ABOUT MORALITY AND THE NATURE OF LAW

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I. ON THE NECESSARY CONNECTION TEST

Two innocent truisms about the law lie behind much of the difficulty we have in understanding the relations between law and morality. *The law can be valuable, but it can also be the source*[1] *of much evil.* Not everyone agrees to these truisms, and there is nothing inappropriate in challenging them, or examining their credentials. They are, however, truisms in being taken by most people to be obviously true and beyond question. In other words, they express many people's direct reactions to or understanding of the phenomena, an understanding which is open to theoretical challenge, but has to be taken as correct absent a successful theoretical challenge.

There is no conflict between the truisms. People and much else in the world can be the source of both good and evil. Trouble begins when we ask ourselves whether it is entirely contingent whether the law is the source of good or ill in various societies, or how much good and how much evil there is in it. There has, of course, been enthusiastic and persisting support for claiming that the connection between law and morality is not contingent. The support comes from contradictory directions. Some strands in political anarchism claim that it is of the essence of law to have features which render it inconsistent with morality. Hence the law is essentially immoral.[2] A clear example of this in recent times has been Robert Paul Wolff's argument that the law in its nature requires obedience regardless of one's judgement about the merit of the obeying conduct, and that this is inconsistent with people's moral autonomy which requires them to take responsibility for their actions and to act only on their own judgement on the merit of their actions.[3] Diametrically opposed to this variant of anarchism is, e.g., a variety of Thomist natural law views which regard the law as good in its very nature.[4]

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1. I say that the law can be the source of much evil, meaning that the evil is brought about by human beings, but that the law often plays a causal role in bringing it about, in facilitating its occurrence.

2. This normally means that "legal authorities" do not have moral authority, and the law they make and enforce is not morally binding on us, at least not as it claims to bind. This allows that the law can also be a source of good in ways which fall short of possessing authority.

3. Robert Paul Wolff, *In Defense of Anarchy* (Berkeley, Calif.: University of California Press, 1998). *The Morality of Freedom* (Oxford, Clarendon Press; New York; Oxford University Press, 1986).

4. For a modern version see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press; New York: Oxford University Press, 1980), especially chapters one and ten.

Both sides of this particular dispute admit that the law can do some good (even according to the anarchists), and that it can be the source of evil (even according to the Thomists). Anarchists can admit that some laws are sensible. They can admit that their directives can create valuable options not otherwise available, and that people ought to conform to them, so long as they do not do so because they were ordered, so long as they conform only where in their judgement, they should perform the legally required act, regardless of the fact that they have a legal duty to perform it, and of course, so long as the law is not coercively enforced. Thomists can admit that the law can be corrupted and put to evil use by governments, or by some of their officials. All they need insist on is that such aberrations are exactly that, namely aberrations, not to be confused with the normal case.[5]

Some of my observations will bear on these views, but my aim is to focus first on a preliminary question: should we, as is common,[6] make the question "is there a necessary connection between law and morality?" a litmus test for the basic orientation of different theories of law? It is common to call those who show negative in the test, including John Austin, Jeremy Bentham, Hans Kelsen, and H.L.A. Hart, *legal positivists*, and to regard Thomas Aquinas, Michael Moore, Philip Soper, and Ronald Dworkin as *natural lawyers*, for no other reason than that they show positive when the litmus test is applied.

Arguably there is no harm in any classification. Any similarity and any difference can be the basis of a classification, and most classifications would do no greater harm than being boring because they would be insignificant. The harm is done by proceeding to make the division between "legal positivists" and "natural lawyers", so defined, the basic division in legal philosophy. For there can be no doubt that there are necessary connections between law and morality. This makes it appear as if "legal positivism" is mistaken, that is as if any "legal positivist" theory is false, and every natural law theory, even if mistaken on some issues, recognises the truth of a deep and contentious thesis. And of course it follows that all the theories which deny any necessary connection between law and morality include at least one false proposition. However, as it happens it does not show that they contain more than one false proposition, because the theories concerned do not build on their mistaken denial of a necessary connection, and all their main theses about the nature of law remain intact. Correspondingly, the truth shared by all natural

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5. See Finnis, *op. cit.*. A similar view is held by a number of other, non-Thomist contemporary legal philosophers. See, e.g., Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986).

