

WHAT IS LEGAL PHILOSOPHY *



he purpose of this paper is to explore the relationship of philosophy to law: to acquaint the reader with the subject matter of legal philosophy by explaining what in law attracts the philosophic mind and how philosophic investigation of the law may inform both disciplines. These brief remarks should not be construed as exhaustive. Indeed, philosophy of law has changed so in method and substance in the last few years that any attempt to define its boundaries at this time would no doubt prove at a later date to be a source of embarrassment. In what follows I will discuss some of both the traditional and more recent concerns of legal philosophy. In doing so, I hope to shed at least indirect light on the role of philosophy in academic legal studies programs.

Of all academic disciplines, philosophy is perhaps the most fundamental. By that I mean that philosophy is concerned with the conceptual foundations, the building blocks, of our claims about the world in a way in which other disciplines are not. The point is illustrated best by the very subject matter of the traditional areas of philosophic inquiry. The domain of epistemology, the theory of knowledge, for example, is marked by two questions: (1) What do we know? and (2) How do we come to know it? What distinguishes the individual who knows

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something to be true from one who correctly believes something to be true, yet does not know it to be so? Is knowledge systematic, and, if so, how can we avoid Cartesian skepticism about its foundations? Metaphysics, which along with epistemology forms the core of philosophy, involves taking inventory of the elements in the universe; it is the study of what there is. Is a universe already "overpopulated" with tables, chairs and people capable of supporting, among other things, facts, states of affairs and numbers. Questions of ontology and knowledge lead one naturally to Philosophy of Science which is concerned to explicate the nature of explanation, prediction, theory, evidence, confirmation, causation and nature itself. Finally, whether moral judgments can be tested or verified in the manner of scientific hypotheses is one of the dominant themes in Meta Ethics; while the search for the standard of right or just action dominates Normative Ethics in general and as these questions apply to the State, Political Philosophy in particular.

Aspects of recent work in legal philosophy share the same concerns with concept elucidation that has motivated much of Anglo/American philosophy since World War II. Nowhere in legal philosophy are the conceptual concerns of abstract philosophy exemplified better than in analytic jurisprudence. The question is: What is law, or what makes law, law? No doubt the search for the essence of law and the necessary and sufficient conditions for the existence of a legal system leads one to chart other grounds on the normative landscape. If we can discover the nature of law, we can thereby isolate a principle by which we can distinguish law from morality--if (as the Positivists claim) the two are distinguishable. An account of the nature of law and of obligation

under the law is essential to evaluating arguments on whether there is a prima facie moral obligation to obey law. Ultimately, questions about the alleged moral obligation to obey law are questions of the legitimacy of authority and of the State generally. So, while it may be useful for the sake of analysis to define narrowly the issues of analytic jurisprudence, it would be unforgivable to overlook the manner in which a theory of law is a component of a more comprehensive moral and political theory.¹

One can distinguish among at least four general categories of answers to the question: What is Law? These are the answers given by (1) The Legal Positivist;² (2) The Legal Realist;³ (3) The Natural Law Theorist;⁴ and (4) The Entitlement Theorist.⁵ In each case the theorist wants to determine when law exists and to account for its "binding" power; that is, how the law imposes obligations on its citizens and why, in obeying the law, citizens view themselves as being obligated to do so.

For the Natural Law theorist, validity of law is a matter of the law's content, of its substance. Aquinas, for example, held that a bad (immoral) law is no law at all, that it imposes no legal obligations. Conversely, for law to be binding, it must have moral worth. Positive law is for the natural lawyer rooted in moral law and obligatory for that reason alone.⁶

The basic tenet of Legal Positivism is that the validity of law is in no way a matter of morality.⁷ Thus, the Positivist must provide an account of the binding power of valid law without having recourse to moral principle. The Positivist Austin held the view that law consists in the general commands (or orders) backed by threatened sanctions

(punishments) of a sovereign properly so-called. A sovereign properly so-called is one who is both internally supreme and externally independent. An internally supreme and externally independent sovereign is one who has the general habit of obedience from his citizens and who is not himself in the habit of obeying anyone. The habit of obedience is secured in the end by the specter of sanction for noncompliance.

