LET LAW AND MORALS BE AS FRIENDS[1]

Very often when the claim is advanced that law and morality are members of the same family, if not even aspects of the same concept as two chairs might be examples of a platonic exemplar of 'chairness', it is the better part of wisdom to nod, and then continue on with something else; or, if taken by the claim, to begin to ask a fundamental question: What does the speaker mean by the word 'law', and what does he mean by the word 'morality'? Are the two words synonyms for a third concept? Or is each word one which designates a specific concept, neither of which concept is interchangeable, as the "bark" of a dog is not to be confused with the "bark" of a tree?

One may call this kind of endeavour "fashionable"; but in addition it may be an attempt to make clear to oneself some limits, if there be any, of the range and scope of a question which has been with us for a long time, and seems destined to be with us an even longer time, given the present nature of man. Were we omniscient we might not need to ask such a question, nor make such divisions of it; but we are not omniscient, and the divisions of the question which our language permits and encourages helps and hinders us. The sentence which was to end all sentences often lets a part of itself drape outside of the suitcase, forcing us to open up again all of our careful packing. We seem to be better at setting out for destinations than at reaching them.

When we investigate the claim that, in some way or other, the sphere of the moral governs the sphere of the legal what confronts us is one problem of how is it that we distinguish the one from the other? How does a set of moral propositions differ from a set of legal propositions? If both were the same, then *legal* and *moral* would be interchangeable concepts, and could be used as if they were synonyms. But experience shows us that legal and moral systems are hardly synonymous if only for the obvious fact that the aims of one system have, at times, been at odds with the aims of the other systems(s).

The natural lawyer might assert that 'law' is a subset of 'moral'. If he is a theist he might complete his chain argument by claiming that both concepts, 'law' and 'morals', derive, in *some* fashion, from the identity of God Himself. It is a bold claim; yet it is a claim which has few adherents. This is not to state that such an argument is illogical or fanciful; it is, on the contrary, a most persuasive argument because it lends consistency and unity to the multiplicity of experience. St. Thomas Aquinas, when discussing natural law in the Summa Theologiae (question 94 of la2ae), felt that it would be the same law for all men but yet realised that material and intellectual conditions of mankind rendered it possible that not all would arrive at the same conclusions about the nature of law. General principles should be the same for all; but specific systems would differ. He could write this position off by claiming that some were hard of heart, or stupid, or infidels; at least the law *should* be the same for all!

To descend from the logic of deity to the logic by which the world should run may be an easy move for a theist of a certain type. If he admits that the world is an expression of the goodness of God and of the self-consistency of God, then it is a short step to take to suggest that the world, and all of its creatures, should mirror the divine consistency in every way according to their own abilities and capacities. We may look at the laws of the early Commonwealth of Massachusetts, for example, to see that the civil order and religious order were nearly one and the same. To be a member of that early settlement meant that the civil and moral realms met in the life of the colonist in much the same way that it is put forth that reason and flesh meet in man.

But is this example one which exhausts future possible legal and moral worlds? Does the argument come to a swift end when one cites an historical example? It might, if we still lived in a world of concepts which made the claim that examples, by themselves, exhausted concepts, just as some of the early thinkers thought that numbers had to be assigned to a finite group of objects.

It is because we are able to construct systems of law which differ from moral systems that we are able to distinguish the one from the other; and it is because we can see that a moral system, by itself, does not necessarily imply or yield a legal system that some of us try to preserve a distinction between the two realms of thought. It is a truism to assert that both systems are, somehow, concerned with man. Are the demands of each the same upon us? Are the ends of each the same for us? If they are, then they are one and the same.

For the modern thinker the bother comes when he realises that one may construct various legal systems. He can appeal to experience, pointing to the various legal systems of various countries; or he can make an appeal to theory. What would be the best legal system to enact? or, What would be a better Constitution for the United States of America? What has such reasoning in common? In any case, be it historical or theoretic one will set forth a series of propositions which detail the legal system. One does not set forth deductions or decisions which may be reached within any of the systems; that is to present another problem in itself (will decisions be simple, clear, mechanical, penumbral, or impossible?). One makes the claim that any legal system is codifiable, whether it is in fact or not. One can do the same for a moral system, in theory at least. With modern computers it should be an easy task to codify all the moral systems in simple imperative or indicative form. reading out very much like a long form of the Decalogue.

