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INCORPORATION BY LAW

Joseph Raz[1]
Balliol College, Oxford, and Columbia University

The truism that launched many theories about the nature of law—that law is a social institution—leaves, not surprisingly, many questions unanswered. One of the most important among them is the question of whether social institutions or more generally social practices can be understood in entirely nonevaluative terms.[2] Not penetrating to the same degree the heart of our understanding of law and of normative phenomena generally is another question left open by the truism, a question much discussed in recent years, namely, whether moral principles can become part of the law of a country by "incorporation".[3] Though different, it may be thought that the two are interconnected in certain ways.

My purpose here is to examine the question of how the law can be incorporated within morality and how the existence of the law can impinge on our moral rights and duties, a question (or questions) which is a central aspect of the broad question of the relation between law and morality. My conclusions cast doubts on the incorporation thesis, that is, the view that moral principles can become part of the law of the land by incorporation.

1. This article includes material presented as the first of three Storrs Lectures at Yale in 2003.

2. We lack a general term to refer collectively to all the concepts characteristic of practical thought. These include concepts belonging to virtue and character-related concepts (courage, etc.), responsibility-related concepts (excuses, etc.), value concepts (admirable, etc.), normative concepts (ought, etc.), and reason concepts (rational, etc.). In previous times "descriptive" and "factual" were commonly used to designate those concepts that are not specifically practical. This, however, miscasts descriptions. ("This is John" is not a description of anything yet is supposed to be a descriptive sentence.) Designating nonevaluative propositions "factual" implies that there are no evaluative facts, which is false. I will use "evaluative" and "normative" interchangeably to refer to all of them, as well as using them more narrowly to refer to items of the subcategories indicated above.

3. That the idea is consistent with Hart's account of the law was intimated by him in his review of LON FULLER, THE MORALITY OF LAW in Hart, 78 HARVARD L. REV. 1281 (1965), repr. in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 361 (1983), and reiterated in the postscript to THE CONCEPT OF LAW 250 (1961), though neither time did Hart stop to explore the meaning and implication of the idea; *see* David Lyons, *Principles, Positivism and Legal Theory*, 87 YALE L.J. 415 (1977), at 423–424, and Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICHIGAN L. REV. 473 (1977). The point was embraced by Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982), and developed and defended at length by him in JULES COLEMAN, THE PRACTICE OF PRINCIPLE (2001). *See*, for a general discussion of the view, Kenneth E. Himma, *Inclusive Legal Positivism, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (J. Coleman & S. Shapiro, eds., 2002).

I. EVEN JUDGES ARE HUMANS

This way of putting the question is not meant to be neutral. Legal theorists tend to start at the other end. They do not ask how law impinges upon morality, but how morality impinges on the law. It may be natural for legal theorists, being as they are focused on the law, to start with the law and ask what room it makes for morality. I will suggest that this way of conceiving the question of the relations between law and morality has contributed to some important mistakes. A better way of motivating reflection on the relations is to start with morality. That is why I have entitled this section "Even judges are humans." In being human, they are subject to morality. That is the only fact the title is meant to convey.

A. The Scope of Morality

Why are judges, and humans generally, subject to morality? This is due to the nature of morality. It has no doctrine of jurisdiction setting out its conditions of application. It applies universally to all agents capable of understanding it.[4] Suppose that by the rules of the university, no one should use offensive language about any member of the university. It makes sense to say: that rule applies only to students of the university and not, say, to their parents, for the university has no jurisdiction over the parents of its students. I do not mean merely that it has no jurisdiction to discipline them if they break the rule. I mean that it has no jurisdiction, no power to make rules applying to them. It has no jurisdiction to bind them.

By way of contrast, let us suppose, for example, that morally, if I learn about a person's intentions in confidence I should not tell people about them. If so, then it makes no sense to say: Morally speaking, I should not tell people about his intention, but luckily morality does not apply to me. It has no jurisdiction over me. If I know that it is morally wrong of me to tell people, and so on, or even if I do not know it but can know it, then it does apply to me.

Some may think that morality has a doctrine of jurisdiction and that I have just stated what I take it to be—morality applies to all agents who are capable of understanding it. But this is a misunderstanding. Reasons are considerations by which agents' behavior is to be guided. They apply only to agents who can, in principle,[5] be aware of their existence, for otherwise those agents cannot be guided by them. Hence the fact that moral reasons apply to people and not to lions is not a result of any doctrine of jurisdiction, nor is it a reflection of any aspect of the content of morality. It is simply a consequence of the fact that moral reasons are reasons.[6]

4. And for agents, understanding it implies the capacity to be guided by it.

5. A weasel word disguising the difficulty of specifying the strength of the "can in principle" in that condition.

6. Other moral properties, such as generosity and conscientiousness, apply to agents in virtue of their propensity to react to moral reasons or the way they did or failed to do so

To repeat, that is why judges are subject to morality. Morality, unlike the law or the norms governing the university or any other social institution, is not a system of rules. Talking of morality is just a way of talking of some of the reasons that people have. They apply to whomever they address. Not all moral reasons apply to everyone. Some apply to pregnant women only, some to parents, some to teachers. Their scope of application is determined by their content. If they are reasons to respect one's children, then they apply only to people who have children. When I say that judges being human are willy-nilly subject to morality, I do not mean that all of them ought to respect their children. Only those who have children ought to do so. That goes without saying. It does not deny that they are all subject to morality.

