POSITIVISM AND FIDELITY TO LAW— A REPLY TO PROFESSOR HART

Lon L. Fuller *

Rephrasing the question of "law and morals" in terms of "order and good order," Professor Fuller criticizes Professor H. L. A. Hart for ignoring the internal "morality of order" necessary to the creation of all law. He then rejects Professor Hart's theory of statutory interpretation on the ground that we seek the objectives of entire provisions rather than the meanings of individual words which are claimed to have "standard instances."

PROFESSOR HART has made an enduring contribution to the literature of legal philosophy. I doubt if the issues he discusses will ever again assume quite the form they had before being touched by his analytical powers. His argument is no mere restatement of Bentham, Austin, Gray, and Holmes. Their views receive in his exposition a new clarity and a new depth that are uniquely his own.

I must confess that when I first encountered the thoughts of Professor Hart's essay, his argument seemed to me to suffer from a deep inner contradiction. On the one hand, he rejects emphatically any confusion of "what is" with "what ought to be." He will tolerate no "merger" of law and conceptions of what law ought to be, but at the most an antiseptic "intersection." Intelligible communication on any subject, he seems to imply, becomes impossible if we leave it uncertain whether we are talking about "what is" or "what ought to be." Yet it was precisely this uncertainty about Professor Hart's own argument which made it difficult for me at first to follow the thread of his thought. At times he seemed to be saying that the distinction between law and morality is something that exists, and will continue to exist, however we may talk about it. It expresses a reality which, whether we like it or not, we must accept if we are to avoid talking nonsense. At other times, he seemed to be warning us that the reality of the distinction is itself in danger and that if we do not mend our ways of thinking and talking we may lose a "precious moral

* Carter Professor of General Jurisprudence, Harvard Law School. A.B., Stanford, 1924, J.D., 1926.

HeinOnline -- 71 Harv. L. Rev. 630 1957

ideal," that of fidelity to law. It is not clear, in other words, whether in Professor Hart's own thinking the distinction between law and morality simply "is," or is something that "ought to be" and that we should join with him in helping to create and maintain.

These were the perplexities I had about Professor Hart's argument when I first encountered it. But on reflection I am sure any criticism of his essay as being self-contradictory would be both unfair and unprofitable. There is no reason why the argument for a strict separation of law and morality cannot be rested on the double ground that this separation serves both intellectual clarity and moral integrity. If there are certain difficulties in bringing these two lines of reasoning into proper relation to one another, these difficulties affect also the position of those who reject the views of Austin, Gray, and Holmes. For those of us who find the "positivist" position unacceptable do ourselves rest our argument on the double ground that its intellectual clarity is specious and that its effects are, or may be, harmful. On the one hand, we assert that Austin's definition of law, for example, violates the reality it purports to describe. Being false in fact, it cannot serve effectively what Kelsen calls "an interest of cognition." On the other hand, we assert that under some conditions the same conception of law may become dangerous, since in human affairs what men mistakenly accept as real tends, by the very act of their acceptance, to become real.

It is a cardinal virtue of Professor Hart's argument that for the first time it opens the way for a truly profitable exchange of views between those whose differences center on the distinction between law and morality. Hitherto there has been no real joinder of issue between the opposing camps. On the one side, we encounter a series of definitional fiats. A rule of law is — that is to say, it really and simply and always is — the command of a sovereign, a rule laid down by a judge, a prediction of the future incidence of state force, a pattern of official behavior, etc. When we ask what purpose these definitions serve, we receive the answer, "Why, no purpose, except to describe accurately the social reality that corresponds to the word 'law.' " When we reply, "But it doesn't look like that to me," the answer comes back, "Well, it does to me." There the matter has to rest.

This state of affairs has been most unsatisfactory for those of us who are convinced that "positivistic" theories have had a distorting effect on the aims of legal philosophy. Our dissatisfac-

HeinOnline -- 71 Harv. L. Rev. 631 1957

tion arose not merely from the impasse we confronted, but because this impasse seemed to us so unnecessary. All that was needed to surmount it was an acknowledgment on the other side that its definitions of "what law really is" are not mere images of some datum of experience, but direction posts for the application of human energies. Since this acknowledgment was not forthcoming, the impasse and its frustrations continued. There is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes its special prescriptive powers precisely to the fact that it disclaims prescriptive intentions. Into this murky debate, some shafts of light did occasionally break through, as in Kelsen's casual admission, apparently never repeated, that his whole system might well rest on an emotional preference for the ideal of order over that of justice.[1] But I have to confess that in general the dispute that has been conducted during the last twenty years has not been very profitable.

Now, with Professor Hart's paper, the discussion takes a new and promising turn. It is now explicitly acknowledged on both sides that one of the chief issues is how we can best define and serve the ideal of fidelity to law. Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials. The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation. If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.

If, as I believe, it is a cardinal virtue of Professor Hart's argument that it brings into the dispute the issue of fidelity to law, its chief defect, if I may say so, lies in a failure to perceive and accept the implications that this enlargement of the frame of argument necessarily entails. This defect seems to me more or less to permeate the whole essay, but it comes most prominently to the fore in his discussion of Gustav Radbruch and the Nazi regime.[2]

---

[1] Kelsen, *Die Idee des Naturrechtes*, 7 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 221, 248 (Austria 1927).

[2] Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615–21 (1958).

HeinOnline -- 71 Harv. L. Rev. 632 1957

Without any inquiry into the actual workings of whatever remained of a legal system under the Nazis, Professor Hart assumes that something must have persisted that still deserved the name of law in a sense that would make meaningful the ideal of fidelity to law. Not that Professor Hart believes the Nazis' laws should have been obeyed. Rather he considers that a decision to disobey them presented not a mere question of prudence or courage, but a genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favor of more fundamental goals. I should have thought it unwise to pass such a judgment without first inquiring with more particularity what "law" itself meant under the Nazi regime.

I shall present later my reasons for thinking that Professor Hart is profoundly mistaken in his estimate of the Nazi situation and that he gravely misinterprets the thought of Professor Radbruch. But first I shall turn to some preliminary definitional problems in which what I regard as the central defect in Professor Hart's thesis seems immediately apparent.

I. The Definition of Law

Throughout his essay Professor Hart aligns himself with a general position which he associates with the names of Bentham, Austin, Gray, and Holmes. He recognizes, of course, that the conceptions of these men as to "what law is" vary considerably, but this diversity he apparently considers irrelevant in his defense of their general school of thought.

If the only issue were that of stipulating a meaning for the word "law" that would be conducive to intellectual clarity, there might be much justification for treating all of these men as working in the same direction. Austin, for example, defines law as the command of the highest legislative power, called the sovereign. For Gray, on the other hand, law consists in the rules laid down by judges. A statute is, for Gray, not a law, but only a source of law, which becomes law only after it has been interpreted and applied by a court. Now if our only object were to obtain that clarity which comes from making our definitions explicit and then adhering strictly to those definitions, one could argue plausibly that either conception of the meaning of "law" will do. Both conceptions appear to avoid a confusion of morals and law, and

HeinOnline -- 71 Harv. L. Rev. 633 1957

both writers let the reader know what meaning they propose to attribute to the word "law."

The matter assumes a very different aspect, however, if our interest lies in the ideal of fidelity to law, for then it may become a matter of capital importance what position is assigned to the judiciary in the general frame of government. Confirmation for this observation may be found in the slight rumbling of constitutional crisis to be heard in this country today. During the past year readers of newspapers have been writing to their editors urging solemnly, and even apparently with sincerity, that we should abolish the Supreme Court as a first step toward a restoration of the rule of law. It is unlikely that this remedy for our governmental ills derives from any deep study of Austin or Gray, but surely those who propose it could hardly be expected to view with indifference the divergent definitions of law offered by those two jurists. If it be said that it is a perversion of Gray's meaning to extract from his writings any moral for present controversies about the role of the Supreme Court, then it seems to me there is equal reason for treating what he wrote as irrelevant to the issue of fidelity to law generally.

Another difference of opinion among the writers defended by Professor Hart concerns Bentham and Austin and their views on constitutional limitations on the power of the sovereign. Bentham considered that a constitution might preclude the highest legislative power from issuing certain kinds of laws. For Austin, on the other hand, any legal limit on the highest lawmaking power was an absurdity and an impossibility. What guide to conscience would be offered by these two writers in a crisis that might some day arise out of the provision of our constitution to the effect that the amending power can never be used to deprive any state without its consent of its equal representation in the Senate? [3] Surely it is not only in the affairs of everyday life that we need clarity about the obligation of fidelity to law, but most particularly and urgently in times of trouble. If all the positivist school has to offer in such times is the observation that, however you may choose to define law, it is always something different from morals, its teachings are not of much use to us.

I suggest, then, that Professor Hart's thesis as it now stands is essentially incomplete and that before he can attain the goals

[3] U.S. CONST. art. V.

HeinOnline -- 71 Harv. L. Rev. 634 1957

he seeks he will have to concern himself more closely with a definition of law that will make meaningful the obligation of fidelity to law.

II. The Definition of Morality

It is characteristic of those sharing the point of view of Professor Hart that their primary concern is to preserve the integrity of the concept of law. Accordingly, they have generally sought a precise definition of law, but have not been at pains to state just what it is they mean to exclude by their definitions. They are like men building a wall for the defense of a village, who must know what it is they wish to protect, but who need not, and indeed cannot, know what invading forces those walls may have to turn back.

When Austin and Gray distinguish law from morality, the word "morality" stands indiscriminately for almost every conceivable standard by which human conduct may be judged that is not itself law. The inner voice of conscience, notions of right and wrong based on religious belief, common conceptions of decency and fair play, culturally conditioned prejudices — all of these are grouped together under the heading of "morality" and are excluded from the domain of law. For the most part Professor Hart follows in the tradition of his predecessors. When he speaks of morality he seems generally to have in mind all sorts of extra-legal notions about "what ought to be," regardless of their sources, pretensions, or intrinsic worth. This is particularly apparent in his treatment of the problem of interpretation, where uncodified notions of what ought to be are viewed as affecting only the penumbra of law, leaving its hard core untouched.

