The Ethics of Deference

Learning from Law's Morals

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Introduction

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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.

any particular legal norm, but about the general ability of legal norms to obligate independent of content. But the evidence for the view that law makes a strong claim of authority is not easily confined to a dispute *within* political theory. The dispute quickly threatens to become a dispute *about* political theory – a dispute about who has the final say on this question of authority within political theory. Presumably, the evidence for law's strong claim is the fact that the law imposes sanctions and enforces its norms regardless of individual views about whether the content of its norms is justified. On the basis of this evidence, one concludes that law must be making a strong claim of authority, not just an ordinary claim about the content of its norms. But by reference to this same evidence, the law's claim appears even stronger. For whatever moral philosophers conclude about the question of political obligation, the law continues to impose sanctions and enforce its decrees, apparently in the continued belief that its decrees obligate just in virtue of their existence. The law, in short, by the same evidence that shows it claims the authority to enforce its norms independent of content, would also seem to be claiming the right to enforce its norms independent of political theory. If law claims to generate obligations that are content independent, then by the same token it also seems to be claiming that those obligations are political theory independent.

Putting the point this way brings out, I hope, the sense in which law and morality seem to confront each other according to these standard current views as distinct normative systems, resting on fundamental differences about the role of individual evaluation in determining what to do. One problem with this view of law's morals is its paradoxical quality. To suggest that law claims that its norms obligate, regardless of what political theory has to say about the matter, cannot be done: It only leads to the question of how such an assertion of legal authority could be justified if not through political theory. To undertake any justification is to embark on political theory. To undertake no justification makes the assertion arbitrary and no more than an exercise of pure power.

One possible conclusion from this discussion is that the autonomous individual should insist that law's strong moral claims be justified by political theory. Of course, there is another possibility. It may be that modern legal theory is mistaken in describing law as making strong rather than ordinary moral claims. If that is so, we would no longer face a conflict between apparently competing normative systems. If law claims only the right to coerce, without necessarily claiming a correlative duty to obey, then the question of whether law obligates just in virtue of its existence will remain a question of ordinary political theory for the individual or moral philosopher to evaluate. However that issue is resolved, no conflict with the claims of law will result. Law's morals and society's morals will coincide.

The point to be emphasized is that one of these resolutions – a revision of currently popular political theory to make it coincide with law's strong claim or a revision of current legal theory to reduce law's claims to the status of

ordinary moral claims – is essential in order to avoid the unhappy stalemate of apparently competing normative systems. That such a stalemate is an unhappy one from the point of view of both legal and moral theory should be clear. Legal and moral points of view are not developed in isolation as if each view were unaware of the other. Philosophers may not often become kings or judges, but they can surely consider what they would do if they did occupy such roles and what principles they would implicitly be endorsing whenever they sent people to prison on the sole ground that they had violated specified laws – laws whose merits they never stop to consider in carrying out their judicial role. Conversely, judges should and presumably do accept the principle of autonomy in their personal lives, recognizing (and teaching their children, no doubt) the value and necessity of exercising individual judgment in determining what to do. The competing normative systems of law and morality, in short, present the classical problem of consistency in thought that should motivate attempts to seek reconciliation from both sides.

SOCIETY'S MORALS: CONNECTIONS BETWEEN CONVENTION AND TRUTH. Put aside for the moment the problems that arise from contemporary descriptions of law's morals and consider the second feature that characterizes current attitudes toward law – the empirical claim about how most people react to law's norms. I said that most people do not seem to object strongly to finding themselves in a system that purports to prescribe actions without regard for individual evaluation of the merits of such action. The truth of this claim can be partially assessed by contrasting the ordinary person's reaction to law with the likely reaction to any other normative system that purported in similar fashion to preempt individual reason in determining what to do.

