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The Natural Logic of Morals and Laws

Ray Jackendoff

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The theme of this special issue is "Is Morality Universal, and Should the Law Care?" For me, this question provokes the further question of what morality and the law *are*. That is what most of this essay is about. The last two sections address the initial question, primarily dealing with laying out its multiple ambiguity. Few of its readings have easy answers; the best I can do in the present discussion is to see what is at stake.

I.   THE COGNITIVE PERSPECTIVE

I come to these issues from the perspective of a linguist applying the theoretical approach of cognitive science to social cognition.[1] The focus of my inquiry is the system of knowledge that enables an individual to understand social and cultural interactions, within the context of social institutions. Morals and laws, contracts and customs would not exist were it not for the human minds that create them, and anyone who does not understand them cannot function in human society. I therefore find it of interest to examine the cognitive system that affords such understanding.

This inquiry is modeled on the approach to language of generative linguistics.[2] Like a culture, a language exists only by virtue of the individuals using it. With a few pathological exceptions, all humans have a language, but they do not all have the *same* language. Generative linguistics therefore takes the object of inquiry to be not "the language in the world," but rather the system in the mind/brain that gives rise to the

[1]   For much more detail, see RAY JACKENDOFF, LANGUAGE, CONSCIOUSNESS, CULTURE: ESSAYS ON MENTAL STRUCTURE (2007).

[2]   NOAM CHOMSKY, LANGUAGE AND MIND 13, 16, 18 (1968); NOAM CHOMSKY, ON NATURE AND LANGUAGE 47-48 (Adriana Belletti & Luigi Rizzi eds., 2002).

ability to speak and understand linguistic utterances, as well as the "hard-wired" system that makes it possible for children to acquire this ability.[3]

Mikhail and Hauser develop an approach to morality in this general vein.[4] Following the approach of Rawls in *A Theory of Justice*,[5] they draw a parallel between the ability to make moral judgments and the ability to make grammaticality judgments, and they advocate accounting for the former ability in terms of a "moral grammar."[6] For my part, I find Rawls's parallel a bit shallow. Being able to make grammaticality judgments is not the point of linguistic competence—it is merely a side effect of being able to use language for communication. By contrast, the ability to make judgments of justice or morality *is* the point of moral competence: it helps determine how one behaves toward the person being judged.[7]

What I take to be a more deeply grounded antecedent for my approach comes from John Macnamara, who draws a parallel between moral reasoning and intuitive geometry.[8] Just as one has an intuitive sense of the geometrical landscape, one has a sense of the *social* landscape, unconsciously organized in terms of a set of fundamental social categories and relations. Just as the basic unit in the conceptualization of physical space is a physical object, a basic unit in the conceptualization of social space is a *person*, the locus of intention, responsibility, rights, and status in the community. Possible social relationships among persons include kinship, dominance, friendship, love, enmity, competition, cooperative partnership, and obligation. Another basic unit is the social *group*, which includes, among other things, families, clans, clubs, cliques, teams, religions, and nations. Members of a group identify themselves with the group, feel loyalty to the group, and under

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[3]   STEVEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE 18 (HarperCollins 2000) (1994); RAY JACKENDOFF, FOUNDATIONS OF LANGUAGE ch. 4 (Oxford Univ. Press 2002).

[4]   MARC D. HAUSER, MORAL MINDS 165 (2006); John Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 TRENDS IN COGNITIVE SCI. 143 (2007).

[5]   JOHN RAWLS, A THEORY OF JUSTICE 47 (1971).

[6]   HAUSER, *supra* note 4, at 43; Mikhail, *supra* note 4, at 144.

[7]   Dupoux and Jacob offer other arguments against Mikhail and Hauser's conceptualization of the problem, though I am not sure I endorse them. *See* Emmanuel Dupoux and Pierre Jacob, *Universal Moral Grammar: A Critical Appraisal*, 11 TRENDS IN COGNITIVE SCI. 373, 373-78 (2007).

[8]   John Macnamara, *The Development of Moral Reasoning and the Foundations of Geometry*, 21 J. FOR THE THEORY OF SOC. BEHAV. 125, 128 (1991).

many circumstances favor fellow group members over non-group members. Again, I stress that all these units and relationships exist only in virtue of the minds of the individuals involved.

I concur with Mikhail and Hauser that it is of interest to explore a theory of "moral grammar,"[9] but I believe it is best embedded in the broader context of a theory of social cognition. The entities with which moral principles are concerned are precisely persons, social groups, and the relationships among them. Returning to the topic of this special issue, these very same entities are the locus of laws. I wish to show that moral principles and laws are quite distinct sorts of mental entities, playing different roles in the logic of social cognition. In order to show this, it is first necessary to discuss the properties they share—not only with each other, but also with other sorts of principles.

II.   SOCIAL NORMS

Morals and certain sorts of laws fall into the general space of *social norms*. A norm (as I will use the term) focuses on the consequences of a state or action for a generic individual.

(1) If any person P is in state S or performs action A, consequence C will ensue, to P's benefit or detriment.

Two things make this more specialized than an ordinary rule of inference. First, P is a generic individual, not a particular person. Second, P stands to benefit from, or be hurt by, the consequence; that is, it turns out to be *good* or *bad* for P to be in state S or to perform action A.

As stated, (1) is too broad for our purposes, since it still includes cases such as (2a) and (2b).

(2) a. If someone is too short, they won't be able to reach the bar.

   b. If anyone eats that, they'll get sick.

These cases concern physical consequences of states and actions. In social norms, the consequence involves the intervention or mediation of other individuals—as it were, a social counterpart of physical causality. For example, in (3), the awarding of the prize and the shooting depend on the

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[9] HAUSER, *supra* note 4, at 43; Mikhail, *supra* note 4, at 150.

intentional action of other individuals in reaction to the actor's action.

