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Hart's Postscript and the Character of Political Philosophy

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Abstract—Several years ago I prepared a point-by-point response to this postscript as a working paper for the NYU Colloquium in Legal, Moral and Political Philosophy. I have not yet published that paper, but I understand that copies of it are in circulation. I do not intend to recapitulate the arguments of that working paper, but instead to concentrate on one aspect of Hart's Postscript, which is his defence of Archimedean jurisprudence. I shall have something to say about his own legal philosophy, which was a form of legal positivism. But I shall mainly be concerned about the method that he said generated his legal positivism.

1. *Archimedeans*

A. *Hart's Project*

When Professor H.L.A. Hart died, his papers contained a draft of a long comment about my own work in legal theory, which he apparently intended to publish, when finished, as an epilogue to a new edition of his best-known book, *The Concept of Law*. I have no idea how satisfied he was with this draft; it contains much that he might well not have found fully satisfactory. But the draft was indeed published as a Postscript to a new edition of the book. In this lecture I discuss the Postscript's central and most important charge. In *The Concept of Law*, Hart set out to say what law is and how valid law is to be identified, and he claimed, for that project, two important features. First, he said, it is a descriptive rather than a morally or ethically evaluative project: it aims to understand but not to evaluate the pervasive and elaborate social practices of law. Second, it is a philosophical rather than a legal project. It is the business of lawyers to try to discover what the law is on particular subjects—whether it is against the law of England to parade a lion in Piccadilly, for example. But identifying what law is in general is not just a particularly ambitious legal exercise, but a philosophical one, calling for entirely different methods from those lawyers use day by day.

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I challenged both these claims. I argued that a general theory about how valid law is to be identified, like Hart's own theory, is not a neutral description of legal practice, but an interpretation of it that aims not just to describe but to justify it—to show why the practice is valuable and how it should be conducted so as to protect and enhance that value.[1] If so, then a legal theory itself rests on moral and ethical judgments and convictions. I also argued that ordinary legal argument has the same character: a judge or citizen who has to decide what the law is on some complicated issue must interpret past law to see what principles best justify it, and then decide what those principles require in the fresh case. So a legal philosopher's theory of law is not different in character from, though it is of course much more abstract than, the ordinary legal claims that lawyers make from case to case.

Hart insists, in the Postscript, that I was wrong on both counts: I had no right, he declared, to deny his project the special philosophical and descriptive character he claimed for it. My own ruminations about how judges should decide hard cases at law are moral and engaged, he said, because I am criticizing and evaluating their activities. But he, on the contrary, simply describes these activities in a general and philosophical way, and describes them from outside, not as an active participant in the legal wars but as a disengaged scholar of those wars. There is room in jurisprudence for both of these projects, he said, but they are different projects.

Hart's view of his own methodology is typical of much contemporary philosophy. Specialist areas of philosophy like meta-ethics and the philosophy of law flourish, each supposedly about but not participating in some particular type or department of social practice. Philosophers look down, from outside and above, on morality, politics, law, science and art. They distinguish the first-order discourse of the practice they study—the discourse of non-philosophers reflecting and arguing about what is right or wrong, legal or illegal, true or false, beautiful or mundane—from their own second-order platform of 'meta' discourse, in which first-order concepts are defined and explored, and first-order claims are classified and assigned to philosophical categories. I have called this view of philosophy 'Archimedean', and this is Archimedeanism's golden age.

The most familiar of these specialist philosophies is so-called 'meta-ethics'. It discusses the logical status of the 'value judgments' that ordinary people make when they say, for example, that abortion is morally wrong, or that racial discrimination is wicked or that it is better to betray one's country than one's friends. Some meta-ethical philosophers say that these value judgments are either true or false, and that if they are true then they correctly report some mind-independent moral fact. Others deny this: they say that value judgments are not reports about an independent reality, but are rather expressions of emotion or personal taste, or recommendations for behaviour, or something subjective of that character. But the philosophers in both groups insist that their own theories—the theory that value judgments are objectively true as well as the rival theory that they only express emotion—are not themselves value judgments. Second-order philosophical

[1] See my book, *Law's Empire*, Harvard University Press (1986).

theories about value judgments, the philosophers insist, are neutral, philosophical and uncommitted. They take no position about the morality of abortion or discrimination or friendship or patriotism. They are conceptual or descriptive, not substantive and engaged.

I argued against this view of meta-ethics in previous work: I believe that philosophical theories about the objectivity or subjectivity of moral opinions are intelligible only as very general or abstract value judgments of their own.[2] Hart's claims about his own methods illustrate a somewhat different, though related, form of Archimedeanism, which is more prominent in political philosophy including legal philosophy than in moral philosophy. The key distinction, once again, is between levels of discourse: in this case between the first-order, substantive 'value judgments' of ordinary people about liberty, equality, democracy, justice, legality and other political ideals, and the second-order, neutral, philosophical analyses of these ideals by political philosophers. Ordinary people—politicians and journalists, citizens and presidents—argue about the relative importance of these ideals. They debate whether legality should sometimes be compromised in order to secure justice, or whether liberty should sometimes be limited in order to achieve equality or preserve community. Philosophers, on the contrary, try to provide accounts of what legality or liberty or equality or democracy or justice or community really is, that is, of what ordinary people are arguing and disagreeing about. Once again the philosophers' work, in their opinion, is neutral among the controversies. It is a descriptive or conceptual question what liberty and equality are, and why conflict between them is inevitable, and any philosophical theory that answers those second-order questions is neutral about which of these values is more important than the others, and which should be preferred and which sacrificed in which circumstances.

This version of Archimedeanism is also mistaken. I shall argue here that definitions or analyses of the concepts of equality, liberty, law and the rest are as substantive, normative and engaged as any of the contending opinions in the political battles that rage about those ideals. Hart's ambition of a purely descriptive solution to the central problems of legal philosophy is misconceived, as are the comparable ambitions of many leading political philosophers.

B. *Sorenson's Case*

I must describe Hart's version of Archimedeanism in more detail, and it will be helpful for that purpose to have before us an example of a complex legal problem.[3] Mrs Sorenson suffered from rheumatoid arthritis and for many years took a generic drug—inventum—to relieve her suffering. During that period inventum was manufactured and marketed under different trade names by 11 different

[2] See my article 'Objectivity and Truth: You'd Better Believe It' *Philosophy & Public Affairs*, Vol 25, Number 2 (Spring, 1996) (hereafter referred to as Objectivity and Truth).

[3] My example is invented. For real cases involving market-share liability, see, e.g. *Sindell* v *Abbott Labs*., 607 P.2d 924, 935–38 (1980), and cases cited therein.

pharmaceutical companies. In fact the drug had serious and undisclosed side-effects, of which the manufacturers should have known, and Mrs Sorenson suffered permanent cardiac damage from taking it. She was unable to prove which manufacturers' pills she had actually taken, or when, and of course unable to prove which manufacturer's pills had actually injured her. She sued all the drug companies who had manufactured inventum, together, and her lawyers argued that each of them was liable to her in proportion to its share of the market in the drug over the years of her treatment. The drug companies replied that the plaintiff's request was entirely novel and contradicted the long-established premise of tort law that no one is liable for injury he has not been shown to have caused. They said that since Mrs Sorenson could not show that any particular defendant had injured her or even manufactured any of the inventum she took, she could recover against none of them.

How should lawyers and judges decide which side—Mrs Sorenson or the drug companies—is correct in its claims about what the law actually requires? In my own view, as I said earlier, they should try to identify general principles that underlie and justify the settled law of product liability, and then apply those principles to this case. They might find, as the drug companies insisted, that the principle that no one is liable for harm that neither he nor anyone for whom he is responsible can be shown to have caused is so firmly embedded in precedent that Mrs Sorenson must therefore be turned away with no remedy. Or they might find, on the contrary, considerable support for a rival principle—that those who have profited from some enterprise must bear the costs of that enterprise as well, for example—that would justify the novel market-share remedy.[4] So on the view I favour Mrs Sorenson might, but does not necessarily, have the best case in law. Everything depends on the best answer to the difficult question of which set of principles provides the best justification for the law in this area as a whole.

Hart's response to cases like Sorenson's was quite different. He summed up that response in the Postscript I referred to in these words:

> According to my theory, the existence and content of the law can be identified by reference to the social sources of the law (e.g. legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of the law.[5]

(I shall call this view—about how law is to be identified in hard cases like Sorenson's case— Hart's 'sources thesis'.) Hart and I disagree, therefore, about how far and in what ways lawyers and judges must make their own 'value judgments' in order to identify the law in particular cases. In my view, legal argument is a characteristically and pervasively moral argument. Lawyers must decide which of competing sets of principles provide the best—morally most compelling—justification of

[4] See *Ira S Bushey & Sons Inc. v United States* 398 F 2nd 167 (1968).
[5] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994) at 269.

legal practice as a whole. According to Hart's sources thesis, on the other hand, substantive legal argument is normative only when social sources make moral standards part of the law. No legislature or past judicial decision has made morality pertinent in Mrs Sorenson's case so, on Hart's view, no moral judgment or deliberation enters into the question whether she is legally entitled to what she asked. So far as the law is concerned, he would have said, she must lose.

Since Hart and I hold opposite opinions about the same issue—how to decide whether Mrs Sorenson had a valid claim in law—it is hard to credit his claim that we are not really disagreeing or that we are not trying to answer the same questions. But the issue remains as to how the project we share should be characterized. His account, he declared in his Postscript 'is descriptive in that it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law'.[6] He said that I might conceivably be right and he wrong about how law is to be identified. Perhaps I am right that lawyers and judges must make value judgments to discover the law in all hard cases. But if I were right about that, he insisted, it would only be because my account of first-order legal practice is better as a second-order description of that practice than his is. So we disagree not only about how law is to be identified, but also about what kind of theory a general answer to that question is. He believed that such a theory is only and purely a description of legal practice. I believe that such a theory is an interpretation of legal practice that makes and rests on moral and ethical claims.

In one respect, however, we are in the same boat. We both believe that we will understand legal practice and phenomena better if we undertake to study, not law in some particular manifestation, like the law of product liability in Scotland, but the very concept of law. Our different claims about the nature and proper methods of that conceptual study, however, might each be thought mysterious, though for different reasons. Conceptual investigations are generally to be contrasted with empirical ones. How can Hart think that his conceptual study is 'descriptive'? What sense of 'descriptive' can he have in mind? Conceptual investigations are also normally to be contrasted with evaluative ones. How can I think that a study is both conceptual and evaluative? In what way can deciding what law should be like help us to see what, in its very nature, it actually is? These are sufficiently important questions to justify changing the subject for several pages.

