LAW AND MORALITY IN H.L.A. HART'S LEGAL PHILOSOPHY

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I. CRITICISM AND UNDERSTANDING

It is a mistake to make generalizations about two opposing theories of law: natural law and legal positivism.[1] Both theories level charges against the other. Some are perceptive; others are unfounded. What is less well known, but equally true, is that historically both the natural law defenders and the proponents of legal positivism have disagreed as much among themselves as with their opponents.[2] If progress is to be made in legal philosophy by studying the works of important legal philosophers, it will be made by carefully examining the theories developed, rather than by attaching a label to the philosopher and then assuming certain things about that legal philosopher because the label has been attached. This is particularly true of the works of H.L.A. Hart.

To better understand H.L.A. Hart, it is worthwhile to discuss some general comments made by those legal philosophers not sympathetic to legal positivism. Generally, natural law asserts several principles that are irreconcilable with legal positivism. Most importantly, natural law finds that there is a necessary, not a contingent, relationship between law and morality. According to natural law theory, when there is a conflict between natural law and human law, natu-

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1. Recently, Ronald Dworkin has offered what has been called a third theory of law, that is, a theory of law which is neither natural law nor legal positivism. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY chs. 2-4, 13 (1977). *See also* J.L. MACKIE, THE THIRD THEORY OF LAW, 7 PHIL. & PUB. AFF. 1-17 (1977); H.L.A. HART, ESSAYS ON BENTHAM 147-53 (1982).

2. Defenders of natural law such as Cicero, Aquinas, Groitus, Locke, Blackstone, Kant, and Fuller have major disagreements as to which version of natural law is preferable. Defenders of legal positivism such as Bentham, Austin, Mill, Gray, Kelsen, Hart, and Raz also have major differences with each other.

ral law must take precedence. In this regard, natural law dictates that all human-made laws must be in accordance with fundamental natural law principles, such as Aquinas' notions of doing good, avoiding evil and promoting the common good.[3] The natural law proponent believes that all law must be morally justified if it is to be legitimately called "law" at all.[4] Thus, any morally acceptable legal order must acknowledge natural law and incorporate its fundamental tenets.

However, there have been occasions where natural law defenders have made some unfair remarks about legal positivism. One commentator has said, "[p]ositivism, in theory, does not recognize as scientific any knowledge beyond that which can be acquired through the senses. It can never, therefore, assert what men should do; but only what they actually do."[5] Another commentator has stated that "[l]egal positivism is a view according to which law is produced by the ruling power in society in a historical process. In this view law is only that which the ruling power has commanded, and anything which it has commanded is law by virtue of this very circumstance."[6] According to Bodenheimer, the legal positivist insists on a separation of positive law from ethics and tends to identify justice with legality.[7] Finally, Fuller, one of Hart's staunchest opponents for the past twenty-five years, explains:

> [T]he analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen

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3. *See* T. AQUINAS, SUMMA THEOLOGICA §§ 90-97 (S. Parry ed. 1966) (Questions).

4. Some natural law proponents expand this basic principle even further by asserting that one is not morally obligated to obey a law which does not meet acceptable moral standards. The issue of whether one is allowed to actively resist an immoral law is resolved differently depending upon which version of natural law one adheres to.

5. R. BEGIN, NATURAL LAW AND POSITIVE LAW 49 (1959).

6. Moor, *Das Problem des Naturrechts*, 28 ARCHIV FÜR RECHTSUND WIRTSCHAFTSPHILOSOPHIE 331 (1935), *quoted in* E. BODENHEIMER, JURISPRUDENCE 94-95 (1974) (footnote omitted).

7. E. BODENHEINER, *supra* note 6, at 94.

> as simply acting on the citizen — morally or immorally, justly or unjustly, as the case may be.[8]

These remarks are typical of the critics of legal positivism. However, they display a lack of understanding of legal positivism. This deficiency is particularly true with respect to H.L.A. Hart. Hart is clearly the leading contemporary legal positivist in Anglo-American jurisprudence. This status is acknowledged by both his critics and defenders alike. Yet it seems many neglect to look deeply enough at his view on morality and the law. This article will explain the basic premise of Hart's philosophy and demonstrate that Hart (a) believes that certain fundamental principles of justice are required for a legal system; (b) takes the relationship between law and morality extremely seriously; (c) finds that there is much in natural law theory which any philosophically defensible theory of law must include; and (d) is a critical, moral philosopher as well as an analytical legal philosopher.