Toward the end of the essay, however, Professor Hart's argument takes a turn that seems to depart from the prevailing tenor of his thought. This consists in reminding us that there is such a thing as an immoral morality and that there are many standards of "what ought to be" that can hardly be called moral.[4] Let us grant, he says, that the judge may properly and inevitably legislate in the penumbra of a legal enactment, and that this legislation (in default of any other standard) must be guided by the judge's notions of what ought to be. Still, this would be true even in a society devoted to the most evil ends, where the judge would

[4] Hart, *supra* note 2, at 624.

HeinOnline -- 71 Harv. L. Rev. 635 1957

supply the insufficiencies of the statute with the iniquity that seemed to him most apt for the occasion. Let us also grant, says Professor Hart toward the end of his essay, that there is at times even something that looks like discovery in the judicial process, when a judge by restating a principle seems to bring more clearly to light what was really sought from the beginning. Again, he reminds us, this could happen in a society devoted to the highest refinements of sin, where the implicit demands of an evil rule might be a matter for discovery when the rule was applied to a situation not consciously considered when it was formulated.

I take it that this is to be a warning addressed to those who wish "to infuse more morality into the law." Professor Hart is reminding them that if their program is adopted the morality that actually gets infused may not be to their liking. If this is his point it is certainly a valid one, though one wishes it had been made more explicitly, for it raises much the most fundamental issue of his whole argument. Since the point is made obliquely, and I may have misinterpreted it, in commenting I shall have to content myself with a few summary observations and questions.

First, Professor Hart seems to assume that evil aims may have as much coherence and inner logic as good ones. I, for one, refuse to accept that assumption. I realize that I am here raising, or perhaps dodging, questions that lead into the most difficult problems of the epistemology of ethics. Even if I were competent to undertake an excursus in that direction, this is not the place for it. I shall have to rest on the assertion of a belief that may seem naïve, namely, that coherence and goodness have more affinity than coherence and evil. Accepting this belief, I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are. Accepting these beliefs, I find a considerable incongruity in any conception that envisages a possible future in which the common law would "work itself pure from case to case" toward a more perfect realization of iniquity.

Second, if there is a serious danger in our society that a weakening of the partition between law and morality would permit an infusion of "immoral morality," the question remains, what is the most effective protection against this danger? I cannot myself believe it is to be found in the positivist position espoused by Austin, Gray, Holmes, and Hart. For those writers seem to me

HeinOnline -- 71 Harv. L. Rev. 636 1957

to falsify the problem into a specious simplicity which leaves untouched the difficult issues where real dangers lie.

Third, let us suppose a judge bent on realizing through his decisions an objective that most ordinary citizens would regard as mistaken or evil. Would such a judge be likely to suspend the letter of the statute by openly invoking a "higher law"? Or would he be more likely to take refuge behind the maxim that "law is law" and explain his decision in such a way that it would appear to be demanded by the law itself?

Fourth, neither Professor Hart nor I belong to anything that could be said in a significant sense to be a "minority group" in our respective countries. This has its advantages and disadvantages to one aspiring to a philosophic view of law and government. But suppose we were both transported to a country where our beliefs were anathemas, and where we, in turn, regarded the prevailing morality as thoroughly evil. No doubt in this situation we would have reason to fear that the law might be covertly manipulated to our disadvantage; I doubt if either of us would be apprehensive that its injunctions would be set aside by an appeal to a morality higher than law. If we felt that the law itself was our safest refuge, would it not be because even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law? And is it not clear that this hesitancy itself derives, not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess?

Fifth, over great areas where the judicial process functions, the danger of an infusion of immoral, or at least unwelcome, morality does not, I suggest, present a real issue. Here the danger is precisely the opposite. For example, in the field of commercial law the British courts in recent years have, if I may say so, fallen into a "law-is-law" formalism that constitutes a kind of belated counterrevolution against all that was accomplished by Mansfield.[5] The matter has reached a stage approaching crisis as commercial cases are increasingly being taken to arbitration. The chief

[5] For an outstanding example, see G. Scammell and Nephew, Ltd. v. Ouston, [1941] A.C. 251 (1940). I personally would be inclined to put under the same head Victoria Laundry, Ltd. v. Newman Industries, Ltd., [1949] 2 K.B. 528 (C.A.).

HeinOnline -- 71 Harv. L. Rev. 637 1957

reason for this development is that arbitrators are willing to take into account the needs of commerce and ordinary standards of commercial fairness. I realize that Professor Hart repudiates "formalism," but I shall try to show later why I think his theory necessarily leads in that direction.[6]

Sixth, in the thinking of many there is one question that predominates in any discussion of the relation of law and morals, to the point of coloring everything that is said or heard on the subject. I refer to the kind of question raised by the Pope's pronouncement concerning the duty of Catholic judges in divorce actions.[7] This pronouncement does indeed raise grave issues. But it does not present a problem of the relation between law, on the one hand, and, on the other, generally shared views of right conduct that have grown spontaneously through experience and discussion. The issue is rather that of a conflict between two pronouncements, both of which claim to be authoritative; if you will, it is one kind of law against another. When this kind of issue is taken as the key to the whole problem of law and morality, the discussion is so denatured and distorted that profitable exchange becomes impossible. In mentioning this last aspect of the dispute about "positivism," I do not mean to intimate that Professor Hart's own discussion is dominated by any *arrière-pensée*; I know it is not. At the same time I am quite sure that I have indicated accurately the issue that will be uppermost in the minds of many as they read his essay.

In resting content with these scant remarks, I do not want to seem to simplify the problem in a direction opposite to that taken by Professor Hart. The questions raised by "immoral morality" deserve a more careful exploration than either Professor Hart or I have offered in these pages.

III. The Moral Foundations of a Legal Order

Professor Hart emphatically rejects "the command theory of law," according to which law is simply a command backed by a force sufficient to make it effective. He observes that such a command can be given by a man with a loaded gun, and "law surely

[6] See Hart, *supra* note 2, at 608–12.

[7] See N.Y. Times, Nov. 8, 1949, p. 1, col. 4 (late city ed.) (report of a speech made on November 7, 1949 to the Central Committee of the Union of Catholic Italian Lawyers).

HeinOnline -- 71 Harv. L. Rev. 638 1957

is not the gunman situation writ large." [8] There is no need to dwell here on the inadequacies of the command theory, since Professor Hart has already revealed its defects more clearly and succinctly than I could. His conclusion is that the foundation of a legal system is not coercive power, but certain "fundamental accepted rules specifying the essential lawmaking procedures." [9]

When I reached this point in his essay, I felt certain that Professor Hart was about to acknowledge an important qualification on his thesis. I confidently expected that he would go on to say something like this: I have insisted throughout on the importance of keeping sharp the distinction between law and morality. The question may now be raised, therefore, as to the nature of these fundamental rules that furnish the framework within which the making of law takes place. On the one hand, they seem to be rules, not of law, but of morality. They derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary. They can hardly be said to be law in the sense of an authoritative pronouncement, since their function is to state when a pronouncement is authoritative. On the other hand, in the daily functioning of the legal system they are often treated and applied much as ordinary rules of law are. Here, then, we must confess there is something that can be called a "merger" of law and morality, and to which the term "intersection" is scarcely appropriate.

Instead of pursuing some such course of thought, to my surprise I found Professor Hart leaving completely untouched the nature of the fundamental rules that make law itself possible, and turning his attention instead to what he considers a confusion of thought on the part of the critics of positivism. Leaving out of account his discussion of analytical jurisprudence, his argument runs something as follows: Two views are associated with the names of Bentham and Austin. One is the command theory of law, the other is an insistence on the separation of law and morality. Critics of these writers came in time to perceive — "dimly" Professor Hart says — that the command theory is untenable. By a loose association of ideas they wrongly supposed that in advancing reasons for rejecting the command theory they had also refuted the view that law and morality must be sharply separated. This was a "natural mistake," but plainly a mistake just the same.

[8] Hart, *supra* note 2, at 603.

[9] *Ibid.*

HeinOnline -- 71 Harv. L. Rev. 639 1957

I do not think any mistake is committed in believing that Bentham and Austin's error in formulating improperly and too simply the problem of the relation of law and morals was part of a larger error that led to the command theory of law. I think the connection between these two errors can be made clear if we ask ourselves what would have happened to Austin's system of thought if he had abandoned the command theory.

One who reads Austin's Lectures V and VI [10] cannot help being impressed by the way he hangs doggedly to the command theory, in spite of the fact that every pull of his own keen mind was toward abandoning it. In the case of a sovereign monarch, law is what the monarch commands. But what shall we say of the "laws" of succession which tell who the "lawful" monarch is? It is of the essence of a command that it be addressed by a superior to an inferior, yet in the case of a "sovereign many," say, a parliament, the sovereign seems to command itself since a member of parliament may be convicted under a law he himself drafted and voted for. The sovereign must be unlimited in legal power, for who could adjudicate the legal bounds of a supreme lawmaking power? Yet a "sovereign many" must accept the limitation of rules before it can make law at all. Such a body can gain the power to issue commands only by acting in a "corporate capacity"; this it can do only by proceeding "agreeably to the modes and forms" established and accepted for the making of law. Judges exercise a power delegated to them by the supreme lawmaking power, and are commissioned to carry out its "direct or circuitous commands." Yet in a federal system it is the courts which must resolve conflicts of competence between the federation and its components.

All of these problems Austin sees with varying degrees of explicitness, and he struggles mightily with them. Over and over again he teeters on the edge of an abandonment of the command theory in favor of what Professor Hart has described as a view that discerns the foundations of a legal order in "certain fundamental accepted rules specifying the essential lawmaking procedures." Yet he never takes the plunge. He does not take it because he had a sure insight that it would forfeit the black-and-white distinction between law and morality that was the whole object of his Lectures — indeed, one may say, the enduring ob-

[10] 1 AUSTIN, LECTURES ON JURISPRUDENCE 167–341 (5th ed. 1885).