Imagine that you have been raised in a nonlegal normative system, say a religion, that you have now begun critically to question. You also accept the principle of autonomy concerning the role of individual judgment in determining what to do. You have read enough works on ethics to have a set of favorite moral philosophers and a rough general theory that you use to evaluate the more serious demands that are made on you by your religion. As you compare the demands of your religion with the ethical prescriptions supported by your own moral theory, you begin to find examples of divergence, some serious, some not so serious, between what you think, morally, you should do and what your religion tells you to do. Sometimes you are able to reconcile this conflict because your own moral theory justifies deferring to religious norms on occasion even when they diverge, on the surface, from what morality seems to require; that is to say, your initial moral evaluation of some action is adjusted by a deeper moral theory that explains why occasional deference to a competing religious norm is permissible or required. Where this possibility of reconciliation does not exist, you ignore the religious norm. Where it does, you continue to have a place, it seems, for both your moral theory and your religion. On reflection,

however, you realize that you no longer share the same basic attitude toward these religious norms as do others around you. In particular, others (believers) do not think, whereas you do, that the validity of the religious norms and their priority over conflicting prescriptions depends on your moral theory. The role left to religion in your life is simply due to the place assigned to it within your moral theory; it no longer operates for you as the normative foundation for prescribing action in the way that it does for everybody else. Whether or not you leave the church, you no longer, it seems, accept its authority. Suppose, finally, that as a result of finding yourself in such a fundamentally different position from other believers, you decide to leave the church but discover you can't. The church, that is, continues to impose its norms on all persons within a certain territory, punishing those who transgress whether or not they are believers. Escaping the church's power is possible only by leaving the country, and that is not an easy thing to do even if you were inclined to uproot your family and leave your friends, community, job, and all the rest.

I present this patently transparent analogy between a religion and a state not to aid or evade analysis, but to support the empirical claim about the inconsistency between the presently popular view that legal systems do not have authority and what I take to be the general practice of most people. What would be the ordinary reaction to a system that imposed and enforced its norms on one with no possibility of opting out in the manner of the religion just described? "Righteous indignation" or anger are not implausible suggestions for answers to that question, even if in many cases the inability to alter the situation might lead to quiet resignation or despair. Indeed, it is precisely because of the power of the principle of autonomy in the lives of all of us that normative systems like religions are typically voluntary associations, with entry and exit determined by each person on the basis of his or her own values and reason. Why, then, do so few people react with the same sense of moral affront when faced with the demands of the law?

The claim that few people do react to law in the way one would expect, *if one assumes that law claims more authority than it has*, is, as I said, an empirical claim. No doubt, there are some (maybe most ordinary people) who have no reason to be offended by law's moral stance because they believe law's claims are justified. Such people implicitly accept a political theory that endorses law's claimed authority in the same way that many people accept, after reflection, religious authority. People in this category, who believe law's strong claims are justified, will not be test cases for the empirical claim.[7]

[7] That most people believe that there is an obligation to obey the law (which would mean that a strong moral claim of authority by the law would be legitimate) is a proposition that is often acknowledged even by those theorists who do not share the belief and who argue against political obligation. See, e.g., Raz, *The Authority of Law*, 235 ("most people believe themselves to be under such an obligation"); A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton Univ. Press, 1979) ("many people feel, I think, that they are tied in a special way to their government, not just by 'bonds of affection,' but by *moral* bonds"); M. B. E. Smith, "Is There

Even the most law-abiding citizen, however, may on occasion strongly disagree with particular legal norms, as the history of civil disobedience attests. This latter class of people – those who disagree on occasion with (and are willing to disobey) particular laws – *are* potential tests of the empirical claim.[8] Such persons are similar to those whose religion just coincidentally happens to prescribe norms that, most of the time, coincide with norms one accepts as valid on independent moral grounds. Such persons do not necessarily accept law's authority if they do not also accept law's claim about its right to impose its decision about what to do on each individual. The conflict between law and morality when law is viewed as making strong moral claims is a conflict of method, not results: a conflict about how to determine what to do. Even if both methods concur most of the time in their substantive recommendations, one ought to resent the idea that one method purports to make and enforce its recommendation without regard for individual evaluation. Preserving one's outrage only for cases of strong substantive disagreement ignores the underlying reason for the conflict and allows the particular disagreement to obscure the more fundamental one about how to determine what to do in the first place. (An imposed religion would not be any less outrageous just because it happened, by and large, to prescribe conduct one would have thought obligatory or appropriate in any event.)

