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978-0-521-73508-7 - I Do Solemnly Swear: The Moral Obligations of Legal Officials

Stephen Michael Sheppard

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I DO SOLEMNLY SWEAR

What conduct should the people expect from their legal officials? This book asks whether officials can be moral and still follow the law, answering that the law requires them to do so. It revives the idea of the good official – the good lawyer, the good judge, the good president, the good legislator – that guided Cicero and Washington and that we seem to have forgotten. Based on stories and law cases from America's founding to the present, this book examines what is good and right in law and why officials must care. This overview of official duties, from oaths to the law itself, explains how morals and law work together to create freedom and justice, and it provides useful maxims to argue for the right answer in hard cases. Important for scholars but useful for lawyers and readable by anybody, this book explains how American law ought to work.

Steve Sheppard is the William Enfield Professor of Law at the University of Arkansas School of Law. He has written articles in legal history, legal philosophy, international law, and the practice of law. With George Fletcher, he wrote *American Law in a Global Context: The Basics*. He is the editor of the *Aspen Bouvier: A Law Dictionary*, *The Selected Writings of Sir Edward Coke*, *The History of Legal Education in the United States*, Karl Llewellyn's *The Bramble Bush*, Allen Farnsworth's *Introduction to the Legal System of the United States*, and several series of law books, and has also contributed introductions to the revived works of John Selden, Sir William Jones, and Francis Lieber, among others. He clerked and practiced law in Mississippi and throughout the South and lives with his family in the Ozarks. He completed his doctorate in the science of law at Columbia University and holds other degrees from Columbia, Oxford University, and the University of Southern Mississippi.

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Preface: Moral Officials, Retail Justice, and Three Caveats

This book examines a very basic idea: Officials must be moral, not just legal. In other words, legal officials ought to carry out their offices according to moral obligations, not just narrowly defined legal rules.

This idea is not popular in the United States: many people do not believe it, and many more are scared by it. In the media and cafe discussion, the idea spooks the left, who think it is code for religious judges, school boards, and legislators to stealthily bend the law to ban abortion, lead forced prayer in schools, arrest homosexuals, and tax the poor while ending liberty, community, and rights. And it scares the right, who think it is code for liberal feminist Black activists, who will coddle terrorists, immigrants, homosexuals, and the homeless while trampling freedom, property, and rights. Both the left and the right worry about a White House claiming ever greater powers, not least through a perpetual wartime license, using the language of moral certainty.

Meanwhile, academics and lawyers mistrust the whole idea of morality, in particular the idea of morality in the law. American society has changed from the days when Abraham Lincoln could argue with Stephen Douglas that the very bases of the law must be moral.¹ We don't trust "morality" until we know whose morality is under discussion. Morality is too contentious and unpredictable, and we have lost our common vocabulary for talking about it.² Rather than consider the idea of morality in law, with its broad

¹ Harold Holzer, *The Lincoln–Douglas Debates: The First Complete, Unexpurgated Text* (Fordham University Press, 2004). On the difference between Douglas's morality in procedure and Lincoln's morality in substance, see David Zarefsky, *Lincoln, Douglas, and Slavery: In the Crucible of Public Debate* (University of Chicago Press, 1993).

² See, for example, Hannah Arendt, "Some Questions of Moral Philosophy," in *Responsibility and Judgment* 139 (Jerome Khon, ed.) (Shoken Press, 2003), and Gertrude Himmelfarb, *The De-Moralization of Society: From Victorian Virtues to Modern Values* (Vintage, 1996).

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and public connotations of duty, lawyers prefer the safer ideas of professional ethics.³

What has been lost?

