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Positivism as a statist philosophy of law*

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> . . . we shall take legal positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.[1]

This statement, by H L A Hart, has had a considerable and lasting influence on modern jurisprudence. The question of law's relationship to morality is most clearly addressed in the context of adjudication, for it is here that questions relating to the law's legitimacy and binding authority arise in their most distinctive forms: if it is sometimes necessary for a judge to reach beyond the settled law in order to produce judgment in a difficult case, then how can the authority of legal decisions be considered an aspect of their legitimacy? The authority of judicial decisions would then seem to be associated with the official powers of a judge (conferred by rules of adjudication) rather than the legal merits of judicial opinions. This forces us to confront the possibility that judicial deliberations must focus on conventional rules and standards which might conflict with general principles of justice and fairness.

The focus on adjudication is unfortunate, for although it allows the basic questions to be posed in a clear-cut way, it also considerably narrows the scope for informative answers: general questions pertaining to law's authority are unhelpfully bound up with the more specific rule-based authority of judges to render decisions. The issue becomes whether the law can be said to exhibit principles of justice which are interpreted and expounded as they are applied; or whether legal judgments should be recognised as entailing moral choices about the applicability of legal rules and principles *in place of* general considerations of justice. Yet if we turn our attention away from the adjudicative context in which the law is applied, and focus instead upon the context in which the law is expounded and studied, the basic questions imposed by Hart's suggestion are much less clearly posed and responded to.

When we consider the law from the perspective of the jurist rather than the judge, it becomes manifestly less easy to separate the formal authority of law from its perceived legitimacy. The common law system of doctrinal precedent is one in which scholarly exposition has generally involved the exploration of received ideas and entitlements rather

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1 H L A Hart, *The Concept of Law* 2nd edn (Oxford: Clarendon 1994), pp. 181–2.

than the enumeration of settled rules. Hence it is difficult to separate the humanly created aspect of law from the thought that doctrinal scholarship consists in the tracing out of principles and entitlements which need to be "dug out" and interpreted from the mass of existing writings and ideas rather than consciously laid down or invented. Because the jurist aims to shed light on the whole mass of legislative rules and decided cases, his writings reveal perspectives on (and hence raise questions about) the principled aspect of law which are not evident from familiarity with the primary legal materials.[2] How might Hart's suggestion help us to reconcile the posited, rule-based character of law with its principled, systematic qualities?

There are two distinct ways in which Hart's statement might be understood. In the first place, it might be read as suggesting that the content of *particular* laws can fail to satisfy or embody particular moral demands: it might be morally necessary for promisors to fulfil their undertakings (at least in normal circumstances) irrespective of the content of the promise, but it is not inevitable that the laws of contract currently in force will replicate such conditions (for instance by making legal liability dependent on consideration or other formalities, or on the legality of the undertaking). In this way, the law may set out a scheme of rights and liabilities which differ from that which morality itself demands.

If this *is* how the above statement is to be read, then it seems too banal to constitute an effective intellectual foundation for legal positivism. For we might accept that law and morality sometimes demand different things without abandoning a view of law as a moral idea. The law of contract may operate on the basis of principles which differ, in various respects, from the moral standards we bring to bear on ordinary cases of promising, but that mundane truth does not force us to give up the belief that law inevitably and intrinsically embodies moral ideals: we might continue to believe that the meaning of legal rules is clarified only through interpretations of their underlying point or purpose in the light of the general values which the law is thought to serve.[3] Legal scholarship, in this way, embodies both the human face of law *and* its moral, principled character: for the activity of the legal scholar in interpreting and expounding the law preserves the intuition that law derives from intellectual endeavour, without forcing us to see it as the product of conscious decision.

Jeremy Bentham is famous for exhibiting hostility to just this idea. For Bentham, the appearance of scholarly reliability and objectivity in expounding the law is undercut when we consider that the fulfilment of the jurist's task (that is, the provision of a principled context within which to comprehend and justify legal rules and decisions) depends upon an obvious disregard for the limits of exposition. Bentham's distinction of "censorial" from "expository" activities anticipates an alternative way of understanding Hart's suggestion: for we may read Hart's statement as proposing a conceptual distinction between law and morality in a more general sense. In this second sense, the statement suggests that propositions of law are not recognised as valid legal rules on the basis of their moral qualities, but according to rules of recognition which identify legal rules by virtue of their basis in one of the formal sources of law. The substance of legal rules is, on this view, determined independently of any moral judgments we might make about the context of underpinning values that the rules are thought to serve. This thought *does* serve to

2 See in particular Blackstone's remarks on the virtues of a common legal education: *Commentaries on the Laws of England* (various editions) vol 1, p. 32.

3 Someone might conceivably object, for example, to the postal acceptance rule on the ground that it sometimes allows individuals to evade their moral responsibilities; but although we might distinguish legal liability from moral duty in this way, we can still accept that the postal acceptance rule serves particular standards of fairness (standards which differ from ours), and that an appreciation of those standards is essential to an understanding of how the rule works in practice.

distinguish legal positivism as a significant philosophical position, but it has the disadvantage of rendering obscure or newly problematic much that was central to traditional understandings of the jurist's and the lawyer's task. Just as Bentham responded to the problem of doctrinal writing by denying its possibility, so it is tempting to view later positivists as highlighting the humanly created aspects of the legal order, whilst downplaying or suppressing those elements of legal scholarship which defy a positivist explanation.

In this essay, I aim to explore some of the intellectual conditions which led to the emergence of legal positivism. I shall suggest that positivism was made possible, in part, by a changing conception of the moral basis of a system of laws. Once seen as a rational reflection of human nature, law gradually came to be viewed as an artificial product of the state. A statist view of law creates an immediate problem for the relationship between authority and legitimacy: how can a body of imposed rules provide a legitimate basis for the rule of law? Legal positivists have tended to respond to this problem by drawing a distinction between the law's formal, rule-based authority and moral questions pertaining to its legitimacy, concentrating largely on the former as the proper domain for jurisprudential enquiry. This has had the unfortunate effect of hindering the development of informative accounts of law's moral nature by focusing attention on the analysis of conceptual distinctions and definitions.

The statism apparent in the writings of Hobbes and his intellectual descendants in some sense makes such conceptual distinctions inevitable; but the direct focus on conceptual connections is in an important sense a product of the 20th century: the analytical philosophy which Hart brought to bear on jurisprudential problems was consciously formulated as a new departure, heralding a fresh approach to the set of problems inherited from the philosophical failures of the past. The attempt to understand the moral nature of law was largely abandoned in favour of the more limited aim of clarifying the concept of "law" *prior* to engagement in the moral and political questions in which the law is immersed; the thought being that such clarified understandings better prepare us for the journey when the time comes. From this perspective, the nature of Bentham's (or Austin's) contrasts between the legal and the moral are much more limited in scope and purpose than the application of the label "analytical jurisprudence" might imply.[4] Bentham and Austin continued to operate in a world in which jurisprudential reflection aimed at a greater understanding of law's role in bringing about progress and social change. Clarifying conceptual categories (such as "law" and "morality") may have played a part in paving the way to such an understanding, but the idea that such clarifying activities form the main focus for jurisprudential concern would have struck the 19th-century legal writer as absurdly misguided.

Doctrinal science and positivist ideas

The jurisprudential thinking of the modern day is characterised by its attachment to conceptual analysis as a means of unearthing the intellectual foundations of legal practice and legal reasoning. By revealing the conceptual presuppositions of legal practice, it is thought, we gain important insights into the form and structure of the legal order; insights that stand apart from the doctrinal disputes confronted by ordinary lawyers, and that supply the general framework of ideas which make such doctrinal disputes intelligible and possible. The modern view of legal practice as being open to general analysis in this way has

4 Bentham, for example, was mainly preoccupied with the goal of demystifying a legal order still largely understood in terms of natural right, and with establishing a scientific approach to legal scholarship which would clarify and distinguish the task of reporting the law from that of judging and reasoning. (One should therefore be wary of assuming that the category of "expository" jurisprudence is a direct precursor of "analytical" jurisprudence.)

encouraged an understanding of law as an arena to which rival conceptual and ethical theories must be applied, rather than a source of moral or political insight in its own right.

Suppose, however, that we think of the moral nature of a society as being shaped and determined not just by the way it addresses questions of human interaction, but also in respect of the aspects of human interaction that are considered to be worth addressing. We might then think of the legal order as a reflection of the moral life of the polity, and its institutional arrangements as a source of moral insight. Older forms of jurisprudential inquiry repay examination in this regard: for they primarily concern, not the presence or absence of conceptual associations between different modes of reasoning, but rather a philosophical investigation into law's moral nature. Within early modern juristic thought, that nature was conceived as being intrinsically bound up with the moral nature of human beings.

