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## THE SEPARATION OF LAW AND MORALS

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### ABSTRACT:

The classic opposition of legal positivism and natural law theory resurfaces continually and reminds us that we have yet to resolve this key conflict in our ways of understanding the moral authority of law. The strengths and weaknesses of the two theories are reviewed—both have fatal flaws. Conventionalism is proposed as a means of finding internal standards in a man-made system of law. The naturally emerging standards for a conventionalist system of law turn out to be the already familiar principles of the rule of law.

### KEY WORDS:

rule of law, legal positivism, separation of law and morals, natural law, American founding, convention, conventionalism, principles of rule of law, morality and law

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- I. The separation of law and morals is a thesis of positivist legal theory which is still highly controversial and which has attracted considerable attention here on campus this semester.
  - A. The utilitarians first developed the thesis that it was important to distinguish between law as it is and law as it ought to be.
    1. Austin put it this way:
      - a. "The existence of law is one thing; its merit or demerit is another.
      - b. "Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."
    2. Their thesis was aimed against holders of the natural law view.
      - a. Blackstone particularly came in for criticism for saying in his Commentaries "that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them, and that all valid laws derive their force from that Divine original."



- (1) Bell went on to conclude this principle prevents our laws from taking any stands on moral issues where we might disagree.
  - (2) In particular, he pointed out that the principle prevented any legal regulation of abortion, pornography, homosexual relationships, and other activities which are morally controversial.
2. On the other hand, Allston Chase blamed legal positivism and its thesis separating law and morals for much of the cultural disaster of our times, and for our inability as a people to develop a coherent moral point of view that would guide our legislatures and judges.
    - a. Chase argued that the American Founders never intended to distinguish law and morality.
    - b. He believes the Founders saw only continuity between law and morals, and that such a separation would have appeared artificial to them.
  3. I want to argue that each of these views is mistaken in fundamental ways, primarily because they each oversimplified the underlying philosophical problem.
    - a. Chase is wrong not to see in the American Founders an acceptance of David Hume's version of the separation of law and morals.
    - b. And Bell was wrong to conclude that the Founder's version of that thesis committed them to the rather extreme interpretation of 20th century libertarians, who can discover no rationale for restricting abortion, drug abuse, pornography or homosexual activities.
- II. The separation thesis makes several important contributions to our understanding of law, which natural lawyers overlook.
- A. The statutes and common law rules that are legally binding on us are human creations. Law is in some significant sense a function of human will.
    1. Even casual observation of the legislative and judicial processes will disabuse us of the notion that our legislators can effectively divine either the will of God or moral truth.

- a. In a free society, law making is very much a matter of forging workable compromises on rules of conduct and action.
      - b. And the people engaged in doing this are quite obviously fallible, often making serious mistakes in the pursuit of their own chosen objectives. The rules they make often have consequences quite different to those intended by their authors.
    - 2. New regimes representing new coalitions of interests can change the rules. This is what elections are all about.
  - B. Moral and religious complaints about legal rules are reasons to try to change the rules.
    - 1. But those who enforce laws have no authority to make these changes as part of the enforcement process.
    - 2. Such changes are reserved to the legislative process.
  - C. The separation thesis respects moral and religious pluralism.
    - 1. It provides a foundation for religious toleration.
    - 2. It undermines the rationale of those who would like to nationalize morality, declaring one true moral view which will be obligatory on all, whether they believe it or not.
- III. The problem with the separation thesis as it stands is that it finds no standards or limits internal to law which will prevent or restrict iniquity and exploitation.
- A. The standard example thrown up to positivists is the Nazi regime and its inhuman statutes, which meet the requirements of legality on the separation thesis, but which natural lawyers could easily dismiss as invalid or as non binding laws.
  - B. As Alston Chase and countless other critics point out, the positivists seem to take the view that morality does not count for anything in questions of law.
  - C. Positivists have not found successful ways of deflecting this criticism, except to stick doggedly to their insights about the origins of law in human will, a point that does not go away easily.
  - D. Recent natural law theorists such as John Finnis have shown that most of the differences between positivist and natural law theory can be reconciled, but the

issue over the separation of law and morals continues.

1. Finnis renews in an impressive way the arguments derived from Aquinas and Aristotle which claim to demonstrate that the operation of a legal system assumes our ability to make objective value judgments, thus assuming a fundamental union of law and morals.
2. Positivists are not persuaded and sense some unbridgeable gap between their unshakable conviction that law is created by fallible men and the attempt to link it directly to some objectively true set of moral principles.

IV. Any solution to this fundamental problem in legal theory will have to derive any internal standards of good law from law as social fact, and not from any external value system.

A. The key to a solution may lie in the characterization of law as convention.

1. Recent theoretical work on convention by economists, game theorists, and linguistic philosophers has characterized conventions as rules of conduct agreed to by participants in situations where they can improve their respective situations through coordination rather than competition.
  - a. Coordination problems are positive sum games where participants can win only if others gain as well.
  - b. Solutions to long term or continuing coordination problems take the form of rules which do not require constant renegotiation, but which lay down legitimate expectations of conduct throughout a community.
  - c. The institution of law itself can then be seen as a community-wide solution to a host of coordination problems, spelling out in advance procedures and authorities for resolving future differences that might arise between participants.
2. Such a beginning point is attractive because it can be attached by extension to traditional positivist accounts, including Hobbes, Hume, and Hart, without violence to their theories. And it also uses some of the analysis of John Finnis, who is attracted to the idea of coordination as definitive of the common good, the basis of the moral content of law.

B. The reason for extending positivist theory in this way is that it opens up a new possibility for deriving internal standards from law as social fact.