Defining the moral obligations of officials is an ancient problem, and the line of philosophers and lawyers who have considered it is formidable. Plato and Aristotle argued strongly for the idea of the good official. The great Roman lawyer Cicero argued for truth and justice as the first duties of officials,⁴ his ideas capturing the views of his predecessors and echoing for a thousand years in the princely letters of medieval bishops and in St. Thomas Aquinas's moral concept of law. Machiavelli, for all that he is read to encourage power at any price, recognized that the better alternative was the prince who was just and right in his actions. Indeed, his admonitions accord with the ideas of many observers of law in the early modern state. Writers who did much to frame our ideas of government and law after the medieval period, such as Elyot, Coke, Grotius, Pufendorf, Thomasius, Locke, and even Hobbes (after a fashion), all argued that real moral limits applied to the holders of office in the state. Hume, Kant, and Bentham, as well as some in our own time, notably Dworkin and Hampshire, have argued similar questions with similar positions.

More to the point of the American political experience, the framers of the Declaration of Independence and the U.S. Constitution, as well as abolitionists such as Garrison and Douglass and, ultimately, Lincoln and Martin Luther King, Jr., rooted their arguments for law and official conduct in what was good or right. This is what it meant to argue that governments must derive their "just powers" from the consent of the governed.⁵

To base a government on the consent of the governed and to base government on the good or the right do not ensure a stable or a peaceful result, though, and many serious controversies have arisen over what is wanted by the polity or what is good for the polity. The most serious of these, the claims for the protection or the abolition of slavery, were rooted in claims of morality and religion on both sides, leading even the abolitionists to mistrust such arguments after the war.⁶

Public discourse in political ethics has declined in popularity and coherence in the twentieth century: public disasters, the Holocaust, unpopular wars,

³ See George P. Fletcher, *Basic Concepts of Legal Thought* 139–41 (Oxford University Press, 1996).

⁴ Cicero could hardly be said always to have lived and practiced what he later preached, particularly in the wonderful book of letters to his son, *De Officiis*. On Cicero, see the very readable Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* (Random House, 2001).

⁵ The Declaration of Independence is available at <http://www.archives.gov>.

⁶ For a nice illustration, see the discussion of the views of young Oliver Wendell Holmes, Jr., in Louis Menand, *The Metaphysical Club: A Story of Ideas in America* 3–72 (Farrar, Straus, and Giroux, 2001).

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public corruption, and the divisive religious claims to the public space have diminished confidence in political leaders as arbiters of morality, have diminished any sense of agreement on a single view of morality, and have increased alienation from communal notions of the good and the right. As ethics have become less rooted in religious convention, ethical duties have been more cabined into specialized notions in philosophy or limited by professional codes, and it has become ever harder to locate a common vocabulary of ethics or morality in American culture.

At the same time, government has grown so powerful in the lives of its subjects that the State and its officials seem beyond morality. The will of politicians seems so unaffected by the anger or needs of citizens that the moral claims of critics seem as nothing compared to the whims of those with authority. The bureaucracy is so complex that officials appear to be ciphers beholden only to politics, leaving the corporate state as the only seeming personality. The notion that officials should be moral became first quaint and then laughable to a polity who knew through its press and politics the foibles of its elected and appointed officials.

Public debates have crowded one another through a boggling array of apparently immoral acts by officials – in the last decade including President Clinton’s scandals and the extraordinary efforts to impeach him; the litigious mess of the 2000 election; the “wedge” policies of Karl Rove; the decisions and justifications to invade Iraq; the holding of U.S. detainees for years without a hearing; the endorsement of torture by Attorney General Alberto Gonzales and his lawyers, as well as the attorney general’s apparent refusal to abide by the laws governing domestic spying; the firing of prosecutors for failing to use their powers for political ends, and the cover-up of those involved in the decisions; the influence of lobbyists; the bribes and misconduct of senators, congressmen, judges, governors, and aides; the failures of government to protect or assist the victims of Hurricane Katrina; the claims of a president to be above the laws through executive signing statements; and the deliberate lies regarding policy in lieu of science forced on the EPA – not to mention legal questions arising from policies on energy and the environment, the wars in Iraq and Afghanistan, the Global War on Terror, and the ever fuzzier lines among intelligence, war, criminal law, and police.⁷

⁷ Attentive readers might infer from this list a partisan bias, one in which this book presents an otherwise unspoken assumption that the misuse of office is more likely by members of one political party than another in the United States. To an extent, this inference by the reader might seem supported by a plurality of examples from the party with executive power, which in 2008 is the Republican Party and has been for some years. I do not intend any partisanship here. Misuse of power is possible for any officeholder and for the members of any party, but it is most likely by those who happen to be the holders of the greatest power at any given time.

