Law and Morality

A Survey of Ideas, Issues, and Cases

By

Joseph L. Esposito

Law and Morality: A Survey of Ideas, Issues, and Cases

Joseph L. Esposito

This book first published 2022

Ethics International Press Ltd, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Print Book ISBN: 978-1-80441-030-1

eBook ISBN: 978-1-80441-031-8

Contents

PREFACE XI

INTRODUCTION 1

PART ONE: THEORY 9

CHAPTER 1 THE INNER AND OUTER MORALITY OF LAW 11

The Ambiguity of Rules 12

The Inner Morality of Law 16

The Outer Morality of Law 31

The Interaction of Law and Morality 37

Morality and the Rule of Law 45

CHAPTER 2 MORAL LAW, POSITIVE LAW, NATURAL LAW 48

Moral Law 48

Positive Law 59

Natural Law 74

PART TWO: METHOD 91

CHAPTER 3 COMMON LAW AND STATUTORY LAW 93

Introduction 93

Holmes and the Common Law 94

Holmes's Legacy 101

The Interplay of Common Law and Statutory Law 105

Can Common Law and Statutory Law be Reconciled? 107

CHAPTER 4 THE ETHICS OF ADJUDICATION AND JUDICIAL REVIEW 114

Adjudication 114

Judicial Review 125

PART THREE: PRACTICE 153

CHAPTER 5 LAW AND RELIGION 155

Defining 'Religion' 156

Madison and Jefferson 161
Religion in the Courts 166
Can Law Cognize Religion? 179
Should Law Cognize Religion? 183
Conclusion 191
CHAPTER 6 FREE SPEECH AND PUBLIC CONSENSUS 193
The Limits of Free Speech 193
Speech That Harms 200
Political Expression and Debate 205
The Problem of Public Consensus 217
CHAPTER 7 PRIVACY, DIGNITY, INTIMACY 222
Elusive Zones of Privacy 222
Privacy Law 224
Expanding Privacy 228
Balancing Privacy Interests 237
Emerging Issues 240
Conclusion 252
CHAPTER 8 LAW AND POLITICS 254
The Politics of Law 254
The Law of Politics 265
Conclusion 280
CHAPTER 9 MORALITY AND LAWS OF THE BODY 282
Introduction 282
Liberty and Paternalism 283
Suicide and Assisted Suicide 288
Assisted Dying, Triage, and Euthanasia 294
Marriage and Parenthood 299
Birth Control and Sterilization 303

Sexual Activity and Experience.....307
Abortion 312
Punishment 319
Conclusion.....326

PREFACE

This book sits at the juncture of my two long careers: as an attorney specializing in federal administrative law, civil rights, employment law, and constitutional law; and as a philosopher specializing in American pragmatism. As a philosophy graduate student at New York University in the 1960s I was exposed to the emerging 'law and philosophy' conversation, inspired in large part by the philosophers who had come through the Great Depression and soon had seen the nations of Europe fall apart and into war. At that time the topic of 'law and morality' were not topics of discussion as much as matters of survival. When I later became a litigator and appellate attorney, I joined the firm of two former United States Attorneys, with a broad portfolio of representing governmental agencies and employees. From them, I learned that law, by virtue of its constitutive role in government, provided wide latitude for its interpretation and application so as to adapt to the political realities of the time. Here, I could see the ideas of the American pragmatists I studied seeping into the very roots of law in the Anglo-American tradition. So, Justice Holmes gets his due in this work.

When I taught an undergraduate course in Law and Morality and an upper-level law school class in Modern American Legal Thought, I realized that, from an student's perspective, law comes across as something formidable and 'supreme', a great and intricate labyrinth of words, rules, and precedents to be followed. But once in the actual practice of law, involving clients, evidence, and courts, law looks somewhat more uncertain and precarious, depending on the invisible intentions of lawmakers and law enforcers, the memory of witnesses, the attention of jurors, and the partiality of judges. I realized that the enterprise of law, in its practical dimensions as legislation, litigation, and enforcement, is not self-executing, nor self-certifying. Nothing of it is beyond analysis, criticism, or revision. Every part requires continual justification or reassessment to maintain its stature as legitimate authority. Attempting to understand and reconcile the relation of law and morality further complicates the picture. Legal philosophers have presented their pet ideas

on that subject. Students, by contrast, must first become acquainted with a variety of ideas, issues, and examples from case law to draw out their moral implications. To study law from this perspective requires some acquaintance with areas of legal history, philosophy, religion, and the various branches of the social sciences such as politics and economics. Achieving this kind of understanding is why I wrote this book.

Acknowledgements: Many individuals influenced and contributed to the ideas that produced this book. In the area of the practice of law these include William C. Smitherman, Joel D. Sacks, Clifford B. Altfeld, James D. Whitney, and those judges, to remain unnamed, before whom I practiced, and who revealed some of the best attributes of their profession: diligent attention, sound reasoning, reflective analysis, and persuasive writing. In the area of academia, I am deeply grateful for those scholars who assisted me in thinking through issues of law and morality, or in putting together a course on that subject: Sidney Hook, Kai Nielsen, Raziel Abelson, William Barrett, James Rachels, Richard M. Martin, Ernest van den Haag, Max Fisch, Ivan Strenski, Michael Gill, Thomas Christiano, Connie Rosati, and Jane Bambauer.

