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A MORALISTIC CASE FOR A-MORALISTIC LAW?

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TWO LECTURES ON LAW AND THE ENFORCEMENT OF MORALS

The essays presented here were first delivered as the Seegers Lectures at the Valparaiso University School of Law on March 26th and 27th, 1985. Edward A. Seegers has been a generous benefactor of the School, and it is an honor to be invited to present lectures in honor of such a friend of learning; all the more so in that the 1985 lectures in the series followed those of Professors Harold Berman and Tom Shaffer, and are to precede lectures by Professor Eugene V. Rostow, of whom I once had the good fortune to be a junior colleague when he was Eastman Professor at Balliol College, Oxford, and who is himself author of a seminal article¹ in the field I address here. The text of the lectures as printed here is as faithful a reproduction of the lectures in their original spoken form as is consistent with proper respect for the requirements of literary presentation.

The first of the lectures does four things: first, it introduces a crude and simple version of legal amoralism, defining this in terms of two theses; secondly it confronts amoralism with a paradox and two problems; and in its third and fourth sections it introduces the main arguments for the two theses of amoralism, called the "legal positivist thesis" and the "moral disestablishment thesis" respectively.

The second lecture also has four parts, the order of the first lecture being more or less inverted. The first explores some difficulties about "moral disestablishment"; the second discusses the relevance of these difficulties to the case for legal positivism; the third reconsiders the paradox and the problems in the light of the resolutions proposed to the difficulties discussed; and the concluding section suggests a qualified and defensible version of legal amoralism.

I. LEGAL AMORALISM: WHAT IT IS AND WHY IT MATTERS

Why should these Seegers lectures be called "a moralistic case for amoralistic law?" What would one mean by "amoralistic law," why

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1. See Rostow, *The Enforcement of Morals*, 18 CAMBRIDGE L.J. 174 (1960). Another particular debt which I should acknowledge on the topic is to Professor Tom

does it matter, and what sort of case can be made out for it anyway? These are fair questions for anyone to put to me as I embark upon my lectures. I hope at least that I shall be able to dispose quickly of the question whether there is an issue here at all, and whether it matters. To that end I can perhaps do no better than to quote a few words from the Inaugural Lecture presented by Professor Levinson before this School of Law:²

Although over the years the Court has fairly consistently sought to maintain the wall of separation between church and state, recent decisions indicate a disturbing trend toward erosion of the barrier. The decisions come at a time when the Moral Majority as well as the administration in power and certain vocal Congressmen clamor for prayer in the schools, censorship of instructional material on "moral grounds" and generally religious solutions to difficult problems such as the abortion issue.

My theme will not, of course, be that of religious establishment or disestablishment (though that topic will prove quite close to some of my present concerns); instead, it is Professor Levinson's remarks about the "Moral Majority" that I want to highlight.

From the side of this self-proclaimed majority and from other quarters in all the Western societies there is a flowing tide of demand for a renewed moralization of the law. What can reasonably be called "legal moralism" is in the air, involving the demand that the criminal law in particular, but other branches of public and private law as well, keep in step with what is, or what a majority thinks to be, sound morals. As against that, there arise other voices—mine is one of them—which express dissent from such programmers for moralizing, or re-moralizing, the law. Such a policy, it is feared, ascribes too much moral wisdom to legislative majorities, even legislative majorities with democratic mandates. It surrenders to the political process issues which belong to individual consciences.

Against proposals in effect to establish a public moral code through legislation, one may feel that what is required is almost a kind of pre-first amendment, saying not only that "Congress shall make no law respecting an establishment of religion, or prohibiting the full exercise thereof . . ." but *a fortiori* that "Congress shall make no

Campbell for his (still unpublished) paper "Ethical Positivism" read in Edinburgh to the Scottish Jurisprudence Discussion Group in May, 1984.

2. See Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U.L. REV. 707, 737 (1984).

law respecting an establishment of morality, or prohibiting the free exercise of moral conscience." This view plainly implies two claims about law and morality, namely, the claim that law and morality are not necessarily the same thing, and the claim that they should not be made so by legislation. Put even more simply: *Law and morality do not have to be identical, and should be kept distinct.* Let that slogan indeed serve as my preliminary, admittedly crude, working definition of "legal amorality"—the "amoralistic law" of my title.

OBSTACLES TO AMORALISM: A PARADOX AND TWO PROBLEMS

Taking legal amorality in the sense just defined, let us ask by what kind of argument one could go about justifying the amoralistic position. What sort of case has to be made in order to make the case for amorality? The answer is plain enough—two things must be done, corresponding to the two claims distinguished above. *First*, we would have to show what law in its own nature is, and show that, properly understood, it is neither identical with, nor in itself a simple segment of, morality. That is, some version of legal positivism has to be shown to be true or at least soundly defensible. *Second*, we would have to show how law, having the nature it has, *ought* to be used; how laws *ought* to be framed and applied; what their content and administration *ought* to be like—and show in so doing that there is good reason to keep the content of the law distinct from that of morality.

This seems at once to reveal a paradox. At least in the second of these steps of argument, it seems as though we shall necessarily be making recourse to moral arguments. After all, we shall be constructing a theory concerning the right, proper and justifiable use of certain governmental powers: particularly those of law-making and of law-enforcement. Such a theory must be at least partly a moral theory, and must be so at its most fundamental level. After all, it cannot be doubted that some of the considerations which justify the use of governmental power are moral considerations, specifically considerations of political morality as distinct from purely personal morality (these two being, however, related). Even if other considerations, such as issues of policy in the sense of *raison d'état*, questions of expediency and efficiency and such like are deemed wholly non-moral in character, it remains open to question what weight they are entitled to bear alongside of the relevant moral considerations. And a theory of the relative weighting of moral and non-moral factors in deliberation is necessarily a moral theory. Hence at the most fundamental level, the arguments we require are moral arguments to sustain our theses as to the proper uses of law and why these proper uses exclude an "establishment of morals." So the paradox is that *the case for amorality has to be itself (at least in part) a moralistic case.*

This paradox may be thought somewhat damaging to the position of the amoralists. For their objection is an objection to the proposals of "moral majorities" (or whoever) to implement certain moral values in and through the law. Yet their own case seems inevitably to involve arguing for the implementation of some other moral values through it. Why cannot the moralists then rejoin that the debate has ceased to be a debate *whether* to implement moral values through the law and has become only a debate *which* moral values to implement? Despite robust denials of this by at least one leading proponent of the disestablishmentarian position, the establishmentarian rejoinder on this point seems to have a good deal of *prima facie* force. At the very least, further thought about this ostensible paradox will be called for.

(1) *The Justifiability of Law Problem*

This is the problem (a problem for the amoralist, I mean) that laws always stand in requirement of some moral justification.³ This has to do with the fact that laws affect the way people treat each other and the way they have to be or may lawfully be treated by public officials. Let us consider in the crudest neo-Hohfeldian way the sorts of normative and practical effect laws can have.

(a) Some laws require certain conduct of people, and subject breaches of requirement to various sanctioning processes, whether in the way of criminal trials and penalties or in the way of civil proceedings and remedies. Laws constrain our behavior within certain limits, exposing us to the stigma of wrongful action and to coercively implemented penalties and remedies where we go against those constraints. Thus law interferes with people, and interferes with them in ways in which call for justification.

(b) Either by special exemption from or by simple absence of such constraining laws, legal systems leave open many things which citizens are legally free to do. But these things a person can freely do may have serious effects on the interests of others, as in the case of exercises of free speech to the detriment of another's peace of mind or reputation, or in the case of tolerated trade competition involving the ruin of a less successful competitor or in the case of abortion (depending on the kind and degree of personality, if any, which it is

3. On this problem see Reyleveld & Brownsword, *The Practical Difference Between Natural-Law Theory and Legal Positivism*, 5 OXFORD J. LEGAL STUDIES 1 (1985). My whole argument on the problem of justifiability of law is intended as a response to the friendly challenge implied by them. *Id.* at 12, n.24.

proper to ascribe to a human fetus), or in the case of the damage to health suffered by persons who are free to smoke the cigarettes sold to them by tobacco firms in the exercise of their freedom. The toleration of such freedoms whose exercise may be harmful either to other persons or to the acting person clearly calls for justification—whether that be thought easy or hard to find.

(c) Sometimes the law enables individuals or collectivities to act in ways which have ulterior legal effects for themselves and others, effects including one such as those covered in (a) and (b) above. Contracts validly made may be enforced judicially at the instance of one party, even to the grave detriment of the other in the events which have turned out. The corporate strength of a trading concern whose promoters have validly incorporated it may affect the trading position of other traders in a market; and in any event the forms of property resulting from such incorporations give rise to all manner and form of law enforcements, and have all sorts of discussable economic side-effects. Legislative power itself—an enablement by law of some citizens to make laws affecting all citizens—calls for justification in its exercise, as was already pointed out in discussing the paradox. Moreover, as Jack Hiller has well observed,⁴ every enablement of somebody is in effect a disablement of somebody else. The powers of property owners to dispose of property have the precise point that others are excluded from dealing with that property save by its owner's leave and license. And so on.

(d) Finally, of course, laws can restrict such powers. Owners of land may be disabled by zoning laws from disposing of it for certain purposes. Legislators, even with conclusive democratic mandates, may find themselves disabled from legally implementing cherished policies—for example, in the way of establishing a religion, or setting up official municipal nativity scenes at Christmas time, or subsidizing the costs of public transport.

All these forms of state interference with people—requiring them to do or abstain from things, letting them do things with effects good or ill for others, enabling them to set up legal arrangements backed by coercive power, or restricting their ability to do so, are things which call for justification. This justification is or includes a justification of the use of stigmatization, force and coercion—or a refusal to use these—in relations among persons. No complete justification of that could avoid being, or at least including as its most fundamental

4. See J. Hiller, *Lawyers, Alternative Lawyers and Alternatives to Lawyers: Of Thomas Hobbes and Rumpelstiltskin* 5 (Valparaiso, 1985) (unpublished paper).

element, a moral justification. Hence, given that it is in the character of law to make such dispositions as these, calling for such justifications as they call for, it is in the character of law that it ought to be morally justifiable.

