

## Obligation and Law

*Note for the Colloquium. What follows are excerpts from the manuscript of my forthcoming book, Justice for Hedgehogs. I have included parts lifted from the introduction to give readers a sense of how the two chapters that follow – on obligation and law – fit into the overall structure.*

### Baedeker

#### *Foxes and Hedgehogs*

This book defends a large and old philosophical thesis: the unity of value. It is not a plea for punishing greedy fund managers. Its title refers to an ancient Greek aphorism that Isaiah Berlin made famous for us: the fox knows many things, but the hedgehog knows one big thing.<sup>1</sup> Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest. I try to illustrate as well as defend the unity of at least ethical and moral values: I describe a theory of what living well is like and what, if we want to live well, we must do for – and not do to – other people.

That idea – that ethical and moral values depend on one another – is a substantive creed; it proposes a way to live. But it is also a very large and complex philosophical theory. We must count accuracy and responsibility as themselves values and we must therefore take up a broad variety of philosophical issues that are not normally treated in the same book. We shall discuss, in different chapters of this book, the metaphysics of value, the character of truth, the nature of interpretation, the conditions of agreement and disagreement, the phenomenon of moral responsibility and the so-called problem of free will as well as more traditional issues of ethical,

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<sup>1</sup> Citation to Berlin, Hedgehog and Fox.

moral and legal theory. My overall thesis is unpopular now – the fox has ruled the roost in academic and literary philosophy for many decades, particularly in the Anglo-American tradition.<sup>2</sup> Hedgehogs seem naïve or charlatans, perhaps even dangerous. I shall try to identify the roots of that popular attitude, the assumptions that account for these suspicions. In this introductory chapter I offer a road map of the argument to come that discloses what I take those roots to be.

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### *Ethics*

In much modern Western philosophy – both Anglophone and Continental – morality is seen as self-abnegation. The moral attitude is an attitude of impartiality: we act out of moral conviction only when we pursue the interests of people generally, counting our own person as only one anonymous figure among billions. In the remaining parts of this book I argue, in contrast, for a

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<sup>2</sup> Some of the widespread disbelief in the possibility of a unified ethical and moral theory stems from a substantive belief that in fact moral concepts and principles conflict. (Cite Berlin on Pluralism and some Nagel article on Conflicts.) But some reflects a general doubt about the possibility of ethical theory at all. Bernard Williams pointed out that Henry Sidgwick’s version of utilitarianism suffered from a failure to reconcile theory and practice. Even philosophers, he said, need practical dispositions that they apply without reflection in practical situations; though these dispositions can be justified in utilitarian theory, they must be given effect as if reflecting, not a utilitarian calculation but the intrinsic value of what they recommend. So a utilitarian theory, Williams thought, creates a war between theory and practice. He took this, however, not as a particular problem for Sidgwick’s version of utilitarianism, but as a general problem of ethical theory. “My own view is that no ethical theory can render a coherent account of its own relation to practice: it will always run into some version of the fundamental difficulty that the practice of life, and hence also an adequate theory of that practice, will require the recognition of what have called deep dispositions; but at the same time the abstract and impersonal view that is required if the theory is to be genuinely a theory cannot be satisfied in relation to the depth and necessity of those dispositions. ... It thus follows that there is no coherent ethical theory.” Williams, *The Point of View of the Universe: Sidgwick and the Ambitions of Ethics*, in *Cambridge Review* 103 (May 1982), reprinted in Williams, *The Sense of the Past*, Cambridge University Press (2006) 295-6. I believe, on the contrary, that the problem Williams identified is peculiar to theories like Sidgwick’s that connect morality to a disposition that it is impossible for people to take up in practice: “the point of view of the universe” that excludes all personal interests, ambitions and attachments. It does not make a theory incoherent simply that it does not require people self-consciously to reflect on its theoretical base in day to day decisions. Sidgwick’s theory did more: it required people to act in ways that, if they did reflect on the theory, the theory would condemn. I hope it will become clear that the unified theory whose outlines appear in this book does not condemn itself in that way.

morality of self-affirmation. That conception of morality enriches moral philosophy, conceived as interpretive, because it allows us to attempt an integration of our moral convictions and ideals not only with one another but with our ethical convictions as well. In Part 3, I argue that we each have a sovereign ethical responsibility to live well, to make something of value of our own lives, as a painter makes something valuable of his canvas, and that our various responsibilities and obligations to others flow from that personal responsibility for our own lives. Only in some special roles and circumstances – principally in politics – do these responsibilities to others include any requirement of impartiality between them and ourselves.

These are very implausible claims unless we take an expansive view of our ethical responsibility. In Chapter 9, I defend an expansive view: we must treat the making of our lives as a challenge, one we can perform well or badly, and we must take the ambition to make our lives authentic and worthy rather than mean or degrading as cardinal among our interests. We must, in particular, cherish our dignity. The concept of dignity has become debased by flabby overuse in political rhetoric: every politician pays lip-service to the idea and almost every covenant of human rights begins with its name. But we need the idea, and the cognate idea of self-respect, if we are to make much sense of our situation and our ambitions. Each of us bursts at once with life and the shadow of inevitable death: we are alone among animals conscious of that apparently absurd situation. The only value we can find in living that stands up to death is adverbial value. We must find the value of living – the meaning of life – in living well just as we find value in painting or writing or singing or diving well. There is no other enduring value or meaning in our lives, but that is value and meaning enough.

Dignity and self-respect – whatever these turn out to mean – are indispensable conditions of living well. We find evidence for that claim in how most people want to live: to hold their heads

high as they struggle for all the other things they want. We find more evidence in the otherwise mysterious phenomenology of shame and insult. We must therefore explore the dimensions of human dignity. I describe two fundamental principles that will govern much of the rest of the book. The first principle holds that it is objectively important that each human life, once begun, go well. The second holds that each person has a fundamental responsibility for identifying and pursuing value in his own life. Of course each of these principles needs much elaboration. I offer part of what is needed in Chapter 9, but the application of the two principles in later chapters furnishes much more detail.

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Chapter 11 sets out the abstract basis for an interpretive integration of ethics and morality, and considers objections to the feasibility of that project. Chapters 12, 13 and 14 take up a series of central issues of substantive morality. When must someone who properly values his own dignity aid others? Why he must not harm them? How and why does he incur special responsibilities to some of them through deliberate acts like promising and also through relationships with them that are often involuntary? The last of these chapters singles out for particular study the important moral relationship that holds among citizens of a political community in virtue of the coercive authority such communities exercise. We encounter, under these various topics, old questions about whether and how numbers count in our decisions who we must aid, our responsibility for unintended harm, puzzles about when we can bring about harm to some people in order to aid others, uncertainties about why promises create obligations and whether we have involuntary obligations in virtue of membership in ethnic, linguistic and other communities beside political ones.

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Chapter 20 challenges the conventional view that law and morals are separate collections of principle and that jurisprudence studies the interconnections between them. It argues instead that law should be treated as a branch of political morality that is in turn a department of morality more broadly understood. That is as far as this book carries the interpretation and integration of value; the epilogue of Chapter 21 only repeats the claim, now through the lens of dignity, that value is indivisible.

## Chapter 14

### *Convention and Obligation*

We want interpretations of our two principles that allow us to live in the light of both without compromising either. In the last two chapters we identified guides. We may swim mainly in our own lanes: we need not show strangers the concern we have for ourselves and those close to us. But we must not be indifferent to their fate. We owe them duties of aid when that aid is crucial, when we can give it with no great damage to our own ambitions and, particularly, when we are directly confronted by suffering or danger. In these circumstances, to refuse our aid would show a contempt for other people's lives that would deny self-respect as well. Our responsibility not to harm strangers is different and much greater. We may not deliberately injure someone else to prevent injury to ourselves unless he is the threat. We explored these moral injunctions – to aid and not to harm – in rough dimension. What they require and forbid in concrete circumstances is a matter for judgment and too much turns on detail for any more detailed rules to be set out in advance. Everything turns, case by case, on further and very often ineffable interpretive judgments. Politics, which comes later, is different.

So much for strangers. In this chapter we consider the ethical challenge in a very different context: when those we might aid, at cost to ourselves, are not strangers but rather people in one or another kind of special relationship with us. These relationships fall into two main categories:

performative and associational. We make some people special, first, through specific, dateable and voluntary acts like making a promise or swearing an oath to them. Some people, second, just are special in virtue of some associational bond: a bond of family, kinship, or partnership in a joint enterprise, for instance. One associational relationship is particularly important: this is political association and I set it aside for separate discussion later in the chapter.

Both performative and associational relationships give rise to what we call “duties” or “obligations;” these terms connote particularly strong responsibilities of aid. So we say that parents have a duty to care for their children, colleagues have a duty to help one another professionally and people who make promises are obliged to keep them. Philosophers and lawyers have given much attention to what they call the “nature” or “logic” of obligations and duties.<sup>3</sup> What is the difference, if any, between the claims that someone ought to help a suffering human being and that it is his duty to do so? What is the connection between obligations and rights? If you have an obligation to help me in some way, does it follow, automatically, that I have a right to your help? Can duties or obligations always be waived by those to whom they are owed? Some of these questions are interesting, but I shall not take them up here because they do not touch our main question, which is how the duties and obligations that are attached to your special relationships are drawn from and affect what it is for you to live well.