INTRODUCTION

Law is a component of the coercive infrastructure of a government in a given political community, while morality provides a source of norms used to guide the applications of the law within that community. Sometime the application is successful, and sometimes not so much. If we lived as members in a great loving community of shared interests and values there would be little or no need for and intersection of law and morality. In such a utopia, if disputes were to arise, we could imagine they would be resolved in a satisfactory manner through a deep rational interrogation of the assumptions that produced the dispute in the first place. After which the disputants would go away satisfied and better informed. So, the establishment of law marks a recognition that disputes may arise that are hard to resolve, either because the disputants are not wise or honest enough to examine their own interests, or because too many interests of too many people are implicated. Historically, some sort of coercive infrastructure has been thought to be the solution to the problem of hard disputes and hard feelings. However, once the idea of coercion enters the picture, the question arises 'How much is appropriate?' and with that question arises all of the various answers the theoretical study of law (jurisprudence) provides. One answer typically given is that coercion generally is justified if it is the product of a fair system of justice, one created and enforced by people acting with impartiality according to widely recognized social norms. It is typically in the characterization of these norms that morality enters the picture. One such norm is: 'Those you make and enforce the laws must also be subject to them', popularly expressed as 'Nobody is above the law.' This norm of fairness is proposed to resist the corruption of special favors and exemptions, but *how* it accomplishes this is one of the great tasks of jurisprudence.

There have been other norms justifying the coercion requirement, such as 'Laws must reflect the intentions and will of God' or 'Laws must advance the common good'. Again, it is the deep work of jurisprudence to explain and justify why these norms should be followed. In the process of doing this work other norms will be identified and applied or rejected. Consider the norm 'The greater the harm caused the greater the punishment

inflicted'. This norm usually operates in the background when attempts are made to make the punishment *fit* the crime. There is usually public consensus that premeditated murder is a graver crime than reckless killing, which is a graver crime than accidental killing. This spectrum, in turn, is governed by yet another underlying norm: 'We are more responsible for the foreseeable consequences of actions we have control over than for those we did not fully or entirely see coming'.

In general, the application of norms to law can be a bedeviling problem. It is easier to identify responsibility when someone plunges a knife into someone else than to trace a decision of an individual in a corporate boardroom that leads to gradual pollution of a waterway. Collective action and dispersive harmful consequences pose special problems for jurisprudence and for identifying and assessing the morality of law. So how do we get our hands around these multi-faceted problems that arise from the interaction of law and morality? If we try to just talk about law, we run the risk of ignoring the influence of morality; if we talk just about morality, we run the risk of leaving out how law can constrain moral options, create moral dilemmas, and even become an instrument of immorality in the name of lawful authority.

The three parts of the book – focusing on theory, method and practice – represent three approaches to characterizing this multifaceted subject. In Part One (Theory) two chapters are devoted to some general theories of the relation of law and morality, the goal being to identify concepts that subsume and govern both domains and in the process to help mark the borderlines between moral and immoral laws. In Chapter One, the ideas of American legal theorist Lon L. Fuller (1902-1978) are presented. He looks at law and morality as examples of rule and norm making activities of social actors designed to delineate acceptable and unacceptable forms of social behavior. So, to the extent that rules are by their very nature hard to formulate for all conditions, and norms hard to apply in all situations, so will these problems emerge in applications of law and morality. From his perspective, morality would be powerless to serve as a constraint on law without the constant vigilance over those involved in the creation and enforcement of it. Such vigilance requires the guidance, in his words, of the norms of the "inner morality" of law. These are norms, he argues, we must

constantly return to in order to see whether we are constructing and applying laws using fair, reasonable, and proportionate rules.

Chapter Two provides several traditional theories of the relation of law and morality. Theories of 'moral law' and 'natural law' eliminate or come close to closing entirely the law-morality gap by identifying certain fundamental characteristics either of human reasoning or of 'laws of nature' that serve as a unified foundation of both law and morality. By contrast 'positive' law theories attempt to explain why law and morality must be regarded as separate enterprises, allowing that moral values (often *utilitarianism*) identifiable as *social facts* may be incorporated into law, but once there cannot be subject further to moral norms. Positivists prefer to talk about the validity of law rather than its moral goodness. If it turns out that a law is 'bad' it must be amended by using the procedures of 'good' law; it cannot be just ignored. In the case of moral and natural law, law reflects the culmination of the best of what reason has to offer because it is constructed from the same operations that make mind and nature possible in the first place. Philosophical giants like Gottfried Leibniz (1646-1716) and Immanuel Kant (1724-1804) accepted this view and set about to create a true 'scientific jurisprudence' as law's foundation. In their view a properly constructed legal system would have no need for *ad hoc* rules to fill in gaps in law coverage, nor 'courts of equity' to make new rules to fit new circumstances when applying existing law would not achieve justice. Positive law, on the other hand, unites law and morality, in the words of English philosopher and jurist, Jeremy Bentham (1748-1832), into a "vast organic whole," a project made possible not because of some appeal to a transcendent realm but because empirical research and the scientific method are capable of knowing the best strategies of action for human improvement and what specific laws should be crafted to achieve it. With their reliance on a transcendent moral order whether embodied in God as Divine lawgiver, the unchanging order of Nature, or the state itself as a permanent embodiment of moral reason, all three theories, in the end, discourage or even outlaw a moral critique of law from any other alternative than that allowed by the law itself.

In the two chapters of Part Two (Method) various strategies for reconciling law and morality problems are discussed. In Chapter Three the relation of

law to morality may be looked upon from the issue of the relation between common law and statutory law. These are often considered separate *sources* of law and legal authority – laws made by legislators versus laws made by judges – but are they really? Can statutes permanently function without the need for judges to interpret them? Can constitutional interpretation be reduced to distinct and complete canons and principles? Does a legislature have the final say over the entire scope of the jurisdiction of its courts? These questions are discussed and answered in the negative. The critical point is that laws being largely made up of definitions and rules inevitably require interpretation. Language as a vehicle of communication is intimately connected with the transient nature of human experience. This means that laws by their very nature are historical creatures. Yesterday's laws require today's interpretations, because often those who created them are gone and have left behind only more words about them.