But the first limb of the amoralist case says that law and morality do not have to be identical; the problem of justifiability of law suggests that law is in its nature something which ought to be morally justifiable, so that it may be doubted whether the positivist limb of amoralism is sustainable. And *a fortiori* the disestablishmentarian limb, according to which law and morality should be kept distinct, seems barely supportable in the fact of this problem. Nor is it the only problem. We turn now to the other.

(2) *The Obligatoriness of Law Problem*

To almost everyone, I suppose, it must seem a desirable goal that laws are accepted and obeyed by citizens not merely out of fear of the consequences of rejection or disobedience but rather out of some sense of obligation thereto. Neither the terrors of deterrence nor the prospects of advantages available to the law abiding are sufficient or, by themselves alone, desirable motives for securing the fidelity of citizens and officials to law. Rather, it seems that in a healthy polity citizens would respect the law in letter and spirit out of a sense of reciprocal obligation with fellow citizens. Measures of coercion annexed to law would be acknowledged as perhaps necessary guarantees of fraternalism among citizens—extra motives available to stiffen one's resolve to comply in cases where contrary temptation was for some reason strong.

But for this ideal state of affairs to obtain, it would have to both be the case and to be acknowledged as the case that the burdens apportioned by the law to the citizens were in broad terms fair burdens, and that the requirements, empowerments, etc. set up by laws were sound and reasonable ones. In these conditions a sense of fair reciprocity could reasonably obtain among citizens. It would be possible for one's legal obligations to be also moral obligations—though of course not necessarily the totality of one's moral obligations.

If the state of affairs envisaged is indeed an ideal state of affairs, this yields the conclusion that (whether or not they actually are so at a given time in a given place) legal obligations ought also to be moral obligations. It is morally desirable that whatever is legally obligatory be also morally obligatory. This in itself poses an obvious problem (the Obligatoriness of Law Problem) for the amoralist position, especially its second limb. Furthermore, we should notice, even

here at this preliminary stage of the present discussion, that it has been powerfully argued that "legal obligations" are a species of obligations properly considered only on condition that, at least from some point of view, the requirements of the law are also morally obligatory.⁵ And this view, if sound, is fatal to the first limb of amorality. Those who propound it certainly intend it to be so.

These lectures would be sorely in want of that factitious dramatic tension which is the hallmark of well constructed soap opera were it not for the paradox and the problems. Happily, however, it is possible to stack up the cards against amorality at the beginning. Hereafter it will be possible to test ingenuity by trying to construct some kind of a case which can resolve the paradox and solve the problems. I believe it will prove possible to do so, though as my tale unfolds it will become clear that only a qualified sort of legal amorality is in the end defensible.

The first job will be to make out the best possible initial case for crude amorality. This I have already defined as comprising a positivist thesis, that law and morality do not have to be identical, and a moral disestablishment thesis, that they ought to be kept distinct. In the next two sections, to the end of Lecture I, I shall busy myself in constructing what I regard as the best case or cases for each of these theses.

A CASE FOR POSITIVISM

"Positivism" is a doctrine about the nature and sources of law. Law, according to the version of positivism which I espouse, consists of a systematically inter-related set of normative rules having effects such as those described in my discussion above of the problem of justifiability of law; these rules are backed by other less determinate standards for conduct and its appraisal, such as principles, policies and values. The rules which count as rules of a given legal system are those which satisfy criteria of validity or bindingness according to the system's doctrine of formal sources of law, whether this doctrine is enshrined in a formal constitution or not, the ultimate foundation for constitutions and formal sources of law being political custom.

On this view, the existence of law is a matter of "institutional fact." It is a matter of fact in that it pertains to and is disclosed by

5. Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178 (1984).

the actual way in which people govern and are governed (even self-governed) in actual working human communities. It is a matter of "institutional" fact, in that its existence is dependent on human conduct and practical attitudes to conduct as shaped and disclosed in customary practices of a kind such as can be made intelligible only through some form of hermeneutic analysis and description.⁶

Such a theory of law as institutional fact supposes further that legal rules are not necessarily moral in their very nature. Certainly, the law cannot help but include moral elements in so far as the customs in which it is grounded express practical attitudes, including moral attitudes, of at least those human beings actually involved in implementing the system. Certainly, a legal system may explicitly incorporate moral values and principles which have to be further elaborated in litigation, legal argumentation and judicial decision-making; the United States Bill of Rights furnishes a classical case of this, and the Canadian Charter of Rights will in due course furnish another. Even apart from such explicit incorporations of moral principle into constitutional practice, the background principles, policies and values which lie behind legal rules and which properly inform their judicial implementation impart at least a partial element of the moral into any legal system's operation, at any rate in the sense that they express what those empowered to implement the rules see as being justifying rationalizations of the valid rules.

Nevertheless, despite these and perhaps other elements of overlap between morality and law to be found in some or all legal systems, there remains two crucial non-entailments. First, that *L* is a law does not entail that *L* is a rule which it is morally justifiable for the authorities of a state to implement or enforce. (Which is not to say that it may be practically and perhaps even logically necessary that those officials involved in making or implementing *L* must purport to consider it justifiable to do so.) Second, that *L* is a law does not entail that *L* is a rule with which it is morally obligatory for citizens to comply. These two non-entailments are statements of what one may call the conceptual independence of law from morality, the point which in this lecture I have stated in the form, "Law and morality do not have to be identical." Provided the account of law as institutional fact which I briefly summarized in the opening section can be expounded in a thoroughly consistent way and shown to cohere

6. See N. MACCORMICK & O. WEINBERGER, AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM introduction, chs. 3-4 (forthcoming, Dordrecht 1986); see also N. MACCORMICK & H.L.A. HART, ON "HERMENEUTICS" chs. 2-4 (1981).

with our experience of law, the positivist thesis for the conceptual independence of law from morality may be proposed as a tenable one.

Being tenable, however, is not enough to secure conviction. What would make it a sound or fully satisfactory thesis? There are, after all, all manner of overlaps and interpretations between the legal and the moral, as already conceded. Would it not be simpler and more realistic if we brought these more centrally into our analysis of law by insisting that the "institutional fact" analysis of law be carried one step further through stipulating that those rules alone can be counted as law which, in addition to satisfying relevant "formal source" criteria, are also such that it is morally justifiable for officials to implement and enforce them? Laws would then be institutional facts subject to the further constraint or test of moral justifiability. It is at least pragmatically self-defeating for officials not to *purport* to be justified in implementing the law. Why not add that they have to *be* justified; otherwise it is not "law" they are implementing?

As H.L.A. Hart has observed, this proposal would amount to suggesting a somewhat narrower conception of law (narrower, because stipulating a further test for legal quality) than that proposed by legal positivists.⁷ Against this narrower conception, Hart has put forward two objections. The first, 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 theory 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.

Hart's second ground for adoption of the broader (positivistic) conception of law is, however, as I have suggested elsewhere, a more promising one. Perhaps I may quote it in full:⁸

7. See H.L.A. HART, *THE CONCEPT OF LAW* 204-07 (1961); for doubts especially on Hart's first argument, J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 357-59 (1980); N. MACCORMICK & H.L.A. HART, *supra* note 6, at ch. 13. See also Reyleveld & Brownsword, *supra* note 3.

8. H.L.A. HART, *supra* note 7, at 205-06.

So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. 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.

The appeal in this argument is not to the intellectual or scholarly consequences, but to the practical consequences, of adopting a wider or narrower conception of law. The practical argument is that states, governments, wielders of power in general, will in practice be able to manipulate the idea of "law." If we insist that nothing is really "law" unless it passes a substantive moral test as well as a "formal sources" test, we risk *enhancing* the moral aura which states and governments can assume, even if our true hope is to cut out of the realm of "law" evil and unjustifiable acts of legislation and of government.

The argument of last resort here is an argument for the final sovereignty of conscience, and how best to preserve it. Nobody, I suppose, doubts that legal positions can be abused, and demands made of people which it may be right for them to defy and perhaps even morally mandatory on them to resist. Natural lawyers counsel that we should withhold here the term "law"; positivists, that we may allow the term "law" precisely because we shall insist that legality is not decisive for obedience. Obedience is a moral question, and hence a question distinct from that of legality.⁹

This practical-cum-moral argument as between positivist and natural law approaches is by no means an easy one to resolve. It may be that we need after all to have recourse to matters of epistemology and methodology, as both Ota Weinberger and Joseph Raz powerfully argue, in order to settle the issue for positivism, or at least to put

9. For various current positions on these points of controversy, see, on the natural law side, M. DETMOLD, *THE UNITY OF LAW AND MORALITY* (1984); J. FINNIS, *supra* note 7; Lyons, *supra* note 5; Reyleveld & Brownsword, *supra* note 3; Finnis, *On "Positivism" and "Legal Rational Authority,"* 5 OXFORD J. LEGAL STUDIES 74 (1985). On the positivist side, see H.L.A. HART, *supra* note 7; H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 8-12 (1983); N. MACCORMICK & O. WEINBERGER, *supra* note 6; J. RAZ, *THE AUTHORITY OF LAW* chs. 3-7 (1979).

forth the best possible case for that view.¹⁰ For the purpose of the present lecture, however, I shall not go into these matters. It is sufficient to the present purpose to note that a powerful case, and perhaps a sufficiently powerful case, can be made out for the positivist position on purely practical and moral grounds. For my own part, I do not believe that any sufficient case can be made out which does not at least include these moral and practical grounds, these arguments for conceptually buttressing the sovereignty of moral conscience.

The paradox which my argument confronts is thereby strengthened. I have already noted that as to part of the amoralistic case I may have to make a moral argument. Now I add that, even for the positivist thesis, the thesis that law and morality do not have to be identical, our argument (or a fundamental part of our argument) is a practical and moral argument for conceptualizing law in a certain way rather than another way. Having thus noted that the best case for the positivistic limb of legal amoralism at least includes some moralistic argument, I press on to consider at least in outline what kind of a case it is that one can make for the thesis of moral disestablishment.