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We need a vocabulary to discuss these affairs and many incidents less prominent yet equally troubling, and there is room yet to root this vocabulary in some notions of moral duty and right conduct. Few people now argue that there are no moral obligations at all, or that agreement cannot be found for them – sometimes.

The language of morals was invoked, for instance, by both sides during President Clinton's impeachment. The articles of impeachment were laden with words of moral significance. Impeachment article I stated that Mr. Clinton "willfully corrupted and manipulated the judicial process . . . [by] his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence in that civil rights action . . . [so that he] has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States."⁸ His lawyers' response was in the same vein: "As the President himself has said, publicly and painfully, 'there is no fancy way to say that I have sinned.'"⁹

Still, there is an unease about such discussions. We find ourselves distracted in trying to prove the unprovable, and we fear being entangled in controversies manufactured for false purposes and misleading reasons. Still, within the great realm of arguments over what conduct is right or is good or is neither, the question usually evolves from whether any obligations exist into what such obligations are. And this question is hard for us for two very different reasons. First, our recent discussions have had very little firm ground shared among the contestants. Second, our arguments about what is good and right are nearly always colored by the fear that we will be held to a standard we will not meet. Our candidate, our leader, our favorite might break a moral precept that we embrace, to our embarrassment. And so we prefer to claim there are no moral limits that apply rather than to accept the inevitable breach of such limits from time to time. We not only lack the tools to agree on the moral obligations that would bind our officials, we are uncomfortable examining what it will mean when they break them.

It is past time for new thinking about all this. Though there are useful foundations for such thoughts in the works of great modern theorists such as Max Weber and H. L. A. Hart, these were not written to answer questions about what officials do and what they ought to do with laws today.

Answers to these questions might be expected to come from perennial debates about the nature of justice – or about what the law should be. In its grandest forms, we could think of these debates as questioning whether law should reflect one or another view of morality in the law's commands to

⁸ U.S. House of Representatives, Committee on the Judiciary, Articles of Impeachment against William Jefferson Clinton, Article I, December 12, 1998.

⁹ Submission by Counsel for President Clinton to the Committee on the Judiciary of the U.S. House of Representatives, December 8, 1998.

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those subject to the law. In most lights, the fuss about justice usually concerns what should be demanded from citizens – whether the rules of law should establish equality or fairness among people in society (which often conflict), or whether the rules should promote property rights or corporate development over security or privacy (which also conflict with each other and with equality and fairness). Other than an implied obligation to enact or enforce the rules required by one outcome or another, the recent innings of these debates teach us only a little about the moral obligations of officials.

When debates over the grand meanings of justice turn from the citizen to the official, they sometimes have an unhelpful focus on the judge, somehow leaving out the legislator, the governor, the administrators, the police, or even the lawyers. Judges – especially judges in the United States who labor in the lights and the shadows cast by cases like *Dred Scott v. Sanford* and *Brown v. Board of Education* – are expected to make great choices and to decide great issues in the complex realms of human affairs. We have come to accept that such management is less likely or less honest in the political environments of the legislature or the executive.¹⁰ However, an emphasis on the judge as the essential form of legal official is not just incomplete, it skews many of our notions of law, not least in creating the false impression that the decision of the official is usually an individual and isolated action, rather than a collaborative one made deep within a great nest of institutions.¹¹

There is a greater problem with this idea of justice on the grand scale: understanding an idea so big usually raises very abstract questions that are hard to understand, much less to solve – such as whether equality is more important than individual right, or whether the right is more important than the good. Yet the real problem is that it is often quite hard to see how an answer to questions of justice on the grand scale would answer questions arising in the law as it is practiced by lawyers or relied on by ordinary people. Most problems under the law are so particular that any answer to the grand questions might still be applied variously in a particular issue, and so it is hard to see the practical value of justice in the grand answers.

