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CONTENTS

The Self and the Question of Moral Worth
Mr. Shyam Krishan Kaushik 1

The Concept Of Law and Political Philosophy
Prof. Matthew Kramer 17

The Nature of Law: Three Problems With One Solution
Prof. N.E. Simmonds 30

The Paradoxes of Public Philosophy
Prof. Brian Leiter 51

Towards an ‘Indian Legal Theory’?
Prof. Upendra Baxi 65
THE SELF AND THE QUESTION OF MORAL WORTH

By Shyam Krishan Kaushik*  

"Be aware. The world is what it is. And you are what you are”  

- Mario Puzo, The Last Don

I

Finnis seems to be arguing that there is a way of finding the intrinsic moral worth of the choices that human beings make. Though he gives a concession by saying that “What is transparent for me, viz. the quality of my choices for the quality of my character, is not transparent when I am making judgments about other people, their choices and their character. Since I do not know the deepest grounds of their choices, I can condemn those choices without condemning (the character of) those who made them”.

Obviously, if Finnis knows the deepest grounds of people’s choices he would also be able to tell if their character was good or not. There are at least three assumptions that he seems to be making. First, that people make choices. Second, that there is a possibility to judge the moral worth of the choices that people make. And third, that with the knowledge of the grounds of the choices, it is possible to comment on the character of people.

The task of judging the moral worth of people’s actions and people themselves can be accomplished only when we have discovered the normative principles to make such judgment. And the effort of discovering such normative principles is rooted in answering a larger question: ‘who we are?’. A theory that suggests any principles for judging the moral worth of human beings or of their actions has to necessarily formulate some conception of the ‘self’ itself. In this paper I shall make a brief survey of three different conceptions of self, and try to show how that difference results in a difference in our opinion about the moral worth of a person. I will also try to show that all these conceptions are based upon speculations. The three conceptions of self that I will explore include Immanuel Kant’s conception of self, Michael Sandel’s conception of self (as the representative case of communitarian philosophy), and Śāṅkhya conception of self.

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2 IMMANUEL KANT, CRITIQUE OF PURE REASON, 248(Paul Guyer and Allen W. Wood ed., Cambridge University Press 1998) (Some may consider it as the representative case of deontological philosophy.)

3 Michael J. Sandel, The Procedural Republic and the Unencumbered Self, 12 Political Theory, 81-96 (1984). (He prefers to be called a republican rather than a communitarian. His arguments appear to be republican in his conception of the ‘good’ but not in his conception of the ‘self’. Therefore, the claims of the ‘self’ may still be based upon the communitarian values; however such claims shall be rightly declined by the courts if they are not in line with the republican values. In his philosophy the competing selves are communitarian selves but the good is the republican
II

Kantian conception of self

To ascribe any moral worth to an action, Kant believed, its conformity with the moral law is not enough. The action should have been done for the sake of the moral law itself. The moral law, therefore, was required to not only be of the highest standards in its content, but also of such a nature that it could have a universal application. In order to discover such moral law he found it necessary to work out a pure moral philosophy.6

In Kantian philosophy my ‘self’ is not just a bundle of ‘inclinations’ that I have. My inclination is to enhance my pleasure and diminish my pain. But my self, in Kantian philosophy, has greater capacity and a bigger role to perform. It is not that the self does not seek pleasure, but the self is much more than a hedonistic entity in Kantian philosophy. In its pleasure enhancing pursuits self does not act freely. To work out a complete moral philosophy Kant explains self as capable of freedom.

It is because of my inclinations that I come to choose what I choose for my pleasure. But there is something in my self that feels that I ought not to have chosen so (in some cases at least). Kant believes that when I choose to satisfy my senses (i.e. to make myself more happy or to increase my pleasure), I am not making a free choice. The idea is that since ‘I’ have not chosen my inclinations, any choice based upon my inclinations cannot be ‘my’ choice. Thus, if my inclination prompts me to read Kant’s Metaphysics of Morals, I cannot claim that I am freely choosing to read that book. It is because of my inclination that I am reading that book. Since I have not chosen my inclinations therefore I have not chosen to read Kant’s book. Such an act is based upon inclinations and therefore does not have any moral worth. The moral worth can come only if I act for the sake of duty.

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4 Irina Kuznetsova and Jonardon Ganeri, Hindu and Buddhist Ideas in Dialogue: Self and Non-Self, (2012). Sāṃkhya is one of the six schools of Hindu philosophy. The other five are: Nyāya, Vaiśeshika, Yoga, Mīmāṃsa and Vedānta. Sāṃkhya philosophy regards the universe and all that exists in it and the life itself as a finite illusion of which the end is non-existence. This philosophic conception is understood as atheistic rather than pantheistic. See Valentine Chirol, India Old and New 19(1921). The doctrines of Buddhism are also closely akin to Sāṃkhya system.


6 Id. at 389.
In Kant’s philosophy ‘I’, the self, exists in two worlds. One is a sensible world and the other is an intelligible world. In the sensible world, I am controlled by the inclinations that are bestowed upon me. When I am merely operating in this world I am controlled by my predispositions and I make choices according to my inclinations. Since I have not chosen my inclinations, any choice made by me due to my inclinations is not a free choice in this world.

In the intelligible world the self is not the same as it is in the sensible world where it is controlled by its senses (inclinations). In the intelligible world I am a different me. In the intelligible world, I am not guided by my predisposed nature or inclinations. In this world, free from my inclinations, I am capable of making free choice. It is in this world that I choose the ‘law’ that would govern me in my sensible world. And that law will become a standard of judgment to determine the moral worth of my actions.

The power that makes a person know that he inhabits two worlds different from each other is: ‘reason’. The reason distinguishes him from all other things. ‘He has therefore two points of view from which he can regard himself and from which he can know laws governing the employment of his powers and consequently governing all his actions’. He inhabits both the worlds at the same time. In the intelligible world, a person shall choose his laws that Kant calls categorical imperatives. And the necessity to act out of reverence for such law without depending on the result expected from it is what constitutes duty. A reverence for such law and my duty to follow that law is because I am the author of that law myself.

In Kant’s line of thinking the ‘I’ as a rational being is the same as ‘you’ as a rational being. Thus, the distinction between you and I vanish when we apply pure practical reason and make laws for us in the intelligible world. The distinction between you and I is due to our inclinations in the sensible world, and when you and I shed our inclinations, we are the same. Since we are the same in the intelligible world that

7 Id. at 451.
8 Id. at 452.
9 Id. at 452 (“... and even from himself as far as he is affected by objects”).
10 Id. at 452.
11 Id. at 456. (“... and that both characteristics not merely can get on perfectly well together, but must be conceived as necessarily combined in the same subject...”).
12 Id. at 421 (“Act only on that maxim through which you can at the same time will that it should become a universal law”); Id. at 429 (“Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end”).
13 Id. at 400,404.
14 Id. at 436.
15 Id. at 434.
we inhabit we choose the same law in that world. Thus, the law that we make for ourselves becomes not just categorical but also universal.\textsuperscript{16}

It is obvious that Kantian self is not just a unifying entity that is engaged in the task of recording the experiences and making sense of life as not just a series of unconnected events, but as a continued and a coherent story.\textsuperscript{17} His self is much more than that.\textsuperscript{18} His self is capable of freedom. And as a free self, it chooses the laws that bind him and that give moral worth to his actions if they are done as a matter of duty toward such laws.

Kant’s philosophy follows a systematic line of reasoning which can be summed up as follows: First, that I exist at two different levels, namely at the level where I am controlled by my inclinations (the sensible world) and also at the level where I am not controlled by my inclinations (the intelligible world). Second, that I have reasons that make me understand my dual existence. Third, that at the level where I am not controlled by my nature, (i.e. the intelligible world) I am still capable of making free choices. Fourth, that the choices of everyone bestowed with reason (all human beings) in the intelligible world (after shedding the sense based differences) shall be the same (i.e. everyone shall choose the same laws: the categorical imperatives). Fifth, that since I make the law (the categorical imperatives) I am duty bound to follow the same (and so is everyone else). Last, when I follow the law (the categorical imperatives) as a matter of duty, (irrespective of the consequences) my action is a morally worthy action.

This moral philosophy sets very high standards for an individual to follow. It creates ‘duties to oneself’.\textsuperscript{19} If I follow my inclinations, in Kantian philosophy, I am not just an un-free man but I am also (possibly) acting contrary to the essential ends of humanity. As I am one of the bearers of humanity, in following my inclinations I am acting contrary to the essential ends of my self. The connection seems to be that without rule-restriction of inclination-satisfaction, we cannot achieve the ends of humanity, that is, the fullest employment of our humanity-defining power, our rational autonomy.\textsuperscript{20} Thus, based on his ethics

\textsuperscript{16} Kant uses the expression ‘kingdom of ends’ to describe a systematic union of different rational beings under common laws. A rational being belongs to the kingdom of ends as a member, when, although he makes its universal laws, he is also himself subject to these laws. See MOM, supra note 5 at 434.

\textsuperscript{17} It is argued that it is plausible to understand Kantian self as a continued cognitive being that can complement theories that have tried to account for our continuity as moral beings. See Patricia Kitcher, Kant on Self Identity, 91 The Philosophical Review, 42 (1982).

\textsuperscript{18} For contrast one may see Human conception of self. For comparison between Humean and Kantian conceptions See Adrian M S Piper, Two Conceptions of The Self, 48 Philosophical Studies 173-197 (1985).

\textsuperscript{19} See Lara Denis, Kant on The Wrongfulness of “Unnatural” Sex, 16 History of Philosophy Quarterly 225-248, 228(Apr.1999) (“The perfect duties that Kant says we have to ourselves as animal and moral beings are duties to avoid suicide, sexual self-debasement, and excessive use of food and drink”).

\textsuperscript{20} Alan Soble, Kant and Sexual Perversion, 86 The Monist 55-89 at 76 (2003) [Hereinafter “Soble”].
of duties to oneself, Kant, in equally strong terms, condemns bestiality, homosexuality, and masturbation. He finds all this unnatural.

The practical difficulty in this philosophy is that the essential ends of humanity are debatable, and so is the legal enforcement of duties toward oneself. The theoretical (and I believe greater) difficulty is in certain assumptions without which this philosophy cannot stand. One such assumption is that human beings are capable of pure reason (and not just an ordinary human reason). In Kantian moral philosophy, ‘all moral concepts have their seat and origin in reason completely a priori, and indeed in the most ordinary human reason just as much as in the most highly speculative: they cannot be abstracted from any empirical, and therefore merely contingent, knowledge.’ Kant finds pure reason of utmost theoretical necessity and also of utmost practical importance. This a priori status of reason is considered necessary by him ‘since moral laws have to hold for every rational being as such, we ought rather to derive our principles from the general concept of a rational being as such, and on this basis to expound the whole ethics...’ The moral principles are worthy to serve as supreme practical principles because of their origin in the purity of reason: the pure reason which is an a priori. Another such assumption is that there is an intelligible world that the self inhabits. But with this intelligible world Kant admits to have no acquaintance. The idea of intelligible world ‘signifies only a ‘something’ that remains over when I have excluded from the grounds determining my will everything that belongs to the world of sense: its sole purpose is to restrict the principle that all motives come from the field of sensibility, by setting bounds to this field and by showing that it does not comprise all in all within itself, but that there is still more

21 Id. at 60.

22 Lina Papadaki, Kantian Marriage and Beyond: Why It Is Worth Thinking about Kant on Marriage, 25 Hypatia 276-294 (Spring 2010); See also SOBLE, supra note 20.

23 See J M Finnis, Legal Enforcement Of “Duties To Onezelf”: Kant v. Neo-Kantians, 87 Columbia Law Review,433-456,453 (Apr 1987) (Finnis argues: “But I deny that education, coercive deterrence, and coercive denial of opportunities can do nothing to assist persons to avoid choices which will degrade or in some other way harm them”. And also that, “Favouring the good of one’s fellow-citizens can rightly involve the use of coercive measures, primarily to dissuade them from morally evil forms of life, and secondarily to punish them, not for violating “duties to themselves,” but for wilfully failing to cooperate in the community’s effort of reducing those evils and of maintaining forms of life more conducive to authentic human flourishing”); See David A J Richards, Kantian Ethics and the Harm Principle: A Reply to John Finnis, 87 Columbia Law Review457-471, 471(Apr 1987) (David A J Richards says: “My argument- the one Finnis criticizes- was that this Kantian conception is naturally elaborated to include the harm principle, and that this principle, properly understood, has a central constitutional and political role to play in the criticism of historical American patterns of over criminalization in many areas. Interpretively, Kant’s political theory of freedom illuminates the values fundamental to the commitment of the American constitutional tradition to protect liberties of religion, speech, and a private life, and clarifies how those values should be elaborate today, including the derivation and application of the constitutional right to privacy”).

24 MOM, supra note 5 at 142.

25 Id. at 412 ("It is not only a requirement of the utmost necessity in respect of theory, where our concern is solely with speculation, but is also of utmost practical importance, to draw these concepts and laws from pure reason...")

26 Id. at 412.
beyond it...'.\textsuperscript{27} With this ‘more’, Kant admits, to have ‘no further acquaintance’.\textsuperscript{28} This idea of an intelligible world ‘remains always a serviceable and permitted idea for the purpose of a rational belief, though all knowledge ends at its boundary’.\textsuperscript{29} Yet another assumption in Kantian philosophy is that in the intelligible world ‘independently of natural instincts’ we are free. This ‘Freedom, however, is a mere Idea: its objective validity can in no way be exhibited by reference to law of nature and consequently cannot be exhibited in possible experience’.\textsuperscript{30} Idea of freedom in the intelligible world holds ‘a necessary presupposition of reason in a being who believes himself to be conscious of a will - that is, of a power distinct from mere appetite’.\textsuperscript{31} On this presupposition ‘that the will of an intelligence is free, there follows necessarily its autonomy as the formal condition under which alone it can be determined’.\textsuperscript{32}

Kant’s discussions of the self show that he thinks that, if there were any such thing, it would have to be something outside of appearances, in the realm of things in themselves. Since that is a realm we could only cognise \textit{a priori}, metaphysics of the self would have to be an \textit{a priori} metaphysics of a thing in itself.\textsuperscript{33} For the sake of ascribing moral worth to human actions, Kant makes enormous presuppositions in constructing a ‘self’. However, the self so constructed chooses the categorical imperatives, which are then used for \textit{judging} the moral worth of human actions. It is doubtful that the question of moral worth of human actions can be settled (if at all it can be settled) on assumptions. The choices made in the presumed free world may leave us in a very un-free world to live in.

\textbf{III}

\textbf{Communitarian conception of self}

Communitarian conception of self is not as complex as Kantian conception of self is. There is no division of the realms and therefore there is no need in communitarian conception of self to transcend from one into the other. Communitarian self is a product of and a constitutive part of the community. It is less autonomous (if at all it is) but still morally responsible entity. It is not required to universalise the maxim on which it is acting to find the moral worth of its actions. Meeting the expectations of the universe in which it finds itself gives moral worth to the actions of this self.

\textsuperscript{27} \textit{Id.} at 462.

\textsuperscript{28} \textit{Id.} at 462.

\textsuperscript{29} \textit{Id.} at 463.

\textsuperscript{30} \textit{Id.} at 459.

\textsuperscript{31} \textit{Id.} at 459.

\textsuperscript{32} \textit{Id.} at 462.

In the communitarian conception of self, ‘I move in a history I neither summon nor command’.\textsuperscript{34} I am just another component of a continuum that is going on forever. Thus ‘I am closer to some and distant to others’. Communitarians do not see me in relation with history merely to explain where I am placed in the path of time; rather they see me in this manner to explain who I am. In the communitarian conception of self ‘I’ am so deeply entangled with my history that I cannot have any self outside the community in which I am placed. In this philosophy it is believed that my aims, commitments and attachments are what they are due to me being placed in a community at a particular point of time. I have not voluntarily chosen my aims, commitments and attachments. Nonetheless it is these aims, commitments and attachments that ‘define the person I am’. So, I am what I am not because I have chosen to be so, but because I am born in a community at a particular point of time. The conviction in my entanglement with my community is so strong in this philosophy, that even a detached reflection on my self by me is considered impossible. ‘As a self-interpreting being, I am able to reflect on my history and in this sense to distance myself from it, but the distance is always precarious and provisional, the point of reflection never finally secured outside the history itself’.\textsuperscript{35} My view about who I am is conditioned by my circumstances. Such a thickly and richly constituted self gives me ‘character’ and ‘moral depth’.\textsuperscript{36} This fixity of character prevents the lapse into arbitrariness.\textsuperscript{37} As I share my history with others knowing myself is a more complicated and less private thing.\textsuperscript{38} My self is less transparent to me and less opaque to others.\textsuperscript{39} In this conception ‘friendship becomes a way of knowing as well as liking’. ‘Uncertain which path to take, I consult a friend who knows me well, and together we deliberate, offering and assessing by turns

\textsuperscript{34} Sandel, supra note 3 at 179.

\textsuperscript{35} Id. at 179; See also Kymlicka, Liberalism, Community, and Culture (Oxford: Clarendon Press 1989). (Kymlicka’s defence of liberal view aptly explains the chooser’s primacy over the choices. An ability to opt for anything, and perhaps nothing in some cases, explains that the self stands prior to the choices that it makes not in time but in concept. And in that sense, it is suggested, the self is unencumbered. It is not tied to the choices that it has made or is making. The self is much more than the choices that it makes. Priority of self over the choices that it makes making it unencumbered in the suggested sense also allows it to critically reflect and do a qualitative assessment of the choices that it is making. Thus, the self can make one choice and then abandon that choice and make another choice later. Here the crucial questions are: ‘does a freedom to make choices also ensures that free choices are made?’, and ‘can the self stand back and make universally valid choices?’ The communitarians claim that it is not possible. No matter how far the self may stand from the choices it is making the point of reflection shall always be within the unchosen ties of the communities. And in that sense the self is never unencumbered. Communitarian claim, therefore, is that the self which is unencumbered in the sense suggested by Kymlicka does not make it free from the unchosen/involuntary communitarian ties. Even the grand self having the capacity of making choices shall be choosing as a member of the community that it belongs to; the community from where it is getting its selfhood.)

\textsuperscript{36} Sandel, supra note 3 at 179.

\textsuperscript{37} Id. at 180.

\textsuperscript{38} Id. at 181.

\textsuperscript{39} Id. at 181.
competing description of the person I am, and of the alternatives I face as they bear on my identity'. Admittedly, this notion of community, of which an individual is but a constitutive component, describes a framework of self-understandings that is distinguishable from and in some sense prior to the sentiments and dispositions of individuals within the framework. A community in this strong sense is constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of participant’s plans of life.

Since this idea of communitarianism rejects the deontological ethics and it cannot also escape from committing that there is no universality of the good. Since the history of one community is different from that of the other, the conception of good for one community is bound to differ from that of the other. Such localised conception of good is a clear hindrance in building any universal conception of rights. But the bigger difficulty lies in a conflict between the expectations of the community and the aspirations of one of its members.

Let’s imagine that in a very well knit community the girls are not allowed to go to school. This community has been following this arrangement of not sending girls to school since time immemorial. The defined role for the girls is to learn household chores, get married at the age of puberty and bear children as soon as and as many as possible. Bulk of the members of the community is happy with this arrangement but not everyone. Some women want to send their daughters to school but they don’t raise their voice because of the taboo attached with it and also because of the fear that if their daughters go to school, nobody will marry them for breaking the societal norm. Girls see boys going to school and getting smarter. Some of the girls also want to go to school. Let’s imagine one such girl (say 15 year old) who wants to go to school but she is uncertain to speak her mind before her parents. So she consults her friend (a communitarian girl say 21 year old). In this kind of situation what is the true nature of her inquiry? Is she consulting her friend on the worth of her ambition and the chances of her success or is she consulting her friend on her own self? Is there more than one possible suggestion that her friend might offer or is there only one suggestion that can be offered? In all probability, she is asking her friend how others will react when she will speak up? Whether her parents and the community will let her go to school or not? Her inquiry is about her chances of success in going to school. Also, her friend may give her various answers. She may say that you should talk to your parents, and as they are very reasonable persons they may find your desire to go to school worth attending to. The friend may also suggest that she herself never felt like going to school and though it seems like an interesting idea she doesn’t know

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40 Id. at 181.
41 Id. at 173.
42 Id. at 173.
what to say in this matter. Or, she may say that it is risky to go to school because somebody may attack you while going to school because you will be breaking a settled practice.

But from a communitarian perspective she is consulting on herself, and there shall be only one right suggestion. Her friend shall not comment on the worthiness of the activity or on the chances of her success. She will comment on her. She will say that you are not able to grasp who you are. You are acting arbitrarily and betraying moral worth. You are aspiring for a wrong way of life, albeit ignorantly, because you are not able to see yourself. If you are able to see who you are, you would not be aspiring in such a manner. She may also say that it does not matter what some of the people (especially women) want because the community has described the framework of self-understanding that is distinguishable from and in some sense prior to the sentiments and dispositions of all of us.43

This suppression of aspiration is not on the ground that since this aspiration cannot become a universal maxim therefore it cannot be allowed, but on a deeper and more disturbing ground that to have such an aspiration is to forget who you are, that you are a part of the community and they have an overriding claim on you. It is not to say that if everyone else would want to do the same thing then there shall be chaos; rather it is to say that since no one else wants to do the same thing therefore not doing it is the right way of life. This reasoning leaves no scope for demonstrating that there might be an inherent quality in the aspired activity. There is no scope for showing that the nature of the activity is such that everyone can do it without any conflict and that will make the world a better place to live in. In this communitarian approach there is a closure of argument before it ever begins.

Communitarians also doubt the possibility of a self in private, which is distinct from a self in public.44 It is of course difficult to draw a line where my private life ends and my public life begins. The difficulty in drawing a line to separate the private and public lives is due to the reason that as soon as I act in my private life, I am stepping into a zone that is outside me and that can be of concern to the society. If I beat up my son, for example, to make him a good citizen it might not strictly be a private matter. Society may still make a claim that my actions need to be regulated by the society of which I am a part. The safety and health of my son is not just my concern but also the concern of the society. This is to say that my son is not just my son; the community to which I belong also has a claim in him. This reasoning, though affords protection to many vulnerable members of the community, leaves nothing in the private domain as far as the acts of an individual are concerned. And even more troubling aspect of communitarian

43 From a communitarian perspective her friend cannot say that aspiring to go to school is bad because it will make everyone unhappy, because if she says that her argument will be a utilitarian argument and not communitarian argument.

44 SANDEL, supra note 3 at 182.
philosophy is that in its effort to show an absence of moral worth in deontological ethic, it starts finding the moral worth in being thickly attached to the encumbrances.

