PART I

LAW'S MORALS

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Introduction

Moral Inquiry and the Problem of Autonomy

Law's Morals

When we say of someone, "He has the morals of . . . (an animal) (a saint)," we engage in a commonsense way in the same activity that sociologists pursue in a professional way: (1) we construct from the description of a person's behavior the implicit normative principles that guide the person's actions; (2) we separate the descriptive parts of an inquiry (what *are* the principles guiding the behavior?) from the ultimate evaluative issue (should this person's morals be approved/condemned?). Of course, in the commonsense case, evaluation is often just a step behind description – to say that someone has "the morals of an animal" would normally serve to censure as much as to describe. It may even be that most of the time when we talk this way about "the morals of a person," we implicitly intend to censure: We *could* say that someone "has the morals of a saint," but it seems more natural, when praise is intended, to say simply that someone "*is* a saint."

Putting aside this last question of whether a disparaging judgment is normally intended, we can talk about "law's morals" in the same way that we do a person's morals: We can describe the ways that legal systems present themselves to those subject to them and reconstruct from that description the implicit normative principles that underlie the legal system's actions. The additional puzzle that is created by making "the law" the subject of the inquiry rather than a person may be ignored so long as "the law" is understood as an institutional analogue to a person engaged in self-conscious, purposive behavior. The "law's morals," we might say, are the implicit normative principles that individuals acting on behalf of legal institutions – officials, for example – implicitly invoke whenever they justify action "in the name of the law."[1]

[1] For further clarification of the personification of the law that seems to be entailed by these discussions, see Chapter 3, 56–61.

The motivation for describing law's morals is much the same as the motivation for describing other people's morals. Apart from the lure of gossip for its own sake, we typically examine another's morals because (1) that person potentially affects us or those we care about in ways that make the person's principles relevant in determining how to interact with him or her ("the president's morals," "her fiancé's morals"); (2) even where no possibility of interaction exists, a person's morals may be useful in establishing a "moral" – an example, good or bad, that provides a guide to character or an aid to developing acceptable moral principles ourselves ("the morals of a Don Juan," "the morals of a Mother Theresa"). In each of these cases, as the examples suggest, description is usually followed closely by evaluation: characterizing another's morals is the preface to an implicit or explicit judgment, approving or censuring the person's behavior or character.

So, too, with law – with one significant difference. Unlike persons who can often be avoided if we disapprove of their morals, the law does not permit easy escape from its actions. One can move to another country or change one's citizenship, but in the modern world, neither course will avoid the confrontation with law. This inability to escape law's reach explains why so much jurisprudence is devoted to the study of legal systems in general: The aim is to characterize the phenomenon of organized state coercion that individuals inevitably confront, regardless of the particular form such coercion may take in particular societies. Moreover, the impossibility of avoiding law's morals ensures that the step from description to evaluation is even more natural than in the case of persons. If law's morals, for example, reveal a commitment to certain normative claims about the right to coerce others, we have much more at stake in the critique or approval of that commitment than in the case of casual encounters with strangers.

Describing law's morals has been the goal of a good deal of modern legal theory, particularly the branch of jurisprudence that considers the nature of law and legal reasoning and that is most prominently on display in the extensive literature discussing positivism and natural law. This literature, I shall argue, contains two mistakes. One mistake is now widely acknowledged; the other is not. The first mistake is the suggestion that law has no morals at all – not in the sense in which we might say of a person that "he has no morals at all" (meaning that he is immoral) but, rather, in the sense in which law is characterized as not being a normative system in the first place, but only a system of organized and effective coercion. The second mistake errs in the opposite direction. Most theorists, including legal positivists, now reject the coercive account of law and endorse instead the view that law is a normative system: Law makes implicit moral claims purporting to justify the coercive actions it takes. But moral claims come in two sizes. What might be called an "ordinary" moral claim is a straightforward claim about the content of a normative prescription. A person who claims that abortion is wrong (or permissible) makes an ordinary moral claim about a particular kind of action; the claim will be true or false,

depending on whether abortion really is wrong/permissible. To be distinguished from ordinary moral claims are what I shall call "strong" moral claims. A strong moral claim usually entails an ordinary moral claim but includes in addition the peculiar claim, often associated with the concept of authority, that an action is wrong/permissible in part just because someone else (an authority) says it is. If I make a strong moral claim that one should not have an abortion, I imply two things: (1) one should not have an abortion because this action is wrong (the ordinary claim); (2) regardless of whether abortion really is wrong, one should not have an abortion because I (or some other appropriate authority) so declare.