A CASE FOR MORAL DISESTABLISHMENT

Let it be supposed, as is sufficiently established, that law and morality do not have to be identical. What sort of a case could then be made out for insisting that they ought to be kept distinct? I have already more than once alluded to the analogy between this view of "moral disestablishment" and the celebrated instance of "religious disestablishment." The analogy can perhaps be pressed to be of further assistance by allowing me to refer to Mark DeWolf Howe's splendid historical account of the Disestablishment Clause in the First Amendment to the United States Constitution. As the title of his book *The Garden and the Wilderness* reminds us, there were from the beginning two visions of the real point of disestablishment.¹¹ One was that of the Puritan divine Roger Williams, who wanted a secure wall built around the garden of religion, safeguarding it against the political wilderness without. The other was the view of Thomas Jefferson, who wanted a firm wall (as it were) erected around each of the plots of

10. N. MACCORMICK & O. WEINBERGER, *supra* note 6, at ch. 5. See also J. RAZ, *supra* note 9; Raz, *The Problem About the Nature of Law*, 3 CONTEMPORARY PHILOSOPHY, A NEW SURVEY 107 (1982); but see his observation at 124:

[I]t does not follow that one can defend the doctrine of the nature of law without using evaluative (though not necessarily moral) arguments.

11. M. HOWE, *THE GARDEN AND THE WILDERNESS* 6-15 (1965).

religion to prevent priestcraft from breaking out and corrupting statecraft. Williams' version was of a depoliticized church, protected from the intrusions of Federal politicians; Jefferson's was of a secularized Government, secured against the ambitions of prelates and priests. We might perhaps do well likewise to think of moral disestablishment as a two sided program—aimed on the one hand at protecting morality from ill judged intrusions by government through the instrumentality of law, and on the other hand at protecting the proper business of the law from excessive (or any) interventions by meddling moralists.

Foremost among arguments of the former group must come again an appeal to the sovereignty of conscience. Where law enters the moral sphere, it risks violating conscientious action. On the one hand, the law may demand of a person what she or he cannot do without violating a conscientiously held duty. It may be said, however, and truly, that the law does not have to be moralistic law in order to risk violating conscience. Public health measures may sometimes violate some consciences, as may laws requiring the education of children, or the disclosure by medical practitioners of contraceptive advice given to children, or draft laws. Still, at least in such cases the violation of conscience is a side effect of a law aimed at some supposed good other than conformity of conduct to a pattern considered right in itself. And here there is a direct contrast with, for example, the criminalization of homosexual relationships, or extra-marital heterosexual ones, or the imposition of religious tests or required religious observances. In so far as freedom of conscience is an acknowledged good, every direct enactment of some moral norm into binding law risks violating that good.

Furthermore, insofar as autonomy in action is a condition of moral motivation, legal compulsions to good behavior deprive that very behavior of its virtuous (as distinct from possibly beneficial) quality. It is of the essence of a moral life that it consists in and rests on the free, that is, the uncoerced choice of right ways of acting for their own sake or for the sake of their consequences viewed in a disinterested way. Coercion, cajolement or bribery would all be ways of depriving otherwise good ways of acting of their real moral quality. So the legislative enactment of moral norms into law, aimed at directly repressing vicious behavior, has the curious consequence of cramping the scope for virtuous behavior.¹²

12. The best recent statement of the Kantian case on autonomy as a condition of morality is W. LAMONT, *LAW AND THE MORAL ORDER* (1981); *but see* H.L.A. HART, *LAW LIBERTY AND MORALITY* (1963) for application of the value of autonomy to the purpose of a critique of moralistic criminal law.

It has been pointed out to me (by Professor Richard Stith¹³) that this argument appears to lead to the bizarre conclusion that then the creation of temptations and occasions of sin would be positively desirable. For only in the presence of real allurements to the bad can an autonomous will to the good have the opportunity to test itself and triumph over adversity. The prayer "Lead us not into temptation" would in this case appear like a *cri de coeur* of moral poltroonery. But nothing which I have said should be read as pressing the case for autonomy to this extreme. One should of course wish for the absence of evil states of affairs as well as for the presence of good actions. Temptations being of the former character, one should not seek to bring them into existence or to foster conditions of temptation. But, that aside, it is morally important to leave people free to choose for the better even though this logically implies their like freedom to opt for the worse.

John Stuart Mill characteristically reminds us that the freedom of freely choosing individuals may have ulterior as well as intrinsic value.¹⁴ This depends on the supposition that ideas are sufficiently unlike money to guarantee that the good will drive out or otherwise triumph over the bad. Where people have a free choice among rival views, the better will tend to prevail. Of course, some ways of putting this tend to the tautological, in the sense that it is stated or hinted that whatever comes to be believed by most people is *eo ipso* true. Such majoritarianism is obviously unsuitable to the present case (as well as wrong), for if majority belief is a sufficient test for truth, we might as well legislate the current majority's current truth into law as wait for some other truth to emerge. The point rather is that free debate is essential to test the strengths and weaknesses of moral and other theses and systems of thought. That an idea has been tested, tempered and refined by the critical processes of free debate properly increases the credence that may rationally be accorded it. Insofar as a majority is a rational majority, its views are a helpful guide; but one's trust in its rationality must be weakened by the extent to which the given majority uses its weight or power to stifle or deter further debate. Given this version of the "free market" metaphor as to ideas, we may heartily endorse Justice Holmes' famous dissent in *Abrams v. United States*.¹⁵

13. The suggestion was made in the context of discussion with students and members of the faculty after the first of these lectures.

14. See J. MILL, ON LIBERTY ch. 2 (1946).

15. 250 U.S. 616, 630 (1919).

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

The difficult point about moral, as about political or religious ideas, however, is that they belong to the sphere of the *practical*. They are not only matters of what people think true in a speculative way. They are how people think lives should be led. So the freedom of debate in these matters, the free moral market, requires freedom to do as well as to say, freedom to test out ways of living by living them. This calls for majoritarian and legislative abstentionism, not for the strategies of moral majoritarianism. To say this is to allude to the good of *toleration*, let it be said active toleration rather than merely passive indifferentism. Toleration, unlike indifference, does not shirk criticism of rival views; merely, it insists on the difference between a critique, however trenchant, of a rival view and a suppression of that view. Perhaps what was recently known under the name of “repressive toleration” was really dead-handed indifference to opinion, as distinct from what I take to be genuine toleration. There is all the difference in the world between being disbelieved and being merely ignored.

What is good about tolerance as a social virtue is that it acknowledges and promotes a form of society in which there are honest, serious and open differences of opinion about the good life and how to live it but in which the holders of rival opinions can fully respect each other as sharing a common citizenship and a common form of social life—that alone in which debate is possible. It allows also that different opinions issue in different lifestyles and ways of life but that the right to dislike or to 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. It is sometimes said that nobody can be serious in his or her own beliefs unless she or he really wants to make other people fall into line with them. To me it seems rather that one is not serious about beliefs unless one thinks it will be their, rather than one’s own, rational strength which will make others accept them, albeit only in a longish run.

However that may be, this range of arguments from that of the value of freedom of conscience to that of the virtue of tolerance states the case for walling legislators out from the garden of morality. What of the other side of the disestablishmentarian case, the case for keeping the law free from the intermeddling of moralists? Here we necessarily move on to the more positive ground of theories as to what lawgivers should actually be busying themselves about, as distinct from implementing moral values through positive laws. Three grand, and not necessarily unconnected, ideas suggest themselves.

First, there is the Kantian idea about the securing of freedom as the proper task for law. The law's business is not to tell people what to do, but to secure to each a sphere of freedom of action within which, in uncoerced virtue, moral personality may develop and realize its full potentiality. What may then be prohibited are all those acts which invade the sphere of freedom of others, definable in terms of the rights each enjoys. This sort of idea has been lately re-stated as the first of the two principles in John Rawls' special conception of justice. The idea is to secure to everyone as large a share of the basic liberties of citizenship as are consonant with everyone else having a like share. This is not set forward as a way to promote any particular pattern of moral excellence, and indeed any admission of any such "perfectionist" considerations would in Rawls' view amount to a departure from justice. This theory of justice has recourse only to a "thin theory of good," concerned with distribution of social primary goods—"liberty and opportunity, income and wealth, and the bases of self-respect"—not on the footing that these alone are good. On the contrary, all are merely instrumental goods; things that anyone has reason to want as enabling him or her to procure or enjoy whatever else it is that he or she wants to have, or that is worth having.¹⁶

The idea of equality of liberty or liberties leaves the notorious problem that civil and political liberties aren't worth much if you are starving. So a further problem of justice in the Rawlsian view is to secure not only that people have equal freedom but also that their equal freedom does not have grossly or unjustly unequal value. So law has the function of securing freedom for all and a proper value of freedom for each.¹⁷

16. See J. RAWLS, *A THEORY OF JUSTICE* 60-65 (1971).

17. See J. RAWLS, *supra* note 16, at 204-06; but see Daniels, *Equal Liberty and Unequal Worth of Liberty* in *READING RAWLS* 253 (N. Daniels ed. 1975); N. MACCORMICK, *LEGAL RIGHT AND SOCIAL DEMOCRACY* 11-14, 97-102 (1982).

