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POSITIVISM AND THE SEPARATION OF LAW AND MORALS †

H. L. A. Hart *

Professor Hart defends the Positivist school of jurisprudence from many of the criticisms which have been leveled against its insistence on distinguishing the law that is from the law that ought to be. He first insists that the critics have confused this distinction with other Positivist theories about law which deserved criticism, and then proceeds to consider the merits of the distinction.

H.L.A. Hart Is a Legal Positivist

Legal Positivism

What the law is—opposed to what the law ought to be—can be *entirely explained and determined* by means of *empirically verifiable social facts*, such as acts of Congress, written laws, the intentions of the legislators, the circumstances under which a law was passed, the corpus of existing law, etc.

Hart quoting from Austin on the separation of Law and Morals (p.596-7)

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

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Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. . . . Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which

they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent . . . .

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they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent . . . .

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law* . . . .[12]

What is Blackstone's mistake according to Hart (quoting Austin)?

Blackstone asserted that human law cannot be a law at all if it contradicts divine law.

Hart and Austin instead believe that that a law *is* still a law even when it is not what the law *ought to be*.

So Blackstone has overlooked the difference between *"what the law is"* and *"what the law ought to be"*

Why Is the Distinction Important?

Two Errors to Avoid

Bentham had in mind the anarchist who argues thus: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it." On the other hand he thought of the reactionary who argues: "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth.

There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.

Question: Does our *obligation* to obey the law stem form the *law itself* or from something beyond the law, say, *morality*?

Two Simples Things (p. 599)

What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.

Two Objections Against Separation of Law and Morals

First Objection

Penumbra Cases

A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use — like "vehicle" in the case I consider — must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case.

Why do penumbra cases pose a challenge for the separation of law and morality?

We may call the problems which arise outside the hard core of standard instances or settled meaning "problems of the penumbra"; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution. If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model

deductive model of Legal reasoning:

Premise 1: Vehicles cannot enter the park
Premise 2: Mike's car is a vehicle
Conclusion: Mike's car cannot entire the park

it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises. So if it is rational or "sound" to argue and to decide that for the purposes of this rule an airplane is not a vehicle, this argument must be sound or rational without being logically conclusive. What is it then that makes such decisions correct or at least better than alternative decisions? Again, it seems true to say that the criterion which makes a decision sound in such cases is some concept of what the law ought to be;

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Why do penumbra cases pose a challenge for the separation of law and morality?

Hart admitted that legal reasoning cannot be viewed as merely logically deductive

And if legal reasoning cannot be merely deductive, determining what the law is in specific cases seems to require principles that lie outside the law itself — i.e., moral principles

Hence, what the law is cannot be separated from what the law ought be (=moral principles)

What Are More Realistic Examples of Penumbra Cases?

Beside the example of vehicles in the park, think of court decisions about same sex marriage.

The concept of marriage, just like the concept of vehicle, is itself liable to different interpretations.

What other examples of penumbra cases can you think of?

Hart's Reply to the Penumbra Objection

If it is true that the intelligent decision of penumbral questions is one made not mechanically but in the light of aims, purposes, and policies, though not necessarily in the light of anything we would call moral principles, is it wise to express this important fact by saying that the firm utilitarian distinction between what the law is and what it ought to be should be dropped?

We are invited to include in the "rule" the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled.

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By contrast, to soften the distinction, to assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of social policy.

Hart's Reply to the Penumbra Objection

Polices and social aims — though not necessarily morality — should sometimes guide legal decisions in penumbra cases.

But most legal decisions about what the law is are not about the *penumbra* but the *core* of legal rules.

So, in the vast majority of legal cases, the distinction between "*what the law is*" and "*what the law ought to be*" still stands.

Second Objection

Unjust Laws

Judgment at Nuremberg 1961

IV.

The third criticism of the separation of law and morals is of a very different character; it certainly is less an intellectual argument against the Utilitarian distinction than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience. For it consists of the testimony of those who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings. Only in this case the Hell was not

beneath or beyond earth, but on it; it was a Hell created on earth by men for other men.

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This appeal comes from those German thinkers who lived through the Nazi regime and reflected upon its evil manifestations in the legal system.

they were concerned with the problem posed by the existence of morally evil laws.

Question: Can people be convicted for immoral actions that were the result of legally valid laws?

In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was

under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich or to impair by any means the military defense of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front.

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Question: Should the women be punished in 1949 for what she did (*legally*) in 1944?

Hart's Sees Two Choices

Many of us might applaud the objective — that of punishing a woman for an outrageously immoral act — but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted. There were, of course, two other choices.

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Hart believes this is a **true dilemma** that cannot be easily reconciled

Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.

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"All Discord Harmony not understood
All Partial Evil Universal Good"

This is surely untrue and there is an insincerity in any formulation of our problem which allows us to describe the treatment of the dilemma as if it were the disposition of the ordinary case.

Why does facing the dilemma matter?

We might punish the woman under a new retrospective law and declare overtly that we were doing something inconsistent with our principles as the lesser of two evils; or we might allow the case to pass as one in which we do not point out precisely where we sacrifice such a principle. But candour is not just one among many minor virtues of the administration of law, just as it is not merely a minor virtue of morality.

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If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted.

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denial of the Utilitarian distinction is the one that the Utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.

What Is Hart's Point?

We should recognize that if the women is convicted in 1949 for what she did (*legally*) in 1944, the conviction can hold only by applying a *retroactive law* (which is considered unconstitutional).

It would do no good to punish the women in 1949 as though what she did in 1944 was illegal. It wasn't.

We should not deprive ourselves of a key source of criticism — i.e., that the 1944 law, albeit legally valid, was morally objectionable