II. RULES: PRIMARY, SECONDARY AND ULTIMATE

In order to understand Hart as a critical, moral philosopher, it is important to understand the analytical basis of Hart's legal philosophy. Hart believes that there are two different types of rules which comprise the "essence" of law: primary rules and secondary rules. The importance of distinguishing between these two types of rules, while recognizing their interrelation, should not be minimized. Hart described their relationship in *The Concept of Law:*

> The main theme of this book is that so many of the distinctive operations of law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule, that their union may be justly regarded as the "essence" of law, *though they may not always be found together whenever the word "law" is correctly used.*[9]

Hart stated that "law may most illuminatingly be characterized as a union of primary rules of obligation with such sec-

8. L. FULLER, THE MORALITY OF LAW 192 (1969).
9. H.L.A. HART, THE CONCEPT OF LAW 151 (1961) (emphasis added).

ondary rules."[10] Hart referred to this union as the "heart" of the legal system.[11]

Primary rules are "duty imposing" rules. They impose certain specific duties upon the citizens of a state to act in a certain manner, or they may be subject to certain legal sanctions. Hart characterizes primary rules as "basic" rules. They tell the citizen what one can and cannot do under the law.[12] For instance, laws setting speed limits, laws prohibiting trespassing or laws prohibiting corporations from requiring their employees to make contributions to political campaigns are all examples of primary rules. Primary rules are generally what the ordinary citizen means when he refers to something as "the law."

Primary rules stand in contrast to secondary rules. Hart explained the difference between the two types of rules:

> [U]nder rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private.[13]

Secondary rules are not duty-imposing rules. They are what Hart calls power-conferring rules. They state the manner in which primary rules may be recognized, changed and adjudicated. For example, they grant Congress the power to legislate and private citizens the right to vote. They state the procedure one must follow in order to make a legal will.[14] Secondary rules are, as Hart puts it, "rules about primary rules."

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10. *Id.* at 91.

11. *Id.* at 93.

12. Marcus Singer, in his excellent review of *The Concept of Law*, 53 J. PHIL. 203-04 (1963), correctly noted that Hart's primary rules do not seem to accommodate "permissive" rules since Hart stated that they impose duties. However, this deficiency is remediable. There is nothing wrong with extending the notion of primary rules to permit, as well as to require and to forbid.

13. *See* H.L.A. HART, *supra* note 9, at 78-79.

14. The power to make a legal will is a secondary rule. The key here is that there is a legally valid way to recognize the will-making procedure. The citizen has the power to avail himself or herself of this opportunity.

Hart explained:

> [Secondary rules] may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.[15]

Secondary rules are necessary in any reasonably complex society. There must be procedures to discover just what the primary rules are and how they can be changed or challenged. This task falls to secondary rules. This union of primary and secondary rules captures for Hart the essence of a legal system.

Hart categorizes secondary rules as either rules of recognition, rules of change, or rules of adjudication. Rules of recognition provide a mechanism for discovering just what is or is not a legitimate primary rule. In a semi-developed legal system, these rules of recognition may be simply a reference to an authoritative text or standard for properly identifying the primary rules that have thus far been established. As a society becomes more complex, the criteria used to identify primary rules will also become more complex. "The criteria so provided may . . . take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases."[16] These various criteria may also be in a hierarchical order; for example, statutes may take precedence over custom.[17] Moreover, constitutional provisions, judicial decisions and legislative enactments have their own hierarchical order. Consider the following case. The City of Milwaukee passes a law which forbids the sale of alcoholic beverages on Sunday before 12:00 noon. The municipal ordinance will control if there is no state statute regulating this area. The ordinance may also be held invalid by

15. *See* H.L.A. HART, *supra* note 9, at 92 (emphasis in original).
16. *Id.* at 97.
17. *Id.* at 92-93.

a judicial decision, if it conflicts with a constitutional provision. Thus, the legal system itself in the United States consists of a vertical hierarchy, with the federal constitution at the apex of that hierarchy.

