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MORALITY AND THE FOUNDATIONS OF LEGAL POSITIVISM

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In recent years we've seen a lot of public controversy about basic social policy. The disputants often try to get their positions cast into law—requiring this, or forbidding the requirement of that, and so on. In these situations it's tempting to appeal to the "nature" of law for help. Maybe an opponent's proposal is so bad that it couldn't be law, or be legal, or be obligatory.

The so-called "natural law" theories can be used in this kind of argument. They include moral standards that law has to meet in order to qualify as True Law. A proposal that flunks the morals test won't be binding, even if it's enacted. (But the trouble is, natural law theories tend to be controversial themselves, so they're not all that much help in a policy dispute. They often only add fuel to the controversy rather than helping to resolve it.)

Legal positivism doesn't have controversial moral standards. It uses an objective, empirical standard only: A rule is law, without regard to its goodness or badness, if it's enacted in the proper way by the proper law-making authority. So an argument based on the "nature" of positivist's law will have a solid empirical foundation. But the argument won't go very far in a policy dispute because there's no screening out of rules that are foolish or immoral. Solid as it is, an empirical standard just isn't a very potent weapon for shooting down an opponent in a policy dispute.

There's another side to this difference between natural law and positivist theories. Natural law theories can say there's a moral obligation to obey the law, since all rules have to pass a morals test in order to be True Law. Legal positivism, on the other hand, is hard put to explain how there could be any kind of obligation to obey the law without regard to its possible wickedness.

Professor MacCormick offers us the best of both worlds. We get the solid empirical moorings of legal positivism. We also get a moral standard that restricts the permissible moral content of law. Although it's a standard for legal argument rather than for the validity of law, it still lets us score points in some policy disputes. What's more, the moral standard rests in part on the very foundations of positivism,

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making it more solid than a detached moral argument would be. Finally, we get something akin to a moral obligation to obey the law (even though valid law can be immoral).

How does Professor MacCormick pull this off? By tinkering with the foundations of positivism. Legal positivism depends on a moral principle of the sovereignty of conscience, he says. And accordingly, the fundamental positivist thesis has to be qualified to reflect this underlying moral principle.

The view I'm going to stake out and defend here is legal positivism in its most conservative and conventional form. Legal positivism has empirical foundations and doesn't rest on any moral principle (such as the sovereignty of conscience). And it's neither necessary nor desirable to qualify the foundations of positivism in order to make moral arguments about what the law should be. Such moral arguments can (and should) be made, of course, and it's only proper that they take cognizance of the nature of law. But they have to stand on their own feet, separate and detached from the positivist theory of what the law is.

EMPIRICAL FOUNDATIONS

The main virtue of legal positivism is that it tries to *describe* law as a social institution. It's a theory (or a group of related theories) in the same sense as other descriptive theories of other social institutions. That is, it contains a good measure of conceptualizing and guesswork; but it aspires to explain hard, observable facts as simply as possible, and its proponents must be ready to change their concepts and speculations when more successful ones come along.

One of the central features (and surely the most interesting feature) of legal positivism is the notion we were discussing earlier that law is a body of rules that can be identified objectively. This is a strong assertion. It says (in principle, at least) that I can go into any human society and discover what counts as law in that society and what doesn't. In testing for a rule's legal status I'd look mainly to its pedigree—where it came from, who promulgated or adopted it and how. I wouldn't necessarily need to concern myself with the rule's content or its goodness. The exact details of the tests I used would depend on the legal system involved, but the theory asserts that the tests would in any case be objective and ultimately empirical.

My disagreement with Professor MacCormick concerns the reasons for not having a morals test in addition to the empirical standard just described. So let's stand back a bit and look at the positivist theory from a broader perspective. I want to make three points which,

taken together, explain why legal positivism defines law with an empirical standard but without any added moral standards.

1. *The Descriptive Purpose*

My first (and main) point is that positivism, being a descriptive theory, has to confine itself as much as possible to objective phenomena and concepts that help describe them. By Ockham's razor, we should go for the simplest theory that fits the facts. Extra moral standards are too problematic to include when they can be avoided—they're too controversial, too hard to coordinate usefully with actual behavior.

It's normal, even characteristic, for a modern descriptive theory to exclude from its province subject matter that doesn't contribute tangibly to the descriptive purpose. Chemistry and alchemy used to be indistinguishable, they say; but when science became more rigorously empirical the science of chemistry emerged with the unruly subject of alchemy defined out. A descriptive theory succeeds in part by excluding material from its province that's problematic and unessential in advancing the descriptive purpose.

It's not that moral ideas are inherently unfit for a descriptive theory. They can be dealt with when necessary. As positivists are fond of pointing out, there's plenty of morality associated with law at various levels, and this can be described. A moral principle could even be adopted as law if the proper law-making authority made it so. But, once it's adopted, we'd look upon such a principle mainly as law rather than as morality, just as we look upon nuclear chemistry (by which some elements are transformed into others) as being chemistry rather than alchemy.

