Tom Campbell and Democratic Legal Positivism

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It is a pleasure to have been asked to be one of four speakers honouring, and celebrating, the work of Tom Campbell.

If I might be forgiven for beginning on a personal note, Tom has always been generous with his time, support and help. And I know there are many others in this room and elsewhere who could, and would, say the same thing. So let me start this short paper by recording my thanks to Tom as one of many beneficiaries of the generosity he has shown in his academic role of encourager and supporter of others.

The substantive topic I have chosen to focus on is Tom's advocacy of 'democratic legal positivism'. Two points need to be made clear right at the start. Firstly, I am overwhelmingly in the Campbell camp as regards the merits and desirability of this general set of positions and views. As a theory of how moral input at the point-of-application *should* (not 'is' but 'should') be kept to a minimum – and hence how that 'ought' plays out as regards appropriate judicial approaches to interpretation, what sort of statutes the legislature should enact, the desirability or otherwise of a bill of rights, the deficiencies of international law, which side prevails in the legal positivism versus natural law debate, and more – I am an observant Campbellian, at least much more so than I am one in the breach. (And I say this as an Allan, which is a sept of the Macdonalds, and so as any Scot in the room will tell you, not lightly.)

Of course this Campbellian position goes by other names than just 'democratic legal positivism'. In fact this is the second point that I think needs to be made clear at the start. The general bundle of positions just sketched above has been given various names. David Dyzenhaus, though he tends to alter and update (in a way judges adopting Dyzenhaus's own preferred approach to interpretation would recognize) the term he uses to describe

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holders of this bundle of views, once described them as 'the Antipodean Positivists'.[1]

And Tom Campbell himself is a tad loose, or free and easy, or in the kindest terms going, undecided, in how he labels this position. Hence, Tom first explains that the sort of legal positivism he is defending is:

> *not* an old style analytical theory that seeks to define law... but a normative or ethical theory that expresses a preference for a certain type of legal system, where, according to my own version at any rate, there is a set of fairly specific general rules that can be identified and applied without recourse to contentious moral or other speculative matters, a system that it is possible for citizens to understand and follow (no doubt with legal advice in complex areas) and judges to apply without recourse to controversial first-order moral judgments.[2]

Having sketched the outlines of his theory, Campbell says:

> I call this theory 'ethical positivism'.... Waldron tends to use the term 'normative positivism'... It is also, for reasons that will become clearer, sometimes called 'democratic positivism'.[3]

Tom then proceeds to call it 'democratic positivism',[4] shifting to 'ethical positivism'[5] one page later, sticking with that term for the next two references,[6] then back to 'democratic positivism',[7] with both labels being used at times thereafter.[8]

This second clarifying point is meant as a warning about shifting terminology and changing labels, and is not meant as any sort of strong criticism, though I myself prefer the tag 'democratic legal positivism'. I think this 'ought' or 'should' theory that both Tom and I subscribe to is premised on

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1 David Dyzenhaus, 'The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law', unpublished lecture, Melbourne, 8 November 2000, p. 4.

2 Tom Campbell, 'Judicial Activism – Justice or Treason?' (2003) 10 *Otago Law Review* 310. This is a précis of the theory given in full in *The Legal Theory of Ethical Positivism*, Dartmouth, Aldershot, 1996.

3 Ibid 311.

4 Ibid 314.

5 Ibid 315.

6 Ibid 316.

7 Ibid 316.

8 See, for example: Ibid 321, 322 and 323.

a particular state-of-affairs, namely that the 'set of fairly specific general rules that can be identified and applied without recourse to contentious moral or other speculative matters'[9] are those that have been enacted by a democratically elected legislature, so that it is true to say – more or less – that all citizens have had an equal say into resolving contentious moral issues in society over which there is obvious and evident disagreement between smart, reasonable, even nice people.

Limiting the moral input at the point-of-application, when the fairly specific general rules issue from a clerical elite, a deranged dictator, or even an oligarchy with a surprising attachment to abiding by procedural Rule of Law desiderata, is in no way self-evidently a good thing. And none of the Antipodean Legal Positivists says it is. So I prefer to have some form of the word 'democracy' in my label for this Campbellian normative theory. In addition, of course, there is the purely tactical or rhetorical advantage of claiming – by the choice of name – the high ground against the Dyzenhauses and Dworkins and T.R.S. Allans of the world, a tactical advantage that the label 'ethical legal positivism' delivers to a lesser extent in my view (though both tags are probably shunned by opponents, in part at least, because of these tactical or rhetorical considerations).