But the best test cases for the empirical claim are those who, after due reflection, conclude as a matter of their own considered political theory that

a Prima Facie Obligation to Obey the Law?" *Yale L. J.* 82 (1973): 975 ("I am not contending that reflective and conscientious citizens would, if asked, deny that there is a prima facie obligation to obey the law. Indeed, I am willing to concede that many more would affirm its existence than deny it" [But see the preface, footnote 5, noting Smith's suggestion in the same article that, released from "conventional views," the reflective man would likely doubt the existence of any such obligation]). Theorists more sympathetic to the existence of political obligation also assume that the "average person in the Western world accepts that one has a general moral obligation to obey the law. . . ." George C. Christie, "On the Moral Obligation to Obey the Law," *Duke L. J.* 1990: 1311, 1312. See also id., 1336 ("Given the failure of [current arguments against political obligation] I am forced to conclude that if ordinary people believe that there is a moral obligation to obey the law, who is to say that they are wrong?"); George Klosko, *The Principle of Fairness and Political Obligation* (Lanham, Md.: Rowman & Littlefield, 1992), 68 ("I take it as intuitively obvious that most individuals believe they have political obligations . . . and that their governments are legitimate").

[8] People who disobey laws that they think are misguided or unjust may do so either (1) because they think their prima facie obligation to obey the law is outweighed in a particular case by a greater duty or (2) because they think there is no obligation to obey law qua law, so they may (must) act as conscience guides with only the sanction (no countervailing moral duty) to worry about. This study defends the first explanation for civil disobedience (almost no philosopher suggests that the obligation to obey the law could be absolute). But note that the law as it is currently pictured by modern legal theorists does not make this distinction between prima facie and absolute obligation. Those who think law claims authority describe the claim as absolute, leaving no room for individual weighing of competing moral duties. Under this description, every act of civil disobedience is always in defiance of the law's claim, which should at least prompt some concern about the divergence between individual and social norms, on the one hand, and law's morals, on the other.

law has no intrinsic power to create a moral obligation to obey. This group, which includes the increasing number of contemporary political theorists who deny that there is any prima facie obligation to obey the law,[9] seldom exhibit in practice, I suspect, what the logic of their position seems to require. Most, I suspect, continue to obey most laws – even those they think are misguided or unjust.[10] And even if they don't have moral qualms when they do disobey particular laws, they probably accept the resulting fine or sanction, if caught and punished, with some grace. Of course, there are many explanations for such conduct that would be consistent with continued rejection of legal authority – just as there would be in cases of continued compliance with, or resigned submission to, a religion one could not escape. But possible rationalization is not the point: The point is the absence of the feeling of outrage that often is a better guide to an internalized moral theory than abstract discussions on the printed page.

The empirical question is, of course, for each individual who does not accept law's claims of authority to decide for herself. Only introspection will determine how one reacts to law's stance and whether that reaction is consistent with one's understanding of what is required by autonomy. Objections to the empirical claim are easy to imagine. It might be thought, for example, that the analogy between law and an imposed religion (which is intended to give the claim some

[9] In a recent work, Leslie Green suggests that this position, if not exactly an emerging consensus, is "shall we say, a significant coalescence of opinion." Green, "Who Believes in Political Obligation," in *For and Against the State*, eds. John T. Sanders and Jan Narveson (Lanham, Md.: Rowman & Littlefield, 1996), 1. Green is also one of the few philosophers in this emerging group who challenge the claim that most ordinary people, in contrast to the philosophers, believe that there is an obligation to obey (see footnote 7). For the most part, Green's challenge consists in raising doubts about how one would go about proving what is, after all, an empirical claim. He considers inconclusive, for example, a recent study that seems to bear out the claim about the ordinary person's view because some of the questions asked in the study (e.g., "Should people obey the law even if it goes against what they think is right?" [82% agreement]) fail to eliminate the possibility that people obey for prudential reasons rather than out of a sense of political obligation; other questions asked in the study are open to related objections. See id., 10–14 (reviewing the empirical study by Tom R. Tyler, *Why People Obey the Law* [New Haven, Conn.: Yale Univ. Press, 1990]). The upshot, for Green, is that the question of what most ordinary people think remains an open one. I have elsewhere suggested that one way to test the empirical question is to use a variation on a question suggested (for a different purpose) by M. B. E. Smith: Knowing that someone has broken a law, but not knowing what kind of law, would you say that the lawbreaker should at least come forth with a justification for what he did? See Philip Soper, "The Moral Value of Law," *Mich. L. Rev.* 84 (1985): 63, 68–9.

