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## Law and the Normativity of Obligation

### Abstract

The paper examines the natural law tradition in ethics and legal theory. This tradition is shown to address two questions.

The first question is to do with the nature of law, and the kind of human capacity that is subject to legal direction. Is law directive of the voluntary – of what is subject to the will, or what can be done or refrained from on the basis of a decision so to do? Or is law directive of some other kind of capacity? The second question is about the nature of ethical normativity, and the relation within normativity of its directive and appraisive aspects. Is direction primary, and appraisal to be explained in terms of a theory of direction; or must a theory of ethical direction be based on a theory of ethical appraisal? Both issues are introduced by reference to Hume's ethical theory, which raises them in a particularly sharp form.

The natural law tradition, in the form it reached by the early modern period, is shown to combine giving a primacy to the appraisive in normative theory, with, in legal theory, a detachment of law from any exclusive tie to the direction of the voluntary. At the heart of the theory of natural law is the idea of law as a distinctive form of normativity directive of a capacity not for voluntariness, but for self-determination. Combined with a view of the state not just as a coordinative authority but as a coercive teacher, this led to a distinctive and highly controversial view of the scope of positive law. The paper ends with Hobbes's sharp opposition to this view of positive law – an opposition that focussed, in particular, on the coercive legal direction of belief.

## Law and the Normativity of Obligation

Thomas Pink

### *1. The problem of obligation*

In the appendix iv 'Of some verbal disputes' to *An Enquiry Concerning the Principles of Morals* David Hume criticized what he took to be a serious distortion in moral theory:

Philosophers, or rather divines under that disguise, treating all morals as on a like footing with civil laws, guarded by sanctions of reward and punishment, were necessarily led to render this circumstance, of voluntary or involuntary, the foundation of their whole theory...but this, in mean time, must be allowed, that *sentiments* are every day experienced of blame and praise, which have objects beyond the dominion of the will or choice, and of which it behoves us, if not as moralists, as speculative philosophers at least, to give some satisfactory theory and explication. David Hume *An Enquiry Concerning the Principles of Morals*, ed. P.H. Nidditch (Oxford: Clarendon Press 1975), appendix iv, 'Of some verbal disputes' p. 322

Hume claimed to be uncovering an unwarranted intrusion into moral theory of notions from positive law. The possibility for such distortion is provided by the notion of obligation or duty, and by related notions of responsibility and blame, which, on the surface at least, very much seem to be shared between morality and positive law. 'You have an obligation to pay the money' could be said by a moralist asserting a moral obligation - or by a judge or state official asserting a legal obligation, that is an obligation under some system of positive law. And just as one can be under obligations that are legal as well as moral, so one can be held legally as well as morally responsible, and legally as well as morally to blame.

In Hume's view, philosophical accounts of moral obligation, responsibility and blame were being distorted through the remodelling of these notions as involving a moral form of positive law, and so a moral version of a legal obligation or duty. The people doing the remodelling were theologians pretending to be philosophers, and importing into moral theory a moral version of the coercive authority involved in systems of positive law - a moral law-giver, God, who decreed moral obligations as directives and enforced those directives with threats of punishment. As a result moral obligation was being understood as a form of legal obligation, but applying to humanity in general. And like legal obligations, moral obligations would therefore be distorted into a set of directives on the *voluntary* - on actions and outcomes that are subject to the will, and that can be produced or prevented on

the basis of a decision to do so, as a means to complying with the directives or to avoiding sanctions.

Hume's target is not imaginary; it exists at least in modern English-language philosophy. There are indeed well-known modern philosophers who do want to allow obligation a place in morality on these terms – by seeking to understand obligation, responsibility and blame in morality in a *positivising* way, on the basis of what these philosophers conceive (accurately or not) to be their role in positive law. Anscombe's 'Modern moral philosophy' is one case, where the existence of moral obligation is said to depend on a moral lawgiver just as she takes legal obligation to depend on a positive lawgiver. But it is important that this theoretical urge is not limited to the religious. Instead of tying moral obligation to the existence of some suitably cosmic moral lawgiver, such philosophers may seek to tie moral obligation to human social pressure instead – some informal analogue of the punishments that can enforce legal obligations.

Thus Bernard Williams characterizes moral obligations as, properly understood, directing us to meet standards of voluntary behaviour that matter socially. Moral obligation

is grounded in the basic issue of what people should be able to rely on. People must rely as far as possible on not being killed or used as a resource, and on having some space and objects and relations with other people that they can count as their own. It also serves their interests if, to some extent at least, they can count on not being lied to. Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana 1985) p. 185

So the standards on voluntary action which protect these vital interests are properly classed as morally obligatory, and are reinforced by social pressure - the appropriateness of some kind of reinforcing pressure being, on this view, of the essence of obligation in all its forms. Our ethical training, which involves this pressure, is designed to leave us strongly motivated towards performing those actions which count as morally obligatory, and away from those which count as wrong and forbidden. We are left concerned to do what is obligatory and to avoid doing what is wrong, and then through this concern thoughts about moral obligation motivate us voluntarily to do what is obligatory as a means to complying with our moral obligations. So the pressure that comes with moral obligatoriness enforces and encourages a certain practical conclusion – in favour of some action as morally obligatory:

...moral obligation is expressed in one especially important kind of deliberative conclusion - a conclusion that is directed toward what to do...The fact that moral obligation is a kind of practical conclusion explains several of its features. An obligation applies to someone with respect to an action - it is an obligation to do something... *Ethics and the Limits of Philosophy* pp. 174-5

The central form of social pressure is blame, whether communicated from without, by others, or once one is trained socially, communicated from within, by oneself to oneself in self-blame and remorse. Blame, like obligation-enforcing pressure generally, is likewise directed at the voluntary:

...blame always tends to share the particularized, practical character of moral obligation in the technical sense. Its negative reaction is focused closely on an action or omission, and this is what is blamed. Moreover – although there are many inevitable anomalies in its actual working - the aspiration of blame is that it should apply only to the extent that the undesired outcome is the product of voluntary action on the particular occasion. *Ethics and the Limits of Philosophy* p. 193

(Williams once expressed to me in conversation the view that our understanding of moral obligation and responsibility and blame should be informed by the theory of legal responsibility proposed by Hart in his idea of sanction-backed law as ideally forming a fair choosing system. A system of pressure, in Williams's view, would be fair only if the sanction or pressure could, at least generally, be avoided at will or voluntarily, on the basis of a desire or decision to avoid it.)

On these positivising views, which can be found among those who espouse some form of virtue theory, there are two very different parts to morality. One part of morality is concerned with character and motivation, aspects of the self that are non-voluntary and not immediately subject to the will. This is the morality of the virtues and vices. Then there is the morality of obligation, which is very different, and which is centrally concerned with direction of the voluntary. These two parts to morality may be seen as having different foundations: some cultures might be thought to lack our morality of obligation entirely, or perhaps the morality of obligation that we presently entertain might under certain conditions be better dispensed with, as Anscombe suggested. And these distinct parts to morality may be seen as having different functions. One, the morality of virtue and vice, seems to be linked very closely to appraisal. The virtues are ways in which, through our character, we might be more or less morally admirable. Obligation on the other hand seems, like law, to be to do with direction – with getting people to do things or refrain from doing them.

Hume was not a virtue theorist of this kind. He thought there was no such division between distinct parts to morality because morality, properly understood, lacked a part directive of the voluntary that was interestingly distinct from the morality of virtue or vice. What distinguished breach of moral duty from a more general moral disadmirability – from the possession of a vice - was simply the degree of disadmirability involved.

A blemish, a fault, a vice, a crime; these expressions seem to denote different degrees of censure and disapprobation; which are, however, all of them, at the bottom, pretty nearly of the same kind or species. David Hume, *An Enquiry Concerning the Principles of Morals* appendix iv p. 322.

Moral duty moreover, in Hume's view, is a standard that immediately applies not to voluntary actions, but to non-voluntary states of motivation and character. One violates duty in morality as a parent, not just through failing to look after one's children, but by lacking affection for them. This, in Hume's view, is the fundamental moral wrong, at the point of motivation, of which the neglect of children at the point of the voluntary is but a symptom or effect.

We blame a father for neglecting his child. Why? because it shows a want of natural affection, which is the duty of every parent. Were not natural affection a duty, care

of children could not be a duty; and 'twere impossible we could have the duty in our eye in the attention we give to our offspring. David Hume, *A Treatise of Human Nature*, ed. P.H. Nidditch (Oxford: Clarendon Press 1978) p. 478

Hume is best understood by relating him to the natural law tradition of the early modern period. This is a tradition in both ethical and legal theory that dominated not only the Catholic world but much of the Protestant world as well. It provided the context of Hume's legal education. It involved distinctive approaches both to the theory of normativity and to the theory of law, and in ways that were importantly connected, and which centred on an account of obligation both in moral and in positive legal form. At the heart of the natural law tradition was a view that moral duty or obligation is a form of law, indeed it is one aspect of law in its primary, moral form. But this theory of a moral law did not at all involve the distortion of which Hume complained – of moral obligation into a set of directives on the voluntary.