Here begins an interesting experiment which, with the aid of computer technology, could be completed, I believe, in a short while. One would construct his computer to show two bands, or channels, on one screen. One part of the screen would show legal systems; while the other part of the screen would show moral systems. In a rather plain way one would be comparing system against system, in much the same way that one would match up colours in a paint shop, or fix parts of photographs in an Identikit for identifying a police suspect. One would be solving for common,

overlapping features. Does a feature from the legal system match up on the screen with a feature from the moral system? If so, then both are the same. If not, then each is different.

The problem begins to become more complicated when we introduce not only *a* moral system, but feed into our computer *all* possible moral systems. One might ask: Can we develop all possible moral systems? If we could, then it implies that moral systems are finite and closed; they can be listed, and then examined, and, in this way, are different from number systems, which do not seem to be finite, but appear only to be bound by rules of self-consistency. What we strive to do, in any case, is to make our claims public. If there is a legal system, then let it be written down; and the same for a moral system.

The legalist who identifies law and morals will look on his screen to see where the two systems, as codified, match up one with the other. One part of the screen might read, "This is x" and match up with another part of the screen which would state the same sentence. It would be curious, if I may remark in passing, that moral sentences would be cast in the same sentential form as legal sentences, but it could be possible, as in a Republic composed of religious believers. When we had matched up the two strings of sentences which made up our moral and legal codes, we could coalesce our readings and instruct the computer to give a print-out of one set of sentences only. Just as one might not gain any advantage by possessing two exact telephone directories for the same city, so one would not require two identical print-outs from the computer, one marked *moral*, the other *legal*, if each were identical to the other.

My example might be called the law-moral theory in its simplest and clearest form. Like the right hand and the left hand, each is a member of the same body. There may be little differences. Moral sentences may be written in a slightly simpler or compressed form, or vice versa, from legal sentences. In any case the test would be the same. To moral sentences one would assign a moral predicate, or use a moral

adjective to describe the force of the sentences. For legal sentences a moral predicate or moral adjective could be discovered to be the guiding intention for the law. Not only would one have an example of 'a law', but one would have an example of a law 'for a moral purpose'. Like a D.N.A. chain, one strand could not be separated from the other strand without, at the same time, undoing and destroying the complex itself. A legal sentence would always have to contain a moral predicate; if it did not, it could not then be described as a legal sentence.[2] One could make a concession, if he wished to be a soft-hearted law and morals man, that not every moral sentence necessarily had to be, at one and the same time, a legal sentence. Moral sentences (or concepts) would function much like bank accounts to assure the worth of any possible legal sentence which might come into existence. At no time would one fear that he had issued a legal sentence without a requisite deposit of moral sentences in the bank. No overdraft would go morally unsecured.

I admit that this is a very simplistic picture of moral and legal systems. In their simplest form there would exist a one-to-one comparison: there would be one moral system only, and against it would be compared one legal system only. Ideally, there would occur a fusion of the two; or, if not a fusion which was absolute, certainty an embracement so secure that the legal package would be wrapped totally with the moral wrapping paper, with moral paper left over to spare.

But where in the world has such a fusion ever happened? One might reply, in the early Commonwealth of Massachusetts, for example. Does that answer the issue? It seems to tell us that a possible case of heaven on earth existed; but it has not answered the problem I have posed. It merely cites an instance where religious and moral beliefs may have been the force of the public order. Our computer experiment would not disallow that possible state-of-affairs; it would only show us that this state-of-affairs was not the final state-of-affairs.

What is the reason for such a claim? I suggest that it rests in the nature of the differences between a moral proposition and a legal proposition. It is quite possible that one proposition may overlap with the other; but that the propositions overlap is not to prove that the propositions, themselves, are the same in every way. Moral propositions spring from beliefs, while legal propositions differ in that their public force is contained in the statement of the propostion itself. I do not believe in legal propositions; I am bound by them, while moral propositions must first have my belief before they can command or compel me.

