SPEECH

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The Law as a Moral Enterprise

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First of all, I want to thank you for being at this lecture this evening. I am grateful for your attendance and participation![1]

In preparing my remarks for this fifth lecture in a series that I pray will continue, I recalled that this Fall marks the fortieth anniversary of my admission to the bar and membership in the legal profession. During these four decades, I have often heard thoughtful individuals, both professional and lay, assert that the law and morality are separate institutions. But I also recall being told something quite different by

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1. This lecture was not delivered as scheduled due to the author's medical issues.

other equally thoughtful individuals—i.e., that there is an overlap or an intersection between law and morality—perhaps even an inextricable and necessary link between the two.

Josiah Royce may well have been on to something when he suggested that there exists a "moral burden of the individual" in his consideration of the role of the human person in society.[2] Of course, this role includes the making and administration of law. Royce's thoughts were further developed by the Yale historian, Robert L. Calhoun, who, in his comments on Royce, suggested that it is imperative to proper human development that the individual person "can become the person that he must become only if he is at once loyal to his community and on occasion sets himself in resistance against its demands."[3]

In further considering the issue of whether there is or is not a connection between law and morality, I also reread the legendary Hart/Fuller debate of 1957 in which Professor H. L. A. Hart of Oxford argued the case for the separation of law and morals.[4] On the other hand, Professor Lon Fuller of Harvard, the gracious friend and debate partner of Hart, offered a different take and argued against his English friend's position by presenting the thesis that fidelity to the law necessitates moral inquiry and evaluation.[5] Although the background of their debate was a discussion over the role of positivism in the law, the examination between these two eminent legal educators was about the connection, if any and if necessary, between law and morality. Others have continued their debate in recent times.

For example, Matthew Kramer has refined the argument of Hart in favor of the separation of law and morality and the defense of legal positivism.[6] Picking up from where Fuller left off, Nigel Simmonds has continued Fuller's thesis demonstrating that law is a "moral idea."[7] Of

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2. Robert L. Calhoun, *Democracy and Natural Law*, 5 NAT. L.F. 31, 46 (1960) (quoting 1 JOSIAH ROYCE, THE PROBLEM OF CHRISTIANITY, ch. iii (1913)).

3. *Id.*

4. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Professor Hart went on to deliver a series of lectures (Stanford) developing his thesis that were published in LAW, LIBERTY, AND MORALITY (1963).

5. Lon L. Fuller, *Positivism and Fidelity to the Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Professor Fuller later went on to deliver a series of lectures (Yale) that were subsequently published in THE MORALITY OF LAW (1964).

6. MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET 1 (2004). Kramer has made a great contribution to the debate by acknowledging and discussing the variety of ways in which legal positivism must be studied and understood, thereby demonstrating from some perspectives that law and morality, from the view of some positivists, can share some similar interests.

7. NIGEL SIMMONDS, LAW AS A MORAL IDEA 4 (2007). A major element of Simmonds' fruitful argument is that the connection between law and justice necessitates the connection

course, one cannot forget the important early work of Michael Perry in his investigation of law and morality, which he conducted somewhat earlier in the 1980s.[8]

In today's annual lecture, I shall offer a more modest study and argue that the law must be considered *as* a moral enterprise. I will leave for another day the investigation of whether the law *is* a moral enterprise. My "as" contention is based on a more detailed justification that will follow. But here I offer a preliminary explanation of my position. This account takes into consideration that the law has been, is, and will remain a social instrument devised by our fellow human beings who have been granted the authority to make, apply, and adjudicate law not for themselves or the interests of their friends and collaborators or the most effective lobbyists, but rather for the attainment and preservation of the common good. I will offer a bit more insight into what I mean by the common good, which I contend is at the core justification for having the law in the first place.

As I have stated previously in the Murray Lecture series, the common good "is the achieving and preservation of the good for the individual *and* the good for . . . all members of the same society. The good for anyone cannot be considered without simultaneously considering the good for others."[9] In essence, the common good is that state of human existence in which each member of society seeks to attain his or her legitimate personal interests, while simultaneously there is an attainment by the society of persons seeking attainment of all the personal interests of everyone. The purpose of this dual objective is to ensure the flourishing of the society at all levels so that conflicts are eliminated, the prosperity of all is sought, and the public peace and welfare of the community are promoted.

Returning to one of the more memorable examinations of whether there is an intersection of law and morality, we can also consider the contributions of Augustine of Hippo[10] and Thomas Aquinas,[11] who

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between law and morality. In a principal justification for his thesis, Simmonds argues that, "Law cannot simultaneously be a lofty moral aspiration and a morally neutral instrument that is as serviceable for evil as for good." *Id.* at 38.