> (3) a.   If anyone invents a better mousetrap, they'll win a prize.
>
> b.   If anyone crosses the border without a passport, they'll be shot.

Some social norms involve only a state of the person P—something for which they cannot be responsible (these are, I gather, real norms from real societies):

> (4) a.   If anyone is an identical twin, they'll be very much admired.
>
> b.   If anyone is an identical twin, they'll be shunned and reviled.

However, in the class of norms under which morals and laws fall, person P performs an intentional action—just being short or a twin is not enough. Yet, such norms may also involve non-intentional characteristics of P (the italicized parts of (5)):

> (5) a.   If anyone *of such-and-such ethnicity* lives here after such-and-such a date, their property will be confiscated.
>
> b.   If anyone *who is a woman* participates in an ordination ceremony, she will be excommunicated.

Norms can be expressed in many different linguistic forms. For instance, the conditions on P and P's actions can be stated in various ways.

> (6) a.   The inventor of a better mousetrap will be rewarded.
>
> b.   A woman participating in an ordination ceremony will be excommunicated.

An important way of expressing norms is with the modal verbs *should*, *must*, and *may*, which leave the good or bad consequences implicit:

> (7) a.   X should do Y = "If X does Y, a good consequence for X will ensue."
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> b.   X shouldn't do Y = "If X does Y, a bad consequence for X will ensue."
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> c.   X must do Y = "If X doesn't do Y, a bad consequence for X will ensue."
>
> d.   X mustn't do Y = "If X does Y, a bad consequence for X will ensue."

    e.   X may do Y = "If X does Y, no bad consequence for X will ensue."

    f.   X may not do Y = "If X does Y, a bad consequence for X will ensue."

Many of these linguistic forms do not distinguish norms from other kinds of inferential statements. For instance, the statements in (3)-(6), with the modal verb *will*, can be read simply as predictions rather than norms. Similarly, *X should do Y* can be read simply as utilitarian advice rather than as a norm; for example, in *It might rain, so you should take an umbrella*. So the question is: What makes a norm a norm?

The conceptual difference between a norm and a prediction has to do with what I will call the *epistemic attitude* under which it is understood. The philosophical literature often speaks rather loosely of "propositional attitudes such as belief, desire, etc." and then concentrates on belief.[10] Propositional attitudes are one sort of epistemic attitude; they involve one's commitment to the truth or falsity of a statement, as in (8).

(8) Joe thinks/doubts/imagines/claims that the earth is flat.

However, another class of epistemic attitudes concerns commitment to contemplated *actions*, for example:

(9) Joe intends/plans/is willing to bake a cake.

Many English verbs express propositional attitudes when followed by a *that*-clause, but actional attitudes when followed by an infinitival clause.

(10) a. John decided/agreed/learned/swore that the earth is flat. (propositional)

    b. John decided/agreed/learned/swore to bake a cake. (actional)

It is important to observe that this correlation is not absolute. For instance, *believe* and *claim* still express propositional attitudes with infinitivals; and *intend* followed by a subjunctive *that*-clause expresses an attitude toward an unexpressed action.

(11) a. Joe believes/claims the earth to be flat. (= "Joe believes/claims that the earth is flat")

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[10] *See, e.g.*, JERRY A. FODOR, PSYCHOSEMANTICS 10-11 (MIT Press 1987); HILARY PUTNAM, REPRESENTATION AND REALITY chs. 3, 4, 7 (1988); ROBERT C. STALNAKER, INQUIRY 15, 18-19, 25 (MIT Press 1984).

b.   Joe intends that Sue come too. (= "Joe intends to bring it about that Sue comes too")

There are further, trickier cases as well.[11] That is, the semantics of epistemic attitudes is not at all mirrored one-to-one by grammatical expressions; there are only tendencies.

I go through this because in addition to commitment to propositions and to actions, there appears to be a third and more complicated kind of epistemic attitude, namely commitment to norms. Consider for instance the norm that one should not steal. If one is committed to this norm, one has the following attitudes:

(12) Commitment to norm "One shouldn't steal" =

a.   Intention not to steal (actional attitude);

b.   Prediction of bad consequences of stealing (propositional attitude);

c.   Approval of bad consequences of stealing, *even if the violator is oneself*.

None of these on its own constitutes commitment to the norm. Having an intention not to steal (12a) does not automatically entail accepting punishment if one steals, nor does it entail an attitude that stealing is bad. The belief that there exists a norm against stealing allows one to predict that stealing will be punished (12b), but one may steal anyway. And if one *does* avoid stealing because of this prediction, it may be merely to avoid punishment, a purely utilitarian strategy.

(12c) gets closer to the heart of the matter: committing to a norm involves, among other things, a sense of the justice of the consequence, even if it is to one's own disadvantage. Could (12c) alone be the only condition necessary for commitment to a norm? This depends on whether you think that someone who steals all the time and then willingly accepts punishment is committed to the norm. I personally wouldn't count this as commitment. It seems to me that all three conditions are necessary.

What kind of attitude is (12c)? It might be couched as a propositional attitude, such as a belief that being punished for stealing is just. But in this way of putting it, the term *just*, meaning roughly "normatively appropriate," simply conceals the problem within a single word. Regardless of how this

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[11]   For details, see JACKENDOFF, *supra* note 1, at ch. 8.

question is resolved, I am inclined to see commitment to a norm as an epistemic attitude distinct from and more complex than both propositional and actional attitudes. The semantic distinction among these attitudes is to some extent obscured by the fact that the linguistic expression of norms overlaps with that of predictions and advice.

