Chapter 10
Obliged to Be Good

As the state turned its sights to human interiority, probing thoughts to punish the offending kind, new vistas opened up. Being good presupposed a congruence between inner inclination and outer act. So long as the state punished only acts, it could hope for law-abiding but not necessarily virtuous citizens. Crimes of thought and their policing raised the possibility—last seen when the authorities had been concerned with sin as well as crime—that goodness, not just propriety, might be the outcome of their interventions.

Apart from habit, custom, and informal sanction, at least three kinds of rules have enforced behavior: religious precepts, moral exhortations, and laws. Each was transgressed in its own way. Sin scoffed at divine edicts or the church's will. Immorality transgressed ethical or moral codes. Crimes violated laws—rules that, neither divinely enjoined nor necessarily ethically informed, had been issued by recognized authority. Religion, morality, and law have often reinforced each other. Once the gods stopped enforcing and the church gave up its temporal power, the law commanded the largest battalions. Nonetheless, religion and morality still undergird the law. Religion, morality, and law today steer in different directions on only a few issues: abortion, euthanasia, homosexuality, and polygamy. Despite increasing secularization, the law continues to enforce morality. "Besides interfering with people who wish to have abortions, commit homosexual acts, visit prostitutes, take drugs, get drunk," as

one scholar listed the still controversial instances in 1976, "it also interferes with people who wish to steal, rob, evade income taxes, assault, and murder."[1]

Ideological regimes, religious or political, have punished wrong thoughts for at least two reasons. First, the thinkers needed to be saved from themselves. That was Augustine's logic. Since eternal damnation awaited heretics, compelling their conversion did them a great favor. Second, wrong thoughts might harm society collectively either by angering higher powers (or—in the secular, political version—by defying ineluctable laws of history or biology) or by undermining its sense of community. As we have seen, the concept of crime as a collective affront has deep historical roots—back to the Greek pollution theory at least. Medieval heretics were persecuted not just to save themselves but also to protect other Christians.[2]

Western societies no longer consider thought crimes a communal danger. As the distinction between sin and crime was elaborated, and as religious and eventually political beliefs were moved from the state's auspices into the private sphere, what individuals thought or believed became a matter largely for them alone. The same held, but to a lesser extent, for the collective danger posed by wrong thinking. If some thoughts motivated wrong action, they undermined society. The individual adulterer might not harm anyone, but widespread philandering threatened to hollow out the family as an institution. Perjury, contempt of court, and tax evasion did not necessarily cause immediate widespread harm but undermined the penal code's deterrent effect.[3] The state might no longer enforce religion, but it did police morality. In much the same way, though the authorities did not suppress political criticism, they did insist on maintaining order. Treason, as we have seen, has been narrowed to the point where only actual attempts to destroy the state are punished. Most opinions may be freely expressed. The concern with speech has shifted from its content—now only rarely actionable—to the circumstances and form of its expression: whether it

threatens unrest or disorder. Around the time of the Peterloo massacre in 1819, the English authorities began paying less attention to whether public statements were libelous and treasonous and more to whether the assemblies where they were uttered were riotous.[4] Contemporary debates over hate speech focus less on the precise—usually risible—claims advanced in that speech and more on the circumstances of their utterance and their consequences in acts.

Does the modern state legislate morality? Founded contractually for its citizens' common good, the state, many think, pursues order, not virtue. Society has therefore banned only those actions that harm it, undermining public tranquility. Sacrilege, even unbelief, are no longer its concern, though blasphemy may disturb the public peace and can be prosecuted on that basis, not as an offense to God or religion.[5] Nor are many behaviors pursued that harm no one, or even those that affect only the person doing them: adultery, sloth, fornication, gluttony, inebriation, masturbation, and other acts that once called down the law's wrath. The private realm of permissible behavior and cogitation has undeniably expanded. Yet what that realm includes and what remains regulated depend on how order and harm are defined. As some behaviors became private, others were recognized as of public concern.

By themselves, religion and later morality lacked strong means of secular enforcement. Big gods enforced sanctions and encouraged prosocial behavior.[6] But on earth law played little role in voluntary communities of the likeminded, bound together by belief but with no official ability to coerce. Among the early Christians, morals and faith guided believers without legal sanctions. As a gathering of the likeminded with no tools of compulsion, the early church could enforce its precepts only through private punishments (penance, fasting, pilgrimages, sartorial markings) that believers agreed to submit to, along with whatever psychic toll was imposed by the conviction that they had fallen from God's favor. Mennonites, the Amish, Mormons, Orthodox Jews, and other religious communities

that enforce behavioral norms not enshrined in statute continue like this today.

