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H. L. A. Hart (1907–1992)

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Herbert Lionel Adolphus Hart was born of Jewish parents in Yorkshire, England and was educated at New College, Oxford. After graduating with a First in Greats, Hart was called to the Bar as a Chancery barrister in London. He spent the next eight years building a successful legal practice, specializing first in property conveyancing, trust drafting, and tax planning, and then moving on to court work and advising. Although his interests quickly turned from law to philosophy, Hart continued to practice and, in fact, during this period he declined an invitation to teach philosophy in Oxford. His legal career, however, was cut short by World War II. While working with British Intelligence, Hart met Gilbert Ryle and Stuart Hampshire, from whom he learned of the new trends in philosophy. When the war ended, Hart left his law practice and returned to Oxford. In 1952, Hart was elected to the Chair of Jurisprudence, a somewhat surprising appointment given that he did not have a degree in either law or philosophy and had published little by that point. He occupied that chair, however, with great distinction, publishing several seminal works in legal theory, including his masterpiece, *The Concept of Law*, in 1961.

Hart is perhaps best known for his vigorous and sophisticated defense of the doctrine known as legal positivism. In its broadest sense, legal positivism is a theory about the nature of law that denies any necessary connection between legality and morality. No stipulation is made that, in order to count as law, a norm must possess any moral attributes. Legal positivists, therefore, believe that it is possible for a legal system to recognize a rule as legally valid even if it happens to be unjust. This analytic separation between the legal and the moral was captured by John Austin when he said: "The existence of law is one thing; its merit or demerit is another" (1954: 184–5).

In an effort to cleanse analytic jurisprudence of its moral content, every legal positivist before Hart thought it necessary to recast the basic legal concepts of *obligation*, *rule*, *validity*, and *authority* in terms of sanctions. Austin, for example, believed that legal rules are nothing more than orders backed by threats of sanctions issued by the sovereign. Sovereignty, in turn, was understood in terms of coercive power, the sovereign being the one in a group who has the power to elicit habitual obedience from every one and who habitually obeys no one. Someone is under a legal obligation to act, on this view, if they are likely to be sanctioned for failing to act.

Hart was firmly committed to the analytic separation of law and morality, but thought that these sanction-centered theories distorted and concealed the various ways in which the law guides conduct. For example, Hart pointed out that there are many legal rules that lack sanctions, in the sense that no penalties are imposed as a result of non-conformity with them. If a person drafts a will but fails to have it signed by two witnesses, that person is not sanctioned for the inadequate attention paid to the testamentary rules. He has simply failed to form a valid will and his actions lack legal effect.

Sanction-centered theories fall short, according to Hart, because they treat all legal rules as if their sole function is to discourage undesirable behavior. Their paradigm is the criminal law, where the rules impose duties to act or forbear from certain behavior and specify sanctions in the event of disobedience. However, not only do the rules related to valid will or contract formation lack sanctions, but, as Hart observed, it does not even make sense to speak of obeying or disobeying them. These rules do not impose *duties*; they instead confer *powers*. Their function is not to discourage people from acting in ways that they otherwise might wish, but to give them facilities for realizing their wishes.

The effacement of power-conferring rules is especially problematic with respect to those rules that confer legal powers on public officials. Without such rules, Hart noted, sanction-centered theories cannot account for the *self-regulating* nature of legal institutions: it is a defining feature of law, as opposed to pre-legal social systems, that its officials are empowered to change the rules and to resolve the disputes that may arise under them.

Hart also believed that these theories give a misleading picture of the nature of the law's normativity. On the sanction-centered approach, the only reasons for action that the law provides are threats of sanctions. This ignores what Hart called *the internal point of view*, which is the perspective of those who treat the rules as standards of acceptable conduct. In every legal system, Hart claimed, some members of the group treat the rules not just as threats, or predictions of what courts will do, but as guides to their conduct and standards for the evaluation of others – as norms that *obligate* and *empower*, not merely *oblige*.

