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A Philosophical Guide

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Sean Coyle



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Positive Law, Positive Justice: Hart

IN THE FIFTH of his lectures on jurisprudence, John Austin (1790–1859) famously claimed that ‘the existence of law is one thing; its merit or demerit is another’.¹ Austin’s statement may strike us as obviously true. One can point to many examples of laws that reasonable people deem to be unjust, or of dubious merit. But the truth of Austin’s claim may seem less straightforward when we reflect upon some of its implications. If the existence of law is a question distinct from its merits, then one must be able to find the law without any reliance upon moral judgements. Is this the case? Examining cases on the law of torts, for example, one might be struck by the extent to which determinations of the courts as to the law to be applied hinge upon considerations of the extent of duties owed to the victim, the onerousness of obligations of care, or of what was reasonable in the circumstances. Indeed, is not litigation concerned in one sense with the justice of the demands being made by the claimant and defendant?

Aware of these dimensions to legal thought, the version of legal positivism offered by HLA Hart (1907–92) emphasises a different idea: that of the contingency of the relationship between law and morality. In chapter IX of *The Concept of Law*, Hart contends that ‘it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so’.² This statement appears to leave room for the possibility that certain legal arguments or decisions of the court might be concerned with the elucidation or justification of moral ideas. But it is nevertheless the case that Hart shares with Austin a belief that legal positivism is concerned above all with the nature of the connections between the domains of law and moral thought. Earlier theories of the nature of law were occupied with a different question: to what extent law consists exclusively of rules and arrangements that are posited, or laid down, establishing a merely conventional justice.

The earliest juridical philosophies sought an understanding of those standards of reason or justice that are in some sense natural to human societies, in

¹ J Austin, *The Province of Jurisprudence Determined* (London, Weidenfeld & Nicholson, 1832) 185.

² HLA Hart, *The Concept of Law*, 3rd edn (Oxford, Clarendon Press, 2012) 185–86.

being directed towards the wellbeing of the community and the soundness and legal virtue of its internal arrangements. The establishment of certain communal conditions was essential for the pursuit of human flourishing or happiness. The private good of each individual could be subsumed under the common good of the community, its shared rational and ideological commitments to developing a common way of life, as the only real path to their fulfilment. If the human being was by nature a social animal, then his most basic need was that of *order*. But classical jurists in the Aristotelian and Platonic traditions believed that stable order was nevertheless possible only if it embodied a measure of justice. Order implies rationality. Thus, the conditions required for human flourishing are not infinite as to the form that they can take. The end of a community's rational and ideological commitments must be orientated to the pursuit of good order (*eunomia*), unless society ultimately unravel itself. It was therefore quite clear to the ancient jurists that if the flourishing life is proper to man, it is yet necessary that he labour in order to achieve it by crafting laws and policies for the direction of social life. But all too often, the positive arrangements and standards that men lay down for themselves can go against justice, standing in opposition to the life that is properly appointed.

In the hands of the Christian jurists of the medieval period, this distinction grew in sophistication and altered in its significance. The life that is ordained for human beings is present in God's eternal law (*lex aeterna*). But humans, removed from the mind of God, do not perceive His eternal will, and it remains unfathomable to them. Yet God's law is not only the product of His will, arbitrary and unrestrained by any consideration, but is shaped by His perfect nature. Consequently, it is possible for human beings to participate in the eternal law in virtue of their rational nature. They can gain knowledge and understanding of a 'natural law' (*ius naturale*). The importance of this is worth exploring.

For the Christian writers, the primary source of human understanding of God's law is revelation. Through the Decalogue and through biblical texts, a part of the eternal law is revealed directly to human beings. But the part of the law that is thus revealed (*lex divina*) is in many ways less than the law that is needed for the guidance of human action. Its commandments are general; its beatitudes are aphoristic. Much that pertains to the way human beings must act in concrete situations remains hidden. We are called upon to be just, but it is unclear precisely what justice involves. As explained in chapter five above, if the divine law arose purely out of God's own 'free' will, the only possible response to it would be obedience (or disobedience). We could not question the justice or wisdom of the law, but only accept it: God's announcement of the law would determine what is just and unjust, and would alone constitute

the reason for the justice or injustice of certain actions.³ There would be no other 'reasons'. But the very 'freedom' of God's will is exercised in the light of His goodness, justice and mercifulness. These are properties of His nature, reflected by, and not mere products of, His will. It is therefore open to human beings to reflect upon God's nature and goodness as a source of further moral insight. God's creative act (the natural order of the world) can itself be comprehended as a good. Human beings in belonging to this creation can come to understand their proper place within it. Their needs for food, clothing, shelter and community are not accidental but can be interpreted as an extension and fulfilment of natural order. Reflecting on these needs, it is possible to understand the actions and forms of life that tend to secure or increase them, and those which limit or deny them. Thus, human beings through reflection upon their own worldly situation can form a deeper understanding of how to live, so that the 'natural law' could almost be spoken of as a law of human flourishing.

At the hands of writers such as Aquinas, therefore, the classical assumption that the correct way to live was to pursue the life of virtue, and that this would bring happiness, was given a specifically theological underpinning. God did not create humankind only for them to suffer and die. His law is not set against the happiness and welfare of human beings, but ensures their very flourishing. Measures of happiness are no doubt possible for those who turn away from goodness; but true fulfilment can only be found by living virtuously, by practising the Christian virtues. Above all, human societies must strive to uphold the common good. The purpose of the state is to ensure the flourishing of its members. The earthly law, the law that human beings create for themselves and for the governance of their social arrangements (*ius positivum*) is therefore intended to articulate human understanding of natural law as it applies at the concrete level: a detailed 'working out' of natural law. Positive law can in this sense add to natural law, but would lose its validity to the extent that it contravenes natural law.

The idea of 'positive law' therefore predates the development of 'legal positivism' by a considerable interval of time. It was above all the disintegration of the Aristotelian framework of political thought that gave rise to the development of positivist thought. In the wake of the Reformation, the political realities of Europe created conditions in which political societies could no longer be seen as underpinned by shared rational understandings of a 'common good' that must be pursued collectively, through shared commitments and ideals. The internal socio-political arrangements of European states were structured around the simultaneous pursuit of a plurality of individual 'goods'

³ Recall that Hobbes attributes a similar power to the earthly ruler, the 'mortal god' of the state.

that tended to limit or impede one another. The need for a framework of authoritative, clearly delineated rules was paramount. Posited law alone was relevant. Lacking agreement on the life that is 'good' or 'proper', individuals had to create their own arrangements. Nothing could be inferred from the character of these arrangements: they did not pursue an 'order' that is natural to man, but represented an imposed framework of governance designed to secure the internal peace and stability of society. From amongst the numerous forms of social ordering that spring from the human will, none reflect arrangements or conditions that serve the 'natural' or 'proper' ends of human beings, but only ends that are selected by human wills.

In the centuries after Hobbes, philosophers in the British intellectual tradition made more direct and deliberate attacks on further aspects of natural law thought. Natural lawyers in the era after Aquinas held largely to the view that the *ius naturale* could be considered as a law congenial to human flourishing. One might almost say, as noted above, that the natural law constituted the law of human happiness. Writers such as Hume (1711–76) and Bentham (1748–1832) were sceptical of the need for such 'natural law' explanations. They noted that whilst the deontic or imperative force of law continued to derive from its divine origin (that it stems from God's will is the reason we *must* obey it), the actual substance of the law was drawn instead from human reason: namely, rational reflection upon our own situation, and what is required in order to make it bearable, comfortable and conducive to human wellbeing. But then why (one might wonder) do human beings need any further motive, aside from its tendency to promote their wellbeing or happiness, to obey that law? Accordingly, the entire theological framework could, it seemed, be removed from the picture without disturbing the substance of established moral and political ideas. All one needed to say was that the purpose of law is to maximise human wellbeing.

At the same time, the new doctrines did not leave existing ideas of law entirely undisturbed. Placing political understandings on a more 'scientific', less obscurely metaphysical, basis allowed philosophers to see more clearly how law can be made to advance the common good. On the one hand, the notion of 'the common good' could itself be treated in a more scientific way. Once it is understood that there is no natural hierarchy amongst various contentious conceptions of the good, it becomes possible to understand the common good as little more than an accumulation of 'units' of 'utility'. You and I may disagree about the nature of the good life. I think the good life consists in amassing knowledge by reading books. You think it is about all-night parties and live-for-now consumerism. If it proves impossible simultaneously to fulfil both desires (there are too few trees to provide *both* paper for my books *and* wood to fire the power stations necessary to sustain your consumption), then society must choose the alternative that maximises utility overall.