This expressive and interpretative process is the subject of Chapter Four, which reviews standards of adjudication (interpreting and applying laws to facts) in lower courts and judicial review (applying judicial decisions to law from a broader legal perspective) in higher/appellate courts. These standards are necessary but not sufficient, it will be argued, for meeting the requirements of an effective moral influence on law. No matter how air tight a theory is that the laws of a society will incorporate its moral norms, in practice it always will take judges to determine if that is the case. Rigorous and precise applications of rules by themselves do not provide that guidance or make for a good judge. Precisely written oppressive laws enacted in bad faith and with insufficient analysis by legislators and notice to the public are still capable of being enforced and interpreted with diligence and consistency. Laws 'on the page', whether as statutes or judicial rulings, must still be evaluated to see whether they perversely require the nearly impossible, have been enacted in bad faith to deceive or entrap, are coherent with other laws, and do not punish retroactively.

So, a well-formed legal system is designed to constrain bad behavior by creating procedures of accountability for the drafting and enforcing of laws, such as: open meeting laws, accurate and informative minutes of meetings, notice and opportunity for public comment, maintenance of accurate legislative and court records, accurate police reports, police

conduct review procedures, freedom of information acts, etc. In the case of adjudication, where laws are applied to facts, rules of procedure and evidence are required. Chapter Four reviews such rules and their importance in producing acceptable lower court decisions. In the case of appellate review, decisions are evaluated in the broader context of the law prevailing in the jurisdiction and even beyond. Here the appellate judge has a wide variety of tools to work with: doctrines determining how much weight to give to precedent (*stare decisis*), rules of statutory interpretation, and an appeal to various judicial philosophies such as legal realism, textualism, originalism, and legal formalism, to be explained later. In this chapter each philosophy is evaluated and the question is considered whether adopting and even promoting a judicial philosophy is consistent with what have been called the 'judicial virtues' of an appellate judge: careful and sober evaluation of the record and pertinent law, as well as an honest and thorough explication of the working assumptions and personal convictions built into the final decisions, especially including the reasons why contrary judicial philosophies do not apply. These critical standards and procedures for producing good judicial decisions, it turns out, also provide opportunities for the introduction of moral norms into the law making and enforcement process.

Part Three (Practice) takes up some of topics and problems that arise when law is applied to social life. Inevitably, applications of law as enacted and applied produce unanticipated practical consequences. The five chapters in this part consider topics closer to the direct influence of law on various areas of ordinary life, and the degree to which law can and ought to impose upon them. Religion is at once deeply personal and yet also permeates may aspects of social life within communities and the nation. How law has tried to reconcile the private and social influence of religion is the subject of Chapter Five. A main difficulty is defining religion itself and the nature of the claims made in its name. Clearly it is a moral question whether the strictures of one group's religion ought to be applied to other religious groups in the same political community. The framers of the Constitution recognized this problem even though they operated largely within the Protestant orbit. Their proposed solutions involving free exercise of religious worship and non-establishment of a state religion ran headlong into their enlightenment values of a government founded on the universal

rights of an autonomous citizenry. The result was that the religion clauses of the First Amendment could not cleanly harmonize private religious values with nonsectarian public life and so produced a long and contentious debate. Religious toleration and the rights of conscience, the answer favored by Madison and Jefferson, have not been embraced by those who live their faith internally but also see it as entirely the measure of what should be true and real for many others outside their faith. Our survey of religion cases reveals a history of *ad hoc* solutions to disputes among sectarian interests and between the sectarian and non-sectarian, raising questions such as whether the claims of religion can be cognizable and adjudicated by law within the existing (non-theocratic) constitutional framework, or whether they are so endemically vague as to be incapable of clear, consistent, and universal application in law?

Chapter Six considers the constellation of laws and norms that affect public communication, including laws limiting or prohibiting speech deemed harmful to individuals, as well as laws promoting speech deemed beneficial to political debate and consensus. The former are laws that prohibit what is deemed 'low value' or even 'immoral' speech; for example, obscene, pornographic, libelous, slanderous, blasphemous, sexist, and racist speech. The latter are laws and regulations of speech directed to the public, particularly during election campaigns. In reviewing free speech cases it is worthwhile to ask: what words in the First Amendment would have to be changed to make them still compatible with the complete suppression of free speech? The answer appears to be: very few, if any; for the history of the First Amendment suggests that the Constitutional guarantee of free public speech and debate is honored except when it is deemed too risky to do so.

Part of the direct moral influence of law on daily life is seen in the ways in which it sets the boundary between acceptable and unacceptable affronts to privacy and intimacy. When such violations occur, our dignity is either enhanced or diminished by what the law allows. Chapter Seven explores the reciprocal interaction between privacy, intimacy, and dignity in American law. Like the wavering protections of free speech, protections to dignity also seem to reflect shifting standards of law; the same law can support one degree of privacy today and a lesser degree tomorrow through

only a slight reinterpretation of its language. An unlawful search one day may be made into a lawful search on another day, depending on surrounding circumstances. Our expectations of privacy may diminish not from an initial change in the law but from what technology makes possible subsequently. In other words, the same wording of the Fourth Amendment, such as "unreasonable searches and seizures" or "probable cause," could be made to apply in a libertarian or an autocratic state by good faith jurists who approach the disputes before them with a different view of the extent and moral value of privacy. If this is the case, then it seems that in the arena of privacy, moral norms have only a tenuous grasp on what the law requires. This chapter examines some areas of human experience where laws affect privacy, intimacy, and dignity, including laws regulating marriage, polygamy, incest, birth control, abortion, and government surveillance.

