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# Desanctification of Law and the Problem of Absolutes

*Jeremy Waldron*

## I INTRODUCTION

Desanctification of law? – we never even knew it was holy! Sure, centuries or millennia ago, positive law was bound up with religion. Trial was by combat or ordeal, so that God could render a verdict. The boundaries of cities and private property were consecrated by religious processions. Treaties were deposited in temples so the deities could supervise their implementation.[1] Contracts were spoken of as sacred. Writs and processes sounded in liturgy and magic as much as in rational inquiry.[2] The sovereign conceived as the fount of justice was anointed "with the oil of gladness at the hands of priests and prophets."[3] A great philosopher writing thousands of years ago about the rule of law could say, "He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast," and expect to be understood.[4] Certain laws were revered as untouchable by human rulers because they dwelt in justice with the gods: "their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth."[5] And the sanction of divine authority, not to mention the threat of divine punishment, was taken for granted as key to the viability of any legal system.

But that was then. A few relics of this sanctity remain – some incantations ("God save this honorable court"), oaths taken on Bibles still, bishops as legislators (in the United Kingdom), and chaplains at executions. But nothing that would warrant excitement or hysteria or even a hesitant lecture about "desanctification."

The desanctification that I want to talk about in this chapter is not just the disentanglement of religion from law. It is also not just the separation of church and state, the sort of thing that prohibits the privileging of any particular religion, let

1 See Delbert R. Hillers, Covenant: The History of a Biblical Idea 6 (1969).
2 See Aldo Schiavone, The Invention of Law in the West Ch. 1 (2012).
3 From the English Coronation Rite: see David Baldwin, Royal Prayer: A Surprising History vii (2009).
4 The Politics of Aristotle Book III, Ch. xvi, 1287a, at 146 (Ernest Barker ed., 1958).
5 Sophocles, Antigone 38, l. 455 (Ruby Blundell ed., 1998).



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alone establishment or dominionism.[6] Nor is desanctification the sort of thing that is compromised just because law continues to respect the place of religion in people's lives through principles of religious liberty, for example, and techniques of accommodation.[7] All that is quite compatible with desanctification. Desanctification certainly doesn't just mean pulling down tablets with the Ten Commandments inscribed on them from the walls of American courtrooms.

I am thinking of it instead as a process whereby certain kinds of meaning and value are drained from legal norms and institutions. It is a process described by the early twentieth-century sociologist Max Weber in his late writings about the rationalization of law and the general disenchantment of the world.[8] I'll say more about Weber in a moment, but in this context desanctification involves the withering away of a spirit of transcendent normativity, a spirit that has in the past sustained certain legal absolutes and encouraged (indeed, required) us to press the hardest questions we can about the justice of our legal arrangements, but which now seems to be at odds with the rational spirit of the age.

Understood in this way, desanctification is not necessarily about religion at all. True, the transcendent normativity that has withered away is something that might once upon a time have been associated naturally with religion. It was not inappropriate to use words like "sacred" to refer to it. But it need not be understood in formally religious terms – though, as we shall see, participants in law's desanctification are still haunted by the specter of the divine. That's what frightens them; that's what they want to extirpate. (Some Weberian discussions even talk of "the disenchantment of religion" as well as the desanctification of law.)[9]

Anyway, religious or not, a dimension of transcendent normativity is supposed to have gone from law and from the evaluation of law. Blinking clear-eyed in the hard light of day, we can no longer apprehend certain kinds of deontic requirements that legal provisions used to embody or certain kinds of deontic principles that law used to respond to. This is what I would like to discuss.

6 Dominionism is a conservative doctrine that identifies the United States as a Christian nation and looks forward to the establishment there of a theocratic form of government that will rule on the basis of Biblical law. See Bruce Barron, Heaven on Earth? The Social and Political Agendas of Dominion Theology (1992).

7 See, e.g., Burwell v. Hobby Lobby Stores 573 U.S. 682 (2014). See also the discussion of religious accommodations in Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 Wash. & Lee L. Rev. 3 (2002).

8 My reference to Weber's late writings means works produced by him around the time of his death in 1919.

9 Michael Löwy, *Anticapitalist Readings of Weber's* Protestant Ethic: *Ernst Bloch, Walter Benjamin, György Lukacs, Erich Fromm*, 9 Logos 1 (2010): "Max Weber admired the protestant ethic as one of the great moments in the disenchantment of religion, and its transformation from magic rituals into an ethical life-conduct." See also Marcel Gauchet, The Disenchantment of the World: A Political History of Religion (Oscar Burge trans., 1997).

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## II MAX WEBER

A body of practical reason can be desanctified as to its form or desanctified as to its content. Or both. I am going to begin with desanctification of the *form* of law – a process described by Max Weber in his late work, particularly in the second volume of his unwieldy and unfinished *Economy and Society*.[10] As we shall see, Jürgen Habermas provides a useful gloss on Weber's account, though Habermas also engages with it critically; he has his own agenda to pursue, which is to show that despite what Weber says, his (Habermas's) moral method is still available for use in evaluating modern law.[11] I won't say much about this rather self-serving critique, but since Habermas has a good understanding of what Weber meant, I shall from time to time draw on his words as a gloss on Weber's.

In *Economy and Society*, Weber describes what he calls the rationalization and formalization of law, a process that develops alongside the growth of an increasingly complex economic system. Legal machinery is needed to resolve "increasingly complex conflicts of interests."[12] Modern markets and large-scale capitalist industry require the commodification of almost all goods and the development of more and more complex instruments of exchange.

"[T]he calculability of the functioning of the coercive machinery" of government is the "technical prerequisite" of "development of a market economy," says Weber.[13] But that calculability comes at a cost. Law in the modern world has such complex tasks to perform and so many technical conceptions to relate to one another that it has to develop a conceptual apparatus of its own. Ordinary language categories will not do; nor will those that are made available in classic natural law theory. Law has to produce calculability but it cannot produce intuitive calculability. Instead, in order to guarantee its consistency and systematicity, events and transactions have to be characterized in law's own terms, which are no longer intuitive categories. Intuitive understanding is lost, but there is a corresponding gain in deductive rigor.

So, for example, a legal description of a transaction or event together with a set of accompanying conditions will generate more or less deductively a legal description of consequences. But the transactions, events, conditions, and consequences have to be classified in the conceptual matrix of legal logic, which has been established precisely to make these inferences work. As Weber put it, "facts of life are juridically construed in order to make them fit the abstract propositions of law and in accordance with the maxim that nothing can exist in the realm of law unless it can be

10 Cite to Max Weber, Economy and Society, two volumes (Guenther Roth & Claus Wittich eds., 1978) – hereinafter "Weber, E&S." I also make use of Max Weber on Law in Economy and Society (Max Rheinstein ed., 1954) – hereinafter "Weber in Rheinstein."