2. *Political Concepts*

Political philosophers construct definitions or analyses of key political concepts: of justice, liberty, equality, democracy and the rest. John Stuart Mill and Isaiah Berlin, for example, both defined liberty (roughly) as the ability to do what you might want to do free from the constraint or coercion of others, and that definition

[6] Ibid at 240.

has been popular among other philosophers. On that account, laws that prohibit violent crime are invasions of everyone's liberty. Almost all the philosophers who accept this proposition quickly add that though such laws do invade liberty they are plainly justifiable—liberty, they insist, must sometimes yield to other values. That further judgment is a value judgment: it takes sides about the relative importance of liberty and security, and some extreme libertarians might actually reject it. But, Berlin insisted, the definition itself, according to which laws against violence do compromise liberty, is not a value judgment: it is not an endorsement or criticism or qualification of the importance of liberty, but just a politically neutral statement of what liberty, properly understood, really is. Some very important conclusions do follow from that supposedly neutral statement: in particular, that the two political virtues of liberty and equality must inevitably conflict in practice. The choice between these, when they do conflict, Berlin said, is a question of value about which people will differ. But that they must conflict, so that some such choice is necessary, was for him not itself a matter of moral or political judgment, but a conceptual fact of some kind.

Berlin was therefore an Archimedean about political philosophy: the project of analyzing what liberty really means, he thought, must be pursued by some form of conceptual analysis that does not involve normative judgment, assumptions or reasoning. Other philosophers insist that liberty is, among other things, a function of money, so that taxation of the rich decreases their liberty. That definition, they insist, leaves fully open the question whether taxation is in principle justified in spite of its impact on liberty. It permits the value judgment that taxation is wicked, but also the opposite value judgment that taxation, like making violence a crime, is a justifiable compromise of liberty. Other political philosophers have treated other political values in a parallel way. It is a very popular idea, for example, that democracy means majority rule. That definition is said to leave open, for substantive decision and argument, such questions as whether democracy is good or bad, and whether it should be compromised by constraints on majority rule that might include, for example, a constitutional system of individual rights against the majority enforced by judicial review. These latter questions, according to the Archimedean view, are substantive and normative, but the threshold question, of what democracy is, is conceptual and descriptive. These various accounts of liberty and democracy are Archimedean because though they are theories about a normative social practice—the ordinary political practice of arguing about liberty and democracy—they claim not themselves to be normative theories. They claim rather to be philosophical or conceptual theories that are only descriptive of social practice and neutral among the controversies that make up that practice.

That claim is embarrassed, however, by two connected difficulties. First, ordinary political argument often includes, not merely as a neutral threshold to substantive controversies but as a central element in those controversies, argument about the very conceptual issues that the philosophers study. Second, the term

'descriptive' is ambiguous—there are many ways or dimensions in which a social practice might be 'described'. So Archimedeans must choose a more precise sense of description in order to make their position defensible. But they cannot do this: each sense of 'description', considered in turn, proves patently inapplicable. We must examine these independently fatal objections in turn.

A. *Controversy Over Concepts*

Philosophers' controversies are often political controversies as well. There is just now a lively argument not only in America but across the world, about whether judicial review is inconsistent with democracy. Lawyers and politicians who argue about this do not just assume that democracy means majority rule, so that judicial review is by definition undemocratic and the only question left to be decided is whether it is nevertheless justified. On the contrary, lawyers and politicians argue about what democracy really is: some of them insist that judicial review is not inconsistent with democracy because democracy does not mean just majority rule, but majority rule subject to those conditions that make majority rule fair.[7] Most of those who oppose judicial review reject this more complex definition of democracy and insist that democracy just means majority rule, or, perhaps, majority rule limited only be a few narrow procedural rights, including freedom of speech, rather than by the full set of rights that are now typically protected in national and international constitutions. Politicians who defend taxation do not concede that taxation invades freedom. On the contrary they deny this and insist that taxation, in itself, has no impact on liberty whatsoever. Some politicians and polemicists do, I agree, declare that taxation cheats on liberty, but, at least in America, these are all politicians who hate taxation and wish to end it. If the definition of democracy or liberty really is a neutral—threshold—issue, with no implications for substantive debate and decision, then why should politicians and citizens waste time arguing about it? Why hasn't common sense taught ordinary people simply to converge on a standard definition of these concepts—that democracy means majority rule, for example—so that they can save their energies for the genuinely substantive issues, like the issue of whether democracy should sometimes be compromised for other values? It might be said, in answer, that people are drawn to definitions that seems most naturally to support their own substantive positions. But that reply concedes the objection: if definitions really are neutral, why should any particular definition be thought an argumentative advantage?

The Archimedean story ignores the way in which political concepts actually function in political argument. They serve as abstract plateaus of agreement. Almost everyone agrees that the values in question are of at least some importance, and perhaps very great importance, but that agreement leaves open crucial

[7] See my book, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press 1996) particularly the Introduction.

substantive issues about what more precisely these values are or mean. We see this most dramatically in the case of the most abstract political concept of all: justice. People do not much dispute the importance of justice: it is normally a decisive objection to a political decision that it unjust. Disputes about justice almost always takes the form of argument, not about how important justice is or when it should be sacrificed to other values, but what it is. That is, we might say, where the action is. It would therefore be most implausible to treat a philosophical theory of *that* concept as Archimedean: it would be implausible, that is, to suppose that an informative theory about the nature of justice could be neutral among issues of substantive political argument. True, sceptical philosophers of justice—who argue that justice is only in the eye of the beholder, or that claims of justice are only projections of emotion—often suppose that their own theories are neutral. But it would be very surprising to find a philosopher defending a positive conception of justice—that political justice consists in the arrangements that maximize a community's wealth, for example—who believed that his theory was not itself a normative theory. Philosophers of justice understand that they are taking sides: that their theories are as normative as the claims about justice and injustice that politicians, leader writers and citizens make. The thicker political concepts of liberty, equality and democracy play the same role in political argument, and theories about the nature of those concepts are also normative. We agree that democracy is of great importance, but disagree about which conception of democracy best expresses and accounts for that importance. None of those who argue about whether judicial review is inconsistent with democracy would accept that the question of what democracy really is, properly understood, is a descriptive matter to be settled by studying, for example, how most people use the word 'democracy'. They understand that their dispute is deeply, essentially substantive.[8]

I should emphasize the difference between the position I am now defending and the more familiar opinion of several philosophers, which is that the leading political concepts are 'mixed' descriptive and normative concepts. On this familiar view the concepts of democracy, liberty and the rest have both emotive and descriptive components, and philosophers can disentangle these from each other. The emotive meaning is a matter of social practice and expectation: in our political culture declaring that some practice is undemocratic is almost inevitably meant and taken as a criticism, and some stranger who did not understand that would have missed something crucial about the concept. But, on this view, democracy nevertheless has a wholly separable descriptive and neutral sense: it means (according to one account) government according to majority will, and there would be no contradiction, in spite of the surprise it would occasion, in someone's saying that America is a democracy and much the worse for it.

[8] Someone might well say, pointing to what he takes to be a clear case—China for example—'You wouldn't call that a democracy, would you?' But this is a tactical move, and the response, 'Yes I would and so would most people', would be disappointing but not itself, even if true, a refutation.

The Archimedean political philosophers who insist that their theories of the central political values are politically neutral are therefore, on this view, making no mistake. They are of course aware of the political force or charge that these concepts carry, but they ignore that charge in laying bare the underlying, and in itself neutral, descriptive meaning.

The truth, I am arguing, is different. The concepts of liberty, democracy and the rest function in ordinary thought and speech as interpretive concepts of *value*: their descriptive sense is contested, and the contest turns on which assignment of a descriptive sense best captures or realizes that value. Descriptive meaning cannot be peeled off from evaluative force because the former depends on the latter in that way. Of course it is possible for a philosopher or citizen to insist that there is no value, after all, in democracy or liberty or equality or legality. But he cannot defend that stance simply by choosing one among the many contested accounts of liberty, for example, and then insisting that, so understood, liberty has no value. He must claim, not simply that liberty on some conception is worthless, but that it is worthless on the best defensible conception, and that is a much more ambitious undertaking that does not separate descriptive and evaluative meanings but trades on the interconnection between them.

B. *Descriptive in What Way?*

The second difficulty I mentioned becomes stark when we ask in what sense of 'descriptive' the supposedly second-order philosophical project of identifying a political value is a descriptive rather than a normative project. Is the supposed project a semantic analysis aiming to uncover the criteria that ordinary people actually use, perhaps all unaware, when they describe something as an invasion of liberty or as inegalitarian or undemocratic or illegal? Or is it a structural project that aims to discover the true essence of what people describe in that way, something like the scientific project of identifying the true nature of a tiger in its genetic structure or the true nature of gold in its atomic structure? Or is it a search for an impressive statistical generalization of some kind—perhaps an ambitious one that depends on the discovery of some law about human nature or behaviour that leads people to denounce the same act as illiberal, for example, or perhaps a less ambitious kind of generalization that merely claims that, as a matter of fact, most people do regard a particular kind of political decision as illiberal?

We should work our way through this brief catalogue of possibilities. The semantic suggestion assumes a certain factual background. It assumes that the use of 'liberty', 'democracy', and the other names of political concepts is governed—in our language—by shared criteria that determine whether a use is correct or incorrect, or falls in some borderline area between the two. It may not be obvious at the outset what these criteria are—indeed, if the philosophical project is worth doing, that will not be obvious. But careful attention, aided by thought

experiments about what it would seem right to say in particular situations, will bring these hidden criteria to the surface. These semantic assumptions are plausible in some cases: when we are studying the concept of an artifact, for example. If I described a single sheet of paper with print on it as a book, I would be making a mistake because there are shared criteria for the application of the concept of a book, and these exclude a single page. Whether I use 'book' correctly depends on how the word is usually used, and if I say that a single page of text is an excellent book I have said something false.

Some philosophers have made the mistake, I believe, of supposing that all concepts are governed by shared criteria in that way, or at least of uncritically assuming that the concepts they study are so governed.[9] But many concepts, including those of most importance to political philosophers, are plainly not. The shared-criteria background does not hold—to return to our easiest case—for the concept of justice. To be sure, we can imagine claims about justice or injustice that would seem ruled out on semantic grounds. I would be making a conceptual mistake if I insisted, and meant it literally, that seven is the most unjust of the prime numbers.[10] But we cannot imagine claims about justice of even the slightest importance or controversy being ruled out in that way.