By emphasizing the internal point of view, Hart was not simply criticizing fellow legal positivists for neglecting an obvious fact, i.e. that at least some people in some circumstances are motivated by the law *qua* law, instead of sanctions. Rather, Hart was also mounting a methodological offensive against the crude scientism of some of his contemporaries. For example, Alf Ross, the Scandinavian Legal Realist, based his legal positivism on his commitment to logical positivism and believed that, if jurisprudence is to have empirical content, legal concepts must be operationalized in purely behavioristic terms. By contrast, Hart believed that theories of law must make essential reference to the attitudes of legal actors because the law is a *social practice*. In order to analyze the practice, it is not enough to record regularities of behavior; one must understand how the participants understand it. Hart's introduction of the internal point of view thus inaugurated the *hermeneutic turn* in jurisprudence, where the law is studied from the *inside*, that is, from the perspective of those who live under, and directly experience, the law.

By engaging in this hermeneutic enterprise, Hart was not, however, giving up on a naturalistic approach to legal theory. Indeed, Hart believed that the internal point of

view allowed the legal positivist to anchor rules in social facts. According to Hart, a social rule in a community exists whenever a sufficient number of people engage in a practice from the internal point of view. This internal aspect of rules is manifested externally in conforming behavior, as well as criticisms that attend deviations from the practice and the use of normative language such as *ought*, *must*, and *obligation* to express such disapprobation. The existence of a rule, therefore, is firmly rooted in the natural world, that is, in regularities of behavior motivated by the appropriate critical attitude.

Hart's theory of social rules forms the foundation of his approach to law. According to Hart, at the root of every legal system is a social rule of a special sort, which he called *the rule of recognition.* This rule imposes a duty on courts to apply rules that bear certain characteristics. In the American system, for example, the rule of recognition requires judges to apply the rules duly enacted by Congress. The rule of recognition, therefore, sets out the criteria of legal validity, that is, those criteria that a rule must possess in order to be law.

The rule of recognition is what Hart called a *secondary* rule: it is a rule about other rules. It is also an *ultimate* rule: it exists because it is accepted by judges from the internal point of view, not in virtue of its validation by another rule. The primary rules, by contrast, owe their existence to the rule of recognition, and not to any guidance that they might engender.

In addition to the rule of recognition, Hart argued that every legal system contains two other secondary rules. The *rule of change* confers the power on legislative bodies to modify the primary rules, whereas the *rule of adjudication* confers the power on courts to adjudicate whether the primary rules have been followed or violated.

By understanding the law as the union of primary and secondary rules, Hart introduced what might be called a *rule-centered* theory of the law. On this model, the law guides conduct not by issuing naked threats, but by providing rules that impose duties and confer powers. The basic legal concepts are also understood in terms of rules, not sanctions. A rule is valid in a legal system when the rule bears those characteristics set out in that system's rule of recognition. An act is legally obligatory, in turn, when it is required by a legally valid rule. A person has supreme legal authority when the secondary rules of the system confer legal power on that person and no other has been conferred a greater power. Even the concept of a sanction is rendered in terms of rules, for a sanction is not simply a cost imposed by the law, but, unlike a tax, is a penalty exacted because a rule has been violated.

Hart did not think that privileging the concept of a rule compromised the analytic separation of law and morals. In his model, a primary legal rule exists just in case it is validated by that system's rule of recognition. There is no demand that the criteria of legal validity set out make reference to the rule's moral properties. It is possible, and regrettably often the case, that a legal rule exists even though, from a moral point of view, it should not. And while it is true that the rule of recognition would not exist unless judges accept it from the internal point of view, this does not mean that they judge it *morally* acceptable or that it is morally acceptable for them to treat it in this way.

Despite Hart's insistence that law be seen as a system of rules, he did not think that judges are always guided by these rules when they decide cases. In his view, courts are not simply the passive servants of the legislature or of tradition, restricted to applying

the rules laid down in advance, but are active players in the creation and development of the law. Judges do not always *find* the law; they sometimes *make* it as well.

Hart, however, was not disturbed by the fact of judicial legislation. He thought that judges should be given free rein to decide some cases, as it enables them to fashion sensible solutions to unforeseen problems. Moreover, given the inherent limitation of natural languages, he believed that judicial legislation was unavoidable. According to Hart, all general terms in natural language (e.g. *vehicle*) contain a core of settled meaning (e.g. *car*) and a penumbra where the reference class is ill-defined (e.g. *tractor*). When a case falls into the core of a general term of the rule, the rule applies and the judge is legally obligated to apply the rule. However, when in the penumbra, the law *runs out* and the judge must exercise his discretion. By necessity, the judge cannot find the law, because there is no law to find, and hence must make new law.

