

Original citation:

Brownlee, Kimberley and Child, Richard. (2017) Can the law help us to be moral? Jurisprudence : An International Journal of Legal and Political Thought.

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Publisher's statement:

"This is an Accepted Manuscript of an article published by Taylor & Francis in International Journal of Social Research Methodology on 25/09/2017 available online:

<https://doi.org/10.1080/20403313.2017.1352317>

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Can the Law Help Us to be Moral?¹

Kimberley Brownlee and Richard Child

A good constitution is not to be expected from morality, but, conversely, a good moral condition of a people is to be expected only under a good constitution.

Immanuel Kant, *Perpetual Peace*²

1. Introduction

There are many interpretations of what it means to be moral and, hence, many ways of interpreting whether the law can help us to be moral. For *consequentialists*, what matters is whether the law can help us to realise more valuable states of affairs than those we could realise without it. For *deontologists*, the issue is whether the law can help us to honour our moral duties better than we could do without it. And for *virtue ethicists*, the question is whether the law can help us to be more virtuous than we could be without it.

In this essay, we consider our central question from all three of these perspectives. In doing so, we are careful to distinguish between (a) the general concept of *law* and (b) the actual law of any particular legal system. We argue that, although the law does have the potential to help us to be moral in each of the three ways just noted, many actual legal systems are conducive to great immorality and injustice. Being moral and living well under such regimes is likely to be much harder than it would be otherwise, even in the absence of any legal system.

2. The Instrumental Value and Intrinsic Value of Law

If the law can indeed help us to be moral, its value is either instrumental or intrinsic (or both). To say that the value of law is instrumental is to say that it functions as a tool to help us achieve various moral objectives.³ We will argue for the instrumental value of law under three headings: (1) Law as a moral advisor; (2) Law as a moral example; (3) Law as a moral motivator. Many of the points we make under these headings are not new; the interest lies in the way we collect them together and organise them. As we will demonstrate, the potential instrumental values of law are quite striking in their variety and complexity.

If the law also has intrinsic value, this means that, where it exists, the law itself instantiates a certain type of moral value, irrespective of any further ends to which it

¹ This paper is forthcoming in *Jurisprudence*. If possible, please cite that version. We are very grateful to Adam Cureton, Michelle Madden Dempsey, Massimo Renzo, and François Tanguay-Renaud for wonderfully helpful comments on this paper. Some ideas in this paper have served as the starting point for Kimberley Brownlee's discussion in 'What's Virtuous about the Law?' (2015) *Legal Theory*, doi: 10.1017/S1352325215000038.

² Immanuel Kant, *Perpetual Peace: First Supplement* (Various editions, [1795]). See: <www.constitution.org/kant/1stsup.htm> (accessed 18 July 2015).

³ For a discussion of related issues, see Leslie Green, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the 21st Century* (Hart Publishing, 2010), Chapter 9.

contributes. Here we have to be especially careful to bear in mind the distinction between the general concept of *law* and the particular laws of specific legal systems. Several writers argue that the subjection of human conduct to the rule of law is a uniquely valuable ideal that represents an especially moral form of human governance.⁴ On this view, our first task is to understand the intrinsically valuable nature of the general concept of *law* and only then turn our attention to determining the degree of intrinsic value possessed by particular empirical instantiations of the ideal. We argue below that, although legal systems can possess intrinsic value, this is not because of the necessary inherent value of the ideal of ‘lawness’.⁵ Instead, we argue, the moral merits of any particular legal system depend on particular qualities of that system. These qualities may of course be shared by many other legal systems. But ontology and morality must be kept separate – there is no guarantee that where we find law we will find something of intrinsic moral worth.

3. The Instrumental Value of Law: Law as a Moral Advisor

The law would be a good moral advisor for us if following its instructions would help us to be moral. This is the *advice or instruction model* of moral expertise. This model is about propositional knowledge (i.e. knowing what to do). A car repair manual gives good instructions on how to fix a car if its instructions tell us clearly what to do to fix the car and thereby help us to fix the car. But, of course, the manual itself cannot fix the car.

There are two main ways in which law might play a role as a moral advisor. These we refer to as the ‘coordination function’ and the ‘moral leadership function’ of law.

3.1 The law’s coordination function

One way in which law fulfils its coordination function is by taking various abstract moral norms and ideals to which the people in a particular jurisdiction are (or should be) committed, such as ‘do not do unnecessary harm’, and ‘avoid unduly risky behaviour’, and specifying them in greater detail. Consider, for example, coordination norms for driving on public roads. Abstract morality is indifferent to which side of the road we drive on.⁶ There is no moral reason as such to favour one side over the other. However, there is a moral reason to drive safely and, hence, there is reason to coordinate our driving so that we do not crash into each other. By instructing us to drive on the right or the left, the law takes the vague moral imperative to drive safely and turns it into a concrete guide to action. By treating the law’s instruction as authoritative, we act better

⁴ See, eg, Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964); John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980); Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007).

⁵ We thank and anonymous referee for suggesting this way of putting the point.

