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A TOO BRIEF REPLY TO D'AMATO, BOYLE, CULLISON AND STITH

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When I first received the critiques of Professors D'Amato, Boyle, Cullison and Stith, I rashly supposed I would do a quick reply to them. Quite apart from the autumnal preoccupations of a teacher who is also a Dean, I arrogantly underestimated the testing of my opinions to which my colleagues' critiques have exposed me. The result has been scandalous delay in keeping the promise, and may yet be even more scandalous inadequacy in this too brief reply to the criticisms offered.

Perhaps everything worth doing philosophically has to be experimental, to be tentative; one should be trying out ideas, not repeating certainties or conclusions. Certainly, that seems to be the case as to one's proper response to such an invitation as that of the Seegers lectures. At all events, my attempt in the lectures to knit together a kind of legal positivism and a kind of moral disestablishmentarianism (or of restricted establishmentarianism) must be confessed to have been tentative and somewhat experimental. It arose from having noticed in the course of writing my book *H.L.A. Hart*, that the chief strength of the Hartian position on positivism appeared to lie in the moral argument for the positivist view of legal validity rather than in the "scientific" one. This then seemed to put the positivist case on rather a similar footing to that involved in a Millian view on the question about the legal enforcement of morals. So although the question whether legal validity presupposes moral value and the question whether legal rules ought to enforce moral values are quite evidently different questions, it seemed potentially illuminating to bring into focus the fact of the possible derivability of one pair of answers to these questions from a common source in a particular vision of moral principles.

Even if the answers are so derivable, the positions they state do of course remain independent positions, in the sense that a positivist could be an out-and-out moral establishmentarian (or an out-and-out disestablishmentarian) while someone who, like me, is a restricted establishmentarian or qualified disestablishmentarian might quite easily be a natural lawyer. The latter is indeed the position for which Professor Boyle has argued, and I fully accept the legitimacy and soundness of his argument. One can quite properly couple his type of natural law view with our shared position on the disestablishment question. What challenges me in his thesis is, in effect, the proposi-

tion that our common position on the disestablishment position is *better* tenable on the basis of his approach to natural law than on the basis of my sort of (admittedly very weak) positivism. Professor D'Amato is also, I think, advancing this case, though it is not, as with Boyle, his main argument.

One move I might make at this stage would be to fall back gracefully into the arms of Professor Cullison. He entices me with the thesis that qualified disestablishment and legal positivism are both sound positions, *but for different reasons*; accordingly he urges us to uphold positivism on purely epistemic or "scientific" grounds, leaving the practical or moral arguments to hold the fort for disestablishment alone. This is so attractive a case so persuasively argued that I must at once explain why I do not wish to accept the proposal (though, incidentally, I agree that it is closer than my view to H.L.A. Hart's).

Much in the Cullison view turns upon the possibility (and presumed desirability on simply intellectual grounds) of an empirical social or legal science: there is this thing law out there, and it merits our attention for what it is, not for what we would wish it to be; whether or not there is an absolute right or wrong in moral matters, there is no prospect of social scientists or legal scientists agreeing on this. So there will be a common, objectively conducted, study of "law" only if everybody conceptualizes it without assuming any particular set of moral principles and values as either right in itself or essential for legal validity and (thus) the existence of law.

With much of this I do agree; yet I do not think it takes us far enough. For it seems to me that the primary uses of the concept "law" are in practical, not theoretical (or "scientific") discourse. There is law "out there" only because people out there use such a concept in their practical discourse and their socio-political practice. In this context appeals to law are appeals to what is—at least relatively—a *justifying* or a dispositive concept. That the law makes certain prescriptions is a reason for doing things, at least a *prima facie* reason. So the social scientists have a topic for objective study only on condition that people do ascribe some value to law and to law-abiding conduct. Their practical concept of law cannot be a Cullisonian social scientific one.