Convinced of their own virtue and ability to guide behavior by example rather than by precept, political ideologies, too, have succumbed to the illusion that they could do without the law. Punishing them treated humans as animals, Marx thought. Under socialism, people would recognize their own wrong-doing and reform themselves. Somewhat unexpectedly, Marx's view of what abolishing the state would actually look like was akin to the United States of the early nineteenth century.[7] Later Marxists believed that law was needed only in bourgeois systems, to defend property against the dispossessed. Law, along with morality and the state, would be superseded under socialism's wholly novel arrangements.[8] Early in the Soviet Union, the police were considered a bourgeois and capitalist institution and thus nothing for socialists.[9] That was the myth of the state withering away in the coming Communist nirvana. Castro thought that socialist Cuba could do without lawyers since revolutionary justice was based on moral convictions, not legal precepts.[10] Yet these political ideologues, just like the religious ones, soon discovered how handy the law could be. Unhampered by due process, the so-called actually existing socialisms attacked their class and ideological enemies mercilessly. The state must be democratic for the proletariat and dictatorial against the bourgeoisie, Lenin decreed.[11] In the theocracies, morality and religion were enforced by law, often backed by terror.

Early on, religion regulated even behaviors that would later be treated as ethical or legal concerns. Thus, theocracies policed a wider range of conduct than we now recognize as pertaining to either morality or the law. The Old Testament decreed death for encroachment on the tabernacle, idolatry, blasphemy, Sabbath breaking, assault on parents, contumacy, murder, manslaughter, negligent killing, adultery, concealed unchastity, rape, homosexual acts, bestiality, prostitution, incest, stealing from God, kidnapping, and serious perjury.[12] Religion

sought to control personal conduct (diet, hygiene, dress, grooming, and other ways of combatting uncleanliness) as well as beliefs (apostasy, sacrilege, heresy, blasphemy), economic and legal relations (usury, perjury, breach of contract, forgery of documents), supernatural and semireligious behaviors (sorcery, witchcraft, magic), morality (adultery, incest), quasi-emotions (greed, pride, envy), and family relations, including women's rights.[13] As if that were not enough, religion also claimed to govern belief, sin, grace, and other inner states. Today's theocracies punish a similarly expansive range of actions, many of which are elsewhere considered private issues or matters of indifference.

Polytheistic religions were not very good at setting consistent ethical precepts. Gods disported themselves with little coherence and even less willingness to set a good example. Among the Aztecs, as the four sons of Ometeotl fought each other for control of the universe, Huitzilopochtli beheaded his sister when she tried to murder their mother, who had become pregnant out of wedlock. The Egyptian god Seth killed his older brother, Osiris, to become king of Egypt and then had to fight his nephew, Horns, to retain power. Deities raped, seduced, and cheated. Osiris sired the god Anubis by the wife of his brother, Seth, and Seth in revenge raped his young nephew, Horns.[14] The monotheistic religions were practically prim in comparison, issuing universalist law codes and punishing a wide variety of behaviors—drinking and gambling in Islam, for example.

Whether mono- or polytheistic, divine precepts were often ethically indifferent, even immoral. Gods were spiteful, vengeful, petty, peevish, and cruel. They were often envious of humans—when mortals were too happy, for example.[15] What they commanded was not always ethical, and far from all sins were immoral.[16] Why gods were not more moral has long been a puzzle. The concept of an "act of God," describing the unpredictable, overpowering forces insurance companies refuse to reimburse for, hints at the dilemma. Job tries our understanding as he endures God's injustice. Accustomed

to mercurial divinities, even the Greeks were often stumped by how unjust the gods could be. In the *Theognidean sylloge*, Zeus is asked the question we pose of Job: Faced with a just person suffering undeservedly, can we still worship the immortals?[17]

It may be sinful not to pray or worship, but it is hardly immoral. Nor was Jonah being immoral when he disobeyed God by taking a ship in the opposite direction instead of going to Nineveh to preach.[18] Dietary injunctions and other rituals were morally indifferent. Whether we believe in the unity or the trinity of the godhead may be theologically significant, but not ethically. Some taboos still in force today are likely rooted in a deep premoral past: laws against suicide, incest, bestiality, necrophilia, and parricide, against improper burial or disposal of corpses, and perhaps against cannibalism. Nor should we read much morality into the first three or four of the Commandments: that only the God who issued them may be worshipped, that he must not be figuratively represented, that his name must not be invoked except to worship him, and that he must be worshipped on a particular weekday.[19] These orders were the trade-unionist aspects of divinity, with religious but no ethical import. Adultery and coveting others' possessions we today regard as mere moral transgressions. In contrast, not stealing, killing, or bearing false witness remain core legal and moral prohibitions.

