The norms which we have so far called those of government are more commonly called those of law. We have so far avoided this word because it is ambiguous and loaded with emotional content. In the sense in which the term is used here the norms of law are those norms of social behavior which are sanctioned by the action of some functionary of politically organized society. Law, in this sense, is simply and plainly the command of the sovereign. This definition is that of legal positivism, a position which has been violently attacked in the past as well as in the present. Positivism has been blamed as justifying not only fascism or national-socialism, but of any despotism of whatever kind. Positivism has been charged with laying the foundations of tyranny and of any nihilism striving to present the outward appearance of order.

Positivism, so it seems, is nothing but the position of Thrasymachus, in which law is simply identified with power, or the attitude so often ascribed to Hegel when he is said to glorify the State as a last end in itself. Positivism, so it is said, separates the law and the State from all ethical values, exempts them from all moral judgment and thus renders possible their vicious growth into all-devouring monsters.

Yet, some consideration of simple logic ought to make us pause before we join in with this chorus of condemnation. How can a mere definition have such consequences? How can a definition ever justify a political postulate or position? It can be either correct or false as far

2 RADIN, LAW AS LOGIC AND EXPERIENCE (1940).
3 Wrongly, it ought to be observed.
as there is concerned its accordance with the actual usage of the word concerned. It can be either clarifying or confusing insofar as we are interested in the clarification of our insight into the actual phenomenon referred to by that word. Hence, the definition of law attacked as that of positivism is devoid of any of the pernicious consequences ascribed to it as long as it is treated as no more than a definition, i.e., as long as it is not combined with a political postulate, viz., the postulate that norms of law are not only different from norms of morality, at least as far as the sanction is concerned, but that they are also independent thereof in the sense of their not being subject to any evaluation or criticism from the point of view of morality. When it is conceived of in this “substantive” rather than in a purely “formal” sense, positivism is more than a definition of the term law; it is that political creed which holds that the commands of the sovereign are ultimate values in themselves which are above any evaluation under any other standard and which, therefore, nobody is entitled to criticize from the point of view of morality, religion or any other conceivable standard. It may be doubted whether substantive positivism has ever been advocated in this radical form. Even the worst villains of history have been trying to justify their tyrannical measures by moral or religious pretensions. Yet, there have been approximations to the position of substantive positivism, quite particularly in the nineteenth and early twentieth centuries, when, especially on the European continent, but, to some extent also in the countries of the common law, lawyers were told that ethical evaluation of the norms of law was none of their business, that they had to apply these norms as they found them handed down through history or enacted by the legislature and that ethical evaluation of the positive law was the exclusive concern of the lawmakers. In the milder form, substantive positivism, while it appears to be derived from the democratic doctrine of separation of powers, has tended to exclude from the criticism of the law those who are among the most competent to do so, and to make courts and lawyers tools of the socially and politically dominant group or groups.

The dangerous doctrine of substantive positivism has naturally called for criticism when it was threatening to become a political reality. Unfortunately, however, the criticism has frequently been directed, not against the doctrine that the governmentally sanctioned norms of social conduct are exempt from moral criticism and evaluation, but against that definition of law which takes account solely of the governmental

4 The author remembers his very first class hour in law school, in which the instructor, one of Germany’s most celebrated legal scholars, warned the eager young students against any confusion of law with justice. “Gentlemen,” he pronounced, “you may expect that as lawyers you will have to deal with justice. You ought to free yourselves of this error. As lawyers you will have to deal with law and nothing but law. Do not meddle with the business of those others whose concern may be justice.”
sanction and does not include any criteria of content. Recognizing the
dangers of the political doctrine of material positivism, social thinkers
have found it advisable to devise definitions of law which include some
moral value as one of its constituent elements. Among such efforts to
define law as containing essentially some ethical value, two groups may
be distinguished *viz.*: first, definitions containing some concrete ethical
value, such as liberty (Kant, Stammler, recently also Bodenheimer) or
reason (St. Thomas, rationalists); and second, definitions containing
some formal element to be filled with varying ethical contents, such as
the proletarian class interest (Communists), the interest of the national
or racial community (National-Socialists), culture (Gurvitch), reciproc
ity (Malinowski), or ethical-imperative coordination (Timasheff).

