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Anthony D'Amato

THE MORAL DILEMMA OF POSITIVISM*

ANTHONY D'AMATO**

Not only do positivists insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle. Neil MacCormick's lectures, "A Moralistic Case for A-Moralistic Law?" which I have been asked to comment upon, exemplifies this problem. To Professor MacCormick's credit, he has attempted to lay an explicit moral foundation for the adoption of the amoralistic positivist conception of law, something which other positivists have avoided or – in H.L.A. Hart's case – let fall implicitly between two books, one addressed to positivism and the other to morality.[1] Professor MacCormick's grace of style and wit tend to mask the inconsistency upon which his argument is erected, and yet at the same time make it a pleasurable task for his readers, including me, to examine that argument with care.

The inconsistency upon which Professor MacCormick builds his argument lies in his critique of the natural-law approach which requires, as he puts it, a two-step procedure for determining whether a given rule is to count as "law." For ease of reference and to generalize the argument as much as possible, I call these two tests the "pedigree" and the "content" tests,[2] and I believe that Professor MacCormick would have no objection to these labels. The tests are:

1. *The Pedigree Test.* What Professor MacCormick calls an "institutional fact" analysis is applied to a given rule, to see whether it has in fact been generated by the constitutional processes of the legal system in question.

2. *The Content Test.* What Professor MacCormick calls a test of "moral justifiability" is then applied to the rule. Such a test calls for an examination of the content of the rule, judging whether it is compatible with morality. (I omit for the moment, because Professor MacCormick omits it also, the question whether the morality referred to is general morality or the morality of the person making the "test.")

** Professor of Law, Northwestern University School of Law.

1. *Compare* H.L.A. HART, THE CONCEPT OF LAW (1961) *with* H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).

2. Professor Dworkin probably first coined the term "pedigree test." *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977).

These are the two tests for *legal validity* according to Professor MacCormick's view of natural law; that is, under *natural-law* theory as he views it, a rule would have to pass *both* tests to count as law. (Again, I put to one side a possible objection to the effect that at least some versions of natural-law theory might not insist upon the rule passing the pedigree test if it passes the content test. For instance, a rule of custom that comes up for the very first time in a contested case might be argued by the naturalist to *be* a valid rule of law that should determine the result in the case, as Lord Mansfield might have viewed the matter in connection with the law merchant. A positivist, on the other hand, holding that the rule cannot be a rule of law because it fails the pedigree test, would have a much harder time arguing the case on behalf of the party asserting the customary rule. But for present purposes, taking Professor MacCormick's thesis in the light most favorable to him, I put aside this rather important objection to his characterization of naturalism.)

Now we come to the inconsistency. Professor MacCormick quotes with approval a passage from H.L.A. Hart, which he says constitutes a "powerful case" for the positivist position "on purely practical and moral grounds:"[3]

> What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[4]

In this passage, Hart uses the term "legally valid" in the positivist sense, namely, a rule that has passed the *pedigree test* alone. How, then, can this passage constitute an *objection* to the naturalist viewpoint — as defined by Professor MacCormick himself — which requires that the rule must also pass the *content test* before it can be determined to have legal validity? What Professor MacCormick has done is to use the passage from Hart to refute the naturalist contention that there should be a content test in addition to a pedigree test, but in so doing contradicts himself by adopting Hart's use of the term "legally valid" on the basis of the pedigree test alone.

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3. MacCormick, *A Moralistic Case for A-Moralistic Law?* 20 VAL. U.L. REV. 1, 11 (1985).

4. *Id.* at 10, *quoting* H.L.A. HART, THE CONCEPT OF LAW 206 (1961).

Professor MacCormick is not alone in making this fatally inconsistent attack upon naturalism. Hart's book, *The Concept of Law,* contains a curious nine-page section which either denies Hart's own thesis that moral obligation cannot be derived from positive law or simultaneously adopts and refutes the naturalists' content test.[5] This form of reasoning in a circle whenever positivists confront the question of moral obligation to law is what I have labelled the moral dilemma of positivism.