John Gardner has criticized the natural law tradition for thinking of morality as itself ever taking the form of law:

Natural law, in the tradition of that name, is not the same thing as human law. It is the higher thing to which human law answers. We may regret that members of the tradition feel a need to present morality as a kind of law, which it is not. For a start, morality is not a system (and it is not made up of systems) and nor does it make claims, pursue aims, or have institutions or officials, all of which features are essential to the nature of law. Nevertheless, even as we resist the idea that morality is a kind of law, we should endorse the idea that morality is entirely natural. It binds us by our nature as human beings, while law binds us, to the extent that it does, only by the grace of morality. 'Nearly natural law' in John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press 2012) pp. 193-4

But what Gardner views as essential to law as such, was viewed by many within the natural law tradition as needed at most for law's positive version. For early modern natural law theory, especially in the scholastic form of that tradition, fully took on board the existence of moral obligation as something independent of such features of legal positivity as courts, legislators and officials and their aims - while believing in a distinctively moral law nonetheless. This is because that natural law tradition viewed law in its primary form not as a humanity-wide version of positive law, but as a distinctive kind of normativity, a *normativity of law*, that was united with at least well-functioning cases of positive legal obligation by involving a common form of normative binding – obligation in its moral form. And this theory of normativity came with a theory of human nature – and especially of what in human nature is of ethical significance. According to the tradition it is certain ethically highly significant capacities within human nature that allow ethical normativity to take, under certain conditions, the special form of law.

Normativity is the property, that moral or ethical standards clearly have, of making some sort of call on us to meet them. This can involve a directive aspect, and an appraisive, a division to which I shall return. In moral law, for the natural law tradition, moral normativity takes a distinctive form. Besides affording us moral rights, it imposes moral obligations. As imposing moral obligations it delivers a

call on us to respond that is distinctively demanding – that idea of normative demand is central to the very idea of moral obligation – and that addresses a special responsibility for how we act. So a normativity of law involves, in obligation, a set of demands on action that we are distinctively responsible for meeting. Contrast the importantly different form of normativity that is advisability, or the call to be sensible. This is not demanding in the same way – the sensible is not obligatory but simply what would be a good idea. And there is no suggestion that the sensible has to do with a special responsibility for action. Non-actions such as passive fears and desires can be sensible or foolish.

What does this demanding form of normativity, this normativity of law, involve, if it exists, and how does it relate to the human capacity for action? We shall see that the natural law answer to this contained two elements. First it involved a distinctive view of normativity in general, and one that put great emphasis on the appraisive side of morality. While the second element has to do with the human capacity that law governs and directs. This was not what Hume took law to direct – a capacity to do things voluntarily. Rather the capacity that law directs was, instead, the capacity for self-determination. Action matters to law, not because action is something we perform voluntarily, or on the basis of a will so to act, but because action is a locus of self-determination: we have, to a significant degree, a capacity to determine for ourselves what we do or refrain from doing, so that we can be distinctively, morally, responsible for what we do or omit doing.

Voluntariness is the capacity to do things on the basis of a pro attitude towards doing them, such as on the basis of a decision or desire to do them. Self-determination, by contrast, is the idea of capacity to determine for oneself what one does. The two kinds of capacity are not obviously the same. Both involve kinds of power – kinds of capacity to produce or determine outcomes. But the powers, and their bearers, are importantly different.

Voluntariness involves a power not immediately of oneself but of one's motivations. And it is very clearly a one-way power: that is, the power can exist as a power to determine but one outcome. As Locke long ago reminded us, to have the capacity to do A on the basis of deciding to do A is not necessarily to have the capacity voluntarily to refrain. To use Locke's example: I can possess and be exercising a power to stay in my room on the basis of wanting to; but, unbeknown to me, the door may be locked, and I altogether lack the power to leave should I so want.<sup>1</sup>

Self-determination, on the other hand, is, by its very nature, a power of the self. And it involves the self in a way somehow distinguished from other determinants. The thought is that in exercising self-determination, you somehow determine *for yourself* what you do or decide. What more specifically this idea of determining things for oneself involves is a central philosophical debate. It gives rise, in particular to the controversy between compatibilists and incompatibilists about the power. Is determining for oneself what one does consistent with what one does

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<sup>1</sup> John Locke, *An Essay Concerning Human Understanding*, ed. P.H. Nidditch (Oxford: Clarendon Press 1975) Book 2, chapter 21 'Of power', §10, p. 238.

also being determined by things and occurrences other than oneself? Moreover self-determination may or may not be a one-way power. Ordinary intuition seems to suggest that it is not one-way. The intuitive conception of self-determination (it might or might not prove to be the right one) is of an inherently multi-way power, *freedom*, conceived as by its very nature a power to determine more than one outcome, extending over alternatives or distinct options and leaving it up to you which of these alternatives you do. On this intuitive conception, to determine for oneself what one does is to possess and exercise control over which actions one performs.<sup>2</sup>

How far does self-determination matter ethically? It does not seem to be generally presupposed in ethics. Much in human life is of ethical significance apart from any capacity for self-determination we might possess. We can be criticized for deficiencies in our motivations, dispositions, beliefs, and indeed in our actions – but just for those defective occurrences, without the issue arising whether we had the capacity to determine or prevent those defective occurrences for ourselves. And the criticism can be obviously moral; the criticism can be for a failure to respect the interests of others or the justifications those interests provide. And such are the metaphysical problems raised by self-determination – some philosophers have thought the very idea of such a capacity incoherent – that many in the modern English-language ethical tradition have sought to exploit the availability of these forms of ethical criticism to deny that self-determination is of any ethical significance at all. There has been a project in ethical and legal theory of sidelining or bypassing the whole issue of self-determination as much as possible. One function of appeals to voluntariness in modern ethical and legal theory has undoubtedly been to pursue this project – to replace self-determination with something else.

But self-determination does look significant when we consider one ethical criticism in particular, moral blame. Moral blame might be taken to be no more than moral criticism – criticism for some moral defect of motivation, disposition or action. R.M. Adams understands it in just these terms

Perhaps for some people the word ‘blame’ has connotations that it does not have for me. To me, it seems strange to say that I do not blame someone though I think poorly of him, believing that his motives are thoroughly selfish. Intuitively speaking, I should have said that thinking poorly of a person in this way is a form of unspoken blame. R. M. Adams, ‘Involuntary sins’, *Philosophical Review*, 94 (1985) 1-35, p. 21.

But the selfishness of someone’s motivation does not of itself settle a further question, and one which is very plainly raised in blame – namely their responsibility for the motivation they possess. Someone’s selfishness or unreasonableness is one thing, and it clearly leaves them unadmirable just as selfish or unreasonable. It is still a further question whether their possession of such a character is their fault. There is no inconsistency at all in criticizing

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<sup>2</sup> For further examination of self-determination see my *The Ethics of Action*, volume I, *Self-Determination* (Oxford: Oxford University Press, forthcoming).



someone as having a selfish or unreasonable character, while wondering or doubting whether their possession of this character really is their fault.

In moral blame, the agent is not merely criticized for some fault in their action, attitude or character. Moral blame involves a further step: the fault is put down to them as their fault. This putting a fault down to someone as their fault is essential to the content of blame. And it is at this point that a power on the agent's part comes in. We are going beyond dispositions or states of the agent or occurrences in their life, and criticism of the agent just for these, such as for being selfish or unreasonable, and addressing the agent as having a further responsibility for these states and occurrences - for their selfishness or unreasonableness. And this brings in the agent not just as someone involved in these states or occurrences but as determinant of them. Why should these faults on the agent's part be their fault unless they had a power to determine their occurrence for themselves - or a power to prevent which, though possessed by the agent, they failed to exercise?

I noted that voluntariness has been used to bypass the whole issue of self-determination. And as we shall see it was so used, in his ethical and especially in his legal theory, by Thomas Hobbes, who did expressly deny the very possibility of self-determination in any form. But there has been a tradition, English language compatibilism in its classical form, that has sought to appeal to voluntariness not to bypass self-determination, but to explain it, in a way that promises to be metaphysically unproblematic. The agent is identified with certain occurrences in his life – his motivations: what they determine, the agent determines for himself. The concept of the power to determine for ourselves what we do is supposed to come to no more than that of the power to act as we will. But as a model of self-determination this proposal faces many difficulties.

First it threatens to make the truth of compatibilism rather trivial, following immediately from the very nature of self-determination. Determination by the self is reduced to determination by something other than the self – by an occurrence for which, if regress is to be avoided, the self is obviously not responsible. Now some form of compatibilism about self-determination may in the end prove true. But self-determination, as we ordinarily understand it, the idea of determining for oneself what one does, far from immediately delivering compatibilism, leaves incompatibilism a theoretical option that is at least very intelligible, and, for many, immediately appealing. The proposed conceptual reduction does nothing to explain why this should be.

