

LAW, MORALS, AND ETHICS

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INTRODUCTION

These days the normative coherence and integrity of the law is open to searching criticism from various directions. This is true of all bodies of law—constitutional law, contract law, tort law, and the law governing the professions such as our own. Any intelligible criticism of law requires a normative framework of its own. That is, normative criticism requires some set of normative concepts in terms of which to carry the discussion forward. Many critics are content to use general epithets such as “unjust,” “exploitive,” or “inefficient.” Others project more sustained critical analyses. Whether general or specific, however, critical analysis must have a place of beginning.

It is possible to criticize law in terms of law itself. However, criticism in these terms reduces to a claim that the law is internally inconsistent in some respect. The law is internally inconsistent, indeed shot through with inconsistencies. Yet, serious criticism aims to go deeper and to say that the law in some particular is wrongheaded or simply wrong. At this stage, the ensuing question is: “Compared to what?”

It seems to me that the comparison must be to norms we experience as either morals or ethics, or some combination of morals and ethics. I shall define these terms in a moment. However, initially I mean to make four points:

First, criticism of law must be in terms of morals or ethics simply because, at least as I will define these concepts, there are no other intelligible normative systems in terms of which criticism could be conducted.

Second, and in an opposite direction, the nature of morals and ethics as normative systems severely limits the coherence of legal criticism that can be conducted in these terms. I do not suggest that law therefore is beyond criticism. I do suggest, however, that law cannot be criticized in terms that are as formal and universal as law itself. As I will attempt to suggest, morals and ethics are delimited by boundaries concerning their scope and force that do not have counterparts in a legal system. Correlatively, a legal system is constrained by its own boundaries, chiefly relating to the problem of objective proof, that are absent in morals and ethics. These constraints explain why so much contemporary

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argument about law seems to involve either people of like mind agreeing with each other or people of different mind talking past each other.

Third, and in a somewhat opposite direction, the fact that law, ethics, and morals do not perfectly correspond is a source of strength that is both analytic and behavioral. Analytically, assessing law in terms of morals, or morals in terms of ethics, for example, permits deeper understanding of each of these normative systems.

Thus, we can speak coherently of someone having a legal duty but not a moral duty (for example, to pay taxes), or an ethical duty but not a legal duty (for example, the classic case of someone other than a lifeguard going to the aid of a drowning person). Addressing a problem through such comparisons reveals characteristics of law, morals, and ethics that otherwise might be less apparent. So also assessing an actor's situation comparatively in terms of law, morals, and ethics can yield greater understanding of the actor's choices and obligations than if a focus limited to legal duties or ethical obligations.

As far as behavior is concerned, the coexistence of legal, moral, and ethical obligations affects the strength of each kind of obligation. For example, the fact that most people consider theft and homicide to be morally wrong reinforces the strength of the legal prohibitions against those behaviors. Not surprisingly, most important obligations are defined as such simultaneously in terms of law, morals, and ethics. Correlatively, a legal duty that does not enjoy popular support, or which is not sustained by personal internalization, generally has correspondingly weaker force.

Finally, I suggest that the present kind of comparison needs more attention in legal discourse and scholarship. This paper is a step in that direction.

I begin by drawing distinctions between three different normative concepts—"law," "morals," and "ethics." No clearcut distinction can be drawn between these categories, for reasons to be suggested in this very discussion. However, there are distinguishing characteristics that can usefully be noticed.

I. LAW

By "law" I mean norms formally promulgated by a political authority that are enforceable and more or less regularly enforced through a legal process based on adjudication.¹ Defining law as being "formally promulgated" implies norms that ordinarily are written and expressed as generalizations. Thus, law includes the norm in contract law that to be enforceable a promise generally must be predicated on an exchange, in contrast to being merely gratuitous. Law also

1. The best general discussions of the concept of law are Lou Fuller, *THE MORALITY OF LAW* (1969); and Herbert L.A. Hart, *THE CONCEPT OF LAW* (1961).

includes the criminal law and tort law. It also includes the norm in the Rules of Professional Conduct that a lawyer must maintain the confidences of a client and the norm in the Internal Revenue Code that all of us must pay our income taxes.

