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THE MORALITY OF LAW

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Law, Morality, and Society: Essays in Honour of H. L. A. Hart, edited by P. M. S. Hacker and J. Raz. Oxford: Clarendon Press, 1976, pp. 312, \$21.95 cloth.

H. L. A. Hart represents the integration of legal philosophy with modern philosophical thought. We see in his work a traditional attempt to find the necessary balance between the autonomous liberty of the individual, and the smooth evolution of social and political morality. Hart is also identified with the restoration of legal philosophy. This identification is warranted by Hart's consistent application of the methodology of moral and political philosophy, the philosophy of mind, language, and philosophical logic. For this, we must be grateful. It has made the philosophy of law more accessible and more meaningful.

To examine Hart's contribution is to examine more closely the world in which we live. Our world evinces a morality. We live in social settings which partially disclose this morality through their legal systems. Thus, law may be viewed as illuminating the foundation of morality. It is a resting place as well as a platform from which we are able to step to derivation and implication. Therein lies logic; and of course, within a broader category, analysis. Logic is the tool. Simplification and elegance are the desired result.

Another aspect of law is that it both imposes and exposes structure. It exposes the ways we think about some things and it imposes ways of doing things. Where law exposes structure, we learn something about human nature and human relationships. Where it imposes structure, we come to know something of what it means to live peacefully together. Law reflects a morality and morality is the foundation of society.

This book honours a man who has fundamentally changed the nature of Anglo-American jurisprudence. No serious work on subjects dealt with by Hart can afford to neglect him. He has expanded the narrow views of law expressed by legal positivists, realists and formalists. MacCormick says that there must be many for whom the beginnings of wisdom in the understanding

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and analysis of legal systems and legal concepts have been found in the lectures and writings of H. L. A. Hart. I am certainly one of them. Finnis says that Hart's Concept of Law restored the theoretical vigour of jurisprudence and its openness to all other philosophies and sciences of human affairs. This is certainly true — of some sixty works, there are many landmarks. *Theory and Definition in Jurisprudence*, *The Concept of Law*, *Law, Liberty, and Morality*, and *Punishment and Responsibility* are but a few.

I

Phillipa Foot asserts that, "It is an important fact about the phenomenon we call 'morality' that we are ready to bring pressure to bear against those who reject it." But this pressure (in the form of approval or disapproval) depends on our ability to influence others. So, the moral point of view taken by society will depend on whether and on what a community will agree. There is a ground common to man. We have agreed that all of us have the authority to speak against some things, *e.g.* murder. Moral approval and disapproval exist only in a setting where morality is taught and heeded. Foot concludes that if approval and disapproval are essentially social, then so is the morality that we are trying to analyze. Lucas reminds us that, "the concept of law, therefore, cannot be given too tidy a definition. It can be elucidated, but only as a social phenomenon that arises when men, who are rational but not very rational, and moral but not very moral, live their lives together." We live in a world of laws; natural and otherwise. We live socially, and most of us morally.

Inevitably, we are in the realm of social contract. Professor Barry laments this. In "Justice Between Generations", he finds later generations without bargaining power. Those who know contracts know that agreement is essential to contract formation, and that bargaining power is often crucial to agreement. It would appear, if this reasoning were sound, that (1) certain kinds of harm to generations (*e.g.* 500 years from now) would be immoral and (2) that if those generations cannot contract with us, then (3) social contract theory will not always produce a moral result. This sort of reasoning is misguided. Professor Barry needs something more to make his point. He believes that since morality is at bottom no more than mutual self-defense, we have nothing to fear from future generations. Therefore, we run the risk of not looking out for them.

But do moral obligations really arise from a base of self-protection? Is there any intrinsic value to being good? Food may be good not only because it provides nutrients, but also because it is delicious. Sexual love may be moral or good because it is a form of communication, of a beautiful sort, but also because it is good directly. It feels good. Or, more subtle perhaps, a promise

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may be good not only because it produces externally justifiable reliance, but because of the pleasure it gives to *use* that convention. It is a pleasure to be in a world where promises exist. This kind of integrity brings stability and serenity to the souls of those who are, with fair consistency, moral and honest. It does the same for those who benefit and rely upon it. The whole interaction is an instance of something good. The interaction *ipso facto* produces a unit of goodness. The world is somewhat brighter. An example is set for future generations. This, however, is probably not enough to reassure Professor Barry — he believes it impossible to take everyone into account.