Although sounding sensible enough, Hart's recognition, and sympathetic acceptance, of judicial legislation has been attacked by his chief critic, and successor to the Chair in Jurisprudence, Ronald Dworkin. In Dworkin's view, the role of a judge is to vindicate the legal rights of the parties and this can only be accomplished if the law completely regulates the judge's behavior in every case. Dworkin faulted Hart for counting as law only rules that have social pedigrees, such as legislation or custom, and ignoring the mass of implicit law represented by moral principles that justify the pedigreed rules and that determine the legally correct answer when these rules run out.

By arguing that, in every case, there is a right answer, Dworkin was not only challenging Hart's theory of adjudication but also his claim that law and morality were conceptually distinct. For if the legally correct answer is determined in part by norms whose only claim to legal validity is their moral validity, then it would seem that morality would be a determinate of legality, contrary to legal positivistic strictures.

In the Postscript to the second edition of *The Concept of Law*, published posthumously, Hart agreed with Dworkin that judges are often legally obligated to apply moral principles that lack pedigrees, and that when judges act on them, they are applying existing law. However, Hart believed that such a position was consistent with legal positivism, for he saw no reason why the rule of recognition could not validate a norm based on its moral properties. Legal positivists, according to Hart, only claim that a rule of recognition *need not* validate a norm on the basis of its moral content, not that it *cannot*. Even when the rule of recognition did validate principles on the basis of their moral content, Hart doubted that these principles would indicate a unique result in every case, thus leaving ample room for the exercise of judicial discretion.

In separating law from morals, Hart did not mean to preclude moral criticism of the law. Quite the contrary, Hart was a vocal and influential critic of many aspects of the criminal law, especially the prohibitions on so-called *private vices.* In *Law, Liberty and Morality*, Hart attacked the doctrine known as *legal moralism*, the belief that society has the right to use the criminal law to enforce its moral code. Lord Devlin had argued that social cohesion is possible only when a common code of morality is respected by all, and the flouting of that code, even in private, threatens such cohesion and, in turn, society's very existence. Hart noted that Devlin failed to produce any evidence supporting his causal claims, and doubted whether any could be mustered. More importantly, he argued that a society that criminalizes behavior that the majority finds

offensive is not a society that respects liberty. To respect liberty, a society must protect the right of individuals to choose their own lifestyle, even when it does not approve of the lifestyle they end up choosing. The *liberty* to act only in ways that others like is, as Hart pointed out, liberty in name only.

In contrast to most of his contemporaries, Hart eschewed grand moral theories in favor of a more commonsense approach to normative analysis, which borrowed elements from both the Utilitarian and Kantian traditions. For example, Hart thought that the justifying aim of punishment is the deterrence of crime. Yet, he also believed that this pursuit must yield to the demands of justice, so that it is wrong to punish people for crimes they did not commit or could not have helped committing. He was thus critical of the attempts to increase the efficiency of the criminal law by eliminating many of the traditionally recognized excuses, such as the restrictions on the use of the insanity defense and the introduction of crimes of strict liability and negligence.

Although Hart recognized that the availability of excuses might allow some to feign incapacity or mistake and thus evade responsibility, he nevertheless thought that the costs are slight compared to the benefits. Not only is it fundamentally unfair to punish those who could not have helped doing what they did, but, as Hart pointed out, a system of excuses places individuals in control of their destinies. For when the law only punishes people for actions they can avoid, people can avoid being punished. As long as individuals never *choose* to break the rules, the law will let them go about their lives. As a result, individuals need not fear that they will unwittingly bring the wrath of the law down upon themselves; they can rely on the fact that the law will excuse behavior that was not, in some suitable sense, a product of choice.

It is a mistake, Hart concluded, to think that reducing crime by eliminating excuses will lead to an increase in security. When excuses are unacceptable, people are unable to predict the consequences of their actions. A world that is unknowable and uncontrollable is a world in which no one is secure.

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