But even wholly circular arguments sometimes do not go away. They remain because of psychological as distinct from logical reasons. Consider the postivist who confronts the moral reality of law after looking at law as an abstract logical entailment derived from constitutional processes. Having completed during the day his analysis showing that a complete test of legal validity is the content-free pedigree test, he awakes suddenly at night realizing that his conception may lead to the worst kinds of official abuses of power. Any dictator's commands are "law" because the dictator is the constitutionally valid legal authority. Once labelled "law," the dictator's commands tend to be obeyed by a public that believes in labels. The public invests some amount of moral obligatoriness in the dictator's decree because it is "the law" even if the decree, in terms of its content, is immoral. We know this happened in Nazi Germany and it continues to happen in dictatorial regimes today.

What can the positivist do about this nightmare? Reexamining the premises of his own theory would compound it. Rather, he must embark upon an ambitious program of changing reality to suit his theory. He must teach the public to erase from its mind any notion that a law carries with it a sense of obligation. Thus he begins by lecturing to law students, then writes articles, and finally publishes books aimed at a larger audience, exhorting his readers to renounce their unenlightened psychological attitudes. He urges them to a draw a sharp line between law and morality. Professor MacCormick adds a refinement of his own to this process: he insists that drawing the sharp line is morally compulsory.

This process reminds me of the story of a director who, during rehearsals, asked the playwright to change a line of the script on the ground that audiences would be confused and sidetracked by the line as written. The playwright responded, "if the audience doesn't like it the way I've written it, why don't you change the audience?" So too

5. H.L.A. HART, THE CONCEPT OF LAW 79-88 (1961).

the positivist, confronted with the nightmarish possibility that the public will confuse legally valid rules with rules that ought to be obeyed, sticks to his positivist thesis and sets out to change the public.

II.

The positivist nevertheless may rejoin that the content test is hopelessly impractical, and that therefore the pedigree test should be the only test for legal validity. If Professor MacCormick makes this argument, he makes it implicitly in his insistance upon a practical solution to the problem of law and morality. He perhaps would have been better off had he made this argument directly instead of attempting to refute naturalism by an argument that we have seen is internally inconsistent. But apart from these tactical points, it seems fair to me that the naturalist should discharge the burden of proving the practicality of the content test, for otherwise the reader is left with choosing between an inconsistent theory of positivism and an impractical theory of naturalism.

Part of what seems to be impractical about the content test is that it would be applied to every rule alleged to be a rule of law. Yet obviously a citizen cannot pick and choose among all rules according to his own feelings about morality, or else society would grind to a halt. A citizen cannot refuse to pay taxes on the basis that progressive rates are unjust, or refuse to obey the laws against theft on the ground that he is hungry, for such self-serving reasons would threaten the efficacy of the legal system as a whole. Rather, I think there are four practical criteria we may employ in giving content to the content test, the first three constituting approval of the overwhelming majority of laws:

(1) Morally neutral legislation passes the content test. Most laws, rules, and regulations, which are addressed to facilitating the interactions among citizens and the interface between citizens and government, are of this type.

(2) All morally supportive legislation passes the content test. This includes nearly all the criminal law, the family law, and the law of torts. (Even the thief, as Jean-Jacques Rousseau once pointed out, is in favor of the laws against theft, for as soon as he steals something, he wants to own and keep it as against everyone else.)

(3) Laws we disapprove of generally pass the content test as well. Here we have to acknowledge the "macro-justice" concept of John Rawls and other philosophers, to the effect that in most societies there will be laws that are unfair to particular persons or groups, and yet overall the unfairnesses tend to be cancelled out. A rich person may complain about progressive income tax rates, and yet there is usually a sales tax

in the same jurisdiction that is regressive. Blacks who in past decades suffered from de facto segregation may today benefit from affirmative action programs. If a society is in general a just society, individual laws that are morally unjustified nevertheless pass the "content test" because, if they did not, the disruption that would occur resulting from auto-invalidation by others would endanger more that is of value to the individual than she could possibly gain by asserting that the particular law she disagreed with was not legally valid.