All these mutually contradictory definitions of law agree in the one
point of refusing to apply the word “law” to a governmental norm or
a system of governmental norms which does not fulfill the concrete
ethical postulate in question. For the Kantian, for instance, the govern-
mental norm which is incompatible with liberty is not law, whilst the
Thomist finds himself compelled to deny this word to the “unreason-
able” governmental norm. The fact that the norm in question is
being enforced by the police, uniformed or secret, the courts, sheriffs,
gaolers, executioners or other governmental functionaries is regarded
as irrelevant.

Of course, we may, with Humpty Dumpty, use words as we please.
There can be no objection to such an arbitrary, subjective use of words,
except that it is hardly conducive to understanding and that it is likely to
result in confusion. In our particular case, experience has shown that
the various “ethical” definitions of law have not only not been helpful
in the clarification of the relation between law and ethics but have
rather achieved the very opposite result, apart from the fact that they
are also incompatible with the common usage of the word law. It would
be difficult to convince the judges of a tyrant, a colonial tribunal, or a
military government court that the norms they administer are not law
but something else.

The efforts to include into the definition of law some ethical value re-
garded as positive, and consequently to deny the term law to any norm
or norm system by which that value is not satisfied, harmful though it is
to clarity of thought, is easily explainable as an instance of a frequent
and important psychological phenomenon. Followers for any cause can be
recruited more easily when this cause is presented not as still impotent
or struggling but as already powerful and victorious. “The victory of
our cause is certain” has been the slogan of every experienced propa
gendist for every religious, political or national cause. The same psy-
chological trick is applied, mostly unconsciously, when some ideal sought
to be achieved is presented as an already, or sometimes a necessarily,
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existing one. Naturally law is the classical example. The propagandistic force of some social ideal sought to be achieved is increased when it is presented as already existing “in nature,” just as the propagandistic efforts of the advocates of conservatism are strengthened when the existing social system is presented as being grounded upon natural necessity. When law is presented as necessarily and essentially containing the element of freedom, or reason, or some other element, the chances are considerably increased that a law containing such element will be achieved. By consistently maintaining that law essentially contains the elements of reason or liberty, schoolmen and natural law philosophers were able effectually to curb the despotic aspirations of medieval rulers or eighteenth century absolutist kings. The ethical definitions of law have been a powerful and salutary weapon in mankind’s struggle to curb despotism. As an intellectual tool, however, these definitions have been harmful. The political dangers ascribed to the formalistic definition of law are imaginary, provided positivism is conceived of not in the substantive but in the formal sense, i.e., in the sense that the rules of law, which are defined by the mere formal criterion of the governmental sanction, are consistently regarded as being subject to ethical evaluation and criticism. In formal positivism, the rules of law, while they are conceptually kept apart from those of ethics and devoid of any necessary ethical content, are brought into relation with the rules of ethics by being regarded as occupying in relation to them an inferior position and as being necessarily subject to constant ethical evaluation. Only in this way, we believe, are we able to maintain correspondence between social reality and our descriptive analysis thereof, as well as to obtain a clearer insight into the relation between law and ethics and thus to understand the meaning of justice, which, in its most important meaning, is nothing but the ethical standard by which we measure the law in its totality as a system as well as with respect to its several individual norms. The just law is the law which is positively evaluated by the standard of ethics. However, before we enter upon the discussion of how this standard is to be conceived, we first should inquire into another meaning of the words “just” and “justice.”

III

In a very general sense we speak of the just man. What we mean thereby is not much different from the virtuous man. The just man is he who not only professes the ethical ideals of his community but is actually practicing them in his dealings with his fellow men. In a community generally professing the ethical ideal of social harmony through respect for the dignity of every human being, the just man is he who practices this ideal and who is particularly unwavering in the expression of his respect for the dignity of all his fellow human beings without paying regard to such irrelevant factors as race, creed, sex or na-
tionality. In this general sense the adjective “just” is simply the expression of a general ethical value judgment of a man with respect to his social attitudes and relations.

We are coming closer to the sphere of law when we speak of the *just judge*. The just judge is he who is living up to the ideal which a given society has established for its judges. In our society the term means the impartial judge who, uninfluenced by such “illegitimate” considerations as personal bias or predilection, fear, anger, etc., incorruptibly renders his decisions in strict accordance with the law.