8. *See, e.g.*, MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (Oxford Univ. Press 1990) (defining and discussing morality and the law).

9. Robert John Araujo, S.J., *The Nature of the Law and the Role of Citizenship*, 45 LOY. U. CHI. L.J. 287, 291–92 (2013) (emphasis in original).

10. ST. AUGUSTINE, THE CITY OF GOD, Bk. IV, Ch. 4, *reprinted in* READINGS IN CLASSIC POLITICAL THOUGHT 468 (Peter J. Steinberger ed., Hackett Publ'g Co. 2000) ("Without justice, what are kingdoms but great robber bands.").

11. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, at pt. I-II, q. 93, art. 3, *reprinted in* READINGS IN CLASSICAL POLITICAL THOUGHT, *supra* note 10, at 521 ("But insofar as [the law]

were earlier contributors to the discussion.[12] While individuals such as these saw a connection between law and morality, we now recall that the nineteenth century John Austin did not.[13] But to understand the question and possess the ability to address it, one must first have an understanding of what is the nature or essence of the law—how is it to be defined and understood. Once there is a solid comprehension in hand of what is the law is, the next task is to tackle the meaning of what is moral. Of subsidiary importance is the need to assess what is an enterprise.

In regard to the nature of the law, the subject of last year's Murray lecture,[14] I should like to recall a few points I offered then as amplified by further reflection. Then, before addressing the topic of today's lecture, I shall offer some background thoughts on what is morality, especially as it relates to the law and what is the nature of an "enterprise" given the context of the law.

I. THE NATURE AND ESSENCE OF THE LAW

The law is something that surrounds and permeates us and our existence, and affects our consciousness and unconsciousness. For many in this country, the date of April 15 often reminds most persons of their legal tax liabilities as defined by the Internal Revenue Code. In a general sense, we also know that the existence of laws is ancient and extends back to the earliest of times. However, the impact of ancient norms on the individuals and the societies whom they affected is less well known. One illustration of an old law is found in the birth narratives of Jesus Christ heard at Christian worship during Christmas. Here we recall that the Jews of ancient Palestine were under the general jurisdiction of the laws of the Roman Empire in addition to their own Mosaic law. The extent to which the Tribes of Israel were subject to

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deviates from reason, it is called an unjust law and has the nature, not of law, but of violence.").

12. Given the Catholic context of Augustine and Aquinas, the authors Simon Lee in his LAW AND MORALS 1 (Oxford Univ. Press 1986), and Norman St. John-Stevas in his LAW AND MORALS 1 (1964) have continued the important and relevant investigation of the relationship of religion, law, and morals.

13. John Austin (1790–1859) was a precursor of Hart, who posited and maintained the "command theory of law" and who asserted that law's source is not the merits of substance, i.e., law is not premised on moral rules, but is established on facts over values where the norm's legitimacy is determined by its source and the capacity of those to whom the law is entrusted for enforcement to exercise sanctions, if necessary. *See* H. L. A. HART, THE CONCEPT OF LAW 18–20 (1961) (discussing Austin's command theory). By the way, Hart did not agree with the command theory presented by Austin, but he agreed with and reinforced the notion that there is a clear distinction between law and the moral point of view.

14. Araujo, *supra* note 9, at 287.

taxation by the Roman Empire may be less well recalled; however, the reason why Joseph and Mary were travelling back to their home was to participate in the Empire's census that would be used for establishing the tax base.[15]

Given its historical roots about the law, which include both religious and temporal influences, we can see that law is often motivated by the need to protect the authentic needs of society and its members—i.e., the common good—by instilling a sense of order that is predictable through the promulgation and the general application of norms. However, when the laws of despots are the subject of investigation, we recognize the hand of the strong positivist mind controlling those subject to the law; moreover, what is typically absent from the positivist legal system is any consideration of the moral evaluation of why the law was promulgated and how it is to be enforced. The sole value of the positivist domain is what will enhance the objectives of the lawmaker, be they good, bad, or indifferent.

Nonetheless, be we disciples of law-and-morality or the-separation-of-law-and-morals, in neither case are we prevented from acknowledging that there is a purpose or an objective that appears to be at the heart of the matter of why we have law and the juridical institutions that participate in its existence. In addressing the laws of more benevolent jurisdictions, Professor Lon Fuller noted that the purpose of law cannot be restricted to a single objective; rather, it is a goal that is shared by the members of the community through their human nature that gives a "human purpose" to the law.[16] But there is more to the law than multiple objectives, which are designed to attain particular goals, which may or may not be geared toward advancing the common good.