Given the geometry of morals we have so far established, we can have obligations to particular people only because we are in a position to cause them a special kind of harm. Social conventions play a role in placing us in that position. Our obligations are dramatically affected by social facts. What counts as a promise, or an excuse for ignoring that promise, varies from context to context, place to place and time to time. The variations are sharp and evident when

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<sup>3</sup> The classic discussion is Hohfeld, *Fundamental Legal Concepts*.

performative acts change legal relations – through the laws of contract, marriage or employment, for instance – but they are impressive even when only moral obligation is in play. The role obligations of a parent or child or colleague or citizen are also defined by contingent conventions. In some communities the duties of kinship are thought to extend to more distant degrees of relationship than in others, for example, and what parents are thought entitled to expect from their children in old age is fixed by what is customary in their social milieu. What business or professional colleagues expect from one another, as of right, depends on custom that might be very different from trade to trade or from profession to profession. In some cases obligations are fixed even more contingently by some form of election or vote. People are widely thought to have a moral obligation to obey almost any law their parliament happens to enact, for instance.

The crucial role of convention poses a philosophical difficulty. Conventions are only matters of fact; how can they create and shape genuine moral duties? How can I be obliged to treat my second cousin like a brother if we live in one place but entitled to ignore him if we live in another? Why isn't the difference just a matter of social anthropology that should cut no moral ice? How can the expression, "I promise," gain moral force just because people take it to have moral force? Doesn't Hume's principle condemn the entire phenomenon of obligation as an enormous mistake? Yes, the moral responsibilities we discussed in the last two chapters do vary as facts vary. Whether you have a duty to try to rescue Hecuba depends on whether you can swim, have a lifeline, and so forth. But that is because a very general moral principle – the principle that governs duties of aid to strangers – makes them relevant. Social practices seem to create performative and associational obligations from scratch. They seem alchemy: making something moral out of nothing moral.

Philosophers have replied to this challenge by proposing other very general moral principles that might, like our general duty to help strangers in need, give contingent facts genuine moral force. They say that conventions give rise to expectations and people have a moral right to have their expectations protected.<sup>4</sup> But of course not all expectations gives rise to rights: we need to know why those that are generated by a particular vocabulary or role have special moral power. Or they cite a general moral duty to respect useful and just social institutions.<sup>5</sup> But there are many useful and just institutions that I have no duty to respect – agricultural production arrangements among African tribes, for example – even though I could benefit them by respecting their production quotas, and even if they expected me to respect them.

Or philosophers say that general principles of fairness require me not to take advantage of the benefits of social institutions without respecting the burdens of those institutions: not to be, as they put it, a free-rider.<sup>6</sup> That principle could explain relatively few role obligations: parents may do nothing that gains them advantage from that role and yet have moral as well as legal responsibilities associated with it. The free-riding principle might seem more apt in the case of promising because people who make promises usually do seek to benefit from the institution: people often (though by no means always) promise in order to extract benefits from those to whom the promise is given. But even here the idea of free-riding seems misplaced. It seems odd to count keeping a promise as the contribution one makes to keeping a useful institution alive, particularly since the obligation a promise creates is an obligation to a particular person not society at large and particularly when, as in the case of a gratuitous promise, the promisor in fact receives no advantage from his promise at all.

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<sup>4</sup> Any citation?

<sup>5</sup> Citation? Rawls?

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There is a more basic objection to the free-riding argument, moreover. There is no general moral principle that requires me to contribute to the cost of producing what benefits me: I may be selfish when I pass by a street musician without tossing him a bill but I violate no obligation even if I have enjoyed his music – even if I have paused to hear more of it.<sup>7</sup> Of course promising is different: I do have an obligation when I promise because – well – I promised. But those philosophers who appeal to the general principle of fairness to explain why promising creates obligations cannot count, as part of the reason why fairness requires keeping promises, that promises create obligations. We find a better account of the moral force of promises and role conventions further back, in the two root principles of dignity whose implications we have been exploring for several chapters now. We begin with promises, and we begin that subject by considering certain occasions when promises play no role at all.

### *Promises*

#### *Prediction, Encouragement and Responsibility*

You cannot live without tempting or even encouraging others to make predictions about what you will do and to rely on those predictions in making their own plans. Governments, advertisers, rivals, family, lovers, friends and opponents try to predict what you will do or want or buy or prefer. It would be impossible – a crippling compromise of your responsibility to live well – for you to avoid encouraging such expectations or to avoid defeating some of them. I may agree to attend some conference because I think you are coming, but you do me no wrong, even if you know this, by deciding not to attend after all. (If we are friends, you should tell me, but

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<sup>7</sup> Cite Nozick on the sound truck. In *Anarchy, State and Utopia*.

that is all.) However, under some circumstances, it is at least arguable and sometimes plain that people do acquire responsibilities because they cultivated expectations in others. You might have said: “I know this doesn’t promise to be a riveting conference. But wouldn’t it be a good idea if we both went? We don’t get a chance much to talk and this would be an excellent opportunity?” Then matters would be different. But how different? Suppose after I accept you see a list of the speakers and realize that the conference would be worse than you thought: in fact a waste of time. You should tell me that you have changed your mind, of course. But do you have any obligation actually to attend the boring meeting just because I now must?

People disagree about situations like that one. Thomas Scanlon, whose investigations of promising have dominated contemporary discussions of the issue, endorses the following “Principle F,” which might be read to require you to attend.

“If (1) A voluntarily and intentionally leads B to expect that A will do X (unless B consents to A’s not doing so); (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) B knows that A has the beliefs and intentions just described; (5) A intends for B to know this, and knows that B does know it; and (6) B knows that A has this knowledge and intent; then, in the absence of special justification, A must do X unless B consents to X’s not being done.”<sup>8</sup>

There are several matters of degree incorporated in this formal statement: what degree of assurance must A intend to provide, for instance? But it is at least arguable that Principle F is satisfied by the conference case I describe. But other commentators disagree: Charles Fried, for example, imagines that I want you as a neighbor and therefore actively encourage you to buy

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<sup>8</sup> Scanlon, *What We Owe*, p.304.

land next to mine, telling you that I intend using my land for my own residence for the rest of my life.<sup>9</sup> But I suffer reverses and then have an opportunity to sell my land to a gas station chain. Fried believes, on balance, that I break no duty to you when I sell, although Scanlon's Principle F might seem to argue otherwise.

The disagreement should not surprise us. We have a general responsibility not to harm other people and when we encourage them to act on assumptions about what we will do and then defeat those expectations the question must arise whether we have harmed them, which is wrong, or only surprised them in the exercise of our continuing responsibility for our own lives, which they must accept. It is a difficult issue how we should interpret our two principles so as to adjudicate such cases. Society depends in a thousand ways on coordination made possible by deliberate intimations of preference and intention. So does commercial and professional life. A young doctor starting in a small community must do what he can to demonstrate an intention to remain so as to tempt patients from more established practices – perhaps, for instance, by furnishing and equipping his surgery lavishly. Nor can we vow never to defeat such expectations. After most local patients have shifted to the new doctor, and the only other doctor in the community has retired and moved away, the young doctor suddenly has a chance to join a teaching hospital with wonderful research facilities far away. What does he owe his new patients? What does he owe himself out of his ethical duty to make something valuable of his own life? We need answers that fit plausible interpretations of both principles.

People respond to such examples differently. Some believe mainly that a person who has deliberately encouraged reliance does have a responsibility not to disappoint that reliance. The doctor did what he could to persuade people to give up their old doctor, and he must not leave

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<sup>9</sup> Cite Fried on gas station. In his book on Promising.

them stranded now. But others believe that this asks too much. People should understand that circumstances change, and that they necessarily run some risk when they rely on even cultivated predictions. They should have appreciated the possibility that a young and ambitious doctor might be tempted to leave, and cannot now complain when he does. Much will turn, for most people, on distinct features of individual cases. How much would those who relied on the expectations the doctor cultivated suffer if he moved? Would it be difficult to tempt some other doctor to take over the surgery? Suppose the young doctor has himself found someone to replace him. Would that extinguish any duty he had to stay?

These moral controversies and uncertainties are inevitable but in some circumstances they would prove disabling and frustrating. You are less likely to help me plow my fields today, even if I have persuaded you that I intend, if you do, to help you plow yours tomorrow, if you think it controversial or doubtful that I would have any obligation if my circumstances changed. You are less likely to tell me that you look forward to seeing me at a conference if you worry that you might have violated an obligation to me if you later change your mind. The institution of promising offers a considerable measure of escape from these incapacities: it helps to resolve, in advance, the question whether a failure to satisfy deliberately aroused expectations counts as a form of betrayal or only the disappointment of surprise. Convention allow us to add something to each of my stories – a promise or an explicit denial of a promise – that in the circumstances I describe tips the moral balance and eliminates the moral uncertainty. We decide and declare that our non-performance would constitute betrayal by saying, “I promise.” We decide and declare that it would not, equally decisively, by saying, “But I don’t promise.” That is a touch hyperbolic and I will qualify it in a moment.

This is of course not an account of how promising arose; nor does it exhaust the convention's value. But it does locate the ground of the convention's moral force and it answers the objection that a mere convention cannot create a genuine obligation. Social practice figures in the explanation not because convention creates an obligation out of nothing but because it provides a vocabulary that allows no – or rather much less – room for doubt that non-performance would be an injury of an independently forbidden kind. We might compare this function of convention with that of stylized insult. Convention has made certain words terms of grave abuse: these include what are known as racial or sexual slurs. The conventions that attach special abuse to those phrases do not create new and distinct obligations. We do wrong to treat someone with contempt; convention establishes these epithets as stylized ways of showing contempt. Of course promising is entirely different from stylized abuse in its importance, value, and the uses to which it is properly put. But it is similar in that both institutions clarify and refine non-conventional ways of harming people and both therefore create new ways of breaching old duties.