11 See Jürgen Habermas, The Theory of Communicative Action: Vol. 1: Reason and Rationalization of Society (Thomas McCarthy trans., 1981) – hereinafter "Habermas, TCA." Habermas points out that even after we turn law into a mere instrumentality, we can still deliberate argumentatively about the values and social purposes it should serve (Habermas, TCA, at 224).

12 Weber in Rheinstein, *supra* note 10, at 61.

13 *Id.*, at 72.

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'conceived' by the jurist in conformity with those 'principles' which are revealed to him by legal science."[14] The whole thing must constitute a formal system,[15] involving what Habermas calls "the systematization of legal propositions, the coherence of legal doctrine, that is to say, the rationalization of law according to internal, purely formal criteria of analytic conceptual structure, deductive rigor, principled explanation and justification, and the like."[16]

The result is technical law, increasingly distant from the comprehension of the layman – "continuous growth of the technical elements in the law and hence of its character as a specialist's domain."[17] A legal specialist is no longer a specialist in the interplay of law and justice; instead he is someone who has gained the ability to manipulate and apply these specifically legal concepts but lost any inclination to associate with them intuitive or ordinary-language meaning or with the meanings we might find in ordinary moral expressions.

All of this is part and parcel of what Weber calls "the overall disenchantment of the world, a process of intellectualization and rationalization that has been at work in Western culture for thousands of years."[18] Our ability to control everything by means of technology and calculation seems to require that "the ultimate and most sublime values have withdrawn from public life. They have retreated either into the abstract realm of mystical life or into the fraternal feelings of personal relations between individuals."[19] Everything is detail; everything is means–end rationality. Ultimate values no longer frame any "big picture." At any rate, they are no longer part of the lawyer's public world. As Habermas glosses Weber's view, "The disenchantment of the religious worldview and the decentration of world understanding are the presuppositions for a transformation of sacred legal concepts."[20] Law no longer presents its norms and concepts for evaluation as moral principles. Instead it presents an interlocking array of technical elements for holistic evaluation in terms of the contribution made by the array to the efficient organization of market relations.

[14] Weber, E&S, *supra* note 10, at ii, 885.

[15] Weber in Rheinstein, *supra* note 10, at 64, states the conditions of formalization as follows: "[F]irst, . . . every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of a legal logic; third, that the law must . . . constitute a 'gapless' system of legal propositions, or must, at least, be treated as if it were such a system; fourth that whatever cannot be 'construed' legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an infringement thereof."

[16] Habermas, TCA, *supra* note 11, at 256.

[17] Weber, E&S, *supra* note 10, at ii, 895.

[18] Max Weber, *Science As a Vocation*, in Max Weber, The Vocation Lectures, 13 (David Owen & Tracy Strong eds., 2004).

[19] *Id.*, at 30.

[20] Habermas, TCA, *supra* note 11, at 257.

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## III UNEVENNESS AND RESISTANCE

So far as legal developments are concerned, Habermas notes that, according to Weber, the process we have been describing "appears very unevenly in the legal developments of different nations [and] more pronouncedly in countries within a tradition of Roman law."[21] At the end of the nineteenth century, the rationalization of law is associated with codification and with law in Continental Europe. In Anglo-American law, by contrast, there was – certainly in Weber's day – not so much codification; the Common Law and its methods (which Weber disparaged as "inductive case-to-case methodology" and "charismatic judging and law-finding") continued to be dominant. There was less in the way of legal science, as Weber understood it.[22] And yet capitalism flourished.[23]

In *Economy and Society*, Weber also discussed various forms of push-back against this formalization of law where it did happen – pushback motivated by status concerns on the part of lawyers and judges who felt demeaned by the "mechanical jurisprudence" of law's formalism.[24] But it wasn't just the technicians who protested. The sentiments of some laymen also demanded a more intuitive (perhaps even moralized) body of law.[25] They thought law should have continued to have recourse to a "metapositive" objective natural law with an emphasis on ideas like justice and dignity.[26]

But this was futile, according to Weber. "The reproduction of social life was . . . far too complex to be comprehended in the meager normative motifs of natural law."[27] Once the process of rationalization was underway, "questions concerning the institutional embodiment of moral-practical rationality are not only shoved aside . . . : they now appear to be the source of irrationality," at any rate "of motives that weaken the formal rationalism of law."[28] According to Weber, "the role played in the development of the law by purely 'emotional' factors, such as the so-called 'sense of justice'"[29] represented a "flight into the irrational."[30]

Even so, it wasn't just moralists who pushed back in this way. The formal rationalization of law was also challenged from a point of view that emphasized

[21] *Id.*, at 256.

[22] Weber E&S, *supra* note 10, at ii, 890–91.

[23] As Mark Kelman, A Guide to Critical Legal Studies 245–46 (1987), puts it, the "powerful Weberian claim that developing capitalism requires a high degree of rule-bound-formality to increase certainty in planning is undercut by Weber's own comparative observations (England, for instance, industrialized without a highly predictable legal code)."

[24] Weber E&S, *supra* note 10, at ii, 886.

[25] *Id.*, at 892.

[26] *Id.*, at 885–88.

[27] Jürgen Habermas, Between Facts and Norms: Contributions to an Discourse Theory of Law and Democracy 45 (William Rehg trans., 1996), 45.

[28] Habermas, TCA, *supra* note 11, at 267.

[29] Weber in Rheinstein, *supra* note 10, at 75.

[30] Weber E&S, *supra* note 10, at ii, 888–89.

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the expectations of business people and the interpretation of legal propositions in terms of the meaning they would have in ordinary commerce.[31]

Max Rheinstein in his introduction to *Max Weber on Law in Economy and Society* presents this as being like the debate between formalists and realists in the early twentieth-century United States, with the realist side represented for example in Felix Cohen's critique of formalist jargon in "Transcendental Nonsense and the Functional Approach."[32] Cohen thought it was still possible to move away from the technical vocabulary of legal science to the sociologically and economically more realistic terms of public policy discourse for the formulation and elaboration of law. To a certain extent this succeeded, in American jurisprudence at least, with formalism being regarded these days by most American lawyers as a fatuous aberration. (We will come back to this – at length – in Section V of the chapter.)

But Weber's conclusion was different. He thought Common Law and Common Law jurisprudence was declining, even in its strongholds. He thought the increasingly technical character of law was irreversible, and notwithstanding all the pushback, the legal ignorance of the layman was bound to increase. Modern law could not now be regarded as anything other than "a rational technical apparatus which is continually transformable in the light of expediential considerations and devoid of all sacredness of content."[33]

## IV NO ROOM FOR ABSOLUTES

To summarize then: the Weberian rationalization of law that I am associating with its desanctification combined a number of trends. The normativity of law was now systemic, rather than characteristic of any proposition in particular. No particular provision carried any categorical normativity considered as detached; its normativity was always relative to the system of deductively interconnected propositions of which it was a part. So far as justification is concerned, it was the whole system that was answerable to the demands of what Weber referred to as "expediential considerations" – that is, to ongoing experience of how the system worked for industry, commerce, and markets.