B. On Points of View

I assume that no one denies that morality applies to judges. The question is how to understand this statement. Some may say: of course morality applies itself to judges; from the moral point of view, judges are morally bound just like anyone else. But the moral point of view is just that—one point of view among many. The question is whether morality applies to judges or to others from, let us say, a prudential point of view; that is, whether it is in their self-interest to be guided by morality. Or one may ask: Is it the law that morality applies to judges? Are they legally bound to follow morality?

To examine the standing of such questions we need to spend a little time looking at the notion of a normative point of view or a normative perspective.[7] Several uses of "a point of view" are helpful and unproblematic. They can be divided into two types. The first consists of discourse where the effect of the qualification "from this and that point of view things are thus and so" is to bracket the question of truth: from a Christian point of view, or from a Kantian point of view, or from the point of view of cognitive science things are thus and so—implying that if Christianity, or Kant's theory, or cognitive science are true, then this is how things are, but without committing to their truth.[8] The second type of use isolates different aspects of a problem, often as a way of helping with thinking about it and advancing towards its solution. For example, we may say "from the economic point of view it would be good for the university to close the philosophy department,

adequately. Some properties make objects or events morally fortunate or unfortunate, and they may apply to things that are not moral agents, but they too ultimately derive their meaning from their relations to circumstances in which rational agents confront choices.

7. The views that follow apply to nonnormative points of view as well, but I will not be concerned to establish that.

8. Though of course one is committed to it being truly so from that point of view. Note that the truth conditions of propositions from a point of view (so understood) are not the same as those of the corresponding material implication; for example, "if Christian doctrine is true then. . . ." For one thing, they assert not merely that the from-a-point-of-view proposition is true but that (in this example) it is Christianity that is the ground of its truth. Besides, the falsity of Christianity, far from guaranteeing the truth of the proposition, has no bearing on the question of its truth.

as its alumni rarely earn much money and the loss of their donations to the university would not hurt it much; from an academic point of view, however, this would not be justified." We can then proceed to a decision of what would be right, all things considered.

Discourse of any possible point of view can serve this second function, that is, indicate that the considerations referred to need not be the only ones, nor need they be the ones which carry the day.[9] But there are some points of view reference to which cannot be used to serve the first function, that of suspending the question of truth. This is obvious if you think of artificially defined or "made up" points of view such as "from the point of view of valid reasons, you have reason to do this and that." Valid reasons are real reasons, and once you have committed yourself that you are talking about valid reasons, you can no longer say "but I do not know if there is any reason to do so." Contrast this with "from a Catholic point of view, I ought to give it to him." Saying this need not imply belief that there is any reason for me to give it to him. The Catholic point of view may be false, that is the specific doctrines and beliefs of the Catholic Church may be false or, if true, only accidentally true, that is, not true for the reasons Catholic doctrine gives for them. So it is perfectly intelligible to say "from a Catholic point of view you ought to give it to him, but I really do not know whether you have any reason to do so."

There are many terms that can indicate a point of view when used in the second way but cannot indicate a point of view when we talk of the suspension of the question of truth. For example, if I say "from the point of view of my own interests, there are reasons for the first option," my statement is qualified by recognition of the possibility of other conflicting interests, but I cannot continue my statement with "but I do not know whether there is any reason at all for that option," for I have already said that there are: my interest furnishes reasons for it.

Morality is another perspective reference to which cannot be used to suspend truth. "Morality" is used to refer only to true or valid considerations. In saying this, I do merely clarify the sense in which I will use the term. While it is the sense in which it is used when considering the relations of law and morality, it is not the only sense in which people use the term. When Dolittle answers Pickering's reprimand "Have you no morals, man?" with "I can't afford them,"[10] he suggests that morals, like breeding, are fineries that only the moneyed classes can afford. But that is not the way the term will be used here.

