DAVID LYONS

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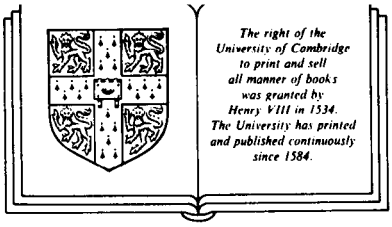

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PREFACE

This book grew out of a variety of courses and seminars I have taught at Cornell University since 1964. These have been exciting times for legal philosophy – sparked by social crises and intellectual adventures. That period is far from over.

And so this book is not a text for a static subject, but a report in progress. It is meant, first of all, for those who wish to become acquainted with contemporary reflections on the nature of law and, especially, its relations to moral reasoning. In that respect it is meant to serve as an introduction to legal philosophy. But it may also interest those who, from the perspective of a single discipline such as law, philosophy, or political science, already have some knowledge of the subject and wish to explore it further, systematically.

I am grateful to Jeremy Mynott of the Cambridge University Press for first suggesting this project to me, and for his patience thereafter. For thoughtful, helpful comments on the draft, I am indebted to Neil MacCormick, William Nelson, and – most especially – David Brink. Judy Oltz and Jylanda Diles produced impeccable typescripts with cheerful efficiency. The Cornell Law School and the Sage School of Philosophy provided time, support, and stimulation.

The book is partial (if symbolic) payment of a debt to those who have most helped me learn about the subject – those who have given me the opportunity to help them learn about it. Next to students, I have learned most from those named in the

text – writers, past and present, whose ideas merit the respect of careful study and searching criticism.

D.L.

Ithaca, April 1983

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Introduction

Philosophical problems concerning law fall within two broad areas: the fundamental nature of law, and how law may be evaluated. Analytical jurisprudence asks, what is a law, and how is it part of a system? How can a decision be made according to law, when the law is unclear? How is law like and unlike other social norms? How is it like or unlike moral standards?

Normative jurisprudence deals with the appraisal of law and moral issues that law generates. Human law can be made and changed by deliberate decision: what direction should those decisions take? Law claims authority to lay down rules and enforce them: are its claims warranted? Can we legitimately refuse to comply? Things are done in the name of the law which are not normally justifiable: people interfere in others' lives, they deprive others of goods, liberty, even life itself. How, if at all, can such practices be defended?

Analytical and normative questions concerning law are closely connected. The law speaks of rights and responsibility, duties and obligations, fairness, justice, and justification: does this mean that law inevitably contains or satisfies moral standards? Ideas about the essential nature of law have emphasized either its connections with, or else its separation from, morality: which view is right?

This book is an introduction to the philosophy of law. It seeks to explain such questions and to suggest how they may be

answered. Meant for the non-specialist, it presupposes neither legal training nor formal study in philosophy. It does not attempt to survey the vast variety of ideas that people have had concerning the nature or appraisal of law. Instead, it addresses such questions by selecting views for discussion that meet the following tests: they are historically important, and their study helps to illuminate the law while making accessible current issues in legal philosophy.

The chapters that follow reflect the dual concern of legal philosophy. Because theories about the nature of law as well as about the direction it should take involve conceptions of morality, we begin, in chapter 1, by considering the nature of moral judgments, and especially their possible justification.

Chapter 2 begins our study of the law itself. It examines the notion that law is a matter of social fact, starting with the familiar idea that laws are commands. These views emphasize the separation of law and morality.

Chapter 3 considers ways in which law, by its very nature, might be connected with morality. It examines legal obligations, the morality of regulating behavior by law, and, especially, the role of moral principles in adjudication.

Chapter 4 examines general theories of evaluation that bear directly on law. It considers how human welfare, rights and obligations, and social justice are relevant to moral judgment. By subjecting normative theories to critical scrutiny, it complements the discussion of justification begun in chapter 1. It also lays the groundwork for dealing with more specific moral problems that arise within a legal context.

Two of the most important and pervasive of these problems are explored in chapters 5 and 6. Some people consider coercion a fundamental feature of the law and it is, in any case, typically found in legal systems. Chapter 5 examines justifications for legal punishment, the law's most familiar method of enforcement. Through its use of coercive regulations, law limits human liberty. Chapter 6 examines bounds that should be placed on legal interference with our free choice.

Chapter 7 takes up "the rule of law" by focusing on two

aspects of that ideal: the values that may be found in legal processes, especially how they relate to the outcomes of legal procedures, and the idea that we all have an obligation to obey the law.

This book is not a survey, neither is it neutral. Like most philosophical studies, its mode of exploration involves both exposition and arguments that are meant to test the soundness of the views discussed. Philosophical ideas are treated seriously when they are subjected to the most demanding critical appraisal. Views that are suggested or defended in this book are, of course, candidates for the same treatment.

