



Law as a Leap of Faith (2000)

by John Gardner
Professor of Jurisprudence
University of Oxford
<http://users.ox.ac.uk/~lawf0081>

This is an author eprint, which may not incorporate final edits.
The definitive version of the paper is published in

P Oliver, S Douglas-Scott and V Tadros (eds), *Faith in Law*
(Oxford: Hart Publishing 2000)
© John Gardner 2000

The typescript appears here with the consent of the publisher,
under the publisher's eprint policy, or by author's reserved rights.
Please do not quote from or cite to this eprint. Always use the
definitive version for quotation and citation.

Law as a Leap of Faith

JOHN GARDNER*

1. *The Socratic challenge*

Euthyphro: I would say that what all the gods love is holy ...

Socrates: The point which I want to resolve first is whether the holy is beloved of the gods because it is holy, or holy because it is beloved of the gods.¹

Socrates' challenge is not merely diverting sophistry. It seriously threatens the fabric of theism. The threat becomes particularly clear if we translate the underlying puzzle into the Judaeo-Christian idiom of a single all-powerful and all-knowing God.² On the one hand, we are told that whatever this God commands is the right thing to do by virtue of God's commanding it. This is an aspect of God's omnipotence. On the other hand, we are reassured that whatever this God commands is commanded because it is the right thing to do. That is an aspect of God's omniscience. But these propositions about God and His commands cannot both be true at once. Either this God makes a

* Reader in Legal Philosophy, King's College London

¹ Plato, 'Euthyphro' in Benjamin Jowett's edition of the *Dialogues* (Oxford 1871), vol. II, at 84.

² For simplicity I am adopting all the trappings of this tradition here, notably the capitalisation of God and the use of male pronouns to identify Him.

constitutive³ difference to what we should do or He does not. So which is it to be?

For obvious reasons, neither alternative is wholly appetising for theists. Either God's commands are supposed to make it right to do what would, apart from God's commands, be wrong, in which case we may ask why we are supposed to give God's commands any rational credence, or else God's commands only make it right to do what is right anyway, in which case God seems to be condemned to rational redundancy. Faced with these apparent alternatives, Christian theologians have gone to extreme lengths to shake off the Socratic puzzle. Kierkegaard, for example, began boldly enough by grasping the first horn of the dilemma, holding that God's commands can make it right to do what would, apart from those commands, be wrong. The crux of the matter, he explained in *Fear and Trembling*, lies in understanding the difference between two points of view. For Abraham to kill Isaac was wrong from the *moral* point of view, but nevertheless right from the *religious* point of view, in virtue of the fact that God commanded it.⁴ When the question arises of whether someone should take the religious or the moral point of

³ I will ignore the possibility that God makes a merely *epistemic* difference to our reasoning, i.e. merely assists our *knowledge* of what we should do without affecting what we should do. I ignore this possibility because (a) it eliminates God's practical authority (in favour of purely theoretical authority) and therefore makes a mockery of God's supposed omnipotence; (b) it takes all the force out of the Biblical example of Abraham and Isaac (discussed below) which illustrates nothing worth dwelling on unless it illustrates that God can command what would be, apart from his commands, truly abhorrent actions; and (c) there is no obvious reason to believe that a believer's knowledge of God's commands is generally more reliable or less vague than his or her knowledge of what he or she ought to do apart from God's commands, and so the general case for treating God as a theoretical authority in such matters is hard to grasp. On the distinction between practical and theoretical authority, see Joseph Raz, *The Morality of Freedom* (Oxford 1986), 00.

⁴ *Fear and Trembling* (trans. Hong & Hong, Princeton 1983), e.g. 55 and 68-9.

view, however, that question is not open to rational deliberation. Within each point of view there are reasons, but there are no further independent reasons to take one or the other point of view. It is a non-rational although (and thus?) courageous leap which brings a person to one or the other, and from the one to the other.⁵ Neither position is absolute except in its own relative eyes, and neither therefore answers absolutely to the other. Nevertheless those who make the courageous leap to occupy the religious point of view, albeit without independent reason to do so, now find themselves paradoxically within grasping distance of an absolute or non-relative position. This absolute position, occupied only by those whom Kierkegaard dubs 'Knights of Faith', is a position in which 'my contrast to [finite, moral] existence constantly expresses itself as the most beautiful and secure harmony with it.'⁶ For the Knight of Faith, in other words, the rational struggle between the moral and the religious is extinguished, nay *transcended*, in the condition of divine grace.