C. The Legal and the Moral Points of View

Sometimes, when reasons for and against an action conflict, there is no rational determination to the conflict. Neither of the conflicting reasons defeats the other. Most commonly this is the case when the conflicting reasons are

9. Barring some artificial creations such as "from the decisive point of view."
10. G.B. SHAW, PYGMALION, *in* THE COMPLETE PLAYS OF BERNARD SHAW 729 (1934).

incommensurate. Not uncommonly incommensurate reasons arise out of diverse values. Sometimes, for example, there is no right answer to the question of whether it is now more important for the government to increase its investments in education or in health services. These are familiar facts, born out by analysis.

Some people, including some philosophers, go further and assume that there is never a rational way of concluding what one may, all told, do when reasons of certain different kinds, say moral reasons and reasons of self-interest, point in different directions. If from a moral point of view one ought to take an action that self-interested reasons indicate one should avoid, then there is no conclusion regarding what one ought to do, all things told. Some people assume that that is so when legal and moral reasons are concerned.[11]

These claims involve two mistakes. They suppose that it is rational to perform an action, that is, that it is rationally alright to perform an action, only if reason requires its performance (in the sense that entails that there are reasons for it that defeat all reasons against it). On this view, it is not rational to pick a tin of Heinz baked bins from a supermarket shelf unless it is the only tin of its kind. If there are more than one placed conveniently, then there is no more reason to choose one of them than to choose any of the others, and therefore it is not alright, rationally speaking, to choose any. This is obviously absurd. It is rationally alright to perform an action so long as the reasons for it are not defeated, for example, so long as the reasons against it are not more stringent. Therefore, if an action is favored by one reason and opposed by another and neither of them defeats the other, then it is right both to perform the action and to refrain from it, and that is so whether or not the two conflicting reasons belong to the same point of view or to different points of view.[12]

The second mistake is the assumption that legal and moral reasons constitute points of view in the same way. Whatever else the law is, it consists, at least in part, in man-made norms, that is, it takes itself to impose duties on people and to do so in virtue of decisions taken by governmental institutions with the intention of imposing duties on people, including people other than those taking the decisions.

Some people tend to think that in democratic countries people are bound only by laws that they themselves made. But those who live in democratic countries know that they are bound by laws made a hundred years before they were born and that their children are bound by laws that they had no say in, and they themselves are bound by laws whether or not they participated in the process leading to their enactment, let alone being bound by them whether or not they supported or opposed them.

11. This may have been Hart's view in his later work; *see* H.L.A. HART, ESSAYS ON BENTHAM (1983).

12. The only alternative I can see is to deny that reasons which belong to a point of view have any bearing on what one ought to do, all told. But if so, it is not clear in what sense they are reasons at all.

It is well understood that no one can impose a duty on another just by expressing his will that the other have that duty. If governments can do so, this can only be because and to the extent that there are valid principles that establish their right to do so. Those principles, the principles establishing the legitimacy of man-made laws and of the governments that make them, are themselves, whatever else they are, moral principles. They may also be principles deriving from people's self-interest. For example, Hobbesians think that all morality derives from self-interest and that all moral principles are also principles of indirect self-interest. They may also be legal principles. I do not wish to prejudge the question of what does and what does not belong to the law. All I am saying is that whether or not the principles that endow governments with legitimacy are legal principles, they are moral principles.

How do we know that? By their content. They are principles that allow, perhaps even require, some people to interfere in important ways in the lives of others. Valid principles that have such content are moral principles, or nothing is. I do not believe that morality is a unified systematic body of principles. But whatever else we grace with the title "moral," principles that impose, or give people power to impose on others, duties affecting central areas of life are moral principles. That much about the nature of morality is clear.

The result is that we cannot conceive of the law as a normatively valid point of view contrasting with morality. Perhaps it is possible to think of reasons of self-interest as a distinct point of view contrasting with that of morality. But that, if possible, is possible only because self-interest is thought to be a ground of reasons independently of morality. It is not similarly possible to think of the law as a ground of reasons independently of morality. Given that much of it is man-made, at least man-made legal duties bind their subjects only if moral principles of legitimacy make them so binding.

We can of course suspend judgment on whether the law is binding on its subjects, on whether legal rules do provide anyone with the reasons they purport to establish. We can thus treat the law as a normative point of view in the way in which we might treat Muslim morality as a distinct normative point of view, that is, if it is legitimate or valid, then we have the reasons that, according to it, we have. But in that sense the law does not conflict with any other normative considerations, since when so treated, it is not assumed that it includes or creates any normative considerations.

D. The Law Presupposing Morality

Far be it for me to claim that all legal systems do enjoy moral legitimacy, which means that legal duties are really duties binding on people rather than being the demands governments impose on people. All I am saying is that when it is assumed that any legal system is legitimate and binding, that it does impose the duties it purports to impose—and I will generally

proceed in this discussion on the assumption that the legal systems we are considering enjoy such legitimacy—in such cases we cannot separate law from morality as two independent normative points of view, for the legal one derives what validity it has from morality.

