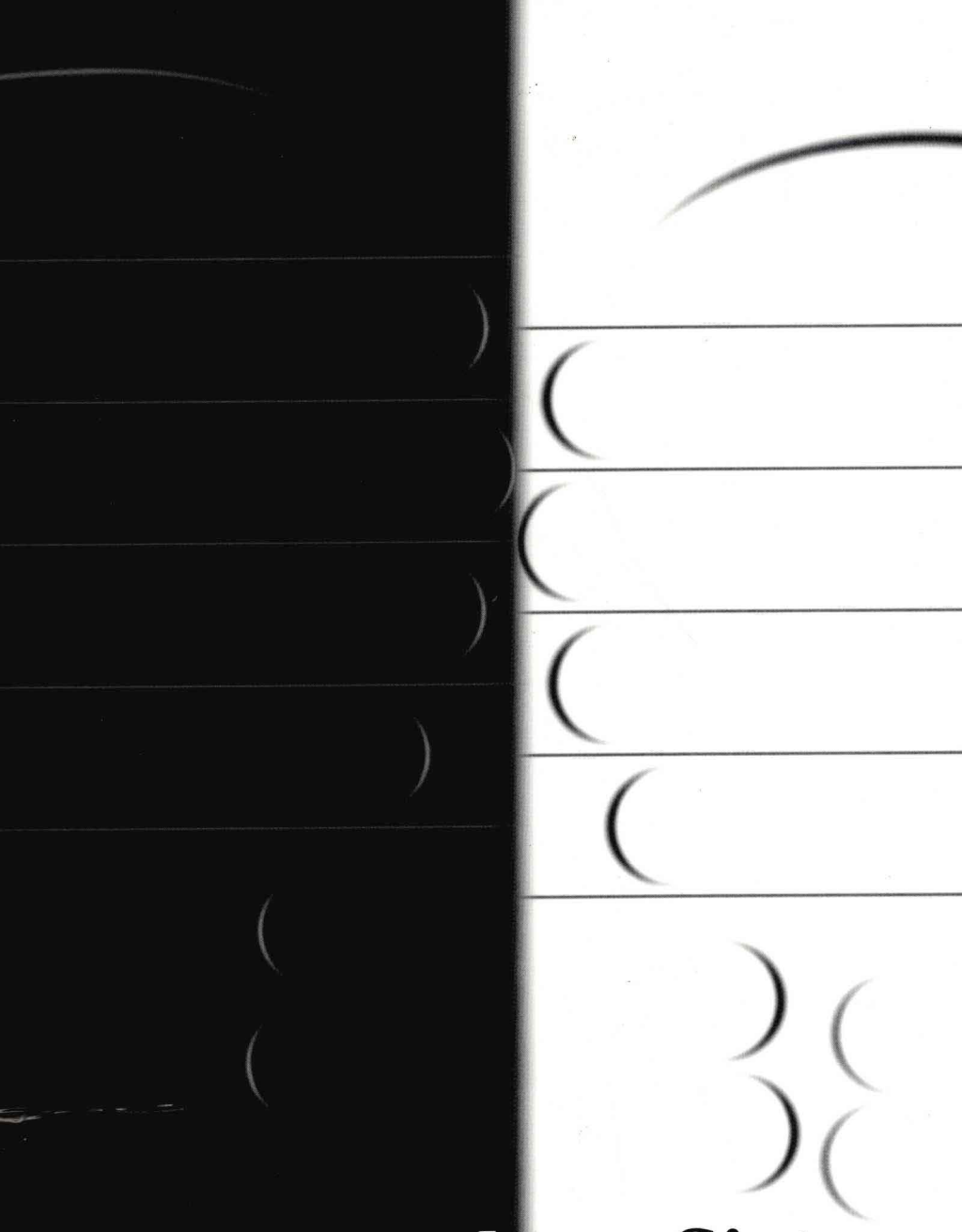

moral conflict and legal reasoning

SCOTT VEITCH

MORAL CONFLICT AND LEGAL REASONING

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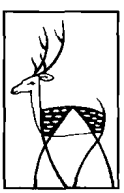