The Knight has felt the pain of renouncing everything [for the sake of religion], even the most precious thing in the world, and yet the finite [mere morality] tastes just as good to him as to one who never came to know anything higher ... he has this security that makes him delight in it as if finitude were the surest thing of all. And yet, yet, the whole earthly figure he presents is a new creation ... He resigned everything infinitely and then he grasped everything again by virtue of the absurd.⁷

The promise here seems to be that the dilemma to which Socrates draws attention is dissolved if and only if one can reach that true oneness with God, which, as the ultimate absurdity of life, no investigation that would satisfy Socrates or any mere philosopher can reveal or explain or accept. Reasoned argument

⁵ Ibid, 48-9.

⁶ Ibid, 50.

⁷ Ibid, 40.

is useless in the sight of God; only faith will do. And where reason ends and faith begins even the truly contradictory can be the case: as a Knight of Faith, Abraham can fully reconcile the rightness of his act with its wrongness, without sinking back into relativity. There is no more struggle between competing points of view. The very categories of right and wrong are transcended in the absoluteness of God. It is probably already clear from the difficulty I am having in expressing this idea that I find it painfully obscure. But then again, approaching the issue by reasoned argument, presumably I am *bound* to find it painfully obscure. That is Kierkegaard's whole point. The obscurity of it all to me only goes to show that I am no Knight of Faith, for Knights of Faith glory in the absurd rather than shrinking from it in Socratic bafflement and disdain.

On his way to this extraordinary dissolution of the Socratic dilemma, Kierkegaard quickly dismisses a simpler dissolution. One might argue that God is none other than a personification of goodness, and His commands therefore none other than imperatively-expressed encapsulations of rightness. It is true, therefore, that God's commands are right. But they are neither His commands because right, nor right because His commands. There is no explanatory order to be found, no possible logical priority as between these apparent alternatives identified by Socrates, because a command's being God's is exactly the same property as its being right. God's command is therefore right *in being* God's and God's *in being* right. Kierkegaard rejects this dissolution on the ground that, in his view, it fails to save God from redundancy. In this solution 'God comes to be an invisible vanishing point, an impotent thought; His power is only in the ethical, which fills all of existence.'⁸ But Kierkegaard is too quick with this dismissal. In fact he is too quick, in general, to anticipate imminent news of God's moral redundancy.

⁸ Ibid, 68.

How so? *Pace* Kierkegaard, it does not follow from the fact that God has the power to command us to do what would otherwise be wrong that God has the power to command us to do wrong. The mere fact that, but for God's commands, Abraham is wrong to kill Isaac does not show, as Kierkegaard assumes it does, that God commands Isaac to do wrong. One need not change from one point of view to another, nor embrace the absurd, to believe that killing Isaac is wrong if God did not command it and right if God did. Both of these propositions may be ordinary moral propositions and both may be sound without paradox or absurdity. The temptation to doubt it comes of an underestimation of the sheer totality of God's omniscience. God, being omniscient, knows not only what is the right thing for His people to do independently of His commands, but also what is the right thing for them to do *given* His commands. He also knows that these two need not be identical actions. He knows, for example, that there may be value, on occasions, in people showing that they have faith in Him through obedience to His commands, even commands to do what would otherwise be wrong. This expressive value may tip the balance, making an action that would otherwise be wrong into a right action. It would be wrong for Abraham to kill Isaac if God did not command it, but remember that God's command to kill Isaac is a test of Abraham's faith. If it is valuable for Abraham to show his faith then it may be right for him, now that God has commanded it, to kill Isaac. All of these may be regarded as ordinary moral propositions. There is no logical discontinuity requiring a shift from one point of view to another. If Abraham does shift into a religious point of view for the purposes of identifying and acting on God's commands this does not mean he has abandoned the moral point of view. For the moral point of view may itself require him to take the religious point of view, given the moral value of faith.