HeinOnline -- 71 Harv. L. Rev. 640 1957

ject of a dedicated life. For if law is made possible by "fundamental accepted rules" — which for Austin must be rules, not of law, but of positive morality — what are we to say of the rules that the lawmaking power enacts to regulate its own lawmaking? We have election laws, laws allocating legislative representation to specific geographic areas, rules of parliamentary procedure, rules for the qualification of voters, and many other laws and rules of similar nature. These do not remain fixed, and all of them shape in varying degrees the lawmaking process. Yet how are we to distinguish between those basic rules that owe their validity to acceptance, and those which are properly rules of law, valid even when men generally consider them to be evil or ill-advised? In other words, how are we to define the words "fundamental" and "essential" in Professor Hart's own formulation: "certain fundamental accepted rules specifying the essential lawmaking procedure"?

The solution for this problem in Kelsen's theory is instructive. Kelsen does in fact take the plunge over which Austin hesitated too long. Kelsen realizes that before we can distinguish between what is law and what is not, there must be an acceptance of some basic procedure by which law is made. In any legal system there must be some fundamental rule that points unambiguously to the source from which laws must come in order to be laws. This rule Kelsen called "the basic norm." In his own words,

> The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law . . . . The idea of a pure positive law, like that of natural law, has its limitations.[11]

It will be noted that Kelsen speaks, not as Professor Hart does, of "fundamental rules" that regulate the making of law, but of a single rule or norm. Of course, there is no such single rule in any modern society. The notion of the basic norm is admittedly a symbol, not a fact. It is a symbol that embodies the positivist quest for some clear and unambiguous test of law, for some clean, sharp line that will divide the rules which owe their validity to their source and those which owe their validity to acceptance and intrinsic appeal. The difficulties Austin avoided by sticking with the command theory, Kelsen avoids by a fiction which simplifies reality into a form that can be absorbed by positivism.

[11] KELSEN, GENERAL THEORY OF LAW AND STATE 401 (3d ed. 1949).

HeinOnline -- 71 Harv. L. Rev. 641 1957

A full exploration of all the problems that result when we recognize that law becomes possible only by virtue of rules that are not law, would require drawing into consideration the effect of the presence or absence of a written constitution. Such a constitution in some ways simplifies the problems I have been discussing, and in some ways complicates them. In so far as a written constitution defines basic lawmaking procedure, it may remove the perplexities that arise when a parliament in effect defines itself. At the same time, a legislature operating under a written constitution may enact statutes that profoundly affect the lawmaking procedure and its predictable outcome. If these statutes are drafted with sufficient cunning, they may remain within the frame of the constitution and yet undermine the institutions it was intended to establish. If the "court-packing" proposal of the 'thirties does not illustrate this danger unequivocally, it at least suggests that the fear of it is not fanciful. No written constitution can be self-executing. To be effective it requires not merely the respectful deference we show for ordinary legal enactments, but that willing convergence of effort we give to moral principles in which we have an active belief. One may properly work to amend a constitution, but so long as it remains unamended one must work with it, not against it or around it. All this amounts to saying that to be effective a written constitution must be accepted, at least provisionally, not just as law, but as good law.

What have these considerations to do with the ideal of fidelity to law? I think they have a great deal to do with it, and that they reveal the essential incapacity of the positivistic view to serve that ideal effectively. For I believe that a realization of this ideal is something for which we must plan, and that is precisely what positivism refuses to do.

Let me illustrate what I mean by planning for a realization of the ideal of fidelity to law. Suppose we are drafting a written constitution for a country just emerging from a period of violence and disorder in which any thread of legal continuity with previous governments has been broken. Obviously such a constitution cannot lift itself unaided into legality; it cannot be law simply because it says it is. We should keep in mind that the efficacy of our work will depend upon general acceptance and that to make this acceptance secure there must be a general belief that the constitution itself is necessary, right, and good. The provisions of the constitution should, therefore, be kept simple and understandable,

HeinOnline -- 71 Harv. L. Rev. 642 1957

not only in language, but also in purpose. Preambles and other explanations of what is being sought, which would be objectionable in an ordinary statute, may find an appropriate place in our constitution. We should think of our constitution as establishing a basic procedural framework for future governmental action in the enactment and administration of laws. Substantive limitations on the power of government should be kept to a minimum and should generally be confined to those for which a need can be generally appreciated. In so far as possible, substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things.

These considerations seem to have been widely ignored in the constitutions that have come into existence since World War II. Not uncommonly these constitutions incorporate a host of economic and political measures of the type one would ordinarily associate with statutory law. It is hardly likely that these measures have been written into the constitution because they represent aims that are generally shared. One suspects that the reason for their inclusion is precisely the opposite, namely, a fear that they would not be able to survive the vicissitudes of an ordinary exercise of parliamentary power. Thus, the divisions of opinion that are a normal accompaniment of lawmaking are written into the document that makes law itself possible. This is obviously a procedure that contains serious dangers for a future realization of the ideal of fidelity to law.

I have ventured these remarks on the making of constitutions not because I think they can claim any special profundity, but because I wished to illustrate what I mean by planning the conditions that will make it possible to realize the ideal of fidelity to law. Even within the limits of my modest purpose, what I have said may be clearly wrong. If so, it would not be for me to say whether I am also wrong clearly. I will, however, venture to assert that if I am wrong, I am wrong significantly. What disturbs me about the school of legal positivism is that it not only refuses to deal with problems of the sort I have just discussed, but bans them on principle from the province of legal philosophy. In its concern to assign the right labels to the things men do, this school seems to lose all interest in asking whether men are doing the right things.

HeinOnline -- 71 Harv. L. Rev. 643 1957

IV. The Morality of Law Itself

Most of the issues raised by Professor Hart's essay can be restated in terms of the distinction between order and good order. Law may be said to represent order *simpliciter*. Good order is law that corresponds to the demands of justice, or morality, or men's notions of what ought to be. This rephrasing of the issue is useful in bringing to light the ambitious nature of Professor Hart's undertaking, for surely we would all agree that it is no easy thing to distinguish order from good order. When it is said, for example, that law simply represents that public order which obtains under all governments — democratic, Fascist, or Communist [12] — the order intended is certainly not that of a morgue or cemetery. We must mean a functioning order, and such an order has to be at least good enough to be considered as functioning by some standard or other. A reminder that workable order usually requires some play in the joints, and therefore cannot be too orderly, is enough to suggest some of the complexities that would be involved in any attempt to draw a sharp distinction between order and good order.

For the time being, however, let us suppose we can in fact clearly separate the concept of order from that of good order. Even in this unreal and abstract form the notion of order itself contains what may be called a moral element. Let me illustrate this "morality of order" in its crudest and most elementary form. Let us suppose an absolute monarch, whose word is the only law known to his subjects. We may further suppose him to be utterly selfish and to seek in his relations with his subjects solely his own advantage. This monarch from time to time issues commands, promising rewards for compliance and threatening punishment for disobedience. He is, however, a dissolute and forgetful fellow, who never makes the slightest attempt to ascertain who have in fact followed his directions and who have not. As a result he habitually punishes loyalty and rewards disobedience. It is apparent that this monarch will never achieve even his own selfish aims until he is ready to accept that minimum self-restraint that will create a meaningful connection between his words and his actions.

---

[12] *E.g.*, Friedmann, *The Planned State and the Rule of Law*, 22 Austr. L.J. 162, 207 (1948).

HeinOnline -- 71 Harv. L. Rev. 644 1957

Let us now suppose that our monarch undergoes a change of heart and begins to pay some attention to what he said yesterday when, today, he has occasion to distribute bounty or to order the chopping off of heads. Under the strain of this new responsibility, however, our monarch relaxes his attention in other directions and becomes hopelessly slothful in the phrasing of his commands. His orders become so ambiguous and are uttered in so inaudible a tone that his subjects never have any clear idea what he wants them to do. Here, again, it is apparent that if our monarch for his own selfish advantage wants to create in his realm anything like a system of law he will have to pull himself together and assume still another responsibility.

Law, considered merely as order, contains, then, its own implicit morality. This morality of order must be respected if we are to create anything that can be called law, even bad law. Law by itself is powerless to bring this morality into existence. Until our monarch is really ready to face the responsibilities of his position, it will do no good for him to issue still another futile command, this time self-addressed and threatening himself with punishment if he does not mend his ways.

There is a twofold sense in which it is true that law cannot be built on law. First of all, the authority to make law must be supported by moral attitudes that accord to it the competency it claims. Here we are dealing with a morality external to law, which makes law possible. But this alone is not enough. We may stipulate that in our monarchy the accepted "basic norm" designates the monarch himself as the only possible source of law. We still cannot have law until our monarch is ready to accept the internal morality of law itself.

In the life of a nation these external and internal moralities of law reciprocally influence one another; a deterioration of the one will almost inevitably produce a deterioration in the other. So closely related are they that when the anthropologist Lowie speaks of "the generally accepted ethical postulates underlying our . . . legal institutions as their ultimate sanction and guaranteeing their smooth functioning," [13] he may be presumed to have both of them in mind.

What I have called "the internal morality of law" seems to be almost completely neglected by Professor Hart. He does make

[13] LOWIE, THE ORIGIN OF THE STATE 113 (1927).

HeinOnline -- 71 Harv. L. Rev. 645 1957

brief mention of "justice in the administration of the law," which consists in the like treatment of like cases, by whatever elevated or perverted standards the word "like" may be defined.[14] But he quickly dismisses this aspect of law as having no special relevance to his main enterprise.

In this I believe he is profoundly mistaken. It is his neglect to analyze the demands of a morality of order that leads him throughout his essay to treat law as a datum projecting itself into human experience and not as an object of human striving. When we realize that order itself is something that must be worked for, it becomes apparent that the existence of a legal system, even a bad or evil legal system, is always a matter of degree. When we recognize this simple fact of everyday legal experience, it becomes impossible to dismiss the problems presented by the Nazi regime with a simple assertion: "Under the Nazis there was law, even if it was bad law." We have instead to inquire how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule, and what moral implications this mutilated system had for the conscientious citizen forced to live under it.