(4) In rare instances, however, a statute or judicial precedent can be so egregiously immoral that it fails the content test and should be stripped of the term "law." One way of conceptualizing when this situation occurs is to speculate that denying the label "law" to such statutes or precedents would actually be a conservative strategy in preserving the rest of the legal system. For example, the Supreme Court's *Dred Scott* decision[6] was systemically intolerable and had to be "reversed" by a bloody civil war. Or suppose the Supreme Court had held in *Brown v. Board of Education*[7] that schools could be segregated because blacks were inferior to whites; such a decision would clearly have been morally repugnant. It would have been publicly proclaimed *illegal* even though it was asserted by the Supreme Court itself. In Nazi Germany, a more naturalistic attitude on the part of the public might have helped to label as illegal the Nuremberg legislation that called for the sterilization of Jews and gypsies. In fact, as we know too well, a pervasive positivist mentality was instrumental in securing the acceptance of such legislation as legally valid and deserving of compliance just as any other rule of "law."

But even if my categories are accepted and it is conceded that very few rules will ever be invalidated under the stringent fourth category test, it is nevertheless open to Professor MacCormick to object to the fourth category itself as still being too elusive. He says that "It is in fact a weakness of natural law proposals to incorporate an element of moral substance into the formal definition of valid law that there can be and is so broad and diverse a range of moral opinions and convictions."[8] And he gives as an *example* of this diversity the Nazi claims that their legislation was "done in the name of moral duty and racial purity and such like supposed moral values."[9] Whenever I see statements such as this, I wonder whether the speaker is talking out of any sense of personal conviction or whether he is simply attempting to score

6. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).
7. 347 U.S. 483 (1954).
8. MacCormick, *supra* note 3, at 29.
9. *Id.*

an academic point. Can Professor MacCormick really believe that the Nazi practices constitute an example of a diverse range of *moral* opinions and convictions? The very sentence I quoted seems to belie the point; he refers to "such like supposed moral values," a phrase which I take it he would not use if he thought they were really moral values. More significantly, Professor MacCormick earlier uses the phrase "justified rules" in several places,[10] as if everyone knows that there is a core content to the term "justified." Presumably he would not count the rack and screw as a justifiable procedure for determining the veracity of witnesses in a courtroom, and hence he must agree to a core absolute standard for the term "justified." I would argue he subconsciously does so as well for the term "morality." He cannot really believe that the Nazi legislation and practices were "moral," and he cannot really believe that the Nazi leaders were justified in their opinions that those practices were moral. True, the Nazis could *claim* that what they did was moral, but what counts is whether we believe them. Otherwise, the alternative is moral relativism.

But moral relativism is an incoherent doctrine, because it denies meaning to the term "moral." Nothing at all is moral if it is moral for people to do the opposite. In order for us to condemn murder, or rape, or child abuse, we have to condemn them in all societies at all times and in all places. We cannot accept a society which holds that child abuse is moral;[11] we would have to label such a society as morally barbarous or savage. Of course we should be careful, as I have argued elsewhere,[12] not to use the term "moral" too broadly or else we will in fact include exotic practices that we really tolerate; I argued for calling those practices "mores" and not "morals." Where Professor MacCormick calls for diversity and toleration, where he says that "different opinions issue in different lifestyles and ways of life but ... the right to dislike or be disgusted with some of these does not carry over into a right to repress them simply on account of their being morally unsound or morally mistaken,"[13] he is actually talking *not* about morality but about mores. A different lifestyle is not in the same category as rape or child abuse. Admittedly this point is not self-evident when first encountered, but because I have spelled it out at length elsewhere, I can only suggest here that Professor MacCormick's loose use of the

10. *Id.* at 22-30, *esp.* 28.

11. Note the dilemma of Colin Turnbull who attempted to report, as an objective anthropologist, on the Ik society in Africa, which practiced child abuse, *in* C.M. TURNBULL, THE MOUNTAIN PEOPLE (1972).

12. *See* D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202, 206-10 (1981).

13. MacCormick, *supra* note 3, at 14.

term "morality" becomes irrelevant to his defense of positivism. Positivism and naturalism can differ as to the attitude law should take regarding genuine matters of morality, but they both have nothing intrinsically to do with the entirely different question of toleration of diverse social mores and lifestyles.[14]

It is only when Professor MacCormick takes up geniune questions of morality that the interesting question which he raises comes into play: whether positivism can be linked to effecutuating that morality. It is to this final question that I now turn.

III.