If more people agree with you than agree with me, then utility is maximised by using the wood for power stations. There is no 'deeper' ethical question about which idea of 'the good' is 'better': human beings just happen to find utility in different things. Utility for you might result in disutility for me (and vice versa). The clear-sighted thinker understands that, in such circumstances, the correct approach for law is to try to maximise the amount of utility in society overall.

Utilitarianism has many more elaborate and complex forms: preference utilitarianism (maximisation of preference-fulfilment); motive utilitarianism (inculcating utility-maximising decision-making traits, such as honesty); negative utilitarianism (ensuring the least suffering for the greatest number); and others. All forms of utilitarianism are united by their consequentialist assumptions: the moral worth of an action is determined only by reference to its resulting outcome. The morality of an action, its relative weight vis-a-vis other possible actions, can therefore be determined only after knowing all its consequences. This gives utilitarianism immense intuitive appeal. It also suggests that actions and arrangements do not have moral properties 'absolutely', but only in relation to other possibilities. They are not 'good' in any ultimate sense, but only better or worse than something else. The project of deciding which alternative is the best, or optimal choice for society to pursue was called by Bentham 'censorial jurisprudence'. Amounting to a vision of the way law ought to be, it must be sharply distinguished from 'expository jurisprudence', the examination of the law as it actually is. The natural lawyer's use of the terminology of '*ius*' had operated to obscure this distinction, by making it unclear whether one was referring to the law or right as it is written down and applied, or intending to denote 'the just situation' itself—or indeed whether it was possible to distinguish these senses at all.

Bentham was bitter in his attacks upon earlier jurists, especially Blackstone, who had striven to represent the common law as an articulation of the natural law. Henceforward, the law was not to be understood as a systematic body of rights, which had to be debated and delineated according to underpinning justifications and notions of justice and entitlement. Such arguments represented glosses on the law, the unauthoritative pronouncements of treatise writers (such as Blackstone) pursuing 'censorial jurisprudence' under the guise of exposition. Labouring under this image of law, writers ever treated hard-edged rules and decisions as mere fragments of larger rights, giving partial expression to the system of rights as a whole. Instead Bentham insisted that the law must be understood to extend only to the enacted provisions and decisions of authoritative institutions. The hard-edged rules were not partial expressions of anything, but a complete expression of the law as it is. The doctrinal writer's 'rights' were nothing other than the writer's subjective ideas concerning the moral implications of the body of rules. Natural law was

nonsense, obscuring clear-sighted moral visions of what ought to be done. But the vision of law as the expression of rights shaped by natural law represented the highest and most refined form of this nonsense: ‘nonsense on stilts’ as Bentham put it.⁴

Seeking to explain the idea of law on the basis of more down-to-earth phenomena, Bentham offered the definition of law as ‘an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state’.⁵ Nothing could be more ‘positive’ than this! Law is ‘an assemblage of signs’: it has an official and unmistakable written form. Truly it can only be found in the written texts of statutes and official records of court decisions. Any ‘interpretations’, glosses or explanations of these written propositions are not law, because they change the written form, substituting an unauthoritative and variant form. A different ‘assemblage of signs’.

Austin’s conception of law too gives a central role to the ‘sovereign’, but one might say that his famous definition is less concerned than Bentham with questions of form, and places the focus more exclusively on questions of origin: law is defined as the ‘command’ of the sovereign. (The two sentences, ‘Hand over all the money!’ and ‘Empty the till!’ could plausibly be said to embody the same command, but they obviously involve rather different ‘assemblages of signs’.) In another sense, Bentham and Austin share a common concern, to present law as a kind of ‘social fact’. From the end of the seventeenth century, across Europe but perhaps especially in England, the idea that the legitimacy of sovereign rule derived from a hypothetical ‘social contract’ was regarded as a false and dangerous idea. If government rested on the consent of the governed, then the people could—hypothetically—rise up and resist the rule of an unpopular or tyrannical sovereign, withdrawing their consent. Bentham’s and Austin’s philosophies represent instances of a line of thinking that was not hypothetically vulnerable to acts of dissolution. Sovereignty itself stood outside the scope of law and even of questions of legitimacy. It derived not from contract or consent, but from social fact: the fact that the people exhibit the regular tendency to obey the sovereign’s commands. Furthermore, the legitimacy of the sovereign was no longer tied to a respect for each person’s ‘natural rights’. Increasingly, government came to be regarded as unconditioned.

⁴ Austin also advocated a utilitarian ethics, but interestingly it is one that restored God’s will to a central role in moral thought. Human beings are required to follow God’s law, but possess only that part of the law that has been revealed to them. Where this law is silent, ‘we must construe [His command] by the principle of utility’. Austin (n 1) Lecture IV.

⁵ J Bentham, *Of Laws in General* (ed HLA Hart, London, Athlone Press, 1970) 1.

THE BASIC DIMENSIONS OF HART'S POSITIVISM

It was Bentham rather than Austin who had the greater influence on Hart. Not only did Hart publish a famous series of essays on aspects of Bentham's philosophy, he also became an editor of Bentham's work later in his career. But it is Austin's work, rather than Bentham's, that forms the starting point for Hart's reflections on the nature of law in his most famous book, *The Concept of Law*, originally published in 1961.

Hart's immediate influences were nevertheless closer to home, bound up with the Oxford 'ordinary language' philosophy of the 1940s and 1950s, and the enthusiasm for 'conceptual analysis'. Amongst the principal ideas of the new philosophy was the belief that traditional enquiries into the nature or essence of things were deeply mistaken. Human knowledge of the world derives from our ability to conceptualise it: in other words, from language. Instead of seeking to understand the 'nature' of a 'right', one should examine and analyse the *concept* of a 'right' as it appears in our thought. Conceiving of rights as ideal or metaphysical entities, one does nothing except chase empty phantoms (as Bentham would have said). Hart instead intends to use 'a sharpened awareness of words to sharpen our perception of the phenomena'.⁶ Sympathetic to Austin's aims in placing law on the level of social fact, he nevertheless demonstrates that Austin's concepts fail to account properly for the obligatory character of law.

If law is underpinned by nothing except habit and fear, then one is obliged to say (as Austin does) that the 'binding' force of the law is simply the fact that one who disobeys is likely to suffer the application of a sanction. But this cannot be all there is to the notion of legal obligation. For one thing, my law-breaking might go undetected. For another, I may have a legal obligation to perform my side of a contract, but you might choose to waive your right to performance. More depressingly, I might die before you have the chance to sue me. But in each of these cases, it seems wrong to suggest that (by avoiding the 'sanction'), I never had an obligation in the first place. It is true that Austin speaks only of the 'likelihood' of having a sanction applied; but the point is that the *reason* for applying the sanction is the breach of the legal obligation, it is not the *ground* of that obligation. These reflections may well prompt us to fall back on ideas of the law's moral character, seeking an explanation of the legitimacy of the law's obligations and sanctions. Hart wishes to avoid this. He wants to demonstrate that legal obligation can after all be understood as a 'social fact' (not a species of moral obligation requiring a moral vision

⁶ Hart (n 2) v. (Hart is quoting the Oxford philosopher JL Austin here).

of the nature of law), but that legal obligations are genuinely prescriptive of behaviour and not simply predictive of likely outcomes.

In the first place, Hart sets out to demonstrate that the notion of a 'command' does not throw much light on the actual experience of law and legal practice. True to his intentions in 'sharpening our awareness' of words, he draws a distinction between the condition of being under an obligation, and the condition of being obliged to act in some way. By threatening to shoot you, I can certainly place you in a position where you have no alternative but to hand over the money. In that sense one could say without too much argument that I have 'obliged' you to hand over the money. But it would be incorrect to say that you possessed an 'obligation' to hand it over. Such 'orders' lack a standing quality that attaches to genuine 'commands', a distinction that Austin seems to be unaware of. In speaking of 'commands', Austin has something much more like the gunman's orders in mind. These ideas are capable of shading into one another (the gunman may correctly be said to 'give an order' to a henchman, and in that sense issue a command), because in some cases the order attaches not simply to a threat in the face of non-compliance, but to a stable structure of hierarchical authority. Hart concedes that the proper, quasi-military notion of 'command' is much closer to the idea of law than the gunman's order. But he instantly dismisses it as therefore unlikely to shed much useful light on law. The element of authority involved in law is the precise aspect of law that obscures explanations of the law's nature. It does not elucidate the nature of law to compare it to the military commander's exercise of a function that depends upon a similar respect for authority.

