

## THE MORAL EVALUATION OF LEGAL RULES

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In this journal Professor Norman E. Bowie simplified considerably, and laid to rest much confusion surrounding, the debate between natural law philosophers and legal positivists with his observation that “the chief issue dividing the two camps is a semantic one, viz., whether or not the passing of some moral test is to be included as part of the meaning of law.”<sup>1</sup> In developing and illustrating this thesis, Professor Bowie reconstructs aspects of Hart’s positivism, sets aside parts of Fuller’s natural law theory as irrelevant to the debate, and distills the contribution of Aquinas and Augustine to the natural law position. In an attempt to reorient the debate, he traces out some of the consequences of the two competing definitions of “law.” This is to provide the ground for choosing between the definitions and ultimately between natural law philosophy and legal positivism.

I have no quibble with Professor Bowie’s contribution to the debate. I do, however, think that his insight as to the chief issue of the debate facilitates our recognizing a problem important for both natural law philosophy and legal positivism that heretofore has neither been identified nor discussed. I speak of the problem of just what is meant when one declares that some law or directive meets or measures up to some moral standard or passes some moral test. I believe that a restatement of Professor Bowie’s thesis, in a slightly more perspicuous form, allows us to see more clearly how this problem is generated from his initial insight. I will then suggest and evaluate alternative moves one might make to resolve the problem in an attempt to select the best type of solution.

Let us first look at the two major views regarding the definition of “law.” It will be brought out that both views assume that directives (candidates to be called laws) or laws are at some time and in some way evaluated by moral standards but neither comes to grips with the dynamics of this evaluation. The first view, to which a legal positivist might subscribe, draws a sharp distinction between what a law is and what a law (morally) ought to be, holding that moral criteria are not among the definitional criteria of “law.” Of some law *L* that has met the definitional criteria of “law,” we might say of *L*, in accord with the definition, that *L* was passed by a legislature, *or* was articulated in some judicial opinion, *or* is the custom of the land, *or* was decreed by some sovereign, *and L* hypothetically or categorically directs certain actions, and so on. The complete exposition of what we might say of *L*,

given the definitional criteria, would contain no statements to the effect that *L* conforms to certain accepted moral standards. Whether *L* ought (in a moral sense) to be a law is a question asked of *L* over and above those considerations that allowed us to determine that what we now call *L* is a law; *i.e.*, the moral standards of, say, X, Y, and Z operate independently of the criteria by which we determined that *L* is a law.

The other view, to which a natural law theorist might subscribe, holds that among those criteria by which we determine whether some directive *D* is a law are certain moral standards, again, say, X, Y, and Z. We cannot say that *D* is a law unless we can say of *D* that it conforms to X, Y, and Z *as well as* that *D* was passed by a legislature, *or...*, and so on. Once we are willing to say that *D* is a law, the question of whether *D* ought (in a moral sense) to be a law is answered. On this view, then, there is no distinction between laws that are and laws that ought or ought not (morally) to be laws.

These views, it might be noted, have not been presented *as such* by any particular thinkers, although I do think them representative of the two opposing schools of thought—legal positivism and the natural law school—with the contemporary representatives being H.L.A. Hart and Lon Fuller, respectively. The arguments in the actual debate are not always at odds. Fuller, *e.g.*, has argued that there is a fine line between the *value judgment*, “This is a good law,” and the objective claim, “This is a law.”<sup>2</sup> Hart raised the question whether moral considerations—apparently *moral standards and not value claims*—are part of an adequate definition of “law” and concluded they are not.<sup>3</sup> Hart has articulated a view representative of positivism (law as it is to be distinguished from law as it ought to be), and Fuller of the natural law school (the distinction is misleading). Yet they are addressing themselves to distinctively different issues. The formulations I outlined above represent an attempt to bring the two schools into clear conflict.