6. But see J. Gardner, "Legal Positivism: 5½ Myths," *American Journal of Jurisprudence*, 46 (2001) 199, 222 ff., rightly rejecting this view.

law theories, so understood, is a relatively trivial thesis, which lends no credence to what is of interest in them.

This shows that the question of a necessary connection is a bad litmus test. Rather than offering a useful key to the typology of legal theories it leads to confusion. To be sure, clarifying the relations between law and morality is rightly seen as central to the explanation of the nature of law. But unless we ask the right questions about that relationship we will not reach illuminating answers.

Here are three examples of necessary connections between law and morality:

- (Following Hart[7], but without trying to be faithful to the details of his argument): given human nature and the conditions of human life (especially mutual vulnerability and relative scarcity), necessarily no legal system can be stable unless it provides some protection for life and property to some of the people to whom it applies.
- Given that only living animals can have sex, necessarily rape cannot be committed by the law nor by legal institutions (though they and the law can sanction it, and legal institutions can be accomplices to it).
- Given value pluralism[8], necessarily no state or legal system can manifest to their highest degree all the virtues or all the vices there are.

The first of these is a natural necessity. The other two can claim to be conceptual, *a priori* necessities. Either way they are necessary connections, for natural necessities — those which exist because of basic features of the world, e.g., because it is governed by the natural laws which do in fact govern it — are sufficiently secure to merit the attention of the theory of law, assuming that they are not trivial in nature. The three necessities enumerated suggest ways of generating many more true statements about necessary connections between law and morality (the law cannot be in love, and therefore cannot have the virtues of true love, etc.). Many of them are of little interest. But regardless of what interest they hold, they show that the existence of necessary connections between law and morality cannot really be doubted, at least that it should not be doubted, and that it has little bearing on important issues which may divide writers like those I mentioned above.

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7. *The Concept of Law* (Oxford: Clarendon Press: New York: Oxford University Press, 2nd ed., 1994), 193 ff.

8. Defined as the existence of a plurality of values which cannot be instantiated in the life of any single human being, and relying on the fact that the realisation of various incompatible values and virtues requires supportive societal conditions (see my *The Morality of Freedom*, chapter 14).

II. ON THE NECESSARY OBLIGATION TO OBEY

Some writers claim, of course that there are other types of necessary connections between law and morality, which have greater significance for an understanding of their relations. Here are a few examples of such *claimed* or *alleged* necessary connections which appear to be of a kind, to belong together:

1. Necessarily, everyone has a duty to obey the law of his country.
2. Necessarily, everyone has a reason to obey the law of his country.
3. Necessarily, if the law is just all its subjects have a duty to obey it (or, alternatively, a reason to obey it).
4. Necessarily, if the government of a country is democratic all its subjects have a duty to obey its law (or, alternatively, a reason to obey its law).
5. Necessarily, one has an obligation to support just legal systems.

Clearly, these claimed necessary connections show, if true, something important about the relations of law and morality. This is, perhaps, most clearly seen in (1).[9] Some people regard it as the real divide between so-called natural lawyers and so-called legal positivists. However, there are natural lawyers who do not uphold it, and in any case (as will be briefly observed below) it does not follow from the basic assumptions of Thomist natural law. (1) claims that the law is a source of moral duties in the way in which one often thinks of promises as a source of moral duties[10]: just as one has a moral duty to do what one promises, and therefore every promise creates a moral duty, so one has a moral duty to do what the law demands of one, and every law imposing another legal duty imposes or creates a moral duty.