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INTRODUCTION

(1)

My hypothesis is that liberalism, in the interpretation of it I will offer, and liberal legalism, defined broadly as the current role, rhetoric, and practices of legal institutions in contemporary liberal society, are incompatible. Further, it suggests, in order to hold true to its premises, such a theory of liberalism must challenge the institutional vesting it presently receives at the hands of the legal system. To explore why this might be so, I give a reading of liberalism which puts the social construction of morality at the heart of its critical concerns. In particular, how meaningful moral disagreement is conceived and articulated is of prime importance. There is great focus in moral and legal literature on how consensus is or ought to be achieved. But it is my contention that how disagreement or dissensus is constructed, and, what dissensus means, have been neglected. In a sense they might be thought of as two sides to the same coin: how to agree to disagree requires consideration of what we agree upon. But how we analyse disagreement can often be overlooked in the rush to create terms of agreement. How and why we disagree needs to be brought more clearly into focus.

Nowhere is this going to be more important than when courts assemble arguments applying "community standards" in justifying decisions. But I want to take a distinctive position when it comes to legal argument. Though I do consider how legal argumentation constructs standards which will be applied in cases that come before judges, there is much to be gained from turning away from this to a consideration of the role and position of law itself in the broader purview and construction of moral agreement and disagreement. Traditional legal scholarship, and certainly education, tend to view morality in terms of trying to understand what exactly its relation to law is: should law embody morality, or are law and morality conceptually distinct? This old, and no doubt important, question perplexes and re-perplexes old and new students in

all jurisprudence courses. But there is a tendency to look at the question as an either/or issue. This in turn works to limit proper attention to questions of morality themselves, which may become homogenised in aspects of content and form since the focus of lawyers and legal philosophers is usually, "how should law (or lawyers) respond?" Once again, this is an important question, but the vantage point—of argument and analysis—is a legal one, and its ultimate destination (law's response) works to obscure the genesis and construction of moral problems in the first place.

In order to explore my hypothesis I concentrate far more on moral theory than many jurisprudential analyses do. But I also follow a suggestion in the work of Alasdair MacIntyre that law is implicated in the way in which we conceive, construct and deal with moral questions. As such it is important not only to consider how moral disagreement is constructed, but to see what role techniques of law, and more particularly the contemporary institutional dependency on law, play in how we deal with moral problems. It is in exploring these issues that I come to suggest the practices of liberal legalism damage and distort the premises of the liberal theory I advance.

(2)

"The values of Liberalism should not to be reduced to nought simply because their practice has historically been so shoddy."[1] There is no shortage of critiques dwelling on such shoddy practice. Critical scholars who often share little else are usually at one in their demonisation of liberalism. But is this an overreaction? What are these values that ought not to be overlooked? Liberals will themselves dispute what these are as they will also dispute their implications. Martha Nussbaum has recently given a succinct three-fold definition of liberal values that will serve as an introduction: first, "that all, just by being human, are of equal dignity and worth, no matter where they are situated in society"; secondly, "that the primary source of this worth is a power of moral choice within them, which consists in the ability to plan a life in accordance with one's own evaluation of ends"; and finally, that "society and politics . . . must respect the liberty of choice, and must respect the equal worth of per-

[1] Elizabeth Fox-Genovese, "The Many Faces of Moral Economy: A Contribution to a Debate", *Past and Present* 58 (Feb. 1973), 168.

sons as choosers".[2] An apparently minimalist position, and not itself uncontested, it is one, I will argue, that has radical consequences when delineated in a certain way. The way I choose here is taken from the work of Isaiah Berlin and represents what John Gray has termed Berlin's "agonistic liberalism".[3]

