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*Jurisprudence and ethics, the author believes, represent distinct efforts to achieve values in society. However, because of their similar methods, bases in fact, and testing by consequences, each has something to give the other. With this in mind, the article examines the work of contemporary writers in ethics both to determine what exactly are their positions and to see what they might offer the student of jurisprudence.*

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This question of ought, turning ultimately on a theory of values, is the hardest one in jurisprudence.

Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 703 (1931).

[Pound's] observations about the purpose of law stop where a real legal philosophy ought to begin.

Radbruch, *Anglo-American Jurisprudence Through Continental Eyes*, 52 L.Q. REV. 530, 542 (1936).

[T]here is an extraordinary naiveté in the view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality. . . . But something more disturbing than naiveté is latent in Radbruch's whole presentation of the issues. . . . We can see in his argument that he has only half digested the spiritual message of liberalism which he is seeking to convey to the legal profession.

Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617-18 (1958).

[O]ne is not reassured to see even so moderate a man as Professor Hart indulging in some pretty broad strokes of the oar.

Let us put aside at least the blunter tools of invective.

Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 658 (1958).

I believe neither his [Lon Fuller's] description of current ethical theory nor his wholesale condemnation of it is well informed . . . .

Nagel, *Fact, Value, and Human Purpose*, 4 NATURAL L.F. 26, 41 (1959).

## I. THE PLACE OF ETHICS IN JURISPRUDENCE

The above quotations are intended to indicate the existence of a problem and to suggest that there is a difference of opinion concerning proposed

* Attorney, Civil Division, Department of Justice.

solutions to the problem. The issue is that of the application or relationship of ethical theories to legal philosophy.

Most legal philosophers agree that if their work is to be significant they must discuss such questions as: What is justice? What standard can be used to determine what the law ought to be or in what direction it ought to move? If we work out a set of jural postulates for a time and place, we ought to have some mechanism for adjusting them to conflicting new wants of civilization and for adjusting them in favor of what are regarded as more desirable wants. These ideas all relate to the values we desire in our society.

An example of the place of ethics in the law can be suggested by the efforts of Justice Cardozo to illuminate the judicial process from the point of view of the judge. He attempted to describe how the mind of the judge was given direction.

> The genesis, the growth, the function, and the end of law—the terms seem general and abstract, too far dissevered from realities, raised too high above the ground, to interest the legal wayfarer. But believe me, it is not so. It is these generalities and abstractions that give direction to legal thinking, that sway the minds of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter.[1]

We may not always be conscious of this propulsion, but it is there. For this reason, as the Justice said: "If we cannot escape the Furies, we shall do well to understand them." He then undertook to show the elements that go into the genesis and growth of the law. Adopting Roscoe Pound's belief that the end of law is the harmonious satisfaction of wants of people, he comes at last to the key problem of the judge. At this point he says:

> In the present state of our knowledge, the estimate of the comparative value of one social interest and another, when they come, two or more of them, into collision, will be shaped for the judge, as it is for the legislator, in accordance with an act of judgment in which many elements cooperate. It will be shaped by his experience of life; his understanding of the prevailing canons of justice and morality; his study of the social sciences; at times, in the end, by his intuitions, his gnesses, even his ignorance or prejudice.[2]

What is of interest to us in this present essay, is how Justice Cardozo thinks a judge determines the content of justice. The freedom to decide is not without limitation. "The judge must subordinate his personal or sub-

1. CARDOZO, THE GROWTH OF THE LAW 25-26 (1924). When we find the doubtful case that will not fit into any existing theories or principles, "the choice that will approve itself to this judge or to that, will be determined largely by his conception of the end of law, the function of legal liability; and this question of ends and functions is a question of philosophy." *Id.* at 101.

2. *Id.* at 85-86.

jective estimate of value to the estimate" declared by the legislature.[3] He may not reject values existing in society with which he personally disagrees. But Cardozo is clear that the place to look is in society itself: "Sooner or later, if the demands of social utility are sufficiently urgent, if the operation of an existing rule is sufficiently productive of hardship or inconvenience, utility will tend to triumph."[4]

He describes how the judge "finds his moral value through his readings of one social mind."[5] But, again, it is repeated that social pressures will prevail if these readings go awry.

> [A] judge in his search for objective estimates of value is helpless to establish standards that will block the onward movement of civilization as civilization is conceived of at any given place or epoch . . . . [However,] the judge, if he may not halt the march of civilization, may do something at times to moderate its pace, to mitigate its ruthless quality.

This is all explainable because the function of judges "is not to transform civilization, but to regulate and order it."[6]

As a conclusion, we can see that for Cardozo, "the judge, so far as freedom of choice is given to him, tends to a result that attaches legal obligation to the folkways, the norms or standards of behavior exemplified in the life about him."[7] Thus, the main line of advance is towards the actual *desired.* There will never be a total ignoring of what ought to be desired, the *desirable,* but the emphasis for the most part will be upon what we now want and how to get it without a total break with the continuum of present experience.[8] The judge's projection of present desires gives motion to the legal system but note that this projection does not, of necessity, entail a consideration as to whether the direction is up or down, good or bad. This seems to stop the judicial process short at the gate to ethics as can be quickly demonstrated:

> The cry for bringing law into harmony with the conditions of the times tacitly assumes that the law will be better law when this has been done. That tacit assumption is justified so long as 'good law' is defined as law which is in harmony with the conditions of the times. But if there have been, and are, as few will deny, retrogressive civilizations, that is, civilizations which have moved in time from a higher to a lower level of powers over internal and external nature, it must be obvious that the process of bringing their law into harmony with their

3. *Id.* at 94.
4. *Id.* at 117.
5. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 54 (1928).
6. *Id.* at 58-59.
7. *Id.* at 15. On Cardozo, see Rooney, *Mr. Justice Cardozo's Relativism,* 19 NEW SCHOLASTICISM 1 (1945) (with bibliography); Aronson, *Cardozo's Doctrine of Sociological Jurisprudence,* 4 J. OF SOC. PHIL. 5 (1938).
8. "[O]ne of the most obvious and obstinate facts about human beings is that they operate in and respond to traditions, and especially to such traditions as are offered to them by the crafts they follow. Tradition grips them, shapes them, limits them, guides them . . . ." LLEWELLYN, THE COMMON LAW TRADITION 53 (1960).

> later state, is a process of degradation of the law from the level of harmony with a higher to that of harmony with a lower civilization.[9]

We thus meet head-on the suggestion of harmony and change not being necessarily good. And we have not yet considered what constitutes the good, nor even, whether the term "good" is properly used in this connection.

Cardozo's dislike of the tyranny of legal concepts[10]—his view that "the social value of a rule has become a test of growing power and importance,"[11] produces a flexibility and a relativism that make it all the more imperative that, if this is the prevailing view today, we seek answers to questions that are implicit in such views. For, traditionally, men have asked about the nature of ethical principles, the ultimate good, and how we can know such things. It is hard to avoid the feeling that such matters are not in our control, if a judge must bow to what the social mind allegedly wants. But Cardozo speaks of the moral urges of judges. There may be something there, and the form and content of such urges will be a prime issue throughout this essay.

Another giant in legal philosophy, Roscoe Pound, has always said that we must have a set of values by which to test our legal rules. He makes constant reference to the ideal element in the law, and yet, he will not argue the point. He persists in saying that the objective of the legal system is the smooth and frictionless achievement of the maximum number of claims and demands of citizens. This, he says, is value enough. This objective arouses the opposition of those who are apparently used to more elaborate ethical systems. This argument isn't enough, they say. Some demands are more desirable than others. Some are worth having even though it creates friction to get them. Pound has recently begun to ask for only a maximum number of reasonable expectations. It is arguable that this is begging the question by assuming a built-in value system. But let us assume not.

According to Pound, "an interest is a demand or desire which human beings either individually or in groups seek to satisfy . . . ."[12] An interest therefore is a fact that is empirically determinable. There either is or is not, for example, an interest or claim of the husband to the services of his

9. Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 531, 545-46 (1935). STONE, THE PROVINCE AND FUNCTION OF LAW 362-63 (1950). On the disintegration of civilizations see 4-6 TOYNBEE, A STUDY OF HISTORY (1939). Stone's argument seems to be a mere debating point. There is no empirical method of determining the direction of a civilization at any particular time.

10. "A fruitful parent of injnstice is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic." CARDOZO, THE PARADOXES OF LEGAL SCIENCE 61 (1928).

11. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 73 (1921).

12. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 96 (5th ed. 1943).

wife. There is no value or ethical question involved in finding or identifying such interests. These determinations are entirely empirical. But when the legal system enters the picture and defines or limits the interests in detail and announces the extent to which that interest will be protected, then a choice has been made and one value accepted over another. For example, suppose that a decision was made not to give the husband the right to service X from his wife on the ground that to give such a right would be an excessive derogation of the wife's individuality. It was the legal system that set in motion the ethical problem. The question to be asked now is: "By what standard was the husband denied this right to service X from his wife?"

Two other American professionals in legal philosophy who have attempted to use ethical theory in their work have been Lon Fuller and Jerome Hall. Professor Fuller is developing his views and it may be premature to say where he will end up. In a full scale debate, he ran into a rather formidable opponent with as yet unanswered results.[13] Jerome Hall some years ago set down his views about law as valuation. These opinions may be briefly examined primarily with the purpose of indicating that this is an open field for any legal scholar.

In *Living Law of Democratic Society*,[14] Hall argued that because law is a coalescence of rule with value, he had to examine the problems of ethics. The basic ethical question that he asks is: "What is the best explanation of the meaning of our moral experience?"[15] For Hall, the best theories are those which rely on intuition and coherence.

He assumes that ethics are a kind of knowledge "as valid, if less rigorous," as that upon which science produces. Where does this knowledge come from? Intuition. "Intuitive knowledge is the direct apprehension of a fact or idea, exhibited in a flash but, often, only after much preliminary study and reflection."[16] He would have it that moral duties come as intuitive truths. Then comes the retreat; "what must be emphasized, however, is that a large part of ethical knowledge is not intuitive." Hall draws a distinction between moral knowledge and right action and "right action . . . depends mostly on more or less established opinions."[17] The factors which blunt our evaluations of moral situations, such as ignorance and prejudice, lead to "imperfect intuitions." The validity of these "more or less probable

13. Fuller, *Human Purpose and Natural Law*, 3 NATURAL L.F. 68 (1958); Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NATURAL L.F. 77 (1958); Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L.F. 83 (1958); Nagel, *Fact, Value, and Human Purpose*, 4 NATURAL L.F. (1959).

14. HALL, LIVING LAW OF DEMOCRATIC SOCIETY (1949).

15. *Id.* at 72.

16. *Id.* at 74. Hall knows that professional ethical opinion attacks this position but he puts forth the claim of common sense "and that is the relevant one for matters of legal significance." *Id.* at 74 n.71.

17. *Id.* at 76.

opinions is established by reflection, logical analysis, reference to (coherence with) other experience, and the consensus of experienced, unbiased persons."[18]

The test of right as what an unprejudiced observer would approve is subject to two objections. If the phrase be interpreted as what an observer who judged rightly would approve it simply adopts the *is* of the observer as the *ought* for other men. If the phrase means what an observer who was not affected by any personal feeling of friendship or antipathy towards the particular people concerned would approve, then the objection may be raised that ethical mistakes occur for reasons other than because people are affected by these feelings, and the objectivity of the observer therefore becomes irrelevant.[19]

To support this view, Hall points to the "very large area of morality common to many peoples." And the prime example is the common disapproval of murder, rape, and theft.

With the above as a basis for moral knowledge and with one reminder "that with reference to many problems, the best attainable knowledge is not scientific, but is only an explanation that satisfies our common sense more than does any competing theory,"[20] Hall turns his attention to the advocacy of a natural law theory.

We are thus in the position of Cardozo's judge in that, if given a free choice, we arrive at the right solution either by intuition or by a more varied process involving reflection, comparison with other cultures, and consensus among "informed unbiased persons."

We shall see that the concept of intuitions is an amorphous one that most certainly does not act like a flash of light. It would also seem that the other alternative has, historically, hardly ever produced the desired unanimity. How can I know I am right when reflection leads other people in diverse paths? What is an informed unbiased person? These sort of questions will not faze Professor Hall. He has already said that common sense and right action are really our objectives. Few ethical philosophers would agree with this. I take it that Professor Hall is not talking about ethics at all, but is concerned about the moral customs within a particular society. The ethical principles within such a society are already determined and any change in such principles is a glacial process, although Hall has

18. "How are we to choose among the vast masses of material and how are we to organize them? The skeptic may, in answer to such a methodological question, develop a purely formal attitude based upon a critical appraisal of the limits of human understanding, or he may turn to common sense, the *communis opinio doctorum* and similar notions. These variations of common sense, like formalism itself, hide rather than solve the philosophical problems because the question is precisely where the standards for evaluation of the common men whose common sense is being acclaimed come from?" FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 165 (1958).

19. EWING, SECOND THOUGHTS IN MORAL PHILOSOPHY 20 (1959).

20. HALL, *op. cit. supra* note 14, at 73.

no doubt of the reality of moral progress.[21] The books we will examine would dispute and reject virtually every sentence he has written.

The writers just mentioned have in common a desire to make clear the moral foundations of our law. In each case we have been brought to the point of realizing that they are discussing problems that have a wide background. This background includes the field of learning called ethics which considers problems that have concerned men, so far as we know, at all times in human history.

But this is not an historical essay. Our interest is here confined to the work of contemporary writers in ethics, mostly British and American, and a consideration of what they might possibly have to offer to students of jurisprudence.

## II. The Nature of Modern Ethical Theory

The quotations which introduce this essay seem to be in accord that ethical theories are important and also seem to imply that the other fellow's theory is not very good. To clarify what is at stake requires an understanding of what underlies the disagreement. Because ethics is a large and difficult field of scholarship requiring special attention, it is not appropriate to look for guidance to the legal philosophers who have adopted ethical theories. It appears preferable to turn to those who work directly in the fields of ethics and moral philosophy. This will be done by going to some new books or reprints of older ones that have appeared in the last few years.[22]

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21. "[W]hen we put aside extravagant claims, it must still be recognized that though the course of moral development is neither unilinear nor indefinite, there has been, there is, moral progress . . . assuming that Soerates' moral insight is superior to that of any living person, it does not follow that there has been no moral progress since his time." *Id.* at 79. "Indeed, it may be fairly asked not only whether there has been any substantive progress in morals since the time of Socrates but also whether there has been any development in the understanding and method of ethics. Whatever the answer to the first query, that to the second is likely to be discouraging; the history of ethics often looks like a set of proposals arranged in time without other direction." Flower, Some Present-Day Disagreements in Moral Philosophy in Aspects of Value 19, 33 (Gruber ed. 1959). "Seen from the mid-twentieth century, the record of human conduct in the West does not seem to be one of clear general moral improvement of progress, not a record of unilinear evolution upward." Brinton, A History of Western Morals 421 (1959). The argument whether or not the history of mankind reveals moral progress is hardly capable of resolution without strict definition and limitation. No snch effort will be made here. The usual proof in favor of progress is made by pointing to the humanitarian efforts of the nineteenth century. Other better known acts of the last twenty-five years are usually left unmentioned. Hitler's ovens and Stalin's slave camps are obvious examples.

22. An Examination of the Place of Reason in Ethics. By Stephen Edelston Toulmin. Cambridge: Cambridge University Press, 1958. Pp. xiv, 228. $4.50.

The Functions of Moral Philosophy. By Harold Ofstad. New York: The Humanities Press (no date). Pp. 45. $1.25.

The Concept of Morality. By Pratima Bowes. London: Ruskin House, 1959. Pp. 220. $4.50.

It is a premise of this essay that the law is going some place. A law which is fixed once and for all would not have the problem of choosing among conflicting values. The judge would only have to discover what the law was, or find it, and then state it. But the obvious existence of apparently equally balanced choices cries out for a test by which to make the choice. Call it what you will, we need a standard, end, ideal, or purpose. Fulfilling this need presents many problems that have plagued men for centuries. We can in a brief space neither trace the history of these issues nor examine them in very close fashion. Even if we could, such is not our main interest here. Rather, the purpose of this essay is to point out an area of learning that has a very significant bearing on legal philosophy. To show the relation of the two fields of learning there have been selected for extended discussion three issues important in ethics to show how thinkers talk in this field. Out of the many subjects that could have been chosen, the three most useful for our purposes seem to be intuitionism, the emotive theory of ethics, and the interrelations between the "is" and the "ought." A further basis for selection was that these particular issues demonstrate that these areas of learning are not separable. One cannot study just jurisprudence, or just ethics, or just metaphysics. These are all somehow linked together in the individual's understanding of the nature of reality and of how society works. In our consideration of intuitionism we shall see at once that we have to face the problem of how we know and what we know. In discussing the emotive theory of ethics, the problem is the extent to which our language and the words we use reflect both our thought processes and external reality. Finally, our investigation of the relation between ethics and actual conduct will indicate not only the difficulty but the widespread disagreement over some of our most basic conceptions.

Before going directly to these substantive problems of modern ethics, some limitations on this present essay should be set forth. For example, since the ethical theories to be closely examined are some of those widely

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SECOND THOUGHTS IN MORAL PHILOSOPHY. By A. C. Ewing. New York: The Macmillan Co., 1959. Pp. vii, 190. $4.50.

ETHICAL SYSTEMS AND LEGAL IDEALS. By Felix S. Cohen. Ithaca: Cornell University Press, 1959. Pp. xi, 303. $1.95.

PRINCIPIA ETHICA. By G. E. Moore. Cambridge: Cambridge University Press, 1959. Pp. xxvii, 232. $1.95.

ETHICS AND LANGUAGE. By Charles L. Stevenson. New Haven: Yale University Press, 190. Pp. xi, 338. $1.75.

THREE TRADITIONS OF MORAL THOUGHT. By Dorothea Krook. Cambridge: Cambridge University Press, 1959. Pp. xiii, 355. $5.50.

ETHICAL NATURALISM AND THE MODERN WORLD-VIEW. By E. M. Adams. Chapel Hill: University of North Carolina Press, 1960. Pp. xii, 229. $6.00.

MEN AND MORALS: THE STORY OF ETHICS. By Woodbridge Riley. New York: Frederick Ungar Publishing Co., 1960. Pp. viii, 425. $6.50 (*cloth*), $1.95 (*paper*).

PRINCIPLES OF MORAL PHILOSOPHY. By Ben Kimpel. New York: Philosophical Library, 1960. Pp. xi, 234. $3.75.

discussed in England and America from the time of G. E. Moore, no purpose would be served by going back further because our primary interest is the impact of modern ethics upon modern jurisprudence. But past is prologue and the student should not, indeed cannot, ignore the historical development of ethics.[23]

If we are not going to review the history of ethics, neither are we going to discuss virtue, its content, or its various forms. A review of older books in ethics, starting with Aristotle, demonstrates that a common method of writing was to describe the good man in all his moral parts. Such books are, in effect, technical manuals giving advice on how to be a virtuous man. It is now considered old-fashioned to discuss ethics in such a manner and the usual book of this type met with today is exhortatory. But it is not necessarily so, and as proof that this approach can indeed be sophisticated, the reader is urged to examine Dorothea Krook's *Three Traditions of Moral Thought.*

Mrs. Krook has elected to evaluate ethical philosophers in terms of their attitudes towards love. The highest form of love is that exemplified by Christ who, in giving His life, redeemed men and delivered them from the consequences of the sin of Adam and Eve. This exhibition of the redemptive power of love is the central theme of the work. The recognition of this power is offered as the test of the great moral philosopher. The more coldblooded thinkers whose ideals are earthbound and who have some antipathy to the passions show their limitations and downgrade themselves by failing to exalt this power of love. Such is Mrs. Krook's rating of the moral philosophy of Aristotle and Hobbes.

Even if we were to admit that the transforming power of love is an inherent attribute of man's moral nature, we would still have to question what kind of love the author has in mind. She is quite dissatisfied with Aristotle's Magnanimous Man with his serene pleasantness to all. Such a man never goes beyond himself. Calmness of person and surroundings is almost an ultimate end for Aristotle. But the higher view of human nature exalts the disinterested love of our fellow men and "disinterested pity, disinterested passion for knowledge."[24] The key words constantly used are "disinterested" and "selfless." Such attributes when attached to action bring men to the higher reaches of morality. It is not clear why this should be so. The author merely asserts that this is the tradition. This ordering of ethical systems depends upon the author's pinpointing of the "single ultimate end of human endeavor" which she does in these terms:

> We might say, with the mystical Christian and Platonist, that the Supreme Good is the loss of self in the soul's union with God; or, with the less mystical Christian,

23. A fine introduction to the history of ethics is RILEY, MEN AND MORALS (1960) (first published in 1929). The book covers various ethical writers and movements through the end of the nineteenth century.