[10] It may be true that one can "find people of impeccable character who break the law and see nothing morally objectionable in so doing." J. W. Harris, *Legal Philosophies* (London: Butterworths, 1980), 209. But this commonplace fact, if it is one, is ambiguous evidence for the empirical question of whether people generally believe there is a prima facie obligation to obey laws. Such a belief, after all, is still consistent with disobeying the law whenever the prima facie obligation is outweighed by other considerations. (This ambiguity in inferring attitudes about the obligation to obey law from the mere fact of disobedience is avoided by the test described in footnote 9.) I return to this issue of the strength of the obligation to obey and how it might be overcome in the final chapter.

plausibility) is misleading or false, and that deference to the law – willing deference, not just grudging submission – is consistent with autonomy in a way that forced submission to a religion is not. Moreover, submission to law, even by those who do not acknowledge its authority, need not result simply from fear of punishment or weakness of will; the motive for submission could stem from more virtuous-sounding ambitions – the desire, for example, to express one's solidarity with a group regardless of the group's misguided claims of authority.[11] These various explanations for the empirical behavior are, no doubt, only a few of those that can be imagined and even defended as normatively appropriate. My main purpose in making the empirical claim is not to deny the possibility of such explanations but to provoke those for whom the claim rings true to think about why that is so. Is the analogy with religion inapt? Would a proper understanding of the basis for deferring to state authority show that autonomy is in fact consistent with routine submission to law in a way that it would not be in the case of an imposed religion?

TRUE MORALS: CONNECTIONS BETWEEN FACT AND VALUE. It might be thought that the empirical claim about society's tendency to defer to law, even if true, proves little about which perspective – society's or the skeptical philosopher's – is correct. But the empirical claim is not unrelated to this question. As I will explain more fully, there is at least one connection between description and prescription in moral theory that only the most self-confident moral philosopher would deny: Social behavior that remains impervious to moral criticism must raise doubts about the moral theory as much as it raises doubts about the integrity of the persons whose behavior is criticized. If most people do submit to law in ways that seem inconsistent with the contemporary philosopher's claim that law does not have authority, it is possible that the moral theory that underlies the philosopher's claim is not the morality of most people – and hence is not an adequate account of *our* moral life. In that case, it is moral theory that should adjust its conclusions to correspond more closely with observed behavior.

[11] This position appears to be that of Joseph Raz, who argues that one may *choose* to respect and obey the law as a means of expressing one's identification with one's community but that one has no *obligation* to do so. See Raz, *The Morality of Freedom*, 88–105. One should not confuse the point made in the text (about the peculiar combination of attitudes involved in believing that states claim authority they do not have) with the different (but related) question of whether one who simply denies that states have authority is necessarily committed to disobeying all laws or seeking the state's destruction. Those who deny that the state has authority will still have general moral reasons for action, some of which will often require compliance with the law. See A. John Simmons, "Philosophical Anarchism," in *For and Against the State*, 19. The questions that the "philosophical anarchist" needs to address are: (1) why should one accept living in a state that claims authority it doesn't have (i.e., why not at least demote the state's claims, even if one continues to tolerate its existence)? and (2) does rejecting the legitimacy of the state mean that one rejects the state's right to coerce or just the idea that such coercion creates a duty to obey? I return to these questions in Chapter 7.

