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What is Law? (Who Cares?)

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WHAT IS LAW? who cares?

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To say precisely when legal theory reached its current dead end would be more difficult and less to the point than describing the nature of the impasse and its causes.

By "legal theory" I mean that body of speculative thought about the nature of law that has dominated analytical jurisprudence since John Austin's lectures on the subject a century-and-a-half ago.[1] By "dead" I mean what the term suggests in ordinary speech: lifeless, drained of connections to any of the purposes that give meaning to human life. Dead "end" I suggest, rather than dead *simpliciter* because, unlike others who mock the sterility of these disputes,[2] I do not believe that the basic enterprise is misconceived so much as misdirected. Legal theory has taken a turn that can only end in an increasing divergence between the phenomena it analyzes and the actual experience of ordinary citizens.

The Problem of Motivation

Those inclined to doubt these claims or to suspect that they are exaggerated should consider what could possibly motivate an intelligent person to explore the "maze of metaphysical literature"[3] on the question, What is law? The uninitiated can be forgiven for assuming that the answer to this question is the obvious one: surely the persons most likely to profit from such a study are professionals or citizens forced by career or circumstance to investigate legal relationships—to find out, in short, just what the law is. In fact these people—judges, lawyers, law teachers, potential litigants, all "insiders" of the legal system, as I shall call them—are the least likely beneficiaries of legal theory. Countless judicial opinions line the shelves of countless professional libraries mutely attesting to the irrelevance of legal theory by their utter disregard for this body of scholarship. To maintain in the face of such evidence that academic speculation about the nature of law has anything at all to do with the practical problem of finding out what the law is can be done comfortably only by those so used to the smell of the lamp that they no longer notice it.

This charge of insider irrelevance rests on more than the evidence of empirical observation. Legal theorists virtually ensure the irrelevance of their results for this class of people by making insider opinions about what law is determinative of the truth of their theoretical claims. In this respect the legal theorist is like the scientist whose theories, say about animal behavior, cannot themselves be a part of animal experience. If bees and apes fail to conform to theory, it is theory that must change to keep pace. The possibility of animals' consulting theory for its behavioral implications is ruled out, not just empirically on grounds of inadequate consciousness, but logically on grounds of absurdity. So too, when the legal theorist tests claims about the nature of law by whether they mirror the opinions of litigants, judges, or professionals, insider irrelevance must result. The old saw, "Law is what the judges say it is," has been replaced by a new one, "Law is whatever insiders say it is." In neither case is the definition of any use to the insider.

Who else then asks, What is law? and what else might such a person be seeking if not information about existing legal relationships? Given the fact of insider irrelevance, it is natural to assume that the person to whom legal theory is addressed must be an

outsider of some sort. Indeed, much of the speculative writing about law, where it displays awareness of the motivation problem at all, seems to be based on the assumption that the critical viewpoint for conducting and evaluating the analysis is that of the external observer. But what kind of observer, and what does he or she want to know? What, precisely, is the point of marking off the distinguishing features of legal systems and separating them from other forms of social control such as moral systems or coercive regimes?

It would be one thing if, say, anthropologists turned to legal theory for help in deciding whether or not to classify a social structure as "legal." But by and large they do not and for good reason. Once the major features of various societies have been described and compared, it is difficult to see what further information is conveyed by adding the label "legal" to some and not to others. The label, like all classifications, lumps together common characteristics; but the question why just these characteristics should be selected as the referent for the word "law" is not an anthropological one.

Much the same conclusion holds for other outside observers who might be suggested as the intended beneficiaries of legal theory. Social psychologists describe and compare legal, moral, and coercive influences on behavior without recourse to legal theory to check the accuracy of their labels. Sociologists record and predict behavioral responses to variations in the law without first consulting legal theory to ascertain what law is. Policy scientists identify the legal impediments to needed change, distinguishing these from the cruder barriers of desire and will, without prior recourse to definitions of law and power. Outsiders, in short, resemble insiders in at least this respect: both make distinctions between law, morality, and force commonly and daily, but at levels and for purposes that have nothing to do with the apparent purposes and level of abstraction of legal theory.