Promising is not a form of magic that creates its own obligatory force. Scanlon is right: the institution gains its moral force from more general moral principles. But the practice is nevertheless genuinely innovative; it provides more than what Scanlon allowed it. He said that the institution offered a short-cut vocabulary for saying only that the conditions of his Principle F are met. (I expand on my reasons for thinking it provides more in a note.<sup>10</sup>) But in all but very

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<sup>10</sup> Scanlon's Principle F anticipates controversy of several kinds. It's various clauses can be satisfied to different degrees, and it may therefore be controversial whether its conditions are sufficiently satisfied in any particular case. It seems best, further, not to read these conditions as defining thresholds such that if any one condition is not satisfied to the requisite degree, no obligation of any kind is produced. We should rather read the conditions as pertinent not only to whether some obligation is incurred, but to the strength of any obligation that has been, and therefore to such questions as what would count as a satisfactory "special justification" for non-performance, or substitute performance, later. If you had called me several times urging me to go to the conference so that we could talk, the reassurance I would think I have been given would be greater than if you had mentioned the matter more casually, and the difference would then be pertinent not only to whether you had acquired some moral responsibility toward me but the strength of that responsibility – whether some conflicting and more important invitation you

rare circumstances, the force of a promise cannot be matched by any strategy of encouragement that falls short of a promise. Suppose I did everything I could, short of promising, to lead you to believe I would care for your cat when you next travel. I did that because I wanted you to care for my cat this weekend, which you did. I might have promised if that had proved necessary; after all I did intend to take your cat when the time came and I was anxious that you take mine now. Nevertheless many excuses that I might later think available because I did not promise would not be available if I had. Since I did not promise, I might think it good enough to say, for example, that I had just taken on a new writing assignment that would make it inconvenient to care for a cat. That would not have been good enough if I had promised. Promises are not absolute: I might have developed an allergy and have had to give away my own cat; in that case I would have been justified in renegeing. But promising automatically sets the bar much higher: the pressure of new work would not have excused me breaking a promise. Expressly *not* promising has even greater force. No matter what I said to induce you to predict that I would take your cat, almost any excuse would have been enough if I had said, “I very much look forward to having your cat with me when you’re away. Of course, I can’t actually commit myself for the future. I can’t promise.”

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subsequently received would provide an adequate excuse for skipping the conference I discussed with you, for instance. Some of Principle F’s clauses need not necessarily be satisfied in order that an obligation be created, moreover: I suggest later in the text that A may acquire an obligation even if B is not actually led to expect him to do as he has encouraged B to expect him to do, for instance. Other clauses may not be necessary either; it might be debated, for instance, whether A must know that B wants reassurance – it may be enough that A strongly wants to reassure him and that B knows that even if B doesn’t particularly want it. We should therefore say that, absent an explicit promise or promise denial, the general situations Principle F contemplates are morally fluid: much depends on circumstance and reasonable people can disagree in most circumstances. An explicit promise or promise denial makes the situation markedly less fluid: it puts substantial weight on the scale either for or against an obligation and for or against the propriety of non-performance for various reasons. It may not be decisive – the questions of interpretation and excuse I discuss in the text still arise – but the weight added is substantial. The institution adds a valuable substantive mechanism to the moral landscape, not just a shorthand vocabulary.

Promising is different from other ways of encouraging expectations in another important respect. If I try to make you believe that I will act in a certain way but you do not believe me, or if you do believe me but you do not in any way rely on your prediction, or if you do rely on it but you will nevertheless suffer no disadvantage if I change my mind, then the case that I am obliged is much weakened and perhaps entirely extinguished. How much it is weakened depends on circumstances. If I only encouraged you to think I would keep your cat for you, in order to get you to keep mine, and did not promise, then I can change my mind if, for example, other neighbors would be happy to take your cat and there is no reason why you shouldn't be as happy to give it to one of them. If I had actually promised, however, then although many circumstances would mitigate my fault if I reneged, these would not erase my obligation. Except in very special cases, you would be entitled to insist if you wanted to and I would wrong you if I refused.

Promising has that force because it resolves a further question that might have no crisp or determinate answer absent a promise. When is the harm I cause by disappointing an expectation I encouraged too small to keep any obligation alive? The institution of promising stipulates that the person who received the promise must normally be allowed the last word on that matter. So promising has a moral force that no amount of cultivating expectations without a promise can achieve. That helps to explain why philosophers have worried that the institution purports to create obligations out of nothing, and that we must therefore suppose some special duty to uphold useful practices or not to ride free in order to explain how promising can work that logical miracle. But no miracle is required once we understand that the institution presupposes and builds on a standing and basic duty not to harm other people. We can then see a creative interaction between that general but imprecise duty and its refinement in convention.

### *Circularity?*

This justification of performative obligations is in most respects like Scanlon's. He appeals to his Principle F to show that promising is only a special case of incurring responsibilities by leading others to form expectations. But he finds the following difficulty in his own argument. Suppose A promises to help B plow B's fields tomorrow. According to the first step in Principle F, A incurs an obligation only if he succeeds in convincing B that he will help plow the field.

However A cannot convince B of that unless B comes to think that A will have a reason to plow. In some circumstances the only reason B might sensibly suppose A to have (after B has finished helping A plow his field) is the obligation he supposes that A incurred through his promise. So the argument for an obligation cannot get started: its first step presupposes its conclusion.<sup>11</sup>

However the first step in Scanlon's principle F is too strong, at least when an actual promise is in play. It is not necessary that A convince B that he will keep his promise in order for A to incur an obligation. He does so, if he promises and other conditions are met, even if B thinks it likely that A will renege but thinks he has a good chance of then shaming him into performing. Or if B wants an occasion, for some reason, to display A's bad character to the world. Or if B is uncertain for some reason whether A's promise really is binding – perhaps A did not realize how much more difficult B's field is to plow than his own and B is uncertain whether A's mistake relieves him from his promise – and still have helped A because he thinks it possible that A will feel obliged. In none of these cases would it follow that A's promise did not really bind him: that

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<sup>11</sup> Scanlon hopes to solve this problem by appealing to a further principle that forbids A to promise unless he reasonably believes that he will perform. B is entitled to believe that A respects that principle as well, and therefore to think that A will perform without relying on the assumption that A incurs an obligation to perform under Principle L. Once B has formed that belief, the conditions of the latter principle are satisfied and A does have that obligation. See Scanlon, *What we Owe*, 308. Critics reasonably comment that B should not conclude from the fact that A has a reasonable belief that he will perform when he makes the promise that he will in fact have a reason to perform at a later time. See, e.g., Niko Kolodny and R. Jay Wallace, *Promises and Practices Revisited*, 2003 *Philosophy & Public Affairs*, 119.

depends on the rest of the case for an obligation not on B's state of mind. If A had not promised, but had strenuously encouraged B to rely on an expectation, then B's state of mind would have been more important in deciding whether A had incurred an obligation. But it would not even then be decisive: A might have been obliged even if B had been doubtful whether he was but hoped A would think he was. A's obligation in those circumstances would be more controversial than if he had promised, however, so this is another example of the kind of uncertainty an explicit promise – or refusal to promise – helps to resolve. Once we adjust Principle F in that necessary way for the special case of promising, the worrying circularity disappears. Promises solidify obligations because they add a normally decisive weight to the case that it would be wrong for the promisor not to perform; that additional weight is not cancelled when the promisee does not actually count on or even expect performance.

### *Promises and Interpretation*

Promises – or alleged promises – raise moral questions as well as settling them. A promise does not preempt the moral neighborhood. A bare promise, without any background of responsibility, may be inert. I pick your name at random from a telephone book and write you thus: "I hereby promise you that next July I will walk from Land's End to John O'Groats. Signed Yr. Obt. Servant Ronald." Even in saner cases, we may be uncertain whether someone has really promised, what he has promised, and whether he really has to keep his promises. Since promising is not a self-contained practice that generates obligations automatically but is rather parasitic on the much more general duty not to harm others, these questions do not call for inspection of some promising rule book. They ask for an interpretation of the practices of promising that locates that practice within the wider network of our overall response to the ethical challenges I described.

We begin with what seems the essential core of any successful interpretation: the point of promising is to set the bar very high for successful excuses for disappointing deliberately encouraged expectations. A promise makes a whole range of excuses ineligible that would be sufficient if reliance had been encouraged in some other way. So we must also set the bar high for counting some act or gesture as a promise: the burden lies on someone who claims rather than denies a promise, and genuine ambiguity counts against the putative beneficiary of the promise. (Contract law is a different and more complex matter.) But once a promise is assumed, we must test the excuses someone offers for breaking that promise against a standard as demanding as that we use to test excuses for undoubted harms – assault or damage to someone’s property, for instance. In each of these cases, of course, the level of excuse required is sensitive to the damage actually suffered. Breaking a promise to dine is ordinarily not grave, but neither is a trivial assault or a token injury. But the fact that damage is negligible – or even that there is no damage at all – is not in itself an excuse. I am entitled that you keep a promise to dine even if one guest less doesn’t really matter, and your having received a better invitation won’t do if I insist on your coming, even if you would be losing much more than I gain. None of these near platitudes offers an algorithm for testing promises and their breach, of course. We can only say that we must assign a high level of seriousness to promises when we integrate our judgments about breach with our other convictions about not harming people.