24. KROOK, THREE TRADITIONS OF MORAL THOUGHT 121 (1959).

> that it is the imitation of Christ in perfect love and service of our fellow-men; or, with the Humanist, that it is the love and service of our fellow-men without reference to the greater glory of God.[25]

The main objection to the book is that its central theme is assumed.[26] As we shall see, modern ethics is almost completely wrapped up in problems that do not seem to exist for Mrs. Krook. An unexpected feature of the book is her selection of writers and works for serious discussion. Matthew Arnold and D. H. Lawrence are featured; Immanuel Kant is mentioned only once; and G. E. Moore, twice. The reason for this curious selection is that the book grew out of lectures to literature, and not philosophy, students. Hence, T. S. Eliot becomes a prominent critic in ethical philosophy. This is an old-fashioned book and yet it will never be completely out of style despite the appearances of the last fifty years.

One further preliminary in this essay relates to the definition of terms. Definition is a lasting problem in this field because frequently there is no care taken about it. Since it will be given some extended consideration later, what is now offered is hardly to be accepted as final, but, instead, will provide a starting point for making some kind of distinction among various ethical terms in common use.

In view of the exposition of the issues faced by Justice Cardozo, it should be clear that a legal philosopher needs some sort of theory to tell him what values the jurist should seek to effect by law. In such a theory, it is likely that justice and goodness would be among the values that ought to be sought along with consistency within the legal system and stability within the political system. But a value theory is not necessarily an ethical theory. There are all sorts of values, such as truth and beauty, which are not associated with human conduct. The general study of values is called axiology. Ethics is but a part of this larger study. Ethics and morality are concerned with the specific problems of acting rightly, of doing what one ought to do, of doing the good, or, most generally, of acting morally. Morality is the general consideration of right conduct. Ethics is devoted primarily to the principles behind moral conduct.

Since axiology and ethics are closely related, ethics asks about the most desirable conduct possible upon the basis of standards worked out by a value theory seeking to determine all of our ends. We shall have to devote some space to indicating the questions that are usually asked in these areas of scholarship. There is much overlapping and very little clarity at the borders. In the opening sentence of his preface to *Principia Ethica* Moore states that the disagreements in ethics can be attributed to "a very simple cause; namely to the attempt to answer questions, without first

25. *Id.* at 120. Compare generally with D'ARCY, THE MIND AND HEART OF LOVE (1956); LEWIS, THE FOUR LOVES (1960).

26. See the lengthy review, Annan, *Love Among the Moralists,* ENCOUNTER 48 (Fed. 1960).

discovering precisely *what* question it is which you desire to answer."[27]

The first issue to be clarified is the difference between morals and ethics. This is necessary so that even if a book is entitled *Men and Morals,* we may know that it actually deals with ethics.[28] Professor Adams makes the distinction by contrasting "the use of moral language in a practical situation . . . and its use in a somewhat detached, academic atmosphere to appraise particular actions . . . or general kinds of doings."[29] The former use is morality and the latter is ethics.

In one sense we can compare morals and ethics with engineering and science. The contrast is between action and thought. There is a clearly defined area of scholarship known as the philosophy of science to which ethical philosophy would appear to be the analogue. The distinction between moral philosophy and ethical philosophy, "to the extent that the two can be distinguished," Professor Adams adds,[30] must be one of the relative emphasis upon conduct or theory. The moral philosopher would be the wise man who understands human actions. The ethical philosopher may be a thinker with a far different objective. This objective is not agreed upon by all writers. For instance, Professor Adams believes that "the ultimate objective of philosophical analysis of moral discourse is to disclose its ontological significance."[31]

If we make ethics consider, in a theoretical fashion, the general problems of conduct, we arrive at varying degrees of abstraction. The discussion of the logical characteristics of ethical language is more than ethics and, in truth, may be called "meta-ethics."[32] The metaphysical characteristics of ethical theories has been grouped under the name of "ethical ontology." The lines dividing these areas are not always clear. Suffice it to know that the areas have been marked out.

We can agree that the "science of morality" or "moral philosophy" refers to "the set of propositions involving the concepts *good, bad, worse* . . . in so far as they are applied to man's voluntary activity."[33] The term "ethics," properly used, would include all such propositions whether or not they refer to voluntary human activity and would include such propositions when they refer to nonhuman entities and to human experiences which do not involve the will. In this sense, morality *must* have a definite reference

27. MOORE, PRINCIPIA ETHICA at vii (1959).

28. This particular book is subtitled *The Story of Ethics,* which suggests that at least for one author there appears to be no difference. See note 23 *supra.*

29. ADAMS, ETHICAL NATURALISM AND THE MODERN WORLD-VIEW 5 (1960).

30. *Id.* at 9.

31. *Ibid.*

32. "The language and argumentation of ethical discourse." OFSTAD, THE FUNCTIONS OF MORAL PHILOSOPHY 17. "[A]n enquiry into the logic and language of ethical terms is purely a linguistic enquiry . . . ." BOWES, THE CONCEPT OF MORALITY 17 (1959). "[A] moral philosopher, whose concern is not primarily to make moral judgements but to analyze their nature." Ayer, Foreword to NOWELL-SMITH, ETHICS (1954).

33. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 128 (1959).

to human conduct and yet it is also clear what is meant when Professor Moore says that "it is not the business of the ethical philosopher to give personal advice or exhortation."[34] Ethics then is the theoretical study of the general principles of what ought to be done. Moore approaches the problem of proper conduct by asking what is good since our objective should be the maximization of the good. Ewing, however, emphasizes duty. He says that our duty will be the good. He isn't sure that if we first found the good we would be bound to do it. These issues will be enlarged upon as we proceed.

Following this consideration of the use of some of the more basic expressions used in this field, a glimpse may now be had of the problems that are or could be discussed within the area of scholarship known as moral philosophy. The pamphlet[35] by Mr. Ofstad of the University of Stockholm performs this task. It is first pointed out that for the classical thinkers, the basic question assumed the uncomplicated form of "How shall we live in order to realize the good life?" The answer to such a question need not be purely descriptive; analysis is permissible. A question in this form draws for answers on whatever learning is available. One line of modern thinking has been to narrow the questions to be considered. For fifty years now the Anglo-American moral philosophers have stressed, as the primary problem in this field, the analysis of ethical language.

As must be apparent to even laymen entering this field, the analysis of ethical language is but a small part of the whole field of moral philosophy. It is just as important that extensive study be made of nonverbal ethical behavior as of the language of ethical discourse. This first task introduces into ethics the scholarship of other sciences, such as sociology and anthropology. The value of this pamphlet lies primarily in the fact that the author has refused to limit the scope of ethics to the narrow confines allowed by so many writers today. It will be argued in this essay that ethics is *not* self-sufficient. It starts from principles not produced by ethics and ends with factual consequences observable by anyone. Language can only help us clarify and understand.

Let us now turn to G. E. Moore, the first of the men who are generally regarded as modern ethical philosophers. We will look briefly at the man and then at the controversies he set going.

## III. G. E. MOORE

There are thinkers who in the course of their lifetime of work constantly

34. MOORE, *op. cit. supra* note 27, at 3. "Philosophers after Moore . . . took it that the central question of ethics was the question 'What does "good" mean?'—but they refrained from answering the question 'What things are good?' and made it clear that this was a matter for the moralist, and not for the philosopher." MURDOCH, METAPHYSICS AND ETHICS IN THE NATURE OF METAPHYSICS 99, 101 (Pears ed. 1957).

35. OFSTAD, THE FUNCTIONS OF MORAL PHILOSOPHY.

change their position as they reconsider the same topics. The two prime examples of this practice in modern philosophy have been G. E. Moore and Bertrand Russell. In Russell's intellectual autobiography, one can read sentences saying: "I now regard the opinions set forth in that book as utter nonsense."[36] These dazzling shifts are, of course, part of the fun of studying Russell.

Moore's very methods of work entailed a continuing re-examination of the problems themselves with apparently no consideration for his previously expressed opinions. For the purposes of the present essay, Moore's views as set forth in the *Principia*, first published in 1903, will be the sole reference. Moore himself later expressed a preference for his *Ethics*[37] which he says is "much clearer and far less full of confusions and invalid arguments than the *Principia*."[38]

In his autobiography, Moore described his way of looking at philosophy. He was stimulated by two problems, "first, the problem of trying to get really as to what on earth a given philosopher *meant* by something which he said, and, secondly, the problem of discovering what really satisfactory reasons there are for supposing that what he meant was true, or, alternatively, was false."[39]

Moore also described how he prepared his lectures in philosophy at Cambridge. For twenty-eight years, he prepared his lectures, as he says, "from hand to mouth." He prepared each lecture as it came due without any reference to how he had handled similar problems in previous lectures. He explains this method in this fashion: "I did this chiefly because I was always each year dissatisfied with what I had said on any given point the year before, and wanted to think more about it and improve my treatment . . . ."[40]

In view of these characteristics, there will be no attempt made to describe the complete ethical system of Professor Moore. Rather we will consider only what the *Principia Ethica* has meant to modern students of ethical philosophy and how they believe, in that book, he analyzed the nature of ethical terms and concepts. Moore's book is a landmark in modern ethics and every student in the field must be familiar with it.

Moore addressed himself to answering three questions: (1) What is the nature of the predicate peculiar to ethics? (2) What kinds of things themselves possess this predicate? (3) What ought we to do? Moore did his work in the simplest kind of language, writing as though he was just using common sense. He argued as though the right result would be obvious if

36. RUSSELL, MY PHILOSOPHICAL DEVELOPMENT *passim* (1959).
37. MOORE, ETHICS (1912).
38. MOORE, *An Autobiography*, in THE PHILOSOPHY OF G. E. MOORE 27 (Schilpp ed. 1942).
39. *Id.* at 14.
40. *Id.* at 31.

only one could show the absurdity of all the wrong paths that he discovered could be followed.

What is this predicate that is peculiar to ethics? It is the good and *"the* good" is "that which is good." "Good" itself is indefinable; it is "a simple, indefinable, unanalyzable object of thought"[41] or notion which is the basic conception in ethics. Moore admits this is disappointing but, nevertheless, important.[42] And then, as he says, to show how important this conclusion is, he asserts "that propositions about the good are all of them synthetic and never analytic . . . ."[43]

Professor Stevenson calls this maxim the "central contention of Moore's ethics."[44] The problem is that if we take a proposition such as "Pleasure is good" we have to say, not only are the two terms equivalent but that they are identical, because by definition good is simple and unanalyzable. Equating good, therefore, with a particular natural term leads to contradictions. Since there are many such terms which qualify as good, none can be excluded, and none can be good to the exclusion of any other. If propositions about good turn out in fact to be only analytic, it becomes impossible both to define good and to make a significant statement about good. But it is also argued by such as Adams and Cohen that to make a synthetic proposition about good, the term cannot be simple. This inconsistency is now known as the naturalistic fallacy. There must be a difference between "pleasure" and "good," but if good is simple, indefinable, and unanalyzable, then it has no properties or parts and simply naming alleged properties does not add to our knowledge of good. We cannot analyze or explain good.

Moore's analysis of this point has difficulties.[45] He gives every sign of fighting the problem and it doesn't come through convincingly. Subsequent writers all discuss the fallacy and it has had a mixed reception. Professor Adams accepts the results but appears to doubt that it represents a logical fallacy. Felix Cohen argues that Moore doesn't prove his case:

> Moore has shown no reason why an adequate definition of *good* is impossible, why, that is, *good* should be simple and unanalyzable. If *good* can be defined (in

41. MOORE, *op. cit. supra* note 27, at 21.

42. *Id.* at 6.

43. *Id.* at 7. These are Kantian terms that have become common currency. KANT, CRITIQUE OF PURE REASON (N. K. Smith transl. 1950). "[A] proposition is analytic when its validity depends solely on the definitions of the symbols it contains, and synthetic when its validity is determined by the facts of experience." AYER, LANGUAGE, TRUTH AND LOGIC 78 (2d ed. 1948).

44. STEVENSON, ETHICS AND LANGUAGE 271 (1960). "[T]he more critical issue is whether ethical statements can qualify as empirical or synthetic ones and it is about this problem that current controversy has raged. The emotivists say 'no'." FLOWER, *Some Present-Day Disagreements in Moral Philosophy,* in ASPECTS OF VALUE 29 (1959).

45. ADAMS, *op. cit. supra* note 29, at 41. "Moore's own statements about the matter are woefully confused and confusing . . . ." *Id.* at 48.

> natural terms) then to ask whether the *definiens* of such a definition is good is simply to question the truth of a tautology. If *good* means "ministering to pleasure" then to ask whether what ministers to pleasure is good is not a significant question.[46]

The issue is vital because almost the first disagreement that is met with in ethics is over the possibility of defining the good in purely psychological or biological terms. Cohen says that "it may be the case that *good* is convenient mental shorthand for some complex natural terms."[47] The issue is not whether or not ethical concepts are objective but whether they are scientifically verifiable. The naturalists assert "that ethical characteristics *can* be analyzed without remainder into non-ethical ones."[48] Or, as Dr. Ewing would have it, the term means "that all ethical judgments are completely analyzable as assertions of factual propositions falling within one subject-matter of a natural science . . . ."[49]

Even though Mrs. Bowes can find little assistance from Moore's analysis of the ethical "good," she nevertheless asserts that "Moore's criticism of naturalism has indeed been of great service to Ethics as he believed it would be, for it brings home to us afresh the important fact that the distinctive nature of morality cannot be realized merely in terms of non-value facts."[50]

So we find that Moore's initial contribution was ontological rather than ethical. He left his mark on the problem of the nature of ethical terms. Because he undermined one theory, the weight of recent ethical theory has tended to be nonnaturalistic. There are strong pockets of naturalism left.[51] Felix Cohen, for example, was a naturalist in ethics. A debating topic could be whether John Dewey was a naturalist.[52] But the remaining writers find something unique in ethical terms and ethical discourse and it is from this unique characteristic and what it means, or contains, or how we can know it that the arguments arise. These arguments will be alluded to in the course of this discussion.

Moore's work on naturalism did not settle all the problems. Even after all this work we cannot certainly designate who is a naturalist. For example, for Professor Adams, Toulmin is a logical naturalist. He feels that Toulmin maintains that

> the conclusion that A is the thing to do in such and such a situation is a valid

46. COHEN, *op. cit. supra* note 33, at 163.
47. *Id.* at 164.
48. BROAD, FIVE TYPES OF ETHICAL THEORY 257 (1951).
49. EWING, SECOND THOUGHTS IN MORAL PHILOSOPHY 1 (1959). See also ADAMS, *op. cit. supra* note 29, at 14.
50. BOWES, *op. cit. supra* note 32, at 132.
51. See NATURALISM AND THE HUMAN SPIRIT (Krikorian ed. 1944).
52. Adams says Yes. ADAMS, *op. cit. supra* note 29, at 58. Stevenson claims him for the emotivists although admitting Dewey's reluctance. STEVENSON, *op. cit. supra* note 44, at 253.

> "ethical inference" from certain factual statements but that we need not look beyond the factual statements which "ethically entail" the moral conclusion in order to discover the ontological significanee of the whole argument. A generalization of this would be a naturalistic thesis that ethical judgments and ethical arguments have no ontological significance other than that of their factual premises.[53]

On the contrary, Ewing maintains that Toulmin's view is "the antithesis of naturalism."[54] He continues: "[O]n this view ethics has a quite unique character, a quite distinct logic of its own. It expresses a unique attitude . . . and it has its own criteria not justifiable in terms of anything else."[55]

The opposition between these two views is complete and clearly more is involved than ethics. The issue is one of ontology or the nature of being. The questions thus raised go beyond the limits of this essay.

As has been noted, Moore's work undermined naturalistic ethics. But it should be added that he did not replace the empty place with anything of his own to guide conduct or to develop a nonnatural objective theory of ethics.[56] Ewing, for example, says: "Unfortunately most philosophers, including myself, are either clear that they have no idea of an indefinable goodness, or at least not at all clear whether they have one or not."[57] Santayana found the idea of good existing without a particular referent like finding whiskey intoxicating as it stands "dead drunk in the bottle."[58] Santayana's argument was in opposition to "hypostatic ethics" in which good is given an objective existence without any connection with specific desires and interests.[59]

If naturalistic ethics are now suspect, the possibilities of nonnaturalistic ethics ought to be canvassed. Since the shortcomings of a subjective ethics are obvious, the search is for an objective system. Ewing's book, for example, is primarily devoted to an inquiry into nonnaturalistic ethical values. Implicit in most of the discussion to follow will be the query as to the possibility of any kind of objective ethics. If "objective" requires independent existence does this imply that the values must exist prior to their

53. ADAMS, *op. cit. supra* note 29, at 102.

54. EWING, *op. cit. supra* note 49, at 35.

55. *Ibid.*

56. See HARROD, THE LIFE OF JOHN MAYNARD KEYNES 75, 214 (1951); KEYNES, TWO MEMOIRS 78 (1949).

57. EWING, *op. cit. supra* note 49, at 82.

58. SANTAYANA, WINDS OF DOCTRINE 146 (1913). Santayana's argument had the interesting effect of converting Bertrand Russell. RUSSELL, PHILOSOPHY 230 (1927); COHEN, *op. cit. supra* note 33, at 159 n.28.

59. "Like aesthetic values, no ethical ones can exist as objective entities independent of human beings, unless some suprahuman mind exists and has established them. If the reality of divine forces cannot be proved with purely scientific means, neither can the independent objective existence of ethical values be so proved. . . .

"We only fool ourselves when we speak of ethical values as 'being there,' independent of men, while expressing or admitting doubt about divine forces." BRECHT, POLITICAL THEORY 290-91 (1959).

application? This will pose a problem if we derive our values from the consequences of human acts. There are many facets to this issue, many of which will be noted in the course of this essay, but some of them are far-ranging. In particular, Professor Adams looks searchingly into the metaphysical qualities of such entities.

Adams' book, as he himself notes, is far too short to develop all the issues raised. His destruction of various forms of naturalism is quickly followed by a conclusion that values are a part of reality—"value-requiredness is a unique categorial feature of reality."[60] We shall not look into the character of this value-requiredness. If this quality inheres in the individual segments of "what there is in the world,"[61] we have something different from independent and separable existences known as nonnatural ethical properties. The differences are apparent in describing reality, in determining what and how we can know, and, of course, in the consequences for ethics. Although the upper reaches of metaphysics are being avoided here, there are some points that have to be considered.

For example, are ethical terms facts? The answer must be that they are not empirically verifiable facts but, as Mrs. Bowes says, we need not so limit the meaning of the word "fact." She says that "a fact is such that we find it somehow demands acceptance and there is nothing which calls for its rejection."[62] The requirements for such a "fact" are "that it is possible for us to conceive of it and such a conception is somehow necessitated by the nature of our experience." This is too easy. To adequately demonstrate that ethical terms are facts, the explanation must be along the lines that Professor Adams suggests. Lon Fuller attempts to merge fact and value but, it seems to me, without success. The failure to communicate between Nagel and Fuller shows that a difficult problem is at issue.[63] This controversy is likely to continue and will be alluded to further in this essay.

If it be accepted that ethical terms are not reducible to natural terms, what shall we say about their being reduced to nonnatural or nonempirical terms? This has meaning only if we return to the issue just considered and inquire about the possibility of a nonnatural objective value. This is not the place to develop the nature of existence that is involved in such a claim. The problem is the nature of reality and Ewing argues that he will not assume "that the ouly reality is that discoverable by natural science."[64] But this feeling does not get him too far because he soon comments on "the oddness and elusiveness of the 'non-natural' properties . . . ."[65] He is reduced to pointing out that "non-natural on non-empirical concepts like

60. ADAMS, *op. cit. supra* note 29, at ix, 202.
61. *Id.* at 15.
62. BOWES, *op. cit. supra* note 32, at 54.
63. See note 13 *supra*.
64. EWING, *op. cit. supra* note 49, at 38.
65. *Id.* at 51. He had previously called them "mysterious." *Id.* at 35.

those of logic are granted existence even by naturalists. Why then can we not admit non-natural ethical terms?"[66]

Mrs. Bowes gets away from this mildly exhortatory approach. She has a variety of reasons for believing that ethical terms are objective facts. An ethical principle has the same relation to the experience of ethically oriented humans as a principle of physics has to the facts of that field. They both explain the nature of existence. There is no problem in calling a principle of physics a fact and she, therefore, feels there should be none with respect to moral principles. Mrs. Bowes feels no necessity to posit "a world of non-natural characteristics." As previously noted, she is satisfied that a fact exists when it somehow demands acceptance and there is no good reason for rejecting it.