In interpreting some of the aspects alluded to in Nussbaum's definition, I argue that it is important to situate that aspect of "moral choice" she refers to in a specifically constructivist sense: that is, one that focuses primarily on the contextual and constitutive relations between self, identity and values, and which draws out the implications of these relations both for a theory of liberalism and for a liberal theory of law. As Nussbaum and many others note, one of the major criticisms of liberal theory or, more precisely perhaps, its "shoddy practice", has been that liberalism has assumed an unjustifiable and harmful methodological individualism. Additionally, it has been taken to link such individualism, or atomism as it has been called, with a specific, though universalised, notion of rationality. Examples abound, but here are a couple that are indicative of such critiques: "liberal theory insist[s] on positing individuals as rational, self-interested, and pre-social ethical beings"[4]; and again, "the denial of dependency on the social other presupposed in the market conception of rationality is present in the original liberal account of the individual and of society and the state . . . [which] denies the social and connected nature of the self".[5]

I argue that such criticism is mistaken. Concentrating on Berlin's version of liberalism, and touching on the moral theory of Adam Smith in whose name—or rather against whose name—much criticism of individualism has been directly or indirectly invoked, I show that individual moral choice, while still a clear value of liberal thought, can only be understood in a contextual manner. The effect of this is to suggest that critiques of liberalism along the lines of the two above set up a straw man. The liberal theory I delineate here challenges these criticisms, and does so by concentrating on the way in which a theory such as Berlin's depends upon the embedded nature of self and values, as well as on the limitations of reason. To do so I once again concentrate on the

[2] Martha Nussbaum, "The Feminist Critique of Liberalism," Lecture at Oxford University, Feb. 1996, excerpted in the *Times Higher Education Supplement* as "The Sleep of Reason", Feb. 1996, 17.

[3] John Gray, *Isaiah Berlin* (London, HarperCollins, 1995), chap. 6.

[4] Allan C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto, Toronto UP, 1995), 95.

[5] Val Plumwood, *Feminism and the Mastery of Nature* (London, Routledge, 1993), 152.

construction of moral judgement and the settings and meanings of moral conflict for such a liberal theory.

I should note that this has two implications. The first is that I refuse to draw a strong distinction between morality and politics. The tendency to locate moral problems in the realm of private autonomous individuals, whilst political problems are deemed merely to concern issues of public welfare or redistribution, has been one of the misunderstandings of both liberal proponents and their detractors. Such a separation is, I suggest, not a necessary component of liberal theory. This is not to deny that liberalism is concerned with the extent of state or any other forms of authoritarian imposition in what may be thought of as private matters: clearly it is. However, I suggest that to hold on to a morality/politics or private/public distinction when posed in this way fails to recognise both the constitutive nature of identity within social forms, and that commitment to values cannot neatly be separated across such divisions without misunderstanding the source and meaning of such values. It is thus in this more expansive sense that I use the term morality in the book.

Secondly, the implications for the role of law I see in this type of liberalism may go further than many liberals, even "agonistic" ones, would themselves endorse. But given the aspirations and meanings of the liberal theory I delineate, it is necessary to make this further conclusion which challenges the current role of law in contemporary society. De Sousa Santos has suggested that "the absorption of law in the modern state was a contingent historical process which, like any other historical process, had a beginning and will have an end".[6] Though I do not get into quite such grand arguments, the more limited point I do want to make is nevertheless similar in vein. That is, that to hold to the worth and values of the type of liberalism put forward here, a more fundamental challenge has to be made to the present positioning of law and particularly the courts, than many liberals, or for that matter their detractors, have so far made.