This, then, is finally the full answer to the question of why judges are humans too, why they are subject to morality: they would not be subject to the law were they not subject to morality.

Let this reply not be misinterpreted: it does not deny that we can discuss and describe the law from a detached point of view. We can talk of a legal system that is practiced in a country and of its requirements and implications without making any assumption that they have normative standing.[13] Such discourse, free of the assumption of the normative standing of the law, is the equivalent of talking of what people demand of others without implying that these demands have any normative standing, that the others have reason to comply with them as they are intended to do. But—and this is my point—where the law is normatively valid, it is so in virtue of a moral principle, and therefore *if we take the law to be normatively valid we cannot construe its requirements as constituting a point of view independent of morality, a point of view that represents a separate normative concern that has nothing to do with morality, and then ask whether it recognizes morality as applying to its officials.* The boot is on the other foot; the question is whether morality, which applies to all humans simply because they are humans, has room for the law. How can morality accommodate the law within it?

II. THE PUZZLES OF SO-CALLED "INCORPORATION"

A. The Puzzle

But before we turn to examine this question (which can only be examined cursorily in this article), it is fitting to consider some questions that the truism that judges are human, and as such subject to morality, may raise. I argued that we cannot counter the claim that judges are subject to morality by saying that from a moral point of view they are, but not necessarily from a legal one. For the legal point of view cannot be contrasted with morality in that way. If they are bound by law, that is because they are morally bound by it. Morality comes first. Does it mean that it is the law that judges are subject to morality? In a way I want to say that that does not make sense. The law cannot empower morality. It is the other way round. It is empowered by morality. But it would be wrong to leave matters at that. Surely the law can instruct judges not to follow morality, and it can instruct them to follow it, and it can do either or both in more discriminating ways. That is, it can instruct judges to decide some issue by reference to morality and not to do so in other cases, or to decide some cases with special reference to some

13. I take this view to have been Kelsen's position.

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parts or aspects of morality, for example, fairness between the parties, or the public interest in safety, and so on.

In other words, how does the view that judges are humans too square with legislation or precedents that at least appear to exclude morality or with legislation or precedents that appear to incorporate morality?

B. Exclusion before Inclusion

As it turns out, inclusion is made possible by the ability of the law legitimately to exclude and modify the application of morality. So let us start with a few remarks regarding exclusion. Tempted to be provocative rather than accurate, one may say that the very existence of the law, even of morally legitimate law, means the exclusion of morality. Think about it: judges are bound by morality. So, absent any law, they would decide the case on the basis of moral considerations. Does it not follow that where there is law, it either makes no difference to their decisions or it forces them to deviate from what they would do on the basis of morality alone—that it in effect excludes morality? Is it not the case that whenever the law makes a difference to the outcome, it excludes morality? If it is the purpose of the law to make a difference to our life, does it not follow that its realization of its purpose depends on its ability to exclude morality?

Few people endorse the view that the law purports to make no difference to what we should do. But no one feels embarrassed by my paradoxical inference. First of all, it will be pointed out that the law is binding, by my own admission, only if it is morally legitimate. (I do not, of course, mean that only then is it legally binding. I mean that to say that it is legally binding implies that it claims to be morally binding, and that it is binding only if it is morally binding, and that it is taken to be binding as it claims to be only by those thinking it to be morally binding). To repeat, the law is binding only if morally legitimate. It would follow that if it is both legitimate and excludes morality, there is no problem, for the exclusion is morally permissible.

It may be relevant here to mention that morality is not a seamless web that is either in or out. We simply refer to some of the myriad considerations that apply to us as moral considerations not because they have a common origin or purpose or some systemic unity but simply on account of their content, for example, that they are considerations requiring us to take notice of the interests of others, regardless of our own aims and interests. For value pluralists it is a commonplace that moral considerations conflict in a variety of ways, that right action requires compromises between various moral concerns, and that sometimes it requires edging some out in favor of others. When we think of the special responsibilities of judges, we are reminded that they are analogous in some respects to the special responsibilities of teachers, doctors, parents, friends, and others, in that each one of those roles requires prioritizing some moral concerns at the expense of others. The rights and duties of a doctor vis-à-vis his or her patients are different

from the rights and duties we have vis-à-vis strangers, and they partly displace them. There are ways of acting that are permissible between strangers but not between doctor and patient.

I am not suggesting that the way the law affects the application of morality is closely analogous to the way roles, such as those of doctors or lawyers, affect it. I bring up the analogy simply to illustrate the more general point, namely that the application of abstract moral principles is affected and modified by special institutional arrangements such as roles. I have previously tried to describe the way the presence of legitimate authorities affects the application of moral principles[14] and will be brief and schematic here.