The general question of what connections, if any, there are between accepted norms and true norms arises only because the principle of autonomy seems to require maintaining a sharp divide between convention and truth. There are many ways, of course, to challenge this divide. Those skeptical of the whole idea of moral truth will explain that conventional norms are as far as one can ever go in justifying or defending moral statements, thus eliminating the distinction between fact and value altogether by translating moral claims into factual ones. I do not tackle this large issue in this brief study. My goal is the more limited one of defending a partial theory of ethics for those who do accept as meaningful the idea of moral truth. The claim I shall defend is, roughly, that even a true moral theory must make more room than is commonly acknowledged for the moral relevance of the ethical views of others – even if those views are wrong.

The clearest example of a connection between convention and truth is what might be called the "evidentiary" connection, illustrated by remarks in the preceding paragraphs. When people fail to behave as moral theory says they should, one possible conclusion is that they are acting immorally. Another possible conclusion is that the moral theory that condemns the behavior is mistaken. Choosing between these alternatives requires comparing one's confidence in the correctness of one's moral theory with one's sensitivity to the fact that nonconforming behavior by others, at least where it is widespread, may be evidence that one's moral theory is wrong. This simple evidentiary point, rather than some more complex "fusion of fact and value," is all that is needed in order to defend at least one link between description and evaluation. Just as moral intuitions are relevant "facts" to consider in the development of basic moral principles,[12] so too with the facts of human behavior: Social practices that fail to conform to moral theory represent occasions either for applying the theory (thus condemning and trying to change the behavior) or for reconsidering the theory.[13]

Admitting an evidentiary connection between convention and truth is easy. The connection, after all, is simply a reminder that the difficulty of knowing what is true in morals makes the contrary views of others relevant as reasons for perhaps reconsidering one's own views. The evidentiary connection also leaves the principle of autonomy intact: The contrary views of others may make one more tentative about one's own conclusions, but those conclusions will in the end remain the operative determinants of what one should do, however much

[12] See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard Univ. Press, 1971), 48–53 (on "reflective equilibrium").

[13] For further discussion, see Philip Soper, "Law's Normative Claims," in *The Autonomy of Law*: *Essays on Legal Positivism*, ed. R. George (Oxford: Clarendon Press, 1996), 216. What I call here the "evidentiary" connection between practice and theory is not a theory of truth so much as a theory about the evidence that bears on truth. It is possible to make stronger claims about the relation between practice and theory, leading to a "coherence" theory of truth. For criticisms of such a stronger approach in this context, see "Who Believes in Political Obligation," Green, 2–5.

they differ from the opinions of others. Listening to others is one thing; but once one has concluded, on reflection, that others are wrong, autonomy, it seems, still requires acting on one's own views. There is a second connection, however, between the views of others and conclusions about what one ought to do that is more direct than the evidentiary connection. Sometimes, morality itself may require one to defer to another, even though one (correctly) believes the other to be wrong. Where this is the case, one can continue to embrace the principle of autonomy, but only by recognizing that the question of what one ought to do in the final analysis (the ultimate "moral truth") often involves a compromise between competing intermediate moral claims. We are familiar with this problem in the case of competing moral goods: A persistent strand in moral philosophy explains that one must sometimes balance the prima facie moral value of (for example) keeping one's promise against the prima facie value of protecting innocent life. If, in the end, we act in a way that would normally be immoral (by breaking our promise, for example), we nevertheless act correctly if the balance between these prima facie moral requirements has been correctly determined. The question is whether a similar moral weighing is justified where the choice is not between competing moral *goods*, but between competing moral *views* – your own and one that you believe to be (and, by hypothesis, *is*) morally wrong.