We pose for ourselves an almost impossible task if we ask, of every piece of statutory legislation, what was its intention? The intention of the statute, or piece of law, should be clear to us on its face. For example, if one takes a written instrument, such as the Constitution of the United States of America, one may read the instrument on its face value, and attempt to make decisions on the scope of the instrument over problems which fall under it by appeal to the language of the instrument itself. In this way one claims that the intention of the law rests in the language of the law itself as expressed, sentence by sentence, in that instrument.

On the other hand if we ask what was the intention of the framers of the Constitution, seeking the "real" intention behind the public utterances as codified, we bend ourselves upon a course without end. Should we read all of the correspondence which led up to the drafting, and final adoption, taking every letter every single framer might have written in which reference was made to the debate, and thence the ratification of the Constitution? Which documents will have greater importance than other documents; or will all documents be treated with equal weight? Will we take into accordance possible changes of mind of a framer, even if the change of mind seems to act against his own best interest, or which he later repudiated, even though the Constitution had been adopted? But why should we stop here? Why should we not ask this question of every piece of

Parliamentary legislation, in order to determine the *real* intent of a piece of legislation?

Moral reasoning proceeds from a different set of assumptions than does legal reasoning. One may make a strong claim or a weak claim with regard to moral reasoning. If one makes a strong claim he says something to the effect: I believe that so and so is the case, and what I believe is true. In a sense this is a self-justifying belief, and much religious reasoning depends upon that form of argument. An example of this sort of reasoning, or justification, is that which claims that God revealed himself to man, and that the proof of His revelation is to be found in various biblical stories, themselves dependent upon Him revealing Himself to mankind. Even the strongest theist stops at this point because he wants to preserve a distinction between claims of faith (or of belief) and claims of reason. If one argues that faith, and its propositions, are like sets of mathematical propositions, then one is in danger, as a theist, of reducing faith to reason, and that theists are wont not to perform.

The weak form of moral belief (and I use the word 'weak' as I would of a weak cup of tea) admits that its fundamental propositions, from which other moral deductions derive, are propositions taken on faith, and can be cast in the form of, "I believe that *p* (what '*p*' might be, or indicate) is the case." If the other party does not believe that *p* is the case, it is wrong (even within the language of the believer's moral system itself) to hold the third party bound by the alien set of beliefs. The third party may respect the beliefs of the other, but this is an example of tolerance or civility on the part of one to the other. The strong claim, as during various religious inquisitions, would claim that the disbeliever is, whether he knows it or not, guilty of an offense, and would punish him for not believing. Law has its parallel here in various strict liability statutes, as when one adulterates milk and, as a result, is punished by fine for having sold such adulterated milk even though one was not responsible for the adulteration.[2] Forms of employers' liability, in various master-servant relationships, take the form

of penalty by means of strict liability through penalising the employer (the master) for acts of his employee (the servant). It may be the case that a legal fiction is herewith employed: the law treats the master as if he were liable for the actions of the servant because the master gains from the employment of the servant, he should, likewise, suffer faults of the servant, reasoning that greater care could have been taken to retain a servant who would be without fault. But in the case of strict legal liability, whether or not one believes in its worth, one is yet bound by the law which acts in that fashion. Strict legal liability does not include in its justification that one share in its grounds of belief. It should be recalled that the claim of the strong moral reasoner is that he holds, as part of his belief, that the other should believe, but for some reason does not. In any case he feels that his moral belief is self-justifying, the self-justification is part of the belief itself. Legal strict liability involves no question of belief; it is the simple fiat of a constructed legal system.

I had asked at the beginning of this paper, how was one to distinguish a legal proposition from a moral proposition? Moral propositions are such that they restrict which action can be done or foreborne from within a range of actions. They restrict by proposing what should or ought to be done, but 'should' or 'ought' carry along with their ordinary meaning an added force: there is an imperative force that such must or must not be done. Just how a moral proposition restricts or guides is itself open to much debate. Some would hold that the very self-consistency of the proposition is a justification of what one may or may not do. If one understands the moral proposition itself, then one knows what act he can or cannot do. The rational consistency of moral propositions, it is argued, guarantees the rational consistency of human actions to which the predicate 'moral' is attached or attributed. Others may argue that the self-consistency of a proposition about what actions may be omitted or committed is no more a guarantee of moral truth than the self-consistency of any axiomatised system is the guarantee of the desirability or worth of the system.

