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BOOK REVIEWS

The Practice of Principle. By JULES COLEMAN. [Oxford: Oxford University Press. 2001. xx, 217, and (Index) 8 pp. Hardback £25.00. ISBN 0–19–829814–5.]

JULES COLEMAN'S impressive, thought-provoking book is divided into three main parts, which are unified (somewhat loosely) by his reflections on the pragmatist ideas that inform his analyses. In the first part of the book, Coleman focusses on a number of methodological questions relating to his own philosophical theory of tort law and to the rival theories developed by proponents of the law-and-economics movement. Though some of his critical observations on law-and-economics are not novel, they are tellingly and perceptively articulated. Furthermore, his methodological ruminations on his own account of tort law—an account that explicates tort law as the embodiment or practice of the principle of corrective justice—are illuminating. It is in the first main part of the book that the subtleties of the volume's title become most evident.

Still, although the arguments by Coleman in Part One are generally powerful and well presented, they are not entirely invulnerable to criticism. Two points should be mentioned here in passing. First, it is unfortunate that he builds into his principle of corrective justice a specific mode of rectification. As he states, his principle holds "that those who are responsible for the wrongful losses imposed on others have a duty to repair those losses" (p. 22). This conception of corrective justice as an ideal effected specifically through compensatory payments by tortfeasors to their victims is regrettable partly because it saddles that ideal with a restriction that was never attached thereto by Aristotle, the great progenitor of the tradition of Western thought about corrective and distributive justice. In addition, that restriction is plainly in tension with some prominent aspects of English (and American) tort law, such as the rights of insurers to subrogation, and the recovery of social-security benefits through payments by tortfeasors to the state which result in commensurate deductions from the compensatory payments owed by the tortfeasors to their victims. In light of those features of English (and American) tort law, huge swathes of that law would lie largely or wholly outside the domain of corrective justice as Coleman defines it. On this particular point, then, the conception of corrective justice which he championed during the 1970s and 1980s—in which he left open the specific mode of rectification—was preferable to the conception which he has espoused since the early 1990s.

A second query worth raising here is connected with Coleman's rejoinders to libertarians such as Richard Epstein. Although the prime target of the strictures in Part One of *The Practice of Principle* is the law-and-economics movement, libertarianism—the key tenet of which is that "one owns the causal upshots of one's actions", whether those upshots be beneficial or untoward (p. 47)—also undergoes some pummelling. Like Stephen Perry, Coleman complains that a principle of strict causal liability

leads to indeterminacy in virtually all cases. In any typical tort case, both some actions of the defendant and some actions of the plaintiff were but-for causes of the mishap from which the plaintiff has suffered injury. Hence, Coleman argues, we cannot decide between the parties by recourse to the concept of causation; we cannot decide between them "independently of some normative standard of care" (p. 47). Now, although Coleman is correct in maintaining that the libertarians' reliance on the sheer concept of causality is otiose, he moves too quickly to the conclusion that the only alternative for the libertarians is the invocation of some normative standard of care. They can instead adopt a more sophisticated understanding of causation and can advert to the property of causal salience as their touchstone for assigning liability. Causal salience is the importance of a cause as a cause, cashed out in probabilistic terms. What has to be measured is the extent to which the actions of each party increased the *ex-ante* probability of the occurrence of a mishap like the one that ensued, against the background of the other circumstances present (crucially including the actions of the other party). If the defendant's conduct raised the *ex-ante* likelihood of such a mishap to a greater extent than did the plaintiff's conduct, then the defendant is to be held liable under the modified libertarian test for liability. To be sure, evaluative judgments will be necessary in the course of ascertaining the relevant probabilities. However, just as the evaluative judgments necessary for a philosophical analysis of the concept of law can be theoretical-explanatory rather than moral-political—as Coleman rightly insists—much the same is true of the evaluative judgments needed for gauging the causal salience of the parties' actions. It is not the case, then, that libertarians must perforce resort to morally fraught standards of care in order to operationalise their criterion for the assignment of liability.