Those two points out of the way, let me turn to how legal positivism on the 'ought' plane – democratic legal positivism – might relate to legal positivism on the 'is' plane, what Tom above called 'an old style analytical theory that seeks to define law'.[10] As both versions of legal positivism are 'essentially contested concepts',[11] I have to be careful here. But it is safe to give you the H.L.A. Hart *Concept of Law* version of the latter, which at core asserts *1)* that law *is* best understood as a system of rules of a particular sort (namely those that have been validated by a rule of recognition, an observable, social test of what happens to be accepted by officials in any particular jurisdiction as legally valid rules) and *2)* that 'law as it is' *ought to be* kept distinct from 'law as it ought to be'.[12]

Some of the best parts of Hart's masterpiece come in chapters 5 through 7 when he expands on the nature of rules, noting that all rules will have a 'core of settled meaning'[13] and a 'penumbra of doubt'.[14] But for our purposes here, ignore criterion *1)* above and focus on criterion *2)*, the claim that law and

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9 Ibid 310.

10 Ibid.

11 W.B. Gallie, 'Essentially Contested Concepts' (1965) 56 *Proceedings of the Aristotelian Society* 167.

12 See H.L.A. Hart, *The Concept of Law* (1961).

13 Ibid 140.

14 Ibid 119.

morality should be kept distinct. Hart makes this argument in chapter nine. Until that point in the book Hart has adopted the vantage of the external observer, the Visiting Martian. But from the middle of chapter nine he shifts gears and adopts the vantage of the Concerned Citizen. Hart nowhere argues that people *do* (on the 'is' plane) separate law and morality. Clearly some people do, and some people do not. Hart, instead, argues that people *should* (on the 'ought' plane) keep separate law and morality, legal rules and moral rules. And they *should* do this because it will have good consequences (thereby betraying, rather subtly, Hart's utilitarian colours).

Notice, even when Hart moves from the disinterested Visiting Martian's Vantage to that of a participant in the system, that he refuses to adopt (implicitly or otherwise) the Judge's Vantage. Dworkin, of course, does. Many other legal theorists do too. But not Hart. And not Tom Campbell either.

Let me put that point in a different, perhaps clearer, way. In one sense the connection between analytical legal positivism (how best to understand what the concept of law *is*, be that a Hartian understanding or some other one, even a Dworkinian one) and democratic legal positivism (how law *should be* created and interpreted and at what point morality infused into it) is wholly contingent. There is no conceptual error in saying, by way of example, that law *is* infused with principles in some Dworkinian manner and that judges *do* construct Herculean-like best background fits held together at this second-order stage by their own moral views, and yet also saying that we *should* try to get rid of as much of this point-of-application moral input as possible. In other words, one's analytical views on the 'is' plane are logically separate from one's normative views on the 'ought' plane.

But if we ask not for any conceptual or logical links between ascribing to democratic legal positivism and opting for any particular version of understanding law on the 'is' plane, and instead ask from which vantage do people tend to see the relationship between law and morality, then I think we can at the very least spot a trend and make a generalization. It is this. Those, like Tom and Jeremy Waldron and Jeff Goldsworthy and me, who on the plane of the 'ought' seek to minimize moral input at the point-of-application – to reduce the scope for judges' particularized (and worse still, authoritative) moral judgments or evaluations – tend to want to see law through the eyes of Concerned Citizens (and Concerned Citizens in a democracy, not in some totalitarian dictatorship or theocratic state ruled by clerics). So did Hart, implicitly, in arguing that we *should* keep separate law and morality because having a separate moral platform from which to assess law (in Benthamite fashion) will make it more likely that we citizens can disobey wicked laws and can realize that law is one thing, morality another, and that when push comes to shove it is the latter, not former, that ought to command our allegiance.