In utilitarian rather than Kantian vein, a legislative task akin to that of hindering hindrances to freedom is the one prescribed by utilitarians such as John Stuart Mill and contemporary followers such as H.L.A. Hart and Joel Feinberg. Here the key test of legitimate legislative interference is supplied by the "harm principle." Whenever action by one person causes or threatens harm to another, that behavior may be prohibited by law under threat of penalties. The point is to prevent harmful behavior in its character as *harmful*, injurious to another's interests; not to express some kind of moral condemnation of intrinsically wicked behavior. Harmful conduct may legitimately be prohibited even if it is not immoral in itself; and immoral behavior may not be prohibited unless it is harmful, and then on account rather of its harmfulness than of its naughtiness.¹⁸

To be stressed in this view is that "harms" presuppose interests of persons, that something is harmful if it violates an interest of a person; merely trivial interests have as their counterpart merely trivial harms, and *de minimis non curat lex*. A particularly delicate case is that of one's interest in avoiding disturbance of sensibilities, an interest liable to violation by whatever offends the sensibilities. But unless a robust view is taken as to the amount of offense people are expected to put up with on the *de minimis* basis, the harm principle can be taken as licensing severe restrictions even on freedom of debate. It has been further a point of discussion how far self-harming activities are justifiably subject to prohibition, that is, how far paternalism is allowable in legislation. But those who think it allowable stress again that paternalistic legislation may be accepted only as a prophylactic against harms, not for goodness' sake.¹⁹

A final candidate for proper, non-moralistic, uses of legislation is that propounded by some of the economic analysts of law: the maximization of wealth. It is possible to propose this as the very antithesis of moralistic legislation, rather along the same lines of argument as represented by Rawls' "thin theory of the good." The question, after all, is not what is worth wanting or worthy of human enjoyment. Wealth is simply a means to an end—*any* end. Lawmakers who seek to maximize wealth seek a maximization of human opportunities—but absolutely abstain from prescribing proper uses of opportunity. Further, since a maximization program excludes any discussion of

18. J. FEINBERG, *SOCIAL PHILOSOPHY* 25f (1973); H.L.A. HART, *supra* note 12; J. MILL, *supra* note 14.

19. See especially H.L.A. HART, *supra* note 12, at 30-34.

distribution, even such morally loaded concepts as that of "fairness" found in Rawls are here eschewed.²⁰

So of course the theories sketched here are in some versions as much in rivalry as in agreement. But each presents what is sometimes thought of as an anti-moralistic view of the proper uses of law. Each proposes a proper task for the lawmaker in such a way as to set up also a "keep out" sign against the legislative moralist. And for all that the theories are in rivalry, the goals they support may be more easily reconcilable than the theories they support. As the old Polish proverb says: it is better to be young, free, healthy and rich than old, enslaved, sick and poor.²¹ So it is, and there is nothing to stop one being all together (age apart). Thus, either alternatively or cumulatively, the principles and values discussed here do seem to afford sound positive reasons for endorsing libertarianism.

As we have seen, then, in this first lecture, a good case can on the face of it be made out for both the limbs of what I am calling legal amoralism. Both as to positivism and as to moral disestablishment, there are good even if not absolutely demonstrative arguments available to the legal amoralist. Curiously enough, both sets of arguments involve an appeal to the same value: that of the sovereignty and freedom of the individual conscience. That requires us both to reject any pretension of the state to be determining morals when making the law and to reject any pretension by the state to be acting rightly if it imposes laws with a view to demanding moral compliance. This is a far from inept idea to put forward in the United States. I quote again Justice Holmes this time from *United States v. Schwimmer*:²²

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

Ringing as these words are, however, I have to remember that stacked up against amoralism are two problems and a paradox. And

20. See J. RAWLS, *supra* note 16, at 395-99 (thin theory of the good), 111-14 (fairness). On wealth-maximization, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); but see R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

21. This is a corrupted version of the proverb as put by Wojciech Sadurski in *Equality, Law and Non-Discrimination*, 21 *BULLETIN OF THE AUSTRALIAN SOCIETY OF LEGAL PHILOSOPHY* 113, 124 (1981).

22. 279 U.S. 644, 654-55 (1929). I owe this reference and also that of *Abrams*, *supra* note 15, to Professor Jack Hiller.

even before we come to that, I am already conscious of some difficulties about the disestablishment thesis which may prove communicable to the positivist thesis as well. So even if the first lecture ends satisfied that a *prima facie* case exists, there are yet difficulties and problems to surmount.

II

The first of these lectures gave a crude preliminary statement of what I envisage as legal amoralism. Then it considered what sort of case would have to be argued to vindicate amoralism; and it turned out, paradoxically, that this case itself would have to be argued on moral grounds. Further to that paradox, two problems for the case were noted, and were labeled respectively the Problem of Justifiability of Law and the Problem of the Obligatoriness of Law. As a preliminary to considering avoidance of the paradox and solution to the problems, the actual case for legal amoralism in its two limbs was then reviewed—first the case for the positivist thesis, then that for moral disestablishment. Curiously enough, it turned out that the argument from sovereignty of conscience may have a major role to play in justifying both theses. But that did not seem to do much in the way of evading the paradox; if anything, it strengthened it.

The present lecture inverts the prior order of proceeding. It starts by casting doubt on the coherence of the moral disestablishmentarian's case as expounded so far; then it reconsiders the positivistic case in the light of the critique of disestablishment. This leads on to a new and qualified statement of the amoralistic position, qualified in both limbs. Finally, the standing of qualified amoralism as against the introductory paradox and problems is re-assessed.

DOUBTS ABOUT DISESTABLISHMENT

The task of the second half of the argument for moral disestablishment as presented above was to advance at least some sketchy ideas as to what it is the proper business of the law to bring about. In noting the arguments for keeping moralists walled out from intermeddling with legislation, we had to note what were the purposes which such meddlings might corrupt. One possible such purpose was the Kantian one of devising laws apt to secure for each individual a sphere of freedom and autonomy, the law's coercions being restricted to ensuring that each citizen is secure from worse coercions by other citizens. Quite closely related to that project is the Millian one of protecting people from harm—and setting the principle which Joel Feinberg calls the "harm principle" as the sole justifying

ground for invocation of criminal laws and penal sanctions. This is contrasted by its proponents with moralistic programs, programs for enforcing moral values. The law's proper purpose is simply to prevent the infliction of harm by persons upon persons (including, perhaps, in extreme cases, upon their own persons). The idea of using the harms of legal punishment only to prevent the infliction of greater harms by some on others is not very greatly different from the Kantian one of using the hindrances of law only to hinder hindrances on freedom (that is, to prevent similar but greater hindrances of some people's freedom by other people). Further to or alternative to both or either of such policies, we might also advocate an idea derived crudely and simplistically from the contemporary economic analysis of law, namely that law should be so used as to create the conditions for maximizing economic well being. All three of these approaches have been advanced as indicating desirable ends for law and grounds for legislation, each preferable to and each capable of being hampered or negated by approaches to legislation grounded in moralistic attitudes.

The trouble, however, is that each of these ideas is in itself a morally loaded one. This is probably at its most obvious when we reflect on the idea of harm to persons. What is a person? (E.g., is a human fetus one?) And what is harm? The idea that something harms, or is harmful to, a person is logically dependent on some conception of what is a good state for a person. To be harmed is, by contrast, to be put into a bad state. It is to have one's interests adversely affected. But what then are the interests properly to be ascribed to persons? What are legitimate interests? It is all very well to treat bodily security as unproblematic, but the moment we move to the sphere of intangibles such as peace of mind and unsullied reputation, to say nothing of property in all its contested forms, at once it becomes obvious that some explicit or implicit views as to legitimacy of interests, that is, as to justice, are in play.

One way or another we cannot avoid the conclusion that some ideal view is needed as to what is a good state in which a person should be. Only in the light of that is harm definable, as whatever puts a person in some state other than this good state, or whatever adversely affects legitimate interests. This also bears on the crude point I took from the economic analysts; for economic well being and an expansion of available resources is surely not to be promoted at any cost whatever. It is not to be promoted at the cost of illegitimate harms or of improper infringements of legitimate interests, nor at the cost of coercions which encroach upon the protected freedom of individuals. But where are the boundaries to be drawn here—when does economic superiority in a bargaining position slide over into

economic coercion? What is the difference between an advantageous offer to a person in adversity and a coercive offer which abuses market power? It is highly doubtful whether all such problems can be resolved purely in economists' terms. And, even if they could, the underlying thesis that maximizing wealth is always a right and rational thing to do cannot but be a moral thesis in itself. Taking in all in all, our question may be: what sorts of freedom are to be secured? What is harm, that is, what human interests are to be protected? Is something other than economic advantage ever worth pursuing? Some one or some combination of these questions must be answered by whoever promotes any one or any combination of the freedom principle, the harm principle or the wealth maximization principle as a statement of the proper (and anti-moralistic) objectives for law and legislation. Nothing that I want to argue today requires me to offer any particular answer to any of these questions. My focus is simply on their character as questions. *All are morally loaded. None can be answered without staking out some moral position. The ideas of harm or freedom or welfare that they introduce into the discourse are morally loaded ideas.*²³

Therefore it cannot but be that some qualification has to be added to the basic idea of moral disestablishment. Some positive purpose for legal intervention has to be postulated over and above the postulate that law should as far as possible leave people free to pursue (or fail to pursue) the good as their conscience discloses it to them. The positive ends we have reviewed—those traditionally favored by those who have opposed legal moralism—are all morally loaded and morally contestable. So pure out-and-out moral disestablishment would seem unsustainable.

Nor does this point stop here. We have to remember by what method legal agencies can and do go about preventing harmful behavior or coercing coercions or propagating the maximization of wealth. This they do by recourse to punishment—by recourse to threats of punishment, and to impositions of punishment where, despite the threat, someone is proved to have broken a rule backed with the threat of a penal action. It is sociologically obvious (and indeed in my view analytically true) that punishment as such involves condemnation. Punishment is not a cool and morally neutral affair as imposed by law courts and then implemented by prison officials. The question

23. Cf. N. MACCORMICK, *supra* note 17, at 27-30; see also N. MACCORMICK & H.L.A. HART, *supra* note 6, ch. 13. I regard the present lecture as teasing out some of the implications of views advanced in these earlier works rather than a supplanting them.

raised in a criminal case is "Guilty or Not Guilty?"; it is whether a *crime* was committed or not, or at least an offense; if a crime or offense is shown to have been committed, the judge must then seek out a *condign* punishment to visit upon the criminal or offender.²⁴

The very imposition of a "punishment" as such always involves some element of moral stigma (whether deservedly or not); and it is more than arguable that this is intrinsic to the logic of the concept itself. Punishment means requital of wrongdoing, and if the "wrong" done were no real wrong, there would be no proper place for punishment in that case. Utilitarians may think this is a mistake. Punishment, perhaps, in their eyes is just a price charged for rule-breaking, set at a level which tries to price breaches out of the market. No need for stigma in it, they say. As to this, one has to ask whether punishment would deter more or less economically if it did not carry some stigma. The answer seems obvious.

On a different tack, one is entitled to remark that utilitarianism must suppose there to be some powerful background justification available for ostensibly treating people (punished persons) as means to public ends, so there has to be some other moral baggage packed into the concept. In fact, recourse to the technique and the terminology of punishment or even penalty seems to me to be exactly calculated to signalize that those who so act as to incur liability to punishment or penalty have chosen thereby to infringe the terms of their citizenship. The idea that laws which incorporate provisions for punishment and penalties could be considered as being clearly and cleanly amoralistic seems purely laughable.