The specification that law is "written" implies norms that have relative constancy of meaning throughout the jurisdiction and across time. The fact that law is written also entails that law's meaning is conveyed, at least in part, through the peculiar medium of verbal symbols rather than through live demonstration or narrative.

Some kinds of law traditionally have been conveyed chiefly by narrative rather than abstract statements of rules. Examples include Jewish law and the scholastic method in the Catholic tradition. Nevertheless, it is possible by induction to formulate legal rules that are illustrated in these narratives. It is also true, unfortunately, that rules having the formal characteristics of law may lack semantic intelligibility. Statutes sometimes have this deficiency, as courts have repeatedly discovered. Judicial decisions also sometimes have this deficiency, as lawyers have repeatedly discovered. It could be said that these formulations are formal only in form.

We who are lawyers become so accustomed to working with written rules that we easily forget how unfamiliar, indeed unnatural, it is to try to understand one's obligations by reading a text. As children we learn how to behave by means other than by reading a rule book. Most normal adults learn how to behave in similar unlettered ways. Indeed, a core legal skill is precisely that of being able to understand obligations in terms of writing.

That law is enforced means that agents of government exercising public authority can use official compulsion to give effect to legal norms. Thus, the income tax laws can be enforced by the combination of police, prosecutors, judges and prison officials. So can speed limits and building codes. Moreover, private persons in a wide variety of circumstances can invoke the government coercive force to vindicate their legal rights. Suits for breach of contract or for personal injury for product defects are simple examples.

The parties defeated in litigation yield after adverse judgment because they know that, if they do not yield, the power of the state may be brought to bear in favor of the judgment winner. Settlement of private legal disputes, which is how most such disputes are resolved, is driven by the same ultimate sanction. If anyone doubts this, let them consider claims that are unsupported by legal authority, for example, the conflicting claims of the Serbs and Bosnians to rights to live in parts of the old Yugoslavia. "Law" thus implies recourse by a victim of legal violation to the assistance of others, specifically public officials, in seeking to induce the transgressor to provide redress.

"Law" is, therefore, a transaction involving, at minimum, three participants: The person whose interest is protected by the norm; the person whose conduct

is in question under the norm; and third parties who mediate or adjudicate controversies concerning application of the norm and who eventually enforce a judgment. In this sense, law is a public activity, that is, a social process that depends for its intelligibility on the existence of persons who are not participants in the underlying transaction. These persons can be described categorically as "judges." Judges are government officials responsible for ascertaining the meaning of legal rules as applied to cases presented to the judges as third party observers.

The judicial function has an additional, more subtle predicate. "Law" is predicated on the assumption that written rules are intersubjectively intelligible. "Intersubjective intelligibility" means, in simpler terms, that a rule written by one person can be substantially understood by another. We may have difficulty convincing ourselves of this fact when, for example, we are stopped for speeding. In that situation, 55 miles an hour means one thing to us and another thing to the highway patrol officer. However, legislators, judges, lawyers, and ordinary citizens all proceed on the assumption that the terms of a rule written by one set of participants beforehand can be understood by another set of participants afterwards.

There is no way to demonstrate the truth of this assumption. The assumption is widely disputed in philosophy and contemporary literary criticism. Moreover, lawyers know that the assumption of mutual intelligibility is only qualifiedly true. It is notorious, for example, that the term "reasonable"—as in "reasonable" time, "reasonable" speed, "reasonable" notice—means different things to different people. However, if the term "reasonable" or any other legal term were unwholly unintelligible as a medium of communication, then law would be impossible. Yet, law not only persists but is flourishing.

The fact that law is to be enforced by government authority has a further implication: The purposive or systematic failure to enforce the law violates a norm of legality. A notorious example from our own history is the failure for many long decades to accord blacks the right to vote that has been guaranteed by the Constitution. A perhaps less sinister example is the irregular enforcement of the laws against gambling. A contemporary troublesome example is the radically incomplete enforcement against illegal drugs. Among other things, purposive or systematic nonenforcement puts in the hands of government officials the discretion to use government authority for their own purposes.