Part Two is the longest of the three major sections of *The Practice of Principle*. Coleman there focusses on the conventionality of law and on the role of moral principles in the law. In so doing, he defends the legal-positivist thesis that any legal authority and any tests for legal validity are products of conventions, and he considers at some length the nature of those conventions. He contends that the modelling of those conventions as solutions to game-theoretical coordination problems is unduly confining, and he looks to the work of the philosopher Michael Bratman for an alternative model. He draws upon Bratman's account of shared cooperative activities, the innumerable undertakings in which people who share certain attitudes and objectives manage to coordinate their efforts by regularly evincing mutual responsiveness and supportiveness as they interact toward their common aims. Coleman argues that, when legal conventions are understood along the lines laid out by Bratman, a medley of objections to legal positivism can be overcome readily and systematically.

Though Coleman's discussions of the nature of legal conventions are valuable, a few critical observations should be advanced briefly here. First, Coleman submits that H.L.A. Hart thought of legal conventions—most notably the Rule of Recognition, in accordance with which the officials of any legal system ascertain the existence and contents of the system's norms—as solutions to game-theoretical coordination problems. His initial attribution of this position to Hart is quite tentative: "Arguably, Hart conceived the rule of recognition as what we would nowadays refer to as a 'coordination convention,' in the formal or game-theoretic sense" (p. 92).

Slightly later, however, Coleman declares more firmly that Hart "was wrong ... to conclude that the rule of recognition represents, in effect, a Nash equilibrium solution to a game of partial conflict" (p. 97). Neither of these assertions is accompanied by any citations to Hart's work. Whether any pertinent citations could have been adduced is dubious. Hart never referred to the game-theoretical literature, and he did not employ the vocabulary of game theory at all. The general tenor of his analyses of social rules and legal conventions is in fact well conveyed by what Coleman says about the application of Bratman's theory to the workings of legal systems: "The practice of officials necessary to create and sustain law is a more general form of social coordination, a form that is otherwise familiar to us" (p. 97).

Second, at several junctures Coleman inadvisably broaches a certain limit on the range of motivations that can impel officials' adherence to the Rule of Recognition that underlies their legal system. Although he is correct in thinking that such adherence consists in exhibiting the critical reflective attitude or internal viewpoint which Hart delineated, he is wrong in thinking that officials' adoption of the critical reflective attitude must stem from punishment-independent considerations. Among his repeated statements of this erroneous view, the following passage is the lengthiest: "[T]he very possibility of a sanction attaching to some rules presupposes the existence of other rules that create the capacity or authority to sanction, and that identify to which rules the sanction applies. It would be viciously circular to explain the authority claimed by these 'secondary' rules in terms of the sanction. For any legal system, therefore, there must exist an important class of rules that officials regard as authorizing the subordinate rules promulgated under them, and whose capacity to guide conduct cannot be explained in terms of sanctions" (p. 71). As Coleman later declares: "To take the internal point of view toward rule-governed behavior is to take the rule—and not an external sanction—as the reason for one's compliance" (p. 82). In proclaiming this limit on the range of motivations that can prompt the adoption of the internal viewpoint, Coleman has succumbed to a fallacy that was exposed by Gregory Kavka two decades ago in his extremely important discussion of "perfect tyranny" (presented afresh in his *Hobbesian Moral and Political Theory* [Princeton, 1986]). As Kavka demonstrated, a legal system can exist wherein *every* official in performing his role is motivated *exclusively* by fear of the punishments that will be inflicted on him by his fellow officials if he does not exhibit the critical reflective attitude toward the system's norms. Although such a situation would not typically last for very long, it could quite coherently arise and continue. More likely and more stable would be a legal system in which the adherence of *some* officials to the Rule of Recognition is motivated by fear of the punishments that will be imposed on them if they do not perform their roles satisfactorily. In short, it is not the case that legal officials' adoption of the critical reflective attitude toward the norms of their system must be based on punishment-independent reasons, and it is therefore not the case that the operations of a legal system *must* be based (wholly or partly) on the motivational force of such reasons. Fear is among the factors that can underpin officials' steadfast implementation of the laws of their regime.