### *Associative Obligations*

#### *Responsibility and Role.*

Why should the fact that everyone else in my community thinks that I have moral obligations to my children, parents, lovers, friends, colleagues and fellow citizens play any role in the case that

I do have those obligations? The answer lies, once again, in a creative interaction between our very general responsibility not to harm other people and the social practices that refine that responsibility. In some cases the mechanism of interaction is straightforward. Children need special care; if the community's practices assign the responsibility for that care to a child's parents, then no one else will supply it and its parents, just for that reason, have a duty to do so. In such cases, though conventions might have been different – in some kibbutzim they are – the fact that they have taken the shape they have accounts for the responsibilities they impose.<sup>12</sup> But in other cases the alternative to assigning some people a special responsibility of care is not that others will be assigned that special responsibility but that no one will. A community in which no one has special responsibilities to sexual partners or colleagues or in virtue of friendship, or in which children have no special responsibility to take care of parents, would seem impoverished to us, but no one else would be expected to pick up the special responsibilities we think these relationships bring. It is the internal character of these relationships not the fact that some assignment of special responsibility is evidently needed that drives the responsibilities that the community's conventions recognize and shape. And recognize and shape differently in different communities. So we must find a justification, for these cases, of the role of those conventions. The best justification, I believe, once again describes a repeated feedback loop between a special responsibility we have to people in special relationships with us, just in the nature of the case, and a set of social practices that progressively reduce the uncertainties inherent in that kind of responsibility. It might be best to state my suggestion initially in compressed form and then to elaborate it through examples. The second principle of dignity requires that we assume a special responsibility for our own lives: it forbids what I described as subordination. In certain

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<sup>12</sup> Thomas Scanlon reminded me of this practical argument for some role obligations.

relationships we defer to the interests, opinions, authority or well-being of others in a way that would count as subordination if it was not in some form a reciprocal deference. The deference takes different forms in different relationships and the necessary reciprocation need not be in kind but might take another form. But unless the parties to the relationship accept some kind or degree of special responsibilities to one another the dignity of the party denied that special concern is compromised.

In our political life, for example, we defer to the authority of others – a sovereign, a parliament or our fellow citizens – when we accept that we have an obligation to do what they command even when we disagree with its fairness or wisdom. That kind of obligation lies at one end of a spectrum of intimacy; I discuss it separately later in the chapter. Sexual intimacy defines the other end of that spectrum: people who accept that they are lovers place themselves, body and soul, in each other's hands. Political association, sexual intimacy and other forms of association I discuss in this section are enormously ethically valuable. They contribute both to the goodness of our lives and our success in living our lives. But it is important to that benefit that they are *risky* relationships: they make each party not only open to a special kind of benefit but vulnerable to a special kind of harm: the violation of the dignity demanded by our second principle that follows from a unilateral abdication of special responsibility for one's own life.

That seems to me the moral nerve of genuine associative obligation. We saw, in the last two chapters, how we cheat others of what their dignity demands, through the first principle, when we display an inappropriately low level of concern for them. Role relationships create genuine obligations because they raise the level, for some people, of the concern that it is an insult to deny. The second principle figures in the explanation why. You do not deny or compromise your special responsibility for your own life if you have made the goodness of your own life

vulnerable to what happens to others, or if you have granted them partial control over your own life, when these mergers of life and fate are matched by a like heightened concern for you. But, except in special circumstances, a person's responsibility is compromised when that merger is unilateral; when the other party to what he takes to be a special relationship treats him as he would any stranger. The benefit he sought, just in the fact of a relationship he valued, is then replaced not just by disappointment but also by a kind of subordination.

It is the special importance of a parent's love for his children and their love for him, and the responsibilities that flow naturally from that love, that redeems what would otherwise be slavery in both directions. Parents' freedom to direct their own lives is dramatically compromised by the responsibility of parenthood; children's subordination to their parents will be, for a time, almost complete. Dickens caught the moral complexity of these facts in his invention of Mrs. Jelleby. She neglected her own children, who lived in chaotic squalor, in order to pursue her "telescopic philanthropy." We do not count her as saintly for that choice; her show of concern for the poor of Asia made the total control she nevertheless exercised over her family seem tyranny. She was ridiculous not because she cared less for her children than for strangers but because she did not care much more for them.

Other, less intense, relationships have their own internal logic. Partnership enterprises of various sorts, whether formal or informal, are deceitful if one partner lacks a commitment to the joint success of both. The special concern partnership demands is of course much more limited than relationships to which love is central. I must show special concern for my fellow-worker in his professional life but not for his life overall. Unless, of course, he is also my friend because friendship is special in yet a different way. Seeking and finding pleasure in the continued company of another person need not imply love but it would be meanly instrumental if it did not

involve, as Aristotle put it, a concern for that person for his own sake that is greater than one's concern for strangers. Displays of friendship would be another kind of indignity if they did not reflect a special and reciprocal concern for a friend's fate.

I anticipate two contrary objections I should notice now. My account may strike you as too moralized. You might prefer to emphasize the evolutionary importance and continuing benefits of the relationships I have in mind and therefore of the obligations that protect those relationships; you might say that it is entirely natural, for instance, that lovers and parents and children should feel responsibility for one another. As throughout, however, we seek a justification for these obligations not an explanation of their origin or subsistence. The natural, ubiquitous and powerful emotional force of these relationships does indeed have justifying importance: it is because the relationships almost invariably carry a natural and powerful emotional force that indignity is palpable when that force is absent or bogus. But it is the harm inflicted by that indignity, not the evolutionary value of those emotions, that grounds the obligation not to inflict that special kind of harm.

You might, on the other hand, think my account ethically defective: decent people do not see themselves as obliged to care for their children or lovers or parents or friends: they just do care for them and act wholly instinctively out of that concern. If they were to pause to reflect on exactly what they owe, or when their failure would compromise someone's dignity, they would be guilty of the now famous one thought too many. Once again, however, the objection would miss the point. Perhaps decent people are never aware of their obligations to those close to them; perhaps they would resent the suggestion that a sense of obligation in any way explains their behavior. But they do have those obligations nevertheless and from time to time they do sense their force: when they feel no desire, for instance, to endure a troublesome old parent.

Their obligations do not disappear when they do ignore them, as the troublesome old parent may make plain when the occasion arises. So we must account for the obligations as well as the behavior of people who are never conscious and never need to be reminded of them.

### *Convention and Responsibility*

I have tried to describe a basis for role obligation in the general moral principles we have already identified in earlier chapters, principles that demand concern and forbid harm, without relying yet on the moral force of convention. But the relationships that generate these obligations cannot appear except in society and therefore cannot be entirely innocent of the impact of convention. Even those relationships most dominated by biology carry cultural freight: identifying someone as a parent adds something to, and does not even assume, a biological fact and what it adds differs to some degree from place to place, time to time. That fact does not make role obligation “only conventional” in a disparaging sense. The obligations are genuine because convention does not create but only focuses and shapes the more general principles and responsibilities it assumes.

First, the more detailed the conventions, the less room for uncertainty they leave as to what would count as the forbidden harm. It would be at best unclear, absent any conventional instruction, who counts as a member of my family to whom I owe special concern. Or what friendship permits or requires by way of favoritism in employment. Social practice reduces these areas of uncertainty; it does this differently in different cultures and also over time. Second, convention sharply increase the risk to dignity when these responsibilities so refined are ignored; it increases the risk by attaching a social and not merely personal meaning to any failure to respect the relationship. Because role conventions stipulate which acts are required or forbidden

by a special relationship they establish a conventional vocabulary of behavior that either confirms or denies the mutual concern that a particular form of association presupposes.

The analogy I offered earlier to other forms of social meaning, including racial slurs, is in point here as well. Just as it is not possible to free a word that has been brought into the lexicon of hate from that meaning without elaborate scaffolding of explanation, so it is not possible to free a denial of help demanded by a role convention from the disrespect it signals without an equally elaborate and hazardous explanation. So convention strengthens as well as shapes role obligations. The expectations they nourish cannot be dismissed as mere predictions with no moral force because they are supported not just by the practices themselves but by the more basic responsibilities the practices refine and protect. The obligation drives the expectation rather than the other way around, and the obligation does not cease when the expectation perishes – when parents become resigned to their children's indifference, for instance. Or vice versa.

Interaction between background responsibility and convention explains a further and crucial feature of associational obligations.. Role conventions do not impose genuine associative obligations automatically: the conventions must satisfy independent ethical and moral tests. Sexist or racist practices, or those that define honor among murderers, drug dealers or thieves, impose no genuine obligation on those they purport to oblige no matter how thoroughly people seem to accept those obligations. Mafia soldiers form expectations, they find the practices of their organization distinctly useful, they take advantage of those practices, and they regard any breach of loyalty by others as an indignity. Other soldiers dangerously regard them as free riders unless they accept the burdens of the organization as well. But once we realize that role practices impose genuine obligations only because – and therefore only when – they allow their members more effectively to meet their standing ethical and moral responsibilities, then we also realize

that these practices cannot impose obligations when they act as obstacles rather than means to that goal. Social practices create genuine obligations only when they respect the two principles of dignity: only when they are consistent with an equal appreciation of the importance of all human lives and only when they do not license the kind of harm to others that is forbidden by that assumption. They demand special treatment for certain people, but they cannot license hatred or murder.

*Interpretation and Role.*

I have concentrated so far on how social practices and conventions impose actual obligations. The question *which* obligations they impose is of much greater practical importance. Role practices, as I said, reduce the uncertainty people face in deciding what they owe people close to them, but they hardly eliminate that uncertainty. Even the most explicit of role conventions – those defining the duties of parents toward young children, for example – leave many questions unresolved. They do not settle, for example, just as a matter of convention, the troubling question whether parents who can afford private education are permitted or required to use relatively poor state schooling instead. Many important role practices – the conventions of friendship, for instance – do little more than recognize a category calling for and justifying special treatment without any precise account of what that special treatment must or may entail. Who exactly is my friend? Where is the line to be drawn between friendship and acquaintance? Can I terminate an inconvenient friendship at will, just by so declaring? Or do friendships, once formed, have more staying power? If so, how and when do they end? What must I do for even a close friend? Help hide his crimes from the police?

