David Lyons is one of the preeminent philosophers of law active in the United States. This volume comprises essays written over a period of twenty-two years in which Professor Lyons outlines his fundamental views about the nature of law and its relation to morality and justice.

The underlying theme of the book is that a system of law has only a tenuous connection with morality and justice. Contrary to those legal theorists who maintain that no matter how bad the law of a community might be, strict conformity to existing law automatically dispenses "formal" justice, Professor Lyons contends that the law must earn the respect that it demands. Moreover, we cannot, as some would suggest, interpret law in a value-neutral manner. Rather, courts should interpret statutes, judicial precedents, and constitutional provisions in terms of values that would justify those laws. In this way officials can promote the justifiability of what they do to people in the name of law and can help the law live up to its moral pretensions.

# Moral aspects of legal theory

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## Essays on law, justice, and political responsibility

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To the memory of
ROBERT NEMIROFF

# Contents

# Preface

The essays in this volume were written over a period of twenty-two years. The first six essays reflect the traditional concern of legal philosophy with the nature of law, especially law's relation to moral principle. The remaining essays address problems and emerging issues of legal interpretation.

If this volume has a dominant theme, it is a *lack* of reverence for the law. The law to which I refer is not some sanitized ideal but rather what counts as law in real legal systems. As far as I can see, those bodies of law have merely contingent, indeed fragile, links with justice.

My attitude toward law is not derived from theory. It was kindled by a clash between reasonable ideals and harsh realities. Growing up during a war against fascism, one naturally acquired ideals of democracy and political decency. But it was dangerous to act on those ideals in the succeeding decade, when law was placed in the service of political repression while it continued to sustain practices of racial and sexual domination.

My sense of law's fallibility was confirmed by some knowledge of its record. Far more often than not, law has served oppressive, unjust, inhumane social arrangements.

Of course, American law has also served as a means of emancipation. In recent decades, law has helped to honor the constitutional promise of justice and liberty. That is why law should be seen not as inherently evil but as available for service to injustice as well as justice.

Despite the historical record, we have reason to think of law as bound to justice, for law has moral pretensions. Judges and others who speak for the law typically contend that what they do in its name is justifiable and just. That posture seems deeply rooted in legal practice and may well be essential to it. The claim invites the demand that law live up to its moral pretensions. As I suggest in the last two essays, this provides a reason for interpreting law so as to maximize the justifiability of official decisions.

When I first encountered legal theory, I thought that the tradition called "legal positivism" embodied a fitting lack of reverence for the law. That

seemed the spirit of its so-called "separation of law and morals." I am not so sure anymore.

I can best explain my uncertainty by referring to a feature of positivist writing that is exemplified by a passage from Bentham's *Fragment on Government:*

> Under a government of Laws, what is the motto of a good citizen? *"To obey punctually; to censure freely."*[1]

This might be taken to imply that disobedience to law cannot be justified. But Bentham's motto is misleading.[2] He presumably means that there is a moral presumption in favor of following law. Bentham seems to mean that disobedience to law requires justification, but obedience does not, even when law fails to satisfy the standards by which it is properly appraised.

Now consider a passage that reflects Bentham's root conception of law:

> No law can ever be made but what trenches upon liberty: if it stops there, it is so much *pure* evil: if it is good upon the whole, it must be in virtue of something that comes after. It may be a necessary evil: but still at any rate it is an evil. To make a law is to do evil that good may come.[3]

In other words, law has inevitable costs but only contingent benefits. One need not accept Bentham's analysis of law to agree. But this truism seems at variance with his idea that there is a moral presumption in favor of following law. Bentham's presumption and the truism are not strictly incompatible. But if one accepts the truism that law has inevitable costs and only contingent benefits, then the presumption favoring obedience needs justification.