Any human society in which individuals live in close proximity to one another is likely to act *both* as a locus of human flourishing and mutual achievement *and* as a source of frictions and conflicts of interest. If social order is a value worth preserving, but can only be secured through the imposition of rules which restrict a naturally free will, then an organised body of legal rules and standards seems both necessary and highly problematic. Classical juristic understandings thus rested on the assumption that the possibility of governance through law was dependent upon that law being, in some sense, *our* law: that is, as embodying shared standards of conduct which emerge, not from "above" by the arbitrary fiat of a political overlord, but from the shared attitudes and understandings of the people to whom the laws apply.

During the course of the 17th century, these assumptions were laid increasingly open to doubt as forms of legal scholarship emerged to challenge the possibility of grounding collective obligations in a shared moral experience. Such approaches developed a concern with law's systematic qualities, and with its posited, rule-based nature, rather than with the substance of customs and usages which evolved to deal with social problems where they arose. These developments were not without long-term consequences for our understanding of the legal order: the central task of the juristic scholar became that of explaining the law's status both as a systematic body of principles and rights, and as an organised body of imposed rules and standards. Jurisprudential theories became increasingly centred upon the structural properties of the legal order, and upon investigations into the ultimate bases of legal authority. The moral basis of a system of laws was seen as something distinct from, and perhaps prior to, the substance of particular laws as such, and hence as something open to rational and scientific investigation in its own right. The move towards a "rational science" of the law therefore entailed a shift away from a conception of law as based on social custom and practice, and towards a conception of law as serving rational principles which transcend those practices.

The pursuit of such rational explanations of law's nature brought about an intellectual climate in which reflection on the substance of customs and established rules was thought incapable of yielding any lasting insights into the moral foundations of law's authority. The foundations of legal authority were instead sought elsewhere: either in the system of rights and principles which derive from the natural law, or else from the state itself, in the form of legislated commands emanating from a sovereign will. Yet the intellectual shifts which distinguish the modern view of the legal order from the medieval are themselves products of various social and political forces which repay close examination.

In the medieval world, the dominant understanding of law's nature viewed the legal order as a product of reason. The intellectual background to this understanding was broadly Aristotelian: rationality (in practical matters, at least) did not in general concern the

deduction of rules from more general principles, but was instead thought to be rooted in experience and the ideal of the examined life.[5] It was therefore in the substance of the customs, rules and maxims that made up the classical common law, rather than in the ultimate foundations or sources of customary rules and ideas, that lawyers looked for evidence of the law's rational nature. The traditional form of moral reflection at common law hence took rules and customs to be an immanent source of moral insight rather than the product of some more basic or transcendent moral ideal.

The legal scholarship of the medieval period was sustained by a number of related assumptions about the nature of reason, and about the place of law within society. The medieval lawyer moved within a conception of law as a reflection of God's eternal law. Legal rules and customs were thought to be the expression of human understandings of the divine will: though reason cannot establish beyond doubt what God's will demands, yet we might hope to approach an understanding of that will by bringing our collective intelligence to bear on the questions of how to live wisely and act righteously in this vale of tears.[6] The common law represented the accumulated wisdom of a society engaged in the attempt rationally to comprehend the application of justice in specific situations.

These assumptions about the character of law could only be made against a background of universally accepted ideas about the nature and ends of moral thought. Christian theology supplied the framework within which lawyers and non-lawyers alike reasoned about moral matters, and as long as that framework continued to shape the fabric of moral thought, it was possible to view law as giving an authoritative and definite expression to justice and the moral good. By the mid-17th century, the realities of sustained religious conflict had considerably eroded faith in the ability of reason to supply insights into the moral good. Rival moral understandings emerged which displaced Aristotelian notions of wisdom and necessity and instead placed human beings with diverse interests and agendas at the centre of the moral universe. Law ceased to be regarded as the expression of universally accepted moral truths and instead came to be seen as an instrument through which the activities of individuals with competing interests and needs might be regulated and coordinated.

The intellectual landscape of the modern era is defined by the shift away from a view of civil society as a world in which human beings strive for the good life through their collective endeavour, to one in which society represents a divided and fragmentary association of individuals who articulate and pursue private conceptions of the good which vie and compete with the rival conceptions of their neighbours. This shift suggested a different basis for law's authority and the need for new explanations of law's binding force. The idea of natural rights supplied one way of interpreting law's binding nature in this divided world: by viewing the standards of justice and rationality necessary for social life as transcending social order rather than being immanent within it, the natural lawyers were able to suggest principles of social order whose origin in the divine will guaranteed their immutability and objectivity. Law could no longer be understood as a loose assortment of decrees and customary remedies, but instead came to be seen as giving expression to

5 See Aristotle, *Nicomachean Ethics*, book 4, ch. 8. On the Aristotelian basis of medieval law in general, see S Siegel, "The Aristotelian basis of English law 1450–1800" (1981) 56 *New York University L Rev* 18, especially 30ff.; also J W Tubbs, *The Common Law Mind: Medieval and early modern conceptions* (Baltimore: Johns Hopkins UP, 2000), ch. 8.

6 See C St German, *Doctor and Student; Or dialogues between a doctor of divinity and a student in the laws of England* 18th edn (S Sweet, 1815), p. 80. St German provides several examples of common law rules and maxims which clarify or supplement the rather limited outpourings of speculative reason, but he also makes the general observation that while reason can warn us against doing evil, it is up to collective experience and custom to establish which particular acts are evil, and to establish earthly penalties for their commission.

universal principles of justice which required systematic explanation. The customary basis of common law scholarship was gradually replaced by the development of a doctrinal science of law and, through a changing conception of juristic speculation, as a series of questions *about* doctrinal legal science.[7]

The purpose of doctrinal legal science was accordingly to trace out the system of justice implicit within the rules of the common law. An individual's rights were seen as deriving from universal principles which structure the social world prior to the establishment of concrete forms of political association. Forms of human association came to be viewed as both expressive of principles of the good and as being governed by such principles. The juristic assumptions of the medieval period, in which moral insights were gained by reflection upon the life of the polity, were gradually replaced by a picture in which morality is seen as a matter of speculative insights upon the nature of the good itself, apart from the various social forms in which moral values participate. This encouraged jurists to develop bolder classificatory schemes which represented the common law not merely as collection of procedures and remedies, but as a body of doctrine giving systematic expression to general principles which underpin the customary forms of redress. Understandings of legal authority hence became more formal: the binding force of particular laws no longer emerged, as it were, from below (from long-established and common usage) but from universal moral principles which imposed duties from the top-down. Political and social life were perceived to be governed *by* law rather than *through* law.

These developments suggested just one way in which a descending model of political authority might be understood. Other philosophical standpoints emerged in which alternative understandings of descending authority were explored and considered. Surprisingly, the most significant of these alternative accounts was also presented as a series of deductions based on natural rights: Hobbes, like Grotius and other natural law writers, based his account of political origins on the thought that human beings possess natural rights to their own preservation and survival. Despite this common starting point, Hobbes was to view the presence of natural rights as giving rise to a conception of legal authority as the product of artifice, and of law as the creature of the state. "The Right of Nature", Hobbes proclaimed,

> is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently of doing any thing, which in his own Judgment, and Reason, he shall conceive to be the aptest means thereunto.[8]

This way of understanding natural rights suggested a very different underpinning for civil authority from that proposed by Grotius and his intellectual heirs. Grotius's own theory was based on the view that the law of nature demanded the mutual recognition of basic rights possessed by human beings, both to self-preservation and to the material means to sustain life. Natural laws thus simultaneously permit human action and set limits to permissible action in ways that allow for collective flourishing.[9] Insofar as the natural law reflected man's social nature, the means by which lasting forms of social order could be achieved were not thought to be fully distinct from the ends in view: many forms of social

7 The idea of a "juristic science" of legal principle came increasingly to prominence in the 18th century, partly under the pressure of developments in the natural sciences. Stair's *Institutions* (1681) was one of a growing body of jurisprudential commentaries whose goal was to present the law from the standpoint of a "rational science" (see *Institutions* 1.1.17).

8 T Hobbes, *Leviathan*, R Tuck (ed.) (Cambridge: CUP, [1651] 1991), I.14.91 – subsequent page references are to this edition.

