TREATISE –

The Negative Side of Positive Law

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Books

America – National or Federal?
Each state, in ratifying the Constitution, is considered a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, the new Constitution will, if established, be a federal and not a national Constitution. The Federalist, No. 39, James Madison

In Search of Liberty
Liberty, sir, is the primary object, …the battles of the Revolution were fought, not to make 'a great and mighty empire', but 'for liberty'. Patrick Henry

What Does Accepted for Value Mean?
Agree with thine adversary quickly, while thou art in the way with him; lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison. Verily I say unto thee, Thou shalt by no means come out thence, till thou hast paid the uttermost farthing.

Matthew 5:25-26

Booklets

1 ***When There is No Money*** FREE
For thus saith the Lord, Ye have sold yourselves for nothing, and ye shall be redeemed without money. Isaiah 52:3

2 ***Liberty*** FREE
Now the Lord is that Spirit: and where the Spirit of the Lord is, there is Liberty.
II Corinthians 3:17

3 ***The Natural Order of Thing*** FREE
Owe no one anything, except to love one another; for he who loves his neighbor has fulfilled the law. Romans 13:8

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Even in almost every nation, which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it. Hence, the haughty notions of state independence, state sovereignty, and state supremacy. Justice Wilson, Chisholm v. Georgia, 2 Dal. (U.S.) 419, 458 (1792)

5 ***The Legal System for Sovereign Rulers*** FREE
The Lord shall judge the people with equity. Psalms 98:9

6 ***The Negative Side of Positive Law*** FREE
Therefore, one must be wise and attentive, since there are those among us who make kings and set up princes outside His law. Hosea 8:4

7 ***Resident/Minister*** FREE
You may also buy some of the temporary residents living among you and members of their clans born in your country, and they will become your property.
Leviticus 25:45

8 ***Introduction to Law Merchant*** FREE
Stand fast, therefore, in the liberty with which Christ hath made us free, and be not entangled again with the yoke of bondage. Galatians 5:1

9 ***Society of Slaves and Freedmen*** FREE
If men, through fear, fraud, or mistake should in terms renounce or give up any natural right, the eternal law of reason and the grand end of society would absolutely vacate such renunciation. The right to freedom being a gift of ALMIGHTY GOD, it is not in the power of man to alienate this gift and voluntarily become a slave. Samuel Adams 1772

10 ***Introduction to Corporate Political Societies*** FREE
Finally, be strong in the Lord and in the strength of his might. Put on the whole armor of God, that you may be able to stand against the wiles of the devil. For we are not contending against flesh and blood, but against principalities, against the powers, against the world rulers of this present darkness, against the spiritual hosts of wickedness in heavenly places. Ephesians 6:10-12

11 ***Superior Law, Higher Law, My Law*** FREE
You have rights antecedent to all earthly governments' rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe. John Adams

Table of Contents

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, are erased from the memory. It is so odious, that nothing can be suffered to support it but positive law. …But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law. *Dred Scott v. Sandford*, 60 U.S. 393, 498 (1856)

Emphasis is added throughout this writing by underlining.
Quoted passages are bolded.

TREATISE –
The Negative Side of Positive Law

1 – INTRODUCTION TO POSITIVE LAW

Positive law refers to legislative enactments found in a legal system used in a state of society functioning according to an unnatural order of things. Positive law presupposes a society with supremacy in rulers or government, and an inferior class of citizens or residents subject to the will or commands of a sovereign authority.

When a country has submitted to a conqueror, generally by force or fraud, or both, and the conqueror establishes a state of society, often referred to as a nation or nation-state, there remains a need to alter the system of government and law to fit the new system. As explained in the book *Ancient Law*, by Sir Henry Sumner Maine, the methods of alteration take the form of 1) fictions, 2) equity, and 3) legislation. This writing on positive law is in reference to the third item – legislation. Legislation is enacted to fit in an unnatural order that supports fictions and equity.