Suppose a person (let’s say 30 year old single male) tells his friend (a communitarian) that he never got physically attracted towards any female in his life and that he gets physically attracted to other males and he is sure that he is homosexually oriented. He also says that he doesn't actually want to have any homosexual relationship because he hasn't any time for any relationship, but in future he may have one. In this case this person does not want to ‘act’, but he is just telling his friend about how he ‘feels’ and who he is. Where is the point of reflection of this homosexual person? How will the communitarian friend react in this case? As a constitutive part of the community and as a traveller in un-summoned and un-commanded history he sees that fellow travellers are heterosexual. But he also sees that he is homosexual. What shall appear to him is that he is different from others. That is because he can see himself from without and also from within. From without he will see that the members of a particular sex, to which he also belongs, have a particular set of desires and they conform to a set of behaviour. From within he will see that his desires are not the same and that he does not want to behave like them. Only two points of reflection allow him to see the difference between him and the others of his sex. However, his communitarian friend shall deny him his internal point of reflection. He will tell him that you are not what you are claiming because you are less transparent to yourself and less opaque to me. There is no way that you can see yourself from within. Your claim about who you are shows that you are betraying moral worth. Communitarian philosophy denies a chance to even feel different without a moral guilt. Communitarianism doesn’t accept that a person may be thickly connected to its community but still in some sense completely independent of it. It doesn't accept that within the history to which a person may belong, there is a possibility of a realm that is independent of any history. And when a person reflects upon who s/he is from/in that realm s/he is most transparent to himself/herself alone. Communitarianism fails to see that reaffirmation of the roles pre-defined by the community may not only form a basis of denying a claim based on orientation of a person, but also shall stigmatise the claimant as morally base person.

43 See Carlos A. Ball, *Communitarianism and Gay Rights* 85CORNELL L. REV 443, 446-450 (2000) (It is said that “commentators have paid little attention to how the ongoing debate between liberals and communitarians impact gay rights. Also that “Ultimately, Sandel’s political philosophy does not sufficiently respect the normative value of autonomy and free choice; as a result, his theory is ultimately incompatible with the interests of gay men and lesbians”).

46 Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality* 77CAL. L. REV 521, 538 (1989) (While explaining how American courts have decided the issues, Sandel says that “the justice or injustice of laws against abortion and homosexual sodomy may have something to do with the morality or immorality of these practices after all”).
The claim of the communitarian philosophy about the nature of the self is based upon the moral experience, which is also its main ground for rejecting deontological ethic. There is a presumed sameness in all the experiencing selves in communitarian philosophy. When all the selves become equally transparent to themselves, they shall have the same moral experience. This, no doubt, is very likely when I am dealing as a member of my community with someone who is not a member of my community and that outsider is also seeing me as a representative of my community in his dealing with me. Thus, when a non-brāhmin says to a brāhmin that brāhmins had monopolised learning and education in India, such brāhmin shall have the moral experience that communitarians are relying upon. However, when a brāhmin is ridiculed by his own community members for not wearing the sacred thread that most other brāhmins are wearing it is doubtful that the moral experience of such brāhmin is of the type communitarians are talking about. On such occasion it is possible that he feels that the encumbrances imposed upon him by his own community members are suffocating his self. If this experience of suffocation is true even in one case it is enough in theory to raise a question: `what is the nature of this self that is feeling this suffocation?` This suffocating self cannot be a part of the strangulating self. If the self is only an encumbered one then there is no reason to feel suffocation in this case. There is some self that stands beyond and outside the community and that self feels the pressure of the community. The description of moral experience of our selves by the communitarians is not accommodating the moral experience of the self-suffocating under the burden of community to which it also belongs.

IV

Śāṅkhyan conception of self

In Śāṅkhyan system it is believed that to begin with there is Puruṣa (pure consciousness) and there is Mūlaprakṛti (the primordial nature). The puruṣa is neither created nor is it creative. Puruṣa does not think, feel or even will anything. It is just a beholder. It is pure consciousness abstracted from all

47 SANDEI, supra note 3 at 178-179 (“If the deontological ethic fails to redeem its own liberating promise, it also fails plausibly to account for certain indispensable aspects of our moral experience.”).

48 See Richard H. Robinson, Some Buddhist and Hindu Concepts of Intellect-Will, 22 PHILOSOPHY EAST AND WEST, 3, 299-307 at 300 (July 1972) [Hereinafter “Robinson”]. It is also described by the word “soul” by Professor Charles Carroll Everett. See Charles Carroll Everett, The Psychology of the Vedanta and Śāṅkhya Philosophies, 20 JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 309-316 at 316 (1899) [Hereinafter “Everett”].

49 Mūlaprakṛti is also referred to as “The Prior” by Professor Charles Carroll Everett. See Everett, id at 311. He also mentions thatti is called as the “Grundform” by Professor Garbe.

50 Kārikā III. There are LXXIII kārikās in Śāṅkhya-kārikā. I am using Śāṅkhya-kārikā of Īśvarakṛṣṇa as given in Appendix B, GERALD JAMES LARSON, CLASSICAL ŚĀṅKHYA: AN INTERPRETATION OF ITS HISTORY AND MEANING (2nd ed., Motilal Banarsidas 1979) [Hereinafter “Kārikā”].

51 Everett, supra note 48 at 312.
content. The mūlaprakṛti is uncreated and non-conscious, but it is creative. From the proximity of puruṣa and prakṛti the creation proceeds. The proximity of prakṛti and puruṣa brings about the disruption of the unmanifest condition, and creation of the world results. The entire living world including human life is thus nothing but a resultant of the proximity of these two basic elements. The first evolve from this proximity is called buddhi. Buddhi is characterised by ascertainment or determination. Virtue, knowledge, non-attachment, and possession of power and also the opposite of these four are buddhi’s various form. Buddhi has a normative function and is the arbiter of duty and decision. From buddhi there proceeds a twofold creation. There proceed a group of eleven [which includes ‘manas’] five sense organs (‘eye’, ‘ear’, ‘nose’, ‘tongue’, ‘skin’); and five organs of action (‘voice’, ‘hands’, ‘feet’, and organs of ‘excretion’ and ‘generation’)] and a group of five [which are subtle elements (‘sound’, ‘touch’, ‘form’, ‘taste’ and ‘smell’)]. From five subtle elements (which are non specific) there emerge five gross elements (‘space’, ‘wind’, ‘fire’, ‘water’ and ‘earth’). It should be noted that manas is different from buddhi. Manas is involved in synthesis or thought construction including fabricating fantasies. Buddhī is involved in reason and realisation of higher truth. Intellect, ego and mind are the internal organs that function in three times i.e. past, present and future. The sense organs (eyes, ears, nose, tongue, skin) and organs of action (voice, hands, feet, organs of excretion, organs of generation) are external organs that

52 Id. at 313.
53 Kārikā III, supra note 50.
54 Kārikā XXI, supra note 50.
55 Kārikā XXII, supra note 50. See also Gerald James Larson, Classical Sāṁkhya: An Interpretation of its History and Meaning 12 (Motilal Banarsidas 1979).
56 Kārikā XXII, supra note 50. The closest English word for buddhi shall be ‘will’ or ‘intellect’.
57 Kārikā XXIII, supra note 50
58 Kārikā XXIII, supra note 50
59 Robinson, supra note 48 at 304.
60 Kārikā XXII, supra note 50
61 Kārikā XXIV, supra note 50
62 Manas is described as the mind. It is also described as ‘surface mind’ or ‘lower mind’. See Robinson, supra note 48 at 305.
63 Subtle elements are called tanmātra.
64 Gross elements are called mahābhūta.
65 Robinson, supra note 48 at 305.
66 Id. at 305.
function only in one time i.e. the present time. Our perception, according to this philosophic system, involves the three internal organs and any one of the sense organs simultaneously and successively.

The mūlaprakṛti (primordial nature) in itself and without association with puruṣa (pure consciousness) is un-manifest, but in association with puruṣa (pure consciousness) it is manifest. Prakṛti in manifest and also in un-manifest form has three guṇa(strands): sattva, rajas, and tamas which are experienced as pleasure, pain and indifference at the psychological level but have deeper constitutive tendency within primordial nature itself as intelligibility, activity and restraint. These guṇa successively dominate, support, activate and interact with one another. There is a different composition of these guṇa of the prakṛti in each one of us, and thus the entire manifest world is diverse and dynamic. Thus, in this philosophical system it is believed that everything, including the intellect, ego and mind, is an evolute of primordial nature. The forms assumed by primordial nature are not merely the causes of thoughts or feelings, the thoughts and feelings themselves are the forms of manifested primordial nature. No one is bound, no one is released and no one transmigrates; only primordial nature in its various forms transmigrates, is bound and is released.

However, this primordial nature and its manifestation is not the real ‘self’ in Sāṅkhya system. Even the intellect (which is capable of rationality), the ego (the self awareness) and the synthesising mind is also not the real self in this system. All these are the evolutes of primordial nature and they get their character from the composition of guṇa (strands) of the primordial nature of which they are made. Man’s deepest selfhood is rather the very fact of consciousness (the puruṣa) which is neither created nor creative and which neither feels nor thinks nor wills. Further, the intellect, ego or mind that addresses itself as ‘I’ and feels as if it is the author of the actions is actually doing nothing voluntarily. All that this ‘I’ doing is behaving according to its constitutive primordial nature’s strands. Thus in Sāṅkhya philosophy the real

67 Kārikā XXXIV, supra note 50.
68 Kārikā XXX, supra note 50.
69 Kārikā XXII, supra note 50.
70 Kārikā LIV, supra note 50.
71 Kārikā VIII, supra note 50.
72 Everett, supra note 48 at 315.
73 Kārikā LXII, supra note 50.
74 Kārikā III, supra note 50.
75 Everett, supra note 48 at 312-313. (“We use the term I in other senses. We sometimes mean by it the concrete personality. So far, however, as it represents the element of pure consciousness, it would seem hardly possible to define it in terms different from those applied to Puruṣa or Atman by the Sāṅkhyas.”).
self has no character of its own and the one that appears to be self (intellect, ego and mind; and also the organs of sense and function) gets its character from the primordial nature.

The purpose of the Sāṅkhyan philosopher is to provide a means of counteracting suffering. The suffering that is aimed to be counteracted in this philosophical system is the individual suffering. The collective suffering is not the direct concern of this philosophy. It is believed that the discriminative knowledge of the manifest, un-manifest and the knower (the puruṣa) ends the suffering. Once it is realised that I (the intellect, ego and mind i.e. the evolutes of nature) am not the real self (the consciousness) the puruṣa comfortably sits like a spectator and the prakṛti also ceases to manifest. Though the two still stay in proximity (i.e. the life may still be there) yet no further creation takes place. The endowed body of a living being still continues because of the force of the past impressions like a potters wheel.

Evidently this philosophical system also works on many assumptions. That there is mūlaprakṛti, the puruṣa, the association of the two, the evolutes of mūlaprakṛti, and the guṇa of evolutes; and also that the suffering ends with this knowledge etc. are all assumptions. That these assumptions are correct is based upon the claim that they are arising out of perception, inference or reliable authority. Of course of this philosophical system (just like the Kantian and communitarian) nothing can be empirically tested. But this philosophical system may still interest us for a very practical reason. It may help us providing an answer to the questions of moral worth and derivative questions of moral guilt which are usually (but not exclusively) associated with human actions and human desires that are supposed to be against the order of nature or of society.

Suppose the person who consulted a communitarian friend about his homosexual orientations now consults another friend who is a Sāṅkhyan scholar. What would this Sāṅkhyan scholar say to him? Perhaps he will say that from aSāṅkhyan perspective, it is possible to see that from the primordial nature it is not just the physical body that emanates but also the cognitive mind. Moreover, the cognition in the mind of the properties of the body is also a part of the manifestation of the primordial nature. Every body emerging from the primordial nature has some characteristics visible to an outside observer and there are some characteristics of the body that are observed by the cognitive mind as an inside observer. The body visible to outside observers, the orientation of the body cognised in the mind - the inside

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76 Kārikā II, supra note 50.
77 Kārikā LXV, supra note 50.
78 Kārikā LXVI, supra note 50.
79 Kārikā LXVII, supra note 50.
80 Kārikā IV, supra note 50.
observer, and the cognising faculty - the mind itself, are all evolutes from the primordial nature. None of these are in a static state due to the strands that they have. Just as the body visible to outside observer is changing all the time, the inclinations/orientations visible to inside observer are also changing all the time. And the cognising faculty is also changing all the time leading to a possibility of ‘neglect’ or ‘discoveries’ of the existing orientation. Therefore, it is possible that a person who has organs of sense and organs of action similar to a particular class of persons does not want to behave like other members of that class. This desire of a different behaviour is also an evolute of muliapraṣṭi, and therefore completely natural. Sāṅkhyan scholar would say that your perception of your orientation is as natural as any other person’s perception of his orientation. Your internal organ of reflection is reflecting from a point which is allocated to it at this moment by the interplay of the guṇa (strands) that is taking place in it. Despite the difference in inclinations and orientation there is a fundamental similarity among all of us that our sex and sexual orientation both have a unified seat in the same evolute emerging from the association of prakṛti and puruṣa and therefore both, our sex as well as our sexual orientation, are in the order of nature (the muliapraṣṭi). The Sāṅkhyan scholar may even go further and say that even if you had a heterosexual inclination in the past and now you are developing homosexual inclinations it is still in the order of nature. The dynamism of the properties of external as well as internal organs allows new discoveries and changing patterns.

On the question of moral guilt the Sāṅkhyan scholar would perhaps say that from the Sāṅkhyan point of view, every human being is totally dynamic and is completely emerging from nature and is, therefore, completely natural in every respect (i.e. in its body, thoughts and acts). There is no other higher being/self that controls any human being. Within a defined range a human being can only know what it is but cannot change itself. Any ‘realisation’ that ‘I’ am doing something or ‘I’ ‘tan’ do something is also a part of the defined composition of the evolute. It is nothing but a part of the cognising properties of the cognitive part of the evolute that has emerged from primordial nature. Thus, the Sāṅkhyan scholar would say that in Sāṅkhya system there are no normative principles laid down against which we may test the conduct or the thought of a person. The question of moral guilt does not arise.

And to that girl who wanted to go to school against the wishes of her community, the Sāṅkhyan scholar will probably say that your desire is a natural desire. Even if the community doesn't approve of your desire there is no betraying of any moral worth by you. It is just because at the present moment you are in minority your going to school seems to be difficult.\(^8\) It might put you in some sort of danger also. But it

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\(^8\) This neutral assessment is also advocated by H L A Hart in opposing Ronald Dworkin’s contention that when a section of society is denied some right based upon external preferences of the larger section of the society it amounts to an inequality in respect and concern. See H.L.A. Hart, Between Utility and Rights in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 217(Oxford 1983). Contrary to traditional libertarian conceptions of treating persons as equals because of their ability to determine, evaluate, and revise the meaning of their life, the Sāṅkhyan reasoning for treating people with equal concern and respect would be the unavoidable compulsion of every one to be who it is.
does not mean that you will always remain in minority. It is possible that if you talk to other girls and they also join you in this desire you all may succeed in going to school safely in near future. The Sāṅkhyan scholar shall make an assessment of this girl’s chances to go to school but shall not comment on moral worth of her desire or of her self. Sāṅkhya philosophy, though as speculative as any other philosophy, has a potential to justify maximum neutrality.

V

Conclusion

Kantian philosophy constructs the self as ‘free and rational sovereigns in the kingdom of ends’ and then stifles it by the chosen universal principles. In Sandel’s communitarian philosophy objective circumstances for the subject of cognition to arrive at universal principles are non obtainable, but the cognition is community bound and so is the self. In Sāṅkhyan philosophy the real self is not active at all, and the one that is active, one that appears to be the self but is not the real self, is a complete and unique universe in itself governed by its own principles having no option to be anything other than what it is.

If all that we have to choose from is nothing but speculative philosophies, why should we not choose that speculation which accommodates greatest possible diversity without passing any moral judgment on anyone of us. In order to organise our societies there is no compelling need to make a moral sense of our world or to look for moral depth in our actions, especially when we know that all that this effort is going to produce is to leave some of us morally condemned and the others resorting to hypocrisy. If peaceful and harmonious co-existence is our goal we may still achieve that goal by relying on more objective reasons to control and guide human actions.
THE CONCEPT OF LAW AND POLITICAL PHILOSOPHY

By Matthew H. Kramer*

H.L.A. Hart’s *The Concept of Law* is, of course, primarily a work of legal philosophy. It is indeed the most influential work of legal philosophy in the English language (and perhaps in any language) published during the twentieth century. However, the immense importance of the book for philosophers of law should not prevent readers from discerning its importance for political and moral philosophers as well. Hart’s insights into the nature of law and sovereignty are themselves of great significance for political philosophy, and the second half of *The Concept of Law* contains ruminations on justice and on the relationships between law and morality that deserve attention from anyone who aspires to think clearly about the problems of political philosophy. In a short compass, this article will seek to underscore the import of Hart’s classic text for theorists who grapple with those problems.

1. The General Character of the Concept of Law

Hart revived the tradition of legal positivism that had stagnated in the English-speaking world after the seminal contributions of Jeremy Bentham and John Austin more than a century earlier. In some of his other writings, Hart followed Bentham and Austin to a certain degree in his adherence to utilitarian lines of thought, though his allegiance to utilitarianism was considerably warier than theirs.¹ In *The Concept of Law*, however, his engagement with Austin was chiefly in the domain of legal philosophy. Having carefully recounted Austin’s model of legal norms as an array of sanction-backed commands issued by a sovereign, Hart assailed that model with a volley of objections. Underlying each of his otherwise diverse criticisms was his complaint that Austin’s model systematically obscures the normativity of law. That is, by taking all laws to be orders backed by threats, Austin obfuscated the ways in which the workings of legal systems prescribe how people, both citizens and officials, ought to conduct themselves. Whereas some authoritative utterances by officials are properly analysable as imperatives, many other such utterances are instead properly analysable as prescriptions that explicitly or implicitly invoke reasons for compliance with their terms. Though the reasons need not be moral reasons, they imbue law with their normativity (which need not be moral normativity).

After sustainedly impugning Austin’s account of law, Hart presented his own account. He argued that the foundation of any system of legal governance consists not in the command-dispensing will of a sovereign, but instead in a Rule of Recognition. The Rule of Recognition comprises the ultimate standards for

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¹ Hart’s combination of liberalism and utilitarianism was far closer to that of John Stuart Mill, as is evident especially in Hart’s book, *Law, Liberty, and Morality*. See H.L.A. HART, LAW, LIBERTY, AND MORALITY (Oxford University Press 1963).
identifying the norms that belong to a system of governance as its laws. By reference to those ultimate standards, the officials in such a system ascertain the existence and contents of the legal norms that regulate everyone’s conduct. Although the phrase “Rule of Recognition” might be taken to suggest a single criterion that can be encapsulated in a pithy formulation, it in fact designates a complex assemblage of standards that both obligate and empower officials to engage in authoritative acts of law-ascertainment. Through those acts, the officials in the adjudicative, executive, and legislative branches of government collectively establish what the law of their jurisdiction is.

At any given time, the complex content of the Rule of Recognition, in this or that jurisdiction, has been determined by the past endeavors of law-ascertainment which the officials there have collectively undertaken. Although those endeavors may have incorporated some moral principles into the law (as criteria for legal validity, or as substantive legal norms that directly regulate the conduct of ordinary people), their having done so is a contingent matter. Thus, despite the major differences between Hart’s model of law and Austin’s model, the two are alike in being on the positivist side of the division between legal positivists and natural-law theorists. In other words, Hart maintained that law and morality are separable — even while he readily acknowledged that they typically are linked in numerous contingent ways. He sought to rebut the arguments with which natural-law theorists purported to vindicate their claims about significant necessary connections between law and morality.

Still, one of the most famous portions of *The Concept of Law* has struck some readers of the book as a retreat from the positivist insistence on the separability of law and morality. That same portion of the text implicitly raises a matter — the matter of political obligation — that is one of the central issues addressed by political philosophers. Thus, my exploration of *The Concept of Law* as a work of political philosophy can best begin by focusing on Hart’s discussion of “the minimum content of natural law.”

2. **Legal Prohibitions and the Human Condition**

In a renowned section of the penultimate chapter of his book, Hart mulled over the indispensability of some basic legal prohibitions in any viable human society. Drawing on ideas propounded by some of the great political thinkers of the past such as Thomas Hobbes, John Locke and David Hume, Hart observed that certain elementary facts of the human condition combine to render the existence of law necessary for the durability of any community that is larger than a few families. If a society on even a moderate scale is to stand any chance of lasting, it must be held together in part by a scheme of legal governance that enforces some general restrictions on people’s conduct.

The five familiar features of human beings and their environments which Hart highlighted are as follows: (1) the vulnerability of each human being to harms that might be inflicted by other human beings; (2) the approximate equality of the large majority of human adults, in that the physical and mental disparities

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among them are generally not overwhelming; (3) the mixture of selfishness and solicitous benevolence in
the make-up of virtually every human being; (4) the moderate scarcity of most resources, and the fact that
many resources have to be subjected to considerable labor before they can satisfy human wants directly;
and (5) the limitedness of each person’s understanding and strength of will, which leads some people to
favor their short-term interests at the expense of their long-term interests. Given these characteristics of
human beings and the world in which they live, the sustainability of every credibly possible community
beyond a tiny size is dependent on the sway of a system of legal governance. Moreover, among the
mandates imposed by any such system there must be certain fundamental prohibitions. As Hart observed,
legal norms forbidding murder, assault, arson, serious fraud, and other grave misdeeds are unforgoable in
setting the terms for durable human interaction. If such norms were absent or wholly unenforced, then —
given the facts of the human condition which Hart invoked— the security that distinguishes civilization
from the frenzy of chaotic anarchy would ipso facto be absent. Every viable scheme of governance must
encompass those basic proscriptions, if it is to encompass anything at all. Yet, since the substance of
those proscriptions is at one with the substance of key moral precepts, Hart’s elementary facts of the
human condition necessitate a convergence between the demands of law and the demands of morality.
The area of that inevitable convergence is what Hart labelled as the “minimum content of natural law.”

As Hart’s label indicates, his reflections on human nature bear importantly on the debates between legal
positivists and natural-law theorists over the separability of law and morality. After all, if the system of
governance in every viable society must include legal mandates that coincide in content with some key
principles of morality, then there is a significant necessary connection between legal requirements and
moral requirements. Even more important for the present essay is that Hart’s reflections on human
nature bear far-reaching implications on the matter of political obligation that has preoccupied many
political philosophers. That is, in combination with certain other premises that will be specified shortly,
Hart’s reflections might appear to imply that everyone in any society is morally obligated to comply with
legal mandates simply by dint of their status as legal mandates. This chapter will begin its examination of
Hart’s argument, in relation to these issues of legal and political philosophy, by pondering some
qualifications that should be attached to the argument straightaway.