It is not necessary, however, to dwell on such moral upheavals as the Nazi regime to see how completely incapable the positivistic philosophy is of serving the one high moral ideal it professes, that of fidelity to law. Its default in serving this ideal actually becomes most apparent, I believe, in the everyday problems that confront those who are earnestly desirous of meeting the moral demands of a legal order, but who have responsible functions to discharge in the very order toward which loyalty is due.

Let us suppose the case of a trial judge who has had an extensive experience in commercial matters and before whom a great many commercial disputes are tried. As a subordinate in a judicial hierarchy, our judge has of course the duty to follow the law laid down by his supreme court. Our imaginary Scrutton has the misfortune, however, to live under a supreme court which he considers woefully ignorant of the ways and needs of commerce. To his mind, many of this court's decisions in the field of commercial law simply do not make sense. If a conscientious judge caught in this dilemma were to turn to the positivistic philosophy what succor could he expect? It will certainly do no good to

[14] Hart, *supra* note 2, at 623–24.

HeinOnline -- 71 Harv. L. Rev. 646 1957

remind him that he has an obligation of fidelity to law. He is aware of this already and painfully so, since it is the source of his predicament. Nor will it help to say that if he legislates, it must be "interstitially," or that his contributions must be "confined from molar to molecular motions." [15] This mode of statement may be congenial to those who like to think of law, not as a purposive thing, but as an expression of the dimensions and directions of state power. But I cannot believe that the essentially trite idea behind this advice can be lifted by literary eloquence to the point where it will offer any real help to our judge; for one thing, it may be impossible for him to know whether his supreme court would regard any particular contribution of his as being wide or narrow.

Nor is it likely that a distinction between core and penumbra would be helpful. The predicament of our judge may well derive, not from particular precedents, but from a mistaken conception of the nature of commerce which extends over many decisions and penetrates them in varying degrees. So far as his problem arises from the use of particular words, he may well find that the supreme court often uses the ordinary terms of commerce in senses foreign to actual business dealings. If he interprets those words as a business executive or accountant would, he may well reduce the precedents he is bound to apply to a logical shambles. On the other hand, he may find great difficulty in discerning the exact sense in which the supreme court used those words, since in his mind that sense is itself the product of a confusion.

Is it not clear that it is precisely positivism's insistence on a rigid separation of law as it is from law as it ought to be that renders the positivistic philosophy incapable of aiding our judge? Is it not also clear that our judge can never achieve a satisfactory resolution of his dilemma unless he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be?

The case I have supposed may seem extreme, but the problem it suggests pervades our whole legal system. If the divergence

[15] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting), paraphrasing Storti v. Commonwealth, 178 Mass. 549, 554, 60 N.E. 210, 211 (1901) (Holmes, C.J.), in which it was held that a statute providing for electrocution as a means of inflicting the punishment of death was not cruel or unusual punishment within the Massachusetts Declaration of Rights, MASS. CONST. pt. First, art. XXVI, simply because it accomplished its object by molecular, rather than molar, motions.

HeinOnline -- 71 Harv. L. Rev. 647 1957

of views between our judge and his supreme court were less drastic, it would be more difficult to present his predicament graphically, but the perplexity of his position might actually increase. Perplexities of this sort are a normal accompaniment of the discharge of any adjudicative function; they perhaps reach their most poignant intensity in the field of administrative law.

One can imagine a case — surely not likely in Professor Hart's country or mine — where a judge might hold profound moral convictions that were exactly the opposite of those held, with equal attachment, by his supreme court. He might also be convinced that the precedents he was bound to apply were the direct product of a morality he considered abhorrent. If such a judge did not find the solution for his dilemma in surrendering his office, he might well be driven to a wooden and literal application of precedents which he could not otherwise apply because he was incapable of understanding the philosophy that animated them. But I doubt that a judge in this situation would need the help of legal positivism to find these melancholy escapes from his predicament. Nor do I think that such a predicament is likely to arise within a nation where both law and good law are regarded as collaborative human achievements in need of constant renewal, and where lawyers are still at least as interested in asking "What is good law?" as they are in asking "What is law?"

V. The Problem of Restoring Respect for Law and Justice After the Collapse of a Regime That Respected Neither

After the collapse of the Nazi regime the German courts were faced with a truly frightful predicament. It was impossible for them to declare the whole dictatorship illegal or to treat as void every decision and legal enactment that had emanated from Hitler's government. Intolerable dislocations would have resulted from any such wholesale outlawing of all that occurred over a span of twelve years. On the other hand, it was equally impossible to carry forward into the new government the effects of every Nazi perversity that had been committed in the name of law; any such course would have tainted an indefinite future with the poisons of Nazism.

This predicament — which was, indeed, a pervasive one, affecting all branches of law — came to a dramatic head in a series

HeinOnline -- 71 Harv. L. Rev. 648 1957

of cases involving informers who had taken advantage of the Nazi terror to get rid of personal enemies or unwanted spouses. If all Nazi statutes and judicial decisions were indiscriminately "law," then these despicable creatures were guiltless, since they had turned their victims over to processes which the Nazis themselves knew by the name of law. Yet it was intolerable, especially for the surviving relatives and friends of the victims, that these people should go about unpunished, while the objects of their spite were dead, or were just being released after years of imprisonment, or, more painful still, simply remained unaccounted for.

The urgency of this situation does not by any means escape Professor Hart. Indeed, he is moved to recommend an expedient that is surely not lacking itself in a certain air of desperation. He suggests that a retroactive criminal statute would have been the least objectionable solution to the problem. This statute would have punished the informer, and branded him as a criminal, for an act which Professor Hart regards as having been perfectly legal when he committed it.[16]

On the other hand, Professor Hart condemns without qualification those judicial decisions in which the courts themselves undertook to declare void certain of the Nazi statutes under which the informer's victims had been convicted. One cannot help raising at this point the question whether the issue as presented by Professor Hart himself is truly that of fidelity to law. Surely it would be a necessary implication of a retroactive criminal statute against informers that, for purposes of that statute at least, the Nazi laws as applied to the informers or their victims were to be regarded as void. With this turn the question seems no longer to be whether what was once law can now be declared not to have been law, but rather who should do the dirty work, the courts or the legislature.

But, as Professor Hart himself suggests, the issues at stake are much too serious to risk losing them in a semantic tangle. Even if the whole question were one of words, we should remind ourselves that we are in an area where words have a powerful effect on human attitudes. I should like, therefore, to undertake a defense of the German courts, and to advance reasons why, in my opinion, their decisions do not represent the abandonment of

[16] See Hart, *supra* note 2, at 619–20.

HeinOnline -- 71 Harv. L. Rev. 649 1957

legal principle that Professor Hart sees in them. In order to understand the background of those decisions we shall have to move a little closer within smelling distance of the witches' caldron than we have been brought so far by Professor Hart. We shall have also to consider an aspect of the problem ignored in his essay, namely, the degree to which the Nazis observed what I have called the inner morality of law itself.

Throughout his discussion Professor Hart seems to assume that the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman. This assumption is, I think, seriously mistaken, and Professor Hart's acceptance of it seems to me to render his discussion unresponsive to the problem it purports to address.

Throughout their period of control the Nazis took generous advantage of a device not wholly unknown to American legislatures, the retroactive statute curing past legal irregularities. The most dramatic use of the curative powers of such a statute occurred on July 3, 1934, after the "Roehm purge." When this intraparty shooting affair was over and more than seventy Nazis had been — one can hardly avoid saying — "rubbed out," Hitler returned to Berlin and procured from his cabinet a law ratifying and confirming the measures taken between June 30, and July 1, 1934, without mentioning the names of those who were now considered to have been lawfully executed.[17] Some time later Hitler declared that during the Roehm purge "the supreme court of the German people . . . consisted of myself," [18] surely not an overstatement of the capacity in which he acted if one takes seriously the enactment conferring retroactive legality on "the measures taken."

Now in England and America it would never occur to anyone to say that "it is in the nature of law that it cannot be retroactive," although, of course, constitutional inhibitions may prohibit certain kinds of retroactivity. We would say it is normal for a law to operate prospectively, and that it may be arguable that it ought never operate otherwise, but there would be a certain occult unpersuasiveness in any assertion that retroactivity violates the very nature of law itself. Yet we have only to imagine a country in which *all* laws are retroactive in order to see that retroactivity

[17] N.Y. Times, July 4, 1934, p. 3, col. 3 (late city ed.).

[18] See N.Y. Times, July 14, 1934, p. 5, col. 2 (late city ed.).

HeinOnline -- 71 Harv. L. Rev. 650 1957

presents a real problem for the internal morality of law. If we suppose an absolute monarch who allows his realm to exist in a constant state of anarchy, we would hardly say that he could create a regime of law simply by enacting a curative statute conferring legality on everything that had happened up to its date and by announcing an intention to enact similar statutes every six months in the future.

A general increase in the resort to statutes curative of past legal irregularities represents a deterioration in that form of legal morality without which law itself cannot exist. The threat of such statutes hangs over the whole legal system, and robs every law on the books of some of its significance. And surely a general threat of this sort is implied when a government is willing to use such a statute to transform into lawful execution what was simple murder when it happened.

During the Nazi regime there were repeated rumors of "secret laws." In the article criticized by Professor Hart, Radbruch mentions a report that the wholesale killings in concentration camps were made "lawful" by a secret enactment.[19] Now surely there can be no greater legal monstrosity than a secret statute. Would anyone seriously recommend that following the war the German courts should have searched for unpublished laws among the files left by Hitler's government so that citizens' rights could be determined by a reference to these laws?

The extent of the legislator's obligation to make his laws known to his subjects is, of course, a problem of legal morality that has been under active discussion at least since the Secession of the Plebs. There is probably no modern state that has not been plagued by this problem in one form or another. It is most likely to arise in modern societies with respect to unpublished administrative directions. Often these are regarded in quite good faith by those who issue them as affecting only matters of internal organization. But since the procedures followed by an administrative agency, even in its "internal" actions, may seriously affect the rights and interests of the citizen, these unpublished, or "secret," regulations are often a subject for complaint.