These issues, however interesting and instructive on what ethical philosophers talk about, will not advance our own themes and will not be pursued. One point that does arise in this type of discussion is the use of the word "true" with respect to ethical judgments. Obviously when used with respect to a natural fact, we mean that there is a discoverable correspondence of one fact with other facts. But the discovery of such a correspondence is not usually regarded as a primary purpose of ethical judgments. Ewing, for example, rejects any contention that "ethical propositions could be *reduced* to merely factual ones or deduced *formally* from the latter."[67] He concludes that truth in ethical judgments is a seeking for a correspondence "in a very wide sense" to reality which will demonstrate that the ethical judgment was justified by the factual situation. This justification by facts is truth in ethics. One alternative to this view is, as we shall see, that ethical judgments are not facts at all but are mere expressions of emotion.

Let us now turn to the three ethical problems which, as previously mentioned, have been selected for expanded treatment. Their full significance may appear only after our task is finished. But in any sweep of the field intuitionism, emotivism, and the relation of fact and norm would have to be considered. Accordingly, even though many other topics are omitted, it is hoped that the discussion of these three will give some of the flavor of modern ethical discussion and some insight into how the professionals in the field talk.

### *A. Intuitionism*

If there is one point in which no modern ethical theorist seems to believe, it is that, as Jerome Hall suggests, one intuits the good or the right thing to do "like a flash."[68] The nature of intuition is an interesting problem into which we cannot delve too deeply because the full statement would entail several theories of knowledge which cannot be unraveled here. All that will

66. *Id.* at 53.
67. *Id.* at 48.
68. See note 16 *supra.*

be attempted will be a study of the general understanding of the term.

"The term intuitionism is ordinarily applied to a theory according to which conduct is held to be right when conformed to certain precepts or principles of Duty, intuitively known to be unconditionally binding!"[69] Note that the intuition is that the conduct is right but that no hint is given as to what goodness is. G. E. Moore is frequently referred to as an intuitionist,[70] but in the preface to the *Principia*, Moore begs that it be noted that he is not an intuitionist "in the ordinary sense of the term."[71]

Moore argues that there are two questions that moral philosophers have failed to distinguish in much of their discussion. They are: What is good in itself? and, What kind of actions ought we perform? Moore claims that there is no relevant evidence that will assist in answering the first question. The answer to the second question, on the other hand, is entirely capable of proof. Thus, as Moore says:

> The Intuitionist proper is distinguished by maintaining that propositions of my *second* class-propositions which assert that a certain action is *right* or a *duty*—are incapable of proof or disproof by any inquiry into the results of such actions. I, on the contrary, am no less anxious to maintain that propositions of *this* kind are *not* "Intuitions," than to maintain that propositions of my *first* class *are* Intuitions.[72]

Properly used, therefore, the term means that the proper course of acting in the face of a given situation is somehow immediately made known to us.[73] There are several criticisms of this method of learning or knowing our duties that merit discussion. For example, what kind of knowledge could this be? Can it really be true that the ethical quality of an act is fixed before we know the consequences of the act in practice? Further, as a moral test, there are serious practical objections to moral knowledge by intuition.

The intuitionist appears to be saying that he knows his duty because he finds it in his heart or head. Accordingly, Toulmin classifies intuitionists among those who regard goodness as an objective property. And he disposes of them in the course of his analysis of the nature of goodness as a directly perceived property.[74] By a series of examples he points out that

69. CALKINS, THE GOOD MAN AND THE GOOD 177 (1923). The interior quotation is from SIDGWICK, THE METHODS OF ETHICS 3 (5th ed. 1893).

70. 1 STAPLETON, PHILOSOPHY AND LIVING 184 (1939); NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 52, 68 (1959); BRECHT, POLITICAL THEORY 534 (1959); ADAMS, *op. cit. supra* note 29, at 44.

71. MOORE, *op. cit. supra* note 27, at x.

72. *Ibid.* Moore adds with respect to *his* intuitions that he means "merely to assert that they are incapable of proof." He implies "nothing whatever as to the manner or origin of our cognition of them."

73. "The word 'directly' or 'immediately' may also suggest that a process of intuition happens in a flash or that all of a sudden we become aware of things we did not know before. I am not using the words in this way, although it is not impossible for some knowledge to occur in a flash." BOWES, *op. cit. supra* note 34, at 70.

74. TOULMIN, AN EXAMINATION OF THE PLACE OF REASON IN ETHICS 18 (1958).

goodness itself cannot be described and that a criterion of goodness, like paying one's debts, does not have the close relationship that, for instance "equality of sides" has to the quality of "squareness." Toulmin concludes his statement of the difficulties of objectively analyzing goodness by saying: "If we take it that a simple (unanalyzable) quality is meant, the apparent arbitrariness of an ostensive definition is puzzling; if a complex (analyzable) quality is understood, no definite routine for confirming its presence is forthcoming."[75]

A theory of knowledge is possible which admits that one can know by intuition.[76] But none of the writers we are here discussing would adhere to it without very substantial qualification. It is of interest, however, to note that the example most frequently used to demonstrate the power of intuitionism is precisely the example used by theorists to exhibit the fallacies inherent in the claims of the intuitionists. We are told that we intuit the right thing to do just as we intuit that this paper is white. There is supposed to be no going behind these intuitions which are basic, unprovable, and self-evident. If our knowledge of right conduct is the same as our knowledge of the physical world we must be equating our knowledge of the attributes of the physical world with our knowledge of the facts of a postulated moral world. There is a significant difference between these two worlds, however, and it lies in our ability to test the data of the physical world and our inability to do likewise with moral facts. If we meet a color-blind man we are not forced to accept his insistence that red is green. There are laboratory methods by which objectively to distinguish red from green. But how different is our experience when we meet a morally blind man! The difference, of course, is that there are no tests to give objective results to moral intuitions.[77]

A most important objection to intuitionism is that it determines ethical values without regard to the consequences of actions. Felix Cohen reacts in typical fashion:

> Intuitive or commonsense ethics recognizes no dependence upon positive science. The immediate reaction of conscience to a particular situation demands no intellectual concatenation of the situation judged with other situations. Indeed it seems probably that adhesion to an ethics of conscience, which we have seen to be rather fashionable among jurists, is responsible for the legal tradition which regards investigation of the actual effects of legal decisions and statutes as trivial and useless.[78]

Before we get too enmeshed in controversy, let us recoguize that we are

75. *Id.* at 19. An ostensive definition is made by giving examples or by pointing.
76. See DUNCAN-JONES, BUTLER'S MORAL PHILOSOPHY *passim* (1952).
77. See NOWELL-SMITH, ETHICS 48 (1954).
78. COHEN, *op. cit. supra* note 33, at 46-47. "Modern ethics recognizes that insofar as we pass moral judgments on acts without knowledge of their consequences we literally do not know what we are talking about." THE LEGAL CONSCIENCE, SELECTED PAPERS OF FELIX S. COHEN 399-400 (Cohen ed. 1960).

faced with two traditions in ethics of which one, the deontological, has dimmed in our times. Some definitions may clarify the point.

A deontological ethics or intuitionist ethics arises from a belief that "conduct is held to be right when conformed to certain precepts or principles of Duty, intuitively known to be binding."[79]

Such a theory could not consider weighing acts to see which would produce the most happiness or the greatest balance of intrinsic value. These considerations require a utilitarian or teleological ethics which takes value or good as the basic idea. John Dewey calls this a theory of the good as contrasted with a jural theory of ethics in which Duty or Right is the fundamental idea. Dewey adds:

> At some point, of course, each theory has to deal with the factor emphasized by its rival. If we start with Law as central, good resides in these acts which conform to its obligations. The good is obedience to law, submission to its moral authority. If we start from the Good, laws, rules, are concerned with the means of defining or achieving it.[80]

In view of these definitions which, be it noted, relate to the rightness of *conduct*, it is easy to demonstrate that G. E. Moore is not an intuitionist in the ordinary sense of the term. In the *Principia* where he discusses ethics in relation to conduct, he defines "duty" as "that action which will cause more good to exist in the Universe than any possible alternative."[81] He means just what he says and in order to arrive at our duty we must possess sufficient knowledge to foresee all the possible consequences on the Universe of all the possible alternative courses of action. He readily agrees that we cannot have such knowledge and without regret concludes: "Accordingly it follows that we never have any reason to suppose that an action is our duty: we can never be sure that any action will produce the greatest value possible."[82]

Hence, for Moore, not only are consequences of action of the utmost importance in knowing our duty but so great is the burden of knowing all the consequences that, in the end, we cannot even know our duty. Moore seems to have something on his side when he insists that he is not a conventional intuitionist. This position ultimately lost Moore many adherents because of its obvious lack of utility.

Turning finally to the practical objections to deciding action on the basis

79. CALKINS, THE GOOD MAN AND THE GOOD 177 (1923). "Primitive ethics is 'deontological,' a matter of rigid duties, taboos, customs and commandments." TOULMIN, *op. cit. supra* note 74, at 137.

80. DEWEY & TUFTS, ETHICS 224-25 (1908); NOWELL-SMITH, ETHICS 133 (1954). "Pound's theory of social interests is thus a teleological type of axiology, like that of Bentham and Ihering; it corresponds to the type of ethical theory known as the theory of the good." PATTERSON, *Pound's Theory of Social Interests*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 558, 561 (1947).

81. MOORE, PRINCIPIA ETHICA 148 (1959).

82. *Id.* at 149.

of intuition, there are two such objections that merit consideration. First, it is an obvious fact of life that we are frequently faced with apparently equally balanced choices of action—and at that time intuitionism doesn't help. The basis for making a selection lies elsewhere and a suspicion arises that if the difficult cases are not settled by intuitionism, we should not need it only for the easy choices.

The second, and even more important, practical objection is that different people have different intuitions. It will not do to say that all people intuit that murder is wrong. The fact is that they intuit differently what murder is and what justifies the killing of one man by another.

The suggestion that there are other techniques for resolving moral problems will not now be followed up, but will be suggested in the course of seeing what some of our other authors think about intuitionism. We have already noted the opinions of Moore, Cohen, and Toulmin. Let us now turn to Mrs. Bowes and Dr. Ewing.

Mrs. Bowes begins her book by discussing whether there can be objective moral facts. Having decided that there can be, she then turns to consider how we can know such facts.[83] She answers this question by stating that, while she does not like to call herself an intuitionist, she does believe that certain moral facts can be known intuitively if that word is understood in a certain way. The certain way, of course, is the key. Intuitive knowledge is immediate knowledge and is to be distinguished from inferential or mediate knowledge. By this is meant that intuited facts are accepted for themselves and not because they entail knowledge of other facts which we already know. We can thus see how close is the verbal analogy between knowledge of moral facts and of sense perceptions. Actually, however, there is nothing in moral knowledge that precisely corresponds to our knowledge of, say, colors.

While intuited knowledge is direct and unlearnt, it arises out of the total background of experience and not through the function of some sense organ. In this sense, intuition is possible "through a gradually widening field of experience and a slow seasoning of our personality to it . . . ."[84] Following such a process we can have a series of intuitions at various stages of our experience and they may, of course, be quite different from one another. There may also be different people with different backgrounds. They will intuit differently. Mrs. Bowes insists that our intuitions at various stages will not be inferences nor based on a process of inference. This appears to limit inference to meaning some process of conscious deduction. Mrs. Bowes has intuition include elements of inference and perception but insists that the final product is a single quality, a reflective summation of all the elements.

83. BOWES, THE CONCEPT OF MORALITY 66 (1959).
84. *Id.* at 70.

Using this definition, Mrs. Bowes then examines the problem of the mistaken intuition. This, for her, is, of course, no problem. A mistaken intuition is like any other unwarranted conclusion and there is no formula to use or criterion to apply to distinguish a right intuition from a wrong one. The intensity of the certainty with which one feels an intuition is no test of its rightness.

Ewing has an excellent analysis of the various uses of the term "intuition." He notes that it is no explanation of ethical knowledge to say that one has an intuition to do a particular act. Such a remark is rather intended to argue that no explanation is needed. But, such an argument is not permissible with every type of knowledge and the issue is just what kind of knowledge is capable of being directly cognizable, that is, known without deliberately pursuing a logical process or remembering. The knowledge that is directly cognized is not without a background. As Ewing says, "the man who knows much of his subject and has reasoned hard is much more likely to make true judgments that are not, strictly speaking, inferred."[85]

Ewing puts neatly and convincingly what all of these writers are asserting. The faculty psychology which supposed the existence of an innate moral sense is obsolete. There is no innate warning bell that tells us that a proposed act is wrong. When we know that we are about to do wrong there is a long personal history of exhortation, thinking, and actual conduct. The result is to reduce reflection on each act to a minimum. If we react "like a flash," we can attribute it to our society and the acculturation process. But, of course, as often as not there is no flash and we must think out what we must do. One way or another, the evaluation process is cognitive.

### *B. The Emotive Theory of Ethics*

A topic in modern ethics arousing intense feeling is the conception of ethics known as the emotive theory of ethics. It is just one more point of general disagreement in this field, but a review of some of the contrasting contentions will show what these writers are thinking and talking about. Charles Stevenson's work is one of the focal points in the discussion about this particular theory of ethics.

As can be seen from the title, Stevenson's *Ethics and Language* discusses two subjects. Subsequent writers have appeared to pay slight attention to his thoughts on language and have pounced upon his ethical theories.[86]

85. EWING, *op. cit. supra* note 49, at 65.

86. The general criticisms directed at the whole school of linguistic philosophers, for example, in GELLNER, WORDS AND THINGS (1960), have also been directed specifically at the ethical theory representatives of the school. Dr. Edel has spoken of language becoming the master and not the servant and, on its own, laying down the nature and function of ethical theory. EDEL, ETHICAL JUDGMENT 83 (1955). "I do not find very enlightening the prevailing intellectual fashion imported from Oxford that philosophy is

Some of the voiced criticisms of these theories will be considered here. During this discussion it should be borne in mind that there are significant consequences for jurisprudence if an ethical statement is noncognitive and is intended only to express or to evoke emotion.

Of the writers we are using, Toulmin has the least trouble with Stevenson, whom he regards merely as a writer in philosophical ethics who has taken a limited view of what is involved in ethical reasoning. However subtle Stevenson's work may be, for Toulmin, it is simply that of another writer who adopts the subjective theory of ethics. The basic subjective argument is that "in saying that anything is good or right, we are reporting on the feelings which we (or the members of our social group) have towards it."[87]

This subjective view of ethics appears to have the fatal weakness that ethical disagreements have no useful meaning if good and bad represent only personal preferences. There is no apparent reason for paying any attention to other people's moral views because, Toulmin argues, no view requiring special reference to the speaker can give an account of a good reason for an ethical judgment or provide any standard for criticizing ethical reasoning. A neutral reference, not common to speaker or listener, is needed for such a standard. As we proceed in this essay, more will be heard about Toulmin's continning search for good reasons in ethics.

Toulmin does not feel that Stevenson's more elaborate version adds anything to the basic subjective theory of ethics. The reason for this is that Toulmin has already announced his central theme, the search for good reasons in ethics, and no matter how elaborate the theory, the subjective approach provides no solution for this problem. In fact, Stevenson rejects as "devoid of interest" the problem of validity in ethics[88] and, according to Toulmin, writers like Stevenson would say that reasons in ethics "have no use except to indicate those reasons and inferences you are psychologically disposed to accept."[89]

Mrs. Bowes singles out for speeial attack the Attitude Theory of Morals as advocated by Stevenson.[90] She gives a more satisfactory statement than Toulmin's of what Stevenson actually said. When a moral disagreement takes place, it is, according to Stevenson, either a disagreement in beliefs or a disagreement in attitudes. If the former, the disagreement can be resolved by an investigation of the facts. If the split is with respect to attitudes, facts will not help. Attitudes cannot ordinarily be changed by referenee to facts; they must be changed by persuasion. When an attitude

primarily a matter of linguistic analysis." WIENER, VALUES IN THE HISTORY OF IDEAS IN ASPECTS OF VALUE 39 (Gruber ed. 1959).

87. TOULMIN, *op. cit. supra* note 74, at 29.

88. STEVENSON, *op. cit. supra* note 44, at 155.

89. TOULMIN, *op. cit. supra* note 74, at 42.

90. BOWES, *op. cit. supra* note 83, at 96.

is embodied in an ethical judgment, the change of attitude must be done by persuading the holder that his attitude is wrong and that the alternative attitude is the better way of looking at the problem. The basis of the change is emotive and imperative. The speaker says: "This is the good; do it." In this sentence there is no new information, but there is an expression of approval and an appeal to follow the suggested course. It is thus argued that reasons may have no effect. They may well be only a make-weight. Their connection with the attitude is psychological, not logical. Stevenson's argument is that ethical terms are emotive and imperative in nature.

Mrs. Bowes agrees with Stevenson's emphasis upon attitudes as the real source of moral disagreements and concurs in the emotional character of the reorientation of attitudes. However, she lists four positions held by Stevenson to which, in her discussion, she objects. They are:

> (a) That producing an emotional orientation towards an issue (i.e., a pro-attitude) is merely a matter of appealing to feelings; (b) that the meaning of ethical terms is emotive; (c) that the relation between a set of beliefs and an ethical attitude can only be psychological and never logical; and (d) that ethical judgments cannot significantly be called "valid" or "true."[91]

These are important objections and an understanding of each of them will advance our understanding of the entire field of scholarship that we are here considering.

First, Mrs. Bowes does not believe that the creation of pro-attitude is merely a matter of appealing to the feelings.[92] This sentence appears to say that the creation of an emotional orientation toward an issue is not merely a matter of emotion. This may be sufficient to make the point the author has in mind. She asserts that to state that "X is good" may, as a matter of fact, not arouse any emotion at all. And, further, there must be more to changing an attitude in *every* case than the emotional upheaval caused by saying "X is good." She, of course, is urging that, in many cases, the rational (or factual) aspects of the case may persuade the listener to change his attitude. Stevenson would agree in all cases where the disagreement was with respect to beliefs and not to attitudes. But he would demand a rigid analysis to determine what was the point of disagreement. Mrs. Bowes is not precise enough here but her intended point seems discernible,

91. *Id.* at 98.

92. For Stevenson, beliefs are concerned with how situations are to be truthfully described and explained; attitudes are concerned with how the same situations are to be favored or disfavored *and* how they are shaped by human efforts. STEVENSON, *op. cit. supra* note 44, at 7. "An attitude is a *disposition* (capacity) to act in certain ways and to experience certain feelings." *Id.* at 90. An emotion is a feeling or attitude with attitudes being more complicated than feelings. *Id.* at 60. For Mrs. Bowes, an emotion seems equivalent to Stevenson's feeling. BOWES, *op. cit. supra* note 83, at 99 n.1. For a realization of the doubtful adequacy of these definitions, see RYLE, THE CONCEPT OF MIND 83 (1949).

that where the disagreement is in attitude and not in belief, the disagreement cannot *in every case* be resolved by emotional means alone; rational arguments can change attitudes. Even though Stevenson appears at times to agree with this view, it is an illusion. He continues to insist in his chapter on Validity[93] that only beliefs are changed by persuasion but does admit that the method of persuasion may be predominantly emotive or predominantly rational. In this sense then, Stevenson does not say that "emotional orientation towards an issue . . . is merely a matter of appealing to feelings."

Mrs. Bowes next objects to the suggestion that the meaning of ethical terms is emotive. Stevenson has an extended discussion of "meaning"[94] with the conclusion that the meaning of a word is its disposition or capacity to affect a hearer. Descriptive meaning is the disposition of a word to affect cognition. "Emotive meaning is a meaning in which the response (from the hearer's point of view) or the stimulus (from the speaker's point of view) is a range of emotions."[95] No sentence was found in Stevenson's book that said that the meaning of ethical terms is wholly and exclusively emotive. The word "good," for example, has descriptive characteristics but it would be folly to deny that, for Stevenson, the normative quality of good is in its emotive meaning. However much he affirms the necessity of rationality and cognition in making ethical judgments, he never really budges from his argument that ethical terms have a predominantly emotive meaning.