In other words, the *just judge is the judge who judges strictly by the law*. The latter term needs some explanation in this connection. It is used here in exactly the same sense in which we have defined it, *viz.*, those norms of social behavior which are sanctioned by the threat of an officer of politically organized society going into action against the transgressor. For its own protection against the ever-present danger of abuse of the power monopolistically entrusted by society to its “government,” society has invented the device of separation of functions. Just as in a well-organized business the disbursing officer is not to make any payments until he is told to do so by another independent functionary, thus, in a politically organized society which has not yet returned to the state of police omnipotence, the force officers (sheriff, police, jailer, executioner, etc.) are not to go into action against any individual unless they are told to do so by another officer, *viz.*, a judge. This other officer is expected not to issue his order to the force officer except upon an objective investigation as to whether or not there exists one of those factual situations in which alone the law orders or permits the application of governmental force against an individual. The norms of law may thus be conceived as being addressed not only to the members of society at large but to its governmental officers, in order to let them know in what circumstances alone they are allowed or expected legitimately to use the powers of force entrusted to them.

These statements do not imply, however, that the norms of law must always and of necessity be formulated in clear words before they can be “applied” by the judge. The norms of the law may be as inarticulate and as little formulated as many or perhaps most of the norms of ethics or social etiquette. Formulation of any of these norms does not take place until their existence becomes doubtful. In an undiversified society the norms of ethics and etiquette are being felt and lived but little talked about. Only in cases of transgression or doubt does it become necessary to formulate them. Thus in the “folk society” the judge “finds” the law by giving articulate expression to the value judgments which are already living in the community. While his activities are creative in the

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5 Dr. Robert Redfield, Professor of Anthropology, University of Chicago, has done considerable work in this connection.
sense of giving a first expression, and thus clarification, to an idea which has so far but vaguely been felt, he does not make a new norm. By adding to the pre-existing moral or social sanction the new sanction of governmental action, he also transforms the pre-existing moral or social norm into a more clearly articulated legal norm. But even such a kadi is judging not outside of, but in accordance with, the law, since in his type of society the law has not yet been separated from morals and etiquette but is found in these realms and applied through the articulation of the norms already obtaining in them.

In our complex society, rules of law are usually conceived as being formulated in words and expressed in such officially recognized “sources of law” as statutes, precedents, learned doctrine, books of authority, etc. Where such articulation has taken place the judges are expected to render their decisions in accordance with the norms thus formulated. However, occasional aberrations notwithstanding, there exists the fairly general insight that not all the law is and ever can be contained in the words of the articulated norms. Life is so immensely manifold that not even the greatest accumulation of human experience and foresight can ever provide a ready-made norm for every situation that may actually occur. Day in and day out the courts have to decide cases for which they cannot find a ready preformulated norm. Yet, even in such cases we do not expect our judges to decide according to their own individual arbitrariness but in accordance with the law. While technically more complicated, the case is not essentially different from that of the kadi. By considering the ethical and social value judgments which have found expression in the formulated norms of law and by probing into the deeper layer of unarticulated, or at least not yet legally articulated, value judgments, the judge is expected to “find” the legally correct decision in the very act of “creating” a new legal norm. The newly formulated norm, if the decision is to be just, must be in harmony with the pre-existing system of legal, social and moral value judgments. Obviously, this task is easier in a simple society in which there exists a large measure of uniformity of social value judgments, or in a totalitarian society where only one system of value judgments is officially recognized, than it is in the free and complex society of present-day America where often incompatible systems of value judgments are competing with each other.

Finally, the just judge is not necessarily he who in all and every circumstance is invariably rendering his decision in strict accordance with the formulated norms of law even where they exist. Again we have to remember that life is too manifold to be covered entirely by a network of articulated norms. Every articulation is but a necessarily insufficient attempt to express in words a value judgment that is felt more or less vaguely. The articulation may be too broad and may thus cover a case in
which the value judgment expressed is felt to be inapplicable lest it be perverted. The just judge has to sense such situations. He has to be ready to correct the law in the interest of the law lest *summum ius* be perverted into *summa iniuria*. The law in the strict sense of the sum total of its formulated rules must be tempered with equity (in the sense of Roman *aequitas*), *i.e.*, by those moral and social value judgments which have sought to find, but have not fully succeeded in finding, articulation in the formulated norms. The law is constituted by the two together, the formulated rules and equity, and the just judge is he and only he who masters the art of tempering and supplementing the law with equity without thereby incurring the vice of arbitrariness.