Both morals and relevant parts of law fall under this logic of norms. In particular, they both concern the consequences of certain actions for the actor. However, they diverge in what those consequences are. Very roughly, in the logic of morals, the consequence of the actor's action concerns what everyone in the community thinks of the actor—the actor's moral reputation. In turn, the actor's reputation affects the way people interact with him or her: one interacts differently with "good" people than with "bad" ones.

The logic of laws is quite different. Laws (of the relevant sort) are obligations and rights created in the name of the state (or other body of authority such as a church) by its authorized representatives. The consequences of violating a law are imposed by the representatives of the state, in the state's name, and consist of direct punishment or, rarely, it seems to me, reward.

Morality and the law also differ in what sorts of actions they pertain to. Some sorts of actions, such as assault and theft, fall under the purview of both. But some fall only under morality, such as helping old ladies cross the street; and some fall only under the law, such as driving on the right-hand side. Lying is a moral violation; the corresponding legal violation is lying *under oath*. Depending on the legal and moral system in question, some sorts of actions fall under both, but in conflicting fashion. An obvious case would be the evil landlord in the melodrama who is evicting the poor widow, in compliance with his legal rights, but in violation of the moral code; more extreme (and real) would be actions carried out under the Nuremberg Laws. A case in the other direction would be civil disobedience in the tradition of Gandhi and Dr. King, in which illegal actions are carried out in the name of a "higher" morality.

We now go into the logic of morals and laws in somewhat more detail.

III.   Variation Among Moral Systems

Morals fall under a larger set of norms, which includes norms of social appropriateness (or manners or etiquette), norms of "proper" language use, dietary customs, customs of dress, and religious norms (although the latter, if enforced by an authority such as the Catholic Church, take on the status of legal codes). Each of these sorts of norms attaches social values of "good" or "bad" to a particular class of actions.

Following the lead of standard moral philosophy, recent work on the cognitive science of morality such as that by Mikhail[12] and Hauser[13] has taken the view that morality can and should be studied in isolation: in order to get at the root of human nature, we ought to strip away the relative superficiality of social convention, looking for universal principles of moral judgment. The argument rests in part on widely cited experiments by Turiel, in which young children readily distinguish those norms that we could "decide to change" (social conventions) from those that we could not (genuine moral principles).[14] The latter are often taken to be timeless, universal, and objective.[15]

I find this approach too limited for several reasons. First, often the only moral principle explored in this research (most frequently using so-called trolley problems) is "Don't hurt people." To be sure, the moral tradeoffs explored by trolley problems are rich and complex, but they represent only one of many domains of moral judgment. Haidt, following suggestions of Shweder et al.,[16] proposes that moral systems potentially deal with five issues: harm (as in trolley problems), fairness, ingroup-outgroup dynamics and loyalty, authority and respect, and purity.[17]

Within these issues, cultures differ in what they themselves consider moral. Two hundred years ago, large

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[12]   Mikhail, *supra* note 4.

[13]   Hauser, *supra* note 4, at 165.

[14]   Elliott Turiel, The Development of Social Knowledge: Morality and Convention chs. 3-6 (1983).

[15]   *Id.* at 34-36.

[16]   Richard A. Shweder, Nancy C. Much, Manamohan Mahapatra & Lawrence Park, *The "Big Three" of Morality (Autonomy, Community, Divinity) and the "Big Three" Explanations of Suffering, in* Morality and Health 119, 130-68 (A. Brandt & P. Rozin eds., 1997).

[17]   Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 Sci. 1001 (2007).

portions of the world considered slavery morally acceptable. That doesn't make the issue of slavery just a matter of "culture-dependent social convention" *for us*. Similarly for sexual mores: questions as basic as whether unmarried men and women can be in each other's company are in some cultures taken to be matters of morality, even though for us they are not. Even within a culture, subcultures may differ, and each may regard its own sense of morality as the only proper one. Doris and Stich cite issues such as abortion, capital punishment, and gay marriage as cases where people's moral judgments diverge radically, just within American culture.[18]

Moral codes also differ in how they view retaliation for harm inflicted.[19] In an "honor-based" culture, retaliation is considered the morally correct response. Alternatively, retaliation may be considered morally acceptable, though not obligatory: "Well, if you want to retaliate, okay, we'll look the other way." A third option is to view retaliation as unacceptable: "Turn the other cheek." Any particular moral code may adopt one or another of these stances for different cases, leading to a rich, though constrained, set of possibilities.

A theory of moral intuitions based on trolley problems and the like also overlooks an important factor in the morality of "don't hurt people": this principle is deeply intertwined with the logic of groups (Haidt's ingroup-outgroup issue).[20] For instance, in the context of a war, killing an enemy, i.e. a member of another group, is typically regarded as good rather than immoral. More generally, cultures differ in how one is supposed to treat members of other groups. It may be considered moral to live and let live or even to be generous to a stranger. Alternatively, it may be considered moral to look out for one's own and let the devil take the rest of them.[21]

Another reason not to try to abstract universal moral principles away from social conventions is that what looks to us like a moral principle and what looks to us like a social

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[18]   John M. Doris & Stephen P. Stich, *As a Matter of Fact: Empirical Perspectives on Ethics*, *in* THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY 114, 114-152. (Frank Jackson & Michael Smith eds., 2005).

[19]   RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 2 (Westview Press 1996).

[20]   Haidt, *supra* note 17, at 1001.

[21]   This parameter could be incorporated into trolley problems by, for example, making the people on the track spies of a foreign power or by making the man on the other track a member of one's family. It is obvious how this might change subjects' biases, but the experiment should be done. I suspect there would be interesting crosscultural differences.

convention may be treated as commensurate within the culture itself. For instance, we might well think that not eating pork and not marrying someone of another faith are matters of social convention. On the other hand, among some Orthodox Jews, violations of these norms lead to the same sort of indignation toward the perpetrators as does, for example, child abuse, which we would be inclined to agree is a moral violation.