Religion at times contradicted morality outright. The elect saw their behavior as inherently virtuous, regardless of how immoral. Subjects who claim direct access to the divine are the state's worst nightmare: unruly, supremely self-assured antinomian anarchists, irrepressible in their mischief. In the twelfth and thirteenth centuries, the Free Spirits of northern France and the Rhine Valley were convinced that, thanks to their immediate relation to a pantheistic god, they had no need of the church and its sacraments. Sinless and thus unbound by conventional morality, they allegedly indulged in spectacular feats of sexual promiscuity, even incest. Intercourse with the illuminated, they cunningly claimed, restored a woman's virginity.[20] The

Ranters of seventeenth-century England believed they were incapable of sin and so welcome to indulge in fornication, incest, adultery, orgies, cursing, whoring, drunkenness, and blasphemy.[21] The Jewish messianic rabbi Sabbatai Zevi made similar claims to direct connection with the divine. Claiming to be the messiah, he married a former prostitute and radically reformed rituals. In 1666, he ordered followers to celebrate his birthday rather than fast on the Ninth of Ab, commemorating the Temple's destruction. Sexual extravagances were also reported among later Sabbatian heretics.[22]

But as religious and secular administration grew separate, so did law and religion and later morality as well. Morality increasingly crystallized out the ethical components of religion, leaving behind the sectarian and ritualistic aspects. Eventually it too was statutorily enforced. Compared to what would have been the Jews' theocratic commandment of religious injunctions if they had had a state, the Romans scarcely enforced religious matters. They did forbid violating the chastity of the Vestal Virgins, who stood in constant contact with the gods if they remained pure.[23] But it was still long before religion and morality were clearly distinguished. The scholastics of the twelfth and thirteenth centuries recognized natural law, but not morality, as something separate from religion.[24] In the sixteenth and seventeenth centuries, natural law, in all its variations, supplemented or replaced the divine as the ultimate authority. By the Enlightenment and especially with Kant, a secular morality had developed with little connection to organized religion, indeed often opposed to it. Voltaire's philosopher Zadig claimed that all religions aimed at a lowest common denominator of ethics. At the same time, sin also came to approximate immorality as religious teachings became more generally ethical and less concerned with theological doctrines.

For Hobbes in 1651, crime was still a subspecies of sin, "consisting in the Committing (by Deed, or Word) of that which the law forbiddeth, or the Omission of what it hath commanded." Every crime was a sin, but not every sin a crime.[25] In the early seventeenth

century, Hugo Grotius, too, hardly distinguished between law and morality. Sin and crime remained conflated. Laws in the eighteenth century still prohibited what were regarded as sins or moral failings: committing adultery, having sex outside of wedlock, working on the Sabbath or not working at all, begging, bear baiting, and cock fighting.[26] But in 1689 Locke separated the two. The magistrate's mandate was the public good. Being covetous, uncharitable, or idle: though possibly sins, these were not crimes. No harm ensued, nor was society's peace disturbed.[27] Law's concern was only with actions that hurt others. The Enlightenment philosophes, such as Beccaria, distinguished between secular punishment in this world and divine justice in the afterlife.[28] The French Constituent Assembly's Law of 8–9 October 1789 declared that the law should prohibit only actions harmful to society.[29] The Bavarian penal code of 1813 distinguished rigorously between law and morality. Law should not deal with acts that violated people's moral obligations to themselves. Masturbation, sodomy, bestiality, and fornication were immoral, but laws punished such sins only if they violated others' rights.[30] Adultery was treated as a breach of contract and dealt with in the code's article following that on attorneys who failed to pursue their clients' interests. It was punished with a maximum of three months' jail.[31] In France half a century after Locke, however, Montesquieu still counted offenses against religion and morality as two out of four forms that crime took, alongside actions against public tranquility and individual security.[32]

Enforcing religion long remained the law's task. The church developed its own courts whose remit included blasphemy and heresy. By 1500, such courts were found throughout Western Christendom.[33] Technically a royal institution, the Inquisition pursued the church's enemies until 1834.[34] Secular authorities eventually entered the field, too. Early in the thirteenth century, several European states instituted death against heresy, which they treated as a secular crime.[35] In seventeenth-century England, blasphemy was a common

law offense and in 1697 also began violating statute. Christians who denied the Trinity, claimed there was more than one God, or rejected the Bible as divine authority could not hold office and suffered other legal disabilities and jail if they repeated any of these offenses.[36] Yet the state cared for public order more than for theological purity. Cromwell's mid-seventeenth-century Puritan republic faced even more extreme nonconformists. Reformers themselves, the Puritans could have enforced orthodoxy only hypocritically. But dissenters such as the Ranters, who believed that God was everywhere and that no authority deserved obedience, gnawed at society's moorings.