This does not mean that (1) claims that any legal duty adds to the number of things one has a moral duty to do. Just as one may promise to act as one morally ought to act in any case, so the law may impose a legal, and therefore a moral, duty to do what one ought to do, or has a moral duty to do, anyway. In saying that every new law creating a legal duty creates a new moral duty we mean only that the obligation to act in the required way acquires a new ground, one which will remain in force even if the others do not exist, or if they cease to exist.[11]

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9. The difference between (1) and (2) relates to the nature and stringency of the moral requirement the law creates. I will make nothing of this difference and my references to (1) should be read as references to either (1) or (2).

10. Moral duties (as well as reasons, values, etc.) do not in general have sources. They can be explained, and it is possible to establish what duties people have. But their explanations, and justifications, or grounds are not "sources". Promisory and legal duties are among the few types of obligations which have sources, i.e. the acts of making promises and laws.

11. Even that is not strictly necessary. It is possible for the moral standing of a law to be

On this view the law is part of morality just as promising is part of morality. It is natural for those who doubt the soundness of such a view to think that the main objection to it is that it underestimates the ability of the law to do evil, and to be immoral. After all if law is part of morality, how can it be immoral or do evil? I suspect, however, that on its own this objection lacks force. There are two ways consistent with a general obligation to obey all law, in which the law can fall short of moral ideals, and they allow for the possibility of considerable evil perpetrated by law.

First, we must allow that any account of the nature of law will apply to central cases, and will allow for degenerate cases of law. To give a related example, there are states like the Vatican, which do not display some of the central characteristics of states, and yet it would be pointless to debate whether they are states or not, or to take them as counter-examples disproving the correctness of otherwise sound characterisations of states. We simply acknowledge them as marginal cases of being a state. Similarly, with the law, there can be legal systems which are so regarded conventionally, yet which are exceptional, or degenerate cases of legal systems. It would be a mistake to deny that they are legal systems, but also a mistake to take them as disproving otherwise sound characterisations of the law.[12]

I do not mean to say that no single example can be a decisive counter-example. Any characterisation which will fail to apply to the law of France, or of the United States, for example, will be defective just in virtue of this fact (though still possibly better than all known alternatives). But some legal systems can reasonably be taken to be marginal or degenerate cases of law.[13]

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conditional on its content being morally required anyway. Compare this case with, for example, a child being told by his parents to obey his minder if at lunch time he tells him to have his lunch. We can imagine that the child should have his lunch anyway (would have had ample reason to have it had he been left alone), and that implicitly the parents intimate that the minder need not be obeyed if he instruct the child to do something the child has no reason to do anyway. Still the minder's instructions to the child are binding on him and we understand that (and would understand similar laws) as meaning that they reinforce the reason or obligation the child has anyway. Once instructed, not doing what one ought is a wrong in an additional way, for an additional reason.

12. For a brief explanation of the theoretical character of accounts of concepts like that of the law see the *Morality of Freedom* chapter 3 (regarding the concept of authority), and Joseph Raz, "Two Views on the Nature of the Theory of Law: A Partial Comparison" in J. Coleman (ed.), *Hart's Postscript* (Oxford; New York: Oxford University Press, 2001).

13. I am assuming, what some people find problematic, that vague concepts can have essential properties. This is possible so long as those properties admit of vagueness, or if they apply, or can apply to a greater or lesser degree, and their vagueness or degree of application is among the factors which make the concept to which they belong vague.

John Finnis and Dworkin[14], both espousers of a general obligation to obey all law, emphasised the possibility of marginal cases of law to which the duty does not apply. There is, however, yet another way in which the law of a country may do evil even if there is a general duty to obey all its laws. That way is open to those who support the duty to obey by content-independent moral reasons. These are reasons which depend not on the claim that each and every one of the laws of all legal systems is morally meritorious in a way which imposes a duty of obedience on all its subjects, rather they depend on general virtues and moral properties of legal systems as a whole, which justify a duty to obey each of their laws, just because they are laws of that system. If that is the foundation of the general obligation to obey then it is compatible with considerable moral failings. It is compatible with many of the laws of the system and many of its institutions being morally defective, or worse.