If this is so, then the Socratic dilemma may be dissolved in the simple way that I indicated, and without Kierkegaard's

extraordinary manoeuvres. God is none other than a personification of goodness, His commands are rightness itself. Being omnipotent, God may command any action and thereby make it right for those commanded to do it. But, being omniscient, He commands only what is right. It does not follow that His commands are redundant, merely highlighting what would be right anyway, quite apart from His commands. Because God does not only command what would be right apart from His commands. He commands what is right *given* His commands, and that, as just explained, need not be the same thing at all.

You may object that the key move here lies in the assumption that faith in God can have moral value, and that this assumption is self-undermining in view of the other elements of the picture presented above. God tells Abraham to kill Isaac as a test of faith. The command, as explained above, is right taking account of the value of that faith, although wrong without it. But why, given that He commands something that would apart from His command be wrong, does God *deserve* this faith? What can be the moral value in having faith in a God who commands, effectively, that one have faith in God? Indeed what can be the *rationality* of this? Aren't we forced back to Kierkegaard's manoeuvre of making Abraham's rectitude depend on a *non-rational* leap of faith? Doesn't the Socratic dilemma therefore simply reassert itself in a new guise?

Not quite. Many moral reasons share the following structure: Being a friend is a reason for acts of friendship, being a judge is a reason for judicial acts, being a citizen is a reason to do one's citizenly duty, etc. These reasons may appear to lift themselves by their own bootstraps. But of course they do not quite do so. They presuppose that one may have a reason for being someone's friend, or for being a judge, or for being a citizen. But that reason may be something quite modest. One has a reason to make friends with someone just in case, for example, one enjoys their company. One has reason to be a judge just in case it would be a good career move. One has reason to become a citizen just

in case this will allow one to escape persecution elsewhere. This need not be a moral reason. Nor need it be a reason to perform, separately, any of the particular acts which, as a friend or as a judge or a citizen, one must then go on to perform. These further acts are made rational, and indeed in some cases morally required, by the fact that one is a friend or a judge, not by the reason one had to become a friend or a judge in the first place.

Things are no different with faith in God. It is true that apart from his faith in God Abraham is morally wrong to kill Isaac, and with it he is morally right to kill Isaac. But his reason for having faith in God need not be, as it stands, a reason to kill Isaac. His reason for having faith in God may be something quite unrelated to Isaac's living or dying. He may have escaped from some terrible disaster or plague by apparently miraculous means. More prosaically, he may have witnessed the long and successful life which faith in God brought to someone else. This is a reason for having faith in God. And given that one has faith in God for this reason, God's commands are reasons for doing what is commanded even though, apart from God's commands, the fact that faith in God could bring a long and successful life would not have been any kind of reason for doing the thing that God commanded (e.g. killing one's son). Thus God's commands are not morally redundant for those who have faith in Him, and yet the leap of faith which gives God's commands their constitutive importance in determining what is the right thing to do need not be unsupported by reasons.

Faith in a God who sometimes engineers a test of one's faith by commanding one to do something awful, which apart from that command one has absolutely no reason to do and every reason not to do, can therefore be fully and normally rational. This does not mean that Abraham himself faces no dilemma, that rationality all points one way for him. It does not mean, for example, that there are some extra moral reasons to prefer his faith in God over his love for his son. There are reasons for his faith in God, no doubt, and reasons, we may be equally sure, for

him to love his son. Given that he has faith in God and love for Isaac, his is an ordinary moral dilemma, in which two incommensurable moral duties are pitted against one another, one a requirement of faith in God and the other a requirement of love for Isaac.⁹ That is the whole point of God's test: it is to place Isaac in this moral dilemma and see whether he chooses faith in God over the love of his son. If Abraham chooses faith in God he is not transcending moral reasons. He is acting on moral reasons, reasons which his faith gives him, a faith he holds, no doubt, for reasons. If the reasons for his faith are undefeated by his reasons for loving his son – and since the two are *ex hypothesi* incommensurable the answer is that they cannot but be undefeated – then he is morally right to kill Isaac in view of the fact that God commanded it, and God commanded it in view of the fact that, for Abraham as a faithful subject of God, it is morally right. Of course if the test leads Abraham, on the contrary, to abandon his faith, then he is wrong to kill Isaac: whatever else it can do, on the argument just sketched out, faith cannot lend its justifications to the faithless.