Third, while Coleman's resort to Bratman's account of shared cooperative activities is adept and fruitful, it is misleading in some respects.

For one thing, Bratman's exposition is especially apt in application to small-scale activities. Notably, each of the examples of shared cooperative activities which Coleman mentions—"taking a walk together, building a house together, and singing a duet together" (p. 96)—is a collaborative undertaking on a very small scale indeed. In application to a national legal system that encompasses millions of judicial and administrative officials, Bratman's analysis is less germane. In particular, the analysis (when so applied) understates the degree of explicitness and formality and hierarchy required for a workable level of coordination among those multitudinous officials; and it overstates the degree of cooperativeness or mutual supportiveness that must obtain among them. For Bratman, a characteristic feature of a shared cooperative activity is a commitment to mutual support (p. 96). In other words, he emphasises the obligingly helpful relations among the participants in such an activity. In application to a legal system, Hart's emphasis on the preparedness of officials to monitor one another and to discountenance deviations by one another from the system's norms is in some ways more illuminating. Although mutual supportiveness among officials is almost always present to a considerable extent in a healthy legal system, mutual vigilance and upbraiding are frequently even more important. When hundreds of thousands of officials have to interact reasonably concertedly in order to sustain the operativeness of a legal system, their inability to get to know one another will often lead them to deal with one another less trustfully and complaisantly and flexibly than would be true of people singing a duet or building a house together. In sum, without the *critical* reflective attitudes highlighted by Hart, the *supportive* reflective attitudes highlighted by Bratman would generally be insufficient to secure the regularity of a legal system's workings.

The remainder of Part Two of *The Practice of Principle* is devoted to a defence of "Inclusive Legal Positivism" against "Exclusive Legal Positivism". The latter school of thought, associated most conspicuously with Joseph Raz, contends that the criteria for the status of norms as legal norms in any regime of law cannot lay down moral tests. Inclusive Legal Positivism, as designated by Coleman, consists of two theses that are each at odds with the Exclusivist stance. First is the claim that the criteria for legal validity in any particular legal system can include, but need not include, a requirement of consistency with various moral values. In any legal system, that is, the consistency of norms with the demands of morality can be a necessary condition for their status as laws within the system. A second claim, which Coleman has heretofore labelled as "Incorporationism," is that the correctness of a norm as a moral principle can be a sufficient condition for the status of the norm as a law within any legal system in which the officials treat such correctness as a hallmark of legal validity. Their adherence to a law-ascertaining criterion which establishes that hallmark as such is by no means inevitable, but it is perfectly possible. When the officials do abide by such a criterion, the principles endowed with legal validity thereunder are full-fledged laws. (I shall henceforth use the phrase "Inclusive Legal Positivism" for the first of the two theses which Coleman defends, and I shall use the term "Incorporationism" for the second of those theses.)

Much of what Coleman says in defence of Inclusive Legal Positivism and Incorporationism is highly admirable, as are his earlier defences of those doctrines. However, this portion of his book is vulnerable to several