1. The theoretical and empirical work on convention as coordination has identified a still loose set of conditions of convention making.
  - a. Conventions presume unanimity among the participants. Without agreement there is no convention. Rules not based in agreement presuppose coercion and are by definition not conventional.
  - b. The conditions of conventionality are illuminating, though not really surprising:
    - (1) Conventions imply expectations of mutual advantage, though the gains to different parties might vary both in nature and in value. People do not voluntarily agree to rules that reduce their welfare overall.
    - (2) Conventions imply acceptable consistency with the various moral beliefs of the participants. People do not willingly join in forming rules that offend their moral views.
    - (3) Conventions tend to form around salient potential solutions. Lacking some salient solution to a coordination problem, rough equality of outcome becomes a standard.
    - (4) New conventions tend not to disrupt existing networks of conventions. Changing existing rules under a system requiring unanimous agreement is very costly.
  
2. But legal systems are quite obviously not driven by the principle of unanimity. So how can they be thought of as conventional in the sense developed here?
  - a. Positivists in the last century were solidly tied to the command theory of law, following Hobbes.
  - b. To this day, positivists see no internal standard in law that distinguishes successfully between tyrannical and free societies. Both rely on coercive rules backed by sanctions.
  
- C. What has not been noticed by these theorists is that reasonable human beings might indeed agree to a system of rules that substituted institutional authority for actual unanimity under conditions which preserve the characteristics of simple conventions based in unanimous agreement.

1. Many theorists, including Hobbes, Hume, and more recently Buchanan, have pointed out the tremendous advantages we all enjoy from having a legal system, advantages which in advance might reasonably be calculated to outweigh many inconveniences and risks.
2. A fundamental convention to accept the authority of a system of law and officials who could interpret, change, and enforce the law would be reasonable if it could preserve certain basic conditions of unanimity. We might say then that we have "constructive unanimity" in a legal system which meets the following criteria:
  - a. Rules in the system would need to be general, not singling out any antecedently identifiable individuals or groups for injury or for benefits at the cost of others.
  - b. Rules in the system could only have prospective effect, and not retrospective without compensation to injured parties or actual unanimous consent.
  - c. Rules of the system cannot implement group goals, but can only function to enhance the efforts of individual members to pursue their individually chosen goals. Of course, this includes the possibility of groups of any size pursuing shared goals in voluntary association with other like minded individuals and within the rules of the system.
  - d. Rules of the system must be clear, unambiguous and public. Conformity to rules must always be possible and reasonable.
  - e. Rules of the system must not directly jeopardize or conflict with strongly held moral or religious views of community members.
  - f. Rules must be plausibly beneficial to the community members as a whole and potentially beneficial to all.
  - g. The rules must be stable and consistent over time.
  - h. There must be conventional procedures for amending the rules which are effectively open to initiatives from all community members.
  - i. The system must provide means of resolving disputes about the rules which operate in a neutral way between the parties.



- D. But these conditions of "constructive unanimity" are basically identical with the traditional principles of rule of law.
- V. The principles of rule of law emerge from this analysis as strong standards internal to the law as fact, and as a solution to the separation of law and morals.
- A. Sociologists recognize convention-making, in the sense described above, as one of the most universal and characteristic of human activities.
- B. Convention-making, when described empirically, yields a set of conditions.
- C. These conditions can reasonably be extended to a mature legal system when they are built into the structure of authority and rules in that system protecting its conventional character. A legal system built on these conditions can be said to exhibit "constructive unanimity," and therefore can fairly be said to be conventional.
- D. Identified as the principles of rule of law when they occur in a legal system, these conditions lay down strong criteria for determining good and bad law as law, though not with respect to any given system of moral or religious beliefs. These provide their own criteria.
- E. This strong account of the rule of law overcomes the separation of law and morals in traditional legal theory, and in a way that can be accepted by both natural lawyers and positivists.
1. It provides clear grounds for evaluative distinction between the laws of a truly conventional system and tyrannical regimes such as the Third Reich, which used "law" as an instrument to pursue its infamous policies.
  2. It does so by invoking two concepts accepted by positivists, the foundation of law in human choice and action, and the idea of rule of law as descriptive of legal systems. But it links these two in a way that gives much more force and central importance to the idea of rule of law, without appealing to ideological theories in the way natural lawyers and some liberal theorists have done to get the same effect.
- F. This account shows both Bell and Chase to be mistaken:
1. Chase could only see moral standards in law coming from systems of religion and ethical belief. Like other natural lawyers, he was prepared to nationalize morality to overcome the positivist inclination to separate law and moralities.

2. Bell appreciated the implications of modern pluralism and the need to respect differing moral and religious points of view in law. But he wrongly concluded that the law could therefore have no inherent standards that would protect us from tyranny or that would allow legislation relative to moral questions.
  - a. Rule of law prevents laws that disadvantage minorities because of their moral beliefs.]
  - b. But there is nothing in rule of law that prevents a community from regulating activities that it deems to be profoundly immoral and dangerous for the welfare of the community as such.
  - c. Rule of law does greatly restrict the means by which such immorality can be regulated, requiring all kinds of openness and fairness.
  - d. Rule of law bridges the traditional gap separating law and morals. But it does not do so by nationalizing morality.
    - (1) Rather, under rule of law, the actual morals held by members of the society come together to form a sieve which functions negatively to prevent legal action that violates the fundamental moral beliefs of minorities.
    - (2) But even this is not a firm protection. And the institutions of rule of law are the true protection minorities enjoy. But there are not guarantees against injustice. A wicked people can injure one another under rule of law.