How shall one account for the respect for authority that appears to be central to laws and military commands? The answer cannot be found in the presence of threats, if only because a military general may have the power to give out orders without having the power to punish disobedience (that may fall to a court martial or tribunal). At the same time, one cannot say that the general's authority derives from any moral obligation on the part of his men to respect military orders. What is it that enables us to speak of law as imposing obligations, rather than simply 'obliging' people to act in certain ways under threat of sanction? Hart suggests that the answer lies with the idea of accepting a rule.

Austin's jurisprudence had rested upon the presence of generalised habits amongst the population to fall in with commanded orders of the sovereign. The regularity that is presupposed by the idea of a 'habit' is present in many aspects of social life not immediately connected with law. Many people regularly go out drinking on a Friday night. But one could not accurately describe this situation by saying that 'it is a rule' that people must go out on a Friday night. On the other hand, people regularly pay their taxes, and speak of this as obeying a rule. What is the difference? In both cases, one could observe a

regular pattern of conduct. Many people engage in both activities. But unlike the habit of going out on Fridays, the presence of a rule is characterised by more than a 'mere regularity' of behaviour. The regularity constitutes what Hart calls the 'external aspect' of a rule, its observable aspect. But for a rule to exist there must also be an 'internal aspect': the fact that people accept the rule as a standard that ought to be complied with, and as a standard for criticism when it is disobeyed. It is above all the presence of this 'normative' terminology (words such as 'ought', 'should', 'must' and so on) and its appropriateness to certain situations that marks out the presence of rules. People do happen to go out on Fridays, but it is false to conclude that they *must* do so. It is the same normative terminology that allows us to speak of legal rules 'imposing obligations' or 'conferring rights'.

The idea of acceptance of a rule (the presence of a critical and reflective attitude) separates law from habits and orders, on the one hand, but Hart says that it also absolves us of the need to seek out moral explanations of the basis of law on the other. The law's authority does not derive from morality, but from acceptance. It remains on the level of social fact.

At the same time, it will be remembered that legal positivism was itself a response to the fact that modern societies tend to be characterised by widespread *disagreement* about the appropriate standards for governing conduct. A clear and stable framework of authoritative rules was required precisely because people cannot agree on what is permissible, what ought to be done and so on. In the same way, the army commander's men do not accept the commander's orders because they necessarily 'accept' the wisdom or necessity of those orders (they may regard the orders as unreasonable or excessive, or anyway unwelcome). What they 'accept' is the authority of the commander. Hart's argument is that this notion of accepting or recognising authority is to be explained as the acceptance of a *rule* instituting or confirming the authority of the relevant office. It is this which makes the commander's orders 'valid' orders, irrespective of their content.

Hart has a similar argument concerning legal validity. The validity of legal rules does not stem from popular acceptance of the standards they embody. (Perhaps most people pay their taxes very reluctantly.) In Hart's terminology, the validity of legal rules derives from acceptance of an underpinning 'rule of recognition' that 'specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts'.⁷ Hart is not prescriptive of the kind of 'features' that are to be taken as conclusive. In an early society, he suggests that the presence of a rule carved on a public monument might suffice. But this does not allow for much flexibility or systematic

⁷ *ibid* 94.

complexity. Therefore, in more sophisticated societies, the identifying characteristics of rules are likely to make reference to their originating from certain recognised *sources* of law, such as statutes or decisions of courts. Indeed, the criteria of recognition might well (as in most Western societies) involve a recognised hierarchy obtaining amongst the sources.

It might occur to us that, on reflection, most law students do not begin their course of study with an already-present knowledge of the hierarchy of sources in (say) English law. It is one of the things they are required to learn. For most people then, knowledge of the sources of English law (including custom as a subordinate source) is not common knowledge and therefore not something about which there is very widespread 'acceptance'. For Hart therefore, the presence of the rule of recognition is explained by its acceptance *amongst officials* as an appropriate standard of criticism. Hart does not state exactly what he means by an 'official', but we might take him to mean those official officers involved in the administration and creation of law at all levels. Since it is these officers who apply the law in accordance with recognised procedures and formalities (eg, treating statute as the superior source of law, deciding cases according to established law rather than subjective whim and so forth), it is their acceptance which grounds the rule of recognition. The rule is present, as before, both in the regularity of official conduct, but also in their 'internal attitude' in accepting the rule as a standard that ought to be complied with.

The rule of recognition seems to satisfy the need, so passionately defended by Hobbes, for publicly ascertainable rules demanded by modern pluralistic societies. Legal validity does not depend upon or reduce to private moral judgements. At the same time, one could say that the rule of recognition also amounts to a significant departure from Hobbes's ideas about law. The need for acceptance and conformity to certain standards on the part of 'officials' distinguishes law from open-ended power. Law is not power alone but also *legality*, the limitation of the operation of that power. And yet law does not demand that power be exercised for specific purposes (such as ensuring the common good), only that it take a specific form. Is it disturbing that the very limits to power that are demanded by the idea of law lie in the hands of the same state that wields it? That law can be considered an instrument that can be used for good or evil ends? A full discussion of this question is deferred until chapter ten. In the meantime, it is worth noting that Hart additionally claims that the efficacy of a functioning legal system depends upon widespread compliance. That is to say: the existence of law depends upon arrangements instituted and observed by the mighty machinery of the state; but its successful functioning requires popular obedience. This distinction is necessary in order to ensure that explanations of authority do not rest with notions of habit, and thus bring Hart full-circle back to Austin's starting point.

The rule of recognition itself is of a kind to which Austin's model of 'commands' pays little attention: rules that are power-conferring rather than duty-imposing. Hart refers to duty-imposing rules (such as prohibitions of the criminal law) as 'primary rules', whereas he calls power-conferring rules 'secondary rules'. The rule of recognition is power-conferring in this sense, because it specifies the conditions under which laws may be enacted, recognised, interpreted and so on. But the law contains other rules of this type. Rules of property law that make provision for the creation of wills and transfers of title provide one example, as do the laws of contract. Hart speaks of these as 'rules of change', because they allow one either to vary one's own legal position, or to vary that of another. Austin was of course himself aware of the existence of the laws of property and contract, but he endeavoured to analyse them by reference to the same notion of sanction-based orders that he applied to all rules. In this case, the 'sanction' would be the failure of the instrument to take its intended legal effect: the nullity of the will, the voiding of the contract and so on. Austin's mistake can be explained by the lack of subtlety in his analysis—precisely that lack of 'sharp awareness' of distinctions and shifts of usage that Hart demanded. Clearly, it is intrinsic to the nature of all rules that they are behaviour-enjoining. The rule of recognition, for example, enjoins officials to act in a certain way. But the enjoining of behaviour is not the same thing as the imposition of a duty. No one is under a duty to create a will or contract after a certain form, simply because no one is under a duty to create a will or contract at all. The nullity that results from failure to obey formal requirements for the creation of wills or contracts is not intended as a punishment, but arises from the very nature of formal instruments. For there to *be* contracts and wills, subject to legal regulation and with certain established effects, these must take a certain form. One must be able to distinguish them from other kinds of agreement which do not enjoy any legal effect. (Something cannot be a contract simply because one party says it is.) It follows from the need for formalities in the creation of legal instruments, that transactions which do not obey the formal requirements simply do not create the instruments.

This brings us to a third kind of secondary rule: rules of adjudication. The law's established rules, doctrines and principles (including its various formalities) demand to be applied in specific cases. The rule of recognition empowers officials to find and interpret the law, but what happens where the established doctrines do not appear to lead to an unambiguous conclusion? It is not open to the court to declare a *non liquet*. In such cases, Hart says that the judge is empowered and indeed obliged to decide the case under the authority granted by rules of adjudication. If this sounds reasonable, it is nevertheless the aspect of Hart's position that has given rise to the most critical discussion. Think about it: in the absence of clear law, the court's judgment in the instant case

would have to depend on precisely those contentious matters of morality and social policy that the law itself (in the eyes of positivists) was meant to supplant. More than anything, parties to a legal dispute go to court seeking a vindication of their rights. If the solution is (as it were) an invented one, in what sense is it a decision ‘in law’? In what sense does it uphold, or adjudicate, the extent of a person’s rights?