This observation suggests that the problem of explaining the point of legal theory is but one aspect of the broader problem of explaining what underlies and motivates classification and definition in general. For most people, it will seem obvious that the way in which we divide the world and categorize its contents depends on our needs. We distinguish chairs from couches because the functions of each in human life are sufficiently different in contexts sufficiently often encountered to justify two categories rather than one. Most people have one concept for snow. But skiers know corn snow and powder, and Eskimos have distinct concepts for even more forms of solid precipitation. Indeed, languages are natural in part just because they permit this kind of modification: new experiences justify breaking an existing concept into several new concepts, each distinguished from the other by differences previously neglected but now worth taking into account.

All of this is familiar enough if not entirely uncontroversial. But recounting the familiar helps explain why it is so hard to discover who might be interested in what legal theorists have to say. The problem is not that social scientists, judges, lawyers, and citizens have no need for the distinctions between law, morality, and coercion that lie at the heart of legal theory. The problem, rather, is that they seem to have no need for the fine tuning that legal theorists add to the grosser discriminations that are more than satisfactory for ordinary people and for other disciplines. The citizen's main concern is to know the probable consequences of past or contemplated action. For that it is enough to know that law is, roughly, a set of directives issued or accepted by officials who have the power to back the directives with organized sanctions. Morality, in contrast, substitutes for the official source and the organized sanction an appeal to conscience to consider the impact of action on others. In contrast to both of these, an order backed only by a threat is neither part of an organized system of sanctions nor the subject of a claim of legitimacy, but depends for its efficacy entirely on the perceived likelihood and severity of the threat. These rough definitions are enough for most people in the same way that a broad, undifferentiated concept of snow is enough for the farmer whose only concern is the possibility of a late frost.

One may, of course, pick at the rough definitions in a variety of ways. One may try to show, for example, by emphasizing the similarities in the motivating sanction of each, that what is at first taken to be three distinct phenomena is in fact but one. Conversely, one could explain to the farmer why the skier finds useful a more finely tuned definition of snow. But who is the analogue to the skier in legal theory? Whose purposes are served by the more careful distinctions drawn by the analytic philosopher between law, morality, and force?

If we continue to press for an answer to this question by observing what legal theorists themselves profess as their goal, two final possibilities emerge. The first denies what we have assumed: that citizens and other insiders *can* operate adequately within their own areas of concern armed only with the rough definition of law. But this denial takes us back to where we started—to the plain fact that theories of law are simply not among the tools insiders use to help predict the consequences of action. At some point, to insist that philosophical analysis will yield sounder conclusions about what the law is when

such conclusions are reached repeatedly without reference to such analysis is to impose the philosopher's own goals on those he purports to aid, thus redefining the problem.

This allusion to the unique goals of the philosopher, however, suggests a second possibility. The effort to mark off the distinguishing features of legal systems may be thought to be a task worth pursuing for its own sake, without regard to the practical implications for other human endeavors. "Knowledge for its own sake" has a reassuring ring, particularly to academic ears, and boasts a renowned lineage in both humanistic and scientific fields. Indeed, much of the analysis that has dominated moral philosophy for the better part of this century seems predicated less on the assumption that it will actually aid in the making of practical moral judgments than on the assumption that philosophical clarity is desirable for its own sake. To be sure, a connection between conceptual clarity and better judgments is often invoked. But the connection is difficult to demonstrate, and, in any event, it seems clear that the analysis would proceed and be thought worthwhile regardless of its demonstrated practical value.