9 H Grotius, *De Iure Belli ac Pacis*, "Prolegomena" (Leiden: Kluwer Law International, 1952), pp. 8–9.

order, from primitive customary orders to complex totalitarian or market societies, might develop as manifestations of this nature as long as basic rights continued to receive recognition and forms of human flourishing remained possible. But although human sociability might be given expression in different ways, the Grotian theory clearly presupposed the existence of basic agreement (through rational reflection) on a framework of moral ideas by which peaceful forms of association could develop.

The philosophical standpoint developed by Hobbes had no place for such a suggestion. For although he shared with Grotius the idea that everybody would recognise a basic right for each person to preserve and defend themselves, he argued that such a recognition could do nothing to prevent fundamental conflicts of belief about the actual circumstances in which defensive actions are justified.[10] Accordingly, Hobbes interpreted such conflicts as creating conditions of permanent and pervasive conflict in which each person must rely on their own judgments as to how their preservation is to be secured. The recognition of this necessity can thus be interpreted as the possession by every person of "a Right to every thing; even to one another's body".[11]

This use of the language of rights is in some ways misleading, for Hobbes's assertion that "right" signifies an area of liberty wholly outside that of "law" makes it unclear whether he intended to describe a juridical situation at all.[12] The conflicts Hobbes has in mind are those of belief: our moral judgments, he believed, were rooted not in any external moral qualities of actions or events, but in desire itself, and thus claims about the good (or evil) "are ever used with relation to the person that useth them," there being "no common Rule of Good or Evil, to be taken from the nature of the objects themselves . . .".[13] It followed that specific implementations of the right of self-preservation are incapable of being characterised as "just" or "unjust" in any significant sense.[14]

Hobbes believed that the sole means of escape from the conditions of boundless conflict lay in the realisation that each person's beliefs about the morality of their actions are products of the imagination which possess no foundation in reality. The fact that each person holds different and opposing beliefs about justice and the good should indicate to the wise that their assumptions are no more secure than anyone else's. The possibility of stable social relations thus depends upon the joint relinquishing of powers of moral judgment, and the passing of those powers onto a judge or arbiter "whom men disagreeing shall by consent set up, and make his sentence the Rule thereof".[15] Hobbes's proposed understanding of political authority is based on the priority of form over content: since there is no secure basis for ethical reflection from which shared moral perspectives might emerge, law must take the form of explicitly prescribed rules laid down by some recognised authority.[16]

10 See R Tuck's "Introduction" to Hobbes, *Leviathan* (p. xxix); also Hobbes, *Leviathan*, I.13.89–90.

11 Hobbes, *Leviathan*, I.14.91.

12 Hobbes, *Leviathan*, I.14.91: "For though they that speak of this subject, use to confound *Ius* and *Lex*, *Right* and *Law*, yet they ought to be distinguished; because RIGHT consisteth in the Liberty, to do or to forebear, Whereas LAW, determineth and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent."

13 Hobbes, *Leviathan*, I.6.39.

14 See Hobbes, *Leviathan*, I.13.90: "To this war of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law; where no Law, no Injustice." I have suggested elsewhere that this reading of Hobbes needs some qualification: see S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law – Property, rights and nature* (Oxford: Hart Publications, 2004), ch. 2.

15 Hobbes, *Leviathan*, I.6.39.

16 'It is not Wisdom, but Authority that makes a Law.': T Hobbes, "Dialogue between a philosopher and a student, of the common laws of England" in A Cromartie and Q Skinner (eds), *Thomas Hobbes: Writings on common law and hereditary right* (Oxford: Clarendon Press, 2005), p. 10.

This approach to the problem of political origins suggests a different, more formal understanding of legal authority from that proposed by natural rights theory: rather than the laws of the polity deriving from substantive principles of the good on which all, in principle, could agree, we are invited to think of the binding force of legal rules as being a matter of their origin and of the fact of their constituting authoritative, clear-edged propositions which each person agrees to accept as a shared basis for social order in the absence of agreed moral perspectives. Law might then be viewed, not as a body of ideas expressive of shared conceptions of the good, but instead as a framework of imposed rules, entitlements and permissions which make the joint pursuit of competing conceptions of the good life possible.

Posited rules and formal authority

The justification of powerful, source-based rules as a consequence of moral disagreement is not without problems. We need such rules because, on this view, we are incapable of otherwise reaching agreement on basic norms which could serve as a foundation for social order: each person pursues their own narrow self-interests, and the endless diversity which exists between personal conceptions of the good would exclude the possibility of developing settled rules for addressing shared moral concerns in abstraction from the circumstances of particular conflicts. Suppose we accept the view that in the absence of authoritative, black-letter rules, the social world would be characterised by a chaotic struggle between subjective understandings and intentions. How can precisely stated posited rules bring about social order in such conditions?

There are two distinct senses in which explicitly formulated rules might be said to offer precision. The rules could be "precise" in the sense of possessing an authoritative verbal form; or they could exhibit precision in *applying* in a fully determined and unambiguous way to the particular circumstances of each disagreement of a certain kind. No realistic set of imposed rules could be said to exhibit precision in the latter sense: the legal rules of a large or complex society inevitably focus on types of behaviour rather than specific actions, so that the application of a rule depends not upon "matching" a set of facts to precisely worded descriptions enshrined in the rule, but proceeds instead from understandings and appraisals of action in the light of the purposes or policies which the rule is thought to serve. The possession of an authoritative verbal form is therefore in itself insufficient for reconciling divergent points of view about the demands of justice in specific situations.

Because no two situations are entirely identical, the application of general rules to particular circumstances involves the tracing out of quite fine differences between otherwise similar sets of facts in the light of the values that the rule promotes. Yet it is precisely these differences that disputing parties will seize upon to justify their divergent understandings of the rule: for their argument can be represented as one concerning the *relevant* respects in which one case can be distinguished from others in the light of the rule's purpose. Verbally formulated rules are thus just as likely to amplify interpretative disagreements as to resolve them.

The Hobbesian state of nature is often taken to exhibit these difficulties in an especially potent form. Outside the artificial bonds of civil society, Hobbes argued, men stand in relationships of "continual jealousies, and in the state and position of gladiators; having their weapons pointing, and their eyes fixed on one another".[17] In a world where each person poses an immediate threat to everyone else, shared interests and beliefs cannot establish themselves: for how could we communicate basic desires to one another when the

17 Hobbes, *Leviathan*, I.13.90.

only occasions for human contact involve tense face-offs and fights for survival? People in such circumstances would remain unreadable to each other, for our grasp of the beliefs and motivations of others would be forever formed from our private interpretations and the struggle for survival at all costs. The very possibility of men setting up by consent a ruler or judge whose sentence will become a source of rules for governing conduct, is undercut by the very conditions which make such rules necessary.[18]

Suppose such an authority laid down rules for regulating conduct in this way. Shared interpretations depend upon a reasonable degree of uniformity in experience and attitudes which allow for the possibility of shared understandings of how human beings adapt their conduct to the world around them. Without some measure of convergence on basic concerns, rules seeking to regulate conduct in specific ways would remain completely unintelligible. We can see this if we contemplate a rule forbidding children from smoking tobacco. In the absence of shared understandings, how might such a rule be regarded? Does it, for example, mean that children are allowed to chew cigars, since chewing is different from smoking? Does "smoking" refer to inhaling, or does it merely imply setting fire to something, so that children are free to purchase cigarettes and inhale their fumes so long as they do not themselves light the cigarette? By "tobacco" does the rule mean to refer only to actual tobacco leaves, so that children are forbidden from setting fire to tobacco plants (perhaps out of a concern for those plants) but are otherwise permitted to light and consume tobacco products? Does "smoking" include the ingestion of the smoke from other people's cigarettes, so that infringements of the rule may occur accidentally? Indeed, does the rule apply only where *more than one child smokes* tobacco at a given time?[19]

There is, in principle, no limit to the number of conflicting interpretations we could make of rules such as this one. The reason why we are able to disregard such interpretations lies in the shared background of understandings and concerns within which individuals in a stable community think and move: though we will inevitably differ with one another to a degree over the moral status of children, issues relating to liberty etc., we share enough in the way of ordinary concerns and ideas as to make the moral conceptions at work in the rule intelligible. We know, for example, that the rule serves to protect children from the consequences of a reduced decision-making capacity, and to promote their health and well-being in the face of avoidable harm. We know this, because we share basic understandings of what children are like, and because we value health and recognise that a free choice is not always appropriate or desirable. Without such understandings, expressly created rules contribute nothing to an orderly social existence.