3. Four Qualifications

The first of the qualifications just mentioned was broached by Hart himself. After adumbrating the basic
legal prohibitions that are necessary for the durability of any society, and after noting the affinities
between those prohibitions and some of the interdictions that are central to morality, he remarked: “The
protections and benefits provided by the system of mutual forbearances which underlies both law and morals may, in different
societies, be extended to very different ranges of persons.” Although the conditions of security that are essential

3 MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 263 (Oxford University
Press 1999).

4 HART, supra note 2, at 200.
for the sustainment of a society must be extended to quite a few people therein, they need not be extended to everyone. A community can persist as such even if some people who reside within it are denied the basic protections that are enjoyed by other people, who belong to relatively privileged groups. “[I]t is plain that neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope, and often they have not done so. In slave-owning societies the sense that the slaves are human beings, not mere objects to be used, may be lost by the dominant group.” As Hart elaborated: “These painful facts of human history are enough to show that, though a society to be viable must offer some of its members a system of mutual forbearances, it need not, unfortunately, offer them to all.” People excluded from the protective ambit of the elementary legal prohibitions may very likely be worse off than they would be in a situation of lawlessness. As far as they are concerned, the coercive mechanisms of legal governance are marshalled to “subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master group, may be large or small, depending on the means of coercion, solidarity, and discipline available to the latter, and the helplessness or inability to organize of the former. For those thus oppressed there may be nothing in the system to command their loyalty but only things to fear. They are its victims, not its beneficiaries.” In regard to the plight of such people, who are less secure within the prevailing system of law than they would be in the absence of any such system, a well-known observation by Locke is pertinent. Replying to the proponents of absolute monarchy such as Robert Filmer, who decried all challenges to the legitimacy of any monarch’s brutal oppression, Locke declared: “As if when Men quitting the State of Nature entered into Society, they agreed that all of them but one, should be under the restraint of Laws, but that he should still retain all the Liberty of the State of Nature, increased with Power, and made licentious by Impunity. This is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by Pole-Cats, or Foxes, but are content, nay think it Safety, to be devoured by Lions.”

When thinking about the jurisprudential implications of the role of law in providing basic security and facilitating the coordination of people’s activities, one plainly should take account of Hart’s point about the credible possibility of societies in which some people are deliberately excluded from the protective reach of prohibitions on very serious misconduct. In any such society, those elementary prohibitions do not coincide in content with any veritable principles of morality. After all, no genuine principle of

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5 KRAMER, supra note 3, at 264.
6 HART, supra note 2, at 201.
7 Id. at 200.
8 KRAMER, supra note 3, at 264.
9 HART, supra note 2, at 201.
11 KRAMER, supra note 3, at 264.
morality forbids the perpetration of very serious misconduct against white people only (or against non-slaves only); any true principle of morality that forbids the perpetration of such misconduct against white people is also a prohibition on the perpetration of such misconduct against other people. Thus, given that the legal proscriptions of very serious misconduct in some actual or credibly possible societies differ from the correct principles of morality on exactly this point, there are no significant necessary connections between the substance of law and the substance of morality. Hart’s ruminations on the human condition do not signal any such connections, despite initial appearances to the contrary.

Three additional qualifications should be attached to those ruminations. First, even in societies where elementary legal prohibitions do coincide in content with genuine principles of morality at an abstract level, they can markedly diverge at more concrete levels. So long as the legal mandates that forbid serious misdeeds in any particular jurisdiction have brought about sufficiently secure conditions to avert a descent into chaos, they can keep a society intact while failing to shield people from numerous harmful modes of conduct that are morally impermissible. Merely from the fact that legal norms bestow protection on individuals sufficiently to prevent a community from disintegrating, we cannot infer that they provide the degree of protection that is minimally required by correct principles of morality. Even in a viable society where everyone enjoys the same level of security as everyone else, that level can fall far short of what it morally ought to be.\textsuperscript{12}

Second, the provision of security through well-enforced legal mandates that proscribe serious misconduct is consistent with heavy-handed oppression. Indeed, the engendering of the security can itself be a source of such oppression, as people are protected from one another through the imposition of extremely harsh penalties for minor breaches (as well as major breaches) of laws against theft, vandalism, assault, and the like. Or perhaps the security enjoyed by each person against mistreatment at the hands of others is accompanied by stiflingly severe restrictions on the permissibility of any actions that might threaten the dominance of the prevailing regime. In such circumstances, each citizen can live in safety \textit{vis-à-vis} other citizens and \textit{vis-à-vis} the regnant government so long as he or she never utters any open criticisms of the government, never signs any petitions or engages in any protests, never uses a photocopier, and so forth. In short, even in a society where each inhabitant is protected on the same terms as every other inhabitant by fundamental legal curbs, those curbs can be situated in an overall matrix of laws that is suffocatingly harsh and restrictive.\textsuperscript{13}

Third, the fundamental legal prohibitions themselves can be introduced and maintained by officials for purely prudential reasons. So long as citizens are submissive and productive, they will usually be far more serviceable for the exploitative purposes of evil officials when alive than when dead. Hence, officials who are devoted solely to their own power-hungry ends will have ample reasons for establishing legal

\textsuperscript{12} KRAMER, \textit{supra} note 3, at 265.

\textsuperscript{13} \textit{Id.}
prohibitions that protect ordinary citizens from one another. Similarly, in order to foster incentives for compliance with their wicked behests, the officials will have strong reasons for extending to each compliant person a much greater degree of security against the officials’ own violence than is extended to any recalcitrant person. In sum, the inclusion of elementary protections (for all or most citizens) among a society’s legal mandates does not perforce bespeak any non-prudential concern on the part of the society’s legal-governmental officials. Those officials might be motivated purely by the sorts of prudential considerations that impel a heartless owner of livestock to attend to the security of the animals in his herd.14

4. Hart and the Problem of Political Obligation

Of great importance for political philosophy as well as for legal philosophy is Hart’s contemplation of the role of law in furnishing the security and coordination that are essential for the durability of a society. One of the most salient concerns of political philosophers is to pin down the conditions under which people are morally obligated to comply with the legal requirements that are applicable to them.15 Particularly prominent is the question whether the inhabitants of any society are always morally obligated to comply with the applicable legal requirements. Hart’s reasoning about the human condition lends itself to being developed into a line of argument that has been advanced by some philosophers who seek to establish that — at least in liberal-democratic societies — there is always a moral obligation to obey the law. Although a full investigation of that line of argument is far beyond the scope of the present essay, a brief account here of the premises and conclusion will help to underscore the importance of The Concept of Law for political philosophers.

The first premise in the argument comes directly from Hart’s discussion:

(1) Without a system of law to give effect to certain legal prohibitions on serious misconduct, no community of any substantial size can endure for more than the briefest period.

A second premise articulates a proposition that would be accepted by most non-anarchists, though specific understandings of the proposition would of course vary:

(2) When substantial numbers of people live in proximity to one another over extended periods of time, an organized community with a system of law to give effect to prohibitions on serious misconduct is necessary for the securing of individual freedom and public order and social coordination.

14 Id.

15 For two valuable introductions to this topic, see JOHN HORTON, POLITICAL OBLIGATION (Macmillan 1992) and DUDLEY KNOWLES, POLITICAL OBLIGATIONS: A CRITICAL INTRODUCTION (Routledge 2009).
The necessity invoked in premise two is of course not logical necessity. As a sheer matter of logic, an organized community with a system of law is not necessary for the occurrence of the effects specified in that premise. However, bare logical possibilities are of little or no weight in political philosophy. What matter instead are credible possibilities. The presence of an organized community with a system of law is necessary for the occurrence of the effects specified in premise two, in that there is no credible possibility of the occurrence of those effects when large numbers of people are living in proximity over extended periods of time without the existence of such a community.

A third premise is also grounded in Hart’s work, though less in The Concept of Law than in a famous passage of an article, which Hart had published several years earlier. In that article, he maintained that each person who enjoys the benefits of some state of affairs is morally obligated to bear a commensurate share of the burdens of sustaining that state of affairs. More specifically, each person who benefits from the adherence of others to some array of mutual forbearances is in turn morally obligated to abide by those forbearances insofar as they apply to him or her. As Hart wrote: “[W]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission…. [T]he moral obligation to obey the rules in such circumstances is due to the cooperating members of the society, and they have the correlative moral right to obedience.” Accordingly, a third premise in the argument about the obligation to obey the law can be formulated as follows:

(3) If someone benefits from the fact that others in her community abide by the mandates of the prevailing system of law with its protections against the perpetration of serious misconduct, then he or she in turn is morally obligated to abide by those mandates insofar as they are applicable.

A fourth premise is closely related to the second and third:

(4) Everyone stands to benefit when others in his or her community help to sustain the prevailing system of legal governance by complying with its mandates, since such compliance upholds a necessary condition for the securing of individual freedom and public order and social coordination.

From these premises a proponent of this line of argument will then draw the following conclusion:

(5) Everyone in a community is morally obligated to comply with the legal mandates imposed by the prevailing system of governance, provided that all or most other people in the community likewise comply.


17 Id. at 185.
Now, as delineated here, the argument is enthymematic. It relies on the premise that, in any jurisdiction, there is no reasonably available and superior alternative to the prevailing system of governance. Even with reference to societies in which that premise is true, however, the soundness of the argument depends on how some of the formulations in its premises and conclusion are to be construed. Although an assessment of the argument’s soundness is far beyond the scope of the present chapter, a couple of brief remarks will serve to accentuate the connections between *The Concept of Law* and political philosophy.

First, much will depend on whether the moral obligation to comply with legal mandates — affirmed in the argument’s conclusion is to be understood as comprehensively applicable and universally borne within each jurisdiction. In other words, to gauge the soundness of the argument just outlined, we would need to know whether the aforementioned obligation is supposed to be incumbent on every sane adult and whether it is supposed to comprehend every legal mandate on every occasion to which any such mandate applies. Both in the eyes of political philosophers and in the eyes of legal philosophers, the obligation will of course be especially noteworthy if it is indeed universally borne and comprehensively applicable. (Its special significance for legal philosophy would derive from its amounting to a major necessary connection between law and morality which is why Hart and most other legal positivists have denied that there is any comprehensively applicable and universally borne moral obligation to obey the law.) However, that noteworthiness is matched by the formidable difficulty of establishing that any such obligation exists; at least on this point, the ambitiousness of the argument is inversely related to the probability of its soundness.

Second, the plausibility of the argument will also hinge on whether its reach is meant to be restricted or unrestricted. That is, we have to know whether the argument’s conclusion is propounded as a claim about every system of legal governance or instead solely about liberal-democratic systems. Unless the conclusion (along with the premises) is construed in the latter fashion, the argument will lack any plausibility. In that respect, the argument built on Hart’s discussion of the human condition is markedly different from the general theorizing in *The Concept of Law* (including the discussion of the human condition). Throughout the book, Hart sought to expound the nature of legal institutions in abstraction from the numerous variations among jurisdictions. As he emphasized in subsequent debates with Lon Fuller and Ronald Dworkin among others, he was aiming to distil fundamental features of law as a general phenomenon, instead of concentrating only on features of liberal-democratic law. Hence, when theorists build on his discussion of the human condition in their endeavours to underwrite an obligation to obey the law, their efforts are somewhat at variance with the tenor of his jurisprudential project.

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18 For a full assessment, with many relevant citations, see KRAMER, supra note 3 at ch. 9.

5. Hart on Justice

Hart was a distinguished participant in twentieth-century debates over justice, albeit his most influential contributions to those debates appeared in essays published after *The Concept of Law*. Writing in response to the theories of justice put forward by Dworkin and John Rawls and Robert Nozick among others, Hart (1983, Part IV) helped to elucidate the values of justice and liberty and the relationships between those values. Similarly, in *Law, Liberty, and Morality*, published shortly after *The Concept of Law*, contributed perceptively to some kindred debates in political philosophy as he upheld the civil-libertarian legacy of John Stuart Mill. Though the remarks on justice in *The Concept of Law* are somewhat less innovative and profound, they should not go unnoticed here.

In the eighth chapter of *The Concept of Law*, Hart drew some important distinctions in his exposition of the concept of justice. Perhaps most familiar is the distinction between distributive justice and corrective justice. Hart took “just” and “fair” to be virtually synonymous, and he contended that the value of fairness is at stake in two main types of contexts: namely, contexts in which some benefits or burdens are to be apportioned among individuals or groups, and contexts in which individuals or groups are called upon to remedy some of the injurious effects of their conduct on other people. Justice pertains to allotments of goods and detriments, and to compensatory measures or other remedial measures. Although this way of differentiating between types of justice is very common, it is not entirely unproblematic. For example, John Finnis has criticized Hart for presuming that the germane point of contrast with distributive justice is corrective justice. Instead, Finnis maintains, the germane point of contrast is the more capacious category of commutative justice which includes corrective justice but also extends more broadly. Commutative justice is transactional and relational justice. Whereas distributive justice lays down standards for the assignment of appropriate shares of benefits and burdens relating to common resources and enterprises, commutative justice pertains to what is due from people by dint of their engaging in certain transactions or standing in certain relationships to one another (insofar as what is due from them is not itself determined by the standards of distributive justice).

Another pregnant distinction drawn by Hart in his comments on justice is the contrast between the substance of the law and the administration of the law. Whereas the substantive justice of any system of law pertains to the general rights and liberties and powers and immunities with which people are endowed under the terms of the regnant legal standards, the procedural justice of the system pertains to the ways in which those general legal positions are given effect. Within a system of law, procedural justice consists in

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21 Hart, supra note 2, at 158-9.


applying legal norms in accordance with their terms to any number of situations; the relevant likenesses or
dissimilarities among those situations are to be identified by reference to the norms themselves. This
distinction between substance and procedure is orthogonal to the distinction between distributive justice
and commutative justice. Both in relation to matters of distribution and in relation to matters of
commutation, questions on either side of the substance/procedure dichotomy can arise.

Cutting across the divide between substantive justice and procedural justice is an element of distributive
justice that Hart highlighted.24 He contended that, whenever legislators or administrators have to reach a
public-policy decision where the interests of some citizens will be furthered at the expense of the interests
of other citizens, the people apt to be affected should be given opportunities to present arguments in
favor of their competing perspectives. “[A] choice, made without prior consideration of the interests of all sections of
the community would be open to criticism as merely partisan and unjust. It would, however, be rescued from this imputation
if the claims of all had been impartially considered before legislation [or administrative regulation], even though in the result
the claims of one section were subordinated to those of others.” Hart declared that the realization of distributive
justice through the apportionment of fair opportunities-to-be-heard is essential for the moral legitimacy
of enactments that involve significant trade-offs: “[J]ustice in this sense is at least a necessary condition to be
satisfied by any legislative [or administrative] choice which purports to be for the common good. We have here a further aspect
of distributive justice, differing from those simple forms which we have discussed. For here what is justly ‘distributed’ is not
some specific benefit among a class of claimants to it, but impartial attention to and consideration of competing claims to
different benefits.” 25

6. Hart on Sovereignty

Chapter 4 of The Concept of Law is the last of the three chapters in which Hart critically came to grips with
Austin’s model of law. In that fourth chapter, Hart trained his scrutiny on Austin’s conception of
sovereignty; his critique merits attention from anyone who enquires into the nature of the state.
According to Austin’s account of legal governance, such governance proceeds through the top-down
imposition of legal requirements by a sovereign whose commands are habitually obeyed by citizens.
Whereas the citizens habitually obey the sovereign, the sovereign obeys no one. Hart objected to Austin’s
reliance on the notion of habitual obedience, and likewise impugned his idea of a monolithic structure of
sovereignty.

In the course of criticizing Austin’s general obfuscation of the normativity of law, Hart specifically
maintained that the compliance of ordinary citizens with legal mandates is often not appositely
understood as a mere matter of habit (not even as a habit that is deeply entrenched through
longstandingness and the prospect of sanctions). Hart distinguished between norm-guided behavior and
merely habitual behavior, and he affirmed that the compliance of citizens with the duties incumbent on

24 HART, supra note 2, at 166-7.

25 Id. at 167.
them under systems of legal governance is frequently norm-guided rather than merely habitual. Moreover, even in an extreme situation where all or most citizens merely obey the mandates of a repressive system of governance instead of accepting those mandates as norms that ought to be supported, the conduct of the system’s officials in their endeavors of law-administration will be norm-guided. Thus, one reason for condemning Austin’s theory as inadequate is that it does not capture the ways in which citizens often react to the legal requirements that are imposed by the institutions which govern them. It does not capture the attitude what Hart called the “critical reflective attitude” that is frequently adopted by citizens in response to those requirements. That is, although Austin’s picture of habitual obedience correctly suggests that most citizens tend to comply with the mandates issued by the system of governance that presides over their society, it obscures the tendency of citizens to censure any deviations from those mandates by others and to invoke the mandates in justification of their disapprobation. It likewise obscures their tendency to accept that criticisms of their own deviations from the mandates are legitimate. (Of course, the strength of these behavioral dispositions is a contingent and scalar matter. However, at least in societies governed by liberal-democratic regimes, the existence of such dispositions at various levels is apparent. At any rate, Hart’s point was not that Austin had underestimated the frequency or intensity of people’s inclinations to exhibit the critical reflective attitude toward the legal mandates that confront them. His point, rather, was that Austin’s picture of habitual obedience completely disregards those inclinations and their manifestations.)

Even more important for political philosophers is Hart’s riposte to the Austinian conception of sovereignty. According to that conception — reminiscent of Hobbes’s conception in many respects — the sway of every sovereign is legally unlimited. Underlying that doctrine of the unlimitedness of a sovereign’s sway is the idea that any legal restrictions would be at odds with the very nature of the sovereign as a sovereign. Given that the Austinian sovereign is not obligated to obey anyone, and given that legal restrictions on the sovereign’s sway would involve the sovereign’s compulsion to obey the person or organization that had imposed the restrictions, there cannot be any such curbs.

Now, as Hart pointed out, 26 one of the sundry shortcomings in the Austinian account is that legal limitations on sovereignty are typically set not through the imposition of duties but instead through the withholding of powers. In other words, the supreme legislator in any jurisdiction- whether a single monarch or a body of people, will typically be unable to introduce valid enactments concerning certain issues. The legislator will probably not be under any legal duties to refrain from efforts to introduce valid enactments on those issues, but any such efforts will be unavailing if the adjudicative and administrative officials accurately gauge the extent of the legislator’s powers when they are called upon to recognize the putative enactments. Thus, for example, the First Amendment to the American Constitution withholds from the U.S. Congress the power to enact valid laws that curtail certain freedoms. That amendment

26 Hart, supra note 2, at 70, 289.
produces its effects not by imposing legal duties but by imposing legal disabilities.

My mention of the First Amendment has signaled an even more far-reaching problem for Austin's thesis that sovereignty is legally unlimited. As Hart observed, and as Austin himself was aware, there can be systems of governance in which the powers of the supreme legislators are constitutionally limited. The American system of governance is one such instance, and there are many others in the contemporary Western world. Austin sought to extend his conception of sovereignty to accommodate such systems of governance (and, indeed, any systems of governance based on elections) by re-identifying the site of sovereign control. He contended that, contrary to initial appearances, the supreme elected officials for example, the U.S. Congress and the U.S. President are not vested with sovereignty in such a system. Instead, sovereign control resides in the electorate.

Among the numerous difficulties engendered by this re-identification of the locus of sovereignty is that it calls into question the claim by Austin that the relationship between sovereign and citizens is one of command and obedience. If the members of the electorate are themselves the sovereign, then (in relation to them) the foregoing characterization of the sovereign/citizen relationship appears clearly in apposite. To be sure, there is an evident way of surmounting this difficulty. We can distinguish between the members of the electorate as a sovereign collectivity and the members of the electorate as individual citizens, and we can affirm that the commands of the former are obeyed by each of the latter. Yet, although such a reply is unexceptionable in itself, it is unavailable to a defender of Austin's position.

After all, as Hart argued trenchantly in an earlier chapter of *The Concept of Law*, a theory that characterizes legal governance as a relationship of commands and obedience does not leave any place for power-conferring laws in contrast with duty-imposing laws. That is, if a theory stipulates that all laws are commands that are to be obeyed, it thereby completely ignores the role of power-conferring laws. Instead of forbidding any modes of conduct, such laws endow people with normative abilities to achieve certain results — such as the formation of contracts or the bequeathing of property or the enactment of valid statutes or the pronouncement of binding administrative decisions — by following certain procedures. Such laws are thus not properly classified as commands, and conformity to their procedures is not properly classified as obedience. Now, what is so problematic for Austin and his defenders is that the laws under which individual citizens compose a collectivity (the electorate) with sovereign control over the institutions of government are power-conferring laws. Hence, when Austin fell back upon the notion of the electorate as a sovereign collectivity, he was presupposing the existence of laws of the very type that his theory systematically overlooks.

With his insistence on the legally unlimited sway of the

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27 Hart, *supra* note 2, at 66-78.


29Hart, *supra* note 2, at 75-8, 290.
sovereign in each jurisdiction, he was led *malgré lui* to rely on a category of legal norms which his theory of sovereign governance altogether omits. Once that inconsistency is exposed, and once the crucial role of power-conferring norms in the establishment of a legal sovereign is recognized, we can further recognize that the doctrine of legally unlimited sovereignty is an untenable dogma. Power-conferring norms constitutive of sovereignty are not an all-or-nothing matter; they can confer supreme authority in a jurisdiction without conferring all-inclusive authority.

7. A Brief Conclusion

This chapter began by acknowledging that, *The Concept of Law* is principally a work of legal philosophy. Nonetheless, as we have seen, the book addresses a number of matters that are squarely of concern to political philosophers: the problem of political obligation, the nature of justice, the scope of sovereignty, among other matters. Because of constraints of space, my explorations of the relevant discussions in *The Concept of Law* have had to be sketchy and selective. Still, enough has been said to indicate that Hart’s classic work is a major contribution to the philosophy of government as well as to the philosophy of law. Its subtle insights do not always resolve definitively the controversies to which they pertain, but they help to elevate the level of argumentation in those controversies.

REFERENCES

THE NATURE OF LAW: THREE PROBLEMS WITH ONE SOLUTION

By N.E. Simmonds*

1. Introduction

Whether or not we have ourselves studied the philosophy of law, most of us are familiar with the fact that philosophical debate concerning the nature of law has been around since Ancient Greece. In much the same way, there have been long-running philosophical debates concerning justice, truth, reason and a host of other issues. The debate concerning law is in some respects different, however. For it is not too difficult to see how the nature of justice or truth or reason could give rise to a specifically philosophical debate, while it is far from clear why the nature of law should generate any philosophical puzzlement at all.