It seems only fair to let the reader know what some of those views are, so I shall mention the more persistent ones now. Though law is no simple fact, we have more reason to regard it as a social datum, subject to moral appraisal, than as something automatically informed by moral principles. And, while the claim of moral judgments to objectivity is problematic, we have more reason to regard them as requiring and sometimes enjoying justification, than as groundless, arbitrary, or irremediably subjective.

But a reader need by no means agree with these ideas or take them for granted. Let them be subjected to searching scrutiny, just like the theories that are examined in the chapters that follow.

1

Moral judgment and the law

In our everyday affairs, we judge laws to be good or bad, just or unjust. Our judgments are of practical importance. We consider ways to make law better, and we engage in political activities which range from voting to movements for reform. We discuss these matters with each other and debate them in the political arena.

Our political discussions seem to presuppose that moral judgments are not, or need not be, fundamentally arbitrary. We offer arguments for the positions that we take, and we seek to answer arguments for opposing views. While each of us is likely to have some firm moral convictions, we often recognize that some of our specific judgments might be mistaken. All of this suggests that there are right and wrong answers to moral questions.

But we may come to wonder whether this is really true. Most of us are uncertain about the principles to be used in evaluating law and human conduct generally. We favor freedom, equality, and the common good, but we are unclear about what these ideas mean, how sound principles may be formulated, and even whether any moral standards can rationally be defended.

Our skeptical doubts about morality may be reinforced by reflection on the contrast between science and ethics, a familiar theme in this age of scientific progress. It is often said that science deals with facts, which are outside of us and objective,

while ethics is concerned with values, which are in us and subjective. Facts can be observed, or at least they can be verified by empirical techniques. But values (it is said) do not describe the world; they express our wishes, hopes, desires, attitudes, or preferences. They represent the way we want the world to be, not the way it is. We do not find them in but rather impose them on the world. Different individuals and different peoples have differing views about the way the world should be, but none of these, it may be said, can be objectively established. Values are inherited, inculcated, or chosen. Thus, values (it is often said) are at bottom arbitrary.

It seems wise to confront these skeptical doubts about morality directly. For moral issues pervade the study of law. They concern not only the appraisal but also the analysis of law, as many theories about the nature of law stress either its independence from or else its links with morality. We cannot hope to evaluate these views, or even understand them, without becoming clearer about the nature of morality.

That is the aim of this chapter. Our emphasis will be on skeptical challenges to morality. We shall consider a variety of ideas which seem to discredit the notion that moral judgments need not be arbitrary. We cannot hope to exhaust the topic, but we can gain some understanding of what is at stake.

Skeptical challenges are not always limited to morality. General skepticism challenges the possibility of any knowledge whatsoever, including knowledge of the natural world. This raises issues that have puzzled reflective people from time immemorial. Our concerns are more limited. We shall take for granted that we can have knowledge of the world around us and shall consider the more specific skeptical challenges to morality.

We must begin with a comment on the contrast between facts and values. These are not analogous. When values are said to be in us and subjective, one is referring to convictions or beliefs – our beliefs about the values that things have. When facts are said to be outside us and objective, one is referring to states of affairs – aspects of the world that may be the subject of

factual beliefs. Moral skepticism may deny that things have value, except insofar as we value them. But it cannot deny that we make evaluations, that we have moral beliefs. For our purposes, then, we should compare beliefs about the world (beliefs that certain facts obtain) with moral beliefs (beliefs about what is good or right or just). We shall assume that factual beliefs can be true or false, right or wrong, sound or unsound. The question posed by moral skepticism is whether moral beliefs can be true or false, right or wrong, sound or unsound.

Law and moral standards

Legal theory has always concerned itself with the nature of morality, as we can see from a brief examination of two classic conceptions of law. Thomas Aquinas and John Austin describe the law in very different terms and seem to approach the study of law in different ways. St Thomas of Aquino (1225–74) was a founder of the "natural law" tradition within jurisprudence, and Austin (1790–1859) helped to establish "legal positivism." Their views are usually contrasted. But they share some common concerns and important similarities lie beneath the surface of their differences. Both writers stressed that law is subject to appraisal from a moral point of view, and both believed that there are standards by which the law may properly be judged.

In his "Treatise on Law," Aquinas says that "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community."[1] Aquinas seems to assume that those who make laws wish their subjects well and always establish rules that serve the common good. By contrast, Austin sees the law as a brute social fact based on power, which can be exercised for good or ill. In *The Province of Jurisprudence Determined*, Austin says that "A law is a command which obliges a person or persons ... Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*." He explains, further, that "the term *superiority* signifies *might*: the power of affecting others

with evil and pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[2] Laws are coercive commands, which can be wise or foolish, just or unjust.

