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## CULTURAL CONVENTION AND LEGITIMATE LAW

ARTHUR ISAK APPLBAUM\*

Any view about the nature of law in the United States depends on a view about the nature of law; any view about the nature of morality in the United States depends on a view about the nature of morality; and any view about the connection between morality and law in the United States depends on a view about the connection between morality and law. Richard Markovits presents an intriguing and nuanced account of morally legitimate legal argument in the culture of the United States.<sup>1</sup> I wish to make more explicit and examine the general view of morally legitimate law on which his views about American morality and law depend.

Much of what Markovits concludes about the moral obligations of individuals and governments in the United States is correct: there are internally-right answers to moral-rights questions in our culture, the basic moral principle in our culture is a version of liberalism, and in our culture the right is prior to the good. But this is all so because there are right answers to moral-rights questions, a version of liberalism is morally required of any culture, and in any culture the right is prior to the good.

Markovits believes that moral obligations get their normative force from social convention, and I do not. Perhaps because foundational questions in moral theory are beyond the scope of his current work, he does not argue *for* moral conventionalism but from it. He sets out to show that it follows from conventionalism and from certain descriptive facts about our moral practices that there are internally-right answers to legal rights questions in the United States—what he calls the *right answer thesis*. I, too, will duck the foundational question. The philosophical literature on conventionalism and other forms of moral relativism is well-worked, and though, as I said, I believe that Markovits's starting point is mistaken, I will

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1. See RICHARD S. MARKOVITS, *MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION* (1998) [hereinafter MOP]; Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415 (1999) [hereinafter LLA].

not rehearse the arguments against it here.<sup>2</sup> Rather, I wish to show that his conclusions about legitimate legal argument in the United States do not follow from his conventionalism, at least not in the way that he supposes.

Markovits's starting point is this: "Using a particular type of argument to determine the content of existing law is morally legitimate in a given culture if and only if doing so is consistent with that culture's moral commitments."<sup>3</sup>

The two crucial phrases, "morally legitimate in a given culture" and "that culture's moral commitments," must be parsed with care. Are "morally" and "moral" here used with anthropological detachment, merely describing the behaviors or beliefs of a culture, or are they meant to have genuine prescriptive or evaluative force? On one read, the proposition is a descriptive tautology: a culture considers certain legal arguments morally legitimate (whether mistaken about that or not) if and only if those arguments are consistent with what that culture considers to be morally legitimate. Now, this clearly is not what Markovits means, but the misreading points out how treacherous the footing of moral language is in the presence of cultural language.

On another read, the proposition is an empirical claim about the connection between a culture's beliefs (whether mistaken or not) about the moral legitimacy of legal argument and its beliefs (whether mistaken or not) about other aspects of morality. This too is a misreading. For, though a culture's moral commitments are a matter of descriptive fact known through anthropological observation, Markovits holds that these facts are the source of genuine moral obligation for members of that culture. On his view (apart from a caveat discussed below), a culture's descriptive moral commitments cannot be mistaken, for collectively thinking that a principle morally obligates makes it morally obligate.

The reading Markovits intends is something like this (though this is my formulation, not his):

- (a) Legal practices and decision makers in a culture make claims about what types of arguments are the correct ones to use in deciding what the law is, but they can be mistaken. Mistaken arguments are likely to lead to mistaken decisions about the law,

2. For a fair-minded recent treatment and helpful references, see T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 328-61 (1998).

3. LLA, *supra* note 1, at 417. Similarly, see MOP, *supra* note 1, at 1, 12, 135.

and when they do, the result is a moral mistake that does not have the genuine normative force of morally legitimate law.<sup>4</sup> Legal practice, says Markovits, is not “self-legitimizing.”<sup>5</sup>

- (b) A legal argument is morally legitimate in a culture if and only if it is consistent with the normatively correct moral principles or values that apply in that culture. A legal argument can fail to be consistent with normatively correct moral principles or values, and so fail to be a morally legitimate legal argument.
- (c) A moral principle or value is normatively correct in a culture if and only if it is a descriptively correct moral principle or value of that culture—a principle or value that, as a matter of empirical fact, the culture considers to be normatively correct. A culture can never be mistaken about what are normatively correct moral principles or values in that culture, for the correct ones are whatever the culture is committed to. Markovits does not say it this way, but moral practice, as opposed to legal practice, *is* self-legitimizing.