Another type of secondary rules are rules of change. These are necessary to efficiently allow primary rules to be amended. They specify how primary rules may be changed. For instance, the United States Constitution can be amended,[18] and statutes can be repealed or modified by later statutes.

The third type of secondary rules are rules of adjudication. These rules are essential to a legal system of a complex society and are intended to remedy the inefficiency of a legal system with just primary rules.[19] Rules of adjudication set criteria for determining when a primary rule has been broken and what procedure is to be followed when the primary violation has been established. Judges, commissions, and regulatory agencies are given authority when the occasion is appropriate to apply secondary rules of adjudication.

The great advantage of having secondary rules in a given legal system, complementing the primary rules, is that certain specific criteria are available to determine just what primary rules are in effect, how they can be changed, and what the appropriate sanction is when a given violation of a primary rule occurs. As Hart stated, "These secondary rules provide the centralized official 'sanctions' of the system."[20] This is the case since secondary rules of adjudication confer power upon the judge to officially sanction the legal disobedient in a manner in accordance with his or her authorized power. Primary rules impose duties upon the citizen not to violate the particular legal rules at issue. This model of law, essentially a union of primary and secondary rules, is for Hart the essence of a legal system.[21]

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18. *See* U.S. CONST. art. V.

19. H.L.A. HART, *supra* note 9, at 94.

20. *Id.* at 95.

21. There are problems with the concept of law as essentially a union of primary and secondary rules. For example, Ronald Dworkin argues that Hart's notion of primary and secondary rules does not allow for legal principles which are also essential in a complete concept of law. *See generally* R. DWORKIN, *supra* note 1.

However, Hart recognizes that there also has to be an ultimate rule to unite the legal system into a coherent whole. Hart believes that the last court of appeal serves this purpose by deciding whether a rule is part of a given legal system. Accordingly, he calls this rule the "ultimate rule of recognition."[22] Hart explained that:

> The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense, which we shall try to clarify, an *ultimate* rule: and where, as is usual, there are several criteria ranked in order of relative subordination and one of them is *supreme*.[23]

The idea here is that in a legal system one rule will govern when the legal validity of a law is called into question. Consider the case when the constitutionality of a law is called into question. Assume that a state passes a law which requires health service agencies to notify the parents of a minor considering having an abortion, and that law is challenged as an unconstitutional deprivation of liberty under the fourteenth amendment. If the United States Supreme Court undertakes to decide the issue, its interpretation of the Constitution will govern the country. Thus, the Supreme Court provides the ultimate rule of recognition in the United States.

Hart's ultimate rule of recognition is less applicable in the United States, because of the separation of power principle, than it is in Great Britain. In Britain there is no written constitution. Moreover, Britain's constitutional law is based on the notion of parliamentary supremacy. This, of course, is not the case in the United States. In our country we have a written constitution. The United States Supreme Court, through the mechanism of judicial review, interprets and applies the constitution. Thus, in the United States, instead of holding "what the Queen in Parliament enacts is law," our ultimate rule of recognition is something like "what the Constitution says as interpreted by a majority of the members of the Supreme Court is law." This rule is not as simple or

22. This analysis has been influenced through discussion with Professor Haskell Fain of the University of Wisconsin, Madison.

23. *See* H.L.A. HART, *supra* note 9, at 102 (emphasis in original).

clear as the British ultimate rule of recognition. However, it gets even more complex. The Supreme Court does not have to review all cases that come before it. Thus, some constitutional issues may not be "ultimately" resolved. In our separation of powers form of government, the Supreme Court may invoke the "political question" doctrine and refuse to make a legal ruling on a sensitive political issue. So, because of American federalism and the doctrine of separation of powers, it is impossible to have one ultimate rule of recognition which can resolve all legal disputes.[24] It is no accident Hart chose the British system to illustrate the idea of the ultimate rule of recognition. Thus, for Hart the ultimate rule of recognition is most clearly expressed by stating "what the Queen in Parliament enacts is law." This rule unites the legal system's primary and secondary rules into one legal system. Any legal rule in the system can have its validity traced back to the ultimate rule of recognition which is the supreme legal rule. The union of primary and secondary rules, together with the ultimate rule of recognition, is what Hart believes to be the essence of a legal system.