Professor MacCormick's central thesis may, I believe, be summarized as follows. "Sovereignty of conscience" is a *moral* principle, not something simply left over when substantive moral requirements are satisified. Sovereignty of conscience ought to be implemented in any society for three or perhaps four fundamental reasons. First, there is not much moral point (according to Professor MacCormick) in coercing people to do things; morality attains its highest goals when it is rationally self-directed. (Thus, legally coercing a person to rescue a drowning stranger negates the possibility of moral altruism by substituting for the altruistic motive the fear of incurring a legal penalty.)[15] Second, recognizing a sphere of autonomy of conscience goes a long way toward illegitimizing certain inroads the state might make into personal privacy, such as "the criminalization of homosexual relationships, or extra-marital heterosexual ones, or the imposition of religious tests or required religious observances."[16] (In this aspect of the matter there is a strong dose, maybe an overwhelming one, of Mill's *On Liberty*.) Third, the autonomy of conscience means not conceding to the state or the majority a monopoly of moral wisdom. (This is an aspect of a more general rule, to which I would subscribe, that one should never delegate to anyone else finality of moral judgment.) Finally, respect for law

14. As Hart has shown, there is no necessary connection between legal positivism and moral relativism. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624-29 (1958). Professor MacCormick's apparent readiness to embrace moral relativism is not necessary for his defense of legal positivism.

15. Suppose a person is sitting on a dock watching another person drown in the waters below. He can save the drowning person by kicking over a coil of rope on the dock. What is more important—*requiring* him to do so, or preserving his sovereignty of conscience by allowing him to continue to do nothing? I have suggested that moral considerations require affirmative action, and to effectuate such action criminal legislation is desirable (I argued against liability in tort). *See* A. D'AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 294-302 (1984).

16. MacCormick, *supra* note 3, at 12.

may be enhanced if sovereignty of conscience is part of the positivist legal program. In this way, there may be after all a sense of obligation that can be imparted to rules that are merely legally valid in the positivist sense — if those rules are part of a legal system that has established sovereignty of conscience and disestablished those substantive moral rules of the type condemned by John Stuart Mill. In that event, Professor MacCormick's conclusion appears prima facie supportable: that "laws satisfying the positivist definition do have some minimal (and readily overridable) moral value."[17]

If my summary of his thesis is accurate, I would suggest that Professor MacCormick's views have a nineteenth century flavor that ignores many of the hard questions of moral philosophy that have been raised since then. It was one thing for John Stuart Mill to argue for individual liberty and autonomy at a time when moralist busybodies such as John Erskine were getting the state involved in all kinds of interferences with the privacy of persons. But today that is not the burning issue. We now see that behind the shield of sovereignty of conscience lie atrocities that were somehow beyond the notice of philosophers such as Bentham and Mill. Consider the plight of battered wives, who in the nineteenth and much of the twentieth century were denied standing in court to complain against spousal brutality. Even more centrally, consider the recent revelations of widespread child abuse now surfacing in congressional hearings in the United States. Child abuse is not new to this century, but it was up to now ignored by the rational autonomous adult world. The term "child abuse" does not begin to convey the real horror only now being exposed: children who have been raped, tortured, chained and blindfolded, severely beaten and often murdered, by parents who have treated them as chattels and nuisances. Many cases of adult schizophrenia, for example, have now been traced to the invention of new personalities to cope with the unending physical and sexual abuse that was their lot as children. Yet Bentham and Mill talk almost exclusively about freedom for adults. It is this freedom, this autonomy, this "Keep Out" sign on the front door, that has protected many parents in their unrestrained brutalization of their own children.

Clearly it is not enough now, and it has never been enough, to rely on parents' "conscience" to protect their children; neither has conscience sufficed to protect wives from battering by their husbands. Of course, Professor MacCormick might respond that he includes wives and children among those persons entitled to moral autonomy, and hence the state ought to protect their autonomy by preventing the

17. *Id.* at 39.

battering and abuse that I have described. But that does not solve the philosophical problem, for what about fetuses? And if fetuses are entitled to potential autonomy because they are potential persons (and Professor MacCormick candidly acknowledges the problem of abortion as hard to deal with in terms of his own theory), what about animal rights? Should the state interfere if a sports hunter, augmenting his natural autonomy, slaughters large mammals in the wild for the sole purpose of bringing their heads back to be stuffed as trophies? The fact that many people's "conscience" might deter them from such sports hunting does not deter those hunters without scruples, and if we care at all about the animals (or even the preservation of their species) we have no choice but to interfere with the hunters' autonomy and to deprive them of the sovereignty of their own conscience.