At the same time, the language of the law tended to become more technical, distancing it from the ordinary vocabulary in which moral demands were expressed, not to mention the vocabulary that characterized the more powerful demands of natural law. The process was confusing, however, since the technical language used in legal formalization often involved adding layers of systemically determined meaning to ordinary-language terms, rather than the invention of a whole new technical jargon.

[31] *Id.*, at 885.

[32] See Rheinstein's introduction, *supra* note 10, at xlvii–lxvii. See also Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

[33] Weber E&S, *supra* note 10, at ii, 895.

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This created the impression that legal formalization refuted – rather than just stood aloof from – classical natural law norms of property, contract, etc.

True, inasmuch as this whole process was uneven and incomplete, occasionally the ordinary-language meaning of legal propositions would erupt into view and be accorded substantive importance by a judge or a party. But there was no telling when this would happen, and the haphazardness of its occurrence and the attempts to deal with it under the auspices of formalized law created an additional layer of technical challenge to those who were trying to approach the law in ordinary-language terms.[34]

These developments made it harder overall to approach private law in moral terms. Certainly, it was not easy to sustain positions associated with the sanctity of property rights and contracts. One could hardly think of *pacta sunt servanda* or the inviolability of property rights as having sacred status now that "contract" and "property" had become in effect technical terms, whose normativity was determined systemically rather than by reference to some story we might tell – a Lockean story, for example – about the essential importance of the substantive content of any particular norm. In any case, it was harder to sustain a consistent sense of the importance of these concepts, when they surfaced only haphazardly in formal legal discourse. There came to seem something quaint and old-fashioned about regarding them as anything like absolutes.

Even the idea of *legal obligation* became problematic and remains so, as evidenced by the struggle of some modern American jurists to try to retrieve a sense in which contract law and tort law, for example, express categorical as opposed to negotiable obligations. (Here I have in mind the work of people like John Macpherson and Ben Zipursky in tort law and Peter Linzer in contract law pushing back against doctrines of "efficient breach.")[35] The doctrine of the "efficient breach" of ordinary civil obligations has meant their reconception as something more like options than like deontic requirements. We used to talk of the sanctity of contracts, but now we just balance different positions in a matrix of costs and benefits. Or that's the way it sometimes seems.

## V LEGAL REALISM

I mentioned earlier that Max Rheinstein, one of Max Weber's American editors, presented Weber's account of technical rationalization as the victory of a certain sort of legal formalism.[36] We saw Weber talking too of the irrationality of any attempt to

[34] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1776 (1976): "[T]he acknowledgement of contradiction makes it easier to understand judicial behavior that offends the ideal of the judge as a supremely rational being. The judge cannot, any more than the analyst, avoid the moment of truth in which one simply shifts modes."

[35] See, e.g., John Goldberg & Ben Zipursky, *Torts As Wrongs*, 88 Tex. L. Rev. 917 (2010); and Peter Linzer, *On the Amorality of Contract Remedies – Efficiency, Equity, and the Second Restatement*, 81 Colum. L. Rev. 111 (1981).

[36] See *supra* note 33 and accompanying text.

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reconcile the technical vocabulary of formalized law with the professional expectations of business people, except insofar as they were legally trained, let alone the normative expectations of the ordinary citizen. But there is more to say about the fate of formalism in the American context, and, as Rheinstein acknowledged, a different story to be told in the USA about the processes of pushback against formalization.

Today, in American legal theory, it is legal formalism that is seen as irrational or, even worse, as sinister – for a lot of the legal realist critique was against the class interests being covertly promoted under cover of formalism's "transcendental nonsense."[37] At any rate, it is seen as largely a defeated movement, considered as a jurisprudential and educational theory. In large part, it is the legacy of the realists that has endured, not just in the modern cult of the personality of judges, but also in the openness of legal reasoning and law's elaboration to policy ideas, like law and economics.

But it is open only to a particular sort of policy discourse, with a momentum of its own; and that policy discourse also challenges the possibility of legal absolutes. It by no means represents a return to anything like natural law ideas. It is the language of economics – either cost–benefit analysis or the wealth-maximization approach of the formal economic analysis of law. Defenders of those approaches will no doubt complain that this process is incomplete; they may call for it to be taken further, to extirpate the last vestiges of old-fashioned morality from our legal thinking. My point is that, despite it being a more realistic as opposed to formalistic framework, it is no more hospitable to older deontic principles or to considerations of justice or human dignity than was the case with the older formalist discourse.

The problem of justice is particularly acute. Despite having seen a resurgence in moral and political philosophy,[38] considerations of justice continue to be excluded or at best represented in distorted fashion in modern policy calculations. There is the clumsy ineptness of viewing distributive justice as just one benefit among others in cost–benefit analysis. Some people have a taste for equity, we are told, so the equitable character of any legal provision generates at least that degree of benefit to be weighed in a consequentialist calculus alongside whatever other benefits or costs it involves. And the extent of the benefit should be determined by what the individuals in question – the ones who value justice – are prepared to pay or forgo for its sake. We may denounce these maneuvers as ethically tone-deaf, but it is less clear how we are actually to account for such values in cost–benefit analysis or in the business of wealth-maximization.[39]

[37] Cohen, *supra* note 32, at 820: "[O]ne may suspect that a court would not consistently hide behind a barrage of transcendental nonsense if the grounds of its decisions were such as could be presented without shame to the public."

[38] A resurgence heralded in the work of Rawls. See, e.g., John Rawls, A Theory of Justice (revised edition, 1999).

[39] There is also a similar process in trying to account for *dignity*: see, e.g., Jeremy Waldron, *It's All for Your Own Good*, N.Y. Rev. of Books, October 9, 2014, reviewing Cass R. Sunstein, Why Nudge? The Politics of Libertarian Paternalism (2008).

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All this represents an aspect of desanctification that is no longer a simple function of the operation of a technically designed formal code. In some ways it is the emergence of exactly the realistic policy science that the realists called for in opposition to formalism. Its failure to accommodate ethical absolutes is no longer a matter of legal form, though it is, in a sense, a matter of the form and formalization of the modern science of policy.

## VI FROM PRIVATE LAW TO PUBLIC LAW

### A Mala in Se

Max Weber's account of formalization applied mainly to private law and certainly, in the American battle between formalists and realists, private law was the main battleground. Admittedly, the realists were skeptical of the public law/private law distinction. Weber also entertained doubts about the distinction.[40] If public law was understood as instructions to officials, private law could be viewed as instructions to officials to do something about private disputes.[41]

In any case, though the processes just described are processes involving private law formalism, we also find as great a normative loss in public law. Although, as we have seen, there has been a decline of belief in the "sanctity" of contracts and the "sacredness" of private property rights,[42] the problem of legal absolutes arises acutely in the realm of public law as well. Here, we have to think about ways in which the development of law and modern morality puts in question what used to be thought of as absolute prohibitions in criminal law, for example, and in the law of human rights. Weber is less directly helpful here, although we follow his insight that the desanctification of law can happen in several different ways, "depending on which of several possible courses legal thinking takes towards rationalization."[43] The process whereby erstwhile absolutes were drained of their deontic normativity certainly followed a different path in areas of avowedly public law. Weber's account offers a starting point, but we need to fill out the characterization of the whole process.