In some contexts, an affirmative answer to this question seems plausible, perhaps because we can translate the issue into the previous one of competing goods. Friendship provides the most obvious example. Persons in a close relationship may sometimes conclude that one ought to defer to the opinion of one's partner even though that partner's opinion is morally wrong. Such examples seem acceptable illustrations of the possibility that moral truth may sometimes require action in accordance with the (erroneous) moral views of another because we can recast this example as a case of competing moral goods: We weigh the prima facie value of maintaining the relationship against the prima facie dis-value of acting incorrectly and discover that sometimes the correct action (in the ultimate sense) requires a compromise of our own (correct) views about what to do.[14]

The purpose of this study is to suggest that this feature of our moral life, illustrated by the example of friendship, is far more widespread than is commonly recognized. I shall suggest that the moral views of others about what to do count, in the sense just described, in ways that explain a variety of puzzling moral problems, including the problem of why and how much promises

[14] For an economic model of the situation as it applies more generally, not just in personal relationships, see Robert E. Goodin and Geoffrey Brennan, "Bargaining Over Beliefs," *Ethics* 111 (2001): 256, 257 ("[Sometimes] disputes over beliefs get 'resolved' through negotiation rather than persuasion. Each still believes the truth of the proposition she was originally advocating, but each sees the need to 'get on with it,' so all agree to treat certain propositions 'as if true,' for the particular purposes at hand").

obligate, the problem of explaining the basis for the obligation of fair play, and the problem of justifying legal authority. It is no coincidence that the primary examples I shall use to illustrate the ethics of deference are precisely those that have long been the major theoretical paradigms for establishing political authority. Classical political theory attempts to explain law's authority by invoking notions of consent and fair play. Most contemporary philosophers conclude that these attempts fail. It may be, however, that they fail because they begin at the wrong end. It may be that we should not try to explain political authority by reference to consent or fair play because the explanation for why promises bind or when obligations of fair play arise is itself dependent on political theory. It may be that when we understand the circumstances under which deference to the views of others is morally required, we will better understand some of the puzzles of promise, fair play, and the like.

The Concept of Deference: Form and Substance

How do reasons for deference compare to other reasons for action? How do they interact with other reasons to justify action that would otherwise, in their absence, be wrong? These are questions about the form or structure of deference. In addition to questions about form, one can also ask questions about substance: What kinds of reasons could justify action that would otherwise be wrong? In this section I offer a preliminary exploration of both kinds of questions by using the example of personal relationships mentioned in the preceding section. By considering how deference works in this context, one in which the concept is likely to be most intuitive and familiar, I hope to lay the groundwork for extending the analysis in later chapters to more controversial contexts, including that of political authority.

FORM. Consider the following cases. You are asked for money by (1) a stranger; (2) a neighbor who wants the money (a) to help him through a temporary setback; (b) to help him buy a luxury vehicle; (3) a friend, who does not explain why he wants the money. Does the request for money in each of these cases provide any reason at all for you to act as requested? One standard suggestion is that requests provide "content-independent" reasons for action, which are to be weighed along with the ordinary "content-dependent" reasons one may have for the action. Thus, in each of the preceding cases, if one decides not to give the money, the person requesting aid may be disappointed, but will understand that the request was considered and weighed along with other reasons: The reasons for not giving the requested aid proved stronger, on balance, even after including the reason provided by the request. In contrast to a "request," which simply adds another reason to be considered in the balance of reasons, an "order" to give someone money would normally be presumptuous: Orders imply that the request is to be given some special priority or weight, more than the normal

weight of a simple content-independent reason – enough additional weight to possibly preempt or outweigh all other reasons that bear on the decision. For a stranger, a neighbor, or even a friend to order me to give money implies a relationship of authority that is absent and thus makes the order, but not the request, presumptuous. Orders, to use our current terminology, assume that deference is appropriate or even required; requests, in contrast, make no assumption about whether deference is due but simply add another reason to the existing reasons bearing on the action.