This is a point of general importance, which I will return to later in the article. The law as a whole can have moral properties because its, or the majority of its, components, especially its laws or rules, have them. These are its aggregate moral properties. But it also has, what I will call, systemic properties, properties which belong to the law or legal system as a whole but not in virtue of being aggregates of the properties of its component parts.[15] The necessary moral properties of the law as a whole may be systemic, allowing for a good deal of shortcoming in the moral merit of its individual norms.

The fact that the general duty to obey may depend on systemic features of the law does not, of course, show that it is compatible with a proper conception of how evil the law can be, and of how much injustice and oppression, etc., it may cause. It is unlikely that the systemic moral qualities of the law are entirely independent of, entirely unaffected by, the moral qualities of the content of the law, that is, of the moral content of the laws which constitute it. How are we, then, to assess the claim that there is a general obligation to obey?

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14. In *Natural Law and Natural Rights*, chapter 1, and in *Law's Empire*, respectively.

15. One needs a more precise way of marking the distinction between systemic and aggregate properties. One could define emergent properties as simply properties of the whole which are not properties of any of its parts. In this sense being wise is a property of a human being, which is not a property of any part of a human being (except metaphorically), though it may be a function of those properties. The distinction I am after is different. It is meant to exclude properties of the whole which are "simple" mathematical functions of the properties of the parts, properties which it is tempting to say are mere modes of representing properties of the parts. I have in mind properties of a whole which, e.g., it possesses simply because there is a property which either all, or a threshold number, or proportion, of its parts have, or because it is the average or the mean of the properties of the parts. These may differ from proper systemic properties only in degree, only in the indirectness or complexity of their dependence on properties of the parts. But the difference matters.

The issue turns, naturally enough, on what are the main essential systemic features of the law, and especially what are its essential systemic moral properties. The commonly accepted answer is that they have to do with the institutionalised character of the law, and its reliance on the use of force. I will follow this line of thought, and will consider the law's use of force to be but an aspect of the kind of institution it is, i.e. as an aspect of its institutional character.[16] The institutions necessarily involved with the law are institutions of adjudication and law enforcement. In most societies they also include law-making institutions, that is those with power to make perfectly general laws, and not only, as with institutions whose power is limited to adjudicative and law enforcing functions, particular laws or legally binding directives.

The case for the moral character of the law, understood as a quest for its systemic moral properties, rather than for the moral properties of each and all its binding standards, is the moral case for having legal authorities, of the law-making and law-applying varieties.

There is such a case. It is a Thomist case. Versions of it have been expressed in recent time by various writers.[17] Broadly speaking, it goes thus:

First, human life goes better when subjected to governance by (conscientious) authority. There is, in other words, a job to be done, a task to be discharged, a need for authority to regulate interactions in human societies.

Second, whoever is in a position to discharge that job has the moral authority to do so. That is, whoever has *de facto* political power and legal control has legitimate power. For, on the one hand, only those with *de facto* political power and legal control can perform the job. Only they can meet the moral need for human societies to be governed by authority. And, on the other hand, possession of *de facto* power is sufficient to make them able to perform that job.

The argument has the right shape, it does not rely on the alleged moral quality of each and every law. Rather, it acknowledges that bad, including morally bad, laws can be laws. The argument relies on the systemic moral qualities of the law, from which an obligation to obey laws, including bad

16. Those who put the emphasis more on the use of force by the law sometimes refer to its monopolisation of the use of force. But that, read simply, is false. Law can be and usually is consistent with a good deal of "private" use of force, i.e. use of force by people and organisations other than law-enforcing ones.