objections, three of which will be outlined here. First are some points of personal privilege. Four pages of Coleman's discussion launch an attack on some unnamed Inclusive Legal Positivists who are said to misunderstand the nature of the Exclusivist challenges to their position (pp. 111–114). Given that Coleman in those pages employs some terminology which I have employed in my own writings on Inclusive Legal Positivism and Incorporationism, and given that he cites an article of his which includes some criticism of me, he appears to have me in mind as the anonymous object of his strictures. In that event, his remarks are misguided. He suggests that I have mistakenly presumed that the Exclusive Legal Positivists are preoccupied with the controversial character of moral principles. Such a suggestion misrepresents the purport of my arguments. I have focussed on the controversial character of moral principles not in order to combat Exclusive Legal Positivism, but in order to explain why Coleman's version of Incorporationism is unilluminating. Hence, when Coleman repeatedly declares that "[c]ontroversy is not the issue for the exclusive legal positivist" (p. 114, emphasis in original) he is pointlessly correcting an error that has not been committed by anyone (save by Coleman himself in a 1996 essay). He also suggests that I defend only Inclusive Legal Positivism and that I reject Incorporationism. In fact I sustainedly champion Incorporationism, though I advocate a version quite different from his. He further implies that I have denied that a Rule of Recognition comprising only Incorporationist criteria is possible. In fact, I have repeatedly affirmed the possibility of such a situation. My point has never been that the idea of a thoroughly Incorporationist Rule of Recognition is incoherent. Rather, my point has always been that the tenability of such a Rule of Recognition in a society of any substantial size is overwhelmingly unlikely. A legal system wherein every official thinks that she performs the role of Hamlet by virtue of carrying out her responsibilities is certainly possible but is overwhelmingly unlikely; quite the same is true of a legal system with a thoroughly Incorporationist Rule of Recognition in a society much larger than a handful of families. Yet another misconceived accusation by Coleman is that I do not "answer Dworkin's original objection" to legal positivism (pp. 113–114). In fact, my version of Incorporationism—which highlights the role of moral principles in hard cases—is much more finely tuned than Coleman's version as a rejoinder to Dworkin, who focussed precisely on the role of moral principles in hard cases. Equally ill-advised is Coleman's assertion that my position "confuses a conceptual argument with an empirical one" (p. 114). I have all along made clear that my wariness of his version of Incorporationism is based partly on empirical premises. Even stranger is the following footnote, which is clearly a response to my critique of his version of Incorporationism: "[This] is not to say that there are no constraints on the criteria of legality. The criteria are expressed in a rule of recognition that is a social rule. Thus, the criteria must be capable of supporting convergent behavior among officials. This is a conceptual constraint, imposed not by any commitment of positivism but by the concept of a social rule" (p. 108, n. 11). Given that legal positivism is committed to the thesis that the criteria for legal validity in any system of law are profoundly conventional, Coleman's claim that his conceptual constraint cannot be traced to "any commitment of positivism" is

mystifying. In sum, Coleman's ripostes to me are baseless distortions that are unworthy of the rest of his commendable book.

A second weakness in Coleman's discussions of Inclusive Legal Positivism and Incorporationism emerges during his efforts to refute Scott Shapiro's contention that moral principles validated as laws under an Incorporationist Rule of Recognition cannot genuinely affect the practical reasoning of anyone for whom that Rule of Recognition itself provides reasons-for-action. Coleman concentrates on showing that the principles *qua* laws can provide epistemic guidance to everyone who is subject to them. His reasoning in support of that point is deftly resourceful; indeed, as is maintained by Wil Waluchow (in "In Pursuit of Pragmatic Legal Theory," 15 Canadian Journal of Law & Jurisprudence 125, 148–149 [2002]), Coleman's arguments are more sturdy than Coleman himself appears to recognise. However, those arguments are largely beside the point, since the truly formidable crux posed by Shapiro pertains not to epistemic guidance but to motivational guidance. That is, Shapiro maintains that anyone provided with reasons-for-action by the criteria in the Incorporationist Rule of Recognition cannot be provided with any further reasons-for-action by the principles that are validated as laws under those criteria. Coleman's ingenious arguments relating to epistemic guidance do nothing to rebut Shapiro's critique relating to motivational guidance.

