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LEGAL POSITIVISM AND MORALITY

by

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INTRODUCTION

The purpose of this work is to gain an understanding of the relationship between law and morality, and to determine if a rigid conceptual distinction between them can be maintained. This is a difficult question and the attempts to deal with it have been many and varied. But in general, arguments concerning the relation between law and morality have tended to fall into one of two philosophical camps, natural law and legal positivism. In their full-blown form, these two schools of thought have provided radically different conceptions of the nature of law. On the one hand, natural law has defined law in terms of morality such that the two concepts are identical and coextensive terms. The thesis which is common to all natural law theories is often expressed by asserting that in the legal sphere it is impossible to separate law as it is from law as it ought to be. The advocate of natural law maintains that the natural law represents the common reason of mankind and is therefore the only basis and justification for legal systems. Natural law philosophers have taken their criteria of justice and of right and good law from many sources: from the "common" nature of man, from the nature of the world, from the nature of God, from the light of reason, and so on. Nevertheless, the central premise shared by all natural law theories is that positive or man-made law is valid
only if founded upon morality, and that in law there is a
coalescence of the is and the ought and that any attempt to
separate them is both undesirable and impossible.

On the other hand, legal positivism insists on drawing a
sharp distinction between the law that is and the law that ought
to be. According to this conception the existence of law is
one thing, and its value or moral character is quite another.
Instead of holding that nothing can be law unless it accords
with universal norms morally valid for all men, the positivist
generally grounds the "oughtness" which attaches to the law in
the threat of sanctions applied by a political sovereign.
According to this conception law may be properly understood
without any reference to morality at all, and that in developing
theories of law we must be at pains to work the law "pure" by
conceiving it as conceptually independent of moral considerations.

The debate between these opposing schools of thought has
been long and heated. The kinds of claims typically made by the
advocates of each side will perhaps draw into sharper focus the
enormous differences which separate them. One natural law
philosopher has said,

The natural moral law may be defined
as 'the light of reason' inherent in
us by nature, through which we perceive
what we ought to do and avoid; or also:
the knowledge, communicated to us by
the creator through nature, that we must
strictly observe in our conduct the
order which corresponds to our nature.¹
Another writes,

For my part, I believe that in every human society, in fact, in 'human nature' itself, there are certain ultimate standards or values that determine approval or disapproval, assent or dissent; and I believe that it is these same values that determine our judgment as to which law is 'just' or 'unjust': in other words... whether we are bound in conscience to obey it or not.²

Yet another has held that human laws are not valid if they contradict the Divine law and that all valid laws derive their force from the Divine original.³ Legal positivists, however, view the matter in another way. One legal positivist claims that "...the concept of law has no moral connotation whatsoever."⁴ In another place he says,

Law separates the concept of the legal completely from that of the moral norm and establishes the law as a specific system independent even of the moral law.⁵

Another holds that "Law, qua law, is simply amoral."⁶ Finally, it is argued that

By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.'

The problem of understanding the nature of the relation between law and morals as stated by these philosophers complicates matters a great deal because whichever way we define law we are led to undesirable conclusions. For if we identify law
as coextensive with morality we are in danger of holding that whatever is commanded by the state should be obeyed, not only because it is commanded but also because the command prescribes morally desirable conduct. If the complete coalescence of law and morals is adopted we have lost the basis for a moral criticism of the law since a morally iniquitous law would already be identified with morality and thus be a contradiction in terms. But if we accept the complete conceptual separation of law and morals, and hold to the view that they present separate kinds of rules for directing human behavior and that they bear no necessary relation to each other, we are faced with the problem of the obligatoriness of law. For this view implies that the only element required to understand our duty to obey the law is the fact of the power of the state to enforce its commands. Hence, by this account law is reduced to the force of the state without reference to moral considerations.

The approach to the problem taken in this work shall be vis-a-vis the legal positivism of three separate philosophers, John Austin, Jeremy Bentham, and H. L. A. Hart. Not only shall we try to understand their point of view, but we shall also inquire whether they have in fact done what they claim to do, i.e., succeeded in demonstrating the conceptual separation of law and morality. We shall argue that their great contribution has been to clear up the confusion injected into legal philosophy by natural law doctrine by making intelligible the
notion of a morally iniquitous law and demonstrating that law and morals are not identical or coextensive terms. But we shall claim that in their reaction against natural law they have overstated their case. By examining their theories of law in some detail, we shall try to show that on their own terms they were unable to treat the nature of law apart from fundamental moral considerations. The fact that they each found it necessary to employ moral notions in spelling out the salient features of a system of law shall be taken as evidence that they failed to provide a conceptual separation of law and morals. And this is something which is generally overlooked by their commentators. For it is widely assumed that because they assert the separation of law and morals they also manage to keep them distinct in their theories. Mark R. MacGuigan, for example, says that for the legal positivist:

Law is something not of reason but of will, and the consequence of this for almost all of the positivists is that it is therefore something wholly independent of morals. This is, for instance, a primary tenet of both Bentham and Austin. For them, law cannot ever create morals, nor can morals ever judge law. Law and morals are not merely distinct...they are wholly separate.8

And George Breckenridge says concerning Hart that,

The whole purpose of Hart's endeavor is to maintain the validity of the concept of law as a morally neutral entity, formally defined in terms of its source, which is itself an entity
located according to a set of
generally accepted secondary rules
from which it derives its power
and authority. 9

But if the account provided here is correct the fully developed
theories of Austin, Bentham, and Hart do not square with their
claim concerning the conceptual separation of law and morals.
It is, therefore, a mistake to write of them as if they did
succeed in maintaining such a separation.

A few preliminary comments are in order before turning
to their analysis. In claiming that there is a conceptual
relationship between law and morality we are not claiming that
the concept of morality somehow flows logically from the con-
cept of law, or that the concept of law is logically encompassed
by the concept of morality. There is an obvious sense in which
law can be defined in any manner one chooses. If the only
problem were to establish once and for all how the word "law"
should be used, or the kinds of phenomena to which it should be
applied, there would be little difficulty. But if law is
roughly conceived as a body of rules or commands for the direction
of human behavior for the attainment of certain ends, an
arbitrary restriction of the term is unsatisfactory. This is
because law affects people in their most sensitive aspect,
their behavior, and when men's behavior is made non-optional or
obligatory they are concerned that the rules governing their
behavior be made in reference to some standard they consider to
be right and proper. The establishment of a system of law is a
human achievement, and its existence and viability depends in large measure on the cooperation of the people living under its aegis. At this point, no other consideration is needed than the fact that men form a society and agree to obey the sovereign for their preservation and not their destruction to show that men believe law should be made with reference to morality.

The conceptual separation of law and morals is thought possible by many legal positivists because they provide definitions of law which are morally neutral. But the history of jurisprudence has shown that attempts to exhaustively define law have been hopelessly incomplete. For in defining law they have singled out particular aspects of law that most readily lend themselves to rigid definition, ignoring many of the more subtle aspects which the concept requires if it is to be understood in all its richness. This is why the concept "law" cannot be defined with the precision of, say, the concept "bachelor," which may be adequately defined in terms of "unmarried male."

It is the attempt to provide a definition of law encompassing the necessary and sufficient conditions which, when satisfied, warrant the application of "law" to the phenomenon in question that has led to confusion. Such a procedure has the advantage of making the concept of law a closed concept with the result that it is fairly easy to apply the accepted criteria to any system which purports to be law, and then render a judgment concerning the felicity of describing
that system as a legal system. But the attempt to formulate comprehensive definitions of a concept as complex as that of law such that certain social phenomena may, on that basis, be said either to possess or not to possess the essential ingredients of law, which all law has in common, is to sacrifice meaningful understanding for neatness, or to confuse personal predilection for fidelity to the nature of the case. The upshot of this quest for essential ingredients is that important issues have often been confused and further, it has significantly hindered communication between opposing schools of thought.

Perhaps the nature of our claim that the definitional approach to the problem of law is unsatisfactory can best be understood by noting that at the outset we are confronted by two exceedingly important considerations. On the one hand, the term "law," the definiendum, does not have a physical counterpart which exhausts its meaning. There is no thing or set of things, or activity or aggregate of activities, to which a person can point and say comprehensively, "That is what I mean by 'law'." This accounts for the great difficulty in trying to provide a stipulative definition for the term which achieves even a modicum of precision and clarity. On the other hand, the term "law" is centuries old and has a meaning or set of meanings prior to any "new" definition that might be offered. Hence, any attempt to define law in terms of essential characteristics must show how other definitions with the same aim
but a different content are somehow "false" or inappropriate. And if we have learned anything from the history of jurisprudence it is that men have never agreed on what these essential elements of law are, and there is little reason to expect widespread agreement in the future.

These considerations in part account for the belief that much of the ink spilled in the quest for the essence of law has been the result of the mistaken view that before anything significant can be said about law and the problems connected with it, one must first exhaustively define it. But this is a mistake. While it may be a natural mistake, it is the result of erroneously assimilating typical questions of the sort "What is a chair?" or "What is X?" with questions calling for the definition of complex intellectual constructions. Whereas questions of the former type may be more or less satisfactorily answered by correlating the X in question with certain things or qualities in the world, questions of the latter type cannot be answered by specifying any one thing or things with which the concept in question may be directly correlated. This is the case with the concept "law" and its related vocabulary consisting of "duty," "right," "obligation," "justice," and so on. These words do not "stand for" or "mean" any one thing or collection of things which can be stated once and for all.

Thus, what is needed is not a definition of law, but an elucidation of the concept of law. So when we claim that there
is a conceptual connection between law and morality, and that on their own terms Austin, Bentham, and Hart give expression to this connection, we are claiming nothing more than that when they elaborate on notions such as obligation under law or the ends of law, they appeal to and make use of fundamental moral considerations without which their analysis would be incomplete. By "morality" in this discussion we are not presupposing any single view as right or which they each adopt. Rather, as employed here, morality is conceived to include the conceptions men form of the rules designed to regulate human behavior. The nature of our claim is unaffected whether these philosophers consider morality as based upon a particular understanding of human nature, or as derived from a theological interpretation of man, or as the result of a shared practice widely held in the community. The main task here is to determine if these writers were able to elucidate the concept of law without reference to moral considerations entering into the meaning of law. The conceptual connection between law and morality is to be understood through the elucidation, not the definition, of law.

We shall try to show that in spite of their insistence on the separation of law and morals, the legal positivists under consideration were nevertheless unable to develop the concept of law without recourse to morality. In this respect they support the widely shared conviction, expressed by the syndicated
columnist, Carl T. Rowan, that collective life on meaningful terms is possible only through law, and that without "... respect for law...no society remains civilized."
FOOTNOTES


CHAPTER I

JOHN AUSTIN AND THE MORAL FOUNDATION OF LAW

In his famous article, "Positivism and the Separation of Law and Morals,"\(^1\) H. L. A. Hart vigorously defends certain aspects of legal positivism found in the philosophy of Bentham and Austin, while at the same time developing a similar theory of his own. The thesis Hart is concerned to maintain is that there is a rigid and analytic separation between law on the one hand and morality on the other. Now there is certainly a sense in which this is true. There are many rules and precepts for human behavior which are morally defensible but which are not rules of law. Likewise, there are many laws which contravene our basic moral principles but which are nevertheless laws. If this were all that is meant by saying that there is an important distinction to be made between law as it is and law as it ought to be, surely there would be no argument. And in places one is led to believe that nothing more than this is meant either by Hart or by the earlier positivists. Hart tells us that what both Bentham and Austin, as well as himself, were anxious to assert is that (1) in the absence of an expressed constitutional or legal provision it does not follow that simply because a rule violates our moral

\(^1\)
standards that it is not a rule of law; and (2) that it does not follow from the mere fact that a rule is morally desirable that it is also a rule of law.²

Austin seems to be saying this when he says:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one of inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry. 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.³

The separation of law and morals in this sense is important and it does help to overcome the confusion injected into legal philosophy by natural law advocates from St. Thomas to the present.

But more than this separation of inquiries about what laws exist and what laws are good or bad is meant both by the earlier positivists and by Hart. For them the separation is conceptual. That is, in opposition to natural law theories which hold that the concept "law" cannot be properly understood or appreciated apart from fundamental moral concepts which are coextensive with it, they have held that the concept "law" is intelligible apart from moral considerations and that we must be at pains to keep the concepts "law" and "morality" distinct.⁴ Hans Kelsen, for example, is a legal philosopher belonging to the positivist tradition who argues we must
conceptually distinguish between law and morality because law is a social enterprise which lends itself to empirical inquiry and verification whereas morality does not. It will be argued here that in spite of their protest to the contrary legal positivists are unable to keep moral considerations out of their theories of law.

At this point a caveat should be mentioned. In arguing that a rigid conceptual distinction between law and morality cannot be maintained and that law rests on a moral foundation, no theory of natural law is being proposed or defended. The term "natural law" has so many meanings and has been used in so many different ways for so many purposes that it seems wise to abandon it altogether. In speaking of the moral basis of the legal order no special code of nature or theory of reason or theological perspective which usually accompanies a doctrine of natural law is being assumed.

Indeed, it was the identification of law with special moral or religious codes that Austin was concerned to deny. But in correctly denying that law is necessarily related to any special brand of morality, Austin went to the other extreme and claimed that law need not be related to morality at all. In order to preserve the integrity of the concept of law, Austin took pains to precisely define law. He believed it necessary to draw a sharp line of demarcation between law on
the one hand and morality on the other. He was convinced that the ideas of morality and justice were too indefinite and subjective to serve as a basis for an adequate theory of law.

Austin's insistence on the separation of law and morality is in part the result of a faulty conception of morality. When he distinguishes law from morality, he allows "morality" to stand for almost any standard by which human conduct may be judged that is not law itself. Thus, he indiscriminately lumps the inner voice of conscience, personal prejudices, notions of right and wrong based on religious belief, and common conceptions of good and evil under the heading of "morality." Although we shall argue that Austin himself failed to maintain a sharp distinction between law and morality in his elaboration of his theory of law, he is often regarded by his followers and critics alike as having accomplished such a separation. Thus, John Chipman Gray described Austin's contribution to law by saying:

The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State... is not an ideal, but something which actually exists. It is not that which is in accord with religion, or nature, or morality; it is not that which ought to be, but that which is. To fix this definition in the Jurisprudence of the Common Law, is the feat that Austin accomplished.
Carl Joachim Friedrich says of Austin that

He correctly fastened upon the problem of sovereignty and undertook to develop a strictly imperative theory of law—law as the command of the sovereign. . . . Austin separates jurisprudence from morals so radically that Hobbes' doctrine of the absorption of natural law by civil law is denied and transcended. . . .

And E. W. Patterson, who sympathizes with the view that the fundamental reality of law lies in the organized force of the state writes,

Those who attack it/The imperative conception of law/ usually profess to have in reserve either some immutable set of ideals, which if revealed turn out to be authoritative religious or ethical doctrines, or else some hunch about the soul of society which seems too ineffable for communication.

Each of these views seems to misunderstand Austin and to presuppose a conception of morality which no system of law need satisfy in order to be law. In arguing that Austin did not, in fact, succeed in rigidly separating law and morality, "morality" is not being used to indicate an "immutable set of ideals" or an "ineffable hunch about the soul of society."

Rather, by morality is meant, basically, norms which give expression to prominent needs, goals and values such as the desire for safety, peace, freedom, prosperity and well-being. These are things about which men are seldom indifferent. The large majority of men have always felt deeply about the basic
conditions under which they are to live their lives. And the large majority of men have always regarded law as a positive value, as an institution which incorporates these norms as the necessary means of the beneficial living together of men in society. Among the conditions which make possible successful pursuit in any field of human endeavor is the mutual respect for the life and liberty of each member of the group. It is morality in the sense of basic norms which make collective living possible and meaningful that serves as the foundation of law, even law as expounded by Austin. It is perhaps worth noting that people who have fled regimes of violence and coercion often speak of the "lawlessness" reigning in these regimes and by this they mean that certain minimum conditions of life, liberty, and security were denied to them, and that their worth as human beings was accorded no respect. It is this minimal, yet exceedingly important, notion of morality that Austin's theory of law embraces. With this as a background we can now turn to Austin's analysis of law and try to see why he claimed that law and morality must be carefully distinguished.

It is certainly not the case that all laws or legal rules are touched by moral considerations. Laws requiring automobiles to be driven on the right side of the road or laws requiring wills to be signed by two witnesses possess no moral
coloring whatever. Other laws provide that if a person wishes to transfer property or if he wishes to enter into a contract then he must satisfy certain requirements. But the decision to enter into these arrangements is usually free of moral connotations. On the other hand, much of the criminal law is intimately related to morality in that what is required or prohibited by law is also required or prohibited by the prevailing moral standards of the time. Thus, laws forbidding segregation and charging usurious interest rates, no less than laws forbidding murder and theft, share with morality an identity of content.

Now Austin does not deny that much of the law is characterized by positively commanding certain kinds of behavior and that this behavior is also required by morality. He was sensitive to the fact that moral influences may be at work in shaping the law. But what he does deny is that there is a necessary relation between law and morality. Hence, he formed a theory of law which allowed no room for the moral element to be found in his definition of law. And this is why Austin's theory of law is often thought to rest solely on the coercive authority of the sovereign independent of any moral considerations whatever. In order to maintain this conceptual distinction between law and morality, Austin defined law in terms of the command of the sovereign supported by a sanction.
It is around these three concepts—sovereign, command and sanction—that Austin built his theory of the nature of law. But it is only when Austin presents these elements in their raw or skeletal form that he manages to preserve the distinction between law and morality. For when he expounds his views and clothes these dry bones with the flesh requisite for a vital and persuasive theory, the relation between law and morality becomes much more intimate than his bare definition would lead one to suspect.9

First, let us consider the concept of sovereignty as it functions in Austin's theory. According to his definition, laws properly so called are a species of command.10 But since only persons can command Austin held that rules of law, which are "general commands," always issue from the political sovereign11 who is "incapable of legal limitation."12 Austin was led to this conclusion because of the way he had defined both the positive law and the sovereign. He defined the sovereign as a political superior represented either by a person or aggregate of persons to whom the bulk of society are in the habit of obedience; and he further stipulated that the person or body of persons known as the sovereign must not be in the habit of obedience to a determinate human superior.13 Since laws emanate only from a sovereign by way of general commands, Austin thought it followed that the sovereign cannot
bind himself by his own laws.

This model for understanding the nature of law gives rise to several serious problems. But for a moment let us accept this theory as an accurate one which faithfully describes the social phenomenon we know as law and see if, on these grounds, Austin is able to maintain his important distinction between law and morality. One of the things which this picture of law brings to mind, and one which has troubled many people, is the notion of the sovereign as the source of law, legally unlimited and restrained by no body or document, issuing commands in any manner he pleases. It is this picture of the sovereign arbitrarily issuing commands which by definition are lawful and obligatory that is disconcerting to many but which, if Austin is correct, adequately represents the nature of law (or at least one way the law may be legitimately manifested).

One of Austin's early critics in objecting to his unembellished theory of sovereignty has said that it

...neglects the mode in which the result has been arrived at. And thus it is that, so far as the restrictions contained in his definition of Sovereignty are concerned, the Queen and Parliament of our own country might direct all weakly children to be put to death...  

This is certainly the impression one gets from a cursory
reading of Austin's theory. For he seems to be saying that law consists simply of the aggregate of the general commands issued by the sovereign, regardless of the content of these commands. Thus, the content of the law might be benevolent or oppressive, conducive to freedom or restrictive of individual rights, moral or immoral. But a closer examination of his theory makes it plain that while the sovereign may be incapable of legal limitation, he is surrounded by moral limitations. Austin writes:

In every, or almost every, independent political society, there are principles or maxims which the sovereign habitually observes, and which the bulk of society, or the bulk of its influential members, regard with feelings of approbation. Not unfrequently, such maxims are expressly adopted, as well as habitually observed, by the sovereign or state. More commonly, they are not expressly adopted by the sovereign or state, but are simply imposed upon it by opinions prevalent in the community. Whether they are expressly adopted by the sovereign or state, or are simply imposed upon it by opinions prevalent in the community, it is bound or constrained to observe them by merely moral sanctions. Or (changing the phrase) in case it ventured to deviate from a maxim of the kind in question, it would not and could not incur a legal pain or penalty, but it probably would incur censure, and might chance to meet with resistance, from the generality or bulk of the governed.16

This passage makes it clear that while Austin considered the sovereign to be legally unlimited, he did not believe the sovereign could issue commands arbitrarily and in
any manner he pleased and still expect respect for this law on the part of the subjects. So even if we grant what is often not the case, that the sovereign is not constrained by legal limitations, we are still faced with the fact that on Austin's own terms the sovereign is bound or constrained to observe and respect maxims and principles which are shared by the community on pain of censure or resistance. And this is a moral limitation circumscribing what the sovereign may or may not command.