Secondly, identifying self-determination with voluntariness does not do justice to moral blame as an ethically distinctive criticism. As we have already noted, ordinary ethical criticism criticizes the person by reference to some deficiency in a state or occurrence in the life of that person. We criticize someone as selfish or unreasonable because they hold or are disposed to hold attitudes that are selfish or unreasonable. The criticism is of defective states and of the person just as possessing those defective states. Blame, on the other hand, does not simply criticize someone for deficiencies in their attitudes or other states but puts their possession of such states down to them as their fault. This supposes something more - a problem not simply with events and states in the agent's life, but with the agent as determiner of those events and states. But explaining such determination

in terms of voluntariness removes this distinctive element. The supposed problem with the agent as determiner is turned back into a problem that primarily involves an event or state within their life, a motivation, and the agent as possessor of the event or state. What then is left of the idea that the agent is especially responsible, in a way that goes beyond ordinary ethical criticizability?

But there exists a third and, for our purposes, very significant problem. The power of self-determination, as we ordinarily understand it, immediately applies to and extends over the non-voluntary. For it applies, in particular, to decisions of the will. We determine for ourselves not only the actions we decide to perform, but our decisions to perform them. We do blame people and hold them directly morally responsible for their own decisions. Action, as what we can determine for ourselves, includes decisions to act, as well as the actions decided upon. But, as Hobbes pointed out, decisions are not themselves subject to the will:

I acknowledge this liberty, that I can do if I will, but to say, I can will if I will, I take to be an absurd speech. Hobbes *The Questions Concerning Liberty, Necessity and Chance* (London 1656) p. 29

Decisions to do A are not taken on the basis of decisions so to decide, in response to the desirability of deciding to do A. Decisions to do A are taken non-voluntarily, not in response to their own desirability but in response to the desirability of their objects – the voluntary actions A decided upon and the various reason-giving features that those voluntary actions have.

The natural law tradition built its theory of law not on the idea of a set of directives on the voluntary, but on the idea of a set of directives on our capacity for self-determination. And this affected not only the theory of moral law, but the theory of positive law as well. The scope of positive legal obligation was certainly limited – but not by a restriction to direction of the voluntary. That way of restricting law was to be the contribution of the natural law tradition's most radical critic – Thomas Hobbes.

So I shall now examine the general problems to which Hume and the natural lawyers gave very different answers, and then look at the natural law tradition more specifically. We shall see that Hume's own relation to that tradition was interestingly complex. In his general normative theory, and his emphasis on a theory of appraisal, he retained a fundamental element of the natural law tradition. But in his theory of law he had fully assimilated a furious rejection of that tradition along with the theory of self-determination linked to it – the rejection made by Hobbes.

## *2. Normativity - direction and appraisal*

We can distinguish two aspects to normativity. First, there is a directive function. Standards that are normative for us may possess a directive role. They may point us in a given direction or at least support us taking it; and are *strongly* directive when they point us in that direction and away from any other - when they not only support A, but oppose any contrary B. And as directive, normative standards

address a capacity to respond to that direction - to register or cognize the direction being given, and to respond to and follow that direction, or at least attempt to.

But secondly there is an appraisive aspect to normativity. People who meet or exceed standards that are normative may be praised or judged favourably for having done so; while those who breach or fail to meet the standards may be criticized or judged unfavourably for this failure. So besides any capacity we might have to register direction and respond to it, there are the capacities and activities that normative standards serve to appraise. Besides providing various kinds of direction, normative standards support various forms of appraisal; and there may be a variety in the kinds of normativity involved, corresponding to the different sorts of capacity and activity appraised.

These two aspects to normativity, the directive and the appraisive, are importantly distinct. Obviously, there can be standards of appraisal that apply to objects that cannot be directed. A vase's goodness has to do with its form and utility, not with its responsiveness to any form of direction. And even as humans the capacities for which we are appraised need not have much to do with our responsiveness to direction either. People are praised for being amusing or for being inventive. But neither talent need be easily subject to direction or much dependent on receptiveness to direction. At the same time standards may serve to give direction without supporting much by way of appraisal of those being directed: consider an instruction manual. Obviously one could use the manual as a basis for appraising people in terms of whether they followed it correctly or not. But this would be vastly peripheral to the main point of the manual - which is simply to provide a set of directions.

Ethical standards give direction. They guide us to do what is right and good, and to avoid what is wrong and bad. But they also serve as a very important basis of appraisal both of agents and of the actions they perform, and in a way that seems profoundly connected to direction. The term 'a good thing to do' may communicate a directive in support of performing the action in question. But the term 'good' also serves favorably to appraise the action, as well as to appraise the agent who performs it. If the action is a good thing to do, it may have been good of the agent to perform it. The combination of the directive and the appraisive is central to ethical standards as we ordinarily understand them. But how to relate the appraisive and directive in morality?

Is direction primary? In which case understanding ethical standards begins with the basic notion of a directive to do something; and appraisal is then explained in terms of the theory of direction: the capacity addressed by ethical standards is simply the capacity to receive and respond to ethical direction, and ethical appraisal of agents is then for whether they follow ethical directives or not. Or perhaps direction is not primary. Perhaps the appraisive side of ethical standards should be viewed as in certain respects importantly independent of and even explanatory of the directive. It may be that ethical appraisal is of capacities that go significantly beyond the capacity to respond to ethical direction. And these further capacities and their ethical significance may then inform and shape not only ethical appraisal but even the use of ethical terms to give direction.

In recent philosophy a very common assumption has been that quite generally, or at least in the moral sphere, normativity is identical with reason. Standards that are normative for us, it is assumed, are just standards that it is reasonable for us to meet. Indeed, the identity of normativity with reason is typically presented as if it were immediate or obvious:

Aspects of the world are normative in as much as they or their existence constitute reasons for persons, that is, grounds which make certain beliefs, moods, emotions, intentions, or actions appropriate or inappropriate.

'Explaining normativity: on rationality and the justification of reason' in Joseph Raz *Engaging Reason*, (Oxford: Oxford University Press, 1999) p. 66

If as philosophers we identify normativity with reason, then we may be inclined to concentrate our attention on the directive side of normative standards, as opposed to their agent-appraisive function. And indeed, it is direction and our capacity to respond to it that has dominated much recent philosophical discussion of normativity. This is because in relation to reason it seems to be agent-direction rather than agent-appraisal that takes central stage. Standards that are clearly and overtly of reason are indeed used to appraise agents; but it seems they are used to appraise agents just in terms of their responsiveness to rational direction. So in relation to reason, it seems to be the directive side of normativity that is primary, the appraisive side to be explained in terms of the directive.

Reason provides directions in the form of justifications. And rational justifications appear to be immediately justifications for or against forming and holding psychological attitudes, whether beliefs, or emotions, desires, intentions and various kinds of content-bearing motivations for action generally.<sup>3</sup> The justifications derive from possible objects of thought at which content-bearing attitudes might be directed, and from the various justification-providing properties those objects of thought might have – such as likelihood of truth in the case of belief, features that make the object desirable in the case of desires and other motivations. These justifications direct us towards the attitudes that they support, and away from the attitudes they oppose.

Favourable rational appraisal, or what is clearly and overtly such, makes use of terms such as 'reasonable', 'sensible', 'rational' and so forth; and unfavourable rational appraisal correspondingly uses terms such as 'foolish', 'less than sensible', 'unreasonable', 'irrational', and the like. It is very plausible that to be subject to appraisal in such terms at all – to count at all either as reasonable or as unreasonable – is always to have some capacity to cognize and respond to justifications and the direction that they provide, whether that capacity be exercised competently or incompetently. Lower animals, such as sharks and mice, which are clearly quite incapable of recognizing or responding to justifications,

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<sup>3</sup>As T.M. Scanlon puts it:

Judgment-sensitive attitudes constitute the class of things for which reasons in the standard normative sense can sensibly be asked for or offered. *What We Owe to Each Other* (Cambridge, Massachusetts: Harvard University Press 1998) p. 21

equally clearly fall outside the sphere of reason. In other words, they are a-rational, and no more capable of being genuinely foolish or unreasonable than they are capable of being sensible or reasonable. Lacking any capacity to respond to rational direction, such lower animals are beyond rational criticism or appraisal.

Not only does rational appraisal presuppose some capacity in the agent appraised to respond to rational direction. Rational appraisal seems also to be precisely for our responsiveness to such direction. The reasonable agent is just one who is responsive to rational direction – who is moved by justifications to form the attitudes justified; and an unreasonable agent is one who fails to respond properly to justifications – who despite having the general capacity to respond to reason, is unmoved by certain justifications, or who is moved instead to form those attitudes that the justifications oppose. It is tempting to think that the capacity addressed by standards of rational appraisal - the capacity for rationality or reasonableness – is just the capacity to respond to rational direction.

If we identify all normativity purely and simply with reason, then we may be tempted to adopt the position that I shall call *ethical rationalism*. This view does not simply regard ethical standards as reasons – a claim I should myself incline to support - but claims that the capacity addressed and governed by ethical standards is simply the general capacity to respond to rational direction.<sup>4</sup> According to the ethical rationalist, there is nothing more to ethical direction than general rational direction as applied to moral questions; and ethical appraisal is just of the capacity to respond to rational direction. Hence for the ethical rationalist it is the directive aspect of normativity that is fundamental to ethical theory.

But the identity of ethical normativity with reason is hardly trivial. For otherwise the ethical project of David Hume would be unintelligible – which it seems not to be. Hume certainly allows that ethical standards are normative for us; he supposes that ethical standards make a call on us to meet them, and support appraisal of us in terms of whether or not we meet the standards. But he denies that the call is that of reason, and that ethical appraisal is of us as reasonable or unreasonable.

