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POSITIVISM, NATURAL LAW, AND DISESTABLISHMENT: SOME QUESTIONS RAISED BY MACCORMICK'S MORALISTIC AMORALISM

JOSEPH M. BOYLE, JR.*

Professor MacCormick's elegant and persuasive case for what he calls "amoralist law" contains much that a natural lawyer would find agreeable. Moreover, if the natural lawyer believes, as MacCormick does, that respect for individual conscience and liberty provides a significant limitation on the justifiability of legally enforcing morals, then the points of agreement with MacCormick are likely to far outweigh any differences.

In fact, one might wonder, after studying MacCormick's lectures, what it is that fundamentally divides natural lawyers and legal positivists. For he suggests that it may be nothing more than that legal positivists are willing to call something a law that does not meet the moral tests natural lawyers think necessary for calling it a proper law. Natural lawyers are unwilling to call something a law unless, in addition to meeting formal, institutional tests, it passes moral muster. But the positivist, according to MacCormick, is willing to call it law even if such tests are not met. The interesting thing is that, on MacCormick's conception of positivism, unless at least some moral tests are passed, what the positivist calls law makes no moral demand on the consciences of citizens. So, moral tests are practically essential, although not necessary for the very classification of something as a law. Only if such tests are passed can satisfactory answers be provided to the problems MacCormick poses for the legal amoralist.

The difference between natural lawyers and positivists is helpfully narrowed, but so much so that it seems to disappear as a substantive philosophical disagreement. Can it be that the only real difference between these historically opposed positions concerns what it is proper to call a law? Is the argument simply that it makes for a healthier skepticism of political authorities if we accept the idea that an enactment can be a law in the fullest and most proper sense, but still be morally indefensible, rather than the view that such an enactment is not really a law unless it is morally justifiable?

Whatever the answers to these questions, MacCormick's discussion raises them. For he appears to accept what we might call "the

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practical primacy of morality." This is the thesis that in practical matters moral judgments are fundamental, that other practical judgments must give way to moral evaluation, that no norm for action is ultimately justified unless it is morally justified.¹ Thus, the law stands under moral judgment, and the question of the limits of legal enforcement of morals is really a moral judgment: How far is it moral to use the power of the law to enforce moral norms? At what point is it immoral to legally enforce morality?

I substantially agree not only with MacCormick's view that the question about the enforcement of morals is a moral question, but also with the general answer MacCormick gives to the question. I do not, however, agree with his suggestions about how his general answer would be worked out in some of the examples he mentions, for example, abortion. Those who favor legal restrictions on abortion do so out of the conviction that abortion is not simply a private moral matter, but involves both the liberty of the mother and the rights of the unborn individual. This conviction presupposes the view that unborn individuals should be treated as legal persons, but this supposition is itself defended as a requirement of justice and not introduced as a religious or private moral belief.²

Analogously, those who favor legal restrictions on the profile of pornography within society or on sexual conduct need not argue their view simply on the ground that the actions should be legally prohibited just because they are immoral. Concern for the liberty of those who do not wish to be tempted, or to have their children tempted, provides what appears to be a legitimate consideration which deserves a place in public discussions of pornography. Considerations of the impact of some kinds of sexual behavior on people's capacity to respect others and relate to them decently might also provide grounds for legally discouraging some such behaviors.³

In short, much of the program of the legal moralists might be developed, and some of it surely has been, as an application of the very principles which MacCormick defends. I wonder, therefore,

1. For a somewhat different defense of the primacy of morality, see Boyle, *A Catholic Perspective on Morality and the Law*, 1 J.L. & RELIGION 227, 227-29 (1983).

2. For a development of this approach to the abortion issue, see Boyle, *That the Fetus Should Be Considered a Legal Person*, 24 AM. J. JURIS. 24, 59-71 (1979). For a development of the same general approach to the issues of euthanasia and suicide, see G. GRISEZ & J. BOYLE, *LIFE AND DEATH WITH LIBERTY AND JUSTICE: A CONTRIBUTION TO THE EUTHANASIA DEBATE* (1979).

3. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 216-18 (1980).

whether there really is a dangerous "tide of demand for a renewed moralization of the law," and not rather a serious concern, which must be argued on its merits, that the law has failed to perform its proper moral function of defending justice, fairly protecting liberties, and perhaps, facilitating decent, neighborly relations between the citizens of a pluralistic society.

Still, I do substantially agree with MacCormick's general answer on the question of the enforcement of morals. Given this substantial agreement, I will focus not so much on his conclusion as on the overall strategy of his argument.

THE TWO LIMBS OF LEGAL AMORALISM

MacCormick's lectures contain two distinct lines of argument for the two propositions which together he takes as defining legal amorality. These two propositions, the "limbs" of legal amorality, are a positivist proposition and a disestablishment proposition. Stated initially, and without the refinements which emerge in the lectures, they are respectively that law and morality do not have to be identical, and that law and morality should be kept distinct.

MacCormick plainly is interested—perhaps equally so—in defending both these propositions. But as the subtitle of his lectures and his introductory remarks suggest, the purpose of the lectures is to dispute "the flowing tide of demand for a remoralization of the law." It seems, then, that the disestablishment proposition is more nearly the conclusion for which MacCormick is arguing, and that the positivist proposition is more nearly a premise. This is further suggested by the fact that the positivist proposition is so formulated as to appear to be a necessary condition for the disestablishment proposition. When two things are not necessarily identical, then we might have a choice about whether or not to keep them distinct, and then it would make sense to say we ought to keep them distinct, as it would not make sense if they were necessarily identical.

Whether or not this is exactly how MacCormick is reasoning, it seems worth inquiring how closely related these two propositions really are. Is a positivist conception of the law really necessary for moral disestablishment? The same question can be posed by assuming disestablishment: Does the truth of some proposition enjoining moral disestablishment imply or give credence to legal positivism? In other words, we can ask whether MacCormick's organism composed of positivist and disestablishment limbs is really a natural growth, or a hybrid whose parts do not constitute a natural whole but a fabricated monster.

In what follows, I will argue that his creation of legal amoralism is indeed a fabrication. In other words, the two propositions which comprise it are not related in a philosophically important or practically significant way. These propositions, I believe, are answers to distinct questions of jurisprudence, and the answer to either question does not commit one to a definite answer to the other. Thus, one who accepted the legal positivist conclusion in the debate over whether an enactment is really a law independent of its moral justifiability is not thereby committed to any specific position on the question of the enforcement of morals. Neither, I believe, would one who accepted a natural law answer to the question about the conceptual relation between laws and moral norms be thereby committed to any specific position on the enforcement of morals. More important, perhaps, one who takes for granted that legal enforcement of morals must be significantly limited by respect for the liberty and consciences of citizens is not thereby committed either to positivism or natural law of the kind MacCormick defends. I will try to show that these issues are simply different.

POSITIVISM IS NOT NECESSARY FOR DISESTABLISHMENT

If the law were simply identical with morality, then the case for moral disestablishment would be very difficult to make. But natural law, no more than positivism, involves such an identification.

As already noted, natural law requires that laws pass moral tests before they are really "laws," at least in the central or focal sense of that term.⁴ In other words, natural law does seem to imply that law is a *part* of morality, that its norms are a kind of subset of the set of moral norms. I say a "*kind* of subset" because according to natural law, laws properly created and promulgated are not simple implications of moral principles but the outcomes of decisions, consistent with moral principle, and made by legitimate authorities. Such laws are generally morally binding and function in many ways like moral norms. So, in contrast to MacCormick's positivism, law is, on this conception, something like "a simple segment" of morality.

But there is nothing in this conception, at least as so far articulated, which implies the relevant kind of identity between laws and moral norms. This identity is not simply that every law is a kind

4. On the importance of the focal meaning of terms in the study of social phenomena, and for a clarification of common misconceptions about natural law, see *id.* at 3-19.

of moral norm, but that any moral norm is a proper basis upon which lawmakers may make laws. That lawmakers have authorization to legally establish any moral norm is no part of natural law as so far described.