III. LAW AND MORALITY

If this union of primary and secondary rules represented the entirety of Hart's legal philosophy, those who claim that Hart's legal positivism has nothing of interest to say about the relationship between law and morality would be correct. They would also be correct in claiming that such an analysis is grossly deficient. However, Hart does have more to say about this subject. Much of what he says is perceptive and illuminating.

Hart is a legal positivist, but he is a critical moral philosopher as well. Legal positivism generally means that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.[25] It is worth noting that Hart does not subscribe to all the theses commonly attributed to legal positivism. He

24. It is beyond the scope of this essay to further develop Hart's ultimate rule of recognition in relation to the United States. These illustrations are only intended to provide a brief overview of the concept of the ultimate rule of law.

25. *See* H.L.A. HART, *supra* note 9, at 81-82.

does not assert that laws are simply a product of sovereign command, or that moral judgments cannot be established as statements of facts can, by rational argument, evidence or proof.[26] He does not maintain that a legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means alone.[27]

It should be noted that Hart does take morality seriously. Hart stated that law and morality are very close, though not necessarily related. He is deeply sympathetic to what he calls "the core of good sense of natural law" and believes that law should continually be subject to moral scrutiny.

Hart endorses the formal principle of justice as desirable in any legal system. This basic principle of fairness emphasizes that laws should treat like cases alike, and different cases differently.[28] This constancy is necessary to give moral legitimacy to a legal order. Now one should be careful not to put too much weight on this principle, as the commentator Frankena perceptively reminded us through the following example. The mad king of Transylvania had just called all of his subjects together. He showed them a huge vat of acid, which, if one were to jump into it, would cause instantaneous death. He ordered all of his subjects to jump into the vat and then jumped in himself. The formal principle of justice was adhered to; yet the principle did not successfully ground a moral system.[29] Material principles were clearly needed as well.

Impartiality in rule application is a moral standard which, according to Hart, is necessary in a legal system. Thus, any judge applying a particular legal rule is expected to do so uninfluenced by, to use Hart's words, "prejudice, interest, or caprice."[30] Once again, however, the notion of impartiality will not take us too far down the road to morality. Hart himself noted "[t]hough that most odious laws may

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26. This concept is known in ethics as noncognitivism.

27. *See* H.L.A. HART, *supra* note 9, at 253. Austin held a version of the sovereign command theory; Kelsen held to the moral judgment concept. To my knowledge no legal positivist has ever held the closed logical system theory, an indefensible position.

28. *See id.* at 155.

29. Frankena, *The Concept of Social Justice*, in SOCIAL JUSTICE 17 (R. Brandt ed. 1962).

30. *See* H.L.A. HART, *supra* note 9, at 202.

be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice."[31] This is not the same as the formal principle of justice since the judge could show adherence to the principle of formal justice and yet be influenced by "prejudice, interests or caprice."

Hart holds that law is an instrument of social control. This means that the rules of law must satisfy certain conditions if they are to properly achieve this goal. For instance, citizens may reasonably expect that the rules of law will not be retroactively applied.[32] A principle of fairness is involved here. Citizens should have both the ability and opportunity to obey the law. So, the principle of formal justice, a principle of impartiality, and the principle of fairness are all built into Hart's concept of law. This is a moral beginning, but only a beginning.

It is appropriate now to turn to a crucial concept in understanding Hart's legal philosophy and its moral dimension. Hart holds that one can look at a legal order from two different perspectives. First, there is the external point of view. When one looks at a legal order from an external point of view, one observes how members of a different society act with respect to its legal system. The observer is outside the legal system. So, when he or she observes that people in the system regularly obey the law, observable regularities of behavior can be noted and recorded. The observer is in the role of the social scientist, dutifully recording the behavioral patterns of the individuals in society. It is important to recognize that the observer can explain what people are doing within the system, but he or she cannot explain why they are doing it. The observer can note that the citizen has obeyed the law, but can never ascertain whether the citizen believes that he or she has a moral obligation to obey that law.[33] It is as if the observer is looking at the legal system through a one-way mirror.