Because law is a three-party transaction, it is precisely correct to refer, as we often do, to a person being "subject to a legal duty." The term "duty" not only signifies an actor having the duty but also implies someone or someone's interest that is protected by the duty, and thus a second party. And the term "subject to" implies some independent authority that admeasures and enforces the obligation.

II. MORALS

I now turn to the concept of morals. By “morals” I refer to the notions of right and wrong that guide each of us individually and subjectively in our daily existence. This is a somewhat arbitrary definition of morals. The term “morals” comes from the Latin word *mores*, a term that signifies usage in a community. More precisely the term can mean “folkways imbued with an ethical significance.”² The reference to folkways reminds us that a person's morals inevitably reflect specific culture. Each of us is born into a culture that has its own specific folkways in which we become indoctrinated.

Nevertheless, it is important to distinguish personal, subjective ideas of right and wrong from ideas of right and wrong that we are able to share with others. Our subjective ideas of right and wrong appear to each of us as a vivid reality. Yet, sharing these ideas with others confronts the impenetrable barrier of subjectivity. It is a mark of maturity when an individual becomes aware that his sense of reality, and his sense of what is right and wrong, are different from the counterpart ideas in the minds of others. Some people never really comprehend this truth and continue to believe that the world is only as they see it. Anyone who has reached maturity realizes the folly of this myopic view. One is reminded of President John Kennedy's response to two reports received about Vietnam in the early stages of that disastrous adventure. Speaking to the aides who had given the reports, Kennedy said: “Are you sure you two visited the same country?”

In moral conceptions each of us therefore lives alone in one's own “country.” The term “alienation” is sometimes used to describe the loneliness of this subjective experience. However, the term “alienation” implies that there is a process or migration or something by which our loneliness can be overcome. We can approximate intersubjective intelligibility in various ways. One is the synchronous recitation of a statement of belief, as in prayers in religious ceremonies, the pledge of allegiance, and singing a national anthem. Similar messages can be conveyed by action, for example, where everyone in attendance at court stands when the judge and jury enter. Even so, one member of the group cannot be sure that the connotation of the common statement is the same in her mind as in the minds of others who are saying the same thing. Intimacy with another permits us to narrow the existential distance between one of us and others, but the gap is never completely closed.

2. WEBSTER'S NEW COLLEGIATE DICTIONARY 548 (1949)

The closest approximation we can make of understanding the world of another person is through fiction. Fiction presents as fully descriptive truth an artificial construct of someone else's subjective world. Celebrated examples are the soliloquies in Shakespeare, such as Hamlet's "To Be or Not to Be." Here, Shakespeare portrays Hamlet's moral dilemma, not by external description of the problem confronting the protagonist, but as perceived by Hamlet in the very act of experiencing the dilemma. Other famous examples from literature are the reveries in Proust and Joyce.

More precisely, fiction is *the* vehicle by which subjectivity can be made intersubjective. We cannot fully share with each other what we think. But the author of fiction can share with us, and have us share with each other, what someone—the fictional character—could have been thinking. By analogy from such demonstration, we can realize that each of us is similarly situated.

Whatever these subjective ideas are called, each of us is aware of them floating and sometimes raging through our minds, beckoning us to decision and action, or perhaps to ennui and despair.

"Morals" as defined here are not written, let alone codified systematically. Personal morality is not enforceable by government authority but only by such action as an individual may decide to take in the face of a morally arousing event. The weakest mechanism for enforcing our moral sentiments is withdrawal from a situation. The most pitiful is denial, that is, the mind's refusal to accept what is happening.

Of course, many people take legal action upon suffering what they consider a moral wrong. That action can include invoking the authority of the government, for example, calling the police, making a report to the authorities, or deciding to sue. But calling the police or deciding to sue involves an interpersonal transaction going beyond the original moral impression, often several steps beyond.

The point is to recognize that moral notions are single-person events that animate each individual's life and cannot be fully communicated to others. In their very nature, therefore, subjective moral standards cannot be publicly expounded like legal rules, nor can they be objectively administered as legal rules can be.