⁶ This example and line of thought are drawn from John Gardner, ‘Ethics and Law’ in John Skorupski (ed) *The Routledge Companion to Ethics* (Routledge, 2010) 420. See Joseph Raz, ‘Incorporation by Law’ (2004) 10 *Legal Theory* 1, for a discussion of how the law concretises and thereby advances certain moral norms. Andrew Simester and Andreas Von Hirsch make use of the points elaborated in this paragraph to explain why the state is justified in *criminalising* certain types of conduct – such as driving on the right (in the UK) or catching more than a specific amount of fish – that are not obviously pre-legally wrong. See, Andrew Simester and Andreas Von Hirsch, *Crimes, Harms and Wrongs* (Hart Publishing, 2011), 24-29.

morally than we would do if we each tried in our own way to apply the moral imperative to drive safely.⁷

Another way in which law might be thought to serve us by solving morally relevant coordination problems can be found in the work of Thomas Hobbes.⁸ Hobbes argues that law is valuable not just for refining existing morality but for actually *creating* it in the first place. In the absence of the state – in the so-called ‘state of nature’ – each individual is as much of an authority as any other when it comes to determining the content of morality, and in particular the content of people’s claim-rights. The problem is not simply that no one can truthfully claim to know the content of people’s already existing claim-rights. The problem, in this view, is that there *are no existing claim-rights*: people have no claims upon each other in the state of nature. In this case, the instrumental value of law, and the reason we have to bring a legal system into existence, is not related to its ability to specify existing rights in more detail, but its ability to create a system of rights in the first place, so the argument goes.⁹

3.2 *The law’s moral leadership function*

There are two parts to the moral leadership function. First, the law exhibits moral leadership when it incorporates moral norms that, while generally endorsed by the wider population, are neither universally endorsed nor endorsed with enthusiasm at the time of their enactment. Examples of this moral leadership might include the law’s recognition that rape should be prohibited even within marriage, that children should be provided with special protections, and that people with impairments have distinctive needs that should be accommodated. A concrete example is the US federal government’s adoption of anti-discrimination civil rights legislation in 1964 that preceded popular support for equal rights in many states. When Democratic President Lyndon B. Johnson signed the Civil Rights Act into law, he is said to have admitted to his aides that he knew he was handing the South to the Republicans for generations to come.

The second, more dramatic way that the law can fulfil its leadership function is by identifying and promoting moral norms that, at the time, are endorsed by only a fraction of the wider population. By highlighting neglected moral norms in what is often a forceful manner (see section 5), the law serves us by expanding our moral horizons and prompting us to attend to issues to which we might not otherwise have given much thought.¹⁰ Of course, the extent to which the law can actively defy public opinion and forge ahead to protect rights and goods that popular opinion does not yet appreciate depends on how responsive the law is to democratic pressure. If it is responsive to such

⁷ It is true that, at any time, the driving laws could be changed without anything moral being lost. The reason is that the law adds specificity to the moral duty to drive safely, and there are many, equally appropriate ways that the law can add such specificity. We thank Adam Cureton for highlighting this point.

⁸ Thomas Hobbes, *Leviathan* (Cambridge University Press, Revised Student Edition 1996 [1651]).

⁹ A similar point is made by Kant, who thinks that law is an existence condition of justice. Of course, since for Kant there is more to morality than justice, he would not agree with Hobbes’s claim that *all* of morality is created by law. For Kant’s views, see Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996 [1797]).

¹⁰ As HLA Hart famously pointed out, while the creation of legal norms is often driven by moral considerations, the direction of influence between law and morality is sometimes the other way round, and the content of the conventional morality of a particular society is driven by innovations in the substance of the law. See HLA Hart, *Law, Liberty and Morality*. (Stanford University Press, 1963), 1-2.

pressure, then deep cultural or religious prejudices may inhibit the law's ability to blaze a moral trail. It is a paradox of democracy that the limits it places on lawmakers' autonomy is both its greatest strength and one of its greatest weaknesses.

3.3 *The Limits of Law's Role as a Moral Advisor*

The law can fail to carry out its coordination and leadership functions most straightforwardly by enacting clearly unjust or immoral rules. If, for instance, the law denies basic political rights and liberties to women, then, far from fulfilling a moral advisory or instructive role, the law reinforces injustice and obscures the moral truth.¹¹

But the law can fail to provide moral coordination and leadership in other ways too. Consider, for instance, laws that are formulated in hopelessly complicated language so that we who are subject to them are unable to understand what is required of us. Or consider laws that lead to unavoidable conflicts with existing rules, or that require us to act in ways that are physically impossible. To the extent that a legal system includes rules that fail to meet certain basic standards – standards that constitute core aspects of what is commonly referred to as the 'Rule of Law'¹² – it will fail to fulfil its role as a moral advisor or instructor, even if there is nothing obviously immoral about the substance of the relevant rules.¹³

Of course, even if the rules that make up a legal system are morally worthy and entirely consistent with rule of law requirements, the law cannot be a moral instructor to us unless we treat its instructions as authoritative. Just as the car manual cannot help us fix the car unless we choose to follow its instructions, so too the law cannot help us to be safe in our driving or decent in our other activities unless we choose to follow its instructions. The important question then is: When *should* we treat the law's requirements as authoritative?

Joseph Raz famously argues that, although it is inherent in the very nature of law that it claims legitimate authority over us, this claim is only *justified* when it is *true* that our submitting to the law's authority – and thus treating its directives as peremptory reasons for action – will better enable us to comply with right reason than we could do if we tried to determine how to act by ourselves (i.e. by deliberating directly on the reasons that apply to us rather than via the law's mediating authority).¹⁴ So, for instance, we might better comply with the reasons we have to drive safely if we simply obey low speed limits on winding roads instead of following our own deliberations about how to drive here, since it would be fun yet dangerous to drive fast, and hence tempting to those of us who are weak-willed to act against right reason if we followed our own deliberations.

¹¹ Of course, as we note in the next section, it is possible that, by enacting obviously unjust rules, the law might arouse people's sense of justice and fair play, thus causing a backlash that may, ironically, lead to a positive moral outcome in the long run.