Mrs. Bowes' concept of morality does not permit her to accept ethical terms as having only emotive meanings. The meaning of ethical terms must accord with the moral point of view. This point of view has a specific character and, as she states, its "ultimate standard of judgment is the requirement that individual human beings should behave in such a way as to be as happy as it is in their nature to be and as to let others be happy in the same way as well."[96] The author would expect ethical terms to be consistent with this standard in addition to evoking emotion and urging action. The demand that ethical terms have the requirement of consistency with the moral point of view is sufficient to show that their meaning is more than merely emotive.

Mrs. Bowes next denies Stevenson's argument that the relation between a set of beliefs and an ethical attitude can only be psychological and never logical. Since this involves the place of logic in ethical reasoning, she also discusses Stevenson's argument that ethical judgments cannot significantly be called "valid" or "true."

These objections require an examination of "the logic of moral discourse."

93. STEVENSON, *op. cit. supra* note 44, at 152.
94. *Id.* at 37.
95. *Id.* at 59.
96. BOWES, *op. cit. supra* note 83, at 100.

The phrase could well be a contradiction of terms in that logic does not deal in ethical terms. The traditional definition of logic is that it is the study of the laws of valid inference. The principal problems studied in logic are those dealing with the relation of implication between propositions. A proposition (conclusion) is implied by another proposition (antecedent) when, *if* the antecedent is true, the conclusion is also true. But valid inference does not depend upon the actual truth of the propositions used.[97] A perfectly valid series of conclusions could be inferred about three-headed men with no necessary inference either that the conclusions were true or that such men existed.

Traditional logic deals with propositions. A proposition is a sentence, declarative in form, in which it can be of significance that it is true or false. This latter requirement thus eliminates questions, commands, and ethical sentences. A valid syllogism cannot be constructed of *ought*-sentences. Nor, on the other hand, can we have a mixture of declarative sentences and ethical sentences. David Hume was one of the first of the modern philosophers who pointed out that an *ought*-sentence cannot logically be deduced from a set of *is*-sentences.[98] This is now general knowledge and has precipitated the argument as to what kind of logic is valid for ethical reasoning.

Mrs. Bowes cuts through this problem rather easily by changing the meaning of the words being used. She states that "there is no reason why the term 'logic' should be restricted to induction or deduction. The term 'logic' or 'logical' is also used to signify any necessity that we find to be involved in any process of thought."[99] Hence, it follows that there is no problem in speaking of "validity" when discussing moral reasoning. "Validity" will mean something like "having logical force"[100] and will turn on

97. COHEN & NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 12 (1934); STEBBING, A MODERN ELEMENTARY LOGIC 6 (5th ed.).

98. 2 HUME, A TREATISE OF HUMAN NATURE 177-78 (Everyman's ed. 1911). Arnold Brecht doesn't think Hume deserves credit for helping establish the modern doctrine of the logical gulf between the Is and Ought. Brecht believes that the doctrine did not really enter modern thought until late in the 19th century. BRECHT, POLITICAL THEORY 539-540 *passim* (1959).

99. BOWES, *op. cit. supra* note 83, at 103. "[T]here would appear to be no convincing reason why such a leap from the domain of the descriptive to the realm of the normative should necessarily be subjected to censure. There exist strong factual (though not logical) bonds between the 'is' and the 'ought,' and the evaluative impulse in human nature is so strong that the bridge from a factual truth to a postulate is easily crossed." Bodenheimer, *The Province of Jurisprudence,* 46 CORNELL L.Q. 1, 6 (1960).

100. Prof. Adams comments that the good-reasons moral philosopher "agrees with the classical naturalist that there are factual validity-grounds for an ethical judgment. . . . He is able to accomplish . . . this by the recognition of a new kind of argument, an ethical argument, which is neither deductive nor inductive. It is an argument with factual premises which *support* an ethical conclusion, but the 'support' is of a different kind from any recognized by the logicians." ADAMS, ETHICAL NATURALISM AND THE MODERN WORLD-VIEW 101 (1960). "There is a relation between an ethical judgment and a factual situation such that we can see the former is justified by the latter,

the reasonableness of the reasons given for an ethical decision. The necessity involved flows from the fact that "certain conceptions and not others are acceptable as suitable standards of moral evaluation."[101] In this view, "we shall not be satisfied merely by being told that moral issues arouse the emotions of approval and disapproval. We also want to know why it is that we approve of certain things and disapprove of others, and what are the standards, acceptable by all from a rational point of view, by which we judge certain things as worthy of moral approval. Hence the importance of belief or cognition in a philosophical treatment of Ethics."[102] The problem of the relation of the factual to the normative is of great importance and will be looked into at some length later in this essay. The position to be taken in this essay will be that it is undeniable that natural and social facts have a direct bearing on what we ought to do and can rationally be brought into play in making moral decisions.

Professor Adams also discusses the emotivists but in his own special terms. One of his main objectives is to identify all forms of ethical naturalism and reveal the weakness of each. It is with what Adams calls "emotive naturalism"[103] that we are here most interested. This type of naturalism had its most prominent statement in Ayer's *Language, Truth and Logic.*[104] Ayer simply asserted that ethical propositions were nonsense and meaningless. They were empirically unverifiable and therefore meant nothing (meaning is determined by empirical verification). The fact is, Ayer says, that ethical propositions "are pure expressions of feeling and as such do not come under the category of truth and falsehood."[105]

As Professor Adams observes, these claims are "shocking" to many people[106] and have produced a large assortment of critics, among whom is numbered Professor Adams. His first step is to examine what it means to say that ethical sentences are meaningless. Stevenson, it will be recalled, devoted a chapter to enlarging the scope of "meaning" so that he could say that "a sign's disposition [power, capacity] to affect a hearer is to be called a 'meaning . . . .' "[107] Adams is not satisfied with this and makes the point that a sentence has a use in the language and it is that use which gives the

though we cannot prove this by logic." EWING, SECOND THOUGHTS IN MORAL PHILOSOPHY 35 (1959).

101. BOWES, *op. cit. supra* note 83, at 104.

102. *Id.* at 106.

103. ADAMS, *op. cit. supra* note 100.

104. AYERS, LANGUAGE, TRUTH AND LOGIC (2d ed. 1948) (first published in 1936).

105. *Id.* at 108.

106. Some critics appear quite outraged. One ethical naturalist argues that Stevenson's thesis is that "so-called ethical judgments are partly descriptive of one's personal attitudes, partly attempts to influence others." In his haughtiest tones, he then adds: "The august imperative quality of the traditional moral law is enfeebled in this picture of personal fiats attempting to seduce one another." EDEL, ETHICAL JUDGMENT 27 (1955).

107. STEVENSON, ETHICS AND LANGUAGE 57 (1960).

sentence meaning. Thus, by definition, we may decide that ethical terms express emotion. If this is done it follows that ethical terms cannot designate an objective ethical property or feature of reality because that is not their use. Adams would, therefore, say that it makes no difference whether we say "ethical and emotive *meaning*" or "ethical and emotive *use*."[108]

The author pursues this theme of the division of labor in language. Value-language is primarily the language of affection and conation. Such language has the power to arouse emotion independently of empirical meaning. It acquired this power by conditioning; such a power is not innate in the words themselves. With these views, we can understand why Professor Adams concludes:

> Moral "reasoning," according to the [emotive] theory, is simply doing something to get a desired effect, throwing words around to produce feelings and attitudes casually in the hearer, like fertilizing, watering, and hoeing flowers to make them grow. There is no question of the *validity* of moral judgments as such, only of their effectiveness.[109]

This argument is, for Adams, not a realistic one. He holds that emotive attitudes are not simply independent natural occurrences. They are a part of a moral situation and are part of what is reasoned about. In this latter sense they must be cognitive. If both of these contentions are true, the emotive theory of ethics, as defined, is not adequate. Professor Adams demonstrates his arguments by analyzing the nature of an emotive attitude.

He says that we do not just make an emotive utterance. The utterance is a symptom of an opinion or belief already held. Any sentence not only expresses an attitude and a belief but also the content of the belief. This content, which he calls its semantic content or dimension, means that the sentence describes something and, by so much, does more than express or cause an emotion or feeling. "Thinking that the act is an injustice or a wrong to someone is an integral part of the feeling of indignation . . . ."[110] The moral judgment "is the semantic content of the attitude. The emotive state makes a cognitive claim . . . ."[111] This demonstration of an inescapable connection between this reasoning and our ultimate moral choices is held to be fatal to the emotive theory of ethics.

As a consequence of this analysis, Professor Adams concludes that the emotive theory of ethics is naturalistic. No proponent of this theory posits an existing entity called "Value." When value-language is used to designate, it designates natural qualities that are recognizable by the language of science, such as moral claims and emotions. The reality is that of the empirical and there is no separate entity that includes "values."

108. ADAMS, *op. cit. supra* note 100, at 81.
109. *Id.* at 85.
110. *Id.* at 91.
111. *Id.* at 92.

We have thus seen three writers (Toulmin, Bowes, and Adams) who, each for his own reasons, find a purely emotive theory of ethics impossible to conceive, prove, or use for discussion. They, of course, are not alone. Dr. Ewing is probably speaking for the majority of students in this field when he declares that "everybody would admit the presence of cognitive, conative and affective factors alike in the typical moral attitudes; the only dispute is as to their relative place and functions."[112] The writers we have studied insist that Stevenson believes that moral judgments are purely emotive and that, therefore, he is wrong.[113]

It is recommended that a final decision not be made on Stevenson's work. The complexity of Stevenson's analysis suggests that he intends more than a simple reduction of ethical terms to some emotive meaning. Time and again he reiterates his belief that effective ethical understanding calls for the fullest range of knowledge of science and human nature. There can be little doubt that he favors a rational approach whenever a choice must be made. But then, in the decisive chapters when ethical sentences are analyzed, he persists in arguing that ethical sentences are emotive and imperative in meaning. This is not the place to do justice to Stevenson. Our purpose is served by showing the nature of the controversy that his work has produced.

It may occur to a reader that Stevenson limits the scope of ethics almost as sharply as does Toulmin. Toulmin would limit attack upon the ultimate principles adopted as ethical standards. Questioning of these principles, he would say, is not ethics. There can be no ethical reasoning *except inside* the system of beliefs adopted. On his side, Stevenson is precluding debate on the cognitive level over attitudes except insofar as such debate is persuasive. He regards the origins of moral ideas as beyond the scope of his work. This appears to refer to the origin of attitudes. He therefore starts with existing attitudes and discusses the means of changing them. He insists that these means can only be persuasive. One cannot be argued out of an attitude. However, good reasons can be given that will induce a change in attitude. This fine distinction weakens Stevenson's overall effort. He tries to keep out what insists on coming in—facts and reasons for ethical choices.

It should have occurred to the reader by now that this is not a problem from which the student of legal philosophy can stand aloof. If ethical judgments are not determinable by rational debate and are not amenable to

112. EWING, *op. cit. supra* note 100, at 6. "The emotive theory was overthrown partly by a return to common sense; it was felt that, surely, ethical statements must somehow be regarded as rational, defensible by argument and reference to fact." MURDOCH, METAPHYSICS AND ETHICS IN THE NATURE OF METAPHYSICS 102 (Pears ed. 1957).

113. "Probably very few would now defend the view that ethical sentences just express emotions as feelings." EWING, *op. cit. supra* note 100, at 7.

change from such debate, our problem is complicated if we hope to develop a body of ethical doctrine capable of immediate influence upon our legal decisions. A few quotations are pertinent to show that legal philosophy has not been left untouched by emotive theory.

> The word "ought" and the like are imperative expressions which are used in order to impress a certain behaviour on people. It is sheer nonsense to say that they signify a reality. Their sole function is to work on the minds of people, directing them to do this or that or to refrain from something else—not to communicate knowledge about the state of things. By means of such expressions the lawgivers are able to influence the conduct of state officials and of the public in general.[114]

Another Scandinavian legal philosopher maintains:

> The moral attitude (sense of morality) . . . is a direct and unqualified attitude toward a norm of action or social order. It is irrational in the sense that it is the expression of an emotion and is inaccessible to justification and argumentation.[115]
>
> As usual in practical problems it is not possible to prove the rightness of the attitude itself that is adopted, but only to discuss the beliefs that condition it.[116]

An explanation of much of Kelsen's work can be gleaned from his conception of ethical terms. For example:

> The problem of values is in the first place the problem of conflicts of values, and this problem cannot be solved by means of rational cognition. The answer to these questions is a judgment of value, determined by emotional factors, and, therefore, subjective in character—valid only for the judging subject . . . .[117]

And again:

> "[J]ustice" connotes an absolute value. Its content cannot be ascertained by the Pure Theory of Law. Indeed it is not ascertainable by rational knowledge at all. The history of human speculation for centuries has been the history of a vain striving after a solution of the problem. That striving has hitherto led only to the emptiest of tautologies, such as the formula *suum cuique* or the categoric imperative. From the standpoint of rational knowledge there are only interests and conflicts of interests, the solution of which is arrived at by an arrangement which may either satisfy the one interest at the expense of the other, or institute an equivalence or compromise between them. To determine, however, whether this or that order has an absolute value, that is, is "just," is not possible by the methods of rational knowledge. Justice is an irrational ideal. However indispensable it may be for the willing and acting of human beings it is not viable by reason.[118]

The reader should by now be getting a sense of how modern ethical writers talk and what they discuss. Admitting that there is virtually no unanimity in the field, nevertheless it cannot be inferred that all is chaos. The following quotation from one of Lon Fuller's articles appears to be an

114. OLIVECRONA, LAW AS FACT 21-22 (1939).
115. ROSS, ON LAW AND JUSTICE 367 (1958).
116. *Id.* at 368.
117. KELSEN, WHAT IS JUSTICE? 4 (1957).
118. Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474, 482 (1934).

extravagant and incomplete statement of modern ethical theory. He asserts that a view of the present state of ethical theory calls to mind a picture something like this.

> A human being, *A*, is engaged in doing some act, such as giving money to a beggar, or paying a gambling debt . . . . An observer, *O*, points to *A's* action and is heard to say, "This is good." At this signal ethical theoreticians begin swarming in from all sides. Their first act is to relieve the scene of the encumbrance of *A*, who is ousted without ceremony. This done, all gather round *O* and embark on a lively disputation . . . . How shall we characterize that sentence *O* just uttered, "This is good"? What is its "semiotic status"? Is it a mere ejaculation equally meaningful and equally meaningless, whether emitted in private or in public? . . . . Or is it perhaps a kind of news report to others about *O's* inner state? Is it such a report coupled with an invitation to others that they join in this inner state? Or instead of being viewed as a mere invitation, shall *O's* remark be interpreted as demanding or claiming that others should or must share his approving glow? Is *O* announcing an invitation or a directive that others do what *A* was just observed to do? At this point someone is heard to shout, "You are wrong, *O*. What *A* did was bad, not good." *O* starts to defend himself . . . [T]he theorists . . . begin debating the kinds of demonstrations or assertions that *O* may properly employ in supporting his position. Can he only say, "Well, I feel that way"? Or can he adduce something that can be called "proof," "validation," "justification," or "explanation" for his position?[119]

Fuller concludes that "if ethical theory is ever to escape from the wordy muddle in which it is now bogged down, . . . the first step will have to be to bring *A* back on the scene."

Fuller insists that this is a realistic view of modern ethics and urges his readers, as proof, to examine an article by George Nakhnikian.[120] This article is of limited support for Professor Fuller since, for example, only a few lines are given to the naturalists. It may also be recognized that most of the writers here being reviewed do not talk in this style. There is some justice in Professor Nagel's observation that neither the description of current ethical theory nor its wholesale condemnation by Fuller is well informed.[121]

In another form the emotive theory has had its impact upon legal theory. For example, it will be argued in this essay that if rules of law are derived from principles and if they are subject to revision if not productive of a maximum or social satisfaction, it is hard to believe that such rules are purely emotive. However, in opposition to this opinion is that of Glanville Williams who states:

> A rule of law is not a referential statement. It is not meant to be a statement about what has actually happened or is happening in the world, nor is it meant exactly as a prophecy. Not yet is it merely a tautology. . . . [I]t must be a

119. Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L.F. 83, 99 (1958).

120. Nakhnikian, *Contemporary Ethical Theories and Jurisprudence*, 2 NATURAL L.F. 4 (1957).

121. Nagel, *Fact, Value, and Human Purpose*, 4 NATURAL L.F. 26, 41 (1959).

> value-judgement. . . . Every legal proposition is reducible in the last analysis to the affirmation or denial of an "ought". . . . Thus the whole of the law consists of emotive statements. As with most other emotive statements there is a referential element, but not such as to make the statement a proposition of fact.[122]

We have previously noted the objections to a wholly emotive ethics. The same reasons apply to this narrow problem. Neither an ethical judgment nor a rule of law is wholly emotive. Professor Morris Cohen, the father of Felix Cohen, has made the point that norms are more than mere expressions of feeling or preference. "Norms must be general, and in order to be rational must be consistent. . . . A rational norm tells us which of two values we should prefer, because it assigns a reason or ground for such preference."[123] Professor Cohen argues that it is only by empirical evidence that we decide upon our preferences and refine our ideals.[124] Professor Kimpel flatly rejects Williams' view and says that "evaluations of moral worth are factual propositions, in the sense that their soundness can be tested by 'facts.' "[125] Such a view seems inevitable, once we start insisting that consequences are the test of ethical decisions. Felix Cohen simply states that "*Ought* propositions are . . . always reducible to *is* propositions. . . . Values are facts."[126]

The position towards which this essay is moving was set forth some years ago by Huntingdon Cairns in the following language:

> Finally, legal philosophy must undertake the evaluation of the suppositions and objects of the legal order. No more important assignment faces jurisprudence as a whole. . . . We are told today that values lie beyond the reach of knowledge, particularly of an empirical kind; that what we like or dislike is wholly a matter of our emotions. We are told also that this opinion is false. If the first view is correct then the idea that law is a form of social control that can direct human conduct to desirable ends is sheer fantasy. It means that societal processes, in the great turns and reversals that they exhibit, are at the mercy of blind impulses and unseeing imponderables. Against that view is the circumstance that it has not been demonstrated that the methods of science are not applicable to the evaluation of moral judgments. There is still reason to believe, therefore, that the ethical aspect of jurisprudence will someday yield to rational manipulation. Beyond this point, notwithstanding the elaborate analysis to which the topic is everywhere subjected, it seems impossible today to go with caution.[127]

### *C. The "Is" and the "Ought"*

Up to this point, we may conclude that there are many students of ethics who subscribe to the belief that ethical decisions are not founded on some simple element but are the end result of an intricate combination of cona-

122. Williams, *Language and the Law-V*, 62 L.Q. Rev. 378, 395-96 (1946).
123. Morris Cohen, A Preface to Logic 156 (1944).
124. See also Morris Cohen, Reason and Nature 427 (1931).
125. Kimpel, Principles of Moral Philosophy 141 (1960).
126. Cohen, Ethical Systems and Legal Ideals 116 (1959).
127. Cairns, Legal Philosophy From Plato to Hegel 566 (1949).

tive, cognitive, emotive, and factual elements. The uprising against the emotive theory of ethics in any form is notable. The rejection of any simple form of intuition and the inclusion in the term of strong influences from experience and reflection are further evidence of the trend. The wide popularity of Toulmin's work and the discussion of ethics in terms of good reasons is another sign that there are many people who insist that a rational and reasonable attitude must remain the sovereign factor in determining ethical decisions. The dominant factor in good reasons for such decisions resides in the establishment of close relations with the actual social facts of a particular society.

What now appears to need examination is the general scope of ethics suggested by some of these various writers. If that be done we may then be somewhat advanced in our effort to see what ethical theory has to contribute to legal philosophy.

The process of developing an ethical code, a system of moral principles, is not simply one of resolving conflicts as they arise. Included also is the development of a set of ideals towards which we believe we are striving. These ideals are also principles. The point being that the facts and needs of our life in society influence not only our immediate ethical responses to situations but also our ultimate aims. It cannot therefore be denied that social facts must have some relation to our moral decisions. And we should no longer delay some decision on the nature of this relation.