Let us begin with those criminal law prohibitions that used to be seen as representatives of ancient *mala in se* – "Thou shalt not kill" etc.[44] Even they are no longer conceived – or certainly no longer presented – in directly deontological

[40] See, e.g., WEBER, E&S, *supra* note 10, at the start of vol. 2 and WEBER in Rheinstein, *supra* note 10, at 41 ff.

[41] Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POLITICAL SCI. Q. 470 (1923).

[42] WEBER in Rheinstein, *supra* note 10, at 39.

[43] *Id.*, at 61.

[44] 1 WILLIAM BLACKSTONE, COMMENTARIES *40 (1765): "[C]rimes and misdemeanors, that are forbidden by the superior laws, and therefore stiled mala in se, such as murder, theft, and perjury . . . contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts!

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terms. They are technical in their presentation: there is no categorical norm addressed directly to the populace. Instead, the style of modern criminal law formulations is to address just the decisions and problems that officials face in regard to killings by citizens: offenses are defined in elaborate terms and distinguished from one another, and punishments are specified (though this itself is often indirect too, referring to classes of felony, provision for the punishment of which is made elsewhere in the code.)[45]

Hans Kelsen was convinced that this was an important feature of modern law, that it mostly addressed itself to the officials of the state. "For Kelsen, a law consists exclusively of an instruction . . . for a government agent to apply a punishment under a set of defined circumstances."[46] He said that if we infer a duty upon the subject to avoid the conduct to which the punishment is attached, "this 'ought' is, so to speak, an epiphenomenon of the 'ought' of the sanction." We "overhear" the instruction to apply a sanction and figure out from that what we are not supposed to do.[47] We may find it stylistically pleasing to refer to this inference as the norm. But according to Kelsen, the only true "ought" in the situation is the "ought" addressed to the official.[48] H. L. A. Hart insisted, in response to Kelsen's characterization, that it is the function of such laws, nevertheless, to guide the conduct of citizens.[49] But his insistence on this is simply dogmatic – rooted in an "old-fashioned" sense of what it is that law *must* do. It is certainly not grounded in any of the ways in which modern legislation is expressed.

If, as Blackstone thought, "the very essence of right and wrong depends upon the direction of the laws to do or to omit them,"[50] then our laws no longer try to get at the essence. Despite containing what ought to be thought of as *mala in se*, our laws formulate them in precisely the style that Blackstone specified for *mala prohibita*.[51] *Mala in se* are supposed to be binding in conscience so that positive law adds little or nothing to the prohibition and penalties applied by divine law. But as for *mala prohibita*, "[t]hese become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life." Such offenses "have no foundation in nature, but are merely created by the law, for the purposes of civil society."[52] All there is to their proscription is a definition and

[45] The logic of the formulation is: "First degree murder is X, Y, and Z. The punishment for first degree murder is A or B."

[46] This characterization of Kelsen's view is from Edward Rubin, *Law and Legislation in the Administrative State*, 89 Colum. L. Rev. 369, 374 (1989).

[47] Cf. the discussion of "acoustic separation" in Meir Dan Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1983).

[48] Hans Kelsen, General Theory of Law and State, 60–61 (1945).

[49] H. L. A. Hart, The Concept of Law 38–42 (1961).

[50] Blackstone, *supra* note 44, *41.

[51] *Mala prohibita* are things that are offenses simply because they are prohibited by public policy, not on account of any intrinsic moral character of their own. Over-parking, for example, is a *malum prohibitum*.

[52] Blackstone, *supra* note 44, *41.

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the specification of a penalty.[53] My point is that *mala in se* – of which we are supposed to have an independent moral understanding – are now expressed in this *mala prohibita* form also. It is as though the only important thing about them is how they are officially defined and what penalty they are associated with.

One might say that this is just a matter of draftsman's technique.[54] Perhaps we were never going to find "Thou shalt not kill" written in the books of positive law. Positive law is never *just* an application of moral ideas; it involves specification, or as the natural lawyers call it *determinatio*.[55] Moral ideas do not initially present themselves in law-like form, if what we mean by law-like is something that can work in the real world like a law. Real-life laws are complex bodies of articulate doctrine and ordered criteria. The layman sometimes complains that cases in law are won or lost on "technicalities." But lawmaking is largely a technical matter, with all sorts of devices that look counterintuitive to the sensitive conscience but which are required to ensure administrability (e.g. in the particular and themselves highly regulated circumstances of a court), to take into account other moral needs that may be relevant to administration (procedural fairness, for example), and to allow a given provision to take its place in a coherent and complex corpus juris.[56]

These technical aspects of positivization would have to apply even if the legal norm in question purported to be just an embodiment of a moral norm. So even in the case of rules which undoubtedly are not conventions – for example the rule against killing – John Finnis observes that "it is the business of the draftsman to specify, precisely, into which of these costumes and relationships an act of killing-under-such-and-such-a-circumstance fits. That is why 'No one may kill . . . ' is legally so defective a formulation."[57] Details have to be settled; rules of evidence, presumptions, and burdens of proof laid down; bright lines drawn; operationalized criteria established; and so on. All of this can be acknowledged. Still it makes it harder for law to function as any sort of great public morality, embodying officially endorsed moral absolutes.

## B FUNDAMENTAL RIGHTS

The other category of what might have been thought of as transcendent absolutes arises in human rights law. Some have argued that human rights can't properly be

[53] *Id.*, *43.

[54] The two paragraphs that follow are adapted from the essay *Civilians, Terrorism and Deadly Serious Conventions*, *in* Jeremy Waldron , Torture, Terror, and Trade-offs: Philosophy for the White House 80, 95 (2010).

[55] See Thomas Aquinas, *Summa Theologiae*, I-II, Q. 95, a. 2, in Aquinas: On Law, Morality, and Politics 54 (Richard Regan trans., 2002).

[56] The best modern account of this is John Finnis, Natural Law and Natural Rights Ch. 10 (1980).

[57] *Id.*, at 283.