THE IDEA OF RETAIL JUSTICE

The more compelling questions in the particular are whether the result in a particular case is fair, or right, or good; whether justice is done in each instance; or whether a person encountering the law has more or less confidence in the institutions of law as a result of the encounter. This retail application of justice echoes the grand considerations of justice, yet it is not the same.

¹⁰ But see Jeremy Waldron's example to the contrary. Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); and compare Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).

¹¹ See Jeremy Waldron, *Law and Disagreement* 203 (Oxford University Press, 1999).

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Once reduced to individual cases, the questions shift in specificity, and the focus becomes very much on the conduct of individuals who use the law, not merely on the law writ large: Have the legislators in a given instance acted well or badly? Have the lawyers framed the questions of law in a dispute accurately from the facts that gave it rise? Has the judge chosen which rules to apply and applied them correctly? Have the lawyers cheated or acted well? How should we assess the actions of the jailors or court clerks? Who lied, or hid evidence, or filed a pleading without any investigation, research, or knowledge, or even care for what unfair burdens it might bring on the other side of the case? Who was too stupid, bored, or disinterested to realize they were being deceived?

To ask whether the officials – the lawyers, the jurors, the judges, the legislators, the police, the clerks, even the voters – have done their best in each case, indeed to ask whether *justice* has been done in each case, is different from asking grand questions of what justice is, although admittedly there is a relationship between the two approaches. This retail view of justice turns on how laws are applied to the common person, not just on how the law as a whole is defined.

To consider retail justice in the making and application of law in a given circumstance is to examine the justice in the conduct of individual officials: the legislators who enact a statute; the judge or administrator who decides to (or fails to) enforce a rule; the lawyer who brings forward a suit; the opposing lawyer who aids (or fails) in providing the court the evidence that is sought; the juror who goes along with the majority to get out of court by lunchtime; the juror who votes on a belief formed from careful thought about all the evidence.¹² All of these people are the actors whose conduct must somehow be assessed. Granted, the judge is an important player on this stage, yet the stage is crowded, and every player is a part of the play.

Today, we tend to think of “Justice” as something done by institutions – such as society as a whole or the state¹³ – as if it is a playing piece found only in a political game. But, institutional justice is not the only sense in which we can think of justice.

¹² Someone unused to juries might think it is easy to be the heroic holdout who alone sees the truth of the case and defends it against all comers, like the fictional Juror Number 8 in Sidney Lumet’s 1957 movie *Twelve Angry Men*, whose quiet confidence turned eleven wrongheaded votes toward justice. More common would be Sir John’s experience in Alfred Hitchcock’s 1930 *Murder!* in which the knowing holdout’s doubts are pushed aside by the majority, and he votes to convict an innocent defendant. Nearly all potential holdouts follow Sir John’s path and conform to the will of the majority. See research collected in Jason D. Reichelt, “Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,” 40 *University of Michigan Journal of Law Reform* 569 (2007).

¹³ This is the sense of justice in John Rawls’s famous project, which pretty much painted the barn for justice discussions for forty years. See John Rawls, *A Theory of Justice* (Harvard University Press, 1970).