J. Feinberg contrasts an “ideal-regarding” theory of interest to something like Barry’s “want-regarding” theory of self-interest and self-protection. “The ideal-regarding theory of interest holds that it is in a person’s interest ultimately not only to have his wants and goals fulfilled, but also to have his tastes elevated, his sensibilities refined, his judgement sharpened, his integrity strengthened: in short to become a better person.” Feinberg gives us examples of the historical intensity with which this idea has evolved by mentioning Socrates’ belief that moral harm is the only genuine harm that may befall us and reminding us that, “Epictetus was so impressed with the harm which consists simply in having a poor character that he thought it redundant to punish a morally-depraved person for his crimes.” Is this a resolution to Barry’s dilemma? Not as it stands but it hints that there is more to the self-interest theory of morality than meets the eye at first. Feinberg may be in a philosophical jungle here — but he is in Barry’s company. They both run the danger of suppressing the correlative (non-selfish) and thus stating philosophical propositions which make no difference at all to the way things are. If everything has elements of self-interest in it, then it makes little sense to compare this to something that is without self-interest. (Where would we find anything?) In Barry’s view all morality is of the self-interested sort, and to Barry, this has unfortunate consequences. To Feinberg, self-interest may explain moral behaviour, but it is also capable of encompassing what we would ordinarily call good (self-less?) behaviour (*e.g.* refined sensibilities). If everything is selfish, we cannot know what it means to be not selfish, therefore self-interest talk is not enlightening. However, it is unfair to leave Feinberg with this dilemma in an article of this kind. For it is possible that he resolved it adequately by describing a balance of selfish and unselfish behaviour, although I retain some doubt about this method of analysis.

Barry’s problems with self-interest and future generations may be resolved in other ways. This resolution ultimately settles on the following: If there is intrinsic good in rational behaviour, in seeking truth for its own sake, then our *lack* of knowledge about a remote generation’s future needs when coupled with a desire for the intrinsic value of other moral virtues (*e.g.* fairness) is precisely what controls our present policies. If we are ignorant (*i.e.* lack

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adequate information to form a true judgement) as to the future needs of some remote generation, we will adjust our own consumption on the basis of this ignorance.

J. M. Finnis' essay "Scepticism, Self-Refutation, and the Good of Truth" provides a partial answer to Barry's rejection of the social contract theory of morality. Finnis notes that behaviour and linguistic activity, "display patterns of reason(ing) and will(ingness); jurisprudence advances by going beyond the display." He disputes Hart's thesis that knowledge and its quest are somehow less important for man than survival. It is in this article that I found the most direct reply to the theories of self-interested morality which Barry discusses and with which Feinberg disagrees.

It may be that Augustine's terminology of love is the best expression of what lies behind our morality. But Finnis' essay is more "a reflection on the implications of our willingness to further our understanding, to raise questions, to seek clarification, and to make efforts to sharpen our perception." Finnis is aware of a difference between generations 2000 years old and present generations (which seem to be more cynical and perhaps more defeated). He rightly recognizes, but does not discuss, the ways in which a survival point of view affects the methodology of such disparate discussions as Hart's *The Concept of Law*, Rawl's *A Theory of Justice*, and Nozick's *Anarchy, State and Utopia*:

Rather my concern is to contribute to a more exact understanding of a practical principle which Plato, Aristotle, and Aquinas regarded — rightly — as self-evident. What most sharply differentiates the classical from the modern philosophy of human affairs is that one asserts while the other denies that truth (and knowledge of it) are as self-evidently and intrinsically good for man as life is.

Finnis does not defend classical expositions of this principle. Both life (survival) and truth are "intrinsically, underderivatively, fundamentally good, and there is no priority, ranking, or hierarchy of the fundamental forms of good." There are other good things, play, friendship, aesthetic experience, etc., and their goodness derives from practical reason. For example, it is morally wrong to destroy a friendship without sufficient justification. It is the necessity of this justification which steers us toward truth. We want true justification to be the only kind capable of allowing us to destroy something so important as a friendship.

