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FOUNDERS AND FOUNDATIONS OF LEGAL POSITIVISM

*David Lyons**

ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY. By *H.L.A. Hart*. Oxford: Clarendon Press. 1982. Pp. viii, 272. Cloth, \$29.95; paper, \$12.95.

JOHN AUSTIN. By *W.L. Morison*. Stanford: Stanford University Press. 1982. Pp. x, 239. \$20.

The tradition of legal theorizing that we call "positivism" embraces two principal, related ideas: first, law is a species of empirical fact; second, law must be distinguished from morality — in particular, we must not confuse the law that we actually have with the law as we would like it to be. These two elements are connected by the notion that, whatever facts determine what it is to have law, they leave it an open question whether a given system of law or particular laws within it merit respect.

Positivist ideas were given their first systematic development by Jeremy Bentham (1748-1832) and John Austin (1790-1859). These theorists had specific conceptions of law and morality from which later positivists have diverged. Contemporary positivists generally reject the notion found in Bentham and Austin that law is to be understood as a set of coercive commands. And some (but by no means all) later positivists seem to have regarded moral judgments as incapable of justification, thus departing from the Bentham-Austin view that sound moral principles can be identified and that they are capable of grounding warranted criticism and reform of legal institutions.

Whatever one may think of their specific theories, the foundational work of these two writers has had a profound effect on the way we think of law. The richness, originality, and rigor of their contributions set new standards for legal theory. As a consequence, their specific views have provided a point of departure for subsequent developments.

These two theorists and their ideas are the respective subjects of two new books, one on Bentham by H.L.A. Hart and one on Austin by W.L. Morison. The books vary greatly in style, structure, and

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content; they also raise vastly different questions. It will be useful to discuss them separately.

I. HART ON BENTHAM

Hart's *Essays on Bentham* comprises ten chapters and a substantive Introduction that traces themes among them. Much of the book has not been published before. It is in any case a coherent collection: the whole is much more than the sum of its parts. The book is also broader than its title suggests; its subtitle, *Studies in Jurisprudence and Political Theory*, is more descriptive.

Not that Bentham is neglected. His most fundamental ideas about law and legal concepts, philosophical method and political responsibility, utility and rights are presented by Hart with extraordinary clarity, developed further, and criticized constructively. Bentham's insights and limitations are considered, as well as his links with Beccaria, Austin, and John Stuart Mill. But Hart's studies of these topics go much further. The foundations of legal theory and the nature of moral rights, legal rights, duties, powers, and sovereignty are explored.

This collection is as rich in scholarship and philosophical reflection as one has come to expect from Hart, the most distinguished contemporary legal philosopher, whose own work has inspired many to reflect systematically on the nature of law and its relations to morality. It would be profitable to pursue many of the topics dealt with by Hart, but that would be impossible in a brief essay. I shall concentrate here on two. One has received considerable attention in the literature: natural (and other) rights. The other has received much less direct attention: the relations between analytic and moral theory.

A. *Natural Rights*

As is well known, Bentham dismissed the very idea of a "natural right" as nonsense. Somewhat less well known is the fact that Mill sought to incorporate a theory of moral rights, and one that might well accommodate natural rights, into his utilitarian conception of morality. In a characteristically thoughtful essay (pp. 79-104), Hart discusses the different approaches of these two writers to the problem of rights and suggests the limitations inherent in those approaches.

Hart understands the basic idea of a natural right to be that of a moral right which is possessed by each and every person. And he understands moral rights as rights whose existence does not presuppose recognition or enforcement either by law or by informal social conventions. We can infer this from the way rights are appealed to in everyday moral reasoning. Our shared concept of a right does not exclude the possibility of rights whose existence is independent of

the law; nor does it exclude the possibility that each and every person might possess some such rights.

Bentham's analysis of rights implies the contrary. He held that rights arise when, but only when, obligations have identifiable beneficiaries. He also held that obligations are the creatures of coercive social norms. This entails that there cannot possibly be any moral rights and *a fortiori* that there cannot possibly be any natural rights.

It follows either that aspects of everyday moral reasoning are nonsensical or that Bentham's analysis is mistaken. Hart observes that Bentham offered no general defense of his analysis. He speculates that Bentham objected

to the separation of the idea of a right from that of a law because it introduces . . . 'criterionlessness'. That is, a hopeless indeterminacy since such a separation, Bentham thought, deprives the notion of any criteria for its identification and application. [P. 82].