Aspects of this situation fall to be discussed in later chapters dealing with critics of Hart’s position. It is, however, clearly in line with the assumptions from which the positivist tradition started: that the law is correctly represented as a body of deliberately created rules. It is not a system of underlying rights of which the rules are to be treated as ‘fragments’ or partial expressions. Instead one can speak of ‘rights’ only analogically as clear implications arising from the rules.

THE NATURE OF LAW

The philosophies of law encountered in the work of Hobbes and Bentham were inimical to the idea of common law. If law were the will of a sovereign, then ‘interpretations’ of that will should not be allowed to blossom into an alternative source of law: legal ‘doctrine’. Consequently, the common law tended to be understood by positivists as the arena in which courts *apply* statutory provisions to specific cases, rather than an autonomous source of legal reflection with its own distinctive priorities and principles. Hart’s position is on the whole more receptive to common law understood in more systematic terms.

In a passage headed ‘The open texture of law’, Hart points out that large societies depend upon ‘general rules, standards and principles’ addressed to classes of person or of act or thing, rather than ‘particular directions’ given to individuals.⁸ The very existence of law therefore ‘depends on a widely diffused capacity to recognize particular acts, things, and circumstances as instances of the general classifications which the law makes’. If it were not possible to communicate general standards of conduct in this way, without the need for further direction, ‘nothing that we now recognize as law could exist’.

This innocuous-sounding passage is in fact rich in implications. For example, we are accustomed in the West to regard personal freedom as a natural and altogether unremarkable condition. Hart can be understood as pointing out that this condition in fact depends upon the fact that we are governed, and capable of being governed, at a general level. Our freedom to choose between various contingencies that lie open to us is the product of what philosophers

⁸ *ibid* 124.

in the Kantian tradition called our 'autonomy': the fact that we are capable of deciding things for ourselves, applying rules to ourselves, and do not require the direction of others. Our actions do not await the explicit permission of outside authorities, in virtue of the fact that we are capable of understanding the general rules that are laid down for us. Human beings are above all *rational*, and it is this capacity that enables governance in the form so familiar to us. For example, we know that homicide is forbidden by law. There are, of course, thousands of imaginative ways of killing a person: shooting, stabbing, beating, dismembering, freezing, crushing, burning, suffocating, strangling and so on. I am sufficiently rational to understand that my beating you to death with the hardback second edition of *The Concept of Law* falls under the class of act denoted by the legal definition of homicide. I do not require 'further direction' from outside in order to know this. Consequently, I do not need to clear all my potential actions with some outside authority before putting my plans into action. If this sounds entirely mundane as an observation, then recall that the rationale behind a political philosophy such as that of Hobbes was focused on the need for obedience as the citizen's first duty, and the avoidance of 'interpretation'. Hart is pointing out that obedience is itself an intellectual act. It is in one sense itself an act of 'interpretation'.

Does this threaten the very idea of positivism? Obligated to reason from generalities which one must apply to one's situation, is one not ultimately reliant on the systematic framework of moral assumptions that Hobbes suggested were insufficient as a basis of social order? In the passage on 'open texture', Hart reconciles the need for such judgements with an underlying positivism in a way that attempts to reveal *both* the law's humanly-created nature *and* its systematic form. Moving away from a concern only with enacted law, he observes that:

Two principal devices, at first sight very different from each other, have been used for the communication of such general standards of conduct in advance of the successive occasions on which they are to be applied. One of them makes a maximal and the other a minimal use of general classifying words. The first is typified by what we call legislation and the second by precedent.⁹

Both precedent and legislation are to be considered as intrinsic to the nature of the law's guidance and functioning. The differences between the operation of these 'devices' is illustrated by an analogy that Hart proposes, of a father instructing his son to remove his hat on entering a church. Hart suggests that the operation of legislation resembles the father laying down a verbal rule to his son ('Every man and boy must remove his hat on entering a church') in advance of the occasion on which it is to be applied. The operation of

⁹ *ibid.*

precedent is revealed by supposing the father gives no verbal rule at all, but performs the action himself (removing his hat), expecting the son to comply by emulating the action. This expectation is based upon the fact that the son can be supposed to respect the father as an authority on the proper form of behaviour in social situations (and not a crank experimenting with outrageous new ideas), and watches the father's actions in order to learn what to do. Precedent, in other words, is to be understood as a form of authoritative example.

Hart observes that communication of general standards by example seems to leave open a range of possibilities 'and hence of doubt' about the standards being set out. Exactly what aspects of the situation demand to be emulated? Does it matter whether the hat is removed slowly or hastily? That the father used his right hand and not his left? That the hat is stowed under the seat rather than on a hatstand or on the empty pew next door? The father leaves the hat off during all the time he is in the church; is this significant or can the hat be placed back on the head once inside the door? Is the purpose of the action indeed explained by the fact that it is not raining inside the church, negating the need for the hat, and nothing more? Or, if removal of the hat is mandatory, is the implication that a hatless person must *purchase* a hat before being allowed to enter the church? One could go on indefinitely. Perhaps these examples might incline us to wonder why the father (here representing the previous line of decisions) should leave the son (the judge in the instant case) foundering amid so many perplexities. Why not just tell the son outright what is demanded: every male is expected to remove his hat on entering a church? Why not just lay down an explicit rule?

In fact, the son is not really all that lost in perplexity. It has been many years since men have habitually worn hats, and perhaps not many of us go to church. Nevertheless, I suspect most or indeed all readers of Hart's book would have understood immediately, without need of further explanation, the precise action required. One knows that the removal of the hat, as a sign of respect, is the point of the father's action. Everybody understands that the use of the left or right hand is immaterial, just as are the many possibilities for storage of the hat inside the church. We all know this, because we share a common set of understandings and values that are so entrenched as not to require any explicit announcement. These background understandings inform our actions and deliberations at all points, allowing people to understand one another without any significant effort. If I enter a shop to buy chocolate, the owner does not immediately pounce or call the police when I remove the chocolate from the shelf. He understands that (in normal circumstances) I intend to take it to the till to pay for it. When I hand over a ten-pound note, I do not need to explain that I require change along with the chocolate, and that I am not offering to buy the bar for that amount. Social situations such as this proceed smoothly

and even without the need for any spoken words at all (try it), because of the presence of a rich stock of values and understandings on which we all draw in giving meaning to the situations that confront or involve us.

On this basis, the son's deliberations can focus pretty accurately on what is required. The context of ordinary unverballed understandings effectively reduces the *possible* interpretations of the situation to *plausible* ones. At the same time, variant interpretations are not altogether eliminated. It remains open to question whether the father is removing his hat out of respect for his God (as we might first suppose), or whether he is an atheist attending a wedding or funeral, and performing the action out of respect for the beliefs of those in the congregation. Again, perhaps the father has no respect for the beliefs, thinking them foolish, but complies out of a desire to avoid censure or criticism. Hart suggests that reasoning from authority (the contemplation of a range of specific examples) guides the court's deliberations without disposing of the question in advance. Legal reasoning is not 'mechanical'. It does not consist simply in the automatic 'application' of rules to particulars. Inescapably, legal reasoning is a process of *judgement*.

