PHL271 Handout 3: Hart on Legal Positivism

§1 Legal Positivism Revisited

HLA Hart was a highly sophisticated philosopher. His defence of legal positivism marked a watershed in 20th Century philosophy of law. Our focus today will be his article 'Positivism and the Separation of Law and Morals' (pp. 28-52 of *Law and Morality*, hereafter 'LM'), and Chapters 5, 6, and 9 of his seminal book *The Concept of Law* (hereafter 'CL').

Let's begin by reminding ourselves of what 'legal positivism' says:

> Legal Positivism: the *Separation* and *Identification* theses are true.
>
> > *Separation Thesis*: there is no necessary connection between law and morality.
> >
> > *Identification Thesis*: legal systems contain only laws whose content can be determined without appeal to moral argument—so called 'positive law'.

Last class we looked at Hobbes's (apparently) legal positivist account of political authority and the law. While Hart doesn't mention Hobbes explicitly, Hobbesian themes show up regularly in Hart's discussion (especially in Ch. 9 of 'CL').

> *Recurring Question*: when, and to what extent, do Hart and Hobbes agree (or disagree)?

Hart's main opponent, when he defends legal positivism, is someone who endorses a version of Natural Law Theory:

> *Natural Law Theory* (rough): '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' (p. 186 of CL)

Next week we'll read Ronald Dworkin, who is the most prominent recent defender of a Natural Law theory.

§1.1 Necessity? (pp. 47–50 of LM)

Hart was an excellent philosopher. And like a true philosopher, he wasn't about to assert the *Separation Thesis* without saying more about what he means by 'necessary' and 'morality'.

Philosophers standardly distinguish different notions of necessity:

> *Nomological Necessity*: a state of affairs is nomologically necessary just if it couldn't have been otherwise, given the laws of nature (e.g. the laws of fundamental physics).
>
> *Metaphysical Necessity*: a state of affairs is metaphysically necessary just if it couldn't have been otherwise, given the metaphysical nature of things (e.g. given that objects and properties constitute distinct metaphysical categories).

> *Logical Necessity*: a state of affairs is logically necessary just if it couldn't have been otherwise, given the laws of logic.

Hart isn't particularly concerned with these three notions of necessity. Instead, he wants to know whether there exists a kind of *natural* necessary connection between law and morality.

Teasing out Hart's notion of 'natural necessity' is difficult. He introduces the notion by way of example (cf. p. 48). Put crudely, a state of affairs is a 'natural necessity' just in case it couldn't be otherwise, given (relevant) features of both our conceptual scheme (or 'conceptual apparatus') and our physical/environmental condition.

Methodological Aside: Hart's focus on 'natural necessity', as well as his way of arguing for 'natural necessity' claims (e.g. his argument on p. 48–49 of LM for the Hobbesian claim that a legal system must forbid the free use of violence), reflects his more general commitment to what P.F. Strawson (1958) calls 'descriptive metaphysics'. The task of a descriptive metaphysician is to articulate the structure and limits of our conceptual scheme. For example, you'll see Hart criticize Natural Law theorists essentially on the grounds that their account generates results that are incompatible with our concept of law (cf. pp. 29 and 46 of LM). Hart's claim isn't that we have a nice tidy definition of the concept; instead, he thinks that the concept of law sits within a large network of related concepts (e.g. 'rule', 'obligation', 'authority', 'obedience', etc.)—a network whose structure imposes constraints on what we can sensibly say about law (and rules, and obligations, and so on).

Hart's focus on 'natural necessity' provides him with important argumentative tools. For example, his theory isn't hostage to just any use of the term 'law' or 'legal system' (see in particular his remarks on p. 81 of CL).

§1.2 Morality? (pp. 39–40 of LM; Ch. 9 of CL)

Hart also says quite a bit about what counts as 'morality' in the context of the debate over legal positivism. We're going to focus on two of these claims.

Unlike a flat-footed legal positivist, who says merely that 'the law is the law', Hart allows a *non-moral* distinction between what the law *is* and what it *ought to be*.

> *'Ought' Pluralism*: There is both a moral and a non-moral reading of 'ought' that can be intelligibly applied to laws and legal systems.
>
> *'Ought' Monism*: Only a moral reading of 'ought' can be intelligibly applied to laws and legal systems.
>
> > *Historical Sidenote*: Hart overlapped at Oxford with the tail end of a movement in moral philosophy that endorsed an even stronger version of 'Ought' Monism according to which the moral 'ought' is only the fundamental 'ought'. On this view the seemingly hard question 'Why ought we be moral?'

(a question made famous by Plato's *Republic*) becomes the trivial question 'Why ought we do what we ought to do?' See Hurka (2015).

In order to maintain his commitment to 'Ought' Pluralism, Hart explains what the moral and non-moral readings of 'ought' have in common: 'The word "ought" merely reflects the presence of some standard of criticism; one of these standards is a moral standard, but not all standards are moral.' (p. 39 of LM)

> Notice: Hart's acknowledgment of multiple standards of criticism permits him to say that the law is subject to internal normative evaluation—a law may be good or bad as a law—which allows him to explain how the extension of the law to cover hard cases or hitherto unconsidered cases (so-called 'penumbral cases') might be an intelligible operation within the law.

Apart from his pluralism about 'Ought', Hart also makes claims about morality that shed light on the scope of legal positivism. In particular, in §2 of Ch. 9 of CL, as well as on p. 49 of LM, Hart endorses a limited overlap between legal rules and moral rules. This overlap doesn't extend very far: he restricts it to rules that prevent indiscriminate killing, and to those that mandate the impartial and objective application of laws.