2. From God to the Grundnorm

The Socratic challenge to theism should strike a chord with legal theorists. Its logic is replicated every year in a thousand

⁹ Some think of Abraham's dilemma as pitting 'Faith' against 'Reason'. But the dilemma as presented here is even-handedly rational, i.e. both alternatives in the dilemma are supported by reasons. To repeat, Abraham has reasons to love Isaac as well as reasons to have faith in God. For those reasons he has faith in God and loves Isaac. The resulting dilemma is *within* rationality, between the duties of faith and the duties of love. As for 'Reason' with the God-like capitalisation, it is hard to know what this is unless it is just rationality, i.e. the capacity and propensity to be guided by reasons, including those mundane ones discussed in the text above (reasons for faith and reasons for love, reasons of faith and reasons of love, etc.).

undergraduate examination essays pitting the tradition of legal positivism against the natural law tradition. In the tradition of legal positivism, law is binding because it is posited. In the natural law tradition, on the other hand, law is posited because it is binding. Since it surely cannot be both, one must choose between positivism and natural law (thus far the second class candidate). Or else one must revel in law's ultimate absurdity, its fundamental contradiction, as Kierkegaard gloried in religion's (a first or a third depending on whether the contradiction is made apparent on purpose or by accident). But are these truly the alternatives? Or can we have law on the same terms as, according to my explanation, we can have God, namely without contradiction as both the (positive) source of right and the (natural) repository of it?

We can indeed. Kelsen already gives us the key to understanding the law in this way. At first sight this may seem surprising, because of all modern theorists of law Kelsen came the closest, in his official account of the relationship between law and morality, to Kierkegaard's view of the relationship between religion and morality. Kelsen describes law and morality as constituting distinct and independent rational points of view. When the question arises of whether someone should take the legal point of view or the moral point of view, however, Kelsen can see no overarching rational point of view from which the question should be asked or answered. One might expect it to be a moral question whether one should take the legal point of view. But for Kelsen it might as well be a legal question whether one should take the moral point of view.¹⁰ Officially, Kelsen makes no point of view answer to any other, rationally speaking. I say 'officially' because, as Raz has shown, Kelsen was not able to honour this doctrine consistently with his analysis of the legal

¹⁰ *General Theory of Law and State* (trans. Wedberg, Cambridge, Mass. 1945), 374.

point of view.¹¹ In an attempt to honour it he was apparently drawn more and more towards a Kierkegaardian glorification of the absurd in his later work, at the expense of his earlier, and more Kantian, exegesis of the Pure Theory.¹² This later work, in which law was said to be based upon a *fiction* of its own rightness,¹³ clouded Kelsen's earlier insights. For those insights depended on the fact that, in the earlier exegesis of the Pure Theory, what is commanded by law is ultimately identical with what is right. Therefore, just as a theist may dissolve the Socratic dilemma of theism by holding that God just is goodness personified, so a Kelsenian resolves the structurally identical dilemma of positivism and natural law by holding that law is rightness institutionalised. The question of whether legal rules are posited because right, or right because posited, thus ultimately evaporates without absurdity in the logic of the earlier Kelsenian legal system.

It is important to stress the word 'ultimately' here. That is because it is well known and cannot be denied that all individual laws, for Kelsen, have whatever normative force they have merely because posited. Regarding individual laws, Kelsen subscribes to a particularly hardline version of legal positivism's definitive 'sources thesis',¹⁴ according to which the bindingness of a law is entirely a matter of its being made by an official authorised to make it by a higher law. Thus Kelsen is rightly associated by many with the view that we lawyers should grasp

¹¹ *The Authority of Law* (Oxford 1979) at 134–7.

¹² For the full story see Iain Stewart, 'Kelsen and the Exegetical Tradition' in Richard Tur and William Twining (eds), *Essays on Kelsen* (Oxford 1986).