This distinction between orders and requests is a plausible starting point for explaining how reasons for deference work, but it needs to be amended in two respects. First, not all requests are reasons for action; second, requests can also be presumptuous. Consider again the beggar who asks for alms. Even if one decides to grant the request, it does not follow that the beggar's request provided a *new* reason for action. The general obligation to help others can be met in various ways. One way is by making contributions to established charities; another way, given the immediacy of the beggar's present claim and the apparent ability immediately to satisfy that need, is through instant donation. The point is twofold: First, we would not say that if one gives the requested alms, one has "deferred" to the beggar; second, we can explain why this action is not a case of deference: Rather than deferring to another's view about what to do, one has simply acted on one's own preexisting assessment of the extent to which aiding others is morally appropriate, using the information provided by the beggar's request as the minor premise in a previously established general argument about when and how to aid those in need. We could make the same point in more mundane contexts. The request to "pass the salt" does not need to be seen as presenting one with a *new reason* to act (in order to please the person who made the request); it can also be seen as simply providing the information needed to act on preexisting reasons one already has for acting appropriately in certain social settings.[15]

Why make this distinction? Why does it matter whether a request provides a new reason for action or simply new information that triggers the application of preexisting reasons? One answer is that it helps to explain how requests can also be presumptuous. Consider again the neighbor who asks me to give him money to help him buy a luxury vehicle. Though the plea here is only a request, not an order, it is equally capable of being presumptuous. It presumes

[15] Raz suggests that it would be wrong to think of requests as "mere communication of information that the speaker . . . needs or wants something." He notes that one might deliberately avoid making a request while still providing another with information about one's needs, because "while one would be pleased if one's need moves the friend into action, one would be displeased if it takes a request to do so." Raz, *The Morality of Freedom*, 36. The discussion in the text is not necessarily in disagreement: *From the point of view of the person making the request*, Raz is persuasive that the request always is *intended* to constitute a new reason for action. The discussion in the text aims to show that *from the point of view of the person addressed*, a request may provide no reason to act at all and may even be presumptuous.

that I have background reasons to help my neighbors buy luxury items when, in fact, no such presumption is warranted (not for *this* neighbor, at any rate). It presumes, in short, a relationship that does not exist. I may be presumed to have background reasons for helping neighbors in temporary need (as I can be presumed to have background reasons for sometimes helping beggars asking for alms), but to ask me to help you buy a yacht or a luxury car is presumptuous. (Even if I accede to the request, one would hardly say that I am deferring to my neighbor's wishes: Perhaps, taken aback by the presumption, I act for reasons of my own bemusement or for reasons based on my own calculations of what I can demand in return.)

We can make the point even more vivid by imagining presumptuous requests in the case of serious normative disagreements. Assume that you believe your children should go to private school; your neighbor, who strongly believes in public schools, requests you to send your children to public school. Does your neighbor's request provide any reason at all for acting as requested? If you believe, for example, that the reasons are equally balanced between public and private school, should the neighbor's request have the power to tip the scales toward the public school choice? The answer, I assume, is no: The fact that it would please your neighbor to know that you have sent your children to public school is not a reason for action at all for you. One might support this conclusion by suggesting that there could be many other neighbors who might feel differently and "one can't please them all." But I am making a stronger claim: Even if all your neighbors were united in their views, pleasing them is not a reason for action because it is none of their business. Asking me to base a decision about my children on your preferences as my neighbor is presumptuous because it assumes, falsely, that the relationship of neighbor warrants making your desires relevant to a decision that is not yours to make. Advice one may welcome, but the expectation that I will take into account the mere fact that you would be pleased if I act as you request is out of place.

In none of these examples so far is it appropriate to talk of deference. I may give alms to the beggar, I may give aid to my neighbor in need, and I may give money to a friend without asking why he wants it. (Depending on the nature of the friendship, the friend's request for money, even to help him buy a luxury item, need not be presumptuous.) But even if I act as requested in these cases, I am not deferring to the wishes or views of another; I am simply acting on my own understanding of what the balance of reasons, in this context, supports.

Deference suggests that I am acting in some sense contrary to the way I would normally act if I simply considered the balance of reasons (including any new information supplied by your request) that bear on the action. Examples are easy to produce. At one extreme, one may have reasons to defer to another even in the case of serious normative disagreement. If one disagrees with one's spouse about whether to send one's children to private or public school, the disagreement is now clearly one in which the views of each spouse are relevant