In this regard, we should consider the purpose of the law in the totalitarian system. An examination will reveal that the objectives of law in such a polity are typically tied to securing and enhancing the position of the ruling elite and commanding the state's subjects or citizens to the will of the leadership. Illustrative of this would be many of the statutes enacted by Henry VIII addressing his multiple marriages or those laws promulgated by the Third Reich of Germany to advance so-called racial purity. But in an authentic democracy, advancing the common good seems to be the objective of the law. There are many laws in either kind of polity (democracy or totalitarian regime), but the question about why they exist is very different in each system. That is

15. *See Luke* 2:1–5.
16. Lon L. Fuller, *Human Purpose and Natural Law*, 3 NAT. L.F. 68, 71 (1958).

why the nature of the law is an inquiry of necessary relevance. To borrow from Saint Thomas More, this land of ours (as the England of which he spoke) is planted "thick with laws."[17] In the context of the United States, I think most would agree that our laws are designed to regulate out of necessity, guide out of need, and protect out of duty. In essence, they are geared to the common good (or, as the Preamble of the Constitution reminds us: to the general welfare). But even in our democracy, we can recite instances where laws have intruded into our lives and desires, although there is typically a reason for that. One example of this would be the Selective Service laws which Congress has passed to draft young men into the military service in a time of war. But at other times the reasons for intrusive laws tend to be thin on explanation of why these laws are consistent with the noble objectives that must undergird the law as a servant of society and not a tool of specific political interests.[18]

This is why I mentioned in last year's Murray Lecture that laws of the benevolent society typically begin with human intelligence comprehending intelligible reality and thereby lead to the promulgation and enforcement of norms geared to the common good of society and its members.[19] Of course, we need to recall that even in the great democracies such as that of the United States, not everyone has embraced all laws with satisfaction and acceptance. For example, the laws dealing with prohibition during the early part of the twentieth century and some elements of the recent Obamacare legislation demonstrate deep divisions within the American polity.[20] While these particular laws are very diverse in their origin, a careful scrutiny will

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17. ROBERT BOLT, A MAN FOR ALL SEASONS 39 (1960). In the play, there is a heated exchange when Thomas More allows the plotting Richard Rich to leave More's home. Will Roper, Sir Thomas's son-in-law, rebukes More. The exchange follows:

> ROPER: So now you'd give the Devil benefit of law!
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> MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?
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> ROPER: I'd cut down every law in England to do that!
>
> MORE: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

18. An illustration of this is the personal mandate of the Patient Protection and Affordable Care Act, necessitating the acquisition or providing of benefits that offend the religious freedom and conscience of particular claimants.

19. *See* Araujo, *supra* note 9, at 289.

20. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

reveal that each contains flaws that would advance the interests of particular groups of citizens rather than all members of the society. This is why I underscore that "[t]he norms necessary for advancing the common good are the basis of the positive human law that are essential to any society so that the common good may always be the objective of the law."[21] Elsewhere I have argued then that the importance and primacy of the common good are contingent on moral consideration.[22]

In the context of the common good being concerned with moral considerations, we can see that most laws usually involve a synthesis of command, grant, enforcement of rights and duties, and forums for their implementation and adjudication. At this stage, an inquiring mind considering the relationship among law, the common good, and moral considerations will begin to address an emerging and probably inevitable question of whether the law is about an "is" or is it about an "ought." This consideration is a key issue and requires further study. The conscientious maker and interpreter of the law realizes that there is a need to consider how the law can be a means of attaining and sustaining the common good. The conscientious person involved with the law will likely acknowledge that there ought to be considerations regarding the common good that are more suitable than others. This consideration could eventually lead to a critical study of existing laws and pending legislation that may become law. This study will then realize that there is an "is" and an "ought" about the law. This understanding enters further reflection on the ontology or essence/nature of the law, both of which keep focus on how the law advances or frustrates the common good.

Through critical thinking, an essential element of human intelligence, a person interested in the law can see that there is an essence or nature of the law that intersects the vital concerns of human existence and achievement of the common good. Any person, regardless of who he or she is, can think about what needs to be done and extends this thought process beyond what is immediately within his or her thoughts. In other words, the person goes beyond the knowledge of the personal self and thinks more deeply and more objectively about the matter under contemplation. The appeal of self-interest, so attractive to most persons, begins to diminish, and it is objective human intelligence that enables the person to see this. In short, the objective thought process enables the individual to reach some truth about the essence of thing and its being and determines whether it will satisfy the need which

21. Araujo, *supra* note 9, at 292.
22. *Id.* at 301.

presents itself or if something else must be pursued to fulfill the need.

This person acknowledges that the law is something which exists and therefore "is," but he or she inevitably will see that there is a further dimension of the law which draws out the "ought" of what needs to be done by the law if attaining and nurturing the common good is a relevant consideration.