One may argue that it is not what the proposition asserts which should be our guide, but what effects or consequences follow from the enactment of the proposition. There is no neat concensus on what constitutes the justification of a moral premise. One may argue, in a final form, that a claim of rationality for moral propositions is a claim not possible to prove, let alone to justify.

If a moral proposition causes us initial difficulties as to assign it to some class, a legal proposition can be just as harrowing. One may hold that a legal proposition is that sentence which compels or directs in some fashion, and has the force of government behind it. Another may assert that a legal proposition compels our belief and adherence because it possesses, as a proposition, a rational consistency to which our minds naturally turn, adapted as the eye is to colour. Blackstone or Burlamaqui, both 18th Century legal theorists, would accept a view which derived law from sets of rational propositions, themselves rationally justified.

Much is made of a democratic society which is not a theocracy, yet which is a polity with binding laws. How can the laws be binding, it may be asked, if, at the same time, the laws are not moral? The question could be turned about and framed in this way: From a plurality of divergent moral systems, how can any one system of civil and criminal law arise?

It is to the latter question which modern legal theorists turn their minds. If a legal system must also be a moral system, then it is a system which is intolerant of beliefs. If a legal system can be subscribed to only because it reinforces one's private moral beliefs, then there is serious doubt if a legal system, as such, could ever arise. The demands of democratic pluralism have forced us to think out and to refine many of our commonsense notions about the scope and claims of legal and moral systems upon each other, as well as upon members of a society. Let me cite two examples. In his Rosenthal Lectures for 1960 Lord Radcliffe tells us that Lord Mansfield was of so fixed a mind that he believed "...that the existence of a moral duty was suffi-

cient groud, without other consideration, for giving legal effect to an actual promise to perform it." Citing *Hawkes v. Saunders*, 1 Cowp. 289, 290 (1775), these words of Lord Mansfield appear: "Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."[4] The case was duly answered as to its moral sentiments but mistake at law when the House of Lords, in 1778, in *Rann v. Hughes*, 4 Brown P. C., delivered its judgement in these words: "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration."[5]

In some moral system of beliefs it may well be the case that Lord Mansfield's belief worked; or, whether it worked or not, he himself would voluntarily be bound by the force of his moral belief. But it was not the law, and it is not the law; yet we do have a law of contracts. Because a promise given without sufficient consideration is not enforceable at English law does it then follow, if we disagree morally with what is accepted at common law, we are thereby discharged from contractual obligations by force of our moral beliefs? If we returned to our computer screen this would be an instance where the moral and legal systems did not match up; nevertheless, we do have a moral system, and we do have a legal system. Is one less in force because of the variance of the other?

This first example is a mild case. We can still act as practical men and admit that a promise which is not supported by a valid form of consideration is not a contract which is binding at common law. We may hold that a bare promise to act can be admitted to be a valid moral candidate in some moral system, but equally understand that it will not receive social protection by a government. If one breaks his promise, then his own conscience will have to administer punishment, or exact guilt; the state will not. There exists a binding system of contract law independent of one's private

moral beliefs. A legal system which has a developed form of contract law and precedents is its own arbiter of what constitutes formal contractual validity. Morally one may abhor the doctrine of *caveat emptor* while legally it is a bona fide part of commercial law. There could as easily exist some other legal system, such as Roman law, which would not follow the "buyer beware" principle, and would also be in accord with some moral system which would eschew our common law practice; nevertheless, the morality of my act does not necessarily entail a subsequent legality. "*A*" may follow upon "*B*"; it need not of necessity.

Although legal fictions were condemned, for the most part, by Bentham, and give moralists migraines, the law functions with the use of legal fictions. Where law and morals have, in the past, conjoined, the law, true to its own identity, has been shown to develop its own methods independent of its moral assumptions. Legal systems to which we accord validity and authority and legitimacy provide us with interesting examples of how independent a legal principle can be from a moral one. For my second example let us turn to Seventeenth Century America.