In 1650, the House of Commons took aim at Ranters with an act punishing those who believed that, thanks to their immediate relationship to God, moral distinctions no longer applied to them, salvation and damnation were irrelevant, and they were incapable of sin. A month later, another act ended all requirements of uniform religious belief and practice. A variety of Christian practices was now tolerated, but extreme dissenters were still beyond the pale—Ranters and Socinians (who rejected Christ's divinity and original sin). In effect, forms of Christianity that were both religious and moral were accepted, but those sects that refused to toe the line of morality and social order were not. This distinction held even after the monarchy was restored in 1660. Christians sects that did not threaten the social order were tolerated. Only those who refused to swear oaths (Quakers) or considered themselves the sinless elect were not. They were punished not for theological deviations but for threatening stability. When John Taylor was convicted of blasphemy in 1676 for calling Christ a bastard, a cheat, and an imposter, he was put in the pillory with a sign saying "for blasphemous words, tending to the subversion of all government."[37] Blasphemy was now punishable in common law because Christianity was part of the social order. But it became enforced by law less as a religious doctrine than as a set of behavioral precepts—more morality than theology.

Morality and religion were conflated. Resting on both, the social order would be undermined if either were violated. In 1675, Chief Justice Hale warned that to deny religion was "to dissolve all those obligations whereby civil society is preserved." A century later, in 1797, Justice William Henry Ashurst said of blasphemy that it was not just an offense against God but against "all law and government from its tendency to dissolve all the bonds and obligations of civil society." Another century on, in 1908, Justice Walter Phillimore allowed that humans were free to think, speak, and teach as they pleased in religious terms but not in moral ones.[38] Purely theological issues had now been left to God, but beliefs with this-worldly consequences—morality—remained the law's concern. That is broadly where the issue has remained ever since. Some still think that morality cannot be taught without religion.[39] But in the main, doctrinal matters have been shifted to the private sphere, out of the state's purview. Outside the world's remaining theocracies, religious practices concern the law only if nonreligious norms have also been violated: bigamy among Mormons, animal cruelty in Santería sacrifices, child neglect by Christian Scientists shunning medicine, truancy among homeschooling Seventh-Day Adventists, infibulation of Muslim women.

Blasphemy, however, has remained on the books in many countries. Thirty-two nations (eight in Europe) still retain antiblasphemy laws. Another twenty punish apostasy.[40] France abolished blasphemy in 1791, and the US never instituted it as a federal crime.[41] Yet it remained in place as a state-level offense. Even colonial Pennsylvania, otherwise religiously ecumenical, outlawed blasphemy. Massachusetts prosecuted it as a capital crime until 1692.[42] By 1951, federal law and First Amendment rights together made prosecutions for blasphemy unconstitutional. And yet as of 2009 it remained law in Massachusetts, Michigan, Oklahoma, Pennsylvania, South Carolina, and Wyoming. On this basis, in 2007 Pennsylvania rejected a bid to name a company "I Choose Hell Productions."[43] Until 2008,

blasphemy remained a crime in Britain, but only against Christianity. This helped the authorities in 1989 when they were pressured to join the fatwa issued by Iran's Ayatollah Khomeini against Salman Rushdie for his treatment of Muhammad in his novel *The Satanic Verses*.[44]

Blasphemy obviously remained a religious issue in theocracies. But to secular societies, blasphemy marked the boundary between free speech and civility, a matter of order and propriety, not theological doctrine.[45] Modern blasphemy laws no longer protect specific doctrines but prohibit the insulting of religious feelings or the inciting of hatred against religious groups.[46] They have become a form of collective libel legislation, protecting minority communities from attack.[47] In 1922, an Australian judge found that while respectful denial of God's existence was not blasphemous, scurrilous and offensive attacks intended to outrage Christians were. In 1978, a British court convicted of blasphemy the publisher of James Kirkup's poem about homosexual sex between Christ and a centurion.[48]

Muslims, whose religion—like some variants of Protestantism—forbids depictions of God as idolatrous, have especially policed blasphemy. Cartoons depicting Muhammad in *Jyllands Posten* in 2005 cast the complacently tolerant Danes as the new Satans of international politics.[49] With the slaughter in 2015 of twelve journalists by Islamist gunmen at the offices of the Parisian satirical magazine *Charlie Hebdo*, free-speech fundamentalism found itself unexpectedly on the defensive against a more cautious consideration of religious sensibilities. Muslims in Europe—however quick to anger and kill—were also downtrodden minorities. Did that give them claim to deference for their cultural singularities? Mormons endured a whirlwind of blasphemy in the wildly popular musical the *Book of Mormon* in 2011.[50] Their official response was commendably restrained. "You've seen the play," the billboards proclaimed, "now read the book."

From Theology to Morality

Yet even as religion was reduced to a public-order issue, ethics were still enforced by law. Individual habits with no immediate social consequences were privatized as citizens' choices: gluttony, sloth, cupidity, and most sexual behavior other than rape and pedophilia. But new immoralities came to be restricted by law, as we will see. Morality was informal social sanction that broadly reinforced what statute also dictated. Did the law need morality as a backup? Or were formalized, democratically decided rules alone legitimate, with morality therefore archaic and redundant?

