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ON THE PRESERVATION OF MORALITY*

RICHARD STITH**

Marvelous. What a pleasure it is to read Professor MacCormick's gracious and elegant prose. And with what relish does one contemplate its effects.

The conservative arguments of a Jerry Falwell, for example, will no longer be criticized for being moral but for being immoral. And changes in public policy, such as recent restrictions on smokers, will be justified as a majority morally imposing its values on a minority.

All to the good, I say. I personally would much rather live in a polity based upon moral principles than in one based upon nonmoral preferences—even where I do not share the principles. I could never see why people should stop smoking simply because others do not *like* smoke, or even do not *like* dying of cancer. But if smoking is *wrong*, because people should have clean air or should not have cancer, that justifies recent restrictions. Not only may laws be based on morality, they must be so based, in my opinion, in order to be justified. And even when I disagree, I can respect and trust a majority if it is acting out of moral motives, and indeed only where it is so motivated. Official displays of somebody else's religion are repugnant to me where they are done to increase consumption by encouraging shopping, but not where they are an honest affirmation of faith. I am a non-Lutheran teaching in a Lutheran university, but I have never thought the imposition of that tradition on our public ceremonies to be unjustified. Were it to stop, I would certainly lose some respect for this institution. It is time we became unashamed of public moral commitment.

But wait. Have I misread Professor MacCormick? Does he really urge us to begin such forthrightly moral public debate? In the last section of his essay, he appears to permit retention of the term "amoralism" to describe his moral position. At least his only qualms about so doing seem to be that such a term might be "misleading" or might concede a monopoly of morality to his opponents.

There is, in my opinion, a far more serious reason to urge abandonment of "amoralism" and cognate terms in public debate. It is this: The effect of disguising a moral position in amoral clothing may be

* Critical analyses of this commentary by Jack Hiller and Peter Bittlinger were a great help to me.

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to undercut the moral base upon which that position itself is built. If, in order to win a tactical victory against certain moral views, amoralists delegitimize all public appeals to morality, then they likewise destroy the moral foundation which Professor MacCormick has so well shown they need.

Look at the two "problems" the lectures have pointed out, the "Justifiability of Law" and the "Obligatoriness of Law." Professor MacCormick uses these problems to elucidate the conceptual weakness of amoralism in law. But they are not merely intellectual puzzles. We very much need a solution to them (a point which Professor MacCormick somehow takes to show that there "ought" to be a moral solution and perhaps even that there is such a solution, at 4-7) because otherwise our polity seems likely to degenerate into tyranny or into anarchy. And that the law's legitimacy is not in fact threatened by amoralism, because it is secretly a moral position, does not help. People's *beliefs* are what count here. If people come to believe that the law can do without morality, the law will eventually come to seem to them not justified and not obligatory.

After his second lecture, Professor MacCormick was asked whether he thought most amoralists to be dishonest people who knew that their own views were derived from moral values, but who pretended otherwise in order to appear to operate at a level of discourse more rational than that of their opponents. He responded that they were only "unconsciously self-deceptive." I think he is probably right, but that makes our political situation all the more dangerous. Machiavellian pretenders could presumably be trusted to cease their cant when the damage became great enough. People who honestly think that law does not need morality cannot be so trusted. I urge Professor MacCormick to continue to work to eliminate that self-deception, not only for the sake of honesty but also for the sake of the health and even the survival of our legal systems.

So much for Professor MacCormick's proofs that amoralism must make moral claims. He is eminently clear and solid on that issue. There remains, however, a bit of confusion about the central principle upon which he founds his own minimalist morality of law, the "sovereignty of conscience" (or "moral autonomy," to use one of his other labels).

Perhaps the best way for me to explain my difficulties would be to continue my conversation with Professor MacCormick concerning the moral effects of temptation, a conversation to which he refers and responds on page 13. On the previous page of his essay, the familiar argument is made that laws requiring morally right action are harmful to the moral virtue even of those who agree with them

(call those people the “moral majority”), because such moral actions may spring from the impure motive of not wishing to be punished rather than from a disinterested desire to do right for its own sake. My point is that then those who morally disagree with the morality upon which such laws are based (call those people the “moral minority”) must paradoxically be advantaged by such laws, in that to do what they see as moral requires very great virtue indeed. This, too is a familiar side of the argument. We have all heard it said that Christians were more faithful in the early centuries when they were a persecuted minority rather than in the post-Constantinian era when they practiced the privileged religion of the State.

Professor MacCormick’s kind response to me does not reach the second half of my point, however—probably because I failed to mention it to him. Just before he makes the argument that the legal removal of temptations to do wrong may be bad for the virtue of the moral majority, he argues that the moral minority’s sovereignty of conscience is violated by laws which increase the temptation to do what its members think to be wrong, resulting in a decreased number of moral actions by them. But then, again by the same token, the moral majority is aided by such laws, because external incentives reduce the frequent *de facto* temptation to do what is wrong and thus increase the number of moral actions done by the majority.

In other words, Professor MacCormick has made two contradictory arguments for the effect of temptation on the moral life, that it is good and that it is bad. And, furthermore, where he argues that it is good, it is clearly also bad, and where he argues that it is bad, it is clearly also good—within the terms of each argument respectively.

I submit that the confusion comes from an unacknowledged change in the meaning of the “sovereignty of conscience” ideal in the course of these arguments, as well as from certain unproven empirical claims. It is worth exploring these problems at some length because that ideal is so central to Professor MacCormick’s argument and to the liberal traditions upon which he draws.