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Justice has traditionally been considered mainly as a personal obligation. In one of the more famous religious proclamations of justice, the minor Israelite prophet Micah, in the seventh century B.C.E., reminded the wayward Israelites of their personal obligations: “What does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?”¹⁴ Or, “It has been told thee, O man, what is good, and what the Lord requires of you: Only to do justice, And to love goodness, and to walk modestly with your God.”¹⁵ Justice as a personal aspect of religious duty is a recurrent theme in both the law and the prophets in the Jewish and Christian traditions.¹⁶ We have, however, long been schooled to think of justice as institutional, and we think of individuals as acting (or not acting) morally, ethically, or even efficiently, rather than justly.¹⁷ Furthermore, there are some messy problems in defining justice, which could allow us to simplify matters and merely to say that what is just is what is lawful.

So, this book is about the retail ideas of justice. In this sense, *all* of the things a good official ought to do, including understanding and following the law, are the same as justice by that official. That is to say that justice is what officials ought to do. Therefore to understand justice we must understand officials and their jobs. In doing so, we learn not only how tough these jobs are, but also how we can assess them. Indeed, we might come some way toward restoring our own sense of discernment over our officials, which is the heart of democracy.

CAVEAT EMPTOR: WE WILL TALK ABOUT MORALITY

This book is about justice and moral obligations, and so it reflects an assumption that it makes sense to talk about moral obligations. In other words, we

¹⁴ Micah 6:8 (Revised New Standard Version).

¹⁵ The last phrase may also translate as “it is prudent to serve your God.” *TANAKH: The Holy Scriptures* 1051 (Jewish Publication Society, 1985).

¹⁶ *Strong’s Concordance* records nearly 500 verses incorporating a word for righteousness or justice in judgment, including 197 for *tsaddiyq*, or righteous judgment (Strong’s 06662); 40 verses with a form of *tsadaq*, or justification by God’s law (Strong’s 06663); 116 of *tsedeq* (Strong’s 06664); 1 of *tsidqah* (Strong’s 06665); and 150 of *tsadaqah*, or justice in judgment (Strong’s 06666). See James Strong, *The New Strong’s Exhaustive Concordance of the Bible* (Nelson Reference 1991). See, for example, Leviticus 19:15; Proverbs 21:3; Isaiah 5:7; Isaiah 9:7. Some of these references are justice that only a prince or magistrate might bestow, but most are justice by each person toward others, regardless of station.

¹⁷ Notwithstanding the ideas of justice promoted since Rawls, the idea of justice as inherently the product of the leader of a polity arose with Aristotle. See Aristotle, *Politics*, Books IV and XIII; and Fred D. Miller, *Nature, Justice, and Rights in Aristotle’s Politics* (Oxford University Press, 1997). There are, of course, modern examples, most notably Sandel’s powerful argument to focus moral civic engagement to the betterment of the individual, rather than merely seeking values across the polity. See Michael Sandel, *Democracy’s Discontent* (Harvard University Press, 1996).

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start with a belief that there is something meaningful in talking about a person's conduct as being right or good (or not). At this level of generality, there is little difference between morality as a whole and ethics as a whole.

This assumption does not require us to accept any one of the many competing theories about morals or ethics or about their fundamental nature. One could believe that morals arise from customs and habits, or from a social contract, or from the natural conditions of mankind in community, or as underived facts about the world, or from the divine will of almighty God whether defined within an ancient canon or by a modern whimsy.¹⁸ In general, this book excludes none of these explanations; it does not require the choice or rejection of any one of these approaches. One can accept that there is morality but not care where it comes from.

Those who believe ethics or morality to be based on a single view of reality, or nature, or vocabulary, or whatnot will find much in the book to be irrelevant. People who embrace radical notions of individualism or objectivism that reject any notion of morality or other concepts of involuntary responsibility of the individual to others will find the book dissatisfying.¹⁹

A SECOND CAVEAT: THE SOURCES ARE UNTIDY

Some readers will find another source of disquiet here. It is the fashion in the modern academy to ground books in the criticism of one or a few prior books. By asserting (or presuming) the authority of a book of the moment, the author can skip the job of explaining the underlying principles of the new argument and move on. The reader is expected either to know the older book or to accept its importance, and no further justification of its premises is usually required in the new book.