For present purposes, we might say that the hallmark of a philosophical question is to be found in an initial sense of bewilderment that overcomes us when we first encounter the question. It is not simply that we have been asked a question to which we do not know the answer. Rather, we have no idea of how one might start looking for an answer, or indeed of what sort of thing an answer might be.

Take the question of the nature of justice. We think of justice as an abstract standard that can be invoked in the criticism or evaluation of human actions and institutions. The content of justice is thought of as independent of all such actions and institutions: the fact that we punish criminals does not, in itself, show that it is just to punish criminals, for example. Nor can justice be regarded as simply a matter of conventional belief: the fact that people believe that it is just to punish criminals does not, in itself, make it just (someone who thinks otherwise has clearly failed to understand what justice is). But, if the content of justice cannot be inferred from our knowledge of any human action, practice or widely-accepted belief, from whence can it be derived? We are faced by a question (what is justice?) but have no idea how one could set about answering it, or even what an answer would look like.

Distinctively philosophical problems tend to concern our most fundamental intellectual and moral criteria. They may often be bound up with issues of reflexivity. For example, they may involve questions about the status or content of a criterion, while the questions can be answered only by reliance upon (some version of) the criterion in question.

Suppose that we want to know what truth (or reason) is. What we want to know is the truth about truth. We want a reason for choosing this account of reason rather than that one. Sometimes, philosophical

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1 See THOMAS HOBBES, LEVIATHAN ch. 14-15 (1651) (illustrating the way that Hobbes’ conclusions depend upon his “Laws of Nature”).
inquiries can be clear about their own status only when the principal problem of the inquiry has been successfully resolved.\(^2\)

When, by contrast with these debates, we turn to the philosophical debate concerning the nature of law, everything seems at first to be different. The terrain can appear to be flat and dull, devoid of reflexivity or any other interesting problems. Far from not knowing how we might proceed with our inquiry, the path ahead seems all too obvious: so obvious, indeed, that we wonder how the debate could have endured so long. For law, we assume, is a social institution that is open to straightforward observation and description. Scholars such as doctrinal experts, historians and social scientists know about its various features. If you are puzzled about its nature, why not ask them? What can the philosopher have to contribute here?

Our confidence that the philosophy of law addresses some genuinely difficult problems, on a par with those explored in other areas of philosophy, will not be strengthened if we examine some influential modern accounts of the core issues. Take, for example, H.L.A. Hart’s account in the opening chapter of his classic work *The Concept of Law.* There, Hart tells us that three recurring issues have driven the long-running debate concerning the nature of law. The first two of these issues concern the relationships between law and morality (on the one hand) and law and “orders backed by threats” (on the other).

Hart explains that in some respects law resembles morality (it consists of a body of prescriptions and employs a similar vocabulary to morality) and in some other respects it resembles orders backed by threats. What we are looking for (in Hart’s view) is a clear understanding of these resemblances and differences.

As an account of either the fundamental goal or the starting point of our inquiry this leaves a lot to be desired. Indeed, it does not really succeed in identifying a philosophical problem at all.\(^4\) Explaining how one thing resembles but also differs from two other things is not, without more, a philosophical enterprise. Until we are told more (about, for example, the special character of the objects to be compared) the task seems to call for careful description rather than philosophical reflection. If, therefore, we set out not understanding how the philosophy of law can call for more than careful description of the observable phenomena of law, Hart’s account will not help us.

In philosophy of law as in every other field of philosophical inquiry, it is both easy and common for philosophers to conflate the intractable problems that they are meant to be addressing with much easier problems that they know how to solve. When this happens a lot, the inquiry can start to founder. People begin to lose any sense of what the questions really are; or they start to think that the questions have now

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\(^2\) See Nigel Simmonds, Law as a Moral Idea 1 (Oxford University Press 2008) (statement of Nigel Simmonds) (“[C]onsequently, jurisprudence can fully understand its own status only when it has solved its central problem, by answering the question “What is law?”) [Hereinafter “Simmonds”].


\(^4\) This is, of course, not to deny that there is a philosophical problem in the vicinity of Hart’s remarks, but Hart has failed to put his finger upon it in a way that can be expected to enlighten the reader.
been solved; or they doubt that there were really any questions there in the first place. Some brief reminders of what those questions are can always be useful. I will offer some such reminders in the next section of this essay.

2. Three Problems

Suppose that we begin from our initial assumption that law is a social institution. This seems to entail the thought that laws are made by human beings. Indeed, this latter thought seems at first so appealing that we may wonder how anyone could doubt it. Yet we also tend to assume that human actions can create law only if they are authorised so to do by the law itself. And here is the difficulty. For, if all laws are made by human actions, and human actions can make law only when legally authorised so to do, we seem to be faced by an infinite regress.

Austin tried to address this problem by abandoning the assumption that all law-making acts must be legally authorised: according to him, the law-making acts of the sovereign are grounded in the facts of power, not in any authorising laws. This response to the problem sounds promising but proves, in the end, not to be very successful. Another response abandons the assumption that all laws are made by human actions: it postulates “natural laws” that are made by no one but that ground the authority of the supreme law-maker.

At first this sounds deeply implausible, for we find ourselves asking, “where could such natural laws come from?” Once we scratch the surface of the position and start to examine it closely, however, it begins to look more convincing. Kant, for example, tells us that one might have a system of wholly posited laws (laws established by a lawmaker) but a natural law (not made by any such lawmaker) would still have to precede the system, by establishing the authority of the lawmaker. What Kant has in mind is a good deal less mysterious than one might at first think. His thinking might be explained as follows. Positive laws are invoked (by, for example, judges) as a justification for the imposition of coercive sanctions. Laws must therefore be the kind of thing that is capable of justifying coercion: decrees that do not in fact justify coercion would be mere simulacra of law. If coercion is sometimes justified, there must be some principles that determine when it is justified. These are (in Kant’s view) the principles that determine when “the choice of one can be united with the choice of another.” The totality of such principles then forms the “natural law” grounding the authority of the supreme lawmaker. As Kant puts it, the principles “establish the basis for any possible giving of positive laws.”

7 Immanuel Kant, The Metaphysics of Morals in Immanuel Kant, Practical Philosophy 353, 379 (Mary J. Gregor ed., Cambridge University Press 1996) [Hereinafter “KANT”].
8 Kant, supra note 7, at 387.
9 Id.
Kant does not think of the relevant principles as something like a complete code of human conduct that the law merely has to reflect. Rather, legislative decision-making is essential to establish the full set of conditions within which “the choice of one can be united with the choice of another.” Thus, we might say that, for Kant, the supreme act of positive law making derives its legal authority from its success in realising the value (joint possibility of choices) that is, in his view, central to the nature of law.

The first problem we have identified concerns the basis of fundamental law-making authority. It exhibits some of the features that are commonly found in philosophical problems. Thus, some attempted solutions that might at first seem tempting tend to founder in familiar philosophical dead ends, such as reductionism (e.g. Austin’s attempt to reduce legislative authority to the facts of power) or infinite regress (if every law-making act is authorised by a higher law that itself was created by a law-making act) or circularity (if, somehow, lawmakers can authorise themselves). Meanwhile, other (potentially superior) solutions turn out not to be self-contained but to be tangled up with otherwise distinct philosophical problems. This is the case with Kant’s solution. For Kant’s proposal is intimately bound up with another puzzle that must be confronted by the philosophy of law: the problem of law’s justificatory force.

Laws are typically invoked by judges as a reason or justification for imposing a sanction. Any theory of law needs to accommodate this fact. For example, one of Hart’s numerous reasons for rejecting Austin’s theory of law concerns Austin’s analysis of “legal obligation.”

Seeking clearly to distinguish law from morality (the latter being, for Austin, embodied in the principle of utility) Austin viewed statements of legal obligation as statements concerning the likelihood of suffering a sanction in certain circumstances. Hart rejected this analysis on the ground that it would render unintelligible the judge’s invocation of legal obligations as a reason for imposing a sanction. Hart thereby acknowledges that a theory of law must explain how laws can intelligibly be invoked as a justification for imposing sanctions.

This gives rise to the question of what “justification” means in this context. Is justification here a matter of moral justification? Or can there be some form of justification that is “technical” and “confined” in so far as it consists in the subsumability of a case under a rule without regard to the question of whether the application of that rule to this case is morally appropriate or permissible? The great philosophers of law, such as Hobbes and Kant, tended to assume that what was in question here was some form of moral justification. Thus, their accounts of the nature of law formed an integral part of broader political philosophies. They asked, in effect, what must law be that it can provide a justification for the use of coercive force? Any attempt to answer this question is of necessity bound up with other philosophical inquiries, into justice and the authority of states.

10 [HART, supra note 3, at 84 (statement of H.L.A. Hart) (“[W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.”)].

11 [H.L.A HART, ESSAYS ON BENTHAM 266 (Oxford, Clarendon Press 1982) [Hereinafter “HART ESSAYS ON BENTHAM”].]
We have identified two philosophical problems of the nature of law: the problem of fundamental law-making authority, and the problem of law’s justificatory force. Now let us note the existence of a third, which I shall call (for want of a better label) the problem of the ideality of law. The problem arises from a simple yet pervasive feature of legal discourse: lawyers frequently offer differing accounts of the law’s rules and principles even when they are fully and equally familiar with all of the statutes, cases and other relevant materials. Lawyers therefore seem to be working with a conception of law that cannot straightforwardly be equated with the totality of rules explicitly established in statutes and cases. We may therefore ask what conception of law that is, and how it relates to the authoritative pronouncements of the lawmakers.

3. Hart’s Solutions

In *The Concept of Law* and subsequent writings, H.L.A. Hart offered a set of elegant solutions to the three problems identified above (in spite of failing, in his opening chapter, to identify the problems in a fully enlightening way). We will briefly summarise his solutions before turning to their deficiencies.

Let us begin with the problem of the basis of supreme law-making authority. The problem arises, it will be recalled, if we assume that all laws are made by human acts and that human acts can create law only if legally authorised so to do. This seems to generate an infinite regress. We may be unwilling to abandon the thought that all laws are made by human acts, and may therefore be tempted to follow Austin in a reductionist approach that grounds ultimate law-making authority directly in the facts of coercive political power.

However (as Hart amply demonstrates) such an approach is unable to offer an adequate analysis of law-making authority, or of the meaning of propositions of law. Adequately to grasp these notions we need to see law-making authority as an authority conferred by rules. What then is the status of these authority-conferring rules?

Hart’s solution is to say that the rules in question are rules *accepted* by officials. The rules exist in so far as the officials accept them and act in accordance with them: they are in that sense rules created by human action (not natural laws). But the rules are not enacted by anyone, and their creation therefore does not require legal authorisation. The solution depends upon Hart’s notion of the “rule of recognition”: a rule, accepted by officials, that identifies other rules (such as rules enacted by lawmakers) as “valid” rules of law. On this account, legal rules generally exist in the sense of being “valid”: which is to say that they satisfy whatever criteria are set out in the rule of recognition of the system in question. The rule of recognition itself, however, is neither valid nor invalid: it is the ultimate criterion of legal validity. It exists in so far as the conduct of officials exhibits a regular pattern of conformity (in, presumably, deciding disputes by reference to certain rules and sources of rules) that Hart calls the “external aspect” and the

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12 RONALD DWORKIN, LAW’S EMPIRE 3-6 (Harvard University Press 1986) (explaining the disagreement about law).

13 HART, supra note 3.
adoption of an attitude (whereby the regular pattern of conforming conduct is viewed as a standard that one ought to comply with) that Hart calls the "internal aspect."

Thus, for Hart, all laws are created by human actions, but not all laws are deliberately enacted. Acts of deliberate law-making require legal authorisation\(^{14}\) before they can successfully create law. But the rule of recognition provides the necessary authorisation without itself requiring authorisation.

Hart’s solution to the first problem brings us to his solution to the second problem: that is, the problem of the law’s justificatory force. For, in order for the rule of recognition to exist, the officials must take “the internal point of view” towards the regular pattern of conforming official conduct. The internal point of view incorporates the belief that the regular pattern of conforming conduct ought to be followed, and that deviation from it should be criticised and the criticism viewed as justified. The “ought” here need not, according to Hart, be any sort of moral “ought”: the officials may take the view that they “ought” to follow the rule of recognition for purely prudential reasons, such as a desire to maintain the power of an exploitative regime from which they benefit. When officials apply the laws to individual citizens, and regard the laws as “justifying” the imposition of sanctions, the “justification” that is involved here can be purely “technical”: simply a matter of showing that the individual case falls under the legal rule, without regard to the question of whether application of the legal rule is morally right or permissible.

In this way, Hart believes that his theory captures the normative, action-guiding, justificatory aspect of law without needing to base law upon morality in any way.

What of the third problem, which I have called the problem of the ideality of law? Hart’s writings contain two different, although mutually compatible, responses to the problem. His principal response\(^{15}\) suggests that the assumption that law somehow goes beyond the authoritative materials of the law is a kind of illusion that arises if we ignore the “open texture” of rules and assume that every case can be resolved by applying the rules of the system. In fact, as Hart points out, rules always give rise to “penumbral cases” where the rules give no determinate answer. Cases where the lawyers appear to be disagreeing about what the law requires are therefore, very often, cases where the rules are indeterminate in their application to this particular case: the case cannot be resolved one way or the other by applying the rules, and the disagreement between the lawyers is, in substance though not in form, a disagreement not about what the law is but a moral or political argument about how a gap in the law should be filled.

4. Where Hart Goes Wrong

Amongst Hart’s critics, the writer who has attracted the most attention is Ronald Dworkin. Dworkin focuses his attack primarily on Hart’s account of penumbral cases. He points out that, in such cases, lawyers think of themselves as offering legal arguments, not as offering extra-legal moral or policy

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\(^{14}\) There are perhaps some exceptions that do not affect the present argument. See Hart, supra note 3, at 153 (discussing the contexts where judges create law and then get their power to create it accepted after the event). (statement of Hart) (“[a]ll that succeeds is success”).

\(^{15}\) I set on one side for present purposes the “inclusive” aspect of Hart’s legal positivism; See Hart, supra note 3, at 250 (explaining the inclusive aspect of Hart’s legal positivism).
considerations. We should try to find a conception of law that makes sense of the lawyers’ assumptions, and only adopt Hart’s view if the lawyers’ ordinary assumptions prove to be indefensible. Dworkin believes that he has constructed a suitable account of law that captures the juridical character of doctrinal arguments in contentious cases, and is in all other respects more enlightening than Hart’s theory.

My own theory also aims to contest Hart’s account of penumbral cases, but it opens its attack on Hart at a different point in the argument. Instead of examining Hart’s response to the problem of the law’s ideality, let us examine his response to the problem of the law’s justificatory force. Hart attempted to steer a middle course between reductionism and the rejection of legal positivism. John Austin’s version of legal positivism was essentially reductionist: it analysed propositions of law (such as propositions concerning legal obligation) as statements regarding the likelihood of suffering a sanction. Reductionism of this sort, Hart felt, was unable to capture the prescriptive, action-guiding character of propositions of law. Yet the alternative to reductionism, Hart felt, need not be a rejection of legal positivism: a theory can accommodate the prescriptive or normative character of law without grounding law in morality. The rule of recognition is the key to Hart’s solution. For the rule of recognition to exist (and, therefore, for a legal system to exist) the officials must adopt the internal point of view towards their shared pattern of convergent conduct: they must regard that pattern as a standard that “ought” to be complied with. But the “ought” need not be a moral “ought”: officials may believe that they should follow the rule of recognition for non-moral reasons of self-interest, for example. Given the rule of recognition, we can grasp the nature of law’s normativity while setting on one side all questions about why the officials adopt the internal attitude. Their reasons may be moral or non-moral: it makes no difference.

Consider the analogy of a game. I may play a game for many different reasons: to keep a promise, to pass the time, to please a friend, to earn money, to humiliate an enemy. Within the context of the game, however, my actions must be guided by the rules. The rules give me reasons for action that are partially independent of my reasons for playing the game in the first place. Thus, we do not need to say whether reasons-within-the-game are moral reasons or prudential reasons: the game is a domain of reasons that enjoys a degree of autonomy vis-à-vis our moral or prudential reasons for playing the game. In the same way, the normativity of law is a matter of the law offering reasons for action that need not be reduced to moral or prudential reasons. This provides us with Hart’s response to the problem of justification. When the judge sets forth, in his judgment, the propositions of law (propositions concerning, for example, the defendant’s legal obligations) that justify his decision, he is offering a justification that is “technical” insofar as it invokes neither moral nor prudential reasons for the decision: it invokes legal reasons that are not directly reducible to either of the two more familiar categories of reason. Hart’s theory in this way hopes to enable us to understand what these legal reasons are and how a fully intelligible human activity gives rise to them.

We may say that Hart regards law as a partially autonomous domain of normative reasoning. It is a domain of normative reasoning, in so far as propositions of law do not (for example) predict the incidence of sanctions or the probable reaction of courts, nor do they describe events such as the issuing of
commands or states of affairs such as the existence of regular patterns of human conduct. Rather, propositions of law have their sense within the realm of reasons and prescriptions, not predictions and descriptions. To say that someone has a legal obligation is to express a conclusion about the applicability of a rule that prescribes his or her conduct, and gives a judge a reason for imposing a sanction.

This domain of normative reasoning is autonomous to the extent that it is not reducible to either moral or prudential reasoning. But the autonomy is only partial for a combination of two different reasons. In the first place, legal reasons can only possess practical force in so far as one has reason to be guided by the law (just as the reasons internal to a game have practical force only if one has reason for playing the game): such reasons could be either moral or prudential. Secondly, penumbral cases cannot be resolved by exclusive reference to the law, but only by reliance upon considerations (of morality or policy, for example) that lie beyond the legal rules. At this point we must call to mind one of Hart’s criticisms of Austin. Austin had claimed that a statement to the effect that a certain person has this or that legal obligation is really asserting that the person in question is likely to suffer a sanction if they act in a certain way (that is, a way of acting that violates the obligation). Hart pointed out that Austin’s analysis is unable to explain the way in which judges invoke legal obligations as a justification for imposing sanctions. When the judge orders X to pay damages, and cites X’s legal obligations as a justification for so ordering him, the judge can scarcely mean, by his invocation of X’s obligations, to assert that X is likely to suffer a sanction: the likelihood of suffering a sanction can hardly be offered as a justification for imposing a sanction.\(^{16}\) By offering this argument, Hart in effect concedes that he regards it as a requirement of an adequate theory of law that it should be able to explain how law (e.g. the defendant’s legal obligations) can intelligibly be invoked as a justification for the imposition of a sanction.

The question that we must ask is whether Hart is really any more successful in satisfying this requirement than Austin was.

Let us begin with a few reminders of our ordinary understandings. We ordinarily assume that the judicial judgment is a setting forth of the justification for the judge’s decision (a decision which may involve ordering the deployment of the state’s coercive force against an individual). We also assume that, within the judgment, the law will play a key role: we assume, in fact, that the judge will cite certain propositions of law as central to the justification for his or her decision. These rules of law are cited not because they are just or wise or otherwise desirable, nor because the judge approves of and endorses them: they are cited precisely because they are law within the relevant jurisdiction. Now let us see how successful Hart’s theory is at capturing these familiar features of the judicial judgment.

According to Hart, the justification offered by the judge for his or her decision is “technical” and “confined.”\(^{17}\) When the judge invokes the defendant’s legal obligations as a justification for imposing a sanction, the judge is operating with reasons that are internal to the domain of law: the judge has a legal

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\(^{16}\) Hart, supra note 3.

\(^{17}\) Hart Essays on Bentham, supra note 11.
reason for imposing a sanction. Of course, for this legal reason to possess real practical force (and so be a genuine reason for action) the judge must have reason to guide his or her conduct by law. But such judicial reasons for being guided by law could, Hart tells us, be either moral reasons or prudential reasons. The judge might have purely prudential reasons of self-interest for following the rule of recognition, yet these would nevertheless be sufficient to give a practical force to the propositions of law invoked in the judgment.

Suppose that a judge sentences me to prison, citing a certain rule as the justification for my punishment. I protest and demand to know how the existence of the rule serves to justify sending me to prison. The judge explains that the rule is a valid rule in so far as it is derivable from the rule of recognition, a rule that he and his fellow judges accept. I continue to protest: why should I care about what rule he and his colleagues accept?

What does that have to do with me?

Now the coherence and intelligibility of the judge’s justification will scarcely be increased if he goes on to add further explanation along Hartian lines, explaining that he and his colleagues accept the rule of recognition for self-interested reasons: clearly I will feel that the judge’s self-interest cannot possibly provide an intelligible justification for sending me to prison. Let us suppose then that the judge accepts a friendly suggestion from Neil MacCormick, even if the suggestion comes at the cost of strict adherence to Hart’s legal positivism. MacCormick pointed out that the justification provided by invocation of the rule of recognition could be complete and transparent only if framed in terms of moral considerations supporting the judge’s acceptance of the rule of recognition (MacCormick called these “underpinning reasons”).

The judge would now be saying, “I am justified in sending you to prison because that is required by a rule that stems from a rule of recognition I and my fellow judges accept for good moral reasons.” The justification has now become fully intelligible. But it still fails to capture one of the settled understandings mentioned above: the understanding that the judgment is a justification of the decision by reference to the law and not simply by reference to the rules that the judge considers wise or desirable or just.

At this point you may think that I have gone astray. For, surely, if the rule invoked by the judge is derivable from the rule of recognition, it must indeed be a law. But this is not so. For one can have a system that successfully maintains order by enforcing rules derived from a basic rule of recognition, and yet it does not constitute a system of law. Suppose, for example, that the rules of the system are all kept secret; or that they change on an hourly basis; or that all of the rules, rather than prescribing duties for citizens, simply confer upon officials’ extensive powers to employ coercive force whenever the officials think best. We would not, I think, regard these systems as systems of law.

18 Neil MacCormick, Legal Reasoning and Legal Theory 139-40 (Oxford University Press 1994). I phrase MacCormick’s point in my own words here, which seem to me to capture his point better than his own formulations (which leave something to be desired).

Consequently, we cannot say that all rules derived from the rule of recognition (in a system that is effectively in force) are necessarily legal rules. For they will only be legal rules if the rule of recognition from which they are derived is the rule of recognition of a system of law. Since one of our settled understandings of the judicial judgment is that it justifies the imposition of the sanction by invoking the law, we must say that judges can never justify their decisions simply by invoking the rule of recognition without addressing, or at least assuming an answer to, the question of whether the system as a whole is a system of law.