¹² For the classic presentation of the 'eight precepts' that formally constitute the 'Rule of Law' see Fuller (n 4). We discuss Fuller's view in more detail below.

¹³ Of course, many writers would say that a legal system that fails to meet the basic standards of the rule of law is not only failing to fulfil its advisory function but that it no longer qualifies as a legal system.

¹⁴ For Raz's most detailed exposition of his theory of authority, see Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 21-109. See also, Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003. For criticism of Raz's view, see Jonathan Quong, *Liberalism Without Perfection* (Oxford University Press, 2011), 112-120.

Raz's view is entirely consistent with thinking that the law's claim to legitimate authority is rarely justified. (Indeed, it is consistent with thinking the law's claim to legitimate authority is *never* justified.) Whether or not the details of Raz's 'service conception' of legitimate authority are correct, it seems likely that the only credible answers to the question about when the law has genuine authority over us are bound to refer at some point to the moral worthiness of its content. Of course, it may be open to us to treat the law's requirements *as if* they are authoritative, even when they do not qualify as such. But what is certain is that the law can only help us to be *moral* if we have *good reasons* for submitting to its authority. And, as we explain below, this means we must never accept the law's authority uncritically.

Finally, the ability of the law to be a moral instructor is inherently limited because its content is inevitably morally incomplete. Law cannot, and should not, attempt to intrude into *all* areas of morality. First, there are moral values, such as generosity, that cannot be realised if the associated conduct, such as donating to charity, is done out of a sense of legal obligation. As soon as such conduct is demanded of us by law, it ceases to have the uncalculating spontaneity and voluntariness that make it capable of realising the moral value of generosity and becomes more akin to the payment of taxes.¹⁵ Second, there are parts of morality that can but ought not to be incorporated into law, such as a spouse's moral right not to be lied to about infidelity and the moral value of listening to another person well enough that we can summarise to her satisfaction what she has said.¹⁶ And, finally, there are parts of morality that can be and may permissibly be incorporated into law but are not because the law cannot do everything. On matters above a moral minimum, the law is often silent.¹⁷ Hence, the law's moral instruction to us is inescapably incomplete.

These considerations mean that, as an advisor or instructor, the law is at best imperfect, at least when judged from a virtue-ethical or consequentialist perspective. Since the law invariably ignores many of the best parts of morality, it can only imperfectly help us to be virtuous and to achieve morally valuable outcomes. (Of course, there may be no other guide that could do better, but that's unlikely. A wise parent or a humanistic spiritual tradition might well guide us better than the law could.) The inherent limitations of law's instructive role are less problematic from a deontological perspective. Since it is capable of incorporating and adding specificity to fundamental parts of morality, the law has the ability – at least in principle if not always in practice – to help us honour basic moral duties such as the duty not to harm others.

¹⁵ As Philip Pettit and Geoffrey Brennan say, 'The lustre which unselfconscious involvement gives to behaviour is an example of a calculatively elusive consequence. It is a benefit which is reliably produced by the unselfconscious predisposition but which evaporates under a regime of sustained action-calculation.' Cf. Philip Pettit and Geoffrey Brennan, 'Restrictive Consequentialism' (1986) 64 *Australasian Journal of Philosophy* 438.

¹⁶ Jacob Needleman, 'Why Can't We be Good?' (presented at Authors@Google Lecture Series 30 April 2007). The relevant remarks begin at 16.20 mins.

¹⁷ Some matters are deemed, rightly or wrongly, to be too trivial for the attention of law. For instance, there are generic maxims like '*de minimis non curat lex*' in criminal law, where the law recognizes some matters as trifling.

4. The Instrumental Value of Law: Law as a Moral Example

The second potential aspect of the law's instrumental value is its ability to set a moral example. The law would set a good moral example for us if following that example would help us to be moral. This is the *emulation model* of moral expertise. The emulation model is about performative knowledge (i.e. knowing *how* to do something). A master chess player, who looks at a board and just sees the best move, has impressive performative knowledge of *how* to play chess. If we could do as she does, we would play chess well too. But, if this player cannot explain what she did to get the best move, then she cannot advise or instruct us on what to do. (The emulation model discussed in this section and the advice model discussed in the last section can be combined. Some experts – perhaps the best experts – know both *what* to do and *how* to do it).

There are two ways that the instrumental value of law might manifest itself as a moral example: first, when the law practises what it preaches and, second, when it serves as a model of virtue.

4.1 *The Value of Law Practising what it Preaches*

To suggest that law might be valued for practising what it preaches is not necessarily to say that law as law possesses intrinsic moral value (we discuss intrinsic value in Section 6). Instead, this part of law's value lies in its instrumental role in increasing the likelihood that we will act as we morally should act. Thus, just as the law can advise us by incorporating certain moral norms into its instructions, so too it can set a good moral example by itself embodying those moral norms. For instance, a legal system that instructs people not to kill can set a good moral example of not killing by banning capital punishment and condemning unjust wars. Similarly, a legal system that instructs people not to engage in invidious discrimination on the basis of sex, age, ethnicity, disability, nationality, or sexual orientation can set a good moral example by ensuring that its own institutions do not exhibit invidious discrimination.

There is an interesting question here of whether the law can succeed in setting a good moral example if it does not *preach* what it practises. If the officials primarily responsible for the operations of the legal system, such as judges, police, and prison officials, invariably respect moral constraints such as prohibitions on killing and torture, but the law itself does not explicitly include these prohibitions in its rules, will the law nevertheless succeed in having some positive moral influence on people's behaviour? Or is it a necessary condition of such influence that the law also preaches what it practises? We will leave this empirical question open.