17. Anscombe, "On the Sources of the Authority of the State", *Collected Papers, Vol. III, Ethics, Religion and Politics* (Oxford: Blackwells, 1981). It is also adopted by Tony Honoré in *Making Law Bind* (Oxford: Clarendon Press; New York: Oxford University Press, 1987). A more specific and detailed argument of the same family is advanced by Finnis in *Natural Law and Natural Rights*, chapters 5 and 10. My rendering of the argument above differs in some respects from that of those writers, but shares their basic approach.

ones, can be derived. But its conclusion can easily be exaggerated. It cannot be used to establish that those who have *de facto* power and legal control have legitimate authority, a right to the power and legal control that they possess, which is what has to be established to vindicate a general obligation to obey the law in any country, as is asserted by (1).

Any obligation to obey the law that it can establish must be doubly qualified. First, since it derives the authority of the state or the government from the fact that it can fulfil a job which needs doing, that authority must be limited to a government which *discharges the job successfully*. The authority of the government cannot derive from its ability to discharge the needed job; rather, it must depend on success (or the likelihood of success) in doing so. Second, the legitimacy of the government which derives from its success (actual or likely) in performing a job which needs doing must be confined to its actions aimed at discharging this job. The argument cannot endow governments with a general authority, an authority to do whatever they see fit, as it must if it is to vindicate a general obligation to obey as in (1).

Let us say for the sake of argument that governments have power to keep the peace, enforce a fair system of property and contractual rights, and make sure that no one suffers (non-voluntarily) from serious deprivation. Arguably, this does not cover the regulation of the consumption of tobacco or its advertising (those who do not eat in smoke-filled restaurants will avoid them, etc.). It would follow that governments which do regulate the consumption and advertising of tobacco exceed their authority, and there is no obligation to obey the laws they make without authority.

Once we subject the criteria of legitimacy to a success condition (to accommodate the first qualification), and a relevance to the needed job condition (to accommodate the second) only those who make a reasonable success of the morally sanctioned task of government, or stand a reasonable chance of succeeding in it, enjoy legitimate authority. Propositions (3) and (4) above contain conditions which may meet the success condition. A just state and a democratic state is a state which succeeds in at least some of its tasks. The justice condition may meet at least some aspects of the concern expressed in the relevance condition. Arguably a state cannot be just if it exceeds its proper jurisdiction, if it strays into areas not its own.

These matters have been much written about, and cannot be resolved here. I will mention briefly, however, that there are two familiar rejoinders to the line of reasoning pursued thus far. One claims that it has gone too far, that there is no need for the success and relevance conditions, while the other claims that the justice or democracy conditions are not sufficient to establish success and relevance and therefore not sufficient to establish even a qualified obligation to obey the law. The first rejoinder is based on the thought that any

conditions on the authority of states or governments will undermine, if generally believed and acted on, their ability to discharge the task which justifies their existence. This is essentially an empirical argument, and I see no reason to give it general credence. Possibly this danger exists in some special situations, but there is no reason to think that it exists always. I say that partly because of some anecdotal knowledge that governments can function reasonably well even when their population is critical and alert, and will withdraw recognition from measures thought to be unjust or anti-democratic, and partly because there is, as will be mentioned below, a separate duty to uphold and support just institutions, which, if generally believed, will obviate the danger this first rejoinder relies on.

The second rejoinder, that the conditions of the government being just or democratic do not suffice to establish an obligation to obey, is more plausible. The problem is that being just, or being democratic, when they are systemic properties of the law, are consistent with individual laws being unjust, or pointless, or oppressive. The question is: is there an obligation to obey such a law, for if there is not there is no obligation to obey the law generally. One answer, and obviously there are many others which I will just have to ignore here, is that it is necessary to support a just institution, a just government and legal system. This is again an empirical question, and I believe that there is plenty of evidence that the better argument is different. Just governments and legal systems, generally speaking, work better with less than perfect compliance. This statement should not be misread. I do not mean that a few murders are better than none. I mean that there are many laws regarding which occasional breach by their subjects, and the occasional turning of a blind eye by the authorities make them achieve their goals with fewer injustices, and less friction with resisting populations. Besides, though here one's sense of justice may cloud one's impressionistic empirical judgement, a population ready to defy pointless, unjust and oppressive laws does more to preserve the just character of governments and their laws than a docile population willing to eat whatever it is dished out.