There are two exceptions to step (c). The first is a requirement of coherence. The observed moral practices of a culture could contain some noise and dissonance, so anthropological observation must be aided by interpretive inferences to clean up gaps and inconsistencies. The second exception is that not just anything can count as a moral value. Markovits doesn't say which attributes are necessary for a purported moral value to be a moral value. These requirements might be formal, like coherence, or they might be substantive limitations on what counts as a moral principle or value.<sup>6</sup> Perhaps here lurks a moral theory that seriously limits the scope of convention. But even though not anything goes, a lot goes. If a culture denies that there are any individual moral rights at all and commits itself to glorify the one true god or to realize moral perfection or to pursue national honor, then, on Markovits's view, members of that culture are morally bound by such values.

To be legitimate, the use of a particular type of legal argument must be consistent with the moral commitments of the culture in which it is made. In a goal-based culture, the use of the relevant

4. It is beyond the scope of Markovits's argument to say what follows from a conclusion that a legal decision is illegitimate. Presumably, it follows that there is no moral obligation to obey such a decision for the reason that it is legitimate law, for the decision is not legitimate law. But there may be other moral reasons to obey even illegitimate legal decisions.

5. MOP, *supra* note 1, at 3, 13, 61.

6. *See id.* at 22, 191-93.

type of argument must promote the goals the society is committed to achieving.<sup>7</sup>

Markovits also recognizes one important qualification to step (a). "The exception to my claim that arguments of moral principle dominate the other forms of legal argument relates to textual argument: the plain meaning of a Constitutional text that was understood by its ratifiers dominates arguments of moral principle when the two conflict."<sup>8</sup> Why this exception is drawn he doesn't really say, but in puzzling through both what his reasons might be and what the exception implies, his account of conventionalism and legitimacy becomes more clear.

That the plain text trumps moral principle does not trouble Markovits because, he says, after the Reconstruction amendments the plain meaning of the text of the U.S. Constitution has not been at odds with liberal principle (with the possible exception that the way the Senate is elected violates political equality). At first read, I was incredulous. Surely the liberal principle of equal concern and respect would recognize a moral right to a list of basic needs, and surely a legal right to such a list is not supported by the plain meaning of our constitutional text. But Markovits is not afraid to go where his argument leads. On his interpretation, the Ninth and Fourteenth Amendments recognize a legal right to a minimum income, among other things.<sup>9</sup>

I would rejoice to discover that Markovits is right that the plain text of the U.S. Constitution supports the positive requirements of liberal equality. But an adequate account of legitimate moral argument in the United States requires an account of legitimate moral argument. If he hopes to offer the more general account, he has to test his view against cases, perhaps counterfactual, where the plain meaning of a constitutional text is at odds with a culture's moral commitments.

So suppose, upon reading and thoughtfully deliberating about Markovits's work, the requisite supermajorities of Congress and the state legislatures ratified the following constitutional amendment:

Neither the Ninth Amendment nor the Fourteenth Amendment nor any other provision of this Constitution shall be construed as

7. LLA, *supra* note 1, at 427.

8. MOP, *supra* note 1, at 87; *see also id.* at 74-78, 389 n.31; LLA, *supra* note 1, at 415 n.1, 416 n.2, 427 n.13, 434.

9. *See* MOP, *supra* note 1, at 4, 132.

establishing a legal right of any person to be provided with food, shelter, education, medical care, or a minimum income.

Anthropologists get to work to see if this signals a giant change in the moral commitments of American society but discover that moral beliefs and practices remain as they were. As shown both in what people say and in how they treat each other, America is still a moral rights culture, a moral right to something like equal concern and respect is still widely recognized, and the priority of moral rights over moral goods is still widely acknowledged. Most people, however, think that not every moral right need be or even should be enforced by a corresponding legal right. Says one native informant, "Lying ordinarily violates the moral rights of others, but I wouldn't want to put ordinary liars in jail." Says another, "Everyone has a moral right to a decent job, which is why our macroeconomic policies should aim to minimize unemployment. But a constitutional right to a job? That doesn't follow." Says a third, "In our town, we like to keep taxes low and voluntarism high. We collect more than enough charitable contributions to keep our shelters and clinics running. No one's come in yet demanding government soup." So when confronted with Markovits's interpretation of the Constitution, a clear majority of the American people hurried to bring the text in line with what they thought it meant all along.

What is Markovits's account to make of this? First, there is no ambiguity about what the amended Constitution says. Plain text understood by its ratifiers trumps a culture's moral commitments, so whatever we say about moral principle in America, with the amendment in place there is no constitutional right to a minimum income. To what principle is this culture morally committed? Markovits could say that the principle is the same one that led him before the amendment to find a constitutional right to a minimum income, and the amendment is simply the sort of anomaly that we should expect when we observe actual moral beliefs and practices. Alas, this "non-fit" has been written into the plain text of the Constitution, and the plain text trumps, so now this culture's constitutional law and its moral commitments are seriously out of line.