I do not want to get sidetracked into substantive moral issues, though I believe that without specificity of some kind these discussions can become hopelessly vague and ambiguous. What I want to conclude from the limited observations I have made is the strong assertion that sovereignty of conscience as a moral principal is incoherent. If we really believe something is morally required, we cannot simultaneously believe in sovereignty of conscience. We cannot sit back and allow parents to torture and rape their children in the name of moral autonomy. While I agree that it is desirable that people arrive at their own moral conclusions by the free exercise of their own rational thought, that desideratum is a luxury compared to the need to prevent real harms. (And my animal-rights example greatly extends the concept of "harms" to non-persons.)

I certainly share with Professor MacCormick, as both of us do with John Stuart Mill, strong opposition to the legal institution of victimless crimes including interferences in the private sexual practices of consenting adults. But are these moral-busybody examples really the negation of "sovereignty of conscience," or are the two concepts only historically and not logically in mutual opposition? It would appear that the terms "sovereignty of conscience" and "moral autonomy of persons," and their cognates, are content-free, and hence cannot be associated necessarily with the practice of non-interference in personal privacy. Another way to look at this matter is to examine the notion of privacy itself. In the nineteenth century, privacy might connote freedom from state interference in matters of personal "vice," but it also meant freedom for the family and for the husband-wife relationship. Today, we can look at the latter "freedoms" as licences for brutality to wives and children; and maybe in the twenty-first century the idea of animal rights will also subtract from "privacy" any right to mistreat sentient animals. We must conclude, therefore, that sovereignty of con-

science, autonomy, and privacy, are linked not logically but only historically (and at that, only in Anglo-American history) with the sorts of freedoms John Stuart Mill was concerned with preserving.

I want to suggest now that exactly the same historical but not logical connection obtains between legal positivism and the Millian freedoms. I know it is difficult for many people schooled or steeped in Benthamite-Millian liberalism to distance themselves from such an historical coincidence. But surely there cannot be a logical connection between the theory of legal positivism and the sort of substantive moral legislation (in favor of the "sovereignty of conscience") that Professor MacCormick purports to discover in his lectures. We need only remind ourselves of Professor Von Hippel's point, cited by Fuller, that the grossest violations of conscience occurred in positivist Nazi Germany when people were legally coerced to do acts that have meaning only when done voluntarily, such as the putting out of flags and saying "Heil Hilter."[18] It is hard to find a natural-law example of anything quite so perverse or quite so inimical to Professor MacCormick's sovereignty of individual conscience.

True, legal positivism of the extremely right-wing Kelsen variety has taken hold in many law schools in Latin America for the reason, I am told, that it seems to help dissolve the pervasive power of the Catholic Church in national legal systems. Perhaps today in Latin America, as was true for Bentham in nineteenth century England, the aura of scientism and objectivity associated with legal positivist theory has the psychological effect of challenging an entrenched establishmentarian legal-moral system. But the converse can be true, depending upon one's time and place. Natural-law theory, as I have already suggested, might have been a potential dissolver of the excesses of Nazism. And today, in South Africa, a natural-law approach might serve the interests of all the people far better than the official white supremecist theory of legal positivism that so obviously pervades the South African legal system and its supporters.

Where, then, are we left at the end of Professor MacCormick's argument? I think there has been an advance, and that advance consists of the recognition by Professor MacCormick, a positivist, that positivism needs to be justified morally (and not just as an apparent scientific and objective fact about legal systems). But the justification that is required cannot consist in labelling "sovereignty of conscience" as a

18. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 672 (1958), *citing* VON HIPPEL, DIE NATIONALSOZIALISTISCHE HERRSCHAFTSORDNUNG ALS WAR NUNG UND LEHRE 6-7 (1946).

moral principal, nor in compounding the confusion by claiming that positivism minimally and hence necessarily promotes sovereignty of conscience. We need, from the positivists, a more logical and coherent argument than that. Until one comes along, I continue to believe that positivists inherently have a difficult time in dealing with moral questions once they begin by insisting that law and morality are and ought to be separate from each other.