In the earlier discussion of some of the objections to the emotive theory of ethics, mention was made of how, even though traditional deductive logic seemed to prevent a direct connection between factual beliefs and ethical attitudes, nevertheless, students in this field, in their own fashion, have found a way out of the problem. For example, Professor Bodenheimer was noted as saying that the factual truth was of such import to the evaluation that there should be no difficulty in bridging the gap between the is and the ought even though the bridge was not a logical one.[128]

There is a psychological security that comes with thinking logically. It is part of our life to think according to the rules of logic. When we know A and B are true and that C is a valid inference from A and B, we feel no desire to ask any more questions. This is the kernel of our ethical problem. We want to be guided by reason, we want to use our new knowledge about the world to make it a better world morally, and yet there is alleged to be no assured and generally accepted process that will lead us from the new and the true to the good.

The above paragraph is plausible but it is incomplete. The symmetry of a logical argument may be a beauty in itself but it does not necessarily lead to truth, action, or value. Some method must be devised whereby, with

128. See note 99 *supra*. "Validity has *nothing* to do with persuasive methods." STEVENSON, *op. cit. supra* note 107, at 152.

assurance, we can make ethical decisions in a rational manner.

The important point, therefore, becomes where we shall start. It will be recalled that Moore stressed the fact that so much of our difficulty in ethical discussion came from a failure to decide what questions we desired to answer.[129] Accordingly, suppose we ask "What is the good?" It has been previously indicated that from Moore we will learn very little about good and nothing at all about duty. It must be clear that, if we simply define good, no inference arises that we ought to do the good. This is unsatisfactory to many.[130] For example, Dewey remarks that "the genuine issue is not whether certain values . . . have being already (whether that of existence or of essence), but what concrete judgment we are to form about ends and means in the regulation of practical behavior."[131] Let us assume that we need not posit the existence of some additional entity like good nor some new world of reality like value. Instead, let us make the decisive question be "What is a good act?" From this question, we can move on with the definitions like the good act is the one we ought to do. We can skip the query as to why we should do good, since as Toulmin notes, this isn't a real question. What else is there to do? We therefore assume that we ought to do the good act; this is equivalent to saying that it is our duty to do such an act. Speaking in this manner, we can then concentrate on what are our duties.[132] The answer to be adopted in this essay is that good acts, our duties, are acts in accordance with the ultimate rules and principles of our society.

This, of course, focuses attention on the nature of such principles. To that problem, we shall now address our attention. The writers we are examining will first be queried, but, as we shall see, we shall have to broaden our study to get a glimpse of the origins and coverage of such principles.

Our writers all consider at length the nature of ethical principles although, it may be noted that they do not look to the historical origins of the principles. All agree that ethical conduct is principled. Ewing points out that the difficulties in conduct arise from a conflict in available principles. For this reason, he espouses the idea of a principle embodying a prima facie duty.[133] That is, we ought to follow a principle unless there be a superior reason advanced against following it. "[T]o say that something is good . . . is only to say that we have a *prima facie* duty to further it."[134] The sufficiency of the reasons for not performing a prima facie duty is part

129. MOORE, PRINCIPIA ETHICA at vii (1959).

130. Some of Moore's students regretted this result. See HARROD, THE LIFE OF JOHN MAYNARD KEYNES 75, 214 (1951).

131. DEWEY, THE QUEST FOR CERTAINTY 46 (1929).

132. The reader is advised that almost two generations of British philosophers are thus dismissed in these sentences.

133. EWING, *op. cit. supra* note 100, at 124.

134. *Id.* at 127.

of the general code of the society. For example, there is certainly a prima facie obligation to keep one's promises and yet, as Ewing notes, "[I]t is occasionally more in accord with benevolence and fairness to break a promise rather than to keep it."[135]

Mrs. Bowes argues along the same lines. For her, "a principle is a positive conception of a suitability and it orients us in certain directions rather than in others."[136] She explains that "general principles have no more than a broad regulative function in determining what we should actually do." Generality of principles is desirable since it leaves us a broad range within which to use our discretion. Principles become established only by persons acting in accordance with them. A child cannot become a saint merely by learning specific principles; he must live in accordance with them.

Duties, for Mrs. Bowes, refer to "particular acts most suitable from the point of view of morality to particular situations in which an agent is called upon to act."[137] It is right that we follow a principle but we have only a prima facie duty or obligation to do so. If the particular situation has one relevant moral aspect, we follow the governing principle. But the determination of which principle governs is the "one that is suitable to the total situation as viewed morally and not merely to any particular feature of it."[138] Principles thus serve as standards of conduct. They represent the right and the suitable course. Duties are confined to particular acts and are, strictly speaking, right acts. Thus, it is useful to note that what is right in general may sometimes appear self-evident, whereas what is right in particular, the duty called for, is what creates the difficulties in ethical decision. And it is the continuing use of our intelligence in selecting the correct duties in accordance with our moral principles that is the hallmark of the truly moral man. There is no readymade solution to moral problems.

Toulmin's view is that principles are "shorthand summaries of experience."[139] In any particular community, certain principles are current—that is to say, attention is paid to certain types of argument, as appealing to ac-

135. *Id.* at 134. The similarity should be noted between Ewing's prima facie obligation and Pound's conception of stare decisis. "[S]*tare decisis* is a feature of the common-law technique of decision. That technique is one of finding the grounds of decision in reported judicial experience, making for stability by requiring adherence to decisions of the same question in the past, and allowing growth and change by freedom of choice among competing analogies of equal authority when new questions arise or old ones take on new forms . . . ."

"It should be noted . . . that when definite states of fact vary markedly, rules cease to be more than starting points of analogical reasoning. In most cases other analogies are at hand so that a more satisfactory starting point for the different state of facts may be found and the question may be put on a basis in touch with the exigencies of the time and place by the ordinary technique of drawing a distinction." 3 POUND, JURISPRUDENCE 562-63 (1959).

136. BOWES, THE CONCEPT OF MORALITY 178 (1959).

137. *Id.* at 180.

138. *Id.* at 181.

139. TOULMIN, AN EXAMINATION OF THE PLACE OF REASON IN ETHICS 18 (1958).

cepted criteria of "'real goodness,' 'real rightness' . . . . And just such a set of principles, of 'prima facie obligations,' of 'categorical imperatives,' is what we call the 'moral code' of the community."[140] But the most important principle adopted or assumed by Toulmin is that of the function of ethics.

Toulmin says that the function of ethics is "to correlate our feelings and behaviour in such a way as to make the fulfilment of everyone's aims and desires as far as possible compatible,"[141] or, again, "to reconcile the independent aims and wills of a community of people."[142] This harmony is clearly designed for a particular community or society.

We thus have a function of ethics that brings happiness and creates harmony. Actions are classified as they are suitable for achieving objectives. Below this grand objective are the series of principles which enable one to see how the harmony is, in general, achieved. The process of achieving this harmony has actions tested by principles; principles, by consequences; and consequences, by agreement with the function of ethics. What we determine to be the function of ethics is the ultimate or highest principle. If we use the word "good" at this point, it must mean "in accordance with an ultimate principle."

Since Moore has said that all propositions about the good are synthetic, he concludes that all such propositions "must rest in the end upon some proposition which must be simply accepted or rejected, which cannot be logically deduced from any other proposition."[143] This result, he says, "may be otherwise expressed by saying that the fundamental principles of Ethics must be self-evident." By self-evident, however, Moore means that, in a logical sense, the principle is not inferred from another proposition. He does not mean that such proposition is true. There can be no reasons which prove such propositions true.

This inability to establish by any scientific method the truth of ultimate principles is the theme of Arnold Brecht's *Political Theory*, published in 1959. He concludes that:

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140. *Id.* at 140.

141. *Id.* at 137.

142. *Id.* at 170. Social engineering "conceives of the legal ordering of society as a practical process in eliminating friction and waste in the attainment of human desires." POUND, CRIMINAL JUSTICE IN AMERICA 3 (1930). Social engineering is the "idea of giving the most complete security and effect to the whole scheme of human demands or desires, which have pressed or are pressing for recognition and securing, with the least sacrifice of the scheme as a whole, the least friction, the least waste." Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 444, 777, 810 (1938). "I have come to feel that instead of putting the task of law, as William James did, in terms of satisfying as much as we can of the total of human demands, we do better to speak of providing as much as we may of the total of men's reasonable expectations in life in civilized society with the minimum of friction and waste." Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1, 19 (1954).

143. MOORE, *op. cit. supra* note 129, at 143.

(1) The question whether something is "valuable" can be answered *scientifically* only in relation to
(a) some goal or purpose for the pursuit of which it is or is not useful (valuable), or to
(b) the ideas held by some person or group of persons regarding what is or is not valuable:
and that, consequently,
(2) it is impossible to establish scientifically what goals are valuable *irrespective* of
(a) the value they have in the pursuit of other goals or purposes, or
(b) of someone's idea about ulterior or ultimate goals or purposes.[144]

According to what Brecht calls Scientific Value Relativism, "'ultimate,' 'highest,' or 'absolute' values or 'standards of values' are 'chosen' by mind or will, or possibly . . . 'grasped' by faith, intuition or instinct; but they are not 'proven' by science . . . ."[145] This unpalatable conclusion has led numerous scholars to seek ways to escape from its limitations. Brecht devotes a long chapter to descriptions of nine different types of such attempts and demonstrates that all fail to achieve their objective.[146]

Even if these principles cannot be demonstrated to be true, we know they are used as the basis of ethical theories. The query must therefore be where they come from. A hint as to the answer is given when Toulmin argues that we cannot usefully compare the principles of a Christian with those of a Moslem. As stated more exactly by an English legal philosopher:

> In acknowledging ultimate ends or moral values we are recognizing something as much imposed upon us by the character of the world in which we live, as little a matter of choice, attitude, feeling, emotion as the truth of factual judgments about what is the case.[147]

To mention our central theme for a moment, Dean Rostow of Yale Law School has pointed out that "law is founded on a collective code of common morality."[148] Arising out of the course of history, "the common custom of a society at any time is a blend of custom and conviction, of reason and feeling, of experience and prejudice." As part of this process, it follows that "the law changes as the society changes its notions of what it wants to achieve through law." As will be developed later, this essay will not conclude that law and morals are identical nor that legal changes come about

144. BRECHT, POLITICAL THEORY 117-18 (1959).
145. *Id.* at 118.
146. *Id.* at 261.
147. Hart, *Positivism and the Separation of Laws and Morals*, 71 HARV. L. REV. 593, 626 (1958). "There is a diversity among moral codes which may spring either from the peculiar but real needs of a given society, or from superstition or ignorance." HART, THE CONCEPT OF LAW 167 (1961).
148. Rostow, *The Enforcement of Morals*, 1960 CAMB. L.J. 174, 198. "[M]ost law is legal reinforcement of cultural and local standards of behavior, of what is considered right and proper . . . ." LA PIERE, THE FREUDIAN ETHIC 260 (1959). No legal philosopher would agree with this.

*solely* from moral urges. The point at issue here is that a society arrives at a time and place with a set of legal and moral principles and it is from these principles that any legal or moral developments or changes come.

The study of the sources of our principles and values is the province of the historian and the sociologist. The study is both general and particular in nature. Whether there are universal values has not been determined with any unanimity.[149] The usual modern view is expressed in this fashion: "We . . . assume that different people have worked out different sets of values from their collective experience in the past, a process which appears so complex as to be almost inscrutable."[150] As Santayana said: "An ultimate good is chosen, found, or aimed at; it is not opined."[151]

A Scandinavian legal philosopher expresses similar ideas in this fashion:

> In every community there is a living tradition of culture which finds expression in more or less uniform ideas as to behaviour in a given situation.[152]
>
> . . . .
>
> The moral attitudes have a social origin, inculcated in a person by suggestive persuasion of its environment. The peculiarity of the persuasion that creates morality is that it happens in the first few years of the person's life.[153]

Presumably the values arose out of social needs, such as security or food scarcity. It is clear not only that there are different needs but that there are different responses possible to the same needs.[154] But once set in motion, the responses and the needs react upon one another through the historical process.

Assuming that the mysterious process of history brings us at any particular moment to the actual values in force in particular society, we are led to the question of how does change take place in an ethical system. The issue is that we have principles, rules, and customs which we are expected to follow. But it is equally obvious that we must make adjustments. A famous example of excessive ethical rigidity is Kant's essay "On a Supposed Right To Tell Lies From Benevolent Motives."[155] Kant con-

149. On even such a value as promise-keeping, see note 178 *infra*. The uniformities posited by exponents of a natural law can be regarded as shared prejudices. The exact content of such prejudices must be examined for each society. If an American does not feel free to kill a man of any other society, it cannot be presumed that there are not societies which do condone the killing of men in certain outside groups.

150. ANGELL, FREE SOCIETY AND MORAL CRISIS 54 (1958).

151. SANTAYANA, WINDS OF DOCTRINE 144 (1913).

152. ROSS, ON LAW AND JUSTICE 60-61 (1958).

153. *Id.* at 365. Professor Kimpel would agree that our principles come from the social contexts in which we live but they are conceived through our reflection upon this experience. This is a job for adults, not children. KIMPEL, *op. cit. supra* note 125, at 49.

154. For example, see LA PIERE, THE FREUDIAN ETHIC (1959), contrasting Max Weber's Protestant Ethic with what the author describes as the prevailing ethic, the Freudian Ethic.

155. See KANT, THEORY OF ETHICS 361 (6th ed. Abbott transl. 1927).

cludes that principles must be strict truths and that there are "never exceptions to them, since exceptions destroy the universality, on account of which alone they bear the name of principles."[156] Such an attitude can become intolerable in practice and of no use in the face of equal choices.

Toulmin points out that deontological ethics are an early development designed to give form and strength to a community. The rigid duties commanded continue to be adhered to so long as there is an agreed-upon need for them. Some situations, such as driving on the right hand side of the road, simply call for a universal rule, almost no matter what the rule may be.

But when conflicts and inadequacies in the codes appear, some technique for adjustment is necessary. Toulmin argues that historically "the 'deontological' code was at first supreme; the 'teleological' criterion now amplifies it, and provides a standard by which to criticise it. This does not mean that morality becomes wholly teleological. . . . All that happens is that the initially inflexible system of taboos is transformed into a *developing* moral code—a code which, in unambiguous cases, remains mandatory, but whose interpretation in equivocal cases and whose future development are controlled by appeal to the function of ethics; that is, to the general requirement that preventable suffering shall be avoided."[157]

This appeal to the function of ethics is obviously an appeal to the consequences of the proposed courses of action. As previously noted, the consequences are weighed in terms of the function of ethics and the new choice is made. The result is to emphasize motives of actions and results of social practices rather than a fixed a priori rule of conduct.

It must be clear that if the ethical act is not determinable until the consequences are known, then the loud cries for moral standards—absolute standards—are misplaced. The pragmatic utilitarian approach of so many modern philosophers deliberately forgoes final predictions on future actions and submits to actual consequences being the decisive factor in moral decisions.[158] Some form of ethical relativism must be accepted. At the very least, it must be acknowledged that different ethical principles may prevail among different societies. Within one pluralistic society like our own, strains of several moral codes may co-exist. And finally, within a society a system of ethics may be changing in time to meet new social conditions. This aura of flux and change in our ethical thinking should, in itself, be sufficient to cast doubt upon the very existence of absolute ethical standards.

But the demand for such standards is persistent. Pound, over the years,

156. *Id.* at 365.

157. TOULMIN, *op. cit. supra* note 139, at 141-42. It also follows that to ensure a developing moral code the society should remain open and should avoid "the tribal, tyrannical and collectivist, 'closed' society." *Id.* at 171.

158. JAFFE, THE PRAGMATIC CONCEPTION OF JUSTICE 14 (1960).

has been attacked for his failure to have such a measure of value.[159] But it will be noted that many of his critics have belonged to schools of thought denying the existence of pluralistic societies and apparently insisting upon the continuing viability of a deontological ethics.

Those who call for absolute standards of morals usually argue that, as a part of reality, all men are bound by moral laws not to commit certain acts. These acts are usually named and are such as murder and robbery. The objection to arguing that all men abhor murder is that murder is not the same to all men. Murder is a human act and, in the analysis of H. L. A. Hart, "our concept of an action, like our concept of property, is a social concept and logically dependent on accepted rules of conduct."[160] In other words, murder is not a descriptive word; it is ascriptive. We ascribe the responsibility of a murderous act to a person. He may admit the killing but deny that it is murder for any of the many reasons established in the law. Again in Hart's term, the ascription of murder is defeasible by any of the established defences. These defences are peculiar to a particular society and vary as between societies.

There is no uniformity among societies as to the content of these acts. There is therefore no absolute standard by which to judge such acts. Similarly, there is little uniformity among societies as to ultimate ends. On this point, Dewey argues that ends are sharply delimited by available means.[161] If means vary among societies, as they indubitably do, the ends must also vary. There is, therefore, much reason on the available evidence, for rejecting the very concept of absolute standards.

Ideals adjusted to available means, set in a particular time and place are necessarily achieved by a piecemeal process. If there are no absolute goals, it is also true that there are no irrevocable decisions. A man and a judge are each allowed a margin of error for mistakes. The mistakes may lead to adjustment of the goals. But the process is what counts. That it be knowledgeable and rational is the essential. We can thus understand Pound's desire to avoid friction. If it be said that friction is a subjective and vague concept, this can hardly be the view of the judge with the friction in front of him demanding relief.

Our doubts about pre-existing absolute standards arise because we are faced with the march of history in which not even hindsight produces any patterns in the past. We feel quite sure that the future is entirely unpredictable. The evidence supports this opinion. Walter Lippman has said that "the unhappy truth is that the prevailing public opinion has been destructively wrong at the critical junctures. The people have imposed

159. Grossman, *The Legal Philosophy of Roscoe Pound*, 44 YALE L.J. 605 (1935); Kennedy, *Pragmatism as a Philosophy of Law*, 9 MARQ. L. REV. 63 (1925).

160. HART, THE ASCRIPTION OF RESPONSIBILITY AND RIGHTS IN LOGIC AND LANGUAGE 145, 161 (Flew ed. 1952).

161. DEWEY, HUMAN NATURE AND CONDUCT 25 (Mod. Libr. ed. 1930).

a veto upon the judgments of informed and responsible officials."[162] But it can hardly be argued that these same officials, if left to themselves, would have done much better. The past few decades have been replete with misjudgment and error. Foreign affairs need no argument. The situation is the same on the domestic scene. Modern living has become a problem of coping with the unexpected. Longtime trends reverse themselves for no discernible reason. From a fashion of one or no children, our bright young adults suddenly want six or more. Everybody has suddenly taken to the road or the suburb. In every city in the world, traffic and juvenile delinquency are major problems. The mature economy of the Thirties has exploded into the riches of the affluent society of the Fifties and Sixties. If there is or was a pre-existing pattern discernible in all of this, someone ought sometime to have noticed. Our ideals are shaped by the consequences of natural and social practices. If these consequences cannot be predicted, the precise application in advance of absolute standards is not possible.

The difficulty of demonstrating the existence of absolute standards for testing moral decisions is equalled by that of showing universal moral standards. When we try to be specific we run into words, like murder, whose meaning is demonstrably variable. If we try to avoid this pitfall by being general, the result is vagueness. Writers like Toulmin regard the problem as unpossible. Each society has its unique ethical and moral system.

Mrs. Bowes confines the study of ethics to the examination of those general moral principles which "have a general applicability to all human beings."[163] These "value ideals," such as the truth ought to be told or a life ought to be respected, do not dictate any particular action but serve as standards for human actions of many different kinds. Dr. Ewing sharpens up these conceptions. He says that "some ethical propositions are indeed universally true."[164] As an example, he suggests that "it is universally true that we ought never to commit a murder if by 'murder' is meant wrongful killing." He notes that such a claim is tautologous but does serve the purpose of showing that we are claiming the existence of a prima facie obligation not to kill human beings unless there is a special justification for such killing. Such propositions thus instruct us as to what classifications we ought to perform with the added qualification of their prima facie character.