Try, instead, looking at law through the eyes of a judge (or even of an omniscient being, though these two vantages are not identical, *pace* the beliefs of a few top judges themselves). It now becomes so much more difficult – not logically impossible, but practically difficult – to think we ought to minimize moral input at the point-of-application. Similarly, from this Judge's Vantage it becomes so much more difficult to agree with Hart in chapter nine and think we *ought* to keep separate law and morality. From the Judge's Vantage, why not leave open the possibility of infusing a moral test (namely the judge's) into the determination of what will count as law or how to interpret a law, and why not blend together or elide law and morality (namely the judge's morality in any case-specific as opposed to any amorphous, pitched up in the Olympian heights of moral abstractions and hence disagreement-finessing sense)?

Now as a Campbellian I think Tom has it right. In arguing for how law *ought* to be, it is better (implicitly or explicitly) to put yourself in the shoes of the Concerned Citizen and forswear the Judge's Vantage. It is from the Concerned Citizen's Vantage that minimizing judges' moral input looks attractive, that passing statutes lacking vague, amorphous, disagreement-finessing abstractions looks attractive, that putting considerably more weight on certainty rather than flexibility at the point-of-application looks attractive, that understanding the notion of the Rule of Law in procedural rather than substantive terms looks attractive, that refusing to make unelected judges the arbiters of society's highly debatable and contentious moral issues under the aegis of a bill of rights looks attractive. In short, democratic legal positivism is persuasive and attractive to the extent one opts for the Concerned Citizen's Vantage over that of the Judge. But once you have opted that way then I think, like me, you are overwhelmingly likely – as an empirical rather than logical or necessary matter – to find the gist of Tom Campbell's democratic legal positivism views very attractive indeed.

It is that desire to adopt the Concerned Citizen's Vantage that provides a link, an admittedly contingent link, between a Hartian or Benthamite (and if you include the Bad Man and his amoral cynicism within the ranks of your citizenry then, too, a Holmesian) insistence that we should keep separate 'law as it is' and 'law as it ought to be' and a Campbellian defence of democratic legal positivism that urges a minimization of moral input at law's point-of-application.

So let us recap. Tom Campbell gives an alternative précis of his democratic legal positivism theory as being:

> a normative or moral form of legal positivism that takes positivism beyond conceptual and empirical analysis into the realm of evaluation and prescription in that at least part of what the theory is about is recommending a

> particular type of legal system, one that takes rules [of sufficient clarity, intelligibility and precision] seriously and seeks to minimize the role of moral judgment in the actual understanding and implementation of these rules whose content falls to be determined by democratic process.[15]

If implemented, the consequential benefits (at least from the Concerned Citizen's Vantage) will cash out in terms that include the greater predictability of judicial decisions, the greater scope to satisfy expectations and plan one's life and, crucially, the greater equality of input – albeit a miniscule one in absolute terms – into resolving society's contentious, debatable political and moral controversies.

Given the limited time and space that remains let me finish with a quibble, a clarification and a lament.

First the quibble. Tom's democratic legal positivism requires that one take a position on how judges ought to interpret the law, and this needs to be done in a world which – as an empirical matter – looks deficient in Campbellian terms. There are vague statutes galore; statutes incorporating amorphous moral tests abound; bills of rights have been entrenched and enacted; and more. That reality, however, does not remove the need 'to identify the most acceptable strategy for judicial decision-making when the legal system is defective'.[16]

Tom opts for a form of textualism, one 'that places texts in their contexts'.[17] This textualism is not, says Tom, to be equated with a context-avoiding literalism nor any strong version of purposive interpretation, where the judges 'use the text to find the ultimate or background over-arching purpose of the legislation then do whatever is necessary to achieve that purpose in this case or in similar cases'.[18] Nor is it intentionalism. Instead, Tom's contextual textualism – or what he dubs 'contextualism' – is a form of originalism 'in the sense that it generates reasons for emphasizing the original texts'.[19]

Here is my quibble. I think that when it comes to ordinary statutes any 'plain-meaning of the official text in context' approach can be seen as a way of

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15 Tom Campbell, 'Blaming Legal Positivism: A Reply to David Dyzenhaus' (2003) 28 *Australian Journal of Legal Philosophy* 34.