The content of the law is the law's being; therefore, the content becomes the "is" of the law. But there is little guarantee that the laws that are promulgated without further ado are what are needed by the society for its general welfare, its domestic tranquility, its mutual defense, and its enjoyment of true justice. If I may borrow from Thomas Aquinas's first principle of the law (seeking the good and avoiding the evil) and ask a question: has the pursuit of doing what is essential for the common good been compromised by the accommodation of special interests that undergird what the law "is"? If this is the case, then the balance between the discerning and objective intellect and the satisfaction of a proper will has been disturbed because the essential "ought" of the law that is vital to the common good has been forgotten or deemphasized.

What is the response to this predicament regarding the "ought"? In essence, the "ought" of the law is the path to securing and maintaining the common good. Here I must emphasize the role of the "moral" in the "ought" of the law because what is moral pertains to the common good. A person considering what is moral and what is not must acknowledge the importance and the primacy of the common good. Both the intellect and the will have crucial roles to play in the common good's attainment. The intellect, by speculative reason, can identify and weigh the merits or lack thereof of the content of the norms to be promulgated that advance the common good. The intellect is the means of evaluating the "is" and the "ought." The will, on the other hand, exercises the determination to ensure that what has been defined by the superior intellect as the "ought" will be attained.

At this point, I must return to the central theme of today's lecture dealing with law and morality, or to put it more precisely, the investigation of the law as a moral enterprise. As I have already explained, this suggestion can be a contentious subject for some people and likely will remain so. But I intend to demonstrate why it should be less contentious for the judicious individual. To address this important issue sensibly and coherently, a sound definition of the term *moral* is in order, as is a brief discourse on the meaning of *enterprise*. Words are important to laws and legal institutions, and their meaning oftentimes represents momentous significance to individuals and to the

communities to which the laws apply. As law is a common resource upon which most, if not all, people rely or are subject to in any jurisdiction, its language must have shared meaning and understanding to avoid being arbitrary and fraught with other perils. So now please allow me to work on and present a suitable definition of the term *moral* and then of *enterprise*.

II. IN SEARCH OF DEFINITIONS—WHAT IS *MORAL*? WHAT IS ENTERPRISE?

It should not be controversial to suggest that words, especially those in law, need a common denominator of mutual understanding and comprehension. Words need to carry a shared meaning that is key to their mutual understanding and acceptance among people who use words to communicate their thoughts with precision. Otherwise language, including that of law, becomes whatever the speaker or writer subjectively or capriciously means, and this leads to the undesirable outcomes of miscommunication and misunderstanding. As Lewis Carroll's Humpty Dumpty relates to Alice, "When *I* use a word . . . it means just what *I* choose it to mean—neither more nor less."[23] That may be all well and good for Humpty Dumpty, but it leaves Alice and most of us at a loss about the meaning of what it is that Humpty Dumpty is attempting to convey. Many of us would look to words as essential tools for clarity so that expressions of thoughts, objectives, and intentions are readily fathomable.

The significance of this assertion that the meaning of words conveys important ideas can be illustrated by the following example. If we were talking on the phone with another person as he was driving through Yellowstone National Park, and he said he had to pay attention to the sign which states "Bear Left," would I think my friend meant that he must gently turn the steering wheel of his vehicle in a left direction because of the fashion in which the road is laid out, or would I otherwise conclude that a large, carnivorous mammal that may have been in the area was no longer was present? You see: the meaning of words is important! But, please *bear* with me as I continue.

Given my topic of the relationship between law and moral consideration, I shall now consider and craft a definition of *moral* that has a bearing on the law. The focus on the word *moral* should bring to mind notions of good and bad or evil, of right and wrong. But these notions necessitate further thought about the human agent whose

23. Lewis Carroll, *Through the Looking Glass*, *in* THE COMPLETE WORKS OF LEWIS CARROLL 214 (Random House 1936).

character and behavior enable the person to distinguish between good and evil or between right and wrong.[24] This additional thinking reflects the cognitive function that is needed to distinguish between the right and the wrong or between the good and the evil. What makes something right and not wrong and what makes something good rather than evil? Are these determinations solely dependent on the mind or experience of the beholder, or are they grounded on something else?

I suggest that the distinction between good and evil and between right and wrong is grounded in the ability of human intelligence to comprehend objectively that right and good are unequivocally preferable to that which is wrong or evil. In short, this objective evaluation is essential to assist any person who makes distinctions and then choices between the good and the evil, between the right and the wrong. And this process of making these distinctions and choices finds a home in the making of, application of, and subsequent adjudication under the law that is designed to advance the common good.