Questions abound. Is this law morally legitimate law? What is the view of legitimate law that makes the plain meaning of constitutional text understood by its ratifiers legitimate, no matter how inconsistent with the only source of moral legitimacy Markovits has identified, a culture's moral commitments? If this law is not

morally legitimate law, but nonetheless valid law, how does Markovits's account of law open up space between validity and legitimacy?<sup>10</sup> And if there is space for valid but illegitimate law, why is the sole occupant of that space plain constitutional text? What about plain statutory text at odds with moral principle?

Markovits might say, instead, that the anthropologists have uncovered an inconsistency so serious that one must conclude that American culture is not (and previously was not) committed to a coherent moral principle. But this is much too strong. One could think that the stand this culture has taken on the connection between moral rights and legal rights is a substantive moral mistake (though, on the conventionalist view, there is no place to stand and say that it is a mistake for *them*). But the view that a moral right does not entail a moral duty to enact a corresponding legal right is not incoherent. Surely, the view that a moral right does not entail that there already is a corresponding legal right is not incoherent. A culture, whether or not it is a moral rights culture, can be morally committed to a number of coherent views that take a number of different stands on the connection between its morality and its law.

It is precisely here that Markovits's view is in danger of coming apart. As a matter of descriptive anthropology, a culture can have moral commitments to both substantive values and moral commitments to what counts as morally legitimate law. In the Republic of Razland, children are schooled in the works of Joseph Raz and so grow up committed to both political values that are liberal and to a view of legitimate law that is positivistic. The laws of Razland are liberal, but judges decide what the law is by appealing to legal sources, not to moral principles. Anthropological study shows both that ordinary Razians appeal to moral rights in their everyday dealings and that they make a clear distinction between the legal rights that they do have and the legal rights that they should have. When legal rulings are inconsistent with liberal principle, they typically do not complain that the judges have made a mistake about the law; they complain that the law or the constitution needs fixing.

Now, one might hold that the two commitments of the Razians are inconsistent (though I do not). But if they are, this is no simple

10. His view on whether there is space between validity and legitimacy is hard to pin down. He allows that an argument may be "morally illegitimate" but "internally correct." LLA, *supra* note 1, at 415 n.1. But he calls textual arguments that trump moral commitments "legitimate." See MOP, *supra* note 1, at 380 n.31. At another point, he says that the moral illegitimacy of an argument renders it legally irrelevant. See LLA, *supra* note 1, at 420.

error that interpretive license can explain away and tidy up, it is no glaring contradiction that makes their social practices absurd, and, whether or not mistaken, it surely counts as a moral view. Razian culture is genuinely committed both to substantive liberalism and to legal positivism. If Markovits is serious about his conventionalism, he must concede that both commitments have genuine normative force for the Razians. Morality, for a conventionalist, is a matter of convention.

Perhaps Markovits holds that only substantive moral values and principles are a matter of cultural convention, but the moral legitimacy of laws is not a matter of cultural convention. There are no culturally-independent correct answers to the questions "What are one's moral obligations in this culture?" and "When is an action morally justified in this culture?" but there are culturally-independent correct answers to the questions "When do legal decisions generate moral obligations in this culture?" and "When are legal decisions morally justified in this culture?"

On this view, what would have to be the case about moral philosophy and anthropology to get the right answer thesis from Markovits's starting point?

- (1) Substantive moral obligations are what cultural conventions say they are.
- (2) Morally legitimate laws are not what cultural conventions say they are. Preconventional morality requires that law conform to substantive moral convention.
- (3) By convention, the United States is a moral rights culture.

Therefore:

- (4) To be morally legitimate, U.S. law must conform to moral rights.

This, however, is not a stable view. For if there is a preconventional spot from which one can conclude that a legal decision lacks genuine moral legitimacy even though the culture considers it to be morally legitimate (premise 2), then from that same spot one can conclude that a descriptive moral principle does not morally obligate, even though the culture considers it to morally obligate. And if there is no spot from which a culture's substantive moral conventions can be judged to be mistakes about genuine moral obligation (premise 1), then why think that there is a spot from which a culture's conventions about the connections between morality and law can be judged to be mistakes?

Consider, then, another route to the right answer thesis:

- (1) Substantive moral obligations are what cultural conventions say they are.
- (2) Morally legitimate laws also are what cultural conventions say they are.
- (3) By convention, the United States is a moral rights culture.
- (4) By convention, legitimate law in the United States conforms to moral rights.