We will see that positive law is contrary to common law and natural law. Positive law exists in a different dimension or reality. We should also understand "**the sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission.**

M'Cullough vs. The State of Maryland, 4 Wheaton, 316 (1819)

A number of years ago I watched Justice Thomas of the United States Supreme Court speaking to a group of law students. The students kept asking Thomas about natural law, to which he replied, as best I recollect – "I don't know why you keep asking me about natural law, we on the court only deal with positive law." Maybe we should have a better understanding of positive law. Emphasis is added in the following quote and throughout this writing.

What is law? In its primary and highest sense, … it might be defined simply as the expressed will of God. It has been well said, "Justice is the offspring of law, as law is the offspring of God." Law … exists in or results from the harmony of the universe and the natural relations and fitness of things. Cicero says, that in his day learned men defined law to be "the highest reason implanted in nature, which prescribes those things which ought to be done, and forbids the contrary." <u>It is not merely an arbitrary or positive rule of action, created by a mortal sovereign's will</u>. Neither is it something invented by human intelligence. It may be discovered by us through

Revelation, or evolved by human wisdom through the results of observation and experience.

Thoughts on Codification of the Common Law,
by Albert Mathews, 1882

2 – POSITIVE LAW DEFINED

After searching numerous sources for the definition of positive law, there is a general consensus on a number of elements that would be included in the meaning of positive law.

In Bouvier's 1859 law dictionary, we find **positive law** is used to mean "**in opposition to natural law**". The term positive law describes "**those rules which are presumed to be law**" and derive their force "**by tacit, but implied agreement**".

From *Black's Law Dictionary*, 4th edition, we see positive law "**is enforced by a sovereign political authority**". It is distinguished from "**the principles of morality and the so-called laws of honor**". All laws that are "**authoritatively imposed**" may be "**described as positive laws**".

So far, we find positive law does not concern itself with the laws of nature, nor actions that may be considered inherently or morally wrong, nor is there a need for a definite expressed agreement or a meeting of the minds. The words *tacit* and *implied* refer to

assumptions and presumptions regarding an understanding that is **"inferred, or understood without being openly expressed or stated; implied by silence or silent acquiescence"** as stated in *Black's Law Dictionary*, 6th edition.

We could say positive law exists in a legal system, while "the laws of Nature and of Nature's God" (from Declaration of Independence) refer to a system based upon law.

Legal looks more to the letter, and lawful to the spirit, of the law. Legal is more appropriate for conformity to positive rules of law; lawful for accord with ethical principle. Legal imports rather that the forms of law are observed, that the proceeding is correct in method, that rules prescribed have been obeyed; lawful that the act is rightful in substance, that moral quality is secured. Legal is, moreover, the antithesis of equitable, and the equivalent of constructive. *Anderson*, 1893

3 – POSITIVE LAW OF NATIONS

The term positive law has an external or non-domestic implication concerning voluntary rules or agreements between nations or states. From the following descriptions of the positive law of nations, we can gain further insight into principle elements.

The positive law of nations consists of rules and obligations, which owe their origin, not to the divine or natural law, but to human compacts or agreements, either express or implied; that is, they are dependent on custom or convention.

A Law Dictionary, Bouvier, 1859, "Law of Nations"

These three kinds of law of nations, the *Voluntary*, the *Conventional*, and the *Customary*, together constitute the *Positive Law of Nations*. For they all proceed from the will of Nations; the *Voluntary* from their *presumed* consent, the *Conventional* from an *express* consent, and the *Customary* from *tacit* consent. Vattel, *Law of Nations*, Preliminaries, p. 9

We see positive law comes into effect after some agreement including presumed consent, express consent, and tacit consent. Upon further analysis of these types of consent, it could easily be said that one may be consenting to positive law without doing so knowingly, voluntarily and intentionally. There is a constructive presumption that a person has agreed to be obligated to the penalties attached to positive laws stemming from the will of a ruler or government operating with sovereign powers.

I should also add that the establishment of the law of nations was for the purpose of attempting to have all nations composing an empire to operate in a similar manner with similar prohibitory laws. The law of nations is sometimes referred to as the common law of nations.