To return to the words of sociology, a decline of moral integration, an increase in tensions, calls for an adjustment of the moral web, the complex of moral norms and institutions.[165] The moral web seeks to stay in equilib-

162. LIPPMANN, THE PUBLIC PHILOSOPHY 24 (1956).
163. BOWES, *op. cit. supra* note 136, at 43.
164. EWING, SECOND THOUGHTS IN MORAL PHILOSOPHY 124 (1959).
165. ANGELL, FREE SOCIETY AND MORAL CRISIS 16 (1958). "At any given moment

rium but it is under constant pressure from all sides—environmental changes, new values brought by an influx of immigrants, new inventions, or, in short, Cardozo's social needs.

It is the pressure of the needs plus the general principles already adopted plus the general function of ethics that determines the direction of the new ethical decisions. The needs may be blocked, the principles may be modified, but the consequences of the decision will ultimately decide. Accordingly, in the face of all this pressure, changes take place based on the consequences of the proposed action. A selection is made, and the result is a new value or a modified principle.

It should be noted that the new value has been a free choice from among genuine alternatives. The ageless debate of freedom versus determinism still appears in most ethical works.[166] But ethics in practice requires freedom to choose. The new value is not to be characterized as mere acceptance of what comes up—the *is*. We elect to do what we ought to do in accordance with our ultimate principles.

There are other ways of describing the method by which social facts are worked into our morality. For example, Ernest Nagel argues:

> Within the framework of such a moral theory, judgments as to what ought to be done do not follow logically from judgments as to what is actual; nevertheless, judgments asserting what ought to be are conceived as hypotheses about ways of resolving conflicting needs and interests.[167]

This view, he says, preserves the "sharp distinction between what is and what ought to be [and] value judgments are not thereby regarded as foreign intrusions into the study of human behavior."

Another method is worked out by returning to the problem of what are the principles we adopt and where do they come from. We can start by saying that men want things and conditions, such as freedom. Much of sociology today is taken up with efforts to determine what it is that men do actually value. Further studies are devoted to discovering what men actually think they ought to want. One step further leads us to the ethical problem of what men ought to want. But these three items are not unrelated.

The work of sociologists in the area of societal values and their origins can barely be indicated here. Among the problems examined in this work is whether there are any universal values for all men in all times and places, common values in a given society for all time, or whether values are under-

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the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who . . . accept and voluntarily co-operate in maintaining the rules . . . and those who . . . reject the rules and attend to them only from the external point of view as a sign of possible punishment." HART, THE CONCEPT OF LAW 88 (1961).

166. EWING, *op. cit. supra* note 164, at 156; BOWES, *op. cit. supra* note 136, at 210.

167. Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NATURAL L.F. 77, 78 (1958).

going a constant change or variation due to social forces, be they physical, economic, or social. A combination of these possibilities must also be included. Anthropologists and sociologists obviously must first determine what *are* the values in each society. Close correlation may then reveal common values.

But wherever the values are found, they are the cement of the society. Men act in obedience to them or in hope of achieving them. Institutions, laws, and cultures embody them. If the "institutions and moral norms are adequate and compatible and behavior is guided by them," it may be said that there is a high degree of moral integration in that society.[168] In such a society, laws would probably reflect the common values and there would be general obedience of these laws. Again, sociologists are interested in the factors that are conducive to a high degree of moral integration in our complex societies.

With a high degree of moral integration or agreement on the values of the society, it can be seen what men actually want. It should then be possible to turn to what ought to be. This process of agreement on values has been described as a "consensual validation of value judgments."[169] While this validation may take place through the rational process of forming hypotheses as described by Nagel, some unanswered questions remain.

For example, why do we adopt a moral attitude toward our experience? Bodenheimer speaks of "the evaluative impulse in human nature."[170] Mrs. Bowes is quite frank and says: "Why we must adopt this point of view is a question that I cannot answer, and whatever mystery there is in our doing so remains insoluble as far as I can see."[171]

Toulmin, however, argues that it makes no sense within ethics to ask whether or not we should be ethical. The test is the presence or absence of genuine alternatives.[172] The Christian can no more make an ethical decision that four wives are better than one, than he can decide that bad is better than good. What gives a Christian his particular values and ways of achieving social harmony is the historical process just mentioned, but once a Christian has his values settled to his private satisfaction, he is in no position to evaluate his way of life with reference to that of a Moslem.

Professor Adams is really suggesting an answer when he insists that the objective of a philosophical analysis of moral discourse is to disclose its ontological significance. Ontology studies the nature of being and reality. How we analyze being, what language we use with respect to it, the things we say about it, are what determine how we regard the world and what

168. ANGELL, FREE SOCIETY AND MORAL CRISIS 8 (1958).
169. BAY, THE STRUCTURE OF FREEDOM 8 (1958).
170. Bodenheimer, *The Province of Jurisprudence*, 46 CORNELL L.Q. 1, 6 (1960).
171. BOWES, *op. cit. supra* note 136, at 83.
172. TOULMIN, *op. cit. supra* note 139, at 153, 162.

is in it. For Adams, value-requiredness is clearly marked out in our experience. Everything has an "ought-to-be."

No enlargement of this theme will be undertaken, but it is sufficient to know that we come by our ethics much as we come by our metaphysics. We are born into a society with characteristic ways of thinking about life and experience.[173] Our language reflects the stage of our experience[174] and, in turn, limits the form of our reaction to that experience. Having briefly noted the sources of principles, let us look at some of their characteristics as seen by our selected authors.

Mrs. Bowes elaborates in considerable detail her basis for ethics. Her conception of morality turns on her meaning of "the moral point of view." To explain this key phrase, she says:

> To adopt the point of view of morality is to act in conformity with certain very general conceptions as to the value of human beings as individuals and as to the sorts of human behavior that fit in with this supposed value of individuals as persons in situations showing certain characteristic features.[175]

We arrive at this way of looking at experience after having achieved a certain maturity. This maturity is an essential to being able to adopt the moral point of view. In practice, we develop a feeling or intuition of the "fittingness" of an action, such as promise-keeping. The characteristic of rightness is already known because we have already adopted the general principle that if a person arouses an expectation in another, that expectation should not be frustrated by nonfulfillment.[176] Mrs. Bowes describes the feature that comprises the moral fittingness of the situation as empirically ascertainable, as she adds "in the sense that we can find it in our experience."[177] But there is no absolute necessity that wherever this feature is found that it be morally fitting. There may be situations, as also noted by Ewing, where promise-keeping "does not fit this situation considered in the totality of its moral aspects." All we can say is that generally promise-keeping is demanded by the moral point of view in actual conduct.[178]

Each of these writers has brought forward an attribute or way of regard-

173. For an anthropologist's view on this point, see BENEDICT, PATTERNS OF CULTURE (1946).

174. See, *e.g.*, the discussion of linguistic anachronisms in SMITH, THE ENGLISH LANGUAGE 214 (1912).

175. BOWES, *op. cit. supra* note 136, at 186.

176. *Id.* at 81.

177. *Id.* at 83.

178. Compare Toulmin: "It is inconceivable . . . that any practice will ever be suggested, to replace promising and promise-keeping, which would be anything like as effective. Even in the most 'advanced' stages of morality, . . . promise-keeping will remain right." TOULMIN, *op. cit. supra* note 139, at 150. "It is a presupposition of the whole economic order that promises will be kept. Indeed, the matter goes deeper. The social order rests upon stability and predictability of conduct, of which keeping promises is a large item." Pound, *Individual Interests of Substance-Promised Advantages*, 59 HARV. L. REV. 1-2 (1945).

ing experience which each seems ready to universalize. But even if we accept the ultimate principle, certainly the practical application of such a principle may take varied forms. For example, Mrs. Bowes says that we should keep our promises because the moral point of view frowns on the intentional raising of an expectation in another followed by an intentional frustration of that expectation. It would be hard to demonstrate that this principle is a universally accepted one.[179] And yet it probably represents what is accepted in, at least, the Atlantic Community. Toulmin's function of ethics as the correlation of "our feelings and behaviour in such a way as to make the fulfillment of everyone's aims and desires as far as possible compatible"[180] is hard to imagine as a leading principle among the state leaders in Moscow. I have no intention of raising and discussing the details involved in ethical relativism, but we cannot avoid noting that, for all our desires, our language and our place in our particular society do fix their mark upon us.

In contrast, it will be recalled that for Moore, our duty is "that action which will cause more good to exist in the Universe than any possible alternative."[181] Since we know that Moore means this literally, we must mark off Moore's theories from those of such as Toulmin who clearly limit a particular ethical theory to a particular society. If our emphasis, as it is, is going to be upon the facts of the society, we should be reconciled to not knowing all about the Universe. In our ordinary affairs we operate on inadequate knowledge[182] and we should not therefore underwrite an ethical theory whose requirements are beyond our powers.

One inference to be drawn from these thoughts is that ethics and jurisprudence are studies devoted to the analysis of the means, conduct, and law most appropriate for achieving some ultimate objective determined outside of these two fields of learning.

It will not be denied that the burden of showing what actually are our values and ultimate principles has been shifted to historians and sociologists. The ethical writers do not undertake either to prove their ultimate principles or state where they come from. Pound's work of describing the prevailing ideas of different historical periods is the reporting of one observer. Moore's insistence upon the self-evidence of principles reflects this

179. The moral philosophers are agreed on the ethical propriety of promise-keeping, but Dean Pound has described the effort to make a simple promise enforceable in law. Pound, *Individual Interest of Substance-Promised Advantages*, 59 HARV. L. REV. 1 (1945).

180. TOULMIN, *op. cit. supra* note 139, at 137.

181. It should, however, be noted that for Moore "personal affections and aesthetic enjoyments include *all* the greatest and *by far* the greatest, goods we can imagine . . . ." MOORE, PRINCIPIA ETHICA 189 (1959).

182. "Every year if not every day we have to wager our salvation upon some prophecy based on imperfect knowledge." Abrams v. United States, 250 U.S. 616, 630 (1919). (Holmes, J., dissenting).

idea that we know what we are without further reason.[183] The consequence is that we must scrutinize the conclusions of the particular thinker. There is no agreed-upon test for determining what are the ultimate principles of a given society at a particular time. This is not a matter for despair, but remains the challenge.

The result of these considerations is to explain why this debate over ethical theories never ends. Nobody has a method for demonstrating the correctness of his own views. No matter how badly he may damage an opponent's analysis, the writer cannot advance his own cause. The debate must, therefore, go on. Our central theme was long ago stated in terms that apply to both ethics and law:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[184]

As a result of these facts of experience, the ought judgment represents a conative attitude "justified and indeed imperatively required by the facts."[185]

The important point to be retained from these observations is that a community of men is held together by values and duties. Toulmin would argue that this is so by definition. Groups of people who live together and respect one another's interests, that is, recognize duties owing to each other is what we mean by a community.[186] If there is not this mutual respect, there is no community. A duty is an action which avoids giving offense to others. The function of ethics is to coordinate these duties, "to reconcile the independent aims and wills of a community of people,"[187] or "to correlate our feelings and behavior in such a way as to make the fulfillment of everyone's aims and desires as far as possible compatible."[188] In this sense, the *ought* is never far from the *is*.

## IV. Ethical Theory and Legal Philosophy

This essay began with illustrations intended to show how legal philosophers and jurists inevitably move to a point where they must make normative decisions. These writers frequently make these decisions without explaining the ethical theory upon which they found their views. It was shown how significant for legal philosophy was the view taken by such

183. Moore, *op. cit. supra* note 181, at 148.
184. Holmes, The Common Law 1 (1881).
185. Ewing, *op. cit. supra* note 164, at 77.
186. Toulmin, *op. cit. supra* note 139, at 135.
187. *Id.* at 170.
188. *Id.* at 137.

men of the nature of ethical judgments.

There was next undertaken a survey of modern ethical theory. As written, this survey was hardly more than a surface skimming. Only the merest indication was given of the subtlety and acuity of the linguistic analysis to be found in the scholarly writings in this field. But certain problems were looked at in some detail in the hope of indicating the manner in which fruitful discussion might take place with respect to them.

With these two objectives accomplished, it remains now to tie them into some conclusions as to the relation between ethical philosophy and legal theory. Again, this section is merely intended to be suggestive. If it appears to be overcrowded with undeveloped topics it should also be recognized that the subject is capable of a vast expansion in both width and depth. Certain conclusions will be reached which, it is trusted, are in accord with our findings on similar problems in ethical theory. In the course of perusing this statement, it should have been apparent that the issues considered here have not been given close attention by very many writers in either field.

In order to get the basic problem before us, the first issue to be looked at will be the relation between law and morals. Dean Pound, as we shall see, has eruditely traced the historical ebb and flow of this relationship. Today, however, we seem to be in a more critical mood and the nature of the precise issues involved have been given careful attention by such analytical writers as H. L. A. Hart. It will become apparent in this discussion that a matter of definitions is involved and we shall indicate the nature of some of the efforts to distinguish law and morals or, if you will, jurisprudence and ethics. As a final issue, there will be examined some current controversies in legal theory upon which our previous discussion of ethical philosophy has some relevance. As can be seen, this is a large order but it is hoped that a reader will be at least impressed by the pertinence and interrelationships of much of the material thus far presented.

Accordingly, we shall turn first to examine some theories on the proper relationship between law and morals. This problem has been handled best by Dean Pound.[189] As usual, he finds four distinct views: the historical, the philosophical, the analytical, and the sociological.

The historical school of the nineteenth century strove to describe the chronological development of the law. According to Pound, the writers of this school generally recognized "four stages in the development of law with respect to morality and morals."

> First, is the stage of undifferentiated ethical customs, customs of popular action, religion, and law . . . . Second, is the stage of strict law, codified or crystallized custom, which in time is outstripped by morality and does not possess sufficient power of growth to keep abreast. Third, there is a stage of infusion of morality

189. Pound, *Law and Morals—Jurisprudence and Ethics*, 23 N.C.L. REV. 185 (1945). Morals, for him, refers to "systems of precepts as to conduct organized by principles as ideal systems." *Ibid.* Compare POUND, LAW AND MORALS (2d ed. 1926).

> into the law and of reshaping it by morals; what I have called in another connection the stage of equity and natural law. Fourth, there is the stage of conscious lawmaking, the maturity of law, in which it is said that morals and morality are for the lawmaker and that law alone is for the judge.[190]

Pound promptly pointed out that the division of function between legislator and judge failed in practice and the judge had to make moral determinations "whenever a legal precept has to be found in order to meet what used to be called a 'gap in the law' . . . ." At such times the precept "is found by choice of a starting point which is governed by considering how far application of the result reached from one or the other will comport with the received ideal."[191]

The philosophical view grew out of the attempts of the natural law jurists of the seventeenth and eighteenth centuries to equate law and morals, to make moral precepts identical with legal precepts. These jurists argued that a legal precept was not binding unless it was a moral precept. This theory had its usefulness in liberalizing the law and bringing it into some conformity with moral principles, but, as Pound notes, "the theory is tolerable practically only at a time when absolute ideas of morals prevail."[192] But in an era "when all absolute theories are discarded and no authorities are recognized, when moreover, classes with divergent interests hold diverse views on fundamental points . . . ," then such a view is impossible lest every man make his own law.

The nineteenth century philosophers got out of this position by finding an ultimate principle of justice from which they deduced both morals and law. They confined morals to prescribing motives for conduct and law was left to account for the outward results of conduct. This allowed the inference that jurisprudence was subordinate to ethics. Jellinek in 1878 concluded that law was a minimum ethics,[193] that part of morals indispensable for a social order. It may be noted that this minimizing of law was in accord with nineteenth century individualism and the minimizing of government.

In Pound's opinion, the analytical view was primarily English in origin. The separation of law and morals was influenced by one of the basic premises of eighteenth century English political theory, the separation of powers. Law and morals were not only separate; they were unrelated. Where they touched in practice, it was a faulty section in the actual governmental structure. The judge was expected to confine himself to law even though his ordinary duties clearly required him to make choices that were necessarily of a moral nature. "In truth, there are continual points of contact with morals at every turn in the ordinary course of the judical

190. Pound, *supra* note 189, at 187.
191. *Id.* at 188.
192. *Id.* at 190.
193. *Id.* at 193.

process. A theory which ignores them, or pictures them as few and of little significance, is not a theory of the actual law in action."[194]

These latter remarks seem so commonplace as to cause Pound to examine the nature of the considerations that could have led the entire analytical school so far afield. He found the answer in the definitions used by this school. "[I]t is said that morals have to do with thought and feeling, while the law has to do only with acts; that in ethics we aim at perfecting the individual character of men, while law seeks only to regulate the relations of individuals with each other and with the state. . . . Next, it is said that as between external and internal observance of the dictates of morals the law has to do with the former only."[195]

Pound argues that these divisions were never, and could never be, strictly applied in practice. But he does not take an extreme view. He says that "it is equally a mistake wholly to divorce law and morals, as the analytical jurists sought to do, and wholly to identify them as the natural-law jurists sought to do."[196]

There are some situations where for the general security we just need uniform rules. There are other situations in which "the law does not approve many things which it does not expressly condemn."[197] And thirdly, law has to deal with incidence of loss where both parties are morally blameless."[198]

Pound's fourth view is the sociological one and here we approach a view more compatible with the prevailing spirit of our times. Law and morals are both forms of social control. There are many forms of such control. "It is important for the jurist to bear in mind, what the sociologists insist upon, that the inner order of groups and associations other than the political organization of a society, and religious and philosophical ideals play a

194. *Id.* at 206.

195. *Id.* at 207-08. "Though much ground is common to both, the subject-matter of Law and of Ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct. Law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another." POLLOCK, A FIRST BOOK OF JURISPRUDENCE 46 (6th ed. 1929). "Besides and beyond the limitation of the field of law to external conduct, there are many actions and kinds of conduct condemned by morality which for various reasons law can either not deal with at all or can deal with only in an incidental and indirect manner." *Id.* at 48. "The moral sciences having thus been grouped under the head of Ethic, in which the object of investigation is the conformity of the will to a rule; and of Nomology, in which the object of investigation is the conformity of acts to a rule, we pass by the former as foreign to our subject, and confine our attention to the latter." HOLLAND, JURISPRUDENCE 28 (13th ed. 1924). As we shall see, this distinction still has vitality. See note 221 *infra*.

196. Pound, *supra* note 189, at 212.

197. For elaboration see Pound, *The Limits of Effective Legal Action*, 3 A.B.A.J. 55 (1917).

198. Pound, *supra* note 189, at 213.

large and often controlling part in the ordering of society in comparison with law in the lawyer's sense."[199]

Pound observes that "morals grow ahead of both law and morality." The reason for this appears to lie in ethics being more responsive to changes in society. New situations, economic, political, or ideological, demand answers that ethics gives. But law and moral customs with their important need for stability and continuity, lag and change only under pressure.

Pound himself takes a large view of society and finds a necessity for maintaining a balance between "(1) justice, the ideal relation between men, (2) morals, the ideal development of individual character; and (3) security."[200] These factors are not mutually exclusive. All three weigh upon and influence each other; each has its role; and each presents its problems. Theoretical purity is out of place here because jurisprudence is a practical science.

Pound's conclusion that law and morals are separate but equal forms of social control leads us towards the necessity of considering more precisely the distinction between law and morals. First, however, let us tarry a moment on an exceptionally fine article by an English writer, H. L. A. Hart, which appeared several years ago in the *Harvard Law Review*.[201]

Hart queries whether there is a point of intersection of law and morals and what it could mean to say that the is and the ought are fused and inseparable. Defending Austin and Bentham, he insists that they recognized the extent of the historical influence of moral opinion so that many legal rules "mirrored moral rules or principles."[202] But their persistent theme was that "it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law."[203]

Hart separates three issues of this general problem: (1) With respect to a particular law there is no difficulty in distinguishing what is the law and what ought to be but (2) the problem arises when "we examine how laws, the meanings of which are in dispute, are interpreted and applied in concrete cases" and (3) again, when we ask "not whether every particular rule of law must satisfy a moral minimum to be a law, but whether a system of rules which altogether failed to do this could be a legal system."[204]

There is a hard core of existing legal rules in any legal system but the normal course of litigation brings up the penumbral situations which do

199. *Id.* at 221.
200. *Id.* at 222.
201. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).
202. *Id.* at 598.
203. *Id.* at 599.
204. *Id.* at 601.

not clearly fit into any existing rule. In such situations the questions arise whether the judge does not reach his decision by making a choice as to what ought to be in terms, say, of social utility and is this not a moral judgment? The answer is in the affirmative only if it is assumed that law and morals are the same. This is not so because all choices are not moral. The judge in making a choice for good reason and according to stated standards is acting rationally but not necessarily morally. His rational decisions are intended to be in accordance with the law even though the result, to the moralist, may be evil. According to Hart, all that needs to be done is that "we must decide the penumbral cases rationally by reference to social aims."[205] It is a mistake, however, to become preoccupied with the penumbra. Those who fuse law and morals tend to make this mistake. But no new judicial effort is required with the solid core of precedents whose position is fixed regardless of morals.