---

[19] Radbruch, *Die Erneuerung des Rechts*, 2 DIE WANDLUNG 8, 9 (Germany 1947). A useful discussion of the Nazi practice with reference to the publicity given laws will be found in Giese, *Verkündung und Gesetzeskraft*, 76 ARCHIV DES ÖFFENTLICHEN RECHTS 464, 471–72 (Germany 1951). I rely on this article for the remarks that follow in the text.

HeinOnline -- 71 Harv. L. Rev. 651 1957

But as with retroactivity, what in most societies is kept under control by the tacit restraints of legal decency broke out in monstrous form under Hitler. Indeed, so loose was the whole Nazi morality of law that it is not easy to know just what should be regarded as an unpublished or secret law. Since unpublished instructions to those administering the law could destroy the letter of any published law by imposing on it an outrageous interpretation, there was a sense in which the meaning of every law was "secret." Even a verbal order from Hitler that a thousand prisoners in concentration camps be put to death was at once an administrative direction and a validation of everything done under it as being "lawful."

But the most important affronts to the morality of law by Hitler's government took no such subtle forms as those exemplified in the bizarre outcroppings I have just discussed. In the first place, when legal forms became inconvenient, it was always possible for the Nazis to bypass them entirely and "to act through the party in the streets." There was no one who dared bring them to account for whatever outrages might thus be committed. In the second place, the Nazi-dominated courts were always ready to disregard any statute, even those enacted by the Nazis themselves, if this suited their convenience or if they feared that a lawyer-like interpretation might incur displeasure "above."

This complete willingness of the Nazis to disregard even their own enactments was an important factor leading Radbruch to take the position he did in the articles so severely criticized by Professor Hart. I do not believe that any fair appraisal of the action of the postwar German courts is possible unless we take this factor into account, as Professor Hart fails completely to do.

These remarks may seem inconclusive in their generality and to rest more on assertion than evidentiary fact. Let us turn at once, then, to the actual case discussed by Professor Hart.[20]

In 1944 a German soldier paid a short visit to his wife while under travel orders on a reassignment. During the single day he was home, he conveyed privately to his wife something of his opinion of the Hitler government. He expressed disapproval of (*sich abfällig geäussert über*) Hitler and other leading personalities of the Nazi party. He also said it was too bad Hitler had not met his end in the assassination attempt that had occurred on

[20] Judgment of July 27, 1949, Oberlandesgericht, Bamberg, 5 SÜDDEUTSCHE JURISTEN-ZEITUNG 207 (Germany 1950), 64 HARV. L. REV. 1005 (1951).

HeinOnline -- 71 Harv. L. Rev. 652 1957

July 20th of that year. Shortly after his departure, his wife, who during his long absence on military duty "had turned to other men" and who wished to get rid of him, reported his remarks to the local leader of the Nazi party, observing that "a man who would say a thing like that does not deserve to live." The result was a trial of the husband by a military tribunal and a sentence of death. After a short period of imprisonment, instead of being executed, he was sent to the front again. After the collapse of the Nazi regime, the wife was brought to trial for having procured the imprisonment of her husband. Her defense rested on the ground that her husband's statements to her about Hitler and the Nazis constituted a crime under the laws then in force. Accordingly, when she informed on her husband she was simply bringing a criminal to justice.

This defense rested on two statutes, one passed in 1934, the other in 1938. Let us first consider the second of these enactments, which was part of a more comprehensive legislation creating a whole series of special wartime criminal offenses. I reproduce below a translation of the only pertinent section:

> The following persons are guilty of destroying the national power of resistance and shall be punished by death: Whoever publicly solicits or incites a refusal to fulfill the obligations of service in the armed forces of Germany, or in armed forces allied with Germany, or who otherwise publicly seeks to injure or destroy the will of the German people or an allied people to assert themselves stalwartly against their enemies.[21]

It is almost inconceivable that a court of present-day Germany would hold the husband's remarks to his wife, who was barred from military duty by her sex, to be a violation of the final catch-all provision of this statute, particularly when it is recalled that the text reproduced above was part of a more comprehensive enactment dealing with such things as harboring deserters, escaping military duty by self-inflicted injuries, and the like. The question arises, then, as to the extent to which the interpretive principles applied by the courts of Hitler's government should be accepted in determining whether the husband's remarks were indeed unlawful.

---

[21] The passage translated is § 5 of a statute creating a Kriegssonderstrafrecht. Law of Aug. 17, 1938, [1939] 2 REICHSGESETZBLATT pt. 1, at 1456. The translation is mine.

HeinOnline -- 71 Harv. L. Rev. 653 1957

This question becomes acute when we note that the act applies only to *public* acts or utterances, whereas the husband's remarks were in the privacy of his own home. Now it appears that the Nazi courts (and it should be noted we are dealing with a special military court) quite generally disregarded this limitation and extended the act to all utterances, private or public.[22] Is Professor Hart prepared to say that the legal meaning of this statute is to be determined in the light of this apparently uniform principle of judicial interpretation?

Let us turn now to the other statute upon which Professor Hart relies in assuming that the husband's utterance was unlawful. This is the act of 1934, the relevant portions of which are translated below:

> (1) Whoever publicly makes spiteful or provocative statements directed against, or statements which disclose a base disposition toward, the leading personalities of the nation or of the National Socialist German Workers' Party, or toward measures taken or institutions established by them, and of such a nature as to undermine the people's confidence in their political leadership, shall be punished by imprisonment.
> (2) Malicious utterances not made in public shall be treated in the same manner as public utterances when the person making them realized or should have realized they would reach the public.
> (3) Prosecution for such utterances shall be only on the order of the National Minister of Justice; in case the utterance was directed against a leading personality of the National Socialist German Workers' Party, the Minister of Justice shall order prosecution only with the advice and consent of the Representative of the Leader.
> (4) The National Minister of Justice shall, with the advice and consent of the Representative of the Leader, determine who shall belong to the class of leading personalities for purposes of Section 1 above.[23]

Extended comment on this legislative monstrosity is scarcely called for, overlarded and undermined as it is by uncontrolled administrative discretion. We may note only: first, that it offers no justification whatever for the death penalty actually imposed on the husband, though never carried out; second, that if the wife's

---

[22] See 5 SÜDDEUTSCHE JURISTEN-ZEITUNG 207, 210 (Germany 1950).

[23] The translated passage is article II of A Law Against Malicious Attacks on the State and the Party and for the Protection of the Party Uniform, Law of Dec. 20, 1934, [1934] 1 REICHSGESETZBLATT 1269. The translation is mine.

HeinOnline -- 71 Harv. L. Rev. 654 1957

act in informing on her husband made his remarks "public," there is no such thing as a private utterance under this statute. I should like to ask the reader whether he can actually share Professor Hart's indignation that, in the perplexities of the postwar reconstruction, the German courts saw fit to declare this thing not a law. Can it be argued seriously that it would have been more beseeming to the judicial process if the postwar courts had undertaken a study of "the interpretative principles" in force during Hitler's rule and had then solemnly applied those "principles" to ascertain the meaning of this statute? On the other hand, would the courts really have been showing respect for Nazi law if they had construed the Nazi statutes by their own, quite different, standards of interpretation?

Professor Hart castigates the German courts and Radbruch, not so much for what they believed had to be done, but because they failed to see that they were confronted by a moral dilemma of a sort that would have been immediately apparent to Bentham and Austin. By the simple dodge of saying, "When a statute is sufficiently evil it ceases to be law," they ran away from the problem they should have faced.

This criticism is, I believe, without justification. So far as the courts are concerned, matters certainly would not have been helped if, instead of saying, "This is not law," they had said, "This is law but it is so evil we will refuse to apply it." Surely moral confusion reaches its height when a court refuses to apply something it admits to be law, and Professor Hart does not recommend any such "facing of the true issue" by the courts themselves. He would have preferred a retroactive statute. Curiously, this was also the preference of Radbruch.[24] But unlike Professor Hart, the German courts and Gustav Radbruch were living participants in a situation of drastic emergency. The informer problem was a pressing one, and if legal institutions were to be rehabilitated in Germany it would not do to allow the people to begin taking the law into their own hands, as might have occurred while the courts were waiting for a statute.

As for Gustav Radbruch, it is, I believe, wholly unjust to say that he did not know he was faced with a moral dilemma. His postwar writings repeatedly stress the antinomies confronted in the effort to rebuild decent and orderly government in Germany.

[24] See Radbruch, *Die Erneuerung des Rechts*, 2 DIE WANDLUNG 8, 10 (Germany 1947).

HeinOnline -- 71 Harv. L. Rev. 655 1957

As for the ideal of fidelity to law, I shall let Radbruch's own words state his position:

> We must not conceal from ourselves — especially not in the light of our experiences during the twelve-year dictatorship — what frightful dangers for the rule of law can be contained in the notion of "statutory lawlessness" and in refusing the quality of law to duly enacted statutes.[25]

The situation is not that legal positivism enables a man to know when he faces a difficult problem of choice, while Radbruch's beliefs deceive him into thinking there is no problem to face. The real issue dividing Professors Hart and Radbruch is: How shall we state the problem? What is the nature of the dilemma in which we are caught?

I hope I am not being unjust to Professor Hart when I say that I can find no way of describing the dilemma as he sees it but to use some such words as the following: On the one hand, we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think is right and decent. When we are confronted by a statute we believe to be thoroughly evil, we have to choose between those two duties.

If this is the positivist position, then I have no hesitancy in rejecting it. The "dilemma" it states has the verbal formulation of a problem, but the problem it states makes no sense. It is like saying I have to choose between giving food to a starving man and being mimsy with the borogoves. I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law. This obligation seems to be conceived as sui generis, wholly unrelated to any of the ordinary, extralegal ends of human life. The fundamental postulate of positivism — that law must be strictly severed from morality — seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations. No mediating principle can measure their respective demands on conscience, for they exist in wholly separate worlds.

While I would not subscribe to all of Radbruch's postwar views — especially those relating to "higher law" — I think he

---

[25] Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105, 107 (Germany 1946) (reprinted in RADBRUCH, RECHTSPHILOSOPHIE 347, 354 (4th ed. 1950)). The translation is mine.