It is time to abandon the dramatic metaphor of the law excluding morality. What happens—and remember, we are talking here of morally legitimate law only—is that the law modifies the way morality applies to people. True, the result is that some moral considerations that apply absent the law do not apply or do not apply in the same way. But barring mistakes and other malfunctioning that can occur even within a just and legitimate system, the law modifies rather than excludes the way moral considerations apply and, in doing so, advances, all things considered, moral concerns rather than undermines them.

I will mention three ways in which this happens. First, the law concretizes general moral considerations, determining, for those to whom it applies, what bearing these considerations have on their lives. It takes away from individuals the right and the burden of deciding in various circumstances how morality bears on the situation—what exactly it requires. For example, what form of dealings in a company's shares is proper for its directors or employees; what information need a doctor disclose to a patient before the patient's consent can count as voluntary and binding on him or her.

Second, in giving moral considerations concrete and public form, the law also makes their relatively uniform and relatively assured enforcement possible, making reliance on them more secure and preventing unfairness in relations between conformers and nonconformers.

Third, it makes moral goals and morally desirable conditions easier to achieve and sometimes it makes possible what would be impossible without it.[15] The simplest and most written-about way in which the law achieves such goals revolves around its ability to secure coordinated conduct that solves, so to speak, what are known as coordination problems and prisoner's dilemma problems. But there is much more to this story than these relatively simple tales. Even fairly straightforward legal institutions, such as contract law, enable the creation of business relationships that would not exist outside institutional contexts. Needless to say, neither corporations nor intellectual property could exist, except in rudimentary ways, outside the law. These

14. *See, e.g.*, JOSEPH RAZ THE MORALITY OF FREEDOM, chs. 2–4 (1993).
15. That is, without some institutional background, not necessarily without this legal system.

may be taken to illustrate the ability of the law to facilitate desirable economic relations and activities. But they and other legal institutions do much more. They made the whole urban civilization as we have known it over the last century or two possible—large numbers of people living with relative anonymity side by side, enjoying freedoms and rich civic amenities together and at the same time separately, each by her or himself, an urban civilization of the kind the world has not known before and is unlikely to enjoy for much longer.

C. When Is Incorporation not Incorporation?

There is much more to be said about the ways the law modifies morality by making the realization of ideals possible. But let me turn to the question of so-called incorporation. Article 1(1) of the German Constitution provides: "Human dignity is inviolable. To respect and protect it is the duty of all state authority." The first amendment of the U.S. Constitution says, among other things, that "Congress shall make no law . . . abridging the freedom of speech," assuming, as it is generally assumed, that the freedom of speech referred to in it is not the freedom of speech existing in the common law before the passing of the Bill of Rights, but a moral right to free speech. This Amendment, too, is often taken as an example of the incorporation of morality by law.

Such instances of apparent incorporation raise the obvious question: What effect can they have, given that judges are subject to morality anyway? Before I consider it, let me answer another question which my terminology was bound to raise: Why do I call these cases "instances of apparent incorporation"? Are they not clear instances of incorporation? The answer is that they are not. That is, they are not cases of incorporation if "incorporation" means legislating or otherwise making a standard into a law of the relevant legal system by a rule that refers to it and gives it some legal effect.

U.K. and U.S. statutes give legal effect to company regulations, to university statutes, and to many other standards without making them part of the law of the United Kingdom or the United States. Conflict-of-law doctrines give effect to foreign law without making it part of the law of the land. Such references make the application of the standards referred to legally required, and rights and duties according to law include thereafter rights and duties determined by those standards. But they do not make those standards part of the law. They no more become part of the law of the land than do legally binding contracts, which are also binding according to law and change people's rights and duties without being themselves part of the law of the land.

There are many diverse forms of giving effect to standards by reference to them. An interesting, relatively recent example illustrating that diversity is the United Kingdom's Human Rights Act 2000, which states in its first article:

> 1. (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—
>
> (a) Articles 2 to 12 and 14 of the Convention,
> (b) Articles 1 to 3 of the First Protocol, and
> (c) Articles 1 and 2 of the Sixth Protocol,
>
> as read with Articles 16 to 18 of the Convention.
>
> (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation.

Does this article make "the convention rights" part of U.K. law? Its language is cautious and qualified. The rest of the act specifies what legal effects the rights have in U.K. law. For example, Article 3 states:

> 3. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Had a statute said "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the edicts of the Pope or with the writings of Kant," we would not have been in the least tempted to think that through it either the edicts of the Pope or the writings of Kant have become parts of the law of the land, though beyond doubt they would have been given by that imagined act some legal effect.