But this would not explain Bentham's failure to acknowledge some extralegal rights, namely, those that are the creatures of coercive social conventions which lie outside the law. If such conventions can be identified, then presumably so can their implications concerning the beneficiaries of the obligations that are imposed by such rules. For that matter, Bentham's objection would not explain why he did not entertain the possibility that some criterion other than one linked with coercive rules might be used to determine when we have rights. One candidate for such a determinate criterion of moral rights would be Bentham's principle of utility. It would determine

liberty-rights when calculations of what would maximize general utility [show] no reason for a man to refrain from some action and rights to services when such calculations [provide] a reason for others to do or to abstain from some action so providing the right-holder with such services. [P. 85].

The trouble with such an approach, however, is that it would allow only for "rights" that differ in significant ways from those we usually invoke. The moral rights we think we have are much more stable than, and are largely independent of, the highly variable results of such direct utilitarian calculations. Furthermore, such a theory would not capture

the peremptory character evident in the invocation of rights as justifying demands made on others, stating what they must do or not do rather than what they merely ought to do or not to do. [P. 86].

The stability and peremptory nature of rights (or at least of one subclass of rights, often called "claims" or "claim-rights") would seem to reflect the close links that rights have with obligations. Bentham was correct in maintaining that rights have such a connection. He was prevented from acknowledging moral rights, therefore, by the fact that his conception of morality, based on direct utilitarian calculations, effectively excluded moral obligations.

Mill recognized the role that rights and obligations play in everyday moral reasoning as well as the fact that they do not generally presuppose coercive social rules. His theory of rights respects their links with obligations and seeks to incorporate both into his own form of utilitarianism. Rights and obligations, Mill believed, have to do with *justifications for* the use of sanctions. Mill understood the judgment that a right exists as meaning that some persons have a valid claim on society to secure something for them. That is his sketch of a conceptual analysis of rights. His utilitarianism enters the picture because to determine whether a particular claim about rights is sound, one must use the test of general utility.

This sort of theory leaves room not just for moral rights in general but for universal rights in particular. People have moral rights *only* when the relevant claim to societal protection can truly be defended. And if there are some things about which valid claims to societal protection can universally be made, then there are some universal rights. If we believe that talk about moral and even universal rights is not nonsensical (that the mere concept of a right does not exclude their possibility) then Mill's theory represents a significant advance beyond Bentham's. Hart believes, however, that Mill's theory is deficient.

Hart understands Mill to have claimed that a judgment that someone has a right means that there is "a good moral reason for having and maintaining a law or social convention conferring a right" (p. 92). He also understands Mill to have recognized only one valid sort of ground for such an assertion, namely, that it would serve the general welfare to confer such a right. This corresponds to one type of argument that is used for having or maintaining a law that confers a right. Such arguments do not assume that those who do or would benefit from the conferral of the legal right have any antecedent, independent moral right to the benefits.

But sometimes, Hart notes, we argue differently for legal rights, on the ground that they do or would respect rights that individuals have independently of law. Sometimes, for example, we argue for legal rights because we believe that certain individuals have already earned the right to, or are otherwise due, special consideration on the ground that they have assumed extra burdens for the benefit of the community or have been treated unfairly and are due compensation. Mill's theory implies that any such argument begs the question because it must be understood as holding "that the reason why there ought to be a certain legal right is that there ought to be a legal right" (p. 92). But if we do have moral rights, then it would seem arbitrary to exclude the possibility of invoking them as grounds for legal rights. If so, then Mill's theory is inadequate.

Hart's distinction between the two types of argument for legal

rights is important. Writers who assume either a utilitarian approach to law or one based on normative "economic analysis" seem to ignore the possibility of an argument for legal rights that presupposes the existence of independent moral rights. Hart understands the distinction in the following way. Utilitarian arguments for legal rights consider benefits and burdens to individuals aggregatively, that is, with regard to net advantages and without regard to how particular individuals may fare. Right-based arguments for legal rights, by contrast, consider how benefits and burdens are distributed.

Hart suggests that Mill's discussions of justice and liberty tacitly reflect a tension within his thinking. Although officially committed to aggregative or utilitarian arguments for legal rights, Mill seemed nevertheless to recognize that affirmative assertions about universal rights are based not on the net advantage of conferring legal rights but rather on the moral importance of the fact that *each and every individual* requires certain conditions for well-being. Hart concludes by noting the continued need for a theory that explains how such factors ground rights if we are "to make sense of the notion of universal moral rights" (p. 103).