4 – POSITIVE LAW AND SOVEREIGNTY

We saw above that positive law is enforced by a sovereign political authority, such political authority meaning a superior authority ruling over that which is inferior. One of the main reasons it is necessary to say positive law is distinguished from or contrary to the law of nature is that in nature, man is not seen as having a rank above or below other men. In nature, the people do not live under a superior human authority. But positive law, like the unnatural order of things and the state of society or civil state, is based upon an artificial structure for a society where it appears, through the use of fictions, that the people have surrendered their natural state and submitted to a superior authority.

To help tie in my earlier writings on *Treatise – The Natural Order of Things* concerning the state of nature distinguished from the state of society with its civil law and civil government, and to apply the *Treatise – Sovereignty* to this writing on positive law, I present the following remarks found in *Ogden v Saunders*, 25 U.S. 213, 319 et seq (1827), which will serve as a good review on those foundational principles and how they related to positive law or positive enactments.

I admit that men have, by the <u>laws of nature</u>, the right of acquiring, and possessing property, and the right of contracting engagements. I admit, that these natural rights have their correspondent natural obligations. I admit, that <u>in a state of</u>

nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is co-extensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. What is this natural obligation? All writers who treat on the subject of obligations, agree, that it consists in the right of the one party, to demand from the other party what is due; and if it be withheld, in his right, and supposed capacity to enforce performance, or to take an equivalent for non-performance, by his own power. This natural obligation exists among sovereign and independent States and nations, and amongst men, in a State of nature, who have no common superior, and over whom none claim, or can exercise, a controlling legislative authority.

But when men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it, then, to be true, that, in general, men derive the right of private property, and of contracting engagements, from the principles of natural, universal law; admitting that these rights are, in the general, not derived from, or created by society, but are brought into it; and that no express, declaratory, municipal law, be necessary for their creation or recognition; yet, it is equally true, that these rights, and the obligations resulting from them, are subject to be regulated, modified, and, sometimes, absolutely restrained, by the positive

enactions of municipal law. I think it incontestibly true, that the natural obligation of private contracts between individuals in society, ceases, and is converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think all must admit, only in the law of the land, and the obligation resulting from this condition is a civil obligation.

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take, or enforce the delivery of the thing due to him by the contract, or its equivalent; so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles it seems to result as a necessary corollary, that the obligation of a contract made within a sovereign State, must be precisely that allowed by the law of the State, and none other. I say allowed, because, if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for, and put in the place of, natural obligation, would be co-extensive with it; but if by positive enactions, the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain the extent of the obligation must depend wholly upon the municipal law. If the positive law of the State declares the contract shall have no obligation it can have no

obligation, whatever may be the principles of natural law in relation to such a contract. This doctrine has been held and maintained by all States and nations. The power of controlling, modifying, and even of taking away, all obligation from such contracts as, independent of positive enactions to the contrary, would have been obligatory, has been exercised by all independent sovereigns. *Ogden v. Saunders*, 25 U.S. 213 (1827)

Sir Henry Sumner Main, in his book *Ancient Law*, in speaking of international law for certain nations, says "**the very conception of a common superior introduces the notion of positive law, and excludes the idea of a law natural**".

In the Introduction section of the book *Ancient Law*, one will find comments in reference to scholars on law in England wishing to move away from natural law and coming up with new conceptions of law:

It may conveniently be called the imperative theory of law and sovereignty. It represented law as par excellence the irresistible command of a legally illimitable sovereign, or 'political superior', issued to a subject, or 'political inferior', who, being assumed to possess the habit of obedience, was absolutely bound by the obligation of submission. Sceptical, and justly sceptical, of the nebulous sanctions of natural or ideal law, it concentrated the whole of its attention upon the

compulsion of positive law, and resolutely declined to consider either its historical or its ethical elements.

We see a fundamental principle for the establishment of positive law is the need to have a state of society governed by a superior or sovereign power functioning in an unnatural order where the people appear as servants or workers in a controlled legal, political, and economic system.