This indeed is one of the sources of the law's power to de-legitimize as well as simply prohibit the acts which it prohibits. In making some activity be subject to the pains and penalties of the law, a legislator is doing something which is certainly calculated to and usually intended to cast a moral cloud over that activity, that is, to de-legitimize it. Conversely, the provision of facultative laws and protective measures for certain kinds of favored activity is a way of legitimizing the activities thus facilitated and protected. This gives a certain poignancy to the recent case in New York where the elder of a male homosexual couple (aged 57) unsuccessfully sought to adopt his 50 year old partner (with the latter's consent) with a view to endowing their *de facto* familial life with a legal form of familiarity.²⁵

24. Cf. J. FEINBERG, *YOUNG AND DESERVING* ch. 5 (1970); and N. MACCORMICK, *supra* note 17, at 30-34.

25. *Matter of Robert Paul P.*, 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984). I owe this reference, and the point it illustrates, to one of the participants in the discussion of my lecture in Valparaiso.

This aspect of legitimizing is of course not confined to private or personal relationships. If we in the West sustain the view that ownership and exploitation of the means of production, distribution and exchange of goods and services can properly be left to private citizens singly and in groups, if we erect and maintain elaborate legal frameworks which sustain such economic activities, criminalizing only the marginal deviances, we surely choose to do or continue doing that which powerfully legitimizes the way of life of the business person in the private sector. By contrast, in the Soviet bloc the law largely prohibits capitalistic enterprise subject to some (and perhaps a growing range of) exceptions. What they have done is as obviously concerned with de-legitimizing certain sorts of economic activity as our practice is concerned with legitimizing it. No legal and political order functions in a moral vacuum, nor is it intended to. And all this has some bearing on the economic analysts' point. They may be right or wrong in their analysis of laws and their purposes and functions. But the idea (if it were proposed) that they are pure amorality who leave moral issues to the moralists is plainly far from the truth.

As a general conclusion to this part of the argument, we have to conclude that the positive tasks which "amoralists" appoint or propose as the proper tasks of law and legislation are, after all, morally defined and morally loaded tasks. And the means appointed as legal means are also morally loaded means—and are calculatedly so. It therefore seems quite unacceptable to make the unqualified claim that "law and morals ought to be kept distinct," to quote again the disestablishmentarian limb of legal amorality in its present crude working definition. Some qualification of it is surely necessary—yet not one which will lose the powerful points earlier made concerning the sovereignty of conscience, the need for moral autonomy, and the associated desirability of mutually respectful pluralism in conceptions of the good life. Before proceeding to essay any statement of the qualifications needed to the disestablishmentarian thesis, however, I shall now consider the implications which some of the doubts expressed about disestablishment have in respect of positivism.

DOUBTS ABOUT POSITIVISM

It has already been noted that positivism is a theory about law as a system of rules—it does not have to, and should not, suppose that law comprises rules only; but it does place rules at the center of the legal stage; rules, that is, derived from authoritative formal sources. A further fact about legal rules is that they are characteristically backed by measures of coercion, whether for the imposition of criminal penalties or civil remedies. That is, legal systems

as rule systems characteristically include rules providing for the coercive implementation of the penal and the remedial measures wherewith norms of conduct are backed. Whether we need to regard this as true by definition of legal systems may be doubted; but the doubt need not detain us here, for it is certain that all known contemporary systems of state law have this character.

In so far as punishments and modes of coercion always have to be justifiable from a moral point of view (which is the point of the problem of Justifiability of Law reconsidered later) and in so far as legal systems characteristically provide for coercive implementation of punishments and remedies for breaches of (certain of) their rules, it appears that the rules themselves have to be justifiable.²⁶ For it will be in justifying the rules that one will justify the coercions. But actually, the very existence of rules as such may have a part to play in justifying coercion.

As a matter of history, the insistence that legal systems primarily exist as systems of rules has been an element in the attempt to justify coercion in human societies: or, rather, to reduce the level and range of official coercion to a point at which it is capable of being justifiable in principle, and also justified in practice. This is exhibited time and again in the attempts societies have made to reduce their legal systems to systems of defined rules. The earliest case I have come across, though doubtless there are others yet earlier, is the case of early Roman law and the codification in the Twelve Tables.²⁷ A form of law administered by and in its details known and understood by a priestly and patrician class or caste in the city became a focus of resentment for the plebians, the ordinary people of the city. In revolt against this mode of government the *plebs* seceded, decamping to a nearby mountain and threatening to found a new rival city there.

The point of this—or the point ascribed to it in Roman legal legend—was that the *plebs* regarded itself as having been excluded from fair terms of citizenship. To be subjected to undisclosed standards of right and wrong implemented by arcane and undisclosed procedures, any flaw in which would be fatal to an action at law, is to be treated intolerably. Without some intimation of what the law is, one cannot reasonably be called upon to obey it or to be penalized for one's infractions. Unless rules are made and published, people do not know where they stand, and they should not stand for that. And

26. This is one of the powerful points taken by Lyons, *supra* note 5, and Reyleveld & Brownsword, *supra* note 3.

27. See DIG. JUST. I.2.2.

it was in response to just such pressures and demands that the early Roman codification of the civil law into the Twelve Tables was accomplished.

Blithely ignoring the passage of more than a millenium and a half, I now switch my gaze to the 18th century and to the writings and demands of reformers such as Beccaria and Bentham. Each as a utilitarian theorist of punishment insists that punishment is only rationally justifiable where it is for clear breach of a clearly pre-announced rule of law.²⁸ This is the meaning of the celebrated brocard *nulla poena sine lege*—no punishment without a *statutory* authorization. Bentham was a particular critic of natural law especially in that version in which the common law was supposed to be an expression of pre-existing natural law. This particular theory has the corollary that all grossly wicked conduct, even if not explicitly prohibited is clearly illegal by natural law and therefore quite properly punishable in positive law. Indeed, it is the duty of the officials of the law to punish with condign punishments all the grosser breaches of natural law, with or without prior precedent for what they do. A case in point is provided by the following statement from Bentham's Scottish near-contemporary, John Erskine in his *Institute*:²⁹

The transgression of the divine law, where it consists in any positive act, hurtful to the peace of society, though there should be no statute forbidding it, is accounted a crime by our practice, and may be punished, even with death, if the nature of the criminal act deserve it. Thus bestiality and sodomy are, by our usage, capital crimes, and single adultery is punished arbitrarily, though none of these crimes are declared criminal by statute.

It needs to be realized that this was the kind of natural law thought of which Bentham was so critical. His advocacy of legal positivism is part and parcel of his opposition to that view, and his advocacy against it of a rationalistic and utilitarian thesis as to the proper government of a civilized community. Resort to punishment

28. See, e.g., BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 10 (2d ed. Stanford 1953) (5th ed. London 1804): "No magistrate . . . can, with justice, inflict on any member of the same society, punishment that is not ordained by the laws."; J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 156-60 (J. Burns & H.L.A. Hart eds. 1970); and see Bentham, *Essay on the Promulgation of Laws* in I THE WORKS OF JEREMY BENTHAM 155-59 (J. Bowring ed. Edinburgh 1843).

29. J. ERSKINE, AN INSTITUTE OF THE LAWS OF SCOTLAND IV.4.3 (1st ed. Edinburgh 1773).

serves a rational purpose in a community of rational agents only if its members have been notified in advance what are the commands and prohibitions they must observe and what penalties will be exacted for non-compliance. To punish in any other case is to act as a man would treat a dog—by beating it *after* some misconduct so as to condition it into better behavior for the future. Given a command theory of law, the common law is no mere declaration of an already knowable natural law, but is simply judiciary law made after the event by will of the judges and tacit pre-adoption by the ultimate sovereign. As such, it is retrospective law; and as retrospective law it is unjust and irrational, a cause rather than a prevention of preventable unhappiness.³⁰

It would be false to say that voluntaristic positivism—the command theory of law in either Bentham's or John Austin's version—implied a necessary connection of law and morality in terms of conduct. Of course not. For them the questions of the existence of a law and of the merit of a law were quite distinct, and this distinction was fundamental.³¹ Nevertheless their theory of what laws are fits exactly with the utilitarian theory of when punishments are justifiable and when not. The point of Bentham's legal theory (as distinct from its truth or soundness as a descriptive theory) is that it is a theory of law geared to a law reform program grounded in a utilitarian critique of existing law. And, of course, Bentham's utilitarianism is both a practical morality and a moral philosophy.

In general, the idea that law is a system of commands or of rules says nothing about the soundness or unsoundness in moral terms of the rules or commands as they are actually issued. A positivist theory of the sources of law makes formal legal validity content-independent, as Joseph Raz has helpfully put the point.³² But, as Lon Fuller has in effect shown, the idea of laws-as-rules may itself be of moral significance.³³ For an efficacious system of rules needs to allow for reasonable generality of rules (not overgenerality and vagueness), publication of the rules, prospectivity in the operation of rules (subject to some few possible exceptions), reasonable clarity, consistency

30. BENTHAM, *supra* note 28; see also A COMMENT ON THE COMMENTARIES 10-33 (J. Burns & H.L.A. Hart eds. 1977); and Bentham, *Brief Remarks* in V THE WORKS OF JEREMY BENTHAM 235 (J. Bowring ed. Edinburgh 1843).

31. See in particular, J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184-85 (H.L.A. Hart ed. 1954).

32. Raz, *Voluntary Obligations and Normative Powers*, 46 ARIST. SOC. SUPP. VOL. 79, 95f (1972).

33. L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

and constancy of the rules taken together as a system. It further requires that the rules do not demand impossible things of people, and that those holding official positions within the rule-system actually conduct themselves in accordance with or congruously with what the law provides. Whatever constraints such requirements of form imply as to the possible content of law (that is a disputed question), it is strongly arguable that there is some positive moral value in a system of government which complies with the eight Fullerian points of so-called "inner morality." The pre-announcement of systems of rules such as Fuller envisages and the restriction of officials to acting under and in the spirit of the laws of itself secures a minimal sort of fairness; an absence of wholly arbitrary exercises of power by person upon person.