The word *moral* and its derivative *morality* have influenced many aspects of human existence. For example, artists, writers, and musicians have addressed matters of rightness and wrongness, goodness and evil in their works with the hope of presenting a moral lesson beneficial to the viewer, listener, or reader. Consider as illustrative the works of Dante and Milton, Michelangelo, Raphael, and those composers who have written music with powerful moral images, e.g., Handel, Bach, or Mozart.

As one considers human actions in general, it is relevant to note that the moral and the virtuous (or the amoral or immoral and unvirtuous) often intersect. The Oxford English Dictionary reminds us of these correlations in its explications of the "moral" as a person's conduct that is virtuous and where human action that may be tempted into certain areas (for example sexual activity and practice between persons) is morally restrained, e.g., non-consensual sexual relations or sexual relations with a minor.[25] Some human deeds may be guided by a certain character, or lack of it, known as the "moral compass." Charles Dickens illustrates this point when he asserts of Mr. Chevy Slyme's "great abilities seemed one and all to point towards the sneaking quarter of the moral compass . . . ."[26]

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24. Moral is defined as "Of or relating to human character or behaviour considered as good or bad." OXFORD ENGLISH DICTIONARY (online ed.) [hereinafter OED ONLINE].

25. *See* OED ONLINE, *supra* note 24 (defining moral restraint as being "[v]irtuous with regard to sexual conduct; showing sexual morality").

26. CHARLES DICKENS, MARTIN CHUZZLEWIT, *in* WORDSWORTH CLASSICS: CHARLES DICKENS 49 (Wordsworth Editions Ltd. 1994).

Human experience and the language used to convey this experience are replete with other instances of moral influence such as "moral turpitude"—the wickedness or depravity of character or conduct; a "moral victory"—the defeat of something demonstrating the victory of good over evil; the "moral welfare"—the well-being of persons and societies; and the "moral world"—a sphere or domain of moral action.[27] Knowing that I have connected in this lecture the word *moral* with the word *enterprise*, it is now time to consider the meaning of this second word.

While the word *enterprise* likely raises for many something that has a commercial ring to it, a principal meaning of the term refers to an undertaking, which often has a "bold, arduous, or momentous" quality.[28] The next question now becomes whether the law is an undertaking in some fashion that correlates to the definition of *enterprise* just given. I propose an affirmative answer to this question in that it is an action and a work of human society that involves the making of normative principles which are used to govern or direct the society for the latter's benefit by seeking and protecting the common good. A subsequent question addresses the issues of whether this action is bold, arduous, or momentous. The response to this issue necessitates some subtlety, but a subtlety that provides clarification rather than obfuscation.

The making of some laws—e.g., traffic regulations dealing with the issue of on which side of the road are vehicles to travel—may seem simple, and perhaps inconsequential. The action involved in their making may appear to be anything but bold, arduous, or momentous. The same conclusion might be reached about such a law's application and interpretation. However, subtlety begins to emerge if a person begins to think more deeply about why such a law dealing with where vehicles travel is necessary in the first place. As this reflection grows, it should become clear that there is at stake a matter of the common good, i.e., the protection of those who use in some fashion the public ways that are governed by such a law that does not simply exist by arbitrarily ordering people to drive on one side of the road rather than the other; this law exists to protect those who use these public ways. The protection of the public, particularly those who use public ways for travel, is a matter that concerns the common good.

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27. These illustrative definitions are based on definitions from the OED Online. *See* OED ONLINE, *supra* note 24 (defining moral welfare as "the well-being of a person, community, etc., esp. with regard to sexual and family matters," and moral world as "the sphere or domain of moral action").

28. OED ONLINE, *supra* note 24.

Another illustration of subtlety in the law and the protection of the common good that raises the moral underpinnings of the law is this: there are municipal ordinances which require property owners to shovel sidewalks that adjoin their property. Under a superficial examination of this law, a property owner may argue that it is unnecessary to remove the snow because the owner does not use the sidewalk in front of her house. However, upon further reflection, concern about the common good becomes evident as one thinks about other members of the community—neighbors, passers-by, and those who deliver the mail and packages—who will need to use the sidewalk. Again, the common good becomes the justification for such an ordinance, which is based on a moral reflection of protecting the interests of the members of society.

With this initial foray into the meaning of the words *moral* and *enterprise*, I shall now explore how the moral consideration is connected with the enterprise of the law.

