University of Baltimore Law Review

Volume 33
Issue 2 *Spring 2004*

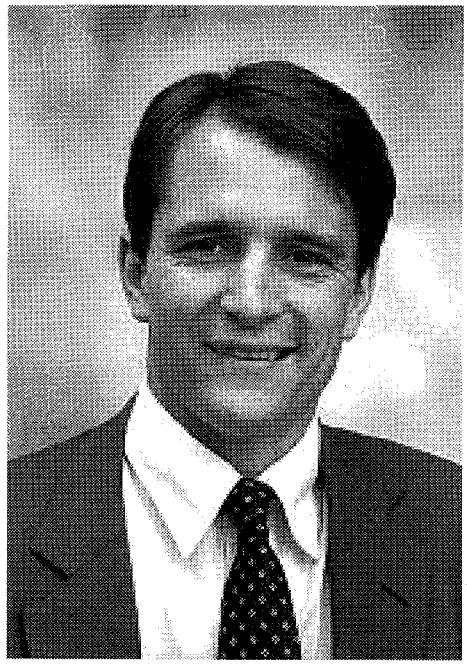
Article 2

2004

Speech: The Value and Purpose of Law

Mortimer N.S. Sellers
University of Baltimore School of Law, msellers@ubalt.edu

REGENTS PROFESSOR OF THE UNIVERSITY SYSTEM OF MARYLAND



M.N.S. Sellers

On October 9, 2003, Professor Mortimer Newlin Stead Sellers delivered his first public lecture as Regents Professor of the University System of Maryland (USM). His discourse on *The Value and Purpose of Law* took place at the University of Baltimore School of Law, in the presence of the USM Chancellor, the Regents and the faculty and students of the University of Baltimore School of Law.

The Regents' Professorship was established to recognize one or more faculty members whose record of scholarly achievement warrants appointment to this highest rank in the University System. Appointment to a Regents' Professorship is made by the chancellor upon recommendation by one or more of the presidents of the University System of Maryland institutions. Criteria for appointment include national or international recognition for achievement in the arts, sciences, or the professions.

THE VALUE AND PURPOSE OF LAW

M.N.S. Sellers
OCTOBER 9, 2003

Thank you for that kind introduction and thank you very much for the invitation to give my first Regents Lecture here, at the University of Baltimore.

I would like to thank the Regents of the University System of Maryland for the honor that they have done me by linking my name with theirs. Or I suppose that I should say, because many Regents are here tonight, thank you Maryland Regents for linking my name with yours.

I am proud to bask in your reflected glory.

I am also proud and grateful to have been a teacher at the University of Baltimore for fourteen years, and very grateful to the colleagues who have encouraged my research, and particularly to Mebane Turner, Ronald Legon, Gilbert Holmes, Eric Schneider and Michael Meyerson, who suggested and supported my selection as a Regents professor, and to University of Baltimore President Robert Bogomolny and University System of Maryland Chancellor William Kirwan who invited you all here tonight. Thank you.

The two persons that I have worked with most closely over the last fourteen years have been Donna Frank and Joyce Bauguess. They have played an enormous role in all of my scholarship and because this talk is being filmed, I will say to Joyce, who is in the hospital. Thank you.

Finally, and above all, I think that this is a good moment publicly to thank my wife, Frances Stead Sellers, and my daughter, Cora Stead Sellers, who have tolerated and even encouraged my academic interests.

Greater love hath no woman than to share her house with three thousand books.

Which brings me to the topic of today's lecture, *The Value and Purpose of Law*, because the value of law is its service to justice; the value of justice is its service to society; and the value of society is its service to human nature, which is to say, in large part, to human affection, or love—the most important and most useful of the human emotions. So love is, in this sense, the ultimate basis of law, justice, society, and peace.

Now, that is a series of very bold and unsubstantiated assertions, and it is one of the beauties of the nature of twenty-five minute lectures that they must *always* consist of a series of bold assertions, which the

constraints of time liberate from *ever* having to be substantiated. But I shall try to elaborate a little bit on what I have just said.

The basis of law is justice because the essential and fundamental purpose of law is to realize justice, and it is the central and necessary claim of every legal system that it does so. It is the nature of law that it claims to realize justice and the proper purpose of law is to do so. Law has value only to the extent that law serves justice and law has no value when it does not.

This will be the central point that I hope to make in this lecture, which purports to discuss the "value" and the "purpose" of law. The *purpose* of law is to realize justice, and law only has *value* to the extent that law does so.

It is the essential nature of legal systems that they claim to be just. Systems that do not claim to be just are not systems of law. To this I might add what really are secondary claims in the context of today's discussion: that *justice* itself is that set of rules which make it possible for members of a society to live full and worthwhile lives; and, that *society* is that community of human welfare to which all human beings are drawn by their human capacity for love or affection. Human beings are drawn to construct societies by their desire to associate with other human beings, because human nature finds its deepest pleasures in human interactions with other living creatures.