Of course I must not claim Fuller as a positivist—that is what he insisted on not being. But his ideas as to the *value* of a system of government under laws-as-rules are in my submission fully compatible even with certain of the ideas of positivists such as Bentham or Joseph Raz. Both Bentham and Raz envisage the possibility of rational human conduct being guided by agents' choices in the light of known rules and provisions as to coercion and punishment.³⁴ Where official interventions in individual affairs are restricted to what rules allow for (given the practical constraints on what it is possible for a self-consistent system of rules to be like), human beings are treated with some respect for humanity, not like dogs or some other kind of "pets" of the state, to borrow and slightly misapply an attractive idea from Richard Stith.³⁵ Where a state is in the minimal sense a *Rechtsstaat*, where a state has rules of law at all and where these rules govern and *alone* give authority for official actions, even if the content of the rules falls short of the desirable or even trespasses into the odious, something of some value is secured. In some minimal sense respect for persons is evinced and the conditions of mutual respect are in part provided. Where laws rule and the Rule of Law exists even in a minimal and purely formal sense, one of the most basic conditions for fair dealing among humans exists. Others may be lacking, and if they are so grossly lacking that they overwhelm the balance of values, the system of government should be instantly subverted and overthrown. But it is false to suppose that whatever

34. THE WORKS OF JEREMY BENTHAM, *supra* note 28; J. RAZ, *supra* note 9, at ch. 11.

35. Stith, *A Critique of Fairness*, 16 VAL. U.L. REV. 459 (1982); *cf.* Bentham, *Truth Versus Ashhurst* in V THE WORKS OF JEREMY BENTHAM 235 (J. Bowring ed. Edinburgh 1843).

is on the whole evil, even grossly evil, can have no good intermingled in it. My submission is that where law, law as analyzed in terms of positivist theory, exists, something of some value is present in the social situation. This is so even where the value of that is wholly outweighed by either or both of an evil content of law or an arbitrary disregard of legal restrictions by officials in some significant range of cases or matters.³⁶

This element of value is value as determined from a certain ethical point of view. The point of view is that according to which human beings are, and ought to be respected as being, capable of acting as rational and autonomous beings with desires and aversions of their own to pursue and to shun. Any system of government or person-management which treats people as rational agents of that sort, not as either herd animals or manipulable pets or cogs in machines or subhumans, accords to them some minimal extent the respect which is their due. But any system of government which is government-under-law in the positivistic sense I adumbrated in *A Case for Positivism* and have further sketched here in the light of others' work, is a system of government which in some minimal degree does fulfill some of the requirement of such respect.

From a certain point of view, then, legal systems have as such a certain moral value in virtue of the formal (and in itself amoral) character which positivist theories ascribe to them; but this is only an inconclusive and readily overrideable element of moral value. The point of view in question is that which treats respect for human rationality and autonomy as a fundamental value. Like any such point of view this one is contestable and controversial; but we must notice that it is the same point of view as that from which attempts at legal establishments of morals are to be considered deplorable. It is a part of that general stance or view in matters moral which, as we saw at an earlier stage, argues against acceptance of the narrower conception of the concept of law, which is put forward by that form of natural law theory which insists on substantive moral value as being essential to legal validity.

Moreover, it is a point of view to which the law's relevance is precisely determined by the facts that the law as such imposes normative constraints on free choice (duties to do this, not to do that, and such) and characteristically backs these with measures of physical and other coercion. These facts about law imply that legal systems

36. Cf. MacCormick, *The Interests of the State and the Rule of Law* in *ESSAYS IN MEMORY OF F.H. LAWSON* (forthcoming, P. Wallington ed. London 1986).

as inhibitors of free agency (and as sources of human suffering through threats of and impositions of punishments) are systems which call for justification and which actively do ill except insofar as they can be justified by being shown to do some good, whether intrinsically or instrumentally. That is one of the strongest reasons why law can never be absolutely amoral in the disestablishmentarian sense, as was shown in the last section. But, as we said at the beginning of this section, it must also be the case *from this moral point of view* that the existence of legal rules is one condition which is necessary for the justifiability of any officially exacted punishments.

The thesis of moral autonomy makes prior rules and breach of them *necessary*, but not sufficient, to the justification of punishment. Only if it were the case that the rules whose breaches are grounds for punishment were also justified rules in virtue of their content, and provided for reasonably proportionate punishments, fair procedures, etc., would it be the case that the existence of the rules fully justified the practice of legal punishment (or other legal sanctions, one might add). Thus from this point of view, it follows that legal rules must at least purport to be justified rules, given the punitive and coercive character of the system to which they belong. So, legal systems having the formal and amoral characteristics which positivists ascribe to them, legal systems are necessarily morally relevant and must necessarily purport to be substantively justified legal systems (no law without supporting ideology — which of course happens to be true). But this point of view is the same point of view as that which justifies adopting the positivist approach to the definition of law and legal system. For in truth the doctrine of the sovereignty of conscience is one which does not only square with, but presupposes the doctrine of autonomy and its value.

The point about the purported substantive justifiability of laws is an important one. Since those who enact laws and those who administer the implementation of them do so upon the necessarily implicit understanding that breach of the laws as issued is a justifying ground for coercive implementation of some punishment, penalty or civil remedy, it follows that those persons have to act either in the belief that, or as though they believed that, the laws in question really are substantially justifiable. It is no accident that we have legislation under the name "Administration of Justice Acts," but never under the name "Administration of Injustice Act" even in the cases when it seems that injustice is actually what is being done under law. It would be pragmatically self-defeating if not strictly logically self-contradictory for a legislator to issue a law bearing the latter title. It follows that the implementation of the law in practice cannot but

contain a large admixture of implementation and enforcement of what is the public morality of the state—what officials rightly or wrongly take to be and treat as morally right, even if they do so mistakenly or with wicked perversity. It is sometimes thought shocking that Nazis and their like can do evil in the name of the law. So it is. But it strikes me as yet more shocking that the evil they do is done in the name of moral duty and racial purity and such like supposed moral values.

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. Some indeed who have known tyrannies which have pursued reigns of terror in the extirpation of the moral evils of the capitalist road or the moral corruption of godless communism, report that a dose of positivism would have done the body politic and the cause of human happiness much good.³⁷ But even apart from that, it is clear that practical compromise on contested moral issues may be necessary in order to secure some, even relatively peaceful, mode of coexistence for human beings. Arguably, a principal justifying reason for recourse to law and legislation is, precisely, to procure a practical settlement for practical disputes in a manner more clear and determinate than could be generated by abstract moral debate at the level of ultimate and irresolubly contestable principles. The point about law is that it settles points of dispute at a practical level even where abstract moral debate remains unsettled or even unsettleable.³⁸ That the law does so in the morally resonant vocabulary of guilt and innocence, duty and breach of duty, right and remedy for invasion of right, reveals that it purports to do so in a morally and practically justifiable way. But by the very same token it can never be taken to do so conclusively, that is, in a way which is conclusive of an issue as a moral issue. That is, it cannot be assumed to be conclusive by anyone who stresses the value of autonomy and its necessity as a basis for moral thought, or anyone who believes in the sovereignty of individuals' consciences. And it is only from that point of view of belief in autonomy and freedom of conscience that we have here been asked to make out a case for legal positivism at all.

So positivism depends upon a point of view in the light of which

37. This point was made to me by Professor Roberto J. Vernengo of Buenos Aries.

38. See R. ALEXY, *THEORIE DER JUSTISTISCHEN ARUMENTATION* (1978) reviewed and discussed in MacCormick, *Legal Reasoning and Practical Reason* in *MIDWEST STUDIES IN PHILOSOPHY* 271 (P. French, T. Vehling, Jr., & H.K. Weinstein eds. 1982).

law must always have some, albeit minimal, moral value; in which law has always moral significance or relevance as a putative punishment-justifier, and in which as a consequence law must appear as purportedly justified; yet, crucially and finally, there can be no presumption that the actuality of law satisfies the necessary pretensions of law-makers and law-enforcers. As a consequence of this, one denies that the label "law" as used by state agencies can ever be conclusive of moral issues since the formal tests for validity or existence of law may be satisfied even in cases where there is no substantive justifiability of law. Our conclusion about the conceptual independence of law is in fact a practical rather than a purely theoretical or speculative one. It is the conclusion that legal validity may properly be determined upon purely formal grounds and that laws ought never be presumed to be morally justified or morally binding upon the ground of their formal validity alone. As this suggests, the final grounds justifying the use of practical concepts have to be themselves partly practical, never purely epistemological. That is indeed the case, and the original working definition of legal amoralism now stands accordingly qualified as to its positivist limb.

LEGAL AMORALISM: THE QUALIFIED VERSION

"Legal validity may properly be determined upon purely formal grounds, and laws ought never to be presumed to be morally justified or morally binding upon the ground of their formal validity alone." This was the restatement offered of the original crude "law and morality do not have to be identical," the terms in which we first stated the positivist limb of legal amoralism. Now we must turn to considering the necessary qualifications of the disestablishmentarian limb, the thesis that "law and morality ought to be kept distinct," as it has hitherto been stated, but as has already been shown too crude to be acceptable.

As we saw earlier, the harm principle and its cognates or (as some would think) rivals do all employ within themselves morally loaded concepts. Further, even if that were not so, it is certainly the case that the positive goals such principles propose for law are goals to be pursued by the coercive mechanism of positive law in its currently known forms. This fact entails supposing the positive goals in question to have substantive justificatory force justifying resort to punishment as well as other forms of coercion. Since punishment is a morally loaded practice it follows that whatever is a substantive justifier of punishment has to be supposed to have positive moral value. So on any view, some degree of "enforcement of morals" is going on whenever there are laws justifiable in the light of the harm

principle, the Kantian libertarian principle, or the wealth-maximization principle.

It follows that legislative debate, whether the debate concerns proposals to reduce or to stretch the scope of the criminal code or the range of civil liability, always includes (in addition to however much practical, legal-technical and factual information) moral considerations. And these are fundamental to it in the sense that the debate of law concerns justification and that one justifies law only by justifying recourse to coercion and to threats of punishment. There is no escape from this conclusion.³⁹

Nevertheless, the truth that no legislative debate excludes moral considerations (though it may skate over them unspoken) does not entail that *all* moral considerations should be admitted as justifying grounds for legislation. The principles appealed to in *A Case for Positivism*, the principles of the sovereignty of conscience, of autonomy as fundamental to morality, of the "market place" in moral ideas and of mutual respect among proponents of different ideals for the good life, are all principles worthy of our allegiance. At least two of them have been reinforced in the course of our deliberations upon positivism. These principles, if as sound as I contend, fully justify taking a highly restrictive view of the range of moralistic considerations we should admit to direct implementation by legal means.

