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Jan M. van Dunné

Morality and Law

According to John Austin's version of legal positivism, laws have much in common with the orders of a gangster given at gunpoint. Just as we are obliged to comply with such orders,

in a perfectly ordinary sense of the term "oblige," Austin claims that our obligation to comply with the law is of the same coercive kind. Critics of positivism—natural lawyers and others—disagree. They claim that legal obligations have their source in morality, and that, as a consequence, moral argument not only provides law with its normative force, but also plays a constitutive role in fixing the law's content. This disagreement between positivists and their critics may seem profound, but on closer inspection the disagreement seems to all but disappear.

Austin's version of positivism was very simple. He thought of law as a system of orders issued by a sovereign, backed by threats of punishment, where he thought of a sovereign, in turn, as someone whose orders are habitually obeyed but who does not habitually obey orders that are issued by anyone else. Given this conception of law it follows that the substantive morality of a legal system is fixed by whether the sovereign's orders are substantively moral in their content. Since there is no necessity that the sovereign even decides which orders to issue on moral grounds, it follows that this is an entirely contingent matter. Moral argument plays no constitutive role in determining the content of law because the law's content is fixed instead by a nonmoral fact, a fact about the content of the orders issued by the sovereign.

In the 1960s H.L.A. Hart, himself also a positivist, pointed out that Austin's version of legal positivism is vulnerable to a serious line of criticism, however. The criticism is significant not just because it leads to a revision of positivism, but also because it leads to a modification of the claim that law and morality are strictly separate. It is a datum, one which any adequate conception of law must explain, that laws are capable of persisting over time and, in particular, between the time that one sovereign stops ruling and another begins to rule. A habit of obedience to a sovereign goes out of existence with the exit of that very sovereign. A new habit takes time to develop. Austin's idea that law is a pattern of habitual obedience to a sovereign thus suggests, falsely, that there must be radical discontinuities in the law between the rule of successive sovereigns. It therefore fails to account for the continuity of law across the reign of successive sovereigns.

In order to account for such continuity Hart argued that we need to introduce a com-

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pletely new element. We need to think of law not as a pattern of habitual obedience to a sovereign but rather as a set of social rules which specify, inter alia, the ways in which the power to make rules is to be transferred from one party to another. Social rules are like habits in being regularities in behavior, but they differ from mere habits in that, for a social rule to exist, enough people in the society whose behavior conforms to the pattern must suppose that there is good reason for everyone to behave in the way in question. Deviation from such a regularity is thus taken to deserve criticism, unlike departure from a mere habit. In this sense, law is essentially a normative enterprise.

Indeed, Hart thought that we could be more precise about the systems of social rules that comprise law, for he thought that all such systems comprise a union of what he called "primary" and "secondary" rules. Primary rules are rules of permission and obligation, rules which tell people how they are permitted or required to behave in various situations. Secondary rules are rules about rules. They include rules of adjudication and change that specify when, how, and by whom rules are to be administered and how and by whom rules may be changed. Most important, the secondary rules also include a rule of recognition, a master rule specifying the properties possessed by all of the other rules if they are to count as valid rules of the system. According to Hart, the master rule of recognition is constituted by a regularity in the behavior of a special subgroup of the society: the officials of the system such as lawmakers, judges, legal advocates, police, and the like. Since their behavior undergirds the existence of the regularities *as rules*, Hart claims that it is the officials, at the very least, who must suppose that there is good reason for people to behave in accordance with these regularities. It is thus the officials who must suppose that deviation merits criticism.

The idea that law is a system of social rules of the kind described allows us to account for the continuity of law across the reign of successive sovereigns. Continuity is possible because there may be regularities in the way people behave, which ground a form of criticism, even when the power to make new social rules is transferred from one party to another. These regularities, and the criticism they ground, will themselves constitute the

rules which specify the ways in which such power is legitimately transferred. In other words, they will constitute rules granting *rights* of succession.

Moreover, once we see law as a system of social rules rather than a set of habits of obedience, we see that Austin's version of positivism was mistaken in a more fundamental way as well, for the existence of law does not require the existence of a lawmaker in the form of a sovereign: that is, someone who issues, but does not in turn obey, orders. Rather, those who make laws, thereby causing there to be regularities in behavior, may themselves be required to obey the very laws they make. Given that in representative democracies there do not seem to be people who are above the law in the way in which Austin supposes a sovereign to be, this is a distinct advantage of Hart's version of positivism over Austin's, for representative democracies most certainly have legal systems.

Hart thus argues for a significant revision in our understanding of legal positivism. Moreover the revision forces us to rethink the relationship between law and morality in important, and potentially radical, ways. As we have seen, Hart's theory tells us that the existence of the social rules that comprise the law requires that enough people in the society, and the officials of the system in particular, comply with the law voluntarily. For this to be so the law must be such that it is at least possible for people to act voluntarily in accordance with it. It therefore follows that laws, in order to be laws at all, must have certain very general features, at least by and large: they must be well publicized, prospective, clear, noncontradictory, relatively stable, and so on. However, as Lon Fuller points out, these features are remarkable precisely because they are themselves morally desirable. It would be unjust if people could be prosecuted for noncompliance with rules with which they were unable to comply because the rules were badly publicized, retroactive, unclear, contradictory, or changed so quickly that keeping track of them was impossible. Even according to positivism, then, the law has, and has of necessity, an "inner morality." The separation of law and morality is thus not as strict as Austin suggested.