4.2 *Law as a Model of Virtue*

As we saw above, some parts of morality, such as forgiveness, generosity, and kindness cannot be incorporated into law as demands upon us because doing so would rob them of the uncalculating good intentions that make them the moral treasures they are. However, to some extent, the law can model such virtues through its policies. The law can choose to be generous to strangers to our society who are in need. It can be welcoming to visitors and migrants. It can be helpful to other communities that are facing disaster. It can be forgiving to people who offend. It can be supportive of people who are vulnerable. It can be appreciative of people who are politically engaged even if they dissent. It can be tolerant of different ways of living. Thus, through its policies, the law

can model, to some extent, the conduct that goes with virtuous states such as forgiveness, generosity, and kindness.

There is a further, more abstract way that the law can model virtue. As H.L.A. Hart points out, the practice of subjugating our will to the directives of a system of general norms necessarily involves the application of certain ‘formal values’ distinct from the substantive values instantiated by the particular content of the rules.¹⁸ These formal values include seeing questions of conduct from an impersonal point of view; taking account of the wants, expectations and reactions of others; and exerting self-discipline in adapting our conduct to a system of reciprocal claims.¹⁹ Thus, even if the content of the law in a particular jurisdiction is not especially morally worthy, the experience of conforming our conduct to a system of generally applicable norms in conjunction with other people who are, by and large, doing likewise, will give us a vivid example of many of the formal elements of practical reasoning that go with conforming to the dictates of objective morality. Emulating the example given by the experience of living in conformity with legal norms may make it easier for us to conform to moral norms.

4.3 The Limits of Law’s Value as a Moral Example

One obvious problem with treating law as a moral example is that, in general, the mere existence of law suggests we don’t trust each other. It suggests we don’t expect that each other will generally honour the fact that killing, raping, torture, theft, assault, and defamation are wrong. (That said, we do seem to expect each other to recognise at least some acts as beyond the pale. In many jurisdictions, there is no law against cannibalism, and this may be because we take it for granted that, outside emergencies, people won’t think it acceptable to eat a human being.) The distrust of each other that the law embodies lessens its credentials as a moral model. Just as for-profit companies are poor models of generosity even if they make substantial donations to charities, so too a distrust-driven enterprise like law is a poor model of trust, even if it is applied honestly and openly.²⁰

There are many interesting questions here, which we will flag, but not address. Does the pessimistic apparatus of criminal justice show that lawmakers actually think the laws they make are too demanding? Or do they think the laws they make are reasonable even though they expect (some) people to fall short and act wrongly? If they do think the laws are reasonable, is that because they think the laws are somehow divorced from other parts of policymaking such as the incentives, the support, and the education that people get (or don’t get) to help them live well?

¹⁸ Strictly speaking, Hart was talking about rules of positive (ie social) morality, but his point is equally applicable to rules of positive law.

¹⁹ Hart (n 9) 71.

²⁰ This is not the only way to view the existence of law. Here are two other possibilities. First, someone might say that, given the valuable coordination function of law, law would exist even if we were all well intentioned and trusted each other completely. For a defence of the view that even angels and morally perfect people would need a state, see Kant (n 2) and Gregory Kavka, ‘Why Even Morally Perfect People Would Need Government’ (1995) 12 *Social Philosophy and Policy* 1. In reply, coordination laws themselves indicate a lack of complete trust. They show that, although we might trust each other to be well intentioned, we don’t trust each other to be *able* to drive safely together unless there are clear, formal rules of the road. Second, someone might say that, far from signalling our distrust of each other, the existence of law signals our wish to respect each other reciprocally as equal members of a polity and equal moral agents. See, Thomas Cristiano, *The Constitution of Equality* (Oxford University Press, 2008).

A final reason for thinking the law has limited value as a moral example lies in the morally problematic things that the law must ask its members to do as a matter of course even in a reasonably good society, including lie, issue threats, attack people, and make laws that harm people as well as detain, arrest, charge, try, sentence, convict, and punish people, where that can include depriving them of their resources, and, in extreme cases, incarcerating or, possibly, killing people. Performing (many of) these tasks is necessary even in a reasonably good society. The best that the law can do is minimise as much as it can the moral burdens it places on people when it requires them to act in these ways.²¹

Given the complexities of practical reality, it is essential that we adopt an appropriate attitude toward the overarching general rules that are law. It is ill-advised to see them as anything other than inevitably imperfect guides to action. And, it is vital that we cultivate a general sense of responsibility and sound practical judgement with which to interpret and apply the overly blunt, general demands of the law. As Gerald Postema notes, doing so depends not only on the quality of our training, but also on our ability to draw on the resources of a broader moral experience, which in turn requires that we seek to achieve a fully integrated moral personality. This is because practical judgement is both a disposition and a skill that must be learned and continually exercised. It is important, he says, ‘if we are seriously to consider matters of moral responsibility...that we pay attention to the conditions of development of this disposition and the exercise of this skill.’²²

5. The Instrumental Value of Law: Law as a Moral Motivator

In addition to instructing us on the content of morality and providing examples of how to act morally, the law might play a third instrumental role in helping us to be moral through its unique ability to motivate us to act in accordance with the dictates of morality. In this section, we consider three ways that the motivational power of law might contribute to helping us to be moral: 1) through the law directly communicating coercive orders to us; 2) through the indirect pressure to respect the law that is exerted by wider society; and 3) through the law’s role in supporting mutually beneficial practices by underpinning duties of reciprocity.