Now the questions of whether (on the legal positivist view) some law ought to be a law and (on the natural law view) whether some directive is a law are significant questions that will arise in the application of the views and seem to require our determining whether the law or directive meets certain moral standards. But the dynamics of such a determination is less than clear, at least compared with the determination of whether some act meets certain moral standards.

Suppose the moral test or standard is “One ought not to kill.” When John kills another, it is by reference to the moral rule that we are able to evaluate his act as morally wrong, rightness and wrongness of actions being functions of imperatives or rules of correctness in action. Consider now the

same moral standard and its application to some law or directive, say, "Exterminate human population X." Undoubtedly, one would want to say that this is an immoral or bad law or directive, *based on* the moral standard. But it seems clear that a different sort of evaluation is being made here than when we assessed John's act as wrong. The suggestion is that moral rules do not bear the same relationship to laws or directives as to actions, despite the fact that we speak of immoral laws as well as immoral acts and laws that are morally objectionable as well as acts that are morally objectionable. Given the discontinuity, again, what we want to know that both sides of the debate in legal philosophy seem to gloss over is just what is being asked when it is queried whether a law, or some candidate to be called a law, meets or conforms to moral standards or passes moral tests.

Let us explore the various alternatives or models for explaining the dynamics of this evaluation. One possibility is that the law commands an act which the moral rule proscribes and we are employing, in determining the morality of the law or directive, some metaethical standard such as, "Whenever some law or directive commands an act proscribed by some moral rule, the law or directive is immoral." The simplicity of such an explanation is elegant but it is not clear that it can adequately explain the peculiarities of the evaluation of a law or directive. Suppose the Environmental Protection Agency promulgates a regulation to the effect that a specified amount of ionizing radiation may be emitted into the atmosphere. Further suppose that the Agency knows that the regulation provides for the overall safety of the citizens, for the development of the uses of atomic energy of benefit to the population, yet it realizes that within three generations hence it can be predicted with some certainty that fifty people will die from cancer caused by the radiation. Has the regulation commanded anyone to kill? It seems that it would be stretching the matter to say that it has. Yet we still may want to say that the moral rule, "One ought not to kill," has some relevance for this situation, that the law is morally objectionable in the light of the moral rule, or that the law has immoral aspects. We thus look beyond this first means of explicating what is involved in the moral evaluation of laws and directives.

Another path that seems open is to assert that moral rules are not involved at all, that the perception of an act or a law or a directive's being immoral issues forth from some other than rational faculty, such as a moral sense, or the emotions, basing the determination of right and wrong on how one perceives or feels about the situation. I do not think it necessary at this time to deal with the merits of such a position. It should be noted, however, that while it may explain how we evaluate laws or directives, it is a move

that subverts the spirit of the controversy at hand. As Professor Bowie's simplification of the debate between legal positivists and natural law theorists suggests, both sides of the controversy concede that it makes sense to speak of a moral test. And any skeptical view in morality would be inimical to this notion of a test; once we assert that moral evaluations do not proceed in accord with some standard of reason, we make arbitrary the determination of right and wrong and reject that there are any moral tests. Accordingly, such a view does not even allow to arise the question we wish to explore.

A further means of dealing with the question before us is suggested by the view that one cannot rigidly demarcate legal and moral rules; on this view there is no denial, as with the skeptical challenge, that there are such entities as legal and moral rules with which we make moral evaluations. Dworkin, for example, holds that "...in complicated legal systems, like those in force in the United States and Great Britain...no ultimate distinction can be made between legal and moral standards."<sup>4</sup> But as with the skeptical view considered, this view seems to deal with our question by preventing the question from arising. For, again, our question supposes that moral standards or rules or tests are analytically distinguishable from directives and laws so that we might either include them or not include them as part of the definitional criteria of "law." And the view under consideration, on a strict interpretation of it, precludes our drawing the distinction.