5 – CREATURES AND POSITIVE LAW

A corporation is an artificial being, the creature of positive law, wholly distinct from the natural persons composing it, its identity being unaffected by changes, however extensive and frequent, of these. *State v. Hood*, S.C., 15 Rich.Law, 177, 188

It might be said all things created by a government, in the exercise of so-called sovereign powers, are things or creatures of positive law. These fictional entities or unnatural characters function in a state of society where they have a legal existence. They are generally designated as persons, whether artificial or natural, since they are perceived as being in a condition of submission to a superior human authority. These creatures of positive law are granted legal or civil rights and privileges, the acceptance of which creates the assumption of consent to be subjected to corresponding duties and obligations

generally in the form of penalties prescribed by legislative or administrative enactment that come under the name of positive law.

We should keep in mind, "**that the sovereignty of a State extends to every thing which exists by its own authority or is introduced by its permission. See also *M'Cullough vs. The State of Maryland*, 4 Wheaton, 316 (1819).** *Wheeling v. City of*, 99 U.S. 273 (1878)

The game being played, if I may call it a game, is to get the living, breathing men and women to represent or be identified with a fictional entity or character, generally in a trustee capacity, constructive or otherwise, and thereby become the party liable for the acts or omissions of the entity. An important scenario is where a man or woman attempts to argue or protest a penal violation of positive law, and thereby commits a moral wrong or sin in attempting to breach the entity's "promise" to submit to the penalty.

If we are not governed by God, then we will be ruled by tyrants.

William Penn, 1681

6 – POSITIVE LAW AND SLAVERY

From the foregoing, it should be no surprise to find the legal existence of slavery depends upon positive law. Slavery and the concept of "status" regarding those that are superior and those

perceived as inferior are not supported by the common law of the people based upon the law of Nature and of Nature's God. We shall see that slavery exists by force of positive law, and we have seen that positive law exists under the notion of supremacy and sovereignty held by rulers.

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, are erased from the memory. It is so odious, that nothing can be suffered to support it but positive law. …But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law. *Dred Scott v. Sandford*, 60 U.S. 393, 498 (1856)

Aliens, citizens of the different states, not naturalized as citizens of the United States, and free negroes, all have their respective legal rights and obligations. They are sui juris, and may, or may not, be held suable or responsible in the civil and criminal courts of the United States. But with slaves it is different. They have no legal rights nor obligations. They can neither sue or be sued. They are punishable, indeed, by the statute law of the state, and only by the positive statute law, since African slavery is unknown to the common law...

The creation of a civil or legal person out of a thing, the

investure of a chattel with *toga civillis*, may be an achievement of the imperial power, but it is beyond the compass of an American congress. Congress must first emancipate the slave, before it can endow him with the rights of a citizen under the constitution, or impose upon him the responsibilities of a legal person, or compel him to pay money, or part with liberty.

United States v. Amy, 24 Fed.Cas.792, 794 #14,445 (1859)

That which is not recognized by the laws of Nature and Nature's God, or by the common law, but serves a purpose for those who implement an unnatural order or new order, can be created and recognized under positive law. As we see above, once a civil or legal person is created, there can be penalties for violations of positive law in the form of monetary penalties and incarceration for those who become entangled with such entities or characters.

The relation of owner and slave is, in the States of this Union in which it has a legal existence, a creature of the municipal law." See Story's Conflict of Laws, 92, 97 (Quoting from Lansford v. Coquillon, 14 Martin's Rep. 402) The same principal is declared by the court in Kentucky, in the case Rankin v Lydia, 3 Marshall 470. They say, slavery is sanctioned by the laws of this State; but we consider this as a right existing by positive law of a municipal character, without foundation in the law of nature.

Commonwealth v Aves, 35 Mass. 193, 217 (1836)

Slavery is not recognized by the Law of Nature and Nature's God. It is a system supported only by man's law.