A proper doctrine of authority should be based on the task to be done argument, qualified by the success and relevance conditions. Adequately formulating these conditions is no easy matter.[18] What appears clear is that they set a test which is far from trivial and that it is not that difficult to find governments which fail it completely (i.e. have no legitimate authority at all) or partially (i.e. have some legitimate authority, but less than they claim to have). This means that there is no chance that the "general obligation to obey", or "a general obligation to obey just or democratic legal systems" theses are correct.

18. I made my suggestion in *The Morality of Freedom*, chapter 3.

III. SYSTEMIC MORAL PROPERTIES OF THE LAW

There is a general mistake undermining theses (1) to (4), a mistake which it is not too difficult to spot: they attempt to derive a moral property which applies equally to each and every law from systemic moral properties of the law as a whole, or of some kinds of legal systems. Admittedly, there is no general reason to think that premises about the systemic moral properties of the law, perhaps afforded by appropriate moral or other premises, will not yield conclusions pointing to moral properties of every single legal norm. Some trivial conclusions come readily to mind (for example, the law of every just legal system has the moral property of belonging to a just legal system). But without additional premises, which I cannot see, no significant conclusions like (1) to (4) seem possible.

Perhaps a more promising route is to explore the systemic moral properties of the law itself in order to establish what attitude to the law as an institution they require. An analogy with promises may guide us. The similarities between promising and the law are considerable. Both are ways of creating obligations by acts intended to do so—a fact often regarded as so mysterious that it has led to most ingenious writings attempting to explain away the mystery.[19] The Thomist type of explanation of authority helps here too. There is a good which binding promises can serve or achieve, and that is why they can be binding. That is, the practice of promising is a morally valuable practice because it is one which can achieve valuable goals.

It does not follow that all promises bind.[20] Promises given by incompetent agents (say young children, or incapacitated people) are not binding, nor are promises given under duress, or those in which the promisee undertakes to perform morally impermissible acts, and there are many others. Just as in the case of the law, we cannot infer from the systemic property of the promising practice (i.e. that it is a valuable moral practice) specific obligations to perform all promises. But needless to say, the very proposition that the practice of promising is a morally valuable practice asserts a necessary connection between promising and morality.

Is not the same true of the law? There are values that it can serve, there is therefore value in the law as a general institution. It is a morally valuable

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19. Often, as in the recent case of Scanlon's *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), by explaining away the fact that promising is a way of creating obligations by intending to do so. But see the effective criticism of his views by Liam Murphy, and by David Owens.

20. In other words, the argument has to be hedged with qualifications when applied to promises, just as when applied to the law.

institution, just as promising is a morally valuable practice. That law is a morally valuable institution is part of its nature. There is a moral property, being morally valuable, which all law has by its very nature. So here we have another necessary connection between law and morality, and one which is of the kind writers in the Thomist tradition assert, and those in the so-called legal-positivist tradition deny. So much for the argument which uses an analogy with promising to establish a necessary connection between law and morality.

What are we to make of it? We should distinguish three claims (among others):

Law, by its nature, is an institution which can be used to realise valuable ends.

Law, by its nature, is an institution with a moral task to perform.

Law, by its nature, is a morally valuable institution.

The first, claiming no more than that the law can be used for moral ends, seems unexceptional. Just about anything can be used for moral ends. Even Nazi gas chambers can be so used. They can be used, I imagine, even though perhaps not very efficiently, to kill some dangerous vermin.