Actions may be laudable or blameable; but they cannot be reasonable or unreasonable: Laudable or blameable, therefore, are not the same with reasonable or unreasonable. David Hume, *A Treatise of Human Nature* p. 458

Hume replaces the notion of reason in the theory of ethical normativity with that of *merit*. Merit is a particular form of personal goodness or admirability. It is admirability in relation to arts or skills – what Hume also refers to as talent. And for Hume moral admirability or virtue is just another form of talent. The supposed distinction between moral virtue and talent is, in Hume's view, wholly verbal.<sup>5</sup> The moral person is good at morals and so admirable or estimable in moral terms as,

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<sup>4</sup> Consider Scanlon's view of our responsibility for meeting ethical standards:

... "being responsible" is mainly a matter of the appropriateness of demanding reasons... *What We Owe to Each Other* p. 22

<sup>5</sup> See again Hume's *An Enquiry Concerning the Principles of Morals*, appendix iv, 'Of some verbal disputes'.

say, the able singer is good at singing and so estimable in terms of standards supplied by the art of singing.

The assimilation of virtue to talent, of moral admirability to a form of merit, tends to broaden the focus of a theory of ethical normativity from being narrowly on reason – which is what Hume intended. It also prevents the theory of ethical normativity from assuming a primacy of the directive over the appraisive. For to possess talent is obviously not in general a mode of being reasonable, just as to lack talent is not in general to be unreasonable. There are plenty of arts and skills that are not greatly dependent on, still less a function of our reason; consider, for example, a talent for song or ballet. And to be appraisable as good or bad in terms of an art or skill may or may not be to possess a capacity to respond to any particular form of direction, let alone to that provided by reason. Some talents may consist in a largely undirectable knack; and their exercise be largely an expression of that knack. Consider again wit, or the talent to amuse.

How far merit appraisal is of our capacity to respond to any form of direction depends on the nature of the art or skill in question, and of the kinds of capacity which practice of the art or skill involves. The immediate question raised by the appeal to merit is the question that ethical rationalism assumes from the very start to have been answered – what kinds of capacity are involved in morality, and what kind of practice is it that involves their exercise? Is more involved than just some general capacity to respond to rational direction? What is it that we are appraising when we appraise people ethically?

Hume needed the appeal to merit because he had already denied himself any recourse to reason. And that is because Hume's psychological theory committed him to a complete denial of the very possibility of any form of practical reason – of reason, that is, in a form governing what ethical standards centrally apply to, namely motivations and the actions which those motivations guide and explain. According to Hume, motivations are contentless feelings, akin to sensations of pain and pleasure.

When I am angry, I am actually possess with the passion, and in that emotion have no more a reference to any other object, than when I am thirsty, or sick, or more than five foot high. David Hume, *A Treatise of Human Nature* p. 415

Motivations, as contentless feelings, are not attitudes towards some object of thought in terms of which they might be justified. So motivations and the actions they explain are, in Hume's view, subject neither to rational direction nor to rational appraisal. Reason, to the extent that Hume admits the notion, is simply directive of belief.

Even if we do not find this wholesale denial of practical reason credible, there is still a question how far ethical normativity in particular is a normativity of reason. For the view that laudable and blameable are not the same as reasonable or unreasonable is clearly right in the general case. As we have noted there can be merit and demerit in relation to arts and skills that does not consist in reason or unreason. We certainly can praise and criticize people other than as reasonable or unreasonable – for forms of excellence or its lack that are not a matter of

rationality or reasonableness or its lack. And even in the ethical case it is not obvious that praise and criticism are as reasonable or unreasonable. For the most immediate terms of ethical appraisal are surely not 'reasonable' and 'unreasonable', still less 'sensible' and 'foolish', but, exactly as Hume supposed, 'good' and 'bad'. Immoral people are bad people – that seems obvious. It is not quite so obvious that they are unreasonable, still less that they are foolish; which is why establishing that immorality is contrary to reason has in the past seemed to many a substantial philosophical problem.

At the same time, Hume's scepticism about practical reason is based on a psychology that renders very problematic any satisfactory theory of ethical direction. Hume certainly did not deny that ethical standards serve to direct us. Such a denial would have been quite incredible. But the form this direction took is left rather mysterious. For Hume, as we have noted, motivations are not content-bearing attitudes formed in response to some object of thought – an object that might serve as justification for the attitudes. Motivations, for Hume, are just contentless feelings, that no are no more attitudes towards an object than is (say) a stab of pain; and, as we have seen, that is fundamental to his general scepticism about practical reason. But how is someone to be directed into or out of feeling a contentless sensation, such as a pain or pleasure? There is no satisfactory account of how mere feelings might be sensitive to normative direction.

But it is very important to our conception of ethical appraisal, whether as good or as bad, that it really is of agents who are capable of ethical direction. Just as to be unreasonable, as opposed to falling a-rationally outside the sphere of reason as might a shark or a mouse, an agent must have at least some capacity to respond to rational direction; so, too, to be genuinely immoral, it might be thought, an agent must have at least some capacity to understand and respond to ethical direction.

Badness in terms of many arts or skills – being bad at them – may, when sufficiently pronounced, detach the talentless from any capacity even to be directed towards excellence. But immorality seems different. To be morally very bad arguably always presupposes some capacity for being directed ethically - and at the very least therefore some cognitive grasp at least of the kinds of ethical standard being disregarded. If that capacity is absent then one is not immoral or bad in moral terms. One falls outside the class of those who are morally appraisable. A shark is not morally bad any more than a shark is foolish. Quite incapable of being directed ethically, sharks fall outside morality just as they fall outside reason.

We now have the basis of two contrary positions, occupying opposing extremes. The first is what I have called 'ethical rationalism'. This certainly provides a theory of ethical direction - one taken from a general theory of rational direction. Yet nothing more is said about moral practice and about moral appraisal in relation to that practice than that the capacity involved and appraised is the capacity to receive and respond to rational direction. But if nothing more than that were involved, why would ethical appraisal be immediately intelligible in terms that are not obviously and immediately those of rational appraisal? Why does ethical appraisal immediately involve terms familiar from general merit appraisal, which takes the form of appraisal of agents as good or bad - terms which leave it to some degree a question whether immorality is *ipso facto* a form of folly or unreason?

Our immediate understanding of immorality is as moral badness; and this leaves the relation between immorality and reason open to debate. For Hume was perfectly right to note that where a person or action is concerned, good is not the same as reasonable, nor is bad the same as unreasonable.

On the other extreme we have the reason-scepticism of Hume, which treats the appraisive function of ethical standards as primary. Ethical standards are introduced just as standards of merit or personal admirability. But the disavowal of any appeal to reason leaves a void as far as explaining ethical direction is concerned. Hume thought that he could accommodate the directiveness of ethical standards; and, in particular, that he could accommodate even the directiveness of obligation. But it is not clear that his appraisive model supplies, on its own, the required basis for explaining ethical direction.

We now have two distinct problems to consider. The first problem concerns law and the human capacities addressed by law. Does law govern and direct a capacity to do things voluntarily, on the basis of a will so to act? Or does law direct something that may be importantly very different – such as a capacity for self-determination? The second is about ethical normativity, and the relation between direction and appraisal. How far need a theory of ethical direction be informed by a theory of ethical appraisal and of various human capacities subject to that appraisal? The natural law tradition combined answers to both these problems – and combined them in a theory of moral obligation as involving a distinctive normativity of law.

### 3. *Obligation and direction*

Where obligation is concerned direction looms large. Suarez for example always uses the term *vis directiva* or *directive force* to refer to obligation, never to advice or counsel. Whatever might be true of other forms of normativity, perhaps to understand obligation we need a theory that appeals immediately to something distinctive at the level of direction.

There is, after all, the connection that we have already noted between obligation and positive law. Legislative authorities impose obligations – legal obligations; and it seems that they do this to direct us. Of course people can be appraised in terms of their responsiveness to such direction, in positive terms as law-abiding or in negative terms as, say, disobedient or criminal. But the primary function of legal obligations and the like, it is natural to think, is not to serve as standards of appraisal, but to guide populations subject to legal authority in one direction rather than another. In so far as the case of positive law is viewed as central to understanding moral obligation, so too direction will appear key to the normativity that moral obligation involves.

But there is a more fundamental consideration that would appeal even to natural lawyers suspicious of using legal positivity as a model for the moral case. Obligations do not merely propose an option or suggest it. They oppose others. They require that those subject to them do one thing rather than any other. It seems then that if moral obligation is a standard of reason, it is reason in a form that is



*strongly* directive, in the sense already defined. In communicating a moral obligation one is asserting normative support, in this case obligatoriness, for one option - that of doing A. But simultaneously, and this is essential to the specific direction being given to do A, the failure to do A is left subject to normative criticism also. The very support given for doing A implies corresponding normative opposition to the failure to do A. If doing A is obligatory, then to fail to do A is to do wrong. Perhaps then what distinguishes obligation is indeed its strong directiveness.