We are now in a position to address the first part of the theme question, "Is morality universal?" The answer is that *a sense of morality is universal, but particular morals are not*. Rather, particular moral systems are associated with particular social groups of various sizes. A group may even recognize its own particular variations on morality: "We hold ourselves to a higher standard" or "If we do this, our gods curse us, but it's different for you." This does not mean that moral systems can vary without limit: For example, I would not expect to find a moral system that reversed the asymmetry between ingroup and outgroup, i.e. that treated outsiders *better* than insiders.

Nevertheless, there is a strong impulse, even among moral philosophers and psychologists of morality, to want morals to be objective, universal, and timeless:[22] "If morality is relative, then there is no morality." "If morality is relative, then why couldn't Hitler be considered moral in his own terms?" (And we can equally imagine the Nazis saying, "Only *we* recognize the true objective morality.") We must resist this impulse and not let it blind us to the obvious facts of moral diversity. Instead, we might ask *why* people have such an impulse.

Consider the task of a child learning the system, trying to figure out what's good behavior and what's bad. From the point of view of the child, for a very good first approximation, the moral system *is* universal: everybody around you shares it. It is timeless: it was there before you were. And it is objective: it operates as inexorably as gravity. For those normative principles that are explicitly taught, the mode of teaching is "This is the way it's done; this is what you have to do; this is what happens if you don't." Moreover, since the operation of the moral system depends primarily on what other people think of you, not on what you think of yourself, you are not at liberty to

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[22]   For instance, Hauser and Mikhail seem to make such presumptions. Hauser, *supra* note 4, at 165; Mikhail, *supra* note 4, at 144.

change it. If you don't like the system, your only options are to grin and bear it, to find a group whose morals better suit your taste, or to persuade your community to adopt your standards. Only the first of these is open to a child, and even for adults, the other two are problematic.

I conjecture, then, that children come to the learning of social norms from the stance of this first approximation, namely moral realism and absolutism. They take the prevailing standards of conduct to be as much a real part of the social world as the prevailing kinds of food are part of the physical world. With this stance, the child does not have to consider whether these standards are *right*. They are right because that's what people do. This stance thus provides a way of helping with the problem of acquisition, a way which while philosophically questionable, does the job of integrating the child into the community.

I would further conjecture that this naïve stance does not altogether go away with experience—that it persists to some degree in adults, especially those without much experience in multiple cultural environments. This stance might be thought of then as "folk metaethics," more or less on par with "folk physics" and "folk psychology."[23]

IV.   THE LOGIC OF MORALS (WITH APOLOGIES TO MORAL PHILOSOPHERS)

Let us now look at the logic of morals as a special case of norms. For convenience, I will use the term "normative judgment" for a judgment made in the domains of morals, etiquette, and so on. The basic structure of a normative judgment is that, on the basis of one of these principles or conventions, an intentional action by a particular person is assigned a *normative value*, which may be positive ("good"), negative ("bad"), or neutral ("okay"). Positive and negative normative values may in addition have a rough magnitude ("very/sort of good/bad," "better/worse than X," "not as good/bad as X"). As discussed in the experimental literature, these judgments are often immediate and intuitive, and people sometimes have a hard time justifying their choices.[24]

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[23] Folk psychology: STEPHEN P. STICH, FROM FOLK PSYCHOLOGY TO COGNITIVE SCIENCE: THE CASE AGAINST BELIEF 1-6 (MIT Press 1983). Folk physics: DANIEL J. POVINELLI, FOLK PHYSICS FOR APES 2-5 (Oxford Univ. Press 2000).

[24] HAUSER, *supra* note 4, at 124-25.

Moreover, one of Hauser's most striking results is that although his subjects are highly uniform in their judgments, they give widely divergent reasons, suggesting that justifications of moral judgments are often post hoc rationalizations.[25]

It is important to distinguish normative judgments from other sorts of value judgments that characterize people, objects, and actions as "good" or "bad."[26] All the way back to Plato, the literature on values has muddied these distinctions. English offers tiny grammatical cues, italicized in (13), that help tell the kinds of value apart.[27]

(13) a. It is good *of* Bill to help the old lady across the street. (Normative value)

Bill is good *to* help the old lady cross the street. (Normative value)

b. It is good *for* Bill to eat broccoli. (Utilitarian value: benefit or cost)

c. It *feels* good to take a shower in the morning. (Affective value)

d. Bill is good *at* baking cakes. (Skill/prowess)

e. This knife is good *for* cutt*ing* plastic. (Quality of artifact for intended function)

Judgments of normative value come with an emotional or affective component. An action of positive normative value may be viewed with approval or admiration; this affect also may accompany an action that exhibits positive skill, such as winning a competition. However, the reaction to actions of negative normative value—indignation or taking offense— appears to be unique to normative value. An action that exhibits negative skill, such as losing a race, is viewed perhaps with disappointment (unless, of course, one is rooting for someone else), but with indignation only if there is some suspicion of cheating, a moral offense. These affective components are sometimes taken to be the defining feature of

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[25]   *Id.* at 128.

[26]   R. M. HARE, THE LANGUAGE OF MORALS 137-50 (Oxford Univ. Press 1964) (1952); JACKENDOFF, *supra* note 1, at 290-93.

[27]   JACKENDOFF, *supra* note 1, at 301; GEORG HENRIK VON WRIGHT, THE VARIETIES OF GOODNESS 8-12 (1963).

morals.[28] To be sure, they are important to cement the force of moral judgments, but they alone do not lead to the character of moral reasoning, which we now turn to.