Hart now turns to consider whether a legal system must contain an inherent morality if it is to be called a legal system. He concedes that a minimum coincidence of law and morality is necessary for survival. Murder, theft, and the like must be barred but little more and certainly nowhere near the extent suggested by the usual natural law theory.[206]

The same results are reached regardless of what ethical system is assumed. A noncognitive emotive theory would, of course, support the complete separation of law and morals. But so can a cognitive theory. Hart argnes that from the nature of an ethical judgment there is no inference to be made as to its relationship to law. But he does add that a cognitive theory would enable a moralist to demonstrate rationally the iniquity of particular laws and the desirability of revision of such laws.[207]

Even if Hart finds it unnecessary in this one article to make any decisions on the nature of ethics, it does seem clear that sooner or later any student in this field must formulate his own definitions of law and morals and the relationship between the two, if any. Those who would mingle the two concepts have much explaining to do.

Hart has not shirked this problem. A brief notice of his thoughts on the distinctions between legal and moral obligation will prepare us for a consideration of the type of definition of law towards which this essay has been moving.

His article[208] has the deceptively simple theme of why people obey laws.

205. *Id.* at 614.

206. "[I]n all moral codes there will be found some form of prohibition of the use of violence, to persons or things, and requirements of truthfulness, fair dealing, and respect for promises. These things . . . can be seen . . . to be essential if human beings are to live continuously together in close proximity." HART, THE CONCEPT OF LAW 176 (1961).

207. *Id.* at 626.

208. Hart, *Legal and Moral Obligations,* in ESSAYS IN MORAL PHILOSOPHY 82 (Melden ed. 1958).

Hart rejects the idea that people so act *solely* out of a habit of obedience or because of a recognition of a moral obligation to do so. Obedience to law is a complex social practice even in the simplest of societies. It consists of a number of factors. There is a general obedience but in order to account for a legal obligation there is also an understanding that the leader *X*'s "words should generally be accepted as constituting a standard of behavior so that deviations from it . . . are treated as occasions for criticisms of various sorts . . . ." and further, "that references to *X's* words are generally made as *reasons* for doing or having done what *X* says, as supporting *demands* that others should do what he says, and as rendering at least permissible the application of coercive repressive measures to persons who deviate from the standard constituted by *X's* words."[209] All this is necessary to support on equal terms both legal rules and conclusions drawn from these rules. There is here obviously no mere habit of obedience and, it cannot be denied, no moral obligation to obey. The belief in such a moral obligation would no doubt be extremely helpful but, in Hart's view, is not essential. There are many reasons why there should be a general obedience to the law, but the point at issue is the factual one of the existence of a legal system and that is sufficiently accounted for by the existence of the social practice previously described.

Following this description of a legal obligation, we may now examine the features of a moral obligation that make it quite distinct from a legal one. First, a moral obligation is dependent upon the actual long-continued practice of the social group. It is, of course, possible to create by fiat a new legal obligation. Second, a moral obligation may exist independent of the content of the obligation. Promise-keeping is the best example of this feature. We are obligated to keep our promises regardless of their content. We obey laws according to their content. Finally, the nature of the coercion available to enforce moral obligation is quite different from that which is used for breaches of legal duties. Moral obligation is encouraged and enforced primarily by reminders and criticism, shame and exhortation. Hart makes an important issue of this point. He argues that "as soon as an appeal is made primarily to fear even of unorganized 'sanctions,' we are on the way from moral to legal obligation."[210] He then adds a comment which, as we shall see, is a significant one for an English legal philosopher:

> The fact that moral pressure is characteristically exerted through an appeal to the delinquent's assumed respect for the institution violated, together with the fact that the plea, "I could not help it," is, if substantiated, always an excuse, jointly constitute the "internality" of morals as compared with the "externality" of law. This has sometimes been grossly misrepresented by the contention that whereas laws require us to do certain actions morals only require us to be in certain states of mind (or soul).[211]

209. *Id.* at 90.
210. *Id.* at 103.
211. *Ibid.*

These views of Hart open up some questions that we are considering in this section of the essay. The emphasis upon actual social practices is compatible with the previous discussion. Hart's distinctions, however, show that we must turn to the problem of definitions, and this in our next query.

With the continuing interest in linguistics among English legal philosophers, it is easy to get into a protracted discussion about definitions.[212] We can argue that the meanings of words are arbitrary or fixed. Professor Williams shows the impossibility of arguing for the latter and, it seems to me, that the former view cannot be true either. We can shun "the false idea that reality follows grammatical form,"[213] but no one need go as far as to say that

> the word "law" is simply a symbol for an idea. This idea may vary with the person who uses the word. . . . Everyone is entitled for his own part to use words in any meaning he pleases; there is no such thing as an intrinsically "proper" or "improper" meaning of a word.[214]

For the present, we want meanings, not only for "law" but also for "morals." And these meanings will have to be of some significance, if all that has gone before in this essay is to have any significance. The definitions, in short, must be useful. There are many possible meanings of meaning,[215] but, without argument, it seems wise to go along with Felix Cohen that "usefulness rather than truth . . . is the only standard by which a verbal definition can be judged."[216]

Our purpose then is to decide upon useful definitions of law and morals. We are about ready to assert that jurisprudence and ethics serve different functions and have different objectives. These objectives can, and do, at times overlap, for example, when the idea of fairness is introduced into the law. But it must be admitted that morally desirable objectives may stand apart from the law, waiting for an introduction, but, because of problems unique to the law, sometimes waiting vainly.[217] We turn now to the method of arriving at a useful definition.

Professor Hart suggests that we do not attempt to define legal *words*. The correct procedure is to take a sentence in which the word plays a characteristic role ("X has a right") and then explain the word "first by specifying the conditions under which the whole sentence is true, and secondly by showing how it [the word] is used in drawing a conclusion

212. See the series of articles by Glanville Williams, *Language and the Law*, 61 L.Q. REV. 71, 179, 293, 384 (1945).

213. *Id.* at 303.

214. Williams, *International Law and the Controversy Concerning the Word "Law,"* 22 BRIT. YB. INT'L L. 146, 163 (1945).

215. Sixteen are listed in OGDEN & RICHARDS, THE MEANING OF MEANING 186-87 (1923).

216. Cohen, ETHICAL SYSTEMS AND LEGAL IDEALS 13 (1959).

217. See the urging of the introduction into the law of a moral obligation in Prof. Seavey's comment, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960).

from the rules in a particular case." As an example the above sentence is true if the following conditions are satisfied:

> (*a*) There is in existence a legal system.
> (*b*) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.
> (*c*) This obligation is made by law dependent on the choice either of X or some other person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X . . . so chooses or alternatively only until X . . . chooses otherwise. [Further,] . . . a statement of the form "X has a right" is used to draw a conclusion of law in a particular case which falls under such rules.[218]

He concludes with "the cardinal principle that legal words can only be elucidated by considering the conditions under which statements in which they have their characteristic use are true."[219]

This conceptual pragmatism is followed by Kantorowicz when he says that "we must choose the most fruitful among several linguistically possible definitions of a term denoting a thing, before we can examine and demonstrate the truth of any . . . assertion regarding the thing denoted."[220]

Following this premise, the author gives his definition of law as "a body of rules prescribing external conduct and considered justiciable."[221] After considering the elements of this definition, he admits that "the first question which presents itself concerns the distinction between legal and moral rules. . . . The best-known distinction is the one . . . : law is concerned with *external* conduct, morals with *internal*." The author believes that this distinction means that "all the various ethical systems *prescribe* internal conduct consisting of volitions, and deem the resulting inner attitudes virtuous . . . , whereas the rules of law never *prescribes* internal conduct, either good faith, due care, or the will to forbear committing a crime. . . . What the law really prescribes is . . . nothing but external conduct, i.e., certain movements of the human body, . . . or the forbearance from performing such movements. These movements must as a rule be capable of being performed consciously and voluntarily, but in certain circumstances the conduct may be mechanical and unconscious without losing its legal significance." To say it another way: "All systems of morals . . . require some kind of motive, or at least some kind of consciousness accompanying, the prescribed acts, or even treat this internal conduct as sufficient without requiring any kind of external manifestation of the will. But in law a person may act from the meanest, or at least from a purely selfish, motive and yet comply with his legal duties . . . ."[222] It is Kan-

218. Hart, *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37, 49 (1954).
219. *Id.* at 59-60. Compare Prof. Adams' definition of ethical words in terms of their use at text accompanying note 111 *supra*.
220. KANTOROWICZ, THE DEFINITION OF LAW 9 (1958).
221. *Id.* at 21.
222. *Id.* at 41-47.

torowicz's conclusion that "the prevailing theory contrasting law and morals as externally and internally binding forces has stood the test of usefulness."[223]

Before deciding upon our agreement with the author, some other points he makes should be noticed. While arguing that, in their essence, law and morals are distinct, nevertheless it is true that the two can intersect. What is called "quasi-morality" is defined by Kantorowicz as "a purely external conduct which as to its content complies with moral rules and which therefore would be moral if it were dictated by a good motive." The significance of this term is that quasi-morality is "all that can be achieved by social reform, practical politics and the pressure of public opinion," that is, external conduct can be coerced but genuine morality is something else.

Another point made by Kantorowicz is contrary to a position stoutly maintained by Hart. Kantorowicz believes that there is a moral obligation to obey the law. He argues that "if selfish motives, e.g., fear of the regular enforcement of the law, were the only ones to recommend its observance, there would be so many ready to take the chance of its nonenforcement that there would soon be no enforcement at all."[224]

As previously mentioned,[225] this distinction between law and morals has been a part of English jurisprudence for about a century. There are serious objections to it which we will review prior to deciding how fatal they are to the distinction. The first objection to be noted is that most ethical writers do not seem to believe that their work is intended only to affect inner attitudes. The previous discussion must surely have made it evident that they are constantly talking of conduct.

Not only moral philosophers, but legal philosophers also, will be dissatisfied with this distinguishing of law and ethics. Pound, for instance, would deny it as a matter of fact. Law is very much concerned with motivation and moral attitudes in judicial rulings. An act done for a malicious motive can convert a lawful act into an unlawful act.[226] Pound also points to the sticky point of wilful inaction on *X's* part in the presence of mortal danger to Y. This Good Samaritan situation has been under attack for years with steadily growing insistence that a failure to act may be actionable.[227] Even when we recognize that the problem is one of what

223. *Id.* at 50. Of this theory, Prof. H. L. A. Hart remarks that it "really amounts to the surprising assertion that legal and moral rules properly understood could not ever have the same content; and though it does contain a hint of the truth it is, as it stands, profoundly misleading." HART, THE CONCEPT OF LAW 168 (1961).

224. *Ibid.*

225. See note 195 *supra.*

226. Tuttle v. Buek, 107 Minn. 145, 119 N.W. 946 (1909); Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor,* 18 HARV. L. REV. 411 (1905).

227. Pound, *Law and Morals—Jurisprudence and Ethics,* 23 N.C.L. REV. 185, 208 (1945).

courts can do about proof and such issues, nevertheless, the law on this particular point is moving steadily to the point where what is now only morally required will in the future, become part of the legal code of our society.

We are really treating here of points of intersection of law and morals. We have earlier noted how Pound thought it was just as wrong to divorce law and morals as it was to equate them.[228] He, of course, has his definitions. Morality is a body of conduct according to accepted standards. Morals, which Pound seems to equate with ethics, is a system of precepts as to conduct organized by principles into an ideal system. "Systems of morals are likely to be in the main idealizings of the morality of the time and place."[229] Morals then become the ideal development of individual character. "What are faults in morals may or may not manifest themselves in tangible infractions of the ideal relation among men, and so may be out of the sphere of the legal adjustment of relations and ordering of conduct."[230]

Law for Pound is, of course, a complex concept. It can stand for the legal order itself, the judicial and administrative processes, or the body of authoritative grounds of or guides to judicial decision and administrative action.[231] The dean describes his sociological jurisprudence as the "study of the system of law functionally as a part or phase of social control, and of its institutions and doctrines with respect to the social ends to be served."[232]

The sociologist has tended to use the term *law* to include both morals and law on the understanding that both are forms of social control. For our purpose, however, this may lead to confusion. Let us understand, therefore, that these are two distinct areas of learning with separate ends, functions, or purposes.

This distinction can also be arrived at by our earlier assumptions (1) that ethical conduct is that which is in accord with the established ultimate ethical principles and (2) that these principles in sum indicate the function of ethics or what is to be expected of ethical conduct. These assumptions lead to the inference that there is no such entity as goodness.[233] There are

228. See text accompanying note 196 *supra*. "In all communities there is a partial overlap in content between legal and moral obligation; though the requirements of legal rules are more specific and are hedged round with more detailed exceptions than their moral counterparts." HART, THE CONCEPT OF LAW 166 (1961).

229. Pound, *supra* note 227, at 186.

230. POUND, JUSTICE ACCORDING TO LAW 7 (1951). H. L. A. Hart complicates the problem by distinguishing social morality from personal morality. HART, THE CONCEPT OF LAW 163 (1961).

231. POUND, OUTLINES OF JURISPRUDENCE 76-77 (5th ed. 1943).

232. *Id.* at 4.

233. Hence, the significance of Prof. Williams' remark on "the false idea that reality follows grammatical form." Williams, *Language and the Law*, 61 L.Q. REV. 293, 303 (1945).

only good acts which are such acts as fulfil the function of ethics. This view led to our agreement with Santayana's objection to the hypostatization or reification of ethics.[234]

By the same argument, there is no objective characteristic known as justice. There are only just acts which fulfil the function of justice or law. We are returned then to the determination of the unique *functions* of ethics and law. They serve different social purposes. Dean Pound is one of the few writers who has followed this approach.

Pound concludes that in the four tasks of (1) making of rules of law and finding grounds of decision, (2) interpreting rules, (3) applying rules and grounds of decision, and (4) exercising of discretion in the judicial and in the administrative process, three things are to be regarded: "(1) justice, the ideal relation between men; (2) morals, the ideal development of individual character; and (3) security. These three have to be kept in balance."[235]

It follows that in decisions law and morals will intersect in varying degrees. The factors to be considered will be the usual ones. Morals will press its claims to be balanced against the practical limitations of effective legal action and the general security in giving predictability and continuity to transactions. It is pertinent to point out, that this view is a completely rational one. The good reasons for the converging claims may be martialled, debated, and put into effect in a thoroughly rational procedure. The ethical approach of Cohen, Bowes, Ewing, Kimpel, and Toulmin are of relevance in this effort. Moore and Stevenson provide as little assistance as does Kelsen in moving rationally in this area.

Felix Cohen has developed in some detail these particular points. He states that "by the term *law* we shall mean a body of rules according to which the courts . . . decide cases."[236] In this definition, there is no connotation of approval or disapproval, "law is law, whether it be good or bad, and only on the admission of this platitude can a meaningful discussion of the goodness and badness of law rest."

Ethics, for Cohen, is "the science of the significance and application of judgments of *good, bad, right, wrong* . . . ." Moral philosophy is "that branch of ethics which is concerned with voluntary human activity."[237] By these definitions, it would appear that the goodness or badness of both law and morals are determined by ethics. This is permissible if, as with Cohen, the ends of both are the same. Both law and morals are intended to affect human conduct so as to promote good human activity or the good life. Without denying this ultimate purpose, we have already assigned to

234. See text accompanying note 59 *supra*.

235. Pound, *supra* note 227, at 222. See also POUND, THE IDEAL ELEMENT IN LAW 82 (1958).

236. Cohen, ETHICAL SYSTEMS AND LEGAL IDEALS 11 (1959).

237. *Id.* at 15-16.

law and morals certain distinct and unique ideals. This would not seem to be precluded by Cohen's analysis.[238]

This distinction between the function of ethics and the function of law is actually one in general use. It is not uncommon to hear a statement to the effect that "*X* has no legal duty to do act *A*, but he does have a moral obligation to do it." Another form of this same distinction may be illustrated from a sentence in a recent article by Julius Stone:

> The essence of the rule of law ideal lies . . . not in "law" narrowly defined, but rather in the supremacy of certain ethical convictions, certain rules of decency prevalent in the community, and in the fact that those who are at the apex of power share those convictions and feel bound to conform to them.[239]

Literally, this opinion puts ethical judgments in a controlling position. However, in accordance with the position here set forth, the rule of law ideal should be governed by principles of justice evolved to set forth the ideal relations of men in society and would have no necessary connection with how men conducted themselves in their personal life. Decency does not seem to be an appropriate word in discussing the rule of law or, at least in Professor Hart's phrase, it is not a characteristic use of the word.

No better discussion of the issues on this point can be found than in the debate in the *Harvard Law Review* several years ago between Professors Hart and Fuller.[240] But this same issue appears in varied forms. The trial of Adolf Eichmann is the same issue in its purest form. Eichmann admitted that, in his heart, he was guilty of murder but argued that he was not guilty in the legal sense, meaning that he simply carried out orders to perform these acts. He performed this duty under the threat of his own death. He could not get transferred from this job. The sole alternative left to him was suicide.[241] Assuming the factual truth behind this argument, Eichmann could be held legally responsible only if a moral law overrides a law that is unjust. The question for the philosopher is how we discover such a moral law. The moral law has to have priority in time over the unjust statute. Sidney Hook has argued why this must be so by saying that

> a moral law does not imply the existence of a lawgiver. We can derive a moral law from a lawgiver only if the lawgiver is moral. To know that he is, we would already have to possess prior knowledge of moral law independent of his existence.

238. This opinion is advanced despite Cohen's remarks, *id.* at 25-26.

239. Stone, *Law, Force and Survival*, 1961 FOREIGN AFFAIRS 549.

240. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and the Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

241. N.Y. Times, Jnly 8, 1961, p. 1, col. 1. A 1950 Israeli statute rules out the defense of superior orders except as ground for mitigation. The statute contemplates a retroactive effect. N.Y. Times, Aug. 10, 1961, p. 4, col. 1. For a sampling of the issues raised by the Eichmann capture and trial see Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961); Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400.

> If the enforcement of legal obligations had no reference to moral obligation, how could we condemn the infamous laws of Hitler and Khruschev, or punish Eichmann and his spiritual kinsmen for executing their legal orders?[242]

The question Professor Hook asks is, of course, precisely the one at issue. The methods of modern philosophy provide no method of reaching this pre-existing moral law. It is not "a brooding omnipresence in the sky,"[243] but, as this essay has attempted to show, is a set of rules derived from the principles that hold the society together. These principles are in this view not apart from any society but are so closely related to the social facts and peculiarities of that society as to be uniquely related to it and not to any other society.

We have previously noted that legal philosophers in the course of developing their views have, almost without argument, adopted particular ethical philosophies. Kelsen's view of the irrationality of ethical concepts is an important aspect of his Pure Theory. Fuller's opinion of the content of modern ethics has thus far precluded his effective use of possible contributions from ethical theory. Dean Pound early arrived at the opinion that the function of law was to satisfy interests. He spent much time in classifying the types of interests. Implicit in this arrangement is the criterion that consequences are the test of the efficacy of law. The ideal legal arrangement was the maximum satisfaction of interests. But while he spoke much of morals, he never seriously worked this field, his many bibliographies show no grasp of the field of ethics, and we are left with only the dictum that ethics and law are both forms of social control.

The previous few pages have shown that students have always noted some relationship between law and morals but like most ideas, this relationship has had a history of ebb and flow. In the past, the effort has been in the direction of emphasizing one or the other. It appears that only recently has it been argued that law and ethics are separate but related fields, each with its own functions. It is here argued that the similarity in conceptual structure is most marked and each has something to contribute to the other.

This similarity is emphasized when we find a problem being vigorously debated, such as the nature of legal principles, with no apparent realization that it is but one form of a larger problem and that in ethics, every student who writes in the field, sooner or later considers the problem of the nature of ethical principles.