These familiar questions roll on indefinitely, even about only one role practice. The traditional explanations of associative obligation that I mentioned early in the chapter offer no help in

answering them. We may accept a duty to bear the burdens as well as the benefits of a social practice, but that cannot help us decide what those burdens are. We may recognize a duty to support an existing institution that we believe to be useful, but that doesn't help in deciding what that existing institution actually does require. We may commit ourselves to respect the expectations that a social practice generates, but that commitment does not help us to choose between people's expectations when these disagree. These purported justifications of role practices are unhelpful because they take these practices to be *only* matters of convention and pure conventions are exhausted by the scope of consensus.

Once we recognize that role practices clarify genuine but indeterminate responsibilities flowing from the nature of the relationship on which they are built, we have a basis for interpreting them in the way we interpret anything else: the long discussion of interpretation in Chapters 7 and 8 is therefore pertinent here. In an earlier book I offered an example specifically tailored to the interpretation of conventional practices thought to impose obligations.<sup>13</sup> We sometimes disagree, even within a single community, about what courtesy requires, particularly when old conventions of respect are eroding. We each form our opinions through mostly unreflective but nevertheless controversial assumptions about the practice's underlying point. I developed a much more extended and important example in the same book about the conventional political association that we will consider next in this chapter and later in Chapter 20. Lawyers and judges interpret legal obligation through assumptions that differ from lawyer to lawyer, at least in detail, about the principles that provide the best justification of legal practice as a whole.

We interpret other role practices in that way when we make more detailed judgments about associational obligations. I do not intend an absurdity: that when a friend asks you for financial

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<sup>13</sup> Cite *Law's Empire*.

help, and you are reluctant, you ponder the underlying point of friendship to decide whether you must. I rather mean that some reaction to his request will seem right to you because of your unstudied understanding of what friendship is and means, and that your decision will solidify as well as give effect to that understanding, and so govern your reaction to later and parallel questions about what you owe to friends. These are interpretive reactions. If we tried to reconstruct them in argumentative form, we would begin with some assumption about what kind of special concern the relationship we call friendship presumes and requires. That is simply to repeat the claims of the earlier discussion of interpretation and to apply them generally to the phenomenon of associative obligation.

### *Political Obligation*

#### *Legitimacy*

Legal and political philosophers debate whether people have a moral obligation to obey the laws of their community just because they are its laws – whether, that is, people have what is often called *political* obligation. Of course we often have an independent moral reason to do what the law requires or not to do what it proscribes. Laws condemn murder and murder is wrong. But the question of political obligation arises when we have no other reason to do what the law requires. A law is adopted by officials I voted against and I believe that law to be unwise in policy and wrong in principle. I may have an important practical reason to obey this law; I may be arrested or fined if I do not. But does the bare fact that this is the law give me a further, distinctly moral reason to obey it? That is not to ask whether we are ever justified in disobeying a law. I can accept that I have a standing obligation, in principle, to obey the laws of our community and yet think that some particular law is so unjust or so brutally unwise that I am justified in disobeying

it. That is the opinion of the very large number of people who believe that civil disobedience – disobedience to protest unjust laws – is sometimes morally permitted and even required. For them, the moral permissibility of disobedience in these circumstances is an exception to a more general principle that requires obedience even to laws we disapprove but do not think wicked.

A government is *legitimate*, let us say, if its officials have a moral right to enforce its laws and its citizens a moral obligation to obey those laws, in both cases just because they are its laws.

Legitimacy is not the same as justice. Government may be legitimate but not fully just – many states are legitimate but few if any are fully just. It may be illegitimate – it may have gained power by recent conquest – even though the laws it now enforces are in themselves just. We concentrate on justice in Part 5 but on legitimacy now. Some philosophers – they are called “anarchists” even though most of them lack beards or bombs – deny that any state can be legitimate as I have just defined this.<sup>14</sup> They say that the bare fact that a law has been passed, even in a community whose structures and laws are generally just, provides no independent moral reason for obeying that law. We have a duty to obey the law when some other reason argues that we must: if the law improves social justice, for example, or if obeying it would make the community as a whole better off. But not, they insist, just because the law was adopted according to the constitutional procedures that the political practices and conventions of our community stipulate.

Some anarchists rely on a general philosophical thesis: they believe that no one has an obligation unless he has voluntarily accepted that obligation. They are right to think that political obligation is not voluntary, except in the relatively rare cases of naturalization. The once popular idea that people voluntarily accept an obligation to obey the laws of their community when they do not

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<sup>14</sup> Cite some anarchists. Wolfe?

leave that community is too silly any longer to take seriously. Political philosophers have tested many other ways of defending the idea that legitimacy depends on the unanimous consent – in some pertinent sense of consent – of the governed. But these have all failed and they are anyway unnecessary because the popular assumption that obligations are genuine only if voluntary is itself untenable. The moral responsibilities we studied in the last two chapters are not voluntary: I have no choice whether I must rescue someone drowning in front of me when I can do so easily. Some of the associational obligations discussed earlier in this chapter are also involuntary – children have no choice in selecting parents – and most of the others are only partly voluntary: most friendships, for instance, arise casually and we often have friends we had no explicit intention of making friends. Philosophers who assume that only voluntary obligations can be genuine contradict themselves, moreover, because they assume that the obligation to keep a promise or respect an oath is genuine even though that obligation was itself never accepted. An involuntary obligation lies behind any voluntary one.

But that is not a positive argument for political obligation: it only denies that anarchists can win their case by appeal to some general principle about obligation and consent. Anarchists are right to reject many other positive arguments that have been suggested. You do not have a moral obligation to obey the law of your community because others expect you to obey. Or because since you have taken advantage of the benefits of political association you have an obligation to accept the burdens. If people do have political obligations – if the anarchists are wrong – then this must be a special case of associational obligation: we must have political obligations because we are related to our fellow citizens in some special way that gives each of us special responsibilities to the others independently of any consent.

It might seem problematic that we could have that kind of special relations with all fellow citizens, however. We know our parents, children, lovers, and friends intimately, and we have at least a personal acquaintance with colleagues and even neighbors. But that is not true of fellow citizens of anything larger than a tiny community: many Americans have denser personal relations with foreigners than with all but a few fellow citizens. It may therefore seem mysterious what associational obligations could hold among people just because they salute – if they do salute – the same flag. We will not find the answer in any history of how political communities came to be formed or reformed. It is only a series of accidents of history and geography – where rivers run and where kings fought and loved – that made the political boundaries of the United States or France or any other place what they are. We must seek the moral force of fellow citizenship not in anything that has preceded political boundaries or explains them historically, but rather in the contemporary consequences of historical and geographical accidents.

One consequence is prominent. Some members of any political community exercise coercive power over others: they threaten punishment for disobedience and they have the power to carry out the threat. That state of affairs threatens dignity in both directions: it threatens both our principles. How can I, given my special responsibility for my own life, accept the dominion of others? How can I, given my respect for the objective importance of other people's lives, join in forcing them to do as I wish? Everyone who is not a dictator faces the first of these challenges. A great many people – in a genuine democracy almost all adults – face the second as well, and it is equally sharp. We may not deliberately harm even strangers for our own advantage. That applies to collective action as well as individual acts: if I combined with allies to imprison someone or steal his property I would show the same contempt for our victim, and therefore for myself, as if

I acted alone. Democratic politics raises the possibility that we all harm each other in that way every day.

Here, then, is our situation. Government – coercive collective power – is obviously indispensable to any sizeable community. But collective coercive power threatens violations of both our principles of dignity. So we must ask: when does collective power *not* violate those principles? This is not the question whether people have a duty to submit themselves to such power. It is a philosophers' parlor game (Thomas Hobbes and John Locke were early players) to fantasize that people once lived in a “state of nature” under no scheme of governance and then to consider what reasons people in that situation might have to institute governments among themselves. The popularity of this exercise helps to account for the mistake I mentioned just now: the unfortunate assumption that legitimacy depends on the unanimous consent of the governed and therefore on some fantastical history or hypothetical fiction about that consent. In any case, that is not our question now. Familiar governments do exist, their boundaries and hence claims of dominion are the product of historical accident, and we are each born or brought into one of them. Each of us who is designated a citizen in any one of these is subject to the special power of other citizens and may – in a democracy does – exercise reciprocal power over them. How can dignity be protected in these circumstances?

Only if government governs in such a way as to treat all those it governs as partners in a collective enterprise so that each can treat collective decisions – even those he disapproves – as issuing from a process in which he has an equal voice. (We will explore in some detail what that means in Part 5; I consider, just below, whether it means that only democracies are legitimate.) Each citizen therefore owes himself, out of concern for his own dignity, and owes fellow citizens out of concern for theirs, a responsibility to do his part in securing that kind of government. This

is a very general and fundamental responsibility. It includes the responsibility that is our topic now: to obey the laws of the community unless those laws themselves outrage dignity. For partnership is possible, even in principle, only when partners accept that a collective decision is binding on all. Otherwise there is no partnership in coercive government but only a tyranny of some over all. The rule of law, among its other virtues, is an egalitarian principle. I owe it to my fellow citizens, and they owe it to me, to obey the law.

But citizens' responsibility to maintain the conditions of dignity in the face of coercive government includes a great deal more than political obligation so narrowly defined. We all have an ethical and moral responsibility each to participate in politics to try to secure *all* the conditions of legitimate government. So all of Part 5 – its canvas of rights, equality, liberty and democracy – elaborates what we owe each other in politics. Political obligation narrowly defined is often treated as a separate, distinct, topic of political morality. It is not: though legitimacy is not the same as justice the two ideas overlap because the citizens of a state must mostly and mainly seek justice to achieve legitimacy. Their own dignity demands that their government treats the lives of all citizens as equally important and respects the responsibility and right of each of them to make his own decisions about ethical values. These are essential conditions lest coercive government betray the dignity of those it governs.