To discuss law and morality is at the same time to discuss morality and politics because the creation and administration of law is one of the primary missions of politics. The main subject of Chapter Eight is political power itself and the ways it is facilitated or thwarted by law. Superficially, law's influence on politics is made to come across as regular, authoritative, and ineluctable. On the one hand, politicians take an oath to follow the law; in the Constitution (Art. II, Sec. 3) the President "shall take care that the laws be faithfully executed." On the other hand, politicians often seek novel opportunities to bend the law or embrace strained interpretations of it for partisan gain. They pass laws affording them a partisan advantage they would oppose if their opponents did the same. The central question of this chapter, then, is whether there are norms that will ultimately constrain politics within fixed guardrails or whether political power has unlimited license to define its own legitimacy through law. Madison believed the former was possible, arguing that a properly constructed representative electoral system of divided government could be achieved when the general public has an opportunity to elect politicians who would put consensus and the common good above their own self or party interests. Yet, remarkably, in spite of this initial faith that such a system had been or was on the way to being constructed, the Constitutional guarantee (Art. IV, Sec. 4) requiring a republican form of government to the states has been all but dead letter from the start, allowing politicians to create voting eligibility

rules, voting districts, and access to the ballot to achieve biased and decidedly un-republican outcomes. Also discussed in this chapter, illustrating the interaction of law and politics, include the doctrine of separation of powers, formation of the Senate, judicial selection and ideology, additional remarks on the doctrine of *stare decisis*, the amendment process, and the moral norms embedded in the Fourteenth Amendment.

Finally, Chapter Nine surveys areas of law that raise the most salient issues for law and morality: the degree to which law can trespass not merely upon privacy and dignity, but directly upon our physical bodies. Some laws are formed because they are able to affect our physical bodies and, in the process, also our minds. Breaking these 'laws of the body' means being broken ourselves in our personhood or humanity. Whenever a penal law affecting the body is drafted, lawmakers anticipate what its effect will be on the average person in terms of pain or the risk of pain. They may say that they have made the punishment 'fit' the crime, but such a claim is imprecisely compatible with a wide range of possible punishments. This process applies not only to criminal punishment, but also to civil infractions, and even to laws that regulate access to pleasure. A threshold question raised in this chapter is: To what extent, if at all, is it moral to use fear, pain, coercion, confinement, or social stigmatization to achieve the purposes of law. This is a question English philosopher and political economist, John Stuart Mill (1806-1873), urged us to consider in *On Liberty*. Mill wanted us to recognize that coercive laws of the body could be justly enacted and enforced only when measured against a presumed standard of avoiding harm to individual autonomy and dignity. With Mill's insight in mind, this chapter looks specifically at the development of laws and cases regulating suicide and dying, marriage and parenthood, birth control and sterilization, sexual experience, abortion, and criminal punishment. In the process two pervasive forms of paternalism come into view: the paternalism of laws that constrains liberty of action and experience, and the paternalism that restricts the degree to which those subject to the laws have an opportunity to change them.

Since this book is a survey of topics on law and morality, chapters are organized by topic and need not be read in the order presented.

Part One: Theory

CHAPTER 1

THE INNER AND OUTER MORALITY OF LAW

In discussing the relation between law and morality we may distinguish whether a law embodies moral values in its creation by law-making bodies, or whether once created it is interpreted and enforced morally. Suppose a system of laws are enacted to allow collective punishment of family members for crimes committed by one of their members. Then the jurisprudence surrounding such a law could easily fill several volumes and could be impressively articulated, but without addressing the question of whether other family members deserve to be punished as well. Definitions of a 'family member' would be required as well as standards for punishing them. Many threshold questions would have to be answered: Should third cousins be punished the same as first cousins? What about members living overseas or in other jurisdictions? A regime of rules and procedures would be required, raising further questions of how well the rules articulate what the law intends and how well the procedures are followed by those carrying out the law. But, in addition, we may also ask: why did legislators decide to legalize punishing family members in the first place? What was their penological philosophy and was it moral? It is always possible to raise such questions about ethical values and moral norms from outside the law.

That there was a fundamental connection between law and its surrounding norms was the insight of Lon L. Fuller when he referred to the inner and outer morality of law.[1] *Outer morality* refers to the moral content expressed directly through law. Even a 'dead letter' law that was enacted but never enforced could still express immoral values. *Inner morality*, by contrast, refers to the norms of behavior of people who create and carry out the law. It operates, for example, in the courthouse when judges, lawyers, jurors,

[1] Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969).

and witnesses assemble to put on a trial. It also is found in the State Houses and halls of Congress when lawmakers sift through documents, listen to constituents and lobbyists, take testimony and then draft, negotiate, and vote on laws. It operates on the cop on the beat, the preparation of reports of pretrial services and the probation department, and all the associated activities that go into managing our prison system. And it is found in the activities of the law interpreters – the professors who teach 'law' to students and write theoretical essays on law in 'law reviews' for colleagues and judges. But suppose on a given day those acting to carry out the law decided to ignore the norms they are supposed to openly follow. Police officers would use their badge to intimidate neighbors or would fabricate evidence and falsify their reports of crime. Lawyers would deliberately misinterpret the law to jurors and sway their opinion with inadmissible or even fraudulent evidence. Judges would make rulings on the basis of personal animus against one or more of the parties before them or would take bribes or spend most of their time in a profitable business of routinely fixing traffic tickets. Prison guards would extort or play favorites with those in their custody. Congressional members of the Senate Judiciary committee would suppress derogatory information about a court nominee they favored. Law professors, legal scholars and high court justices would explain the law in ways calculated to deceive in order to achieve personal or partisan political objectives. *In other words, the persistent violation of the inner moral norms of law would undermine even the best of moral codes and in a matter of time produce endemic corruption, public distrust, and eventually political chaos.*