The failure of authoritative, deliberately posited rules to bring about stable social relations by virtue of their supposed "precision" may lead us to contemplate another way in which expressly created rules might supply grounds of social order in a morally divided world. For, instead of bringing about a convergence in attitudes and concerns, such rules might be seen as offering neutral standpoints within which various, possibly conflicting visions of the good life can be formulated and pursued. Law, on this view, consists of a framework of rules and principles which prescribe no particular form for the good life, but instead establish pockets of right and liberty within which individuals are free to engage in their own projects and pursuits.

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18 For one thing, it is entirely unclear how the denizens of the state of nature could evolve a shared language through which such sentences would be understood. Shared interpretations of vocal sounds and utterances also depend upon some collective sense of how human beings perceive and understand the world around them. Without a shared language, of course, it would seem that human beings lack the ability to formulate reasoned propositions about what the laws of nature demand. See Hobbes, *Leviathan*, I.13.89.

19 For further discussion, see N E Simmonds, "Between positivism and idealism" (1991) 50 *Cambridge LJ* 311–18.

This proposal initially seems more promising than one which focuses on the precision with which deliberately created rules are expressed. Whereas the latter approach conceives of legal rules as bringing interpretative disagreements about the good to an end, the former seeks instead to contain such disagreements within the reasonable boundaries set by the rules. Indeed, the rule-based neutrality view need not be premised on a view of law as consisting in *posited* rules at all: we might, if we wished, think of morality or reason as suggesting an ideal distribution of entitlement and liberty under which each person can freely pursue his or her own ends without undermining the efforts of others.[20] The circumstances of disagreement from which the need for positive rules of law arises nevertheless reveal rule-based neutrality as a particularly attractive ideal in which to enfold a positivist view of law. A chaos of competing views and ideas would prevent any widespread recognition of neutral standpoints; yet the explicit creation of formal rules for peaceful social interaction would both furnish such standpoints and reveal the law's moral neutrality.

We might wonder whether, in the end, rule-based neutrality provides any better reasons for embracing legal positivism than the view that deliberately imposed rules create "precision". For rule-based neutrality to work, the rules of the legal order must not be constitutive of any particular form of the good, but must instead bring about conditions which facilitate the pursuit of diverse conceptions of the good by individuals who disagree about what the moral good requires. Suppose we think of a conception of the good life as being a matter of what each individual rationally prefers. Since there are no obvious means of establishing which set of rational preferences are the best, the laws of the polity must ensure that each person remains free and unmolested in their pursuit of their own preferences in their own way.

There are at least two difficulties with this suggestion. It is, first of all, unclear whether this ideal is really any different from one of "precision": saying that legal rules must not allow any one conception of the good life to dominate over others is the same as saying that the rules must not be capable of interpretation in the light of subjective conceptions of the good. As we have seen, however, the application of general rules to specific circumstances of disagreement is precisely an occasion for the emergence of rival interpretations of the rules in the light of the moral conceptions and experiences of disputing parties. The ideal of "neutrality" is thus of no more use than the ideal of "precision" in bringing such disputes within a firm regulatory framework.

Suppose it were possible for legal rules to establish precise, determinate standards, which would allow them to express moral neutrality in this way. The ideal of rule-based neutrality would still face a second, and seemingly insurmountable objection. Each person, on this view, formulates and pursues their private conception of the good life within the boundaries permitted by the rules. The formulation of each person's rational preferences therefore takes place within constraints and limits imposed by authority. Neutrality demands that the formulation of preferences remains independent of the content of legal rules; for the presence of causal links between rules and preferences would undermine moral neutrality. Yet we do not think of individuals as plucking preferences out of thin air: rather, we think of preferences as making sense only within the concrete possibilities established by a way of life. Since the framework of legal rules is instrumental in determining the form of life within the polity, a person's preferences are never fully independent of the rules which make social life possible.

20 See, e.g. Kant's "Metaphysical principles of the science of right" in I Kant, *Philosophy of Law*, W Hastie (trans) (Edinburgh: T&T Clarke, 1887).

The rule-based neutrality view overlooks the constitutive role played by legal rules in shaping the social life of the polity. A person's preferences relate to the choices which can be made about different paths in life. Law inevitably shapes such choices, by establishing limits to permissible conduct. Consider the rule banning children from smoking: even if we share enough in the way of cultural understandings to comprehend the meaning of such an injunction, how can it be presented as a neutral standpoint in a world in which concerned welfarists live alongside radical libertines? In such a world, disagreements about the positive rules would force the jurist to seek out "neutral" interpretations in ever more abstract and recondite forms. An image of rationality in which each individual adopts a free-floating attitude of "preferring", within the constraints established by posited rules, is thus of no value to an understanding of the complex relationship between law and the web of social life. For, we think of each person as formulating and making choices from a position of immersion within the ordinary meanings and shared understandings which the rules perpetuate.[21]

Positivism and statism

The attempt to understand law in terms of formal authority was a response to the circumstances of disagreement which characterise the modern world. The problem of peaceful coexistence in such a world was the problem of identifying neutral standpoints which could serve as a basis for social order. Legal positivists conceived of deliberately created standards as the unique means by which a peaceful and stable coexistence could be achieved.

Despite the problems with that suggestion, we may feel reluctant to give up altogether the idea that posited rules are in some sense necessary for the coordination and regulation of conflicting desires and interests. In conditions of prolonged controversy about the moral good, customary rules and practices will seem to offer too thin a basis for stable social relations, and the idea of natural rights will fail to stabilise expectations significantly in the absence of broad agreement as to how such rights should be traced out. Positive law might then be thought of not as a creative force, bringing about agreement through the imposition of rigid prescriptions on an otherwise shapeless social void, but as an instrument through which existing expectations and interpretations are reflected and refined.

A proposal of this kind requires substantial revisions to the positivist notion of formal authority. Suppose we were to turn the Hobbesian argument around: black-letter rules do not forge social consensus out of the chaos of competing moral visions, but instead prevent the breakdown of shared beliefs to the point where a chaotic anarchy of subjective claims threatens to engulf us all. Such rules cannot exist apart from shared understandings and beliefs, but they provide a focal point through which beliefs and understandings can be articulated and reinforced. This necessitates the recognition of the social world as something other than an anarchy of conflicting subjective visions. But such a recognition renders a purely *formal* conception of legal authority impossible: for it demands that we view many ordinary legal rules as being tied to underlying practices which treat the rules as expressive of the broad moral ideals which are implicit in our social relationships and dealings. Some degree of convergence in ethical judgments is a prerequisite for social relations of any kind; we might then think of the rules as offering further stability and refinement to ordinary expectations where reasonable people disagree about the precise implications of informal understandings.

21 A similar argument can be levelled at Ronald Dworkin's interpretivism: see Simmonds, "Between positivism", p. 325.

Legal positivism of this latter kind is captured neither by the thought that posited rules establish rigid and precise standards, nor by the idea that legal rules exhibit moral neutrality. Positivism of this kind is best understood as the suggestion that the law of a complex and morally diverse society must consist largely in rules articulated by the state: either in the form of general legislative frameworks devised to secure some collective advantage or goal, or through the binding judgments of courts in the adjudication of private interests and claims. A statist conception of law is thus indicative of a changing conception of the function of law. Law is no longer viewed simply as a collection of customary remedies for redressing private wrongs, but as an instrument for the general regulation of private life and for the pursuit and realisation of social goals. As the possibilities of law's regulatory function manifest themselves within the scholarly imagination, doctrinal legal rules are less easily presented as crystallised customs, their content increasingly seen instead as determined by official practices of recognition.

The shift towards a statist conception of law entails certain assumptions about official determinations of the content of legal rules. One persistent source of philosophical debate in modern jurisprudence is thus the notion of a "rule of recognition". In some respects, the rule of recognition offers a means of clarifying the legal order's place in intellectual life which is not vastly different in scope and purpose from the definitional manoeuvres of Austin and earlier positivists: exercises of political power constitute a permanent source of moral disagreement among the members of a polity, but (the positivist argues) our moral deliberations are considerably clarified by an understanding of which forms of political interference have the force of law.

If a rule of recognition is to produce such clarity, modern-day positivists believe, then it must establish criteria of legal validity which do not *inevitably* appeal to moral values: the criteria of validity which determine the law within a jurisdiction may include reference to moral criteria, but do not *necessarily* so refer. Hence many legal philosophers have sought to clarify the nature of law not by sustained reflection on the role of law within the political life of the polity, but through argument about the properties of the rule of recognition itself. Jurisprudential reflection has thus come to centre on the issue of whether or not the process of "recognising" the validity of legal rules is inherently a moral one.