As a solution to the motivational problem in legal theory, however, this justification is remarkably uninspiring. For one thing, it wrongly analogizes social phenomena to the phenomena of the natural sciences. The idea of pure research directed at discovering, for example, the nature of the atom, makes some sense regardless of one's views about whether such knowledge will ever have practical consequences. By "makes sense" I mean both that such investigations are possible and that the impulse behind them is psychologically plausible. Objects can be described and differences and similarities noted without ever stopping to consider what purposes might justify marking off just these distinctions. The motivation for such disinterested analysis—exploration of one's environment for its own sake—is, moreover, from crib to lab, a familiar part of experience. In contrast, it is difficult to defend both the possibility and the plausibility of maintaining a disinterested attitude toward the investigation of social phenomena. The possibility is problematic because social phenomena and correlated concepts may themselves be affected by the theorist's analysis. If law is unmasked as force, attitudes toward law may change and previously perceived distinctions between tax collectors and muggers may blur. The theorist who ignores these potential consequences does so at the risk of discovering that yesterday's theory no longer explains today's data.

Even assuming one could control for the interaction between theory and data, it is hard to understand why anyone would undertake such a disinterested dissection in the first place. Unlike the physical universe, social reality consists of the internal attitudes of people as well as their observable behavior. The motivation for studying just the behavior, while deliberately ignoring the underlying attitudes—the hopes, fears, dreams, and desires that determine behavior—is comparable to the impulse that leads one to do crossword puzzles and brain teasers. The latter activities *are* typically pursued simply for the inherent enjoyment of discovering or manipulating logical or preconstructed relationships. They are psychologically plausible largely because they make no pretense of being relevant or meaningful beyond the context of the game itself. If the motivation for legal theory is analysis for its own sake in this sense, it should come as no surprise that the enterprise lacks relevance for ordinary purposes and appears to many to be a professional philosopher's pastime.

Instead of trying to infer the purpose of legal theory from the existing literature on the subject, it may be more profitable to ask directly what purpose legal theory *ought* or *could* be made to serve. What reasons, beyond the interest in conceptual analysis for its own sake, could motivate serious inquiry into the nature of law? Providing an answer to that question is as simple as attempting to infer it from the existing literature is difficult. Legal theory is a branch of philosophy, and the central questions of philosophy, from Plato to Kant, have never changed. What can I know? What ought I to do? and What may I hope? remain the cognitive core of every serious attempt to confront the human condition. If legal theory were viewed as an attempt to answer the second of these questions—What is law that I should obey it?—the motivational problem would be solved: The inquiry into the nature of law would be connected to a persistent human concern. Moreover, by viewing legal theory as a branch of moral philosophy, one can explain the nature of the wrong turn that has been taken in this field of jurisprudence. The problem is not, as some would have it, that legal theorists are guilty of "essentialism"—of assuming that law is somehow "out there" with a unique essence waiting to be described. (Law *is* "out there"; and it can be described.) The problem, rather, is that legal theory appears bent on a description whose point is primarily epistemological rather than moral. It is not the question of what to do, but of what one can know that has come to dominate analytical jurisprudence, even though the answers legal theory provides to this epistemological question are poorly designed to aid those who might be thought to be most interested in it—anthropologists, say, or lawyers, judges, and litigants. It is as if one had decided at a watchmaker's

What is law? Philip Soper advances the idea of two distinct, competing visions. His metaphor for the definitional task is not that of the blind men and the elephant but that of the drawings one can view as either a duck or a rabbit, a young girl or an old crone, stairs rising or descending — the symbol capable of totally different interpretations irreconcilable by so simple an act as walking around the beast.

convention to deliver a discourse on the question, "What is time?" when all that could conceivably interest those in attendance would be the problem of how to measure time more accurately.

Legal and Political Theory

Nothing better illustrates just how curious a state of affairs has been reached in this field of philosophy than the gulf that currently separates political and legal theory. The central question of political theory is that of legitimacy: Why should I, or anyone, obey the state? Political theorists thus confront directly what I have identified as the moral question that ought to guide legal theorists as well. Indeed, classical philosophy did not distinguish these as separate disciplines. Thrasymachus' challenge to distinguish might from right is as much a preface to every serious contemporary investigation into the nature of law as it is to Plato's *Republic*. But in Plato's case the preface is to a far more exciting and elaborate story than the tale typically told by modern legal theorists. The latter turn the challenge into a request to dispel linguistic confusion; Plato accepts it as requiring an investigation into the nature and basis of the just state, which necessitates in turn a wide-ranging inquiry into the substantive issues of moral and political philosophy.