2. *The Universality of Law*

My second point is that, since legal positivism tries to describe a *universal* social institution, its concept of law has to reflect the shared concepts of people from all sorts of societies. Moral standards won't work for the general concept of "law" if they're at all controversial.

If everyone agreed on some moral standard as an essential ingredient of law, that would allow (indeed, require) positivists to incorporate it into their concept. Very possibly there are such shared standards. But to count they have to be empirically demonstrable. (And, once demonstrated, they'd seem trivial precisely because they're so widely shared. This isn't the kind of moral principle that cuts to the heart of a policy dispute.)

A particular society might have a moral standard that's accepted as an added requirement for legal status in that society. But if other societies don't buy into the project, we can't include it in the unitary concept of "law." Rather, we'd view the standard as part of the local law (part of the pedigree test—a secondary rule, ultimately supported by the rule of recognition) for that particular society; so it wouldn't be an "added" standard after all.

3. *Law-Making And the Management of Controversy*

My third point about why the positivist concept of law doesn't have a morals test asserts something about how people actually use law. The point is that one important function law serves in many societies (such as our own) is to remove morality from legal disputes.

One of the many insights contained in Professor MacCormick's paper is his observation that law-makers generally settle disputes at a practical level and leave underlying moral issues unsettled.¹ Yet they cast their rules in the morally resonant vocabulary of guilt and innocence, duty and breach, right and remedy, and so on, as though they were concluding the moral issues they avoid.²

Lawyers are familiar with the effect this has on the terms of later disputes. When law is applied, the controversy focuses on the narrow "legal" issues defined by the rules being applied. The rules steer us away from the larger, expansive issues of good and evil and leave us to decide a case in terms of issues the law-makers have chosen, terms that often seem nit-picky and confining. But that's the point: the legal system has co-opted the moral dimensions of the dispute without resolving the moral issues.

Of course rules *could* be promulgated to steer us into the juicy issues of naked Truth and Justice, but this is rarely done in fact. Law is used to manage and contain controversy. What the law-maker leaves for the law-applier to decide (and the litigants to argue about) is severely limited and largely de-moralized.

To summarize: The last two points, taken together, show how legal positivism, as a descriptive theory, sorts out moral issues according to their level of controversiality. (The controversiality of an idea is itself a social fact that the descriptive theory has to reflect.) If a moral idea is universally shared, it can be included in the theory's

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

2. *Id.*

global concept of "law." If the idea is shared within a particular society, it can be included in the description of the local law for that society. But if there's controversy within a society and the authorized law-makers don't resolve it, then the moral idea just isn't a valid and binding part of law.

But what if we "know" (for whatever reasons) that some moral idea is Right and True, even though the lesser lights who run and live in the various legal systems don't agree? Shouldn't we include this Truth as a tenet of our theory despite its controversiality? This is the first (and main) point: Not if our theory is a descriptive theory of social phenomena. Such a normative idea might be useful in criticizing law; but to have a role in identifying law, it has to contribute tangibly to our theory's descriptive purpose. Ockham's razor lops it off. Thus it is that legal positivism, as an empirical, descriptive theory, doesn't include any added moral standards for legal validity.

HART'S POSITIVISM

I need to tie H.L.A. Hart's theory more specifically into my scenario because it figures in the premises of Professor MacCormick's argument.

Professor Hart's concept of law was formulated as a descriptive theory. His aim was to understand social phenomena, and to clarify the general framework of legal thought rather than to criticize law and legal policy.³ The standard he adopted for legal validity was objective—ultimately an empirical, though complex, question of fact.⁴

He took up the issue, pressed by natural-law types, of adding a morals test that would invalidate some rules even when the society involved considered them valid. He offered two reasons for sticking with the broader, empirical concept of law (broader in that it doesn't exclude rules on moral grounds). His first reason (which I've been building up to in my scenario) was based on his scientific, descriptive purpose:

It seems clear that nothing is gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower [natural-law type] concept: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law. Nothing, surely, but

3. H.L.A. Hart, *CONCEPT OF LAW* vi (1961).

4. *Id.* at 245, n.1.

confusion could follow from a proposal to leave the study of such rules to another discipline, and certainly no history or other form of legal study has found it profitable to do this. If we adopt the wider concept we can accommodate within it the study of whatever special features morally iniquitous laws have, and the reaction of society to them. Hence, the use of the narrower concept here must inevitably split, in a confusing way, our effort to understand both the development and potentialities of the specific method of social control to be seen in a system of primary and secondary rules.⁵

This is Hart's way of putting the first point I made earlier: It would not advance, and would even impede, the descriptive purpose of his theory to complicate it with extra concepts that are introduced for a different purpose.