According to Austin, the validity of law is a matter of form. It is a question of whose command, not one of the subject matter or substance of the command. "Law" is valid if it is the sovereign's command. But can a formal test of validity give rise to an account of obligation? For Austin the obligatory force of law is derived from the threatened evil that is likely to attend noncompliance. But it is easy to see that even where law imposes sanctions for noncompliance, the penalty is a secondary motive for compliance. Acceptance of the rule of law as a standard of behavior is the primary motive for acting in accordance with it. Where internal acceptance fails, the sanctions are imposed both to penalize the transgressor and to promote general compliance. In addition, as H. L. A. Hart rightly notes, a citizenry that bestows upon its sovereign the habit of obedience need not be acting from a sense of obligation. Indeed, when one acts under threat--as does the bank teller in handing over money to the gunman--one acts in a fashion that contrasts with acting from obligation. One acts in such cases under compulsion or duress; one obeys; one is obliged to act in the required way; yet one does not appear to act as if one were under an obligation to do so.⁸ Obligations devolve, for example, from promises and contracts, not from threats.⁹

What we need is an account of the legitimacy of the sovereign's commands so that we may account for their binding force. But in Austin the sovereign's legitimacy is a function of his having secured the habit of obedience; and his securing that is a matter of (using the term somewhat loosely) force, not legitimacy. (I have argued elsewhere that Austin does have another argument for the sovereign's legitimacy, but it is one which undermines his claim to Positivism.)

In Hart, the obligatory nature of law is explained in part by laws consisting in rules rather than in habits of obedience to commands.¹⁰ Rules are normative as well as descriptive. They specify how one should act and thus provide both good reasons for acting in a particular way and grounds for criticism in the event of divergence or noncompliance. Individuals who follow rules accept them as standards of conduct and evaluation and it is this process of internalization that makes law binding. Law exists when individuals in a community accept rules as providing them with both reasons for acting in certain specified ways and grounds for criticizing others whose conduct diverges from the norm. But law may exist even in the absence of widespread internalization. The question is how might Hart account for the obligatory aspect of valid law in the event of a breakdown in the process of internalization?

At this point Hart's position becomes somewhat more complex. First, he introduces the concept of internal validity.¹¹ In the above paragraph we talked about the validity of law as being a matter of the practice of a community, in particular, their employing the rules as laws, that is, as standards of action and evaluation. The question whether such rules are laws is answered by observing the social practices. In contrast, one can imagine a formal internal system of validity analogous

perhaps to a closed logical system with its initial axioms and derived theorems. In such a system, the validity of particular theorems is an internal question answerable only by checking the theorem against axioms. Similarly, if a legal system has an ultimate rule, an axiom of sorts, the validity of rules under it is determined by seeing if the rule in question is subsumable under the ultimate rule. Thus, a legal system may have both an internal and external test of validity.

Second, in order for there to be an internal test of validity we must distinguish between two kinds of legal rules. For Hart, this is the distinction between primary and secondary rules.¹² Primary rules, like Austin's Commands, impose duties. Secondary rules confer power on authorities either to change law or to adjudicate it. Among the secondary rules of a legal system is the rule of recognition, the ultimate rule of the system. While other secondary rules enable individuals to make, alter or judge law, the rule of recognition is the test by which the internal validity of other rules is determined. In Hart's view, the rule of recognition is a secondary rule though it does not actually confer power. Law exists when there is a union of primary and secondary rules: where there are rules that impose duties and a rule of recognition for determining which subordinate rules constitute valid law.

The argument that law is binding involves the application of both internal and external tests. The validity of particular rules is determined internally by appealing to the rule of recognition. Because it is the ultimate rule, the validity of the rule of recognition can be determined only in practice.¹³ It is valid if those who apply it, especially judges and legislators, internalize it, that is, adopt it

as binding upon them. If the rule is valid and binding, then so are all those particular (primary) rules formally valid under it.

How far Hart advances the Positivists' cause depends on whether he has provided a formal account of legal validity that can explain the binding nature of law without recourse to a moralistic account of their acceptance or internalization.

Jurisprudes wedded to the Natural Law tradition reject all Positivist efforts to explain the force of law. Positivists fail to "derive" law from morality, an indispensable ingredient in a citizen's obligation to obey law. Natural Law theorists disagree, however, about the point at which law must be rooted in moral principle in order for it to impose obligations. We can distinguish between two categories of Natural Law Theory: Substantive and Procedural. Under the former, legal validity is a matter of substance.¹⁴ A law's validity (at least in part) depends on whether its command is a moral one; whether it requires one to act in morally permissible ways.

Procedural Natural Lawyers do not maintain that all or even most laws must be rooted in moral standards for law to exist. Lon Fuller, the staunchest advocate of this position, maintains that law is an activity with "its own morality," the morality of law making; thus the term "procedural natural law theory." For law to be valid, it must be the output of a process that adheres to principles of, among others, openness, consistency, plausibility, clarity and coherence. To the extent the process complies with these canons, valid law exists. The validity of particular rules is then in part a question of how well the system generally complies with its own "inner morality."