5.1 The Direct Coercive Power of Law

The most obvious way in which the law can ‘help’ us to be moral is by coercing us to act in accordance with moral requirements.²³ If the content of the law in a particular jurisdiction is morally commendable, but those subject to the law are not motivated (or are only weakly motivated) to comply with its requirements, then the benefit of attaching a prudential incentive to the law’s directives is obvious. The threat of sanctions gets the job done by pushing us to comply. Of course, there are limits to the kinds of moral value

²¹ See Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford University Press, 2012), ch. 3

²² Gerald Postema, ‘Moral Responsibility in Professional Ethics’ (1980) 55 *New York University Law Review* 63.

²³ See, for example, Frederick Schauer, ‘Or ‘Emet Lecture on *Law and Coercion*’ <vimeo.com/120808375> (accessed 18 July 2015).

that can be realised through such directly coercive methods, and we discuss these limits below.

A possible objection might be that, in commending the (qualified) instrumental value of legal sanctions, we are commending not the instrumental value of the law but the instrumental value of the *state* as the effective enforcer of law. If this were the case, then the point we have just made about the instrumental value of coercion would be tangential to our main question, which is whether the *law* can help us to be moral. In response, while we do not want to deny the logical possibility of conceiving of a system of legal rules without appealing to facts about their coercive enforcement, we think that this way of conceptualising the *law* is unhelpful for the purposes of our current discussion. This is because our aim is to assess a distinctly *practical* quality of the law as it applies to us here and now. If human beings were better informed, more intelligent, stronger willed, and less vulnerable than they actually are, and if they were surrounded by a much greater abundance of resources, then sanctions might indeed be a superfluous addition to a system of legal rules. But our question requires us to take the world as it is, not how we would like it to be. We therefore feel justified in restricting our attention to a conception of *law* that is sensitive to certain empirical constraints. Thus, in arguing that the law plays a role in motivating our conformity with morality, it makes sense to work with a concept of *law* that takes coercive enforcement of the rules to be, if admittedly not a logical necessity, then at least what Hart called a ‘natural necessity’.²⁴

5.2 Indirect Social Pressure and ‘Respect for Law’

The existence of a legal system brings, in addition to the threat of sanctions, a distinct motivational pressure to conform to the law. This pressure comes not from the state, as the public face of the law, but from the wider society of law-abiding subjects. Consider the widespread tendency to think that the law has moral force, and that we have a moral duty to follow it. If it is now illegal to smoke in restaurants in our society, we will be surprised if we see someone smoking in a restaurant. A voice inside us might say, ‘Hey, that’s against the law!’, and we might even decide to communicate our disapprobation. It is clear that one effective way the law can motivate compliance is to get as many of us as possible to adopt this critical attitude towards potential or actual law-breakers. Indeed, a rational aim of any government concerned with effective control is surely to reach a point where each of us internalises these critical voices and directs them against ourselves if and when we contemplate breaking the law.

There is little doubt about the motivational efficacy of this strategy when it comes to improving the level of law-abidingness in a society (though there is room for doubt over how successful any government’s attempt to pursue this strategy would be; our level of respect for the law is not something that administrations can easily control). What is abundantly clear, however, is that the *moral* value of this part of law’s motivational efficacy is again conditional on the content of the laws to which we defer. The goals of maintaining ‘respect for law’ and avoiding ‘bringing the law into disrepute’ often seem to

²⁴ HLA. Hart. *The Concept of Law* (Oxford University Press, 2nd edition 1994), 199. For more on the role played in Hart’s view by the notion of ‘natural necessity’, see Matthew Kramer, *In Defense of Legal Positivism*. (Oxford University Press, 1999), 204-6. We thank an anonymous referee for encouraging us to clarify our response to this objection.

be among the highest priorities of legal and governmental officials. But respect for law is only valuable when the law is worthy of respect.²⁵

5.3 Underpinning Mutually Beneficial Schemes

The most obvious reason for the law to impose sanctions for offending is to increase the likelihood that recalcitrant individuals will follow the rules. That said, a powerful secondary reason is to provide assurance to everyone else who is already motivated to comply irrespective of the threat of sanctions, that their compliance will not be taken advantage of. We touched on the coordination function of law in Section 3, but the emphasis there was on the law's *epistemic* role (i.e. knowing what to do) rather than its *motivational* role. What makes the law's motivational role so important is that, while few of us are naturally motivated to abide by moral norms for purely altruistic reasons, many more of us are happy to abide by moral norms for reasons of *reciprocity*. What is needed to make use of this moral resource is some guarantee that those of us who make sacrifices now for the sake of others will receive a similar sacrifice from others (not necessarily the same others) in the future.²⁶

This role of law in underpinning mutually beneficial reciprocity schemes has long been recognised as one of its most important moral benefits, and forms the central plank in social contract arguments for the legitimate authority of the state and the law. Of course, the history of the social contract tradition also makes clear why an appreciation of law's ability to provide assurances to would-be co-operators is insufficient to guarantee that the cooperative schemes that result will indeed be mutually beneficial. Hobbes may have been right when he said that life in the pre-civil-society 'state of nature' was solitary, poor, nasty, brutish and short. But, as the history of the twentieth century made emphatically clear, life for some people under the sway of totalitarian regimes is almost certainly worse.