So the ultimate basis of law is *love,* in the sense that law exists for the maintenance of human society, but the more immediate purpose of law is *justice,* and that will be the focus of my remarks today.

Now, I don't suppose that this last statement will seem particularly controversial to those of you who are not lawyers. Law ought to be just, because society ought to be just. People ought to care about the law, and to respect the law, when the law is systematically just, but not when the law is systematically unjust. Governments claim that people ought to obey their laws and, therefore, must also claim that their laws are just.

Governments claim in their public pronouncements to "establish justice" through law. This claim is made by the United States Constitution. All governments make this claim whether or not their laws actually establish justice. Governments always make this claim whether or not their laws actually establish just institutions. The claim will always be made that the existing legal system is just, whether or not it *is* just, in fact.

This helps to explain why lawyers and even philosophers have so seldom in the past formulated their definitions and descriptions of law in terms of the law's claim to justice. Lawyers and philosophers in the past have not very often formulated their definitions and descriptions of law in terms of the law's claim to justice, because the law is not, in fact, always just.

It is possible to say that such-and-such a rule *is* the law in such-and-such a jurisdiction, but that it is, in fact, unjust. So, for example, H.L.A. Hart, when he was professor of Jurisprudence at Oxford University, insisted on the separation of law and morals.[1] He wanted to make a firm distinction between what the law is, and what the law ought to be.[2] Bad laws should be disobeyed, perhaps, but that does not mean that they are not laws, Hart said, it just means that they do not deserve our respect and obedience.[3] This is far from being a novel view.

John Austin, the very influential English legal theorist of the early nineteenth century, strongly promoted the view that "[t]he existence of law is one thing, its merit or demerit another."[4] Austin described law as commands,[5] by which he meant significations of desire. He believed that all laws were significations of desire, coupled with the purpose of inflicting an evil or pain if the desire should be disregarded.[6] For legal positivists such as Austin, laws are commands that oblige generally to acts or forbearances of a class.[7] Laws are commands issued by a determinate rational being to those subordinate to him.[8] This way of looking at things makes it very easy to separate law from morality. Law, according to Austin's theory, is whatever the sovereign in any given state says that it is.

The trouble with looking at law in this way is that it misses the role of judges and other enforcers of the law. Respect for the law, but even more than that, respect for judges, has always been a particularly prominent feature of American culture, so it should not be surprising that it was an American, John Chipman Gray, who very quickly noticed Austin's weakness in this respect, and reformulated Austin's definition of law.

Gray claimed that the law of the state is composed of those rules which the courts, which is to say, the judicial organs of the state, "lay down for the determination of rights and duties."[9]

In other words, for Gray, the law is not what the legislature or sovereign says that it is, but what the courts say that it is.

Gray's near contemporary, the famous cynic and United States Supreme Court justice, Oliver Wendell Holmes, went one step further.

---

1. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, 49 (Clarendon Press, Oxford 1983).
2. *Id.* at 71.
3. *Id.* at 75.
4. *Id.* at 52.
5. JOHN AUSTIN, Lecture I, THE PROVINCE OF JURISPRUDENCE DETERMINED, 10-11 (The Lawbook Exchange, Ltd. ed. 1999) (1832).
6. *Id.* at 21.
7. *Id.* at 29.
8. *Id.* at 118.
9. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW, 82 (Columbia Univ. Press, 1909).

Speaking to a group of idealistic young law students, in a forum much like this one, at the dedication of a new law building at Boston University. Speaking to sweet young law students in all the nastiness of his embittered old age, Holmes said that law is not even what the judges themselves say that it is. Instead, law is what judges actually *do* in deciding cases. "Law," for Holmes, was "a set of prophecies of what the courts will do in fact."[10] Holmes insisted that "the object of our study"—he meant the study of law—the object of our study should be "the prediction of the incidence of the public force through the instrumentality of the courts."[11]

Now, John Chipman Gray was largely right about what gets taught in law schools. An awful lot of time in law schools *is* spent on studying what judges have said in the past about what the law is in particular cases. And Oliver Wendell Holmes was right about what many lawyers spend much of their time doing. Many lawyers spend much of their time predicting what courts will actually punish their clients for having done. Holmes called this the "bad man" theory of law. Holmes looked at law from the perspective of the bad man, who cares only about what he will be made to suffer for. Lots of lawyers, and their clients, are "bad men" in the sense that Holmes approved of.

But that is not the purpose of law.

It is not what makes law valuable.

And although it is also at some level *true,* it does not reach the essential attribute of law, which is its claim to be just.

The examples that I have given so far illustrate three common fallacies about law: the *positivist* fallacy of law; the *interpretivist* fallacy of law; and the *realist* fallacy of law.

Positivists, such as Austin, think that the content of law can be determined by looking at the determinate intent of determinate legislators. They think that law is some particular person's determinable expression of how things ought to be done.