…the right of the master, which is founded on the municipal law of the place only, does not continue (in other places where) there is no law which sanctions his detention in slavery. … Slavery is a local law, and therefore if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognized by the local law, they have broken their chains, they have escaped from their prison, and are free. That slavery is a relation founded in force, not in right, existing, where it does, by force of positive law, and not recognized as founded in natural right, is intimated by the definition of slavery in the civil law. *Commonwealth v Aves*, 35 Mass. 193, 214-5 (1836)

That every human being has a right to liberty, as well as to life and property, and to enjoy the fruit of his own labor; that slavery is contrary to the principles of natural right and to the great law of love; that it [slavery] is founded on injustice and fraud, and can be supported only by the provisions of positive law are positions, which it is not necessary here to prove. … the very idea of slavery implies, that the slave is one who is in subjection to the will of another.

Jackson v Bulloch, 12 Conn. 38, 40 (1857), Ch. J. Williams

7 – POSITIVE LAW AND MALA PROHIBITA

The ideas of crime and penal statutes are within the realm of positive law. Crime is in simple terms the doing of an act or omission to act contrary to the will of a superior or sovereign authority. In the natural order of things, people may do wrong to another for which they may responsible. Such actions are not crimes. When you enter the world of fiction and illusion inhabited by fictional superiors and inferiors, and the law of force, as we see in positive law, there is no telling how far removed from the natural order the state of society may journey.

MALA PROHIBITA. **Prohibited wrongs or offenses; acts which are made offenses by positive laws, and prohibited as such. Acts or omissions which are made criminal by statute but which, of themselves, are not criminal. Generally, no criminal intent or mens rea is required and the mere accomplishment of the act or omission is sufficient for criminal liability. Term is used in contrast to mala in se which are acts which are wrongs in themselves such as robbery.** *Black's Law Dictionary*, 6th ed

MELA PROHIBITA. **Wrong only as forbidden by positive law. 21 Am J2d Crim L at 25 A crime not involving moral turpitude, 66 P2d 1026. Evil because prohibited by law. 17 Am J2d Contr at 167. Wrong because prohibited by law but not immoral. 199 NW 988.** *Ballentine's* 3rd ed.

MORAL. **Pertains to character, conduct, intention, social relations, etc. 1. Pertaining or relating to the conscience or moral sense or to the general principles of right conduct. 2. Cognizable or enforceable only by the conscience or by the principles of right conduct, as distinguished from positive law.**

Black's Law Dictionary, 4th ed.

We see that positive law does not concern itself with moral or ethical questions. It is simply the imposition of compulsion or force to abide by the dictates or will of a sovereign power. Positive laws generally need to be "sold" to the public as necessary for their safety or protection. The various educational and media outlets serve to promote the need for positive or prohibitory laws.

The following case is comparing traditional concepts of mala in se and mala prohibita with a new concept the attorneys for "the Government", operating under the fiction of sovereignty, are attempting to impose in this case. The historical idea was that mala in se crimes or misdemeanors sprang from Biblical principles where they were considered immoral acts as sins or wrongs. When such acts, considered as wrongs in the state of nature, became incorporated or adapted into a state of society, they were labeled crimes and misdemeanors prosecuted by a so-called political sovereign authority.

Now, "the Government" wants you to believe we should redefine immorality by what contemporary society would consider immoral,

not what history or the Bible says is immoral. Traditionally, there is a greater punishment for immoral acts (mala in se) compared to mere violations of prohibitory or positive statutes and regulations that do not pertain to immoral acts (mala prohibita).

I should add that offenses in the mala in se or immoral category are to be initiated by a grand jury if a government or its agents are charging the wrongdoer. Also, the one accused of a moral wrong according to nature is to be judged by a jury composed of people from the area preferably jurists who know the accused and the witnesses. Intent to do wrong must be proven. On the other hand, generally persons charged with a mala prohibita offense do not get an indictment by a real grand jury, but the action proceeds upon an information. The trial does not necessarily need a decision from a jury, nor does the prosecutor for such prohibitory crimes and misdemeanors need to show intent to do wrong. Courts of equity do not need a jury, and if there is a jury, it is only to inform the conscience of the court.

This classification comes to us from common law, which in its early history freely blended religious conceptions of sin with legal conceptions of crime. This statute seems to revert to that practice.