In our case, this book might have offered as foundations Herbert Hart's *A Concept of Law*, Isaiah Berlin's *Crooked Timber of Humanity*, John Rawls's *A Theory of Justice*, Ronald Dworkin's *Law's Empire*, John Finnis's *Natural Law and Natural Rights*, Stuart Hampshire's *Justice Is Conflict*, Michael Sandel's *Democracy's Discontent*, or any of the works on professional or legal ethics by

¹⁸ The Church of the Flying Spaghetti Monster arose during an argument over a Kansas state school-board rule for public schools that teach evolution also to teach "intelligent design," the argument being that the believers in the Flying Spaghetti Monster (called "pastafarians") have as much claim for their theories in state school science books as do literal Christians. Pastafarians have a moral code based on meatballs and sea piracy, among other things. See Bobby Henderson, *The Gospel of the Flying Spaghetti Monster* (Random House, 2006); Cf. "Review: The Editors Recommend The Gospel of the Flying Spaghetti Monster," 294(6) *Scientific American* 94 (2004).

¹⁹ See, for example, Ayn Rand, *The Virtue of Selfishness* (Signet, 1964). Even so, the preceding arguments include several that are entirely voluntary, and in those arguments, the followers of Rand might find room for agreement.

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Deborah Rhode, Dan Coquillette, William Simon, Arthur Isak Applbaum, or other mavens of professional responsibility. These works have large followings of clever readers, they are benchmarks in the current landscape of law and morals, and their extended criticism would have added an aura of authority to my project.

Yet these books were not written to answer the exact questions posed here, and their criticism for these purposes would have been aside from the points those authors intended to make. Though some of these books will be helpful in the questions here posed, the books that are more to the point for these questions are not as well known now. Most, like the works of Cicero, Gottfried Leibniz, Christian Thomasius, Francis Lieber, and even David Hume, have aged into obscurity. Others, such as the works of Lon Fuller, failed to acquire a wide audience, or like the statements of St. Paul or of the Prophet Mohammad, presented a view that not everyone would consider authoritative.

So, this book does not ground its arguments in a handful of prior books but presents a bricolage, an aggregation of stories and ideas from many works in jurisprudence, many moments in history, arguments in many religions and cultures, and many cases in the law. The arguments depend less on an authority assumed from others' books than upon the reader's decisions to accept or reject the conclusions drawn from these illustrations. In short, the reader has little netting from familiar texts and must walk alone the moral tightrope over law.

THIRD CAVEAT: WE ARE TALKING ABOUT MORALS AS A BASIS FOR OFFICIAL CONDUCT

Many smart people think there is no reason to ask what morality there is in the acts of a legal official. The idea that officials have moral obligations when making decisions or committing legal actions has lost interest for a century, and many lawyers and judges might argue that the idea does not even merit discussion. For some, it is a fool's errand.

For instance, the very scholarly and influential Judge Richard Posner has argued strenuously that there is nothing for the law to gain by basing legal decisions in ideas of morality. Morality, as he sees much of it, is just "dominant public opinion," which he believes neither influences behavior nor increases the justification of the law.²⁰ If he is right in all three conclusions,

²⁰ Richard Posner, *The Problematics of Moral and Legal Theory* 3–90 (Harvard University Press, 1999). The quote is from his handy summary of his views in a more recent blog. Richard Posner, "Faith-Based Morality and Public Policy," December 27, 2004, in *Guest Blogger: Richard Posner*, http://leiterreports.typepad.com/blog/2004/12/faithbased_mora.html (last visited July 17, 2007). Judge Posner distinguishes the morality he criticizes from other forms of normative and ethical theory, including moral theory in the vein of Adam Smith and David Hume, to reject anything smacking of moral realism that can serve as a touchstone for judicial decision-making, preferring instead a professional and pragmatic approach.