One theory of the moral life sees internal virtue as what really counts. Easy morality is worth little precisely because it does not require much character. Hard choices to do one’s duty despite countervailing self-interests are what really reveal the inner worth of a person. It is this meaning of sovereignty of conscience which treats moralistic laws as harmful to the moral majority.

Another theory views moral action as what is important. While moralistic laws may not harm the inner virtue of those of the moral minority who have strong character, they do lead to a decrease in

the number of actions done by that minority which are moral according to its views. It is this meaning of his ideal to which Professor MacCormick is appealing when he claims that moralistic laws harm the minority which disagrees with them.

Which of these theses—that morality aims at pure inner virtue or that it aims at right acts—is correct? Surely the answer is: both. It seems to me that pure inner virtue is what we aim at in others for whom we care—in our children, for example, so that this aim can appropriately be called “parental.” I want my daughters to be excellent human beings, and I firmly believe that strong moral character is an essential part of human virtue. I would also like them to do right acts, but primarily insofar as the latter spring from inner virtue. I care much less about their right acts which are motivated by hope of gain or fear of punishment. If I had to choose for them between a few virtuous acts and many (behaviorally identical) opportunistic acts, I would without hesitation choose the former.

Yet at the same time we as ethical agents do not aim at our own virtue. What we care about is doing right, not being moral heroes or saints. We wish to have non-moral supports for our behavior, because we know they make moral action more likely. We pray “Lead us not into temptation,” as Professor MacCormick remarks. Someone like the noble Roland, who looks only to his own virtue rather than trumpet for help, seems a picture of immoral pride rather than moral virtue. In other words, moral virtue may be the most valuable thing in the world, but it does not aim at itself. It aims at right acts. It even sacrifices itself for right acts. The virtuous response to the argument that inner virtue may decline if right acts become too easy is: so be it.

When people join together as a majority to mutually reinforce their right actions through the law, they are taking the position that virtuous moral agents ought to take. They are acting “fraternally,” as comrades in moral action, and are not “parentally” seeking to maximize the good in others about whom they are concerned from the outside.

So at least would seem to be the perspectives of these two different meanings of the “sovereignty of conscience.” We can see why they point in opposite directions and why Professor MacCormick gets into trouble when he appeals to both at the same time.

Yet our problems do not end here. I have been treating moral virtue and moral action as though they were relatively independent of each other. But in point of empirical fact, they may well not be so separate. As a parent, what I want above all in my children is

moral virtue, the ability to resist any temptation for the sake of what is right. But maybe the way to achieve such virtue is at least initially to habituate them to doing right by punishing them when they do wrong. (I say "maybe" because I unfortunately really do not know—and they are already half grown!) Conversely, it may be that the occasional *choice* to do right despite great temptation to the contrary leads in the end not only to strengthened inner virtue but also to far more right acts than a system of rewards or punishments produces. It may represent a kind of renewed "conversion" to the good which has lasting practical effects. Again, these seem to me questions of empirical contingencies which the mind alone is unable to sort out.

In sum, Professor MacCormick's arguments, at least with regard to the effect of temptation on the moral life,* do not seem to support his assertion that the moral content of law should be kept to a certain minimum. The ultimate aim of his restrictive view, sovereignty of conscience, is self-contradictory and opposes his minimalist conclusion as much as it supports it. Moreover, both its support and its opposition depend in the end on unknown empirical facts.

Yet let me hazard a guess at what those facts would show if they could be properly analyzed. I suspect that there is more pure moral virtue among Catholics *and* among Communists in Poland than in Italy. There may even be more moral acts—e.g. attendance at church and beating up of believers respectively. Either dominating *or* being dominated may do more for moral commitment than an amoralist toleration which privatizes and trivializes most of the moral life.

* The temptation section is not the only place, however, where Professor MacCormick slides perhaps unnoticed from one meaning of something like sovereignty of conscience to another. In his discussion of rules (at 25-27) he argues that advance notice of forbidden conduct is important in order that people be treated as "rational and autonomous" beings, rather than conditioned to behavior like dogs. He then contends that the "same proof of view" (at 27) which supports *ex ante* rules also must deplore legal establishments of morals. But the autonomy value first appealed to here does not speak against the quantity or nature of rules; it only opposes behavior control methods (such as those we use in juvenile justice) which do not presume free choice. Subrational conditioning of a single act violates this value, but the Draconian imposition of a mammoth written moral code does not.

This value is yet a third possible meaning of sovereignty of conscience. It can be thought necessary and sufficient for a conscientious choice that one have all the relevant facts and rules presented clearly to the mind prior to making a choice. As argued, if this were our only ideal, we would be indifferent to the content of the law and to temptation. Rewards and punishments, no matter how great, would not affect the fact of free choice, as long as they were consciously analyzed.

* * *

I have not argued that being moral requires that the law enforce a broad range of moral concerns. I have argued only that Professor MacCormick, in those portions of his broad and eclectic argumentation considered by this commentary, has not proven that being moral requires that the law not enforce many moral ideals. My task has been easy—that of searching for logical imperfections—while our guest's aim was far more difficult—that of constructing an argument without logical imperfections. And no doubt I have botched even this easier job. Still, it has been an honor to think with and against this intriguing contribution to the development of positivist thought.