I think that the cumulative effect of the various articles of the Human Rights Act entitles one to say that it incorporates "convention rights" into U.K. law, that is, that U.K. law now includes those rights.[16] But I hope that these remarks show that decision on this issue is not straightforward and that not everything which looks like incorporation is incorporation. They also show that the difference between making a standard part of the law and merely giving it some legal effect without making it in itself part of the law of the land does not lie in the language of the "incorporating"

16. Though they do not have the same effect or force in U.K. law as if they were enacted in a straightforward way nor the same effect that they have in other countries that have embraced the European Convention on Human Rights.

legislative measure—that it depends in part on our general conception of what a legal system is and how it relates to normative standards outside it, such as foreign law, moral considerations, or the constitution and laws of nonstate organisations.

Perhaps I should add that the distinction between what is part of the law and what are standards binding according to law but not themselves part of the law is particularly vague. That is not surprising given that we do not often need to rely on it. Though sometimes there are procedural differences regarding, say, judicial notice and rules of evidence and of presentation that do or do not apply to standards that are part of the law or merely enforceable according to law, much of the time the practical implications of a standard are the same either way. That is not to say that we can dispense with the distinction or that it is of no importance. So long as we maintain that what is required according to law is made so by law, we cannot dispense with it, and so long as the law maintains its place at the heart of the political organization of society and remains a focus of attitudes of identification and alienation, the distinction has an importance way beyond any legal technicalities.

I believe that so-called "incorporating" reference to morality belongs, with conflicts-of-law doctrines, to a nonincorporating form of giving standards legal effect without turning them into part of the law of the land. To see the reasons for this view, we need first to examine the legal effect of such references.

D. So-Called Incorporation as Modulated Exclusion

So back to the main question: What is the point of provisions giving effect to moral considerations if judges are subject to morality anyway? The point is that such references help the law modulate its intervention in and modification of the way moral considerations affect us. I will use three examples to make the point. As a general rule the law, as we have seen, can modify the application of moral principles to its subjects. The law is, however, a complex institution, a complex *set* of institutions. Which legal organs have such powers? As a general rule, all lawmaking institutions have the power to modify moral considerations and can use this power whenever they make new law. In fact the making of law implies the use of such powers.[17] So-called "incorporation" of morality modulates the application of this general rule.

My first example has to do with the truism that the lawmaking functions are unequally distributed among various bodies. Some are federal and some are state, some legislative and some judicial, some are superior to others. All

17. Qualifications are in place here for a law may be newly made yet old in content, being a mere restatement of "old" law, and it can, though more rarely than we tend to imagine, merely restate moral precepts as they are without any modification and without any implications (for the process of enforcement and implementation) that modify the application of moral considerations.

such divisions imply limits on the lawmaking powers of some institutions. One way in which they are set is by establishing a conflict rule prioritizing the rules made by one body over those of others when the two conflict. Hence Congress cannot make law which is at odds with the Constitution. When the Constitution "incorporates" a moral consideration, such as freedom of speech, it sets limits to the power of Congress and other lawmakers to modify this aspect of morality. References to moral considerations in constitutions are typically not cases of the incorporation of morality but blocks to its exclusion or modification by ordinary legislation.

My second example concerns the common practice of coupling such constitutional provisions with judicial review. Judicial review not only makes the block to the exclusion or modification of constitutionally protected moral considerations by legislation enforceable; in addition in conferring on the courts powers to enforce that block, it gives them, when adjudicating on the compatibility of legislation with the constitutionally protected moral considerations, the power to modify the application of those moral considerations themselves. So a second use of so-called incorporation of morality into law is to allocate powers among lawmaking institutions.

Legislative reference to moral considerations has various other legal functions. My third and last example is again both typical and simple. It is the legal equivalent of the multistage decision procedure we are all familiar with in our lives. When I was last looking to move house, my final decision to buy and move to the apartment where I now live was not taken all at once but in stages. At least three are easily discernible. First, I decided how much I could afford to spend. Then, in light of that decision and other factors, I decided on the neighborhood in which to buy an apartment. Finally, I collected information about available accommodation within my price range in the chosen neighborhood and chose the one to buy on the basis of a whole slate of functional and esthetic considerations. Each of the first two stages terminated with a partial decision about what apartment to buy (an apartment costing no more than about . . . , an apartment in this neighborhood) that narrowed the options I considered in the next stage. Each stage brought to bear considerations that did not play a part in the previous stage (or played only an indirect part). And, crucially, each stage terminated my deliberations about the impact of some reasons, which were not revisited in the later stages. We resort to multistaged decision procedures often. They make life simpler, improving our ability to reach reasonable decisions.