Concern about law's moral nature is, of course, hardly new. The political writers and jurists of the Exclusion era constantly feared the development of "arbitrary" or absolute government: the fear that the monarch, as the supreme source of legal and political power, would seek to rule without Parliament and institute political and religious reforms fundamentally at odds with the established customs and moral life of the realm. Opposition to the idea of arbitrary rule received expression through the belief that the country was governed by an ancient constitution which safeguarded individual rights and established limits to the use of political power throughout the polity. The traditional focus on immemorial custom embodied the idea that the binding quality and ruling force of law in some sense emerge from the characteristics and practices of the people to whom it applies.[22] The possibility of law was thus thought to depend upon the positive law being underpinned by practices which treat those rules as expressive of a moral position drawn from the social life and customs of the realm.

22 This belief constituted the main strand of Whig opposition thought throughout the late 17th and early 18th centuries. Parallel notions of social contract and popular sovereignty were sharply distinguished from it, and were largely confined to the margins of British political life. For a useful, though not wholly reliable, account of Exclusion-era political thought, see L Ward, *The Politics of Liberty in England and Revolutionary America* (Cambridge: CUP, 2004). For a rather different take, see J C D Clark, *English Society 1660–1832* 2nd edn (Cambridge: CUP, 2000).

To a modern positivist, the fears of the Exclusion-era writers demonstrate the contingency of the association between law and morality: by deliberating and opposing the idea of arbitrary government, early modern thinkers displayed their awareness of absolutist rule as a *possible* form of social order. Hence (we might be led to suppose), the rule of law does not inevitably depend upon conformity to certain moral values, but may just as easily rest upon the shoulders of a powerful monarch whose very word is law. There are at least two good reasons for denying the validity of such suppositions.

In the first place, it is far from clear that arbitrary government in the positivist's intended sense *is* a possible source of stable social order. Where repressive, totalitarian or absolutist forms of government exist, they generally have to be sustained by a significant ruling class to whose values and interests the laws appeal. Not only will laws require interpretation in the light of those values and preferences, the legal order must also continue to regulate the wider moral, political and economic life of the polity. A system of laws is thus dependent upon the maintenance of existing social ties in respect of commerce, labour, religion, the recognition of property and familial relationships, and so on. An authoritarian regime with an aggressive agenda for social change will inevitably modify *some* established ties, but it must ensure basic continuity with previous patterns of social practice if it is to create a lasting form of social order. A system of posited laws (even under "arbitrary government") must therefore be rooted in widely acknowledged social practices which treat those laws as expressive of certain moral ideals. The ideals do not have to be bolshevik in cultural origin, but they must at least be menshevik. Lasting forms of social order thus do not invite classification as law because they conform to positivistic semantic criteria, but because they foster or perpetuate certain social and political practices which, in the case of absolutist regimes, allow the ruling caste to maintain dominance over the repressed majority.

The second point is that the forms of arbitrary government to which the positivist may appeal in support of the law/morality distinction do not represent the typical form of governance in the real world. The goal of jurisprudential reflection is to understand the role of law *within* the political life of the polity. The proper focus for philosophical inquiry is thus upon the forms of legal order most central to that life.[23] Since it is typically governance rather than "repression" as such which constitutes the point of law, philosophical reflection is best aided by concentration on instances of legal order which seek to promote stability and peaceful forms of human flourishing rather than those which undermine or suppress them. Analytical philosophers may, of course, develop and pursue conceptions of "law" in ways that are independent of particular political goals and ideals; but they do not thereby clarify law's role within political life: rather they obscure it. Notions such as "law", "right", "justice" etc. do not constitute self-standing ideas but form part of the canon of political ideas through which we understand and reflect upon our form of life. The idea that we can achieve an enlightening understanding of law prior to immersion in substantive moral and political forms is a chimera indeed.[24]

Statism and its limits

The statist idea of law came about as a means of addressing the problem of coordination and stability in conditions of moral pluralism and social disagreement. Early positivists such

23 Typical or central, that is, as opposed to merely most prevalent; although one would obviously expect forms of governance which are most central to the realisation of a form of social life to be also most prevalent among instances of that form of life.

24 One is reminded of Jeremy Waldron's suggestion that latter-day positivists seem intent on defending a position *called* "legal positivism", no matter what that position turns out to be (*Law and Disagreement* (Oxford: OUP, 1999), p. 166).

as Hobbes and Bentham are best understood as proposing a conception of law as an instrument for stabilising and securing moral consensus rather than suggesting the legal order's total separation from morality. Nevertheless, the move towards a more formal conception of law's authority is bound to invite progression beyond a view of the law's refining function, to one in which legal rules are viewed as modifying and supplanting existing moral practices (as is the case in Bentham's jurisprudence). The central problem of jurisprudence then becomes that of explaining how law can be both reflective and at the same time constitutive of social order.

The same circumstances of disagreement which propel the idea of posited black-letter rules into the centre of legal thought also render accounts of law's binding authority deeply problematic. It is not easy to offer systematic answers to these contradictory features of the legal order without presupposing either a narrow and constraining positivism or increasingly abstract versions of moral idealism. It is nonetheless possible to offer the following tentative suggestions.

(1) The law of a complex market society is no longer capable of being viewed as a body of customs reflecting shared practices and expectations; rather, law inevitably comes to be seen as consisting largely in a system of imposed rules which *restructure* expectations. A statist conception of law thus makes it impossible to understand legitimacy as deriving from the thought that the law is in some sense "our" law. Instead, (in the absence of any other obvious expedient), legitimacy becomes a matter of the law's conformity to standards of fairness, equality and the protection of individual rights etc. which exist in abstraction from the ordinary contexts of clashing understandings in which they figure.

This is inclined to suggest a picture in which the law is *either* seen as serving universal moral values which lie beyond the expressly formulated rules; or else as establishing conventions to which each person is subject in the same way, no matter what their personal status: the legal rules which apply to young hooligans are the same as those which apply to little old ladies.

The former view encourages the legal scholar to seek out the meaning of equality and fairness at ever-increasing levels of abstraction from the black-letter rules which are said to exhibit those virtues. Legal rules are then conceived as giving no more than partial expression to moral ideas which stand in need of elaboration in the light of more general ethical understandings and ideas of justice. Accordingly, the jurist's task is seen as that of offering an account of the general theory of justice which underpins the black-letter rules. Unfortunately, the entire corpus of legal rules (taken as a whole) is not usually thought to serve this or that specific moral purpose, but rather to regulate a whole range of social relations in the absence of shared moral perspectives on the questions to which the rules apply. Doctrinal principles of tort law can be viewed as expressing *the same* underlying principles of justice as rules relating to the operation of trusts only by espousing ideals of justice in the most glib and uninformative terms. The quest for unifying explanations of a body of rules is thus often wont to suggest the picture of an ideal order of moral principles quite at odds with the mundane reality of clashing interests and interpretations.

The second suggestion lately set out does not, however, fit with ordinary legal practice much more successfully. For the common law is not easily

viewed as consisting in the application of fixed standards to abstract bearers of rights and duties, but instead displays sensitivity to circumstance and to the peculiarities of the dealings between the litigating parties (think about the kinds of circumstances which affect a person's status as a bona fide purchaser, for example). Jurisprudential writers who favour this second understanding are then forced to resort to the pernicious idiom of distinguishing rigidly between "applications" of the rules versus formulated "exceptions" to those rules.

The formalistic conception of legal authority encouraged by the statist view is unfortunate in making abstraction at one of these points – either in the interpretation of rules, or in their application – seem inescapable.

(2) The conception of formal authority proposed by the statist idea of law is best viewed as a response to the problem of clashing moral visions which characterises the modern polity. Viewed in this way, it is possible to understand a positivist outlook on law as a symptom of the erosion of shared understandings, and of the realisation that customary practices alone are incapable of providing a stable basis for social order in the modern world. We have seen that a body of posited rules (as much as a putative body of natural rights) can offer no final way of resolving the conflict of interests which defines modern social existence. Much of the law thus exists to impose a level of order and regulation upon a body of interests and expectations which will continue to conflict even in the presence of deliberately posited rules. How such an understanding of law's role is connected to questions of authority and legitimacy remains fairly unclear, and it is possible to see a good deal of modern "analytical" jurisprudence as involving the avoidance of this question in favour of a series of attempts to locate moral understandings either within legal practice itself or else in the regulatory interstices created by the focus on deliberately formulated rules.