The Acts of Assembly which were passed in the Colony of Virginia from the year 1662 provide a curious example of how a legal and moral system enmeshed, but how the legal aspect of the fusion developed in its own peculiar fashion. It had been part of the common law requirement for homicide that one had to form a proper intent to commit the crime, 'proper' in this instance meaning necessary element for the commission of an act. We can read in Sir Edward Coke's *Reports* (part 12, [1656]) how a simple, but important, distinction is made between murder and manslaughter:

> "Divers men playing at Bowls at great Marlow in the county of Kent, two of them fell out, and quarrelled the one with the other, and a third man who had not any quarrel, in revenge of his friend, struck the other with a Bowl, of which blow he died. This was held Manslaughter, for this, that it hapned upon a suddain

> motion in revenge of his friend." (Trin 9 Jac. Regis. page 87)

The reasoning here is clearly that a sudden, unpremeditated (given proof to, perhaps, by the suddenness of the action) act should not be deemed to constitute the felony of murder. Although this is early reasoning about the nature of intention, or *mens rea*, the bent is that natural consequences do not necessarily merit one description only even though serious consequences flow from a rash act. Centuries later, for example, the House of Lords might divide itself on the merit of such a proposition, as it did in the recent murder case *Hyam v. Director of Public Prosecutions* (1974) 2 All ER 41, holding that certain unintended consequences do prove that a murderous intent was present, whether or not an accused admits this, even if not in his own mind.

In 1668 a grand assembly convened by prerogation at James City, in a Virginia colony, during the 21st year of the reign of Charles II. One of the first acts passed was the following, *"An Act about the casual killing of Slaves."*

> "Whereas the only Law in Force for Punishment of refractory Servants resisting their Masters, Mistresses, or Overseer, cannot be inflicted on Negroes, nor the Obstinancy of many of them, by other than violent means suppressed: Be it Enacted and Declared by this Grand Assembly, and the Authority thereof, that if any Slave resist his Master, or others by his Master's Order, correcting him, and by the Extremity of the Correction should chance to die, such Death shall not be accounted Felony, but the Master, or that other Person by his Master appointed to punish him, be acquit from Molestation, since it cannot be presumed, that prepensed Malice which alone makes Murder Felony, should induce any Man to destroy his own Estate."*

One would hardly say that in 1668 a valid legal system was not in force. It possessed the elements of a legal system: the laws were public, promulgated, and enforced. Furthermore, the laws did not present any outrageous affront to

the greater part of the subjects in the community. The act is consistent in its use of a legal fiction: one was not to be assumed to destroy his own property if he disciplined it vigorously. Not much imagination is needed to visualise what horrid abuses could flow from such a piece of legislation; but does the horridness of the legislation make it any less a piece of law?

Those who wish to conjoin law and morals by use of the argument that no legal system can exist unless it also embodies moral premises appear to advance more than they mean with less than they should. It is never clear whether they mean that each and every legal proposition must, at the same time, be a moral proposition, or whether they mean that a legal system (all of its imperative sentences, its statutes, its decisions, its deductions, and such paraphernalia) must, in the broad sense, embody certain broad moral sentiments, such as to do good and avoid evil, and the like. The first premise commits us to an impossible task, while the second commits us to fuziness and a certain type of "good-willism". Neither position, to my mind, satisfactorily resolves the problem(s) in the law and morality debate.

Law, in the wide sense, is concerned with the welfare and order of some society or other. Even Satan, with his legions in Hell, seems to have some kind of law: a possessory claim upon men through their acts and actions, with certain rights and obligations which God must honour. I use the theological case because it seems to be an imaginative model which answers successfully that force of argument which claims that a legal system *necessarily* must embody moral elements. Patently a legal system need not embody any moral system. One can easily construct a legal system which, under Hohfeldian analysis (which would reduce *any* legal system to certain fundamental elements), would not yield a moral predicate or moral element. One need not pursue theological arcanum to state that Satan, as the figure for primordial evilness, is not supposed to have a single redeeming feature in his character: yet he can be thought of as that to whom legal predicates apply.