But strong directiveness does not in fact distinguish obligation from recommendation. For advice can be strongly directive in this way too. True, advice is recommendatory rather than demanding. But recommendations can be strongly directive when they assert that doing A is the only sensible thing to do. For then it follows that the failure to do A is subject to normative criticism too - as foolish or as less than sensible. Granted much advice need not be strongly directive: it can be asserted that it would be sensible enough or a good idea to do A, but without any implication that doing B instead might not be sensible too. But then the normativity of obligation can take a weakly directive form too, as permission. Doing A can be normatively supported as permissible, in that refraining from doing A is not obligatory; but doing B instead may be permissible too.

So the difference between obligation and advice is not that one form of normativity is strongly directive and the other is not, but that one normativity is directive in a demanding way, and the other is directive in a recommendatory or advisory way. There is an essential difference in their force that seems not to be a difference in the strength of their directiveness. Which suggests that we may not be able to explain the difference between the two forms of normativity just by appeal to normative direction.

What distinguishes the advisable and the obligatory? It appears that each can be as directive as the other. The difference lies in the terms in which equally strong direction is communicated in each case. And these are terms of appraisal - that are distinguished by the kind of criticism they make of agents for disregarding the relevant form of strong direction. Someone who disregards strong direction that comes with the force of advice is foolish. While someone who disregards strong direction that comes with the force of duty or obligation is subject to a different criticism. That person is a wrongdoer, and - if without excuse - is fully responsible and to blame for having done wrong. To explain the difference between obligation and advice we need then to turn to the theory of normative appraisal and to an account of the nature and significance of the capacities and activities subject to such appraisal - capacities that go beyond what mere direction and responsiveness to it involve. And this will be our view. But we should consider the appeal to normative direction further, for there is more to be said on its behalf.

It might be admitted that advisability and obligation can both be strongly directive, but that moral obligation is distinguished by something that reinforces direction at least at the motivational level and that Bernard Williams appealed to - the appropriateness of some kind of pressure. But what might the pressure involve?

Perhaps, it might be thought, the pressure just involves being held publicly to account.<sup>6</sup> The pressure is the public communication of criticism. But if the pressure involves nothing more than the public communication of criticism – holding someone to account for their normative failure – it is hard to distinguish breach of obligation from other cases of normative failure, such as folly.

For it might be thought equally appropriate, or even as much part of one's basic obligation to a neighbour or fellow human being, to bring their folly to their attention, at least where the folly might impose significant costs, if not on others even just on themselves. If someone is making a silly mistake that will profoundly damage themselves or others, under many circumstances it may be basic charity forcefully to point the matter out. It is the costs that follow, and the concern of those to any caring fellow human being, that are crucial, and not whether it is through some lack of sense or actual breach of obligation that those costs arise.

Moreover it is a presupposition of much communication that theoretical folly is perfectly the business of others publicly to correct. There is a practice of public accountability for sense or folly in expressed belief that is as central to our culture as public accountability in any other form. So appropriateness of public criticism may not straightforwardly distinguish obligation from other forms of normativity.

If it is claimed that breach of obligation peculiarly warrants not just expressed criticism, but the threat of genuine sanctions going beyond mere criticism - some unmistakable coercion - then again the distinctiveness of obligation is left arguable at best. For whatever might be true of legal obligatoriness, not all breach of moral obligation is obviously to be prevented by coercion. And perhaps if persistence in folly would do great damage, then for the good of others or even just of themselves the fool too can be forced to stop. At any rate the issue seems very debatable, and not immediately settled by the very distinction between obligatoriness and advisability.

It might be more promising to leave pressure and sanctions, and return to reason itself, and some other distinctive form that rational direction might take where obligation is concerned. This time, it is not the strength of the direction provided, or not that alone, but the way that opposing options are rationally opposed – in a way that involves a rational limitation to the agent's competence to assess and act on reasons. This is the now familiar idea of exclusionary reasons, associated often with forms of positive legal direction.<sup>7</sup> Could this explain the very idea of obligation itself?<sup>8</sup>

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<sup>6</sup> For a theory of obligation that appeals to public accountability, see Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Cambridge Massachusetts: Harvard University Press, 2006)

<sup>7</sup> For the theory of exclusionary reasons see Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990).

<sup>8</sup> For an attempt to explain moral obligation in terms of exclusionary reasons see John Gardner and Timothy Macklem's 'Reasons' in *The Oxford Handbook of Jurisprudence and Philosophy of Law* eds Jules Coleman and Scott Shapiro (Oxford: Oxford University Press 2002) pp. 440-475

There may be situations where we have reason to act, to use Joseph Raz's vivid phrase, other on the basis of the 'merits of the case'.<sup>9</sup> We may have a reason to do A that is also a reason to act other than on the basis of a balance of reasons – the merits of the case – for and against doing A. Those further reasons are not rationally outweighed but are rationally excluded. For example, we may be too tired to appraise the reasons for and against making a particular investment. Given our tiredness, we have reason to refrain from investing, but other than on the basis of any view of the merits of that investment. Or it may be the business of some coordinative authority to work out the balance of reasons for and against a particular course of action, and then to issue a legal directive. The directive gives each of us subject to the authority reason just to act as directed, other than on the basis of our own particular view of the merits of the action. As Raz observes, in such cases, intuitively, there is a potential tension in our view of the rationality of what the agent does – between a view based on the merits of the case, and a possibly conflicting view based on what the agent had reason to do, given their reason not to act on the basis of those merits. We may in some cases endorse the investment, but disapprove of the agent for making it when tired. Or we may endorse the agent's action because it conformed to an authority's direction, but criticize it as, considered just on its merits, the wrong course of action.<sup>10</sup>

So does moral obligation consist in, or at least imply, a distinctive form of rational direction – direction in exclusionary form? Or do we have here an important complexity in the theory of rational direction, that has to do with how rationally to accommodate limitations in individual rationality – limitations that might, for example, have to do with an individual's own incapacity, or with the need to coordinate action at the collective level; but which, like directive strength, has nothing specifically to do with the distinction between advisability and obligation?

As the case of the tired investor shows, a reason that excludes us from acting on the merits of the case need not impose an obligation. It could be merely foolish to make an investment when tired, not a breach of duty. But perhaps exclusionary force is still essential to moral obligation and a necessary constituent of it.

On this proposal, moral obligation and what gives rise to it always serves rationally to limit our competence to decide and act on the merits of a case. The obligation to perform an action always exists in potential tension with the merits of so acting. But that is not a plausible view of obligation in general. Take some vulnerable person's need and the duty on us to help them that that need may impose. The duty is not in tension with the merits of providing the help. The person's need demands that we meet it – but not by rationally detaching us from the merits of the case. Whether there is need, and whether the need is demanding – this is central to any case for and against providing help. Where providing help is concerned, the need and its demanding nature is a central feature of the case – a

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<sup>9</sup> See *Practical Reason and Norms* p. 37.

<sup>10</sup> For the intuitiveness of such a tension as key to identifying exclusionary reasons, see *Practical Reason and Norms* pp. 41-5.

basic aspect of the practical situation. To remove the need, or to remove it as something morally demanding, is not to remove some rational barrier to our acting on the case's merits. It is drastically to change the case.

How is the vulnerable person's need a basic feature of the case – and in a way that involves obligation? Key is something about which the appeal to exclusionary reasons, and ethical rationalism generally, is entirely silent. Ignoring the person's need would, given their vulnerability, be bad. One basic element in a balance of reasons can be the fact that to perform a particular action, or to omit it, would be morally very bad. This moral badness lies at the heart of our conception of the action, or its omission, as wrong and a breach of obligation. And this no more exists as a limitation in our competence to act on the merits of the case than does the fact that to perform an action, or to omit it, would be foolish.

This brings us back to what lies at the heart of our conception of moral obligation – a theory of ethical good and bad. To understand moral obligation as action-directive law we need to turn to a distinctive form of normative appraisal, as good and bad, and characterize the distinctively demanding direction provided by moral obligation in terms of that. And the kinds of capacity subject to appraisal to which such a theory may avert may go considerably beyond any capacity to respond to rational direction.

#### *4. The natural law tradition and the appeal to appraisal*

By the early modern period the natural law tradition had come to formulate a theory of moral law that was, in effect, a *via media* between ethical rationalism with its prioritisation of normative direction, and reason-scepticism with its exclusive attention to normative appraisal. As natural law, moral obligation provides a form of rational direction, and so addresses a capacity to respond to that direction. But the peculiarly demanding and action-specific direction that comes with obligation is explained in terms of a theory of ethical appraisal, and by reference to capacities subject to that appraisal that do indeed go beyond a simple capacity to respond to rational direction. The theory of normative direction is a theory of practical reason. But this theory is informed by a theory of normative appraisal that goes beyond a simple theory of rationality and reason. And this is a theory of appraisal elements of which eventually survived, detached from the general theory of rational direction, to form Hume's theory of merit.

Aquinas thought, just as did Hume, that moral obligation is linked to a negative form of moral appraisal. As for Hume, moral obligation is a standard to breach which is to be disadmirable or bad. Wrongdoing involves demerit. But, by contrast to Hume, the negative appraisal that relates to breach of moral obligation is not just ordinary negative evaluation, but takes a distinctive form - as moral blame.