As we shall see, many legal theorists currently describe law as making this latter strong moral claim about its directives. Sometimes this is expressed by saying that law claims authority, or that law claims that persons are to obey just because something is required by law, regardless of the merits of the law. I examine and criticize this characterization of law's morals in Chapter 3. For now, in light of the popularity of the view that law makes this strong claim, I point out in the remainder of this chapter some of the problems created by this view of law's morals.

Society's Morals

Just as we can talk about the morals of an abstract entity like law, we can and do talk about established normative practices within a society that are not necessarily enforced by state coercion. Philosophers call such practices "conventional norms": "conventional" to emphasize, once again, that we are dealing with description rather than evaluation (what *are* the established patterns of conduct in this community, and what do they reveal about the community's implicit moral principles?); "norms" to call attention to the distinction between practices that have an implicit, self-critical aspect as opposed to patterns of behavior that, though predictable and regular, do not depend for their maintenance on critical justification.

The extensive literature in legal theory describing law's morals does not have a precise counterpart in the case of society's morals. In part, that is because modern societies often appear too diverse and heterogeneous to permit confident descriptions of norms that underlie or guide patterns of group behavior. Conventional norms, typically stand out as objects for study in three cases: (1) when the group whose norms we are describing is a relatively homogeneous society or societal subgroup; (2) when the norm is embodied in formal documents, as in the case of particular legal norms; and (3) when the norm is so vague that it can command assent among diverse groups precisely because the level of abstraction is sufficiently great to avoid disputes about how to apply the concept in concrete cases.

The first case speaks for itself: Where groups are homogeneous and small, anthropological studies of a familiar sort can often describe the group's customs

and compare and contrast them to more familiar moral ideas. The second case is also familiar. Conventional norms may be revealed in documents accepted as authoritative sources of legal norms within a society. We might call these norms "law's morals writ small." Unlike the concept of law's morals discussed in the previous section, which refers to the characteristics of legal systems in general, societal norms revealed by legal documents are particular to that society: They reveal norms sufficiently widely accepted to underlie the legal structure of that society, whether or not they are found in other legal systems. We use "law's morals writ small" whenever we characterize particular societies by reference to differences in their fundamental frameworks or constitutions or by reference to variations in the day-to-day laws enacted and enforced in the society. Thus constitutional documents that vary in the protections accorded property rights lead to descriptions of societies as "socialist" or "capitalist," just as varying constitutional procedures for enacting laws can reveal a society to be "democratic" or "totalitarian." Because these descriptions of a society's morals stem from authoritative sources, the task of description is somewhat easier than in the case of informal custom, and thus permits tentative descriptions of conventional morals of this sort even in societies made up of large and diverse groups.

The case of vague social norms illustrates the third possible way of describing a society's morals even in a complex and diverse community: One may sometimes succeed in describing conventional norms in a heterogeneous society by sacrificing specificity for accuracy of description. It may be accurate, for example, to claim that respect for privacy is a conventional norm in the United States, with weak or no counterparts in other countries. But explaining precisely what this vague norm entails in particular cases (e.g., abortion) would be difficult or impossible (there may be no conventional norm in particular cases), even though one might be able to describe with some precision the legal norm concerning abortion.