Institutions have additional reasons to use such procedures. Some institutions are better than others in assessing some aspects of the decision. Political accountability demands that certain institutions will take part in the decision, but they are too burdened with work to be able to consider it thoroughly. It may be best to let them set a framework that will be filled out by others. Some of the information that may be helpful will not be available until nearer the time when deciding from scratch will no longer be rationally possible, and sometimes it may be advisable to delay some aspects

of a decision until nearer the time of its implementation. Typically we find that such considerations furnish at least part of the justification for delegating legislative or regulatory powers to subordinate bodies and agencies and to the courts. Such delegation occurs whenever a standard is set but is to be implemented in a way that is sensitive to certain moral concerns, for example, the doctrine of contract determines who can make them and under what conditions they are valid but adds that contracts against public policy will not be enforceable, delegating to the courts a residual power to set aside contracts on grounds of public policy.

References to morality in this context indicate to the courts or the regulatory agencies or delegated legislature that while the maker of the law has considered moral and other considerations and found that they justify the legislated standards, it did not consider, or did not exhaustively consider, the impact of the so-called incorporated moral considerations, and it is for the court or regulator and so on to do that.[18] Again, what appears as incorporation is no more than an indication that certain considerations are not excluded. The courts cannot gainsay the legislation and set it aside because they think that a better standard should be endorsed. The legislation bars them from doing so. It in effect excludes their access to the moral considerations on which the legislator should have relied in passing the act. But they can supplement or modify the standard set by the act in light of the nonexcluded considerations.

To conclude, judges are humans, and they are subject to morality without any special incorporation of morality, as are we all. What appear as incorporation are various instances of nonexclusion.

III. INCLUSIVE POSITIVISM AND THE BOUNDARIES OF LAW

The discussion and conclusions of this article relate to one of the oldest and most important questions in our quest to understand the nature of the law: the question of its relation to morality. One of its aspects is the question of the boundaries of law, and especially the boundary between law and morality. I tried, in the course of the discussion above, to avoid prejudging that issue, the question of the boundary between what is and what is not part of the law. My preliminary remarks on "so-called incorporation" explain why the problem of the boundaries of law is an unprofitable focus for a jurisprudential discussion. Yet I also remarked that the distinction

18. A very simple illustration (drawn to my attention by T. Endicott) is in practice direction 25.13 of the Civil Procedure Rules (in the U.K.) which says: "The court may make an order for security for costs under rule 25.12 if (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order." Clearly it might just as well have said "the court may, in its discretion, make an order for security for costs. . . ." In that case, too, the court would have had to do what is just. The language of the rule merely reminds courts that their discretion was not curtailed. It does not "incorporate" anything.

between what does and what does not belong to the law is inescapable, an inescapable conclusion of any sensible theory of the law. It is worth dwelling a little further on the nature of the problem and its difficulties.

As noted above, for the courts the difference between standards they have to apply because they are the law of the land and those they have to apply "merely" according to law often makes no practical difference, with the consequence that they do not bother to establish sharp boundaries to the notions. It is true that that is not always the case. Standards such as foreign law, rules of other organizations, private agreements, and their like sometimes occasion the application of different rules of evidence, or of procedure, or general doctrines constraining the validity of one kind of rules and not of others (e.g., being subject to federal constitutional doctrines if but only if they are the law of the land, or being subject to public policy doctrines only if they are not). For people whose thinking about the law is focused exclusively on the practice of the courts, it may appear that that is all that can matter to anyone. They may doubt that the distinction is needed at all. To the extent that we find it in our thinking about the law, in our legal practices, it is, they would claim, of mere local interest and without any theoretical significance.

The law is, however, not merely a set of guides for court decisions. It is a political institution of great importance to the working of societies and to their members. From this point of view a British person cannot say "Polish law is my law" just because it will be followed by British courts when their conflict-of-law rules direct them to do so. The distinction between standards that the courts have to apply and those that are the law of the land is vital to our ability to identify the law as the political institution it is.

Vital distinctions are not necessarily sharp ones. It may be that in many cases we have to resist the temptation to adjudicate whether a matter is part of the law or merely to be followed according to law. It makes no difference, we may say. You could take it either way. Or we may feel that neither view can strictly be proclaimed to be correct.

Is not the so-called incorporation of morality a case of this kind, where it is six of one or half dozen of the other? On the contrary, it seems to me that the question of the status of the incorporation of morality provides a good case study showing the need to attend sometimes to the question of the boundaries of the law and the way that need arises only in the service of other issues, rather than because there is an inherent importance in fixing such boundaries for their own sake.

When the question is the relation between law and morality, it seems inevitable that different claims about this relationship will imply different demarcations of the boundary of law, at least in the interface between it and morality.[19] So long as we allow that it is possible for a population not to be

19. Of course, a society or a culture that does not have the concepts of morality and of law does not have a view about their demarcation. Such a society may even be subject to law. The

governed by law, there must be a difference between legal standards and those which are not legal, not part of the law. If a population has law, then it has a normative system that can fail to exist.[20] Morality, on the other hand, cannot fail to exist or to apply. Moreover, in any country subject to law there are moral rights and duties that are not legal rights and duties, or at least there can be such. Hence there is a boundary between law and morality. Hence there are boundaries to the law.