Of course, it is possible to discourse *about* morality—to pose moral dilemmas, to converse with others concerning those dilemmas and how they might be resolved, and so on. Such is the subject of moral philosophy in a tradition associated with Socrates, Plato, Aristotle, Aquinas, Hume, Kant, and many other famous thinkers. Yet, in one way or another all moral philosophers have come up against the enigma of subjectivity: How can I fully explain, to myself let alone to others, a course of action that is already moving from the

prospective into being history? Our subjective conceptions of right and wrong not only are indecipherable from without, but they are evanescent from within.³

Thus, the normative realm I have identified with the term "morals" is thus distinctly subjective. For this reason, it is somewhat misleading to speak, as we often do in common parlance, of someone "having a moral duty." This parlance suggests that morals occupy the same social space as law, whereas these normative realms are quite different, as I have tried to show. More fundamentally, people, other than the actor, cannot know exactly why the actor is proceeding as he is. In particular, an outsider cannot possibly know what Kant thought was critical in ethics, namely whether an actor is proceeding in true goodness or merely in deference to considerations of expedience.⁴

Of course, we can estimate someone's moral sincerity—whether she is acting with genuine beneficence or simply to gain recognition for being beneficent, or some combination of both. It would be better if we went no further than observing that an actor may profess some sort of moral duty and is acting in manner compatible with that duty. Beyond this, however, another person's subjective realm of morality is impenetrable.

"Law" and "morals" are thus at opposite ends of the normative spectrum in terms of form, mutual intelligibility, and as mechanisms of personal and social action. In between law and morals are "ethics."

III. ETHICS

By "ethics," I mean norms shared by a group on a basis of mutual and usually reciprocal recognition. Ethics, as thus defined, is essentially a two-party transaction.

Shared mutual intelligibility distinguishes what I am calling "ethics" from what I have called "morals." The term "ethics" comes to us from the Greek *ethikos*, a word which signified a custom or usage. Thus, the term refers to a norm having the characteristic of being understood in a community.⁵ For a norm to have become understood in a community implies that the norm somehow was made manifest within the community. It implies, further, that a norm recognized in the present derived from an earlier stage in the community's existence. Thus, ethics entails a dimension of outward manifestation resulting in communication within the relevant community and a dimension of historical sequence through which an idea manifested at one period is remembered at a subsequent period.

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3. Wittgenstein's ruminations remain the best demonstration, although not explanation, of this subjectivity. See Ludwig Wittgenstein, *PHILOSOPHICAL INVESTIGATIONS* (Anscombe trans. 1958).
 4. See, e.g., Emmanuel Kant, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Patton trans. 1964).
 5. Ethics as thus defined is the subject matter of the disciplines of sociology and anthropology.

For example, when merchants say that a wholesale vendor is required to "make good" on an undertaking, they have reference to some previously received common meaning about delivery and quality of performance. When doctors refer to a patient's symptoms, they do so in terms of a received medical ethic as to the information appropriately to be noted about the patient's condition. A school community has a set of norms concerning the role of teacher and student and concerning the relationships between students. Every work site has a similar set of norms. So does every family, for example, concerning who does the dishes. Neighborhoods have implicit standards about acceptable noise levels and disposal of trash. And so on.

The very idea of ethics accordingly implies that norms can be mutually intelligible. Some norms appear to be intelligible across the whole human community, for example, the way in which strangers from utterly diverse cultures can signal to each other that they approach in peace rather than hostility, and by which they can quickly move to the possibility of mutually profitable exchange. The more fully integrated a community, the greater the mutuality of intelligibility. In many intimate communities, for example, in marriages or in small work groups, complete messages can be conveyed with a roll of the eyes or a shrug of shoulder. Conversely, many games in life depend upon not conveying intelligible messages. Poker is such a game and so is negotiating settlement of a legal controversy.

It is worth digressing briefly to consider an aspect of the relationship between mutual intelligibility and subjectivity. In a small community isolated from other cultures, there must be a small difference, perhaps undiscernible, between mutually intelligible ethical norms (i.e., tribal norms) and the subjective normative sense that I have called "morals." This is because a member of an isolated tribe knows only the ethical standards of that tribe from which the personal morality of a member of the tribe is derived. To a lesser degree, the same holds for people living in a small town or neighborhood in today's world. In contrast, a person exposed to more than one community realizes the significance of the adage, "when in Rome, do as the Romans do."