However, more than this is involved in Austin's theory. Put simply, legal positivism is a doctrine concerning the source of law. For if the source of law is such that in the beginning law is not freighted with moral considerations, then the distinction insisted upon by legal positivism is much more tenable. And Austin's definition of the source of law seems to be consistent with the distinction between law and morality for the source of law is conceived in terms of the sovereign's command supported by force (i.e., a sanction). But, again, the matter is not so simple for a closer look at Austin's theory shows that he was not contemplating law which had no moral characteristics. This can be seen by noting an important distinction which Austin made between a "loose" and a "strict" way of defining the "source" of law. In the "loose" sense the source of law is whatever has an influence in the shaping and
creating of positive law. In this sense many things may be identified as constituting the source of law, e.g., custom, prevailing opinions, reason, external circumstances, etc. But in the "strict" sense there is only one source of the law and that is the command of the sovereign. Austin writes:

Taking the term 'source' in a loose signification, customs may be styled sources of laws. For the existence of a custom, with the general opinion in favor of it, is the cause or occasion, or is one of the causes or occasions, of that legal rule which is moulded or fashioned upon it. But taking the term 'source' in the same loose signification, the causes of the custom from which the law emerges are also a source or fountain of the law itself: And, generally, any cause of any law must be ranked with its sources or fountains.

Accordingly, certain writers...have ranked experience and reason, together with external circumstances wherein mankind are placed, amongst the sources of the laws whereby mankind are governed.17

Austin is here making an important distinction between the "cause" of law and the "source" of law. It is important because his theory of sovereignty requires that it be made. In other words, Austin held that there has been confusion between these influences which have "caused" a law to be made and the actual "source" from which the law as law flows. It is in terms of this distinction that Austin is able to define the sovereign as incapable of legal limitation, for if God or nature or custom were taken as sources of law instead of
causes, he thought it would follow that there are laws prior to or above the sovereign. Instead, Austin maintains that these rules which emanate from God or nature or custom are not law in the strict sense but are the positive rules of morality. He says:

"... God or nature is not a source of law in the strict sense; that is, of law established by the sovereign or state immediately or remotely. God, or nature, is ranked among the sources of law, through the same confusion of the sources of law with its remoter causes. ... But... [law] is a law, strictly so called, by the establishment it receives from the human sovereign. The sovereign is the author of all law strictly so called, although it be fashioned by him on the law of God or nature; just as customary law is established by the sovereign, although he fashions it after a pre-existing custom. God, or nature, is the remote cause of the law, but its source and proximate cause is the earthly sovereign, by whom it is positum or established."18

In order, then, to maintain the status of the sovereign which his theory calls for, Austin found it necessary to introduce the distinctions between a loose and a strict sense of the source of law and also between the remote causes of law and its proximate source. For the purpose of this discussion the important point is not whether Austin's distinctions are really tenable, but rather, what sense, if any, can be attached to them such that the conceptual distinction between law and morality is justified. And it seems clearly the case that
simply to say that the sovereign is the proximate source of the law does not entail that there is, on that account, a conceptual separation between law and morality. On the contrary, what Austin has done is to show more clearly than doctrines of natural law how law is related to morality. For it is through the activity of the sovereign that moral convictions and values are transformed into law. Morality, prior to this recognition by the sovereign, is morality and not law, and in this respect Austin was quite right to insist on distinguishing law and morality. But when Austin admits that customary law, for example, is fashioned by the sovereign after pre-existing custom (which for Austin is synonymous with positive morality) he is showing that law does not derive simply from the sovereign as sovereign without prior conditions and limitations.

Thus, Maine's criticism of Austin's sovereign as a legal entity who may, at will, require the death of weakly children is a natural one, but one which does not square with Austin's fully developed theory. Austin did not hold that the sovereign can do anything he wishes. Austin concentrated on the sovereign because it is in this activity that so much of his theory of law is centered. But he did not believe that the concept of sovereignty could be properly understood without an understanding of the way in which sovereignty is constituted, and that means a recognition of the moral limitations which
govern his activity. He writes, for example:

The law of England...cannot be understood, without a knowledge of the constitution of Parliament, and of the various rules by which that sovereign body conducts the business of legislation: although it is manifest that much of the law which determines the constitution of the Parliament, and many of the rules which Parliament follows in legislating, are either mere law imposed by the opinion of the community, or merely ethical maxims which the body spontaneously observes.  

It is clear, therefore, that Austin thought the positive law could only be understood in the light of moral limitations. And the moral limitations circumscribing the sovereign result in the union, rather than the separation, of law and morals. And this union is contrary to the claim made by, and attributed to, the school of legal positivism. Austin, however, was not unaware that the relation between law and morals is at times considerably more intimate than his raw theory suggests. He admits this, though reluctantly, when he says:

But though, in logical rigour, much of the so-called law which relates to the Sovereign, ought to be banished from the corpus juris, it ought to be inserted in the corpus juris for reasons of convenience which are paramount to logical symmetry. For though, in strictness, it belongs to positive morality or to ethics, a knowledge of it is absolutely necessary in order to have a knowledge of the positive law with which the corpus juris is properly concerned.
It is important to realize that Austin did not hold merely that at the point of its inception the sovereign's status is influenced and shaped by moral considerations limiting the range and kind of activities he could command. He further believed that there are positive duties which the sovereign incurs towards his subjects. That is to say, the relations obtaining between sovereign and subject take place on a two-way street. There are duties running in both directions, and the very existence of the legal entities known as sovereign and subject depends on the mutual respect and obedience which they both share. On the one hand, the subjects are legally and morally obligated to obey the commands of the sovereign since the general good which follows from submission outweighs the general good which would probably follow from resistance. But the condition of this obedience is not achieved independently of certain limiting factors imposed upon sovereignty. Now the duties of the sovereign government towards its subjects cannot be legal duties on Austin's account because it would then follow that it was not supreme but merely a subordinate government. But Austin clearly recognizes that the sovereign government has religious and moral duties towards its subjects. The religious duties of the sovereign toward its subjects are bound by the Divine law as known through the principle of utility, to advance as far as possible the weal or good of
mankind. . . ." The moral duties of the sovereign toward its subjects are "...mainly...the general opinion of its own community which it lays or imposes on it." Austin believes that it follows from his analysis that the duties of the subjects towards the sovereign government and the duties of the sovereign government towards the subjects may be sufficiently accounted for as originating in three sources: "the Divine law (as indicated by the principle of utility), positive law, and positive morality."²⁴

It is apparent, therefore, from Austin's own elaboration of his theory, that the notion of the sovereign arbitrarily and capriciously barking out commands is not the one he intends to convey. The criticism of Maine and others of Austin's theory is certainly a natural one and one which his doctrine, stripped of flesh and bones, seems to suggest. But Austin was much too astute a thinker to be guilty of such a gross mistake. He recognized and admitted that when law is considered in its inception it must bear some resemblance to moral standards, since it is these standards which guide the sovereign when he fashions the law. This is not to say, and certainly Austin never implied, that to argue for the relation of law and morals is to reduce law to the requirements of morality, or to reduce morality to the demands of law. Assuredly, after law has been created there still remains the problem of ascertaining whether
or not that law is morally justifiable. But what is asserted in Austin's analysis is that the sovereign cannot and should not separate the process of creating law from a consideration of morality. As Austin says in a typical passage,

The case I am now considering is one of the numerous cases wherein law and morality are so intimately related and indissolubly allied, that, though they are of distinct natures and ought to be carefully distinguished, it is necessary nevertheless to consider them in conjunction. 25

To summarize our discussion to this point we can say that in order to preserve the integrity of the concept of law Austin concluded that the only secure foundation for order lies in the power of a man or group of men known as the sovereign to issue commands that society will obey. Hence, the definition of law as the command of the sovereign supported by a sanction. But in his elaboration of this doctrine Austin makes it clear, although his critics often overlook this feature of his theory, that this power to command cannot be sheer physical force. Certainly, this power may terminate in a physical expression, but Austin's analysis makes it plain that the organization of government upon law cannot as a whole be built simply upon physical constraint. The source of the power to command lies not in brute strength, but in the habit of obedience which assures that what is commanded will be carried out and generally obeyed. The habit of obedience indicates
that to command is to exercise authority over men and not solely the power to inflict harm. So the power to command, while it may be combined with threats of harm, is essentially an appeal not to fear but to respect for authority. It is the element of authority involved in the law, which Austin repeatedly recognized, that renders it a mistake to regard his view of law as simply a doctrine of force. He begins by defining law as force-backed commands, but his elucidation of that definition brings him to talk about rule-backed force. Instead of men habitually obeying "the sovereign one or many" out of fear, we find men subjecting themselves to sovereign authority because the rules (commands) he issues are seen to be right and necessary for the existence of a stable society. It is in this sense that Austin's theory of law is based on a moral foundation. The authority of the sovereign resides not in physical power but in the conviction that obedience to his commands will promote at least a minimum of order and security, without which all other goods would be unattainable. Perhaps this can be made clearer by turning to an analysis of "command" as it functions in Austin's theory.

As we have seen, Austin identifies law as the command of the sovereign. In other words, he is saying that only those rules which emanate from the sovereign are law and that these rules take the form of commands. In order to be clear on this
point, Austin carefully distinguishes among the different types of commands and says only those commands which originate or have their source in the will of the sovereign are law. In addition, law is identified as those commands of the sovereign which are supported by a sanction, and a sanction is defined by Austin as the threat of evil which the sovereign can implement when his commands have been disobeyed.

Again, this notion of law as a command based upon a sanction does not accurately describe much of what takes place in the legal arena. But let us once more overlook this problem and see if the articulation of "command" by Austin makes the theoretical separation of law and morality plausible. At the outset it does appear that the notion of "command" as it functions in Austin's theory provides for an absolute separation of law and morals. The reason this appears to be the case is simply that it follows by definition that only the sovereign's commands are laws, and the rules he commands are laws only because he commands them and no other reason appears to enter the picture. Nevertheless, here, as with the concept of sovereignty, the stark definition and the picture it suggests does not square with Austin's elaboration of it.

One thing which should be made clear from the beginning is that something more than a mere definition or decision as to how to use certain words is involved in the definition of
law as a command of the sovereign. If man's only concern were to establish once and for all an exhaustive definition of the word "law," we could agree that law is nothing more than a command issued from a political superior known as the sovereign, regardless of what that command might be. But more than a definition is involved when men reflect on the nature of law. Because men are affected in important ways by the laws under which they live, they have a concern that these laws be "right" and "just." And this is why, for men who have wrestled with the problem of determining what the law is and what good law is, it is something more than a game of semantics. That is to say, men raise questions about the source of law precisely because an arbitrary and capricious restriction of the term is not deemed satisfactory when we are dealing with something as important and crucial as the behavior of human beings. Thus, when men reflect on the source of law they do so from the standpoint of participants in a way of life, and as such they are concerned with formulating a theory of the source of law as they think it ought to be. This does not mean, of course, that all men agree on what should properly be regarded as the source of law, but it does mean that they are concerned about the content of commands which are binding upon those to whom they are addressed, and the way in which they acquire force and efficacy.
The first characteristic which comes to mind is that the notion of law is unintelligible when viewed solely as a command. It would be absurd to embrace a view of law which holds that laws are commands issued from a sovereign, and to deny that these commands affect or concern the conduct of men. Commands are not issued in a vacuum; rather, laws understood as commands affect men in profoundly important ways, namely, they govern men's behavior. And it is because men are never indifferent to the rules which govern their behavior that they are so concerned about the source and nature of the law.

Now it is of course true that Austin was aware that the commands of the sovereign are directed to men and are concerned with their behavior. But what is disconcerting about the formulation this concept seems to receive in Austin is that in his definition of law the phenomenon of command is stripped of its prior conditions and purposes, for nothing seems to be required except that the sovereign as sovereign must be in the habit of being obeyed. On these terms, it appears to follow that whatever the sovereign commands is law, and that the sovereign can command whatever he wishes. Moreover, it is sometimes thought that on Austin's account the subject's obligation to obey the law lies in nothing other than the fact that he was commanded.\(^{28}\) Thus, we find Austin writing "...the term command comprises the term law...."\(^{29}\) And,
A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. 

Further, "Being liable to evil from you if I comply not... I am bound or obliged by your command, or I lie under a duty to obey it." 

It is easy to see why Austin's formulation, in raw form at least, gives rise to the view that if the sovereign has enough power he could command anything whatever, and the further view that the obligation or duty to obey is located solely in this power to impose a sanction. But we saw earlier that a deeper examination of the way in which sovereignty is constituted reveals that the sovereign is restrained by moral considerations and that he is not free to command as he wishes. It is because of the fact that men's lives are ordered by law that they have looked elsewhere than the bare notion of command for the proper source of the law. Even if we grant much of Austin's argument and agree that men are amenable to accepting as law only what the sovereign commands, it is not true that they are willing to admit that anything he commands is law. This is to say nothing more than that men have never been willing to agree that there should be a separation of law and morals; rather, most men have believed that law as it directs and governs human behavior
should itself be governed by, and conducted in reference to, some moral standard. In other words, while men have recognized that in any human activity there will be mistakes, and therefore bad laws, they have never been willing to mechanically obey sovereign commands in the absence of rules or provisions governing the way in which the sovereign fashions his laws.

One fact which is helpful in illuminating the conditions under which sovereign commands acquire force comes to us from Thomas Hobbes and H. L. A. Hart. They both recognized that when men band together and agree to obey the commands of the sovereign, they do so because it is the most effective way of securing peace and realizing a stability, without which many of the goals of men would be unattainable. The most important of these goals, or at least the most fundamental, is security of life and limb without which the others would not be possible. So, even if we grant no more than that man is concerned with his own preservation, we still have a basic precondition governing sovereign commands, that they be designed to protect and preserve man rather than to allow for his destruction. The moral value of preservation of life is therefore one of the fundamental values limiting what the sovereign may command. And even if we were to go no further than this, it is apparent that law bears an important relation to morality.

To demonstrate that Austin's theory of law rests on a
moral foundation, it is not, of course, necessary to show that by his account every law is a moral one or that it is con-
formable with some standard of morality. The fact that laws, viewed as commands by Austin, affect the behavior of men and direct ways in which they should act, indicates that these laws are made with reference to some standard or norm in accordance with which some person, or body of persons, believes that men should act. It is this kind of consideration which serves to relate the phenomenon of law to morality, and the fact that not all men agree on these matters does not show them to be unrelated to morality, but instead shows that they hold different standards and are not persuaded by the moral reasoning employed by those in power. The bitterness with which some laws are opposed, on moral grounds, tends to show that men believe there is, and should be, a relation between law and morality rather than the converse.

At this point it is perhaps instructive to notice two characteristics which are constitutive of the concept "command." In the first place, there are certain ends or objectives or values which the fulfillment of the command is thought to achieve. In the second place, there is the method or mode of issuing the command. The concept "command" is not intelligible without both of these aspects being realized. For example, if a parent wishes to see to it that his child spend more time on
homework and less time watching television, he might instruct or "command" the child to finish his lessons before turning on the set. Now in this case the objectives or ends sought may be several. The parent may wish to see to it that the child receive a better education or acquire a greater degree of self-discipline or spend more time on worthwhile activities and less on television, or all of these combined. But whatever the specific reasons, the over-all concern is with the proper growth and development of the child. The way in which the child receives these instructions may be through oral communication, a note written on the blackboard in the kitchen, or by the maid in care of the child. Two things are operative here, the end sought and the procedure for communicating instructions.

Now the two points mentioned here seem so obvious as to be hardly worth considering. But law viewed as a command involves the same two aspects and often only the mechanical process of formal promulgation seems to be recognized. One legal scholar, following the view erroneously attributed to Austin, has written:

"Adhering firmly to the positivistic tradition, I would define law as a specific technic of social ordering, deriving its essential character from its reliance upon the prestige, authority, and ultimately the reserved monopoly of force of politically organized society. . . . Law, as here
defined, has no moral or ethical coloration. Law, *qua* law, is simply amoral.\(^{32}\)

Such a definition of law takes into account only the formal method of promulgation and the way it is enforced, while ignoring the important moral and general value-convictions the society or legislator wishes to express through the medium of law. Much of the corpus of legal positivism seems to consider only the way in which law is made and upheld and not what is hoped to be achieved through it. But a meaningful and intelligible understanding of law requires that both aspects be accounted for.

Although in places Austin attempted to conceive law only as commands promulgated in a certain way, his over-all discussion reveals him to be sensitive to the needs and objectives of men. Perhaps this is where Austin comes closest to bringing law and morality together. It is true that he spoke of natural law as the "veriest foolishness," but he went on to emphasize one of the fundamental tenets of that school—that the concept of law rests upon what is "necessary" and what is "bottomed in the common nature of man."\(^{33}\) Austin's point seems to be that one cannot make sense of the concept of law until he has recognized certain features of human nature. That is, just as Hobbes had held that life is "short, brutish and nasty" in the state of nature, and therefore that men need law for
their own protection and preservation, Austin held that law is not comprehensible until it is seen as a corrective of the problem of evil. He says:

But the notion or idea of evil or imperfection is involved in the connected notions of law, duty and sanction. For, seeing that every law imposes a restraint and every law is an evil of itself: and unless it be the work of malignity, or proceed from consumate folly, it also presupposes an evil which it is designed to prevent or remedy. Law, like medicine, is a preventive or remedy of evil: and if the world were free from evil, the notion and the name would not be known.34

Thus, while Austin's theory of law as command may at times sound as if he had in mind only commands which were properly made, i.e., issued from a sovereign, we see that he does not overlook the purposes of those commands. They are designed to be a corrective of evil and as such, presuppose a conception of what is good. The content of this "good" we come by, Austin held, through an understanding of what is "bottomed in the common nature of man." Moreover, without this antithesis of good and evil, we would not even be acquainted with the world "law." If this does not reveal an intimate relationship between law and morality in Austin's thought--if it does not show that he could not conceive law without reference to morality--then surely nothing could.

This is not, however, the only way in which the notion of command is shown to have a link with morality. Austin
writes,

...being a command, every law properly so called flows from a determinate source...the author from which it proceeds is a determinate rational being, or a determinate body or aggregate of rational beings. For whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear: and the latter is obnoxious to an evil which the former intends to inflict in case the wish be disregarded.35

The important thing to notice here is that Austin specifies that the command flows from a rational being. We have already noted that certain interpretations of Austin's theory give rise to the picture of the sovereign barking out commands and the subjects, like Pavlovian dogs, responding on cue. But again, this is not the picture Austin intends to convey. He not only specifies that the sovereign is a rational being, he goes further and says that the commands are directed toward intelligent subjects. We are told:

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.36

It is apparent, then, that Austin conceives law, both in its creation and in the subject to whom it is directed, as being closely connected with the faculty of reason. Law, thus conceived, is a rational process and as such is diametrically opposed to a process of arbitrary and capricious commands.
followed by a conditioned response.