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That truth is good is self-evident. That moral evaluation must be concerned with true evaluation is not precluded by the difference between facts and evaluation. "The difference between 'factual' judgements, such as 'this book is blue' or 'iron melts at 1535°C' and evaluative statements such as 'truth is good', do not warrant the conclusions that only the former class of judgements can be objective." Nor is it impossible to *truly* determine that such and such an act is morally wrong. It is self-evident that there is much more to morality than self-interest. Of course, the philosophical objection to this may be stated: It is not self-evident *to me*.

II

Peter Hacker discusses Hart's philosophy of law as a distinguished contribution to moral and political philosophy, and to social theory in general. Hacker attributes two primary aspects to Hart. The first is methodological; the second jurisprudential. To those who practice the art of philosophical analysis, the insights yielded are rich and invaluable. Hart quoted J.L. Austin in an explanation of his method. The analysis undertaken in his work was designed to give us "a sharpened awareness of words to sharpen our awareness of the phenomena", and it reveals, "the similarities and differences, recognized in language, between various social situations and relationships."

Yet Hart was aware of the problems with classical definition. Perhaps too much so, as Hacker mentions, for it seems to have led him astray. Hart believed there are three recurrent issues in any attempt to state a definition of law: (1) the binding nature of law which renders conduct obligatory, (2) the difference between law and morality, and (3) the role of rules. He does not, however, state a definition of law. Perhaps Hacker is right, philosophical illumination will not come from the concise definition of law but rather from the expository analytic matter which precedes any attempted definition of it.

There is an inseparable affinity between Hart and analytic philosophy. He draws from Frege's ideas on presupposition, revived by Strawson in the early fifties. Hart distinguishes between internal and external statements of law so that, naturally, certain types of normative statements presuppose a background of attitudes upon which any external statement relies. The force of this is the implication allowed. If a speaker says x, then y may be implied — and this y may also be analyzed. So Hart abandoned speech act analysis in favour of "statements made from the internal point of view." If it is possible to make this distinction clear and useful, it is not apparent here. However, what is intended, I believe, is simply to recognize that some set of attitudes, beliefs, unconscious desires, and certain experiences together are internalized

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(assimilated) and form a substantial foundation for what we state to the world as our opinions and beliefs (external statements). This distinction is of course relevant to an external statement of law (e.g. a statutory declaration). Surrounding this distinction is Professor Hacker's discussion of the profound influence of the philosophy of language on Hart's work. Hart was aware of a steady theme of Wittgenstein's namely, that there exists a wide range of complex issues surrounding the gap between rules (external statements) and their application (which takes into account the internal point of view.) A vagueness and open-texture exists in concepts Hart welcomed. Therefore he was aware that rules cannot dictate their own application — we must do that. The open texture of language (the *statement* of a rule) allows us to be flexible and reasonable when we approach an individual case.

Hacker discusses Hart's conception of law as a combination of primary and secondary rules. This is a famous distinction and has occasioned much comment. Secondary rules have been called "power-conferring" rules and are analogous to procedural rules. Primary rules are those, Hart says, which impose duties. Hart realized that a system of "duty-imposing" rules does not produce a normative system, it would be missing a subset of rules which govern the internal relations between various members of the duty-imposing set. For example, there would be no category of rules which would tell us whether one statement of duty-imposing rules was a true statement. Therefore we would be uncertain about both the identity of various duty-imposing rules and their permitted area of application. There would be no procedure for improving them, and no process by which we could reach a decision in disputed cases.