On the face of it ('at first sight' as Hart puts it), reasoning from authoritative *rules* seems to guide reasoning in a more rigid way. The son in the example is not left in doubt as to what is required, but is given the criteria for action in explicit verbal form. He has only to recognise particular instances of the verbal terms in order to apply the rule. And yet on reflection, it turns out that these two 'principal devices', though superficially different, are in fact underpinned by a deeper and profound similarity. Application of verbally formulated rules is no more mechanical, no less a process of judgement, than reasoning from precedent. This is not simply because verbal rules might refer to such ideas as 'reasonableness' or 'foreseeability', but because language generally possesses an 'open texture'. Even the most mundane words exhibit this property. Hart invites the reader to imagine a rule prohibiting vehicles from a public park. Clearly this will apply to cars, lorries and buses, for example. But what about a mountain bike, or a skateboard, or a rowing boat? At some stage, reference must be made to the point or purpose of the rule in determining its application. The language of the rule itself does not 'claim its own instances'.¹⁰

Suppose a case arises in which a person is convicted of driving a car through the park, presumably as a shortcut to escape traffic congestion on a homebound commute. A court would have little difficulty in applying the rule. One can readily imagine a judge making obiter remarks about the extreme danger to users of the park (many of which will be children), and the selfish actions of the driver in breaching rules instituted for their protection. Now imagine that at some later time, somebody suffers a cardiac arrest in the middle of the

¹⁰ *ibid* 126.

park, and an ambulance crew rush to respond, driving the ambulance into the very heart of the park. Would a court be likely to treat this in the same way as the first case? Undoubtedly not: a judge would be likely to observe that the rule was put in place as a safety measure to protect both the users of the park and the park's grounds from harm. It could not have been the intention to exclude emergency services from answering calls and dealing with on-the-spot situations. On the other hand, what would be the situation if a radio station's traffic helicopter persistently hovered in the air above the trees? On the one hand, there are no real safety issues involved. One could say that commercial air traffic in general passes over parkland all the time, albeit at greater altitude. Nevertheless, it is conceivable, if the helicopter frequently flew low over the park, that a court might seek to broaden their interpretation of the rule. The rule exists to ensure the reasonable enjoyment of the park's amenities. Noise and downdraft from the helicopter all but prevents reasonable use of the park: scaring small children, ruining the park's tranquility and so on. Enjoyment of the park requires not only safety, but also freedom from extreme noise and disturbance.

Could this broader reading of the rule lead to further extensions of the scope of the rule? For example, could an 'environmental' understanding of the rule be used to prevent the use of rowing boats on the lake, which might threaten fragile grasses along the banks, or interfere with the nesting sites of water birds? Might skateboards or mountain bikes constitute a nuisance to those who like to stroll along the park's paths? Here the court might end up restoring a narrower reading of the rule, refocusing deliberation on issues of safety and amenity. Or perhaps it will be said that the rule exists for a variety of different reasons, demanding a balance between different considerations which might come into conflict. Or again, perhaps the different purposes do not have equal or merely circumstantial priority, but demand to be ranked into some hierarchy or order. (One could go on.)

Hart's example demonstrates that the application of hard-edged statutory rules is no more 'mechanical', involves no less a process of judgement, than does the use of precedent. Indeed, as even the highly simplified considerations above show, application of explicitly formulated rules quite quickly become encrusted with various exceptions, considerations and extensions which occur in the very course of their application. Invariably, a body of jurisprudence (legal doctrine) grows up around posited rules, so that the deliberately created aspect of law can scarcely be separated in practice from the law's systematic aspect as an expression of reason (or reasoning). At the same time, Hart urges his readers to an awareness of the essential indeterminacy of aim that is characteristic of deliberately posited rules. The introduction of the rule is not a random, arbitrary phenomenon, but has an end in view. It is intended to settle some question or other. But by introducing the rule, there are also many things

that we have not settled, because it is impossible to anticipate or account for all ends to which the rule might be related. Insofar as the rule settles certain matters (the car driven through the park), it is possible to speak of their being an agreement in judgements on the matter. The rule guides our reasoning, by specifying the criteria to be applied. Other dimensions of the morality of the situation are to be excluded. In this way, the presence of written laws does indeed replace an inchoate moral consensus with authoritative standards on which all can rely.

It is possible to be misled by the idea of an 'agreement' in judgements, or the notion of 'settled' law. Neither situation is dispositive of contentious questions that might arise. The nature of the agreement is a kind of *convergence*, which might fragment at various points. This might not be very troubling. You and I might disagree about the relative priorities involved in the rule banning vehicles from the park. I say it is primarily about safety, whereas you think it is primarily about conservation of the park's delicate environment. Faced with a case of a car being driven through the park, there is no need to pursue these divergent views: we both agree this involves a breach of the rule. Despite the lack of deeper agreement, our judgements converge. The presence of the rule serves an important purpose in allowing us to proceed without having to entertain any of the deeper, contentious reasons. But at some point, competing outlooks will reassert themselves where the application of the rule proves indeterminate.¹¹ Hart insists that the operation of statute and precedent (indeed, all sources of law) produce a certain openness in the law, resulting in the 'need for the further exercise of choice in the application of general rules to particular cases'.¹² No system of law is so complete or comprehensive that it does not leave to judges a certain responsibility for the further development of the law in ways that are bound to be contentious.¹³

One might be tempted to believe that the fundamental claim of positivists is nonetheless correct. Perhaps one can maintain that the presence of formalised rules considerably narrows the scope of this judicial discretion, in restricting the criteria to be applied. Legal decisions are not mechanical but involve judgement; but this is nevertheless a process of legal judgement rather than open-ended moral judgement. The rule's announcement of the criteria to be applied ensures that the judgement that is required always operates within certain limits, must always pay attention to established legal doctrines and

¹¹ *ibid* 128.

¹² *ibid* 129.

¹³ See *ibid* 130: '[A]ll systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case'.

ideas (such as reasonableness, foreseeability and so on). Don't be so sure: the issue of whether mountain bikes (which after all may cause significant injury to others in a collision) are legally excluded from the park may even touch on such fundamental questions as individual liberty. Can one not say that even reasonable safety concerns should not be allowed to make significant encroachments on my liberty to ride my bicycle where I like? Where might such arguments end?

LAW AND MORALITY

I have alluded to the extent to which legal judgements do, or do not, involve considerations of a decidedly moral nature. But can this question be answered before morality itself is properly understood? All societies seem to contain limitations upon certain forms of behaviour, such as the use of violence, observance of notions and practices of property ownership and so forth. Limits of this kind, when taken together, appear to be essential to the very existence and durability of social order, allowing human beings 'to live continuously together in close proximity'.¹⁴ Students of moral philosophy encounter numerous theoretical standpoints that attempt to account for this phenomenon. That of Aristotle, as we have seen in Part One, insists upon a close connection between morality on the one hand, and human needs and interests on the other. Utilitarians may argue for a narrower connection, suggesting that nothing can count as a moral rule or principle unless it can be demonstrated to redound to human happiness or wellbeing. Hart wishes to prescind from all such standpoints, adopting a 'broader view' of morality in the light of its defining characteristics: the relative importance given to moral rules versus other forms of social pressure or expectation; the immunity of moral principles from deliberate change; the voluntary nature of moral offences; and the 'special' form of moral pressure which involves appeals to respect for the principle itself, aside from threats or considerations of fear or interest. Hart admits that standards classified as 'moral' in this way might sometimes come into conflict with the 'narrower' understandings proposed by moral philosophies such as utilitarianism (which might condemn certain rules as barbarous or unenlightened). But Hart suggests that his proposal has the virtue of bringing a certain form of social rule under one banner, avoiding the need 'to divide in a very unrealistic manner elements in a social structure which function in an identical manner'.¹⁵

At the same time, moral considerations of various kinds may give rise to different sorts of expectation. Those standards which define obligations and

¹⁴ *ibid* 181.

¹⁵ *ibid* 182.

duties constitute the bedrock of morality, but societies also contain more broadly defined moral ideals. We do not *demand* that people exhibit saintly virtues of patience or benevolence, whereas we demand that people perform their duties. But we recognise the performance of virtuous actions as a kind of moral excellence. Hart's characterisation of virtues as 'supererogatory' and 'ancillary' is by no means uncontroversial: classical philosophies in particular treated the cardinal virtues as exactly those dispositions of the rational character upon which the individual's moral life hinged. Equally, Hart suggests that a society's morality 'may extend its protections from harm to its own members only, or even only to certain classes, leaving a slave or helot class at the mercy of their masters' whims'.¹⁶ In this sense, a society's morality itself may become the object of moral criticism if it seems to depart from standards of rationality or generality. Given these complexities and differences, Hart begins the ninth chapter of his book ('Laws and Morals') with a warning, that '[t]here are many different types of relation between law and morals, and there is nothing which can be profitably singled out for study as *the* relationship between them'.¹⁷

Hart is happy to concede that the development of law ('at all times and places') has in fact been profoundly influenced both by conventional moral standards and social ideals, and by 'critical morality' (those standards by which a society's conventional moral practices are themselves subjected to criticism). However, Hart emphatically wishes to resist the claim, which he thinks is all too often confused with the foregoing admission, that a legal system *must* exhibit 'some specific conformity' with morality or justice, or must depend upon a widely held conviction that there is a moral obligation to obey it. The purpose of the discussion of chapter IX is intended to refute this latter claim, and to defend legal positivism against the doctrines of the natural law tradition.