HeinOnline -- 71 Harv. L. Rev. 656 1957

saw, much more clearly than does Professor Hart, the true nature of the dilemma confronted by Germany in seeking to rebuild her shattered legal institutions. Germany had to restore both respect for law and respect for justice. Though neither of these could be restored without the other, painful antinomies were encountered in attempting to restore both at once, as Radbruch saw all too clearly. Essentially Radbruch saw the dilemma as that of meeting the demands of order, on the one hand, and those of good order, on the other. Of course no pat formula can be derived from this phrasing of the problem. But, unlike legal positivism, it does not present us with opposing demands that have no living contact with one another, that simply shout their contradictions across a vacuum. As we seek order, we can meaningfully remind ourselves that order itself will do us no good unless it is good for something. As we seek to make our order good, we can remind ourselves that justice itself is impossible without order, and that we must not lose order itself in the attempt to make it good.

VI. The Moral Implications of Legal Positivism

We now reach the question whether there is any ground for Gustav Radbruch's belief that a general acceptance of the positivistic philosophy in pre-Nazi Germany made smoother the route to dictatorship. Understandably, Professor Hart regards this as the most outrageous of all charges against positivism.

Here indeed we enter upon a hazardous area of controversy, where ugly words and ugly charges have become commonplace. During the last half century in this country no issue of legal philosophy has caused more spilling of ink and adrenalin than the assertion that there are "totalitarian" implications in the views of Oliver Wendell Holmes, Jr. Even the most cautiously phrased criticisms of that grand old figure from the age of Darwin, Huxley, and Haeckel seem to stir the reader's mind with the memory of past acerbities.[26] It does no good to suggest that perhaps Holmes did not perceive all the implications of his own philosophy, for this is merely to substitute one insult for another. Nor does it help much to recall the dictum of one of the closest companions of Holmes' youth — surely no imperceptive observer — that Holmes

[26] See, *e.g.*, Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 529 (1951).

HeinOnline -- 71 Harv. L. Rev. 657 1957

was "composed of at least two and a half different people rolled into one, and the way he keeps them together in one tight skin, without quarreling any more than they do, is remarkable." [27]

In venturing upon these roughest of all jurisprudential waters, one is not reassured to see even so moderate a man as Professor Hart indulging in some pretty broad strokes of the oar. Radbruch disclosed "an extraordinary naïveté" in assessing the temper of his own profession in Germany and in supposing that its adherence to positivism helped the Nazis to power.[28] His judgment on this and other matters shows that he had "only half digested the spiritual message of liberalism" he mistakenly thought he was conveying to his countrymen.[29] A state of "hysteria" [30] is revealed by those who see a wholesome reorientation of German legal thinking in such judicial decisions as were rendered in the informer cases.

Let us put aside at least the blunter tools of invective and address ourselves as calmly as we can to the question whether legal positivism, as practiced and preached in Germany, had, or could have had, any causal connection with Hitler's ascent to power. It should be recalled that in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a standing such as it enjoyed in no other country. Austin praised a German scholar for bringing international law within the clarity-producing restraints of positivism.[31] Gray reported with pleasure that the "abler" German jurists of his time were "abjuring all *'nicht positivisches Recht,'*" and cited Bergbohm as an example.[32] This is an illuminating example, for Bergbohm was a scholar whose ambition was to make German positivism live up to its own pretensions. He was distressed to encounter vestigial traces of natural-law thinking in writings claiming to be positivistic. In particular, he was disturbed by the frequent recurrence of such notions as that law owes its efficacy to a perceived moral need for order, or that it is in the nature of man that he requires a legal order, etc. Bergbohm announced a program, never realized, to drive from positivistic thinking these last miasmas from the swamp

[27] See 1 PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES 297 (1935) (quoting a letter written by William James in 1869).

[28] Hart, *supra* note 2, at 617–18.

[29] *Id.* at 618.

[30] *Id.* at 619.

[31] 1 AUSTIN, LECTURES ON JURISPRUDENCE 173 (5th ed. 1885) (Lecture V).

[32] GRAY, THE NATURE AND SOURCES OF THE LAW 96 (2d ed. 1921).

HeinOnline -- 71 Harv. L. Rev. 658 1957

of natural law.[33] German jurists generally tended to regard the Anglo-American common law as a messy and unprincipled conglomerate of law and morals.[34] Positivism was the only theory of law that could claim to be "scientific" in an Age of Science. Dissenters from this view were characterized by positivists with that epithet modern man fears above all others: "naïve." The result was that it could be reported by 1927 that "to be found guilty of adherence to natural law theories is a kind of social disgrace."[35]

To this background we must add the observation that the Germans seem never to have achieved that curious ability possessed by the British, and to some extent by the Americans, of holding their logic on short leash. When a German defines law, he means his definition to be taken seriously. If a German writer had hit upon the slogan of American legal realism, "Law is simply the behavior patterns of judges and other state officials," he would not have regarded this as an interesting little conversation-starter. He would have believed it and acted on it.

German legal positivism not only banned from legal science any consideration of the moral ends of law, but it was also indifferent to what I have called the inner morality of law itself. The German lawyer was therefore peculiarly prepared to accept as "law" anything that called itself by that name, was printed at government expense, and seemed to come "*von oben herab*."

In the light of these considerations I cannot see either absurdity or perversity in the suggestion that the attitudes prevailing in the German legal profession were helpful to the Nazis. Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.

Professor Hart and others have been understandably distressed by references to a "higher law" in some of the decisions concerning informers and in Radbruch's postwar writings. I suggest that if German jurisprudence had concerned itself more with the inner morality of law, it would not have been necessary to invoke

---

[33] 1 BERGBOHM, JURISPRUDENZ UND RECHTSPHILOSOPHIE 355–552 (1892).

[34] See, *e.g.*, Heller, *Die Krisis der Staatslehre*, 55 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 289, 309 (Germany 1926).

[35] Voegelin, *Kelsen's Pure Theory of Law*, 42 POL. SCI. Q. 268, 269 (1927).

HeinOnline -- 71 Harv. L. Rev. 659 1957

any notion of this sort in declaring void the more outrageous Nazi statutes.

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality — when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.

I believe that the invalidity of the statutes involved in the informer cases could have been grounded on considerations such as I have just outlined. But if you were raised with a generation that said "law is law" and meant it, you may feel the only way you can escape one law is to set another off against it, and this perforce must be a "higher law." Hence these notions of "higher law," which are a justifiable cause for alarm, may themselves be a belated fruit of German legal positivism.

It should be remarked at this point that it is chiefly in Roman Catholic writings that the theory of natural law is considered, not simply as a search for those principles that will enable men to live together successfully, but as a quest for something that can be called "a higher law." This identification of natural law with a law that is above human laws seems in fact to be demanded by any doctrine that asserts the possibility of an authoritative pronouncement of the demands of natural law. In those areas affected by such pronouncements as have so far been issued, the conflict between Roman Catholic doctrine and opposing views seems to me to be a conflict between two forms of positivism. Fortunately, over most of the area with which lawyers are concerned, no such pronouncements exist. In these areas I think those of us who are not adherents of its faith can be grateful to the Catholic Church for having kept alive the rationalistic tradition in ethics.

I do not assert that the solution I have suggested for the informer cases would not have entailed its own difficulties, particularly the familiar one of knowing where to stop. But I think it demonstrable that the most serious deterioration in legal mo-

HeinOnline -- 71 Harv. L. Rev. 660 1957

rality under Hitler took place in branches of the law like those involved in the informer cases; no comparable deterioration was to be observed in the ordinary branches of private law. It was in those areas where the ends of law were most odious by ordinary standards of decency that the morality of law itself was most flagrantly disregarded. In other words, where one would have been most tempted to say, "This is so evil it cannot be a law," one could usually have said instead, "This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law." I think there is something more than accident here, for the overlapping suggests that legal morality cannot live when it is severed from a striving toward justice and decency.

But as an actual solution for the informer cases, I, like Professors Hart and Radbruch, would have preferred a retroactive statute. My reason for this preference is not that this is the most nearly lawful way of making unlawful what was once law. Rather I would see such a statute as a way of symbolizing a sharp break with the past, as a means of isolating a kind of cleanup operation from the normal functioning of the judicial process. By this isolation it would become possible for the judiciary to return more rapidly to a condition in which the demands of legal morality could be given proper respect. In other words, it would make it possible to plan more effectively to regain for the ideal of fidelity to law its normal meaning.

VII. The Problem of Interpretation: The Core and the Penumbra

It is essential that we be just as clear as we can be about the meaning of Professor Hart's doctrine of "the core and the penumbra," [36] because I believe the casual reader is likely to misinterpret what he has to say. Such a reader is apt to suppose that Professor Hart is merely describing something that is a matter of everyday experience for the lawyer, namely, that in the interpretation of legal rules it is typically the case (though not universally so) that there are some situations which will seem to fall rather clearly within the rule, while others will be more doubtful. Professor Hart's thesis takes no such jejune form. His extended discussion of the core and the penumbra is not just a complicated way of recognizing that some cases are hard, while others are

[36] Hart, *supra* note 2, at 606–08.

HeinOnline -- 71 Harv. L. Rev. 661 1957

easy. Instead, on the basis of a theory about language meaning generally, he is proposing a theory of judicial interpretation which is, I believe, wholly novel. Certainly it has never been put forward in so uncompromising a form before.

As I understand Professor Hart's thesis (if we add some tacit assumptions implied by it, as well as some qualifications he would no doubt wish his readers to supply) a full statement would run something as follows: The task of interpretation is commonly that of determining the meaning of the individual words of a legal rule, like "vehicle" in a rule excluding vehicles from a park. More particularly, the task of interpretation is to determine the range of reference of such a word, or the aggregate of things to which it points. Communication is possible only because words have a "standard instance," or a "core of meaning" that remains relatively constant, whatever the context in which the word may appear. Except in unusual circumstances, it will always be proper to regard a word like "vehicle" as embracing its "standard instance," that is, that aggregate of things it would include in all ordinary contexts, within or without the law. This meaning the word will have in any legal rule, whatever its purpose. In applying the word to its "standard instance," no creative role is assumed by the judge. He is simply applying the law "as it is."