Surely it is desirable in any society to avoid avoidable conflict between the compulsory norms of the community's law and the demands of individual conscience. People should not be placed in the position of having to choose between the demands of conscience and the demands of citizenship, unless for unavoidable overriding reasons. No one should have unnecessarily to choose between her or his idea of a good life for a human being and the state's conditions for law abiding citizenship. The parallel with religious disestablishment is here striking. Should taxes levied upon all be used to back up the celebration of religious festivals expressing the faith of some—even of the great majority? It is easy for someone like me to think of Christmas Nativity Scenes and the like as simply a part of the heritage of tradition of all. But Professor Levinson's inaugural lecture reminds us that it is just such comfortably unthinking assumptions which can leave some citizens feeling themselves second class citizens.⁴⁰

39. Cf. MACCORMICK, *supra* note 17, at ch. 2.

40. Levinson, *supra* note 2, at 721-24, 735-36, *discussing* Lynch v. Donnelly, 104 S.Ct. 1355 (1984).

Equally so when, even apart from religion, some particular view of the good (as perhaps artificially distinguished from the Godly) life is overridden in favor of a different one, even a majority's. Any attempt to foist upon everybody a single vision of the whole of what morality demands, a vision commending itself to charismatic leader, ruling class or even democratic majority, is an appalling affront to the moral life itself.

Very well. But in all that, some qualifications remain—no *avoidable* conflicts with conscience; no imposition of common morals *beyond necessity*. Somewhere we are hinting at a line to be drawn, say, between ritual murders carried out by conscientious Thugs or Nazis and less injurious departures from a consensual ethic. How do we get at the limits of the avoidable, the necessary? How do we specify the restrictions on the moral considerations that enter the justification of legal enforcements?

The only proposal I am able to offer towards answering these very difficult questions is one which tries, somewhat tentatively, to differentiate various sectors or segments of morality.

The first differentiation is between matters of duty and matters of aspiration or of supererogation. We may hope for kindness or charity in human beings, but we draw the line at active cruelty; we value scrupulous honesty, but draw the line at deliberate deceit. Different of us draw different lines at different places on the map of the virtues and vices; and not all of the territory of virtue and vice is itself charted on terms agreed among all cartographers anyway. But even though there are different conceptions of how to differentiate duty from aspiration or supererogation and within what forms of life, the concept of this difference is commonly and justifiably recognized. We can properly demand that measures of active enforcement through law be reserved only for points of duty. Compulsion to saintliness or heroism is in all events a contradiction in terms.

That is the first grand differentiation, important in protecting the higher goods from legal intervention, an intervention most likely to cut into some people's vision of the greatest goods precisely where intervention aims at backing that of others. But even after this differentiation of duty and more-than-the-run-of-duty, there remains further differentiation worthy to be made. These further differentiations are between different kinds of duty—duties with different topics, different subject matter and focus of concern. The first of these is the difference between self-regarding and other-regarding duties, the second a difference between the two types of other-regarding duties: duties of justice and duties of love.

The Parable of the Talents speaks to the idea that humans can have—do have—duties in respect to their own persons and of the development of certain qualities.⁴¹ Biblically, this is indeed seen as an other-regarding duty, owed in this case to God, the bestower of the talents we are called upon to develop. But even without appeal to theological considerations, we can perfectly intelligibly postulate duties of self-respect. We are to respect human nature and its potentialities both in ourselves and in others. A slothful failure to make of oneself what lies in oneself to become; or *a fortiori* a destruction of the self by drugs or alcohol or wanton recklessness—these are real vices. At any rate, it is a perfectly intelligible view that this is so. It is neither unintelligible nor self contradictory to postulate such self-concerning duties, even though some substantive moral theories may deny that there actually are any.

To show how intelligible such duties are, consider the following example adapted from Adam Smith.⁴² Suppose that a traveler is waylaid by a highway robber and threatened with death unless he pays a large sum of money. As it happens, the traveler has hardly any money there; and so he prepares himself for death. But the robber offers to spare his life if he will promise in return to make the payment at some future date, without cheating or entrapment. There are (as Smith points out) strong reasons of public utility why no legal system should permit the enforcement of such promises as binding contracts. Moreover, the robber who obtained such a promise under grave duress could never be conceived in any reasonable morality to have a right to be paid the promised money. Even so, says Smith, a man of honor would regard himself as honor bound to keep the promise as a matter of self-respect and honor rather than as a matter of justice, that is, a matter concerning rights of the promisee. One could owe it to oneself to pay even though the payment was not in truth owed to the other.

Such a conception of honor is not everyone's cup of tea, perhaps. But is plainly not self-contradictory; it is a perfectly intelligible ethic, albeit not universally acceptable in its substance. Since that is so, it follows that duties of self-respect, self-regarding duties, self-concerning duties, "perfectionist" duties (in a very misleading usage) or whatever we should call them, are a *possible* moral category. Moreover, they are above all the realm which can most safely be

41. *Matthew* 25:14-30.

42. A. SMITH, *THE THEORY OF MORAL SENTIMENTS* VII. iv. 9-11 (D.D. Raphael & A.L. Macfie eds. 1976).

entrusted to the sovereignty of conscience and to the dictates of autonomy strictly so called, in the sense of the self-legislating will. Here what is chiefly at stake is a person's own vision of the sort of being she or he ought to be or become; no doubt with guidance and fraternal or sisterly support from others; but surely not under coercion.

The contrast in the highwayman's tale is with ordinary promises and contracts made without duress. In ordinary promises too, one's sense of honor may be engaged; but that is not all. Those to whom promises are made on fair terms have a right to their being kept. They are the beneficiaries of duties owed to them by others the point of which lies in the performance itself, rather than in the spirit in which performance is undertaken. Such duties, whether owed to other individuals or to other persons in general (duties to respect the quality of the physical environment, for example), precisely because they concern performances and abstentions which are *due to* their beneficiaries as well as *owed by* their bearers, are duties which the former may reasonably exact under coercion when voluntary performance is lacking. Such duties precisely delimit the concept of "harm" and are presupposed by it rather than (as in Mill's or Hart's version) derivable from it. It is again, of course, a contestable and contested question what exactly is the scope or ambit of such *duties of justice*. But for the moment I am concerned to distinguish them conceptually from other classes of duty, not to supply a convincing list of the duties of justice I acknowledge. One interesting question (which, as it happens, I answer affirmatively) is whether there are duties of *distributive justice*, duties to share out good things among members of a community simply on account of their membership; or whether this is a matter rather of *charity* or *benevolence*.

That question—not the answer—introduces my other class of other-regarding duties, which I shall call *duties of love*. Crucial here, in my view, is not the performance in and of itself but the performance-as-rendered-in-a-certain-spirit. Parents, perhaps, are duty bound to love their children; children their parents; even, perhaps, all of us each and every one of our neighbors. This duty concerns the quality of care or concern we should bring to our dealings with others, and sometimes even the thing it is we must do as well as the spirit in which we should do it. On some views, the spirit of giving to the needy out of concern for their need ought so to predominate in any such case as to rule out any supposition of a right in the needy. If so, there is no distributive justice, but only charity; if not, there is distributive justice, though not so as to override a duty of love to one's neighbor. And so on. But again, the point is not to fill in

the whole list, or a complete and convincing list of such duties. Rather it is to highlight the conceptual differentiation, and, having done so to move to the here-decisive conclusion. That is, to the point that duties of love are intrinsically unenforceable. We do not point for unkindness, says the Scotch legal proverb; and rightly.⁴³ If the spirit is weak, coercion of the flesh cannot supply its defect. The performance alone, if that be due also in justice, can indeed be enforced. But the risk is to elide the duties and virtues of love in just those cases where it matters most acutely.

To my mind, that is a reason for deep hesitancy about penalizing abortion, even where one cannot regard it with equanimity. The duty of nurture and sustenance as between putative mother and fetus is, if any duty, one of love. It is not well exacted by coercion; nor is it clear that conscription to motherhood is the path of wisdom. To put the case upon "Pro-Life" grounds may seem a little to beg the question, for the issue then seems to be about the *spirit* which should animate our actings (surely, indeed, a pro-life one) rather than about the performances properly to be enacted under coercion.

But I digress, and risk going into the issue of substance rather than resting content to have drawn the conceptual distinction between duties pertaining to the "cautious, jealous virtue" of justice (to borrow a just word from David Hume⁴⁴) and those pertaining to love, or benevolence or (in the old, uncorrupted sense) charity, *caritas*.

My contention here is that the distinctions I have drawn supply the crucial test for the question of how to restrict the legal enforcement of morals without denying the rightness and inevitability of some enforcement of moral duties. The proper spheres of conscience, exhortation, good example and in the end autonomous decision beyond and without coercion is the sphere of aspirational values, of duties of self-respect and of duties of love. To bring coercion into these spheres is to destroy or stunt that for the sake of which coercion is introduced, namely a spirit of questing for the good beyond duty, or for the right lines of development of a self, or for the proper regard to bestow upon one's family, friends or neighbors. Contrasting with these is the case of duties of justice, where what is owed is a performance, not a spirit of performance; and where another has a right to it against the one who has the duty to do or to abstain. Here,

43. Cf. JAMES VISCOUNT STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND I.1.16 (D.M. Walker ed. 1982).

44. D. HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS III.1.184 (Selby-Rigge & Nidditch eds. 1975).

there are two autonomies at stake; and even if by coercion we risk invading or overriding the conscience or self-regulation of the defaulting actor, the alternative involves sacrificing the right of the party acted against, which is unjust. So here, coercion is allowed and even required; here, we have discovered that segment of morality which it is right, proper and even inevitable to enforce by law.