For where intelligence is not, or where it is too bounded to take the name of reason, and, therefore, is too bounded to conceive the purpose of a law, there is not the will which law can work on or which duty can incite or restrain.37

Two things seem clear at this point in our discussion. First the concept of command as employed by Austin, does not have meaning or coherence apart from some notion as to how men ought to behave. It is only when viewed as an act of providing directions for human behavior that the concept command acquires meaning, and such direction necessarily contain moral implications. It is not necessary for all men to agree on the moral worth and value of certain commands for the intimate relation between law and morality to be clear. Austin provides evidence that the purposiveness of commands carry moral implications for the legislator when he says concerning utility,

...I shall often have occasion to refer to that principle...as that which not only ought to guide, but has commonly in fact guided the legislator.38

And that we cannot understand the nature of law apart from moral considerations is made clear when he says,

...I should often be unable to explain distinctly and precisely the scope and purport of a law, without having brought the principle of utility directly before you.39
Second, the emphasis Austin places on rationality and intelligence is crucially important. He is suggesting that one of the "necessary" features of law is its rational character insofar as it is conceived to direct human conduct. When men create, interpret and reflect on the law, there is no reason to suppose that all of their reasoning remains intact except their moral reasoning, or that they think or reflect differently than when they reason about their moral duties. Austin's treatment of law certainly does not lend itself to this view. In fact, when Austin discusses the element of rationality in the law his language is strikingly reminiscent of Kant's discussion of the moral law. When Kant speaks of morality, he has in mind the production of moral decisions in accordance with the law which proceeds from practical reason. For morality to even make sense Kant believes that men must be volitionally autonomous human beings who are capable of acting out of respect for the moral law. And to act out of respect for the moral law is to do one's duty.

Now when Austin speaks of law as a general command issued by a rational and intelligent person to other rational and intelligent persons, he is calling attention to the faculty of reason from which the law flows. Apart from this reason he believes there would be no will the law could act upon. This implies, as Kant saw, that law presupposes an autonomy of the
will which can be exercised in accordance with this reason. Indeed, Austin speaks of the duty flowing from commands based on this reason which can incite or restrain the will.

This is not to suggest that Austin's position here resembles Kant's in all respects. But his language is sufficiently similar to Kant's to invite comparison. Perhaps the most significant difference is that Kant claims the categorical imperative declares an action to be necessary without any reference to any purpose or end whatever, while Austin's conception of commands can only be understood in reference to certain ends which promote the common good. But on this point Austin seems to be right, for his argument does not lose sight of what it is that is claimed to be desirable and good. The content of the obligation created by law is accounted for in Austin's analysis by considering the purpose of the law, which, at bottom, is seen to be a corrective of evil.

Thus, what Austin showed was that law flows, in an important sense, from human reason—the same human reason which is the source of positive morality. To suppose, as some people have, that for Austin the rules of law which guide and control men's behavior are simply amoral is ludicrous. It would be a serious mistake, as we have said, to hold that the law must in every case be identical with morality to show the intimate relation between the two. It is no less serious a mistake to
believe that laws have no moral coloring whatever. Although Austin always maintained that a law is a law whether it is good or bad, he never held, or even intimated, that law has no moral characteristics.
FOOTNOTES


2Ibid., p. 599.


4Hart attaches a qualification to this in his "minimal theory of natural law" where he describes an intersection between law and morality. This notion will be treated in a later chapter and it will be argued that Hart does not go far enough and that the relation between law and morals is closer than he indicates.


8But even here it might be noted that to make driving safe or to make the disposition of a person's belongings possible, some rules of the road and of the transfer of goods must exist.
9 See Samuel E. Stumpf, *Morality and the Law* (Nashville: Vanderbilt University Press, 1966) chapter three. Stumpf, standing almost alone among writers in the philosophy of law, argues that Austin did not consistently maintain a theory which demonstrates the separation of law and morals. He believes that Austin is not guilty of all that his critics say about his treatment of law and morals. The position taken in this work, which is considerably influenced by Stumpf, is that not only is Stumpf right concerning his analysis of Austin, but that a similar analysis of Bentham and Hart reveals their versions of legal positivism to be likewise dependent upon moral considerations.

10 *Province*, p. 1.


16 *Province*, pp. 257-258 (emphasis added).


19. Ibid., p. 772.

20. Ibid., pp. 771-772.


22. Ibid., pp. 307-308.

23. Ibid., p. 308.

24. Ibid.


27. For further treatment of this point, see Stumpf, The Morality of Law, pp. 96-98. Stumpf argues, "It is precisely because the commands of the law involve the life of man in its most sensitive and intensely human aspect that men continue to raise the question about the source of law." (p. 97)

28. I wish to make it clear that I am not suggesting that Austin himself is guilty of regarding the matter in this way. On the contrary, I do not think this picture is one Austin intended to convey. Nevertheless, there are passages in Austin which seem to warrant this interpretation and it is this confusion I am trying to clear up. Also, whether he intended this picture or not, he has been taken in this way by a number of
legal scholars and this is justification for dealing with the problem. See, for example, Lon Fuller, Law in the Quest of Itself (Chicago: Foundation Press, 1940) Lecture I; Gustav Radbruch, "Anglo-American Jurisprudence Through Continental Eyes," 158 The Law Quarterly Review (1936); and Edgar Bodenheimer, "Reflections on the Rule of Law," 8 Utah Law Review (1962).

29 Province, p. 13.


31 Ibid.


33 Province, p. 373.

34 Ibid., p. 85.

35 Ibid., p. 133.

36 Ibid., p. 10 (emphasis added).


38 Ibid., p. 59.

39 Ibid.
CHAPTER II

JEREMY BENTHAM AND THE MORALITY OF LAW

The writings of Jeremy Bentham provided the starting point for many of the ideas developed by Austin. In particular, the notion of law as command, the concept of the sovereign as the one to whom the bulk of the population was in the habit of obedience, and the idea of the complete codification of the law were taken over and further developed by Austin. Bentham also insisted upon drawing a sharp distinction between law and morality, and this aspect of his legal philosophy is viewed approvingly by Hart. In spite of the blistering attacks often levelled against his utilitarianism, Bentham is generally regarded as one of the heroes of legal positivism for it was he, they believe, who first attempted to demonstrate the conceptual separation of law and morality. It is appropriate, therefore, to examine Bentham's position in some detail in order to see if it squares with the widely shared belief that he successfully elaborated a concept of law apart from moral considerations. For, if neither Austin nor Bentham completely severed considerations of morality from the proper understanding of law, contemporary legal positivists will have to look elsewhere for support of their fundamental thesis that the
elucidation of law need not involve morality.

It is certainly true that Bentham did not consider law and morals to be identical on coextensive terms. Much of his work was directed against Sir William Blackstone's Commentaries on the Laws of England and the natural law doctrine it contained. Bentham had only contempt for natural law and he wondered just what Blackstone had achieved when he argued that natural law places limits upon what the positive law can control. He dismisses natural law theory by saying:

The various systems that have been formed concerning the standard of right and wrong, may all be reduced to the principle of sympathy and antipathy. One account may serve for them all. They consist all of them in so many contrivances for avoiding the obligation of appealing to any external standard, and for prevailing upon the reader to accept the author's sentiment or opinions as a reason for itself. The phrases different, but the principle the same.¹

Bentham rejects natural law and the confusion it creates on the grounds that it is usually understood in terms of concepts such as conscience, moral sense, common sense, and eternal rules of right.² And he believed that these concepts were bottomed on the false principle of sympathy and antipathy which, in his view, allows anyone to disapprove of what he dislikes and approve of what he likes without assigning any reason other than, "I feel that it is so."
The interesting point here is that a rejection of natural law is often thought to entail the acceptance of legal positivism and the conceptual separation of law and morals. One writer has said that

Bentham's positivistic definition of law should give cause for reflection. . . . For there is no conceivable alternative definition of law which does not introduce an ideological element and thus associates the definition of law with the particular philosophy of the writer. This only obscures a clear perception of the basic legal values underlying any legal system.

This, however, is seriously misleading. In the first place, although Bentham's positivistic definition of law does not allow room for the moral element, his elaboration of that definition makes it clear that he was unable to conceive a fully developed concept of law apart from its moral aims and purposes. In this respect his position is similar to Austin's. In the second place, Bentham's treatment of the concept of law, perhaps more than any other legal philosopher, is indissolubly related to his particular philosophy, utilitarianism. For, by his account the reason and justification for any law is determined exclusively by its utility. Finally, to suggest that only through a positivistic account of the law can basic legal values be perceived is to presuppose that legal values and moral values are different in content. And as we shall try to show, the legal values with which Bentham was concerned were in
large measure the same as the moral values he believed followed from a well defined and conscientiously practiced utilitarianism. To support this we shall turn to an analysis of Bentham's legal theory.

Bentham's definition of law can be best understood by contrasting it with Blackstone's for it was his extreme displeasure with Blackstone's theory that moved him to formulate his own. Blackstone held in his Commentaries that the laws of God are superior in obligation to all other laws, that no human law should be allowed to contradict them, that human or positive laws are not valid if they contradict the Divine Law, and that all valid laws derive their force from the Divine original. In opposition to this, Bentham defined law as a command of a sovereign. A law, he tells us, is

...an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons.

And concerning the sovereign, he says,

...I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person.

By a disposition of habit of obedience, Bentham says he means "...an assemblage of acts of obedience." Finally, "An act
which is the object of a command. . . considered before it is performed, is styled a duty. . . ."8

Obviously, Bentham's definition of law inspired that of Austin. And just as obviously, it lends itself to the interpretation that the sovereign may issue whatever commands he pleases and in whatever fashion he pleases. Undoubtedly, it is this unembellished definition of law that has led people to believe that on Bentham's account law may be properly understood without recourse to morality. But this is to misunderstand Bentham and the nature of his work. For, in rejecting natural law, Bentham was not denying that law and morality are intimately related so much as he was denying that the validity of law can be determined a priori by the "light of reason." His overriding concern in developing a theory of law was to substitute an objective and scientific basis for the establishment of a good legal order in place of the subjective preference of the natural law theorist. The great failing of the natural law philosopher, according to Bentham, was that he tried to deduce an ideal body of legal principles from some rationally ascertained or self-evident first principle which was usually expressed by the vacuous proposition that one must do good and avoid evil.9 Bentham, on the other hand, conceived law as a system of norms created by acts of the human will; it is man made. For him, law is not determined by
reference to any transcendental notions of justice or ultimate truth, but rather by specific acts of human legislation. It is in terms of his theory of legislation that we are best able to assess the extent to which considerations of morality entered into his concept of law.

Bentham's theory of legislation was set forth in a major work, An Introduction to the Principles of Morals and Legislation, which was written as an introduction to a penal code. In this work law and morals are indissolubly united in Bentham's statement of governing principles. Both are grounded in the substructure of concepts which support the all-pervasive principle of utility and thus both are interpreted as having the same end. The central element in Bentham's philosophy is stated at the outset of his work.

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. . . . The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. . . . By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the
same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government. 10

This is the cornerstone of Bentham’s theory of legislation. Since pleasure and pain are paramount in the study of the moralist and legislator, we need to determine the sources from which they flow. According to Bentham, they are four in number: the physical, the political, the moral, and the religious. Each of these is held by Bentham to be a "sanction," by which he means something which tends to make a person recognize that his own greatest happiness coincides with the greatest happiness of others. Thus, sanctions are conceived as providing certain forces (pleasure and pain, reward and punishment) which serve to bring the interest of the individual into harmony with the public interest. When pleasure or pain comes to us from the ordinary course of nature, independent of the agency of any human being (or any superior invisible being), it is said to issue from the physical sanction. But when pleasure or pain comes to us through properly constituted authority in the community, and is administered by a duly accredited person or agency (e.g., a judge), it issues from the political sanction. The political sanction is generally known as the law of the land. The moral sanction refers to reward
or punishment at the hands of the public at large through the pressure of public opinion. This should properly be called the popular sanction. This sanction is effective in making a person seek the approval of his fellow men in order to gain the advantages which result from that approval and avoid the disadvantages which result from their disapproval. The religious sanction has reference to our belief in God and his relation to us both in this life and in the future.\textsuperscript{11}

Next, Bentham tells us "the value of a lot of pleasure or pain" depends upon four things: its intensity, its duration, its certainty or uncertainty, and its propinquity or remoteness. But two other considerations must also be taken into account--its fecundity (the likelihood of its being followed by sensations of the same kind, pleasures by pleasures and pains by pains), and its purity (the likelihood of its not being followed by sensations of the same kind, pleasures by pains or pains by pleasures). And insofar as a collection of individuals is concerned, the extent of the pain or pleasure (the number of persons affected by it) must also be taken into account.\textsuperscript{12}

Now once this is done Bentham believes it is a matter of employing a hedonistic calculus--a summing up of pleasures and pains in any particular case and then balancing the pleasures against the pains and estimating the value accordingly. While
this is the theoretically perfect process, it is not necessary in actual practice to strictly follow it previous to every moral judgment or every legislative or judicial operation. For things have been simplified for us by the fact that we do not live in a world by ourselves, but in a society where the four sources from which pleasure and pain flow are already established and in operation. In such a society there are customs, laws, rules, and institutions which provide guidance based upon a large and varied experience.\textsuperscript{13} Nevertheless, Bentham goes on to catalogue fourteen simple pleasures and twelve simple pains,\textsuperscript{14} and he sets forth thirty-two factors that influence sensibility to pleasure and pain (e.g., health, bodily imperfection, pecuniary circumstances, intellectual powers, etc.).\textsuperscript{15}

Once his doctrine of utility is spelled out, Bentham makes use of it in describing the task of the moralist and the legislator. According to him pain and pleasure are not only guides for moral and legislative or judicial decisions, but they should be used by the legislator to produce the desired behavior in a particular community. For not only are the ends of legislation pleasure and the absence of pain, but the means of achieving these ends are also pleasure and pain, or, in other words, the infliction of pain to insure the greatest happiness of the greatest number. The task of the legislator, therefore, is to make a man realize that his own greatest happiness coincides with the greatest happiness of others. By inflicting pain in the case of
deviations from desired modes of conduct the individual's egoistic inclinations may be made compatible with the good of the greatest number. And for Bentham, law alone can produce the greatest happiness for the greatest number. He says, "The business of government is to promote the happiness of the society by punishing and rewarding." But he emphasizes punishment more than rewarding since this is more exclusively the subject of penal law. By his account offenses are to be classified in accordance with the principle of utility. That is, an act is more or less pernicious according to the pain or pleasure it produces in the community, with things such as intention, motive, and the general disposition of the act taken into account. But since the punishment of an offense involves a pain, it is itself a mischief, and its use is justified only when it excludes some greater evil. Thus, punishment is to be avoided where there is no mischief for it to prevent, or where it cannot be effective, or where it will produce more mischief than it prevents.

This, in broad outline, is the foundation of Bentham's theory of legislation. He offered it as an alternative to Blackstone's theory of natural law. He believed the value of such a view was that it provided an objective basis for formulating rules of human conduct, and that in terms of it bad laws could be easily detected since their utility would be rendered suspicious by the difficulty of finding a place for them in such an arrangement. He substituted pains and pleasures for the
"false principle" of sympathy and antipathy as the chief study of the moralist and legislator; for he was convinced that any reasoning in morals or legislation which cannot be translated into these simple terms is obscure and sophistical, and from which no conclusion can safely be drawn. The objectivity of such a view consists in the fact that if men will reflect they will discover that pain and pleasure determines their behavior and Bentham tells his readers to pin their faith not on him but on their own experience.

Moreover, Bentham thought his account made it possible to draw the line between the province of private ethics and the province of legislation. He argues that according to the principle of utility we understand that

Private ethics teaches how each man may dispose himself to pursue the course most conducive to his own happiness, by means of such motives as offer themselves: the art of legislation... teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conducive to the whole community, by means of motives to be applied by the legislator. 19

Since the direct interference of legislation into human conduct must be by punishment, the general criterion for distinguishing between law and morals is stated by Bentham:

If... there be any... cases in which, although legislation ought not, private ethics does or ought to interfere, these cases will serve to point out the limits between the two arts or branches of science. 20
Thus, with Austin, Bentham never held that law is reducible to the requirements of morality and he always maintained that they are of distinct natures. But in spite of his contempt for natural law and its union of law and morals, he too found it necessary to refer to fundamental moral notions in spelling out the salient features of a system of law. A closer look at certain important passages will make manifest the fact that on Bentham's account the relation between law and morals is more intimate than many of his commentators have believed. For example, many of the concerns of positive morality are also the concerns of positive law. And this similarity of content between morals and the law is not merely an accident but the way things should be, according to Bentham. In an instructive passage Bentham tells us:

Now private ethics has happiness for its end: and legislation can have no other. Private ethics concerns every member; that is, the happiness and the actions of every member of any community that can be proposed: and legislation can concern no more. Thus far, then, private ethics and the art of legislation go hand in hand. The end they have, or ought to have in view, is of the same nature. The persons whose happiness they ought to have in view, as also the persons whose conduct they ought to be occupied in directing, are precisely the same. The very acts they ought to be conversant about, are even in a great measure the same.21

This is an important passage because it shows that in his reflection on the nature of law Bentham found it necessary to
consider the ends of the law. Bentham began his inquiry by asserting the separation of law and morals and by holding that law is simply a command. But he discovered he could not elucidate the concept of "command" apart from a connection with "ends." Now the ends of the law for Bentham had to do with values and the values sought by law are the same values which are hoped to be achieved through private ethics. That is to say, it is the idea of the greatest good for the greatest number which serves as the measure for the ends of both law and morality.

It is instructive to note that in his analysis of the ends of law Bentham went considerably further than other legal positivists. Both Thomas Hobbes and H. L. A. Hart consider order and security of life and limbs as a minimum end to be achieved through law. But Bentham raised the principle of utility, or the greatest good for the greatest number, as the proper end of law and he based this principle on the "...natural constitution of the human frame...." He tells us, "The common end of all law as prescribed by the principle of utility is the promotion of the public good." So for Bentham the function of the law is to promote action which is conformable to the principle of utility. And of such action

...one may always say either that it is one that ought to be done, or at least that it is not one that not to be done. One may also say, that it is right that it should be done...
Thus, while Bentham too considered law to be a command he
did not consider just any command to be law, or at least he did
not consider the concept of command as the complete idea of law,
for he was always mindful of the proper concern over the moral
content of the law where good is determined by the good of the
community. He says that what we hope to achieve through law "... is to increase the efficacy of private ethics, by giving strength
and direction to the influence of the moral sanction."

In fact, Bentham goes so far as to suggest that the limits of the law on
this point seem to be capable of being extended a good deal
further than they have been hitherto. He writes:

In particular, in cases where the person
is in danger, why should it not be made
the duty of every man to save another
from mischief, when it can be done without
prejudicing himself, as well as to abstain
from bringing it on him? This, accordingly,
is the idea pursued in the work.

A woman's head-dress catches fire: water
is at hand: a man, instead of assisting
to quench the fire, looks on, and laughs
at it. A drunken man, falling with his
face downwards into a puddle, is in danger
of suffocation: lifting his head a little
on one side would save him: another man
sees this, and lets him die. A quantity
of gunpowder lies scattered about a room:
a man is going into it with a lighted
chandelier: another, knowing this, lets him
go in without warning. Who is there that
in any of these cases would think punish-
ment misapplied?

Bentham is here indicating the kinds of situations which law,
taking its cue from morality, should include within its ends.
And he is able to embrace this view of the ends of law because by end he says he does not mean "...the eventual end, which is a matter of chance, but the intended end, which is a matter of design."^27

Bentham also makes it clear that while laws originate in the commands of the sovereign these commands must be justified on moral grounds. For example, he tells us that

The good of the community cannot require, that any act should be made an offense, which is not liable, in some way or other, to be detrimental to the community.^28

The notion of the "good of the community" or the "interest of the community" is one which plays an important role in Bentham's understanding of the nature of law. For any theory of law which fails to take this into account in fashioning rules for human conduct is incurably incomplete. Thus, the commands of the sovereign are understood by Bentham to be the necessary means of promoting the good of the community. And by "the community" Bentham rejected the notion of its being an independent and autonomous organism. He says,

The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what? - the sum of the interests of the several members who compose it.^29

It is the analysis of the good of the community that reveals Bentham's concept of law to be particularly tied to moral
considerations. When he discusses the nature of this good, he says:

We have now arrived at the principle object of the Laws: the care of security. This inestimable good is the distinctive mark of civilization: it is entirely the work of the laws. Without law there is no security. 30

The realization of security is not only the fundamental aim of the law, according to Bentham, but it also helps define the principal task of the legislator as that of bringing the individual's conduct in line with this good. For whether the individual is sufficiently enlightened to realize it or not, his own self interest is so intimately tied to security, particularly general security, that the pain he would suffer as a result of a breakdown in security would be far greater than any pleasure he would receive from doing an otherwise pleasurable act. Concerning acts which do not endanger security, the individual is left to suffer the consequences if he wrongly estimates the pain flowing to him from such acts. But as for acts which would endanger security, the pain that would flow naturally from such a breakdown might be so disastrous that neither the individual nor the community would ever recover. Therefore, Bentham believed that the individual must not be allowed to await the pain following a breakdown of security to determine that he did not act in his own self interest in performing the act which caused the breakdown. The legislator should prescribe artificial pains
as the result of acts endangering security in an effort to prevent them, rather than rely upon the individual being sufficiently enlightened to make a correct estimate of the natural pains he would experience after the destruction of security. Bentham realized it might be impossible to enlighten the individual as to the relationship between his contemplated act and security or the pain he would experience if there were no security; however, the legislator could enlighten him as to the artificial pains and make them so certain that the individual could not fail to estimate them while considering the act.