The Government, however, offers the mala prohibita, mala in se doctrine here in slightly different verbiage for determining the nature of these crimes. It says: "Essentially, they must be

measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral."

… [Footnote 10] Crimes mala in se, according to Blackstone, are offenses against "[t]hose rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, . . . the worship of God, the maintenance of children, and the like." They are "crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled mala in se (crimes in themselves), such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature." According to Blackstone, crimes mala prohibita "enjoin only positive duties, and forbid only such things as are not mala in se . . . without any intermixture of moral guilt." Illustrative of this type of crime are "exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied." [A]nd his conscience will be clear, which ever side of the alternative he thinks proper to embrace. Cooley's Blackstone, Vol. I (4th ed.), pp.54, 58. *Jordan v De George*, 341 U.S. 223, 236-7 (1951)

As commentators have pointed out, the small penalties attached to such offenses [mala prohibita or prohibitory] logically complemented the absence of a mens rea requirement in a system that generally requires a "vicious will" to establish a crime, 4 W. Blackstone, Commentaries 21, imposing severe punishments for offenses that require no mens rea would seem incongruous. See Sayre, Public Welfare Offenses, 33 Colum.L.Rev. 55, 70 (1933). Indeed, some courts justified the absence of mens rea in part on the basis that the offenses did not bear the same punishments as "infamous crimes," Tenement House Dept. v. McDevitt, 215 N.Y. 160, 168, 109 N.E. 88, 90 (1915) (Cardozo, J.), and questioned whether imprisonment was compatible with the reduced culpability required for such regulatory offenses. See, e. g., People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 32-33, 121 N.E. 474, 477 (1918) (Cardozo, J.); id., at 35, 121 N.E., at 478 (Crane, J., concurring) (arguing that imprisonment for a crime that requires no mens rea would stretch the law regarding acts mala prohibita beyond its limitations). Similarly, commentators collecting the early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require mens rea. See R. Perkins, Criminal Law 793-798 (2d ed. 1969) (suggesting that the penalty should be the starting point in determining whether a statute describes a public welfare offense); Sayre, supra, at 72 ("Crimes punishable

**with prison sentences . . . ordinarily require proof of a guilty intent"). ***Staples v. United States*, 511 U.S. 600 (1994)

[Footnote 7] See also Morissette, 342 U.S. at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

State of Alaska v. Hazelwood, Supreme Court No. S-7602, No. 4891 (1997)

Why are there so many people behind bars who did not commit a moral or natural wrong – that is, there is no damaged or injured party? It is due to these so-called "crimes" under the auspices of mala prohibita, prohibitory, or regulatory offenses. The following will be a part of a future writing, but it accompanies this discussion on positive law as well.

8 – TURNING MALA PROHIBITA INTO MALA IN SE

The point to be made here is that prohibitory offenses where no mens rea or guilty mind or moral wrong is involved were to have merely small monetary penalties. Yet, as you probably are well aware, these kinds of offenses have led to large monetary penalties and considerable time in jail.

Could it be that under the equity side of a court, they are able to turn a mere prohibitory violation into a natural or moral wrong? What started out as a mala prohibita offense gets turned into a mala in se offense by the actions and words of the one speaking for or authorizing and validating the defense of the person charged. Consider the following.

Just. Inst. l. 3. tit. 14. p Grotius, (De J. B de P.) 'On this subject we are supplied with noble arguments from the divine oracles, which inform us that GOD himself, who can be limited by no established rules of law, would act contrary to his own nature, if he did not perform his promises. From whence it follows, that the obligation to perform promises, springs from the nature of that unchangeable justice, which is an attribute of GOD, and common to all who bear his image in the use of reason.' (B. 2. ch. 11. s. 1) 'It is a most sacred command of nature, and guides the whole order of human life, that every man fulfil his contracts.' (B. 3. ch. 4. s. 2.) Burlamaqui. 'It is as ridiculous to assert that before the establishment of civil laws and society, there was no rule of justice to which mankind were subject, as to pretend that truth and rectitude depend on the will of men, and not on the nature of things.' (Vol. 2. p. 158.) Vattel, Droit des Gens. 'It is shown by the law of nature, that he who has made a promise to any one, has conferred on him a true right to require the thing promised; and that, consequently, not to keep a perfect promise, is to violate the right of another, and is as manifest an injustice