Such a challenge follows not simply a recognisably liberal argument about the fears of an intrusive state, but further points to an analysis of how the common law, as part of what has been "absorbed" into and in fact bolstered the law of the state, continues to be an obstacle to the goals and values of the liberalism I describe. The common law has had, at least since the time of Sir Edward Coke, extraordinarily powerful

[6] See his *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London, Routledge, 1995), 94–95.

integrating, unifying and consequently excluding, effects on the shaping of community, and has used the rhetoric of its, in Coke's words, "artificial reason" to mythologise and mystify the standards according to which it works. Moreover, the logic, if not the outcomes, has remained remarkably static over time. "Once the facts are proved", wrote a recent Chief Justice of the Australian High Court in a negligence decision, "all that remains for the court to do in determining the standard of care is to apply community standards".[7] The question this challenge is concerned with, then, is how, given the liberal premise of tolerance towards *incommensurable* values, the common law can operate so smoothly to produce the "community standards" by reference to which it justifies its decisions. And the issues that need addressing are not simply how the judges produce such standards (the problem to which traditional legal scholarship devotes so much of its time), but what is the meaning and significance of their doing so? In particular, what effects do the institutional setting and dynamic of law within the community have in turn *back* on the varied values and social forms of that community? Again, to explore these concerns it is necessary to focus more determinedly on the construction of these values and forms themselves, before considering the legal viewpoint.

(3)

The book is constructed in three broad parts. The first provides an in-depth analysis of the recent work of Alasdair MacIntyre in moral theory. It charts his historical argument about transitions in thinking about morality from Aristotelian to current models, and in particular draws out his critique of liberal moral theory. He suggests that we are witnessing a new Dark Ages, and that this is the result of the necessary failure of what he calls the Enlightenment project. I focus in particular on the way in which he sees moral debate taking place in liberal community, and how the conception of the self informs this debate. To complement this analysis I consider the liberal theory of Richard Rorty which, I argue, though it celebrates some aspects of what MacIntyre treats as a failure, nevertheless essentially replicates MacIntyre's description of liberalism.

I spend some time delineating these arguments because of what they have to say about the role of law in contemporary society. MacIntyre's

[7] Brennan J, in *Gala v Preston* (1991) 172 CLR 243.

analysis of liberalism provides a way of seeing how the use of law and the position of legal institutions impact and in some sense depend upon the meaning of moral conflict in the broader community. Using a four-level model drawn from his work, I suggest that though MacIntyre may be incorrect in his diagnosis of liberalism and its conception of the self (the full critique of which does not emerge until the second part), he does provide important insights into the role of law in liberal community, and in doing so opens out the possibility for challenging the legitimacy of law in the liberal legal order.

The second part examines, and in part develops, a theory of liberalism drawn from the work of Isaiah Berlin. Here I consider the version of liberalism alluded to above, and one that is clearly at odds with the picture of liberalism usually portrayed by its detractors. I concentrate on the way in which he treats the meaning and significance of moral conflict, and how this depends upon the constitutive relation between self and values and the limited role that reason has to play in resolving such conflict. Here I draw on the helpful analysis of Joseph Raz which I treat, particularly in its notion of "constitutive incommensurabilities", as a more subtle though indirect development of the arguments Berlin is making. Finally I extrapolate from Berlin's liberalism some tentative conclusions about the role of law, and do so by way of comparing this theory with MacIntyre's.

The third part draws on two strands of critique in recent theoretical developments in order to address how they conceptualise responses to liberal legal institutions. These strands are taken from feminist analysis and from postmodern critiques based on what has been called the "ethic of alterity". In considering several elements to these positions I look at two things: first, whether they correctly identify problems with liberal theory, or whether they tend to set up the "straw man" of liberalism while attacking instead its "shoddy practices"; and, secondly, what a genuine countering of the practices of liberal legal institutions might involve. In order to explore this, at this stage I consider both how legal justification takes place in contemporary institutions and some of the often unexamined dimensions to this process (including for example what Judith Shklar calls the "ideology of agreement"), and some of the sociological significations of this process, such as the effects of legal professionalism.

Here I will argue that in order to give full expression to the incommensurable values and social forms that liberalism identifies and seeks to respect, and with which, I suggest, recent critiques espousing differ-

ence and "otherness" may seem to be remarkably at one, fuller attention to the stifling effects of common law reasoning and its institutional power is required. When postmodern theorists, in particular, overlook that institutional dimension, they fail properly to grasp the structural and constitutive effects of law. Where they talk then of exploring forms of "partial" or "local" justice, such arguments, I suggest, can only make sense within a more global critique of vested power and the institutional dynamics of law, an approach that has historically been one of the core concerns of liberal thought.