> Note: In endorsing these points of overlap, Hart reveals a significant point of agreement between his view and Hobbes's. Both agree that without this minimal overlap, a legal system would be 'pointless' (in Hobbes's case, because it wouldn't save us from a state of nature).

Hart thinks this minimal overlap between legal and moral rules constitutes the grain of truth in Natural Law theories. The mistake of such theories, in Hart's view, is their attempt to extend the overlap to include a rich array of moral principles.

In order to defend himself from the charge that he has abandoned legal positivism, Hart responds that legal systems have exhibited the required minimal overlap with moral rules, yet nevertheless count as evil. His example (p. 50 of LM): slave-owning societies.

§2 The Three Criticisms of Legal Positivism

In 'Positivism and the Separation of Law and Morals' Hart considers and answers three important lines of criticism advanced against legal positivism.

§2.1 Against the Imperative Theory of Law (pp. 31–34 of LM)

Imperative Theory of Law: a policy is a law iff it is presented as an appropriate command.

> What makes a command 'appropriate'? Hart ascribes the following view to the Utilitarians Bentham and Austin (Cf. p. 31 of LM): 'Commands are laws if two conditions are satisfied: first, they must be general; second they must be commanded by what (as Bentham and Austin claimed) exists in every political society whatever its constitutional form, namely, a person or a

> group of persons who are in receipt of habitual obedience from most of the society but pay no such obedience to others.'

Hart considers the following objection: (a) legal positivism requires the Imperative Theory of Law and (b) the Imperative Theory is false.

> Notice: if (a) and (b) are both true, legal positivism is false; if only one of (a) or (b) is true, legal positivism remains standing.

In response to this objection, Hart argues that (b) is true and (a) is false.

> He presents three arguments against the Imperative Theory: (1) being under a legal obligation is not the same thing as 'being obliged' (as a gunman might oblige you to hand over your money, but you aren't under an obligation to do so); (2) legislative (a.k.a. 'commanding') bodies are themselves bound by laws that specify law-making procedures; (3) not all legal rules are presented as commands, and nor would treating these rules as commands permit them to fulfill their function (e.g. laws governing wills).

Hart's argument for the falsity of (a) appears very briefly on p. 34 of LM, but gets elaborated further in Ch. 5 of CL. In LM he points out that legal rights need not arise from commands (*contra* Imperative Theory), but also (*contra* Natural Law theorists) need not arise from moral principles.

> Later, in CL Hart argues that what matters to legal positivism isn't the notion of a 'command' as such, but instead the notion of 'acceptance of a rule'. His discussion of rules and their acceptance is quite complex, and we'll talk more about it later.

Nice question: does Hobbes count as a proponent of the Imperative Theory? And is his theory vulnerable to Hart's arguments against the Imperative Theory?

§2.2 Problem of the Penumbra (pp. 35–41 of LM)

Perhaps the most complicated discussion in Hart's article is his discussion of the Problem of the Penumbra. Here's the problem in a nutshell: legal rules have central cases where the decision is obvious, but also 'penumbral' cases where the legal rules seem incomplete and in need of extension (or supplementation). To deal with penumbral cases, judges must make rational decisions about how to extend the law. Yet for these decisions to be rational (or 'intelligent'), it seems they must be guided by what the law *ought* to be; yet if this 'ought' is read as a moral 'ought', legal positivism looks to be in trouble.

> To get feel for the problem, check out Hart's 'vehicle' example on p. 37 of LM.

Hart's reply to this objection is complicated, and (as we see in CL) ultimately turns on his views about rule-following. Yet in LM he mostly contents himself with an appeal to his 'Ought' Pluralism, which he bolsters by saying that the relevant standards of correctness are

determined by social aims. Yet these aims could, for all his view says about them, turn out to be evil. So the necessary separation of law and morals remains intact.

§2.3 Problem of Wicked Legal Systems (pp. 42–46 of LM)

The most famous of the objections Hart considers is the 'problem of wicked legal systems'. Put briefly, it is the objection that legal positivism permits the existence of morally wicked or abhorrent legal systems.

> Obvious examples: Apartheid South Africa; Nazi Germany's Nuremberg Laws.

On the surface, Hart's basic response to the problem is to say 'so what?' Yet further examination reveals a more sophisticated line of response running through Hart's discussion.

> This response has two parts. First, Hart notes that we must distinguish the question of 'is X legally valid?' from the question 'should X be obeyed?' Natural Law theorists don't sufficiently distinguish these questions, and so attribute too much weight to a 'yes' answer to the first question. As he puts it: 'Law is not morality; do not let it supplant morality' (cf. p. 44 of LM). (See especially the discussion of 'moral criticism' on p. 46 of LM)
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> The second part of the response jumps off from Hart's discussion of a disturbing case drawn from Nazi Germany involving a woman who gets rid of her husband by reporting him to the authorities for criticizing the Nazi establishment. What Natural Law theory obscures, and what legal positivism reveals, is the important *moral dilemma* that such a case gives rise to: we are forced to choose between letting this evil person get away with it (since she was obeyed the law of the time) and introducing *retroactive* laws (an option that seems generally contrary to the operation of justice).

§3 Primary and Secondary Rules

In CL Hart argues that a legal system is, at its most fundamental explanatory level, the union of two sets of rules:

> *Primary Rules (roughly)*: the rules that govern human conduct
>
> *Secondary Rules (roughly)*: the rules that govern the establishment, maintenance, and alternation of primary rules.

Central among the secondary rules is the Rule of Recognition:

> Rule of Recognition: a rule that provides a legal system with its criteria of legal validity (cf. p. 110 of CL)

Question: what do Hobbes's Sovereign and Hart's Rule of Recognition have in common?