But the positivist fallacy is mistaken, because those who promulgate their will as law also claim that law ought to be obeyed. In other words, they claim that their will is just, as expressed through law. They claim that their will is just and, in staking a claim to justice, they must enlist the interpretive power of judges and other public officials. Law is not only what they say it is, but is also supposedly just; and this claim of justice colors the interpretation and application of supposedly positive legal norms.

Seeing this to be true, one might fall into the *interpretivist* fallacy of law, which is to believe that the law emerges and becomes determinate

10. Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457 (1897).
11. *Id.*

only through the application by judges and others of positive sources of law (such as legislation) to actual cases and controversies.

But interpretivists also go too far on the strength of their one important insight, because judges and the police can still be mistaken. When legislators or a constitution charge judges or the police with a certain amount of discretion, by using moral words such as "liberty" or "reasonable" in statutes, for example, judges may still interpret these statutes wrongly, or corruptly. Not all interpretations are correct, or even *prima facie* acceptable. Some interpretations of the law can be seen to be wrong, even when they are made by courts, and enforced by the state.

The *realist* might say that even if some judicial decisions are wrong, wrong decisions are law, if they are enforced. But here too realists will get into trouble, because in order to predict what courts will do, and which decisions the state will enforce, lawyers will have to take into account the formal sources and the moral pretensions of law. Law may be (at some level) whatever the courts will do, but what courts will do depends on the legal system that they belong to, and judges in all legal systems will be directed in part by their system's claim of legitimacy.

Judges and other officers of the law will be guided by the moral directives of their legal system's claim to be just.

Which brings me to the final fallacy about law that I want to criticize today, and then I will finish by returning to my own—let us call this the "correct"—view about the value and purpose of law.

The final fallacy that I want to identify this evening is the *naturalist* fallacy of law, which identifies the law with justice. The naturalist fallacy assumes that everything which *ought* to be law *is* the law in fact. I have never actually met anybody who really believed this. But I think that it is worth bringing up the naturalist fallacy to distinguish it from what I am saying myself.

The naturalist fallacy assumes that everything which *ought* to be the law, *is* the law in fact.

What *I* am saying, in company, I think, with every legal system that the world has ever known, is not that what ought to be the law *is* already the law, without any mediation by the legal system itself. The concept of law that I am articulating here begins with the universal and, indeed, the tautologous position that what *ought* to be the law, *ought* to be the law. I am saying that the value and purpose of all legal systems is to make what *ought* to be the law, the law in *fact.*

Laws only exist in the context of the legal systems that create them, and all legal systems claim to be just. All legal systems claim the virtue of maintaining a process through which what ought to be the law becomes the law in fact. It is on the basis of this assertion of moral correctness that legal systems make the further claim that their subjects ought to obey them. And indeed it is true that the subjects of a legal

system would have a duty to obey its laws in most circumstances, if it were in fact also true that the legal system answered questions of what ought to be the law, better than its subjects would by using some other system.

The value of all legal systems is *epistemic*, if they have any value at all. Legal systems properly exist for the purpose of giving right answers about justice.

This observation has two important implications: first, the less effective a legal system is in doing this—which is to say, the less effective that a legal system is in giving right answers about justice—the less attention or obedience that legal system deserves; and second, in order to capture attention and obedience, legal systems will try to *appear* to be just, or even actually try to *be* just in some aspects of their rule, and this will have an influence on judges, the police, and other officers of the law.

So all legal systems contain a certain amount of moral language, which requires interpretation and opens a gap between the law itself and the original intentions or understandings of the persons who framed it.

If the value and purpose of law lies in the realization of justice, then the legitimacy of all legal systems will depend on their actual ability to realize justice, in fact.

The legitimacy of all legal systems depends upon their actual ability to realize justice in a particular society, and this separates the study of justice from the study of law.

Justice derives, as I have asserted, from the rules that should govern a human society, so that all its members can live worthwhile and fulfilling lives.

Law begins somewhat differently with the political institutions that discover and implement these rules of justice best. What such institutions discover and implement is the law, even when it is not fully just.

One may have, and in fact I do have, quite an elaborate theory of justice—and I have hinted already this evening about what my theory of justice is—but the more important question for the actual implementation of justice, which is to say for law, is how to adjudicate between my particular conception of justice and somebody else's.

Law is a theory of practical justice, and a *legal system* is a process for discovering and implementing the rules that justice requires.

Lawyers and others should look at the law in this way for two reasons: *first*, because it is in fact the way that most people *do* look at the law, as a system that ought to implement justice. All legal systems claim to do so; and *second*, because the less effective any legal system is in realizing justice, the less it deserves anyone's attention or obedience.

The *purpose* of law is to realize justice.

Law's *value* depends upon doing so well.

Our duty as lawyers, law professors, judges and citizens is to measure the law against the purpose for which law exists, and to strive to help the law to serve this purpose better.