Professor MacCormick rejects this first reason out of hand. I'll deal with that matter presently.

Hart's second reason argues that, on moral or policy grounds, the concept of law *shouldn't* include extra moral standards: Even if we could educate people to change the concept they hold, the positivist concept would still be the better concept for them to hold because it clarifies the *moral* issues involved in resisting an abuse of power.⁶ Having rejected the first reason, Professor MacCormick pursues this second one, which he takes to be "an argument for the final sovereignty of conscience, and how to best preserve it."⁷

This second reason is, to MacCormick, the *only* reason not to have the morals test. Thus he concludes that legal positivism depends on a moral position (the sovereignty of conscience reflected in Hart's second reason), that the positivist thesis must be qualified to reflect.⁸

5. *Id.* at 204-05.

6. *Id.* at 205-06. The point is, roughly, this: You can better see your moral duty to disobey a wicked rule that purports to be "law" if you understand that laws can be wicked.

7. MacCormick, *supra* note 1, at 10. This is because Hart's second reason assumes that people, as individual moral agents, have to decide for themselves what laws are too immoral to obey.

8. Professor MacCormick evidently anticipates that some positivists will favor a purely descriptive version of positivism. *See id.* at 10-11. Accordingly, many of his assertions are carefully guarded and qualified, as though his thesis were only tentative. *See, e.g., id.* at 11 ("our argument (or a fundamental part of our argument) . . . is moral"; the "best case" for the positivistic limb "at least includes" moral argument); *Id.* at 18

My view is that legal positivism can stand on its own empirical feet, that it doesn't require or depend on moral justification. The sovereignty of conscience is an attractive idea, to be sure, and positivists are free to espouse it. But you do not *have* to espouse it in order to be a positivist. Hart's first reason alone is a sound and sufficient justification for not adding a morals test to his definition of law.

So back to Hart's first reason. Here's why Professor MacCormick rejects it:

The first [reason], which seems an extremely weak one, is that no intellectual or scholarly purpose could be served by expelling from the province of jurisprudence and legal studies those rules which governmental agencies impose and implement as "laws" even though they lacked the moral quality of justifiability which natural law would stipulate as essential to true legality. The fact, however, is that no such exclusion from the discipline of legal study need take place. Such rules could and should be studied as purported but pathological specimens of "law," and the grounds for their exclusion from the true category could and should be expounded and addressed within the discipline of law, even if a natural lawyer's criteria of legality were adopted.⁹

What MacCormick rejects here isn't really Hart's first reason.

Hart didn't say there's no "intellectual or scholarly purpose" in the moral standards of natural law theories. Rather, there's no scientific or descriptive purpose in using them to identify law. He wasn't trying to define the entire field of jurisprudence, but only the description of law as a social phenomenon. He objected to the expulsion of bad rules from the concept of "law" that provided the central focus of his descriptive theory.

An extra normative standard that eliminates bad rules wouldn't have any scientific purpose, and would only confuse things. This is

(difficulties with the disestablishment thesis "may prove communicable" to the positivist thesis); *Id.* at 18 (sovereignty of conscience "may have a major role to play" in justifying both theses).

However, other assertions are less equivocal. *E.g., id.* at 28 (point of view "which justifies adopting the positivist approach"); *Id.* at 29-30 (positivism "depends on a point of view" by which law must always have some moral value); *Id.* at 30 (positivist limb "now stands accordingly qualified").

9. MacCormick, *supra* note 1, at 9; see also N. MacCormick, H.L.A. HART 159-60 (1981); J. Finnis, NATURAL LAW AND NATURAL RIGHTS 357-59 (1980).

essentially the same reason Copernicus had in removing the earth from the center of the universe. That concept didn't add to his scientific purpose, and it even confused things by requiring a lot of fancy footwork with epicycles in order to explain the hard facts. There were *normative* reasons to keep the earth in the center, but that's not enough.

So, in my view, Hart's first reason for rejecting the moral standards is entirely sufficient. Positivism doesn't *depend* on a moral principle of the sovereignty of conscience. If there are further reasons, grounded in moral argument, not to have a morals test, that's fine. But let's not tinker with the theory just so we can make the moral argument stronger.

THE QUALIFICATION

How much tinkering does Professor MacCormick want to do? His qualification on the positivist thesis may seem very mild, especially in comparison with the havoc a natural lawyer type would wreak. It's simply this: *Laws ought never to be presumed to be morally justified or morally binding upon the ground of their formal validity alone.*¹⁰ If positivism were qualified by including this proposition as one of its tenets, the argument against a natural-law type morals test would be strengthened. Maybe we positivists should just accept the qualification, cut our losses, and be happy to have a stronger defense against the natural lawyers.