III. THE LAW AS A MORAL ENTERPRISE

The issue of whether there is a nexus between law and morality is not simply a function of the legal theory of Hart, Fuller, and others. The concern with and connection between law and morality precedes the mid-twentieth century by over two millennia. In considering what is just and what is not, Plato and Aristotle tackled the concept of justice, and, in doing so, saw that justice is dependent on harmony within the person and within the society (it is a consideration of the common good which that considers the interests of the individual person and all members of society); moreover, both concluded that justice is connected to virtue.[29] Theirs is a moral consideration as it involves the common good. Furthermore, consideration of the common good raises the matter of the universal because the common good is not dependent on time or place (it concerns the right relationship amongst all peoples, the "right relationship" being a fundamental understanding of justice because it necessarily takes account of what is due each person). We recall the timeless connection between law and the moral as we consider Augustine's argument, relied upon by Martin Luther King, Jr., that an unjust law is no law at all.[30] In addition, we recall from Augustine the

29. For Plato, justice is achieved when the virtues of wisdom, courage, and temperance are used to advance the good of individual and the society (state). *See* FREDERICK COPLESTON S.J., THE HISTORY OF PHILOSOPHY, VOLUME 1: GREECE AND ROME 220 (discussing Plato's cardinal virtues). For Aristotle, justice is the virtue practiced toward others. ARISTOTLE, THE NICHOMACHEAN ETHICS OF ARISTOTLE 122 (F.H. Peters trans., London, Kegan Paul, Trench, Treubner & Co. 1893); *see* COPLESTON, *supra*, at 334, 341 (discussing the same).

30. *See* Martin Luther King, Jr., *Letter from a Birmingham Jail*, 26 U.C. DAVIS L. REV. 835,

state is nothing more than a great band of robbers when it, the state, acts unjustly.[31] With the monumental work of Thomas Aquinas in focus, the nexus between the moral and the law is solidified further as we take account of his conclusion that the first principle of the law is to seek good and to avoid evil.[32] His point raises the very core of the meaning of *moral*.

But moral evaluation does not stop with these great thinkers. Lon Fuller suggested more than half a century ago that there is a human purpose that permeates the law and this purpose is linked with a value or values.[33] To demonstrate what values are and are not, he relied, in part, on the illustration of Ludwig Wittgenstein's famous "rule": "Show the children a game."[34] But what if the game is one that contains danger or exposes children to corrupting influences, which are inappropriate for their age? [In Wittgenstein's example the game was throwing dice.] Is not the common good still of concern notwithstanding the fact that the "law" promulgated was simply a rule designed to entertain the children of a family? Fuller understood that the words of commands are important and not to be understood superficially. Reflection, especially moral reflection, was and remains necessary in order to assess properly the command: "Show the children a game." Given the context of supervising children, moral reflection of the kind of game that would be appropriate is in order. Crucial to this moral reflection is consideration of the ought—what should be done, and what should be avoided; what is the good to be pursued, and what is the evil to be avoided. As Fuller further warned, rejection of the moral consideration of the "ought," is "tragically felt" in the contemporary age.[35] It is this moral reflection that is essential to the durability of the "social order" (the common good), but which was being forgotten in his time.[36]

I, for one, think that Fuller was correct not only in making the points he did for the mid-twentieth century, but for our time as well. Today the notions of the common good, morality, and the "ought" are often considered immaterial to political, legal, and social discourse. What becomes central to the discussion is this: what is my right, my

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840 (1993) (discussing the difference between just and unjust laws).

31. ST. AUGUSTINE, *supra* note 10, at Bk. IV Ch. 4.

32. ST. THOMAS AQUINAS, *supra* note 11, at 521.

33. *See* Fuller, *supra* note 16, at 69 (discussing the merger of fact and value).

34. *Id.* at 71 (citing LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (2d ed. 1958)).

35. *Id.* at 75.

36. *Id.*

entitlement if I do not simultaneously give due consideration for the rights and entitlements of the other? Focus only on the entitlement of the self-promoting autonomous individual is a problematic approach to the law because it is riddled with subjectivity and thus tends to ignore the common good. The "mystery of human life" dictum of *Casey* is relevant to the point I make here.[37] As the plurality said in its opinion, there is "a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[38] This dictum continues to find reanimation in decisions such as *Goodridge v. Department of Public Health*[39] and *Lawrence v. Texas*.[40] There is a grave problem that lurks in this dictum from *Casey* and laws, including judge-made laws, which are built upon it. The central problem is that the dictum militates against the common good. It does so by placing on a collision course competing subjective definitions of rights based on an aggressively autonomous sense of liberty. However, human thought and action cannot simply rely on what I want or think is good. Reflection of what is the good, the "ought," for each member of society is crucial when the subjective view of the good is under discussion. When norms regarding rights are developed by the competent law-maker, central to the consideration is that they are for the benefit of society and each of its members—not just one or some members. And this enterprise is a moral enterprise as it is an undertaking to pursue what is right over what is wrong; what is good over what it is not.