Hart believes that to determine whether a citizen believes he or she has a moral obligation to obey the law, the system

31. *Id.*

32. *Id.*

33. *Id.* at 86-88.

must be viewed from an internal point of view.[34] The internal point of view is applied by one who is a member of a legal system and accepts it as a legitimate legal system. The internal point of view differs from the external point of view in that it offers one the opportunity to understand why citizens believe the law should be obeyed. Hart reiterates that it is not necessary in applying the internal point of view that one obey the law for moral reasons. Clearly, most people sometimes stop at stop signs not because it is the right thing to do, but because there might be a police officer lurking nearby. Nevertheless, the most stable and well-ordered legal system will be one whose citizens and public officers generally apply the internal point of view for moral reasons. Hart in this context wrote:

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought," "must," "should," "right," and "wrong."[35]

Hart does believe that law and morality have a very close relationship. Individuals often use moral language in explaining the justification for obeying the law. And public officials use moral language to explain and justify why they legislate, enforce, and adjudicate the law.[36]

There is more. Hart believes that there is a minimum content to natural law theory that a legal system must incorporate.[37] Hart wrote:

> We have, indeed, insisted that in all moral codes there will be found some form of prohibition of the use of violence,

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34. For a discussion of Hart's views, see R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 23-24 (1969) (noting that Kelsen missed the crucial distinction between the external and the internal point of view).

35. *See* H.L.A. HART, *supra* note 9, at 56.

36. See Austin, *A Plea for Excuses*, 57 P.A.S. 15 (1956-57), for a discussion of the distinction between "excuse" and "justification."

37. Hart's minimum content of natural law has been discussed previously. *See* INTRODUCTION TO THE PRINCIPLES OF SOCIAL ORDER 24-26 (K. Winston ed. 1981). The point here is to emphasize the context of Hart's use of natural law within his overall legal philosophy. Hart's endorsement of the minimum content of natural law is one component of his view on the relationship between law and morality. He skill-

> to persons or things, and requirements of truthfulness, fair dealing, and respect for promises. These things, granted only certain very obvious truisms about human nature and the character of the physical world, can be seen in fact to be essential if human beings are to live continuously together in close proximity; and it therefore would be extraordinary if rules providing for them were not everywhere endowed with the moral importance and status which we have described. It seems clear that the sacrifice of personal interest which such rules *demand* is the price which must be paid in a world such as ours for living with others, and the protection they *afford* is the minimum which, for beings such as ourselves, makes living without others worth while. These simple facts constitute . . . a core of indisputable truth in the doctrines of Natural Law.[38]

Hart's version of natural law is empirical.[39] His position is based on a theory of human nature which believes in certain truisms.[40] For example, Hart believes that one truism of human nature is that the overwhelming majority of human beings wish to survive; in other words they would rather live than die.[41] If we wish to survive, it is imperative that a society be developed which will help ensure survival. Hart believes there are five features of the human condition which sometimes work against survival, and the legal system must take these into account.[42]

First, there is the feature of human vulnerability. Human beings can be harmed, and it is up to the legal sys-

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fully shows how close this relationship is. This also has strong overtones for the concept of human nature and the subject of moral psychology.

It is beyond the scope of this essay to further develop these issues. The point is that there are several important ways in which Hart recognizes the close relationship between law and morality. The core of natural law is one of these ways.

38. *See* H.L.A. HART, *supra* note 9, at 176 (emphasis in original).

39. His debt to Hobbes and especially Hume are obvious. *See* T. HOBBES, LEVIATHAN Parts I and II (1651); D. HUME, A TREATISE OF HUMAN NATURE Part III, § 2 (1738). It is not based on a more traditional natural law resting on a specific type of metaphysics, epistemology, or theology. This type can be found in various ways in such classical philosophers as Aristotle, Aquinas, Kant or Locke.

40. *See* H.L.A. HART, *supra* note 9, at 187.

41. Hart did not maintain, as Fuller claimed he did, that "survival furnishes the core and central element of all human striving." *See id.* at 187.