In addition to a constant core, however, words also have a penumbra of meaning which, unlike the core, will vary from context to context. When the object in question (say, a tricycle) falls within this penumbral area, the judge is forced to assume a more creative role. He must now undertake, for the first time, an interpretation of the rule in the light of its purpose or aim. Having in mind what was sought by the regulation concerning parks, ought it to be considered as barring tricycles? When questions of this sort are decided there is at least an "intersection" of "is" and "ought," since the judge, in deciding what the rule "is," does so in the light of his notions of what "it ought to be" in order to carry out its purpose.

If I have properly interpreted Professor Hart's theory as it affects the "hard core," then I think it is quite untenable. The most obvious defect of his theory lies in its assumption that problems of interpretation typically turn on the meaning of individual words. Surely no judge applying a rule of the common law ever followed any such procedure as that described (and, I take it, prescribed) by Professor Hart; indeed, we do not normally even

HeinOnline -- 71 Harv. L. Rev. 662 1957

think of his problem as being one of "interpretation." Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text. Surely a paragraph does not have a "standard instance" that remains constant whatever the context in which it appears. If a statute seems to have a kind of "core meaning" that we can apply without a too precise inquiry into its exact purpose, this is because we can see that, however one might formulate the precise objective of the statute, *this* case would still come within it.

Even in situations where our interpretive difficulties seem to head up in a single word, Professor Hart's analysis seems to me to give no real account of what does or should happen. In his illustration of the "vehicle," although he tells us this word has a core of meaning that in all contexts defines unequivocally a range of objects embraced by it, he never tells us what these objects might be. If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule "is aiming at in general" so that we know there is no need to worry about the difference between Fords and Cadillacs. If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the park, or to save carefree strollers from injury, we know, "without thinking," that a noisy automobile must be excluded.

What would Professor Hart say if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the "no vehicle" rule? Does this truck, in perfect working order, fall within the core or the penumbra?

Professor Hart seems to assert that unless words have "standard instances" that remain constant regardless of context, effective communication would break down and it would become impossible to construct a system of "rules which have authority." [37] If in every context words took on a unique meaning, peculiar to that context, the whole process of interpretation would become

[37] See *id.* at 607.

HeinOnline -- 71 Harv. L. Rev. 663 1957

so uncertain and subjective that the ideal of a rule of law would lose its meaning. In other words, Professor Hart seems to be saying that unless we are prepared to accept his analysis of interpretation, we must surrender all hope of giving an effective meaning to the ideal of fidelity to law. This presents a very dark prospect indeed, if one believes, as I do, that we cannot accept his theory of interpretation. I do not take so gloomy a view of the future of the ideal of fidelity to law.

An illustration will help to test, not only Professor Hart's theory of the core and the penumbra, but its relevance to the ideal of fidelity to law as well. Let us suppose that in leafing through the statutes, we come upon the following enactment: "It shall be a misdemeanor, punishable by a fine of five dollars, to sleep in any railway station." We have no trouble in perceiving the general nature of the target toward which this statute is aimed. Indeed, we are likely at once to call to mind the picture of a disheveled tramp, spread out in an ungainly fashion on one of the benches of the station, keeping weary passengers on their feet and filling their ears with raucous and alcoholic snores. This vision may fairly be said to represent the "obvious instance" contemplated by the statute, though certainly it is far from being the "standard instance" of the physiological state called "sleep."

Now let us see how this example bears on the ideal of fidelity to law. Suppose I am a judge, and that two men are brought before me for violating this statute. The first is a passenger who was waiting at 3 A.M. for a delayed train. When he was arrested he was sitting upright in an orderly fashion, but was heard by the arresting officer to be gently snoring. The second is a man who had brought a blanket and pillow to the station and had obviously settled himself down for the night. He was arrested, however, before he had a chance to go to sleep. Which of these cases presents the "standard instance" of the word "sleep"? If I disregard that question, and decide to fine the second man and set free the first, have I violated a duty of fidelity to law? Have I violated that duty if I interpret the word "sleep" as used in this statute to mean something like "to spread oneself out on a bench or floor to spend the night, or as if to spend the night"?

Testing another aspect of Professor Hart's theory, is it really ever possible to interpret a word in a statute without knowing the aim of the statute? Suppose we encounter the following incomplete sentence: "All improvements must be promptly reported

HeinOnline -- 71 Harv. L. Rev. 664 1957

to . . . ." Professor Hart's theory seems to assert that even if we have only this fragment before us we can safely construe the word "improvement" to apply to its "standard instance," though we would have to know the rest of the sentence before we could deal intelligently with "problems of the penumbra." Yet surely in the truncated sentence I have quoted, the word "improvement" is almost as devoid of meaning as the symbol "X."

The word "improvement" will immediately take on meaning if we fill out the sentence with the words, "the head nurse," or, "the Town Planning Authority," though the two meanings that come to mind are radically dissimilar. It can hardly be said that these two meanings represent some kind of penumbral accretion to the word's "standard instance." And one wonders, parenthetically, how helpful the theory of the core and the penumbra would be in deciding whether, when the report is to be made to the planning authorities, the word "improvement" includes an unmortgageable monstrosity of a house that lowers the market value of the land on which it is built.

It will be instructive, I think, to consider the effect of other ways of filling out the sentence. Suppose we add to, "All improvements must be promptly reported to . . ." the words, "the Dean of the Graduate Division." Here we no longer seem, as we once did, to be groping in the dark; rather, we seem now to be reaching into an empty box. We achieve a little better orientation if the final clause reads, "to the Principal of the School," and we feel completely at ease if it becomes, "to the Chairman of the Committee on Relations with the Parents of Children in the Primary Division."

It should be noted that in deciding what the word "improvement" means in all these cases, we do not proceed simply by placing the word in some general context, such as hospital practice, town planning, or education. If this were so, the "improvement" in the last instance might just as well be that of the teacher as that of the pupil. Rather, we ask ourselves, What can this rule be for? What evil does it seek to avert? What good is it intended to promote? When it is "the head nurse" who receives the report, we are apt to find ourselves asking, "Is there, perhaps, a shortage of hospital space, so that patients who improve sufficiently are sent home or are assigned to a ward where they will receive less attention?" If "Principal" offers more orientation than "Dean of the Graduate Division," this must be because we know something

HeinOnline -- 71 Harv. L. Rev. 665 1957

about the differences between primary education and education on the postgraduate university level. We must have some minimum acquaintance with the ways in which these two educational enterprises are conducted, and with the problems encountered in both of them, before any distinction between "Principal" and "Dean of the Graduate Division" would affect our interpretation of "improvement." We must, in other words, be sufficiently capable of putting ourselves in the position of those who drafted the rule to know what they thought "ought to be." It is in the light of this "ought" that we must decide what the rule "is."

Turning now to the phenomenon Professor Hart calls "preoccupation with the penumbra," we have to ask ourselves what is actually contributed to the process of interpretation by the common practice of supposing various "borderline" situations. Professor Hart seems to say, "Why, nothing at all, unless we are working with problems of the penumbra." If this is what he means, I find his view a puzzling one, for it still leaves unexplained why, under his theory, if one is dealing with a penumbral problem, it could be useful to think about other penumbral problems.

Throughout his whole discussion of interpretation, Professor Hart seems to assume that it is a kind of cataloguing procedure. A judge faced with a novel situation is like a library clerk who has to decide where to shelve a new book. There are easy cases: the *Bible* belongs under Religion, *The Wealth of Nations* under Economics, etc. Then there are hard cases, when the librarian has to exercise a kind of creative choice, as in deciding whether *Das Kapital* belongs under Politics or Economics, *Gulliver's Travels* under Fantasy or Philosophy. But whether the decision where to shelve is easy or hard, once it is made all the librarian has to do is to put the book away. And so it is with judges, Professor Hart seems to say, in all essential particulars. Surely the judicial process is something more than a cataloguing procedure. The judge does not discharge his responsibility when he pins an apt diagnostic label on the case. He has to do something about it, to treat it, if you will. It is this larger responsibility which explains why interpretative problems almost never turn on a single word, and also why lawyers for generations have found the putting of imaginary borderline cases useful, not only "on the penumbra," but in order to know where the penumbra begins.

These points can be made clear, I believe, by drawing again on

HeinOnline -- 71 Harv. L. Rev. 666 1957

our example of the statutory fragment which reads, "All improvements must be promptly reported to . . . ." Whatever the concluding phrase may be, the judge has not solved his problems simply by deciding what kind of improvement is meant. Almost all of the words in the sentence may require interpretation, but most obviously this is so of "promptly" and "reported." What kind of "report" is contemplated: a written note, a call at the office, entry in a hospital record? How specific must it be? Will it be enough to say "a lot better," or "a big house with a bay window"?

Now it should be apparent to any lawyer that in interpreting words like "improvement," "prompt," and "report," no real help is obtained by asking how some extralegal "standard instance" would define these words. But, much more important, when these words are all parts of a single structure of thought, they are in interaction with one another during the process of interpretation. "What is an 'improvement'? Well, it must be something that can be made the subject of a report. So, for purposes of this statute 'improvement' really means 'reportable improvement.' What kind of 'report' must be made? Well, that depends upon the sort of 'improvement' about which information is desired and the reasons for desiring the information."

When we look beyond individual words to the statute as a whole, it becomes apparent how the putting of hypothetical cases assists the interpretative process generally. By pulling our minds first in one direction, then in another, these cases help us to understand the fabric of thought before us. This fabric is something we seek to discern, so that we may know truly what it is, but it is also something that we inevitably help to create as we strive (in accordance with our obligation of fidelity to law) to make the statute a coherent, workable whole.

I should have considered all these remarks much too trite to put down here if they did not seem to be demanded in an answer to the theory of interpretation proposed by Professor Hart, a theory by which he puts such store that he implies we cannot have fidelity to law in any meaningful sense unless we are prepared to accept it. Can it be possible that the positivistic philosophy demands that we abandon a view of interpretation which sees as its central concern, not words, but purpose and structure? If so, then the stakes in this battle of schools are indeed high.