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understood except in religious terms.[58] There is no doubt that the dignitarian terms in which they are presented are open to that interpretation, even if they do not compel it. Certainly human rights are expressed in deontic terms, at least in the great charters and covenants. Those documents are unabashed about referencing the supra-positive inspiration of these rights;[59] their formulation in the texts of these covenants is explicitly presented as the positivization of what are supposed to be morally compelling ideas. So, for example, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) makes the following no-nonsense claim: "No one shall be subjected to torture . . . ." Not only that, but the Article 7 provision is explicitly insulated from any consideration of emergency conditions. Article 4 (1) of the ICCPR says that "[i]n time of public emergency which threatens the life of the nation . . . the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation." But then it is quick to add in subsection (2) that "[n]o derogation from article[] . . . 7 . . . may be made under this provision."[60]

However, as they work their way into a municipal legal system, the deontic character of their formulation is diluted. Human rights provisions are often doubly or multiply positivized – for example, in national as well as in international human rights law.[61] And the second positivization of the torture provision in American law is much more technical than its positivization in the ICCPR. There is nothing equivalent to the deontic formula "No one shall be subjected to torture . . . ." Instead there is a reversion to the Kelsenian directive form. Our torture statute[62] contains an elaborate definition of the offense:

> As used in this chapter—(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; . . . .

And then that is followed by an (admittedly quite draconian) provision for punishment.

> Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death

58 See, e.g., Michael Perry, *Is the Idea of Human Rights Ineliminably Religious?*, *in* Legal Rights: Historical and Philosophical Perspectives 205 (Austin Sarat & Thomas R. Kearns, eds., 1996).

59 See Gerald Neuman, *Human Rights and Constitutional Rights*, 55 Stan. L. Rev. 1863 (2003), for this term. It means that they are "conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system."

60 See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2(2), Dec. 10, 1984: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."

61 See Neuman, *Human Rights and Constitutional Rights*, *supra* note 59, 1868, for the idea of dual positivization.

62 18 U.S.C. §§ 2340 and 2340A.

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> results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

The punishments threatened are fierce. But "Thou shalt not torture" does not get a look in. There is not a lot of normativity in §2340.

Again we could dismiss this as just a matter of drafting technique. But when the United States was actually faced with a years-long crisis about official use of torture in our black prisons overseas in the first decade of the war on terror, all sorts of maneuvers were adopted to reinterpret §2340 or to find indeterminacy in its formulations that could be exploited to make room for "coercive interrogation." Boalt Hall Professor John Yoo's and Judge Jay Bybee's technique of "reading down" the statutory definition, in a memo from the Office of Legal Counsel, became notorious.[63]

The Bybee memo also raised the possibility of a necessity defense against any allegation of a violation of the anti-torture statute:

> As it has been described in the case law and literature, the purpose behind necessity is one of public policy . . . "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." [T]he more likely it appears to be that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary.[64]

[63] Jay Bybee, *Standards of Conduct for Interrogation under 18 U.S.C. 2340–2340A*, Memorandum from the Justice Department's Office of Legal Counsel for Alberto R. Gonzalez, counsel to President Bush (August 1, 2002). (This memorandum is also available in The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg and Joshua Dratel eds., 2005), 172.) The approach in the memo involved drawing on statutes governing medical administration, where, it was said, attempts to define the phrase "severe pain" had already been made.

> [T]he phrase "severe pain" appears in statutes defining an emergency medical condition for the purpose of providing health benefits. . . . These statutes define an emergency condition as one "manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person, who possesses an average knowledge of health and medicine) could reasonably expect the absence of immediate medical attention to result in – placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." . . . Although these statutes address a substantially different subject from §2340, they are nonetheless helpful for understanding what constitutes severe pain.

From this, the Bybee memo concluded that "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death." It is hard to know where to start in criticizing this "analysis." The statutory provision that was quoted uses conditions (i) through (iii) to define the phrase "emergency condition," not to define "severe pain." The medical administration statute says that severe symptoms (including severe pain) add up to an emergency condition if conditions (i), (ii), or (iii) are satisfied. But since the anti-torture statute does not use the term "emergency condition," conditions (i) to (iii) are irrelevant to its interpretation.

[64] *Id.*, at 41.

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A similar argument was made, and conceded in principle, in the Israeli High Court's torture decision of 1994. The court said that it was "prepared to accept that in the appropriate circumstances, GSS investigators may avail themselves of the 'necessity' defence, if criminally indicted." (The court did however go on to insist that no ex ante authorization could possibly be inferred from this.)

The absolutism of individual rights is often taken as the *leit-motif* of American jurisprudence.[65] In fact, although rights are spoken of as absolutes, time and again courts prove themselves ready to balance them and trade them off against one another – and not only against one another but against various considerations of the general interest, whenever it seems appropriate to invoke that. As Mark Tushnet puts it, "Rights become indeterminate as first one side and then the other attaches new long term consequences to recognition or denial of particular claims of right."[66] These are Critical Legal Studies claims and none the less insightful for that.

We need to look at rather than fantasize about the commitment to rights in American law. As Duncan Kennedy has observed, there is in real-life American jurisprudence a sort of flattening out of the distinction between rights-arguments and policy arguments. Talk of constitutional rights does not preclude "open-textured arguments from morality, social welfare, expectations and institutional competence and administrability. . . . The rights are just legal rules, more or less abstract, more or less easy to administer, that we are trying to interpret along with all the other legal materials to justify our outcomes."[67] In other words, our actual experience with rights in law is far from the sort of reverence for them and paramount enforcement of them that rights-rhetoric would suggest. The use of balancing and proportionality as characteristic of the actual administration of most rights (i.e., rights set out in the Constitution and in international covenants, as well as ordinary rights in statute and common law). One or two philosophers may conceive of rights as trumps;[68] but in law they are just cards – and pretty low cards at that – played in the ordinary suits or currency of political compromise.[69] In other words, what we see in all of this is the erasure of any uncompromising deontology. Rights no longer present themselves as the legal embodiment of absolutes. Like everything else in law, they have been made tractable, negotiable – *reasonable*.

## VII THE DESANCTIFICATION OF MORALITY

So what? Even if law itself is developing and changing in these various ways, still are we not able to deploy whatever moral standards we like to evaluate the law as it is,

65 See Mary Ann Glendon , Rights Talk: The Impoverishment of Political Discourse (1993).

66 Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1364 (1984).

67 Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* Left Legalism/Left Critique 195–96 (Janet Halley & Wendy Brown eds., 2002).

68 Ronald Dworkin, Taking Rights Seriously 6 (1977).

69 See Tushnet, *supra* note 66, at 1373.

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and if need be to denounce it? If existing legal practice appears to countenance something that ordinary language would call "torture" or if it doesn't seem hospitable to an absolute prohibition of the practice, can we – who are disturbed by this – not use traditional deontological prohibitions to condemn this? John Yoo once said to me in a debate in 2005, "I think it would be very difficult to be a Kantian and have any responsibility in the government."[70] But surely from outside government, we critics can say anything we like. We might even use religious arguments against torture, as I tried to do in 2006 in an article in *Theology Today*,[71] or as David Gushee and others did in 2007 in *An Evangelical Declaration against Torture*.[72]

This is fine, up to a point. As critics, we *can* do what we like and judge the laws that apply to us by whatever standards seem appropriate, irrespective of the processes that modernism dictates and Max Weber describes. And if moral evaluation of law were a purely personal matter, that would be a reasonable response. If it were purely a matter of determining one's conscientious stance as a citizen toward a given law or one's own compliance, in circumstances where cooperation in evil was called for, one could deploy any moral standards that seemed right or true.