Furthermore, an individual exposed to different cultures can more readily come to realize that there is something unique about his own personal consciousness. Having become able to distinguish between ethical systems, it is not a large step to distinguish between the normative systems of various communities and one's own subjective normative system. Perhaps it is no coincidence that the notion of self-consciousness, generally considered to have arisen in about the 15th Century, emerged after members of the European culture encountered fundamentally different cultures—Marco Polo *redux*.

Ethics not only are mutually intelligible but are conveyed by action or narrative rather than by precept or other formulary. Ethics can be expressed as

concrete conduct by members of the community, or in stories about concrete conduct rather than as hypotheticals or abstract prepositions. Here, we find vital differences between norms as understood by most people and norms as understood by lawyers.

A business executive, a politician, or a mother dealing with school authorities is primarily concerned not with a rule, as such, but with normatively significant action, including prospective action: what will actually be done by some relevant other, not in what is said ought to be done. By the same token, most people are unconcerned whether specific conduct could be construed as implying some norm with different contours for future application. The legal mind is constantly alert to the fact that any new transaction can be the basis for new formulation of the governing norm. But the legal mind is peculiar in this respect.

The law also is fashioned in terms that have outside boundaries. These boundaries are defined by the very terms in which a legal rule is cast. For example, whatever might be meant by the term "contract," in the legal realm the term by implication refers also to a condition of "no contract." So also, "property" implies a condition of no property, "liability" a condition of no liability, and so on.

Narrative as a medium of ethics, in contrast, is open-ended. The Biblical narrative of the Jews' search for the promised land is an epic of searching, not finding. So also Christianity, once the expectation of the millennium had receded, became a quest for peace and justice, not their realization. Every episode recounted by Homer was a preface to a subsequent episode.

Finally, and relatedly, ethics as a medium of expressing norms has both strengths and limitations as compared with legal rules. Its strength is that the medium of communication (i.e., action) is not merely promise about a norm but fulfillment of the norm. Recall the statement by John Mitchell, Attorney General under Richard Nixon, to the effect that "people should pay attention to what we do, not what we say." Unfortunately for Mr. Mitchell, and as well for Mr. Nixon, people did pay attention in that way. One is moved to say that this distinction between words and action still seems to elude President Clinton. Ethical behavior is, thus, a completed commitment rather than, to use a legal phrase, a mere executory promise.

The limitation of ethics is correlative. Action in its very nature cannot be generalized. Of course, a course of action can be repeated and the repetition may imply a continuing commitment that similar action will be similarly repeated on other occasions. But action as such is an historically bounded singular event, not a generalization. An action does not necessarily involve a commitment that, when a similar case comes along in the future, that case will be handled in the

same way. The same is true of narrative. Law, on the other hand, involves precisely such a commitment.

IV. LAW, MORALS, AND ETHICS

In a given community at a specific time, there is a continuous interaction among the various types of norms signified by the terms law, morals, and ethics. We all know that some laws are taken very seriously and generally observed, such as the law of homicide even in our troubled country. We know that other laws are not taken as seriously, such as the speed limit on the interstate and much of the building codes. However, those who disobey the speeding laws or the building codes do not consider themselves oblivious to community norms. Rather, they believe that the community in practice recognizes that some ethical norm has "trumped" the legal norm. Most drivers would say, for example, that driving over the posted speed limit is only technically wrongful. But they would also say that driving 85 miles an hour violates the ethics of driving. Moreover, they would say that driving at 85 is a violation that justifies an arrest and speeding ticket, whereas they would say that a ticket for driving 60 miles an hour represents an excess of governmental authority.

A similar interaction occurs in virtually all situations where the discrepancy is substantial between what the law ordains and what people actually do. It is impossible for people other than psychopaths to proceed in life without being mindful of the ethical norms prevailing in their community. I think it is also impossible for people of post-infantile experience to be unaware of the distinction between law—meaning in this connection the official rules—and ethics, meaning what most people in the community regard as appropriate conduct.