Though Hart agreed with this conclusion, he thought that his version of positivism still had much in common with Austin's. This is

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because the mere existence of a set of social rules, even rules with which people can voluntarily comply if they so wish, does not guarantee all by itself the substantive *morality* of people's behavior in accordance with those rules. Such behavior, and so such rules, may still be unjust, or harmful, or in some other way immoral. Moreover, Hart argued that it remains the case, even in his version of legal positivism, that moral argument has no constitutive role to play in determining the content of law. As with Austin's theory the content of law is still fixed by nonmoral facts: facts about regularities in the behavior of a social group and the attitudes toward these regularities had by certain people within that group. Hart therefore thought that, in a relatively straightforward sense, law and morality are still separate in much the way Austin had said.

Whether Hart was right about this is, however, far from clear. The problem lies in the fact that, for Hart, the officials of the system must have certain attitudes toward the law: they must think that there is good reason both for themselves and for others to comply with the rules; they must believe that those who deviate rightly deserve criticism. What sort of criticism is deviation from the law supposed to legitimate? What is the ground of the normativity of law supposed to be?

One answer, Hart's own, is that this question has no single answer. This is because the sort of criticism involved will mirror the nature of the reasons the officials have for compliance with the rules, and, as far as Hart is concerned, there is no significant restriction on the sorts of reasons officials can have. Thus, at one extreme—and perhaps this is the typical situation in most modern democracies—the officials of the system may have moral reasons for obeying the rules of the system. They may think that acting in accordance with the rules, and so enforcing them, is morally required. At the other extreme—and perhaps this has only ever been the case in societies in which a governing elite who care for each other, but not for the rest, pass laws restricting the access of the rest of the society to opportunities and resources—the officials of the system may have purely self-interested reasons for obeying the rules of the system. They may think that the flourishing of those who they deeply care about, those in the governing elite, simply depends on everyone's acting in accordance with the rules. This may be their only reason for

obeying, and so for enforcing, the rules of the system. They may give no thought to the substantive morality of their acts, or even think them immoral.

Many of Hart's critics argue that this answer is inadequate, however. As they see things, the officials of the system must have moral reasons for complying with the rules, because if officials had merely self-interested reasons for complying, then they would be unable to appeal to these reasons by way of criticism of those who deviate—the mere fact that a deviant's complying with the rules is in accordance with a judge's interests is hardly a criticism of the deviant, after all. The reasons officials have for obeying the rules, in order to be reasons that ground *criticism* of those who deviate, must therefore be reasons that those who deviate from the rules can share. The only reasons capable of playing this role are moral reasons. If the law has normative content, then that content must derive from morality, or so these critics argue.

If Hart's critics are right, then it follows that the connection between law and morality is even tighter than Hart thought. Because the existence of law is, *inter alia*, a matter that is fixed by the contents of the moral beliefs of the officials of the system, it follows that, even according to Hart's version of legal positivism, moral argument does indeed play a constitutive role in determining the content of law. Those who fix the content of law, the officials of the system, have no choice but to engage in moral argument. Moreover, since the officials themselves should have true moral beliefs, it follows that there is no longer such a clear line to be drawn between what the law is and what it morally ought to be.

Suppose that there are certain regularities in the behavior of a social group, regularities in behavior that are believed morally correct by the officials in that group; suppose also that we outside observers of that group believe their behavior is morally incorrect. Suppose further that we are in a position to construct an argument for this conclusion, an argument that would show that certain other behaviors in the community are morally required instead. Given that the officials of the group decide what the law is by deciding what morally ought to be the case, it follows that we must suppose not just that the officials of the system have false beliefs, but also that they have available to them an argument that they should

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find convincing for the alternative views that we have. We must therefore suppose that the officials of the system are mistaken in the moral reasoning that led them to formulate the law, and that this is something they could come to appreciate. Moreover, if they did, then we must suppose that they would have to change their minds and conclude that the law is really quite different from the way they currently believe it to be.

In this way of seeing things, the difference between legal positivism and natural law is thus very small indeed, perhaps vanishingly small. However, whether or not Hart's critics are right to insist that we see things in this way is a difficult matter to decide. Everything turns on whether we should call the system described earlier in which the officials act voluntarily in accordance with certain rules, though for purely self-interested reasons that nonofficials of the system cannot share, a "legal system." If so, then Austin and Hart are right that laws need not even purport to have a moral foundation. Questions like these are extremely difficult to answer, precisely because the term "legal system" becomes vague at just the point that we need precision if we are to give an unequivocal answer.

Even if we decide that they are right, however, we should immediately go on to insist that the natural lawyers are right about something as well. In the vast majority of legal systems, perhaps all those that we encounter these days, the rules are indeed thought to be morally justifiable by those who administer them. In this vast majority of cases, then, legal reasoning is inextricably bound up with moral reasoning in much the way that natural lawyers insist.

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Michael Smith

See also NATURAL LAW; POSITIVISM, LEGAL

Mortgage

See SECONDARY RIGHTS

Murder

See HOMICIDE

Myth

See SAGAS, ICELANDIC

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