The second claim, that law by its nature has a moral task, seems both true and more interesting. It does more than indicate a possibility of a morally laudable use for the law. It postulates that some specific (though possibly abstractly conceived) moral task is central to the law, essential to it being the type of institution it is. It is important to note what this claim does not imply.

First, it does not imply that it is morally or otherwise preferable to be governed by law than not to be subject to law, not even that it is preferable to be governed by a just legal system. Many anarchists, for example, who believe that it is much better not to be subject to law could agree to the claim that by its nature law has a moral task. Some anarchists, those who take any legal system to be radically immoral, will demur. But moderate anarchists who hold that it is better to be governed by other means than through the law may agree that if one is subject to law, that is governed by a legal system, that law has a moral task.

Second, it does not imply anything about the moral character of any actually existing legal system. It allows that legal systems can be radically evil. Nor does it imply anything regarding the likelihood that any legal system will be just or unjust, good or evil. It merely claims that there is a specific moral test by which (among other tests) any legal system should be judged.

Third, the claim does not imply that nothing but the law can have that task. It does not say that it is unique to the law. I doubt that there are important tasks that are unique to the law, in the sense that they cannot at all be achieved any other way.

Fourth, the claim does not imply that the law may not legitimately aim to achieve other aims than the specific moral task inherent in its nature.

The claim that law has, by its nature, a specific moral task, is nevertheless an important claim, as it sets the way in which we should think about the law. It sets a critical perspective for judging it. Just as we do not fully understand what chairs are without knowing that they are meant to sit on, and judged (*inter alia*) by how well they serve that function so, the claim is, we do not fully understand what law is unless we understand that it has a certain task, and is to be judged (*inter alia*) by how well it performs it.

While endorsing the thought that there are essential tasks the law is burdened with, I have been so far shy of identifying any. This essay is meant primarily to be about the basic way of conceiving the connection between law and morality. In this regard identifying the possibility or likelihood that one such connection is that the law has moral tasks is all that is required. The specific identification of the tasks can be left to a more extended and substantial discussion in political philosophy. For what it is worth, however, let me state, rather briefly and dogmatically, what task I can see for the law. It arises out of the law's character as a structure of authority, that is a structured, co-ordinated system of authorities. Authorities are legitimate only if they facilitate conformity with reason. *The law's task, put abstractly, is to secure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realised.*

If the law has an essential task, does it follow that it is by its nature *an essentially valuable institution* (as per (3) above)? The analogy with promises would suggest so. But the analogy is flawed.

There are, among others, two important differences between promises and the law, differences which bear on the way we conceive of their relations to morality. First, promises are made voluntarily (if binding) by a promisor, and accepted, or not rejected by the promisee. They bind the promisor and no one else. The law could not be more different. Typically it is binding on people who did not make it, and had little influence on its content (even in a democracy, if only because the law binds successive generations, as well as those who voted against it). It is as if rather than binding himself the promisor were to impose obligations on the promisee who would be bound by them regardless of his agreement. That is why the law typically does, whereas promises do not, rely on coercion to improve the chances of compliance. Second, the law is not a promise, or a set of discrete promises, but a whole normative system, a system of interrelating norms with a network of institutions in charge of their modification and application.

The first point makes it reasonable to think that the law is more prone to abuse, to injustice and immorality than promises. But it is the second difference between them which is crucial. When we say that promising is a morally valuable institution (or practice) we are judging the abstract institution, not the way it is put into practice in one country or another. Perhaps in some countries most promises are of doubtful character. We imply nothing about that, nothing about the actual use made of promising, in saying that promising is morally valuable. Not so when we say that the law is a valuable moral institution. 'The law is ...' is, in most contexts, short for the law of the country of which we speak. "The law requires me to pay income tax" is not a statement about the abstract institution, but about UK law. When we do not refer to the law of a specific country we normally refer to the law of all countries, or of all countries today, etc.