Members of a community are in position to change the relationship between law and ethics. Obviously, this is the position of members of a modern legislature whose business includes deciding whether emergent ethical notions should be transformed into law. In our system, the courts have a similar, although subtler, role in this respect. Members of every calling and vocation similarly contribute to transformation of ethics into law. The norm of communication between doctor and patient, for example, in recent years has been strongly influenced by the concept of informed consent. The norms of business accounting are as much the product of accounting practice as of government regulation. Lawyers can transform the meaning of law by the interpretations they impose through practice.⁶

6. See Susan Koniak, *The Law Between the Bar and the State*, 70 N.C.L.Rev. 1389 (1992).

Every individual also has some potential for producing such an interaction by exercise of personal moral judgment. Most of us have witnessed situations where one recalcitrant self-centered person has caused breakdown in an orderly queue, thus transforming a norm of first-come, first-served into one of devil-take-the-hindmost. By the same token, we have witnessed situations where exemplary conduct by a single individual has brought about change in community ethos. All tales of heroism carry this message.

The wellspring of ethical change is personal morality. A community can change its sense of right and wrong only through initiative taken by someone within the community or acting upon it. Mary Ann Evans Cross, writing under the name of George Eliot, transformed the community's concept of a woman's place in letters, as did Susan B. Anthony change the community's concept of a woman's place in politics. Martin Luther King changed the community's conception of the place of black people in our society, even if his dream has not yet been realized.

The flow of normative change is from subjective morality to an ethic shared by a group, eventually perhaps into expression as law. All drivers regulate their own speed according to their own judgment, whatever they might think about the driving practices of others. Similar judgments are made by parents in trying to manage their households, by workers in carrying out their jobs, and by professionals engaged in their professions. Everyone in everything exercises subjective judgment about their courses of action.

These subjective judgments result in individual conduct that ordinarily is observable by others. They thereby transform a one-person moral transaction into a two-person ethical transaction. Every individual's conduct is a model, better for worse, for others to consider emulating. Children model themselves on parents, sometimes of course by adopting the obversion or a perversion of the original. Rookies learn from the established players. I learned how to teach by being taught and how to talk on the telephone as a lawyer by listening to other lawyers talk on the telephone. With experience in life, we come to understand that there are different models and that any given model was itself modelled on some previous pattern. Whatever one's presentation of self, to use Erving Goffman's marvelous phrase,⁷ the presentation reflects personal morality as well as a community standard and in turn portrays a standard which other members of the community may decide to emulate.

7. Erving Goffman, *PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

CONCLUSION

Thus, we realize that every community—therefore, every social relationship—encompasses three distinguishable types of norms: Law, being the norms more or less recognized in all sectors of the community and distinctive in being expressed in written symbol and enforceable through the community's collective mechanism of coercion; morals, being the various subjective senses of right and wrong in the minds of individual members of the community and being distinctive in being fundamentally incommunicable; and ethics, being norms of action and exemplification within a community.

These norms are not clearly distinguishable from each other. Every policeman and every judge acts upon not only official authority but also in fulfillment of personal and community notions of proper conduct in the circumstances. Every citizen responds to other citizens and to official authority in the same way. None of the regimes can maintain a complete normative monopoly. Law sometimes yields to ethical notions shared in subsectors of the community; ethics sometimes yields to law; both law and ethics sometimes yield to the claims of personal conscience, as in the case of conscientious objectors.

Recognizing the differences between law, morals, and ethics is important in orderly normative discourse. When I speak of a claim of conscience, referring to my own conscience, I am making a claim that is intelligible to others only through analogy. When we speak of a claim of ethical duty, we are referring to patterns of action within some community or part of a community, and thus to a norm that has an objective aspect. When we speak of law, we are referring to a normative system having not only an objective content but a content that is expressed in a formulaic language.

Thus, these normative realms are not coextensive. Yet, we are able to employ one kind of normative concept in conducting discourse about another, for example, discussing law in terms of morality. Indeed, we could not otherwise discuss our normative conceptions, even though the terms of discourse cannot be strictly correlative. Moreover, recognizing the distinctive characteristics of law, morals, and ethics permits us to appreciate their potential for dissonance and for synergism in our everyday existence. In conducting such discussions, we therefore become attentive to the possibility that we may be simply agreeing with others of like mind and talking past everyone else.