5. Reflexivity in Law

In Hart’s view, the rule of recognition represents an outer bounding limit upon the juridical domain. Adjudicative legal thought is at its core a matter of applying the rule of recognition and the valid rules that stem from it (beyond the core, adjudicative legal thought is a matter of deciding, on extra-legal grounds, matters that fall within the penumbra of uncertainty of the rules and so are left undetermined by the existing law).

Once we reach the rule of recognition itself, we have reached the ultimate basis of legal validity and legal justification. Of the rule of recognition itself one can ask factual questions (e.g. how secure is its acceptance by officials?) or moral questions (e.g. is it a good rule?) but one cannot ask juridical questions. To ask, for example, whether the rule of recognition is “legally valid” is to ask a meaningless question: being the ultimate basis of legal validity, the rule of recognition is itself neither valid nor invalid.20

Can we not then ask whether the rule of recognition is the rule of recognition of a system of law? Such a question does not seem to lack sense for, as we saw above, one could have a system that failed to amount to law in spite of possessing a rule of recognition. Hartian legal positivists would in all probability agree that such a question (unlike a question concerning the validity of the rule of recognition) is perfectly meaningful; but they would also insist that it is essentially a classificatory question the answer to which forms no part of the justificatory reasoning underpinning a judicial judgment. Raz, for example, has insisted that the judge’s duty is simply one to apply the rules of the system under which he or she was appointed, without regard to the question of whether or not the system is a system of law.21

The insistence that the rule of recognition bounds the limit of the juridical domain in this way is intended, amongst other things, to police a distinction between legal doctrinal questions concerning the content of the existing law (on the one hand) and jurisprudential questions concerning the nature of law (on the other). Jurisprudence, in Hart’s view, does not contribute to the justification of judicial decisions nor offer guidance to the judge: it is an essentially descriptive enterprise concerned to note the resemblances and differences between different phenomena (as he explains in the opening chapter of The Concept of Law). As

20 Hart, supra note 3, at 100-23.

explained above, we might well feel a sense of dissatisfaction with this account of the nature of jurisprudence, since it fails to identify an intellectual project of an unambiguously philosophical character. We now have a further reason for questioning Hart’s account of the nature of jurisprudence. For we have seen that, if the judicial judgment is to be understood in a manner compatible with our settled understandings, it cannot be construed as simply relying upon the rule of recognition and its valid progeny without explicitly or implicitly addressing the question of the status as law of the system as a whole. We ordinarily take the judgment to be a setting forth of the justification for the judge’s decision, addressed to the litigants amongst others; and we assume that, within such justification, the status of certain rules as law will play a key part. Indeed, these assumptions seem to be quite central to our understanding of the justification that is offered. A judge cannot intelligibly justify a decision (perhaps involving the ordering of coercive force against the defendant) by citing a rule that he accepts for self-interested reasons. While the invocation of moral reasons (McCormick’s “underpinning reasons”) here might reduce our sense of bewilderment, they would still not capture our normal understanding of the judicial judgment. For we ordinarily assume that judges do not justify the imposition of sanctions by reference to their own moral or political views, but by reference to what they claim to be the law. Making sense of this claim has always been one of the central tasks for jurisprudence.

What this suggests is that the philosophical problem of law’s nature does not spring, as Hart seems to think, from a need for the careful description of resemblances and differences between different social phenomena, but from the reflectivity of legal thought. That is to say, legal thought is always guided and informed by reflection upon the idea of law, and it is the task of jurisprudence to investigate that idea.

6. The Idea of Law

Legal thought is guided by the idea of law. As Lon Fuller expressed the point, the law is always “in quest of itself.” Many lawyers will react to this claim with incredulity. Surely, they will say, whatever its faults, Hart’s theory that lawyers are guided by a basic rule of recognition is more plausible than this! After all, lawyers do not think of themselves as engaged in a philosophical inquiry, nor do they daily reflect upon such an abstraction as “the idea of law.”

To dispel the incredulity, we should first notice that being guided by reflection upon the idea of law is not incompatible with being guided by a basic rule of recognition. What it does exclude is the thought that the

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22 Might one object that, since Hart’s project is a purely descriptive one, he need not explain how the imposition of sanctions is to be justified? Such an objection would be misguided. Hart’s theory “is concerned with the clarification of the general framework of legal thought.” See HART, supra note 3, at iv. Hart would readily concede that this requires him to be able to explain how laws can intelligibly be invoked as a justification for the judicial decision, even if they do not in fact succeed in justifying the sanction. After all, it is on precisely this basis that Hart rejects Austin’s analysis of “legal obligation” in terms of the likelihood of suffering a sanction: one cannot intelligibly invoke the likelihood of suffering a sanction as a reason for imposing a sanction.

basic rule of recognition is an outer bounding limit on juridical thought, beyond which lie factual and moral questions, but no juridical questions.

In fact, we can only capture our settled understandings of the nature of judicial judgments (i.e. the understandings that (i) the judgment sets forth a justification of the decision, addressed amongst others to the litigants; and (ii) that, in that justification, the status of certain rules as law plays a central role) if we treat the judgment as assuming that the rule of recognition in question is the rule of recognition of a system of law. The rule of recognition can acquire an appropriate justificatory relevance only on the assumption that it grounds a system of law; and, in certain circumstances, this assumption could be rendered questionable and problematic.

Once we have seen this point we start to appreciate the extent to which the concept of “law” is not one that simply describes a familiar social phenomenon: the concept also plays an indispensable role within that phenomenon. Judges do not justify their decisions by reference to the rules that they accept for whatever reasons, or the rules that they consider to be wise or just: they justify their decisions by reference to the law, and the status of the relevant rules as law is regarded as essential to the justification of the decision. Similarly, legislators do not issue commands: they enact laws, and the fact that their enactments are law is regarded as essential to the claim that they make upon the citizen’s conduct. The practices of law are practices oriented towards an idea of law.

This is not to say, of course, that lawyers are constantly pondering on the idea of law. The daily reality of law is a matter of unreflective conformity structured by a range of settled and unquestioned assumptions: philosophical problems arise when we try to assemble these understandings into a coherent picture of law’s nature, as we occasionally need to do even to address the practical issues that the law confronts.

How then are we to proceed in investigating the idea of law? The philosophy of law is a battlefield where almost no ground seems uncontested. From what starting point, then, can our inquiry proceed?

In his Essay on Philosophical Method, Collingwood offered the following description of “a method repeatedly used throughout the history of philosophy”:

> To define a philosophical concept . . . it is necessary first to think of that concept as specifying itself in a form so rudimentary that anything less would fail to embody the concept at all. This will be the minimum specification of the concept, the lower end of the scale; and the first phase of the definition will consist in stating this. Later phases will modify this minimum definition by adding new determinations, each implied in what went before, but each introducing into it qualitative changes as well as additions and complications.24

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Collingwood described philosophical reflection as an activity that we are always “trying to bring into conformity with an idea of what it ought to be.” Something similar is true of law. For legal thought, like philosophical reflection, is also always “trying to bring itself into conformity with an idea of what it ought to be.” But a philosophy of law should not be a product of the utopian imagination: it should be a reconstruction of the ideas and conceptions structuring the form of association that we think of as a legal order. The trouble, of course, is that the ground is contested, and has probably been contested as long as there has been anything that we could recognize as legal thought. Law exists only in so far as a great many people share certain understandings and expectations. But which understandings are essential to the existence of law, and which are peripheral? Which understandings are soundly based and which are misguided products of intellectual confusion or wishful thinking? The ground having always been so hotly disputed, there seem to be no uncontested points from which an argument can proceed, at least if the argument aspires to pass beyond purely banal and unhelpful propositions. Collingwood’s observation offers us a possible procedure for addressing the problem. Can we begin by identifying a “minimum specification” of the concept of law, in the form of a set of conditions without which nothing could count as law at all? From such a minimum specification, can we proceed in some orderly and intellectually defensible way towards “later phases” of the concept, with their “qualitative changes as well as additions and complications”? The possibility is worth exploring, however unfashionable may be the philosophical viewpoint from which it springs.

7. From Minimum Conditions to Guiding Ideal

The philosophical trajectory described by Collingwood can be pursued from a starting point provided by Fuller. Fuller’s famous story of Rex, and his failed attempts to enact law, addresses the first stage of Collingwood’s method by identifying the minimum conditions that something must satisfy in order to count as an instance of law. Through the narrative, Fuller presents us with a series of bizarre fairy-tale examples, and invites us to draw clear conclusions about them. In effect he says to us: “If you encountered a system of governance that had no rules at all, you would not regard it as a legal system, would you? Similarly, what if you encountered a system where all the rules were retrospective? Or where they were all kept secret?” and so on. In this way Fuller identifies eight desiderata for law:

(1) there must be rules;
(2) which are published;
(3) prospective;
(4) possible to comply with;
(5) intelligible;
(6) free from contradiction;
(7) reasonably stable through time; and
(8) there must be congruence between the declared rules and the official action.

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25 Id. at 4.
Fuller takes these eight requirements to encompass the traditional rule of law requirement that force should be employed against the citizen only in response to the violation of a law. It is of great importance that one should notice the wholly uncontentious nature of the understandings that Fuller seeks to isolate and identify here. This is why his story has the character of a fairy tale. In the real world, we do not encounter systems where literally all of the rules are kept secret, or where all of the rules are purely retrospective, or where officials never act in accordance with the rules. Yet we nevertheless seem to have firm semantic intuitions concerning such fairy tale imaginings: we clearly would not regard them as instances of law. In this way Fuller seeks to rise above the faction-infested battleground of claims and counter claims concerning the propriety of labelling as law various evil or otherwise imperfect regimes. However, the stability of the starting point might at first seem to come at the price of sterility. For what could be the interest in establishing that we do have stable semantic intuitions regarding such unreal examples? Fuller’s theory becomes interesting when he proceeds to demonstrate that the eight desiderata (identified as minimum conditions), when taken collectively, can be regarded as a guiding ideal for legal thought: the ideal that we usually label “the rule of law.”

Much of Fuller’s book is taken up with showing how legal practices represent, as he puts it, a purposive activity, and how the overall coherence of the activity is revealed by grasping the way in which it serves the idea of compliance with the eight desiderata.

Fuller claimed that his eight requirements represent an “inner morality of law.” This claim has been much discussed and widely rejected. Hart’s critique of Fuller appeared to suggest that the moral value of compliance with the eight requirements is wholly contingent upon the law’s content, and that the eight requirements are more akin to precepts of efficiency than to moral standards. This criticism has been widely endorsed as correct.

In fact, the criticism is not correct. The eight requirements are not principles of efficacy, but (when taken together) represent a moral ideal for legal systems. Considerations of efficacy would, at best, provide a good reason to comply with the eight requirements to a limited extent. If we abstract from the content of governmental objectives, we must say that, beyond a certain point, compliance with the precepts would significantly restrain the ability of a government to pursue its objectives, rather than advance that ability. It is not uncommonly the case that some degree of compliance with moral precepts (such as principles of justice) will be capable of serving a variety of morally neutral or positively wicked goals, but this does not demonstrate that such moral precepts are really only morally neutral principles of efficacy. Nor does the

26 See Matthew Kramer, Objectivity and the Rule of Law 108-09 (Cambridge University Press 2007) (disputing the idea). I think, however, that Kramer misunderstands the import of Fuller’s observation that the ideal of perfect realisation of the eight desiderata “is not actually a useful target for guiding the impulse towards legality.” See Simmonds, supra note 2, at 145.

27 See Simmonds, supra note 2, at 69-76.

alleged compatibility with evil of the eight requirements demonstrate that they are of morally neutral character: for legal systems, as for people, there may be distinct moral virtues, and virtue in one respect may be compatible with lack of virtue in some other respect.

Nevertheless, it must be conceded that Fuller never really succeeded in giving a clear explanation of the moral status of his eight requirements. It is here that I feel my own work clarifies matters and contributes positively to the debate. It is wise to begin from claims that have traditionally been made for the virtue of the rule of law. Most commonly, those who have sought to extol the virtues of the rule of law have suggested that it is intrinsically connected with liberty. But the claim has tended to attract a curt dismissal from those legal positivists who wish to emphasise (in line with Hart’s critique of Fuller) the absence of any necessary connection between law and a value such as liberty. They have pointed out that the law may sometimes protect the liberty of the citizen, but may also restrict that liberty very severely: everything depends upon the content of the law, and upon the circumstances. Thus it is perfectly conceivable that someone living under a regime that scrupulously adheres to the rule of law might enjoy less liberty than some other person whose government violates the rule of law extensively.

It should be noticed, however, that this familiar argument assumes that liberty is a matter of the number or extent (and perhaps quality) of the options one has available: to have more options (or more extensive options, or perhaps better options) is to have more liberty; to have fewer options (or less extensive or worse options) is to have less liberty.30

But this well-established approach to the notion of liberty clearly fails to capture every aspect of the relevant value. For example, few will wish to deny that slavery is inherently violative of liberty. Only someone dogmatically committed to a theoretical agenda could wish to claim that the connection between slavery and lack of freedom is purely contingent and dependent upon all of the circumstances. Yet that is the logical consequence of saying that the notion of freedom is fully captured by the idea of “freedom as available options.” The reason is quite simple: a slave may conceivably, in certain circumstances, enjoy more options than a free man: consider a slave whose master gives him very few tasks to perform, by contrast with a free man who has many onerous duties as part of his work, or his family life, or his role as a citizen.

If we want to preserve our sense that slavery is inherently violative freedom we must look beyond “freedom as available options” and must acknowledge that there is another aspect to freedom. We may call it “freedom as independence from the power of another” and it can best be understood by reference to the contrast between the slave and the free man.

Whether the slave has many options available to him or very few, those options are all dependent upon the will of his master. In the case of the free man, by contrast, the options that he has, and the duties he

29 HART, supra note 3, at 207.

30 This summary description of the position obviously skates over a host of questions concerning, for example, the kinds of interferences that will prevent an option counting as being “available”.
bears, are never fully dependent upon the will of someone else. This is so, at least, to the extent that the free man lives under the rule of law.

8. **Freedom as Independence**

To the extent that we are governed by institutions approximating to full compliance with Fuller’s eight precepts, we enjoy a degree of freedom as independence that can be enjoyed in no other way. Of course, the law imposes duties upon us and, to the extent that it is effectively enforced, it restricts the options that are factually available to us, as well as normatively available. But to comply with Fuller’s eight precepts, the rules must be such that they are possible to comply with. It follows from this that the rules must leave me in possession of certain domains of optional conduct, however restricted those domains may be: even if my life is fully occupied with the performance of my legal duties, I must still have some choices left to me if the duties are to be performable at all (e.g. Should I whistle while performing my duty? Should I wear a blue tie?). Those available options are independent of the will of anyone else to an extent that is impossible, within a human community, in the absence of the institutions of law. The intrinsic moral value of law, therefore, consists in the way in which law secures a degree of freedom as independence that can exist in no other way. There are two different aspects to this, and they are perhaps worth distinguishing. Any human community will require some procedures or strategies for dealing with disputes, and it is unlikely that such arrangements can ever be wholly optional and voluntary: even when they are not supported by the use of coercive force they will be surrounded by informal mechanisms of social pressure and collective disapproval, so that those who refuse to submit to the dispute resolution process are conceived to have failed in their duties to the community. Where the rule of law does not obtain, these dispute resolution mechanisms subject one to the will of some or all of the other members of one’s community. Where the rule of law does obtain, however, one to that extent enjoys a realm that is free from any duty of submission to the wishes of others. This gives us one aspect of freedom as independence. But we may go further. Any government of any orderly society will need to place restrictions upon the use of violence by one citizen against another. Such restrictions will inevitably provide a perimeter of protection for those liberties that stem (as explained above) from the law’s performability. Hence, the rule of law provides a degree of protection for the individual, not only from the power of communal dispute resolution and other decision-making processes, but also from the actions of fellow citizens.

A variety of objections might be made to my argument at this point. Some of them merit more discussion than they can receive here, but I will nevertheless address them briefly at this point.

**A. The Will of the Lawmaker**

It might be said that my argument ignores the obvious fact that, within a legal system, the citizen’s options depend upon the will of the lawmaker. Indeed, one might see legal systems as achieving a

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31 Hart, Essays on Bentham, supra note 11, at 171-173.
particularly thorough subjection of the citizen’s options to the will of those who enact the law. The objection ignores the fact, however, that compliance with Fuller’s eight desiderata involves the rules being prospective not retrospective. Therefore, at any one point in time, my options will depend upon a law that is already in place, and that law will constrain the powers that the lawmaker, along with everyone else, has in relation to me. It might be said in response that the lawmaker could change the law for the next moment, so that my options are pretty insecure. But it must also be remembered that compliance with the eight desiderata requires that the rules should be reasonably stable through time: a lawmaker who constantly changes the law departs from the eight precepts and undermines freedom as independence to that extent.

B. The Will of Everyone
A slightly more subtle argument points out that the existence of a legal system consists in the adoption of certain expectations, understandings and intentions by a great many people (lawmakers, judges, other officials, citizens). If they were all, simultaneously, to abandon their current understandings, expectations and intentions, the law would cease to exist. Consequently, my “freedom as independence” is always fully dependent upon the will of others, since they could, if they so choose, take it away at a stroke. This argument fails for a quite obvious reason. My claim is not that the existence of a legal system renders one’s options wholly independent of the will of anyone else: such a situation can never obtain except for the type of pre-social natural man imagined by Rousseau. Rather, my claim is that, to the extent that the eight desiderata are satisfied, one enjoys a degree of freedom as independence that (within the context of a human society) can be enjoyed in no other way. This claim is not damaged at all by the objection.

C. “Freedom as Independence” Is Reducible to “Freedom as Available Options”
Here it could be argued that what I am calling “freedom as independence” is really just a matter of the probability or improbability of my being interfered with (and so having my options reduced) in the future. Such an argument has been offered, for example, against the “republican” conception of liberty defended by Philip Pettit and Quentin Skinner.32 Now it is true that my conception of “freedom as independence” is quite similar to the republican account developed by Pettit and Skinner. But I have deliberately avoided expressly associating my position with those views for two reasons. In the first place, Pettit and Skinner are inclined at times (quite frequently but not invariably) to conflate the dependence of a person’s options upon the will of another with that person’s vulnerability to future interference from another. Secondly, my account of “freedom as independence” is presented as an aspect of freedom, and an aspect that must be taken into account by any


33 See also ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY (Harvard University Press 2009) (explaining Kant’s position for another equally significant connections) [Hereinafter “RIPSTEIN”].
adequate account of the nature of freedom. To the extent that the standard liberal account of negative freedom ignores this aspect, it is deficient. But “freedom as independence” on my account need not be viewed as a self-standing rival to the liberal account. In endorsing my account of “freedom as independence” one need not follow the claim of Pettit and Skinner\(^\text{34}\) that, when it serves the interests of the governed, the law can reduce people’s options without reducing their freedom. One could equally say that, when the law reduces my options, it thereby reduces one aspect of my freedom, even though (to the extent that it satisfies the eight desiderata) it may also respect another aspect of my freedom. Liberals can therefore regard my position as a friendly supplement to their position rather than a rival, thereby reducing the necessity for them to oppose it. But, more fundamentally, I most certainly do not conflate the status of “freedom as independence” with a low level of vulnerability to future interference, as Pettit and Skinner are sometimes inclined to do. On my account, a slave is still a slave even if we can be quite sure that his master will never interfere with him.\(^\text{35}\)

**D. Too Thin?**

People sometimes find my position unsatisfactory in so far as the moral value to which I am connecting law seems very thin and impoverished. Certainly “freedom as independence” is not everything. Some would say it is not much. But they would be mistaken. This aspect of freedom is real and important, and it grounds the intrinsic value of law. Moreover, as we shall see in due course, a full and well-grounded concern for freedom as independence leads us into a concern for justice and principle that may go some way towards satisfying the critic’s craving for a richer and more sustaining value at the heart of juridical thought.

**E. Private Threats to Freedom as Independence?**

A more interesting objection to my argument might point out that, even within a sophisticated legal system that complies with the eight desiderata to a very high degree, I may find my options depending upon private institutions and the will of fellow citizens. I may, for example, enter into contracts, which have that effect. This is, of course, true. But notice once again that my argument is not that the existence of law gives one perfect and absolute freedom as independence (assuming for the moment that such a concept of perfection is fully intelligible): my argument is that, to the extent that the eight desiderata are realised, one enjoys a degree of freedom as independence that can be enjoyed in no other way. Although unsound as an objection, however, the argument points us to an interesting feature of the rule of law, namely its implications for the regulation of private power. Fuller was himself very concerned with the need to think about private power and private institutions in terms of the rule of law, and his insights here


\(^{35}\) I am sure that Pettit and Skinner would wish to echo this claim; my point is simply that they sometimes appear to lose sight of it, and as a result, they seem to render themselves vulnerable to the line of attack developed by Carter and echoed by Kramer.
have been taken up by others.\textsuperscript{36} Indeed, the strong association between “freedom as independence” and the need for an appropriate structure of private rights is a prominent theme in Kant’s philosophy of law.\textsuperscript{37}

9. The Ideality of Law

Since the judicial decision must be justified by reference to the law, and since (as we have seen) the derivability of a rule from the rule of recognition does not guarantee that the rule is law, we cannot treat the judge’s duty as fundamentally a duty to follow the rule of recognition. As Fuller himself emphasised, the fundamental duty of the judge is one of “fidelity to law.” We can understand this as “fidelity to the idea of law.” The notion of fidelity to law provides us with a vantage point from which Hart’s analysis of penumbral cases can effectively be challenged.

Suppose that the law consist of a finite body of rules derived from the rule of recognition. If such rules are exhaustive of the law, the law will, as Hart points out, give rise to “penumbral cases” where there is no determinate legal answer. But might the duty of fidelity to the idea of law have implications for the legal resolution of such supposedly penumbral cases?

The idea of law is the idea of that set of conditions within which citizens can enjoy a degree of freedom as independence. What then is the best that a judge can do to sustain such conditions in cases where the established rules yield no straightforward answer? The answer is: the judge can try to decide the case justly. To decide the case according to principles of justice is to decide according to standards that are independent of the judge’s will or preference (to doubt that this is possible is to say that there is no such thing as justice).

The distinction between the core case (where the rule can be straightforwardly applied) and the penumbral case (where it cannot) is a continuous distinction. That is to say, there is no clear boundary between the core and the penumbra. For that reason, the judge cannot adopt a discontinuous strategy of adjudication that requires core cases to be decided one way (by reference to the rules) and penumbral cases to be decided differently (by reference to justice). The judge must adopt a strategy of adjudication that addresses all cases in the same way. It follows that the duty of fidelity to law requires the judge, in every case, to construe the law (so far as possible) as just. The texts of the law must be read as texts concerning justice, as if they were intended to put forward a series of propositions concerning justice.