42. For analogous reasoning in moral philosophy, see generally G.J. WARNOCK, THE OBJECT OF MORALITY (1971).

tem to develop appropriate laws prohibiting one from harming another. Second, there is the Hobbesian notion of approximate equality. All humans can be relatively equal in power and intelligence since they can form alliances to defeat opponents. As a result we have to compromise our desires and settle our conflicts of interest peacefully. For Hart, this is the core of both legal and moral obligation. Hart expressed this view in the following passage:

> Even the strongest must sleep at times and, when asleep, loses temporarily his superiority. This fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation. Social life with its rules requiring such forbearance is irksome at times; but it is at any rate less nasty, less brutish, and less short than unrestrained aggression for beings thus approximately equal.[43]

Third, Hart believes in the truism that human beings possess at best a limited altruism. Both law and morality force us to look beyond ourselves and live together peacefully with others in society.[44]

Fourth, Hart believes that the concept of limited resources governs our actions. We simply cannot have everything we want. Law is necessary to adjudicate competing claims. It is also necessary to institute the concept of property and provide for its protection. Thus, through law one will be able to keep what he or she is legally entitled to possess.

Fifth, Hart believes that the idea of limited understanding and strength of will is important to any society. The law protects us from others and ourselves through its coercive framework. Of course, the entire notion of paternalism is controversial in contemporary legal philosophy.[45] How far

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43. *See* H.L.A. HART, *supra* note 9, at 191.

44. James Madison said that if men were angels, there would be no need for government. *See* THE FEDERALIST No. 10 (J. Madison). Hart's addition could easily be that if men were devils, there would be no need for government either.

45. *See, e.g.*, Beauchamp, *Paternalism and Bio Behavioral Control*, 60 MONIST 62 (1977); Dworkin, *Paternalism*, 56 MONIST 64 (1972); H.L.A. HART, LAW, LIBERTY AND MORALITY (1979); J. MILL, ON LIBERTY (1159).

Paternalism is the idea that one can either be forced to do something or prohibited from doing something on the grounds that it is "for one's own good." Paternalism is

the government has a moral right to have paternalistic laws is difficult to ascertain, but Hart seems to allow for some degree of paternalism.[46] Hart concluded the discussion of these five features of the human condition by noting:

> The simple truisms we have discussed not only disclose the core of good sense in the doctrine of Natural Law. They are of vital importance for the understanding of law and morals, and they explain why the definition of the basic forms of these in purely formal terms, without reference to any specific content or social needs, has proved so inadequate.[47]

So, Hart asserts that there is a core of morality in every legal system. Thus, to seriously maintain that legal positivism is a priori unsympathetic to all varieties of natural law is to make an unsubstantiated claim.

It is sheer nonsense and a gross misrepresentation of legal positivism to maintain that legal positivism holds that law and morality do not interact with each other and that law is not concerned with morality. This is true of criticisms of all the legal positivists, but it is especially true in the case of Hart. Hart carefully explained that there is a close relationship between law and morality,[48] emphasizing that:

> The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the

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not concerned with forbidding one to harm others; it is concerned with forbidding harm to oneself. Examples of paternalistic laws are statutes which require one to wear a helmet while riding a motorcycle, require one to wear a seatbelt while driving an automobile, or forbid one to swim at a public beach without a lifeguard present.

46. H.L.A. HART, *supra* note 45, at 31-33.

47. *See* H.L.A. HART, *supra* note 9, at 194.

48. Chapters 8 and 9 of *The Concept of Law* are explicitly devoted to this issue. The issue is treated throughout many of Hart's articles as well. *See, e.g.*, H.L.A. HART, LAW, LIBERTY AND MORALITY (1979); H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW (1965); H.L.A. HART PUNISHMENT AND RESPONSIBILITY (1960); Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 827 (1979); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958);

> supreme legislature, its legislation may yet no less scrupulously conform to justice or morality. The further ways in which law mirrors morality are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fairness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility. No "positivist" could deny that these are facts, or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connexion of law and morals, its existence should be conceded.[49]

Can anyone possibly doubt that Hart recognizes the interrelationship between law and morality when one considers this passage and the other ways in which it has been seen that Hart clearly believes that law and morality are closely related? But Hart refuses to take the final step and find that morality is a necessary condition of legal validity. He refuses for two reasons.