Not only can problems in the two fields be attacked by the same methods but it should also be realized that problems in jurisprudence and ethics are also dependent upon conclusions reached elsewhere. We have endeavored to point out where appropriate how differences in ethics were brought about

242. N.Y. Times, May 7, 1961, Book Rev. Section, p. 35.

243. "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ." Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

by metaphysical or epistemological beliefs. Not many legal philosophers in America have stressed these larger studies. F. S. C. Northrop and Thomas Cowan are two who do today. Kelsen's philosophical background is such that an American student is in almost no position at all to appreciate Kelsen's legal work.

In this past section, we have traced the relations of law and morals. Emphasizing the modern view, we have now concluded that these two areas of learning—jurisprudence and ethics—represent distinct efforts to achieve values in society. They have their own needs and claims. They are not in any necessary conflict and do, frequently, intersect. Certainly it should be clear that the methods of studying and talking about both fields are quite similar, if not actually identical. Both must be considered rationally; both have close associations with the empirical facts of social living. Before concluding this essay, we shall turn to two problems very much alive in legal circles today and show how significant are the contributions that may be made by students of ethical theory to these problems.

As this is being written there is a widening controversy going on in our law reviews as to the nature of the principles that ought to govern the adjudications of constitutional issues that come before the Supreme Court. The issue is simply what are good reasons in constitutional law. Although other areas of scholarship are being introduced by the later articles in this debate, I have not yet seen any reference to Toulmin nor, indeed, to any of these writers whose thoughts we have been discussing in spite of their obvious relevance.

The nature of our constitutional system has, of course, been a subject of continuing interest throughout our history. The recent flareup grew out of two articles in the *Harvard Law Review* several years ago.[244] One of the authors, Professor Wechsler, has issued a call for "reasons that in their generality and their neutrality transcend any immediate result that is involved."[245] Only such reasons, he says, should be the basis of constitutional decisions and the "virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees."[246]

The introduction by such an authority of a novel expression like "neutral principles" aroused considerable comment. The real problem has become to decide what the expression meant. It can be accepted that a principle ought to be larger than the immediate case. That is what is meant by a general principle; it is intended to hold good for a class of cases. A judge deciding on constitutional issues is making a choice on what ought to be.

244. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Hart, *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

245. Wechsler, *supra* note 244, at 19.

246. *Id.* at 19-20.

He must decide what ought to be included as significant factors in his decision. He cannot hope to decide each case as though it were unique. He must compare, analogize, and generalize.

The argument that one makes a choice in making a decision appears to be arguing about a tautology. Evidence of alternative choices across the board in scholarship is worth demonstrating[247] but it finally seems cumulative. However, the point argued is basic. Two conclusions may be made on the issue of choice in judicial decision and they have, of course, been made: (1) "The question is not whether the Justices . . . followed neutral principles, but rather what value preferences did they espouse,"[248] and (2) "today there is . . . need for more conscious normation on the part of the members of the Court."[249]

The two writers here being quoted come out for what they call "teleological jurisprudence," which would be "purposive in nature." Their basis for this apparent invention is that "any reference to neutral or impersonal principles is . . . little more than a call for a return to a mechanistic jurisprudence and for a jurisprudence of nondisclosure as well as an attempted denial of the teleological aspects of any decision, wherever made."[250] This is slightly extravagant, assuming that Professor Wechsler really has some meaning for neutral principles. His words are the cause of all the writing and yet the articles written in opposition are striking at views which do not appear to be his. He writes, just as his apparent opponents do, that "courts in constitutional determinations face issues that are inescapably 'political' . . . in that they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone."[251]

The choice, as he constantly says, as though to undo what he has said, must be in terms of "reasons that in their generality and neutrality transcend any immediate result that is involved." One cannot avoid wondering how a neutral principle can be used in a value choice. We get no answer, only another question as he now asks: "[I]s not the relative compulsion of the language of the Constitution, of history and precedent . . . itself a matter to be judged, so far as possible by neutral principles—by standards that transcend the case at hand?"[252]

If "neutral" means more than "general" perhaps we can get assistance by considering another term recently introduced by Dean Griswold of Harvard Law School. The dean has entered the debate and has issued his

247. It is well done in Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).
248. *Id.* at 675.
249. *Id.* at 689.
250. *Id.* at 671.
251. Wechsler, *supra* note 244, at 15. He also speaks of "the basic values of a free society." *Id.* at 19.
252. *Id.* at 17.

warnings against decisions that are excessively "result oriented."[253] His reasons for avoiding concern about the result of the particular case are that "long human experience has shown that where there is interest there is not likely to be independence of judgment; and interest for this purpose is much broader than mere personal or financial responsibility."[254]

He concludes by asking that decisions be reached "on intellectually valid and disinterested grounds." There is, thus, substantial agreement that principles express values, should be general, and should result from a reflection upon the complex of issues involved in the particular circumstances.[255]

After the above comments were written, Professor Wechsler made it clear that (1) the various guesses as to his meaning were in error and (2) he wasn't going to help clarify matters. His comment was:

> Some of those who heard or read "Toward Neutral Principles" have doubted whether "neutral" is the proper word to designate the quality I have in mind or whether its intended meaning is made clear.
>
> As to the choice of adjective, my case is simply that I could discover none that better serves my purpose. Neither "impartial," nor "disinterested," nor "impersonal," the main alternatives that I considered, seems to me as adequate in its expression; and to rest on "general," though the idea is certainly included, is to give up overtones that I intend. That those overtones are somewhat enigmatic in their content is not, from my point of view, a real deficiency; this is an enigmatic subject.
>
> As to my meaning, I must rest upon the paper to provide the necessary exegesis, but explicit statement on one point may be of aid. In calling for neutrality of principle, I certainly do not deny that constitutional provisions are directed to protecting certain special values or that the principled development of a particular provision is concerned with the value or the values thus involved. The demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim.[256]

It is submitted that this entire discussion is similar to that met in almost any book of modern ethics. The considerations set forth earlier on the place and functions of principles in ethics[257] have complete relevance here. Professor Wechsler is not, whatever "neutral" means, asking for

253. Griswold, *The Supreme Court 1959 Term, Foreward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 91 (1960).

254. *Ibid.*

255. It is assumed "that what Professor Wechsler chiefly seeks is a method of adjudication which is disinterested, reasoned, and comprehensive of the full range of like constitutional issues, coupled with a method of judicial exposition which plainly and fully articulates the real bases of decision." Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 32 (1959). But the author promptly confesses that he doesn't really know exactly what "neutral" means.

256. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW at xiii-xiv (1961). The real enigma is why anyone should be so proudly and defiantly enigmatic.

257. Hart, *supra* note 147, at 593.

anything but a determination and refinement of the basic principles in our constitutional law. If this is so, it is astonishing that a great nation should be guided by principles that are "enigmatic."

In similar fashion we have noted two authors who felt that "neutral" must mean something like "devoid of values."[258] Their sharp reaction was, instead, to demand a "teleological jurisprudence" which would openly avow the values being espoused. Again, it is believed to be clear that a deontological ethics corresponds to a mechanistic jurisprudence just as a teleological ethics is the analogue of a teleological jurisprudence.[259] Again we have an obvious parallel between theories of law and ethics. We can even pursue this further.

The proposed teleological jurisprudence requires that we establish ends. Legal principles are to be tested by the manner in which they further these ends. While Wechsler recognized the existence of societal values, he was intent upon a methodological problem and apparently was content to call for his neutral principles and made no attempt to flesh them out. Even those who called for this purposive legal philosophy do not tell us what the ultimate end is to be. In speaking of the Court, it is asserted that

> alternatives of choice are to be considered, not so much in terms of who the litigants are or what the issue is, but rather in terms of the realization or non-realization of stated societal values. What these values might be, we do not now set forth.[260]

So the work is yet to be done, as we found in ethics.

As soon as good reasons for choice in ethics or constitutional law no longer turn solely upon adherence to pre-existing principles, but are dependent upon an accord between the consequences of action and some end, we must consider the details of the end. This has not been done by many legal writers.

Toulmin believes that we can answer the question, "Is this the right thing to do?", only with reference to a discussion of social practices which are genuine alternatives within one society.[261] As has been seen, he argues that it makes no sense for a Christian and a Moslem to argue about whether it is better to have four wives. That argument would actually turn upon a personal preference for a way of life.

But within the confines of one given society, *e.g.*, our own, we can now ask questions like, "Shall *X* be allowed to distribute inflammatory pamphlets among crowds protesting an integration order?" Suppose, to complicate matters, Congress had passed a law forbidding such distribution. Can one predict what the result will be as our Supreme Court is presently con-

258. Miller & Howell, *supra* note 248, at 675.
259. DEWEY & TUFTS, *op. cit. supra* note 80, at 224.
260. Miller & Howell, *supra* note 248, at 691.
261. TOULMIN, *op. cit. supra* note 22, at 152-53.

stituted? But of greater interest, is the method of arriving at principles which govern such a situation. First of all, the Court can and must decide a case on the issue if properly presented to it. Two recent writers concluded that

> *Marbury* clearly states that the choice of the premise by the legislature is not unreviewable; the Court has a duty to review it. We do not say that in that process the Court is free to indulge in whim or caprice. Surely, in considering the value choice of the legislature it ought to bring to bear all the wisdom, precedent and experience which are available. But in the end, it has the final say, and that say can neither be preordained nor positively tested by a logical formula. It is the strong impression to the contrary created by the writings of those who insist in "generality and neutrality" which bothers us.[262]

The strong-minded men who have become our justices have not shown too much reluctance to make a choice, but they have not agreed with one another—a not unknown condition. But in the forum from which they speak, there is an opportunity for choice from among genuine alternatives. They speak for one society; there is a standard (the Constitution and the *United States Reports*), and the values of the society are determinable. The remaining issue is which, if any, values should be given preference and why. And what is our ultimate objective? In *Brown v. Board of Education*,[263] it is understood that a segregated public school system violated the fourteenth amendment by denying the equal protection of the laws. Professor Wechsler *seems* to object to the decision because it did not consider a right of selecting one's associates which is an important value in our society.[264] Assuming that there is such a right and that the Court gave it full consideration, what is the standard by which the right of free association for the whites could have been rejected? It seems to me that this type of argument has been considered by our ethical writers.

Toulmin, for example, asserts that "the function of ethics is to correlate our feelings and behavior in such a way as to make the fulfillment of everyone's aims and desires as far as possible compatible."[265] An ethical judgment "is used to harmonize people's actions . . . ."[266] Good reasons are such as show the tendency of an action towards these ends. Talk in terms

262. Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A.L. REV. 571, 588 (1960). The cause of their troubled minds is not clear since Wechsler says: "The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as action invariably does." Wechsler, *supra* note 244, at 19. For further wrestling with what Prof. Wechsler meant by neutral principles, see Karst, *Legislative Facts in Constitutional Litigation*, in THE SUPREME COURT REVIEW 75, 110 (1960); Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 652 (1961).

263. 347 U.S. 483 (1954).

264. Wechsler, *supra* note 244, at 34.

265. TOULMIN, *op. cit. supra* note 22, at 137.

266. *Id.* at 145.

of good reasons rather than neutrality might contribute some light on these subjects.

Turning now to a final issue that may be clarified by the considerations that have been stressed throughout this essay, let us look at the general nature of the judicial decision in American courts.

Thirty years ago, a common lay opinion was that judges were captives of their economic and social origins and their opinions were expected to be reflections of this fact. There seemed to be much evidence supporting this view. But this monistic view has now been largely dissipated. We, like Dean Pound, find impossible "the reference of every item in the judicial process, of every single decision and every working out of a legal precept by applying the technique of the law to the received materials of decision, to the operation, conscious or unconscious, of the desires and self interest of an economically dominant class."[267]

We cannot deny that there are influences bearing down on judges, as on all men. But in the professionally trained class of judges, "what stands out in the history of Anglo-American law is the resistance of the taught tradition in the hands of judges from any class you like . . . ."[268] This is Maitland's taught law which is such tough law.

The judge, as does all of the legal profession, takes the received precepts and ideals and uses them in his work. How he finds the law, how he discovers the pertinent principle or analogy of similar facts is the oft-discussed problem of the logic of the judicial process.[269] But our present concern is with the finished product. How can we decide that the decisions are good? Good in this context must mean in accordance with the function or end of law. It has already been indicated that the objective of law is the establishment of ideal relations among men. This, in turn, is to be understood as the establishment of a system of social control giving effect to the maximum amount of the needs and wants of a society. The issue now is whether a procedure can be developed to assure that this end is given a full consideration in the course of the judicial process.

A Stanford professor of philosophy and law has recently considered this complex of problems. His book[270] deserves a close examination because here is the evidence for the value, if any, of this entire discussion. Here is the proof that the problems to be solved, the methods of solution, and the reasoning to be used are the same in ethics and in legal philosophy.

This work is devoted to an analysis of the possible procedures that may be used in judicial decisions. The purpose of this examination is to see

267. Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 366 (1940).

268. *Ibid.*

269. See generally Loevinger, *An Introduction to Legal Logic*, 27 IND. L.J. 471 (1952); Probert, *The Psycho-Semantics of Judicial Inquiry*, 34 TEMP. L.Q. 235 (1961).

270. WASSERSTROM, THE JUDICIAL DECISION (1961).

how these procedures produce decisions that fulfil the functions of a legal system. The author states that "a desirable legal system is one that succeeds in giving maximum effect to the needs, desires, interests, and aspirations of the members of the society of which it is a part."[271] The procedure for success in this effort can be derived by analogy from the procedures of modern ethics, that is, "moral decisions ought to be justified in the same way in which legal decisions are justified,"[272] and, presumably, vice versa.

In accordance with this view, the author rejects a procedure in which decisions are based upon precedent in which precedent is followed for *the sole reason* that it is precedent. Professor Wasserstrom comments that this method "is . . . patently incompatible with all conceptions of progress, enlightment, and self-correction . . . ."[273] This is what we concluded with respect to a deontological ethics which gave no heed to the consequences of actions. It should be noted, however, that there are important values to be secured from following precedent. These include certainty and predictability, the ability to rely upon the past, equality among litigants, efficiency in adjudication, and the avoidance of legal error. Whatever procedure is ultimately adopted, some provision will have to be made for these values.

From the opposite angle, a procedure of deciding cases may be adopted that aims solely at rendering justice in the particular case. When this course is considered, the primary question is how justice is discovered. According to the author, this theory of particular justification is usually based upon some nonrational method of reaching a decision. Such methods include arriving at the just decision by a flash of light, an intuition, or a hunch. We have had occasion to see what ethical writers think of this method of reaching a conclusion. Professor Wasserstrom in similar manner concludes that it "can only be deemed an unwise, ill-conceived, and indefensible normative position."[274]

The two extreme positions having been disposed of, the author turns to his own position. He digresses to explain the analogy he is developing. Modern ethics, he says, has taken to asking for good reasons for moral decisions and, as evidence, quotes from Toulmin. But there are "two different kinds of moral reasons. There are reasons that are relevant to the criticism or justification of *individual actions* and there are reasons that are relevant to *social practices and rules.*"[275] These two types of reasons should both be satisfied in any decision.

The reason for an individual decision in law may be that it follows an existing precedent or rule. The rule is the social practice whose justification must next be examined. The rightness of a social practice is determined

271. *Id.* at 10.
272. *Id.* at 118.
273. *Id.* at 56.
274. *Id.* at 96.
275. *Id.* at 120.

by the extent to which it complies with the function of morality which "is to encourage conduct that will produce a maximum of happiness or a minimum of conflict . . . ."[276]

Applying these views to the procedure for justifying legal decisions, the author argues that this procedure is a two-level one. Each decision follows from an existing legal rule. In the usual case, this will be sufficient, but the rule itself is always open to being tested by the standard of utility or whatever the ultimate standard may be. This restricted utilitarian process gains the advantages of a strict precedential procedure by following and adhering to precedents, by recognizing a prima facie obligation to follow the precedent and, then, only in a special process, looking beyond to the reasons justifying the rule.

The author claims that his proposed procedure is both rational and desirable. The decision must, first of all, be formally deducible from a legal rule. Secondly, the requirement that legal rules "be conducive to the production of socially desirable consequences,"[277] introduces empirical inquiry. "The techniques of empirical inquiry are as essential to the production of reasoned legal justifications as they are to the successful operation of any other social program that relies upon the truth or falsity of descriptive claims."[278]

## V. CONCLUSION

The direction of speculation in this area is what determines the outcome. Conduct of humans does not appear important when, as with Professor Adams, "the ultimate objective of philosophical analysis of moral discourse is to disclose its ontological significance."[279] Nor can it be argued that this is Moore's interest when he requires that in order to know our duty we must know the consequences of our acts through all future time throughout the Universe.

But our own concern here is, and has been, conduct. As Ewing says: "The problem of what ought to be done is central."[280] Pound never tires of arguing that the law is practical. John Dewey was expressing a similar view when he declared that "Philosophy . . . is willing to abandon its supposed task of knowing nltimate reality and to devote itself to a proximate human office . . . ."[281]

In this practical effort the view we have adopted is not without an ontological basis. We have found no Ideal lying already embedded in Reality. A unique entity, the Good, was not discovered. All the world consisted of

276. *Id.* at 119.
277. *Id.* at 173.
278. *Ibid.*
279. ADAMS, ETHICAL NATURALISM AND THE MODERN WORLD-VIEW 9 (1960).
280. EWING, SECOND THOUGHTS IN MORAL PHILOSOPHY 4 (1959).
281. DEWEY, THE QUEST FOR CERTAINTY 47 (1929).

was feeling, knowing, and living. The variety and unpredictability of such a world is no source of anguish to a nominalist who finds no mechanical movement of history, no pre-existing but binding universals, but only the free movement of hosts of individuals in great numbers of social groups. We are unable to know what F. S. C. Northrop calls first-order facts, which "are the introspected or sensed raw data, antecedent to all theory and all cultures." He adds that "nature and natural law are the names given for all first-order facts and their relations."[282] The conclusions we are reaching are sufficiently based on Northrop's second-order facts, known as culture and living law, cultural facts and artifacts. All we are aware of is man in society.

With an assumed philosophical foundation along these lines, it will be realized that Professor Adams' book presented considerable difficulty. His work has been used in the course of this essay primarily for its critical insights. The author ultimately rejected all forms of ethical naturalism and then advanced some thoughts of his own. Adams is convinced that there is a category of reality called "value-requiredness." This puts value into all parts of nature and makes nature teleological.[283] This is in contrast to our present concept of modern science being value-free. The conventional mechanical explanation of the physical world is unsatisfactory to Professor Adams. He argues that his teleological view does all that the mechanical theory does and does it better.

Adams' argument on this metaphysics is not as detailed nor as thorough as his analysis of ethical naturalism. He has no hope of making a widespread conversion. He remarks that "at some point in such cases one has simply to make a categorical commitment and proceed accordingly."[284] One enters an analysis with a commitment to categories of thought and a preconceived view on the contents of the stuff of experience and how to look at such experience. And what is the origin of this commitment? Adams answers that "the categorical features of a natural language consist of the basic distinctions that the people of one's culture and their ancestors have noted and found important in their long struggle to come to grips with and to adjust to reality."[285]

It is my own guess that in our society we are not prepared to find values necessarily a part of every situation. Science in the modern western world has insisted that that is not the way we make progress in our thinking. Lon Fuller must be arguing along these lines proposed by Adams, when he

282. NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 254 (1959).

283. Hart connects natural law with this older conception of nature in which "every nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good—or the *end* . . . appropriate for it." HART, THE CONCEPT OF LAW 184 (1961).

284. ADAMS, *op. cit. supra* note 279, at 214.

285. *Id.* at 18.

attempts to merge fact and value. But, as was widely noted after their notable debate,[286] he was not even intelligible to the naturalist, Ernest Nagel.

Men in various types of social groups have various needs. Some sort of control must be exercised to insure that these needs will be satisfied. If we assume a simple, closed, agrarian society the problem can be simple. The development of a particular type of personal conduct may be sufficient. But such societies are rare today. Our modern pluralistic societies contain within their borders many communities and groups with varying needs and ideals. A large city needs more law and order than a rural town. The personal conduct and ideals of the many individuals need some coordination to avoid chaos—or, in Pound's phrase, friction. The failure of individuals to live up to their code of personal conduct may lead to situations when it is desirable for the government to intervene and enforce as mandatory at least part of the conduct enjoined by ethics. In this sense, law can be described as minimum ethics, but, of course, it is far more than just that. The ends of the two are different as was noted. But their methods, their basis in fact, their testing by consequences are similar and, being so, each has something to give to the other.

286. See note 13 *supra* and accompanying text.