The definition that Hart offers of 'legal positivism' at the beginning of this chapter has led to considerable debate and controversy. I propose to ignore these later debates as much as possible, both because readers are unlikely to derive much benefit from a discussion of their complexities, and because a lengthy digression would obscure rather than clarify Hart's argument and concerns. The definition Hart offers is as follows: 'Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so'.¹⁸ His aim is to defend positivism against two rival understandings:

- i. classical theories of natural law, according to which 'there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid'; and

¹⁶ *ibid* 183.

¹⁷ *ibid* 185.

¹⁸ *ibid* 185–86.

- ii. a 'less rationalist' view of morality according to which legal validity is connected with standards of equality and justice.

Hart's way of defining these oppositions is not entirely helpful. Both employ a concept of 'legal validity' that is not immediately known in ordinary legal practice. In practice, 'validity' is an idea most often associated with questions of procedural correctness, or the proper exercise of functions or powers. It does not appear for example in the language of natural law, which does not ask about the conditions of 'valid law' or legal validity, but about the conformity of positive law to the *ius naturale*, or the extent of one's obligations in conscience to abide by positive law. These are not equivalent questions: Hart's notion of 'valid law' is defined in terms of 'acceptance' and the rule of recognition. The question of whether *law* is connected to standards of equality and justice, or to the common good, is not the same as the question of whether a rule must so conform in order to be 'recognised' as 'valid'.

Some of the deeper objections to Hart's claims will be considered in later chapters. For the moment, let us examine Hart's argument itself.

NATURAL LAW

Hart rightly observes that the notion of morality as consisting of standards of rightness that are discoverable by human reason is not self-standing, but derives from a general conception of nature as possessing intelligibility, purpose or direction. On the other hand, modern secular thought possesses an altogether different idea of nature, devoid of purpose and possessing no order and no forces that cannot be scientifically explained and experimentally confirmed. There is no 'order' beyond the 'order' that can be scientifically observed or implied. In consequence, these arguments about the character of morality are not likely to be open to final resolution. Can one do no more than oppose these alternative images of worldly and universal order to one another?

In a way that is reminiscent of the earlier standpoints of Hume and Bentham, Hart suggests that the fundamental core of natural law thinking is not logically dependent upon a metaphysical framework 'which few could now accept'.¹⁹ Consequently, he sees it as possible to extract certain 'elementary truths' of natural law thinking that are 'of importance' for understanding of law and morality, 'disentangling' them from their metaphysical framework in order to restate them in 'simpler' terms.

¹⁹ *ibid* 188.

At the heart of the earlier metaphysical view of the world was the idea of teleology: nature, but also things in nature, exhibit purposefulness and are conceived as possessing a proper goal or end (*telos*). This is as much true of acorns, which achieve their proper end by becoming oak trees, as of human beings whose *telos* (according to Aristotle) is to lead the good, or flourishing, life, which is coeval with the life of virtue. There might be a thousand reasons why an acorn may fail of its purpose. Too much rain, and the acorn will rot in the ground. Too little, and it will wither. It may be consumed, or crushed, or land on barren soil, or become diseased. In all these cases, one could say that the acorn failed in its purpose, did not reach its optimum state. But we continue to think of its optimum state as the oak tree. We do not (without much thoughtful reflection) consider that the acorn possesses many (or perhaps no) optimal states of which the oak tree is merely one, decay and disintegration representing other equally viable ‘optimum’ states. Similarly, Aristotle conceives of the life of virtue as the proper, or appointed end of human beings. Human beings may create for themselves many actual ‘ends’, as well as being subject to disease and premature death like the acorn. A person may become a liar, a drunkard, a coward, a recluse and many other things. But in such cases the person has failed in their purpose, turning away from their true or proper end.

Hart is sceptical of this mode of reasoning, dismissing it even as ‘somewhat comic’ when applied to elements of a supposed natural order that are inanimate. But Hart also draws attention to the fact that modern thinking considers human beings as having purposes of their own devising, which they consciously adopt and pursue, and do not have a specific optimum state or end that is somehow set for them in advance. This is a fundamental shift in thinking: no longer is it supposed that human beings desire certain things (a commodious life, virtue and other things) because it is their good or end; but it is thought now that certain things constitute goals or ends because we desire them.

At the same time, Hart concedes (or perhaps warns) that the earlier teleological assumptions continue to influence the way in which people ordinarily think and speak about themselves and the world. It is, Hart says, latent in the identification of certain things as constituting human ‘needs’ that it is ‘good’ to satisfy; and we similarly classify certain things as ‘harms’ or ‘injuries’. We do not accidentally happen to desire food and rest, but these are necessary for us: they constitute human *needs*. When we call such needs ‘natural’, it is to distinguish them from needs that are merely conventional (such as the need for luxury possessions or fame: so-called ‘false needs’). Underlying these ‘natural’ needs is nothing pertaining to the human being’s status as a rational animal or a moral being. All are drawn from biological priorities that human beings

share with all animals. Above all they rest upon ‘the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence’.²⁰

If we were to leave the argument at that point, Hart suggests that what we would have is a very attenuated natural law theory. This would still fall considerably short of what most natural lawyers would want to claim, because survival (*perseverare in esse suo*) was only the most basic element in a much richer (‘and far more debatable’) conception of the proper end for the human being. But Hart wants to go further than this in rejecting natural law. In a clear indication that he did not intend his thesis as a ‘very attenuated version of natural law’, Hart goes on to say that we can, when speaking of survival,

discard, as too metaphysical for modern minds, the notion that this is something antecedently fixed which men necessarily desire because it is their proper goal or end. Instead we may hold it to be a mere contingent fact which could be otherwise.²¹

Once again: it is an end for us only because, and insofar as, we do happen to desire it. This provides an underpinning (however contingent) for our analytical assumptions about law and governance. For we can assume that what we are dealing with are social arrangements designed collectively to secure our ‘continued existence’.

Hart’s argument is effectively designed to resolve the tension between two ideas that are both seemingly attractive, perhaps even unarguable, but also in tension with one another. On the one hand, the humanly created nature of our laws tends to imply that there is no permanent, necessary content to law. All is the product of human convention, and therefore contingent and revisable. But on the other hand, it appears that all legal systems everywhere (those recognisable to us as systems of ‘law’) do seem to share certain characteristics that might even seem to constitute part of our conception of law: laws prohibiting homicides, regulating access to resources, recognising ownership of property etc. Are these not indeed permanent or necessary features of law? Are they not absolutely fundamental to the order that law secures, such that the absence of that order would betoken also the absence of an effective legal order?

Hart’s reply is as follows. Any questions concerning the arrangements by which human beings live together *must* begin by assuming survival as an aim. Once this assumption has been granted, one can proceed to some ‘very obvious’ generalisations about human beings. As long as these continue to hold true, there will be certain rules and arrangements which must be reflected in our created modes of social organisation if that organisation is to be viable.

²⁰ *ibid* 191.

²¹ *ibid* 192.

Indeed, these arrangements 'do in fact constitute a common element in the law and conventional morality of all societies'.²² From the fact that human beings are vulnerable, subject to deliberate and natural harms, it follows that limitations must be placed upon violence and the infliction of bodily harm. This is absolutely necessary given the way human beings are, but falls short of belonging to the very idea of law because it remains contingent upon our continued, collective interest in survival, and also upon continued susceptibility to physical harm (we might evolve into beings invulnerable to attack). Hobbes had pointed to the fact that all human beings are approximately equal to one another, despite minor variations in physical strength and intellectual ability. In a clear reference to Hobbes, Hart argues that this fact entails the necessity of a system of mutual forbearances. Being limited each in their own fashion, human beings absolutely require order above all else, one founded on a domain of compromise between their various interests. No individual is strong enough to accomplish all that they desire alone. At the same time as she is reliant on the cooperation of others, the human being is also characterised by limited altruism (the limited but not entirely absent interest in the wellbeing and interests of others). Hence, human beings cannot be relied upon to create a spontaneous domain of compromise of their own. Law demands to be of the nature of a coercive system for the organisation of social life: again, so long as survival continues to be an overarching goal. The limited understanding and strength of will possessed by most people entails that such coercion requires to be backed by an equally orderly system of sanctions. Finally, the fact that human beings live in a world of limited resources entails the need for order in the matter of the fulfilment of basic human needs such as clothing, shelter, food and so on. It is as a consequence of this that legal order must involve conceptions of property, and invoke the systematic regulation of ownership after some design or pattern. As Grotius observed, the particular arrangements of different societies may exhibit great variety concerning the manner of distribution, and in determining in whose hands ownership lies. But all societies demand absolutely some legal organisation and recognition of property.