as that of depriving a person of his property. There would be no more security, no longer any commerce between mankind, did they not believe themselves obliged to preserve their faith and to keep their word. This obligation is then as necessary, as natural, and indubitable, between the nations that live together in a state of nature, and acknowledge no superior on earth, to maintain order and peace in their society.' (B. 2. ch. 12. s. 163.) Pothier, des Obligations. 'Natural law is the cause, mediately at least, of all obligations; for if contracts, torts, and quasi torts, produce obligations, it is because the natural law ordains that every one should perform his promises, and repair the wrongs he has committed.' (Pt. 1. ch. 1.)

Ogden v. Saunders, 25 U.S. 213, footnotes (1827)

It is believed that not keeping one's promise is a natural wrong, a sin, and therefore would be a mala in se offense. As a mala in se offense, morally or naturally wrong, a more severe punishment may be inflicted on the guilty party including imprisonment. A court of equity addresses moral issues and promises in a state of society.

Tie this in with what we read earlier in this section: "**Now these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied**."

Jordan v De George, 341 U.S. 223, 236-7 (1951)

First, we will look at "submit to the penalty, if levied". The penalty of the statute (or bond) would not be levied. The penalty for breach of promise is what is levied. There would be no defending, arguing, protesting, disputing, etc., if one could show additional facts or new matter that would render the charge or claim of the plaintiff null and void. This would be an affirmative defense or more correctly an affirmative statement with new facts or records the plaintiff failed to disclose. The avoidance of defending is sometimes referred to as a plea in bar, or a confession and avoidance; all of which do not involve a violation of a previous promise to submit to a penalty. One may avoid the penalty of a positive law while remaining in honor with the court and its process.

The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for

bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

Boyd v. US, 116 U.S. 616 (1886)

If not an avoidance of the penalty, what is another possibility? One may pay, discharge, setoff, or settle the account showing a liability created by positive law. A more detailed explanation of a method for discharging the liability goes beyond this treatise on positive law, and will need a separate writing for which I am gathering information.

These prohibitory laws or positive laws are based upon what? -- Implied consent, expressed consent, tacit consent. The fictitious name or strawman charged with such a prohibitory violation is deemed to have previously consented to the penalty; IT MADE A PROMISE when it accepted some legal right, privilege, or benefit. If the person charged with the violation argues, disputes, protests, defends, etc. against the violation and penalty, is there not now a more

serious violation against "**a most sacred command of nature**". Now you have a moral offense, or sin against God, Creation, and mankind, if you accept the rhetoric quoted above about not keeping your promises. Once the man comes into the court or by papers submitted thereto, as trustee, surety or otherwise on behalf of the named defendant entity, and the black robed official witnesses a **breach of a promise or obligation in conscience to submit to the penalty, if levied,** now you have a man or woman violating a law of Nature and of Nature's God, and therefore subject to a more severe punishment.

What type of court concerns itself with promises, morality, and conscience? The court of equity.

EQUITY. **…The general purpose of equity is to moderate the rigor of the law, supply its deficiencies, and bring it into harmony with <u>conscience and moral justice</u>.**

A Dictionary of Law, Anderson, 1893

The jurisdiction of a court of chancery (equity) over persons out of the reach of its process is founded either upon the <u>inherent power of the court or upon positive statute</u>. In England, as well as in various States of the Union, such jurisdiction is constantly exercised, either by a substituted and formal service of subpoena upon some officer of the court, or by publication. Nor is this jurisdiction at all confined to cases involving the title to lands

within the particular sovereignty, but it extends to matters strictly in personam. *Boswell's v. Otis*, 50 U.S. 336 (1850)

Courts of equity regularly enforce their decrees for performance or nonperformance of specific acts by punishing disobedience thereto as contempt. This is the origin of the popular phrase "government by injunction."