Thus, the obligation for individuals to obey the legislator comes about on Bentham's account through the individual's acting in his own self interest, though it may be that it would not have been in his self interest to act in that manner in the absence of the legislative prescription. To the extent that the individual is unaware that his self interest is consistent with that of the community, Bentham's legislator would prescribe artificial pains to enlighten him or to make his pleasure consistent with that of the community. For without a significant measure of harmony between self interest and community interest security, which under Bentham's theory makes all other goods possible, could not be achieved.

It is obvious that Bentham conceived law to be a specific means of controlling the behavior of individuals in such a way
that the greatest happiness of the greatest number might be the result. The main value of this analysis is that it embodies a teleological or purposeful conception of the nature of law. If law is to be divorced from such a conception legal control must be viewed as simply force and nothing more. But if law should be recognized as a means of social control, and not as an end in itself, then the control it exercises will be governed by the ends it takes to be worth pursuit. And assuredly this is the conception adopted by Bentham. For he recognized that law is the predominant moral means by which human beings may force one another to act in a given way resulting in a common good. This is why he could say

The reason of a Law, in short, is no other than the good produced by the mode of conduct which it enjoins, or (which comes to the same thing) the mischief produced by the mode of conduct which it prohibits.31

Since he held that law and morality are concerned with the same conduct and share the same end and are in fact based upon the same principle, law and morality are in his view much more closely related than the talk of a rigid conceptual separation between the two suggests.
FOOTNOTES


2See note 1, Ibid.


6Ibid., p. 101.


8Ibid., p. 139.


10Ibid., pp. 1-2.
11 Ibid., pp. 24-25.

12 Ibid., pp. 29-32.

13 Ibid.

14 Ibid., pp. 33-34.

15 Ibid., pp. 44-45.

16 Ibid., p. 70.

17 See Ibid., pp. 70-151.

18 Ibid., p. 171.

19 Ibid., p. 323.

20 Ibid., p. 314.

21 Ibid., p. 313.

22 Ibid., p. 4.

23 Limits of Jurisprudence Defined, p. 115.


27 *Limits of Jurisprudence Defined*, p. 113.

28 *Principles of Morals and Legislation*, p. 205.


31 *Fragment on Government*, p. 121, note 1.
CHAPTER III

H. L. A. HART AND THE MORAL FOUNDATION OF LAW

In The Concept of Law H. L. A. Hart claims to have found the key to the science of jurisprudence in the union of primary and secondary rules. In making this claim he is rejecting Austin's similar claim to have located the defining feature of law in the concept of "command" supported by a sanction. But while Hart believes his account of primary and secondary rules to be at the heart of the proper elucidation of the concept of law, he also believes such elucidation is morally neutral in that it does not reveal or presuppose an intimate or necessary connection between law and morality. The purpose of this chapter is to attempt to see if on Hart's own terms the concept of law is free of moral coloring and can properly be elucidated apart from fundamental moral considerations. This is important because if Hart, the most prominent contemporary advocate of legal positivism, in addition to Austin and Bentham, is unable to develop a concept of law apart from important moral considerations, we will have considerably strengthened the case for holding that the relation between law and morality is more intimate than legal positivism would suggest.
The starting point for any theory of law, including Hart's, is the recognition of the fact that where there is law human conduct is in some sense made non-optional or obligatory. Thus, it is important to note that in his criticism of Austin and the earlier legal positivists, Hart rejects the claim that the most salient feature characterizing a legal system and according to which legal obligation is to be explained, lies in the idea of a series of commands generally obeyed and backed by threats. Indeed, he holds that ideas of orders, obedience, habits, and threats cannot alone, or in combination, yield an elucidation of even the most elementary forms of law. The significance of this lies in the fact that according to Hart a coercive order, by itself, is insufficient to either explain or warrant the appellation "system of law."

It follows, therefore, that for Hart the core of a legal system, both in fact and in explanatory power, must be located in something other than a coercive regime based simply upon power. And this "something other" for Hart is the union of primary and secondary rules.

According to Hart's thesis, primary rules require human beings to do or abstain from doing certain actions, whether they wish to or not. They are rules prescribing duties and imposing obligations. Secondary rules are parasitic upon or secondary to primary rules. These rules provide
the mechanism whereby people may, by doing or saying certain things, introduce new primary rules and do away with or modify old ones. Primary rules have to do with actions involving physical movement or changes, whereas secondary rules go further and provide for the creation or variation of duties and obligations. So, while primary rules impose duties and obligations, secondary rules confer powers, either public or private. Thus, for Hart, the criminal law, apart from its provisions for imposing sanctions, consists of primary rules which define certain kinds of conduct to be avoided or done by those to whom they apply, regardless of their wishes or desires. But the legal rules defining the ways in which valid wills or marriages or contracts are made do not require people to act in certain ways whether they wish to or not. Rather, they provide individuals with facilities for realizing their wishes by conferring legal powers upon them to create structures of rights and duties within the coercive framework of the law. And further, it is secondary rules that lie behind the exercise of legislative and judicial powers. Hart argues that it is in the union of these two types of rules that

...there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely 'the key to the science of jurisprudence'.
The reason why Hart accords this union of elements a central place in his legal theory is because of their explanatory power in elucidating the basic concepts that constitute the framework of legal thought. And the position taken here is that Hart has indeed brought to the fore the distinction between two types of rules which are of crucial importance in jurisprudence. Our task is to raise the question whether this distinction, as Hart elaborates it, justifies his firm belief that there is nothing more than an antiseptic intersection between law and morality. In raising this question we might first recall just what distinguishes Hart's form of legal positivism from his predecessors. Austin and Bentham were champions of the "command theory" of law as well as the insistence on the separation of law and morality. Hart emphatically rejects the command theory in terms of which law is conceived to be simply a command backed by sufficient force to make it effective. His reason for disassociating himself from this view is that such a command can be given by a man with a loaded gun and he says, "Law surely is not the gunman situation writ large, and a legal order is surely not to be ... identified with compulsion." But while Hart rejects this feature of legal positivism he supports the view that there is a rigid separation between law and morality. His conclusion is that the foundation of a legal system is not
coercive power, but certain "fundamental accepted rules specifying the essential lawmaking procedures." It follows, therefore, that if Hart is to make his case he must show that these "fundamental accepted rules," which replace coercive power as the foundation of a legal system, bear no necessary connection to morality.

Hart makes an important distinction between being "obliged" and having an "obligation." A person may be said to be obliged to do something if he is ordered to do something by another person and if he believes the person issuing the order has both the power and the determination to visit unpleasant consequences upon him if he fails to perform has ordered. Thus, on Hart's analogy, the person facing the barrel of a gun and ordered to pass over his money or lose his life may be said to be obliged to surrender his purse. The salient features characterizing this situation are the power and determination of the bandit coupled with the belief on the part of the victim that the gunman means what he says and the desire to continue living. Thus, while it is true in this case that the victim was obliged to relinquish his money, it would be inaccurate to say he had a duty or an obligation to do so. Accordingly, Hart looks for something else to provide an understanding of the idea of obligation which characterizes much of peoples' conduct under law.
It is important to note that Hart holds that before we can understand the concept of obligation in its legal form it is necessary to understand the general idea of obligation and this requires the analysis of a social situation which, unlike the gunman case, includes the existence of social rules. There are two facts according to Hart which contribute to the meaning of the statement that a person has an obligation. He says:

First, the existence of such rules, making certain types of behavior a standard, is the normal, though unstated, background or proper context for such a statement; and secondly, the distinctive function of such a statement is to apply such a general rule to a particular case by calling attention to the fact that his case falls under it. 10

An important corollary to this is the notion that there is involved in the existence of a social rule a combination of regular conduct with a distinctive attitude toward that conduct as a standard. In the light of these considerations, Hart is able to state what he believes to be the three main characteristics of obligation. He says:

17 What is important is that the insistence on importance or seriousness of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations. . . . 12 The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of
it. . . . \[37\] . . . it is generally recognized that the conduct required by these rules may, while benefitting others, conflict with what the person who owes the duty may wish to do. Hence, obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist. II

For Hart, then, rules may be said to impose obligations when they are such that the general demand for conformity is insistent and when the social pressures visited upon those who deviate, or threaten to deviate, is great. On this account rules of obligation define certain standards, deviations from which are regarded as faults and which are generally accepted as good reasons for applying criticism. It is not necessary, however, that everybody should regard the rules and the behavior they enjoin as right standards for human conduct. How many of a group must regard certain modes of behavior as a standard of criticism, and for how long, before it can be said that the group shares a practice which gives rise to social rules are matters it is impossible to answer precisely. But marginal cases need not concern us any more than the question as to how many years a man must live before he is old, or how many accomplishments he must achieve before he is successful. Hart tells us we need only remember
that

...the statement that a group has a certain rule is compatible with the existence of a minority who not only break the rule but refuse to look upon it as a standard for themselves or others. 12

Thus, for Hart, the notion of primary rules of obligation is an indispensable conceptual element in understanding the foundation of a system of law, especially the criminal law. Accordingly, it is important to examine this concept in more detail in order to determine whether the position of moral neutrality which he takes in regard to the concept of law is tenable. The first thing that comes to mind is his substitution of primary rules of obligation for coercion as the cornerstone of a system of law. In locating the obligatory character of the conduct required or prohibited by law in certain widely accepted social rules instead of commands supported by force, Hart is tacitly recognizing an important distinction between tyranny and the legitimate exercise of authority. That is to say, not only is he rejecting arbitrary and capricious orders made effective through the imposition of sanctions as a defining feature of law, he is also rejecting the concept of coercion, by itself, as an adequate foundation of law, either in fact or in explanatory power. And this implies that both the content of the law and the
procedures for its enforcement are in some sense governed by considerations which are right and proper. This is not to deny what has been argued in the preceding sections that law is not reducible to morality and that there is no contradiction in the concept of a morally iniquitous law. But it is to argue that Hart's emphatic rejection of coercion as the basis of a legal system serves to make clearer the ways in which the law, in its inception, is freighted with morality.

For example, we noted earlier that Hart holds that before we can understand the notion of legal obligation it is necessary to first have an understanding of the general idea of obligation as grounded in social rules. The important features which comprise such rules of obligation include certain kinds of conduct which are regarded as a standard and which make possible the proper context for the ascription of obligations. Thus, obligation statements at this level of human intercourse, depend for their intelligibility on the existence of regular modes of conduct shared by most of the people in the group along with certain distinctive attitudes toward that conduct as a standard in terms of which people may be judged and criticized. This is important because it is in terms of regarding deviations from such conduct as grounds for criticism and blame that we are able to distinguish social rules imposing obligations from social habits. Social
habits are those forms of behavior generally followed by the majority of the people in a certain group, such as going to the park on Sunday, but deviations from which are not regarded as serious matters and do not warrant the pressure of criticism and the demand for conformity. Moreover, where rules imposing obligations are concerned, not only are deviations from the standard criticized, but such deviations are taken as good reasons for the application of criticism and censure. In this sense, the failure to comply with standard forms of behavior is considered justification for holding a person at fault or to blame for his conduct. Thus, not only must social rules imposing obligations describe modes of behavior generally shared by the majority of the people, but they must prescribe behavior which is thought to be "right" and "proper" by the majority. And this makes possible the normative vocabulary of "ought," "must," "should," "duty," etc. in connection with primary rules of obligation. Against this background Hart is able to conceive primary rules as imposing obligations because of the seriousness of the social pressure behind them and because they are, as he says, thought to be necessary to the maintenance of social life and highly desired features of it. That the conduct required by such rules may, while making possible the necessary conditions for harmonious living and the promotion of the
general good, conflict with what the person owing the duty wishes, is one of the facts of the moral life.

It is now time to raise the question as to what the basic presuppositions of such a view are and to consider what implications they have for the question at hand, namely, are they consistent with a morally neutral account of the concept of law. In fairness it must be said that Hart allows that if humans are to live in close proximity to each other the primary rules of obligation must include some form of restriction on the free use of violence, theft, and deception. And insofar as primary rules of obligation are effective in achieving this, he grants there is a necessary intersection between law and morality. But the position taken here is that the social practice giving rise to primary rules of obligation, which in an important sense constitutes the embryo of any legal system, reveals the law to rest on a moral foundation of larger dimensions than Hart is willing to concede.

The first presupposition in Hart's analysis is that human beings are creatures with certain wants, needs, desires, aspirations, etc., with the corollary that the satisfaction of some of these at least are goods to be sought or values to be achieved. It is only on these grounds that the maintenance of social life is important and that there are features of it
which are "highly prized." Surely rational beings possessing such wants and needs desire more than merely protection from bodily harm and those things necessary simply for the continuation of life. If the obligations and duties resulting from primary rules required nothing more than preservation of life and limb and the absence of grosser forms of deception, they would be compatible with a way of life in which personal security was insured but hardly worth having. Restrictions on the free use of violence and theft may be the necessary minimum for the continuation of life on the lowest level of human existence, but they are not sufficient for the achievement of a social order, if by that we mean something more than sheer survival. And unquestionably Hart has more than this in mind when he analyzes the complex structure of duties and obligations which are said to follow from primary rules. It is the recognition that humans have important wants and needs in terms of which they can agree upon certain "goods" and "values" which make particular forms of conduct a standard to be supported by serious social pressure, including criticism and censure in the case of real or threatened deviations. The important point here is not just that there are goods about which most people can agree, but that there are right ways of attaining them.  

Now all this is implicit but unstated in Hart's
conception of the primary rules of obligation. It is only because social life and the advantages it provides are thought to be worth having that men seek to achieve it in the first place. But the obligations and duties imposed by primary rules indicate that they may not be sought in just any way or secured by just any means; rather, they must be rightly achieved in accordance with the rules and requirements of the social practice in which men, as rational beings, can be responsibly engaged. This is to call attention to the fact that while the conduct required by social rules may be beneficial to others, it may, nevertheless, conflict with what particular persons wish to do. And this is why the behavior required by these rules is thought of in terms of obligation instead of incentive. For to be under an obligation is to be bound or morally constrained to do not just what we should prefer doing, but what as thus bound we must do. And Hart recognizes this for he says concerning the primary rules of obligation that they "... are thought of as characteristically involving sacrifice or renunciation, and there is the standing possibility of conflict between obligation or duty and interest..."¹⁶

At this point in our analysis two things are clear. In the first place, there are primary rules of obligation on Hart's account only because men possess certain attitudes and
wants which make some things and states of affairs worth having, i.e., goods or values to be achieved. In the second place, it is only when persons recognize that in acquiring these goods they are under an obligation to conduct themselves in certain ways and to respect similar pursuits on the part of others that they can be rightly achieved. And these considerations bring to light another presupposition central to Hart's thesis, the notion of a moral community. In other words, there can be primary rules of obligation defining certain modes of conduct as a standard to be followed only if there is a background of practices on which there is general agreement in the community in question. Hart admits this for he regards one of the conditions necessary for the existence of these obligations to be "This attitude of shared acceptance of rules..."17 And it is in large measure this shared acceptance of rules and values that defines a moral community. Only within such a community can the appeal to reasons be made and criticism and social pressure efficaciously applied. There is no doubt that Hart has such a community in mind for he speaks of deviations from generally accepted standards of conduct as "good reasons" for applying criticism,18 and he regards the use of primary rules of obligation "...as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment."19
The presuppositions underlying Hart's account of the primary rules of obligation serve to bring into sharper focus the extent to which law, grounded in large measure upon their acceptance by the majority of the people, is based upon a moral foundation. By calling attention to these presuppositions it is easy to see that Hart's development of the concept of law, in its inception, makes tacit use of important moral considerations without which his theory would be neither persuasive nor adequate. For what Hart has done is to show how the shared attitudes and wants on the part of a group of people defines a common good and makes certain things or states of affairs worth having. Because such a group exhibits at least a limited agreement in judgments and practice there are certain types of behavior which come to be regarded as standard if the things considered valuable are to be achieved. Without a certain amount of agreement in behavior and without general acceptance of certain values there could be no common good and the use of normative language would not be possible. But because there is this agreement in judgments there are social rules in accordance with which people speak of "right" and "wrong" conduct, and of "duties" and "responsibilities" and "obligations." And once this happens the group has become a moral community and its members are related to each other in distinctive ways. Arthur Murphy describes this condition
as

...that minimum of practical understanding required for membership in any community in which 'right' can have a moral cogency for action, in which the requirements of a man's moral situation are recognized and used as grounds for warrantable claims that he is bound, as a brother...or a citizen, to honor his conduct."20"

At this point in our discussion we should try to further clarify the nature of the moral foundation of law by appealing to yet another important distinction. Obviously, the behavior required by the primary rules of obligation is that minimum without which an ordered society is impossible, or without which the specific goals of an ordered society cannot be achieved. The moral requirements demanded by these social rules do not exhaust the wider and richer conceptions of human perfection which are also considered under the general rubric of "morality." Accordingly, we may distinguish between what might be called the "morality of obligation" and the "morality of perfection."21 The morality of perfection has to do with the good life, with the full realization of those excellences which the human spirit is capable of achieving. This morality presents optimal inducements for the attainment of those ideals and aspirations which people sometimes exhibit, whereas the morality of obligation presents requirements to be met if there is to be social order at all.
This distinction is reflected in our use of moral language for when men fail to realize their fullest capabilities or achieve those excellences of character thought desirable according to some standard, they are condemned for failure, not for dereliction to duty; for shortcoming, not for wrongdoing. Likewise, when they do succeed they are praised and their conduct is judged to be morally meritorious. But according to the morality of obligation men are not condemned or blamed for failing to embrace opportunities for the full development of their moral character, rather, they are condemned for failing to observe the basic requirements of social living. An illuminating model for understanding the distinction between these two moralities is provided by Lon Fuller. He says, rewording an example borrowed from Adam Smith:

The morality of duty may be compared to the rules of grammar; the morality of aspiration to the rules which critics lay down for the attainment of what is sublime and elegant in composition. The rules of grammar prescribe what is requisite to preserve language as an instrument of communication, just as the rules of a morality of duty prescribe what is necessary for social living. Like the principles of a morality of aspiration, the principles of good writing are loose, vague, and indeterminate, and present us with a general idea of the perfection we ought to aim at, rather than afford us any certain and infallible directions of acquiring it. 22
Now, Hart's primary rules have to do with the morality of obligation or duty, rather than the morality of perfection or aspiration, for they define the conditions and modes of behavior necessary for commodities and social living. But because they are social rules operative at the lowest level of the moral scale, they are not on that account the less important. In fact, what Hart has done is to show more precisely than his predecessors how the origin of law is infused with morality. That is, Hart and the legal positivists are right when they deny that law is necessarily infused with what has here been called the morality of perfection. For there is no way the law can compel a man to live up to the excellences of which he is capable. And even if it could, there would be the constant danger that the oppressive measures of imposed obligation, at this level on the moral scale, might stifle experimentation and creativity. But what the law can do, based upon the primary rules of obligation identified by Hart, is to exclude from human affairs the grosser and more obvious manifestations of chance and irrationality which make the achievement of social life impossible. Primary rules of obligation providing the underpinning of a system of law create the conditions essential for a rational and meaningful human existence. Thus, they are the necessary, but not the sufficient, conditions for the
attainment of that end.