But in social and political life, we mobilize shared standards to evaluate the law *together*; in criticizing a law for failing to meet a given standard, one offers that criticism to one's fellow citizens and one expects what one is saying to make sense to them. I am not distinguishing here between critical and positive morality (though the latter category is woefully under-explored in political and legal philosophy).[73] I am talking about modes of critical moralizing that seem natural, appropriate, and familiar to those with whom one shares the enterprise of evaluating positive law. And the worry is that, at this level, the shared standards that make social sense – that seem appropriately put forward – as a reasonable basis for the moral evaluation of law also seem to be losing the deontic dimension of their meaning. One says something – something deontological as it might be – and one receives a sort of blank stare from one's audience. (I remember such a blank stare in a faculty seminar once at Columbia Law School when I suggested that the design of bankruptcy law was a problem in distributive justice rather than economic efficiency.)[74]

What I am suggesting here is that the desanctification of law is not a matter of detaching it as an autonomous discipline from its erstwhile moral

70 See *Waldron-Yoo Debate on Torture*, COLUM. L. SCH.: FEDERALIST SOC'Y BLOG! (April 21, 2005), http://expost.blogspot.com/2005/04/waldron-yoo-debate-on-torture.html.

71 Jeremy Waldron, *What Can Christian Teaching Add to the Debate about Torture?* 63 THEOLOGY TODAY 330 (2006), reprinted in WALDRON, TORTURE, TERROR AND TRADE-OFFS, *supra* note 54.

72 Evangelicals for Human Rights, *An Evangelical Declaration against Torture: Protecting Human Rights in an Age of Terror*, published by National Association of Evangelicals (March 2007), available at www.nae.net/an-evangelical-declaration-against-torture/, reprinted in DAVID GUSHEE , THE FUTURE OF FAITH IN AMERICAN POLITICS: THE PUBLIC WITNESS OF THE EVANGELICAL CENTER 253 (2008). The *Evangelical Declaration* is discussed extensively in Jeremy Waldron, *Two-way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation*, 63 MERCER L. REV. 845 (2012).

73 For the distinction, see HART, *supra* note 49, at 169.

74 For the distributive justice characterization of bankruptcy law, see FINNIS, *supra* note 56, 188–93.

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underpinnings.[75] Maybe as law becomes more technical and harder to appreciate intuitively, it is correspondingly more difficult to apprehend as the embodiment of extralegal principles. But what is even more difficult is to relate law systematically to a set of, as it were, *old-fashioned* moral principles. New law has its own new morality to go along with it.

I say this to avoid the impression that desanctification is just legal positivism in another guise. Legal positivism is connected with desanctification. And legal positivism did try to drain law of its moral content and moral meaning – though not necessarily to discredit the moral enterprise as such. The idea was to separate law and morality, not to destroy the latter. One or two positivists might have inclined in a more destructive direction – Thomas Hobbes, for example, in his suggestion that law's function was to supersede morality,[76] and Hans Kelsen's corrosive moral relativism.[77] For most legal positivists, however, morality is kept separate from law and intact – first, so as to clarify one's sense of the objective legal situation without contamination from wishful thinking. Then, second, one keeps morality separate so that it can be brought back, in its uncontaminated character, to bear on the task of evaluating law and determining our (morally) appropriate attitude towards it. Or at least that is the official story.[78]

It does not follow, however, that the processes Weber and others described have no impact on morality, that is, that they only have impact on law. It is perfectly consistent with the positivist picture – crude and un-thought-through as it is in the hands of most modern legal philosophers – that those processes have an impact on the morality (that is reserved for the critical appraisal of law) which is quite like its impact on law itself. Put more simply, I am inviting us to consider the possibility that the social processes that change the character of law also change the character of morality concomitantly.[79] The process of the rationalization and desanctification of law may be matched by isomorphic processes of rationalization and desanctification of morality – at least of the morality that can plausibly be put in play where legal evaluation and legal change are at issue. The morality that results is not necessarily

[75] Habermas, *supra* note 11, at 243, paraphrases Weber's position as describing what he (Habermas) calls in a characteristic bit of jargon, "the detachment of subsystems of purposive-rational action from their moral-practical foundations." Habermas is responding to a familiar Weberian pessimism to the effect that under instrumental rationality we lose touch with ends and values.

[76] Thomas Hobbes, Leviathan 183 (Richard Tuck ed., 1988): "I define Civill Law in this manner. Civill Law, Is to every Subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, *to make use of, for the Distinction of Right, and Wrong*" (my emphasis).

[77] Hans Kelsen, Pure Theory of Law, 64 (1934). See also Hans Kelsen, What Is Justice? 141 and 179 (1960).

[78] Hart, *supra* note 49, 210–12. See also the discussion in Liam Murphy, *Better to See Law this Way*, 83 N.Y.U. L. Rev. 1088 (2008).

[79] The insight is from Habermas, *supra* note 27, at 105: "[A]t the postmetaphysical level of justification, legal and moral rules are simultaneously differentiated from traditional ethical life and appear side by side as two different but mutually complementary kinds of action norms."

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tame or uncritical; but it subjects law only to certain kinds of critique and it makes other moral critiques seem odd or inappropriate.

So consider, for example, the transformation of "morality" contemplated as a realistic standard of evaluation by the American legal realists. Maybe the Langdellian formalists had their own vision of morality to map onto their legal logic.[80] Be that as it may, certainly some of the legal realists envisaged making law amenable to substantive evaluation. There would be a perspective from which law could be evaluated for the purposes of reform and to which it could be made accountable. But the realists thought it important to emphasize that it was going to be *a new sort of evaluation* and *a new sort of moral accountability*.

"[T]he man of the future," said Oliver Wendell Holmes, "is the man of statistics and the master of economics."[81] If there was to be morality in the work of legal scientists, it was not going to be a theological or deontic morality. Thirty years later, Felix Cohen put the point this way:

> What a judge ought to do in a given case is quite as much a moral issue as any of the traditional problems of Sunday School morality. It is difficult for those who still conceive of morality in otherworldly terms to recognize that every case presents a moral question to the court. But this notion has no terrors for those who think of morality in earthly terms. Morality, so conceived, is vitally concerned with such facts as human expectations based upon past decisions, the stability of economic transactions, and even the maintenance of order and simplicity in our legal system.[82]

The words "ethics" and "morality" mean a lot of different things, says Cohen, but "[t]he spontaneous outpourings of a sensitive conscience unfamiliar with the social context" are not what modern law needs.[83]

> If ethics is chiefly concerned with the problems that teachers of ethics have discussed during the past three or four hundred years, that is to say, with the conduct of a man towards his next door neighbor and towards his next-door neighbor's wife ... and, on the whole, with questions of *manners* rather than with basic questions of social values, then ethics has little to offer to those who practice or study law. ... [T]he basic problems of the law today involve social forms and patterns that cannot be compressed into the narrow confines of what may be called "Sunday School ethics." Only an ethics that squarely faces the problems which modern commerce and modern science have brought into our world can offer any worthwhile gifts to modern law.[84]

[80] Opinions seem to have varied as between those who saw the formal logic of law as utterly autonomous and those who sought to map it on to the nostrums of laissez-faire economics. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 26 ff. (1997).