Third, in replying to Shapiro's critiques, Coleman opts for a tack that has previously been adopted by Waluchow, Kenneth Himma, and me. He writes: "Instead of abandoning the claim that law must be capable of making a practical difference, all we need give up is the claim that this is a conceptual constraint on *each* law. Surely it does not follow logically that because *law* must be capable of [providing motivational guidance], no norm can count as a *law* unless it is capable of [providing motivational guidance] in the requisite way" (p. 143, emphases in original). Effective though this retort may be against Shapiro, it is not really available to Coleman. After all, Coleman espouses a version of Incorporationism that not merely allows but highlights the possibility of a legal system in which the only criteria for legal validity are Incorporationist criteria. In other words, he highlights a situation in which *no* law within a legal system is capable of providing motivational guidance. By centring his position on such a situation, he largely deprives himself of the ability to fall back upon the retort quoted above.

Part Three of *The Practice of Principle* returns to methodological issues, with some detailed explorations of the status and entailments of the analyses undertaken by legal philosophers. A number of the points made in this final part of the book are not novel, but they are generally articulated skillfully and insightfully. Only one criticism need be raised here. Coleman inexplicably denigrates the legal-positivist insistence on the separability of law and morality. As I have emphasised in my *In Defense of Legal Positivism* (Oxford, 1999), that insistence consists in an array of theses stemming from different ways in which morality can be understood. Coleman singles out only one of those theses, the claim that "a legal system in which the substantive morality or value of a norm in no way bears on its legality is conceptually possible". He submits that "[t]he truth of this claim seems so undeniable as to render it almost entirely without interest; the claim it makes so weak, no one really contests it" (p. 151). He

concludes: "We cannot usefully characterize legal positivism in terms of the separability thesis" (p. 152). Let us begin by noting that Coleman errs in declaring that no one contests the particular claim which he has singled out as the positivist affirmation of the separability of law and morality. Michael Moore, Deryck Beyleveld, Roger Brownsword, Michael Detmold, and others have contested that claim during the past couple of decades. More important, Coleman's dismissal of the significance of the separability thesis is due entirely to his fixing upon the least controversial variant of that thesis to the exclusion of other variants. Especially during the past three or four decades, most of the interesting debates between legal positivists and their opponents have revolved around other renderings of that thesis, involving different senses or dimensions of morality. As Coleman himself later acknowledges (p. 193, n. 21), we shall find those debates largely unintelligible if we do not realise that they are centred on the separability of law and morality. When the positivist affirmation of that separability is grasped in its multi-faceted richness—rather than simply in its most pallid formulation—we can see that it indeed forms the heart of legal positivism. To slight that affirmation is to darken counsel by rendering opaque most of the disputes between legal positivists and their adversaries.

This review has had to skip over most of the details of Coleman's arguments and analyses. Suffice it here to say that those arguments and analyses offer ample food for thought on the part of anyone interested in legal philosophy. Coleman has enabled his readers to deepen their contemplation of the issues which he addresses.

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The Fee Tail and the Common Recovery in Medieval England 1176–1502. By JOSEPH BIANCALANA. [Cambridge: Cambridge University Press. 20001. xix, 351, (Appendices) 88, (Bibliography) 14, and (Index) 45 pp. Hardback £70.00. ISBN 0–521–80646–1.]

ENTAILS were abolished in Scotland nearly a century ago, and recently English entails, at the bidding of the Law Commission, have come under the ban of the law. So it is perhaps timely to have a work which traces the origin and growth of this peculiar interest in freehold land, and its development into a perpetuitous interest until made destructible by way of common recoveries. This monograph takes the reader through the span of the later middle ages; it is effectively a study of the dynamics of land and family law during this period. As anyone who has striven to follow the effect of *De Donis* (1285) and the later complexities of the common recovery can appreciate, the subject-matter presents difficulties, and additionally there has been a dearth of knowledge as to the theory and practice of entailing land. The author has been conscious of this, for there are helpful summaries both forward and backward looking, much as occasional oasis relieves a trying territory. It is not without interest to note that this work started over ten years ago (at the instance of Professor Sam Thorne) as a study of the common recovery and then extended beyond into entails, as so could be read backward if following the author's own studies (almost as a series of essays), but it seems easier to begin at the beginning.