When looked at in this way we can see that the moral obligations and duties which give rise to legal systems do not define optional excellences with which only special persons need be concerned; rather, they specify that minimum of moral behavior which is a requirement for all who share in the life of the society. Paraphrasing Zeus, we might say life under law cannot exist if only a few share in the virtues as in the arts. But what is important here, and what is presupposed in Hart's analysis, is that the conduct prescribed by primary rules of obligation is not an unwarranted imposition upon persons who might, without this imposition, achieve their own proper goal in some other and easier way. Primary rules of obligation are requirements for this achievement itself and that is why the conduct they enjoin is considered to be right and is taken as a standard of criticism. What Hart has done is to call attention to moral obligations which are so basic that without their acceptance social life would not be possible. As such, they are the minimal but necessary conditions for that mutual confidence and respect in terms of which men can live together harmoniously, and in a way in which normative distinctions between right and wrong can be maintained. While the moral foundation of law must be conceived according to the morality of obligation and is in
this sense minimal, it is nevertheless an indispensable prerequisite for the attainment of higher moral values. As Murphy expresses it,

    Men do indeed come to hunger and thirst after righteousness, but if they did not hunger and thirst after other things, food, shelter, security and affection, for example, which can be reliably attained, on humanly liveable terms, only on the condition that they deal righteously with each other in the pursuit and enjoyment of them, righteousness would have no content and its dictates no normative cogency.23

Thus far in our analysis we have been looking at the implications primary rules of obligation have as the cornerstone of a legal system. It would be helpful to consider now how these rules are incorporated into a system of law. Hart imagines a society without any courts or legislatures or officials where the only form of social control is the general attitude of the group toward its own standard modes of behavior in terms of which he has characterized rules of obligation. Now in such a society two conditions must be satisfied. First, there must be the restrictions on violence, theft, and deception mentioned earlier. Second, while not everyone in this society must regard the conduct prescribed by the social rules as right or morally binding, they cannot constitute more than a minority if so loosely organized a society of persons is to endure. In other words, according
to Hart it must be the case that in a society governed only by primary rules of obligation the majority of the people must share the "internal point of view" with regard to the rules. That is, the majority of the people must be concerned with the rules as members of the group which does accept them and which uses them as guides to conduct. This is in contrast with those who are concerned with the rules from the "external point of view" in the sense that they do not accept them as prescribing right and proper conduct and who observe them only out of fear of the social pressure brought to bear in the case of deviation. This is important for it calls attention to the fact that in a simple society existing under primary rules of obligation what is necessary is shared acceptance of attitudes to certain forms of conduct as a common standard, manifested in terms of criticism and demands for conformity. Moreover, the internal point of view acknowledges that such criticism and demands are justified and this leads to the expression of primary rules in the normative vocabulary consisting of "ought," "should," "right," and "wrong." So the social order based upon primary rules is a moral order supported and held together by moral sanctions.

Hart recognizes that it is only in a small and closely knit community that such a social order is possible. In larger and more complex societies this simple form of social
control proves to be inadequate and requires further supplementation. Hart has identified three main defects in a society consisting only of primary rules of obligation. First, in all but the smallest societies the rules by which the group lives will not form a system but will simply present a set of standards with no identifying features except that they are the rules by which the group lives. Thus, if doubts arise concerning what the rules are or their nature and scope, there will be no procedure for resolving this doubt. This defect in a social order based upon primary rules Hart calls its "uncertainty." Second, there is the defect of the "static" character of the rules. Hart says that the only mode of change in the rules known to such a society will be the slow process of growth by which modes of conduct once thought optional become first habitual or usual and then obligatory, and the reverse process of decay when deviations once harshly dealt with are first tolerated and then pass unnoticed. Thus, such a simple society has no facility for deliberately changing rules to meet new circumstances, either by eliminating old rules or by introducing new ones. Third, disputes as to whether an admitted rule has been violated or not will always occur, and may continue indefinitely if there is no agency designed to authoritatively decide the matter. This defect Hart calls the "inefficiency"
of the diffuse social pressure by which the rules are maintained.

Now, Hart considers the remedy for each of these defects in a simple society based upon primary rules of obligation to lie in supplementing them with secondary rules which are rules of a different kind. While primary rules have to do with the action that individuals must or must not do, Hart holds that secondary rules are all concerned with the primary rules themselves. He says, "They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." Accordingly, the simplest form of remedy for the uncertainty of the social order based upon primary rules is the introduction of what Hart calls a "rule of recognition." The rule of recognition specifies certain features, possession of which by a suggested rule, is taken to be conclusive evidence that it is a rule of the group and is to be supported by the social pressure it exerts. Hart tells us concerning the rule of recognition that

...what is crucial is the acknowledgement of reference to the writing or inscription as authoritative, i.e., as the proper way of disposing of doubts as to the existence of a rule.

By means of this criterion the primary rules of obligation are no longer a diffused and unconnected set but are unified. The
remedy for the static nature of the regime of primary rules is
the introduction of what Hart calls "rules of change."

The simplest form of such a rule is
that which empowers an individual or
a body of persons to introduce new
primary rules for the conduct of the
life of the group, or of some classes
within it, and to eliminate old rules. 28

And finally, the remedy for the inefficiency of the diffused
social pressure in a simple society of primary rules is con-
ceived by Hart to consist

...of secondary rules empowering
individuals to make authoritative
determinations of the question whether,
on a particular occasion, a primary
rule has been broken. 29

Now, Hart believes that the introduction of the remedy
for each defect found in a regime of primary rules may be
considered a step from the pre-legal into the legal world. And
he holds that "certainly all three remedies together are enough
to convert the regime of primary rules into what is indisputably
a legal system." 30 Further, he says,

If we stand back and consider the
structure which has resulted from
the combination of primary rules of
obligation with the secondary rules
of recognition, change and adjudica-
tion, it is plain that we have here
not only the heart of a legal system,
but a most powerful tool for the
analysis of much that has puzzled
both the jurist and the political
theorist. 31
If we once again raise the question whether there is a necessary or only a contingent and intermittent relation between law and morality the answer seems to be that on Hart's own terms the positive legal order is not autonomous, and the regime of law is indeed founded upon morality. The simple society existing under primary rules of obligation as the only means of social control is, to the extent we have indicated, a community held together by moral bonds. And it is because of the problems Hart referred to that such a society takes the necessary steps to convert it into a legal society. The reason for taking these steps is to insure a moral stability and cohesion which in any large society is impossible without some means of formal control. Hence, the legal order, as Hart's analysis makes plain, is the direct result of the desire to make the moral order more effective by officially defining the rules by which the group lives and by providing the appropriate means of support.

Secondary rules, then, are those fundamental rules that furnish the framework within which the making of law takes place. But even secondary rules, especially when they are first introduced, are more like rules of morality than rules of law. This is because the authority and efficacy which they possess is derived from a widespread acceptance on the part of the community in question. And, as we have already seen, this
general acceptance is founded on the conviction that they are necessary for an ordered society in which rational and meaningful human co-existence is possible. The rule of recognition, for example, is not a law in the sense of a legal pronouncement; rather, its function is to determine when a pronouncement is in fact legal. But in the ordinary working of the law, as exercised daily in the activities of courts, the rule of recognition is usually treated on a par with any other legal rule. What Hart has succeeded in doing in his idea of the union of primary and secondary rules is to show that the authority to make law must be supported by the moral attitudes that accord it the legitimacy it claims. And to recognize this is to admit that the relation between law and morality is more intimate than the phrase "contingent intersection" suggests.

It is important to keep in mind that Hart is not claiming that where there is a legal order there first was a regime of primary rules which, as a matter of historical fact, became translated into legal rules. The union of primary and secondary rules is a conceptual device in terms of which Hart tries to elucidate the concept of law by taking cognizance of salient features which characterize a system of law. In this respect his notion of the union of primary and secondary rules is much like Hobbes' notion of the state of nature in which each man
was at war with every other man. It is the explanatory power of these two notions of rules that is of importance in elucidating the concept of law, not their literal historical and chronological manifestation. And if our understanding and treatment of Hart's position has been fair, it seems clearly the case that he has been able to develop a concept of law only by appealing to important moral considerations.

It is in the light of the union of primary and secondary rules that Hart believes he is able to state the necessary and sufficient conditions for the existence of a legal system. He says:

On the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials. The first condition is the only one which private citizens need satisfy: they may obey each 'for his part only' and from any motive whatever . . . . The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behavior and appraise critically their own and each other's deviations as lapses. \(^{33}\)

But this is misleading and does not square with his account of the primary rules of obligation. Here Hart is saying that the rules of behavior which are recognized as valid
according to the rules of recognition may be obeyed from any motive whatever. But this is to forget that these rules of behavior originated in the first place because they were thought to be necessary for the achievement of social life and highly prized features of it. They define modes of conduct which are taken as standard and which are supported by serious social pressure. They are characteristically expressed through the normative vocabulary of "duty," "ought," "must," "right," etc., and deviations are met with criticism and blame. And they are possible only because of their "shared acceptance" on the part of the majority of the people representing the internal point of view, which, we may recall, means they are used as guides to right and proper conduct. Hart says explicitly that those who reject the rules cannot be more than a minority "...for otherwise those who reject the rules would have too little social pressure to fear."34 So clearly, in his simple regime of primary rules it is decidedly not the case that persons may conform to the rules out of any motive whatever; instead, the majority must conform to the rules because they are thought to be right and necessary. Or perhaps a better way of putting it would be that in this simple society the majority conform to certain modes of behavior which are thought to be right and necessary and in terms of this conformity the rules are themselves formulated.
If it should be objected that Hart is here not talking about the simple regime of primary rules but about a legal system instead, we need only reply that it was because of the uncertainty concerning what the rules are and their precise scope that the rule of recognition was introduced. This step from the pre-legal to the legal world, as he calls it, is taken, by his own account, as a means of resolving this uncertainty and of stabilizing and unifying the moral order. The rule of recognition is designed to supplement primary rules of obligation by making them more effective. So if Hart's model for understanding the essential features of a legal system is to be taken seriously it cannot be the case, at least in the beginning, that private citizens may obey from any motive whatever. If this were not so, Hart's model would be compatible with a system based upon coercion where people obeyed out of fear, and he has explicitly rejected coercion as a means of explaining the obligatory nature of law. It is, therefore, difficult to see how Hart can, without contradiction, move from holding the origin of a legal system is to be conceived in terms of primary rules imposing obligations and duties which are accepted by the majority, and secondary rules which are certain "fundamental accepted rules specifying the essential law making procedures," to holding that persons may
obey out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations.\textsuperscript{35}

Hart does allow, however, that the officials charged with executing a system of law must consider themselves bound by common public standards of official behavior. That there are proper ways to make and adjudicate law which officials are under a duty to respect serves to call further attention to the fact that law cannot be built upon law. For, in having rejected coercion as the defining feature of law, Hart has helped to show how the authority to make law must be supported by the moral attitudes of the community, and in terms of which that authority is distinguished from tyranny. This is the morality which makes law possible. Concerning the rule of recognition, for example, Hart says

\textit{\ldots if it is to exist at all, it must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards which are essentially common or public.}\textsuperscript{36}

If we add to this by pointing out other duties of officials,
for example, the duty of the executive to support judicial decisions, or the duty of the legislature to operate within established constitutional limitations, or the duty of judges to follow precedent and to support the rulings of courts of superior jurisdiction, we have further evidence that law cannot be sharply distinguished from morality. For these are important duties which must be observed if law, distinguished from regimes of coercion and the arbitrary exercise of power, is to even be possible. These duties, binding the officials charged with executing the law, are both legal and moral. As such, they presuppose the acceptance of a wider system of moral ideas than Hart's analysis recognizes.\textsuperscript{37}

A final word needs to be said concerning Hart's thesis about the "minimum content of natural law." Hart admits that if we accept the simple fact that most men most of the time wish to survive, we are led to appreciate the point that there are some natural laws. Given survival as an aim, morality and law, as a matter of fact, must have a certain content. For without such a content, law and morality could not forward the minimum purpose of survival. Accordingly, Hart says,

\begin{quote}
\ldots there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control.\textsuperscript{38}
\end{quote}
Thus, these universally recognized principles of conduct having their basis in fundamental truths concerning human beings are considered by Hart to be the "minimum content of Natural Law."

In this sense Hart's thesis is very much like Hobbes' theory of natural law for he makes the minimum number of assumptions about human nature and its purpose. But if we examine his thesis in more detail we find that these requirements, minimal though they are, reveal the very important way in which law derives its authority from morality. For example, one of the facts of human nature Hart points to is that of man's vulnerability. Because of this vulnerability among the most important rules necessary for social life are those that restrict the use of violence in killing or inflicting bodily harm. This ever-present possibility of injury provides the most obvious basis for both law and morality. For if by nature men were perfectly secure and had nothing to fear, the primary reason for law and morality would not exist. It is the precariousness of human existence that serves as the first link between human nature, morality and law, for both morality and law are designed to overcome this permanent fact of vulnerability.

Another fact of human nature mentioned by Hart is the approximate equality of men which he says, more than any other,
makes obvious the necessity for a system of mutual forbearance and compromise which is the basis of both legal and moral obligation. It is this equality that renders everyone vulnerable. Natural equality and vulnerability, then, become one of the reasons for morality and law for they attempt to overcome the threat of harm by imposing rules of behavior and a system of restraints. Hobbes, whose theory at this point is closely paralleled by Hart, said "...we can neither expect from others, nor promise to ourselves the least security." Hence, to achieve this security morality and law are necessary.

A third feature of human nature considered by Hart is that of limited resources. Since humans need food, clothes and shelter, and since these do not exist in unlimited abundance, he holds that some minimal form of the institution of property and the distinctive rule which requires respect for it is indispensable. Both morality and law help achieve this end for they seek to protect the mechanism of survival from disruption by invasion from others. The important point here is that moral rules and the legal regime come into being in order to stabilize this struggle for survival which the scarcity of things makes necessary. Otherwise, as Hobbes saw, given the fact of limited resources "...it follows that the strongest must have it." Now the significance of these considerations lies in
the implications they have for understanding the relation between law and morality. And these implications can best be seen by noting the assumptions which underlie Hart's account of human nature. The first assumption is that the legal order is comprised of rational and intelligent human beings. If we assume that there was a time when there was no legal order, as Hart did in his conception of the simple regime of primary rules, we must also assume that men in that society possessed the same natural capacities they exhibit in the legal order. If this were not the case we would have to explain how human nature became transformed from a non-rational to a rational condition. For only rational beings are capable of understanding rules prescribing behavior, and further, only rational beings can understand the value of creating a legal order in the first place. The second assumption in Hart's account is that man is capable, by nature, of making fundamental moral distinctions. That is, man is able to anticipate and evaluate certain dangers which threaten his well-being and as a result he devises measures for protecting himself. It is partially in recognizing evils to be avoided that goods to be achieved are defined. So on the basis of these two assumptions we can say that basic rules of law exist as rules of morality before the legal order is instituted.

Our concern in this whole chapter has been not simply
to designate the proximate origin of rules of law but rather
to account for their origin as rules. And on Hart's account
men have by nature the rational capacity to derive from human
nature certain rules for human behavior, and these rules are
the primary forms of the rules of law. So the major difference
between the simple regime of primary rules and the legal order
is that in the former laws are unwritten and each person is
free to interpret them as he chooses, whereas in the latter
there are formal procedures for promulgating laws and render-
ing interpretations and decisions. Thus, the legal order does
not begin simply with the fact of law, as though law had no
prior conditions and causes. The preconditions of law are
rational human beings, knowledge of basic "natural laws," and
some form of consent authorizing the legal order.

The most important aspect of Hart's theory, if our
analysis has been correct, is that he is unable to describe
the origin of the legal order without appealing to fundamental
moral considerations. For if we are right the function of law
is not to create morality or law as though these did not exist
before the creation of the legal order; rather, the positive
law comes into being through the moral law which enjoins men
to seek peace, to enter into agreements, to keep promises and
contracts, and to yield certain freedoms for the sake of
achieving a more stable and tolerable human existence. The
notion of a society existing under primary rules of obligation prior to the legal order, whether taken as fiction or fact, is not the crucial feature of Hart's theory; the important point is that there is, prior to a system of law, a moral order and the purpose of the law is to implement it. Thus, the legal order is not autonomous; its reason for existing can be found by looking at the moral convictions and values which give rise to it. Or, as Hobbes puts it, "... the city was not instituted for its own, but for the subject's sake. ..." 42 What is clear from Hart's development of the concept of law is that he was never able to divorce it from morality. We cannot, therefore, take literally his claim that a legal system need not include, tacitly or explicitly, a reference to morality or justice.
FOOTNOTES


2Ibid., p. 78.

3Ibid., p. 79.

4Ibid., p. 27.

5Ibid.

6Ibid., p. 31. It must be noted that Hart recognizes that there are important differences which obtain among secondary rules, such as those specifying proper procedures for making wills or contracts and those conferring and defining the proper exercise of legislative authority. It might be that secondary rules have nothing in common as a class except that they are non-duty imposing rules. Hart concedes that a "...full detailed taxonomy of the varieties of law...still remains to be accomplished" (p. 32). He further acknowledges that his categories of "duty-imposing" and "power-conferring" rules are "very rough" (p. 32). But the importance of this distinction in his analysis is to call attention to the radical difference between the rules of criminal law which resemble, in some respects, orders backed by threats, and other rules essential for understanding the nature of law which are completely distorted if understood in this way. It was partly the failure to make this broad distinction that led some of his predecessors to identify law with coercion.


9 *The Concept of Law*, pp. 80-81.


13 For Hart's discussion on the differences between social rules and social habits, see *The Concept of Law*, pp. 54-55.


15 The basic idea developed here that man's attitudes, wants, and desires define certain goods and values for which there are right and proper means of achievement is treated in great detail in Arthur E. Murphy's *The Theory of Practical Reason* (LaSalle, Illinois: Open Court, 1965) especially chapters 4 and 5. Many of the ideas presented in this section are the product of reading Murphy.

16 *The Concept of Law*, p. 85.


The Theory of Practical Reason, p. 111.

This distinction is not new, but the implications it has for understanding the relations between law and morality have not been sufficiently recognized. By applying the distinction along the lines developed by Fuller to Hart's analysis of primary rules of obligation, we achieve a clearer understanding of the way law is founded on morality. For further discussion of this distinction, see Lon L. Fuller, The Morality of Law (New Haven: Yale University Press, 1964) Chapter One; Richard B. Brandt, Ethical Theory (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1959) pp. 356-358; also The Concept of Law, pp. 176-180.

The Morality of Law, p. 6.

The Theory of Practical Reason, p. 97.

For a detailed account of Hart's "internal, external" distinction, see The Concept of Law, pp. 86-88.

Ibid., pp. 90-91

Ibid., p. 92.

Ibid.

Ibid., p. 93.

Ibid., p. 94.

Ibid., p. 90.
31 Ibid., p. 95.

32 The point that the legal framework and apparatus for making and determining law presupposes a basis in morality has been made by Fuller. See Lon L. Fuller, "Positivism and Fidelity to Law--a Reply to Professor Hart," 71 Harvard Law Review (1958) p. 639. But since Fuller's point was made in a slightly different context, and three years before the publication of The Concept of Law, in which the distinction between primary and secondary rules was introduced, it is worthwhile to apply it to Hart's thesis about secondary rules.

33 The Concept of Law, p. 113.

34 Ibid., p. 89.

35 Ibid., p. 112.

36 Ibid.

37 See Marcus G. Singer, "Hart's Concept of Law," The Journal of Philosophy, April, 1963, p. 208. Singer suggests, but does not develop, the position taken in this chapter, namely, that Hart's concept of law is more closely allied with morality than he admits. For example, Singer says concerning the union of primary and secondary rules which are supposed to distinguish law from other forms of social control that it "... surely does not distinguish law from morality" (p. 202). And he takes this to be a basic unclarity in the primary thesis of the book. Later he offers his opinion "... that the claim that the question whether a legal system exists never involves any issues of morality or any judgments of value... requires more argument than Hart has given it" (p. 214). Further, he raises the question whether Hart can consistently maintain the "... morally neutral account of the concept of law and... the external point of view he adopts throughout..." (p. 218).
38 The Concept of Law, p. 188.