A simple-minded view has it that the law is marked by its connection with certain institutions and that there are two ways in which it is so connected: first, only standards, norms, enacted or endorsed by certain institutions (law-making institutions, among them courts) are law and they are law because they are so endorsed. Second, only standards, norms, that apply to certain institutions (law-applying institutions, among them courts) are law. Any theory that endorses the simple view will tend to regard the connection between law and morality as largely contingent, though it need not and should not deny that there are some necessary connections between law and morality.

The main alternatives to the simple view abandon the first condition of legal validity. They find only one necessary connection between law and social institutions, the connection to law-applying institutions, with almost always an exclusive concentration on the courts. There is a large number of possible variations on that theme. One could, for example, argue that the law consists of all the norms that the simple view acknowledges but in addition contains also the moral principles that apply to the conduct of legal institutions, such as courts. Rules such as *audi alteram partem*, for example, are, on this view, part of perhaps every legal system, regardless of whether they are followed in it or not and regardless of whether they were made into law by its legal institutions, simply because it is a moral norm binding on institutions such as courts of law. Another variant of this approach holds that the law consists of all the norms that the courts ought to apply. These may include those standards that the simple view recognizes, and they may include the moral standards that apply to the courts. But they include more, namely, standards regardless of whom they apply to, which the courts have a moral duty to follow, or something like that.

Both alternatives to the simple view allow that moral norms are part of the law just because they are moral norms, yet both—and they are just two prototypes among many—respect the institutional nature of the law by acknowledging that moral norms are part of the law only if they are connected specifically to legal institutions. The views known as inclusive

existence of a legal system in any country does not depend on the possession of the concept of law by the population of that country. But it does not follow, of course, that in that country there is no boundary demarcating the limits of law, distinguishing between what is part of it and what is not. The argument in the text applies to it as well.

20. I rely on the view that the law exists, where it does, as a normative system; that is, that there are no single, stand-alone laws that are not part of a normative system.

legal positivism seem to be closer to the simple view in that like it they insist on the dual connection between legal institutions and legal standards—legal standards are made so by legal institutions as well as being applied and enforced by legal institutions. In fact, they can lay claim to being pure advocates of the simple view: if, according to them, a legal standard requires appropriate sections of the population to follow it and the courts to apply a certain standard, then it is part of the law. And if the legal standard so-called incorporates moral standards, then those moral standards are part of the law. If there is a law that stipulates that one ought, in all dealings with people to whom one does not owe special responsibility, to observe all the moral requirements that apply to dealings between strangers, then the moral standards setting out these requirements have become part of the law. I will call this version of inclusive legal positivist thesis the incorporation thesis.[21]

The conclusions of the earlier part of this article pose a difficulty for the incorporation thesis. If morality applies to people and courts alike anyway, then we are all, courts included, bound by it even before its incorporation. In what way can incorporation turn it into law? The fact that the incorporation thesis is the purest expression of the simple view counts against it rather than being a point in its favor. We know that the simple view is too simple. We know that Polish law is not part of Greek law just because Greek conflict-of-law rules direct people and courts to follow Polish law on certain occasions.

The incorporation thesis claims that moral standards turn into law simply because of their incorporation. It seems to lack the resources to distinguish between law directing us and the courts to follow some foreign law or to obey the rules of some associations, and so on, and the incorporation of morality. In fact it has a special difficulty with the latter, for morality applies anyway, and the incorporation thesis suggests that it applies only if incorporated.

The argument of this article has shown that so-called incorporating laws have their point—that their effect is not to incorporate but rather to prevent the exclusion of morality by law. This deprives the incorporation thesis of another possible argument, namely, that it alone can make sense of the existence of laws that appear to incorporate moral standards. On the contrary, it cannot explain their function. Given that morality applies anyway, their function cannot be to incorporate it. None of this *proves* that the incorporation thesis is false. But it raises serious doubts about it, doubts that its supporters have not yet confronted successfully.[22]

21. These remarks apply only to what Himma, *supra*, note 3, calls the sufficiency condition of inclusive legal positivism, that is, to the view that so-called "incorporation" can turn morality into law. I do not, in this article, consider in any way the case for or against the view that the validity of legal norms may depend, whether because some other law so determines or for other reasons, on them being consistent with some nonlegal norms, moral or other.

22. I raised essentially the same question in THE AUTHORITY OF LAW 47, note 8 (1979), though I did so rather briefly and without the supporting arguments above.