As the last example illustrates, legal and social norms can diverge in obvious and familiar ways. But this divergence between particular norms within a society must be distinguished from divergence between law's morals and society's morals. Law's morals are those normative principles that underlie the general attempt to justify imposing sanctions on others "just because it is the law." A society might be sharply divided about the content of particular norms and yet agree that the law is justified in acting as it does. It is society's morals on *this* issue – the issue of the legitimacy of state coercion – that poses the more radical problem in the event of divergence. If law implicitly operates on a theory of legitimacy inconsistent with the theory accepted by society, the need for reconciliation is more compelling than in the case of particular legal norms temporarily out of step with the times. In the latter case, divergence leads to legal reform or to a change in societal norms; in the former case, divergence leads at best to disrespect for law or, at worst, to civil unrest or revolution.

True Morals

If descriptive inquiries into the morals of others are typically preliminary steps toward evaluation, sooner or later one confronts the problem of evaluation: how to justify moral judgments. By comparison, that problem makes the difficulties that confront descriptive or conceptual inquiries pale. One reason for the difficulty is the continued influence of the view that factual and moral judgments are radically different sorts of things, with the concept of "truth" more easily explained and applied in the former case than in the latter. Moreover, even those who accept that truth has meaning in ethics often insist on maintaining a divide between facts and values that can be crossed, if at all, only very cautiously. It is not that facts are irrelevant in the construction of a true moral theory. A true moral theory must be a theory about how *humans* should act in *this* world; it is not a theory for super-beings in a science fiction setting. Moral theory must accordingly be based on intelligent judgments about facts: facts about what people are like and what the world they confront is like.[2] This much, it seems, any good moral philosopher will concede. What is difficult to concede is that facts *about other people's moral views* have any bearing as such on moral truth. Another person's morals, society's morals, law's morals – all three are examples of conventional or individual norms that have no necessary connection with true norms: Conventional norms are simply another kind of fact that true moral theory must evaluate.

For most objective moral theories, this view about the lack of connection between convention and truth functions almost like an axiom whose strength is hard to overestimate. The autonomous individual may be well advised to listen to others in developing his or her own moral views; but in the final analysis, autonomy requires individuals to make their own judgments about the merits of opposing views and about the correct action to take. No religious, legal, or social system has any legitimate claim (as opposed to causal influence) on one's allegiance except as one's independent, mature judgment determines.

It is this "principle of autonomy," as it is sometimes called, that seems often to present an insurmountable obstacle to attempts to justify deferring to the normative views of others. If deference requires, as I shall argue it does, acceding to the views of others even when one's own personal judgment is that the recommended action is wrong, how could deference ever be consistent with autonomy? In traditional discussions of political obligation, this alleged conflict between autonomy and authority is famously illustrated by Robert Paul Wolff's claim that "for the autonomous person there is no such thing as a command."

[2] It is this connection with the facts of the natural world that makes it hard sometimes to know how natural law moral theories are any different in the end from any other objective theory of ethics. See Philip Soper, "Some Natural Confusions about Natural Law," *Mich. L. Rev.* 90 (1992): 2393. See also William K. Frankena, "On Defining and Defending Natural Law," in *Law and Philosophy*, ed. Sidney Hook (New York: New York Univ. Press, 1964), 200.

If one decides, for example, to follow the orders of the captain of a sinking ship who is directing the manning of lifeboats, one is not acknowledging the captain's authority, but simply making one's own autonomous judgment about the best course of action under the circumstances:

> [I]nsofar as I make such a decision, I am not obeying his command; that is, I am not acknowledging him as having authority over me. I would make the same decision, for exactly the same reasons, if one of the passengers had started to issue "orders" and had, in the confusion, come to be obeyed.[3]

This study concedes the principle of autonomy as a claim about the necessity for individual judgment in deciding how to act. But that concession does not entail the conclusion that deference to the views of others can never be justified. The principle of autonomy is open to two interpretations: One is harmless; the other is false or, at best, unproven. The harmless interpretation is simply the truism that autonomous individuals must, in the end, make judgments for themselves – including judgments about the circumstances in which authority is legitimate. Individual views about the foundations of morality and the ethical life are necessarily *individual* views, personally developed and rationally defended against the contrary views of everyone else. Where starting points are thought to be inevitable, as they always are in moral theory, that thought too is presented as a matter for others to share and acknowledge. There are, in short, no givens in ethics, no prescriptions about what one should do that are immune from the critical examination of individual reason.