39 For a list of the assumptions Hart makes about human nature, see The Concept of Law, pp. 190-192.


41 Ibid., p. 26.

42 Ibid., p. 142.
CHAPTER IV

LEGAL POSITIVISM AND THE JUDICIAL PROCESS

So far we have been arguing that law is not autonomous and that the reason for the existence of a legal system must be found by looking at the moral convictions and values which give rise to it and which serve as its foundation. It is now time to raise the question whether the judicial process, whereby laws are interpreted and applied, reveals the relation between law and morality to be more intimate than legal positivists have suggested. In other words, does the claim that judges frequently make the law and in so doing inevitably inject their own or society's moral standards into their decisions serve to reveal a union between law and morals and make clear the impossibility of their rigid and analytic separation?

Roscoe Pound has described the kind of law sought after by the legal positivists (or analytical jurists as they are sometimes called) in terms of "...a conception of a body of logically interdependent legal precepts commanded or authoritatively recognized by the state or derivable by logical processes from precepts so commanded or so recognized."1 He also tells us that the analytical jurists regard "...the science of law as wholly self sufficient"2 in that they assume the
existence of a

. . . logically consistent and logically
interdependent system of legal precepts,
completely covering the whole field of
human relations, so far as they could
become the subject of controversy. . . . 3

Thus, according to Pound, the essence of the positivist
approach to law consists in a belief in the autonomous and
self-contained character of legal science, coupled with the
conviction that it is possible to decide legal issues coming
before the courts almost entirely by the logical processes of
deductive reasoning from given principles and established
norms of the legal order. We need to inquire now whether this
characterization accurately describes the legal positivists
we are considering and determine whether, on their own terms,
the judicial process is free of moral considerations.

Austin's whole life-work may be regarded as a valiant
endeavor to establish an incisive separation between the
realms of law and morality. 4 Late in life he wrote:

With the goodness or badness of laws,
as tried by the test of utility (or
by any of the various tests which
divide the opinions of mankind) it
jurisprudence/ has no immediate
concern. 5

We have already argued that Austin's fully developed theory
concerning the nature of law does not square with his skeletal
definitions in which he strongly resists the idea that law and
morality are closely related. We showed that Austin was aware
of the fact that few laws could be made without concern for their moral consequences and social utility. Indeed, he even recognized a special science of legislation devoted to the task of determining the principles upon which positive laws must be fashioned in order to merit moral approbation. But the science of jurisprudence was conceived by Austin as being concerned solely with positive laws after they have sprung into existence, and with the analysis and interpretation of such laws without regard to their ethical goodness or badness. The main function of the science of jurisprudence was thought by Austin to lie in the exposition of principles, notions, and distinctions which are common to developed systems of law. He carried out this program in his Lectures on Jurisprudence where he made a considerable effort to elucidate concepts such as Right, Duty, Sanction, Injury, Sovereignty, etc., an effort which would be meaningless unless in making it he was convinced that he would thereby contribute towards furthering the autonomy of the positive legal order and promote its independence from the ethical and political motivations necessarily entering into the creation of new law. That he was so convinced is made clear when he says,

By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.
Now this statement indicates the firm conviction on Austin's part that the art of law-finding, unlike the art of legislating, can be insulated to a very great extent against the incursion of moral and other non-legal considerations. But before we can understand Austin at this point we need to call attention to an important distinction between his ideal conception of the science of jurisprudence, and the science of jurisprudence as it was actually carried out in his own day and in his writings. Austin's clearly stated ideal was the future consumption of a comprehensive codification of the law which would eliminate uncertainties and definitional ambiguities to the extent humanly possible. He therefore wished to expedite the demise of judicial legislation, which he considered a loose form of law-making usually undertaken in haste and for the most part unknown to the bulk of the population. Austin admitted that no code of laws could ever be complete and perfect but he argued that "...it may be less incomplete than judge-made law, and (if well constructed) free from the great defects which I have pointed out in the latter." He believed that if law were more simple and scientific minds of a higher order would embrace it. By eliminating vague and non-technical phrases such as "justice," "equity," or "reasonableness," from the legislative vocabulary, Austin believed future law-makers would be able to confine the introduction of value judgments
into the administration of the law to an irreducible minimum and thereby enhance the certainty of the legal order.

On the basis of this ideal envisioned by Austin, it is possible to understand the view expressed by Dean Pound\textsuperscript{13} that Austin considered it the function of analytical jurisprudence to forge out a science of law uncontaminated by social or moral judgments. It is this ideal which has given rise to the charge that Austin's theory of the judicial process may be described as a "slot-machine" theory or as "mechanical" jurisprudence. But it is important in assessing the precise relationship between law and morality in Austin's work to recognize that the complete codification of law was only an ideal and that he was very much aware that much law comes from the activity of the courts. Indeed, not only was he aware of the practice of judicial legislation, he even praised judges for engaging in it. He writes:

I by no means disapprove of it... judge-made laws... I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator.\textsuperscript{14}

In the same passage Austin says judge-made law is "highly beneficial" and "absolutely necessary," and that if judges are
to be criticized it should be for the timid, narrow, and piece-meal manner in which they have legislated.

It is clear, therefore, that Austin believed that until his ideal is realized judges not only will make law, they have an obligation to do so. Nevertheless, in order to maintain the separation of law and morality, with which he was so concerned, Austin denied that judicial activity represents a unique source of the law. The way he tried to meet the objection that judge-made law indicates a necessary relation between law and morality was to hold that it does not follow from the fact that courts engage in moral reasoning in arriving at their decisions, and therefore in creating law, that these courts are independent of the sovereign. Austin says that "...sovereignty...includes the judicial as well as the legislative power." On his view, when courts make law the sovereign is making law, for the courts are part of the sovereign. He holds that unless the supreme sovereign revokes the act of a subordinate sovereign, there is the tacit assumption that it is the sovereign itself which is legislating when the court renders a decision.

Judicial law-making, then, is for Austin one of the legitimate ways in which the law is made. His argument here reveals two interesting points. First, it demonstrates the logical symmetry of his theory since his thesis concerning the
supremacy of the sovereign as the only source of law remains intact. Second, it provides a clear illustration that it is in the persistent attempt to incorporate the moral norms embraced by a society into the law that judges make law. In an illuminating passage, Austin writes:

Now a merely moral, or merely customary rule, may take the quality of a legal rule in two ways: - it may be adopted by a sovereign or subordinate legislature, and turned into a law in the direct mode; or it may be taken as the ground of a judicial decision, which afterwards obtains as a precedent; and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign or subordinate legislature or judge, who transmutes the moral or imperfect rule into a legal or perfect one.17

Austin does add, however, that with respect to these moral rules "Those who maintain that it existed as law before it was enforced by the legal sanction. . . confound law with positive morality. . . ."18 So, while he concedes that courts are a source of the law, to the extent that law consists of judicial decisions, he regards the courts and judicial legislation as subordinate to the sovereign and holds that they are

. . . reservoirs fed from the source of all law, the supreme legislature, and again emitting the borrowed waters which they receive from that Fountain of Law.19

Now, Austin is assuredly right when he says that law
exists as positive law only after it has been officially recognized and supported by expressly legal criteria. But our concern all along has been not to argue that positive law exists as positive law prior to official enactment, but rather to show that the sovereign's authority lies in morality and that the sovereign's responsibility is morally circumscribed. Law is not based simply upon law but has its prior conditions and purposes. And it is in recognizing that these conditions and purposes are to a great extent moral in nature that makes clear the impossibility of a hard and fast conceptual distinction between law and morality. The above quotation, with its metaphorical language, involves more than merely the idea of a hierarchy of superior and subordinate sovereigns. Surely the quality and character of laws, the content of which is designed to shape and direct human behavior, is to be understood as flowing from the moral convictions of the law-maker and not simply from the abstract "Fountain of Law" known as the sovereign.

Furthermore, if law is not a self-contained and closed logical system, and this was envisioned by Austin only as a future ideal but not the reality of his day, it follows that judges are not bound to follow in all respects the implications of previous decisions or precedents. This is not to suggest that there need not be a uniformity in judicial decisions based
on existing statutes and precedents. But Austin recognized that the courts frequently distinguish new cases not exhaustively covered by prior decisions for the purpose of removing inequities or in order to overcome the "negligence" or "incapacity" of the legislator. When judges distinguish cases in this way they are making law or legislating and in so doing they are, on Austin's own terms, expressing their desire to achieve justice or provide a corrective to prior legislation which would not be possible by a mechanical application of previous statutes or decisions. By Austin's own account the judicial concern about what a law is and what it ought to be is part of the phenomenon of law. Since he holds that the court is acting on the authority of the sovereign, or more precisely, is a subordinate sovereign, then what the courts say and do is law. Therefore, the concept "law" for Austin includes what the judges do in formulating their decision. The fact that judges persistently strive to achieve justice—what the law ought to be—reveals that in the judicial process there is an intimate relation between law and morality. Thus, what the layman thinks the law ought to be might not be law, but what the judge thinks the law ought to be, when rendering a decision in a new or unique case, is the law. So the judge's responsibility to satisfy the demands of justice requires going beyond the mechanical approach of a machine and is an essential
part of what the law is.

In the previous chapter on Austin we saw his attempt to define law as the command of the sovereign directing the conduct of those in the habit of obedience as a means of separating law and morality. But we also saw that this definitional attempt to separate law and morals was unsuccessful because Austin's sovereign was not free to make laws arbitrarily and capriciously but was under the constraint of moral limitation. In a like manner, the judge, as part of the sovereign, is under the influence of that same moral constraint and is engaged in the activity of achieving the purpose of the law, justice. Thus, for Austin, since the judge is part of the sovereign, the judicial process is contained in the very concept of "law." And since this process, by Austin's own account, operates under the aegis of the quest for justice, law cannot be sharply separated from moral considerations.

A brief word concerning Bentham is in order since his writings in legal philosophy contain in embryo many of the points developed by Austin. It is true that Bentham spoke disparagingly about judge-made law and provided the initial idea of complete codification which later became Austin's ideal. Nevertheless, Bentham was aware that judges do make law and in this sense legislate, and he never lost sight of the fact that it was the duty of the legislator to implement those moral norms
which promote the greatest amount of happiness and further social utility. The significant point here is not the adequacy or inadequacy of Bentham's utilitarianism as a moral philosophy, but his conviction that the legislator (including judges when they legislate) is under an obligation to promote the general good and happiness of the people. Our contention all along has been not that legal rules and judicial decisions are morally meritorious according to some universal standard on which we can all agree, but rather that they express the moral sentiments of the particular sovereign or judge in question and hence show the impossibility of framing a theory of the legal order apart from considerations which are intrinsically moral. It would be ludicrous to suppose that anyone could set forth a series of moral precepts on which all law must be based, or moral criteria in terms of which all judicial decisions may be judged, and have all men agree on their intrinsic worth and desirability. But from this fact it does not follow, as some legal positivists have supposed, that considerations which are moral in nature do not enter (or at least need not enter) the foundation and activity of that phenomenon we call law. Indeed, if universal recognition and acceptance were necessary for the proper appellation of the term moral to any belief or institution or activity, morality would be impossible. So to say that Bentham was unable to keep moral considerations out of
his theory of judicial legislation is to say nothing more than that he defined such activity in terms of what, according to him, the law ought to be and do.

Now, Bentham divided those who deal with or write about the law into two categories, that of expositor and that of censor. The expositor has the task of explaining what he supposes the law is. The censor is to say what he thinks the law ought to be. Bentham assumed the role of censor and his primary concern was with the law as it ought to be. He directed his attention in the Introduction to the Principles of Morals and Legislation to the legislator as the proper person to make the law what it ought to be. The legislator could be any duly constituted person or body of persons and while he preferred judges to only apply law rather than make it, he did recognize that they often do function as legislators. The task of the legislator, for Bentham, was to make the law what it ought to be, guided solely by the principles of utility. The end result of this law was to be the most happiness for the most people insofar as this attainment was within the realm of legislation. When this end of law was realized, Bentham believed the "legal is" and the "moral ought," in matters of legislative concern, would coalesce and become one. If this did not happen, Bentham believed that the legislator, either accidentally or deliberately, failed to follow the principles of utility.
It is in this regard that Bentham held that many of the concerns of positive law are the same as those of positive morality. Thus, just as positive morality has happiness for its end, so the judge, when legislating, must also be guided by considerations which will promote the happiness of every member of the community. In this respect Bentham held that morality and the judicial process go hand in hand. The significance of this lies in the fact that when reflecting on the nature of the judicial process Bentham found it necessary to consider the ends of the law and what they are designed to accomplish. And this is always to be determined in reference to the greatest happiness of the greatest number, which in turn defines the common good and provides guidelines for achieving the best social order. Thus, for Bentham, the ends of the law have to do with values and the values sought are those same values which are hoped to be achieved through the practice of positive morality. And on these grounds it is clear that while Bentham may have looked disapprovingly upon judges making law, he nevertheless accepted it as a fact of his day and conceived their role in so doing to implement the norms of positive morality which are best designed to achieve the greatest happiness of the greatest number. And this, after all, was the supreme moral principle underlying all that he wrote. So, in spite of his insistence on the separation of law
and morals, he could not help but conceive them as sharing a common purpose with the result that, on his own terms, the judicial process is unintelligible apart from the use and understanding of moral considerations.

H. L. A. Hart is much more skeptical than either Bentham or Austin concerning the possibility of complete codification of the law. He does not believe that even the adoption of an elaborate network of legal rules in conjunction with an authoritative legal dictionary defining all the terms and concepts employed would lead to certainty and mechanical decisions. Judicial interpretation necessarily involves bringing particular cases under general rules. And Hart admits that the open texture of law leaves a vast field for a creative activity which some call legislative. The way he tries to account for the problem of interpretation in the judicial process is by appealing to an important distinction between the "core" and the "penumbra" of legal rules. He concedes that there is a penumbra of uncertainty necessarily surrounding the use of all legal rules and

...that if legal arguments and legal decisions of penumbral questions are to be rational, and that is the agreed assumption their rationality must lie in something other than a logical relation to its premises.

As an example, Hart cites a legal rule forbidding persons to take a vehicle into the public park. Clearly, this rule
prohibits automobiles and motorcycles, but does it also prohibit bicycles or roller skates or toy cars? Are these to be considered vehicles for the purpose of the rule or not? Now Hart says that if we are to communicate with each other at all, and if, through law, we express our intentions that certain types of behavior be regulated by rules, then the general words we use—such as vehicle—must have some standard instance in which there are no doubts about its application. He tells us

...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.28

Thus, on Hart's account communication and judicial interpretation are possible only because words have a standard instance or core of meaning that remains relatively constant, whatever the context in which they appear. It follows for him that the judge's task of interpretation is often no more than determining the meaning of the individual words that constitute a legal rule, such as "vehicle," in a rule excluding vehicles from the park. In such a case the judge is simply applying the word to its standard instance and no creative role is assumed; he is applying the law "as it is." However, since words also have a penumbra of meaning which, unlike the core, varies from context to context, it is sometimes necessary for the judge, when the object in question falls within this
penumbral area, to assume a more creative role. In these
cases the judge must interpret the legal rule in the light of
its purpose or aim. And when this happens, Hart admits,

... 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. ... 
So here we touch upon a point of
necessary 'intersection between law
and morals'. ... 29

Now the interesting feature of Hart's argument at this
point is that although he rejects the mechanical or deductive
time of judicial decision as an accurate account of what
judges do in rendering judgments, and holds such judgments are
made in accordance with the judge's conception of what the law
ought to be, he does not believe that this reveals any important
connection between law and morality. He says,

It does not follow that, because the
opposite of a decision reached blindly
in the formalist or literalist manner
is a decision intelligently reached by
reference to some conception of what
ought to be, we have a junction of law
and morals. ... The point here is
that intelligent decisions which we
oppose to mechanical or formal decisions
are not necessarily identical with
decisions on moral grounds. 30

But this seems to embody a confusion we have been trying to
erase. Hart, throughout his writing, seems to suppose that if a
conceptual connection between law and morality is granted we
then open the flood-gates for a full blown theory of natural law.
But we have been at pains throughout to make clear that the recognition that law cannot be properly elucidated or understood apart from important moral considerations in no way entails a theory of universally valid and binding principles in terms of which all law must be appraised, and on the basis of which it acquires its validity. Our claim has been the more modest one of holding that the authority and competency of the law derives from the moral attitudes of those who support it. In the preceding chapter we argued this was clearly the case concerning Hart's thesis about the union of primary and secondary rules which provide the foundation for a legal system. And here our claim goes no further than to hold that the process of intelligent decision whereby judicial decisions are officially rendered involves moral reasoning on the part of the judge. The fact that not everyone agrees with the moral propriety of the decision, or even that most people regard a particular judgment as morally indefensible, does not show that the judge was not guided by considerations he believed to be intrinsically moral. And Hart admits that "...laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims." Thus, on Hart's own terms, the judicial process is intelligible only by taking cognizance of the social aims and values which the judge seeks to implement in rendering decisions. It is therefore difficult
to understand Hart's position when, on the one hand, he allows that penumbral cases involve a "necessary intersection between law and morals" and on the other hand, denies that this reveals a "junction of law and morals" and insists on the conceptual separation of the two.

But more than this is involved in Hart's distinction between the core and the penumbra of legal rules. He seems to assume that problems of judicial interpretation frequently involve nothing more than determining the meaning or scope of individual words in a particular rule. This is the case when the legal rule in question has a "core meaning" and the only problem is deciding if the case at hand is embraced by this core, or counts as a "standard instance" of the word in question. But do words have such a core of meaning which remains constant from one context to the next? Is it ever possible, in other words, for a judge to decide a case solely by determining whether or not it is included in the core of meaning of a legal rule without asking the purpose of the rule and what it was designed to accomplish? In his example about the rule prohibiting vehicles in the park, Hart tells us this word has a core of meaning which in all contexts remains the same and all the judge has to do in rendering a decision is to recognize that cars are a standard instance and are thus excluded. He talks as if in such a case the judge is able to make a decision
without considering the purpose of the rule. Lon Fuller has attacked Hart at this point\(^{32}\) and argues that the reason that such a rule is easy to apply in this case is because we already see clearly enough what the rule is aiming at in general. Fuller holds that if there are cases in which we seem to be able to apply the rule without asking its purpose this is not because we can treat a directive arrangement as if it had no purpose, but rather because the case in question so obviously falls under the scope of the rule, the purpose of which is so obviously transparent, that we are not conscious of determining its aim.

This, however, is confusing. Fuller takes Hart's view necessarily to imply that legal rules must be applied solely on the basis of the standard meanings of the terms of the rule, provided the fact situation is a clear instance of the standard meaning, without regard for the purpose of the rule. If this is a fair and correct understanding of Hart, Fuller's criticism seems justified. But if Hart's position is only that there must usually be standard instances of meaning before communication is possible and, indeed, before it is possible to ask in any meaningful sense about the purpose of a legal rule, then Hart's position is very strong. And this interpretation of Hart seems more plausible. His point seems to be that there are some fact situations which clearly can be characterized, for
legal purposes, in only one way and that other characterizations would immediately be judged to be erroneous or arbitrary. And if this is right it does not follow, as Fuller suggests, that on Hart's account judicial decisions, even in the area of the core, are made without reference to the purpose of the rule and the value it is designed to achieve. So, if Fuller is right, Hart is mistaken; but if we are right, even cases that head up in a single word are not, on Hart's account, divorced from some conception of the law as it ought to be. For when a decision turns on the meaning of a single word, it must be possible for the judge to sufficiently place himself in the position of those who drafted the rule to know what they thought "ought to be." And it is in terms of this "ought" that the judge must decide what the legal rule "is."