16 Campbell, above n 2, 316.

17 Ibid 318.

18 Ibid.

19 Ibid.

upholding the dominance of the legislature, at least in a long-term sense.[20] This flows from the fact that if the normal meaning of the official text differs from the intentions of the enactors (in those rare instances of there being persuasive evidence of this divergence), then opting for the plain-meaning anyway still leaves room for a legislative response. It can pass a new statute on the usual basis and trump the judges, no doubt also learning a lesson about the desirability of enacting official texts whose plain meaning does not diverge from the intended meaning.

But that is patently not true of constitutional interpretation. Plain-meaning there has much graver weaknesses. Firstly, constitutions are framed in more general terms, by and large, than most statutes. Appeal to plain-meaning here often simply hands the decision over to the point-of-application judges because, as applied to the dispute before the court, there is no plain meaning answer. The same is true of bills of rights, be they entrenched in the constitution or in statutory form (as in the latter case we know that in practice, from mounds of empirical evidence and despite the assurances of proponents, that the legislature is virtually never able to summon up the political courage to gainsay the judges).

Accordingly, leaving the last word on constitutional and bill of rights interpretation with the judges, with the only route for trumping them being a constitutional amendment with all the super-majoritarian hurdles that requires, ought to concern a democratic legal positivist.

My view is that Tom's preferred approach to interpretation is fine for regular statutes; however, as regards constitutional interpretation (and statutory bills of rights) a better approach would be a more direct and vigorous form of originalism, one with more constraints on the interpreting judge than just its plain meaning in context. This might play out in terms of founders' intentions or the original understandings of those alive at the time. To see what I mean in a more specific context, take the injunction against 'cruel and unusual punishment' and consider capital punishment. Interpreting such a moral abstraction based on plain meaning in context does not appear to me to be as constraining on the judge as interpreting based on original understanding at the time or based on the original intentions of the founders (and I ignore here which of those two is preferable). In both the latter cases, given the widespread use of capital punishment at the time, it is clear that the injunction was not understood, or intended, to outlaw the death penalty. So either approach seems to me to put more constraints on the judge than contextualism.

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20 See James Allan, 'Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of "Original Intent"' (2000) 6 *Legal Theory* 109.

I call this a quibble, however, because it is a comparatively obscure aspect of the theory, and because it may be that Tom agrees – that for constitutional interpretation he is in fact an original understandings man. I cannot tell. But that is the extent of my quibble.

The clarification is this. In deciding whether to blend or infuse morality into law at the point-of-application the choice can be affected by whether one focuses on extreme situations or regular day-to-day situations.

Take any two Benevolent Legal Systems. Call one country X and the other country Y. Let us assume that the former one, country X, has to a significant extent blended together law and morality – perhaps by entrenching a justiciable bill of rights or by repeated incorporations of broad moral tests into the statute book. Country Y, by contrast, has not done so. In comparative terms it has minimized the last word moral input of its unelected judges.

Now assume some sort of extreme situation arises. The elected branches of government of these two jurisdictions proceed to act in a way that most people, in calmer times, would consider heavy-handed, if not morally odious. Perhaps the legislature enacts certain anti-terrorism provisions that would result in suspects being detained without trial for unusually long periods. Or the executive branch keeps non-citizen suspects off-shore. Or members of an identifiable minority, one linked to the causing of the extreme situation, are rounded up and moved elsewhere.

In such extreme circumstances it is abundantly evident that the judges in country X – because there is less separation of law and morality there – have more legitimate scope to soften the harsh aspects of such laws and actions than do their judicial colleagues in country Y. The judges in country X may even be able to annul or strike down or re-interpret such enactments or declare unconstitutional such executive actions.

Accordingly, if we focus on such extreme situations, and especially if we judge the responses of the elected branches in hindsight and with the standards we use when times are generally good and calm and peaceful, then country X's arrangements will appear preferable to country Y's.

Put differently, the option *not* to minimize the judges' last word moral input generates better consequences than doing so in these sort of extreme situations. At least that appears *prima facie* likely.