Furthermore, there is a general ground within natural law theory which blocks this kind of identity between law and morality. For law is morally justified only if the lawmakers are authorized to establish it as law. And lawmakers are authorized to act only with respect to the common good of the society for which they have responsibility. The common good of political societies can include various aspects of the overall good of its members, but plainly does not encompass every aspect of the overall good of its members. Unless it did so, the common good of political society would not include everything on the basis of which moral norms are based, and so would not provide the needed authorization for legislation of all moral norms.

Thus, Thomas Aquinas, a natural lawyer if ever there was one, argues that law does not prescribe all the acts of all the virtues, but only those that can be ordered to the common good.⁵ He also argues that the law should not seek to prohibit all vices, but only the more serious ones, and "especially those which involve harm to others, without whose prohibition human society could not be preserved. . . ."⁶

So, natural law does not involve the identity between law and morality which would render impossible the limitation of legal enforcement. Those natural lawyers who have thought otherwise can be criticized on natural law grounds. Thus, the sort of nonidentity between law and morality needed for limiting the legal enforcement of morality is found in natural law theories as well as positivist conceptions of the law, and does not presuppose a positivist conception.

The grounds for limiting the enforcement of morality according to natural law have not, for the most part, emphasized individual conscience and liberty,⁷ but instead have focused on such things as the incapacity of law to effectively control some aspects of personal life, and the burdens which efforts to legislate morality can impose. But the natural law view recognizes clearly that the inference from "Action A is immoral" to "Action A ought to be legally prohibited" is

5. T. AQUINAS, *SUMMA THEOLOGIAE* at First Part of the Second Part, Question 96, Article 3.

6. *Id.* at First Part of the Second Part, Question 96, Article 2.

7. A conspicuous, recent exception is the teaching on religious liberty by Vatican Council II. See *DECLARATION ON RELIGIOUS LIBERTY (DIGNITATIS HUMANAЕ)* (especially paragraph 2).

illicit. More is needed than A's immorality to justify its legal prohibition.

Moreover, natural law reasoning shows that among the factors which must be considered before making the move from moral judgment to legal prohibition is respect for individual conscience and liberty. For the common good of political society is what justifies the use and coercive power of the law. This good surely includes justice among citizens, and between citizens and political authority, and no doubt other things as well, for example, the facilitation of various forms of cooperation among citizens. But it does not include all the goods of persons and all the purposes for which people might decide to cooperate, and so not all moral norms.

The use of the power of the law to promote purposes outside the common good of political society is an unjustified infringement of individual liberty. Such uses of the law are not warranted by the common good of political society, hence not justified. They unreasonably violate liberty because such uses of the law compel some people to act for purposes to which they are not committed, and to which they are not obliged as good citizens to be committed.

Such compulsion has bad consequences. It can cause the disaffection of even upright citizens from their government, and can lead people to act against their consciences. But even when these consequences do not obtain, the constraint of liberty is, as MacCormick has shown, harmful to the moral life as a self-determined structuring of one's life much of the value of which is that one does it by one's own choice in the light of one's own considered judgment.⁸

The point of this section has been to argue that MacCormick's positivism is not necessary for his disestablishment proposition. I have tried to achieve this by sketching out the way a natural lawyer might approach the issue of the legal enforcement of morals. Since the natural lawyer can reach a conclusion on this question rather like MacCormick's own, it would seem that there is no special kinship between his version of positivism and moral disestablishment. My final question to MacCormick, then, is this: Could not the positivist limb of amoralist law be amputated and replaced with a natural law limb without rejection by the organism, but only some relocated paradoxes? Or would that kind of amoralist law be just too moralistic?

8. For a fuller statement of the argument of which this and the preceding paragraphs are the barest sketch, see G. GRISEZ & J. BOYLE, *supra* note 2, at 452-58.