That is also true, as we have already seen, of the thicker concepts of equality, liberty, democracy, patriotism, community and the rest. Once again we can construct silly examples of linguistic mistakes involving these concepts: the claim, for example, that a country automatically becomes less democratic when its annual rainfall increases. But there are no standard criteria of usage from which it would follow, one way or the other, whether judicial review imperils democracy, or whether all criminal laws invade people's freedom, or whether taxation compromises liberty. Nor does anyone think that standard usage can settle such controversies. Whether judicial review is inconsistent with democracy does not depend on what most people think or on how most people talk, and people have genuine disagreements about democracy, liberty and equality, in spite of the fact that each is using a somewhat different conception of these political values. Indeed, people's political disagreements are particularly profound when they disagree about what democracy or liberty or equality really are.

We should therefore turn to the second possibility in our catalogue. Some of our concepts are governed not by the background assumptions about shared criteria I just described but by an entirely different set of background assumptions: that the correct attribution of the concept is fixed by a certain kind of fact about the objects in question, facts that can be the object of very widespread error. What philosophers call 'natural kinds' provide clear examples. People use the word 'tiger' to describe a certain kind of animal. But zoologists may discover, through appropriate genetic analysis, that only some of what people call tigers

[9] See my discussion of the 'semantic sting' in *Law's Empire*.

[10] I do not mean to rule out a poetic claim along this line: if April is the cruellest month, so seven might be called, in an appropriate context, the most unjust number.

really are tigers; some of them may be a different animal, with a very different genetic composition, that look exactly like tigers. In this way, by identifying the distinctive tiger DNA, scientists can improve our understanding of the nature or essence of tigers. We can tell a parallel story about other natural kinds including, for example, gold. People may be entirely wrong in what they, perhaps uniformly, call gold. A sophisticated chemical analysis may show that some, or indeed all, of what most people now call gold is not really gold at all but only the gold of fools.

Are the political concepts of democracy, liberty, equality and the rest like that? Do these concepts describe, if not natural kinds, at least political kinds that like natural kinds can be thought to have a basic ingrained physical structure or essence? Or at least some structure that is open to discovery by some wholly scientific, descriptive, non-normative process? Can philosophers hope to discover what equality or legality really is by something like a DNA or chemical analysis? No. That is nonsense. We might pretend to such an idea. We might compile a list of all the past and present arrangements of political power that we would agree are democratic arrangements, and then ask which of the features that all such instances share are essential to their counting as democracy and which are only accidental or dispensable. But that pseudo-scientific recasting of our question would not help us, because we would still need an account of what makes one feature of a social or political arrangement essential to its character as a democracy and another feature only contingent, and once we have rejected the idea that reflection on the meaning of the word 'democracy' will supply that distinction, nothing else will.

That is true not only of political concepts but of all the concepts of different kinds of social arrangement or institution. Suppose a task force were assembled to compile a long list of the different kinds of legal and social arrangement, over the centuries that we would now describe as all instances of marriage, in spite of their great institutional and other differences. Suppose we found that in every case in our enormously long list some dateable ceremony was involved and that in no case was this ceremony performed to unite two people of the same sex. Now the question arises—imagine for the first time—whether a common law marriage is really a marriage or whether homosexuals can, as a conceptual matter, marry. It would be mad, would it not, it to suppose that these questions about the very nature of marriage could be settled by staring, however long, at the list we had compiled?

So philosophical analysis of political concepts cannot be shown to be descriptive on the model of scientific investigation into natural kinds. Liberty has no DNA. Now turn to the third possibility on our list. We now suppose that Archimedean political philosophy is scientific in a more informal sense. It aims only at historical generalizations, so, just as we might say that as a matter of fact no homosexual marriages have been recognized anywhere in the past, we might also say, if our evidence supported this proposition, that in the past people have

always regarded judicial review as inconsistent with democracy. But this seems, not just weaker than the conceptual claims political philosophers make, but too weak to distinguish political philosophy from social history or political anthropology. Isaiah Berlin said not merely that liberty and equality have very often been thought to conflict, but that they do, in their nature, conflict, and he could not have supported that ambitious claim simply by pointing out (even if this were true) that almost no one had ever doubted it. True, we might fortify the interest of such sociological generalizations by attempting to explain them in biological or cultural or economic law or theory. But that would not help much. It provides no effective argument for the proposition that marriage is by its very nature or essence limited to heterosexual couples to insist that there are good Darwinian or economic explanations why homosexual marriage has been everywhere rejected.

C. *Conceptual and Normative?*

Still, just as there is plainly something different between a lawyer's argument about whether Mrs Sorenson should win her case and a philosopher's argument about what law is, so there is something different between the way a politician appeals to liberty or democracy or equality and a philosopher's studied conception of these ideals. If we can't distinguish between the two by supposing that the philosopher's enterprise is descriptive, neutral and disengaged, then how can we identify the difference? Can we say that the philosopher's engagement is conceptual in some way that the politician's is not? How can a normative argument also be conceptual? And if it can, why isn't the politician's argument conceptual as well?

Return for a moment to the argument I made about natural kinds: in fact there are instructive similarities between natural kinds and political concepts that I ignored in that argument. Natural kinds have the following important properties. They are real: neither their existence nor their features depend on anyone's invention or belief or decision. They have a deep structure—their genetic profile or molecular character—that explains the rest of their features, including the surface features through which we recognize them whether or not we are aware of that deep structure. We recognize water in part because it is transparent and liquid at room temperature, for example, and the deep structure of water—its molecular composition—explains why it has those characteristics. Political and other values are in almost all those respects like natural kinds. First, political values, too, are real: the existence and character of freedom as a value does not depend on anyone's invention or belief or decision. That is, I know, a controversial claim: many philosophers dispute it. But I shall assume that it is true.[11] Second, political values have a deep structure that explains their concrete manifestations. If progressive taxation is unjust, it is unjust in virtue of some more general, fundamental, property of just institutions that progressive taxation

[11] See Objectivity and Truth.

lacks. That, too, is a controversial claim: it would be rejected by 'intuitionists' who believe that concrete moral facts are simply true in and of themselves, as they are, in their view, apprehended to be true. But once again I shall assume that it is true.

The difference between natural kinds and political values that I emphasized of course remains after we have noticed these similarities. The deep structure of natural kinds is physical. The deep structure of political values is not physical—it is normative. But just as a scientist can aim, as a distinct kind of project, to reveal the very nature of a tiger or of gold by exposing the basic physical structure of these entities, so a political philosopher can aim to reveal the very nature of freedom by exposing its normative core. In each case we can describe the enterprise, if we wish, as conceptual. The physicist helps us to see the essence of water; the philosopher helps us to see the essence of liberty. The difference between these projects, so grandly described, and more mundane projects—between discovering the essence of water and discovering the temperature at which it freezes, or between identifying the nature of freedom and deciding whether taxation compromises freedom—is finally only one of degree. But the comprehensiveness and the fundamental character of the more ambitious study—its self-conscious aim at discovering something that is fundamental by way of explanation—justifies reserving the name of conceptual for it. We cannot sensibly claim that a philosophical analysis of a value is conceptual, neutral and disengaged. But we can sensibly claim it to be normative, engaged, and conceptual.

D. *What's Good About It? I*

A conceptual claim about a political value aims to show, as I said, the value *in* it: it aims to provide some account of its value that is comparably fundamental, by way of explanation, to the molecular structure of a metal. So a general theory about justice will try to capture, at a suitably fundamental level, the value of justice: it will try to show justice, as we might put it, in its best light. But how can we do that without begging the question? Wouldn't that be like trying to explain the colour of red without referring to its redness? We can say that justice is indispensable because only justice avoids injustice, or that democracy is valuable because it gives people self-government, or that liberty has value because it makes people free, or that equality is good because it treats people as of the same importance. But these propositions are not helpful, because they use the idea they are meant to explain. How could we hope to do better than that? We might try an instrumental justification—justice is good because injustice makes people miserable, or democracy is good because it generally promotes prosperity, for example. But these instrumental claims don't answer: we want to know what is distinctively good about justice and democracy, not what other kinds of good they provide. The 'mixed' account of political values that I mentioned earlier hopes to evade that difficulty: it allows philosophers to acknowledge the 'value' part of democracy's meaning, as a kind of brute fact, and then concentrate on

unpacking the purely 'descriptive' part. But, as I said, that won't do either: if we want to understand what freedom or democracy or law or justice really is, we must confront the difficult question of how to identify a value's value. We can only hope to do this—I shall argue—by locating that value's place in a larger web of conviction. I cannot begin that argument, however, without introducing another important distinction.

E. *Detached and Integrated Values*

We want to understand better what justice, democracy and freedom are because we think we can all live better, together, if we understand and agree on this. But there are two views we might take about the connection between understanding a value and living better in consequence. We might, first, treat the value as detached from and fixed independently of our concern to live well: we must respect it simply because it is, in itself, something of value that we do wrong or badly not to recognize. Or, second, we might treat the value as integrated with our interest in living well: we might suppose that it is a value, and has the character it does, because accepting it as a value with that character enhances our life in some other way.

Orthodox religions take the first view of the central values of their faith: they treat these as detached. They insist that living well requires devotion to one or more gods, but they deny that the nature of these gods, or their standing as gods, in any way derives from the fact that a good life consists in respecting them, or that we can advance our understanding of their nature by asking how, more precisely, they would have to be in order to make respecting them good or better for us. We take the same view of the importance of scientific knowledge. We think that it is better for us to understand the fundamental structure of the universe, but we do not think — unless we are crude pragmatists or mad —that that structure depends on what it would be in any way good for us that it be. We are, we might say, add-ons to a physical world that already and independently had whatever fundamental physical structure it has now when we arrived. So though our practical interests are prods and signals in our science—they help us to decide what to investigate and when to rest content with some claim or justification—they do not contribute to the truth of the claim or the cogency of the justification.

Many people take the same view of the value of art. We are add-ons, they say, to the world of that value: we are responsible for discovering what is wonderful in art, and respecting its wonder, but we must take care not to commit the fallacy of supposing that something is beautiful because it makes our life better to appreciate it, or that we can identify and analyze its beauty by considering what it would be otherwise good for us to admire in the way we admire art. G.E. Moore held a very strong form of the view that art's value is detached: he said that art would retain its full value even if all the creatures that could appreciate it perished never to return. We need not go that far to suppose that the art's value is detached, however, we can say that a painting would have no value if it could

have no meaning for or impact on any sensibility without also supposing that its value depends on the impact that it actually has, or the independent value of that impact for any creature.