Can we work with such a view understood in a more relaxed sense and construct another possible answer to the question while at the same time recognizing the question as genuine? One might see correctly that laws, directives, moral rules, legal rules, moral tests, etc.—call them what you will—all fall into some general class of rules or directives by reference to which we can regulate and evaluate conduct and events. And because of the overlapping purposes and subject matter that are attempted to be regulated by these rules, it may very well be that no absolute distinction between the moral and the legal can be carved out. Most important, however, is the observation that a law or directive does not differ in kind from moral rules—they all fall into the general category of rules. A law or directive clearly shares more in common with moral rules than with actions, and it is thus reasonable to suspect that the evaluation of some law or directive by moral standards involves something quite different from the evaluation of an act by moral standards. While one may not, on this view, be able to identify precisely what our system or set of moral rules is, one may still recognize it as more or less identifiable. And putting this together with the kinship we observed between laws or directives and moral rules, one might

view the question of whether a law or directive passes certain moral tests or measures up to certain moral standards as the question of whether the law or directive is compatible with the moral tests or rules in question. The compatibility may be determined by some metaethical compatibility criterion which need not differ in kind from a criterion by which one might determine the compatibility of our moral rules, one with another.

How do these approaches to answering our question stack up against each other? Which should we select? Assuming that the natural law-legal positivism debate is genuine and that it makes sense to speak of laws or directives as passing moral tests, we can reject the skeptical move and what we referred to as a strict interpretation of Dworkin's move. For, as we saw, such views allow us neither to make the distinctions nor recognize the entities necessary for the debate to get off the ground. And the first view, which had us look to the act commanded by the moral rule, not only had some inherent difficulties but also obscured the kinship between moral rules and laws or directives. The final view discussed—let us call it the compatibility view—made explicit that kinship. In addition, it facilitates our morally evaluating a law or directive in a way no different from how we might morally evaluate some moral rule. In both cases we can see that a crucial element in the evaluation is the compatibility of the rule in question with some moral rule(s). A further advantage of this approach over the first is that we can obviate, or at least smooth out, the difficulty displayed by the first—the difficulty of our wanting to say that there is something morally objectionable about some law or directive when it is not clear that the law or directive clearly commands some act which the moral rule proscribes. On the compatibility view, we might admit of degrees to which various rules are compatible or aspects in which various rules are more or less compatible, giving us more leeway in the evaluation, and, to my mind, staying closer to the complexity of the phenomenon of morally evaluating laws or directives. Thus, in cases where the law or directive is clearly incompatible with some moral rule or test, we can say the law or directive has failed the test or has not measured up to the moral standard. Restricting the situation to a single law or directive and a single moral rule, we can recognize “Exterminate human population X” as clearly incompatible with the moral rule, “Do not kill.” In more complex cases, such as the EPA example above, we can account for our wanting to say that there are morally objectionable features to the regulation by recognizing that the regulation is, to some degree, incompatible with the moral rule. Precisely how much incompatibility is required before we declare that a law, regulation, directive, or moral rule has failed the moral test is an important and difficult question that arises not only for

the debate at hand but also for moral philosophy generally — but which I set aside for the present.

My doing so should be sufficient to indicate that I am not here claiming to have said the last word on what is involved in the moral evaluation of laws or directives. Further, we can readily recognize that an analytic conceptual analysis of our notion of the compatibility of rules would contribute to our overall understanding of the evaluation. The attempt here has been primarily one of identifying the issue as one important for both sides of the debate between natural law theorists and legal positivists, of suggesting the main alternatives open for explicating the evaluation, and of selecting what appears to be the most fruitful approach.

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### Notes

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<sup>1</sup>Norman E. Bowie, "The War between Natural Law Philosophy and Legal Positivism," *Idealistic Studies*, Vol. IV, No. 2, May (1974), 145.

<sup>2</sup>See, e.g., Lon Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1940), pp. 5-12.

<sup>3</sup>See, e.g., H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), p. 2.

<sup>4</sup>Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 46.