This qualification is quite easy to accept for some meanings of "ought." There's nothing in the descriptive positivist theory to suggest that a valid law *is* morally justified or binding;¹¹ indeed, the theory admits the possibility that a law might be immoral. So moral justification or bindingness "ought" not be presumed in the sense that there's simply no basis for such a presumption. For this sense of "ought," the qualification isn't really a qualification at all.

However, when MacCormick says "ought," he's also thinking of the sovereignty of conscience: It would violate that affirmative moral principle to make the presumption. Indeed, the qualification is derived from that moral principle, which he sees as necessary for the justification of the positivist theory. I can't buy the qualification if he packs all of that into the word "ought." We shouldn't qualify the descriptive theory to accommodate a purely normative concept.

10. MacCormick, *supra* note 1, at 30.

11. That is, not unless it's imported through some added concept like Kelsen's *grundnorm*. See *infra* note 12 and accompanying text.

THE OBLIGATION TO OBEY

If there's no morals test for law, and evil rules can be valid law, then what in the world does it mean to say law is binding? What's a legal obligation? People everywhere think of law as being obligatory, and that's a hard fact that positivists have to take into account. However, positivists haven't always agreed on how to do the accounting.

The strongest position a positivist can take here is to say there's a moral obligation to obey the law. Kelsen took such a view; it came packaged with his controversial basic norm.¹² But the transempirical basic norm is hard for a true-blue descriptive theorist to swallow if there's another way to explain the social facts.

Possibly there "is" no obligation to follow the law in any purely objective and universal sense. Even so, as Hart taught us, we can elucidate the concept if, along with the hard external facts, we consider the internal viewpoint of law. Don't simply ask what a legal obligation "is"; ask what statements using the concept mean. An assertion like "you are bound to do what the law provides," is a conclusion based on a legal system that the speaker accepts. The author of such an assertion, by accepting the rules of the legal system, takes the internal viewpoint of law. A descriptive theorist doesn't himself have to assume that viewpoint (and hold that the law "is" binding). But he has to take it into account if he wants to fully describe the social institution of law.

There's a hint of evasiveness in Hart's elucidation. It's a bit like saying "an obligation is something that a person who thinks you're obligated says you have." But if we can't find, beyond this, any objective basis for saying there "is" an obligation to obey, then we'll have to settle for Hart's elucidation alone.

Professor MacCormick offers something better, something additional. There's *some* moral value in any valid law, he says, even an evil law from a wicked ruler. The mere fact of validity gives it *some* claim (if only minimal) on our attention as moral agents. There "is" an obligation to obey, though it's only hypothetical in the sense that it's inconclusive; it leaves open the question of moral (categorical) obligation.¹³

12. Kelsen's presupposed basic norm makes it obligatory to follow what the framers of a constitution provide. So the constitution, and hence also any laws adopted pursuant to it, are binding. To Kelsen, there "is," in this presupposed way, an obligation to obey any valid law. H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 115-16 (1949).

13. MacCormick, *supra* note 1, at 39-40.

My main problem with MacCormick's argument (as usual) is that it's based partly on the moral viewpoint he sees lurking in the foundations of positivism. Even so, he has independent arguments, not based on that premise, pointing toward a moral value for all law. Any rule that has enough social and political support to be enacted in a truly functioning legal system may indeed have *some* minimum moral value to go along with its legal validity. It's an appealing thesis. But it should stand on its own as a descriptive assertion, and other theorists (even other positivists) may disagree about how to characterize the moral issues and moral values.

CONCLUSION

Professor MacCormick is a positivist of the first rank. He suffers the abuses inflicted on all notable theorists, which is to be sniped at from all directions by all sorts of people. The snipers come out of the woodwork to take a potshot or two, and then retreat. Here's one sniper who'd like to tip his hat before retreating.

MacCormick's arguments are powerful, yet intricately crafted. This is partly because they do have to stand up to rigorous criticism from all jurisprudential viewpoints. He's proposing significant changes in the jurisprudential landscape. He'd like legal positivism to occupy a larger part of the total field of jurisprudence than its purely descriptive versions can claim—to contribute directly to some normative issues about what the law should be. This would reclaim for positivists some of the moral territory once held by the utilitarians. It's a large and impressive undertaking.

My own view: Legal positivism (including Hart's version) is mainly a description of social phenomena. It stands without need of extra-empirical moral justification (that being just frosting on the cake). So when Professor MacCormick throws out Hart's first reason for avoiding a morals test, he's throwing out (I'd say) the main point. He ends up in the very awkward position (for positivists) that positivism must stand or fall on Hart's second, moral ground.

My position is, perhaps, old fashioned, and it's rather hopeless for people who want to appeal to the nature of law in support of their arguments on controversial issues of social policy. But you can't describe your way into an answer to policy issues about what the law should be.