Hart believes the evolution to a normative system is accomplished in part by a set of secondary rules and in part by the rule of recognition. The rule of recognition allows us to identify exactly what rule we are talking about and where it does or does not apply. We become efficient in our system with rules of adjudication. As I have already stated, I believe this set of secondary rules is analogous to the rules of civil, criminal, administrative, and legislative procedure. If we are able to recognize all these rules and their proper application at the right time, we have a legal system. Hacker notes that perhaps this is only a "distinction by enumeration". However, I believe that there is so little which distinguishes them, that even distinguishing them by enumeration is misleading, and prejudicially so. This sort of confusion shows up in the characteristically legal distinction between substantive and procedural law and related rights. We read from opinions that the "merits" of a claim may not be reached because of some procedural problem; when the biggest "merit" was the procedural one. I often sense a great deal of misunderstanding in this area of the relationship between substantive rights and procedure. From the layman, we often hear that so and so got off on a

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procedural technicality. What is inexcusable is when a lawyer explains something in the same way to a client or group of non-lawyers. I believe Hart neglected the substantive aspects of procedural law. He is misleading in his characterization of rules of obligation as primary and somehow substantively different from rules of procedure. Hacker mentions that secondary rules seem to do as much behaviour-guiding as primary rules. Indeed they do. Nothing will be served by distinguishing them on the ground that one imposes obligations. Judges must follow procedural rules, and are bound by them, just as we are bound, contractually, to keep our promises.

I find Hart's discussion of this distinction troubling and confusing, but not without value. This kind of distinction is important if only in pointing out the trouble we get into when we make it. For surely, a power-conferring rule cannot profitably be separated from the duty that goes along with it. A judge not only has the power to decide a properly pleaded case; he has a duty to decide it. This distinction would probably be a harmless illusion if it was not for what Hart seems to accomplish with it. Hacker reveals Hart's employment of this distinction:

The notion of a power conferring rule is one of Hart's main instruments in demolishing the obsessive picture of legal norms as hugely complex, imposing duties only (Bentham) or directed exclusively at officials (Kelsen) and containing in their antecedent conditional clauses as much legal material as would fill several volumes. Constructively, the notion not only provides a basis for the proper analysis of legal relations which will supersede the inadequate Hohfeldian analysis, but is the first step to a proper typology of laws.

There is a risk in trying to demolish complexity. If the objective under consideration is *necessarily* complex then obliterating this complexity with an ill-conceived or at least useless distinction prevents us from finding out what is really going on. Western civilisation has evolved a concept of right which includes the right to due process, fair hearing, and other procedural rights. If it is true that rights are correlative but conceptually and logically subsequent aspects of duties, then before these procedural rights were logically possible, there must have been some duty from which they could be derived. Thus a power-conferring rule does little more than express a social duty to properly identify which rules are used in adjudicating issues, a duty to truly ascertain their scope, a duty to test the validity of these rules and a duty to provide a

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method of changing them and many other obligations.

Such a distinction will not serve to demolish Bentham's view of legal norms as complex entities. The law is majestic in its complexity and intricacy. Justice is evident in even the most intricate and complex relationships. This does not mean law is basically incomprehensible. It means only that a simple distinction between rules of procedure and other kinds of rules is certainly not sufficient to preclude the possibility of a complex legal universe.

In R. S. Summers' view, Hart is a naive instrumentalist. In "Naive Instrumentalism and the Law" he describes a point of view which distorts reality and hides complexity. What is it that a naive instrumentalist misses? For one thing, he misses the importance of private parties in a legal system. For another, he misses the value of analyzing procedure in legal methodology. Both Bentham and Austin neglected the importance of private parties and the process by which they maintained their rights. We live with legislation and regulation, but also with contracts, wills, corporations, unions, personal injury and family. The extent to which each of these evolve, depends, at bottom, on the strength and integrity of the process that permits us to complain when something goes wrong with one of them. Summers agrees that Hart too often thinks of law as a means of social control, yet, statistically, the largest group of litigators and legislators are private parties. In Summer's words, "private individuals, classes of individuals, and groups set far more legal goals in a given day than all of officialdom combined in the course of a year." The law is not a set of prescriptions and proscriptions. This distorts reality, and, Summers says, fails to recognize the complicated task of attempting to apply well-recognized moral principles of equity and justice to disputes between individuals. This is the mystery and majesty of law. This is the delicate nature of jurisprudence.