On the other hand, it would be starkly implausible to treat the personal virtues and achievements that make up a creditable life as having only detached value. Being amusing or interesting are virtues to cultivate and admire, but only because of the contribution they make to the enjoyment of our own and other people's lives. It is harder to identify the contribution of more complex virtues, like sensibility and imagination, for example, but it is equally implausible that our recognition of these as virtues would survive a general understanding that they make no independent contribution at all. Most people cherish friendship: they think a life with no close connections to others is impoverished. But we do not think that friendship just is what it is, like a planet, and that its only connection with a desirable life is that a desirable life is one that recognizes it, whatever it turns out to be. I do not mean, of course, that relationships like friendship are valuable only for the narrow benefits they bring to friends, like cooperation in achieving goals. But their value is not independent of the way that they enhance life in other ways; we may disagree about exactly which ways these are—friendship is an interpretive concept[12]—but no one thinks that friendship would remain something of importance if it turned out to do nothing for the lives of friends, except make them friends.

But though it would be implausible to suppose that some personal quality or achievement has only detached value, it is often difficult, as some of these examples suggest, to identify the way in which the value of that virtue or achievement is bound up in the more comprehensive idea of a good life. We count integrity, style, independence, responsibility, modesty, humility and sensibility as virtues, for example, and friendship, theoretical knowledge and self-respect as important achievements. Some enterprising social Darwinian might one day show that these traits and ambitions had survival value in ancestral savannahs. But that is not how they appear to us: we do not think that sensibility or personal integrity or achieving some understanding of the science of the day is important because a community would be less prosperous or more at risk from enemy invasion if its citizens did not take it to be a virtue or a goal. We rather consider these values as aspects or components of, not instrumental means toward, an attractive, fully successful, life.

It would make as little sense to treat the political values that we have been discussing, like justice, freedom, legality and democracy, as detached values. Justice is not a god or an icon: we value it, if we do, because of its consequences for the lives we lead as individuals and together. True, the Archimedean tradition sometimes seems to suppose that liberty, for example, like great art, just is what it is, and that though we must perhaps consult our own needs and interests in deciding how important liberty is, those needs and interests are not relevant in deciding

[12] See *Law's Empire*.

what it is. Or what democracy or equality or legality really mean. Nothing but that assumption could explain Berlin's confident declaration, for example, that liberty and equality, just in the nature of the case, are conflicting values, or other philosophers' claim that liberty, properly understood, is compromised by even fair taxation. But it nevertheless seems deeply counterintuitive that important political values, which almost everyone must sometimes make sacrifices to protect, have only detached value, and none of the political Archimedeans, so far as I am aware, has actually made that claim.

F. *What's Good About It? II*

That apparently irresistible fact—that the political values are integrated rather than detached—routes us straight back to the difficulty we encountered earlier. How can we explain what's good about these values without begging the question? That demand is less threatening in the case of detached than integrated values. We might well think it crazy even to imagine that the question of why great art, for example, has value could be answered without begging the question. If the value of art just lies in its own, detached, value, then it really would be just as odd to ask for an account of that value in other terms as to ask for a description of red's colour in other terms. We might of course question whether art actually does have value, after all. But we could not sensibly urge, as evidence that it does not, that it is impossible to specify that value in some non-circular way. We cannot dispose of the difficulty so easily in the case of integrated values, however, for we suppose not only that an integrated value's existence depends on some contribution it makes to some other, independently specifiable, kind of value, like the goodness of the lives that people can lead, but that the more precise characterization of a integrated value—the more precise account of what liberty, for instance, actually is—depends upon identifying that contribution. Imagine a discussion about some virtue: modesty, for example. We ask whether modesty is, after all, a virtue, and, if so, what the line is between that virtue and the vice of self-abnegation. It would be perfectly appropriate to expect, in the course of that reflection, some account of modesty's benefits, and if none could be provided, except that modesty is its own reward, to count that fact as fatal to the virtue's claims.

So we cannot avoid, but must now confront, the question how the value of integrated values including political values can be identified. Some integrated values, like charm, might be thought wholly instrumental. But the more interesting ones, like friendship, modesty and the political values, are not instrumental in any obvious way. We do not value friendship just for the narrow advantages it might bring, or democracy just because it is good for commerce. If we could arrange these various integrated values in a hierarchical structure, we might be able to explain the contribution of those lower in the hierarchy by showing how they contribute to or enhance those higher. We might be able to show, for instance, that modesty is a virtue because it contributes in some way to a capacity

for love or friendship. But this project seems hopeless, for—though it is possible to see some ethical values as supporting others in some way—the support seems more mutual than hierarchical. A modest person might for that reason have a greater capacity for love or friendship, but deep love and friendship might also contribute to making people modest. No one aspect of what we take to be an attractive and successful life seems sufficiently dominant to make it plausible that all the other virtues and goals we recognize are only servants to it. We can, I think, speculate about the general character of a good life. I have elsewhere argued, for example, that we should adopt a challenge model for ethics—living well means performing well in response to a challenge that can be met well without otherwise affecting human history—rather than a model that measures a life's success by asking how much it has improved human history.[13] But no general model for ethics can serve as a final or ultimate test for subordinate virtues or goals. We can accept that living well means responding well to a distinct kind of challenge without thereby deciding whether living with flair is responding well or only preening, or whether humility in certain circumstances is really servility, or whether nobility is soiled by an interest in commerce, or whether democracy is only majority rule.

If we are better to understand the non-instrumental integrated values of ethics, we must try to understand them holistically and interpretively, each in the light of the others, organized not in hierarchy but in the fashion of a geodesic dome. We must try to decide what friendship or integrity or style is, and how important these values are, by seeing which conception of each and what assignment of importance to them best fits our sense of the other dimensions of living well, of making a success of the challenge of living a life. Ethics is a complex structure of different goals, achievements and virtues, and the part each of these plays in that complex structure can only be understood by elaborating its role in an overall design fixed by the others. Until we can see how our ethical values hang together in that way, so that each can be tested against our provisional account of the others, we do not understand any of them. Two of the most overworked of philosophical images are nevertheless apposite here. In value as in science we rebuild our boat one plank at a time, at sea. Or, if you prefer, light dawns slowly over the whole.

Political philosophy that aims better to understand the political values must fold its own work into that large structure. It must aim, first, to construct conceptions or interpretations of each of these values that reinforce the others—a conception of democracy, for example, that serves equality and liberty, and conceptions of each of these other values that serves democracy so understood. It must aim to construct these political conceptions, moreover, as part of an even more inclusive structure of value that connects the political structure not only to morality more generally but to ethics as well. All this sounds, no doubt, impossibly and even perhaps unattractively holistic. But I see no other way in which

[13] See my book, *Sovereign Virtue* (Cambridge and London: Harvard University Press, 2001), ch 6.

philosophers can approach the assignment of making as much critical sense as is possible of any, let alone all, parts of this vast humanist structure. If we understand that that is philosophers' collective responsibility, over time, we will each have a better sense of our own separate marginal and incremental roles.

I must concede that this conception of political philosophy stands in opposition to two of the most noted examples of contemporary work in that field: John Rawls' 'political' liberalism and the political pluralism associated with Isaiah Berlin. My recommendation is similar to Rawls' method of reflective equilibrium, which aims to bring our intuitions and theories about justice into line with one another. The difference with Rawls' methodology is more striking than the similarities, however, because the equilibrium I believe philosophy must seek is not limited, as his is, to the constitutional essentials of politics, but embraces what he calls a 'comprehensive' theory that includes personal morality and ethics as well. If political philosophy is not comprehensive in its ambition it fails to redeem the crucial insight that political values are integrated, not detached.

I cannot describe political philosophy so conceived in any greater detail here. But I offer my recent book, *Sovereign Virtue*, as an example of work at least self-consciously in that spirit.[14] I should stress that this comprehensive project is not based on the preposterous premise that truth in political philosophy, or in the theory of value more generally, is a matter of coherence. Elegant and exquisitely coherent theories of political morality may be false, even repulsive. We aim, not at coherence for its own sake, but at both conviction and as much coherence as we can command. Those twin aims may—indeed I think they often must—reinforce one another. It is easier to find a deep sense of rightness in a unified, integrated set of values than in a shopping list. But the two aims may, we must also remember, cause trouble for one another. They may do so, for example, when our initial sense of the character of two values—patriotism and friendship in E.M. Forster's celebrated example, for instance, or liberty and equality as Berlin explains these—shows these values to be in conflict. We may be able to construct conceptions of patriotism and friendship, or of liberty and equality, that eliminate the conflict. But these conceptions may not grip our soul: they may feel artificial or alien or just not right. We should reflect further, if we have world enough and time, and imagination enough and skill: we should try to find some compelling conception of both friendship and patriotism, for instance, that show them not in conflict. We may not be able to do this, however.[15] We must then believe whatever it is that we cannot help believing—that patriotism and friendship are both essential but that we cannot have both in full or even adequate measure, perhaps. But we cannot then think that our reflection has been a success, that we have earned the right to stop. We are only stuck, which is different.

[14] 'Justice for Hedgehogs', the unpublished *Dewey Lectures* at Columbia University that I mentioned in the introduction to *Sovereign Virtue*, is more explicitly an attempt to illustrate this kind of philosophy.

[15] See my article 'Do Liberal Values Conflict?' in Dworkin, Lilla and Silvers (eds), *The Legacy of Isaiah Berlin* (New York Review Books, 2001).

3. *Law*

A. *Hart's Defence*

Law is a political concept: people use it to form claims *of* law, that is, claims that the law of some place or other prohibits or permits or requires certain actions, or provides certain entitlements, or has other consequences. An enormous social practice is built around making, contesting, defending and ruling on such claims. But their character is elusive. What does the claim that 'the law' requires something really mean? What in the world makes that claim true when it is true, and false when it is false? The law of England requires people to pay taxes periodically, and to pay damages if they break their contracts, except in certain circumstances. These propositions are true, English lawyers will tell you, because of what Parliament has enacted and what English judges have decided in the past. But why do these particular institutions (rather than, for example, an assembly of the presidents of major universities) have the power to make propositions of law true? Lawyers often claim, moreover, that some proposition of law is true—for instance, that Mrs Sorenson is legally entitled to a share of damages from each of the drug companies—when no legislature or past judges have so declared or ruled. What else, beside these institutional sources, can make a claim of law true? Lawyers often disagree about whether some claim of law, including that one, is true, even when they know all the facts about what institutions have decided in the past. What in the world are they then disagreeing about? We want, moreover, to answer these questions not just for a particular legal system, like English law, but for law in general, whether in Alabama or Afghanistan, or anywhere else. Can we say anything, in general, about what makes a claim of law true wherever it is true? Can there be true claims of law in places with very different kinds of political institutions from those we have? Or no recognizable political institutions at all? Is there a difference, in England or anyplace else, between the claim that the law requires someone to perform contracts he signed and a prediction that officials will punish him if he does not? Or between that claim and the apparently different claim that he is morally obligated to perform his contracts? If a claim of law is different from both a prediction of consequences and a statement of moral obligation, how, exactly, is it different?