The Enlightenment's debates over atheism posed such issues first. Could society function without a commonly accepted sense of sin? Could atheists be moral? Even the philosophes found it hard to shake off the basic assumptions of a fundamentally religious era.[51] Hobbes endowed the Leviathan with a strong state church—not for religion's intrinsic value but to secure order. Though religiously tolerant, Locke banished atheists because—considering that they accepted no higher power—their oaths and promises meant nothing.[52] If people did not believe in a punitive God, Voltaire feared, society would crumble. That was the gist of his often misunderstood assertion that bereft of God, we would have to invent him.[53] Though a generation younger, Pierre Bayle had already cast off religion's social role. Morality was not necessarily based on religion. An atheistic society would function civilly and morally so long as it punished crimes and honored laudable acts. We have no right, he insisted, to assume that an atheist is less moral than a believer.[54]

That the irreligious could also be moral was discovered only slowly. In the developing world, vast majorities still refuse to accept that one can be both moral and yet not a believer.[55] Even today, we continue to insist on religiously observant leaders. Outside China, few public figures dare to openly acknowledge their atheism.[56] Similar issues were raised when James Fitzjames Stephen and John Stuart

Mill crossed pens in the nineteenth century. Punishments voiced society's moral revulsion, Stephen thought, whereas Mill allowed sanction only if citizens directly harmed each other.[57] These issues arose again in the 1960s in debates fought as Britain reviewed the criminalization of (male) homosexuality. Did society need the glue of a common moral codex to undergird formal statute and avoid ethical anomie? Patrick Devlin famously argued that it mattered less what moral values society held so long as they were widely shared and enforced.[58] Both sides back then broadly assumed that gay sex was immoral; at issue was whether it should also be illegal.

Should the law enforce morality? Did purely individual transgressions even exist—ones with no consequence for others? Conservatives insisted that individual acts—divorce, sexual unorthodoxy, blasphemy—weakened society's bonds.[59] But what level of harm should be punished? Most expansively, not just tangible harm but offense, too, was actionable. Acts that merely offended others, even without damaging them, could be condemned. That risked leaving the penal code responsive to society's most delicate souls. They might feel impaired just by the possibility that somewhere someone was doing something disturbing.[60] Without a semiobjective criterion of harm, the definition of offense would endlessly expand. In 1957, the Wolfenden Committee (Parliamentary Committee on Homosexual Offences and Prostitution) in Britain solved the problem by deft distinction. It simultaneously demarcated a private sphere where actions—in this case male homosexuality—were permitted even if offensive to some but advocated more stringent penalties for street prostitution, regarded as a public harm.[61]

Nevertheless, society still rested on moral and behavioral norms. The law dealt originally with crime, sin, and immorality, all together. As the three were gradually separated out, it focused on violations of statute, not of theology or morality. Depending on how "to bear false witness" is defined, twentieth-century British law embodies either three and a half or four and a half of the

Bible's Ten Commandments.[62] Today, the law is much larger than morality, prohibiting many more actions. Yet it has also narrowed. Large swaths of once illegal conduct are now solely a matter for ethicists or theologians. Purely theological transgressions are rarely legal issues any longer. Many acts once considered immoral are now often legal: adultery, homosexuality, prostitution, abortion, suicide, euthanasia. And not all immorality is illegal: lying, cheating on your spouse, bullying, standing by while someone drowns. Conversely, most crimes are not immoral: jaywalking, driving with a broken tail light, failing to withhold employee Social Security deductions. The distinction between illegality and immorality has become a commonplace.[63]

As philosophers explored the various moral codes in effect across the globe, their relativity caused lawyers to fear hitching statute too closely to ethics. Montesquieu emphasized the multiplicity of legal and political systems. Locke and Kant sought to separate law from morality, John Austin and Bentham (who considered the idea of natural rights "nonsense on stilts") to free their utilitarian codex from it entirely. The French Revolution, invoking what the revolutionaries insisted were natural laws, scared many, prompting conservatives such as Edmund Burke and Friedrich Karl von Savigny to draw sharp distinctions between law and morals.[64] Starting in the late nineteenth century, legal realists, for whom the law was only what the authorities decided, unlinked to anything transcendent, made the separation watertight.[65] The law sought to wall itself off from religion and morality and to remain untainted by what it regarded as outmoded behavioral prescriptions. The Austrian legal philosopher Hans Kelsen insisted in the early twentieth century that morality was culture specific, without a common core. The law could not be founded on such relativistic quicksand.[66]

Nonetheless, despite the most astringent legal theorists' distaste, the legal and the moral still overlapped. True, the law expanded to include more actions only tangentially related to religion or ethics,

but its core remained the fundamental tenets of morality.[67] Do not kill, lie, assault, cheat, or steal. Blurring the line between law and morality became a problem mainly when statute enforced those aspects of morality that did not involve protecting others from direct harm. Should the law require us to perform acts that benefit others? To avoid acts that cause indirect harm to others or harm to ourselves? To shun acts that offend others or that are regarded by them as immoral?[68] These were gray areas where law and morality overlapped, where cultures differed in which ethical precepts they enforced legally, and where changing social mores, striving to be recognized in legal reform, first had an effect.