¹³ Kelsen, 'The Function of a Constitution', written in 1964 and translated by Iain Stewart for *Essays on Kelsen*, previous note. See especially the discussion at 117: 'A fiction in this sense is characterized by its not only contradicting reality but also containing contradiction within itself.' Similarly: Kelsen, 'On the Pure Theory of Law', *Israel Law Review* 1 (1966), 1 at 6

¹⁴ On which see Raz, *The Authority of Law*, above note 11, ch 3.

the first horn of the Socratic dilemma, and hold that law is binding because posited, not posited because binding. But Kelsen is also famous for the thesis that the ultimate source of validity for any legal system is what he called the system's *Grundnorm*, its basic norm. It is ultimately by the grace of the *Grundnorm* alone that all positive law is valid. And the *Grundnorm* is neither right because posited nor posited because right, for it is not posited at all. Its validity is, rather, a presupposition of those who treat posited law as valid *qua* law.

So what exactly is this presupposition? As Kelsen often stated it, it is the presupposition that the historically first constitution is valid.¹⁵ But 'valid' here is a notoriously problematic term. This validity cannot *ex hypothesi* be validity endowed by some further authorising norm. For *ex hypothesi* we are talking of the historically first constitution and this cannot, by its very definition, take its validity from any other positing act. It cannot take its validity from its sources. It must, instead, be valid *on its merits*. For 'sources' and 'merits' exhaust the possible ways of validating anything. The *Grundnorm* must therefore be interpreted as the presupposition that the historically first constitution is meritorious, and that this merit is inherited by whatever positive law the first constitution authorises. The presupposition of the *Grundnorm* therefore brings might and right into a necessary, definitional alignment. Like the *Grundnorm* itself, what is authorised by the *Grundnorm* is neither right because authorised nor authorised because right. Again there is no explanatory order to be found. For in the presupposition of the *Grundnorm* is the identification or fusion, in the juristic consciousness, of authorisation and rightness. The *Grundnorm* is, in this sense, the juristic God.¹⁶ Under the authority vested by

¹⁵ e.g. *General Theory of Law and State*, above note 10, 115.

¹⁶ Kelsen himself makes the comparison very briefly in *ibid.* at 110-11. I think he errs (theologically) in regarding God as more akin to the first Constitution, and therefore as having a basic norm presupposed behind Him, which says

the *Grundnorm* we must, of course, often do what apart from that authority we should or need not do. In law, the sources therefore often seem to require us to depart from the merits. But with the *Grundnorm* presupposed the merits are brought back into line. For the *Grundnorm* by its nature lends its merit to whatever sources it authorises. Like God, the *Grundnorm* can make it right, by its demands, to do what would otherwise be wrong.

Kelsen himself had notorious difficulty conveying this point. On the one hand he was anxious to distance himself from the natural law tradition by denying that the *Grundnorm* is a moral norm. On the other hand his normative rationalism prevented him from denying that the *Grundnorm*'s validity turns on its merit or value by shifting instead to a practice-based or empirically-grounded foundation for the legal system of the kind that Hart later endorsed.¹⁷ Although this led to some wavering on Kelsen's part throughout his career, there is an important passage in the *General Theory of Law and State* in which he steers a course between empiricist positivism and natural law in the following terms:

The essential characteristic of positivism, as contrasted with natural law theory, may be found precisely in the difficult renunciation of an absolute, material justification, in this self-denying and self-imposed restriction to a merely hypothetical, formal foundation in the basic norm. ... Any attempt to push beyond the relative-hypothetical foundations of positive law, that is, to move from a hypothetical to an absolutely valid fundamental norm justifying the validity of positive law

something like 'the commands of God are valid'. See sections 3.3 and 3.4 below for closer consideration of this difficult point. And see Raz, *The Concept of a Legal System* (Oxford, Clarendon Press, 1970), for the argument that there need be no *Grundnorm* behind the first Constitution either, i.e. that the most basic legal norm can itself be a positive norm of the system. I cannot pursue here my reasons for disagreeing with Raz on this point.

¹⁷ See Hart's famous note comparing his 'Rule of Recognition' with Kelsen's *Grundnorm* on pages 245-6 of *The Concept of Law* (Oxford 1961).