Hart set out to answer these ancient questions in *The Concept of Law*. I quoted his own summary of his answer—the sources thesis—earlier. The details of that thesis are well-known among legal philosophers. Hart thought that in every community in which claims of law are made the great bulk of the officials of the community all accept, as a kind of convention, some master rule of recognition that identifies which historical or other facts or events make claims of law true. These conventions might be very different from one legal system to another: in one place the master convention might identify legislatures and past judicial decisions as the source of true legal claims, while in another the convention might

identify custom or even moral soundness as the source. What form the convention takes, in any particular community, is a matter of social fact: everything turns on what the bulk of the officials in that community happen to have agreed on as the master test. But it is part of the very concept of law that in every community some master convention exists and picks out what counts as law for that community.

Hart's sources thesis is controversial: my own view of what makes claims of law true when they are true is very different, as I said. What is now important, however, is not the adequacy of Hart's theory but its character. Ordinary, first-order legal practice may consist in competing value judgments: it will do so, Hart says in his Postscript, if the community's master rule of recognition uses moral standards as part of the test for valid claims of law. But his own theory, he insists, which describes ordinary legal argument, is not a normative or evaluative theory—it is not a value judgment of any kind. It is rather an empirical or descriptive theory that elucidates the concepts that that ordinary legal argument deploys. Hart's position is a special case of the standard Archimedean view that there is a logical divide between the ordinary use of political concepts and the philosophical elucidation of them.

His position is therefore open to the same objections we reviewed against Archimedeanism in general. First, it is impossible to distinguish the two kinds of claims—to distinguish the first-order claims of lawyers in legal practice from second-order philosophers' claims about how first-order claims are to be identified and tested—sufficiently to assign them to different logical categories. Hart's sources thesis is very far from neutral between the parties in Mrs Sorenson's case, for example. No 'source' of the kind Hart had in mind had provided that people in Mrs Sorenson's position are entitled to recover damages on a market-share basis, or stipulated a moral standard that might have that upshot or consequence. So if Hart is right Mrs Sorenson cannot claim that law is on her side. Indeed, the drug companies' lawyers made exactly the same argument in court as Hart made in his book. They said that her claim fails because nothing in the explicit law of the state, as identified by settled legal conventions, provides for such a claim. Mrs Sorenson's lawyers argued to the contrary. They denied the sources thesis: they said that general principles inherent in the law entitled their client to win. So Hart's view is not neutral in the argument: it takes sides. It takes sides, in fact, in every difficult legal dispute, in favour of those who insist that the legal rights of the parties are to be settled entirely by consulting the traditional sources of law.

So the first difficulty of political Archimedeanism holds for Hart's legal version as well. So does the second difficulty. In what way is Hart's social sources theses supposed to be 'descriptive'? Of course, as he and his defenders acknowledge, description is always itself a normative enterprise in *some* sense: any descriptive theory picks out one explanation of some phenomena as more revealing or salient or useful or something of the sort. Hart agreed that his analysis of law was normative in the sense in which any explanation of anything is normative: he meant that his theory is descriptive as opposed to morally or ethically evaluative. But as

we noticed in the case of liberty, equality and the rest, there are several modes of description, and we must ask in which of these modes he meant his theory to be descriptive. Though he and his followers have energetically protested that my criticism of their work is based on a misunderstandings of their methods and ambitions, it is difficult to find any helpful positive statements of what these methods and ambitions are, let alone any that explains their claim to a descriptive status. In a famously baffling phrase in the original version of *The Concept of Law*, he said that that book should be understood as 'an exercise in descriptive sociology'. But he did not elaborate that bare claim, and it is far from plain, as we shall see, what he could have meant by it.

We must, once again, exercise our own imagination. I earlier distinguished three ways in which someone might think that a conceptual analysis of a political concept is a descriptive enterprise, and we must consider each of these again, in this context. Is the sources thesis a semantic claim: does it aim to bring to the surface linguistic criteria that lawyers everywhere, or at least the bulk of them, actually follow when they make and judge claims of law? Hart did not mean, of course, to offer a simple dictionary definition or set of synonyms for any particular word or phrase. But it seems to me plausible that he meant to make a more ambitious philosophical claim, elucidating criteria of application that lawyers and others might recognize, after he had pointed them out, as the rules that they actually do follow in speaking about what the law requires or permits. I proposed that understanding of his enterprise in *Law's Empire*; I said that if my understanding was correct his enterprise was doomed because there are no shared criteria, even hidden ones, for endorsing or rejecting propositions of law, even among lawyers in particular jurisdictions let alone everywhere. In his Postscript, Hart vigorously denies that he intended any such thing; he says that I deeply misunderstood his project. I am battered but unbowed: I still think that my understanding of the enterprise in *The Concept of Law* is the best available.[16] Still, since Hart ridiculed this understanding of his project in his Postscript, we must look elsewhere.

Could he have thought that propositions of law form a kind of natural kind, like tigers and gold, so that discoveries might be made about them that could contradict what most people think about their truth or falsity? Just as we might discover that many animals labelled 'Tiger' in zoos are not actually tigers, so, on this view, we might discover that, whatever people think, nothing is law that does not conform to the sources thesis. Deep discoveries about natural kinds do seem at once conceptual—tiger DNA can plausibly be called the essence of tigerhood—and descriptive. So this hypothesis, if we could accept it, would explain Hart's apparent belief that a conceptual investigation into law could be descriptive but not semantic. We need not pursue this, however, because Hart

[16] Others agree. See, e.g. N. Stavropoulos, 'Hart's Semantics' in J. Coleman (ed.), H*art's Postscript* (Oxford: Oxford University Press 2001) at 59.

could not have thought that true claims of law form a natural kind. If liberty has no DNA, neither does law.

We are left with the third possibility I distinguished: that Hart's sources thesis is meant to be descriptive in the way of an empirical generalization of some sort. Some army of legal anthropologists might conceivably collect all the data that history can provide about the various occasions on which people have made, accepted or rejected what we regard as claims of law. Some sociologist with a room-sized computer and a huge budget might hope to analyze that Everest of data, not to find the essence or nature of law, but simply to discover patterns and repetitions in the vast story. He might, most ambitiously, aim to identify laws of human nature: if he finds that people accept propositions of law only when the sources thesis endorses them, for example, he might hope to explain that remarkable fact through Darwinian principles, perhaps, or economic equations, or something of the sort. Or he might be much less ambitious—he might simply point out the regularity, which would certainly be interesting enough in itself, and not try to explain it.

Shall we understand Hart's Archimedeanism to be empirical in either the more or less ambitious of these senses? There is an insuperable threshold objection: neither Hart nor his descendants have even so much as begun on the lifetime-consuming empirical studies that would be needed. They have not produced an anthill let alone an Everest of data. There is a further threshold objection, at least in Hart's own case. It would be exceedingly odd to refer to any such empirical study or generalization as aimed at discovering the concept or nature or very idea of law, and so odd to name a book supposedly reporting those discoveries *The Concept of Law*. Imagine an economist saying that Ricardo's laws lay bare the very concept of wage or profit, for example.

Behind these threshold difficulties lies a third and even greater embarrassment. If we conceive Hart's theories—or those of his descendants—as empirical generalizations, we must concede at once that they are also spectacular failures. It would, I said, take a mountain of data to support the sources thesis as an empirical generalization, but it takes only a few counter-examples to refute it, and these are everywhere. There is now a lively debate in the United States about whether capital punishment is constitutional. The argument hinges on whether the Eighth Amendment to the Constitution, which prohibits 'cruel and unusual punishments', incorporates some moral standard for appropriate punishments, which capital punishment might well be thought to fail, or whether, on the contrary, it incorporates no moral standard but instead prohibits only punishments that the statesmen and politicians who made the amendment—or the general public to which it was addressed—thought cruel. If we assume that capital punishment is in fact unacceptably cruel, but that almost no one thought it so in the 18th Century, then lawyers who accept the first of these interpretations will think that constitutional law prohibits capital punishment and those who accept the second will think that it permits capital punishment. Those who argue for the first, or

moral, reading plainly contradict the social sources thesis, since no social source has directed that the Eighth Amendment be read to incorporate morality. But, since no social source has ruled that morality is not relevant, those who argue against the moral reading also contradict that thesis.

Hart said that morality becomes relevant to identifying law when some 'source' has decreed that morality should have that role, and he gave the abstract clauses of the American Constitution as examples. But he misunderstood the state of American constitutional law. There is no consensus either in favour of or against the moral reading of the Constitution: it is on the contrary a matter of fierce disagreement. I, among others, endorse the moral reading that Hart apparently has in mind.[17] But others, including Justice Antonin Scalia of the United States Supreme Court, and a notorious former judge, Robert Bork, denounce the moral reading as profoundly misjudged.[18] There is no convention for or against it, no basic rule of recognition from which either side could hope to support the propositions of constitutional law that it nevertheless claims to be true.

4. *The Value of Legality*

A. *Legality*

A fresh start? I said earlier that political concepts are concepts of value, and that political philosophers should aim to show, for each of them, more precisely where its value lies. I said that since political values are integrated rather than detached, this project must find the place of each value in a larger and mutually supporting web of conviction that displays supporting connections among moral and political values generally and then places these in the still larger context of ethics. This picture of political philosophy is not only wildly ambitious—it can only even be imagined in a cooperative way—but it is also, as I conceded, very much against contemporary fashion. It is not in the spirit of modest value pluralism. It aims at a utopian and always unrealized goal—Plato's unity of value—instead.

We should try to approach the ancient puzzles of law in that way. We need to find, however, a political value that is linked to those puzzles in the right way. It must be a real value, like liberty, democracy and the rest, and it must be widely accepted as a real value, at least if our project is to have any chance of influence. The value must nevertheless function, within our community, as an interpretive value—those who accept it as a value must nevertheless disagree about precisely what value it is, and must disagree, in consequence, at least to some degree,

[17] See *Freedom's Law*.

[18] See the debate between Justice Scalia and myself in A. Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997) at 117. See also my article 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve', 65 *Fordham L Rev* 1249, March, 1997.

about which political arrangements satisfy it, or which satisfy it better and which worse. It must be a distinctly legal value so fundamental to legal practice that understanding the value better will help us better to understand what claims of law mean and what makes them true or false. We must be able to see, for example, how a specific conception of the value would generate the sources thesis, and how other conceptions would generate the very different theories of law that are also part of the literature of jurisprudence. We must be able to see how embracing one conception of the value rather than another would mean reaching one decision rather than another in Mrs Sorenson's case.