Hart's discussion of Mill's theory seems to suggest the conclusion that moral rights in general and universal rights in particular could not be accommodated to utilitarianism. He suggests, for example, that Mill could not consistently have adopted an analysis of rights which would enable him "to make sense" of such notions. It should be observed, however, that this cannot be inferred from the deficiencies of Mill's analysis that are identified by Hart. Hart's discussion gives us reason to reject the analyses offered by both Bentham and Mill. But it does not clearly give us reason to suppose that a more adequate analysis of talk about rights could not be integrated into a recognizably utilitarian moral theory.

Let us suppose that moral rights are capable of grounding arguments for legal rights, as Hart maintains. What a more satisfactory utilitarian theory would seem to need, then, is an analysis of judgments about moral rights which does not reduce them to aggregative or utilitarian arguments for legal rights. The utilitarian theory would have to be capable of showing that people have some moral rights and obligations which themselves have the stability and "peremptory character" noted by Hart. Since rights and obligations play a role in moral reasoning which is somewhat independent of direct utilitarian calculations, such a moral theory would have to limit direct utilitarian evaluations. It could not regard them as alone determining the rightness or wrongness of behavior. The theory would have to be a form of indirect utilitarianism.

I do not see how we can assume that such a theory is impossible.

The trouble with such a theory, I think, is this. I understand the various forms of indirect utilitarianism to be compromises between the basic idea of utilitarianism (which involves no restrictions on direct applications of the principle of utility in evaluating behavior) and our considered, reflective ideas about the role of moral rights and obligations as well as morally justified legal rights and obligations in moral reasoning. For the latter does not allow direct utilitarian arguments alone to determine the rightness or wrongness of behavior. The conclusion to be drawn, then, is that any such form of indirect utilitarianism represents an awareness of the moral inadequacy of unrestricted direct utilitarian reasoning.¹

B. *Analysis and Moral Commitment*

Much of Bentham's work was concerned with the analysis of legal concepts. By this I mean not the identification and interpretation of general principles that are embedded in the law but the explanation in more fundamental terms of the very idea of law and of the more specific ideas such as that of a legal right or obligation. Thus, Bentham was concerned to reveal not just what the law of a particular jurisdiction at a given time requires and allows but also what it is for there to be law, what it is for someone to have a legal right, and so on. A good deal of work within legal philosophy has focused on such abstract questions. But the connections between this seemingly pure theoretical inquiry and the moral concerns or commitments of legal philosophers have not been systematically explored.

In Hart's *Essays on Bentham* one finds occasional reference to such connections. For example, Hart characterizes Bentham's analysis of law as "morally neutral" (p. 28) and indicates his approval (pp. 146-47, 161, 262-63). Hart also remarks that sometimes Bentham's "utilitarianism gets in the way of his analytical vision" (p. 162). These passages raise complex questions about the proper approach to analysis.

One way of understanding Bentham's general approach to the analysis of legal concepts is this: We are concerned with the possible divergence between the law that is and the law that ought to be. One cannot properly evaluate the law and develop well-grounded proposals for improvement or strategies for coping with its defects unless one correctly identifies and interprets the law that is (taking due

1. I discuss these matters further in Lyons, *Utility and Rights*, in *ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV* 107 (1982). This seems the appropriate place to acknowledge Hart's occasional references to my interpretations of Bentham and Mill on various matters, *see, e.g.*, Lyons, *Human Rights and the General Welfare*, 6 *PHIL. & PUB. AFF.* 113 (1977), from which he frequently diverges. Hart's interpretations are always fair and are often more accurate representations of the historical texts. My concern has usually been to extract from such works suggestions for more promising theories, though that motivation was not always made sufficiently clear.

account, of course, of differences that may exist between what officials are supposed to do by law and what they actually do). This, in turn, requires a faithful description of the crucial concepts that are used in law, so that what the law requires and allows can be accurately represented, its implications can be understood, and the effects attributable to law (under the circumstances that prevail) can be estimated.

Such an approach suggests that the analysis of law and legal concepts must be "morally neutral" in the following sense: evaluation presupposes accurate description, which presupposes accurate analysis. Thus analysis is logically prior to evaluation. Hart suggests, however, that Bentham had a slightly different approach to analysis. Bentham would not limit his role to that of a descriptive analyst because "his standpoint was critical and reformative" (p. 137). He was not just "an Expositor concerned to analyse" the structure of the law but also "a utilitarian Censor critical of the law" (p. 137).