... means the abandonment of the distinction between positive and natural law.¹⁸

This passage is easily misconstrued. One may think it cuts against my claim that the *Grundnorm* is a juristic God – for after all, God is surely absolute if He exists? But this passage in fact captures Kelsen's affirmation of what I said. In legal science or legal theory, which is Kelsen's subject-matter in this passage, the *Grundnorm* is a mere hypothesis. But in the juristic consciousness it is not a hypothesis but a presupposition. Studying the nature of law theoretically we must understand how it looks from the inside, but that is different from actually standing inside it. What is relative in legal science is absolute in law itself. What legal science interprets as a norm which is valid hypothetically – i.e. only if one presupposes the *Grundnorm* – is, from the perspective of one who *does* presuppose the *Grundnorm*, simply right. What is hypothetical in the view of legal theory is absolute in the view of law. It is exactly the same as with theism. What is relative for me as a student of theism, namely the presupposition of the existence of God as a personification of goodness, is necessarily absolute in the view of the faithful whose faith I am studying. So rather than driving a wedge between positivism and natural law the *Grundnorm* ultimately reconciles them. With the presupposition of the *Grundnorm* merely hypothesised, law is valid on its sources alone. With the *Grundnorm* presupposed those sources necessarily have absolute merit. By virtue of the *Grundnorm*, their authorisation entails their rightness and their rightness entails their authorisation. For the two properties are one and the same.

And just as the question arises of whether God deserves one's faith, so the question arises of whether the *Grundnorm* deserves one's allegiance. Just as one may have reasons for faith in God, so one may have reasons for allying oneself with the *Grundnorm*. Just as one's reasons for having faith in God may be non-moral

¹⁸ *General Theory of Law and State*, above note 10, 396.

reasons, so one's reasons for respecting the law may be non-moral reasons. Just as those who have faith in God thereby automatically acquire new moral reasons irrespective of whether their original reason for having faith in God was a moral reason, so those who ally themselves with the *Grundnorm* automatically acquire new moral reasons irrespective of whether their original reason for allying themselves with the *Grundnorm* was a moral reason. Therefore, just as the faithful may have moral reasons to do on the basis of God's commands what, apart from God's commands, they would have no moral reason to do, so those who ally themselves with the *Grundnorm* may have moral reasons to do on the basis of legal rules what, apart from these legal rules, they would have no moral reason to do. And just as the moral reasons mentioned here to do what God commands have no application to the faithless, so the moral reasons mentioned here to follow legal rules have no application to those who do not ally themselves with the *Grundnorm*, or who, to put it another way, do not have faith in law. My own belief is that such faith need not be irrational or arational any more than faith in God need be irrational or arational. It may be straightforwardly rational. People may have faith in the law for the simple reason that it once endeared itself to them by determining a case in their favour. If they do then, other things being equal, their law-abidingness may be justified. But by the same token lack of faith in the law may be rational for those who had unfortunate dealings with it, and to that extent a general attitude of law-abidingness need have no rational attraction for those who lack faith in law.

3. Loosening the analogy

Lest too much is made of these similarities between theistic and legalistic belief, let me mention five important and closely interrelated dissimilarities between God (seen as goodness

personified) and the *Grundnorm*, dissimilarities which the above remarks inevitably tended to suppress.

3.1. Where God is concerned, it can be morally right to do on His command what would be morally wrong without it, *only* if one is faithful. Only faith can fill the apparent logical gap. One may, of course, have instrumental reasons for becoming faithful (e.g. fear of eternal damnation) but once one is faithful the logical gap can only be filled non-instrumentally by the expressive value of faith itself. Regarding the law things are more complicated. Faith in the law, held for whatever reason, is one of the things which can fill the apparent logical gap between what one should do apart from the law and what one should do in the light of it. But instrumental considerations can also fill that logical gap in part. The classic (although not the only) case is that of the co-ordination problem in which any one of several alternative actions would be justified apart from the law but only one of these is justified given the law. Here it is the law's ability to eliminate transaction costs by getting us to act in harmony which fills the apparent logical gap.¹⁹ This does not depend on faith in the sense discussed above, or anything analogous to it. Of course these co-ordination-based reasons arise only if people in general have faith in the law as a way of solving problems – otherwise the law will fail to establish a co-ordinating practice. But given that people in general do have this faith in the law, its instrumental co-ordinating reasons apply even to those who are faithless, who do not ally themselves in the slightest with the *Grundnorm*. They too should join in the law's solution, where applicable, to reduce transaction costs. Of course these considerations do not apply across the whole body of the law. Not everything which the law does is an example of successful co-ordination, or of some other instrumental achievement. But my view is that these