[81] Oliver Wendell Holmes, *The Path of the Law* (Reprint), 78 B.U. L. REV. 699, 708 (1998).

[82] Cohen, *supra* note 32, at 840.

[83] *Id.*

[84] Felix Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 36 (1934).

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This is certainly a rejection of pure formalism; it involves a substantial rationalization of law. But the nature of the rationalization and the nature of the evaluations it contemplates make it harder to accommodate values like justice and dignity, and harder still to insist on moral absolutes.

All that is from the side of the lawyers. What about the philosophers? Well, it would be wrong to deny that modern moral philosophy is also complicit in this new understanding of social morality. Its main features are a pervasive consequentialism and a reliance on "reflective equilibrium" to avoid conclusions that sound dogmatic or unreasonable.[85]

For example, everyone makes fun of Kant's remark that lying is absolutely wrong: we just know that lying is sometimes right and, unlike the old Prussian dogmatist, we have the methodology to accommodate that conviction.[86] It just *can't* be right that there is a duty to tell the truth when better results will accrue from falsehood; any principles that seem to have that implication obviously require some adjustment. Or to take another example: I remember during the torture crisis of 2003–08 finding precious few moral philosophers who were prepared to stand for a moral absolute in that regard. I found both lawyers and moralists saying that there just could not *be* – they couldn't make sense of – an absolute prohibition on torture. There would always have to be some necessity one could appeal to in order to excuse if not justify torture, some technique of "reading down" the prohibition, or some indeterminacy in the legal meaning of words like "torture" that would make ostensibly implacable norms negotiable. The thought seemed to be that effective but coercive interrogation just *can't* be something whose use is simply foreclosed (as opposed to being rendered inadvisable in most circumstances). There were always ticking bomb hypotheticals to be manufactured[87] and residual doctrines of the avoidance of "catastrophic moral horror"[88] to mitigate the rigor of morality's strictures. Habermas talks of the erasure of "the deontological dimension of normative validity" within morality itself.[89] I fear he is right.

One or two philosophers, conscious of this transformation, have suggested that it is actually the loss of *the law's ability to sustain absolutes* that has led to a loss of faith in them in moral philosophy. If law has lost some of its moral bearings, morality too is losing some of the bearings that it took from a certain conception of law. Morality used to be structured partly in the way that law was once thought to be structured.[90] Now it

[85] For reflective equilibrium, see Rawls, *supra* note 38, 40–46 (revised edition, 1999).

[86] Immanuel Kant, *On a Supposed Right to Lie from Philanthropy* (1797), *in* Immanuel Kant, Practical Philosophy 611 (Mary Gregor ed., 1996); Cf. Richard Epstein, *Smart Consequentialism: Kantian Moral Theory and the (Qualified) Defense of Capitalism*, NYU Law Faculty Lunch Presentation (Fall 2015): "It is hard to deny the simple proposition that lying in defense of self and third persons constitutes from the ex ante perspective a strong Pareto and Kaldor-Hicks improvement."

[87] See Jeremy Waldron, *What are Moral Absolutes Like?* 18 Harv. Rev. of Philosophy 4 (2012).

[88] The phrase has been taken up by philosophers from a throwaway line in Robert Nozick, Anarchy, State and Utopia 30n (1974). See also Michael Moore, *Torture and the Balance of Evils*, 23 Isr. L. Rev. 327 (1989).

[89] Habermas, *supra* note 27, at 49.

[90] Habermas, *supra* note 11, at 251 says that Weber "plays down the structural analogies that obtain between moral development and the rationalization of law."

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is harder to see either enterprise as deontological. I know that when I wrote about moral absolutes a few years ago I said (rather over-confidently), "we know what legal absolutes look like" – categorical prohibitions stated starkly that do not seem to brook any justifying conditions – and I said it would do no harm to begin with them as our role models.[91] But now I think there are no such role models, and morality is impoverished because there is so much less to be learned from the law.

Almost sixty years ago, G. E. M. Anscombe was already venturing this diagnosis.[92] Concepts like moral obligation and moral duty and the moral sense of "ought" are nowadays quite mysterious, she said. "It is as if the notion 'criminal' were to remain when criminal law and criminal courts had been abolished and forgotten. . . . The situation, if I am right, [is] the interesting one of the survival of a concept outside the framework of thought that made it a really intelligible one."[93] Concepts like moral obligation and moral duty used to be intelligible within a framework of divine law; now they are so no longer, and the result is a complete transformation in our sense of what we ought to tolerate:

> Every one of the best known English academic moral philosophers has put out a philosophy according to which, e.g., it is not possible to hold that it cannot be right to kill the innocent as a means to any end whatsoever . . . . Now this is a significant thing: for it means that all these philosophies are quite incompatible with the Hebrew-Christian ethic. For it has been characteristic of that ethic to teach that there are certain things forbidden whatever consequences threaten, such as: choosing to kill the innocent for any purpose, however good.[94]

Anscombe believes that this failure to accommodate the possibility that certain things are prohibited "simply in virtue of their description as such-and-such identifiable kinds of action, regardless of any further consequences" is surely the most important fact about modern moral philosophy.[95]

It is not just a matter of convictions. It is also a matter of moral methodology. Since Anscombe's day, philosophers have become accustomed to the methodology of "reflective equilibrium," a process by which we bring our abstract and universal commitments into line with our considered judgments about particular matters by making adjustments at both ends – reconstructing our principles and abandoning or modifying a few of our considered judgments. The hope is that we will eventually be left with a set of considered judgments we can cling to, which is in rough equilibrium with a set of principles rigged to generate them.[96]

In this process, it seems, we think of the principles we are working on as "ours" – ours to change or modify as the exigencies of reflective equilibrium dictate. Can we still say

[91] Waldron, *supra* note 87, at 8.
[92] G. E. M. Anscombe, *Modern Moral Philosophy*, 33 Philosophy 1 (1958).
[93] *Id.*, at 6.
[94] *Id.*, at 10.
[95] *Id.*, at 9–10.
[96] For reflective equilibrium, see Rawls, *supra* note 38, at 18–19 and 40–46.