III

Analytic philosophers tend to look for something else in any system under consideration. This is also true of legal philosophers, or it should be. There is no justice in a system that is incomplete or that is unable to handle each possible combination of facts. Nor is justice obtained in a system where one outcome is inconsistent with another. The law expresses this kind of problem by prohibiting decisions which are arbitrary or capricious. Or it sends up signals when like cases are treated unequally. The logician looks for completeness, consistency, methods of verification and validity. We want our legal system to be sound and unified. We must know whether or not a rule belongs to our system. In jurisprudence, this has been called the problem of unity in a legal system.

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As with Hart's system of primary and secondary rules, his method of establishing the unity and validity of a legal system is incomplete and obscure. He attempts to do this with a rule of recognition. Hacker believes this much at least is clear about the rule: (1) that it is necessary; (2) that it is ultimate (meaning it is neither valid nor invalid); (3) that it is found in social practice; (4) that it contains criteria for identifying other rules in the system and has the ability to subordinate one rule to another (*e.g.* the rules of precedent to statutory enactment); (5) that it is open textured (allowing interpretation); and (6) that it is accepted generally and is perceived from the internal point of view.

One of the problems with Hart's explication of the rule is that he neglects its employment by ordinary people (private parties) and tends to think of it as primarily addressed to judicial officials. Judicial officials have a duty to apply laws satisfying a certain criteria of validity. But a more serious problem, epistemologically, is Hart's characterization of the rule as ultimate (meaning neither valid nor invalid). This point of view rests the validity of a legal system on a merely stipulated unverifiable function of some "rule of recognition". This validity is certainly an object of legal reasoning (it is undoubtedly of prime import to an innocent criminal defendant), and it will not come from a principle that will not admit validity or invalidity. Hacker argues that it is possible for Hart to get along without such a strong statement of a rule of recognition. He argues that there may be many such rules addressed to various judicial officials. The rules of recognition may be distinguished by their content, though their form remains identical — and Hacker argues that these rules need not be ultimate; that the validity of a legal system need not rest on something neither valid nor invalid. Epistemologically we must be grateful for Hacker's arguments, for we should feel uneasy with a system so puzzling that we are unable to tell when we have a true answer and when we do not. There are principles which can establish validity but these are ordinary principles of reason and therefore are not peculiar to legal discourse. The rules of recognition, therefore, (to preserve Hart's thesis) must be viewed only as adjudicative rules. They are not logical rules; although this is where their validity must ultimately be grounded. The foundation of a legal system must be logical, founded on reason. The ultimate principles must be self-evidently moral and may be taken to include statements like: avoid unreasoned remarks, do not confuse x with y, do not allow immoral decisions, be just, fair, good, compassionate, and moral, and maximize freedom and happiness. Of course, these principles are not unambiguous, and clarification is necessary to elucidate the foundations of our jurisprudence. Moreover, this point of view removes the simplicity of Hart's system. However a system founded upon truth and morality will ultimately be more than just one founded upon artificial simplicity. Yet Hart succeeds even when he fails. He has brought us

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closer to the truth about our laws and our morality and he has fundamentally influenced the debate about the central problems in legal philosophy.

IV

In "Defeasibility and Meaning", G. P. Baker discusses two principles central to Hart's jurisprudence. The first is that it is possible to explain legal concepts and legal statements. The second is that legal statements are *sui generis*. This means, as Baker puts it, they cannot be shown to be logically equivalent to non-legal concepts and non-legal statements. This is a controversial synthesis, and many philosophers believe it is not possible to adequately explain legal statements without reducing legal discourse to non-legal discourse. For the practitioner this presents insurmountable difficulties if Hart turns out to be correct. This is due to problems involved in explaining to juries and even judges just what a particular law means. Definitions appear elliptical if not absolutely circular and the result is confusion. Imagine the problems of explaining legislation to the democratic public. Fortunately, Baker has found a way to resolve some of the controversy.

In "No Right Answer?", Ronald Dworkin probably finds Baker's resolution of Hart's problems unsatisfactory. If Baker's resolution were successful there might be justification for Hart's contention that legal concepts are open-textured and inclined toward a contextual sort of definition. All this leaves the judge a great deal of discretion in applying legal principles to particular circumstances. There are many lawyers and judges who rally to the truth of the statement that, in law, there are no right answers. Though the same lawyers, when found on the wrong side of this discretion, may decry it. Is it all a seamless web? Dworkin may be heard from the darkness asking, no right answer? He believes that it is possible, even in difficult cases, to arrive at an answer that scientifically and analytically we would call the right one.