In fact, the presence or absence of conceptual connections between law and morality shed little light on an understanding of the contribution of deliberate black-letter rules to social order. Even if the application of legal rules does not presuppose some general commitment to the moral value of those rules (or to law generally), such rules still need interpreting in the light of their perceived point or purpose: except in extremely mundane contexts involving the application of precise technical rules to well-understood situations, this interpretative activity will amount to the tracing out of conceptions of morality or justice taken to be implicit within the express verbal form of the rules. Theoretical attempts to place such moral understandings outside the formal boundaries of the law are in the end of little significance to our ability to comprehend these interpretative activities.

(3) Modern outlooks on the legal order depend in some measure upon an understanding of the law's coordinating function. We might think of an official practice of recognition in this context as supplying an additional dimension of precision and stability to ordinary understandings. The harmonisation of divergent outlooks and interests in a large and complex society cannot, however, be achieved simply on the basis of imposed solutions, but instead implies compromise between a range of conflicting interests. For, suppose the legal order embodied an arbitrary preference for

one set of interests over another: those whose interests are trammelled and systematically overridden would have little motive for seeking the protection of their interests or the resolution of grievances *within* the law, and indeed would have few reasons for taking much interest in the law at all (except perhaps for the narrow purposes of the "bad man").[25]

These thoughts might lead us to feel some hesitation in embracing an official practice of recognition as a way out of the problems of fundamental disagreement. Officials, as much as the rest of us, think and function within the context of ordinary understandings and moral dilemmas, and the supposition of an "official attitude" towards the interpretation of rules can be viewed as an attempt to identify conditions of convergence and harmony in the way that the law is discovered and applied. We are encouraged to think of such official practices as existing in detachment both from the rules (which do not specify the conditions of their own application) and from the background of social understandings (which continue to diverge and conflict).[26] But how, we might ask, does such a free-floating interpretative attitude establish itself, and how are participants in that practice to identify it?

Any systematic practice of interpretation is likely to generate its own rules and conventions: conventions which will differ in certain respects from the background understandings and expectations which an ordinary person might possess. Yet (as we have seen) the interpretative activity needed for the application of general rules to particular situations does not consist merely in the application of static "canons of interpretation" in each case, any more than it involves the imposition of rigid propositions or imperatives. In the absence of a means of specifying general conditions for the application of fixed rules to all conceivable situations (or at least dispositive conditions for so doing), each official or judge must at some stage resort to his own complex moral understandings of the main features of the case.

We should therefore replace the "top-down" image, of legal officials making judgments about the application of law on the basis of settled *rules* of recognition, with an idea of judges and officials deciding cases from the bottom-up: the traditional form of common law reasoning is a mode of moral reflection in which the decision is reached by the contemplation of the relatively fine distinctions which might be drawn between otherwise similar cases.[27] The distinctions which count as morally *relevant* for these purposes are determined on the basis of fairly narrow doctrinal ideas and principles which are incapable of being fully articulated or understood outwith the immediate context of their application. A judge's deliberations are thus guided along paths which differ in various respects from those employed by the lay person, but the moral understandings which the judge brings to bear are firmly rooted both in the shared background of attitudes and beliefs in which all thinkers reflect upon their moral experience and in the rules and doctrines being applied.

(4) The recognition of the state as a distinct entity with the power to impose rules and alter entitlements naturally brings about a division of society into

25 O Wendell Holmes, "The path of the law" (1897) 10 *Harvard L Rev* 457.

26 Hart, *The Concept of Law*.

27 S Coyle, "Practices and the rule of recognition" (2006) 25 *Law and Philosophy* 417–52.

public and private realms. Legal rules for the regulation of private entitlements are then conceivable as a series of public interventions into the circumstances of private interests and choices. This is suggestive of an image of society in which the law is brought into conflict with the moral lives of individuals: an image which makes any attempt to resolve a shared sense of law's binding authority exceedingly difficult.

It is notoriously difficult to distinguish the public and private realms in an intellectually satisfactory way. Without collective recognition and control of private entitlements, individual rights, liberties and powers become illusory, and the private realm itself cannot exist apart from a general framework of regulation and governance which permeates the private lives of its citizens. At the same time, the modern view of the legal order is inclined to suggest the misleading notion of the individual as the locus of *private* rights and interests which are sharply distinguished from those of others, or from collective goals more generally. The legal order then exists to secure and balance those different kinds of interest.

This picture is misleading in various respects. When we speak of individuals having "private" interests, we usually mean only to distinguish such interests from collective goals in the basic sense that the individual concerned is acting out of his own, privately formulated needs and desires rather than altruistically pursuing some public good. We do not (in other contexts at least) think of private interests as being *fully* distinct from collective or interpersonal concerns: insofar as a person's interests are developed and expressed only *within* a context of social interaction, those interests will be formulated against a background of joint understandings and possibilities for personal flourishing. Just as others' interests affect my life in certain ways, my interests have effects (sometimes very pronounced) on other people in my social circle. My interest in a contented family life (for example) pervasively shapes my interests in other areas of my life, just as my interest in amassing great wealth might give way to interests in being a charitable, or likeable, or even honourable person. We generally understand and accept such social and familial ties when formulating and pursuing interests.

The notion of each individual pursuing his own atomistic interests in myopic isolation from the lives of others is thus not an illuminating way of proceeding when contemplating the legal order of a modern society. The dichotomy of "public" and "private" is apt to suggest a particularly intractable problem for the legitimacy and binding authority of the law: against such a background, the legal order will appear as a monolithic system of impositions which interfere directly in each person's moral life and choices. By recognising that such an account may offer too simplistic a view of the competition between public goals and private interests, might we not come to view the questions of legitimacy raised by that picture as being unnecessarily stark?

Statist impulses and moral visions

It is unclear whether these musings can blossom into a coherent understanding of the legal order. Indeed, we might view the statist conception of law as giving rise to a number of contradictory impulses which can only be jointly satisfied by imposing fixed theoretical frameworks for the understanding of law within the modern polity. If that is so, then a

fully coherent theory of law will be achievable only at the expense of a detailed and genuine cultural understanding. The rigid analytical dogmas of legal positivism (and moral idealism) might be considered anew in this light. For we can view the positivist as attempting to combine an account of the law's coherence and determinacy with an account of legal authority in a social world which continues to be divided along moral, political and religious lines.

Early modern jurists were clearly aware of the troubling implications of the positivism which they encountered in writings such as those of Hobbes. The fear of arbitrary government was perhaps the strongest influence on the shape of English political thought during the late 17th century, and this plainly affected lawyerly attempts to come to grips with Hobbes.[28] Reading such works, however, one is struck not so much by the near-universal rejection of Hobbesian jurisprudence, as by the deep and clearly widespread dissatisfaction with the contemporary state of common law reason. Support for the legal positivist view of black-letter rules imposed by the state came not from political sources but from within the legal order itself: lawyers, unequal to the attempt to impose clear order on the unsystematic mass of rules and procedures, increasingly turned to legislation as a means of demystifying the law.

The inability of lawyers to impose a rational framework for thought upon the body of common law customs and remedies had become, for many, something of a theoretical embarrassment.[29] As late as the mid-18th century, Blackstone struggled to accommodate the written rules of the legal order within a customary framework of standards and principles organised systematically under Roman law headings.[30] In the end, however, the analytical framework within which Blackstone sought to interpret the law remained little more than a free-floating set of abstract ideas, which remained separate from his substantive explanations of the law as a set of remedies.[31] It was becoming clear to most lawyers that the scientific precision increasingly demanded of the law was possible only through the interpretative lens of a "science of legislation".

It is tempting to suppose that a statist conception of law is in some sense made inevitable by the circumstances of the modern state. Nevertheless, the legal positivist view of authority at work in such a conception expressed hostility towards the customary forms of social order which early modern thinkers defended as the basis of liberty. If the validity of legal rules is a matter of their being established by official patterns of recognition rather than the reflection of shared standards and practices, then how is the binding authority of law to be explained? The positivists' understanding of law seems to presuppose a conception of authority under which questions pertaining to the validity of legal rules are unconnected to understandings of the moral nature and legitimacy of a system of laws.

I propose to conclude this essay by offering some thoughts on how a statist conception of legal authority might be linked to an account of law's moral nature. For, despite appearances, important connections might be made between those formal, posited features of the legal order which derive from its statist character, and the systematic, principled aspect of the law which is most evident in doctrinal commentary. The constitutive role

28 The most notable of these attempts is that of Matthew Hale, *A Brief Survey of the Dangerous and Pernicious Errors to Church and State in Mr Hobbes' Book Entitled Leviathan* (1676), but he was far from alone. See, e.g. the critical discussion of Hobbes in James Tyrrell's *Patriarcha, Non Monarcha* (1681), pp. 103ff.