It follows that people have no obligation to obey the laws of those political communities that claim dominion over them but whose procedures cannot even plausibly be understood as displaying equal concern for them. Civil disobedience is appropriate, provided other necessary conditions are met, when the overall conditions of political obligation exist – the procedures and general structure of law do reflect at least some colorable conception of equal concern and respect for all – but some particular law is so strikingly unjust that disobedience is justified as an

exception. In contrast, political obligation wholly fails for any group that is systematically denigrated in second-class citizenship – or none at all – as in the ante-bellum South, Nazi Germany, apartheid South Africa, the genocidal nations of Africa and the Soviet tyranny.

Does political obligation hold only in democracies? We might be tempted to say so because we may think that a state does not express an equal concern for all its citizens, or respect the special responsibility of each for his own life, if it allows some of them a special status of coercive power from which others are systematically excluded. No feasible principle of exclusion – by blood, wealth or capacity – seems finally consistent with equal concern and respect. If we accept that tempting conclusion, however, then we must also accept that most of the subjects of most of the political communities over history had no moral duty to obey the laws of their community. That seems counter-intuitive; certainly it contradicts what I assume to be the convictions of most people in, for example, stable and reasonably just monarchies. It seems better to allow the question of political obligation to turn not on the traditional categories of government but on a more detailed examination of the character and spirit of working political practices. That is why I spoke of a colorable rather than a persuasive conception of equal concern and respect. Some governments that might be called democratic on standard tests would then appear actually to lack legitimacy – those in which a racial or other majority systematically discriminates against some minority it allows to vote, for instance – and some forms of what John Rawls called a “hierarchal” society would seem to qualify as legitimate.<sup>15</sup> It would also be wise to treat legitimacy, and hence political obligation, as a matter of degree rather than absolute threshold. We might say that citizens of genuine partnership democracies have stronger political obligations

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<sup>15</sup> Cite Rawls, Peoples.

– less susceptible to exceptions for civil disobedience, perhaps – than those of other forms of government.<sup>16</sup>

Though this discussion of legitimacy provides a bridge to the next part of the book, about politics, the obligations discussed here are individual obligations. They define the extent of the special responsibilities citizens of a political community each owes the others: they owe each other special concern in the exercise of political power. I have a duty, when I vote or lobby for a change in the national tax scheme, to try to establish a just scheme rather than any different one that favors me or my family, and I must count the impact on the resources of everyone in the community as equally important in deciding what is fair. I do not need to count the impact of a tax scheme on foreigners in the same way. I owe them the decent treatment discussed in Chapter 12, but not the special concern I owe fellow citizens, because I am not part of the process through which the obligations of foreigners are fixed.<sup>17</sup> Nevertheless my special responsibility for fellow citizens is not a general responsibility. Here is an absurd example in the spirit of others I have used: if I can save one of two drowning swimmers, I have no special reason to save the American rather than the foreigner. Certainly I have no reason to save one American when I could save two foreigners instead. My responsibilities to my countrymen are limited to my role in the processes that settle what their political rights and obligations will be, including my own part in upholding the rule of law that is essential to my and their dignity.

#### *Tribal Obligations?*

We have just been discussing obligation that arises from the special facts, powers and vulnerabilities of political association. Many, perhaps most, people cherish other special

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<sup>16</sup> See Chapter 19.

<sup>17</sup> Cite Nagel PAPA article.

relationships beyond those I discussed: these center largely on relationships that are in different ways cultural and historical rather than biological, social or political. American Jews very often feel a special concern for other Jews: they give particularly to charities that benefit Jews, for instance, or work for causes they think, in the conventional phrase, good for their people. Blacks, ethnic Poles across the world, people who speak the same language whether across national political boundaries or within multi-lingual states, often feel a similar tug to favor other members of that group in some way. They sometimes, in some circumstances, speak of a right of such groups to something mysteriously called self-determination.

It is therefore important to notice that nothing in the argument of this chapter supports those assumptions of tribal loyalty, no matter how common or expected they might be. My argument fixed on standing ethical and moral features of our relationships with others: relationships that for different reasons threaten indignity if they are not structured by some special and shared concern. Political association is among these for reasons we have just canvassed: coercive government destroys dignity without partnership. But the different popular forms of tribal association have no such features. I have no connection with other Jews, just in virtue of some questionable and in any case dimly shared ancestry, that requires my singling them out for special concern or special treatment. I owe them, of course, what I owe everyone: the respect due a human being. But I have no relationship with fellow Jews (other than my friendship with some of them, friendship in which cultural or religious association might indeed have played a causal role) that would make that relationship deceitful or a sham or tyranny without special concern for them, and I participate in no political or other processes that touches them distinctly. I have neither license nor need for any special treatment of or heightened concern for them. I accept a responsibility to support the state of Israel when I can do so justly because of the terrible

circumstances in which that state was born and the dangers it now faces. But that responsibility is shared by Jew and non-Jew alike, and of course it does not include any obligation to support any violation of international law or human rights of which that nation may be guilty. Blacks may feel a parallel concern to eradicate the lingering stereotype and discrimination that has caused such pain and injustice in the United States and elsewhere; but that is a responsibility, again, that they share with whites as much as fellow blacks.

I realize that many people believe that their racial, national, religious and linguistic connections are of central importance to their lives; they will find my dismissals bewildering. Perhaps these emotional attachments, or some of them, have a genetic foundation; if so it will prove particularly hard to ignore and particularly pointless to disparage them. But neither popularity nor genetic foundation can give them moral significance or justification, and though the examples I just cited may seem relatively benign, tribal passions have been and sadly remain one of the greatest forces for great evil. Throw a dart at a spinning globe and the odds are good that it will land where tribes of race, religion or language are killing each other and destroying their communities. These hatreds may be as enduring as they are destructive, and we should have no illusions that they will disappear or even ebb from human affairs. I only insist that nothing in the argument of this chapter lends them any moral or ethical support.

## Chapter 20

### Law

#### *Law and Morals*

I have written even more about law than about other parts of political morality and my aim in this chapter is not to summarize my jurisprudential views in any detail but rather to show how these form part of the integrated scheme of value this book imagines.<sup>18</sup> I can therefore be – at least relatively – brief. I concentrate on what is no doubt the hoariest of the chestnuts burning legal philosophers’ fingers for centuries. What is the relation between law and morals? I begin by describing how that problem has traditionally been conceived by almost all legal philosophers including, once, myself and then argue for a sharp revision in how we understand the issues in play.

Here is the orthodox picture. “Law” and “morals” describe different collections of norms. The differences are deep and important. Law belongs to a particular community. Morality does not: it consists of a set of standards or norms that have imperative force for everyone. Law is, at least for the most part, made by human beings, through contingent decisions and practices of different sorts. It is a contingent fact that the law in England requires people to compensate others whom they injure by their negligent acts. Morality is not made by anyone (except, on some views, God) and it is not contingent on any human decision or practice. It is a necessary not contingent fact

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<sup>18</sup> Cite Taking Rights Seriously, A Matter of Principle, Law’s Empire and Justice in Robes.

that people who injure others negligently have a moral obligation to compensate them if they can.

I should add that I am describing morality as most people understand it, and as I described it in earlier parts of this book. Some philosophers reject this description: they are conventionalists or relativists. They think that morality is more like law in all the ways I distinguished: that it belongs to communities, that it is made by people, that it is contingent. I suggested earlier why I believe this view is indefensible: for now I only mean to describe morality as you and I understand it. But the orthodox picture explains just as well how relativists and conventionalists see the relation between law and morals. They agree that these are different systems of norms, and that problems arise about the connections between them, even though they think that both law and morality are man-made.

The classical jurisprudential question asks: how are these two different collections of norms related or connected? One kind of connection is obvious. When a community decides what legal norms to create it should be guided and restrained by morality. It should not, except in very exceptional emergency circumstances, make laws it believes to be deeply unjust. The classical question asks about a different kind of connection. How does the content of each system affect the content of the other as things actually stand? How far do our moral obligations and responsibilities depend on what the law in fact provides? Do we have, for instance, a moral obligation to obey the law? How far do our legal rights and obligations depend, as things stand, on what morality requires? Can an immoral rule really be part of the law?

We reviewed the first set of questions in Chapter 14. We concentrate now on the second set of questions: how far is morality relevant in fixing law's content on any particular issue? Lawyers and legal philosophers have defended a great variety of theories, each interestingly different from

the others. But these theories fall into three groups that textbooks recognize: we can call the first group “natural law,” the second “legal positivism,” and the third “interpretivism”. These labels are not important, however, because nothing in the argument I’ll make – that the traditional way of understanding all these theories is deeply misleading – depends on my labels’ historical accuracy.

Here is a very general account of each group, ignoring nuance. The natural law theory gives morality a veto over law. If a community purports to add some rule to the system of its laws, but the law is morally outrageous, then outrageous rule is not actually law. Positivism, on the other hand, declares the complete independence of the two systems. What the law is depends only on historical matters of fact: it depends finally on what the community in question, as a matter of custom and practice, accepts as law.<sup>19</sup> If an unjust law meets the community’s accepted test for law – if it was adopted by a legislature and everyone agrees that the legislature is the supreme lawmaker – then the unjust law really is law.