One can, however, interpret the principle of autonomy in a second way: as a substantive claim that extends beyond the truism that autonomous individuals think for themselves. The substantive claim, under this interpretation, is a denial that deference *could* ever be justified for an autonomous individual. But this claim, if it is to be more than an unproven assertion, requires for its defense a confrontation with the arguments within political theory aimed at demonstrating that rational individuals do, sometimes, have reason to defer to the views of others, including the state, in deciding what to do. The major point of this study is to explore and describe circumstances in which individuals have just such reasons for deference – even if the views to which they defer are wrong. To the extent that the study succeeds, the principle of autonomy will remain untouched and the claim that the principle is inconsistent with deference will be proved false: Reasons for deference will be reasons that any autonomous individual should acknowledge.[4]

[3] R. P. Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970), 14.

[4] I follow here a treatment of the problem of autonomy similar to that found in Josepn Raz, *The Authority of Law*: *Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 25–7. See also Tom Campbell, "Obligation: Societal, Political, and Legal," in *On Political Obligation*, ed. Paul Harris (London: Routledge, 1990), 120, 146–7.

Deference: An Overview

The Practice of Deference

Before examining possible reasons for deference, it may be helpful first to note some examples of the practice. Several familiar features of our moral life point to a more complicated picture of the relationship between convention and truth than is admitted by the view that "true morals" are necessarily independent of conventional norms. These features suggest that deference to the views of others does in fact occur in a variety of contexts, including the context of political authority, in ways that help motivate a study designed to understand whether such deference can be defended. I shall introduce these examples of deference (1) by considering the connection between law's morals and true morals; (2) by considering the connection between society's morals and true morals; and (3) by considering the dependence of a true moral theory itself on the morals of others.

LAW'S MORALS: THE PROBLEM OF COMPETING NORMATIVE SYSTEMS. Current attitudes toward law display two features that strongly suggest that many people believe, rightly or wrongly, that there are reasons to defer to political authority. First, as noted earlier, the currently popular view about law's morals is that legal systems make strong normative claims for their directives: Law prescribes conduct without any apparent concern for individual evaluation of the merits of its prescriptions. If this view about the nature of law is correct, it would be natural to assume that the legal claim coincides with background social understandings: Why would we continue to accept a concept of law that commits law to claiming authority if, in fact, we do not believe such a claim is defensible as a matter of political theory? Second, even the most conscientious person, committed to the necessity of autonomous judgment in deciding what to do, exhibits in practice a tendency to accept the law's particular set of prescribed norms without serious objection. Each of these features provides an occasion for reexamining the possible connection between conventional (legal) norms and true norms and for considering what reasons might justify deference to law. The first feature states a descriptive or conceptual claim about law's morals; the second feature represents an empirical claim about the way most people respond to law's morals – a claim about society's morals, as reflected in commonplace attitudes toward law. Both features, but particularly the first, will be examined more closely in the course of this study. For now, I want only to describe these two features as vividly as possible in order to show that there is here, in the phenomenology of the ordinary confrontation with law, an unresolved problem – a problem that would be solved if there are in fact reasons to defer to law.

The descriptive or conceptual claim is that the legal system – any legal system – purports to deny exactly what I have suggested the principle of autonomy

assumes: the relevance of individual evaluation to the validity of its norms. Much of this book is about the problems created for moral theory in trying to reconcile this alleged posture of the law with the principle of autonomy. We have already seen that in some ways this conflict has a familiar ring – how to reconcile authority and autonomy. But it is important to understand how this old, familiar issue of political theory differs from the contemporary problem that arises when one views law and morality as apparently competing normative systems. The "old, familiar issue," as usually treated, turns into just another occasion for the moral philosopher to determine whether and on what grounds the demands of law are justified. The contemporary problem is more complex than, though related to, this traditional issue: The current clash is not just a clash of content between what is prescribed by one putative normative system (law) and what is validated by the "true" methods of moral philosophy. The clash is between what appear to be two entirely different theories of morality, two views about the role of individual evaluation in the determination of what one ought to do. In order to demonstrate how this clash differs from ordinary disputes within morality or political theory, it may be helpful to review briefly the stages that led to the current situation in legal theory.