As Anthony D'Amato has stated about Cicero,

> True laws . . . were those laws consistent with justice [here, I suggest, right relationship] and natural law; if a law duly enacted was inconsistent with justice or morality, then it was a law in name only, not deserving of the title "law" any more than a harmful chemical packaged by a non-druggist was entitled to be called a "prescription."[41]

Law can certainly be inconsistent with justice and the moral considerations that underpin the objective intelligence comprehending objective reality essential to legal reasoning. One only need think about

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37. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion).

38. *Id.* at 847, 851.

39. Goodridge v. Dep't of Health, 798 N.E.2d 941, 948 (2003) (relying on *Casey* and *Lawrence v. Texas* to legitimize same-sex marriage by redefining marriage).

40. 539 U.S. 558, 571 (2003).

41. Anthony D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202, 203 (1981).

laws of a totalitarian state in this context. This is why Heinrich Rommen, a victim of National Socialism and its laws, argued that there can be no law without morality; moreover, as he contended, laws that are not morally founded are a contradiction of terms.[42] Might this be one of the self-evident truths identified by Jefferson in the Declaration of Independence?[43] Another self-evident truth is not that what I believe to be true is true purely because *I* make the assertion that it is true; rather, truth is what objective human intelligence that comprehends intelligible reality identifies as truth. The first assertion of the individual isolated from the rest of society is mere subjectivity that is an exercise of positivism, but the second is an exercise of objective reason that withstands the scrutiny of subjective judgment.

This is why the law, if it is an exercise of a moral enterprise, recognizes that law is of general or universal application. In essence, it is not just about "me"; it is true for me as it is for thee. This is the point that enabled Rommen to conclude that,

> When little or no respect any longer exists for any authority; when marriage [whose meaning is the subject of bitter debate today] generally ceases to be differentiated from concubinage and promiscuity; when the honor of one's fellow citizen is no longer respected and oaths no longer have force, then the possibility of social living, of order in human affairs, vanishes altogether.[44]

Some may argue, based on an appropriation of *Casey*, that their morality, their truth is as solid, is as legitimate as that of anyone else. But such a declaration serves as incontrovertible evidence that such claim is subjective and relativistic. Inescapably, this person's morality and truth are headed on a collision course with his or her neighbor's morality and truth when the neighbor's perspective differs. And this collision spells doom for the common good.

For the moral claim to be moral, for the truth claim to be true, universality is essential. This can be illustrated by the relativism of the argument made in *Dred Scott v. Sandford*[45]: on one side of a geographic border, Dred Scot was a free man, but on the other side of that border, he was a slave. The allegation of the individual who claimed to own

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42. HEINRICH ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 188 (Thomas R. Hanley trans., B. Herder Book Co. 1949).

43. Jefferson identifies four self-evident truths: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

44. ROMMEN, *supra* note 42, at 256–57.

45. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 394 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Dred Scott is illogical because it defies the morality and truth of human personhood, i.e., that a man is a man wherever he is, which is verifiable by objective truth comprehending objective morality. This point has trenchant application today as we consider that the same claim be made of the human child regardless of which side of the birth canal he or she may find himself or herself.

For the law to be related to moral enterprise, the law must take account of the "ought" to maximize the realization of the good over the evil and the right over the wrong. In the final analysis, the "ought" offers the dependable path to securing the common good. Deciding what is moral and what is not acknowledges the importance and the primacy of the common good in the law. Both the intellect and the will have crucial roles to play in the legal moral enterprise and in the common good's attainment. The intellect, by speculative reason, can identify and weigh the merits of, or lack thereof, the content of the norms to be promulgated that advance the common good. The intellect is the means of evaluating the "is" and the "ought." The will, on the other hand, exercises the determination to ensure that what has been defined by the superior intellect as the "ought" will be attained. To assist in this important project to ascertain the "is" and the "ought," we should take stock of how Heinrich Rommen demonstrated that the necessary moral evaluation will help identify the material content of the human (positive) law that advances the common good as understood by the "rational, free, and social nature of man."[46]

One need not be a member of a particular religion, such as Catholicism, to accept Rommen's thesis. One need not be a subscriber to a particular school of legal philosophy to see the legitimacy of his assertion. Rommen's point parallels that of Chief Justice Harlan Stone who concluded, in the context of the protection of conscience, that:

> All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep is its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.[47]

But Chief Justice Stone is not alone in making such an observation that accords with Rommen. The late Professor Alexander M. Bickel of

46. ROMMEN, *supra* note 42, at 186.

47. Harlan F. Stone, *The Conscientious Objector*, 21 COL. UNIV. Q., 253, 269 (1919).

Yale Law School recognized that there can be conflicts and clashes between the moral order and the legal order.[48] In the turbulent days of the 1960s and 1970s, he recognized that there was a "bombardment" of opposing, politicized views that obscured the search for both the legal and the moral.[49] By way of illustrating his point, he discussed a seminar called by Kingman Brewster, the then president of Yale and a legal scholar, in 1969.[50] The nature of the seminar was geared toward investigating the question "What is happening to morality today?"[51] In noting that many claims were presumably built on "moral argument," Bickel argued that the conflict of moral claims "threatens to engulf us."[52] He further argued the legal order has "heaved and groaned for years under a prodigality of moral causes" which have, if not broken the legal order, bent it badly.[53]