Is Hart's argument convincing? On the one hand, Hart maintains that the substance of legal rules and doctrines is indeed contingent, despite the remarkable degree of convergence exhibited by legal systems across the world in prohibiting murder, administering property ownership and so on. This is so because none of those substantive provisions belong to the very idea of 'law' itself. They are not necessary truths about law, but derive from elsewhere: from the overarching human desire for survival. On the other hand, Hart can call

²² *ibid* 193.

upon the deep human instinct for survival to explain why such a remarkable degree of convergence in fact obtains. So deeply ingrained are these traits that we can hardly avoid thinking and speaking of them as being ‘natural’ or ‘necessary’. Yet it remains: were the human desire for survival to diminish, or were certain features of human beings or of the world to change, the substance of legal arrangements might look very different.

Having claimed that the desire for survival is, in fact, contingent (despite appearances to the contrary), Hart goes on to explain that survival nevertheless has ‘a special status’ in relation to human thought:

For it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that this is reflected in whole structures of our thought and language, in terms of which we describe the world and each other. We could not subtract the general wish to live and leave intact concepts like danger and safety, harm and benefit, need and function, disease and cure; for these are ways of simultaneously describing and appraising things by reference to the contribution they make to survival which is accepted as an aim.²³

But if this is the case, in what sense is the ‘end’ of survival not ‘discoverable by human reason’? Hart’s use of the phrase ‘awaiting discovery by reason’ might suggest a kind of passive reception of the human intellect to outside phenomena that somehow impinge upon it, much as the eye receives light. In that sense, we might well wonder how the intellect can discover moral truths. Writers within the ‘classical’ natural law tradition (the object of Hart’s criticism) instead conceived of reason as an active faculty, a processing or intellection of the world. Aristotle and Aquinas both remark upon the human being’s status as a linguistic animal: it is the possession of language that gives to the human being a knowledge of good and evil.²⁴ It is language that fits the human animal as specifically a *political* animal. There is not, as it were, an experience of the world *and then* an intellection or speaking of it. Rather, the experience consists in our speaking of it. Thus, if we discover that the aim of survival is presupposed in entire structures of thought and language—presupposed in our very knowledge of and understanding of the world, and of human beings—then how can one resist the claim that survival is for us an ‘end’ discoverable by reason, an objective good-for-man? Our notions of harm and injury (to take Hart’s example) speak to the way in which we conceive of our relationships to others. Everything from our actions towards those we love (and wish to save from harm) to our actions towards enemies (to whom we wish to do harm) suggest that survival is understood as intrinsically valuable to human beings.

Hart’s suggestion that structures of thought and language might change, if the human condition were to change in some fundamental way (making us

²³ *ibid* 192.

²⁴ Aristotle, *Politics* I.

invulnerable), is quite misleading. Hart suggests that such changes would be reflected in the structures and priorities of social arrangements, which might no longer require systematic controls upon the use of violence. That might be so; but is not jurisprudence meant above all to focus on the nature of law within the human condition? Indeed, is it not part of an attempt to reflect upon and understand that condition? One might recall Aristotle's observation in the *Politics* that a person who does not stand in need of society is either a beast or a god, either sub-human or super-human. It would quite miss the point to suggest that everything Aristotle has to say on the subject of politics is 'entirely contingent' upon human beings continuing to require society for their existence and flourishing: Aristotle's claim is precisely that a social nature is a necessary feature of what it means to *be* human.

Similarly, Hart's insistence that survival is an 'aim' that is contingent and 'might be otherwise' deserves to be questioned. If its contingency depends (as Hart says) upon entire structures of thought and language with which it is fundamentally and thoroughly intertwined—if in short it represents a basic building-block of our relationship with and knowledge of the world (and each other)—then it is far from clear that any contrary outlook is actually imaginable to us. One cannot steadily and soberly imagine an alternative viewpoint, for the very reason that the value of survival is presupposed by all practical reason and understanding.²⁵ Human beings may embrace death for all sorts of intelligible reasons, including self-sacrifice in the service of others, heroism, fear of pain or of a long and difficult illness, despair and so on. But none of these reasons invoke the worthlessness of life as such as the reason for seeking its extinction. Rather the underlying belief is that insurmountable obstacles stand in the way of one's own ability to participate fully and meaningfully in that good (in the case of illness or despair), or that certain other values (including the value of others' lives) may take priority over one's own life. In the latter case, self-sacrifice and heroism are remarkable and significant acts precisely because the thing being laid down in service of other values (ie, one's life) is itself so precious.

This train of thought might take us in several directions. Is survival (*perseverare in esse suo*) the only value that is presupposed by human reason and action in this way? Or is it, as the natural lawyers indeed argued, only the first stratum in a richer conception of the human condition and of human ends? Might it not lead to a concern with broader conceptions of the 'flourishing' life? Alternatively, is survival itself intelligible as a distinct value apart from conceptions of the 'good' or 'worthwhile' life? If this should prove to be the case, is the life without (say) knowledge less valuable than the life of one who

²⁵ See J. Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford, Clarendon Press, 2011), and the discussion in ch 9 below.

is learned in some, or a number of, fields? Are all lives equally valuable? In all cases, what else might be deduced about the character of law and legal arrangements, against the background of these richer conceptions of human goods or ends? Might this not lead us to reject Hart's dissociation of law and morality, to embrace the possibility that it is indeed necessary that laws reproduce or satisfy certain demands of morality? There is no reason (in advance of much thought on the matter) why the inevitably contentious character of these richer legal visions should be taken for their contingency. Not everything that is true or necessary is obvious, incontestable, unarguable.

JUSTICE AND EQUALITY

Having conceded a 'minimum content' of natural law as the foundation of legal systems, Hart devotes the rest of chapter IX to a consideration of further senses in which law might be said to be 'necessarily' connected to morality. A basic feature of law is its concern with justice. Lawyers are familiar with the idea that like cases demand to be treated alike, but also devote much thought, judgement and writing to the determination of the presence or absence of similarities between shifting sets of particulars. Is it the fulfilment of justice to give each person an equal share in some finite resource, such as a birthday cake? Or must we distinguish between fully grown adults, who require a comparatively larger intake, and children who consume relatively less, so that each receives a portion in relation to his or her size? There again, should those who bought the most thoughtful or expensive presents be rewarded in proportion to their generosity, or is this an irrelevant consideration? The question of how to treat people as equals is enormously complex. Earlier in the book, Hart points out that:

The connection between this aspect of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice.²⁶

Yet the connection between justice and the very notion of following rules should not, Hart suggests, lead us to conclude that questions of morality are intrinsic to law. It remains that courts may apply certain rules unjustly, or indeed Parliament may enact unjust rules, conferring benefits unevenly or on a favoured group to the detriment of others. It is plain, Hart says, 'that neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope, and often they have not done so'.²⁷

²⁶ Hart (n 2), 161. See ch VIII in general for Hart's treatment of justice.

²⁷ *ibid* 200.

In order for a regime to maintain itself in power, it is necessary that it confer benefits on some of its citizens. (Recall that Hart said popular acceptance was necessary for a functioning, effective legal system.) But it is possible that a very organised ‘master group’, in possession of significant resources and characterised by high levels of solidarity, can dominate and maintain in a position of permanent inferiority a ‘subject group’, denying it basic protections or advantages, and limiting its ability to organise.

