

LEGAL REASONING AND ETHICAL PRINCIPLES

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Anglo-American law is anchored in four forms of ethical consideration, even though the legal reasoning does not explicitly engage in ethics.

1. Ethical principles serve as the recognized (or recognizable) ground laws of the legal corpus, setting a purpose and limit to subsequent laws. The Traffic Code is a set of laws absolved of any reference to ethical matters, eschewing the traditional language of ethics concerning "good" and "evil". It relies upon a neutral descriptive language appropriate to discussion of mechanism and physical events. Its purpose is to regulate automobile use, rather than tell us what constitutes the path to the Good Life. To apply the Traffic Code one fits together general rules and specific facts in a logic directed to ascertaining what is *correct*, rather than exercising ethical reasoning as an evaluative determination of what is *good*. But, obviously, regulation of vehicular traffic is dictated by a proper ethical concern for the safety of citizens. It exists *for the sake of the people*. And it is not just *efficient* operation of vehicles on public thoroughfares that is intended, for the value placed on the well-being of the citizenry gives purpose to such efficiency and also places limits on it.

2. In the application and revision of the statutes — not just in their genesis — is often found an insertion of ethical principle into otherwise neutral legal reasoning. Thus, if one violates a traffic rule (going through a stop signal) it is a permissible defense to argue this was done intentionally as the most effective way to bring immediate assistance to some injured party (someone lying on the roadway). Adherence to the *particular rule* in such a case would actually be disserving the purpose of *all such rules*, namely respecting the well-being of citizens, so that it is reasonable to suspend the rule (assuming it does not generate greater dangers) to accomplish by a pri-

vate act what is intended by public rules. Only the coldest neutral calculation, without reference to human purpose, suffering, or responsibility, would disallow such a defense and insist instead that the penalty must be inflicted for the *prima facie* violation of the rule.

The pressure for statutory revision of the rules often springs from the recognition of their inadequacy in safeguarding people involved. The conditions covered by the statutes are not static. Human activities engender change. Automobiles, for instance, increase in number and power, roads become more congested, lifestyle itself becomes *automotive*. The Traffic Code must be redrawn with greater precision, and with greater severity, not simply because there is increased technical complexity to be regulated, but chiefly because there are greater dangers citizens are exposed to. The law is chronically a step behind in human protection. By introjecting the ethical principle into the legal reasoning we make the law catch up. Once it has caught up it appears that we are merely applying neutral rules in a logical fashion to factual circumstances: e.g. a driver exceeds the speed limit fixed by statute for school zones because he was late for work. This case is adjudicated *without* reference to (1) the ethical purpose of school zone speed limits, and *without* introjection of (2) an overriding ethical consideration that would suspend operation of the statutory rule. Thus, in the "normal" or static condition of the regulatory law the legal reasoning stands aloof from ethical considerations, while in the formative or corrective condition of the law, ethical considerations are decisive in the reasoning. Of course, the usual situation may well be one in which laws are changing, while only rarely are they stable enough to be neutrally applied. *But what we aim at in dealing with changing law is an adjustment by means of the ethical considerations such that it can thenceforth be neutrally applied.* Yet even well-established laws are open to new challenges in terms of some overriding ethical consideration that seems to be disserved by the law.

Let us take more serious cases in the Criminal Law. Homicide in general is to be outlawed for its *prima facie* deprivation of

precisely what the law must protect — human lives. But justifiable homicide, such as killing in self-defense, can be distinguished from murder on the grounds that it operates on *the same purpose as the general law*, namely protecting human life — in this case one's own. Even nonnegligent accidental homicide is excusable on the grounds that one cannot be held responsible for what was totally beyond one's control: to disallow such an excuse would paradoxically reduce every person's activity to the mere fluctuation of fortune. These are the two overriding ethical pleas that suspend laws (and that excuse torts): It had to be done for the sake of protecting human life (higher purposiveness); It was done without my responsibility (not purposive). But the general rules cannot *always* be suspended by such pleas: there is no plea of rape in self-defense or of accidental rape.

Laws against homosexuality might once have been thought of as forbidding sexual abuses as did those against rape. But the cases are distinguished, for while there can be no such thing as consensual rape between adults, there can be consensual homosexual acts between adults, which makes a *prima facie* case that no injury is done, thus removing the ethical purpose of the prohibition. Legal reasoning may shift the focus of the ethical principle onto the welfare of the general society to argue that homosexuality is an affront to others and a bad example that would lead to social decline. Legislation may legitimately be concerned with preventing such social ills. But it is to the same principle of general well-being that the reformer appeals, arguing that a healthier or better society results when adults enjoy the freedom to engage in sexual relationships of their choice, which would include homosexuality, even if the choices of some are repellent to others. The private liberty outweighs the public distaste, as John Stuart Mill argued. Mill also conceded that the prevention of a sexual affront to the public outweighed the exercise of the private liberty of the sexual exhibitionist.