29 See, e.g. Stair *Institutions* 1.1.17.

30 Blackstone, *Commentaries*, vol 1, p. 32.

31 M Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Clarendon, 1991), ch. 3.

played by legal and social practices in the development of moral thought that I wish to explore is, perhaps, most clearly evident in the context of Hobbes's political theory.

The solipsistic conditions of the state of nature might be thought to exhibit the barest conditions of natural right which remain after all that is culturally specific has been stripped away from agents nominally endowed with rationality.[32] In construing such rights as rights to self-preservation at all costs, Hobbes offered a picture of uncivilised existence which sharply diverged from that offered by Grotius; yet in spite of contrasting views on man's possession of an essentially social nature, both writers in fact presupposed a very similar account of the conditions which make moral thought possible. In both cases, it is through the creation and exploration of social bonds that moral knowledge is achieved. This is seen most starkly in Hobbes. If (in the state of nature) the typical occasions for interaction between human beings are occasions of conflict brought about by the "continual fear, and danger of violent death" at the hands of the other, then the creation of social bonds of even a primitive kind seems impossible. Hobbes suggests that it is through the exercise of reason that peaceful relations can be instituted: I must be prepared to lay down my pre-emptive rights if others are so willing. But if the state of nature represents conditions in which *all* cultural knowledge is absent, then how am I to communicate my willingness to others? How, indeed, am I to formulate the thought at all since the conditions for language and conceptual thought are among those that are excluded from the state of nature by hypothesis?

As noted earlier, the conditions of solipsism and continual fear that Hobbes describes are such as to make human beings completely unintelligible to each other. The uncivilised landscape is one in which human beings roam about like tigers in the forest. Moral thought is impossible in such conditions: for even if we assumed the existence of an intuitive moral sense by which human beings could grasp a platonic realm of moral forms, how would each human agent represent the content of such intuitions to themselves? The possibility of moral reflection is thus tied to the context of stable social relations which allow language and conceptual thought to flourish. More than that, it is reasonable to assume that a shared language of sufficient richness for moral reflection would emerge only through a common experience from which shared outlooks, beliefs and understandings have flowered. The social practices (including the legal practices) of such a society would then naturally be thought of not simply as contingent facts to which more permanent moral insights might be applied, but as a source of moral insight in their own right.

The thought that a society's social and institutional arrangements can act as a source of moral reflection in this way may help to explain the connection between the formal, rule-based elements of the law and its substantive, moral nature (for even posited rules, in this way, are the product of a history of shared understandings and values); but there might be a lingering suspicion that all of this undermines the objectivity or permanence of the moral insights which seem to be a feature of moral belief. Such an appearance is misleading however, both about the character of morality and about the nature and significance of law.

Modern philosophy (probably since Descartes and Leibniz) presupposes a conception of morality in which the objectivity of moral values derives from their invariance and their transcendental qualities: if moral insights are capable of evaluating human practices, it is

32 See R Tuck, *The Rights of War and Peace: Political thought and the international order from Grotius to Kant* (Oxford: OUP, 1999), pp. 6–7. Given the inexorable logic of pre-emptive self-defence, we might equally characterise the situation as one in which agents are precluded from exercising rational impulses whilst at the mercy of social forces beyond anyone's control.

thought, then they must ultimately derive from a source outside the practices themselves.[33] Moral philosophy then becomes the project of proposing, systematising and defending concepts of right and wrong in abstraction from the variable human situations to which they are to be applied. Alternatively, however, we might adopt a view of moral thought in which the objectivity of moral insights is grounded in rationality and value. Could we not then view moral reflection as the rational contemplation of human nature, as reflected in our social life and institutions? This reflects the thought that morality itself only makes sense within the context of a shared social existence, in which one person's actions have consequences for the lives of others. Once that thought is grasped, we might well regard the division of theoretical enquiry into two separate stages: empirical, social investigations, on the one hand, and normative investigations of those empirical arrangements, on the other, as a crude oversimplification.

Moral reflection of this kind was also present in Aristotelian ethics, in the thought that an understanding of the good can only come from pursuing and leading a good (morally worthwhile) life. This form of moral understanding owed much more to conceptions of practical wisdom (*phronesis*) than to ideas of speculative reason: we know virtue through living virtuously, and by reflecting upon those aspects of our lives that seem to us of most value. The moral philosophy to be found in Hobbes amounts to an almost complete rejection of Aristotelian thought, yet it retains (perhaps paradoxically) its key feature: the thought that moral understandings are possible only through immersion in the fabric of social relations. Abstract man from his social surroundings and morality ceases to have any meaning.[34] Moral inquiries therefore do not stand apart from and above inquiries into the content of human interests and practices, but identify concerns that are only possible within a context of overlapping and conflicting interests.

Law might be thought to represent a reflective engagement with human interests in an especially potent way. Indeed, the classical representation of the common law as the repository of a society's accumulated wisdom owed much to the Aristotelianism of the medieval jurists and legal commentators. Yet the focus on law as the pre-eminent example of a social institution through which we can reflect upon and explain our shared moral inheritance is not an inevitable one. In the customary order of medieval Europe, it was social institutions such as the family, property and the feudal order which were regarded as the primary sources of reflection upon human nature; law was simply a manifestation of authority which supported and sustained those structures, and accumulated knowledge of them so as to guide our understanding of the standards of proper conduct (and punish those who sought to transgress them). It is only when law is transformed from a collection of procedures and remedies into a body of systematic principles of justice that the legal

33 This idea is present in arguably its strongest form in the "original position" of John Rawls (*A Theory of Justice* (Oxford: OUP, 1972), p. 11ff.). Not all moral philosophers are satisfied with the extreme abstractionism of this position as a path to justice in the real world, but the general confidence in this form of rationalism nevertheless sustains a great many moral philosophies of the present day: see R Dworkin, "Objectivity and truth: you'd better believe it" (1996) 25 *Philosophy & Public Affairs* 87–139: "It is an interpretive question whether a general statement about morality is a positive moral judgment. A sociological account of other peoples' moral convictions is not, because it does not itself endorse or presuppose any moral assessment."

34 See Hobbes, *Leviathan*, I.13.90: "To this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice . . . Justice and injustice are none of the faculties, neither of the body nor mind. If they were, they might be in a man that were alone in the world, as well as his senses and passions." I am not suggesting that we understand Hobbes as proposing an Aristotelian conception of practical wisdom, for he clearly has in mind a more Protestant, even subjective notion. But if we subtract Hobbes's insistence on imposed meanings, we might see his arguments about the state of nature as leading to a partial resurrection of the Aristotelian conception of practical wisdom.

order becomes a natural focus for moral reflection on the ethical life and characteristics of the polity. It is, in short, doctrinal science which gives to law its profound importance as a source of ethical reflection.

Doctrinal legal science is both the most obvious manifestation of law's moral nature and its most problematic. The doctrinal scholar offers reasoned interpretations of the moral basis of a system of laws; but once abstract principles of justice are worked out into proposals about the content of interlocking rights and rules, it becomes less easy to regard the law as a repository of collective ideals and understandings. Instead, the legal order takes on the appearance of a body of standards which establish spheres of personal autonomy within which each person is free to discover their own form of the good life through introspective engagement with their own personal experience. The ideal of abstract legal equality which is the natural adjunct to a system of interlocking rights thus emphasises not what is shared by a political community, but what is personal and contestable. The descending model of legal authority hence gives expression to Protestant conceptions of autonomy and moral reflection which sit awkwardly with the idea of law's importance as a source of moral insights.

The positivistic conception of law as an instrument of the state can be seen as an attempt to contain the problems of moral Protestantism within reasonable limits. By construing the legal order as a complex body of posited rules and published decisions,[35] the positivist might hope to minimise the significance of individualistic reflection on moral problems by marginalising the need for such reflective engagement to situations in which the application of rules is hopelessly in doubt. In all other cases, juridical activity would be construed as resolving the penumbral uncertainty of the rules according to well-established juristic concepts (such as harm or reasonableness) or by explaining the bearing of one rule or concept upon another. In this way, a distinctive jurisprudence would grow out of the general mass of rules and decisions, which would both add to the completeness and certainty of law (by resolving meanings and closing "gaps"), and furnish the legal scholar with a distinctive subject matter for his ruminations: for the task of the legal scholar would then involve clarifying the significance of the principles and concepts relied upon in legal argument, and building up a coherent picture of the entitlements and duties established by the published rules and decisions.

