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Philosophy, Law, and Morality

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In September 1787, our Constitutional Convention adjourned, the summer's work having produced a remarkable political document. An unnamed woman addressed Ben Franklin as he was leaving the hall for the last time. "What do we have, Dr. Franklin, a Republic or a Monarchy?" "A Republic, Madam, if we can keep it," he answered. Whether the anecdote is apocryphal or not, it conveys the spirit of experiment which pervaded the thinking of our founding fathers and continues to characterize the political structuring of American society. The United States was conceived of as an experiment, Thomas Jefferson's term being most concise and elegant, "The Great Experiment." By the time that the eighteenth century was drawing to a close, the new nation already lacked the factors most congenial to social cohesion, an inevitability only complicated by a political philosophy that fostered individualism. Accordingly, providing for unity amidst diversity was already in their minds. How our founding fathers addressed the question about fostering cohesion is not my purpose here. Suffice to say that the United States became a nation of laws.

One of the many outcomes of this unprecedented socio-political experiment is that we are a nation of laws and we have often rejoiced in this description. It has been axiomatic that, whatever the diversity in ethnic, racial or religious identities, laws will achieve the social cohesion necessary. There are of course different modes of coercion or control, each of which serves in some way to achieve the cohesion. Most of these are the interest of anthropology and sociology and are not my concern now. Among the several modes of control, two have been pre-eminent, law and morality. But their pre-eminence has not been an unmixed blessing.

As you can see by the title of my presentation, the relationship between law and morality figures large in my remarks today. I hope to argue here that these two forms of social control have become the two horns of a dilemma for American life. To accomplish this, I will sketch out the origin of our dilemma and take the liberty of speculating wherein a resolution may lie.

For most of Western civilization, there was cooperation between law and morality—though a cooperation-by-default. The many expressions concerning law and human society, beginning with Plato, Aristotle and the Stoics and continuing on up to the Renaissance seldom if ever conceived of law as value-free, as hermetically sealed from the dreams, efforts, foibles or values of human choice. We can use Augustine's famous dictum as emblematic of this theory of law, that which has come to be labeled the Natural Law tradition: An unjust law is no law at all. The relation between the two modes of control was not a problem, because their separation had not yet been seriously conceived.

The distinguishing and/or separating came in the wake of the positivism generated by the emergence of modern science. (Here, I use 'positivism' in the general sense of an enthusiasm for the assumptions, concepts, and methods of science.) If empiricism works so well in understanding and manipulating the physical world, why can empiricism not work elsewhere? Positivism in legal theory is credited to John Austin who, in 1832, published a now-classic tract, "The Province of Jurisprudence Determined."[1] Legal Positivism divided the turf of legal theory into two great regions: analytical jurisprudence studies law, as it is; normative jurisprudence studies law as it ought to be. We cannot do the latter task. We must do the former. All normative questions are off-bounds in the doing and studying of law.

Accordingly, lists of contrasting traits evolved.[2] Law, one will read, has its origin in a public consensus within the community, but morality comes from private, inner states of an individual. Law is concerned with external, observable actions, while morality extends over both external and internal events. Law enforces a minimum but morality encourages the achieving of an ideal or maximum. Violations of law are punishable; those of morality, not. Law is not concerned with nobility of motives; morality requires that the best motives emerge from a good conscience. Such lists have sometimes grown quite long and elaborate, in the optimism that law can bring order into society as well as into our thinking without the complications of personal values or interests.

Hans Kelsen's Pure Theory of Law appeared in the mid-twentieth century as a continuation and refinement of Austin's early version. Kelsen's rendition is a formalism, in that it purports to offer a template of the essential characteristics of any and every instance of law, a template void of all particularizing content.

> It seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples.[3]

A formalism which is content-free, supposedly, and content-neutral, Kelsen's version of Legal Positivism hoped to bring order without "...the ideological bias or the historical and cultural myopia that afflicts all more concrete and specific efforts."[4] This very-pure positivism was probably not possible. The treatment of law as socially neutral is itself an expression of a distinct preference: Those who think law should, for instance, make people's lives better will have to disagree with Kelsen. So, such positivism is not neutral at all.

Positivism achieved its most credible statement in H.L.A. Hart, who placed himself in the Austinian tradition.

> What then was the concern of the great battle cries of legal positivism? 'The existence of law is one thing; its merit or demerit another'. (Austin); 'The law of a State is not an ideal but something which actually exists...it is not that which ought to be, but that which is'. (Gray); 'Legal norms may have any kind of content'. (Kelsen)"[5]

While Hart refined and corrected what he considered Austin's more primitive formulation, in order to give it a fresh start, he argued firmly that law as it is must be clearly distinguished from law as it ought to be. It was, he said, a "simple but vital distinction."[6]

Positivism's appeal was probably not its affection for things scientific so much as its desire to separate the private sphere of life from the public and the intention of avoiding the incorporation of personal

values in law.[7] If one is pursuing clear and distinct ideas as well as conclusions marked by their certainty, one should avoid normative investigations and their attendant messiness. For Americans there was also a constitutional reason for thinking along positivistic lines. If value judgments come, as they often do, from organized religion, such judgments would have to become a matter of consensus if they are to enter into public policy. Organized religion, though, has been disestablished from public life by the First Amendment and can not easily serve as a conceptual framework for public policy. There are political considerations as well. The term 'values' is sloppy, because it cannot encompass every shade of belief or morality or worldview. Not only the values themselves but the mode of their application would be difficult to identify. Political consensus would seem, then, unachievable. Better to heed Hart's advice: The distinction between law and morality is simple but vital.

Not all theorists have been willing to distinguish and/or separate these two modes of control, however. The most significant challenge to Hart has been Ronald Dworkin. The Hart-Dworkin debate has been engaged on many theoretical points. If one wishes to select just one instance of the debate, the question of judicial activism is suitable.