In the role of Censor he could argue that the purpose of the analysis of such notions as legal obligation or duty was to provide a set of clear terms to be used in describing a legal system in a way which would focus attention on aspects of prime importance to the critic, and among these aspects of the law to which it was important to the critic to attend are those points at which the legal system itself creates human suffering or makes it likely. [P. 137].

So Bentham as a utilitarian would be prepared to offer a new, revised concept of legal obligation.

In the passages just referred to, Hart does not suggest any reservations about such an approach to analysis. In another essay, however, Hart remarks (as I have noted) that Bentham's utilitarianism sometimes "gets in the way of his analytical vision" (p. 162). This suggests that Bentham's analysis sometimes suffers because it is distorted by his utilitarian preoccupations. And yet Hart goes on to suggest that an "individualistic critic of the law" would quite properly view the concept of a right somewhat differently from a utilitarian (pp. 192-93). Wouldn't the individualistic critic then be making the same mistake as Bentham?

I think what Hart means is that, like everyone else, Bentham thinks of rights as somehow advantageous. As a utilitarian, he naturally thought of advantages as benefits, which led him to develop a benefit theory of rights. But this theory implies what is false, namely, that one must be some kind of "beneficiary" in order to have a right. Hart's point about the individualistic critic is misleading. The individualist, unlike the utilitarian, is primarily concerned with choice, not benefits. This enables the individualist to appreciate the independent fact that choice of one sort or another is, at bottom, the advantage that is secured (in one way or another) to a person with a right.

All of this would seem to presuppose the significance of a distinction that I drew at the beginning of this section, namely between two sorts of conditions that relate in different ways to the application of normative terms (or to the exemplification of normative concepts). We must be able to distinguish between the questions "What is it to have a right (or obligation)?" and "What rights (or obligations) do people actually have?" True answers to the former sort of question must be logically prior to true answers to the latter sort of question. In the case of moral rights and obligations, disagreements about what rights and obligations people actually have must be compatible with shared concepts of rights and obligations. Likewise, changes in the substantive law which generate or extinguish rights or obligations must be compatible with relatively stable concepts of rights and obligations. I have qualified this to allow for the possibility that, over time and partly as a result of changes in law or moral beliefs, terms like "right" and "obligation" can change in meaning; in this sense, the corresponding concepts can be thought of as evolving. But the previous discussion assumes that the relevant concepts have sufficiently determinate and relatively stable criteria of application based on common usage in the respective realms of discourse.

Bentham's case suggests that a particular moral commitment can get in the way of adequate analysis. But this does not appear inevitable. It would be a mistake to suppose, for example, that his utilitarianism logically impelled him to conceive of the advantages secured by rights as benefits and that he could not have consistently entertained the idea that those advantages involve choice. As utilitarians appreciate, choice is closely connected with benefit.

We might therefore draw a conclusion that Hart does not explicitly state: sometimes Bentham functioned as Censor when he should have been Expositor. Bentham may have gone wrong because he tried to do two distinct things more or less at the same time. He tried to lay the conceptual groundwork for a system of social control that he thought would be maximally useful to create and maintain. At the same time, he tried to reveal the conceptual foundations of an existing system of social control, namely law. The two sets of concepts are not necessarily the same. Moreover, I see no reason to suppose that a faithfully descriptive analysis of existing legal concepts (part of the "expository" function) is likely to interfere with one's role as critic. The critical function would not seem to require that existing law be analyzed in terms of revised concepts which, after all, might be confused with those that are already embedded in the law.

If one wishes, however, to propose a new set of concepts on the ground that it would be more useful to understand and appraise law in such terms, then one's proposal must be supported by calculations of the relative utilities of different ways of conceiving of social con-

trol. To develop such an argument, one must be able to assign utility to both the existing and the proposed new concepts. But this requires that one first identify accurately the two sets of concepts. So for this purpose, too, the two sets of concepts should be kept distinct.

All of this might seem to imply that the analysis of law must be "morally neutral." But that is not the point at all. Our assumption is that normative concepts have a certain degree of independence from the directly relevant substantive norms. Thus, the *idea* of a legal right remains stable through changes in the law and the *idea* of a moral right is neutral with respect to different moral positions. This implies nothing about the relations between legal and moral concepts.