Being able to make normative judgments of people's actions is not an end in itself. One uses normative judgments of actions for two purposes: to help decide whether someone is a good or bad *person*, and to guide one's own choice of contemplated actions. Consider first the former. The basic principle is that a person who does good things is thereby a good person; a person who does bad things is thereby a bad person. A more sophisticated version of the principle is that one's good acts add to one's total "goodness" and one's bad acts subtract from it.

The result of the addition to or subtraction from one's "moral record" is far less rigid than arithmetic: the relative weights of current and past events are highly subjective. We intuitively recognize this subjectivity in statements like these in response to the very same action:

(14) a.   Even though what you just did was horrible, I'm not going to hold it against you.

b.   What you did was so horrible that it wiped out my whole good opinion of you.

A further odd aspect of this reasoning is that the entailment tends to be treated as two-way, as if everything that good people do is good and everything that bad people do is bad. This leads to the possibility of entirely opposite rationalizations of people's actions, depending on one's opinion of them:

(15) a.   The president is bad, so whatever he does, no matter how harmless it looks, must have a pernicious motive behind it.

b.   The president is good, so whatever he does, no matter how superficially bad it looks, must be in our best interests.

(The latter reasoning is often used for God too.)

Judging that someone is a good or bad person is not an end in itself either. Rather, it helps establish the person's *reputation*, or the *esteem* in which one holds the person. Esteem is a composite of many factors; in addition to one's moral worth, it includes at least one's dominance, one's relevant skills, one's attractiveness, one's wealth, and one's clan (as in otherwise

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[28]   *See* Doris & Stich, *supra* note 18, at 128.

undistinguished Kennedy or Bush offspring). In turn, the esteem in which a person is held affects how much other people want to associate with him or her; being able to associate with someone esteemed adds to one's own feeling of self-worth: "Can you believe it? I met Nelson Mandela today!" Again, moral standing is only one part of this equation: I imagine a lot of people might get a thrill from meeting Al Capone or Stalin too.[29]

Which leads to the second use of normative judgments: to help choose one's own actions. A perennial philosophical question is: "Why be good?" One reason to act in accordance with normative principles is out of concern for *others'* opinions: one wants to have a good reputation, to be held in esteem. The attractiveness bestowed by esteem gives one power over others and therefore increased opportunity for potentially beneficial situations. Hence, in the end, a good reputation is a social resource and potentially an economic resource, and so being good is ultimately for utilitarian ends. In fact, as Richard Alexander points out, for this purpose, all that *really* matters is the *appearance* of moral behavior[30]—and we are all familiar with cases where exemplary behavior is only apparent.

This reason for being good strikes many people as calculated and even cynical. Yet evolutionary psychologists who ask why humans have developed a moral sense invariably arrive at this as the factor that makes the moral sense adaptive.[31] They see moral codes as a way of enforcing cooperation in large groups, in that group members who do not conform to the code, in particular free riders on the benefits of cooperation, come to be shunned.[32]

Alexander goes one step further and darker, asking how large-scale cooperation could have benefited early hominids.[33] He conjectures that the principal predators on early hominids were other hominids, based on paleontological evidence of mass slaughter of hominids carried out by stone tools.[34] If Alexander is correct, there was safety in numbers: the bigger a group, the

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[29]   We use the term *notorious* to describe people who have a large reputation despite low moral standing.

[30]   RICHARD D. ALEXANDER, THE BIOLOGY OF MORAL SYSTEMS 95 (2d ed. 2009).

[31]   *See, e.g.*, *id.* at 93-97; ROBERT BOYD & PETER J. RICHERSON, THE ORIGIN AND EVOLUTION OF CULTURES 129 (2005).

[32]   ALEXANDER, *supra* note 30, at 94; BOYD & RICHERSON, *supra* note 31, at 167.

[33]   ALEXANDER, *supra* note 30, at 79.

[34]   *Id.* at 79.

more likely it was to prevail over other groups in battle. Hence larger groups would have an adaptive advantage—which unfortunately would lead to greater opportunity for free riders. The cognitive innovation of a moral sense, instantiated in moral codes, offered a means of keeping free riders in check, thereby maintaining larger and more powerful groups, which in turn afforded more surviving offspring.

Regrettably, I find Alexander's proposal all too plausible. It helps explain the highly restrictive character of many moral codes (though not the frequent extreme gender biases). It also helps explain the group-based character of normative codes, in particular the universal norm to the effect that, although it is bad to treat members of one's own group badly, it's good (or at least not so bad) to treat members of other groups badly. And it also helps explain the continuing prevalence of warfare and ethnic cleansing, despite everyone's protestations that these are bad things.

In case this reason for conforming to the normative code leaves one deeply uncomfortable (as well it might), there seem to be two further reasons why one might choose to be good. First, it often *feels* good to do good, and it often *feels* bad to do bad (we call the latter feeling *a guilty conscience*). To some extent this follows from applying the principles of esteem to oneself. Doing something good raises one's esteem not only in the eyes of others, but also in one's own. And then, in accordance with behavior of evolutionary antiquity, the resulting sense of well-being leads one to hold oneself higher. Thus the cognitive system has cleverly built internal reasons into us—in addition to the threat of being shunned—that incline us to behave in accordance with the moral code. My understanding of the literature on psychopaths is that they lack this sense: they understand the moral code, but they derive neither pleasure from conforming to it nor guilt from violating it.

Even this reason for doing good may strike one as not noble enough. A more transcendental motivation for doing good might be simply "doing the right thing," in all humility, regardless of the cost to oneself. Most people probably act out of this motive only occasionally. Alexander observes that we call people who act primarily out of these motives *saints*,[35] and they are vanishingly rare.

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[35] *Id.* at 103.