This difference in approach reflects more than a difference in storytelling tastes; it reflects as well a difference of view about the connection between the questions of political and legal theory. That such a connection exists should hardly surprise. The political theorist's goal of characterizing the just state seems to require the cooperation of the legal theorist in two ways, thus solving the motivational problem. First, in order to know what constitutes a good legal system, one must already know, it seems, what a legal system

is. From this perspective, legal and political theory, though separate, are related in the sense that an adequate legal theory is a logical prerequisite for an adequate political theory. Second, by viewing legal theory as a first step toward an adequate political theory, the analysis of the concept of law itself is guided by the problem of political obligation that motivates it: the central question for the legal theorist, for example, will be whether or not we might just mean by "legal system" those organized social systems that have some legitimate moral claim on us.

Contrast now the reality reflected in the current relationship between political and legal theory. Two events in the last two decades led to a resurgence of interest in both fields. In legal theory, H.L.A. Hart's *The Concept of Law* revived debates about the nature of law and furnished the foil then, as it continues to now, for those who challenge the positivist view that Hart endorsed. In political theory a non-literary event, the experience in the United States of an unpopular war, revived professional philosophical interest in the question of political obligation, spawning innumerable articles on the nature and basis of the obligation to obey the law. Despite the classical and apparently logical connection between these two fields, the briefest glance shows that each is oblivious of the other.

Consider first the political theorist's discussion of the obligation to obey the law. Most such discussions typically proceed without the slightest hint that one first needs to know what law is in order to decide whether there is an obligation to obey it. In contrast, a good deal of legal theory has its origins in, and continues to be preoccupied with, the problem of explaining whether and how law differs from force. Explaining what is wrong with the view of law as force is not an easy task. But current analyses of political obligation ignore the problem altogether. If law is only force, as Austin claimed, one does not need pages of discussion about the nature and extent of the obligation to comply: there is none. The analysis could end as quickly as Hart dismisses Austin's model of law as the "gunman situation writ large."[4] The political theorist, in short, who sets out to determine whether there is an obligation to obey the law without first examining what is meant by "law," risks the charge that his political theory is either incomplete or trivial. It is incomplete if it depends critically on a preconceived idea of law that is not defended; it is trivial if that idea about what law is already entails the conclusion with respect to the obligation to obey.

The situation with respect to legal theory is no better; indeed it is the mirror image of the problem in political theory. Where political theory ignores the need to define law in a way that does not trivialize further investigation into the grounds for obligation, legal theory ignores the phenomenon of political obligation in the account it provides of a legal system. The best way to illustrate this particular claim is to consider developments in legal theory since the appearance of *The Concept of Law*, which at first glance appears to be a counter-example to the claim. Hart begins his investigation with the problem of accounting for obligation as the key to his criticism of Austin. But from that beginning, the investigation shifts increasingly toward what I have called the epistemological inquiry: the focus is on the kind of entities (rules) that make up law and the ways in which varieties of these rules combine to yield a legal system. In the end it is this quest for a descriptive model of legal systems that dominates the analysis. The original and critical question, of how rules accepted and enforced by officials can be said to be rules of obligation, is largely ignored.

Etiology and Prognosis

What explains the preoccupation with the epistemological questions? What caused the classically conceived unitary inquiry to dissolve into separate inquiries, each apparently blind to the other?

Part of the answer, no doubt, lies in the nature of analytic philosophy itself, which increasingly in this century has taken its task to be the presumably value-free one of dissecting language to reveal meaning and to correct mistaken ways of thinking and talking. One need not disparage this enterprise to note the risk it entails of producing puzzles that are puzzles only for philosophers, not for ordinary people. One can push at the boundaries on the map created by language at almost any point and discover how easily the lines blur. But most people do not push. When they do, it is in response to new problems, sufficiently unusual to make old categories become suddenly less useful.