That relation is one of Hart's central concerns. He says, for example:

The terms that Bentham uses to define law are all flatly descriptive and normatively neutral . . . nothing in his definition is owed to morality, and therefore nothing follows from the statement that laws so defined exist as to any moral reason for obedience. [P. 28].

Hart makes clear that he endorses this approach to analyzing law and that he regards it as an axiom of legal positivism, which "denies that there is any conceptual or necessary connection between law and morality" (pp. 262-63).

Thus the positivist is committed to a conceptual claim that has moral implications. He believes that there is not necessarily any moral obligation to obey the law. This means not only that one may sometimes be morally justified in disobeying the law, for that would be compatible with the claim that there *is* always, necessarily, a moral obligation to obey the law, though it is one which, like most if not all other obligations, can sometimes be overridden. Hart's point would seem to be, rather, that the very existence of *any* moral obligation to obey the law depends on conditions which are not necessarily satisfied under a system of law.

I believe this to be true. But I think it is misleading to characterize the position as "moral neutrality," and my reasons go beyond the point just made about the positivist's commitment to a substantive moral judgment, which is liable to be controversial. If the positivist's idea of a "separation of law and morals" is not merely arbitrary, it must have some foundations. But on what could it be based? I shall suggest that it can only be based on the exercise of moral judgment.

Let us note, first, that Hart's more general formulation of the point is quite broad. He denies that there is *any* "conceptual or necessary connection between law and morality." I think this may be misleading. I do not think that Hart would be concerned to deny, for example, that there may be *some* conceptual connections between law and morality. If it were suggested, for example, that both

law and morality essentially involve some general standards for conduct (so that the generic idea of a standard for conduct is common to both and provides a conceptual link between law and morality), this would not be taken as threatening to the positivist's ideas about the "separation of law and morality." What Hart seems to suggest, rather, is (very roughly speaking) that legal judgments of persons, conduct, and so on, by themselves have no corresponding moral implications. For example, from the mere fact that I have a legal right nothing follows concerning how, from a moral point of view, I or others may properly behave.

For simplicity's sake, I shall limit my attention to Hart's narrower point that there is not necessarily a moral obligation to obey the law. Because this point is narrower than what might be included within the broad scope of a "separation of law and morals," what I have to say about it will be seen to apply even more forcefully to any broader positivistic claim.

One can imagine an argument that would establish the sort of "moral neutrality" to which Hart refers, along the following lines: (1) If conditions L are satisfied, there is law. (2) There is a moral obligation to obey the law only if conditions O are satisfied. (3) The satisfaction of conditions L does not entail the satisfaction of conditions O. So there is not necessarily a moral obligation to obey the law. For such an argument to work, it would have to state (1) a true analysis of what it is for there to be law and (2) the conditions that must be satisfied if one is to be under an obligation to obey the law. No one has ever offered an argument of this sort.

An even broader argument would be required to explain how positivists who disagree among themselves about the specification of both conditions L and conditions O could embrace such a conclusion. For example, (1) would have to be replaced by a "meta-theory" concerning the generic sorts of conditions that must go into any adequate analysis of law. Furthermore, this meta-theory would have to satisfy more than Hart's requirement that the terms used be "flatly descriptive," because that alone would not guarantee that the satisfaction of conditions L would not entail the satisfaction of conditions O. This is because any adequate theory of the conditions under which one can have an obligation to obey the law must likewise state them in descriptive terms. And it would add nothing to insist that the terms used in L be "normatively neutral," because in the present context this means only that L *should not entail* O, which is what the argument is all about.

To put the matter simply, the positivist believes that, *whatever L and O should prove to be, (3) will turn out to be true*. This is one of the principal elements of positivism — it is part of the positivist's "meta-theory" about law. It is an *axiom* of legal positivism that *any*

adequate analysis of law will respect the truth of (3). Let us suppose, then, that the positivist's "separation of law and morals" is a fundamental principle of the positivist tradition. Are we to infer that it must be arbitrary? I do not think so.

To see this, consider the following sort of argument: (a) the institution of chattel slavery is sometimes permitted and enforced by law; (b) no plausible moral position is capable of justifying the claim that people who are forced into slavery, and treated as chattel slaves have in fact been treated, are under a moral obligation to obey the law (including, of course, the laws that enforce chattel slavery); (c) if so, then no plausible moral position is capable of accommodating the claim that there is necessarily a moral obligation to obey the law.