Thus adjudicative judgment must always depend upon the judge’s understanding of justice, constrained by the texts that the judge must interpret. This captures many of the features of legal reasoning that are highlighted in Dworkin’s theory of law, but without some of that theory’s problematic features, such as the need to invoke a special value of “integrity.” The present argument requires only the familiar values of “legality” and “justice.”

There are other features of the judge’s duty of fidelity to the idea of law that point in a similar direction. For example, Fuller’s requirement that the law should exhibit reasonable stability through time suggests

\textsuperscript{36}See, e.g., PHILIP SELZNICK ET AL., LAW, SOCIETY AND INDUSTRIAL JUSTICE (Russell Sage Foundation 1969).

\textsuperscript{37}See RIPSTEIN, supra note 33.
that, even when specific rules and doctrines change, they should so far as possible respect more fundamental principles that can be thought to underpin the law as a whole. The requirement that the law should be intelligible suggests that it should, so far as possible, reflect moral and other understandings that will be shared by the populace as a whole. And the requirement that the law should be performable suggests that the body of law should amount to a scheme of rules that is compatible with a tolerable communal existence where the most basic human needs are satisfied. Thus, what might at first appear to be the disorderly ragbag of considerations that inform the interpretation and development of law can nevertheless be best understood as guided by the single idea of law. There is no point at which the judge’s duty of fidelity to law can be said to have exhausted its implications.

10. Conclusion

Underlying the ancient philosophical debate concerning law are three problems. These are not the “three recurring issues” identified by Hart, for Hart fails clearly to identify a philosophical problem here, confusing the real issues with the search for a description of the resemblances and differences between different social phenomena. In spite of his preliminary misidentification of the problem, however, Hart’s theory can nevertheless be reconstructed as an attempt to resolve the three key difficulties that I have identified.

Although subtle and ingenious, Hart’s analysis fails. His discussion of the internal point of view, for example, explains how officials might have self-interested reasons for following the rules, but is unable to explain how law can intelligibly be invoked as a justification for the sanction. Yet this latter question is at the centre of philosophical inquiry into law’s nature: Hart himself tacitly acknowledges this when he rejects Austin’s analysis of the notion of “legal obligation” for a similar failure to explain how such obligations can intelligibly be invoked as a justification for the sanction.

To arrive at a better analysis, we need to reject Hart’s account of the rule of recognition and to grasp the extent to which legal thought is reflexive: the task of determining the content of law is ultimately guided, not by a basic rule of recognition (such a rule may play a part, but is not fundamental), but by reflection upon the nature of law itself.

Philosophical inquiry into law’s nature should be understood as an attempt to deepen our understanding of the guiding idea. To this end we can take as our starting point the minimum conditions identified by Fuller, conditions which point towards the ideal of freedom as independence. Law represents the only set of conditions within which people can enjoy, within the context of a human society, a degree of freedom as independence.

38 N.E. Simmonds, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 270-74 (Sweet & Maxwell, 3rd ed. 2008).


The value is a distinct, and distinctly precious, one, and its realisation gives to the law its justificatory force. Practices constitute law to the extent that they realise the necessary conditions. The ideality of law is to be explained by reference to the intimate connections between “fidelity to law” and the idea of justice. We have one solution to three problems.
Philosophy has long been part of the public life of human societies: one need only mention Socrates in Greece or Confucius in China, or, to leap forward a couple of thousand years, Rousseau in France and Hegel in Germany to recognize that philosophers can be taken very seriously by the politicians, the journalists, the ordinary citizens of their eras.

But the idea of “public philosophy” as I will be discussing it here, is an artefact of the professionalization of the discipline over the past two hundred years, with the rise of research universities and, especially in the Anglophone world, after World War II, the rise of a professional class of philosophers—”professional” in the precise sense that they earn their living by teaching and writing about philosophy, paid either by private or mostly public universities to do so. There are now numerous organizations that promote “public philosophy,” that seeks to make philosophy “relevant” and “significant” to the broader culture. These locutions are themselves striking, since philosophy is relevant and significant to anyone—including presumably members of the “public”—who want to know what is true or to know what they do and do not know, but that is obviously not what is meant by “public philosophy.” Rather, the special purview of so-called “public philosophy” is to contribute philosophical insight or knowledge or skill to questions of moral and political urgency in the community in which it is located. So conceived, public philosophy is an artefact of what is usually called the “neoliberal” way of thinking that has dominated the capitalist world completely since the 1980s, in which every human activity justifies itself by its contribution to something for which there is demand in the marketplace. The most extreme form of this pathology in a country with a formerly preeminent but now declining university system is England, where philosophers are asked to adduce evidence of their “impact” in order to justify the funding of their work.¹“Impact” here does not mean influencing how other scholars or students think about issues, but rather such ephemera as appearing on television or having one’s research discussed in a newspaper.

¹ This is not the first time, of course, since the birth of the research universities that philosophers have had to justify their place in it. But during prior iterations, the question was an intellectually and epistemically serious one. See Frederick Beiser, After Hegel: German Philosophy, 1840–1900 18 (2014) (regarding German academia a bit before mid-19th-century: “To receive funding, a faculty had to demonstrate that its discipline was legitimate, that it had its own ‘scientific’ methods, and that it occupied a necessary place in the academic division of labor.”) Demonstrating the existence of a Wissenschaft, of reliable and rigorous methods for ascertaining knowledge, is quite a bit different than adducing evidence that The Daily Mail noted one’s research.
The idea of “public philosophy” so conceived—that is, philosophy as contributing to questions of moral and political urgency in the community in which it is located—is paradoxical, however, for reasons that I propose to discuss. The first puzzle may be simply put: normative philosophy has no well-established substantive conclusions about the right and the good—literally, none!—that could possibly dictate to the polity at large what should be done. All biologists agree that the theory of evolution by natural selection is crucial to understanding the diversity of life on the planet; all physicists agree that Newtonian mechanics gives a correct description of the movement of mid-size physical objects; all moral and political philosophers agree about nothing, except perhaps the very modest claim that all human beings have equal moral standing. And they do not even really agree about that, since some major philosophers, like Nietzsche, deny it; others deny that equality of moral standing attaches to species membership at all; and all the rest differ so dramatically on what is required for or because of “equal moral standing” that the apparent agreement is wholly illusory (consider: for Kantians, equal moral standing requires something like rational personhood; for some utilitarians, something like sentence; for Marxists, something like needs). Moral and political philosophers can not agree about whether the right has priority over the good or vice versa; they can not agree about what the criterion of human well-being is; they can not agree about the correct formulation of Kant’s categorical imperative; they can not agree whether agents in the Rawlsian original position would choose deontological or utilitarian principles; and so on.

Agreement may not secure the reliability of the claims agreed upon, of course, but such agreement does seem a prerequisite for successful influence on questions of public interest. Consider a pseudo-science like economics, which in the United States has had considerable influence on public policy. That economists could present fairly unified fronts for significant periods of time—first, under the Keynesian umbrella, subsequently under the “Chicago School” umbrella—no doubt lent credence to their claimed epistemic authority. (Even there, one suspects that non-intellectual factors, such as the extent to which economic theory tracked the interests of ruling elites, played a decisive role in the triumph of various economic orthodoxies at the level of policy.) In the United States, at least, that apparent authority may now be ending, due partly to the very public nature of the disagreements—a result primarily of the prominent polemics of the Neo-Keynsian Paul Krugman—and partly to what is increasingly apparent, namely, that macroeconomists, in either camp, have almost no ability to predict any significant economic events. Putative sciences with no significant predictive power eventually lose credibility.

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3 See Derek Parfit, *On What Matters* (2011) (A leading contemporary moral philosopher, does think such agreement is essential to secure the objective truth of moral conclusions).

But let us return to philosophy. No philosopher can even pretend to enter the fray of public debate by reporting, “Philosophers have discovered that rule utilitarianism is the only correct way to assess questions of public policy.” Nor can any philosopher intervene in a dispute by noting that “such a policy would be unjust given the Rawlsian difference principle.” The “difference principle”—the idea that economic rewards should be distributed in such a way as to maximize the position of the economically worst-off in a society—is not a result or a discovery, but an intuition, the formalization of some vague feelings about what justice involves. If a society ignores the difference principle—as essentially all do—there is no discernible consequence. If someone tries to ignore the laws of Newtonian mechanics, the consequences are immediate!

In short, the first paradox of public philosophy is that philosophers enter into moral and political debate purporting to offer some kind of expertise, but the expertise they offer can not consist in any credible claim to know what is good, right, valuable, or any other substantive normative proposition that might be decisive in practical affairs.

That brings us to the second paradox of public philosophy. If it is not substantive normative knowledge that philosophers bring to debate, then perhaps it is a method or way of thinking about contested normative questions that they offer. And this strikes me as a far more plausible suggestion. Starting with certain normative intuitions, public philosophers work out their entailments, demonstrating claims of the form, “If you believe X, then you ought to believe Y,” and, “If you believe Y, you should not do Z.” What philosophers—at least those in the broadly Socratic traditions—are good at is parsing arguments, clarifying the concepts at play in a debate, teasing out the dialectical entailments of suppositions and claims, and so on: Socratic philosophers are, in short, purveyors of what I will call “discursive hygiene.”

Although this constitutes a detour from my main claims, I want to emphasize that this conception of moral and political philosophers as purveyors of discursive hygiene is compatible with the emotivist theory of normative discourse defended by A.J. Ayer and Charles Stevenson in the middle of the 20th-century, despite the fact that their meta-ethical views tend to be reviled today by those who think they somehow distracted philosophers from important normative questions for a long period of time.5 Recall that for Stevenson ethical judgments express, roughly, an attitude like, “I disapprove of X, do so as well.” So they express pro- and con- (favorable and unfavorable) attitudes, plus a meta-attitude about the attitudes others should have. Stevenson thought, correctly I believe, that the emotive meaning of ethical terms was central to understanding their centrality to social life. Ethical disagreements are at bottom a function of disagreement in attitudes, rather than disagreements in beliefs (here he follows Ayer): “ethical argument usually terminates when disagreement in attitude terminates, even though a certain amount of

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5 The irony, of course, is that those philosophers who did address “normative” questions never addressed important ones! See Brian Leiter, Why Marxism Still Does Not Need Normative Theory, 37(2) Analyse und Kritik 23-50 (2015) (for the discussion of “bourgeois practical philosophy”) [Hereinafter “Leiter”].
disagreement in belief remains.” (He thinks this counts in favor of explaining what we observe about moral disagreements, namely, that they often end when we secure agreement in belief, but seem interminable when they involve disagreements in attitudes.) But this does not mean that all ethical disagreement is just brute clash of attitudes. As Stevenson writes, “Since attitudes are often functions of beliefs, an agreement in belief may lead people, as a matter of psychological fact, to agree in attitude” (cf. there is “the psychological fact that altered beliefs may cause altered attitudes”). Notice, though, that on Stevenson’s account, the connection between particular facts and our attitudes is just a contingent psychological/ causal fact: it is just a psychological fact about many creatures like us that if our beliefs change, our attitudes often change too. Philippa Foot, a famous critic of emotivism, emphasized this point: on Stevenson’s view, she complains, “there are no rules validating particular inferences [from beliefs to evaluative attitudes], but only causal connexions between the beliefs and attitudes concerned.”

Was Stevenson wrong in thinking that normative theory operates mainly by exploiting the fact that creatures like us—or at least some of those creatures—are psychologically disposed to be moved by certain kinds of inferential connections between our attitudes or between our attitudes and our beliefs? Around the same time as Foot levelled her critiques of Stevenson’s emotivism, Richard Brandt, in his 1959 textbook Ethical Theory (a really crucial book for anyone who wants to understand the sociology of Anglophone moral theory in the last half-century), offered a similar challenge. Brandt asks us to imagine the case of Mr. A and Mr. B who disagree about whether colleges should accept direct grants of money from the government, Mr. A holding a favorable attitude, Mr. B an unfavorable attitude. Brandt writes:

“We do not consider an argument relevant or well-taken just because it is successful in influencing attitudes. If Mr. B. is a legislator and Mr. A wants to influence his vote, there are various “arguments” he might use that no one would think ethically relevant. Mr. A might say: “Your alma mater will surely go bankrupt unless this bill is passed.” Or, perhaps better, he might say, “Your daughter will be admitted to ____ College, if you vote for this bill; otherwise she won’t be.” These arguments may be of wonderful effect in changing Mr. B’s attitudes, but they are not ethically relevant. On the contrary, suppose Mr. A argues about the importance of having independent educational institutions, where absolutely uncensored thinking and discussion can occur. In this case, Mr. A will have argued relevantly, irrespective of whether Mr. B is interested.”

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7 Id.


Unnoted by Brandt is that the judgment that an attitude-altering argument is not “ethically relevant” is itself an evaluative judgment, so the expression of another attitude, according to the emotivist. So what Brandt’s example really illustrates is that we also have pro- and con- attitudes about the kinds of arguments that influence attitudes, which is hardly surprising. In other words, sometimes we not only want someone to change their attitude, we want them to do so for a non-self-interested reason, because we have an unfavorable attitude towards self-interested considerations and a favorable attitude towards those we denominate “ethical” considerations.11 I believe that Stevenson had it exactly right. Changes in belief do influence changes in attitude, but only as a contingent, psychological fact: this includes changes in belief about the logical or inferential relations between beliefs or between beliefs and attitudes. This brings us to the second paradox of public philosophy. Although philosophers can contribute no substantive knowledge about the good and the right, they can contribute discursive hygiene. But discursive hygiene plays almost no role in public life, and an only erratic, and highly contingent, role in how people form beliefs about matters of moral and political urgency. Both points deserve notice, but they are distinct.

The absence of discursive hygiene in public life should be familiar to any reflective observer. Public debate, including in democracies, is awash in fallacious inferences, non-sequiturs, and arguments based on obviously false premises. I shall give just one example, chosen only because it is recent and I know a lot about it because I was involved in the public debate. The University of Illinois at Urbana-Champaign, a major public research university in my home state in America, offered a tenured position on its faculty to a man named Steven Salaita. Dr. Salaita writes about colonialism and the experiences of colonized peoples, including the Palestinians in the Middle East. (Salaita himself is a Palestinian-American.) He was offered a tenured position at the University of Illinois in October 2013, accepted it fairly quickly, and the University began making arrangements for his arrival and for his teaching to start in late August of 2014. Dr. Salaita is also an active user of social media, including Twitter. In response to the Israeli attack on Gaza in the spring and summer of 2014, Dr. Salaita began “tweeting” vigorous moral outrage at the slaughter of children and civilians, and at the apologists for these crimes, and began expressing himself in increasingly vulgar and hostile terms. I will give just one example. Dr. Salaita re-posted on his Twitter page a comment someone else made about an American journalist named Jeffrey Goldberg, who is an utterly shameless and morally bankrupt apologist for any crimes committed by Israel. Here is the statement that Dr. Salaita “re-tweeted”:

Jeffrey Goldberg’s story should have ended at the pointy end of a shiv.

A “shiv,” for those who do not know, is a sharp knife, like the kind that might also be known as a “bayonet” attached to a rifle. The most natural reading of this tweet—contrary to some defenders of Dr.

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11 The point extends to our epistemic attitudes on my view, though I do not discuss that here. See Brian Leiter, **Moralities are a Sign-Language of the Affects**, 30 SOC. PHIL. & POL’Y 237-258, 253-255 (2013).
Salaita—was that he wished Goldberg dead. That’s not a nice sentiment, but it is not illegal in the U.S. to express such a wish on your Twitter account, and far more illustrious writers than Dr. Salaita have made the same point. We need only recall Heinrich Heine, one of the great German writers of the 19th-century, who famously expressed the wish that “if God wants to make my happiness complete, he will grant me the joy of seeing some six or seven of my enemies hanging from [the] trees” in front of his cottage. It is easy enough to understand how someone who believes his people are the victims of violent oppression might wish apologists for this oppression dead.

We only know about this “tweet” because, in the United States, there are a large number of so-called “conservative”—mainly reactionary and crypto-fascist—websites and media outlets devoted to monitoring and harassing university professors who deviate from what they regard as “acceptable” opinion. These websites began publicizing other examples of offensive, sometimes vulgar “tweets” by Dr. Salaita in July of this year. Soon alumni and wealthy donors to the University of Illinois began complaining to the University about this prospective hire. Although the tenured appointment had been approved by the Department, by the Dean, and by the Provost a year ago, the Chancellor on August 1 of this year notified Dr. Salaita she would not forward the appointment to the Board of Trustees for final approval (ordinarily pro forma in every prior case).

From a legal point of view, the issues here are fairly clear-cut. In the United States, it is illegal for a public university to deny employment to someone because of their political point of view: that violates their constitutional right to free speech and freedom of association. Citizens also have a well-established constitutional right in the United States to express their political views in vulgar and offensive terms. From a constitutional point of view, these claims are banal and familiar to lawyers and scholars. Yet the Chairman of the University’s Board of Trustees, in justifying the firing of Dr. Salaita, declared that “there can be no place” for “disrespectful and demeaning speech” “in our democracy, and therefore, there will be no place for it in our university.” As a factual matter, there is quite a lot of disrespectful and demeaning speech in American democracy, and, more importantly, the University of Illinois, as a public university, and thus subject to constitutional limits, must permit such speech, at least to the extent it takes place outside the classroom. (Inside the classroom, it likely would disrupt the university’s pedagogical mission, and so could be regulated, but that was not at issue here.) The Chairman went further, saying that he believes only in “free speech tempered in respect for human rights.” There are some countries where this statement would make sense: in Germany, for example, human dignity is the fundamental constitutional value, which can trump freedom of expression. But American constitutional law is the opposite of

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12 Heinrich Heine, Gedanken und Einfällein SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 21 59-145 (1930).

13 Salaita v. Kennedy et. al., 1:15-cv-00924, No. 59 (N.D.Ill. 2015). (A federal court in the United States has since rejected an attempt by the University of Illinois to dismiss Prof. Salaita’s lawsuit, affirming that he clearly had valid legal claims. The University subsequently paid out nearly a million dollars to settle his claim.)
German: there is no doctrine of “free speech tempered in respect for human rights,” what is called in other jurisdictions “hate speech” is fully protected under American law. Anyone interested in the prospects of public philosophy should think hard about this case: we have a public official, the Chairman of the Board of Trustees of a major public university in the United States, who is completely ignorant of the basic facts of American constitutional law, making assertions that are both false and, if implemented, wholly illegal. Can one imagine the travesty that would result were there to be subtle issues of philosophical argumentation at stake?

Alas, this public stupidity was not anomalous in this affair. Chicago’s leading newspaper, the Chicago Tribune, defended the decision14 to fire Salaita on the grounds that his critical comments constituted “hate speech.” I want to emphasize that Chicago is the third largest city in the United States, and this newspaper serves a community of eight million people: after The New York Times, the Tribune is one of the three or four most significant newspapers in my country. Yet nowhere does the editorial defending the obviously illegal firing of Salaita even mention that “hate speech” is constitutionally protected in the United States. The editorial does not even mention that under most “hate speech” legislation in other countries that I have seen, nothing Salaita said would qualify.

I must underline that I am here talking about clear points of law, not hard philosophical questions. Yet the editors of a major American newspaper and the public official chairing a major American University’s Board of Trustees do not even understand simple legal points, and so make claims and arguments that are false and fallacious. I wish this problem were only confined to the United States, but I am sure I do not need to persuade members of this audience that it is, sadly, not.15 So what hope is there for public philosophy—for the discursive hygiene that philosophers can offer—in a world like this?

That discursive hygiene should be almost wholly absent from public debate is not surprising given the psychological evidence that people’s beliefs about matters of moral and political urgency—and, perhaps, more important, what they do based on those beliefs—are only slightly influenced by a regime of discursive hygiene; instead, their emotional and affective responses mostly determine their moral attitudes. Consider the psychologist Jonathan Haidt’s famous work on the “social intuitionist” model of moral judgment,16 according to which in most ordinary situations, moral judgments are produced by emotional or affective responses, the reasons adduced in their support being post-hoc: they do not


15 See e.g., Pankaj Mishra, Modi’s Idea of India, INT’L. N. Y. TIMES, Oct. 25-26, 2014 6-7 (which discusses the outrageous historical fabrications and misunderstandings common among the Hindu nationalists, who claim Modi as their leader).

explain the judgment, as evidenced by the resilience of the judgment even in the face of the defeat of the proffered reasons. Thus, in one famous case, Haidt describes to experimental subjects the case of a brother and sister who decide, after discussion, to experiment with incestuous sex. All the experimental subject thinks this is wrong, but the scenario, as described by Haidt, rules out all the reasons for thinking it wrong: the brother and sister only do it once, they do it voluntarily and are happy with the experiment, they use birth control to insure no pregnancy results, no one knows what they did, and so on. But people’s visceral reaction remains powerful and unshakeable, even when the reasons they give for their judgment are defeated by the facts of the hypothetical. In the realm of ordinary moral judgment, emotion trumps reason.

We also know from work in empirical psychology that individuals “with selective deficits in emotional processing” due to disease or injury to the brain render different moral judgments about hypothetical situation like the Trolley cases, than most emotionally normal subjects to hypothetical situations, suggesting that the emotional responses are the real causes of the moral judgments. Psychologist and philosopher Joshua Greene has argued that emotional responses loom larger in deontological than consequentialist moral judgments, the latter demanding more “controlled cognition,” but in more recent work even Greene has acknowledged that “affect [or emotion] supplies the primary motivation to view harm as a bad thing” in the first place, so that even consequentialist reasoning has “an affective basis.”

More precisely, according to Greene et al. “affect supplies the primary motivation to regard harm as bad. Once this primary motivation is supplied, reasoning proceeds in a currency-like manner (“currency emotions are designed to participate in the process of practical reasoning”). “[A]larm-bell emotions are designed to circumvent reasoning” and, arguably, this is “the origin of the welfare principle”.

In a recent review of the empirical literature, Timothy Schroeder, Adina Roskies and Shaun Nichols found that the view they dub “sentimentalism”—namely, the view that “the emotions typically play a key causal role in motivating moral behavior”—is well-supported by the “evidence from psychology and

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19 Cushman et. al., 54 (2010).

20 Id. at 62.

21 Id. at 63.

22 Id. at 62, 63.

neuroscience”\textsuperscript{24} and that while “motivation derived [exclusively] from higher cognitive centres independently of desire is possible… the only known model of it is pathological” involving Tourette syndrome.\textsuperscript{25} Such empirical findings do not rule out the possibility that moral judgments can be influenced by what I have been calling discursive hygiene, but they certainly explain why so much of public discourse is manifestly irrational and emotion-driven.