The Ambiguity of Rules

By focusing on the norms of morality Fuller is stressing a problem that is endemic to all rule-governed activity. Laws provide rules and must be implemented in a rule-governed way. But no law can ever guarantee its faithful execution. No rule or set of rules is self-executing. There is always a question whether rules or laws apply in a given situation. The act of taking an oath involves an agreement, expressed publicly, to follow certain rules, for example of an officer to carry out the law or of a witness to tell the truth in court. But oath taking by itself is never sufficient to guarantee the faithful execution of the law; nor the uniform and consistent application

of rules. If there is to be a guarantee at all it is only to be found in the degree to which laws and their rules are open to critique and modification from the social and political environment, and especially from opportunities for the public to see the laws being created and enforced and then being able to influence those processes.

So, part of the morality of law is recognizing the fact that laws and rules are expressed in language and that words are never free from the need to interpret them correctly. Even definitions of terms incorporated into a set of laws or rules are not entirely free from a need to interpret them. Part of the diligence of rulemaking is the process of anticipating where the rules would *not* apply. Examining public discussions of law, including legal arguments made to judges and juries in court, debates in legislatures, journalistic reporting, scholarly analysis of legislation and judicial opinions, and information from lobbyists and the general public create opportunities for more precise articulations of law. In theory that flow of information ought to produce well-articulated and designed laws. That at least is the stated moral aspiration. Sometimes, however, the opposite results: laws are drafted and enacted that are vague, unenforceable, or worse yet surreptitious and entrapping, while procedures implementing laws can be corrupt, empty of true accountability, or enforced in bad faith. In those instances, the morality of law requires the analysis of the meaning of words and sentences as they are articulated in the form of assertions and explanations by those who enact and enforce the law. Since rules and laws are never self-executing or self-interpreting, it can never be a valid defense to say that they 'speak for themselves', a common method of moral evasion in the realm of law. If we set something down in writing we are simultaneously establishing a commitment to explain what we are attempting to say.

Ordinarily, the interpretation of rules is attributed to the experience of those who are in the business of applying them. But even the employment of experts does not eliminate problems of misinterpretation or interpretations that still leave some doubt. In baseball, while we have relied on the umpires' visual judgment of when a ball or strike occurs as it passes over the plate we know and accept that some umpires have a wide (or a narrow) interpretation of what it means to be 'over the plate'. Even using

precise visual technology to detect whether the ball is in the 'strike zone' will require the use of written rules to set quality control protocols for the device and resolve boundary disputes over the precision of its functionability. In professional football a 'catch' is made when a player "in the process of attempting to catch the ball, …secures control of the ball prior to it touching the ground, and that control is maintained during and after the ball has touched the ground. (NFL Rule Book, Rule 3, Sec. 2: "The Ball and Possession of the Ball," Art. 7.). The rule does not define an 'attempt'; nor does the rule say anything about the loss and regaining of control of the ball during the catch process. Other rules describe 'possession' as a "firm grip" and as "complete control," but leave it to the judgment of umpires or experts to decide when those words apply in practice. When troublesome applications of rules apply, they can be rewritten to minimize ambiguity. Rules may be modified for greater clarity, but only after the fact and, then, only to reduce uncertainty but never eliminate it. One way to reduce ambiguity of rules, is to provide specific examples of situations where the rules apply or do not apply; those examples would allow an interpreter to analogize them to their situation. This process of recognizing and attempting to resolve ambiguity occurs in all of the rules of sports and other games, but also is part of the interpretation of law itself.[2]

Rules that seem to be absolutely cut and dry on their face also may have uncertain application. Consider the rule of voter eligibility in the Twenty-Sixth Amendment to the U.S. Constitution: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." The rule seems clear enough on its face – nobody can vote until they are eighteen years of age. Obviously, a difficulty arises if one does not know their birthdate even though they obviously have one. To remedy this problem an attempt is made to identify every person's birthday with birth certificates containing witnesses and signatures, but ascertaining these facts is not self-evident in which case a person who is actually eighteen still

[2] Legal treatises such as the *American Law Reports*, or the various "Restatements of Law" published by the American Law Institute, compile fact-patterns from specific cases to assist attorneys in interpreting how the law in their case is likely to be interpreted by judges.

may not vote until someone in authority determines they are eligible by age. In the case of being born at the 'stroke of midnight' it is generally accepted as being born on the 'next day'. Or: consider citizens who vote electronically from east of the international dateline where they are eighteen but then travel west across the dateline when their vote is tabulated and when they are seventeen. Was their vote authorized? Was it even fraudulent? Clearly, the assumption built into the language of the Constitution is of a world where humans or their votes do not travel at high speeds over long distances.

Another illustration of the difficulty of applying voter eligibility rules involves their application to residency. Individuals may be a domiciled resident entitled to vote as long as they intend to remain so domiciled minutes after the vote is tabulated. But they may also change their minds a few minutes later and decide to move elsewhere. There are no clear rules for situations like that, though doubtless some could be formulated; as, for example, by requiring residents to remain in place for a specified time later before their vote is validated. But then more rules about applying the residency rule would be required. Many other *ad hoc* rules apply to voting. We deny to voters an opportunity to change their votes after being cast or after the results have been announced because they have changed their minds or accidentally indicated the wrong candidate. We merely assume that voters know what they want to do and have the proper eyesight and motor skills to accomplish it even though we know that campaigns are deceptive and physical errors in marking a ballot may easily exceed the margin of victory in a close election. Also, we do not interview voters to determine whether their vote is carefully considered and informed. Consent is simply imputed to the process as a whole.