Such a view might seem to possess a number of advantages. For one thing, it would help to explain the ambiguous status of the jurist's "clarifications" (for the juristic writer possesses no rule-based authority of his own): the doctrinal claims of the legal scholar would be seen as expounding the *sense* of the existing law (the rules and decisions), and thus as guiding and clarifying judicial deliberations, without constituting a finally authoritative statement of the law (until actually endorsed by a court or enshrined in statute). For another, it would provide some account of the possibility of law in a world of conflicting Protestant interpretations: the legal order would represent a source of insight into the moral life of the polity, not by directly reflecting the shared beliefs and customs of its inhabitants, but indirectly, by enshrining standards of behaviour and comity which sustain and make possible the joint pursuit of certain interests and goals whilst downplaying or suppressing others.

35 The publication of adjudicative decisions in yearbooks or case reports is not a necessary requirement for a flourishing doctrinal legal science; but it is a prerequisite for a doctrine of stare decisis which could ground such decisions within a positivistic conception of legal validity: without an authoritative source for adjudicative reflection, legal decision would inevitably rely on substantive claims about justice, common sense and the like rather than the "authority" of past decisions.

There are manifest problems with this approach. Not least, it is hard to suppress the sense that scholarly writings and judicial deliberations can be viewed as offering clarifications of penumbral uncertainties only at the price of considerable distortion: for they seem rather to concern the elucidation and application of principles of justice which defy translation into static or authoritative meanings. Ronald Dworkin has offered many arguments against this form of positivism.[36] Yet his own attempts to reconcile the statist elements of the legal order with its principled, moral character, despite being richly suggestive, are themselves problematic in various respects.

Dworkin emphasises the "interpretive" character of law over its conventional, rule-based aspects in a way which would seem to reveal the law's nature as a source of moral insight and reflection:

> Integrity [he says] expands and deepens the role individual citizens can play in developing the public standards of their community, because it requires them to treat relations among themselves as characteristically, not just spasmodically, governed by those standards.

Under this conception, political obligation "becomes a more Protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme".[37]

In this case, however, the positivistic understandings of the statist elements of law are reversed: rather than moral reflection being used to fill in gaps or rectify uncertainties left open by the body of legal rules and decisions, the legal rules are here considered as political markers which guide moral reflection towards principles which determine the way in which conflicting interests should be weighed and balanced. Dworkin believes, of course, that the scheme of justice implicit within the law in fact uniquely determines the judgment which should be given in each case. It is by no means easy to see why each person's "Protestant" interpretation of the legal order should converge on right answers, however. We can think of each person's interpretation as establishing good reasons for supposing the existence of permissions, duties and entitlements of a particular kind. But what reason is there for believing that standards of rationality impose a hierarchy on such reasons? For each person's reasoned interpretations of shared practices and institutions are as likely to emphasise divergent conceptions of the significance of shared values and beliefs as they are to establish clear criteria by which the value of conflicting principles may be weighed and balanced. The conception of rationality at work in the notion of "right answers" seemingly undercuts moral Protestantism rather than reinforcing it.

Dworkin suggests that a shared language, as well as common interests and convictions, are necessary if we are to make sense of each other's behaviour and beliefs.[38] He *could* claim, therefore, that the intelligibility of "fit" as a distinct determinant of legal decision (aside from the substance of interpretative judgments) testifies to the presence of settled interpretations which reflect shared insights into the nature of the good: the shared background of taken-for-granted assumptions establishes conditions which make possible widespread (if defeasible) agreement on what the right answers are.

This suggestion is problematic, however, for it fails to realise that there is no basis to shared interpretations *other than* the fact of agreement in judgments. By recognising the presence of common interests and convictions, we might hope to narrow the gap between rationality and Protestant autonomy: since moral thought is rooted in shared convictions, it

36 *Law's Empire* (London: Fontana, 1986), ch. 4.

37 Dworkin, *Law's Empire*, p. 190.

38 Dworkin, *Law's Empire*, pp. 63–4.

is then believed, such thought involves the recognition of common standards of rationality by which personal interpretations can be evaluated and compared. There seems to me no intelligible distinction between standards of reason or rationality and good moral reasons. Since moral reasoning does not take place in complete abstraction from the circumstances to which moral values are applied, it is impossible to sustain a distinction between two different stages of reasoning: the determination of good or sound moral reasons, and the subjection of those reasons to further, independent tests of rationality which apply in abstraction from the variable circumstances in which moral convictions are formed. On the contrary, the rationality or otherwise of moral convictions is a matter of acceptance of, or convergence upon, good moral reasons. The suggested resolution of the tension between Protestant autonomy and the presence of "right answers" thus fails because it does not acknowledge the constitutive role played by social practices and institutions in the furnishing of moral knowledge. Let me explain.

On the view we have been considering, the contingencies of human practices and associations establish pre-conditions which must hold if moral thought of a meaningful kind is possible, but they do not themselves contribute to the substance or appeal of moral views: the facts of human experience and human social arrangements are "mere" conventions which are devoid of moral significance until contemplated from the perspective of some act of moral interpretation. These facts or conventions then establish the boundaries of "fit" within which all acts of (otherwise unanchored) interpretation must move.[39] This picture of rationality is one in which the human will provides the only source of moral value, by breathing ethical life into otherwise mute facts. Understood in this way, human social arrangements are in no way constitutive of moral experience, since they constrain the available moral interpretations only by virtue of the significance with which human wills invest them. In the end, each person's introspective ideals address (that is, are "fitted" to) a shared experience, the nature and significance of which is exactly the subject of broad and complex disagreements.

In separating fit from substance (as distinct elements of legal decision), and in detaching moral values from the fabric of social institutions, Dworkin offers little insight into how a shared experience and shared social institutions play a constitutive role in the shaping of moral understandings and values. In this respect, the assumptions which underpin Dworkin's "interpretive" approach are not vastly different from those which drive modern versions of positivism which deny the presence of conceptual connections between law and morality: in both cases, moral values and insights are considered as detached from and independent of "mere" social conventions. It is perhaps the most important feature of Dworkin's writings that they raise squarely the question of the moral force of social conventions in the legal and ethical life of the polity. In practice, attention has been deflected from this issue as jurisprudential scholars have concerned themselves almost exclusively with the question of whether Dworkin has undermined the central insights of positivism.

In this essay, I have sought to bring to light an alternative understanding of the jurisprudential writer's task to that of establishing or denying necessary connections. For, I have endeavoured to illustrate the way in which substantive reflection upon the nature of law can shed light on our current practices and institutions. In these terms, we can see modern jurisprudence as a continuing attempt to come to terms with a descending model of legal authority, and to offer an account of the relationship between law's systematic, moral nature and its posited, statist character. On this view, investigations into law's nature

39 In fact, the dynamics of "fit" offer few intelligible constraints on the kinds of interpretation which might be offered (for the principles which underpin legal decision are rarely lucid enough to give definite form to legal entitlements).

cannot take place except by reflecting upon the historically extended practices within which the law develops.

Morality, I have argued, is not simply a report on the substance of our practices, but it is nevertheless rooted in those practices in the form of immanent ideas of justice, rightness and wrongness. Once that is understood, it becomes possible to shake ourselves free of the influence of a picture of morality as a set of transcendent principles which apply to all situations, whatever form human arrangements might take. We can then understand positivist accounts of law, and their rivals, as responding to differing interpretations of the moral basis of a system of laws. That, it seems to me, is a more fruitful way of reflecting upon the contribution of law to our social and moral existence.

It is possible to think of morality, not as a set of free-standing principles which *apply* to the facts of human experience (whatever form that takes), but as an essential *part* of that experience. Morality is then part of a continuous process of reflection on our collective experience, with law constituting one particular manifestation of that process of reflection. Morality cannot stand apart from the forms of human association which make reflection possible, but the problems and frictions which inevitably arise whenever human beings live alongside one another in close and permanent relations should not be thought of as admitting of general solutions: morality and law supply ways of dealing with the effects of the problems of collective living, but do not finally resolve those problems.

The moral perspectives which develop within a society are therefore reflective of that society's attempt to have its say about political and social problems which will continue to press on human beings even after present generations and civilisations have exited the mortal stage.[40] The moral nature of a society will in consequence be shaped and determined not just by the way it addresses questions of human social interaction, but also in the light of the aspects of human interaction that are considered to be worth addressing. Positivism and its rivals thus embody philosophies of law and government which throw considerable light on our form of human association. A philosophical perspective which seeks to pit legal positivist arguments against rival positions purely on the supposed strength of their conceptual claims seems in consequence a curiously blind way of reflecting upon questions about law and morality.

40 See L Fuller, "The case of the speluncean explorers" (1942) 62 *Harvard L Rev* 616.