¹⁹ See e.g. John Finnis, 'Law as Co-ordination', *Ratio Juris* 2 (1989), 97.

considerations do not apply *at all* in the case of God. Only those who have faith are, to my mind, ever affected by God's commands. God's authority, to put it another way, is exclusively inspirational rather than instrumental. If one is not inspired by God then God has no authority over one at all. Not so the law, where some authority is instrumentally justified and other authority expressively justified, i.e. justified as an expression of the faithful's faith. In this respect an atheist is in a different moral position from an anarchist. An anarchist is morally permitted to deny authority to the law where, were she to have faith in law, that fact in itself would lend the law its authority over her actions. But the anarchist is morally wrong to deny authority to the law where its authority over her is instrumentally justified, e.g. through the benefits of co-ordination. But it seems to me that an atheist, even if she is wrong to deny God's existence, is morally permitted to deny Him any authority over her actions at all.

3.2. In the case of God, to know Him is to love Him. Cognition of God entails moral commitment. Not so the *Grundnorm*. Kelsen struggled with this point throughout his career.²⁰ He struggled to find a way in which lawyers, for example, could enjoy cognition of the law without any personal commitment to it. He clearly believed that this was possible. He believed that one could be an anarchist who is a perfectly competent lawyer, or at any rate a perfectly competent scholar or teacher of law.²¹ So, fundamentally, he needed to find two different ways in which the *Grundnorm* could be presupposed – fully, if you like, and on the other hand merely *arguendo*. He never quite succeeded in this, although successors like Raz and MacCormick

²⁰ See his testimony to his own problem with this in the notes of *The Pure Theory of Law* (trans Knight, 2nd ed, 1960, Berkeley 1967), at 204.

²¹ *Ibid*, 218n.

have fared much better.²² The point I am making is merely that this divide cannot even intelligibly be sought in the case of God. The reason is not simply that God is goodness personified in the eyes of the faithful. After all, as I argued, something very similar is true of the *Grundnorm* in the eyes of its faithful. The reason, rather, is that of God's comprehensively overarching role in the universe, if He exists. This role is such that merely recognising His existence amounts, necessarily, to laying oneself down before Him. Nobody need feel the same about a legal system. One may see that a legal system exists, and what it involves, without in the slightest laying oneself down before it. For example, one may look up French law to discover how things are done in France. When one does so, to borrow Raz's terms, one presupposes the *Grundnorm* in a detached rather than a committed way, or, to borrow MacCormick's terms, one has the cognitive internal attitude to law without the volitional internal attitude. To know the law is not to love it even though the *Grundnorm*, if for any reason we *do* come to love the law, necessarily fuses for us the merits and the sources of law.

3.3. The *Grundnorm* does not command directly, for it is not an agent but a norm. It merely authorises agents to command. All legal authority, even constitutional authority, is thus for Kelsen legally subordinate authority. God, on the other hand, commands directly. There is disagreement among faiths and among interpreters of faiths about whether He also commands *indirectly*, e.g. through His officers on earth. Some hold that these officers are merely conduits through whom God issues His own commands. Others hold that these officers issue their own commands, by delegated authority from God. Still others hold that God's officers are fallible interpreters of God's commands.

²² Raz, *The Authority of Law*, above note 11, 137ff, MacCormick, *Legal Reasoning and Legal Theory* (revised ed, Oxford 1994), 275ff (discussing Hart rather than Kelsen, but to much the same effect).

The question is interesting and important because it bears on the relationship between the merits and the sources of religious doctrine. If God delegates authority, does it follow that His officers on earth also share, by God's authority, the definitional goodness which He personifies? Are they, within the scope of their offices, likewise personifications of goodness? The matter bears on the Kelsenian view of law because, given that the *Grundnorm* does not command directly, we need to know whether those whom it authorises to command are always necessarily commanding meritoriously just because of their authorisation. Kelsen's very appealing answer is that they are. Within the law, by virtue of the *Grundnorm*, source-based authority is the only merit that counts. The *Grundnorm* makes legal officials infallible when they act within the scope of their authorisation, even though what they command was, for example, in their own discretion rather than dictated by the first constitution, and whether or not what they commanded is a matter of interpretation of some existing law. It does not of course make legal officials infallible regarding what should be done apart from what they command. They often make mistakes in determining where the merits of the case lay before they gave judgment, or issued their instructions etc. The *Grundnorm* makes them infallible regarding only what should be done given what, with the *Grundnorm's* authorisation, they command. Their lawful rulings are, to put it simply, dispositive in the eyes of the law.