5.4 Further Problems with Law's Role as a Motivational Tool

The pessimism about human nature that underlines many extant legal systems can be found not only in the assumption that we need announcements of prohibitions to keep us in line, but also in the assumption that, despite those announcements, we will step out of line, and hence there's a need for sanctions. The more expansive and harsh our criminal justice system is and the more extensive its use of police, prosecutors, courts, and prisons, the greater our society's apparent scepticism about people's willingness to act well toward each other.²⁷ This underlines our point in the last section about the limits of law's value as a moral exemplar.

When assessing the value of law as a motivational tool, however, its coercive *modus operandi* raises several further problems that we have not yet noted. First, the fact that laws usually come as coercive orders can actively hinder our efforts to be moral. There are the psychological risks of self-alienation, loss of integrity, and moral dull-

²⁵ For an interesting argument to the effect that a person's having respect for law can itself generate an obligation on that person to obey the law, see Joseph Raz, *The Authority of Law* (Oxford University Press 2nd Edition 2009), 250-261.

²⁶ For a short but insightful discussion of this (and other) aspects of justice as reciprocity, see Allan Gibbard, 'Constructing Justice' (1991) 20 *Philosophy and Public Affairs* 264.

²⁷ Cf. James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, 2005).

mindedness that dog absolutist expectations that we follow the rules. If the law directs too much of our lives, it can impede our ability to cultivate reasoning skills. If we are cowed by the law, or manipulated by it, then we lose opportunities to reflect on how to act. We lose opportunities to cultivate our practical reasoning, good judgement, and will. And, this can make us less motivated to take responsibility for our conduct than we would be if we had those opportunities.²⁸

Indeed, the risk of too many legal demands is not merely that we'll develop weakness of will, but that we'll develop *resistance* of will. The fact that the law always *demand*s that we follow it can be a disincentive to follow it. It can make it more difficult for us to follow the law, even the good laws, than it would be if the law's expectations were not unyielding. Given this risk, it is in the interests of any society not to have the law assert absolute priority, so that members can cultivate the will, commitment, and capacity for general law-abidance.²⁹

A further worry is that it's morally perverse for us to act well *only because* the law demands it. For example, it's perverse to care for our children *because* the law expects it and not because we love them. This worry is analogous to a worry in moral philosophy, which Michael Stocker calls the schizophrenia of modern ethical theories.³⁰ Stocker observes that we shouldn't visit a friend in the hospital *because* it's our moral duty. We should visit a friend in the hospital *because* she is our friend and we care about her. This issue of motivation takes us into deep moral waters. Some thinkers say that if our act is morally right or good, the motivation that animates us is irrelevant. But other thinkers would agree with the examples above that, in at least some cases, the motivation is key to the act being the act it is. For a declaration of love to be a true declaration of love, it must be motivated by true love, and not by a sense of duty or even a desire to make another person happy.

Being motivated to act because the law demands it can also pervert our relation to the law itself. This is because, as Stocker suggests, it is a malady if we do not value what moves us to act. So, if the law is what moves us to act, but is neither what we actually value nor what we *should* value for itself, then we are moved by something we do not and ought not to value, and hence are alienated from our own motivations. Perhaps, though, we might think of the law's instructions as helping us to 'fake it until we make it'. That is, we might just do as the law says because it says so until we appreciate the underlying moral reasons to act as the law instructs.

These points add up, at best, to a mixed verdict on law's value as a motivational tool. The main worry is that law may ultimately threaten the moral sensibilities that we could cultivate if its imperative voice weren't booming at us. With this mixed conclusion in hand, let us now consider the potential intrinsic moral value of law.

6. The Intrinsic Value of Law

When we turn to intrinsic value, the distinction we introduced at the outset of this paper between law in general and the law of a particular legal system becomes especially

²⁸ Postema (n 22).

²⁹ For a discussion of the value of law-abidance, see William Edmundson, 'The Virtue of Law-Abidance' (2006) 6 *Philosophers' Imprint* 1.

³⁰ Michael Stocker, 'The Schizophrenia of Modern Ethical Theories' (1976) 74 *The Journal of Philosophy* 453.

important. On the one hand, if law in the general sense has intrinsic moral value, this guarantees an affirmative answer to our central question. For if law in general is intrinsically moral, then any particular instantiation of a genuine legal system necessarily creates moral value. Of course, in an ‘all things considered’ judgement, this moral value might be outweighed by countervailing considerations, but at least we could be sure that the mere existence of law places something of value on the positive side of the ledger. If, on the other hand, it is only the law of particular legal systems that has intrinsic moral value then at best we can give a conditional answer to our central question. We have already seen that the instrumental value of law in helping us to be moral is conditional on certain empirical facts. If we cannot guarantee the positive moral value of all actual and potential legal systems, then we must say the same for the intrinsic value of law. The latter claim – that the intrinsic value of law is conditional – is the one we will ultimately defend in this section. The law’s possession of intrinsic moral value, like its possession of instrumental moral value, is never guaranteed, but is conditional on the nature of the particular legal system in question.

6.1 Moral Attentiveness and Dialogical Responsiveness

If Jacob Needleman is right that one deeply moral act is to listen to others as well as we can, then an interesting way the law might display intrinsic moral value is by instituting practices that enable lawmakers and enforcers to listen as well as possible to society’s members, visitors, friends, and enemies in situations of conflict.