Blame for doing wrong is distinctively condemnatory because, as we have already observed, it does not just detect a fault in the agent's action, but attributes that fault to the agent as their fault, condemning the agent himself. Aquinas understood this putting the fault in the agent down to them as their fault in evaluative terms. What the agent did was bad, and it was bad of them to do it. And Aquinas argued that

this condemnation of the agent as bad to have done what he did presupposes a central and distinguishing human capacity - the capacity for freedom:

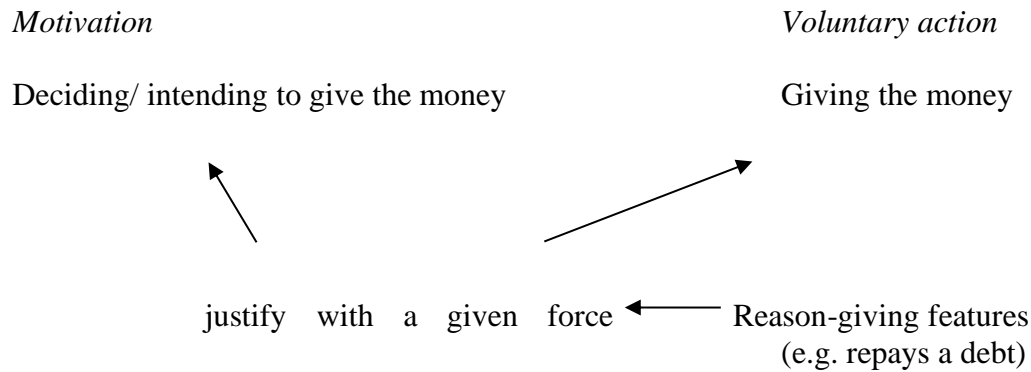
Hence a human action is worthy of praise or blame in so far as it is good or bad. For praise and blame is nothing other than for the goodness or badness of his action to be imputed to someone. Now an action is imputed to an agent when it is within his power, so that he has dominion over the act. But this is the case with all actions involving the will: for it is through the will that man has dominion over his action...Hence it follows that good or bad in actions of the will alone justifies praise and blame; for in such actions badness, fault and blame come to one and the same. Thomas Aquinas, *Summa theologiae*, 1, 2 q21 a 2, resp. (*Summa Theologiae*, Turin: Marietti, 1950), volume 2, p. 122

Hume did not recognize the capacity for freedom as of moral significance - which is why he took moral blame to be no different from other forms of negative evaluation. But there is another difference between Aquinas and Hume. For Aquinas, the negative evaluation involved in moral blame is also a form of rational criticism, and addresses a failure to follow a form of rational direction. This direction comes not as rational advice, but as rational demand. This is a distinctive form of direction that is identified by the special form of negative appraisal, moral blame, that is made of those who, without excuse, disregard the direction – who, without excuse, breach moral obligation.

Obligation and advice as modes of rational direction are distinguished at the level of appraisal - the way in which failure to follow the rational direction is negatively appraised. In the case of duty or obligation, the negative appraisal does not allege folly or lack of sense. That is the criticism that meets disregard of advice. Rather the criticism takes the form of moral blame. Moral obligation is that standard to breach which without excuse is to be morally blameworthy, not in the sense that blame should be communicated to you as a form of pressure, but in the sense that in your case the content of moral blame is true. And the message of moral blame is that the agent is a wrongdoer, and that in the absence of excuse the agent was therefore bad to have done what they did.

So the direction given by moral obligation is located by the scholastic tradition within a general framework of rational direction. But the peculiar kind of rational direction involved is then explained in terms of a theory of appraisal - appraisal that is not simply of the agent's capacity to respond to reason, but of how the agent exercises freedom.

The general theory of rational direction takes motivations, the agent's decisions and intentions, to be directed at objects of thought - objects that specify various voluntary actions between which the agent must decide, and which he will perform on the basis of deciding to perform them. Thus I might have to decide between keeping a sum of money or giving it to someone else. Each voluntary action may have various reason-giving features that rationally support its performance. Thus keeping the money allows me to spend it on myself. Giving it to another might repay a debt.



Besides these reason-giving features and the justification they provide, we need the idea of various kinds of directive force with which these features might support or justify both the voluntary actions that possess them and the motivations for performing these voluntary actions. The difference between advisability and obligatoriness is then explained as a difference in respect of justificatory force - a difference between recommendation and demand - that is unpacked, in turn, in terms of a theory of appraisal. To disregard the force of advice is to be criticized as foolish or less than sensible. To disregard the force of obligation is to act badly so that, where there is no excuse such as from ignorance or lack of control, it was bad of one so to act.

In the practical sphere the pair 'sensible' and 'foolish' shares with 'good' and 'bad' a set of common properties. Each pair similarly applies both to voluntary actions and to prior motivations to act, and in a way that both conveys direction, and that serves to appraise people for their response to such direction.

The terms 'sensible' or 'foolish' can be used of voluntary actions to pick them out as possessing features that support or oppose their performance and leave that performance advisable or inadvisable. But they also apply to the motivations to perform those voluntary actions; and then they track the application to those motivations of the justificatory force generated by their voluntary objects. If it is sensible to give the money, then to intend or to be motivated to give the money is sensible too. And correspondingly if it is foolish to hand the money over, then it is foolish to intend to hand the money over. Finally those terms 'sensible' and 'foolish' serve to appraise agents for their responsiveness to the force of the justification provided, both for voluntary actions and the prior motivations to perform them. Agents who are sensible act and are motivated to act in ways that are sensible.

But the same pattern applies to 'morally good' and 'morally bad'. The terms can similarly be used to pick out voluntary actions as possessing features that support or oppose their performance. And just as with 'sensible' this support applies also to the motivations to perform those actions. Giving the money might be morally good because it helps another or fulfills a promise. And if it is good to give the money, it is correspondingly good to intend or be motivated to give the money; if morally bad or wrong to give the money, then it is equally bad or wrong to intend to give the money. And then 'good' and 'bad' also serve to appraise agents for their responsiveness, through their capacity for freedom, to this normative support

or lack of it for various voluntary actions and the motivations to perform them. While, by parallel contrast to 'sensible/foolish' and 'good/bad', 'advisable' and 'obligatory' apply not to agents themselves, but only to motivations and actions, to pick them out as justified with the relevant kind of force.

So 'morally good' and 'morally bad' are used in the same way as 'sensible' and 'foolish' in relation to objects of thought, to communicate the support given by them to psychological attitudes. And they are also used in the same way in arguments to support the formation of motivations directed at those objects of thought. And both 'bad/wrong' and 'foolish' are used to convey strong direction in a way that we immediately treat and understand as equally argumentatively conclusive in each case. To point out that doing A would be foolish is plainly not a merely preliminary step in a rational argument against doing A that would need to be completed by somehow showing that (therefore) it would be wrong or bad of one to do A. But nor is pointing out that it would be bad or wrong of one to do A merely the first step in a rational argument against doing A that would need to be completed by somehow showing that (therefore) it would be foolish of one to do A. Once either the folly or the wrongness and badness of an action has been established, each is on its own enough to convey an argumentative and rational rejection of the action as an option. Advisability and obligatoriness is each a genuine force of reason, and neither needs to be buttressed by the other.

There is in late scholasticism a systematic project of using this appraisal-based account of moral obligation and the rational direction it provides not only to identify obligation as constituting a natural form of law - a set of directives that are demanding, and that address a special responsibility for how we act - but sharply to distinguish this from the structures of legislation and sanction so characteristic of positive law. In particular it became increasingly clear to many in this tradition that appeal to divine or other legislation had no place in the theory of law as such. Thus take John Punch, an early seventeenth century Scotist:

Since even if God never gave any command about the matter, it would still be bad to kill a human being without reason, to show contempt for one's superiors, or to expose oneself to clear danger of death, therefore even if natural law did not do so by way of any particular commandment given by God, natural law would still forbid such actions. ... for by the natural law we understand that on account of which some action is good or bad independently of any positive law, and so insofar as there would still be very many good and bad actions even if there were no divine commands, there would still be a natural law even in the absence of such commands. John Punch, commentary on Scotus on the decalogue, *distinctio* 37 in Duns Scotus, *Opera Omnia*, volume 7, ed. Luke Wadding (Lyons, 1639), pp. 857-77.

Those who did still wish to hold on to a tie of natural law to divine legislation had a fight on their hands. They could not win the victory cheaply, just by claiming that law could not exist without legislators, officials and their aims. For they knew what was at issue were the conditions for a distinctively demanding kind of normativity, linked to appraisal, that addressed a special responsibility we have for how we act. So they had to struggle to make their case for divine legislation within the framework of that model. Thus Suarez concedes part of Punch's case - the independence from divine legislation of moral good and bad. But he insists

that for law proper you need a special sort of badness – that involved in disregard of divine commands, that he calls *praevaricatio* or *transgression*:

I therefore reply that in a human action there is indeed some goodness or badness by virtue of the object positively aimed at, in as much as that object is compatible or incompatible with right reason, so that by right reason the action can be counted as bad, and a fault and blameworthy in that regard, apart from any relation to law proper. But beyond this a human action has a *particular character of being good or bad* in relation to God, when we add divine law forbidding or decreeing, and in respect of that the human action counts in a particular way as a fault or blameworthy in relation to God by virtue of its breaching of the genuine law of God himself, which *particular badness Paul seems to have referred to by the name of transgression* when he said, 'Where there is not law, neither is there any transgression'. Francisco Suarez, *De legibus ac legislatore deo*, in *Opera Omnia*, volume 5, ed. Charles Berton (Paris: Louis Vives 1856) p. 110 (my emphases)

Whether or not Suarez's position is convincing, it is clear that directiveness that is properly law-involving is being characterized by him in terms of a 'particular badness'. The peculiarly demanding direction that constitutes moral obligation as moral law is being characterised in terms of a distinctive form of moral appraisal.