But the research on the role of irrational emotional responses to moral questions is just the tip of the iceberg. The real problem, of course, is that prejudice and bias are dominant forces in human life. What I will call Tribalism—the propensity of creatures like us to identify with those “like themselves,” and to view others as unacceptably different, deficient, depraved, and perhaps dangerous—\textsuperscript{26} is, as any realistic appraisal of human affairs will reveal, the dominant force in public life. Tribalism—whether it is Irish Catholics killing Irish Protestants, or Sunni Muslims terrorizing Shia Muslims, or working class American whites hating working class American blacks—is the curse of our species, against which discursive hygiene is the feeblest of weapons. As Nietzsche observed, “Nothing is easier to wipe out than a dialectical effect” (TI II: 6), and he was only thinking of Socrates’s argumentative harassment of the rich youth of Athens. Given that Tribalist prejudices engage a range of powerful emotions—pride, self-respect, resentment, and others—how can discursive hygiene make an impact?

It may be said that Tribalism’s terrain has receded, especially in the last two hundred years, and that certainly seems to be true in various parts of the world. But we may reasonably ask what role discursive hygiene actually played in this process? Consider that the post-World War II consensus that emerged in many democracies about the importance of “universal human rights” only emerged after the ghastly slaughters that resulted from the extreme Tribalism of German and Japanese fascists and racists. Argument played little or no role; emotional revulsion at barbarity did. Yet Tribalist loyalties and prejudices remain ferocious, in America, in Iraq, in Israel, in India, in Pakistan and elsewhere. The great cosmopolitan ideal of the 19\textsuperscript{th}-century, famously expressed by Karl Marx, was that, “Human emancipation will only be complete when the real, individual man has…in his everyday life, in his work, and in his relationships…become a species-being [\textit{Gattungswesen}],”\textsuperscript{27} that Marxian ideal of human beings who recognize their social and existential interdependence in producing the conditions of their existence \textit{qua} human beings, but who no longer identify as simply the self-interested members of their tribes. That Marxian ideal remains an aspiration, even as some tribalist loyalties have receded over the last century.

\textsuperscript{24} Id. at 98.

\textsuperscript{25} Id. at 94.

\textsuperscript{26} See DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE DEMEAN, ENSLAVE, AND EXTERMINATE OTHERS(2011) (For a striking catalogue of the extreme version of this phenomenon).

\textsuperscript{27} KARL MARX, ON THE JEWISH QUESTION THE MARX-ENGELS READER (R.Tucker ed. 2\textsuperscript{nd} ed. 1978) 46.
The key point, however, is that we philosophers must recognize that moral change depends fundamentally on the emotional attitudes of people, and that these attitudes tend in a strongly Tribalist direction. And the most plausible explanations for the evolution of such attitudes do not, alas, assign much role to discursive hygiene. Consider selectionist explanations, which are all the rage these days in philosophy and the social sciences. These explanations appeal to evolution by natural selection, as opposed to all the other evolutionary mechanisms (e.g., genetic hitchhiking or genetic drift) that affect the evolution of species. Such explanations have serious limitations, but they do help explain the persistence of tribalist tendencies. First, these explanations concern only the evolutionary explanation of altruism, that is, concern for others, a kind of concern that can, of course, be far more tepid than considering the “other” to be a full-fledged member of the non-tribal moral community, whose suffering, for example, has as much moral salience as the suffering of anyone else. Second, the only well-confirmed and generally accepted evolutionary hypothesis in the literature—deriving from the work of biologist W.D. Hamilton— involves altruistic concern for kin, that is, for organisms that share some of the genetic make-up of the altruist. From a selectionist point of view, so the Hamiltonian argument goes, altruistic concern for kin can be highly effective in passing on genetic material to the next generation as long as that concern is directed towards kin, such as sisters or cousins or aunts who have some of the same genetic material. Thus, natural selection will select for a genetic predisposition to nurture and sustain kin, since they too can pass the genetic inheritance on. That, of course, is a far cry from viewing non-kin, indeed utter strangers, regardless of race or religion or tribe, as entitled to basic moral consideration, but it is certainly consistent with the Tribalism we observe. Third, even the more ambitious selectionist arguments for “group selectionism,” associated with Elliott Sober and David Sloan Wilson, would still fail to explain the evolution of moral sensibilities beyond tribalist ones, since, at best, these arguments tell us why individuals might develop altruistic concern for members of their group who are not kin; they do not explain why human communities might come to adopt non-tribalist moral ideals.

Doubts about the prospects of discursive hygiene are strikingly illustrated by considering the case of Peter Singer, undoubtedly the most successful “public philosopher” in the Anglophone world in recent years, though in a somewhat schizophrenic way: he is lauded for his defense of the rights of non-human animals, but also denounced (indeed, sometimes banned from speaking—in Germany, for example) for

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29 See, e.g., Brian Leiter & Michael Weisberg, Why Evolutionary Biology is (so far) Irrelevant to Legal Regulation, 29 Law & Phil. 31-74 (2010).


his willingness to approve of the killing of defective human beings. Singer is, however, a paragon of consistent discursive hygiene. He has argued, on the one hand, that our treatment of non-human animals is morally indefensible, since the suffering of a sentient creature is what is morally salient, not the species of the sufferer. Yet, on the other hand, he has argued that it can be morally justifiable to kill human infants afflicted with various kinds of cognitive and physical defects, since to allow them to live would, over the long term, produce more suffering than happiness. If one thought infanticide was morally abhorrent—as a matter of brute moral attitude—then one might take Singer’s position as a simple reduction of the idea that suffering per se is the only thing that is morally relevant, since it leads to an absurd and heinous conclusion. Singer has no actual argument against such a response, since his entire position rests simply on an equally brute, and unexplained, emotional attitude, namely, that suffering per se is abhorrent. But if the consequence of believing that suffering per se (regardless of species) is the only thing that is morally salient leads to the conclusion that it is permissible to kill human babies with defects, it is equally reasonable to take that to show that species membership (namely, being human) is morally salient, since it explains why killing human babies is wrong, even when their cognitive and physical defects will impose burdens on others. That this rather obvious point is not much acknowledged in the philosophical literature should make even philosophers wonder what role discursive rationality as opposed to other forces are playing in their arguments.

From a serious philosophical point of view, of course, it should hardly be surprising that it is not rationally obligatory to think the suffering of non-human animals is on a par with that of humans. More general lessons of twentieth-century philosophy, I believe, show that no belief about any subject-matter is rationally obligatory for all agents regardless of their ends. First, from the famous Duhem-Quine thesis, about the under-determination of scientific theories by evidence, we know that there are not even any scientific hypotheses that are rationally obligatory, in the sense of required by logic and evidence. This is because any recalcitrant evidence elicited in a test of an hypothesis is compatible with the hypothesis as long as we are willing to give up the background assumptions such a test requires. In choosing among competing hypotheses and background assumptions, we must always fall back on non-rational considerations, such as theoretical simplicity, methodological conservatism, and consilience. Second, unless there were a plausible substantive conception of rationality (there does not appear to be one, alas), then rationality itself is instrumental, imposing normative constraints only on the means chosen to

32 There are nuances of Singer’s views I am ignoring here: e.g., he talks in terms of desire-satisfaction, rather than pleasure and pain, though this comes to the same thing in the case of non-human animals. Singer also thinks sapience can be morally salient, insofar as it affects the experience of pleasure and pain (or the satisfaction of desires).

33 He sometimes derides responses like this as failures to follow through a principled and rational argument, but such responses are obviously question-begging.

34 Named after French chemist Pierre Duhem and American philosopher W.V.O. Quine.

realize our ends, whatever they may happen to be. Thus, even norms for belief are hostage to ultimate ends, and so particular beliefs are “irrational” only relative to the believer’s ends. Neither Singer nor anyone else can show that one is rationally required to rule out ends (like forbidding infanticide) which require as a matter of instrumental reasoning the repudiation of the moral salience of suffering without regard to species.

Given our general epistemological predicament—namely, that no belief is rationally obligatory—it becomes even more interesting to ask what role discursive hygiene can play in public life? Even Peter Singer has acknowledged, that one of the most influential parts of his 1975 book *Animal Liberation,* was not the Benthamite argument mentioned already, but rather the emotionally evocative description of factory-farming practices in Chapter 3 of his book. These descriptions evoked the suffering of sentient creatures, and so elicited feelings of compassion from readers quite effectively. But from Singer’s perspective, the moral salience of suffering also entails the moral permissibility of infanticide, and it is easy enough to see that even a rather discreet description of infanticide factories or hospices (call them what you want) would immediately elicit a very different set of moral intuitions and feelings. Clearly our emotional responses to vivid descriptions of factory-farmed chickens and the painless killing of defective human babies are not going to yield a rational verdict about the moral propriety of either practice.

So if Tribalism and emotion dominate most moral thinking in the public sphere, should we simply not bother with “public philosophy”? That is not, in fact, the skeptical conclusion I draw and it is important to emphasize why. First, of course, some of us, both citizens and philosophers, want to try to reason our way to sound views of moral and political questions of public significance, despite the irrational and Tribalist tendencies of most public discourse. That may effectively render “public philosophy” private, defeating its originally neoliberal rationalization: but perhaps that needs to be acknowledged. The primary reason for trying to figure out what is right and wrong in public affairs is to figure out what is right and wrong (assuming there might be facts of the matter about this), not necessarily to influence public policy. Second, let us also remember that we do not understand well the conditions under which discursive hygiene matters to public policy over the long haul, and that is an additional reason for philosophers to continue trying to cleanse public debate and reasoning of its fallacies and non-sequiturs: discursive

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39 The anti-abortion forces in the United States have always employed a Singerian strategy of describing the disgusting particulars of abortion to motivate “moral” opposition to it. It strikes me as curious that philosophers skeptical of the latter fail to notice the similarity to the most successful bits of rhetoric in support of the rights of non-human animals.
hygiene may lead philosophers to satisfactory conclusions about the right and the good, but it also may, through causal channels we do not yet understand very well, lead society to similar conclusions.

Finally, and perhaps most significantly, we do know that the discipline closest to philosophy—namely, law—is grounded in a commitment to discursive hygiene as well, albeit less rigorously and formally. Judges give reasons for their decisions, and those reasons are based on premises, from which inferential steps purportedly follow. Judges are influenced by a myriad of non-legal factors, but discursive hygiene matters to them, as even those great skeptics of 20th-century Anglophone jurisprudence, the American Legal Realists, repeatedly emphasized. Let us recall the anecdote invoked by Jerome Frank, one of the two most important American Realists and the most skeptical of the group; he observed:

A century ago a great American judge, Chancellor Kent, in a personal letter explained his method of arriving at a decision. He first made himself “master of the facts.” Then (he wrote) “I saw where justice lay, and the moral sense decided the court half the time. I then sat down to search the authorities...I might once in a while be embarrassed by a technical rule, but I almost always found principles suited to my view of the case....”

Frank took this to be illustrative of the general form of legal decision-making by judges, namely, that they arrive at their decision based on their “moral sense” about what would be a fair outcome given what happened. In this regard, Frank’s picture is still consistent with Haidt’s “social intuitionist” model of moral judgment. But notice that the account Frank endorses has two other striking features: first, judges, on Frank’s picture, still want to find legal principles that will justify deductively the conclusion they find morally attractive; and second, judges can still be “embarrassed by a technical rule,” that is, they can come to recognize that the result they deem fair is not permissible discursively because of the logical entailments of the controlling legal rules. Those concessions by a radical skeptic like Jerome Frank about rational decision-making about practical questions should remind us that even in the sphere of emotional reaction and Tribalism, discursive hygiene can still exert pressures. Public philosophy can contribute to those pressures.

This will no doubt seem too tepid a conclusion to those whose vision of philosophy is different than mine. But, like the Skeptics of antiquity, and like the great modern skeptics about reason, namely, Hume and Nietzsche, I think we must recognize that reason underdetermines what to believe, even in the best of circumstances, and that, unsurprisingly, in the worst of circumstances—such as public discourse—non-rational factors overwhelm all others. We philosophers labor at the margins of public life, public life being dominated by irrational emotion and Tribalist prejudice. But in ways we can not always anticipate, our labors in the service of discursive hygiene may matter. Law is our ally in this regard, because lawyers are the practical torchbearers of discursive hygiene. But lawyers understand something that most philosophers—the Sophists, Marx, and Nietzsche are prominent exceptions—do not understand, namely, that rhetoric—the art of persuasion apart from appeal to what follows from discursive hygiene—matters,

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40 Jerome Frank, Law and the Modern Mind, Ch. XII 112 (1930).
and often matters decisively, in what the public believes. “Belief fixation,” the process by which certain beliefs take hold in the cognitive and affective economy of the mind and thus yield action, does not necessarily track evidential, inferential and logical relations that interest philosophers: the empirical evidence for that is, by now, overwhelming. Rhetoric was always, from the Sophists onward, the art of producing belief fixation, and it is not taught sufficiently either in law or philosophy faculties.

Of course, rhetoric does not tell us what beliefs we should try to produce with our rhetorical tools, but for reasons I have already discussed, it is doubtful that discursive hygiene will help us on this score. The two great polemicists of modern philosophy, Marx and Nietzsche, understood this, despite their differences in moral attitudes. Marx did not engage in public philosophy in the sense now fashionable in professional philosophy: he did not offer reasons why the abolition of capitalism was just or morally obligatory.\(^{41}\) Instead, Marx offered a causal-explanatory theory of historical and economic change, taking for granted that as capitalism immiserated the mass of humanity, the understanding of how things really work would suffice to produce action, since the motivations of the vast majority to change things could be taken for granted. Nietzsche, by contrast, viewing almost all philosophy in the Socratic tradition as a kind of fraud, the attempt to rationalize the emotional prejudices of particular cultures, or particularly sick individuals (as Nietzsche viewed most philosophers), wanted to displace it with a self-conscious “legislation of values,” values in the service of making life worth living. For Nietzsche, this meant living in a world in which genius and its aesthetically pleasing products prevailed, something to which he thought the ascetic moralities of the last two thousand years constituted obstacles. Marx and Nietzsche both were “public philosophers”—Marx during his lifetime in some measure, Nietzsche only afterwards—and both on a scale undreamed of by any academics of the last hundred years, yet neither was primarily a practitioner of discursive hygiene in the sense of neoliberal “public philosophy.” There may be an important lesson in this fact for aspiring “public philosophers,” who should give at least as much attention to rhetoric as to discursive hygiene. We need discursive hygiene for the study and the seminar room; but in public, we need something else, something much more important, namely, rhetorical skill that will make our academic conclusions salient to a public too often influenced by emotion and Tribalist sympathies.

\(^{41}\) Leiter, \textit{supra} note at 5.
TOWARDS AN ‘INDIAN LEGAL THEORY’?

By Upendra Baxi

I.

As Jacques Derrida rightly observed the Western metaphysics, ontology needs the ‘dangerous supplement’ of ‘hauntology’ as the canon of reason always is confronted by its share of spectre, or the spectral.42 The spectre of a universal legal theory haunts thus the more contextual law—the diverse productions of conflicting cultural meanings, narratives, and cultural histories of what ‘law’ may and ought to be.

In what does a universal legal theory— the ‘ready-made multipurpose concepts or logical laws’ as Henri Bergson named these—consist? If legal theory is science of law it has to be universal—a mathematical formula or postulate (like two and two equals four) must apply everywhere without exception. Just as there may not be a chemistry or physics that may be called Indian, there may not then be any Indian or common law or American legal theory but only a universal theory of law.44

There may be, however, many prudences including jurisprudence—that is, decisions concerning what constitutes law according to the courts and principles said to be underlying or animating these—but not amounting to not a legal theory. Another way of distinguishing jurisprudence from legal theory is to differentiate between legisprudence, jurisprudence, and demosprudence.45 Jurisprudence derives its cultural or civilizational import from the contexts it creates, destroys, and recreates; it is like mathematics or numeracy, a ‘profoundly social, and… therefore a moving target because its contents depend on a particular social context’.46

There are, however, many meanings we may give to legal theory. A properly so-called legal theory is a scientific theory about law, its postulates and basic logical functions. Postulates or axioms are necessary

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for avoiding infinite regress in imparting validity to any order: Hans Kelsen tellingly demonstrated this through his theory of a grundnorm as a basic norm presupposed to be valid and made effective by this postulation\(^{47}\) and H.L.A. Hart by rules of recognition recognized as such by the officials in the first, and the people as a whole, in the last instance. \(^{48}\) They thought that the need for postulation arises for any legal order. However, this arises for all normative orders such as fashion or custom: scientific/logical theory insists that what-- at the end of the day, or on night (as the case may be) -- legal theory ought to separate what is legal from that which is ‘legitimate’. What is legitimacy is considered an important issue but beyond the bounds of legal theory'.\(^{49}\)

But what is scientific'/logical theory? Obviously, its function is to describe, analyse, explain, and to predict, especially the latter by way of causal laws. I have considered this matter elsewhere, especially Michel Foucault’s idea of a ’totalitarian’ theory\(^{50}\); here, we may consider a lot of talk about social embedment of science, ever since Karl Mannheim\(^{51}\) and Thomas Kuhn\(^{52}\); what was earlier called sociology of knowledge and history of ideas, now known as ‘social epistemology’ (to which a whole

\(^{47}\) The most recent work on Kelsen is instructive; See JOCHEN VON BERNSTORFF, THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN: BELIEVING IN UNIVERSAL LAW, (Thomas Dunlap trans., 2001); See also STANLEY L. PAULSON & BONNIE LITSCHEWK PAULSON., NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES(1998).

\(^{48}\) H. L. A. HART, THE CONCEPT OF LAW (1961); See also Martin Kreygier, The Concept of Law and Social Theory, 2:2 OXFORD J. OF LEGAL STUD., 155-180 (1982)(Martin Kreygier subjects Hart’s claim that his is an essay in descriptive sociology of law’ to a friendlier reading); See also W. L. Twining, Academic Law and Legal Philosophy: The Significance of Herbert Hart, 95 L.Q. REV. 561 (1979).

\(^{49}\) But a religion based (theistic natural law) theory may find its grundnorm in Divine Will or Reason, gives us the approaches to Divine Law basic norm of Eternal Law (theological voluntarism) or secular, though God-imbu  

\(^{50}\) UPENDRA BAXI, HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS Ch.1 (2007).

\(^{51}\) KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (Louis Wirth & Karl Mannheim trans., 1936); KARL MANNHEIM, MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION (Edward Shils trans., 1940).

\(^{52}\) THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th Ed., 2012) (Suggests that: ‘In the absence of a paradigm or some candidate for paradigm, all the facts that could possibly pertain to the development of a given science are likely to seem equally relevant’ at p.15. Incidentally, may this after all define the pre-paradigmatic?] In contrast, ‘normal science’ signifies ‘research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice’ at p.10. Science here signifies natural sciences: ‘no natural history can be interpreted in the absence of at least some implicit body of interwoven theoretical and methodological belief that permits selection, evaluation, and criticism’ at p.16-17); See also Derek L. Phillips, Epistemology and the Sociology of Knowledge: The Contributions of Mannheim, Mills, and Merton1 THEORY AND SOCy. 59-88 (1974); and in a different context, Peter Hafner, Theories and Paradigms in Sociology, 1:PHIL.&SOC. 455-464 (1998);See also Douglas Lee Eckberg & Lester Hill Jr.,The Paradigm Concept and Sociology: A Critical Review, 44AM.SOC.REV. 925-37(1979); Babette E. Babich, Kuhn’s Paradigm as a Parable for the Cold War: Incommensurability and its Discontents from Fuller’s Tale of Harvard to Fleck’s Unsing Law, 17:2 & 3 SOC. EPistemology 99-109 (2003); Robert Scott Root-Bernstein, On Paradigms and Revolutions in Science and Art: The Challenge of Interpretation, 44:2 ART J. 109-18(1984); CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos and Alan Musgrave eds., 1970) 59-90.
Journal is now devoted). Bonaventura de Sousa Santos has further developed the notion of troubled paradigms and paradigm shifts to a sociological understanding of law when he enunciates the conflict of law as a paradigm for regulation and emancipation. The question for legal theory remains: should one understand the contexts deeply and well to reduce thought and theory to that context, or are these context-transcending and to vary the metaphor attempt to speak to human beings as species?

Modern legal theory can be considered as a long conversation between legal theorists who are at once analytical as well as are positivists, activists and thinkers (usually lumped together as ‘sociological school of law’), who approach the law as socially and culturally grounded. Both are concerned, in their own ways, with the diction between law and non-law and the basis of legal obligation. But the sociological approach studies these aspects as changing with state formative practices and social change and conflict; the positivist theory in sharp contrast presupposes a whole social theory of law. It is eminently a theory about validity, not efficacy, of the law of the state.

With this general background, this short article discusses the aspiration to develop an Indian legal theory, which had a short shelf life in the 70s and 80s of the preceding century. The project of some scholars


54 Bonaventura de Sousa Santos, Toward A New Common Sense: Law, Science And Politics In The Paradigmatic Transition, (1995); For his most recent essay, see also Law’s Global and Theoretical Contexts: Essays in Honour of William Twining (Upendra Baxi, Abul Paliwala, and Christopher McCrudden eds., 2015); See Jan Nederveen Pieterse, Between Emancipation and Regulation: The Pillars of Modernity, 4:3 Euro. J. of Soc. Theory 297–306 (2001); Just as Kuhn, an inaugural figuration, was indebted to many others, so is Santos. Just as Merton both anticipates Kuhn and further addresses the problematic of translocation of the Kuhn-talk from the ‘natural’ to ‘social’ sciences, Santos extends this talk further to the genre of postmodern social theory of law, resistance, and human rights. Further, in dealing with the aesthetic paradigm in his 1995 text (especially the metaphor of the Baroque), Santos situates Kuhnian/Mertonian understandings to human sciences as well Kuhn’s engagement with auto-critique seems now somewhat parallelled in Santos with his new concern, as I understand it, contrasting ‘paradigmatic’ with the ‘abyssal’ forms of thought. In a rather precious sense, Santos illustrates poignantly the role, status, and the ‘image the social scientist has of himself [herself] as a scientific agent’ pursuing ‘paradigm as a form of personal salvation’ In this despite his well-stated differences with Foucault (1995:3-5,405-11), he would still seem to agree with Foucault’s statement concerning the role of an ‘intellectual as constantly engaged’ in a ‘battle …for truth, or at least around truth’ which is ‘a battle about the status of truth and economic and political role it plays. However, the salvational languages stand transformed in Santossian discourse as a collective subaltern project of ‘emancipation.’ In turn, this further raises the concern regarding the possible construction of insurrectionary social theory pitted against the dominant ways of ‘doing’ this.