Clearly, this kind of moral attentiveness is not something that the law can embody easily, particularly when its responses to wrongdoing are unreservedly retributive. Consider, for example, the way that a communicative theorist such as Antony Duff understands state punishment. According to Duff, punishment represents a liberal state’s effort to engage a person who has offended in a moral *dialogue* about his offence. In essence, punishment can be seen as a secular form of penance that vividly confronts the person with the effects of his crime. The justification for punishment, Duff says, is primarily backward-looking and turns on the appropriateness of communicating condemnation for the wrong done.³¹ The problem with this view is that it does not allow the person who has offended to communicate back. Instead, the punishment requires him to go through the public ritual of apology irrespective of his attitudes toward the judgement upon him. Such a forced response fails to respect him as a person and fails to satisfy the reciprocal respect conditions for moral dialogue. A further problem is that, in some cases, such as when persons repent or are civilly disobedient, they should not want to follow the formal script of apology dictated by the state because they differ relevantly from people who are unrepentant. They’re trying to engage society in a different dialogue, which is ignored when punishment is purely backward-looking and retributive.³²

There are, of course, alternative accounts of state punishment that do not render it unable to attend to the reciprocal communicative efforts of the person who has offended. A pluralistic communicative theory of punishment supplements retributive justice with other moral values, such as concern for the person’s wellbeing, to determine what

³¹ Antony Duff, ‘Desert and Penance’ in Andrew Ashworth and Andrew von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 1998) 162.

³² Cf. Brownlee (n 21), ch 7.

punishment, if any, is morally justified all things considered. In principle, such an approach can be more sensitive to the person's communicative efforts, and hence can more closely approximate a genuine dialogue.³³ But this merely goes to show how careful we must be, and how hard the law must work, before we are justified in attributing intrinsic moral value to it.

6.2 Political Obligation and the Concept of Law

Let us return to the earlier observation about our widespread tendency to think that we have a moral duty to follow the law. In many cases, this claim seems plausible enough. For instance, when the content of the law is morally worthy, it seems clear we have a moral duty to follow it. Similarly, when failure to conform with the law would predictably lead to negative results, such as the breakdown of a cooperation scheme, or a widespread breakdown of respect for law, it seems clear we have a moral duty to conform with the law. But notice that these duties to conform are derived from moral considerations whose truth is independent of the law. When we talk about a moral obligation to follow the law we may simply be referring to these independent sources of duty. But often we are referring to a different kind of duty altogether: the moral duty to follow the law simply because it is the law.³⁴ This is called *political obligation*.

The positions that legal theorists adopt on the question of political obligation are heavily influenced by their underlying views of the nature of law. Without wanting to deny that the major fault line between legal positivists and their critics concerns the nature of legal validity,³⁵ it remains true in general that, whereas legal positivists typically believe that the extent of our political obligations depends on the contingent nature of the particular legal system under which we live, natural law theorists tend to locate the source of our political obligations in the necessary features of law itself.

Legal positivists hold that the existence and content of law depend on social facts and not moral merit.³⁶ Law is a powerful tool for efficient and effective governance that can usefully serve either morally benign or corrupt regimes. Thus, the bare fact that the law orders us to act in a particular way offers no guarantee that there exists a positive moral reason to act in that way. To show that such a positive moral reason exists, we

³³ John Tasioulas, 'Punishment and Repentance,' (2006) 81 *Philosophy* 279. See also, John Tasioulas, 'Mercy,' (2003) 103 *Proceedings of the Aristotelian Society* 101.

³⁴ The literature on the topic of political obligation is vast, and is extensively covered in both political and legal philosophy. A key early text is John Simmons, *Moral Principles and Political Obligations*. (Princeton University Press, 1979). For a good recent introduction, see Dudley Knowles, *Political Obligation: A Critical Introduction* (Routledge, 2010). For a detailed debate between two leading writers on the topic, see Christopher H. Wellman and John Simmons. *Is There a Duty to Obey the Law?* (Cambridge University Press, 2005). Finally, for the best discussion of the problem from a jurisprudential perspective, see Kramer (n 24).

³⁵ For a defence of this claim see, John Gardner, 'Legal Positivism: 5½ Myths', (2001) 46 *The American Journal of Jurisprudence* 199.

³⁶ Leslie Green, 'Legal Positivism' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2003) <plato.stanford.edu/entries/legal-positivism> (accessed 18 July 2015). For the classic modern statement of this view, see Hart (n 23). For more recent elaborations and defences of legal positivism see, Jules Coleman, 'Negative and Positive Positivism', (1982) 11 *The Journal of Legal Studies* 139; Kramer (n 24); Matthew Kramer, *Where Law and Morality Meet* (Oxford University Press, 2003); Kenneth E. Himma, 'Inclusive Legal Positivism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002) 125-165.

must show either that there are independent moral reasons to act in that way (i.e. reasons independent of the fact that we were ordered to act in that way) or that there are independent moral reasons to treat the directives of the particular legal regime as authoritative (recall, for example, Raz's argument that we have a duty to adhere to an authority's directives only when following them is the best way for us to conform with the independent moral reasons that already apply to us). At no point, according to legal positivists, can we explain the moral obligatoriness of legal requirements by simply pointing to the fundamental nature of law itself. When the law is morally obligatory it is so because it satisfies independent moral standards.³⁷

By contrast, natural law theorists see the rule of law as an intrinsically moral ideal like justice or freedom (even though some legal regimes lack intrinsic value all things considered). In their view, just as we would think someone who denied the moral value of justice was making a basic conceptual error, so too we should think that someone who denies the necessary moral value of law is making a conceptual error. If natural law theorists are right, then the pronouncements of law automatically generate moral reasons for action in the same way that the pronouncements of justice do.³⁸