In hard cases a relevant statute may be too vague to be helpful, or more than one statute may be relevant and give contrary direction to a judge whose task it is to enforce the law. Hart spoke of the 'open texture' of law; Dworkin, of its 'fuzzy edges.' In such a situation, the judge can not merely deduce a decision from the law but has to go beyond it creatively. According to Dworkin, standards by which a society governs itself include principles as well as rules. Positivism conceptualizes law as a system of rules, and, he says, misses the existence of operating principles. Principles and rules are not coextensive. A principle is, he writes, "...a standard that is to be observed...because it is a requirement of justice or fairness or some other dimension of morality."[8] A judge who is making a determination in a hard case is not merely enforcing law but is weighing principles. Using his discretion, he is not bound by standards set by legislators, since their statutory standards are unworkable at this point. Dworkin places himself in the Natural Law tradition. "Natural law," he wrote, "insists that what the law is depends in some way on what the law should be...If the crude description of natural law I just gave is correct...then I am guilty of natural law."[9]

Articles and books carried on this debate between Hart and Dworkin, or Legal Positivism and Natural Law theory, right up to Hart's death in 1992. Like all great debates it had a remarkable capacity for survival, yet, as one commentator wrote, theorists end up arguing about definitions and run the risk of losing sense of the relevance of their positions to non-theorists and the society at large.[10] The relevance of this particular debate is very much alive and well here, though. Positivism argues that connections between law and morality, if they exist at all, are loose and accidental. Natural Law theory argues that such connections are inevitable and necessary. The question is how to use both forms to create, even foster, social cohesion.

There is growing evidence that laws do not achieve the degree of cohesion which we seek. Let me offer two instances. Our Civil Rights movement is one. We can date the process, at least the contemporary phase of it, from 1954, and the Brown decision. Here we stand in 1999, after forty-five years of all sorts of laws. Can we say that racism has gone? I think not. Is the United States a racist society? None of us can reasonably answer in the negative. While behavior has changed, improved in many good ways, the scope of law is limited. It sees only our external, observable behavior; this it is rather good at controlling. But I am more than my external, observable actions, and I am assuming that you are too. Law may control my behavior, if I wish to avoid sanctions, but it can not make me better. What I really think, what my feelings genuinely are, the actions I might have performed, the words which I might have spoken: Laws and their accompanying sanctions are deaf, dumb, and blind to these. Racism is a morally relevant problem requiring a moral solution. While current laws may be a necessary condition of a solution, they are not a sufficient condition thereof. Violence and hate crimes are a second instance. Will increasingly more specific and intricate laws about guns, their size, caliber, or locks stop hate crimes? Will regulations about how many days are needed for background checks stop hate crimes? Will laws about the proximity of gun shows to schools stop the angry, destructive mayhem? If the future is like the past, my prediction is that laws will not end violence and hate crimes, unassisted. The point is this: We Americans are now requiring of law more than it can deliver.

Here stands, then, our American dilemma. We wish to be governed by laws alone, but laws are ineffective for the full completion of the tasks assigned to them. Morality, the other significant form of control, could conceivably become part of public policy, but constitutional and political difficulties render these controversial if not useless. I do not have an answer, but traditional logic has taught us all how to address a dilemma, or how to begin designing a strategy. We either "escape between the horns" or we "grab the horns." This ancient principle would mean for us here, that we either find a third alternative, thus "escaping between the horns" or that we show that the two alternatives are really not separate after all. This second method would be "grabbling the horns." There is hope, I suggest, for both strategies but today I will speculate about the first one only.

Philosophical ethics represents an accumulation of conceptual-linguistic frameworks, which may serve well in addressing the issue. Ethics has the correct pedigree. It emerged in classical Greece, pre-dating the Western religions, their moral principles most importantly, and ethics remained virtually uninfluenced by these. It is neutral. It is secular, and it is beyond any constitutional and political questioning. Ethics also encompasses a wealth of concepts, terminology, and patterns of reasoning, which could serve as tools of analysis, speculation, and judgment. Each of its three areas, viz. ethical theory, normative ethics, and meta-ethics, is rich. Ethics may be a plausible third way of seeking the unity of a Republic.

Unlike other social animals in nature, humans do not have unity thrust upon them but must achieve it. Furthermore, we wish to achieve it in the rational discourse and ethical concerns which render humans unique. Yes, "we have a Republic," as Ben Franklin observed, "if we can keep it."

ENDNOTES:

1. Robert N. Moles took issue with Hart's reading of Austin, arguing that Hart misunderstood Austin's intentions in distinguishing analytical from normative jurisprudence. His view is an exception, and Hart's reading dominates the conversation. Definition and Rule in Legal Theory, A Reassessment of H.L.A. Hart and the Positivist Tradition. Basil Blackwell, 1987.
2. Judith Shklar presents a tidy summary (pp. 43-44) in Legalism, Law, Morals and Political Trials. Harvard University Press, 1986.
3. Hans Kelsen, Pure Theory of Law, University of California Press, 1967. Page 267.
4. Shklar, p. 33.
5. H.L.A. Hart, The Concept of Law, Clarendon Press, 1961.
6. H.L.A. Hart, "Positivism and the Separation of Law and Morals" Harvard Law Review 71 (1958) in Feinberg and Gross, Philosophy of Law, Fifth edition, Wadsworth Publishing Company, 1995.
7. See Shklar. "Positivist formalism is the intellectual expression of the skeptic's wish to de-ideologize political discourse and political life in general." p. 38.
8. Ronald Dworkin, "The Model of Rules" University of Chicago Law Review 14 (1967) in Feinberg and Gross, pp. 134-151.
9. Id. at p.156.
10. Shklar, p.30.

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