I have noted that the natural law tradition gives ethical significance to capacities distinct from the simple capacity to respond to reason, and that one such capacity is a capacity or power of self-determination. But the capacity for self-determination is not the only such capacity at issue. For Hume's interest in personal admirability or merit had an important antecedent. In the natural law tradition also, the theory of evaluation central to understanding moral obligation was part of a wider theory of personal admirability that included talent as well as virtue.

And such a theory seems to be required to the extent that there do turn out to be parallels between our use of 'good' and 'bad' in the evaluation of people both morally and also in relation to arts and skills. A theory of all this will be a general theory of (broadly) ethical good and bad. A full account of normativity in this area will develop Hume's fascinating and often disregarded project of examining the affinities, as well as the differences, between virtue and talent – between personal admirability in its moral and its non-moral forms, including forms not interestingly a function of the agent's reasonableness.<sup>11</sup>

##### 5. Thomas Hobbes and law as directive of the voluntary

Law, for the natural law tradition, is not taken to be exclusively directive of the voluntary. The primary form of law is a kind of justificatory force – a force that is understood immediately to direct, like other forms of directive force within practical reason, non-voluntary motivation and not voluntary action alone. The force of demand moves us by leaving it correspondingly obligatory to decide on

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<sup>11</sup> For such an account, as part of a wider account of normativity in general, see my *The Ethics of Action*, volume 2, *Normativity* (Oxford: Oxford University Press, forthcoming).



those voluntary actions that are obligatory, just as the force of advice moves us by making it correspondingly advisable to decide on those voluntary actions that are advisable.<sup>12</sup> The force of moral obligation is tied to directing action – but as a locus of self-determination, not of voluntariness.

But did not even the natural lawyers still see one, albeit for them secondary, form of obligation as tied to direction of the voluntary? This is obligation under positive law or legal obligation. For the following is a very inviting natural law model of the relation between moral obligatoriness and legal obligatoriness. Legal authorities serve to extend and render more determinate the requirements of the natural law, and especially the moral obligation or demand that we cooperate together for the good of a community. So legal authorities facilitate this by imposing legally obligatory directives to act together in specific ways, and these directives, when authority is doing its job, give us reason to act in those specific ways, and do so with the force of moral obligation. So legal obligatoriness will generally turn up where the reason-giving features we have so far been considering turn up – as a feature of actions that we might generally perform or refrain from voluntarily, on the basis of a decision so to do, and as a means to complying with legal obligations. Legal obligatoriness, then, is properly a reason-giving feature of the voluntary. And its function is to generate moral obligatoriness as a justificatory force – a force that applies both to the voluntary actions with that feature, and to the non-voluntary motivations so to act.

Now this view does very plausibly cover many cases of legal obligation. Many legal obligations do fulfil just this action-coordinative function, facilitating morally demanded cooperation at the point of the voluntary. They direct us to some specific mode of cooperation, thereby obligating us morally to act together in that specific way - just because we have been so directed. But many early modern natural lawyers did not see positive legal directives as functioning solely to direct the voluntary. And this involved a feature of the natural law tradition to which Thomas Hobbes was deeply, and very influentially opposed. This was the tradition's conception of political authority and the state - as not just a coordinator of human action, but a coercive teacher too. It was Hobbes's opposition to this idea of the state as coercive teacher that led him very aggressively to tie positive law to the direction of the voluntary.

Central to Hobbes's attack on the natural law tradition is an attack on the human capacity that lay at its heart – the capacity for self-determination. Hobbes was not even a compatibilist about this capacity. He thought that the very idea of people determining for themselves what they do was incoherent. He had a range of very interesting objections to the idea, but one especially vivid and (on the surface) simple one was that the very idea of self-determination was viciously regressive:

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<sup>12</sup> Thus Suarez on how moral obligations lie on the will, and not just on voluntary action:

So teaches Saint Thomas and on this point everyone. And the point is established because the law of nature is placed in reason, and immediately directs and governs the will. So it is on the will first and foremost that as it were by its very nature the obligation of the law is imposed. So the law is not kept unless through the exercise of the will. *De legibus ac legislatore deo* in *Opera Omnia*, volume 5, p. 123.

And if a man determine himself, the question will still remain what determined him to determine himself in that manner. Thomas Hobbes, *The Questions Concerning Liberty, Necessity and Chance*, (London 1656) p. 26.

Our actions were determined not by ourselves but by prior passions as motions in matter which were not themselves our doing. Action was restricted to voluntariness, but voluntariness conceived (as it had to be if Hobbes's identification of action with voluntariness were not itself to prove viciously regressive) as an effect of motivation in passive form – of motivation as passion, not some inner action of decision.

Law could no longer exist primarily as a distinctive form of normativity directive of a capacity for self-determination. How then would it exist? Clearly, if law is to remain directive exclusively of our capacity for action, and action is to be identified exclusively with voluntariness, then we immediately move into a theory of law as serving to direct the voluntary. If it is to be agency-specific, obligatoriness can no longer be a justificatory force generated by features of the voluntary – a justificatory force that like any such would apply to non-voluntary motivation. For non-voluntary motivation, on Hobbes's view, is now uniformly passive. Obligatoriness must instead be restricted to occurring as a reason-giving feature of the voluntary – like many cases at least of legal obligatoriness under positive law.

But Hobbes did not immediately move in this direction. For Hobbes did retain something like a conception of law as a justificatory force that addresses and binds non-voluntary motivation and not just voluntary action. He just gave up the tie to the direction of action. Where the fundamental form of law is concerned, that Hobbes terms the laws of nature, and which precedes the legislation of any earthly sovereign, law continues to exist just as a general form of rational direction at the level of the practical, applying like any such to non-voluntary motivations of the will, though now conceived simply as passive desire.

The Laws of Nature oblige *in foro interno*; that is to say, they bind to a desire they should take place: but *in foro externo*; that is, to putting them in act, not always. Hobbes, *Leviathan*, chapter 15 'Of other Lawes of Nature', volume 2, ed. Noel Malcolm (Oxford: Clarendon Press 2012) p. 240.

So desire can be bound by the laws of nature. Though, Hobbes observes, these laws of nature count as law, properly speaking, rather than general theorems of reason, only as commanded by a law-giver who exists prior to any earthly sovereign - God.<sup>13</sup> Indeed it is easy to see why Hobbes so readily brings God into the picture at this point. Without God there would indeed be nothing much to distinguish these 'laws' of nature from general theorems of reason or advice, albeit very serious and forceful advice about the preservation of one's life – advice that only a fool would disregard.

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<sup>13</sup> See Hobbes, *Leviathan* chapter 15 'Of other Lawes of Nature', volume 2, ed. Noel Malcolm (Oxford: Clarendon Press 2012) p.242.

When we consider the legislation of human authorities, however, Hobbes takes quite a different attitude, and one which he repeatedly deploys in relation to one object of legal direction in particular – the direction of belief. And here it does become important to Hobbes that belief is not only inner, but also non-voluntary – and so for that reason something that cannot be subject to human legal direction:

As for the inward *thought*, and *beleef* of men, which humane Governours can take no notice of, (for God onely knoweth the heart) they are not voluntary, nor the effect of the laws, but of the unrevealed will, and of the power of God; and consequently fall not under obligation. Hobbes, *Leviathan* chapter 40 ‘Of the Rights of the Kingdome of God’, volume 3, ed. Noel Malcolm (Oxford: Clarendon Press 2012), p. 738.

Hobbes was attacking a widely held view within the natural law tradition – that one proper object of human legal direction was belief. How could belief be a matter of legal direction?

We find an especially worked out theory of belief and its legal direction in one of Hobbes’s key ideological opponents – Francisco Suarez. Suarez insists that considered just as an inner mental state belief is indeed not the concern of human law.<sup>14</sup> Beliefs that are never expressed, which remain entirely shut up in the mind of the believer, are not the business of any human court. But beliefs, especially about religion and the ethical, are very apt to be expressed; and as expressed, and as concerned with God or the nature of other humans, they could, in his view, greatly affect the good of a human community. Here it would not be the mere occurrence of some speech that mattered; but the belief that the speech revealed. Moreover, motivations for voluntary action were not the only case where our capacity for self-determination might apply to an attitude that was non-voluntary. Just as we can determine for ourselves what decisions to act we take so, under certain conditions, we can determine for ourselves what beliefs we hold. In those cases we can be just as distinctively and morally responsible for what we believe as for what voluntary actions we decide to perform.