Whether in sports, morality, or law an unarticulated pragmatic assumption, perhaps expressed as a 'meta-rule', is that norms and rules need only be good enough to accomplish the result desired. But the rule of pragmatic finality is coupled with another meta-rule: where a rule can be made better it should be made so. Formulating and revising rules to make them better is a concerted process of interpretation, yet ironically subjecting rules to interpretation also turns out to be a de-legitimizing process; it reveals a certain frailty, often revealed as vagueness or inconsistency in the

application of the rules. To compensate for this, *ad hoc* meta-rules are introduced to bolster application of the rules and re-legitimize them. The stipulated jurisdiction of courts and the finality of their rulings (*res judicata*) are two such meta-rules, rules specifying what kind of disputes a court can hear in its location, what kind of relationship to the court the parties must have, the dollar amount in dispute, when it is too late to sue ('statutes of limitations'), and how far an appeal may go. Other examples of rule bolstering meta-rules are the various rules for interpreting the words of statutes ('statutory construction'), for example, how to distinguish 'may' (discretionary) from' shall' (compulsory), used to determine how the specific wording of laws should be applied to specific circumstances.

The Inner Morality of Law

Fuller wants us to think of law and morality as parts of a practical and continuous process of social problem-solving and adjustment. Both are systems of rules, but it is not entirely accurate to say that moral rules function as imperatives, things we ought to do, while legal rules function as commands, things we must do. Both recognize the importance of an enforcing authority of some sort. Rules in sports require governing bodies and referees. Rules of etiquette require acknowledged social authorities about proper behavior and appearance. Many social settings imply certain rules of behavior, clothing and manner. Offices and classrooms have many tacit and often articulated rules of appearance and conduct. Military organizations are a riot of such rules from morning till night. At a certain point, social offenses may cross a line and become a breach of the peace, a nuisance, a disruption of the quiet enjoyment of others, and so elevate to violations of legal rules. But it is not just at the boundary of law and morality that rules overlap. Legal concepts at the heart of law itself when carefully teased out, concepts such as agreement, promise, remedy, remorse, duty of care, due process, equal protection, and many more are infused with moral conceptions and could not function without them. Fuller wants us to recognize that moral and legal rules are not simply the results of the edicts of rule-conferring authorities. Some authorities are better than others when looked at from the perspective of their purposes and rule-making procedures, but especially in their capacity to reexamine their own purposes and procedures.

Recognizing this complex interrelationship of law and morality, Fuller has called law a "dimension of human life."[3] By this sweeping remark he suggests that wherever there are human beings there will be found laws in some form or other. Even an utterly solitary life might be the source of rules expressed in the form of habits and routines of daily life. We may even be hardwired to develop habits and routines for ourselves, though not always for obeying someone else's. Laws set the obligation to obey; but to merit obedience the very processes of law making, interpreting, and enforcing must acquire the stature of morality. Of course, it is possible for immoral persons to accidentally produce good laws or even write laws intended to be bad that turn out to have good consequences. This seldom happens, however, because law making invariably is a *power* process that easily facilitates corrupt intentions.

In spite of their evident defects should all laws be obeyed? Should you stop at a red light in the middle of a vacant desert in the middle of the night? If a baby is about to be born in the backseat should you stop under the same circumstances? If laws are designed to regulate social life by subjecting conduct to norms, do they apply at the limits of social life, for example in extreme emergencies when a natural catastrophe is about to occur? Also, do I have the same obligation to obey the laws of a foreign country as I do in my own? Treaties, international conventions, 'laws of nations', diplomatic immunities, and customs regulations help smooth out some of these issues by providing some rules and remedies for peoples who enter into foreign jurisdictions. But even living in one's own country questions may arise about the limits of obedience to law and of the jurisdiction of the courts of law. Fuller toyed with this idea in an interesting essay about a group of trapped cave explorers (spelunkers) deep underground and near starvation who draw lots to kill and eat one of their members. They bring their morality with them but, Fuller wonders, do they also bring the laws that apply to them into the cave if they are bodily inaccessible to law enforcement?[4] From the perspective of jurisdiction, they might as well be on the moon, raising the question: How

[3] Lon L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968), 2-3.

[4] Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L Rev. 616 (1949).

can the state regulate conduct through a law if it cannot control and enforce it even if it wants to?

In the spelunker case, Fuller is raising the question of the outer limits of law. Those limits are typically defined not only by the territorial limits of a law but also by its capacity to generate effective enforcement. Fuller wants us to see laws not as cut and dried commands to obey, but as a process of social adjustment and pragmatic judgment. For example, many laws 'on the books' are only selectively enforced. Some are not enforced at all because nobody knows they have been violated, at times even by the person violating them. Other laws are known to be violated in some circumstances but not enforced because the state has more important priorities and must allocate scarce resources. Every traffic cop and police department have *de facto* rules of thumb as to what speed constitutes an enforced speeding violation, which is usually more than a few miles per hour above the actual lawful limit. And, some laws are not enforced because they are no longer deemed worthy of enforcement due to changes in cultural and moral values. In recent years, adultery rarely has been punished; so also unmarried cohabitation, fornication, or sex acts deemed 'nonstandard' by previous norms. But there is an obvious distinction between laws that are unenforced because, though many people openly violate them, law enforcement looks the other way, and laws that are unenforced as a matter of intentional policy. The legal *doctrine of desuetude* ('outdated') does the work of sorting out these distinctions. For example, laws derived from constitutional provisions (bills of attainder, emoluments clauses) are deemed never to lapse, while some penal laws may lose their teeth under the doctrine because the conduct penalized is no longer offensive or practiced.