What I have offered here is, confessedly, a conceptual clarification rather than a precise and itemized practically applicable account of the duties which belong to the class of duties of justice as contradistinguished from duties of self-respect or of love, or matters of aspiration or supererogation. I think, however, that the conceptual clarification is perhaps that which most matters; for, if accepted, it rules out certain ways of arguing about law as abuses of the legal method. The thing to which anti-moralists have characteristically objected is legislative regulation of matters of aspiration (the good life, as distinct from the life of avoidance of wrongdoing), duties of self-respect (regulations of various forms of sexual and sensual indulgence) and duties of love or benevolence (trying to enforce the spirit or the motive of action, rather than concentrating on simple results). This they have thought of as the moralistic use of law, as distinct from the enforcement through law of duties of justice, where what matters is the outcome and the impact (or non-impact) on others, not the spirit behind the outcome.

There are, I believe, powerful reasons, that is, powerful *moral* reasons for restricting our recourse to legal enforcement of moral duties exactly in this way. To that extent amoralism is correct. Further, since what justifies the legal intervention in the case of duties of justice is protection of the party affected rather than securing the moral uprightness or virtuousness of the actor as a sufficient good-in-itself, there is certainly a sense in which we would speak misleadingly if we here talked about "enforcing morals." It is rather that we uphold or protect the *right* of individual, group or community at large than that we call the delinquent to duty's path. But since we do this *inter alia* by punishment, we do so justifiably only where infringements of right arise out of willful, reckless or careless breaches of duty. Upholding such rights is certainly both a moral and a morally justified enterprise. But that is perhaps not quite the same as a "moralistic" enterprise.

However that may be, we arrive at the conclusion that although laws ought to contain some moral element and uphold certain moral values, they should do so only restrictedly. Where earlier we defined the disestablishmentarian limits of amoralism in the terms that, "Law and morality . . . ought to be kept distinct," we now see that it would

be more proper to put it in the terms that, "Law should be restricted as to its moral content," the restriction being to the sector of duties of justice. And accordingly, if we were to state in full our revised version of amoralism, it would go as follows:

Legal validity may properly be determined on purely formal grounds, and laws ought never to be presumed to be morally justified or morally binding upon the ground of their formal validity alone; and law should be restricted as to its moral content.

This I both offer and subscribe to as a creed or pair of creeds about law. Its overriding virtue is that it make utterly clear a refusal to concede any monopoly of moral wisdom to states or public authorities. The law will be as the law will be; and the question whether it is justifiably so will remain open. One element in the question of justifiability will be the question whether the law arrogates to its sphere matters which rightly fall outside it, belonging to the legal no-go areas of the moral life. All this follows from due respect for the autonomy of moral agents and the legitimate freedom and sovereignty of their consciences.

PARADOX LOST

At the beginning of these lectures, it was represented as a paradox that those who argue for amoralism seem themselves committed to a moralistic line of argument. Even as of that time, one might have registered a little quibble as to "moralistic" there. That a case is grounded in moral reasons does not equate with its being a *moralistic* case in the precisely *nuance* sense noted a little while back. But, all quibbling apart, we certainly have shown at great and even painful length that there are moral grounds for each limb of the amoralist position, and that the position is sustainable only if the moral case for it is sound. "Legal amoralism" cannot avoid being a moral position. What our revised version of the position makes perfectly clear is that it *is* a moral position, concerning both the question how we ought to determine legal validity and the question how far the law ought to replicate demands of morality.

How could it be anything other than a moral position? What it contends against is the moralistic thesis that whatever is a serious moral duty may be (or even ought to be) made a legal duty. Such a thesis can be argued down only by someone who advances rival moral reasons. The question is not whether moral reasoning is necessary to justifying the content of the rules of a legal system; it is what form of moral reasoning gives the sounder justification. My

contention has throughout been that a conception of the nature and the content of law which preserves conscience and autonomy is morally preferable to rivals which allow of a more unrestricted moral range for the content of the law—with or without a different view as to its nature. This way of arguing would be paradoxical only if we were to frame some conception of legal amorality in such terms as to suggest that *all* moral considerations are excluded from *every* justificatory argument at law. Especially my revised version of amorality makes it explicit that this is not so. So the verdict here may be: paradox lost.

What then of the problems of the justifiability of law and the obligatoriness of law? Starting with the first of these, we may again observe that the revisions made in the amoralist thesis have plainly the effect of dissolving this problem as a problem for either the positivist or the disestablishmentarian limb of amorality. As to positivism, it has been indeed acknowledged that the *form* of legal rules is itself moral value as a necessary *albeit not sufficient* condition of the justifiability of the punishments and coercions that law licenses; and that those who manipulate the rules and the resources of the law must purport to be justified in the uses to which they put the law; that they so purport does not, however, mean that they are actually justified; and whether or not they are actually justified depends *inter alia* on their countenancing or embodying only an appropriately restricted moral establishment. Unless one were willing to risk to seemingly confer a monopoly of wisdom on the authorities of a state, one should always wish to keep open the moral question of justifiability even once the actuality of law is clearly settled. That laws ought to be justifiable and that the justifiability of any law rests in part on moral grounds are true propositions. But they do not confute either restricted disestablishmentarianism or revised amorality.

What then about the second problem, that of the obligatoriness of law? Assuredly it is desirable that it be supported by a sense of obligation in which all citizens could share. Such obligations would then be reciprocal among all members of a community and would be reinforced by obligations of reciprocity arising under the Hartian principle of "mutuality of restrictions." But surely nothing could be better calculated to uphold both a sense of obligation, and an actuality of obligation, than observance of a legislative principle which fully respected the autonomy and free conscience of individuals while at the same time striving to secure legitimate rights by enforcing duties of justice. So far from being hostile to or indifferent to the desirability of ensuring a real obligatoriness of law, restricted disestablishmentarianism is a principle well calculated to ensure it.

Nevertheless, even if this be accepted there remains alive perhaps the most serious of the objections to amorality directed at its positivist limb. This is the objection put forth by David Lyons in his masterly recent essay "Justification and Judicial Responsibility" that positivists speak misleadingly when they speak of the requirements of the law as being obligations; and that by speaking misleadingly, they mislead themselves:⁴⁵

Following the positivist tradition, MacCormick affirms "that the existence of law is always a conceptually distinct question from its merit or demerit." He says that "all laws" are "always open to moral criticism."

It is implausible to combine MacCormick's view with the notion that legal requirements always merit some respect, or with the notion that there is always an obligation to obey the law. . . . We cannot assume that there is such a duty [to respect the law] *over and above* mere legal requirements, unless we can assume that those legal requirements are justified or that there is *always* a sound argument for obeying the law. And "the separation of law and morals" makes it implausible to assume this.

The upshot of this critique is that people like me ought to give up one or other of two views: the view that law and morality are conceptually distinct or the view that it is proper to deal with legal requirements as a species of "obligations" (together with the related view that arguments deriving a certain decision from legal rules and principles are a kind of "justification").

These lectures have, I hope, provided a ground for respectfully rejecting this critique. Legal positivism as I present it does indeed rest on the thesis that legal validity may be determined on purely formal and non-moral grounds. But the reasons for upholding this thesis include fundamentally a moral principle about the sovereignty of conscience; and that principle together with the associated principle of autonomy of persons was shown to justify the view that laws satisfying the positivist definition do have some minimal (and readily overridable) moral value. That the law favors a given decision is then *some* justification of the decision (albeit inconclusive of itself as a justification, in the absence of some "underpinning reasons").⁴⁶ And accordingly,

45. Lyons, *supra* note 5, at 197.

46. For this concept, see N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 62-65 (1978).

what the law requires me to do is a factor in determining what is the right thing to do, albeit not conclusive of the question.

Thus it can be seen that legal obligation does indeed belong to the same category as moral obligation or obligation *sans phrase*; but without being identical, and without any conclusive weight in determining what it is really obligatory to do. The relationship of legal to moral obligation is, as it were, that of hypothetical to categorical obligations. My moral obligations are (or are among) the things I categorically must do as a human being and as a moral agent. My legal obligations are (or are among) the things I must do in order to be law-abiding; but whether I ought to be, or must be, or have an obligation to be law-abiding depends on the circumstances of the case, and most crucially on the moral quality of the given law and the legal system in question. Whether that which the law makes it hypothetically obligatory for me to do is also categorically obligatory is, according to positivism, an open question. And that, for all the reasons I have stated, is what seems to me the correct view of the matter.⁴⁷

CONCLUSION: PARADOX REGAINED

There is perhaps a final remaining sense of paradox in my retention of the term "amoralism"—even if "revised" or "qualified" amoralism—to describe that particular conception of legal positivism and restricted moral disestablishment for which I have argued in these pages. After all, the argument throughout has been a moral argument, and the case I have put forth for both limbs of my position is a moral case. Perhaps it is too paradoxical to be such a moralistic proponent of amoralistic law; and perhaps the choice of terms betokens no more than an undue propensity towards hopefully catchy titles for lectures. Maybe it would have been less misleading to call the whole performance "An unpretentious case for morally unpretentious law" or something like that. (But excessive unpretentiousness might not do too much for audience ratings.) At least it will now be clear why there is a question mark upon the title of the lectures.

It would after all be a great mistake to suppose or to let it be supposed that only legal moralists or moral majoritarians have moral concerns about the quality of the law, or concerns that law take

47. It is perhaps somewhat confusing that, as I suggested in N. MACCORMICK & H.L.A. HART, *supra* note 6, at ch. 5, legal obligations are *in the law's perspective* categorical requirements; but there is no real confusion here. What the law treats as categorically obligatory is only hypothetically so from a moral point of view.

morality seriously. My counter-thrust to that is to argue that a proper moral concern for the quality of law is one which restricts law's moral sphere to that of duties of justice, and that we only take morality seriously by cutting the other segments of moral duty and moral concern clear of the coercive apparatus of the law. Those who, with all proper respect to the legal moralists and moral majoritarians, reject their arguments should be very wary of adopting terms which seem to surrender a monopoly of moral concern to their opponents. The case is quite otherwise. What I have here called legal amoralism solely for want of a better name is an expression, not a rejection, of moral concern about the law. Not least among its concerns is to deny a monopoly of moral concern and of moral wisdom to either state authorities or democratic majorities. We should avoid any approach to law which grants any such a monopoly.