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there is precious little benefit in discussing moral obligations for officials of the law.

Several reactions suggest possible objections or limits to this view, though. The first is this: even if we agree with Judge Posner that there is nothing to gain from considering *what* moral ideas might justify legal decisions, that alone does not tell us whether moral ideas guide *how* decisions of law are made.

We could imagine that it does not matter whether the law is fair, right, or just, but we would not, from that alone, have imagined that it would not matter if the laws were created or applied unfairly, wrongly, or unjustly. We might still think that making the rules in an unfair or bad way, or applying them wrongly or unjustly, could have dreadful repercussions for the legal system as a whole and for the people it regulates.

There is a second reaction. By reaching outside the law to certain moral concepts, such as fairness, liberty, and justice, the people and officials might prevent officials from lawfully running cruel and unjust regimes that are allowed by the narrowly written rules of the law. This is the heart of the matter. There is no *legal* protection against tyranny, because laws may always be changed by law. The only successful protection is a refusal by officials and the people to tolerate it. Likewise, there is no lasting assurance of legal protection against brutality and evil by legal officials; the only assurance that can guard such protections is the refusal by other officials and the people to support or allow it.

This practical moral limit on officials' actions is a problem of ancient concern. Montesquieu, the great French historian, put the matter nicely when he summarized how the Roman emperor Tiberius corrupted the Senate and cowed the judiciary so that his unjust excesses were carried out according to the law, a law altered to his liking: "No tyranny is more cruel than the one practiced in the shadow of the laws and under color of justice – when, so to speak, one proceeds to drown the unfortunate on the very plank by which they had saved themselves."²¹ Such a statement echoes to us through the shadows of legal slavery, of the legality of the regime of Nazi Germany, of *de jure* discrimination in the United States, and of the writings of American lawyers excusing torture.

A third reaction may occur if we agree with Judge Posner's idea of morality as public opinion. His view is that morality is invented by people (rather than morality being inherent in the nature of mankind or of the world, positions he rejects). If we think this, we still do not have to believe that the law, which also

This distinction could mean that Judge Posner would agree with some of the possibilities presented on this page and the next several. More of Judge Posner's argument is discussed in Chapter 3.

²¹ Charles de Secondat, Baron de Montesquieu, *Considerations on the Causes of the Greatness of the Romans and Their Decline* 130 (David Lowenthal, trans.) (Free Press, 1965). Montesquieu's view of Tiberius was, of course, strongly influenced by Tacitus, whose portrait of Tiberius was before him. See Tacitus, *The Annals* (David Lowenthal, trans.) (Franklin Library, 1982).

is invented by people, could not benefit if legal officials applied these invented moral ideas to invent legal standards of conduct. We might have to agree that a legal decision based on a wholly invented moral notion would be vulnerable to the criticisms to which the invented moral notion becomes vulnerable.

If we base a law on a moral idea and the morality changes, the law is likely to change as well.²² This is exactly what happened when, thankfully, the Jim Crow laws²³ that were initially based on arguments of racial hierarchy, privilege, and paternalism fell under the scrutiny of new moral arguments for liberty and equality that America promoted for other countries during World War II and the Cold War.²⁴ Laws based on moral ideas can also encourage acceptance of those ideas, as was the case initially with racial desegregation in America, which was considered by many people (and not just in the Southern states) to be an immoral imposition until social mores grew somewhat more egalitarian.²⁵ This dynamic of the influence of morals on laws is, perhaps, more easily seen in the illustration of private dueling, which was long prohibited by law but fell from favor among the upper classes only when it came into ridicule among the social elites who had once embraced it.²⁶

²² This statement begs the questions of how morals change, who must accept or reject changed beliefs, and how norms develop or decline in society generally. The answers vary a great deal from case to case. All we need now is to acknowledge that some morals do change. See Crane Brinton, *A History of Western Morals* (1959) (Paragon House, 2000); *Sextus Empiricus: Outlines of Scepticism* (Julia Annas & Jonathan Barnes, eds.) (Cambridge University Press, 2000). Centuries ago, the common law was more confident in its reliance on social custom and morality as its source of law, giving rise to the legal fiction that laws did not really change. See Sir Henry Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (1861) (Everyman's Library, 1972).