However, in order to put the unelected judges in that position should such extreme situations arise, they must also be put in that position when times are not extreme. Where judges can legitimately infuse their particularized moral views into law on the basis of some set of moral abstractions having

been incorporated or blended into law, they can do so in bad times *and* good. Yes, they can do it in extreme situations. And if they actually do do so that will be seen by many as beneficial. The price for enabling that judicial safety net, though, is a not insignificant one. To enable that you must also enable the judges to decide various legalized moral issues where the elected branches are *not* acting in haste or without consideration of issues of rights, when times are good, calm and peaceful and there just happens to be fundamental disagreement across society. Smart, well-informed, reasonable, even nice people simply disagree about where to draw debatable, contentious lines when it comes to campaign finance rules, say, or hate speech provisions, abortion, euthanasia, religious practices such as women wishing to cover their faces with veils when passing through airport security, how precisely to balance criminal suspects' entitlements against the safety of the general public (think about whether drunk drivers ought to be able to call a lawyer before blowing into the breathalyzer or whether the cross-examination of rape complainants can be circumscribed in non-standard ways) and so much more. In these standard, non-extreme situations country Y's minimal judicial moral input arrangements will appear preferable to many people.

By focusing on the extreme situation and attempting to justify last word moral input at the point-of-application as a safeguard in those sort of instances, what that entails in terms of the non-extreme situation can be obscured. There is a trade-off involved in a Benevolent Legal System in choosing not to keep to a minimum the judges' legitimate last word moral input.

The trade-off needs to be resolved by asking which of the following is the greater risk. Is it that an elected legislature and executive will do something everyone, or almost everyone, will at some future point concede is wicked? Or is it that in normal, non-extreme situations the unelected point-of-application judges will become overly powerful and that their moral line-drawing views will too frequently trump those of the majority of citizens in their country?

That is the trade-off issue in stark terms. Obviously there are a host of ancillary issues that might affect which of the two is seen as the greater risk. For instance, how likely is it that these extreme situations will arise where the elected branches grossly over-react? And when they do arise – when times really are grave and bleak because Pearl Harbour has been bombed or the Germans are sweeping across Europe or two skyscrapers have been demolished by suicidal fanatics – is it in fact true that the unelected judges will be able, or indeed inclined, to stand up to the elected politicians?

The less frequent the likely instances of extreme situation abuse, the more country X's and country Y's arrangements will be measured on the basis of the day-to-day scenario in which moral dissensus and disagreement in

society between reasonable, well-meaning people is an observable fact and some procedure to resolve it needs to be adopted.

Similarly, the less likely it is that unelected judges in country X will be able to stand up to the elected branches when times are very bleak, the more the non-extreme situation (and which arrangement is preferable there) becomes the basis for choosing between country X's and country Y's arrangements.

And related to that, I suppose, is the further issue of whether the judges in country Y, judges who have little or no *legitimate* authority to instill their own moral views into law, might in extreme situations nevertheless feel compelled to lie. (And note that nothing in democratic legal positivism forecloses the Hartian option, even for judges, of opting for morality over law and lying. It is just so hard, normally, to justify that course in a democratic legal system.) Will they cheat in other words, and say the law they have sworn to uphold means something other than what they honestly take it to mean? Will they opt for morality over law *in extremis*? The point here is not so much the philosophical one, that a theory of when disobedience is warranted is distinct from a theory of how best to interpret, but rather that extreme situations may not be the best basis for choosing whether to incorporate morality into law. In extreme situations one might find either that the judges support (or are unwilling to gainsay) the elected branches, thereby nullifying the predicted advantages of incorporating morality into law. Alternatively, one might find that in extreme situations the judges in country Y sometimes disobey the law in favour of morality, thereby narrowing the differences between country X and country Y *in extremis* – though not in the non-extreme situations.

That is the clarification, and I would be interested to hear the extent to which Tom concurs with me.

Lastly comes the lament. It takes us back to the earlier point about how the vantage one adopts can affect the perceived attractions of democratic legal positivism. And it is directed towards law professors, all the people in the room today. Too many law professors think about law, implicitly or explicitly, from the Judge's Vantage. They imagine themselves on the jurisdiction's highest court deciding those rare failures in the system cases that wind their way up to a final appeal court, rather than considering what things would be like from the point-of-view of the citizen. As my old jurisprudence professor in London, Professor Twining, was wont to say, they have a bad case of 'appeal-court-itis'.

Cure that and more law professors might come to see the attractions of democratic legal positivism, joining the ranks of today's comparatively few Campbellians.