V. THE LOGIC OF RIGHTS, OBLIGATIONS, AUTHORITY, AND LAWS

We now turn to the logic of laws. The part of a legal system relevant for present purposes consists of a system of obligations and rights sanctioned by and enforced by the state. In order to analyze the logic of laws, we must therefore start with the logic of obligations and rights.[36]

An obligation involves two characters: an *actor* who is under obligation to perform some action, and a *beneficiary* to whom the actor is obliged and who stands to benefit from the actor's performing the action. The operative inference that makes a situation an obligation is (16); this is a special case of the general formula for social norms in (1).

(16) Actor is obligated to Beneficiary to do action X =

> If Actor does not do action X, Beneficiary acquires the right to do some action Y (the Sanction) that is harmful to Actor.

That is, if the Actor does not fulfill the obligation, the Beneficiary may or may not sanction the Actor. Moreover, if the Beneficiary does so, the Actor accepts this as okay, following the principles in (12) for commitment to a norm. (Or more subtly, the Actor is *obligated* to accept this as okay.)

Rights are a bit more ramified. One version involves a Right-holder and a potential action by this person from which s/he stands to benefit. A right of this sort, which I will call an *active* right, has the inference pattern (17).

(17) Right-holder has an active right to do action X =

> If a person P (the Violator) prevents Right-holder from doing action X, Right-holder acquires the right to do some action Y (the Sanction) that is harmful to Violator.

In (17), the Violator may be a specific person against whom the Right-holder holds the right (as in a tenant's rights against a landlord), or the Violator may be anybody (as in a right to free speech).

In another sort of right, which I call a *passive* right, the holder of the right is protected against harmful actions by someone else:

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[36] I disregard the type of law that establishes an institution, say the Parks Commission. What is interesting for our purposes is the part of the law that goes on to say what the Parks Commission *does*.

(18) Right-holder has a passive right concerning action X, potentially harmful to Right-holder =

If a person P (the Violator) performs action X, Right-holder acquires the right to do some action Y (the Sanction) that is harmful to Violator.

Again, the Violator may be a particular person (as in a restraining order, where the Right-holder has the right not to be disturbed by the Violator), or the Violator may be anybody (as in a right to privacy). The contrast between active and passive rights shows up grammatically in the form of the complement of the word *right*: an active right is typically expressed as *a right to do X*, and a passive right as *a right not to be X-ed*.

Notice that this system is completely self-referential. Violation of either an obligation or a right confers a right on the person violated, and the Violator is obligated to accept the Sanction if it is imposed. Furthermore, suppose an Actor is obligated to a Beneficiary to do something. Then, because the Beneficiary stands to benefit, s/he is harmed by the Actor's nonperformance, and therefore s/he has a passive right to have the Actor perform.[37] In short, there is no way to define obligations and rights independently of this network of inferences.

One can *acquire* obligations and rights in various ways. The two are different in how one acquires them because of the asymmetry in who stands to benefit from the action.

- One can impose an obligation on oneself, for instance by making a promise to someone.

- One can grant others rights against oneself. For instance, offering to do an action X gives the person to whom the offer was made the right to demand that the action be performed.

- One cannot grant oneself a right. One can *claim* or *assert* a right, but in order to exercise a right, it has to be assented to by the person against whom it is held.[38]

- Obligations and rights can be conferred by an *authority* such as parents, teachers, bosses, or the state. An *order* to do something is the imposition of an obligation by an authority. *Permission* to do something is the granting of a right by an authority.

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[37]   *See* JULIUS STONE, HUMAN LAW AND HUMAN JUSTICE 296 (1965) (noting the reciprocity of obligations and passive rights).

[38]   This pertains even to the Universal Declaration of Human Rights, which is a claim of rights for everyone against all the governments of the world.

In addition, the logic of rights and obligations itself provides a way to acquire new rights and obligations:

- A Beneficiary of an obligation acquires a right to impose a Sanction on an Actor who has not performed. A Right-holder acquires a right to impose a Sanction on a Violator. A non-performing Actor in an obligation and a Violator of a right acquire an obligation to accept a Sanction.

Two other important sources of rights and obligations are ownership and agreement for cooperative action:

- Ownership of an object consists of a bundle of rights: (a) the right to use the object, (b) the right to regulate the use of the object by others (i.e. to confer rights and obligations on them), and (c) the right to give the object away (i.e. to confer these rights on someone else).[39] So one way to acquire rights is to acquire ownership of an object.

- When two people agree to engage in a cooperative action, they thereby undertake obligations to each other to perform their respective parts of the action. This mutual obligation is crucial to contracts (including marriages). But it is much broader, extending to mundane activities like holding a conversation, in which there is a tacit mutual obligation not to conclude except by mutual agreement.

Consider further the nature of authority. Adding to the incestuous character of the system, authority basically consists of the right to confer obligations and rights, and the right to impose sanctions. Thus the question naturally arises of how *this* right arises. Here are several possibilities:

- Parents are taken to have a "natural" authority over their children.

- Authority may be granted by a higher authority that has jurisdiction over both Actor and Beneficiary of an obligation or right. For example, a judge's authority is established by the state; a CEO's authority is established by the Board.

- The highest level of authority, the state or the church (which in many cases historically have been the same thing) may claim authority from God.

- Or it may claim authority from the "consent of the governed," in which case the legal system takes itself to be viewed as a matter of mutual agreement on cooperative activity ("We, the people").

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[39]   Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200, 202-04 (1972).

- Alternatively, authority may be imposed through threat of force. In this case, the norms of the legal system are not so much accepted as adhered to on utilitarian grounds, as a way of avoiding punishment. Even so, the official face of the legal system may be one of "representing the people's will."

Now we are finally ready to look at the form of laws. The general form of legal obligations and rights is a special mediated case of ordinary obligations and rights, in which the sanctions on a violator are regulated by the state (or other organization such as a church, club, or union):

(19) Actor has a legal obligation to Beneficiary to do action X =

If Actor does not do action X, Beneficiary acquires the right to request the state (or its authorized representatives) to do action Y (the Sanction), which is harmful to Actor.