Ronald Dworkin has taken both the Positivists and the Natural Lawyers to task. His argument against Fuller is simply that while

adherence to Fuller's canons may be necessary for law to exist, there is no reason to believe that the canons themselves state moral principles.¹⁵ Failure to comply with one of them may be a strategic flaw in lawmaking though not a moral one. To support his claim he cites the canon which requires good draftsmanship. Poor draftsmanship need not be morally blameworthy, so it follows that the canon requiring good draftsmanship cannot be a moral one.¹⁶ However, while negligent carelessness may not be immoral, intentionally shoddy draftsmanship may well be. Moreover, we can interpret Fuller not as claiming that each canon states a moral requirement of lawmaking, but as arguing that adherence to these principles tends to promote certain moral virtues of legal systems, e.g., openness, coherence, consistency and the like. Indeed, one could argue that in the absence of such virtues, it would be hard to imagine the internalization of law necessary on Hart's view to account for its obligatory nature. The acceptance of law depends on its possessing at least these moral virtues.

Dworkin is better known for his criticism of the Positivists. For both Austin and Hart, legal validity is a matter of form, not substance. Dworkin denies that any such noncontestable exhaustive standard of validity exists. His argument is based on considering "hard cases."¹⁷ A hard case is one in which judges cannot mechanically reach decisions by applying the rules whose validity has already been determined by the appropriate test to the facts of individual cases. Typically, hard cases arise when no settled rule seems to apply, or when the rule which appears to apply is vague so that we can't determine if the particular case actually falls under it,¹⁸ or if two conflicting rules each appear to apply equally well to the fact situation. Ex hypothesi, in resolving

these cases, the judges cannot appeal to the rules alone. Factors other than formally valid law must be decisive in rendering decisions in these cases. In such cases, judges must make, rather than find law. Under the Positivist definition of what is law--commitment to the rule of recognition--principles decisive in hard cases are not themselves law.

If one adopts the Positivists position, there is no best or correct decision as a matter of law in hard cases. It follows that the litigants in such cases are not entitled to a particular decision. In contrast, Dworkin suggests that we begin analysis not with the rule of recognition and the authority of individual judges to go beyond the law to reach decisions, but with the rights of individual litigants. If litigants are entitled to the best decision as a matter of law, then the judge is not free to exercise discretion, but is obligated instead to determine which litigant has the legal right in every case. Such a search may be informed by "black letter law" valid under the rule of recognition, but in hard cases, that won't suffice. The judge must be informed by moral principle as well; and these principles of political morality are part of the law, though no rule of recognition identifies them as such. Where they are decisive in determining which litigant ought to win, principles of political morality are part of the law. Principles, unlike rules, have the dimension of weight. How much weight a principle has in a particular case depends upon its entrenchment in other cases, preambles to legislation and the like.

Numerous questions can be raised about Dworkin's views; whether in theory one could construct a rule of recognition for moral principles as well as for rules, thus rendering even Dworkin a Positivist of sorts;¹⁹

whether just because a principle becomes a basis for making a judgment in law, the principle itself is a matter of law, and more. But a thorough review of Dworkin's subtle work is best left for another occasion.

The foregoing overview of some of the positions that have been taken on the question of the definition of law, the basis for its binding effect and the basis on which decisions can be made in law, suggests the work of legal philosophy on perennial questions. In some ways, they epitomize the struggle that has been waged across time between letter and spirit, between rule and reason, between rule and principle for rule, or somewhat more grandiosely, between philosophy and law.

II

The most interesting work in legal philosophy is currently being done on problems relating to Responsibility. Early works in legal responsibility focused on questions in meta ethics, usually on the justification of punishment and the role of excuses in a theory of responsibility. The simple truth is that most of these efforts were sadly uninformed by prevailing legal theory and practice. It was not uncommon for moral philosophers unfamiliar with the nature of the criminal sanction, tort liability or contractual obligation to pronounce judgment on the morality of criminal, tort and contractual liability respectively.

There have, however, always been exceptions to this sad rule of ill-informed speculation. H. L. A. Hart, Joel Feinberg, Herbert Morris and Richard Wasserstrom have taken a more interdisciplinary approach,

and more philosophers have taken law degrees or have "done time" in law schools. Some philosophers have studied sociology, criminology, economics and other disciplines.

The truly interdisciplinary character of legal philosophy is illustrated by work in tort liability. In torts, liability is generally determined by applying the criterion of fault, i.e. an injurer is liable for harms caused by his fault; a victim is entitled to recover only for those harms caused by another's fault. The rule of fault liability has been abandoned in some cases falling under the rule of strict liability²⁰ which states that fault is not a condition to responsibility or compensation.

The allocation of personal losses on the basis of fault in some cases but not in others leads to a number of fundamental issues: What does the standard of fault in torts amount to? What is its relation to moral fault? What is its relation to the standard of criminal guilt? How might one justify fault as a standard of liability? Is that a matter of justice, economics, or something else entirely? If imposing liability on the basis of fault is a matter of justice, then liability in the absence of fault must be unjust. But is it?