A common caricature of natural law theory takes it to be the view that there can be no such thing as an unjust law (*lex iniusta non est lex*). This extreme view is obviously unattractive because to insist that valid law can never be unjust is to deny that we can ever sensibly criticise law on grounds of justice.³⁹ But natural law theorists need not be committed to this extreme view. A more moderate view is simply that we cannot make sense of legal practice until we understand law's fundamentally moral nature. Only when we grasp the intrinsically valuable nature of law will we understand why it is, for instance, that judges typically justify their decisions not by appealing to the moral rightness of the decision, but simply by invoking the law.⁴⁰

What is it about the law that seemingly lends it intrinsic moral value? Different natural law theorists give different answers. John Finnis says that law represents the requirements of practical reason applied to the common good. For Finnis, the value of law lies not only in the fact that it is a means to a morally worthy communal life, but also in the fact that it is *constitutive* of such a life.⁴¹ By contrast, Nigel Simmonds, following the work of Lon Fuller, argues that the idea of law represents an ideal of freedom conceived as independence from the power of others. The value of law lies not just in its ability to help individuals achieve independence from the power of others, but in the fact that it embodies that very ideal.⁴² Ronald Dworkin, who is also seen by many as a moderate natural law theorist, says that the law acts both as a record of past political decisions that reflects the community's underlying moral principles and as a way of justifying the exercise of state power on the basis of these principles. The value of a

³⁷ See Raz (n 5) 1-17.

³⁸ See Michelle M. Dempsey, 'On Finnis's Way In' (paper presented at the 6th Annual John F. Scarpa Conference, 30 September 2011). See also, John Finnis, 'Response', (paper presented at the 6th Annual John F. Scarpa Conference, 30 September 2011).

³⁹ For a good discussion of early ('extreme') natural law theorising, see John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 1.

⁴⁰ Simmonds (n 4) 170.

⁴¹ Finnis (n 4).

⁴² Simmonds (n 4).

community's adhering to the fundamental moral principles reflected in its legal tradition is what Dworkin refers to as 'integrity'. Thus, the value of law, for Dworkin, lies not only in its ability to help us achieve integrity, but also in its being an *expression* of the community's integrity.⁴³

Each of these natural law theories has been the subject of a range of powerful criticisms, to which we cannot hope to do full justice here.⁴⁴ Instead we offer a more general response, which is that all of these natural law theories, because of their monistic approach to the intrinsic value of law, are overly exclusive. Instead of leaving open the possibility that different intrinsic values may be instantiated by different legal systems, they each take a single intrinsic value that certain legal systems might plausibly be said to possess and then reify that value into the defining feature of the very concept of *law* itself. Of course, taken by itself, the exclusivity of a theory's main substantive claims is not a reason to reject that theory. But when there is an alternative approach to hand – legal positivism – which offers a simpler, more coherent, and more ecumenical analysis of the concept of *law*, the worry about exclusivity becomes much more serious.

The reasons just listed for favouring legal positivism are the reasons advanced by Hart in his classic defence of the approach.⁴⁵ Legal positivism is simpler than the natural law approach because it makes do with a narrower range of concepts by avoiding incorporating moral ideals into the analysis of law.⁴⁶ It is more coherent because the same analysis applies across all characteristically legal regimes, whether morally benign or corrupt. And it is more ecumenical because, again, it avoids premising its account of the nature of law on any substantive moral claims. This superior descriptive power of legal positivism combines with a second advantage, which is that it makes the moral assessment of actual and potential legal regimes clearer and easier than natural law theory does. By separating the ontological analysis of law from its moral assessment, legal positivism improves our ability to isolate the relevant moral considerations and helps us to make a clear-headed judgement about the best course of action in the face of the law. The ecumenism of legal positivism allows us to say that, while some legal systems may instantiate the value of integrity, other legal systems may instantiate the value of freedom as independence, and others may represent an aspect of the ideal of practical reasonableness (and of course there may be many other intrinsic values that we have not mentioned). In our view, an approach that enables this kind of pluralistic understanding of the potential intrinsic values that might be instantiated by different particular legal systems is to be preferred over the restrictive monism of the natural law approach.

The point to take away here is that law *can* but *need not* be intrinsically moral. If we have a duty to follow a given law, or support a given legal system, it is because morality says we have a duty to follow that law or support that system in light of its particular virtues. And the best way to determine what these virtues are is to work out

⁴³ Ronald Dworkin. *Law's Empire* (Hart Publishing, 1986).

⁴⁴ See, eg, Ruth Gavison, *Issues in Contemporary Legal Philosophy* (Oxford University Press, 1987); Kramer (n 24); Marshall Cohen, *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 2001); Brian Leiter, 'Beyond the Hart-Dworkin Debate: The Methodology Problem in Jurisprudence', (2003) 48 *American Journal of Jurisprudence* 17; Scott Shapiro, *Legality* (Harvard University Press, 2011).

⁴⁵ See, HLA. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

⁴⁶ Cf. Julie Dickson's discussion of legal positivism as indirectly evaluative: Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001).

what the law in a particular legal system *is* in a way that does not pre-empt or presuppose any of the relevant moral issues.

Conclusion

This essay has shown that the answer to our question – Can the law help us to be moral? – is at best mixed. The law has the potential, in principle, to guide us morally through its instructions, its examples, and its motivational prompts. At its best, it also has the potential to instantiate intrinsic moral value in the world. But there is nothing *necessarily* moral about law, and following its directives offers no guarantee that we will act virtuously, fulfil our moral duties, or promote anything of moral value in the world. The inescapable obstacles that complicate and potentially undermine law's capacity to help us to be moral remind us to be vigilant in our assessment of law's moral credentials and reflective about our willingness to conform with its demands.