A. M. Honoré describes in "Real Laws" the differences between laws spoken of by professionals (lawyers and judges) and laws as described by legal theorists. Though it is ungenerous to suppose that a thorough practitioner may be distinguished from a legal theoretician, there are other problems with this distinction. The most salient of these is Honoré's peculiar tendency to claim that law is identical with its expression, the intellectual whole, is immaterial and that "to suppose otherwise is to become the victim of a strange form of analytical metaphysics." Bentham and many others have been victimized by this if Honoré is right. Fortunately he is not. His mistake is in not realizing the difference between the sense of something and its referring expression. "Blue" refers us to an idea which we could spend a lifetime becoming more definite

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about. The word blue is not what we contemplate when we think about the colour blue. A statute is not what we think about when we contemplate statutory law. The real law like the real colour blue always remains partly unexpressed.

In "Positivism, Adjudication and Democracy", G. Marshall discusses aspects of Dworkin's article "Hard Cases", exposing the fallacy of the positivist proposition that recourse to moral principles and policies is unnecessary in difficult cases. Is judicial discretion ever a sufficient basis for a decision? Along with Dworkin, Marshall agrees that there is probably less room for this kind of discretion than is commonly supposed.

Rupert Cross discusses rules of precedent and the problems involved in failing to recognize that judicial statements about them are neither the reasons for deciding cases nor can they form any incidental support for an opinion. A preceding opinion may or may not express a true statement of law. To the extent that it does its truth is not to be governed by its precedential expression (*i.e.* the mere fact that it has been expressed historically). The expression must stand on its own, and nothing is "well-settled" that fails to make sense. We shall be thankful that "A statement read by the Lord Chancellor on 26 July 1966 announced that the House of Lords proposed to modify its existing practice of invariably following its past decisions and to 'depart from a previous decision when it appears right to do so'."

Intention has always formed a significant distinction in law. One is generally more culpable when he intends his wrongful conduct than when one does not. Professor Kenny discusses the role of intention in murder, neglecting somewhat the role of recklessness. The law has often stated (second degree murder) and left unstated the rough equivalence of recklessness with intention and this equivalence often explains a great deal. J. L. Mackie's analysis allows us to focus better on the role of recklessness in law; to conflate the distinction between 'x knew' and 'x should have known' when applying legal sanctions. Although both Kenny and Mackie seem to be aware of this, they both neglect a *direct* analysis which is necessary to a complete understanding of intention and responsibility.

D. N. MacCormick in "Rights in Legislation" argues that legislation is not a creator of rights, but rather an expression of rights. He is absolutely correct in stating the logically prior step, that *recognition* of the right justifies the imposition of a legislatively remedial provision. Experience and discovery establish moral duties (logically prior to rights); recognition of these duties permits valid legislation *ubi ius, ibi remedium* (Where there is a right, there is a remedy). It is said that the rule of primitive law was the reverse, Where there is a remedy, there is a right.

Hart seemed to rely on a distinction between statements like: "x ought to do such and such" and "x has an obligation to do such and such", although his

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reasons for so relying are as unclear as the results he believed he accomplished with it. J. Raz sides with those who find the distinction a matter of style or emphasis. Although the distinction may be of historical importance, it is of little practical significance. The discussion is an interesting explanation of the normative institution of a promise.

V

In this collection of essays we have a fairly comprehensive account of the central problems in Anglo-American jurisprudence. The essays themselves, through their imperfections, point out something quite human about the nature of jurisprudence. Like the artist, the musician, the accountant, the engineer, and the physicist, lawyers must solve their problems by looking to the world they live in — to its social, political, and moral structure.

Wittgenstein warned us that we must be careful of our logical eyeglasses, our professional attitudes and complacency. We must realize that Beethoven's symphonies are philosophical as much as musical; musical notation the language, combination and sequence the thought. We must realize that law is the same; the foundation is philosophical and moral. The superficial notation (*e.g.* the statute) is merely the expression. Often it is imperfect, inadequate, and usually in difficult cases, in need of supplemental reason.

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