IV

This analysis of the meaning of the word *just* as applied to the judge is but a first step in the analysis of the multi-meaningful word justice. If we agree that the just judge is the judge who judges in accordance with the law, we are, of necessity, driven to another question, *viz.*, the question of the *justice of the law*. Unless we subscribe to the doctrines of substantive positivism or to one of the substantive definitions of law criticized above, we have to recognize that law may be unjust. Indeed, this proposition is the essence of the approach of formal positivism advocated here. But what is the test of the justice of the law? A first, but not final, answer finds this test in the degree of the law’s accordance with the moral and social value judgments of the society in question. Just, in this sense, is the law which agrees with these value judgments; unjust, the law which disagrees with them. As long as law is “created” by the articulation of the value judgments already living in the community, no such discrepancy can arise. However, law can be created in other ways: it can be imposed upon a community by a foreign conqueror or occupant, or by a native tyrant, or by a ruling clique or class; or law can become the domain of a profession of specialists in whose hands its developments are guided into channels of its own which may easily lead away from the original source of community values with the result that the law becomes *volksfremd* and constitutes a more or less self-sufficient system of norms cut off from community convictions; or, in modern complex society, convictions about moral values may become so vague, indeterminate or conflicting that there no longer exists a body of generally accepted social and moral value judgments with which the law could correspond. Perhaps in the last-named case one should not speak of the law as unjust; but certainly this word is appropriately applied to the selfish or arbitrary command of the despot, of the despotic clique or of the foreign conqueror. As long as their laws are in opposition to the value judgments held and cherished by the people, they are felt by them

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6 Or, more correctly, of its *gravior pars*. 
as unjust. Examples have been innumerable in the world's history from the inhuman command of Kreon in Sophocles' *Antigone* to the modern laws seeking to impose the language of a foreign conqueror upon a subject population, be it in the former Prussian parts of Poland, in South Tyrol or in Puerto Rico.

V

At this stage of our reflections we have reached the point where we are able to say that a law or legal system will be regarded as just by Papuans, modern Fascists or Communists if it corresponds to their respective ethical ideals and convictions. Such a relativistic and subjective answer does not satisfy our quest for justice which makes us yearn for a more objective answer. We can give such an answer easily if we identify ourselves with any one of the ethical systems, all of which, by their very essence, claim objective and universal validity. However, this way out may appear too easy to one who has observed the variety and so often mutually exclusive nature of ethical systems. Which of these ethical systems shall we make our own? Which one or which ones are just? From the question as to the justice of laws or legal systems we are driven to the question as to the justice of ethical systems.

Where do we find the standard for the ethical evaluation of ethical systems? The standard which is frequently offered to us is that of reason. Reason, so we are told, tells us how we can achieve the Good Society and thus provides us with the ultimate standard of justice for which we are searching. This, indeed, has been the answer of the philosophers of what has been called the Great Tradition of Western Civilization all the time since Socrates. We have been referred to reason by Plato and Aristotle, by St. Thomas and later schoolmen, by Hobbs, Locke and the thinkers of the Enlightenment, by Kant, Humboldt and Hegel, just as well as by Marx or by contemporary liberals or Neo-Scholastics. Throughout this Great Tradition the aim has been the same, viz., the peaceful and harmonious society. Whatever controversy there has been within it—and such controversy has been frequent and lively or even violent—such controversy has been concerned with the structure of the Good Society and with the ways and means by which the peaceful and harmonious social order can be achieved. Is the Good Society to be static or dynamic, is it to be hierarchic or equalitarian? Reason is invoked to provide us with the answer to this and similar questions, with controversy again existing as to the problem of whether reason ought to be applied a priori or a posteriori.

Recognizing all the profound differences which we find between Platonism and Aristotelianism, between Conservatism and Liberalism, between Scholasticism and Enlightenment, between Individualism and Socialism, or among all the other systems developed within the
Great Tradition, they all agree, to some large extent at least, in the following three points, *viz.*:

(1) The Good Society is that which is peaceful, orderly and harmonious.

(2) The way in which to achieve the Good Society can be found through the application of reason.

(3) Diversity of opinion about the results of the application of reason can ultimately be solved through the process of discussion.