I take (a) to be unproblematic. The crux of such an argument is step (b). This assumes that we already know a good deal about the sorts of considerations that are relevant to claims about moral obligations. It should suffice for our purposes to mention three examples. Some hold that an obligation to obey the law turns on the effects of disobedience as compared with obedience. Others claim that such an obligation depends primarily on considerations of fairness. Still others believe that such an obligation derives from a "social contract." But it seems at best extravagant to suppose that considerations of utility, fairness, or voluntary undertakings akin to contracts are capable of showing that there are always good moral reasons for chattel slaves (or indeed others) to obey the laws enforcing slavery. Sometimes laws merit no respect at all.

The idea that there is *not necessarily* a moral obligation to obey the law does not imply that there is *never* a general obligation to obey the law, that is, an obligation which applies to all persons within a given jurisdiction and to all its laws, including those that are deficient from a moral point of view. Our moral sensibilities are sufficiently developed to distinguish between these two ideas, just as they are developed enough to compare how people may be treated under a system of law with reasonable notions of how they should be treated. We are not, after all, starting such inquiries from scratch. We can draw upon thousands of years of legal experience and moral reflection.

So my suggestion is that the most plausible case, perhaps the only plausible case, that can be made for the positivist's "separation of law and morals" depends on the exercise of moral judgment. I put the matter this way not to suggest that moral judgment turns upon some infallible and mysterious moral "intuition," but rather to emphasize that such a conclusion does not rely upon a single well-grounded theory of obligation. Anyone who wishes to challenge this element of positivism ought to try to prove the contrary position,

taking into account the full range of relevant human experience, both legal and moral.

II. MORISON ON AUSTIN

Morison's *John Austin* is the second volume in a valuable new series on legal theorists. It is an ambitious book, covering not only Austin's life and work but also the origins and impact of his ideas. It is packed with information and excellent summaries of relevant writings by Austin and many others. A running critical commentary is provided. The book concludes with a vigorous defense of Austin's general approach, despite the serious shortcomings of his specific theories; a provocative critique of recent approaches, most notably Hart's; and positive suggestions for progress in legal theory, which draw inspiration from the work of Lasswell and McDougal.

Morison's judgment of Austin is exemplified in his discussion of the most general aspects of Austin's theory of law. Austin, like Bentham before him, held that law is to be understood as a set of coercive commands issued by the uncommanded commanders in a community. Morison's reservations about Austin's attempt to develop and defend this sort of theory are largely in agreement with criticisms that have been made familiar by Hart. For example: law-making presupposes legal authority, which is itself conferred by law. Thus, Austin is unable to account for the legal status of laws without falling into circularity. The Austinian conception of a legal "sovereign" is unequal to its task of explaining how the existence of law is a matter of ordinary empirical fact. But this does not lead Morison to infer that Austin's underlying aim of analyzing law in straightforwardly factual terms is misguided. Law *is*, he argues, a matter of empirical fact. Austin's mistake was to identify the wrong sort of fact as the basis of law.

Morison claims that Austin alone among prominent English jurists "presented the fundamental philosophical problem of legal theory to himself" in "the right way" (p. 147). The distinctive argument of this book is a defense and elaboration of this theme, and a substantial portion of the book is devoted to it. I shall discuss three aspects of Morison's argument: (A) his "naive empiricism" (p. 178); (B) his analysis of normative judgments; and (C) his objections to Hart's legal theory.

A. "Naive Empiricism"

Morison endorses and attributes to Austin a traditional kind of philosophical empiricism that has in fact been quite influential and important. It may be summarized, at least in part, as follows. Reality consists entirely in what can be observed. The only things that can be observed are particular facts. There is nothing but particular

facts; to suppose otherwise is to indulge in metaphysical nonsense. Truth mirrors reality, so statements that do not purport to represent particular facts are meaningless. A significant true statement is either an accurate picture of a particular fact or else can be exhaustively analyzed into a collection of such pictures. Thus,

a true theory is only a compendium of particular truths. It is only the terms of the theory which are general and abstract, so that it abbreviates or condenses particular truths. [P. 142].

That is the basic theory. It will profit us to consider some of the details that remain unclear.