Although Hart's distinction between the core and the penumbra is not as clear as it might be, there is evidence in some of his other writing that tends to support our interpretation and makes clear the fact that even those judicial decisions turning on a single word must include a reference to the purpose and function of the rules. In his article, "Definition and Theory in Jurisprudence," his main point is that legal terms such as "rule," "right," "law," "duty," etc. cannot be defined by pointing to corresponding things or actions in the world, but can only be understood in terms of the uses to
which they are put in the system as a whole; just as one cannot understand the umpire's ruling, "You're out!" without first having a familiarity with the rules of baseball. He tells us:

The . . . efforts to define words like 'corporation' 'right' or 'duty' reveal that these do not have the straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words. There is nothing which simply 'corresponds' to these legal words and when we try to define them we find that the expressions we tender in our definition specifying kinds of persons, things, qualities, events, and processes, material or psychological, are never precisely the equivalent of those legal words though often connected in some way.34

So, in spite of the perhaps misleading talk of a "core of settled meaning" remaining unchanged from context to context, it is clear that Hart recognizes that the meaning of legal concepts depends on their function and purpose. Thus, even the meaning of the word "vehicle" in the rule prohibiting vehicles in the park cannot be understood and intelligently applied apart from the recognition that the purpose of the rule is to preserve quiet and insure safety, and that for this purpose a toy wagon is not a vehicle.

The most serious defect in Hart's distinction, however, is the intimation that problems of interpretation usually turn
on the meaning of individual words. More commonly, though, even in the case of statutes, the problem is to assign meaning not to particular words but to sentences or whole paragraphs. For example, does the First Amendment to the United States Constitution fall within the core or the penumbra? Does the guarantee of the "right of the people peaceably to assemble, and to petition the government for a redress of grievances" have a core of settled meaning which makes its range and application clear in all cases? Does it include, for example, the right to peaceably demonstrate in a downtown area during rush hour and tie up traffic for several hours? Does the guarantee of the free exercise of religion apply in those cases where taking drugs, otherwise prohibited, is considered an essential part of the religious ceremony? Or consider the Brown v. Board of Education case where the issue was the constitutionality of racial segregation in the public schools. In this case the nine Supreme Court Justices had very little to draw on in the way of legal authority. There was one constitutional clause stating, ". . .nor shall any State deny to any person within its jurisdiction the equal protection of the laws." In the way of precedents there were a few inconclusive and distinguishable past decisions. Nevertheless, the issue had to be decided one way or the other. There was no core of settled meaning or standard instance here to guide the Justices in their
decision. Their duty to support the Constitution included the obligation to give concreteness to those vague but great guidelines of American liberty, one of which is "the equal protection of the laws," and from this moral obligation it was impossible to hide. In reaching their decision the Justices were largely unguided by technical legal authority and their responsibility was to concretize the moral precept that all men are of equal moral worth and have the right to the same opportunities as every other. And they had to reach their decision in the face of potential violence and widespread disaffection.

The point here is that in cases such as these it is nonsense to talk of applying the law as it is apart from any conception of what it ought to be. These decisions can be made only after a great deal of inner turmoil in which the judge tries to determine what those who framed the law thought it ought to be and what, in the light of current moral attitudes, he thinks it ought to be. In many cases there will be no certainty that the decision reached is the right one, and it may be made with a keen awareness of personal unworthiness for final moral evaluations. But the judge, unlike the physical or even the pure social scientist, cannot always withhold action until all the returns are in and the evidence clear. But the uncertainty surrounding judicial decisions does not mean that moral reasoning has not taken place or that the decision
was reached by considering law as it is and not as it ought to be.

Now we have been claiming that the judicial process reveals the impossibility of sharply distinguishing between law and morality because the function of judicial decisions is at least partially to aid in controlling human behavior, and therefore cannot proceed without reference to purposes and moral imperatives. And to claim this is not to make any claims in the name of natural law. Hart, however, confuses the issue by implying that to hold that judicial decisions cannot be made apart from some conception of what law ought to be, or without reference to the purposes behind it, is to assume the banner of natural law. He says concerning his critics who believe the relation between law and morals to be more intimate than he will allow, that they have

... seen that the rational treatment of problems of the penumbra involves consideration of the purposes 'behind' the law and ... have invoked the traditional terminology of Natural Law... to express their views.37

Our claim, however, has merely been that the concept of law is unintelligible without some reference to moral considerations and, in addition, that the legal positivists themselves found it necessary to employ moral concepts in fashioning their theories about the nature of law. We have shown how Hart allows that in the penumbral area decisions must be made in
reference to some standard of what ought to be and that here, on his own terms, judges inject their own or the community's moral convictions into their judicial decisions. Also, we suggested that the distinction between the core and the penumbra of law is not as clear cut as Hart seems to think, and that reflection on what the law ought to be takes place in many of those relatively clear cut cases which he believes fall within the core of the law. This is certainly not to suggest that Hart's position could be faithfully described in terms of natural law, but only that in rejecting the confusions which natural law theory created Hart (along with Austin and Bentham) went too far in his reaction against it and wrongly believes that law and morals can be sharply and analytically distinguished.

Perhaps a final example will serve to make clear the nature of our claim insofar as it pertains to the judicial process. In most States possession of marijuana is a felony offense, punishable by fine, imprisonment, or both. This controversial law is both defended and opposed on moral grounds. Those who defend the law claim the legalization of marijuana would lead to even wider usage of a drug they either believe to be dangerous or that might, in the future, be proved to be dangerous. They warn of the dangers of a drug-dependent society which they believe repeal of the law would encourage. Some
believe there is a psychological, if not causal, connection between the use of marijuana and other drugs known to be harmful, and that legalization would contribute to the increased traffic of hard narcotics. They believe it is the function of the State, through law, to control the use of a drug which would undermine the health and well-being of its citizenry. On the other hand, there are those who believe the law should be repealed on the grounds that there are no conclusive studies which indicate the use of marijuana is significantly harmful or dangerous and that such laws represent an infringement on the liberty of the individual. Some hold that to legalize marijuana would be to eliminate the underground market and hence to take a big step in fighting organized crime. If marijuana were legalized and taxed as is alcohol, they claim, the State would derive millions of dollars in revenue which is currently going to a few powerful organizations which operate outside the law, and the result would be a healthier and more honest society. These are considerations which must be weighed and evaluated by legislators as they wrestle with the problem of marijuana. It may be true that now it is impossible to know with any certainty which position is sounder, but the important thing to recognize is that in dealing with the problem both sides appeal to moral arguments to support their case.

Now consider the role of the judge in such a case.
Suppose he is charged with sentencing a first offender for the possession of one marijuana cigarette. Surely, in this case, the factors to be weighed are moral and the judge is called upon to exercise moral judgment. If he believes the law is defensible and what it "ought to be," he may justify a harsh decision on the grounds that society must not be exposed to those who knowingly flout the law and help to undermine important values shared by the community. But even here, too much suffering must not be inflicted on either the victim or his dependents, and efforts must be made to enable him to regain a position in the society whose laws he has violated. But if the judge believes the law to be ill-conceived he may exercise his discretionary authority and grant probation on the ground that imprisonment might well destroy an otherwise useful and valuable human being. So, in cases such as these, intelligent and rational decision is guided, albeit uncertainly, by moral aims.

Hart concedes the validity of our claim at this point for he recognizes the need to employ some acceptable general principle as a reasoned basis for decision. He says:

No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice. In all this we have the 'weighing' and 'balancing' characteristic of the effort to do
justice between competing interests. Few would deny the importance of these elements, which may well be called 'moral' in rendering decisions acceptable. . . . 38

But he immediately denies that this reveals any unnecessary connection between law and morals because the same principles have been honoured nearly as much in the breach as in the observance.

Our claim, however, has not been that the judicial process is without its subtleties and dangers, and that there is no risk that the judicial function might open the courts to the subjective whims of individual judges. Rather, our claim has been that the judicial process cannot be intelligently understood apart from the purposes and social aims which it is designed to implement, and that these are, to a considerable extent, moral in nature. Just as law rests on a moral foundation and has its reason for being in establishing a social order which makes possible the attainment of certain widely shared basic wants and desires, which in turn defines the common good, so the judicial process cannot be meaningfully construed apart from these same objectives.

The main purpose of the judicial process is to implement those fundamental rules without which an ordered society is not possible, or without which the specific goals of society cannot be achieved. Its task is to identify and apply those
principles that will best promote the ends men seek to attain by collective action. So, it is in terms of problems and functions and purposes, and not in terms of definitions and abstract sources, that the judicial process is seen to be an essential part in achieving the full intent of the law, and to forget this is to denature or falsify it. There may be a sense in which the positivist claim that law is what the sovereign commands is correct. But our claim is that the sovereign is that authority which is accepted by the people as the lawgiving power, and this acceptance rests on a conception that life in society is impossible without a central authority to regulate men's relation with one another. The positivists who have said that the test of sovereign power is efficacy have failed to recognize that "efficacy" is an abstraction that cannot be understood in isolation from its roots in morality. If this were not the case we would be talking about a regime of coercion or tyranny which in no meaningful sense can be described as law.
FOOTNOTES


3Ibid., p. 41.

4See Pound, Law and Morals, p. 40.


7Ibid., pp. 126, 373. But Austin realized that the divorce of jurisprudence from legislative science could not be absolute since the moral or utilitarian purposes of a statute would have to be taken into account in explaining its origin or purpose.

8Ibid., p. 367.

9Ibid., p. 371.

10Austin, Lectures on Jurisprudence, pp. 685-704.
11Ibid., pp. 671-673.

12Ibid., p. 688.

13Pound, Law and Morals, pp. 43-44.

14Austin, Province, p. 191.

15Austin, Lectures, p. 536.

16This is misleading as was pointed out in the chapter on Austin. There we saw that his distinction between a "loose" and a "strict" understanding of the sources of law allowed him to preserve the logical consistency of his argument, while at the same time recognizing the moral influences at work in shaping the law.

17Austin, Lectures, p. 553.

18Ibid., p. 554.

19Ibid., p. 526.

20See Austin, Province, p. 191.


35 This criticism is briefly mentioned, but not developed, by Fuller, Op. Cit., pp. 662-663.

36 Fourteenth Amendment, United States Constitution.


CHAPTER V

THE OBLIGATION TO OBEY THE LAW

If our claim in the preceding chapters that an adequate understanding of the concept of law involves reference to certain fundamental moral considerations and widely shared values is correct, we are in a better position to appraise the nature of the obligation to obey the law. For it is widely held by legal philosophers and jurists that there is a moral obligation to obey the law. But if the phenomenon of law may be properly understood and elucidated as simply an amoral institution, or even as an immoral institution, the claim that we are under a moral obligation to obey it would not make sense. Indeed, if law need not embrace any moral principles whatever, or include ends which are in the common interest of collective society, it would be a contradiction in terms to speak of the moral obligation to obey it. Thus, the purpose of this chapter is to bring into clearer focus the nature of the obligation to obey the law by calling attention to those minimal but fundamental moral values which a system properly called law must be designed to achieve.

We may begin our analysis vis-a-vis H. L. A. Hart, for there is much in his position which is important and sound, and
by using his theory as a starting point we shall be able to make clear just where our position differs from his. First, recall that where there is law human conduct is in some sense rendered non-optional or obligatory, and further, that Hart has rejected coercion as the defining feature of this obligation. In his article, "Legal and Moral Obligation," Hart raises the question how words can create legal obligations and what are the legal obligations they create. He tells us that this question necessarily involves consideration of the foundation of any legal system and of what is involved in the assertion that a legal system exists, "for any answer that stops short of this will leave the original problem on our hands." The problem, then, is to determine what it means to say of legal rules that they exist and that they provide that persons shall have certain obligations. It is not enough, according to Hart, to say that the assertion that the rules exist means that they belong to a class of rules marked off as valid rules of the particular system by criteria specified in the fundamental rules of the system (such as the rule of the Constitution that--within certain limits--what Congress enacts is law). He holds that to say of these fundamental rules which provide legislative competence and authority that they exist is to say something different from saying that they are "valid given the system's criteria of validity." In this case, he tells us, exists "must refer to
the actual practice of the particular social group whose legal system is under consideration."^3 Thus, on Hart's analysis, the minimum required in addition to general obedience, if we are to speak of the group's having a legal obligation to do something specified by X, is

(1) that X's words should generally be accepted as constituting a standard of behavior so that deviations from it (unlike the mere failure to follow a mere habit current in the society, such as that of drinking tea or coffee) are to be treated as occasions for criticism of various sorts;
(2) that references to X's words are generally made as reasons for doing or having done what X says, as supporting demands that others should do what he says, and as rendering at least permissible the application of coercive repressive measures to persons who deviate from the standard constituted by X's words.\(^4\)

By Hart's account, it must be the case that in any social group where obligations are created by legislation and expressions of the form "I have a legal obligation to do this" or "He has a legal obligation to do that" have their present force, there must be a social practice at least as complex as he describes which goes considerably beyond the mere habitual obedience on the part of the members of the group. He says,

... anyone who uses such forms of expression as 'I (you) have an obligation to' implies that his own attitude to the legislator's words is that [which he has] described, for these statements of obligation are used to draw conclusions from legal rules on the footing that the rules are authoritative for the speaker.\(^5\)
If this were not the case, i.e., if one did not accept the fundamental rules of the system as authoritative and as prescribing proper modes of conduct, the natural expression from this point of view would be not "I (you) have an obligation to" but "I am (you are) obliged to" or "under this system I (you) will suffer if I (you) do not." We might also recall at this point that in The Concept of Law, where Hart was analyzing this same concept, he held that these legal rules imposing obligations must be accepted from the "internal point of view" which means they must be voluntarily accepted as right and proper guides to conduct by the majority of the people and in terms of which our normative vocabulary is possible.

Now in the chapter on Hart we argued that his thesis concerning the union of primary and secondary rules as the heart of a legal system revealed such a system to rest on a moral foundation from which it derives its efficacy and authority. We tried to show this by considering the presuppositions which are required for Hart's theory to be adequate and persuasive. We showed that Hart's analysis presupposes that human beings are creatures with certain wants, needs, desires, aspirations, etc., with the corollary that the satisfaction of some of these at least are goods to be sought or values to be achieved. We argued that widely shared wants and needs make possible a background of practices on which there is general agreement in a given community and that it is in terms of this that there can
be a moral community and a common good. We shall now continue
with that analysis and try to set out in greater detail the
minimum moral value which a system of law must achieve. And
in terms of this "good" we shall attempt to account for the
moral obligation to obey the law.

As we noted earlier, Hart claims that the regime of
primary rules is possible only in extremely small and closely
knit societies and that because of certain defects in a system
of primary rules they must be supplemented by secondary rules.
One defect of such a society is its uncertainty since the
rules by which the group live will not form a system but will
simply be a set of separate standards without any identifying
or common mark. Thus, if doubts arise as to what the rules
are, or the precise scope of some particular rule, there will
be no procedure for settling this doubt. Another defect of
this simple social life is the inefficiency of the diffuse
social pressure by which the rules are supported. There will
always be disputes as to whether a rule has been violated and
if so how it should be adjudicated, and these disputes would
continue indefinitely if there was no agency designed to
ascertain and authoritatively resolve them. The remedy for
these defects according to Hart consists in supplementing the
primary rules with secondary rules of "recognition" and "ajudi-
cation." And once this is done the regime of primary rules
has been converted into a legal system.

In providing this analysis Hart has called attention to two essential ingredients which a system of law must reflect and without which we have something less than law. We might reword these requirements for a system of law in terms of "order" and "the quest for justice." If we raise the question whether the institution of law is necessary and beneficial for society, we might expect the initial answer to reflect Hart's important insights, though in a less sophisticated manner. On the one hand, we might say that there is a need for the institution of law because if social life is to be possible there must be a certain amount of order in the community. That is, we need to know in our human and business relationships what we may do without the fear of coercive and repressive sanctions, and we must know, generally, what modes of conduct are required or prohibited for ourselves and what we can reasonably expect from other people with whom we have social intercourse. In the absence of a system of law we would be surrounded by uncertainty with respect to our obligations and duties, and we would be at the mercy of those holding coercive and undefined power to interfere with our personal and business life in whatever manner they chose. On the other hand, we might say, reflecting Hart's second point, that in any society there will inevitably be quarrels and disputes among the various
members and that some way must be found to resolve these con-
traversies. We would probably add that the most agreeable
solution to this problem would be to entrust the adjudication
of disputes to an impartial agency designed to do justice to
the litigants and settle the matter in a fair and intelligent
fashion.

Now these two responses to the question whether law is
necessary and beneficial to society are not only consistent
with, but are another way of expressing, the points raised
by Hart. The first response calls attention to the fact that
a normative system such as law serves the basic need for im-
plementing an ordered and structured organization without
which the community in question could not endure, or at least
in any meaningful way. The second response reiterates the
claim we have made throughout that people expect the legal
order to establish not just any set of authoritative commands,
but an order which satisfies their sense of reasonableness and
justice. And it must not be overlooked that what people ex-
pect a legal system to be, within certain limits, plays an
important role in determining what a given legal system is.
This is because the authority and efficacy of a legal system
depends on its acceptance by the majority of the people and
that without this acceptance it cannot long endure. It is, of
course, possible for a group of people to exercise sufficient
coercive power to impose whatever orders they choose but, following Hart, we have rejected coercion as a defining feature of law and such a regime must be viewed as a regime of coercion and not law.

The reason why Hart does not accord these two elements a more prominent place in his legal theory, we must assume, is because to continue with this analysis would be to admit that law must conform to certain fundamental requirements and this would be to abandon his thesis concerning the analytic separation between law and morality. Undoubtedly, Hart believes a legal system ought to achieve these goals and more besides, but for him what it ought to be and what it is are two entirely different questions. Nevertheless, we shall continue with this analysis and argue that the "common good" which the elements of order and justice help define makes possible the elucidation of the moral obligation to obey the law.8

The extremely close relationship between a system of law and the establishment of order is manifested in the writing of Austin, Bentham, and Hart. They all recognize that even in primitive societies collective living is possible only through the acceptance of social custom and the seriousness with which it is observed and supported. Hart makes it plain that the steps from a pre-legal to a legal society are in large part taken because of the desire to stabilize the elements constitutive of a social order. And Bentham and Austin emphasized
the tendency to codify legal rules and principles and recommended that judges follow, wherever possible, prior decisions so as to secure an element of certainty with respect to the kinds of conduct people are expected to satisfy and that they can reasonably expect from others. They each approved the adoption of some kind of "basic law," such as a constitution, defining the fundamental elements of the legal and social structure in terms of which the uniformity of legal action may be measured. This recognition, variously expressed, indicates the conviction on their part that where men seek to live together in a collective society they must avoid unregulated chaos and establish some form of a liveable order.

The important point here is that this desire for orderly patterns of human coexistence is not simply an arbitrary or dispensable trait of human beings. It is necessary if humans are to exist in close proximity on humanly liveable terms. The achievement of this order depends on a certain amount of generality which is hallmark of law. Austin held that only a command which "obliges generally to acts or forbearances of a class" has the character of law. And Hart says that the law is typically general in two ways for it "indicates a general type of conduct and applies to a general class of persons who are expected to see that it applies to them. . . ." This emphasis on generality is designed to show that law, on the whole,
is used to measure and shape and judge human conduct in a rational manner, rather than provide occasional or particular directions for the solution of specific problems. It has sometimes been claimed that in small communities leaders need not decide cases by general rules but may rely on their subjective sense of justice, and that in such communities there would certainly be law. But as Bodenheimer has pointed out, this is subject to qualification. For if in such a case the leader's subjective sense of justice was manifested in uniform and similar decisions, then a normative content would already be imparted to his adjudication and his standards of decision, and even if they were not formally enunciated, they would be known in the community at large. But if his subjective approach in rendering decisions was wholly irrational, arbitrary and unpredictable, the community in question would probably regard this state of affairs as the antithesis of an order of law. The reason for this is what we have held throughout, that law and arbitrariness are opposites. Sir Frederick Pollock saw this when he said,

...an exercise of merely capricious power, however great in relation to that which it acts upon, does not satisfy the general conception of law, whether it does or does not fit the words of any artificial definition.12

The extremely close connection between a system of law and the notion of order is thus not just an accident, but
rather a deliberate attempt to introduce an element of stability and coherence into the social order which makes possible internal security and provides the framework for a fair and impartial administration of justice. The application of general rules and uniform standards of decision are the necessary, if not the sufficient, conditions for the attainment of social life in complex communities. Because of this generality pervading the law, men are able to predict the legal consequences of situations that have yet to come before the courts, and they can plan their conduct in a way which is rendered less uncertain. And as Hart makes clear, in large and heterogenous societies the achievement of this order and its advantages depends in large measure on the adoption of a rule of recognition specifying some feature or features possession of which by a suggested rule is taken as conclusive affirmation that the rule belongs to the group to be supported by the system in question. Implicit in Hart's point is the recognition that in any large community the total absence of these general rules, maintained by social pressure and legal sanctions, there would be the danger of a capricious and subjective regime straining a system of law to the breaking point.