Interpretivism, the third general theory, does not hold that morality has a veto over law, and it is therefore different from natural law. But it also denies that law and morals are wholly independent systems. It argues that law includes not only the specific rules enacted in accordance with the community’s accepted practices, but also the principles that provide the best justification in morality of those enacted rules; the law includes rules that follow from those justifying principles even though those rules were never enacted. Interpretivism, in other words, adopts for law the process of reasoning I have defended much more generally – across all of the

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<sup>19</sup> Exception for “soft” positivism.

interpretive domains – in this book. It treats law as an interpretive concept.<sup>20</sup> It treats lawyers' claims about what the law holds or requires on some matter as reports of an argument that is interpretive at its core even though most of the interpretive work is almost always hidden.

Forgive a paragraph of autobiography. When, more than forty years ago, I first tried to defend interpretivism, I defended it within this orthodox two-systems picture. I assumed that law and morals are different systems of norms and that the crucial question is how they interact. So I said what I have just said: that the law includes not just enacted rules, or rules with pedigree, but justifying principles as well. I soon came to think, however, that the two-systems picture of the problem was itself flawed, and I began to approach the issue through a very different picture. I did not appreciate the nature of that picture, however, or how different it was from the orthodox model, until much later when I began to consider the larger issues of this book.<sup>21</sup>

#### *Analytic Jurisprudence*

There is a flaw in the two-systems picture. Once we take law and morality to compose separate systems of norms there is no neutral standpoint from which the connections between the supposed two systems can be adjudicated. I just distinguished natural law, positivism and interpretivism. These hold that morality provides a veto over law, that law is independent of morality, and that morality enters law through the interpretive character of legal reasoning. Where shall we turn for our answer to which of these accounts is most accurate or otherwise better? Is this a moral question or a legal question? Either choice yields a circular argument with much too short a radius.

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<sup>20</sup> More strictly speaking it treats the doctrinal concept of law – the concept we use when we declare what “the law” requires or permits on some matter – as an interpretive concept. See my book, *Justice in Robes*.

<sup>21</sup> Reference to *Introduction to Justice in Robes*.

Suppose we treat the question as legal. We look to legal material – constitutions, statutes, judicial decisions, lawyers’ assumptions and the rest – and ask: what does the correct reading of that material declare the relation between law and morality to be? We cannot answer that question without a theory in hand about how to read legal material and we can’t have such a theory until we have already decided what role morality plays in fixing the content of the law. When we ask whether the legal material demonstrates or denies a connection between law and morality, do we exclude from that material what we take to be unjust laws and practices? Do we suppose that the material includes not only rules with a pedigree in conventional practices but also the principles necessary to justify those rules? If not, then we have built positivism in from the start, and mustn’t feign surprise when positivism emerges at the end. But if we do exclude unjust putative laws or include justifying principles then we have built one of the other answers.

If we turn to morality for our answer we beg the question in the opposite direction. We can ask: would it be good for justice if morality was understood to have a veto power on law? Or if morality played the part in legal analysis that interpretivism claims? Or is it actually better for the moral tone of a community if law and morals are kept separate as the positivists insist? These questions certainly make sense; they are indeed key jurisprudential questions. But according to the two-systems picture they can produce only circular arguments. If law and morals are two separate systems, it begs the question to suppose that the best account of the actual content of law depends on such moral issues. That assumes we have already decided against positivism and in favor of one of the other theories.

The two-systems picture therefore faces an apparently insoluble problem: it poses a question that cannot be answered other than by assuming an answer from the start. That logical difficulty explains what would otherwise be a remarkable fact: the turn in Anglo-American jurisprudence,

led by positivists in the 19<sup>th</sup> Century, to the surprising idea that the puzzle about law and morals is neither a legal nor a moral problem but instead a *conceptual* one: it can be settled through an analysis of the very concept of law. When we reflect on the concept of law itself, according to this view, then we see that what law is and it should be are entirely different questions, so that law and morals are in their very nature or essence distinct. We need make no question-begging assumptions either of legal or moral theory in order to defend this conclusion. Philosophers who rejected positivism nevertheless accepted this account of the problem's character. They tried to show that the very concept of law permits morality a veto power or a role in interpretive legal reasoning.

We have already noticed, in Chapter 8, the fallacy in this construction of the problem. We cannot solve the circularity problem presented by the two-systems picture through an analysis of the concept of law unless that concept can sensibly be treated as a criterial (or perhaps as a natural kind) concept.<sup>22</sup> But the concept cannot be understood to be either criterial or a natural kind concept because there is no agreement among lawyers and judges in complex and mature political communities about how to decide which propositions of law are true. It is no wonder that positivists have had such difficulty in explaining the kind or mode of analysis they suppose reveals the positivistic truth about the concept. John Austin, a nineteenth century positivist, said this was just a matter of the correct use of language, which is plainly wrong. H.L.A. Hart, though he called his most influential book *The Concept of Law*, never offered much by way of explanation of what he took conceptual analysis to be. When he wrote that book, in Oxford, the

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<sup>22</sup> In crude summary of Chapter 8: we share criterial concepts because we agree, mainly, about the right criteria for identifying instances; we share natural kind concepts because, although our criteria for instances may differ, we agree that the concept properly applies to a distinct biological or physical kind like a lion or gold; we share an interpretive concept when and because we agree that the proper application of the concept depends on the best interpretation of practices in which it centrally figures. Analysis of an interpretive concept is a normative and controversial exercise.

dominant account of analysis among Oxford philosophers supposed that analysis consists in making evident the hidden convergent practices of speech of ordinary users of a language in which the concept figures. That method can't be applied to the concept of law because there are no convergent practices to expose. (Positivists now disown both the dictionary-definition and the ordinary-language explanation of what they suppose conceptual analysis to be, but without offering any positive account.<sup>23</sup>) The concept of law can only be understood as an interpretive concept with the character and structure we reviewed in Chapter 8. The best conception of that interpretive concept can only be a controversial theory of political morality. The analysis of the concept must assume from the start an intimate connection between law and morality. The supposed escape from the circularity problem is no escape at all.

#### *Law as Morality*

We must scrap the old picture that counts law and morality as two separate systems and then seeks or denies interconnections between them. We must replace this with a one system picture: law is a part or aspect of morality. That is, of course, not a solution to the circularity problem posed by the two-systems approach: it begins in assuming not just a connection between law and morals but that the former is embedded in the latter. It offers a fresh start. The suggestion will sound absurd to some readers, paradoxical to others and a joke to the rest. It might strike you as a brazen and hyperbolic form of natural law theory because it might seem to suggest that a community's law is always exactly what it should be. I have in mind something much less revolutionary or counter-intuitive.

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<sup>23</sup> Citation?

The latter portion of this book has been an exercise in layers of embedding. We saw how personal morality might be thought to flow from personal ethics, and then how political morality might be seen as flowing from personal morality. Our aim has been to establish an underlying unity in what are often taken to be separate departments of evaluation. We can easily place law in that tree structure: law is a branch, a sub-division, of political morality. How law should be distinguished from the rest of political morality – how these two interpretive concepts should be distinguished to show one as only part of the other – is itself an interpretive question. Any sensible answer will capitalize on the phenomenon of institutionalization. Political morality itself emerges as a useful category only when specialized political institutions emerge. Law then emerges from political morality only when institutional practices have become sophisticated in a certain direction: by making it appropriate to claim that both rulers and citizens have obligations that follow distinctly from the exercise of political power in the past, that these fresh obligations can expand on, contradict and supersede the obligations that they would have had were that history different, and that these rights and obligations can be enforced, in principle, on the demand of those in whom they create corresponding rights. There is nothing mysterious or metaphysical in that process: it supposes no emergent forces. Nor – this is crucial – does it deny the distinctness of questions about what the law is and what it ought to be.

Consider a banal but parallel story: the development of special moral code or practice for a single family. You have two children, a teen-age girl, Becky, and her younger brother Tim. Becky has promised to take Tim to a sold-out and much heralded pop concert for which she has been lucky enough to find two tickets. But someone she has been anxious to date calls and she offers the place to him instead. Tim protests and comes to you; he wants you to tell Becky to keep her word. A host of questions arise. Do you have legitimate associational authority, as a parent, to tell

Becky what to do or Tim what to accept? Do they have distinct associational obligations to do or accept what you say, just as your children? If you think you do have that authority, and they have that obligation, should you try to recall, as you ponder the question now, what you said to them about keeping promises in the past? Or what decisions you or your spouse made on past, similar, occasions when you were asked to settle arguments? What makes a past occasion similar? What if you have revised your opinion about the importance of promising? You used to think promises should almost never be broken; now you are attracted to a more flexible view. How far should you regard yourself as required by your past decisions to treat new claims in the old way? Do you have to announce your changed views in advance of the events that give rise to new arguments? Or can you immediately decide new controversies as you now think right? Need you try to anticipate, as you reflect on these issues, the other controversies that will inevitably arise? How far must you adjust or simply your arguments now so that your rulings provide adequate guidance to allow the family to anticipate what you will decide in the future?

It would be foolish to press the analogy between these domestic issues and grand questions of legal theory and practice much further. But I doubt we can find any jurisprudential issue that arises in law for which we cannot find an analogue in the more primitive family story. In any case that family story illustrates how a distinction between what law is and what it ought to be arises as a complexity within political morality itself. As you decide the domestic questions you affect a distinct institutional morality: the special morality of your family. This is a dynamic morality: as moral pronouncements are made and applied on concrete occasions the special family morality shifts. At some point a difference emerges between two questions. What does keeping faith with family morality require? What should family morality have required? The latter asks: what direction would it have been better to take? But it is crucial to see that these two

different questions are *both* moral questions, and may easily attract different answers. It would be wrong to suppose that the special family history and practices have created a distinct, non-moral, code, like traditions of dress, that have some form of authority within the family that is not a moral authority.