Therefore:

- (5) To be morally legitimate, U.S. law must conform to moral rights.

The problem here is that the conclusion is too contingent on the anthropological facts. If the conclusion that our society is morally committed to making moral argument the dominant form of legal argument depends on the empirical observation that our society is morally committed to making moral argument the dominant form of legal argument, then the view has much less generality, and much less need for jurisprudential argument, than Markovits supposes. How to explain the plain text trump? More refined anthropological observation leads to this modification:

- (4') By convention, legitimate law in the United States conforms to moral rights (except when the plain text of the Constitution does not conform to moral rights).

Therefore:

- (5') To be morally legitimate, U.S. law must conform to moral rights (except when the plain text of the Constitution does not conform to moral rights).

Premise 4' may be empirically true, but it is not the sort of explanation that explains.

It is time to say more about an idea central to Markovits's view, *moral legitimacy*. It is useful to distinguish the concept of moral legitimacy from particular conceptions of moral legitimacy, and to distinguish the concept of moral legitimacy from other related concepts. The concept of moral legitimacy, roughly, is morally justified authorship (typically, but not only, the morally justified power, in the Hohfeldian sense, to create morally relevant institutional facts). Moral legitimacy is a property that not only laws can have or fail to have, but is also a property of governments, institutions, practices, procedures, policies, actors, actions, reasons, and arguments. A conception of moral legitimacy offers conditions and criteria for what counts as morally legitimate. So, the proposition

that rulers are morally legitimate if and only if they have been anointed by god is a conception of moral legitimacy. The proposition that rulers are morally legitimate if and only if they have been elected in free and fair elections under a just constitution is a competing conception of the same concept. The concept itself makes no essential reference to a procedure, so “a law is morally legitimate if and only if it is morally good” is a possible conception. But neither does the concept make an essential reference to substantive goodness, justness, or all-things-considered moral correctness. Particular conceptions of moral legitimacy of course might specify either some procedure or some substantive attribute or both as necessary or sufficient conditions.

Moral legitimacy is usefully distinguished from two other concepts, moral rightness or justice, on the one hand, and validity, on the other. On some conceptions, these concepts are coextensive: one could hold the view that a law is valid if and only if it is morally legitimate, and that a law is morally legitimate if and only if it is substantively just. But the three concepts pick out three different properties that a law can have.

The concept of valid law makes no essential reference to moral justification. The concept of valid law refers simply to the institutional fact of the matter of what counts as the law for those who are subject to it. One could argue that built into the concept of legal validity is the claim of moral legitimacy. This may be so, but a *claim* of moral legitimacy is not yet moral legitimacy.<sup>11</sup> On particular conceptions of legal validity, laws are valid only if they are morally legitimate or only if they are just. But valid law doesn't just mean morally legitimate law or just law. A natural lawyer and a legal positivist disagree about what counts as valid law, but they agree about what they are disagreeing about.

Why am I going on about this? Because much of Markovits's account is more plausible if read as offering a conception of valid law that is conditioned on a culture's beliefs about moral legitimacy than if read as offering a conception of morally legitimate law.

If validity is an institutional fact, it depends on shared understandings. It is quite plausible to suppose that cultures would include a shared understanding of moral legitimacy as a condition of legal validity, even if such a condition is not a formal requirement for

11. Unlike Raz, I think that validity and legitimacy can be pried apart without reducing valid law to effective threat. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 146-59 (1979).

having a shared understanding about valid law. But what a culture considers to be morally legitimate is not, by itself, morally legitimate. Cultural understandings about moral legitimacy can be mistaken. The correct conception of moral legitimacy could be conditioned on substantive justice of a certain sort. For example, I believe that the correct conception of morally legitimate law includes: “a law is morally legitimate only if it does not severely violate the equal political liberties or severely violate basic human rights.” A culture that has the correct conception of substantive justice—commitment to the correct moral principles—is more likely to have the correct conception of morally legitimate law as well. In such a culture, as in any culture, when laws are valid it is because the culture understands them to be valid—commitment makes it so. Happily, a culture committed to the correct conception of substantive justice is likely to count as valid only those laws that have genuine moral legitimacy. But when laws are morally legitimate, it is because they meet the substantive and procedural conditions for legitimate law, which do not depend on the culture understanding them to be the correct conditions. So Markovits is right to insist that law is not self-legitimizing, but not because morally legitimate law has to have the right connection to a culture’s moral principles, but because morally legitimate law has to have the right connection to the *correct* moral principles. To show this, however, rather than to merely assert it, would require taking on the foundational questions in moral theory that both I and Markovits have left for another day.