Throughout and underlying much of what follows is a view of morality or moral rationality, and of the self, which challenges the view of liberalism as being committed to a rule-based individualism, whether that interpretation is given by its adherents or its critics. But not enough has been done within liberal thought to see how such a view relates to the role and impacts of justificatory practices of law when these practices endorse a commitment to a universalism at odds with that initial position. The Scottish institutional writer Erskine wrote that because of "the depravity of men's minds", civil powers add to the laws of nature positive laws "that so all members of the community, instead of being left to their own partial reasonings, may be tied down to a set of laws that speak the same uniform language to every individual".[8] This is in many ways emblematic of the liberal legal argument about law's aspiration to impartiality; to raise law above those "partial reasonings" that exist beyond the legal realm. But what are the status and nature of these partial reasonings? Erskine himself believed them to be rooted in a theology of original sin, in the "depravity of men's minds". Others, including the two critics mentioned above, see them as allied to an instrumentalist self-seeking market rationality. Alasdair MacIntyre thinks they exemplify an emotivist set of preferences to be fulfilled. I want to explore a conception different from all three, and one that in turn has implications for the perceived legitimacy of law and legal reasoning.

The relation between law and "partial reasonings" is of prime concern. Erskine suggested that law should "speak the same uniform language" to all individuals. For him, law's partiality itself was not put in question. A century earlier Hobbes had given perhaps the most powerful argument to defend law's legitimacy, partial or not. Addressing the same issue as Erskine, he noted that, "Law can never be against Reason,

[8] John Erskine, *An Institute of the Law of Scotland*, (1773, 5th edn., Edinburgh, Bell and Bradfute, 1812), I.17.

our Lawyers are agreed . . . but the doubt is, of whose Reason it is, that shall be received for Law".[9] Hobbes's answer, of course, was that "[i]t is not Wisdom, but Authority that makes a Law".[10] Here was a striking answer to law's relation to "partial reasonings", and one that has remained remarkably resilient.

For Hobbes, Erskine and others, the role of law is integrally related to how our "partial reasonings" are conceived. In a sense, I agree. But what happens when such reasonings are reconceptualised, when "partiality" is seen as integral to social forms within which meaningful values and identities are constituted and maintained? If law is to speak a uniform language, as Erskine suggests, or is to apply "community standards" as Chief Justice Brennan would have it, how is this singular voice construed, and what effects does this have on the language and meaning of the partial reasonings by which we live our lives outside the formal legal arena? These are the kind of questions the book seeks to explore.

Erskine's contemporary, David Hume, though himself committed to "general and inflexible rules of justice", nevertheless observed that, "there is a principle of human nature, which we have frequently taken note of, that men are mightily addicted to general rules, and that often we carry our maxims beyond those reasons which first induc'd us to establish them".[11] I contend that such a "mighty addiction" has had a hold on the mind-set of liberal legalism and has edged it to the place where the aspirations for its institution—the values and concerns of liberalism—may now be being done a disservice by the continued devotion to a bureaucratic legalism at odds with the radical spirit of liberal thought. To address this problem requires a focus on the institutional vesting of common law reasoning and the paraphenalia of power and expertise which supports it, but above all requires an investigation of the worth and meaning of those "partial reasonings" without which we could neither make sense of ourselves nor the commitments and values which we hold so variously and so dearly. With this in mind, let us begin.

[9] Thomas Hobbes, *Leviathan* (ed. C. B. Macpherson, Harmondsworth, Penguin, 1968), ch. XXVI.7.

[10] Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Law of England* (ed. J. Cropsey, Chicago, Chicago UP, 1971), 55.

[11] David Hume, *A Treatise of Human Nature* (2nd edn., ed. L. A. Selby-Bigge, Oxford, Clarendon Press, 1978), 551.