It may seem as if these two theorists disagree fundamentally about the nature of law and its relations to morality. Austin seems more realistic. Experience tells us that law is capable of doing good but also has great potential for evil. It can settle disputes that would otherwise lead to private feuds, provide security, and enhance liberty, but it can be an instrument of oppression, protecting fraud, shrinking liberty, enforcing chattel slavery. Law does not necessarily serve the common good, nor is it always designed to do so.

Aquinas is not blind, however, to these aspects of human law. His general characterization of law, as "an ordinance of reason for the common good," does not automatically apply to what he calls laws "framed by man." These, he says, "are either just or unjust."[3] ". . . the force of a law depends on the extent of its justice . . . according to the rule of reason. But the first rule of reason is the law of nature . . . Consequently, every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law."[4] I understand this to mean that unjust human laws are a perversion of the ideal of law, which is given by right reason and the law of nature.

According to Aquinas, human laws are just when they serve the common good, distribute burdens fairly, show no disrespect for God, and do not exceed the law maker's authority. When laws framed by humans fail to satisfy these conditions, they are unjust. And then, Aquinas says, they do not "bind in conscience." One is morally bound to obey just laws, but not unjust laws. One should obey unjust laws only when circumstances demand it, "in order to avoid scandal or disturbance."[5] Human law does not automatically merit our respect, and its legitimate claim to our obedience depends on moral considerations that are independent of human law.

Austin approaches the study of law somewhat differently. He is concerned to lay the groundwork for professional legal training, and so he wishes to emphasize the distinction between what he calls "positive law" and other standards, including those by which law may properly be judged.[6] This is also necessary, he believes, to insure sound appraisal and intelligent reform of positive law.

Austin provides a general theory about the nature of rules that are supposed to regulate human behavior, which he believes can be understood on the model of coercive commands that create obligations. He first of all distinguishes laws that are meant to describe regularities in the natural world from laws that are meant to guide the behavior of individuals who are capable of modifying their own conduct accordingly. Austin then divides the latter realm into three parts: Divine law, positive law, and positive morality. Divine law consists of the rules for humans that are laid down by God. Positive laws are created by "political superiors," such as the "sovereign" of a community – some person or set of persons habitually obeyed by the bulk of the community and habitually obedient to no other human.[7] Positive morality includes some rules that are explicitly laid down, but also includes some guidelines that are not formally expressed or enforced, but are determined by a convergence of popular attitudes and supported by informal social pressures. Much of "positive morality" is what we might call custom or convention.

Positive law can be judged by either of the other standards, but Austin believes that Divine law is supreme: its obligations are superior to any others. He believes that we cannot have direct knowledge of God's will; but, assuming that God is benevolent, he infers that Divine law is meant to serve "general utility."[8] On Austin's view, positive law can be judged as just or unjust depending on whether it serves the welfare of those affected by it.

So, despite their philosophical differences, Aquinas and Austin appear to share some fundamental ideas about human or positive law. Both believe that human law is morally fallible.

It does not necessarily conform to those standards by which it may properly be judged.

Aquinas and Austin also share a traditional theory about the foundation for moral judgments. They believe Divine law provides morality with its required basis. God is seen as the source of the "moral law." Because they accept this idea of an objective morality, they can also distinguish it from the moral beliefs that people happen to have (what Austin calls positive morality).

A theological conception of the foundation for moral judgments is still widely accepted. It is shared not only by many who believe in the existence of a God but also by many who deny or doubt that a God exists. Some atheists accordingly believe that no foundation is possible for moral judgments, and some agnostics are doubtful whether there are objective moral standards.

But many disagree. Some believers do not regard objective moral standards as dependent on God's will. The philosopher Immanuel Kant (1724–1804), for example, based his theory of morality on an understanding of what it is to be a "rational agent," a being capable of directing his own behavior by reasons. One who acts for reasons is committed, Kant believed, to judging actions in general terms. To act for a reason is to commit oneself to a general principle. Kant argued that the fundamental test of the morality of action is whether one could consistently will that the principle of one's action should become a universal law of human nature (his famous "categorical imperative"). The application of reason to action rather than God is the foundation of Kantian ethics.[9]

And of course many who believe that moral standards can be objectively valid have not been believers in God at all. An apt example is Jeremy Bentham (1748–1832), whose legal and moral theory is otherwise similar to Austin's. Bentham believed that laws should serve the welfare of those they affect, but he did not base this on a belief in God. Bentham held that his "principle of utility" is rationally defensible in its own right.[10] Although his principle is controversial, many who