But now the trouble arises for me, in that I do, as Boyle surmises, acknowledge "the practical primacy of morality." If law has *prima facie* practical normativity, it follows that the only condition in which one can conclude that one simply ought to do what one legally ought to do is if it is morally justifiable—as distinct from morally obligatory—to do so. In a practical sense, the legal "ought" can be cancelled by the moral "ought not." So the difficulty of the Cullison position is that

the social scientist analyzing and discussing what are represented to be plain facts of the matter may actually be, or seem to be, endorsing the practical normativity of what he or she describes as law, *even though his or her methodological principles have ruled out any value assumptions on the scientist's part* in the respect of the system studied. And this is precisely the danger to which Professor D'Amato says positivists in post-1933 Germany incurred, and positivists like myself still incur. And he has a point.

The challenge of D'Amato to Cullison and myself equally must then be that if we persist in investigating the things we investigate by recourse to the methodological principles under which we do it, we have no business to use the primarily practical term "law" for the subject of our investigations. We could after all—though D'Amato doesn't make this point explicit—call it "purported law" or "so-called law" or "WAL" or something else. As I see it, this is a powerful objection to positivism. And I do not think that a resort to Cullison's strategy meets the point. To say that one is engaged in purely descriptive, detached, scientific work, and that one's use of the term "law" has therefore no evaluative implications is to be met by the rejoinder that the term *is* a practical one, and that one's scientific protocols simply denature it and mystify it and its users all at once.

If there is a reply to this, it must be couched in practical terms, and in terms which acknowledge the practical primacy of morality. Unless one can adduce adequate practical, and in the last resort moral, grounds for commending the positivist stipulations as to the senses of "legal validity," "law" and the rest, one had better change the terminology used by jurisprudence in its purely analytical phases. That is what I tried to do in the lectures, and for the moment at least I adhere still to the position proposed there.

In adhering to it, I must however face up to the serious charge laid by Professor D'Amato that I commit inconsistency and self-contradiction in adopting and adapting from Hart a moral ground for a positivistic approach to the concept of legal validity. I think he means really that we beg the question in assuming a positivist conception of legal validity for the purposes of an argument which supposedly constitutes an argument against natural law. The charge is a serious one, and may point to unclarities in expression by either Hart or me, or both of us. But it is, I think, readily rebuttable. The assumption at the given stage of the argument is that there are no *conclusive* scientific, linguistic or other purely theoretic reasons for adopting a positivistic or a naturalistic conception of legal validity. One therefore takes it that the choice between these rival conceptions should be on some practical basis. The argument then offered is that a positivistic conception of legal validity if adopted by

people at large will protect them against any assumption that whatever law requires is *eo ipso* morally sound or acceptable. The fear about a naturalistic conception is that it will enable state officials to get away more easily with acting upon false or unreasonable moral view by casting them in the clothes of a (purportedly) "valid law." It is fair to point out to Hart or to me that in *this* case the citizen's conscientious alertness to moral issues can take the form of a challenge to purported validity (though the judges who adjudicate the challenge may also get the answer wrong, I suppose), *as well as* the form of a last resort refusal to obey in any case. To some extent both sides to this argument are guessing about risks. But neither, surely, is self-contradictory.

The best way to balance the risks, in my opinion, is to follow a lead first set in the first nine amendments to the Constitution of the United States. That is, use the mechanisms of establishment of positive law to establish some basic moral principles—basic moral rights—as positively established conditions of validity in a given constitutional order. (The positive establishment of *this* kind of content-based test for legal validity is of course wholly compatible with a positivist account of legal validity; so also, by the way, though D'Amato denies it, is the acceptance of certain kinds of customs as a source of law. That a rule has emerged from the usages of a community is a perfectly acceptable test of "pedigree.") What seems unwise to me is to treat legal validity as *meaning* satisfaction of some unstated implicit principles.