The goodness or badness of a legal system may be judged in terms of its legal efficiency or inefficiency, its workability, and its purpose. When we introduce a moral criterion we do so at great risk. Which moral criterion shall we employ? Shall we paint the canvas in broad, undefined strokes; or will we be pointillists, examining every part of the legal system in an attempt to pass moral judgment upon each part? How will we resolve moral differences between differing points of view? Would there be an additional "moral court" created which, though itself not part of the moral courtroom, would adjudicate between moral suits? Would we then have an appeal procedure for the aggrieved parties whereby a final appeal, or an appellate appeal, would lie to a meta-moral-legal court, itself deemed to exist as a neutral party to any controversy? But what of the moralist who would not agree to this procedure? What would we do with the party who faced this final supreme court and said, much as John Ehrlichman said to Judge Gesell of the United States District Court, Washington, D.C. in the Summer of 1974: "I believe I am the only one who really knows whether I am guilty and, your Honour, I am innocent of each and every charge."? Judge Gesell had just sentenced Mr. Ehrlichman to a five year term in prison.[7] Would the emotivist, or the rationalist, or the natural lawyer, or the utilitarian, or the determinist, or the existentialist, or whom would prevail in winning *the* moral approval which a legal system must have for the approval of a moralist?

What one ought to fear is the prospect of a legal system functioning as if it were also a moral system. One may be the Keeper of the King's Conscience as Lord Chancellor; but it is folly for a legal system, as it was with St. Thomas a Becket, to make the Keeper Archbishop of Canterbury. It may salve one's soul; but it destroys freedom of conscience and liberty of the person. One may judge if the other has obeyed the law. But how is one to judge — to reach a final determination correct in its description of the interior moral state of another — that some other person has been moral or not? History is replete with the carnage and victimization

from legal-moral systems. When a legal system is also the moral system why should there be tolerance? The moral system rests upon private belief, but it can move on like a battering ram mounted on the legal chassis of the state to effect its moral aims. The Jew, the unbeliever, the Catholic or the Protestant, the espouser of an unpopular cause, the member of a minority, the scientist, have at many times through history been victims because their beliefs, or their status, were in opposition to the established moral beliefs in the legal system of the period. If the moral can work through the legal, why should not the legal move just as fiercely to excommunicate or execrate or destroy that person who by force of his own belief stands outside of the moral system which the law promotes? Why should one tolerate the "law-breaker"? Conscience should be the aim of the state, not the aims of the private citizen, if law and morality are one.

But they ought not to be. They should exist as friends, tolerant of differences, but joined by love. This is the case for which I argue.

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NOTES

1. "If citizens be friends, they have no need of justice; but though they be just, they need friendship." Book viii, *Nicomachean Ethics.*
2. This position has been coherently argued in, *English Hamlyn Lectures,* (page 51), Stevens and Son Ltd., 1953.

   In the conclusion of his lecture he wrote, "The conclusion which I have therefore reached is that the strength of English Law, from the basic rules of the Constitution to a minor regulation issued by a local authority, depends in large part on the fact that the people of this country recognise that they are under an obligation to obey the law, and that this sense of

obligation is based not on force or fear, but on reason, morality, religion, and the inherited traditions of the nation".* I feel that Goodhart is partly right, and party wrong, and I hope to deal with his position in a later paper, for it is a position which, in part, I favour. He seemed to be unaware of the difference between a legal proposition and a moral proposition, as I have stated in this paper.

3. A recent example of strict liability is the following case, now on appeal to the House of Lords: *Tesco Stores Ltd. v. Roberts*, (1974), 3 All ER 74, held that the defendants (Tesco) had contravened S 2(1) a of the Food and Drugs Act 1955 by selling a package of frozen liver which, when thawed, proved to be spoiled; but such spoilage could not have been known to the defendants at the time of sale; furthermore, they claim that they simply sold meat which they had bought from a wholesaler who had frozen the liver in the first phase.
4. Lord Radcliffe, *The Law and its Compass*, (Faber & Faber, 1961), pp. 29-30.
5. A promise on a promise is sufficient consideration, as when I promise to pay for which the other promises to sell; or *A* sells me the shoes on my promise to pay for them at a later date.
6. *Acts of Assembly*, London, 1728, printed by John Baskett, copy in the Library of the Honourable Society of Lincoln's Inn.
7. *International Herald Tribune*, Paris edition, Agust 1st, 1974, page one, story by Robert Siner.