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of the result that it is objectively true? Maybe; but if so, objectivity is just a label we paste on to the product of our rethinking, the product of our drive to find a position we are comfortable with. A deeper sense of objectivity would cover principles that present themselves to us in a more uncompromising and non-negotiable way. These would not be treated as norms that *we* have control over; they would not be for us to tamper with.[97] Understanding such principles as divine commands or transcendent givens, we would understand ourselves as more passive in the recognition and construction of principles put forward for the evaluation of law than modern moral philosophers generally take themselves to be.

## VIII ULTIMATE ENDS AND "POLITICS AS A VOCATION"

Some will say it is not an impoverishment to cut both law and public morality away from their more irrational and sectarian manifestations. We need a body of law that is apt for use in the modern world, they will say, and it needs to be matched by a morality that can be used rationally by the members of a political community, acting together, to evaluate law's serviceability for that purpose.

The idea of "public reason," introduced in John Rawls's later work, can be understood as a way of disciplining the moral evaluation of law along these lines.[98] Though in principle people might deploy all sorts of standards – some traditional, some religious, some deeply philosophical – to evaluate the laws we have, the idea is that we should limit the evaluative arguments that we introduce into the public realm to those we can reasonably expect all others to understand. Nothing can be regarded as an appropriate contribution to public deliberation unless it is phrased in terms that make sense to all the members of the society, in all their ethical, philosophical, and religious diversity. That means that we should be very wary of introducing religious conceptions into politics – since these are inherently divisive – and very wary of taking a public stand on moral absolutes if the grounding of these presupposes religious or philosophical commitments on which a large number of our fellow citizens have long since turned their backs. If I say that terrorists must be respected like everyone because they are created in the image of God,[99] or if I say that torture "is a sin against the Holy Ghost,"[100] I am not saying anything that my secular fellow citizens can get their minds around and I am myself committing the sin of incivility by simply giving voice to my own theological

[97] This is adapted from Waldron, *supra* note 71, at 338.

[98] See John Rawls, Political Liberalism 212 ff. (1996).

[99] See HCJ 769/02 Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. Government of Israel and others §25 (2005) (Isr.): "Needless to say, unlawful combatants are not beyond the law. They are not 'outlaws.' God created them as well in his image; their human dignity as well is to be honored" (president Barak J.).

[100] F. S. Cocks (United Kingdom delegate), as reported in 2 *Council of Europe, Collected Edition of the "Travaux Préparatoires" of the Eur. Conv. on H.R.* 40 (1975).

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convictions instead of engaging with my fellow deliberators on terms we can all understand.

The Rawlsian idea of public reason remains controversial;[101] I mention it here simply as an instance of the way in which some philosophers think morality has to transform itself to match the needs of a desanctified body of law.

Finally and even more substantively, we may circle back round to one last thesis from Max Weber. As we saw in Section II of this chapter, Weber's account of the processes we have been describing is mainly formalistic: law has had to become formalized in a way that puts it beyond the reach of certain kinds of evaluation. But Weber matches that with a substantive thesis as well. In his great lecture from 1919, "Politics as a Vocation," he maintained that a responsible person with a vocation for politics must, in a sense, commit himself broadly speaking to a consequentialist ethics.

> [T]here is a profound abyss between acting in accordance with the maxim of an ethic governing an ethics of conviction and acting in tune with an ethics of responsibility. In the former case this means, to put it in religious terms, "A Christian does what is right and leaves the outcome to God," while in the latter you must answer for the foreseeable consequences of your actions.[102]

Sanctity and political responsibility stand on opposite sides of this abyss. Someone committed to an ethic of ultimate ends is admirable in a way, but with his repudiation of every action that makes use of morally suspect ends he must be kept away from politics.

> No ethic in the world can ignore the fact that in many cases the achievement of "good" ends is inseparable from the use of morally dubious or at least dangerous means ones and that we cannot escape the possibility or even probability of evil side effects. . . . [I]t is not true that nothing but good comes from good and nothing but evil from evil, but rather quite frequently the opposite is the case. Anyone who does not realize this is in fact a mere child in political matters.[103]

It is not just a point about consequentialism; it is a point about politics itself and its artifact, law. For, however elevated our jurisprudence may be, there is no getting away from the fact that "[i]n politics, the decisive means is the use of force" and that the making, changing, and evaluation of law is also about the way in which in the last resort force will be used in our society.[104] "Whoever makes a pact with the use of force, for whatever ends (and every politician does so), is at the mercy of its particular consequences."[105]

[101] My own doubts about the public reason idea are voiced in Jeremy Waldron, *Public Reason and 'Justification' in the Courtroom*, 1 J.L. Phil. & Culture 107 (2007).

[102] Max Weber, *Politics as a Vocation*, *in* The Vocation Lectures, *supra* note 18, at 83.

[103] *Id.*, at 84 and 86.

[104] *Id.*, at 84.

[105] *Id.*, at 89.

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Myself, I don't believe that this means that a responsible politician gives up on the very idea of certain actions – actions of certain kinds – being beyond the pale in politics. It is one thing to accept that politics will inevitably involve distasteful actions;[106] quite another to say that no action, however wrong or distasteful can ever be finally excluded. The trouble is that the denigration of those who renounce the merely distasteful in politics probably makes it much harder for us to sustain any sense that, nevertheless, there are some things that are forbidden.

## IX CONCLUSION

It has been hard to know what tone to take in this chapter. The English satirical magazine *Private Eye* used to have an "old fogey" poet on its staff in the 1980s who would write doggerel beginning, "Oh, isn't everything awful / in this dreadful modern age." The tone of what I have written sounds, on rereading, like a litany of grumpiness or frustration or both, and that worries me. Obviously I regard some of the developments I have set out as deplorable. But the aim has been to describe and characterize desanctification – admittedly from the perspective of someone who cares about it – rather than to deplore it.

Also, it is easy to sound hysterical about all this, as though the processes described were univocal in their tendency and utterly out of our hands. But in exploring these developments, I do not want to commit myself to a hard-and-fast version of these processes. We are talking at most about tendencies – tendencies that have proceeded unevenly across legal systems and across areas of law for a century or more. The chapter tries to describe a reduction in the ease and naturalness – the increasing difficulty and a diminishing sense of the plausibility – of certain pathways of moral and legal thought.

Finally, the normative tenor of this piece is supposed to be diagnosis and vague lamentation; no recommendations are on offer. I do believe that we need some sense of absolute prohibitions in morality; we should not be turning our backs on a whole dimension of normativity. But the processes traced here – processes of desanctification identified by Weber and others – indicate how deep and difficult it may be to restore that normative dimension.

[106] Cf. Bernard Williams, *Politics and Moral Character, in* PUBLIC AND PRIVATE MORALITY (Stuart Hampshire ed., 1978), arguing that things like "lying, or at least . . . the making of misleading statements; breaking promises; . . . sacrifice of the interest of worthy persons to those of unworthy persons; and . . . coercion up to blackmail" may all be required of a participant in ordinary politics, certainly a participant with any power in his hands, in order to have any chance of successfully promoting policies that he or she judges good and just."

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