Morison wishes to embrace what he calls "consistent empiricism" (p. 143). I would suppose that a consistent empiricism would take seriously the methods and findings of empirical science, in the first instance those branches of empirical science which, experience shows, have been most successful in increasing our knowledge of reality. That Morison does not do so is suggested in several ways. His general statements of empiricist philosophy would seem to imply that knowledge of reality is accessible only by means of direct observation. But in one place, at least, he allows that we can legitimately use logical methods to derive some truths from others (pp. 195-96). This would seem to allow for the possibility of achieving some knowledge of reality indirectly, that is, by rigorous deduction from particular truths already known by means of direct observation. But if Morison restricts the legitimate uses of logic to rigorous deductions, then he is excluding nondeductive logic, which does not guarantee that the conclusions of good arguments are true whenever the premises are true, but only supports conclusions inconclusively, that is, leaving it open that the conclusions might fall short of the truth. And this is important because it is arguable that nondeductive inference is the principal method in virtually all realms of systematic inquiry. Empirical science, for example, employs nondeductive inference to increase our knowledge of reality, without insuring that its conclusions are precise pictures of reality even when its premises impeccably represent pieces of reality.

Does Morison's "empiricism" then conflict with the most rigorous practice of the most successful empirical sciences? This is even more clearly suggested by his explicit rejection of the idea that there might be "ulterior explanations" of observed facts (p. 143). Much of the success of natural science turns upon its capacity to explain regularities in natural phenomena by reference to microstructures and mechanisms that *cannot* be directly observed and the determination of which relies *essentially* upon nondeductive logical methods. According to Morison, theories are true only insofar as they can be analyzed in terms of directly observable facts. But, most scientific theories are not reducible to observable facts in any such way, as their implications are not so limited and they make essential refer-

ence to unobservables. Thus, much of what experience seems to show that we learn from the enterprise of science would be rejected by Morison's sort of empiricism as metaphysical nonsense. This is, as I have said, a familiar sort of empiricist view, but it has not fared well in recent philosophical inquiries, not because it is too consistently empiricist, but rather because it ignores some important elements of accumulated human experience.

Consider now the nature of observation. Morison presumably wishes us to limit what counts as observation in a consistently empiricist way. He asserts, however, that "consistent empiricism requires that we trust what we appear to observe in the first place" (p. 143). This is, at best, puzzling. For experience seems to show that there can be such things as observational error, illusions, and hallucinations, that is, sense impressions which do not correspond to reality. Does Morison mean to deny this? If so, he would seem obliged to endorse an even more radical "empiricism" than he explicitly avows — some version of what philosophers call "phenomenalism." This sort of view identifies ultimate reality with the *mere* contents of sense impressions. It regards statements about *ordinary* material objects, such as tables and chairs, as logical constructs out of statements about visual and other sense impressions.

But the phenomenalist program is inherently problematic. Statements about ordinary material objects are no more reducible to statements about actual sense impressions than are statements about microstructures and hidden mechanisms reducible to statements about material objects. And it seems clear that phenomenalism puts the cart before the horse, for the phenomenalist program requires that we construct statements about material objects by piecing together elements of sensation. But we cannot even begin to determine how sense impressions must be related to one another so as to count as impressions of a single material object without considerable understanding of the ordinary material world, including, for example, our knowledge of perspective, reflection, refraction, and the like. And this knowledge gradually acquires considerable reference to "ulterior explanations" (as, for example, our knowledge of refraction relies upon our understanding of how light waves are affected by moving between materials of different density at angles other than ninety degrees to their common surfaces). Indeed, one would suppose that what is to count as true observation, from an empiricist point of view, is itself something to be determined by an understanding of how material objects are capable of interacting.

For reasons like these, it does seem disingenuous for Morison to characterize his view as "naive empiricism." It is by no means naive, because it involves rejecting as metaphysical nonsense the methods and results of the most successful of empirical disciplines and corre-

sponds to little of our ordinary ideas about the nature of truth and reality. Furthermore, Morison gives us absolutely no reason to endorse this narrow conception of empiricism.

B. *Normative Judgments*

Morison sets great stock in what he calls "traditional logic" which he claims represents "the wisdom of the ages" (p. 147). It is ironic that an avowed empiricist should pay more respect to traditional logic than to empirical science, but that is not the focus of our present concern. Both deductive and nondeductive logic deal with indicative statements, which can be either true or false. Morison believes that consistent empiricism must reject the idea of any other type of logic, such as the logic of imperatives first laid out by Bentham. He writes:

For the naive empiricist there is only one logic — covering the general propositional and implicational characteristics which everything we observe has — universally. If the term logic is applied to more specialized structures, this implies for him that there are different kinds of realities, which is unacceptable because it is then impossible to represent the relations of those realities by propositions which would fall within any of the realities being supposed. [P. 190].