Does this not go against what Hart admits about the ‘very close’ connection between justice and the idea that the law consists in stable, certain ‘general’ rules? We have already seen that the process of applying rules to specific cases is neither mechanical nor arbitrary: it is, inescapably, a matter of *judgement*. This process is one which often displays ‘characteristic judicial virtues’ of ‘impartiality and neutrality in surveying the alternatives; consideration for the interests of all those who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision’.²⁸ Yet for all their importance and centrality to received ‘canons of interpretation’, Hart reminds us that these principles ‘have been honoured nearly as much in the breach as in the observance’. But consider: insofar as one breaches these considerations, departs from these virtues, does one’s decision not represent precisely an arbitrary (or perhaps a mechanical) one? The idea of ‘judgement’ and offering a ‘reasoned basis for decision’ are one and the same. The unreasoned decision is an automatic or arbitrary one. Indeed, as Hart goes on to admit:

[T]he contention that a legal system must treat all human beings within its scope as entitled to certain basic protections and freedoms, is now generally accepted as a statement of an ideal of obvious relevance in the criticism of law. Even where practice departs from it, lip service to this ideal is usually forthcoming. It may even be the case that a morality which does not take this view of the right of all men to equal consideration, can be shown by philosophy to be involved in some inner contradiction, dogmatism or irrationality.²⁹

But if Hart is right about judgement being an inescapable feature of following and applying rules, then the commitment to a reasoned (non-arbitrary) decision is more than mere ‘lip service’. Might these considerations, which Hart says ‘might well be called moral’ not be considered an intrinsic property of the administration of law? Hart is of course right to say that legal orders have flouted these principles of justice. But what does this tell us? Does it reveal any more than that legal systems have failed, either through the limitation of human insight and impartiality, or else deliberate effort, to offer a perfect

²⁸ *ibid* 205.

²⁹ *ibid* 206. I explore this further in ch 9 below.

instantiation of that rationality that is intrinsic to legal judgement? Hart insists that this demonstrates the lack of a ‘necessary connection’ between law and morality because his focus is on the question of the ‘validity’ of legal rules. Iniquitous or unjust rules may be applied and recognised as ‘valid’ law. Yet if we prescind from the question of the validity of unjust rules, might we not come to see that the ‘rational’ nature of legal judgement, invoking as it does notions of justice and equality, remains intrinsic to the very idea of law, so that an entire *system* of governance, if it were utterly bereft of rational and conscious concern for defensible, intelligible grounds of decision, would scarcely resemble ‘what we now recognize as law’?

Hart seems to accept something of the sort a little earlier in his discussion. Statutes may be understood as a kind of shell, and ‘demand by their express terms to be filled out with the aid of moral principles’ in much the same way as ‘the range of enforceable contracts may be limited by reference to conceptions of morality and fairness’ and liability for civil and criminal wrongs may be judged according to ‘prevailing views of moral responsibility’. If viable legal systems are, as Hart suggests, dependent ‘in part upon such types of correspondence with morals’, then ‘[i]f this is what is meant by the necessary connection of law and morals, its existence should be conceded’.³⁰ Furthermore, the principles of natural justice (impartiality in respect of the application of general rules, undeflected by prejudice, interest or caprice), which are synonymous with the idea of ‘legality’, represent what Lon Fuller calls an ‘inner morality of law’: Hart says that ‘we may accept’ this as a necessary connection between law and morality, though observes that ‘[i]t is unfortunately compatible with very great iniquity’.³¹

In spite of these concessions, Hart wants to maintain that governance through law is not an intrinsically moral idea. Authority itself, though not resting entirely on the ‘mere power of man over man’, is not yet created or cemented by a moral obligation, but depends upon acceptance. But the ‘internal attitude’ need not be a moral one. People’s allegiance to the law ‘may be based on many different considerations’, including ‘calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do’.³² As a result, Hart ‘think[s] it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct’.³³

³⁰ *ibid* 204.

³¹ *ibid* 207. Hart’s acceptance of this idea is in fact less straightforward than it might appear from this passage. Hart in fact argued in print with Fuller on this issue: see ch 10 below.

³² *ibid* 203.

³³ *ibid* 249.

This argument could be turned another way. The ‘power of man over man’ alone is not the same as governance through law. The characteristic form of the latter requires (in Hart’s view) the cooperation and voluntary ‘acceptance’ of persons in society, even if the law’s protections do not extend to all. Those who voluntarily accept the authority of law may indeed have numerous reasons for doing so, or perhaps in some cases may indeed have no conscious reasons, being unreflective. But these attitudes are sustainable only given a basic assumption: that the law in some way furthers or protects their fundamental interests. I will remain ‘disinterested’ in my interest in others, for example, only insofar as their lifestyles are not bought at the expense of all that I hold dear or necessary to my own. Similarly, an unthinking attitude of obedience is likely to be the luxury of someone whose interests are untroubled by undue restrictions and arbitrary impedances. If my deepest interests become threatened, will I not begin to ponder? Such attitudes can only exist, one might say, only where the law serves the general good.

History does indeed contain terrible examples of societies in which minorities, and even sometimes downtrodden peoples as a whole, are subjected to depredations and terrors, being deprived of liberty, property and the protection of law. It is abundantly clear that institutional and regulatory form can be given to the measures by which people are alienated from their ordinary existences. But here we might ask a question. Does the existence of law—understood to conform to principles of legality or ‘natural justice’—aid and accelerate such processes, or does it stand in their way? As Kristen Rundle recalls, some narratives of the Holocaust run along these lines:

By 1938, the Jewish subject of Nazi law had been living under an oppressive, grossly discriminatory and incrementally pathological legal order for over five years. But even in the early months of 1938, there were still authorities to report to and rules to follow, forms to fill out and sign—including, crucially, those associated with the April 1938 decree that required all Jews to declare and register their property holdings—and officials to receive and process them. In these structures, so the testimonies and memoirs tell us, one found at least some threads of stability; or, one might suggest, of the possibility of a continuing ‘daily life’. But over the course of that year, the modes of Nazi oppression expanded in their variety and escalated in their effects. And then, on the night of 9–10 November, there was wanton destruction and defilement, brutal violence and murder, arbitrary arrest and transportation to concentration camps for no apparent crime. This, we are told, is when ‘daily life’ ended.³⁴

Contestable and complex though such interpretations are, they give to us a sense of the contentiousness of Hart’s own position. We might call attention

³⁴ KA Rundle, ‘Law and Daily Life: Questions for Legal Theory from November 1938’ (2012) 3 *Jurisprudence* 429.

to the specific regulatory measures by which Jews and others were deprived of property, status and basic liberties, recognising that these were enacted against the background of a legal order that continued to regulate other aspects of life for ordinary Germans in the usual way. But we can also direct attention to the combined and systematic effect of the range of such measures, which (as Hart puts it) operate to deprive a certain group within society of the benefits and protections of law. If we remain on this plane of engagement, then we might consider that the effect overall is an interruption to the principles of legality and natural justice characteristic of ordinary legal judgement. And if we concede this, we may consider that the regime that has deliberately so departed from or interrupted those principles has, precisely in so doing, decreed that a part of its rule has thenceforward been withdrawn from the constraints of legality, and applied as sheer force or power. Is the regime that does this, which regards itself as no longer bound to rule according to and within the limits of law, any different from the regime which enacts, with procedural propriety, a statute declaring that intent directly, namely to rule without legal limitation and in defiance of legally established rights? And, if any government did enact such a statute, can one say that its terms could be held without contradiction to constitute 'law' as we understand it?

There is perhaps no easy answer to such questions. Certainly, one cannot resolve the issue by offering a stipulative definition, as Hart himself recognises: 'Plainly we cannot grapple adequately with this issue if we see it as one concerning the complexities of linguistic usage'.³⁵ Hart's solution is to ask, of any given way of conceptualising the matter, whether it will aid our understandings:

If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.³⁶

Hart's approach exhibits an underlying functionalism: the concept to be adopted is the one that allows us to group and consider together as 'law' all those rules that are valid according to the formal tests of a system of primary and secondary rules, over one that would exclude certain rules on moral grounds even if they exhibited all the other characteristics of laws as part of 'a system of rules generally effective in social life'.³⁷ Is this so straightforward and

³⁵ Hart (n 2) 209. The issue Hart has in mind here is slightly different from the one I have raised, but relates to the issue of whether the rule of law can become so iniquitous that it can no longer be obeyed, and whether it follows this that its propositions are not 'valid' rules of law.

³⁶ *ibid.*

³⁷ *ibid.*

value-neutral? On what grounds do we determine whether our theoretical deliberations have been ‘clarified’ rather than obscured, by a particular scheme of conceptualisation? How rich or austere, simple or complex, should our conception of social function be? It seems, in the end, that our impression of such things cannot avoid appealing to conceptions of the human condition, and the aspects of that condition (such as survival, but possibly others as well: justice or the good life), that it is the function of the rules to advance and protect.

SUGGESTED READING

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