It should now be clear what value that is: it is the value of legality—or, as it is sometimes more grandly called, the rule of law. Legality is a real value, and it is a distinctly legal value. Many people think, for instance, that the Nuremberg trials in which Nazi leaders were tried and sentenced after World War II offended legality even though they were justified by other political values—justice or expediency, for example. Legality is, moreover, a very popular value. It has been much more widely embraced, and over many more centuries, than the other values I discussed earlier, and it is very widely regarded as of even more fundamental importance than they are. Classical and medieval philosophers analyzed and celebrated legality long before other philosophers celebrated liberty, let alone equality.

From the beginning, moreover, legality was an interpretive ideal, and it remains so for us. There are various ways to state the value abstractly. Legality is engaged, we might say, when political officials deploy the state's coercive power directly against particular persons or bodies or groups—by arresting or punishing them, for example, or forcing them to pay fines or damages. Legality insists that such power be exercised only in accordance with standards established in the right way before that exercise. But that abstract formulation is, on its own, almost entirely uninformative: it remains to be specified what kinds of standards satisfy legality's demands, and what counts as a standard's having been established in the right way in advance. People disagree markedly about those issues. Some say, as I just noted, that the Nuremberg trials offended legality, whether or not they were finally justified by some other value. But others say that the trials protected or enhanced the true ideals of legality. People disagree now, along similar lines, about trials of deposed dictators for inhumane acts not condemned by local law when they acted, and about the trials of Balkan villains in international criminal courts. These different views represent a common adherence to the value of legality, but different conceptions of what legality is.

Nor can there be much doubt about the connection between the value of legality with the problem of identifying true or valid claims of law. Conceptions of legality differ, as I said, about what kinds of standards are sufficient to satisfy legality and in what way these standards must be established in advance; claims of law are claims about which standards of the right sort have in fact been established in the right way. A conception of legality is therefore a general account of

how to decide which particular claims of law are true: Hart's sources thesis is a conception of legality. We could make little sense of either legality or law if we denied this intimate connection between conceptions of legality and the identification of true claims of law. We can sensibly think that though the law rejects Mrs Sorenson's claim for damages according to market share, justice supports that claim. Or (less plausibly) the other way around: that though the law grants her that claim, justice condemns it. But it would be nonsense to suppose that though the law, properly understood, grants her a right to recovery, the value of legality argues against it. Or that though the law, properly understood, denies her a right to recovery, legality would nevertheless be served by making the companies pay.

We can rescue the important questions of legal philosophy from Archimedean obscurantism by attacking them in this different way. We understand legal practice better, and make more intelligible sense of propositions of law, by pursuing an explicitly normative and political enterprise: refining and defending conceptions of legality and drawing tests for concrete claims of law from favoured conceptions. There is no question of taking theories of law constructed in that way to be merely 'descriptive'. They are conceptual, but only in the normative, interpretive sense in which theories of justice, as well as theories of democracy, liberty and equality, are conceptual. They may be, like such theories, more or less ambitious. The more ambitious try to find support for their conceptions of legality in other political values—or rather, because the process is not one-way, they try to find support for a conception of legality in a set of other, related, political values, each of these understood in turn in a way that reflects and is supported by that conception of legality.

I offer my own book, *Law's Empire*, as a more elaborate example of what, at least in effort, I have in mind. I did not emphasize the word 'legality' there, but I did appeal to the value: I said that a philosophical theory of law must begin in some understanding of the point of legal practice as a whole. I was not then so concerned with isolating and refining the other values that any persuasive account of law's point would implicate. But the more ambitious description of jurisprudence I have now described helps me better to understand, and I hope better to pursue, issues underdeveloped or ignored in the book. I said there, for example, that identifying true propositions of law is a matter of interpreting legal data constructively, and that a constructive interpretation aims both to fit and to justify the data. I warned that 'fit' and 'justification' are only names for two rough dimensions of interpretation, and that further refinement would require a more careful analysis of other, discrete political values through which to understand these dimensions more thoroughly, so that we might see, for example, how to integrate them in an overall judgment of interpretive superiority when they pull in opposite directions. The key political concepts that must be explored in that way, it now seems to me, are those of procedural fairness, which is the nerve of the dimension of fit, and substantive justice, which is the nerve of political justification. Understanding the concept of legality better, that is, means

expanding the discussion of adjudication to include a study of these further values, and though it would be surprising if that further study did not alter our understanding of law in some way, it would also be surprising if our understanding of law did not produce at least somewhat different views of fairness and justice as well. A wide-ranging reinterpretation of political values leaves nothing wholly as it was.

B. *Jurisprudence Revisited*

Can we interpret the leading traditions or schools of jurisprudence as reflecting (and therefore as different from another in respect of) different conceptions of legality? That value insists that the coercive power of a political community should be deployed against its citizens only in accordance with standards established in advance of that deployment. What kind of standards? Established in what way? We attack these questions by proposing some reading of the value of legality—some putative point served by constraining the use of political power in that way—and this reading must implicate, as I have several times now said, other values that we recognize. If it is sufficiently ambitious, it will implicate a great many of them in what I called earlier a web of conviction. Nevertheless different conceptions will select different connected values as more important in that mix: conceptions will differ, we might say, in the importance each assigns to different values in creating the local magnetic field in which it places legality.

Schools or traditions of jurisprudence are formed by large differences in the character of those choices. Three important traditions have in fact been formed by the rival choices, as locally influential values, of the political values of accuracy, efficiency and fairness. I shall explore each of these three traditions in that light, but I want particularly to emphasize, in advance, that I am not suggesting that any of the traditions I describe has chosen one of these three values as the exclusive key to legality, and disparaged or neglected all others. I claim that the legal positivist tradition emphasizes the relation between legality and efficiency, for example, but I do not mean that positivists have been insensitive to either good or fair government. Positivists differ among themselves, not only because they hold somewhat different views of what political efficiency means, and why it is valuable, but because they also hold different views, reflected in the details of their positions, about the character and force of many other political ideals, and I shall mention some of the other values to which different positivists have appealed to shape and reinforce their dominant reliance on efficiency. My tripartite division distinguishes the centres of gravity of different groups or schools of theory; it is not meant to exhaust the complexity or explain the details of any one theory.

Accuracy. By accuracy I mean the power of political officials to exercise the state's coercive power in a substantively just and wise way. Legality promotes accuracy if official acts are more likely to be wise or just if they are governed by established standards than if they represent merely the contemporary judgment

of some official about what would be just or wise. It is not immediately evident that that will always, or even usually, be the case. Plato said that legality would hinder accuracy if the officials whose power it restrained were people of great knowledge, insight and character, because they would know more about the immediate case than those who had laid down laws in the past, and they would be sensitive to discrete aspects of the case that might require or justify some different treatment. But there are at least two possible reasons for thinking that nevertheless legality does improve accuracy. The first appeals to institutional, historical or other contingent reasons for thinking that the judgment of past lawmakers, in spite of their distance from some immediate problem or issue, is nevertheless likely to be better than the contemporary official's instinct or decision. Plato endorsed legality, in spite of the reservation I just reported, for that sort of reason. Philosopher-kings are rarely in power, he said, and, particularly in a democracy, the people actually in charge are ill-informed, incompetent, corrupt, self-serving or all of these. In those unfortunate circumstances, he said, it is better that officials be constrained to follow what was laid down in the past, because they cannot be trusted to make a good contemporary decision of their own. Political conservatives, like Burke and Blackstone, often defended legality in much the same way. They thought that established law was a repository of accumulated wisdom and clear thought, and was therefore more to be trusted than the decisions, particularly those made in the heat of some moment, of individuals of limited character, knowledge and skill.

The second reason for supposing that legality improves accuracy is very different: it relies, not on any contingent reason for supposing that established standards are wiser and more just than fresh case-by-case rulings, but on a conception of legality that allows the tests for established standards to promote or even to guarantee that result. The medieval natural lawyers thought that good government meant government in accordance with God's will, that God's will was expressed in moral laws of nature, and that divinely inspired priests and rulers were reliable guides to that law. They were naturally attracted, therefore, to a conception of legality that emphasized these fortunate connections between legality and political virtue, and therefore to tests for law that include a requirement of moral worth or acceptability. There is nothing in the abstract concept of legality that excludes that connection, and if the true value of legality is identified only through a conception that formalizes it, then that conception will seem, for those who accept the sets of understandings into which it fits, irresistible. The natural law tradition, in its various forms and manifestations, is premised on that way of understanding why legality has the value it does.

Efficiency. Jeremy Bentham, the founder of at least the British form of legal positivism, was not, however, attracted to either of these two sets of assumptions. He did not suppose that old standards are good ones; on the contrary he was a restless, even radical, innovator. He did not believe that the moral law is evident in God's nature: he thought, on the contrary, that the very idea of

natural rights is nonsense on stilts. His conception of legality's virtue lay not in accuracy but in efficiency. Political morality, he thought, lies in the greatest good of the greatest number, and that can best be secured, not by different coercive or policy decisions taken by different officials relying on their own immediate and diverse judgments, but by detailed policy schemes whose complex consequences can be carefully considered in advance, and which can be laid down in detail, preferably in elaborate statutory codes, and enforced to the letter. Only in that way can the massive problems of coordination that the government of a complex society confronts be solved. Legal positivism is a natural upshot of that understanding of legality's true point and value. Efficiency is compromised or entirely undermined, he thought, when moral tests are included among the tests for law, because moral tests allow citizens and officials who disagree, often strenuously, about what morality requires to substitute their own judgment about what standards have been established: the consequent disorganization will produce not utility but chaos. So Bentham and his followers insisted that law is whatever and only what the sovereign ruler or parliament has decreed: law stops where decree ends. Only that understanding can protect law's efficiency.

Later positivists have been true to that faith: they all stress law's role in substituting crisp direction for the uncertainties of customary or moral imprecation. Hart wrote, much in the spirit of Thomas Hobbes, a positivist of an earlier era, that legality cures the inefficiencies of a mythical pre-law state of nature or custom. Joseph Raz argues that the nerve of legality is authority, and that authority is damaged or undermined unless its directives can be identified without recourse to the kinds of reasons for action that citizens have before authority has spoken. Authority cannot serve its purpose, he insists, unless it directives replace rather than only add to the reasons people already have.