In science these concept frontiers are crossed continually, but by an ever smaller group of experts. In ethics the opposite is the case: everybody is an expert (which means nobody is) and at the same time, the moral categories and concepts one uses in making practical judgments differ little from those in use in classical Greece. There is simply no analogue in moral philosophy to the proliferation of concepts in, say, particle physics. The consequence is a powerful incentive to accommodate philosophy to the scientific model; to turn what should be moral inquiries, where progress is difficult, into scientific inquiries, where progress, at least in the form of new classifications and distinctions, is possible. Unfortu-

nately, to stake claims to moral progress on this analogy to science comes at the cost of any conceivable relevance for human affairs.

Current legal theory is preoccupied with linguistic distinctions and difficult cases. Whether law is properly characterized as "a rule, a principle, a norm, or a command" and "how to find the law in a hard case" are two examples of the kinds of questions it seeks to answer. My suggested focus in investigating the nature of law is, instead, the easy case, the simple directives of an organized society that citizens confront, for example, every time they stop to think about the speed limit sign they are passing. What must be true about such directives—law in the simple sense—if they are to yield obligation?

Such a focus, admittedly, seems open to the charge that one is no longer doing legal theory at all, but only political or moral theory. Thus, if one shows that humans, in order to fly, would have to have wings and a different bone structure, one proves only that the creature described is not what we mean by "human." So too, after completing an analysis of law that preserves a place for fidelity, how does one respond to the outright dismissal of the analysis on the ground that that's just not what we mean by law?

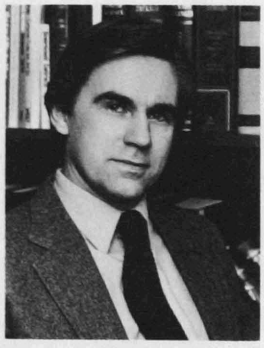
In part I have already answered this question. Others, Hart for example, also take as a starting point the idea that an adequate concept of law must at least connote obligation. The redirection that I propose simply goes one step further: What better way, after all, to show that law connotes obligation than to show that it obligates in fact? In that sense, by insisting that actual obligation is one of the phenomena of legal systems for which theory must account, one is no less arbitrary in the selection of data to be explained than are those who focus only on that other entity, the legal directive.

In the end, however, one may have to concede the possibility that political obligation and legal obligation are entirely unrelated—sharing a name (obligation) but not a common moral meaning. My choice of metaphor for the definitional task I propose is not that of the blind men and the elephant but that of the drawings that can be seen as either a duck or a rabbit, a young girl or an old crone, stairs rising or stairs descending—the symbol capable of totally different interpretations that cannot be reconciled by so simple an act as walking around the beast. These alternative interpretations, though in one sense irreconcilable, are not, however, completely arbitrary; they are obviously bounded by the objective reality of the phenomenon. The duck-rabbit cannot plausibly be seen as a female nude except on the psychiatrist's couch. Something like a creative, self-fulfilling choice must determine which of the objectively plausible views one takes.

As things currently stand, the only vision to be found in contemporary legal theory is one that cannot, except by fiat, distinguish law from force. What is needed is an investigation that shows how it is possible to see law as more than this, without also simply declaring by fiat that law and morality coincide. Such an investigation requires reestablishing the link between political and legal theory, constructing in the process *a* theory of law (emphasis, but not too much, on the indefinite article). Estimating the chances of success in such an undertaking is probably best done at this stage by keeping in mind another observation: "Most philosophical ideas are simple enough. . . . The difficulty . . . comes when the philosophers attempt to prove they are right."[5] ⚄

Footnotes

1. See John Austin, *The Province of Jurisprudence Determined* (London: J. Murray, 1832).
2. See, e.g., Glanville Williams, "The Controversy Concerning the Word 'Law,' " in *Philosophy, Politics, and Society*, 1st ser., ed. (Oxford: Oxford University Press, 1967), p. 134. See also Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964).
3. Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935), p. 216.
4. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 7.
5. Morse Peckham, *Beyond the Tragic Vision* (New York: George Braziller, 1962), p. 148.



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