(20) Right-holder has a legal active right to do action X =

If a person P (Violator) prevents Right-holder from doing action X, Right-holder acquires the right to request the state (or its authorized representatives) to do action Y (the Sanction), which is harmful to Violator.

(21) Right-holder has a legal passive right concerning action X, potentially harmful to Right-holder =

If a person P (Violator) performs action X, Right-holder acquires the right to request the state (or its authorized representatives) to do action Y (the Sanction), which is harmful to Violator.

(19)-(21) state the right in question as involving a *request* to the state. A stronger version would state it in terms of a *demand* to the state, whereby the state is then *obligated* to consider the status of the alleged violation.

A special case of (19)-(21) is when the state itself is one of the characters involved. Tax laws and (for instance) laws against the drinking of alcohol establish an individual's obligations to the state. Habeas corpus and Social Security are among an individual's passive rights against the state, as well as the state's obligations to the individual. Freedom of religion is an individual's active right against the state as well as against other individuals.

VI.   SUMMARY SO FAR: COMPARISON OF MORALS AND LAWS

As discussed at the outset, morals and obligations are both particular cases of social norms. Having a right does *not* fall under the strict definition of social norms, in that the

Right-holder is not the one punished if the right is violated. However, rights *can* be construed as social norms if they are rephrased as prohibitions from infringing on the action or state of the Right-holder. Laws, as a particular case of obligations and rights, then also fall under social norms.

Morals, obligations and rights, and laws differ in their consequences. In the case of morals (and other normative values), the consequences of good behavior are approval or even admiration by all members of the community; the consequences of bad behavior are disapproval or indignation from all members of the community. One's good and bad acts amalgamate with other aspects of one's behavior and status to help determine how community members treat him or her.

In the case of obligations and rights, the consequences of violations are further obligations and rights. The Beneficiary of an obligation and the Holder of a right acquire the right to sanction the Violator, and the Violator acquires an obligation to accept the Sanction. The difference between obligations and morals can be made clearer through the example of promises. If I make a promise to you to do some action, I have in effect undertaken an obligation to you to perform the action, and you are the Beneficiary of my obligation. If I fail to perform, you acquire the right to sanction me in some specific fashion. But in addition, because breaking promises is a moral violation, *everyone* is entitled to think less of me.[40] In other words, promises partake of the character of obligations *and* morality.

Laws are special cases of obligations and rights, conferred on individuals by the state and regulated and enforced by the state. Because (at least in some forms of government) they purport to be imposed by the community as a whole, they come closer to morals than do ordinary obligations and rights. On the other hand, the consequences of violations differ: for moral violations, the consequences are the community's disapproval and indignation; for legal violations, an obligation to accept specifically spelled out sanctions.

Another important difference between morals and laws is in their explicitness. As observed earlier, moral principles may or may not be explicit; moral judgments are often made intuitively, and justification of moral judgments is often post

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[40]   The philosophical literature does not always recognize this difference. *See*, *e.g.*, Jay Conison, *The Pragmatics of Promise*, 10 CAN. J. L. & JUR., 273, 321-22 (1997). It is, however, noticed by von Wright. GEORG HENRIK VON WRIGHT, NORM AND ACTION: A LOGICAL ENQUIRY 11-12, 92, 99 (1963).

hoc.[41] Children acquire the local moral principles in part by observation, in part by explicit teaching, and, if recent thinking in moral psychology is on the right track, in part through innate inclinations or "moral instinct."[42] The origin of moral principles is unclear; they often seem to be timeless, and they are often attributed to supernatural sources such as gods or ancestors. Moral principles often seem to need no justification; they present themselves as "the way things ought to be."

By contrast, laws are by their nature explicit, legal judgments are (at least in principle) made through conscious deliberation, and their justification is (at least in principle) rationally based on explicit principles. People acquire knowledge of the local legal system through explicit education. Each law has a specific origin; its codification can be traced to particular individuals at particular times. Laws call for justification, reasons why they exist; and laws, unlike morals, can be repealed.

VII.   SHOULD THE LAW CARE ABOUT MORALITY?

With all this in place, we can now return to the initial question: "Are morals universal, and should the law care?" Having established that morals are not universal, we need not dwell on the first part of the question. The second part of the question, however, is multiply ambiguous and requires some exegesis.

First, I take it that the question involves a metonymy: the law, being a set of statements, can't itself care about anything. It is the people who make and enforce laws that might or might not care.

Second, there is an ambiguity in the word *should*, which has at least two value-laden readings. One appears in *You should write your aunt a thank-you note*. This is the *normative* reading: it specifies what is moral and/or socially appropriate. Another appears in *It's going to rain, so you should take an umbrella*. This is the *utilitarian* reading: it makes a prediction of costs and benefits. Thus the second question might be paraphrased as either (22a) or (22b).

(22) . . . and should the law care?

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[41] *See supra* Part IV.

[42] *See, e.g.*, Alexander, *supra* note 30, at 130-39; Boyd & Richerson, *supra* note 31, at 380; Doris & Stich, *supra* note 18, at 127-28; Hauser, *supra* note 4, at 258-59; Haidt, *supra* note 17, at 1001; Mikhail, *supra* note 4, at 143-44.

    a.   Normative reading:

        Is it right for those who make and enforce the law to care?

    b.   Utilitarian reading:

        Is it beneficial for those who make and enforce the law to care?

Third, "should the law care?" is not specific about what the law should care *about*. (23) offers three interpretations. Since we have established that morality is not universal, we can disregard (23b) in favor of (23b').

(23) a.   Should those who make and enforce the law care about morality?

     b.   Should those who make and enforce the law care whether morality is universal? [*irrelevant*]

     b'.   Should those who make and enforce the law care that morality is not universal?