3.4. The fact that legal authority is all more or less subordinate opens the way, you might say, for selective faith in law. Couldn't one have, for example, faith in the courts but none in the legislature, or faith in old law but not in newer law? Yes, one could. The question is whether this makes the *Grundnorm* drop out of the picture. For the importance of the *Grundnorm* surely resides in the fact that it entails the coincidence of all sources and all merits, so that on the doctrine of the *Grundnorm* one would expect faith in the law, like faith in God, to be an all-or-nothing

affair, in which picking and choosing is unintelligible? Doesn't the possibility of picking and choosing in one's faith make the *Grundnorm* redundant? This is a premature conclusion. The fact that one may through the detached presupposition of the *Grundnorm* know law without loving it is what explains the possibility of picking and choosing where one will put one's faith. Cognition of the *Grundnorm* with detachment allows one to identify laws and understand them complete with their claim to meritoriousness *in advance of commitment to them*. Not so God and His commands. Since to know God is to love him, one has no logical space to pick and choose with His commands. His role in the life of the faithful is, for that reason and that reason alone, all or nothing. It is not that He would be redundant if we could pick and choose. It is that He would be something much less extraordinary than what, if He exists, by His nature He must be.

3.5. You may say that now we have now come, at last, to the crunch. Law plainly exists. But God's existence is everywhere and always in doubt. In admitting that there are cases in which faith in God is rational we surely assumed God's existence. For there can be no reason for anyone to have faith in a non-existent God. In case of a non-existent God, faith is reduced to superstition. Of course such superstition may be excusable. People who act on justified but false beliefs can often be excused their consequently erroneous actions.²³ But the issue here is whether faith in God can lend *justification*, not mere excuse, to the faithful. There is a short answer. The short answer is that we *obviously* assumed God's existence. After all, the Socratic puzzle with which we started assumes God's existence. For if God does not exist, then God does not command, and if God does not command then there can be no puzzle about the constitutive

²³ See my 'Justification and Reasons' in A.T.H. Smith and Andrew Simester (eds), *Harm and Culpability* (Oxford 1996).

difference that his commands make. So there was never any hesitation in this discussion so far as the assumption of God's existence is concerned. But personally, as I am sure I have made tolerably clear, I think the assumption is false. I do not believe that goodness is personified anywhere in the universe. I have, in that sense, no knowledge of God. But of course I can grasp the *idea* of goodness personified, and hence hypothesise the presuppositions of a believer in such a thing. It is no different from what I do as a philosopher of law when I daily hypothesise the presuppositions of lawyers. One must be careful not to confuse detachment and hypothesis. We noted above (3.2) that one cannot presuppose God's existence in a detached way as one can presuppose the *Grundnorm* in a detached way. But it does not follow that, as a philosopher, one cannot hypothesise the believer's committed presupposition of God in the same way that one hypothesises the lawyer's detached presupposition of the *Grundnorm*. The capacity of the human intellect for hypothesis and its capacity for detached presupposition are quite different. Ronald Dworkin's *Law's Empire* tells us that, as lawyers, we cannot presuppose the validity of the first constitution non-committally - we must be committed to the whole history of the constitution. The same book tells us that, as legal theorists, we cannot hypothesise the presuppositions of lawyers without endorsing them.²⁴ So not only lawyers but also legal theorists can only talk about law while being committed to it. Dworkin is wrong even on the first point. Law is not God and happily lawyers need not, in their professional capacity, be true believers. But Dworkin's error is deepened by his failure adequately to distinguish the two points. Even if law were God, so that lawyers would have to be true believers, it would not follow that only true believers could be *philosophers* of law.

²⁴ The moves are sketched in *Law's Empire* (Cambridge, Mass. 1986), 11-15.