As I said, efficiency is not the only value that positivists take into account in forming their conceptions of legality, and it is worth noticing some of the others. Bentham, for example, thought it important that the public retain a healthy sense of suspicion and even scepticism about the moral worth of their laws: they should understand the difference between law as it is and as it should be. He worried that if judges could properly appeal to morality in deciding what the law is, then this crucial line would be blurred: people might assume that whatever judges declare to be law cannot be very bad because it has passed that moral test. Liam Murphy, among contemporary legal positivists, has appealed to the importance of public vigilance in defending his own positivistic understanding of legality's value.[19] Hart was concerned, not just about efficiency, but about an independent aspect of political fairness. If a community's law can be determined simply by discovering what the pertinent social sources—the legislature, for instance—have declared, then citizens are put on fair warning about when the state will intervene in their affairs to help or obstruct or punish them. If, on the other hand, the decisions of those sources are subject to supplement or qualification

[19] See L. Murphy 'The Political Question of the Concept of Law' in Hart's Postscript.

by moral considerations and principles, citizens cannot as easily or with the same confidence know where they stand. In America, some constitutional lawyers are drawn to a version of positivism for an entirely different reason. If morality is acknowledged to be among the tests for law, then judges whose own moral opinions would then be decisive in constitutional cases have much greater power over ordinary citizens than if morality is understood to be irrelevant to their office. Particularly when judges are appointed rather than elected, and cannot be deposed by popular will, this aggrandizement of their power is undemocratic.[20]

So legal positivists can defend their conception of legality, which insists that morality is not pertinent to the identification of law, by showing how well legality so understood serves efficiency, and also these other values. That defence assumes, of course, particular conceptions of these other values, and these conceptions can and have been challenged. It might be argued that political efficiency means coordinating a population's behaviour towards good goals, for example, rather than simply any goals, that fair warning is sufficiently given, at least in some contexts, by the promise or threat that moral standards will be applied in judging particular behaviour, that the critical judgment of a populace is sharpened not diminished by a 'protestant' understanding of law that allows it to disagree, in part on moral grounds, with official declarations of what the law requires, and that democracy means not just majority rule but majority rule subject to the conditions, which are moral conditions, that make majority rule fair. Positivism rejects these and other alternative understandings—that is, it not only selects which political values to emphasize in constructing an account of legality, but also interprets those other values, controversially in the light of its own conception of legality. There is nothing threateningly circular in this complex conceptual interaction; on the contrary it is exactly what the philosophical project of locating a political value like legality in a larger web of value requires.

Integrity. Efficiency of government, on any plausible conception of what that means, is plainly an important product of legality, and any plausible explanation of legality's value must emphasize that fact. No ruler, even a tyrant, survives for long or achieves his goals, even very bad ones, if he altogether abandons legality for whimsy or terror. But there is another important value that legality might also be seen to serve, not in competition with efficiency, but sufficiently independent of it to provide, for those who take it be of great importance, a distinctive conception of what legality is for. This is political integrity, which means equality before the law, not merely in the sense that the law is enforced as written, but in the more consequential sense that government must govern under a set of principles in principle applicable to all. Arbitrary coercion or punishment violates that crucial dimension of political equality, even if, from time to time, it does make government more efficient.

[20] I elaborate and criticize this argument from democracy to positivism in *Freedom's Law*.

Integrity has been a popular ideal among political philosophers for centuries, and its connection with legality has often been noted. The connection is sometimes expressed in the rubric that under the rule of law no man is above the law; but the force of that claim, as the various discussions of it make plain, is not exhausted by the idea that each law should be enforced against everyone according to its terms. That stipulation would be satisfied by laws that, by their terms, applied only to the poor, or exempted the privileged, and the philosophers who describe legality in this way have in mind substantial and not merely formal equality before the law. A.V. Dicey, for example, in his classic study of the British Constitution, draws the following distinction:

> We mean in the second place, when we speak of the rule of law . . . not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm. . .

and he later refers to this as 'the idea of legal equality'.[21] F.A. Hayek makes much the same claim though, unsurprisingly, he associates it with liberty rather than equality. He wrote in a classic work:

> The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. . . . This, however, is true only if by "law" we mean the general rules that apply equally to everybody. This generality is probably the most important aspect of that attribute of law which we have called its "abstractness". As a true law should not name any particulars, so it should especially not single out any specific person or group of persons.[22]

If we associate legality with integrity in this way, then we will favour a conception of the former that reflects and enhances the association. We prefer an account of what law is, and of how it is to be identified, that incorporates the value—integrity—whose pertinence and importance we recognize. If one way of deciding Mrs Sorenson's case will treat her as equal before the law, in the sense that integrity assumes, and another will not, then we prefer a conception of legality that encourages the first and discourages the second decision. I tried to construct such a conception of law in *Law's Empire*; I described it briefly earlier in this essay and I will not expand that description now. I want to emphasize, instead, that *Law's Empire* reports only one way in which integrity and legality can be understood in each other's terms, and readers who are dissatisfied with my own construction should not reject the general project for that reason.

I suppose I should, however, anticipate a different objection that someone might wish to make at this point. He might object that the correct decision in Mrs Sorenson's case depends on what the law actually is, not on what we would like the law to be because we are attracted to some other ideal, like integrity.

[21] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, 1915) at 114.
[22] F.A. Hayek, *The Constitution of Liberty* (London: Routledge, 1960) at 153.

But, as I have been trying to argue for many pages, we cannot identify the correct tests for deciding what the law really is without deploying and defending a conception of legality, and we cannot do that without deciding what, if anything, is really good about legality. Jurisprudence is an exercise in substantive political morality. Of course, we cannot successfully propose an analysis of legality that bears no relation to legal practice: a successful account of any value must be able to be seen as an account of *that* value as it exists and functions in a scheme of values we share. Just as a claim about Mrs Sorenson's legal rights must fit the legal practice of the jurisdiction in which the case arises, so any claim about what legality is must fit legal practice more generally. But more than one conception of legality will fit well enough; that is why we have different judicial philosophies represented even on the same bench. The cutting edge of a jurisprudential argument is its moral edge.

C. *Interpretive Positivism*

The difficulties I have been describing in Hart's self-professed methodology, which insists that theories of law are descriptive and neutral, can all be cured by recasting his arguments in the interpretive mode I have been suggesting. We strive to understand legality by understanding what is distinctly important and valuable in it, and we are tempted, initially, by the idea that legality is important because it provides authority in circumstances when authority is needed. But that claim invites a further conceptual question. Authority, too, is a contested concept: we need an account of authority that shows what the value is in it. The key to that further question lies in the mix of other values that legal positivists have traditionally celebrated, and, particularly, in the efficiency that authority brings. As positivists from Hobbes to Hart have pointed out, and as history has amply confirmed, political authority makes policy and coordination possible, and though policy and coordination may not work to everyone's benefit, they often, perhaps even usually, do. We are guided by this larger matrix of ideas in settling on conceptions of the discrete concepts it engages: the concepts of legality, efficiency and authority. We must settle on conceptions of each that allows it to play its part in the larger story.

So we adopt an 'exclusive' positivist conception of legality, which insists that morality plays no role in identifying true claims of law, and we also adopt what Joseph Raz calls a 'service' conception of authority, which insists that there is no exercise of authority except when what has been directed can be identified without recourse to reasons the directive is meant to resolve and replace.[23] We no longer suppose that these conceptual claims are neutral, Archimedean excavations of rules buried in concepts that everyone with a full grasp of the concept or a full knowledge of the language will recognize. We may still say, as positivists have,

[23] See J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994).

that we have identified the salient aspects of our concepts that help us best to understand ourselves or our practice or our world. But now we make explicit what is obscure in those unhelpful claims: we understand ourselves and our practices better in one particular way—by designing conceptions of our values that show what, on reflection, we find most valuable in them, each and in the whole. We make no pretence that our conclusions are uncontroversial or disengaged from concrete political decision. If our constructions show that most of what most people think about law is a mistake—if they show that the claims of law that both sides make in Sorenson's case are wrong because none of them respects the sources thesis—then that is not an embarrassment to us, any more than it would embarrass us if our conclusions about equality showed that most people have steadily misunderstood what equality really is.

That is, I think, the best we can do for the central claims of legal positivism. It sounds tinny and artificial, I know, because in fact it would not make our law more certain or predictable or our government more efficient or effective if our judges were suddenly converted to legal positivism and explicitly and rigorously enforced the sources thesis. On the contrary judges would then rely much less on claims of law than they now do. If I am right, American judges would be forced to declare that there is no law in America at all, except the bare, uninterpreted, words of the Constitution.[24] Even if they somehow avoided that frightening conclusion, they would be forced to subvert rather than to serve legality, even on the positivist's conception of that virtue, because they would be forced to declare much too often that either the law said nothing about the matter in controversy, or that the law was too unjust or unwise or ineffective to enforce. Judges who thought it intolerable that Sorenson should have no remedy, for example, would be forced to declare that, in spite of the fact that the law favoured the defendant, they would ignore the law and hence ignore legality and award her compensation. They would announce that they had a 'discretion' to change the law (or, what comes to the same thing, to fill in gaps in the law they had discovered) through the exercise of a fresh legislative power that contradicts the most basic understanding of what legality requires.

So it may seem perverse, or at least ungenerous, for me to attribute to positivists such a self-defeating argument for their position. But we should now notice that when positivism was first proposed, and when it was an actual force among lawyers and judges rather than only an academic position, the political situation was very different. Bentham, for example, wrote in an age of simpler and more stable commerce and a more homogenous moral culture: he could plausibly hope, as he did, for statutory codifications that would rarely leave gaps or require controversial interpretation. In those circumstances judges wielding moral tests for law posed a distinct threat to utilitarian efficiency that could be avoided most

[24] See my article 'Thirty Years On', 116 *Harvard L Rev* 1655, 1675 (2002). That article, written some time after the lecture published here was given, briefly summarizes some of the material in the next several paragraphs of this text. See ibid at 1677.

simply by denying them any such power. Even in the earlier years of the last century, progressive lawyers shared Bentham's views: progress, they thought, was available through administrative agencies, acting under broad parliamentary mandates, issuing detailed regulations that could be applied and enforced by technicians. Or, in the United States, through detailed uniform codes compiled by a national law institute trained by academic lawyers and proposed for adoption by the several states. Once again, in this atmosphere, judges claiming power to distil moral principles from an ancient and unsuited common law seemed archaic, conservative, and chaotic. The danger of such a claim was brilliantly illustrated by the Supreme Court's 1904 *Lochner* decision, which held that the conception of liberty embedded in the Fourteenth Amendment made progressive legislation that limited the number of hours bakers could be asked to work each day unconstitutional. Legal positivism, progressives thought, saved law from such reactionary morality.