The first stage in legal theory embraced the view that law is not a system of norms at all, but a system of directives enforced by coercive sanctions. As previously noted, this view is no longer as popular as it once was. But the view illustrates one way of avoiding the apparent inconsistency of living within competing normative systems. Any moral theory must deal with the obstacles that the natural world poses to the achievement of one's aims. Rivers and mountains can impede travel, but so can hostile people. The view that law is just such a set of hostile threats renders its directives no different from other such natural obstacles that sensible persons must take into account in deciding what to do. Moreover, it is not just the actively hostile whose reactions must be considered; one must also consider the reaction of all those who accept or acquiesce in the law's demands and adjust one's own conduct accordingly. (Whatever one thinks about the authority of law, one has reason to stop on red and go on green just because there is a law to that effect that one knows others are likely to observe.[5])

This view of law as mere force or constraining obstacle avoids the conflict between law and morality and restores the autonomous individual's prerogative

[5] See Donald Regan, "Law's Halo," *Soc. Phil. Policy* 4 (1986): 15, 16. The contribution of law to solving such coordination problems is often noted. The contemporary discussion focuses on whether this contribution depends on recognizing the law's authority or is simply a result of law's providing a salient point that permits others to achieve coordination. The latter view (law simply provides salience) allows one to deny law's authority even in these apparently paradigmatic cases of coordination; the former view (law coordinates only because its authority is recognized and real) acknowledges the authority of law in coordination cases but not, apparently, in the many other cases where law also seems to claim authority. For further discussion, see Chapters 2 and 3.

to decide for himself how to act in the face of law's threats. But it does so only by ignoring persuasive arguments, developed during the second stage of modern legal theory, concerning the appropriate descriptive or conceptual account of law. Law makes moral claims – ordinary moral claims, at least – about its right to coerce. The hostile reactions encountered in law are not like the threats of a primitive tribe encountered in the jungle; they are reactions from one's own community, one's own neighbors, and they are reactions that presumably take place in a community that acknowledges that one cannot normally jail, fine, or otherwise invade significant interests of others without moral justification. It is this apparently moral nature of the claims made by legal systems that has led so many modern legal theorists in this second stage of development to reject the view that law is nothing but force.

Conceding that law makes moral claims, the legal theorist's next logical step would be to view law's claims like any other moral claim. The fact that two individuals disagree about what morality requires does not show that they operate within competing normative systems: It shows only that they are involved in an ordinary case of moral disagreement of the sort that sets the process of moral inquiry in motion. So too with law's claims: Those claims are conventional facts and represent, at most, a moral claim whose truth is to be established by moral theory.

This transformation of the legal claim into just another moral claim to be evaluated like any other would be unproblematic, consistent both with the principle of autonomy and with a continued denial of the existence of reasons to defer to the state. But a third stage of legal theory has recently added a striking additional feature to the descriptive account of law's morals. Law, we are told, does not simply claim that the content of its prescriptions is morally justified; law makes what I have labeled the strong moral claim, associated with the idea of authority: The actions it prescribes are morally obligatory just because the law so declares. Law, in short, makes precisely the claim about its ability to create moral obligations just in virtue of its existence whose truth moral philosophers debate, question, and regularly deny.[6]

At this point, the conflict between the alleged claims of law and the "true" claims of morality becomes problematic. If law made only ordinary moral claims about the contents of its norms, we would be faced with an ordinary case of deciding whether those claims were correct by reference to one's own autonomous moral views. But if law makes the claim that its norms obligate just in virtue of their existence, one is now confronted with an issue of political theory. The conflict will still be, on one level, just another ordinary case of moral disagreement, though the disagreement now is not about the content of

[6] I am repeating here a commonly accepted view about law – that it claims authority in the sense described here, even though that claim is not justified in many cases. As will become evident, I do not think that this is a correct view of law's claims.