Some laws are so poorly drafted that their violations are too hard to detect. Texas has a constitutional provision (Art. 1, § 4) prohibiting anyone from holding an office who does not "acknowledge the existence of a Supreme Being." But how supreme should this being be? In referring to "a Supreme Being" does the law allow you to select your own from among other candidates; and supreme in what sense? Would a theological disquisition be required ahead of taking the oath in order to determine whether the oath is being violated? The reasoning behind the law may be that atheists cannot

be moral and cannot properly take oaths and so must be weeded out. Yet, the best evidence for this would be that atheists invariably fail in their moral duties at a higher rate than do theists who are motivated by fear of divine retribution. But has evidence for this claim ever been clearly set out? Without answers to these seldom-asked questions, it is difficult to charge someone with violating the oath provision because the facts to be elicited would be so subjective and their application potentially lawless.

To get a clearer idea of the influence of morality on law Fuller first distinguishes morality as duty and as aspiration, and then describes the essential aspirational characteristics of a good law and a good law-making process. When lawmakers are considering gambling legislation, for example, they must shuttle back and forth between the two moralities. They could draft a law that prohibits the possession or use of gambling paraphernalia (dice, cards, roulette wheels, etc.). They could also draft a law that prohibits activities directly associated with gambling, such as renting a hotel room in a Las Vegas casino; or a law prohibiting the use of the national currency or banking system to make bets. In the first case you would have a clear duty not to possess or use gambling paraphernalia for gambling purposes. But in the later examples, the duty is less specific and reflects more aspirational values. Would I have a clear duty not to stay at any hotel with casinos whether or not I gamble or intend to? And if the aspirational value of restricting gambling is to discourage the healthy practice of assessing risk through reasoned analysis, is gambling utterly devoid of such analysis? The duties in these latter cases are not as clear. Betting on chance events, whether on slot machines, card games, or horse races, for example, are not a repudiation of risk assessment. After all, bookmakers profit from gambling because gamblers do not devote all their time to carefully assessing risk. If we all became casino operators or bookmakers, individual and societal benefits from gambling proceeds would suffer because we could not rely upon people who are willing to throw their money away for a small chance at a big reward. So, gambling laws must achieve a balance of risk and reward by establishing a regulated infrastructure working in the background. Gambling paraphernalia such a dice, cards, or slot machines must meet stringent manufacturing standards, which in turn require stringent quality control and administrative standards. There must be a sound promise, backed by law, that winning

bets will be paid off. The entire gambling environment requires constant vigilance in order to catch cheaters. Events that influence gambling odds, such as insider corruption and new cheating methods, must be accurately identified, disclosed and publicly reported. In other words, gambling is not a repudiation of reason but a game set up to test the capacity of reason to assess risk under uncertainty. It requires a trusted *legal* system of fairness and equal opportunity for gamblers, who would otherwise flee from a rigged system. The same kind of reasoning applies to legislation that regulates the 'gambling' in the stock market. All of these considerations ought to pass through the mind of legislators when they evaluate the purposes, scope, and sanction of such legislation, while keeping in view the social values they aspire to achieve.

Aspirational morality, then, seeks to articulate big generalities about how we ought to live in a society governed by law, and hope that legislators are able to exercise aspirational morality when drafting laws. Lawmakers must focus practically on identifying what specific conduct to punish and then hope they get the consequences right over the long run. "There is no way open to us by which we can compel a man to live the life of reason. We can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality," observes Fuller.[5] From his perspective law and morality do not perfectly fit each other's needs even under the best of circumstances:

> If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, men may begin to weigh and qualify their obligations by standards of their own and we may end with the poet tossing his wife into the river in the belief – perhaps quite justified – that he will be able to write better poetry in her absence.[6]

Given the difficulties of writing laws that can be said to balance the values of duty and aspiration, by what factors should we measure success? Draconian laws may be highly successful if every member of a terrified

[5] Fuller, *The Morality of Law*, xx.

[6] Ibid., 28.

population never fails to obey them. But obedience cannot be a complete measure of the success of a law. They must be constructed to be worthy of obedience. Fuller's proposal is that to be considered good, or moral, laws should have certain attributes that reflect standards of good legal practice. Here he provides eight standards that good laws should meet.

Generality: Legal rules should not be overly specific, nor too general. Laws should not apply to the specific acts of specific individuals in specific places at specific times. Such a condition would render the aspiration of 'equality under the law' impossible to achieve. Under early English law, a Bill of Attainder could be issued against an individual or small group of individuals for treason or serious criminal conduct. The fact that the person and not conduct was the object of punishment is reflected in the fact that the relatives of the 'tainted' individual also could be punished; and all family lands for generations to come could be tainted by confiscation. Attainder was an efficient and elegant device for punishing crime. It made every family member both a potential law victim and its enforcer. Since, it could not be distinguished from summary punishment and applied only to one case, it offended our sense of justice that laws be drafted to apply in a variety of situations.

Attainder was practiced and abused during the American revolutionary period as legislatures enacted either vindictive laws to confiscate property of British sympathizers, or laws conferring special benefits and monopolies to businesses and individuals who assisted in the revolution. Many framers of the Constitution saw the potential for corruption in a political system that could not distinguish a law from a direct order. It should be the business of the legislature to establish general rules and it should be up to the courts to decide which individuals fell under them, they argued. So, enacting Bills of Attainder were expressly abolished by the Constitution for both federal and state legislatures (Article 1, Sec. 9, cls. 3 and 10).