The first reason is practical; Hart is sympathetic to the empiricist tradition which has been prevalent in British philosophy for the past several centuries.[50] He believes that we can obtain a better understanding of law in society by developing a philosophical position consistent with the way law actually operates in the real world. In this sense Hart is a descriptivist, not a prescriptivist.[51]

Hart explains that we can more accurately describe a legal system if we take a wider view of what the law is. This view includes all laws which are upheld under the ultimate rule of recognition, even though some of these rules may be immoral. This view can be contrasted with a narrower concept of law as espoused by most natural law theorists, which

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49. H.L.A. HART, *supra* note 9, at 199-200.

50. Empiricism posits that we obtain factual knowledge through our senses. All knowledge is obtained this way except for tautologies or logical truths, for example, the truths of deductive logic and mathematics. Hart comes of this Humean tradition. So, we learn about the concept of law by observing how legal systems actually operate in the world, not by merely creating a theory in a vacuum.

51. See J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 21 (1980), for further elaboration.

holds that immoral rules, even if they are authorized by the legal system as a primary or secondary rule, are not to be considered as law at all. Hart explained:

> It seems clear that nothing is to be gained in the theoretical or scientific study of law as social phenomenon by adopting the narrower concept: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law. Nothing, surely, but confusion could follow from a proposal to leave the study of such rules to another discipline, and certainly no history or other form of legal study has found it profitable to do this.[52]

On this point Hart asserted that it is more important for a philosopher to offer an accurate description of a legal system than to prescribe a method of invalidating laws on moral grounds. Hart believes that there must be a strong correlation between a philosophical analysis of law and the way law actually operates in the real world. Thus Hart rejects any such "law in philosopher's heaven" model.[53]

The second reason for Hart's refusal to find that morality is a necessary condition for legal validity is moral. Hart stated:

> So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[54]

This argument is a moral argument.[55] Hart stated that it is a mistake to maintain that the enactment of a law is defini-

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52. *See* H.L.A. HART, *supra* note 9, at 205.

53. The phrase was Ronald Dworkin's. Dworkin also rejected the idea of law in philosopher's heaven.

54. *See* H.L.A. HART, *supra* note 9, at 205-06.

55. This interpretation was influenced by Neil MacCormick's study, H.L.A. HART 158-62 (1981). However, I disagree with MacCormick's conclusion that this passage showed that Hart could not maintain that law and morality have a contingent relationship. Hart has shown this in the sense that immoral laws are still laws. It is then another question whether a particular immoral law ought or ought not be

tive with respect to the moral question whether the law ought to be obeyed. Hart emphasizes that law is morally relevant; it is not morally conclusive. Laws exist because they meet legal structural standards necessary for a particular social rule to be called a law. Once enacted the law is still subject to moral scrutiny. If a law is immoral, a question arises as to whether the law ought or ought not be obeyed. Numerous factors must be considered in deciding on a course of action. Is the law horribly immoral? Is change likely by going through official channels? Will others support disobedience? Is punishment likely for disobedience? There are no universally accepted solutions.[56]

IV. HARMONY

Hart's legal position and his critical morality are consistent with each other. Hart, the legal positivist, develops a model of law which he believes is both philosophically defensible and in accord with the way law is practiced in the real world. Hart, the critical moral philosopher, implores both judicial officials and ordinary citizens to require that the legal system meet an acceptable standard of morality in both its content and application. The law should be constantly subjected to moral scrutiny by society. If certain laws do not meet such a standard or, in a more extreme case, the legal system itself does not meet an acceptable moral standard, an appropriate course of conduct must be determined. This is when hard choices must be made. Of course, morality should affect legal validity. Tragically, there are occasions when it does not. Only a simple person would claim there are simple answers. Hart knows this, and in this respect develops a theory of law based on sound moral principles.[57]

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obeyed. On the whole, though, MacCormick's book is excellent and strongly recommended to the reader.

56. See H.L.A. HART, *supra* note 9, at 206-07, where Hart seems to suggest this himself.

57. One can find utilitarian, Kantian and rights-based aspects of morality in Hart; he would hold all are essential in a comprehensive moral theory.