Morality has obviously varied—sometimes dramatically—among and within cultures. Such differences have tended to concern sex and women: homosexuality, pedophilia, adultery, bigamy, divorce, contraception, abortion. The law often limped along, barely keeping abreast of evolving mores.[69] In the US outmoded detritus still litters state penal codes, technically outlawing a wide range of behaviors: adultery, fornication, sodomy, and (in some state or municipal code somewhere) just about any form of sexual behavior short of the missionary position within marriage and solitary masturbation. In 1948, Boston police arrested 248 adulterers. Massachusetts successfully prosecuted an adultery case in 1983, and as of 2012 the offense remained on the state's books as a felony.[70] Nevertheless, a common core arguably united most behaviors considered morally significant: promise keeping, truth telling, protecting innocents from violent attack.[71] That punishments should be proportionate to offenses approximates a human constant.[72] The endless debates over natural law at least served to distill plausibly quasi-universal rules. And law helped reinforce morality when it was used expressively to undergird society's ethical precepts.[73]

Even today the law is based more on morality than is often recognized. Hospitality law, how to treat aliens, what the Germans call *Gastrecht*, has evolved from a moral obligation to a legal duty in

international law.[74] The obviously unethical is usually illegal as well, but morality also informs everyday economic transactions. The law of contract depends on the concept of good faith. The US Uniform Commercial Code defines good faith as "honesty in fact in the conduct or transaction concerned."[75] All commercial systems rest on the (moral) assumption that those engaged in exchange can rely on each other's promises. Such promises may be reinforced in law. The blossoming of contract law in the nineteenth century put some steel in the velvet glove of promises made in the free market by its interacting parties.[76] But without good faith, systems of exchange would collapse.[77] More generally, good faith transactions—keeping promises, performing what was agreed upon, and the like—were behaviors enforced at first by custom and religion in self-governing communities. When the law began regulating these actions, they long kept religious forms. The standards of due care in the law of negligence, of fair competition, and of fair conduct of a fiduciary: all involved a concept of fairness and reasonableness that—though applied by courts—ultimately rested on moral intuitions.[78] In the continental civil codes, contracts were explicitly premised on morality. Those that were immoral could be declared invalid.[79]

Relations of law to morality had long been given voice in two sets of distinctions. Where both morality and law forbade the same actions, they targeted inherent evil, *malum in se*. Where the law alone prohibited conduct that might not be immoral, it created the *malum prohibitum*.[80] *Mala in se* were fundamentally unethical actions, directed against life, health and bodily security, personal liberty and dignity, property rights, as well as the constitutional order and safety of the state. Sins they were not, but the term *moral turpitude* was often used to describe them.[81] *Mala prohibita* were forbidden acts or regulatory or civil offenses. Plato distinguished between curable and incurable offenses, Aristotle between natural political justice (having the same force everywhere) and legal political justice (important only once laid down in the law).[82] The

distinction had become formalized by the late fifteenth century and then rendered orthodoxy by Blackstone in the 1760s.[83] Despite being ridiculed by Bentham, the distinction remains in good standing, cited by the US Supreme Court as recently as the 1950s.[84]

Related, though not identical, was the distinction between torts and crimes, emerging after the thirteenth century in common law. Before this point, crimes could be pursued both by private parties and by the king, and the law could impose either compensation or corporeal punishments.[85] Torts were harms that could be assuaged through compensation alone. Before the state assumed responsibility for justice, most transgressions had been treated as torts—even ones, such as homicide, that later became crimes. They were settled between the disputant parties through an exchange of value. Torts were actions society preferred to regulate, whereas crimes were forbidden outright. One priced acts; the other prohibited them. Torts were not worth the bother of criminal sanctions. Or, because certain offenses might enrich the offender more than they harmed society, they were more efficiently dealt with by recouping their social cost through fines. Crimes, in contrast, were acts whose cost society was unwilling to monetize and collect, therefore to be forbidden altogether. Punishing crime aimed not to reimburse victims but to deter others. Sanctions inflicted real suffering. Crimes were actions society sought to eliminate wholly (rape and murder), whereas torts might have some social utility (the economic efficiencies of turning a blind eye to polluting or workplace accidents) and should be discouraged and reduced but not wholly forbidden. It sufficed if their cost was internalized, borne by the offender.[86]