Bickel explained that the catalyst for the Yale symposium was the arrest and trial of the African-American activist, Bobby Seale.[54] In admitting that a crisis had emerged from Seale's trial, Bickel noted that the source of the predicament was "the abandonment of reason, of standards, of measure, the loss of balance and judgment."[55] The tensions between competing interests and perspectives on this political, social, and cultural issue included "incivility and even violence of rhetoric and action that academics and other intellectuals domesticated into their universe of discourse . . . ."[56] But that is not all that Bickel noticed when commenting on the escape of objectivity and reason. As he noted further, there was a prohibition of objective discussion, a veto or exclusion that was progressively embraced by leading academics who should have known better.[57] He recognized parallels of the events surrounding the seminar that took place in the German universities of the 1930s when learned faculty and administrators did not resist their movement into the despotic political envelopment of National Socialism.[58]

Professor Bickel ended this aspect of his commentary by concluding that:

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48. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 119–20 (Yale Univ. Press 1975).
49. *Id.* at 120.
50. *Id.* at 119–20.
51. *Id.*
52. *Id.* at 119.
53. *Id.*
54. *Id.* at 136.
55. *Id.* at 137.
56. *Id.*
57. *Id.*
58. *Id.* at 136.

> If most of the things that politics is about are not seen as existing well this side of moral imperatives, in a middle distance, if they are not seen as subject on both sides of a division of opinion to fallible human choice, then the only thing left to a society is to succumb to or be seized by a dictatorship of the self-righteous. I do not wish to overstate the case, but this seems to me inevitably the conclusion to which disenchanted and embittered simplifiers and moralizers must come. But if we do resist the seductive temptations of moral imperatives and fix our eye on that middle distance where values are provisionally held, are tested, and evolve within the legal order—derived from the morality of process, which is the morality of consent—our moral authority will carry more weight. The computing principle Burke urged upon us can lead us then to an imperfect justice, for there is no other kind.[59]

If I understand Bickel correctly, he is not arguing against the role of moral consideration in society and its legal functioning. He is assuredly critiquing the morality that is not based on objective reason and critical testing of the human intellect comprehending intelligible reality. But he is also appraising a morality that is founded on self-righteousness that relies not on the objective intellect but on the will, which knows nothing else but a self-defined or self-referential goal.

The term he uses to define his investigation is the morality of consent. But there is more to morality than consent, for even a despotism of a majority can sway from that which is truly objective, because the morality of such a majority does not have at the center of its concern the common good. Professor Anthony D'Amato has pointed out that what the law should be in light of what opinion polls or majority views suggest is problematic. Public opinion about common "moral values" can and does shift. What is immoral and unlawful today can dramatically change tomorrow.[60] As majoritarian moral values shift, the law that is essential to the integrity of public life and the common good can be adversely affected; thus, if the shift about values is frequent, repeated amendments to the law may be required to reflect changes in attitudes about what is moral and what is not. This means that the legal and moral guidance necessary to society and the common good will be founded on the subjective and shifting sands of popular opinion rather than on the stability and durability of objective reason. That is why the law as a moral enterprise must be understood and accepted by people of good will; moreover, this necessitates the fact

59. *Id.* at 142.

60. *See, e.g.*, D'Amato, *supra* note 41, at 217 (questioning how judges would rule if acts that were once considered immoral were considered moral over time).

that the law promulgated by society must also be founded upon and practiced by objective human intelligence comprehending intelligible reality.

Bickel, Rommen, and others have placed on notice that societies and their legal institutions can ignore the necessary and proper moral consideration. Yet, morality can be misused as easily by the totalitarian regime as by the democratic republic. The test for assessing whether the moral consideration is authentic or not involves applying the objective intellect that enables one to comprehend the intelligible reality of the world. Here I need to add a useful and reasonable restraint: if Bickel is on to something by suggesting that ours is an imperfect justice—"for there is no other kind"[61]—then might we make it more moral and, therefore more perfect, by embracing that labor of reason and love that is within all our grasps and that is an exercise of the objective intelligence given to us at birth?

This is an undertaking that is arduous and necessitates boldness and courage. But it is an undertaking that is nonetheless needed for the law to be humanity's great servant as its focus is the attaining and preservation of the common good.

I thank you very much!

61. BICKEL, *supra* note 48, at 142.