The ethical importance of recognizing and believing certain truths, and our capacity, in principle, to determine for ourselves whether we do so, could leave it morally obligatory on us to hold the relevant beliefs. And because our holding these beliefs could matter to the good of the community, our moral responsibility for such beliefs could fairly be enforced, through human legal directives backed by punishments – punishments that, because of our moral responsibility, could be deserved. Positive law could be directive of belief.<sup>15</sup> This theory was not restricted to a model of the Church as a coercive authority, though it was certainly applied in that case, to explain the canon law on heresy; but, in general outline, was applied to the authority of the state as well, and in relation to more general forms of belief relevant to the good of a political community.

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<sup>14</sup> On this point see Suarez *De fide*, in *Opera Omnia*, volume 12, p. 535

<sup>15</sup> Suarez, *De fide*, in *Opera Omnia*, volume 12, pp. 514-15

But this theory was also accompanied by a very clear theory of a personal right to liberty, based on the same capacity for self-determination that, in the view of the natural lawyers, also enabled us to be bound by obligatory law. The normativity of law addressed our capacity to determine for ourselves what we do not only by imposing obligations on us, but also by giving us a right to liberty understood as a right to determine things for ourselves – a right to exercise our capacity for self-determination.<sup>16</sup> This set normative limits to the coercive activities of human authorities. We had a right not to be subjected to coercive legal direction save by authorities whose jurisdiction extended to the relevant kind of activity, and under whose jurisdiction we ourselves fell. Authorities were under obligation not to attempt legal direction beyond those limits. So though the coercive direction of belief was allowed for as a just and intelligible use of human law, there were strict limits too. For example, in Suarez's opinion states could not on their own authority impose obligations on religious belief, at least where supernatural or revealed religion was concerned, since their jurisdiction was not concerned with the human good at that level, revealed religious truth going beyond the natural happiness and justice that was the proper concern of the state.<sup>17</sup>

Hobbes was in a more difficult position. For his denial of any human capacity for self-determination left him without that basis for a right to liberty. And he did not satisfactorily replace it with another, certainly not enough to generate a right to liberty that would obligate the state to its subjects. For Hobbes liberty is what is left us by the obligations of law in its various forms - by the laws of nature and then by the decrees of earthly sovereigns. The right to liberty survives, but as the space left obligation-imposing law. Supposing then, to take a case that would have immediately interested Hobbes's seventeenth century readers, that the ruler of a state were to entertain directing his subjects to believe some debatable form of religion: what could block these subjects from being bound by such a directive? Not, in Hobbes's system, any obligation on the ruler to respect their liberty. Nor was Hobbes willing to make an issue of the actual truth of the religion in question.

Hobbes turns elsewhere – to a theory of the directiveness of law, at least in its coercive and humanly imposed form. Law cannot impose obligations on belief because belief cannot be produced through legal direction. He appeals to the only way, in his view, that law, backed by the threat of coercive sanctions, can actually get people to comply. And so we have a repeated appeal by him to two features of religious belief that supposedly make it impossible legally to coerce. First Hobbes appeals to the supposed privacy of belief. The thought is simple. When faced by the sovereign and his inquisitors, we can always conceal what we truly believe, so that any law on belief is unenforceable on that account. Then, secondly, belief is non-voluntary. Beliefs cannot be adopted or abandoned at will, just in order to

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<sup>16</sup> Suarez *De legibus ac deo legislatore* in *Opera Omnia*, volume 5, p. 141. For further discussion of this linking of the right to liberty to the capacity for self-determination, and the implications for the right to liberty of Hobbes's denial of the very possibility of self-determination, see my 'Thomas Hobbes and the ethics of freedom' in *Inquiry*, 54 (2011) 541-63; and my 'Hobbes on liberty, action and free will' in *The Oxford Handbook of Hobbes* eds. Kinch Hoekstra and Al Martinich (Oxford: Oxford University Press, forthcoming).

<sup>17</sup> Suarez, *Defensio fidei catholicae* in *Opera Omnia*, volume 24, pp. 320-21

comply with the law and avoid sanctions imposed on illegal belief. But that is the only way coercive law can work – as something that we can respond to voluntarily, on the basis of a decision to do so, just as a means to conforming to the law. And so we return to the view of legal obligation with which we began – the view, which Hume espoused after Hobbes, of legal obligations as directives on the voluntary.

Hobbes won a victory here, at least for many in the English-language ethical tradition, where it is often taken as just obvious that belief cannot be subject to legal direction or legally coerced, because belief is not voluntary or subject to the will. As Bernard Williams noted, there is a ‘very important argument in favour of religious toleration’ namely that the coercion of belief is ‘essentially fruitless, because the forces of the state cannot reach a person’s centre of conviction’.<sup>18</sup>

But the Hobbesean view does not adequately address the theory of the legal regulation of belief we find in Suarez. In the first place, for Suarez religious and ethical belief generally is not interestingly private. Such belief is to a great degree, and inevitably, a public phenomenon; it is of great significance in our social relations, and is very liable sooner or later to be expressed. That is one reason why what people believe can be of concern to a wider community. And on this issue Suarez is obviously correct. Hobbes imagines a religion happily surviving prolonged state hostility as a purely mental phenomenon, wholly locked up inside the head of each individual believer, and never, in any way, expressed. This fantasy is no more than studied naïveté on Hobbes’s part.

But more crucially, the non-voluntariness of belief is just not to the point. For the function of sanction-backed legal coercion is not to motivate people to form or hold beliefs voluntarily, simply on the basis of a will or motivation to avoid sanctions. Rather the function of the legal direction and the threatened sanctions that come with it is to direct the believer’s attention to a (supposedly) sound epistemic case, based on evidence or else on authoritative testimony, for the obligatory opinion - a case that the believer had hitherto been culpably ignoring - so that the required belief is then formed in response to that epistemic case. Consider Suarez’s model of the use of state law to enforce something that, being of his time, he thought quite obviously vital to the good of a political community – not some form of revealed religion, but natural religion, or a shared rational monotheism :

Even a pagan—that is, a non-Christian—king, if he has a knowledge of the true God, may coerce his own subjects into believing that truth, *either by their own reasoning if they are educated, or by putting human faith in more learned men, if they are ignorant*; and consequently, he may compel those same subjects to cease from the worship of idols and from similar superstitions contrary to natural reason. Suarez *De fide in Opera Omnia*, volume 12, p.451 (my emphases)

The punitive imposition of sanctions does not presuppose that belief can be formed at will, irrespective of testimony or evidence. Belief is importantly non-voluntary because it is directed at its object as true, and so is dependent on truth-related

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<sup>18</sup> See Bernard Williams ‘Toleration, a political or moral question’ in his collection *In the Beginning was the Deed* ed. G. Hawthorn, (Princeton: Princeton University Press 2005) at pp. 133-4.

testimony or evidence. What is presupposed, instead, in Suarez's view, is some capacity to determine for oneself whether one responds to that evidence. It is that power of self-determination that enables the believer fairly to be bound by obligations, positive as well as moral, on belief, and to be liable to just punishment for breach of those obligations.

Behind this conception of state or positive law was a view of the educative function of law that was very old. We find it, for example, in book 10 of Aristotle's *Nicomachean Ethics*. The state's legislation, including its imposition of punitively enforced legal obligations, is certainly concerned with something that looms large in modern legal theory – mutually advantageous coordination at the point of the voluntary. The tradition had no interest in denying this. But state legislation is also concerned with education – with inducing change in the direction of ethically important truth at the level of citizens' belief. The state is a coercive teacher.

The function of sanction-backed legal obligations, on this natural law tradition, is not restricted to giving justifications, perhaps with the force of moral obligation, for doing something at the point of the voluntary. Sometimes legal obligations serve to direct attention to prior justifications for the non-voluntary – such as those arising for belief out of the truth of a socially and morally important claim, whether about God or about the nature and status of other humans; and in a case where these justifications, though dependent on truth, as relating to that truth also involve some good that binds us with the force of moral obligation, such as that we all believe this important truth on this ethically vital matter.

Despite modern protests that the coercion of belief is 'essentially fruitless' the coercive structures of early modern states could be rather effective at changing what large numbers of people believed. Indeed, modern states do still appear to go to some length to influence belief, not just by various forms of positive recognition and endorsement, but also by the threat and application of sanctions – though in our culture the desired beliefs are generally produced through sanction-backed directives on other things. The legal prohibitions and the sanctions typically now lie not on beliefs themselves, but on their subject matter – on actions that the state very much wishes us to come to believe are wrong. Nevertheless, this difference aside, it does seem that penal coercion and its threat in the criminal law are still aimed at influencing belief, in just the way that so interested Joel Feinberg: which is to engage attention and help communicate a message that, in many cases, there may anyway be prior grounds to believe – that the action threatened by punishment really would be seriously wrong.<sup>19</sup> One function of sanction-backed criminal law may indeed be to drive home an argument and change what people actually believe. The state may indeed be a coercive teacher. It is not surprising then that a tradition of ethical thought that took deeply seriously coercive authority's role as a teacher, and that saw law and obligation as centred on the direction, and the appraisal, of self-determination with respect to non-voluntary attitudes, should

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<sup>19</sup> See Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press 1970).

have viewed the non-voluntariness of belief as no practical obstacle at all to its legal direction.

Thomas Pink