The boundary between morality and law has constantly shifted across history. Many behaviors have boiled off the core of immorality to become legal: sex between racial groups, drinking, adultery, homosexuality, to some extent abortion and prostitution, to some extent the use of inebriants other than alcohol. Incest may be moving toward a crossing of the ethical Rubicon.[87] Polygamy is

ambiguous. Monogamy has historically been the exception. China and India, together composing well more than a third of humanity, did not forbid polygamy until the mid-1950s.[88] Outlawed in the West, it remains present throughout the Muslim world, in parts of non-Muslim Africa, surreptitiously among Mormons, as well as in more recent demands by urban hipsters for civil unions of threesomes.[89] Bestiality has been decriminalized in some nations (although animal rights may end up trumping claims to human erotic self-expression). Euthanasia, once considered murder, is legal in several jurisdictions. Attempted suicide is less commonly punished than earlier and has been decriminalized in some sixty nations, mostly Western.[90]

Tax avoidance may be morally suspect, but tax evasion is illegal, too. Working on the Sabbath was once irreligious, immoral, and illegal, but, overall, Sabbatarian regulation has declined.[91] Yet surprising numbers of laws still shape economic activity according to religious fiat. In allegedly secular Sweden, taxis charge even more on Lutheran high holy days than on weekends or nights.[92] Signs on playgrounds in the Calvinist parts of the Outer Hebrides discourage children from using them on Sundays.[93] Blue laws still regulate liquor sales on Sundays in the US. A popular movement in Catholic Bavaria seeks to reverse their few exceptions to Sunday closing laws. Communism sought to upend inherited moral instincts about property (or theft, according to the anarchist Pierre-Joseph Proudhon). The Soviet Union punished theft of state property more harshly than theft of private possessions, often with death and with no chance of amnesty, but the penal codes of most Communist states still prohibited conventional larceny.[94]

The law does not just reflect social value judgments; it helps shape them. Durkheim wrote that the collective consciousness is not offended by an act because it is criminal, but that it is criminal because society abhors it.[95] This oft-quoted bon mot did not, however, spare him the paradox he thought he was sidestepping. Yes, as he rightly pointed out, the quality of the criminality that society

shuns is hard to define, but cleverly turning the tables does nothing to solve the causal problem. Why does the collective consciousness decide that something is abhorrent and therefore criminal? And, having done so for its own inscrutable reasons, how can things ever change? In fact, seen historically, not only has the law changed continuously, but changes in statute have also driven views of what offends. The law has taught us right and wrong, not just mirrored our views thereof.

The realm of the illegal and immoral has not just shrunken but also expanded. Many once legally indifferent behaviors are now outlawed. Two centuries ago, a man who refused a duel would become a social outcast. Today, one who accepts the challenge risks a charge of attempted homicide.[96] Honor killings—once an imperative—are no longer permitted or acceptable. Conventional industrial waste disposal—that is, polluting—has become broadly illegal. Tobacco use is increasingly forbidden, almost like other drugs, even as other inebriants have become tolerated. Primogeniture once kept the family intact and men on top. Today, anyone who insists on leaving all assets to an eldest son would be regarded as peculiar and in most developed nations denied his or her wish.[97] Theft of intellectual property became a crime starting in the late eighteenth century and expanded massively through the twentieth, though in the digital age it has become something of a misdemeanor and even morally valorized as justified use.[98]

White-collar crime, once treated more leniently than physical offenses, is taken more seriously.[99] Whereas being tough on crime is often a conservative cause, economic offenses have riled the Left—just as the women's and environmental movements brought their own rosters of new offenses to be prosecuted. In the 1960s, corporate executives from major American businesses, conspiring to fix prices, went to jail for the first time. In the 1970s, the US began prosecuting bribes paid to foreign authorities—once regarded as a cost of doing business. Insider trading has been criminalized, even

though it was earlier considered a normal—if a bit sharp—business practice or at worst a violation of tort or regulatory law.[100] In 1934, insider traders could be required to disgorge only illicitly procured funds. By the 1960s, they could be fined as well; as of the 1980s, they were slapped with treble damage sanctions and jail. Prison sentences have become a regular occurrence in the US business world.[101] Wall Street executives, pillars of their Connecticut communities, are perp-walked for the news cameras as they are taken to be booked. And as sentencing reform diminished judicial discretion and pegged punishments to the dollar value of the harm, prison stays for crimes such as securities fraud have lengthened to rival those for murder.[102]