Nonetheless, in spite of the constitutional prohibition, special or private laws are routinely passes by legislatures. Historically the Supreme Court has given more deference to targeted 'special legislation' that confers benefits than to such legislation that inflicts punishment. Congress has passed many bills 'for the benefit of' specifically named individuals to be exempt from immigration laws or to receive war widows' pensions, restore political rights,

or grant citizenship. Sometime these benefits are even granted in such a way as to hide the identity of the beneficiary. They may even be applied to a family or small group of people and are enacted typically to correct an injury resulting from a governmental policy or program, as opposed to public laws that apply to the public generally. Fuller considers it a matter of "linguistic convenience" whether private laws are really laws as opposed to being executive orders or exemptions from laws.[7]

Fuller expressed his generality requirement as a truism: "to subject human conduct to the control of rules, there must be rules."[8] A private law that allows an individual to get a visa by issuing one and then reducing the existing visa quota by just that one looks like a mere administrative adjustment, and not the exercise of a private law. That maneuver, however, is accepted on the assumption that such private laws would be few in number and so do little harm to congressional determination of immigration quotas. Private laws, in other words, ought to be applied sparingly so as not to undermine general public laws and the policies behind them. They are sometimes justified by arguing that if Congress has plenary authority over an area of its control, such as immigration, that authority should bring within it the capacity to make some exceptions. Here the risk of violating the norm against excessive specificity is considerable, potentially turning law into gifts of favoritism. Consider a legal system with only one public rule: *All individuals must obey all private laws.* This excessively general rule has little content since the private law that I fail to obey could be written specifically to apply to my situation by those in power. Under such a system there would be little need for a Constitution or even a judiciary. The cost of such a system, however, would be that official secrecy and corruption of those in power would go unchecked.[9]

---

[7] Ibid., 49.

[8] Ibid.

[9] In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) the Supreme Court found the law requiring President Nixon to turn over to Congress certain papers and audio tapes was not a Bill of Attainder, but governed general conduct and norms of the Presidency itself. See also Matthew Mantel, *Private Bills and Private Laws*, 99 Law Lib. J. 87 (2007).

Promulgation: Rules should be publicly available in a timely manner. The inner morality of law requires that laws be made known to the public and not be hidden away. But is there a knowledge threshold below which something procedurally passed as law ceases to be law because it was not promulgated sufficiently? Laws passed in the middle of the night that become effective at dawn may be legal as long as notice of their future enactment was itself sufficiently promulgated. To avoid unfair surprise laws typically are enacted first after several consecutive readings and then come into effect at a later time. Adding amendments to bills at the last minute, particularly by burying them in a large 'Omnibus Bill', violates Fuller's promulgation requirement, but happens nonetheless too frequently. This requirement also points to the moral importance of a vigorous system of accurate news coverage in the public interest. Journalists who follow the legislative process and report on it assist in creating public knowledge of laws that are about to be or have been recently enacted. Without it, corrupt officials could take advantage of an implicit rule that 'ignorance of a law is no excuse for violating it'.

Prospectivity: Rules should apply only to future conduct. Generality and promulgation establish that rules be made known and that they be known as a general condition for a general kind of conduct, so that someone can understand the difference between following a rule and breaking it. But rulemaking is not always perfect and its application clearly intended. Laws and judgments contain errors, as do the decisions of administrative agencies. Sometimes a mere typo has to be fixed with no effect on the law's binding effect. However, judicial opinions may more substantially change the interpretation of a law already on the books. Internal morality, therefore, requires adequate opportunities to amend legislation, reopen judicial rulings, and seek appellate review of contested rulings. Whenever a statute is interpreted by a court in some manner different from the understanding prior to the ruling, it is possible to say that a law has been changed retroactively as if a new law has been created in its place. This is how losing parties in litigation, who have relied upon a prior incorrect interpretation of the law, now regard their situation. Losing parties will conclude that they are being unfairly subject to retroactive laws. In all of these situations *de facto* retroactive laws are clarified and reinterpreted by the judicial oversight of the legislative function or by substantial constitutional rulings of the

Supreme Court, rendering the law void or requiring that lower courts adopt the correct interpretation while it remains in effect.

However, the expressly retroactive laws referred to the Constitution (Art. I, Sec. 9, cl 3) are of a more virulent kind. They may be deliberate entrapments, an excuse for retrospective punishment, or may even have an unintended punishing effect. Consider a bank that makes loans at 12% interest to less than credit-worthy borrowers. A new law setting the highest interest rate at 10% for all new loans and all existing loans going forward will seriously impact the bank's business model which had relied on the 12% return. Suppose the new law reset the rate for existing loans since their inception, requiring the bank to rebate the overpayment. This example illustrates that retroactivity comes in degrees depending on the severity of the damage. In the case of a retroactive law now carrying the death penalty for certain previous non-capital offenses the damage is absolute and final for those already charged or convicted of them. They will now be executed under the new law. The framers of the Constitution were sensitive to these degrees of penalty because they were facing a revolutionary situation where laws that people under the colonial regime had relied upon were being changed literally overnight, and they were especially worried about retroactive criminal laws. Non-criminal laws, where the penalty of retroactivity was less severe, could still be protected against retroactivity by specific prohibitions, for example, against taking property without just compensation (Fifth Amendment) or laws against impairing contracts (Art, 1 Sec. 10, cl.1), as in the banking example above, which provide remedies against less severe retroactivity. In these provisions the framers were doing the careful balancing of state and personal interests required by the inner morality of law.[10]

Nonetheless, the struggles of the framers continue on in variously degrees in everyday life. Fuller puts it this way: "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever."[11] This means

[10] See *Calder v. Bull*, 3 U.S. 386 (1798); also, Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 Idaho L. Rev. 489 (2003).

[11] *The Morality of Law*, 60.