Our first intuitions about responsibility may turn out to be partially indefensible. Justice seems to require that a person be at fault before bearing the costs of injuries to another. Were this intuition sound, no-fault accident laws and strict liability in general would surely be immoral. But as Coleman²¹ and Calabresi²² have argued, no principle of justice has as its consequence the rule of fault liability. In particular, Coleman points out that while principles of retributive justice may require that those at fault be penalized and compensatory

justice may require that those victimized by another's fault be compensated, there is no single principle of justice which requires either that the victim's recompense come from his injurer or that the injurer's penalty take the form of his having to render compensation to his victim. But to argue that fault liability is not required as a matter of justice is not to suggest that the fault principle is totally indefensible. Similarly, to show that strict liability is not necessarily unjust is not to argue that in all cases strict liability would satisfy our standards of justice.

The focal point of all analysis into tort liability is Holmes' famous remark that in the absence of a good reason for shifting it, a loss ought to lie where it falls. The fault principle suggests that the presence of injurer fault is a good reason for shifting a loss from the victim to his injurer. Coleman has argued that the fault principle as a justification for shifting the loss from the victim is a matter of compensatory justice.²³ However, as noted above, the principle of compensatory justice does not require that the faulty injurer bear the loss; it requires only that the faultless victim be compensated.

What reason might one offer for imposing the victim's loss on the faulty injurer? Why impose liability upon him? If fault liability is not a matter of justice, perhaps it is a matter of economics.

For the economist, when a person is at fault he acts in an economically inefficient manner,²⁴ that is, he imposes risks of harm the costs of which are greater than the costs of accident avoidance. By imposing liability on the basis of fault we impose a burden on inefficient conduct in order to deter it. Liability is imposed on the basis of fault, not as a requirement of justice but of cost minimization, i.e., as a

requirement of efficiency.²⁵ As Coleman has pointed out, the efficiency account may give a reason for imposing the burden on the faulty injurer, but it does not explain why the injurer should be made to compensate his victim. The efficiency argument works equally well if the injurer is required to render his due to the state or to a charity. In other words, by itself, the efficiency argument does not account for the compensatory component in torts.²⁶

My purpose here is not to determine whether the law of torts is best understood by the light of moral or economic reason. The point of the present discussion is more modest. It is that one simply can't say much that is useful or interesting about the subject unless one is sensitive to philosophic, legal, economic (and perhaps other) models.

III

While Jurisprudence and Responsibility remain at the forefront of legal philosophy, they no longer dominate research or teaching in the field. Courses and literature have appeared on the Abortion Issue, Medical Ethics, Affirmative Action and the like. In my own case, I have taught a course on Political Philosophy and the Constitution which focuses on whether any particular political philosophy is embedded in the Constitution. The issue arises in the following way. When goods and services are allocated in a market, it is said that no need arises to "justify" a particular award or allocation. That X is willing to pay more than Y for an item suffices, given the market standard, to justify the distribution. Of course, one can call into question the morality of using a market to distribute certain goods.

Government allocations, unlike their open market counterparts, are restricted by the Equal Protection Clause of the Fourteenth Amendment. Legislative enactments draw distinctions between categories or classes of persons. For example, the legislation establishing welfare benefits sets out eligibility requirements; some, but not others, are entitled to the benefit. The question is always which classifications of inclusion and exclusion fall within the boundaries of the Equal Protection Clause. In resolving challenges to legislation on Equal Protection grounds, the Supreme Court asks whether sufficiently good reasons exist to justify the classifications; in other words, are there constitutionally acceptable reasons for awarding, say, a benefit to Smith while denying it to Jones.²⁷ Does this practice of the Court commit it in any way to a general political theory about what kinds of reasons are good ones? If so, is the Constitution itself committed to a particular political theory?

Other fascinating issues emerge under Eminent Domain. The Fifth Amendment prescribes that the government not take private property for public use without just compensation. But what is a taking? If the local government condemns property, takes title to it, then tears it down to build a public highway, surely that's a taking. But what if they don't "touch it;" instead, the city zoning commission rezones the land so that what was once commercial property is now a refuge for migrating geese. Suppose that in virtue of this governmental action, the value of the land diminishes drastically from, say, \$100,000 to \$1,000. Has property been taken?

If one argues that in cases like the above, property is taken in the appropriate sense, then one must rethink the notion of property. One must begin to view property not in terms of particular holdings

but in terms of "bundles" of user rights instead. Perhaps, property may be taken even if it remains in its owner's possession if the government drastically reduces the kinds of user rights to it that one would otherwise have. These questions suggest that the idea of property must be articulated as a part of the history of political philosophy and justice.

Legal Philosophy is a young and growing discipline. The questions it poses and the answers it gives will be limited only by the people it attracts. Perhaps this whirlwind tour of its frontiers will help make it attractive to those it needs most, that is, young scholars committed to a truly interdisciplinary approach.

(Footnotes are available on request.)