Oliver Wendell Holmes' positivism was a working legal doctrine: he cited positivism in dissenting from Supreme Court decisions in which, in his view, justices had assumed an illegitimate power to make their own law by pretending to find principles embedded in the law as a whole. 'The common law is not a brooding omnipresence in the sky', he declared in one famous dissent, 'but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact'.[25] The jurisprudential argument between positivism and older theories of law was at the centre of the long controversy about whether federal judges, when they had jurisdiction only because the parties were from different states, were constitutionally obliged to enforce the common law of one of those states as that law had been declared by the state's own courts, or whether they were permitted to decide differently by finding and applying principles of 'general' law not recognized by any state court. In *Erie Railroad* v *Tompkins*, the Supreme Court finally decided that that there was no such thing as 'general' law: there was only law as declared by particular states. Justice Brandeis, for the Court, quoted another famous Holmes passage:

> Law in the sense in which courts speak of it today does not exist without some definite authority behind it . . . the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.

Brandeis made plain the practical importance of this view of law: the contrary view, long followed by the federal courts, destroyed uniformity because it produced different results on the same issue in state and federal courts, encouraging out-of-state plaintiffs to bring suits in federal courts when that was to their advantage. Of course, the Court could have reached the same result—for those

[25] *Southern Pacific Co.* v *Jensen*, 244 U.S. 205, 222, Holmes dissenting.

practical reasons—without embracing positivism, but the muscular rhetoric of that legal doctrine had great appeal because it allowed Holmes, Brandeis, Learned Hand[26] and other 'progressives' to paint their more conservative opponents as victims of an incoherent metaphysics. Changes in society's expectations of law and judges were well under way, however, even in the 1930s when they wrote, and with accelerating velocity in the decades that followed, that made positivism's general conception of legality steadily more implausible and self-defeating. Elaborate statutory schemes became increasingly important sources of law, but these schemes were not—could not be—detailed codes. They were more and more constructed of general statements of principle and policy that needed to be elaborated in concrete administrative and judicial decisions; if judges had continued to say that law stopped where explicit sovereign direction ran out, they would have had constantly to declare, as I said, that legality was either irrelevant to or compromised in their judgments.

In the 1950s, moreover, several Supreme Court justices began a new turn in American constitutional law that made jurisprudence a riveting issue of national politics. They began to interpret the abstract clauses of the Constitution, including the due process and equal protection clauses, as stating general moral principles that give individual citizens important rights against national and state governments, rights whose existence presupposed that law was not limited to deliberate enactment, and whose contours could only be identified through substantive moral and political judgment. That initiative suddenly reversed the political valence of the jurisprudential argument: conservatives became positivists who argued that the Court was making up new constitutional rights of racial equality and freedom in reproductive decisions, for example, and therefore subverting legality. Some of the liberals who approved the Court's direction then moved from positivism toward a different conception of legality that stressed the principled integrity of the American constitutional settlement. In the last decades, the most conservative Supreme Court justices have engineered a further change in valence: their initiatives increasingly require them to ignore much Supreme Court precedent, and they therefore find a better justification in conservative political principle than in any orthodox version of legal positivism.

When Hart wrote *The Concept of Law* he could no longer rely, as Bentham and Holmes could, on the contemporary appeal of the positivist conception of legality. Hart's account of positivism's efficiency is a Just-So story from an imagined ancient past: a supposed pre-historical transition from the chaos of primary-rule tribal inefficiency to the crisp authority of secondary rules embraced in a liberating and near-uniform explosion of consensus. Those who followed his lead have continued to write about authority, efficiency and coordination. But they cannot confirm their claims in actual political practice either, and that may explain why they fall back, as Hart did, on self-descriptions that seem to isolate their theories from such practice. They say that they are probing the very concept or nature of

[26] See *Freedom's Law*, ch 17.

law, which remains the same in spite of shifting features of political practice or structure, or that, in any rate, they offer only descriptive accounts of what that practice is, withholding any judgment about what it should be or become. That is the methodological camouflage that I have challenged in this essay. If, as I have argued, the self-description cannot be made both intelligible and defensible, then we must concentrate on the more comprehensible justification I tried to substitute—the substantive, positivist account of the value of legality that I have now described. It is a virtue of that description, I think, that it brings to the surface the appeal positivism had for lawyers and judges, and for scholars in substantive fields of law, in times past, when its conception of legality seemed more plausible than it now does.

D. *Concluding Thoughts*

I have been emphasizing similarities between the concept of legality—as a foundation for legal philosophy—and other political concepts, and I shall close by noting an important difference. Legality is sensitive in its application, to a far greater degree than is liberty, equality or democracy, to the history and standing practices of the community which aims to respect the value, because a political community displays legality, among other requirements, by keeping faith in certain ways with its past. It is central to legality that a government's executive decisions be guided and justified by standards already in place, rather than by new ones made up *ex post facto*, and these standards must include not only substantive laws but also the institutional standards that give authority to various officials to create, enforce and adjudicate such standards for the future. Revolution may be consistent with liberty, equality and democracy. It may, and often has been, necessary in order to achieve even a decent level of those values. But revolution, even when it promises to improve legality in the future, almost always involves an immediate assault on it.

So any even moderately detailed account of what legality requires in concrete terms in some particular jurisdiction must attend very carefully to the special institutional practices and history of that jurisdiction, and even a moderately detailed account of what it requires in one place will be different, and perhaps very different, from a parallel account of what it requires elsewhere. (Arguing and deciding about these concrete requirements in a particular community is the quotidian work of that community's practicing lawyers, at one level, and of its academic lawyers at another.) That is also true, to some more limited extent, about other political virtues: the concrete institutional arrangements that count as improving democracy or advancing equality or better protecting liberty in a country with one political demography and history may well be different from those that count in that way in another.

But though legality is evidently even more sensitive, in detail, to special features of political practice and history than these other virtues, it does not follow, for legality any more than for the others, that nothing of importance can or should be done to explore the value at a philosophical level that transcends most details

of place. For just as we can explore the general concept of democracy by developing an attractive abstract conception of that concept, so we can also aim at a conception of legality of similar abstraction, and then attempt to see what follows, by way of concrete propositions of law, more locally. There is no bright-line conceptual or logical difference of the kind the Archimedeans want between jurisprudence so conceived and the more ordinary, day to day, concerns of lawyers and legal scholars I just mentioned. But there is nevertheless a sufficient difference in level of abstraction and in relevant skills to explain why the philosophical issues seem different, and are ordinarily in the hands of people with somewhat different training, from the more concrete ones.

Any attempt at an ecumenical conception of legality faces pressure from two directions. It must aim at sufficient content to avoid vacuity but also at sufficient abstraction to avoid parochialism.[27] I tried to steer the needed course between these dangers in *Law's Empire*: I said that legality is best served through a process of constructive interpretation along the lines, and responding to the two dimensions, mentioned above. My views have been sufficiently controversial to suggest that I escaped vacuity, but it is unclear how far I escaped parochialism. It is a frequent objection among British critics that my project is either parochial in inspiration—that it aims at no more than explaining the legal practice of my own country—or obviously parochial in result because we can somehow see, without much thought or research, that it fits only that one legal practice.[28] In fact, my account aims at very great generality, and how far it succeeds in that aim can only be assessed by a much more painstaking exercise in comparative legal interpretation than these critics have undertaken. I said, earlier, in discussing other political values, that we cannot tell in advance how far we might succeed in finding plausible conceptions of these that reconcile them with one another rather than leaving them, as they are so often declared to be, in conflict. We must do our best, and then see how far we have succeeded. We must take the same view of the different question of how much abstraction an informative account of legality can achieve. We must wait and see.

That leads me to a final story. A few weeks ago, talking to Professor John Gardner of Oxford University, I said that I thought that legal philosophy should be interesting. He jumped on me. 'Don't you see?', he replied. 'That's your trouble'. I am guilty of his charge. But let me say what I mean by 'interesting'. I believe that

[27] There are further condition of success. Any successful conception of legality must preserve the distinctness of that concept from other political values, including procedural fairness and substantive justice, no matter how closely related and interdependent our theories declare these various concepts to be. If we believe that even quite unjust political arrangements may nevertheless display the virtue of legality, as most of us do, then our account of legality must permit and explain that judgment. How this is to be done is the nerve of an old jurisprudential chestnut: can very wicked places have law? I argued, again in *Law's Empire*, that we can answer this question in different ways provided that we surround our answer with enough else by way of an account of legality to capture the necessary distinctions and discriminations. Hart said, in his Postscript, that my remarks on this score concede everything at issue to legal positivism. But he misunderstood.

[28] The criticism is not confined to British critics: it appealed to Judge Richard Posner in his Clarendon Lecture at Oxford, though perhaps more as an observation than a criticism, because he added that Hart's jurisprudence is equally parochial. See Posner, *Law and Legal Theory in England and America* (Oxford: Clarendon Press, 1997).

legal philosophy should be of interest to disciplines both more and less abstract than itself. It should be of interest to other departments of philosophy—political philosophy, of course, but other departments as well—and it should be of interest to lawyers and judges. Much legal philosophy has indeed proved of great interest to lawyers and judges. There is, just now, an explosion of interest in legal philosophy, not just in the United States, but in Europe, South Africa and China, for example, as well. But this explosion is taking place not within courses called 'jurisprudence', which I fear remain rather dreary, but within substantive areas of law: constitutional law, of course, which has been theory-driven for a long time, but torts, contracts, conflicts of law, federal jurisdiction and even, most recently, tax law as well. I don't just mean that these courses engage theoretical as well as practical issues: they engage exactly the issues I have been discussing: about the content of legality and its implications for the content of law. But legal philosophers who regard their work as descriptive or conceptual as distinct from normative have, in my view, lost an opportunity to join these discussions and debates, and in some universities the dominion of jurisprudence has shrunk in consequence.

On occasions like this one it is hard to resist speaking directly to young scholars who have not yet joined a doctrinal army. So I close with this appeal to those of you who plan to take up legal philosophy. When you do, take up philosophy's rightful burdens, and abandon the cloak of neutrality. Speak for Mrs Sorenson and for all the others whose fate depends on novel claims about what the law already is. Or, if you can't speak for them, at least speak to them, and explain why they have no right to what they ask. Speak to the lawyers and judges who must puzzle about what to do with the new Human Rights Act. Don't tell the judges that they should exercise their discretion as they think best. They want to know how to understand the Act as law, how to decide, and from what record, how freedom and equality have now been made not just political ideals but legal rights. If you help them, if you speak to the world in this way, then you will remain more true to Herbert Hart's genius and passion than if you follow his narrower ideas about the character and limits of analytic jurisprudence. I warn you, however, that if you set out in this way you are in grave danger of being, well, interesting.