To this, the issue of the diversity of moral opinions is indeed relevant, though I think D'Amato has misapprehended my view of this point. Of course some parties to moral disagreements may be wrong—outrageously so, as in the case of exponents of "racial purity." But the problem of diversity of opinions remains, and where bad moral opinions prevail, then a natural law conception of legal validity will not help, since it will be operationalized by officials and understood by citizens in terms of their false moral view. There seems to me to be as easy a Nazi abuse of natural law as of legal positivism, and I rather think one went on during those dark years. We are back to the practical primacy of the moral—the crucial thing is the refutation by moral argument and example of repulsive moral views.

One repulsive moral view to me is that which unduly impedes free conscientious action. But of course freedom of conscience and its close sibling moral autonomy are not absolute and overriding moral values. That the right be done is as important as that it be done conscientously, and sometimes more so. Crucially, when it comes to protecting the rights of individuals, infringements of those by the acts—however conscientious the acts—of others is not to be tolerated.

(E.g., good policemen may do bad things from good motives, and may infringe prisoners' rights. This ought to be stopped.) That is why I believe that moral disestablishment cannot be total. The law must enforce other-regarding duties of justice. This will of course include protecting the rights of wives and children against violent fathers or husbands and will not over-emphasize privacy against other legitimate interests. D'Amato's attack on me for favoring a position historically associated with certain evils is an egregious resort to guilt by association, and I reject it out of hand. It is, by the way, no fairer either to Mill or to Bentham.

Be that as it may, I have other difficulties to face on the score of freedom of conscience and the related values I discussed in the lectures. These difficulties are most lucidly posed in Professor Stith's critique. He suggests that I use my basic values to make several different points, which is true; he further suggests that my arguments for these points are mutually inconsistent, or in conflict. Unhappily this also is true, and I need to clarify my position; that is to re-state it so as to avoid these difficulties. I am most grateful for this criticism as showing the way to what is, I hope, an improvement.

So far as concerns my resort to respect for persons in the disestablishmentarian argument, the most basic point is that about fair notice of the law and fair opportunity for compliance. Even where the law most plainly enforces the protection of important rights of persons or other duties of justice, that is, in those areas where the claims of conscientious dissent are weakest and are normally overridden, the point about fair notice of the law's requirements applies. If people are here subject to coercion, they are nevertheless given a position of choice to comply knowingly or unknowingly to disobey.

In such cases, it could even be true, as Stith points out, that the most heroic conscientiousness of action is precisely shown when, fully advised of the law's requirements, a person nevertheless follows his or her own moral judgment and disobeys the law. What about draft-refusers during the Vietnam war? So far as we value conscientious actings for their own sake, is this not of the highest value? At least, I have to think it is, if at the same time I deny the moral value of compliant action, even in a case where what the law requires and what a person's conscience directs point in the same direction. My answer to all this has to be as follows: even if the value of conscientious action is most spectacularly exemplified in such cases of noncompliance, the punishment of a person who acts according to conscience is always an evil in itself, if sometimes a necessary and justifiable one. Furthermore, to act against such threats is not a

necessary condition of an act's being conscientious. So, ideally, one keeps the risks of a law/conscience conflict to a minimum. Further, one must acknowledge that where the law supports rather than supplants conscience this is, as D'Amato and Stith argue, a good thing.

What then is left to the principle? I should now say that so far as concerns the specific value of purely conscientious action and of moral autonomy in setting one's own order of moral principles, this cannot override the need for a common code of law imposing duties of justice. But surely in those spheres where duties are primarily self-regarding, or where the good rather than the right is conceived to be at stake, here even if the cost is a diminution in instantiation of what some, even a majority, hold to be a right or a good way of life, the good of free conscientious choice and of moral autonomy do outweigh the good of enforced laws, at least in most normal cases. Sometimes even here, conscience-supportive laws always may be legitimate in the interests of a majority; but surely only in cases where a special argument can be made for admitting paternalism (or parentalism) or fraternalism in the law. This needs careful definition and delimitation.

At the very least, I need still to do some more tidying-up of my thoughts here. I am indebted to those who have pointed the way. They tell me also that I should not call myself an "amoralist." And of course they are right, as I said myself. I hope not too much has been sacrificed in an attempt to catch a catchy title for the lectures.