The law against the private homosexual act can be redefended on the old grounds that injury really does accrue to the involved parties, though it is by consent. There are, after all,

some kinds of consensual acts, such as selling oneself into slavery, which it is legitimate to legislate against in order to protect the individual from his own mistakes. Here the legal reasoning is directed toward *preserving the ethical status of the person from any irrevocable loss*. It is assumed that any person in his right mind would want to be saved from such loss. Thus the law prevents suicide, presuming that the individual does not *really* will to kill himself. Yet the law ought not to interfere in lesser "injuries" the individual freely subjects himself to which do not involve surrender of his ethical capacity. The reason, again, is that the personal freedom of pursuing one's own image of well-being ought to have the largest possible scope, given the huge diversity of views of happiness. Paradoxically, in its service of human well-being, the law leaves the drinker or the wastrel to wile away his hours. And homosexuality may not be an injury or abuse at all as some who dislike it think, but it may be a fulfillment of happiness to those who engage in it. Thus, ethical principles denounce the anti-homosexuality laws which presumably were motivated by such principles.

3. Here legal reasoning has had to contend with another principle: *To fulfill the purposes* of the law (well-being of citizens) there should be *no law operative* in certain areas of human activity. Now, for historical and psychological reasons it turns out that we have been overlegislated in ethical and personal matters, such as sexual practice. Gradually the law is being forced back out of the domain of such matters, but there ought to be regularly renewed evaluation of all existing laws as possibly overreaching the boundaries of the legislable. The *overlegal* is unethical and also illegal.

4. Symmetrical with the third ethical principle is this fourth one which may operate within legal reasoning: Laws ought *to be introduced* into some areas of human activity, presently unregulated, for the sake of the general well-being. Thus, a new body of environmental law rapidly emerges as we recognize that protection is needed against pollution and despoliation of the planet. In the older view, a man was exercising his right to private property in doing something on his own land

that may have resulted in smoke being discharged into the air or refuse into a stream. He was doing *no one* any harm, though he may have been abusing nature. By the third principle it follows that he has the liberty to abuse his own property and also nature as he sees fit, without the law's interference, so long as he is not destroying public property or injuring others. By the fourth principle we *stipulate* that the air we breathe and the streams that nourish our earth are public property and that abuse of them does indirectly injure others. But this fourth principle, it may be said, is nothing but the first ethical principle operative in legal reasoning, namely the setting of the well-being of citizens as the purpose to any law corpus. Indeed, the principle is the same in substance for all four principles though different in form.

The first principle is *originative*: it is found at the root of any existent body of laws. In its second form the principle is *corrective*: it recalls the direction of the laws to the root. The third form of the principle is *eliminative*: it uproots a body of law as inappropriate to a field of activity. The fourth form is *creative*: it calls for a new planting of laws in a field of activity. The fourth case, then, is where we *create laws* with ethical purpose, whereas the initial case is where *laws have been created* with such purpose. That purpose is appealed to by the second principle in order *to revise laws*, while by the third principle it is decisive *in striking down entire areas of law*. The four forms of the ethical principle thus impart divergent movements to legal reasoning. When is each of the forms to be applied?

It seems the force of legal reasoning under "normal" conditions is to avoid facing *any* of these forms of ethical question: the logic of the law steers clear of the dangerous rocks of ethical controversy and value judgment. This in large part is what we demand of the law. But there are rough sailings in the affairs of men and the old vessels of law must be broken up to give way to newer and safer ones. *Thus, it is an appropriate commencement of legal nonethical reasoning to ask this question: What is the ethical significance of this law (or of the alternative laws)?* Answers to the question will then appear

under any of the four forms of ethical principle. One then has a context and a direction for exercising the logical principles in the legal reasoning.

But an additional point must be made about those seemingly neutral logical principles, namely that some of them also have ethical significance. *Stare decisis* will serve as an example. Respecting legal precedent clearly does have systematic value in organizing the decisions, clarifying issues, and making precise the import of the law. But in addition to its service in the logic of the law, this principle of respecting settled decisions also ethically implies an equal respect for persons (like cases are to be treated in like ways) as well as a recognition of human responsibility (we learn from law what is required of us). And the principle of *stare decisis* itself is subject to suspension, while other legal principles are given decisive prominence, when the prevailing precedents are counter to human well-being. Thus, while legal reasoning in its "normal" exercise has a practical logic of its own not explicitly ethical, yet the consideration of ethical principle is inevitable in the crucial reasoning of the law.

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