Many now illegal acts have also become immoral: slavery, wife beating, marital rape, child labor, child marriage, child abuse, cruelty to animals. Pedophilia, considered normal (within limits) in ancient Greece, is today regarded as the single most immoral and illegal act, potently stigmatized. Once prized as manly behavior, hunting endangered megafauna has become both illegal and immoral.[103] Now illegal and on the cusp of also being immoral are actions such as insider trading, price fixing, bribing, and antitrust violations. Driving drunk is illegal and increasingly regarded also as immoral. Some jurisdictions have harnessed popular sentiment to state enforcement by prosecuting hosts who allow guests to depart inebriated. Endangering consumers by knowingly selling deficient products is considered immoral. The days of caveat emptor (buyer beware), when consumers bore most risk in a purchase, are long gone. Sexual harassment is criminal and has recently also become regarded as immoral, not just a lark that women ought to tolerate. Abortion remains morally fraught but also illegal in many places and circumstances. Polluting is not just illegal but has become immoral, too. In surveys, it often ranks as more serious than traditional offenses, even murder.[104] This new view is arguably colored by older theological concepts of pollution as a transcendent

violation. Ancient ideas of despoiling the sacred order were broader in their understanding of taint than modern biological and chemical concepts, though today deep ecologists come close to this older view.[105]

Law has sometimes directly enforced moral obligations. Certain duties became required of citizens: providing testimony in court, paying taxes, serving on juries and in the military. Perjury became a crime in England in the mid-sixteenth century. The act did not just undermine the court system but was also morally tainted since it violated an oath.[106] The medieval English law of hue and cry obliged all within earshot to join in pursuing a felon.[107] Hit-and-run laws today impose a duty not to leave an accident. Owners have obligations to those they invite onto their property. But, otherwise, there has been little legal requirement to help those in need.[108] Drawing up the Indian penal code in the 1830s, Thomas Babington Macauley argued that the law could not specify what bystanders had to endure to help strangers. Should they be required to go one hundred yards to caution someone against fording a swollen river, or a mile? The law should only keep people from doing harm, Macauley concluded, leaving morality and religion to encourage the good.[109]

But Good Samaritan paragraphs in civil law codes have demanded more.[110] The moral obligation to provide aid where there is no risk to the bystander is a legal duty in several European nations.[111] Israeli law requires aid in traffic accidents.[112] Already the German penal code of 1870 required citizens to help the police on request, and the Nazi regime broadened this obligation into a citizen's duty to aid others. In 1954, the German Great Criminal Senate declared the duty a moral obligation and "an imperative command of Christian doctrine."[113] The equivalent French legislation was initiated in 1941 by the collaborationist Vichy regime to encourage Frenchmen to aid German occupiers wounded by resistance fighters.[114] Since then, such statutes have been regularly invoked in Europe. The estate of David Sharp, who perished on Mount Everest in 2006 as forty

other climbers passed him by, could have sued in France but not in Britain.[115] The English-speaking world became aware of Europe's Good Samaritan laws after Lady Diana's death in Paris in 1997, when the French authorities considered prosecuting the paparazzi who chased her car and then stood by photographing her as she lay dying.[116] The law of the sea has also long recognized a duty to help those in distress.[117]

Is moral evolution eventually reflected in the law? Or do changes in statute help shape ethics? Those remain open questions.[118] Authorities have often struggled to punish what most people do not regard as immoral offenses. Early modern popular opinion commonly refused to consider smuggling, poaching, or gleaning (once it had been revoked as a right) as crimes. They were "social crimes," more illegal than immoral.[119] Smuggling was once widespread across Europe, and the state's concern to prosecute it was too obviously self-serving in the early modern era, when tariffs were a major source of revenue.[120] It was thus more akin to tax evasion today than to the peccadillo we now—in an era of much freer trade—consider it. Nonetheless, as late as 1964, when *Goldfinger* became the third hit James Bond movie, its villain still transported gold across borders by smuggling it as the bodywork of his car.

Sometimes the law has been a teacher. Making something illegal has less reflected a moral shift than helped to create it. The authorities' vigorous suppression of dueling likely helped change opinion on something once held in favor. In the United States, tax evasion began to move into the realm of immorality when it was made a felony in 1924 and then in 1952 when its prosecution changed from merely a means for the state to recoup the income foregone to a tool of general deterrence.[121] Other fairly technical offenses, such as insider trading, antitrust violations, and bribery, which were scarcely known to the public beforehand, became morally condemnable in the wake of outlawing them.[122] Conversely, when law did not reflect popular morality, enforcement bogged down.

Juries nullified verdicts, refusing to convict those whose actions, although illegal, did not seem immoral. In so doing, they expressed society's broader sentiments. The growing acceptance of euthanasia was revealed when it took the US authorities four attempts to convict Jack Kevorkian in 1997 for assisting the terminally ill to die.[123] In the 1920s, prohibitionists thought they were bringing law and morality into alignment by forbidding the sale of alcohol, but, in fact, their moral intuitions turned out not to have been widely shared.

Command and Persuade

Crime, Law, and the State across History

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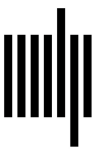

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