The American Peoples Encyclopedia, Grolier Incorporated, 1968, "contempt", Vol. 5, pp 446, 447

Chancery (equity), in contrast with common law, placed the emphasis on the promise and breach of faith rather than possession; its concern was to hold the trustees to perform the promise. *Courts and Legal Organisations*

Another principle held to be fundamental to this action is this: that there must exist a privity between the plaintiff and defendant; something on which an obligation, an engagement, a promise from the latter to the former can be implied; for if such implication be excluded from the relation between the parties by positive law, or by inevitable legal intendment, every foundation for the promise and of the action upon it is destroyed.

Cary v Curtis, 44 U.S. 236, 247-8 (1845)

Right is antecedent to all law. The object of law is to secure right; not so much to define as to enforce it, and to prevent wrong. When we speak of what is malum in se, we have an

accurate and explicable meaning. We say at once that it is against law, referring to a standard to which all laws must be supposed to conform. So of the obligation of promises, and the like, derived from a source above the law. It is this common law, which in every state and nation protects and secures the great body of our rights, and enforces obligations founded in morality.

Bank of Augusta v. Earle, 38 U.S. 519 (1839)

We see all these words and concepts being applied in these quotes. While this treatise will not give the reader a complete understanding of all the various elements and issues being raised in these quotes and this writing, it hopefully provides a foundation upon which more can be built to achieve a better understanding of the methods being employed in today's legal system.

9 – POSITIVE LAW AND EQUITY

Conscience, I say, not thine own, but of the other; for why is my liberty judged by another man's conscience?

I Corinthians 10:29-31

We have just seen a brief glimpse of how positive law and equity work together in the courts today. The positive law provides the penalty and the implied promise to submit to the penalty, and the equity side of the court cleans up with some form of contempt of

court for a serious breach on a promise. This is said to be a part of the inherent power of the equity court – acts that are by nature wrong or evil, without the need for a positive law enacted by a legislature or administrative body or agency. Below, we see that positive law is construed from equity, and both equity and positive law rely on the fact the fictions have first been established and are in operation in the state of society. The first quote below from *Ancient Law* tells how the new system of law for an unnatural order in a state of society is established.

Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them… I know of no instance in which the order of their appearance has been changed or inverted. …they exercise a sustained and substantial influence in transforming the original law.

Ancient Law, by Sir Henry Maine, page 21

In the early history of the law … It was then asserted that equity was bounded by no certain limits or rules, and that it was alone controlled by conscience and natural justice. 3 Bl. Com. 43-3, 440, 441. 2. In a moral sense … In an enlarged legal view, equity, in its true and genuine meaning, is the soul and spirit of the law; positive law is construed, and rational law is made by it.

A Dictionary of Law, Bouvier, 1859

In the following case, the jurisdiction of courts of equity is being considered.

The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three, an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole. The State construes them, the State applies them, the State controls them, and the State decides how far the social exercise of the rights they give us over each other can be justly asserted. *Ogden v. Saunders*, 25 U.S. 213, 282 (1827)

Does it appear the people are in charge, or are public officials acting as masters over the private affairs of the people? Of course, they do not issue positive laws and equity decrees for people, but only for persons.

10 – OTHER REMARKS ABOUT POSITIVE LAW

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 404 (1971) we find that acts of **positive law** relate to "**substantive social policy**".

In *Boyd v. United States*, 116 U.S. 616 (1886), it was said the "**right of property [may be] set aside by positive law**", and examples of this are "**distresses, executions, forfeitures, taxes, etc.**". This is done "**for the sake of justice and the general good**".

There are ways to preserve freedom and liberty which are important aspects of life given to us by our Creator, if we gain more knowledge and understanding (or maybe discover certain secrets) about how the legal system works with its positive laws and courts of equity in a state of society.

The laws of nature are the laws of God, whose authority can be superseded by no power on earth. George Mason, a member of Constitutional Convention, speaking before the General Court of Virginia

Therefore, one must be wise and attentive, since there are those among us who make kings and set up princes outside His law. Hosea 8:4.

By Byron Beers
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