Therefore, "the law is a moral instititution" means something quite different from "promising is a moral institution". The latter refers to an abstract moral institution, the former to the way it is actually implemented in history. But that is not a claim which can be warranted. While we can affirm that the law, as an abstract institution, as a kind of complex social practice, can be put to moral use, and that, where it exists, it has moral tasks to discharge, so that it is to be judged, among other ways, by its success in discharging them, we cannot say that in its historical manifestations through the ages it has always, or generally, been a morally valuable institution, and we can certainly not say that it has necessarily been so. To say that is to claim that by its very nature the law cannot be realised except in a morally valuable way. And that is not so.

CONCLUSION

My ruminations so far did not yield very definite results. On the one hand, I argued that the denial of necessary connections between law and morality cannot be sustained. On the other hand, I contended that many of the claims of specific necessary connections between law and morality made by legal theorists are mistaken. My suggestion was that while there are necessary connections between morality and how the law is, the more significant necessary connections relate to the evaluative perspective which informs our thinking of how the law ought to be, rather than how it is.

It may be thought that the thesis that by its nature the law ought to be moral is empty or trivial, for everyone and everything ought to be moral. But that is not so. To be sure, nothing should be immoral. But it is not the case that the University of Oxford, or the city of Oxford, ought to be moral in the way that the law is. The intrinsic virtue of a university, i.e. what makes a university

into a good university, is excellence in learning, research and teaching. The intrinsic excellence of a city may be comfort, and the provision of certain services. What makes the law different, what makes its intrinsic excellence a moral excellence, is that it is a structure of authority, that it is in the business of telling people what they must do. Necessarily, the law claims to have legitimate moral authority over its subjects. Hence its intrinsic virtue is to have such authority. To say that is to say that its virtue is to be moral but in a special way, in meeting the conditions of legitimacy. Like cities and universities it too can excel in other ways, including in other moral ways. The possession of moral legitimacy is only its intrinsic excellence, the one it must have, not the only one it may, or ideally should have.

Let me instance one other important virtue the law may possess, in order to help bring out the difference between it, and other possible excellences of the law, and the possession of legitimate authority. People, Aristotle reminded us, are social animals. People can prosper and enjoy a rich and fulfilled life only within human society, and that requires the existence of social groups, communities, of a variety of kinds. Perhaps no specific kind of grouping is necessary. Perhaps humans need not live in societies organised as they are today, with the familiar nation-states, and small heterosexual families. But a variety of types of social groupings, some larger and some more intimate, are needed to provide the background for fulfilled human lives. Let us accept such vague statements as being along the right lines. It can be claimed that the law is a constitutive element of some valuable forms of society, in today's world of a national society, which is valuable for human prosperity. It can be further claimed that identification with the societies one belongs to is needed to make one prosper by being part of them. Does it follow that, therefore, people should identify with the law, holding it in respect and esteem?

Not quite, for we are moving from necessary conditions for forms or aspects of personal prosperity to a conclusion taking them to be sufficient to require identification and respect. Still, it does follow from the very vague suggestion I articulated that the law, and society generally, could be worthy objects of identification and respect. If they are then identifying with them would be worthwhile. It is an additional virtue in a good legal system that it is a worthy object of identification and respect.

These are, as I said, very vague suggestions, but there is something to them. Generally, talk of "the law", as in "the law is a constitutive element of some valuable social groupings", refers to one or some or all of actual legal systems. And they may be immoral and unjust, lacking in legitimacy, and they may be a constitutive element of an inherently immoral grouping, rather than of a valuable one. We are here in the hands of human history, and no virtue is guaranteed. Moreover, it is not necessary for valuable social forms that they

be constituted by law. There are national groups which do not form nation states, and enjoy no special legal standing, and are none the worse for it. And so on. All we can say is that the law can be a valuable constituent component of valuable social groups, and if it is it has moral merit in being a worthy object of identification and respect. But we cannot say that it must be such a constituent component, or that it fails if it does not. On the other hand, all law must enjoy legitimate authority, or it fails in meeting its inherent claim to authority.