It is often suggested that law normally does enough good on the whole to support a presumption favoring obedience, if not a full-fledged moral obligation to obey the law. It may be suggested, for example, that law makes social life possible or that life without law would be nasty, brutish, and short. The trouble is that life has been like that for most people living under law. But it is not uncommon for positivists to assume a moral

[1] Preface, par. 17: in Jeremy Bentham, *Comment on the Commentaries* and *A Fragment on Government,* ed. J. H. Burns and H.L.A. Hart (London: Athlone Press, 1977), p. 399.
[2] See, for example, ibid., chap. IV, §21; p. 483f.
[3] Jeremy Bentham, *Of Laws in General,* ed. H.L.A. Hart (London: Athlone Press, 1970), chap. VI, § 4; p. 54.

presumption in favor of following law. This aspect of positivism is considered in several of the essays.

The past two decades have witnessed a remarkable turn in legal philosophy. Prior to Dworkin's work,[4] the subject of legal interpretation largely consisted of theories denying its possibility. The later essays in this volume address problems of interpretation. Beginning with familiar issues in constitutional theory, they go on to embrace elements of Dworkin's approach but also suggest its limits.

Another ground of my worry about legal positivism concerns interpretation.[5] To interpret law is not merely to assign it meaning but to discover its meaning. Some positivists maintain that judges do not interpret law when their reasoning involves moral judgment. We are told that, even when moral reasoning is needed because the law contains explicit moral language, this clarification adds to law and does not count as interpretation.[6]

This view of the matter depends on a theory of linguistic meaning. The positivist recognition that law is morally fallible does not require it. For moral language can be incorporated into law without ensuring that the law satisfy minimal standards of moral decency. Moral language can be found in unjust law.

If we do not consider the explication of moral language in law as interpretation, we may not assume, as we should, that sound principles should provide the basis for applying explicit moral requirements that are laid down by law; and we cannot criticize as unsound interpretation the use of unsound moral principles when officials explicate moral language in law.

Using sound principles presumably serves justice better than explicating moral requirements by reference to, say, the values embraced by groups that dominate society. Justice may be served even more effectively if one generally approaches interpretation by reading constitutions, statutes, and precedents in terms of values that provide their best justification. The last two essays in this volume consider merits and demerits of such an ap-

4. See Ronald Dworkin, *Law's Empire* (Harvard, 1986); for an earlier version, see his " 'Natural' Law Revisited," *University of Florida Law Review* 34 (1982) 165.

5 This volume's essay "Legal Formalism and Instrumentalism" examines assumptions – associated with positivism as well as legal "realism" – that deny the possibility of legal interpretation when it is most often needed.

6 I have not seen evidence that positivists embraced such a view before it was attributed to them by a critic; see Ronald Dworkin, *Taking Rights Seriously* (Harvard, 1978), pp. 345–50. For one positivist's concurrence, see Joseph Raz, *The Authority of Law* (Oxford, 1979), pp. 37–52.

proach to legal interpretation. It does not ensure that judges can in good conscience apply law as they find it. That is the problem with which these essays leave the reader.

A judge's commitment of fidelity to law may be stronger than any comparable obligation on the part of ordinary members of a community. But we have no reason to assume that a judicial obligation of fidelity to law is absolute. That is a lesson from our past – from judicial involvement in chattel slavery and other crimes against humanity. It is a painful issue that legal theory tends to avoid.

# Acknowledgments

I had the good fortune to be introduced to legal philosophy by Herbert Hart, first by studying his then–recently published *Concept of Law* in a graduate seminar at Harvard, then by attending his seminar and lectures in Oxford. When I later began to research theories about rights, Hart's helpful suggestions led me deeper into legal theory. I am grateful for his generous support in these and in other, more important ways.

During the period in which these essays were written I have been a member of the Sage School of Philosophy at Cornell University. By the time the third essay was composed, I was a member of Cornell's Law School faculty as well. I am grateful to both sets of colleagues for friendship and encouragement, and to students in both schools for continual challenges.

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The essays in this volume are presented in the order of their composition. Original publishing information is provided at the bottom of the first page of each essay. The last essay was written for another collection, which has not yet appeared.

The essays are reprinted here with only a few minor corrections, confined mainly to notes. Unnumbered footnotes and bracketed material in numbered footnotes have been added.