I am puzzled by the novelty Professor Hart attributes to the

HeinOnline -- 71 Harv. L. Rev. 667 1957

lessons I once tried to draw from Wittgenstein's example about teaching a game to children.[38] I was simply trying to show the role reflection plays in deciding what ought to be done. I was trying to make such simple points as that decisions about what ought to be done are improved by reflection, by an exchange of views with others sharing the same problems, and by imagining various situations that might be presented. I was assuming that all of these innocent and familiar measures might serve to sharpen our perception of what we were trying to do, and that the product of the whole process might be, not merely a more apt choice of means for the end sought, but a clarification of the end itself. I had thought that a famous judge of the English bench had something like this in mind when he spoke of the common law as working "itself pure." [39] If this view of the judicial process is no longer entertained in the country of its origin, I can only say that, whatever the vicissitudes of Lord Mansfield's British reputation may be, he will always remain for us in this country a heroic figure of jurisprudence.

I have stressed here the deficiencies of Professor Hart's theory as that theory affects judicial interpretation. I believe, however, that its defects go deeper and result ultimately from a mistaken theory about the meaning of language generally. Professor Hart seems to subscribe to what may be called "the pointer theory of meaning," [40] a theory which ignores or minimizes the effect on the

---

[38] Fuller, *Human Purpose and Natural Law*, 53 J. PHILOS. 697, 700 (1956).

[39] Omychund v. Barker, 1 Atk. 21, 33, 26 Eng. Rep. 15, 22–23 (Ch. 1744) (argument of Solicitor-General Murray, later Lord Mansfield):

> All occasions do not arise at once; . . . a statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.

[40] I am speaking of the linguistic theory that seems to be implied in the essay under discussion here. In Professor Hart's brilliant inaugural address, *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37 (1954), the most important point made is that terms like "rule," "right," and "legal person" cannot be defined by pointing to correspondent things or actions in the external world, but can only be understood in terms of the function performed by them in the larger system, just as one cannot understand the umpire's ruling, "Y're out!" without having at least a general familiarity with the rules of baseball. Even in the analysis presented in the inaugural address, however, Professor Hart seems to think that the dependence of meaning on function and context is a peculiarity of formal and explicit systems, like those of a game or a legal system. He seems not to recognize that what he has to say about explicit systems is also true of the countless informal and overlapping systems that run through language as a whole. These implicit systematic or structural elements in language often enable us to understand at once the meaning of a word used in a wholly novel sense, as in the statement, "Experts regard

HeinOnline -- 71 Harv. L. Rev. 668 1957

meaning of words of the speaker's purpose and the structure of language. Characteristically, this school of thought embraces the notion of "common usage." The reason is, of course, that it is only with the aid of this notion that it can seem to attain the inert datum of meaning it seeks, a meaning isolated from the effects of purpose and structure.

It would not do to attempt here an extended excursus into linguistic theory. I shall have to content myself with remarking that the theory of meaning implied in Professor Hart's essay seems to me to have been rejected by three men who stand at the very head of modern developments in logical analysis: Wittgenstein, Russell, and Whitehead. Wittgenstein's posthumous *Philosophical Investigations* constitutes a sort of running commentary on the way words shift and transform their meanings as they move from context to context. Russell repudiates the cult of "common usage," and asks what "instance" of the word "word" itself can be given that does not imply some specific intention in the use of it.[41] Whitehead explains the appeal that "the deceptive identity of the repeated word" has for modern philosophers; only by assuming some linguistic constant (such as the "core of meaning") can validity be claimed for procedures of logic which of necessity move the word from one context to another.[42]

VIII. The Moral and Emotional Foundations of Positivism

If we ignore the specific theories of law associated with the positivistic philosophy, I believe we can say that the dominant tone of positivism is set by a fear of a purposive interpretation of law and legal institutions, or at least by a fear that such an interpretation may be pushed too far. I think one can find confirmatory traces of this fear in all of those classified as "positivists" by Professor Hart, with the outstanding exception of

---

the English Channel as the most difficult swim in the world." In the essay now being discussed, Professor Hart seems nowhere to recognize that a rule or statute has a structural or systematic quality that reflects itself in some measure into the meaning of every principal term in it.

[41] Russell, *The Cult of "Common Usage,"* in Portraits From Memory and Other Essays 166, 170–71 (1956).

[42] Whitehead, *Analysis of Meaning*, in Essays in Science and Philosophy 122, 127 (1947).

HeinOnline -- 71 Harv. L. Rev. 669 1957

Bentham, who is in all things a case apart and who was worlds removed from anything that could be called *ethical* positivism.

Now the belief that many of us hold, that this fear of purpose takes a morbid turn in positivism, should not mislead us into thinking that the fear is wholly without justification, or that it reflects no significant problem in the organization of society.

Fidelity to law *can* become impossible if we do not accept the broader responsibilities (themselves purposive, as all responsibilities are and must be) that go with a purposive interpretation of law. One can imagine a course of reasoning that might run as follows: This statute says absinthe shall not be sold. What is its purpose? To promote health. Now, as everyone knows, absinthe is a sound, wholesome, and beneficial beverage. Therefore, interpreting the statute in the light of its purpose, I construe it to direct a general sale and consumption of that most healthful of beverages, absinthe.

If the risk of this sort of thing is implicit in a purposive interpretation, what measures can we take to eliminate it, or to reduce it to bearable proportions? One is tempted to say, "Why, just use ordinary common sense." But this would be an evasion, and would amount to saying that although we know the answer, we cannot say what it is. To give a better answer, I fear I shall have to depart from those high standards of clarity Professor Hart so rightly prizes and so generally exemplifies. I shall have to say that the answer lies in the concept of *structure*. A statute or a rule of common law has, either explicitly, or by virtue of its relation with other rules, something that may be called a structural integrity. This is what we have in mind when we speak of "the intent of the statute," though we know it is men who have intentions and not words on paper. Within the limits of that structure, fidelity to law not only permits but demands a creative role from the judge, but beyond that structure it does not permit him to go. Of course, the structure of which I speak presents its own "problems of the penumbra." But the penumbra in this case surrounds something real, something that has a meaning and integrity of its own. It is not a purposeless collocation of words that gets its meaning on loan from lay usage.

It is one of the great virtues of Professor Hart's essay that it makes explicit positivism's concern for the ideal of fidelity to law. Yet I believe, though I cannot prove, that the basic reason why positivism fears a purposive interpretation is not that it may lead

HeinOnline -- 71 Harv. L. Rev. 670 1957

to anarchy, but that it may push us too far in the opposite direction. It sees in a purposive interpretation, carried too far, a threat to human freedom and human dignity.

Let me illustrate what I mean by supposing that I am a man without religious beliefs living in a community of ardent Protestant Christian faith. A statute in this community makes it unlawful for me to play golf on Sunday. I find this statute an annoyance and accept its restraints reluctantly. But the annoyance I feel is not greatly different from that I might experience if, though it were lawful to play on Sunday, a power failure prevented me from taking the streetcar I would normally use in reaching the course. In the vernacular, "it is just one of those things."

What a different complexion the whole matter assumes if a statute compels me to attend church, or, worse still, to kneel and recite prayers! Here I may feel a direct affront to my integrity as a human being. Yet the purpose of both statutes may well be to increase church attendance. The difference may even seem to be that the first statute seeks its end slyly and by indirection, the second, honestly and openly. Yet surely this is a case in which indirection has its virtues and honesty its heavy price in human dignity.

Now I believe that positivism fears that a too explicit and uninhibited interpretation in terms of purpose may well push the first kind of statute in the direction of the second. If this is a basic concern underlying the positivistic philosophy, that philosophy is dealing with a real problem, however inept its response to the problem may seem to be. For this problem of the impressed purpose is a crucial one in our society. One thinks of the obligation to bargain "in good faith" imposed by the National Labor Relations Act.[43] One recalls the remark that to punish a criminal is less of an affront to his dignity than to reform and improve him. The statutory preamble comes to mind: the increasing use made of it, its legislative wisdom, the significance that should be accorded to it in judicial interpretation. The flag salute cases[44] will, of course, occur to everyone. I myself recall the splendid analysis by Professor von Hippel of the things that were fundamentally wrong about Nazism, and his conclusion that the grossest

[43] § 8(d), added by 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1952); see NLRA §§ 8(a)(5), (b)(3), as amended, 61 Stat. 141 (1947), 29 U.S.C. §§ 158(a)(5), (b)(3) (1952).

[44] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

HeinOnline -- 71 Harv. L. Rev. 671 1957

of all Nazi perversities was that of coercing acts, like the putting out of flags and saying, "Heil Hitler!" that have meaning only when done voluntarily, or, more accurately, have a meaning when coerced that is wholly parasitic on an association of them with past voluntary expressions.[45]

Questions of this sort are undoubtedly becoming more acute as the state assumes a more active role with respect to economic activity. No significant economic activity can be organized exclusively by "don'ts." By its nature economic production requires a co-operative effort. In the economic field there is special reason, therefore, to fear that "This you may not do" will be transformed into "This you must do — but willingly." As we all know, the most tempting opportunity for effecting this transformation is presented by what is called in administrative practice "the prehearing conference," in which the negative threat of a statute's sanctions may be used by its administrators to induce what they regard, in all good conscience, as "the proper attitude."

I look forward to the day when legal philosophy can address itself earnestly to issues of this sort, and not simply exploit them to score points in favor of a position already taken. Professor Hart's essay seems to me to open the way for such a discussion, for it eliminates from the positivistic philosophy a pretense that has hitherto obscured every issue touched by it. I mean, of course, the pretense of the ethical neutrality of positivism. That is why I can say in all sincerity that, despite my almost paragraph-by-paragraph disagreement with the views expressed in his essay, I believe Professor Hart has made an enduring contribution to legal philosophy.

---

[45] VON HIPPEL, DIE NATIONALSOZIALISTISCHE HERRSCHAFTSORDNUNG ALS WARNUNG UND LEHRE 6–7 (1946).

HeinOnline -- 71 Harv. L. Rev. 672 1957