Since *should* can be understood in either normative or utilitarian terms in both (23a) and (23b'), we have four versions of the question to deal with.

    Let's start with (23a). One way to understand this is whether it is important for the law to track morality. Should it attempt to replicate morality or should it be indifferent to the dictates of morality? Law and morality regulate many of the same issues that are involved in keeping a society operating, so it should be no surprise that they often overlap in their application. The issue is whether this overlap should be a deliberate concern.

    The normative reading of this question is (24).

(24) Is it right for those who make and enforce the law to attempt to replicate morality?

Different societies have different answers. In societies governed by religious law, the answer has been that it is right for the law to replicate morality. It seems to me that in such societies there is a partial fusion of morality and law (or lack of differentiation between them). Here in the United States, the answer is not so clear, which is why we're engaging in writing this special issue. In particular, the separation of church and state makes it possible to decouple religiously-governed morality and law, and we take this to be normatively right. Still, the founding documents of the United States explicitly attempt to track so-called "natural rights," which basically set forth a moral stance.

The utilitarian version of (23a) is (25).

(25) Is it beneficial for those who make and enforce the law to attempt to replicate morality?

One answer was provided by an audience member at the symposium from which this special issue is derived: laws that violate commonly held morals are not conducive to widespread compliance or enforcement—consider Prohibition or present-day marijuana laws. So to that extent it is beneficial for laws to track morality.

However, there is a deeper question here: beneficial *to whom*? And what kind of benefit? The answer might well come out differently depending whether we are interested in the well-being of all individuals, that of a particular class of individuals, or that of the state as a whole, which might be measured in terms of its smooth function (e.g. keeping crime and unrest down). And it might well also depend on whether we are concerned with emotional well-being, with health, with economic well-being, or with some combination thereof. In the case of the well-being of the state, we might also ask whether the benefits to be sought include political and/or military domination over other states. So presto, before we can even decide what question we're asking, we find ourselves in a thicket of longstanding burning questions in political philosophy. And all of these require decisions among normative and utilitarian motives as well. So I drop this thread of inquiry here.

Now consider the other major interpretation of the initial question, namely (23b') "Should those who make and enforce the law care that morality is not universal?" Here we are asking about the status of laws such as the French ban on headscarves in schools, which violates the Islamic sense of morality, and the law of the Catholic Church banning the ordination of women, which violates some people's moral sense of gender equality. For that matter, we might be asking about the status of laws regulating abortion and gay marriage, which track some people's morality and violate others'. A possible elaboration of this question, then, would be (26):

(26) a. Should those who make and enforce laws favor some moral codes over others? And if so, which ones?

b. Or should they strive to take account of multiple, potentially conflicting moralities within the community to which the laws apply?

(26), like (23a), can be differentiated into two readings, depending on the interpretation of *should*. The answer to the normative reading of (26) is again that it depends on the society. Some societies have norms that lead to legal tolerance of multiple moralities; others have norms that lead to legal intolerance of moralities other than that of the politically dominant culture. And again, the utilitarian reading of (26) demands an answer to the question: Whom do you intend the system to benefit?

VIII.   INCONCLUSION

In order to stress the range of possible relations between morality and the law, I have mentioned quite a few examples of real normative and legal principles that I (and I presume many readers) find strange or even disagreeable. Presumably, within contemporary American secular culture, where we reject many such norms, the possibilities we are actually inclined to consider is correspondingly narrowed a great deal. We are not ready to consider a legal system based on, say, fundamentalist religion. Of course, in a society built around fundamentalist religion, as we have seen, the range of possibilities is narrower still. But even with the narrowing that *we* approve of, the issue of morality and the law constantly flares up in discussions of abortion, gay marriage, and the teaching of evolution. My impression is that typically the left and the right each basically favor a coupling between the law and morality—but their *own* morality.

More generally, an answer to whether laws should be coupled to morality partly depends on how norms, including norms about laws, are to be grounded within a society that does not rely on a particular God's authority. I don't believe there has been a coherent solution. Rawls, for example, proposes the doctrine of "justice as fairness," arguing that this is what people *would* want to adopt, given the proper circumstances.[43] But that is not the same as being able to say what they *should* adopt, in either the normative or utilitarian senses.

Mahlmann discusses several modern positions that have concluded that the only possible foundation for law is the

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[43]   RAWLS, *supra* note 5, at 11.

threat of force.[44] He shows why they are unsatisfactory, and not just for their unappetizing conclusions.[45] For the most part, I don't find that people opposing the religious fundamentalists, such as Dawkins, really try to offer a grounding for norms; they just assert their own moral codes and point out the contradictions and vast helpings of self-interest in the religion-based position.[46]

I am not so sure that an evolutionary theory of social cognition can provide a proper grounding for values either, although perhaps it can offer some insights into sources of difficulty, as I have attempted here. For instance, Dawkins shows that biologically driven values do not always coincide with morality.[47] His way of putting this conclusion is that our rationality can free us from the dictates of our genes.[48] But appealing to rationality or science to tell us which course we ought to follow implicitly assumes some particular normative or utilitarian goal for how we want society to be. Again this raises the question of whose interests we think the system ought to serve, and how an answer to *that* question is justified.

At this point it seems appropriate to stop.

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[44]   Matthias Mahlmann, *Law and Force: Twentieth Century Radical Legal Philosophy, Post-Modernism and the Foundations of Law*, 9 RES PUBLICA 19, 19 (2003).

[45]   *Id.* at 20-21.

[46]   RICHARD DAWKINS, THE GOD DELUSION (2006).

[47]   RICHARD DAWKINS, THE SELFISH GENE 139 (2d ed. 1989).

[48]   *Id.*