55 I think it a great error to lump diverse thinkers as a constituting one ‘schools”: teaching of jurisprudence through ‘schools’ has damaged generations into thinking that they all aim at the same theoretical goal. Indian students are thus placed at a great disadvantage in their distance from the salient texts of various individual jurists; See, e.g., N. E. H. Hull, Some Realism About The Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927-1931 Wis. L. Rev. 921 (1987)and William Twining, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). (For the debate between Roscoe Pond and Karl Llewellyn.)

56 Chattapatti Singh, Law from Anarchy to Utopia (1985). (The ‘project’ of doing legal theory was pursued autonomously by him); Upendra Baxi, Chhatrapati Singh and The Idea of A Legal Theory, 56:1 J. of the Indian L.Inst.5-34(2014); See also, SABERWAL, supra note at 3. To this must be added the distinctive corpus of Ranbir Samaddar in a multivolume work on justice (Delhi, SAGE, 2009); See also Samaddar, The Justice-Seeking Subject in The
succeeded in endowing India with a rich sense of jurisprudence and comparative law perspectives. They did not distinguish between legal theory and jurisprudence too sharply; theirs was ultimately a pedagogic aspiration and in pursuing this they made some small gains in legal theory which have largely been ignored by Indian as well as other scholars. I name their contribution as the ‘Jaipur Law School Indian jurisprudence’ because Professor Gyan Swaroop Sharma (the founding Dean of Jaipur Law School and then the Director of the Indian Law Institute) nurtured this multidisciplinary inspiration and the project.

II.

Gyan Swaroop Sharma’s many splendored contributions to the life of law in India remain unacknowledged and unremembered. In this, he is not alone. His great predecessors and contemporaries have also been all but forgotten. But the loss of memory of Gyan Sharma is particularly poignant because he straddled creatively the founding and succeeding contemporary generations of Indian legal scholarship.

All this raises the threshold question: Why is it that our law teaching, research, legal profession, and courts and justices so forgetful of its founders? Is this because as generations pass, the forerunners and founders cease to be worthy of memory? Or is it because that we remain worried that recalling them will expose us in a poor light, because we have not lived up to their expectations and endowment? Or is it because the Indian legal professions (teaching, research, advocacy, and adjudication) are inherently cannibalistic, and revel in the massacre of ancestors?

If we were serious in posing the threshold question, we will find many an approach to answers than the three modes that I here suggest. My own preference, I must confess, is the one suggested by the third proposition. Offensive and unflattering as it may seem to our self-images, it seems to me to be that the Indian legal professions are the most cannibalistic of all our professions.

BORDERS OF JUSTICE 144-161 (Étienne Balibar, Sandro Mezzadra, and Ranabir Samaddar eds, 2012). (It will carry this paper far afield to discuss these valuable contributions directly here).

57 Among them most certainly is Professor R. U. Singh who at University of Lucknow shaped the career of modern Indian legal education; today it would be a matter of surprise if any one, outside the charmed circle of his former students, would even recognise that name! I have spoken with many of his pupils and suggested for years that a set of essays commemorating his achievement be published. The suggestion has fallen on well-cultivated hearing-impaired ears.

58 G.S. Sharma has shaped many a legal mind and professional career on the Bar and the Bench, and not just in Uttar Pradesh and Rajasthan where he primarily taught and worked. Yet no senior lawyer or judge has thought it fit to celebrate his memory, let alone promote his legacy.

59 Allow me to provide some rather detailed and specific examples of cultivated loss of memory in the professional traditions of lawyering and adjudication. The Indian Appellate Bar is among the most affluent sections of Indian society and will grow in affluence as globalization of India deepens even further. It is also the most spendthrift of memory. India has contributed a fair share to world’s list of leading lawyers. During the struggle for independence, leading lawyers were household names: Motilal Nehru, C. R. Das, and K.M. Munshi. H.S. Gaur, among their other very illustrious contemporaries. Sir Hari Singh Gaur incidentally inaugurated a tradition of philanthropy by
Not merely do we recall our great lawyers of the past generation, we also chose to forget the best and the greatest of our past Justices. No one in any Law School in India thus recalls with pride the name of Sir Radha Binod Pal, who was a judge of the international tribunal in the Tokyo War Crimes Trials. He wrote a famous dissent, in effect, saying that the existing international law norms, standards, and values did not authorise the victor’s justice. He is researched and studied by Japanese scholars, who embarrassingly enough ask me concerning Indian legal literature on the subject. The truth is there is none. The only scholar who has written about him is Professor Ashis Nandy, a non-lawperson60 and I do not know too many judges, lawyers, law scholars, and law students who have read this solitary writing!61

This, fortunately no exhaustive listing of eminent lawyers and justices, just serves to remind us of the enormous confiscation of memory that we choose to so extravagantly impose on ourselves. The social cost of this is indeed enormous: and it must be named in terms of the loss of role-models, patterns of exemplarship, of ethical and socially responsive, at times activist, stewardship of the Bar and the Bench.

More or less, the same may be said concerning legal education. Let me say it, and with example, rather pithily. The idea and the imagination of National Law School are Gyan Swaroop Sharma’s gift to the nation. He developed it in a germinal article entitled ‘Some Thoughts on a National Law School in India’. He worked steadfastly towards the realisation of that idea in many ways and remains the founding father of the first National Law School of India University, and all other Schools that followed. Yet no law school in India, or even the once famous Indian Law Institute Library that Gyan Sharma assiduously assembled holds a collection of his writings. These are few in numbers but far reaching in their messages dedicating his entire life’s earnings and his family estate to form a University of Sagar in Madhya Pradesh. Soon upon the independence, names such as Motilal Setalvad, C.K. Daphtrary, acquired legendary status for their integrity, followed by veterans such as H. M. Seervai, Nani Palkhivala, Govind Swaminathan, Ethi Raju Naidu, Lal Narain Sinha, and the early generation of the Supreme and High Court Justices who were elevated from the Bar. Today names such as V.M. Tarkunde Shanti Bhusan, Fali Nariman, Ram Jethmalani, Soli Sorabjee, L.M. Singhvi, K.K. Venugopal, among those fortunately still with us, and Rajni Patel, Mohan Kumarmanaglam, Subrato Roy Chowdhury, Gobindo Mukhoty and Ramesh K Garg, among those whom we lost prematurely, command national deference. Ask yourselves how many of these names does the Indian Bar today recall and cherish in concrete ways and you will draw a blank! Very few commemorative lectures, endowment chairs, law libraries, scholarships bear the golden weight of their names! It is as if they never existed! When I appealed to the Bar Council of India, during my thirteen-year stint as the Honorary Director of the National Law School of India, Bangalore, to raise resources to endow twelve chairs commemorating some of their illustrious kindred, the response was lackadaisical indeed!


61 Need I say more? Some of our most scintillating Justices of yesteryear are no longer remembered: among this Pantheon are: Justices Vivian Bose, Venkataswami Iyer, Subba Rao, Hidayatuallah, K.K. Matthew, M. C. Chagla, M. C. Shah, Untwalia. When we unfortunately lose Justices Krishna Iyer, O. Chinnappa Reddy, D.A. Desai, and P.N. Bhagwati from our midst, even they too are likely to be forever forgotten.

for the future of Indian legal education and research. And yet no National Law school has, as far as I know, a G. S. Sharma Chair or library or annual lecture.63

III.

Let me now try to do the impossible: to archive Gyan Sharma’s manifold and munificent legacy. And I do not do so in nostalgic or hagiographic mood, which is in a mode that canonises his life and memory. I am not here to speak of any Saint Gyan Sharma. He lived the life of an imperfect human being, with a most notable difference that he acknowledged and admitted this fact.64 I do not wish to be regarded as saying that this acknowledgement in itself is a sovereign virtue. The acknowledgement of imperfection is a virtue only in so far as we may want to transcend our limitations. In this task, Gyan Sharma remains even till this day our persuasive mentor.

What did Gyan Sharma bring to the understanding of law in India is perhaps an impertinent question yet one that must be addressed for a generation that has no memory of him.65 He did not bring to postindependence legal education what some of his notable contemporaries (like Professor P.K. Tripathi at Delhi and Anandjee at Benaras) did --- lots of Ford Foundation grants, teacher exchange programmes with American Law Schools, semester system, and the so-called case method of teaching. In his home base at Jaipur, Gyan Sharma instead preferred to continue to think about an alternate jurisprudence for India. I think that this quest was his most important, and in many ways, a lasting contribution to Indian law teaching and research.

Gyan Sharma saw the task of transformation not in terms of modernisation, which rests on the premise that what is good for the West is good for all the Rest; rather, although not enunciated thus way, the task as a quest for truly postcolonial legal education and research. His contribution was that the postcolonial

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63 The first GS Sharma lecture was organized by Jodhpur National Law School University in 2006. You can imagine the measure of my affectionate gratitude to the founding Director Professor Nripnedra Mitra for breaching the cannibalistic protocols that mandate organized forgetfulness of founding memories. I earnestly hope that this gesture will become a flourishing tradition at Jodhpur.

64 Gyan Sharma never claimed any degree of perfection in his personal life as spouse, father, and friend; nor did he claim perfection in his professional life as a scholar, teacher, and thinker. He never claimed the certitude of juristic knowledge. Unlike many of his contemporaries and successors he readily acknowledged the fact that one may never know enough law and the law one may know may not always be right. He insisted on the fallibility of all ways of legal knowing.

65 Gyan Sharma did his utmost to revitalize legal theory, jurisprudence, teaching and research. One of his unique contributions was to hold seminars assembling India’s law teachers, judges, and lawyers. Such our Delhi seminars that he convened, as Director of the Indian Law Institute were a great resource for law teachers, especially the younger ones as these helped to stimulate thought and fostered solidarity among lawpersons. He was the leading light of the first ever law teachers’ workshop (in the late 70s) on jurisprudence which Professor Ajjapa of University of Dharwad so assiduously convened. I edited two volumes on jurisprudence, aspects of which were discussed in the workshop and also in the pre-natal and post-natal sessions by the core faculty, which I still recall with nostalgia.
should have a critical grasp of them pre-colonial: he insisted that we should grasp in India the pre-colonial traditions such as the Hindu and Islamic. If this task were not adequately pursued, we would, he feared, end up with neo-colonial education. These two expressions must indeed be used with very great care. Postcolonial, in a literal sense, is that which happens after decolonization. Accurate perhaps in a chronological sense, this way of understanding reduces the struggle for Swaraj into mere transfer of power, a term still used, even today, by some legal and social historians to describe what happened in 1947-49. A more apt meaning of the term ‘postcolonial’ is the discovery of the new space for authentic freedom for subjugated peoples. On this register, postcolonial signifies a project for future history, not in terms of the mere (to deploy a Nehruvian image) ‘discovery of India’ but of (in the imagery of Mohandas) the invention of India. To discover is to find; to invent is to create. Acts, performances, and feats of discovery then help us to find what pre-exists and to build continuities with what exists. The quest for what may not exist before leads to adventures in invention. The term ‘postcolonial’ is the saga of this endeavour.

In contrast, neo-colonialism is perfectly consistent with the logic of discovery. What the makers of the Indian constitution discovered were the virtues of British rule of law that needed to be adjusted to the new circumstance of Indian Independence. In this circumstance, and conjuncture, governance and development become the keywords, not participation and justice. The virtues of participation and justice were to be mere accompaniments to the Tasks of governance and development rather than their defining, constitutive characteristic. Neo-colonialism thus carries habits of past governance into future histories. No doubt, these ‘virtues’ have to be adjusted to innovations necessarily ushered in by the Constitution, with all its languages of human rights, independent judiciary, representative law making, widespread adult suffrage, free mass media, competitive liberal politics, and new social movements. But, overall, neo-colonialism stands impressed with two dominant features.

The first was expressed by Frantz Fannon who spoke of neo-colonialism in the deeply evocative image of ‘Black Skins, White Masks.’ The phrase ‘transfer of power’ captures this phenomenon of continual domination acutely well. The second feature of neo-colonialism was expressed acutely by Kwame

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66 I later learnt that he was an LLM jurisprudence examiner for Bombay University which a system of asking answers to any four questions; I could only answer one question which was on relativism where I compared Gustav Radbruch with Sage Parasara and demonstrated that relativism was well known to ancient Indian legal thought and there was merit in a nuanced comparison between East and West. I wrote aspects of the answer on reaching home and these were published in 1964 by the Bombay Law Reporter as ‘Relativism in Ancient Indian Legal Thought-A Sketch’. So pleased was Gyan at the answer that not merely he gave me the highest marks in the subject but asked Phiroze Irani, the Head of the Department for my address to invite me to contribute a paper on advanced legal education and research in India at Kasuali seminar which was later published. Thus began my lifelong association with him.

67 I recall to this day when the Bhils in Chottaudepur, in Baroda District, called me as a ‘White Man’ (ujjaliat) when I began my fieldwork concerning the Lokadalat in Rangpur. I later learnt that the expression ‘white person’ was extended to any one coming from the urban metropolis: such visitation signified potential for further exploitation for them. This was in mid-seventies and still seems to be the case. See Upendra Baxi, From Takrar to Karar: The Lok Adalat at Rangpur, J. CONST. & PARL. STUD. 52-98 (1975); See also Marc Galanter & Jayanth K. Krishnan, “Bread for
Nkrumah when he described it in terms of continuing state of affairs where power is exercised without responsibility and exploitation continues without redress. Gyan Sharma, as I said before, did not deploy this framework at all. But what he sought to and indeed achieved in some measure may be best understood in this framework. He quested for postcolonial legal education and research, wholly opposed to the neo-colonial agendum of reform.

IV.

The circumstance and imagination of the postcolonial defined that sphere for him. Not for him was any slavish imitation of the so-called sociological school of jurisprudence, although he was widely read in that genre, especially the corpus of Roscoe Pound and Julius Stone. Gyan acknowledged that these founders were truly worthy of respect. Indeed, he worked closely with Julius Stone, in his three-volume revision of a modern legal classic, *The Province and Function of Law*. And I can testify that the great Julius Stone held him in very high esteem. I was privileged to start by teaching career with Stone at the Sydney Law School Department of Jurisprudence and International Law and there was rarely a reflexive conversational occasion when Julius failed to acknowledge the debt to Gyan in terms of the interrogation he posed both to the nature of their theoretical enterprise and to the claims of extension to new forms of legality in the Third World. As far as I know, none of his Indian contemporaries ever achieved this kind of authentic esteem.

What made Gyan’s contributions distinctive was the fact that he contested Eurocentrism of the contemporary legal theory, jurisprudence, and sociology of law paradigm. Gyan understood well the mainsprings of imperative theory of law, which lay in ‘secularization of legal thought’ in the “West”. One implication of this’ starting perhaps with Austin…was to expose the law to a neutralist status’. Second, the ‘separation’ helped also ‘to acquire the much needed base of persuasion and self-obligation in an age in which at least in theory political power has passed to the whole people’. Third, in these two ways, he...

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69 See Julius Stone, *The Province and Function of Law* (1946); Julius Stone, *Legal Systems and Lawyer’s Reasonings* (1964); Julius Stone, *Human Law and Human Justice* (1965); Julius Stone, *Social Dimensions of Law and Justice* (1967). (Indeed, he add to Stone’s critique of Pound by maintaining that in India, and other developing countries, it was the function of law to stimulate de facto demands rather than to follow and adjust these.)


71 *Id.* at 3.

72 *Id.*
articulates the imponderableness both of natural law and positivism: ‘...the insoluble problem of natural law is one of effectively particularising the universal’, the ‘central question of legal positivism is universalizing the particular’, of ‘finding the necessary minimum of universal content in socio-ethical ideals of time and place’. 73

This constitutes an amazing passage. The reasons why Gyan did not christen the ‘separation’ thesis as analytical are interesting. He regarded it as not only logically but sociologically essential to the very idea of legal positivism.Appealing to new ‘insights into the theory science’ that have ‘taken the pinch out of the old criticism that the concern with value is unscientific’, 74 Gyan seems to critique the entire edifice of legal positivism. While in a strictly analytical sense the separation between law and morals may be thought as a purely logical operation for the theorist, in terms of the ‘persuasion’ and ‘self-obligation’ the law was sociologically real. He indirectly queried the notion that the ‘whole’ people must be said to accept what the analytic and imperative theory of positive law ordain as ‘universalizing the particular’, of ‘finding the necessary minimum of universal content in socio-ethical ideals of time and place’. But is Dharma, conceived as eternal theistic or secular natural law, any more successful in ‘effectively particularising the universal’?

Deploying the Svetasvatara Upanishadic imagery of amritasya putra (human being as ‘son of eternity’) 75, Gyan writes: ‘The doctrine of Dharma resulted from a view of life as one and indivisible and not as compartmentalized into well-defined and well-marked out realms of the moral and the material, or the value and fact’. 76 Dharma, put another way, was just a ‘code of conduct’ when ‘put into practice’ will enable each individual to distinguish “good from evil, charity from cruelty, justice from injustice”. 77 The separation or rejection of the two realms is, however, only understandable if one were only to follow Dharmasastra tradition and ignore the corpus of Arthasastra. 78 Moreover, the invocation of Dharma ignores the Ambedkarite and Buddhist critique of the concept. 79 In this sense it is correct to take on board Gyan’s gravamen against natural law for its failure to ‘effectively’ particularize the ‘universal’.

73 Id.
74 Id.
75 Gyan did not feminize this term.
76 Sharma, supra note 28, at 5.
77 This fine phrase is in inverted commas (in Horizons at but does not provide the source of the quote.)
79See Upendra Baxi, Restoring ‘Title Deeds to Humanity’: Lawless Law, Living Death and the Insurgent Reason of Babasaheb Ambedkar (Delhi, 5th Dr B R Ambedkar Memorial Lecture, Ambedkar University, Delhi); and martials refereed therein and in Towards a Sociology of Indian Law, supra at especially Chapter 9.
A more sustained argument against legal positivism ‘separation of law and morality is to be found in Professor A.K. Saran’s contribution to Horizons. Saran writes as an Indian sociologist on the ‘Implications of Kelsen’s Pure Theory of Law in India’ and this fine paper has been unfortunately not referred to in the wide Kelsen literature and Indian teaching of ‘jurisprudence’. His principal target is the distinction between ‘is’ and ‘ought’. Ought- statements, according to Saran, are necessary and possible at all because ‘reality’ is ‘not completely rational’ including of course ‘man’s psychic life’. It is the ‘disparity’, and ‘discontinuity’ (and one may also add and ‘disjuncture’) that the normativity of ‘ought’s statement indwells. Moral, as also legal, ought ‘is ‘either a volitional or rational category or transcendent one’. Thus, a choice had to be made and the positivist makes this in from of a ‘separation’ thesis. This avoids recourse to any of the versions of the transcendent postulates of natural law and can be achieved only if one as a jurist practices value neutrality. But, after a patient examination, Saran points out that there is ‘conclusive evidence’ that the distinction between ‘ought’ and ‘is’ remains unviable and the legal positivist rules out, somewhat extravagantly, ways out of this distinction. Had the distinction between a ‘thing’ and an ‘action’ been carefully grasped, ‘this kind of separation between norm and fact in the human realm would not have been possible’. I think that—rightly— Saran and Gyan would agree that Kelsen as innatualist thinker is more relevant to India than as positivist Kelsen.

V.

80 Sharma, supra note 28, at 22-47.
81 Sharma, supra note 28, at 2-22. (We must pause to note here that Saran’s analyses and actual usage of the term ‘norm’ and ‘fact’ accurately anticipates); Jürgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE: THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).
82 Id. at 32.
83 Id. at 33.
84 Id. at 33, quoting Hans Kelsen, THE GENERAL THEORY OF STATE AND LAW(which clearly states that a judgement about ends is always a means toward an end and ‘such a judgement is always determined by emotional factors’. Saran this raises the question, familiar on literature concerning Kelsen and in general legal positivism, whether the thesis of non-cognitivism is inherent to it. See alip. 34-37 where Saran also critiques the non-derivability of an ‘ought’ from an ‘is’.
85 Sharma, supra note 28, at 34.
86 Sharma, supra note 28, at 38. (The distinction, in Saran, is not as clear as appears on the first sight. What we may ask marks and maps the distinction between the realm of ‘action’ and ‘things’? Are ‘events’ always ‘things’ that happen? Are these at times, if not always, guided by norms, pre-existing or nascently emergent?); See Quentin Meillassoux, History And Event In Alain Badiou12:11 PARRHESIA, 1 – 11 (Thomas Nail trans., 2011); Nick Srnicek, What is to be Done: Alain Badiou and the Pre-eventual Symposium: CANADIAN J. OF CONTINENTAL PHIL. 111-126 available at www.artsrn.ualberta.ca/symposium/files/original/fc06c4b1212133e031f: visited February 16, 2016).
87 There is ample room for so reading him as quotes on p.45 of the Horizons reveal, and even more crucially now as well analysed by Jochen von Bernstorff, THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN: BELIEVING IN UNIVERSAL LAW (2014).
Gyan Sharma sought to build a bridge between progressive Eurocentrism and ‘Eastern thought’ in legal theory and social sciences.\textsuperscript{88} Regressive Eurocentrism stood for colonialism and imperialism and somewhat fake European Enlightenment values, which claimed all human rights and rule of to be its sole products.\textsuperscript{89} In contrast, progressive Eurocentric thinkers – A to Z (from Gorgio Agamben to Slavoj Zizek) thinkers, as I fondly call them- eschew these Westphalian virtues and remain inclusive of the non-European others, and the contribution they have made (and continue to make) to spotlight, when not to resolve, some antinomies among law, power, and justice. In legal theory and jurisprudence, Gyan Swaroop Sharma aspired to develop a progressively Eurocentric view of law and justice—a task still worthy of emulation in a heavily globalizing, increasingly free market-friendly, and politically authoritarian world.

\textsuperscript{88} Note particularly his summate quotation from Karl Polanyi on tacit and personal knowledge leading to an appreciation of the felt values of Dharma. See also Gyan Swarup Sharma, \textit{Influence of India on English Jurisprudence} 19:1 \textit{INDIAN J. POL. SCI.} 39-44 (1958). (It concludes momentously with the following words:

‘Paradoxical though it may appear the English legal crusade in India had two different consequences on the English law itself. It helped on the one hand a separation of the national and more equitable rules of English law from the purely technical and historical rules and on the other hand brought to mind of the English jurists to bear on the relation of law to political, social and economic needs. It needed a mind like that of Sir Henry Maine to perceive that relation from a series of administrative experiments that were more than a century old. On its rational side common law "has long passed its boundaries" and as Lord Wright says "England cannot have a monopoly or even a primacy in this great and widespread development. On the historical side Maine’s work has led to the vast and complex structure of Sociological Jurisprudence."

\textsuperscript{89} See Upendra Baxi, \textit{THE FUTURE OF HUMAN RIGHTS}, Ch. 2 (2013).
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