PART ONE

1: The Dark Ages of Liberalism

Amongst other things, the phrase Dark Ages conjures up a time of cultural loss, a loss sustained most dramatically as a result of the virtual disappearance of the classic texts of the past. The loss could be considered as a double one in the following sense. First there had occurred the fragmentation of a once more whole body of knowledge and, secondly, the means whereby the fragments that remained could be brought back together under a new cohering unity had also been lost. Irreparable damage would thus have occurred. Described very simply in these terms we might be somewhat quizzical when we hear the suggestion that contemporary society is experiencing a new Dark Ages. What, we might ask, is the loss we are alleged to have suffered? And does not the idea of irreparable damage cut across the grain of our culture of possibility and innovation? Apart from the run-of-the-mill prophets of doom, is not loss, in the sense of fragmentation, most often experienced in the form of an idealised nostalgia for a more simple and just past, a nostalgia, as Lyotard puts it, of the whole?[1] Often it can be. But the purpose of this chapter is to outline and assess a serious and challenging reconstruction of a part of philosophical history which points us precisely towards this "new Dark Ages" conclusion.

In focussing particularly on moral discourse Alasdair MacIntyre attempts to show how we should see our contemporary moral vocabulary as little more than a series of fragmented survivals from a once more coherent past. He suggests that "the contemporary vision of the world . . . is predominantly, although perhaps not always in detail, Weberian".[2] Yet his argument is at once more specific and dramatic than the Weberian description of disenchantment. Disenchantment, which Weber saw somewhat nostalgically as a loss, but nevertheless as an inevitable price to pay in the rise of modernity, is for MacIntyre a key symptom of fundamental flaws and a prefiguring of our contemporary malaise. Contemplating the Weberian universe, where on the one hand

[1] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (transl. G. Bennington and B. Massumi, Manchester, Manchester UP, 1984), Appendix, "Answering the Question: What is Postmodernism?".

[2] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (2nd edn., London, Duckworth, 1985), 109. Note that page references, in brackets, in this and the following two sections of the text are to this book.

we find a moral world without objective foundations and on the other the rise of an instrumental rationality at home in an efficiency-driven formalism, is for MacIntyre to contemplate an arena of despair. Entering contemporary moral discourse with MacIntyre is like finding oneself in the familiar territory of a Shakespearean tragedy. Here we find a dialogue riddled with unsustainable dreams and burning ambitions, fatal flaws and doomed revolutions. And of course, dead bodies.

For Weber "disenchantment" was, literally translated, "demagification", the world "robbed of gods" and mystical spirits through which people had once understood the world and their place in it. It meant:

> that principally there are no mysterious incalculable forces that come into play, but rather that one can, in principle, master all things by calculation . . . One need no longer have recourse to magical means in order to master or implore the spirits, as did the savage, for whom such mysterious powers existed. Technical means and calculations perform the service.[3]

These "technical means and calculations" Weber identified with the processes of rationalisation which had developed specifically in the West largely since the Renaissance. Though they had many distinct manifestations—in natural science, architecture, law and government, for example—a commonality could be traced. As Gerth and Mills have put it:

> The extent and direction of "rationalisation" is measured negatively in terms of the degree to which magical elements of thought are displaced, or positively by the extent to which ideas gain in systematic coherence and naturalistic consistency.[4]

It may be considered to be one of the paradoxes of modernity that at the same time structures of thought and organisation worked to improve the efficiency of means available to humans—the more they helped us to predict and therefore to control the future "by means of increasingly precise and abstract concepts",[5] the more disenchanted the world became.

Moreover, for Weber, the success of these techniques had finally driven a wedge between the normative and the scientific. Where for the pre-modern world a harmony of man and nature had meant the possibility of a theological unity—where knowledge came with obligation, so

[3] Max Weber, "Science as a Vocation" in H. H. Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology* (London, Routledge, 1991), 139.

[4] "Introduction", *ibid.*, 51.

[5] Max Weber, "Bureaucracy" in *ibid.*, 239.