That would be a mistake for two reasons. First, the reasons that you and other members of the family have for deferring to this history, even to some limited extent, are moral reasons.

Deciding now on different principles than you have used before – imposing a standard on Becky that you refused to enforce in her favor on some earlier occasion when she asked you to make someone else keep a promise to her – would be not simply surprising, like wearing a tie to a picnic, but unfair. Unfair, that is, unless some moral argument shows why it is not unfair.

Second, the dynamic character of these traditions is refueled constantly by further moral questions and answers. Only further reflection about fairness within the family could lead, as sooner or later it must lead, to revised opinion about some element of the practice: the importance of deciding like cases alike, for instance, or what makes cases alike.

I do not suggest (or deny) that anthropologists can find the historical origins of the elaborate legal structures and practices with which we are familiar in the development of similar tribal moralities. It is enough for my point that such a genealogy could explain the early history of what we now have. We can construct an illustrative genealogy by identifying discrete questions of political morality that arise in the development of law. The answers a political community gives also creates a dynamic morality. Its heart is the question what fairness now requires some political institution to do or decree given the community's history. We must distinguish this question from the different question whether that history has been what we might now wish it to

have been. These are different questions but they are both questions of political morality. Only confusion comes from pretending otherwise.

*What Difference Does It Make?*

*Theory*

If this embedded view of the connection between law and morals became canonical, replacing the frustrating two-systems view, legal philosophy and theory would change. The old confrontations between the schools of jurisprudence I described earlier would wither away, as would the schools themselves. The spirit of each would persist, but in a political rather than conceptual form. It would be unlikely that anyone would want to defend a global positive position. He would have to find moral arguments why fairness should never count in deciding how the constitutional or substantive law of a political community should be interpreted, and it is hard to imagine where he might find such arguments. But a narrower, more selective, kind of positivism defended on political grounds is certainly intelligible even if not persuasive. A theorist might argue, for example, that ambiguous or vague statutes should be read in whatever way the legislature that adopted them would most likely have decided if confronted with the choice. He might say: that makes interpretation turn on an historical test that would improve predictability: that test would not eliminate but it might substantially reduce uncertainty and controversy. Or he might say that allowing even long-dead legislators to decide political issues, even counterfactually, is more democratic than remitting those issues to the moral sensibilities of unelected contemporary judges. In any case, jurisprudence would become both more challenging and more important because it would be integrated into rather than distinct from the other intellectual domains of the time. Treating legal theory as a branch of political philosophy, to be

pursued in philosophy and politics departments as well as law schools, would deepen both disciplines.

Certain more limited legal theories would also require amendment. Some constitutional lawyers have defended the doctrine that some legal rights are unenforceable in court because they are assigned for protection to other branches of government.<sup>24</sup> This “under-enforcement” idea makes considerable sense to theorists who adopt some global version of today’s orthodox legal positivism, because that theory makes law depend on historical fact and therefore allows a plain distinction between the essentially factual question of what the law is on some subject and the normative question of whether judges should enforce the law. It allows a distinction, that is, between a theory of law and a theory of adjudication. Once we merge law and political morality, however, so as to make the former only a branch of the latter, we jeopardize that distinction because law and politics are not only both normative but essentially normative in the same way. How shall we distinguish law as a special department?

We cannot say only what the family story I told might suggest: that a legal right is a right we have in virtue of the political community’s history rather than through morality itself. For many political rights are shaped by history: veterans of a fresh war may have a right to an education following their return because the nation has provided an education to veterans of past wars and it would be unfair to treat them differently. But if so their rights are not legal rights because their benefit would require fresh legislation. It would be more natural to make the distinction turn on that latter fact and therefore on institutional structure. Legal rights are political rights that are properly enforced, directly on a citizen’s demand, by an adjudicative body. The distinction between theories of law and adjudication is erased, and the doctrine of under-enforcement falls

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<sup>24</sup> Cite Lawrence Sager

with it. I should not be dogmatic. Perhaps a different way to distinguish legal rights from other political rights is available within the new picture that would allow some greater distinction between law and adjudication and make room for doctrines like under-enforcement. I mean only to show the breadth of the new issues that the new picture raises.

I must say something, finally, about that favorite question of jurisprudence classes in law schools. Should we say that the Nazis had a legal system but a very wicked one, and that many of its provisions were so wicked that judges should have refused to enforce them, even, perhaps, at the cost of their own lives? Or should we say that the Nazi regime was so wicked that its rules, enactments and regulations did not count as law at all? I once thought that this was only a verbal dispute, and that either way of putting the matter was acceptable so long as the necessary qualifications were added.<sup>25</sup> I now favor a more discriminating account.

When we are under the spell of the two-systems model we take the old question to require some overall judgment about the nature of law from which we draw one of two polar answers to a question about the whole of Nazi law. If positivism is right, all the enactments of the Nazis regime were as much law as those of any other country. They created all the legal rights they purported to create. If natural law is correct, on the other hand, the Nazis had no law at all. They created no legal rights. Once we accept that law is a branch of morality, however, we decline an overall characterization that settles all discrete legal issues in that way. We ask questions at retail. Would it have been unfair for German judges to decline to enforce ordinary commercial contracts that were made under the old rules of contract law the Nazis had not changed, rules that matched the familiar law of contract of democratic countries? If so, then some legal rights remained. Were there other rules the regime declared law that were so tainted with racial

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<sup>25</sup> See Law's Empire.

inhumanity or other forms of injustice that no moral case *at all* could be made for enforcing them? If so then there would be no ground for supposing these rules part of the law.

### *Practice*

The old two-systems picture nourished an important distinction between process and substance: between the procedures through which law is created and enforced and the content of the law that is created and enforced. The long debate about law and morals concentrated on substance. Is an immoral law really law? Do considerations of justice help decide whether the law as it stands permits people swindled by Bernie Madoff to sue the SEC for negligence? The debate largely left process alone: it seemed plain that the methods through which law is created are a matter of local convention whose properties were fixed by that convention. Indeed, that assumption seemed essential to the two-systems picture: something in law must be immune from shifts in moral opinion if the systems are to be seen as even in principle distinct.

When I was a law student in Britain, more than half a century ago, I was told that in that country unlike America the legislature – parliament – is supreme. That was held to be a cardinal example of what was just true as a matter of unchallengeable law: it went without saying. But it hardly went without saying in an earlier century: Lord Coke disagreed in the 17<sup>th</sup> Century, for instance.<sup>26</sup> Nor does it go without saying now. Many lawyers, and at least some judges, now believe that parliament's power is indeed limited. When the government recently floated the idea of a bill that would oust the courts of jurisdiction over detainees suspected of terrorism, because

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<sup>26</sup> Citation to Coke on natural law.

the courts had imposed limits on detention that the government thought unwise, these lawyers claimed that such an act would be null and void.<sup>27</sup> What changed, and then changed again?

The answer seems clear enough. Once, in Coke's time, the idea that individuals have rights as trumps over the collective good – natural rights – was very widely accepted. Later, in the nineteenth century, a different political morality became dominant. Jeremy Bentham declared natural rights nonsense on stilts and lawyers of that opinion created the idea of absolute parliamentary sovereignty. Now the wheel is turning again: utilitarianism is giving way once again to a recognition of individual rights, now called human rights, and parliamentary sovereignty is no longer evidently just. The status of parliamentary decision is certainly a legal question. It is also and therefore a deep question of political morality: easily among the deepest such questions. Lawyers and judges are the working political philosophers of a democratic state. American constitutional lawyers have debated whether the abstract constitutional clauses granting individual rights in moral terms – the “right” to free speech and religion, to freedom from cruel and unusual punishment, to equal protection of the laws, and to due process of law – should be read as moral principles.<sup>28</sup> But the apparently more specific clauses have usually been thought to depend on history not morality. Two recent Supreme Court cases illustrate that assumption. The Second Amendment, about the rights of citizens to bear arms, is ambiguous but it contains no even arguably moral language. The Court offered an extended discussion of English law in the 18<sup>th</sup> and earlier centuries to support its ruling that the Amendment does grant individual citizens rights that a flat prohibition on handguns violate; the dissenting arguments appealed to the same period of history to contradict that conclusion. The Constitution stipulates

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<sup>27</sup> Cite Jowell on ousting legislation.

<sup>28</sup> See Freedom's Law

that Congress may suspend the right of habeas corpus only in special circumstances but it does not specify explicitly who is otherwise entitled to the writ. A 5-4 majority of the Court held that aliens detained at Guántanamo Bay were entitled to it. The strongly worded dissenting opinion insisted that no class of persons who were not regarded as entitled to the writ in the 18<sup>th</sup> Century were entitled to it now. The majority opinion did not object to that claim, but ruled that the history was inconclusive and held that the alien detainees could bring habeas corpus actions.

The Court's debates in these cases would seem odd if law were treated as a branch of political morality. There are overwhelmingly powerful political arguments for taking the Constitution's words as boundaries of constitutional law. There would otherwise be no limit to what constitutional judges could do. But it does not follow that history must fix which of the interpretations that are permitted by these words as boundaries should govern political practice now. On the contrary 18<sup>th</sup> Century practice, under entirely different circumstances from those that confront our nation now, governed by moral and political standards we have long rejected, would seem a wholly inappropriate guide. When we treat our law as a department of our morals an entirely different standard of interpretation seems irresistible. We must do our best, within the boundary constraints, to make our country's law what our sense of justice would approve, not because we must sometimes make law bend to morality, or compromise law with morality, but because that is exactly what the law, properly understood, itself requires.