So far we have been speaking of order in an abstract or formal sense, ignoring the content of these patterns and rules making order possible. And it is the emphasis on the
formal structure of the rules or commands to the neglect of content that allows Austin, and perhaps even Hart, to try to conceive law as a system of order apart from any moral values or substantive components. But this is insufficient, for law cannot meaningfully be conceived as merely order apart from considerations of its feasibility and capability of being enforced. For example, a community might (conceivably) adopt an "order" according to which all decisions concerning political policy and the rules governing public conduct would be determined by first graders. They might agree that all such decisions would be faithfully observed by all the members of the community. One can imagine the results of such an "order" and it is highly likely that it could not endure or would soon be abandoned. The point is that the very possibility of genuine order depends upon at least a minimum of rightness or reasonableness. But when these considerations are injected into the concept of order a substantive element has been introduced. For a legal order to be practicable or feasible, it must be predicated upon at least a minimum of rationality and concern for the important traits which characterize human beings.

Or consider the matter another way, employing a device used by Hart but with a different content.¹⁴ Suppose there is a population living in a territory in which an absolute
monarch, Rex, is invested with unlimited power and his every command is taken as law. Now assume that Rex suddenly decides to effect a complete transvaluation of widely shared values. He issues commands that each person must kill several persons a day, rob and loot business, practice dishonesty and deceit in their private and public affairs, and ignore or murder any one who tries to resist his new "law." Obviously, in such a situation order and stability would break down immediately and chaos would result. While this is an extreme example, it shows that a wholesale rejection of all our values, frustrating the basic wants and needs of human beings, cannot take place except perhaps for temporary periods of total corruption or anarchy if society is to survive. What these considerations are designed to establish is that a system of law cannot have just any content whatever, and that the nature of the order made possible through law necessarily involves a minimum of substantive value, and that this element is presupposed by concepts such as "practicable" or "reasonable."

The element of order, however, is not the only ingredient in the concept of law. To it must be added the idea of justice if order under law is to be feasible. We shall not attempt to provide a complete analysis of the very elusive concept of justice, but simply try to delineate certain salient features of the term which must be satisfied if a legal system
is to be non-arbitrary and efficacious. The first feature which comes to mind is that justice demands that there be a certain measure of equality in human social life. This calls attention to the widespread belief that where people are equal they should be treated equally. It gives expression to the universal experience that when human beings are accorded discriminatory treatment which they believe to be unreasonable or capricious, they are highly apt to rebel. This is true in all forms of social life and not just life under law. In families or schools or businesses an already present or newly created inequality considered unfounded and unnecessary is bound to give rise to a sense of injustice. Thus, one writer says

...equality is in general the creature of positive law.... The point is that the inequalities resulting from the law must make sense. If decisions differ, some discernable distinction must be found bearing an intelligible relation to the difference in result. The sense of injustice revolts against whatever is unequal by caprice.15

Now the requirement that equal men and equal situations be treated equally under law prohibits the wholesale infusion of arbitrariness in the concept of law. There are, however, difficulties in this conception of justice and as it stands it is incomplete. In the first place, it is compatible with an equality of mistreatment which does not satisfy mankind's
minimum expectation concerning a just order. If all or most of the people in a collective community are subjected equally to oppression or abuse, there is no reason to believe that justice has been achieved though equals may be treated equally. If all persons receiving traffic tickets were summarily imprisoned or executed equals would be treated equally but justice would not be achieved. In the second place, this conception of justice does not provide for the adjudication of unique or unusual situations not lending themselves to easy classification or comparison. As we saw earlier, justice, which has a special role in the province of judicial decision, seeks to administer an appropriate punishment for particular crimes committed under unusual circumstances and defying precise classification in terms of generally accepted standards of judgment. It also assumes special importance in adjudicating conflicts arising between the legitimate and reasonable interests of two competing parties. In such cases as these, there must be a conscientious attempt to weigh the relative merits of opposing claims with a view to resolving them, if possible, in a way that is fair and impartial to both sides. The requirements of justice at this point are reflected in the words of Cohen when he says,

...we must remember that the law always defeats the expectation of at least one party in a law suit. To maintain its prestige, in spite
of that, requires such persistent and conspicuous effort at impartiality that even the defeated party will be impressed.\textsuperscript{16}

In order to remedy these two deficiencies in the notion of justice as the equal treatment of equals, it must be supplemented with a principle to the effect that everyone must be rendered that to which he is entitled. When these principles are combined we have a conception of justice which strives for equality where equality is due as well as differentiation where differentiation is due. But even here we must be aware that these principles are quite imperfect and vague and that they do not provide a certain standard of determining what is due to a person or how equality or inequality are to be measured and understood in terms of human social life and needs. They must always, therefore, be supplemented by a concrete social or legal content. Some such conception of justice is adopted by Hart for he tells us,

\textellipsis justice is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently'.\textsuperscript{17}

While he considers this a central element in the idea of justice, he admits it must remain an empty form and that to give it content "we must know when, for the purposes at hand, cases
are to be regarded as alike and what differences are to be relevant." And he concedes that the connection between this aspect of justice and the notion of proceeding by rules is very close. He says,

".. 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."

We have done nothing more than outline some of the main features of the concept of justice. And it is unquestionably correct to say that this concept of justice includes in large measure a relative component making it necessary to interpret and appraise systems of justice in the light of their historical and social setting. But this is not to be confused with the assertion that at any given time justice is the product of fortuitous and arbitrary social conventions. Rather, what this admission shows is that the achievement of justice is always subject to the particular aims and purposes which the moral and social values of a particular community are designed to achieve. While the ends in view may always be the same, i.e., to satisfy reasonable needs and promote the general good of collective living, the means of achieving these ends must be adapted to the given necessities of time and place. Nevertheless, the possibility of approximating such an order of justice
is founded upon those conditions and restraints which are necessary for the attainment of social life.

Now surely no one would disagree that the institution of law ought to aim for the realization of order and justice as outlined here. But if our claim is right, a modicum of such order and justice is necessary if collective living under law is to be possible at all. Order and justice are complementary notions as employed in the concept of law. If justice is to be achieved there must be a certain amount of order in our human affairs so that people may know what is expected of them in their conduct and business relations, and also what they may reasonably expect of other people. But unless this order is supplemented by considerations of justice it cannot achieve the widespread support of the people in terms of which it is efficacious and practicable. Any "justice" determined exclusively by the arbitrary whims and subjective interests of judges (or whomever) would not only arouse our feelings of injustice but would also be conceptually incoherent because, as Hart pointed out, the administration of justice bears an extremely close affinity to the application of general rules. And any "order" imposed without some respect for justice, although it may be temporarily maintained by coercive measures, would not satisfy Hart's requirement that the order imposed by law be accepted as in some sense right and necessary and
supported by serious social pressure. But since in any complex society there may be serious differences of opinion among the various members as to the precise nature of the order to be established, or as to what situations call for similar or equal decisions, the adoption of a body of binding standards of recognition or adjudication is virtually indispensable for the proper realization of a regime of law. This demand, too, is recognized and countenanced by Hart through his introduction of secondary rules. So, if our analysis has been correct, even on Hart's terms, the phenomenon of law cannot be conceived apart from recognizing an intimate link between law and morality. And to a large extent the morality of law may be understood in terms of the creation of order as well as the realization of justice, both of which carry considerable weight in defining the common good.

It is against this background that we need to assess the nature of the obligation to obey the law. So far we have held, following Hart, that law may be conceived as a system of rules making certain forms of conduct obligatory. Also, following Hart, we have rejected the element of force as defining the nature of these obligations. Our position has been that once coercion is rejected as the essential feature of law, we come to realize that the nature of these rules are based on other grounds and that the most important of these is moral.
For this reason we have held that moral convictions are one of the essential forces in establishing not only the efficacy of law, but its very existence as well. Hart, however, denies that there must be a general recognition of a moral obligation to obey the law, calling such a view as a "misconception."

He says that

...general obedience and the further use of and attitudes to the law may be motivated by fear, inertia, admiration of tradition, or long-sighted calculation of selfish interests as well as by a recognition of moral obligation. As long as the general complex practice is there, this is enough to answer affirmatively the inquiry whether a system of law exists. The question of what motivates the practice, though important, is an independent inquiry.

This, however, is not consistent with Hart's account of the existence of a legal system as consisting in the union of primary and secondary rules. For, remember that those rules of behavior designated as "primary" originated in the first place because they were believed to be necessary for the achievement of social life and highly prized features of it. By Hart's account they define modes of conduct which are accepted as standards and which are supported by serious social pressure. Further, they are characteristically expressed through the normative vocabulary of "duty," "ought," "right," etc., and deviations are met with criticism and blame. Such rules are possible because of their shared acceptance by the
bulk of the population who view them as guides to right and proper conduct. Only a minority may reject the rules, according to Hart, since otherwise they would have too little social pressure to fear. Clearly, then, in the beginning at least, the complex practice Hart describes is motivated by moral concerns and not just anything whatever. And it is well to recall that these primary rules are incorporated into a legal system as a means of resolving uncertainty and stabilizing and unifying the moral order. If these considerations did not hold, Hart's model would be indistinguishable from a system founded upon force and he explicitly rules out coercion as a means of elucidating the obligatory nature of law.

The main reason, however, that Hart believes there need not be a general recognition of the moral obligation to obey the law lies in a faulty analysis of the notion of obligation. Hart is a proponent of the "rules" or "practices" conception of obligation whereby obligations and duties are defined in terms of the rules of a practice which is widely shared. There is much to be said for this view for it calls attention to important features of the moral life. But as it is expressed in Hart's writing it is incomplete and therefore misleading. By emphasizing the notions of rules and practice, and largely ignoring their purpose or point, Hart tends to slight the moral
good which they are designed to achieve. On his account, the way to justify an action or piece of behavior is to show that there is a rule which governs it and that it is binding on the individual within that particular practice. Thus, that the rule exists is a social fact meaning that it is accepted as a justifying norm for action. Within the practice where this rule is operative references to it are accepted as reasons for doing, or not doing, a particular action. Hart expresses it, "The morality of duty and obligation is that of principles which would lose their moral force unless they were widely accepted in a particular group."23 Since they are the rules or principles of this particular practice, it is only as they are thus accepted that such a practice exists.

Such a view may be better understood on analogy with a game. Baseball is a game which is defined by certain rules and it is only as those rules are accepted and followed that the game itself exists. If someone wants to know why he must touch first base before moving to second base, the logically sufficient answer is that that is the way the game is played. Within the game itself appeal to the rules is quite final. If one did not know or understand the rules, or accept them as binding, he would not be able to play the game at all. Rawls, another proponent of the "practice" theory, expresses the matter this way: "When a particular action is specified by a
practice there is no justification possible of the particular action of a particular person save by reference to the practice." Thus, inside a practice the rules simply provide the structure in terms of which the game is played, and unless we act in accordance with them we are not playing that game. As Murphy says, "Their correct observance is a conceptual must of the practice that, as a social fact, exists."25

This, however, is only half of the picture. For when we are concerned with obligations as a ground for moral action the kind of justification we want is not to be reminded of what the rules are, but what account we ought to take of them in our conduct. The practice has not only rules but a point, and the question why the rules should be observed cannot be raised within the practice itself since here a reference to them as socially accepted is all the justification required. But what we want to know is whether conformity to such rule-bound behavior is for the common good or in the interest of collective society. Should, in other words, this practice and its rules be accepted? Once this question has been raised, we leave the arena of justifying behavior by pointing to a rule which governs it and seeks to justify the rules themselves. And this justification of the rules requires that they be shown to be an adequate and acceptable means to the end of beneficial social living.
If we are right in holding that obligations are to be determined not only in the light of rules socially existing, but also by reference to the good which they make possible, we are in a better position to understand the nature of the obligation to obey the law. For in that case our obligation to obey the law is only partially understood or justified by appeal to socially accepted rules, and to be complete we must bring into the picture what Hart has cut out of it, a reference to the good itself. And if our claim is right that a system of law must aim at the creation of order as well as the realization of justice, we have helped identify this good and brought it into clearer focus. For a social system characterized by comprehensive and systematic regulation of human behavior, as we have seen, cannot be effective without a significant measure of what those to whom the law is addressed regard as necessary order and elementary justice. Thus, the obligation to obey the law must be understood not merely in terms of the rule-bound behavior comprising a complex practice, but also in terms of the social benefits such behavior makes possible. The obligation to obey the law is therefore a moral obligation, the proper analysis of which requires reference, as Hart points out, to the rules defining a practice and, as Hart does not say, to the good they make possible. For there is no morally acceptable good without obligations, and
there are no obligations justification of which does not re-
quire the realization of such good. As Murphy eloquently ex-
presses it,

... just as there is no obligation
that makes moral sense without good,
so there is no normatively cogent
good that does not have its roots in
obligation, understood not as rule-
bound conformity to the formal require-
ments of a game, but as obligation-
bound acceptance to the moral require-
ments of a way of life. 26

Thus, if we are right, men living under law have an
obligation to obey it understood not in terms of the logical
requirements of a practice, but in terms of the moral require-
ments for a way of life. To respect and follow the rules of
law (understood in terms of our minimum conditions of order
and justice) is a requirement for the participation in a way
of life which makes collective life possible on humanly
liveable terms. It is in this way that the obligations imposed
by law are to be viewed as binding, and only as thus under-
stood can a reference to the rules provide a moral ground for
action. What Hart tried to do but failed, through his analysis
of obligation in terms of a practice, was to reduce the justi-
fying sense of obligation to the explanatory sense of a con-
ceptual elucidation of socially accepted rules. And he was
bound to fail for it is only when the rules thus elucidated are
understood as a ground of obligation in terms of a good they
are designed to achieve, that such a conceptual elucidation is possible. It is true that we often have an obligation to follow socially accepted rules, though sometimes we do not. But the moral sense of the rule is to be found in the correlative notions of obligation and good, and Hart's analysis includes only the rule and obligation, leaving out the essential element of the good which is required if the analysis is to make sense or be complete.

Thus, the claim being made here is that law cannot be properly understood solely in terms of the rules which define a practice, but must further be viewed as a directive for human conduct making possible a common good. To regard law in this way is to recognize the means-end nature of law. That is to say, law understood as a directive is a judgment made by some proper and competent authority, the purpose of which is to direct those subject to it to some goal or end. Central among those things in common interest of people living under law are, as we have seen, order, justice, and security. It is the realization of these and similar things, e.g., health, safety, education, etc. to which men are directed by law. In short, the modes of conduct required by law are generally to be understood as being necessary to the attainment of "common goods," and the types of behavior prohibited by law are those actions which will thwart their attainment. It is only against this
background that we can understand Austin's assertion that law is a preventive of evil,27 or Bentham's claim that the end of all law is the promotion of the public good,28 or Hart's belief that law is necessary to the maintenance of highly prized features of social life.29

If the analysis of the nature of law provided here is correct, the obligation to obey it must be regarded as deriving from the content of law itself. For the relationship of means to ends in the law which secures a common good is part of that content. We have argued that men share certain basic goals and needs and desires and that it is in terms of these that a common good is intelligible. And it is because there is a necessary connection between men's behavior and the achievement of this common good that men are under an obligation to obey the law. Thus, if law is the only effective means of satisfying the common interests of collective society, the source of the obligation to obey it must be seen as flowing from its very content.

Because the content of law is designed to establish a "common good" and to promote the interests of collective living, law is to be regarded as an intrinsically moral phenomenon. Viewed in this way we avoid the difficulty of regarding law as simply a brute datum projecting itself into human experience and yet somehow requiring our obedience and respect.30 For if
the account of law developed throughout this work is correct, the obligation to obey it and the claim it has on our respect arises from its own moral nature and not from external factors.

Thus, just as we have held that the concept of law cannot be properly understood or elucidated apart from fundamental moral considerations, neither can the obligation to obey it be intelligibly conceived without reference to a moral good. But to admit this is not to be committed to the view that all laws are morally good, or that the validity of any particular law is exclusively determined by certain moral requirements. There is no contradiction or conceptual confusion in the idea of a morally iniquitous law. The creation of a system of law is a human achievement and as such is always imperfect and admits of varying degrees of success. There will inevitably be mistakes in the law, either by chance or by design, because law is a human artifact. What we have tried to do is call attention to the fact that law, as a means of social control, must include reference to fundamental and widely shared social values. Hart is right, as far as he goes, for the notion of rules defining a practice is an indispensable aid in understanding the law. But the point of such shared activities, as we have shown, is the attainment of goods that only in such activities are possible to man. And moral requirements are necessary for the preservation of that level of
understanding, helpfulness, and respect which is the condition for the attainment of such goods. We are, after all, analyzing life under law and not war or anarchy. Without some principles of moral order, voluntarily accepted for the most part as a required condition for collective living, law in the sense we have described it would be impossible. And if a system of law did not provide the attainment of goods, and allow for other sides of man's nature to be developed than those fulfilled in obedience to its commands, it would not be worth the obedience it claims.31

As a result of this analysis, we may say that law is a body of rules fashioned for the purpose of regulating human behavior, and that in making these rules there is a deep indebtedness to the conceptions of morality. Of course, law must be enforced by the coercive power of the state, but as we have seen, this power is not to be viewed as the defining feature of law for it is employed as a means of securing a common good. Morality and power are both ingredients of the law, but we distort its nature if we try to reduce it wholly to either.
FOOTNOTES

1See, for example, Part I of Law and Philosophy, edited by Sidney Hook (New York: New York University Press, 1964). Here eleven well known philosophers all devote their attention to the nature of the moral obligation to obey the law. While they do not agree on the precise origin or nature of this obligation, they are unanimous in affirming that there is a moral obligation to obey the law.


3Ibid., p. 88.

4Ibid., p. 90.

5Ibid.


7Ibid., p. 91.

8The role of the concepts "order" and "justice" entering into a definition of the law is examined in an excellent article by Edgar Bodenheimer, "Law as Order and Justice," 6 Journal of Public Law (1957) pp. 194-218. Several of the ideas gleaned from this article gave rise to the approach taken here concerning the moral obligation to obey the law.

10. The Concept of Law, p. 21.


13. The Concept of Law, p. 92.

14. Ibid., Chapter IV. Here Hart tries to bring out salient features of a legal system by considering the imaginary reign of a mythical monarch "Rex" by assuming certain things about Rex and the kind of law he seeks to implement.


17. The Concept of Law, p. 155.

18. Ibid.


21. Ibid., p. 93.
22. The thesis maintained here that "obligation" and "good" are correlative terms and that their analysis is incomplete without reference to each other is, again, the product of reading Murphy. The idea that the "good" of the order and justice secured by law has its roots in obligation, and that obligation divorced from some "good" is less than moral, first originated by following out his analysis. For his account of the reciprocal relationship between "obligation" and "good" see Arthur E. Murphy, The Theory of Practical Reason (LaSalle: Open Court, 1965) pp. 196-211.


26. Ibid., p. 203.


29. The Concept of Law, p. 85.

30. See Lon L. Fuller, "Positivism and Fidelity to Law - A Reply to Professor Hart," 71 Harvard Law Review (1958) p. 646. Fuller argues against Hart that the only meaningful way we can understand the nature of the obligation to obey the law is to recognize an "inner morality" of law from which our obligation derives. On this point we are siding with Fuller for unless law reflects the means necessary to the attainment of men's general good we would not have an obligation to obey it, although we might, following Hart's important distinction, be "obliged" to obey it.
31 See The Theory of Practical Reason, p. 102.
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