²³ See Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (Doubleday, 2008). Blackmon illuminates the shameful-ness of “Jim Crow laws” in even its name: “Imagine if the first years of the holocaust were known by the name of Germany’s most famous anti-Semitic comedian of the 1930’s.” *New York Times Book Review* (June 22, 2008).

²⁴ The American civil rights movement has many historians. For the influence of the rhetoric of the United Nations see C. Vann Woodward, *The Strange Career of Jim Crow* (1954) (Oxford University Press, 1991). For the egalitarian rhetoric of Christian religion, see David Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* (University of North Carolina Press, 2003). For a reasonably complete telling of the tale, see Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press, 2004).

²⁵ See, for example, Stephan Thernstrom & Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (Touchstone, 1997).

²⁶ See Robert Baldick, *The Duel, A History* (Barnes & Noble Books, 1965). The duel follows a familiar pattern, descended from primitive fights through judicial combat to private arguments for honor to a waste of life. Legal prohibitions were nearly universal for centuries before its demise. See also John Selden, *The Duello* (1610), in John Selden, *Opera Omnia* (2d ed.) (Lawbook Exchange, 2008); Selden wrote appropriately for his time, accepting the duel as a legitimate means for determining both matters that could and matters that could not have been resolved by the law.

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Thus, we learn that our third possible response to Judge Posner must take seriously the risks he poses for morals in law. The law is vulnerable to rejection or change if the morals are vulnerable to rejection or change. This does not mean that there might not be benefits to law – perhaps benefits essential to the law – in this relationship.

A fourth reaction, the last to be considered here, may be the most important. Those subject to the law might believe that the law is immoral (in many different senses) and for that reason act to evade or destroy the legal system. Citizens²⁷ have a choice to obey the law; they might prefer to risk punishment rather than to obey. Officials,²⁸ too, may choose how or if they will carry out their duties. As long as “fair,” “good,” or “right,” “just,” or “helpful” or similar notions matter at all, then citizens and officials may use such notions to assess the rules of the law, the means of their enactment and enforcement, and the significance of laws not enacted or not enforced.²⁹ Such assessments occur broadly as a matter of fact from time to time in a legal system, and there is no benefit to denying that they do. The United States resulted from a revolution that followed British law’s failure in such a test.

These four reactions suggest that Judge Posner’s objections, although very important, are not so broad as to end our inquiry. Even so, his argument at least challenges the study of moral obligations and the law to demonstrate that such studies fit within the traditions of law, its creation, its practice, its adjudication, and its influence in society.

²⁷ Throughout this book, “citizen” must stand in for a host of roles, and I use it interchangeably with the word “subject” and even “any person not acting as an official,” as well as “official acting not within the role of office.” Obviously, not every nonofficial in a country is a citizen. Many countries have aliens or native noncitizens, and of course, monarchies such as the United Kingdom use not “citizen” but “subject.” Unless the context makes it clearly otherwise, “citizen” and “subject” here are meant to include every person who is subject to the law of the state, including officials when not acting in their official role.

²⁸ “Official” represents any of the many roles in the legal system, each of which shares one defining characteristic. An official is a person who is given authority by a law to act, whether individually or in a group, and that act affects another person, whether directly or indirectly, through the apparatus of the legal system. See Chapter 1.

²⁹ See, for example, Peter Coss (ed.), *The Moral World of the Law* (Cambridge University Press, 2000). A classic, if dated, argument for the interaction of a legal system and its moral climate is in Arthur L. Goodhart, *English Law and the Moral Law* (Stevens and Sons, 1953).

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