In contemporary America we agree almost generally that the Good Society ought to be dynamic rather than static, equalitarian rather than hierarchic; that it should be based upon respect for the dignity of the individual and the recognition of his basic rights and liberties; that there should be an economy of abundance with the largest possible spread of the enjoyment of material goods; that political power has the primary purpose of safeguarding these liberties; and also, although somewhat controversial, that human welfare and security should be promoted through certain democratically determined common enterprises; that power, both political and economic, ought to be kept under strict control, however; and that excessive concentrations of power ought to be prevented. Within this general pattern the Good Society is expected to be achieved, or is regarded as having been achieved already, and the just law is that which furthers, or at least does not prevent, the achievement or preservation of this social order. Recognizing that there exist wide divergencies even within the Great Tradition, we can still say, however, that *the just law is that which reason shows us as being apt to facilitate, or at least not to impede, the achievement and preservation of a peaceful and harmonious order of society*, in whatever shape this peaceful and harmonious order is visualized in detail.

The implications of this proposition are far-reaching. *Reason is reflection about experience.* Thus we have to use the accumulated experience of mankind together with systematic observation of social and natural realities and apply to them the refined techniques of dispassionate reflection as especially developed in the social sciences for the attempt of predicting the results of a given system of ethics as a whole as well as of concrete laws or proposed laws. By following this method we are able to a considerable extent to determine whether such a system, law or proposed law is likely to promote or to impede our approximation to the eirenic ideal of the peaceful and harmonious society.

Yet, we must also be careful not to overestimate the powers of reason. It is a precious and powerful, but not an infallible, tool. Reality is too complex to be penetrated in all its interrelations and complications. Man is not omniscient. The range of all his accumulated knowledge is limited. Only to a certain degree can we isolate some single social factor and determine all its causes and possible results. Experimentation
is hardly possible at all in the social realm. Finally, and perhaps most important of all, man is motivated in his action not only, or perhaps not so much, by reason, but also by passion and emotion, whose directions are largely unforeseeable.

This very same insight into human nature will also make us modest as to our ultimate goal. We must know that the just society can never be perfectly achieved by sinful man. And yet, we must never cease to strive for it and we must never cease either to apply our reason, limited though its power may be, to determine, as far as it is possible to us, whether a given social system, law or proposed law is compatible with the ideal for which we are ever to strive though knowing that, at best, we may be able to approximate, but never to achieve it.

VI

There still remains for our reflection one final problem. We have defined the just law as that law which reason shows us to be conducive to, or at least compatible with, a peaceful and harmonious social order. We have to recognize, however, that this peaceful and harmonious social order is not universally recognized as the ultimate social ideal. In every man we find two antagonistic tendencies: that toward order, security and predictability and that toward antagonistic self-assertion. By observation we are led to recognize that there are human beings in whom the antagonistic tendencies are so strong that the ideal of a peaceful and harmonious society appears to them abhorrent and that they regard as the good society that in which continuous struggle provides eternal opportunity for the strong or the cunning, the hero or the fox, to achieve and enjoy the thrills and excitements of fight, victory, power and glory, including the glory of heroic defeat and self-destruction. The events of the last few decades have, or at least should have, demonstrated the reality of the existence of this ideal even to peace-loving, democratic, liberal Americans. The eirenic ideal of the Good Society is not the only one existing in human minds. There also exists the agonistic ideal and it must be reckoned with as a powerful psychological reality. The peaceful dweller of the heavenly city of the eirenic ideal is despised by him to whom the heavenly city appears as a Valhalla populated by heroic warriors and Valkyries.

The virtues of the soldier, such as fortitude, loyalty, simple-mindedness, discipline, frugality, chivalry and joie de vivre, may be as much regarded as the ideal as those of the businessman. Since agonistic man is less given to intellectual reflection than his counterpart, the eirenic man, the agonistic ideal has found less frequent expression in philosophical systems of ethics than the eirenic. As a matter of fact, until fairly recent times practically all systems of moral philosophy have been of the eirenic type. Machiavelli may more properly be called a precursor than a representative of agonistic moral philosophy. The development
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.\(^7\)

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 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 its commonplaceness; e.g., the occasional observation of an impartial person that “this is the law, but not the justice of the case” con-

\(^7\) 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.

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