Thus, Morison believes that imperatives must somehow be reducible to indicatives, that there is no need for any sort of "deontic logic," and that Hart and others who believe that law, because it incorporates action-guiding sentences akin to imperatives, requires such additional logic, are fundamentally misguided.

I believe that Morison's concerns are misplaced and that his positive suggestions about the logic of normative statements are, when clear, insupportable. Morison does not tell us how to effect the reduction of statements that are not indicatives into indicatives; he simply expresses the firm conviction that it must be done. But his reasoning appears confused. The reasons why imperatives like "Shut the door" and "Keep your promises" appear to require a special logic are: (a) such statements are neither true nor false; (b) traditional logic applies only to statements that are either true or false (or that are interpretable in such terms), and so does not apply to imperatives; but (c) it seems reasonable to suppose that there can be logical relations among imperatives (for example, between some general and some particular imperatives). Morison ignores these considerations. He is concerned that acknowledging the possibility of such a logic would conflict with the empiricist conception of reality.

But this is silly. If it is a fact that Jones said "Shut the door," then a statement asserting that fact is simply true. That fact is an element of empirical reality. The idea that "Shut the door" may be regulated by a logic whose realm is not that of truth and falsity does not imply that there is anything but empirical reality. That threat

might be real if we supposed that Jones' utterance were either true or false and thus could be thought to represent a different reality. But it is neither true nor false. So the threat is imaginary.

Morison's misplaced concern is explained by his narrow conception of meaningfulness. He simply does not acknowledge that there can be any sort of linguistic meaning other than that possessed by simple indicative statements. But it seems true that imperative utterances can be meaningful, and whatever meaning imperative utterances have is not identical to that of indicatives. There is more to linguistic meaning than Morison allows himself to believe. And this point seems neutral with respect to empiricism.

Morison does make one fairly clear suggestion about the analysis of normative judgments. When a person makes an "ought" statement, he is making a double assertion: (1) he is asserting "his own approbation"; and (2) he is asserting "that the approval follows from something approved by both his hearers and himself" (p. 143). So a second-person "ought" statement is to be understood as carrying the following sort of meaning:

'All things required for the achievement of X are things that you and I approve', 'Y is a thing required for the achievement of X', 'therefore Y is a thing that you and I approve — even if you have not immediately recognized this.' [P. 143].

In considering this proposal, one should first take note of the fact that it has no clear bearing on the possibility of a logic of imperatives. For a statement to the effect that someone or other ought to do Y is an indicative. The same applies to statements concerning what is right or wrong, good or bad, just or unjust, fair or unfair, commendable or reprehensible. There is no reason to assume that traditional logic is inapplicable to such statements — at least until we have good reason to suppose that they are neither true nor false.

In the second place, Morison's reasons for analyzing such statements in terms of the speaker's assertion of his own approval, etc., are vaguely negative and do not support any particular analysis. Here is all that Morison says that seems at all relevant to his proposal: (1) "the attempt to suggest that one is uttering propositions about something objective outside oneself when making moral judgments is . . . an attempt to disguise the personal reference of the statement being made" (p. 170); and (2) "we do not think it possible to justify our own preferences except by referring to others of our preferences, which may or may not appeal to the persons addressed" (p. 175).

It is not clear how best to analyze the varieties of moral judgments, but it does seem clear that Morison's proposal is anything but "naive empiricism." For there are many respects in which it conflicts with the character of ordinary moral reasoning. While it is true

that we seek common ground with those we wish to persuade of the truth of our moral judgments, it is not true that we are always prepared to retract our judgments when such common ground is absent. But on Morison's proposed analysis, I must regard as false any moral judgment I have made that I realize others are not committed to accepting. Not only does this not square with observable linguistic practice, it also conflicts with our idea that moral understanding is not a matter of universal acceptance. Morality is not inherently conventionalistic in the way Morison implies. One cannot construct a plausible empiricist conception of morality simply by extrapolating from dogmatic philosophical views about the subjectivity of moral judgment.

C. *Morison versus Hart*

Morison believes that Hart's approach to legal theory is too "conceptualist" (p. 183). I can suggest what Morison means by first sketching Hart's conception of law² and then comparing it with some of Morison's ideas.

Hart believes that a legal system at a given time has what I shall call a normative content. For example, it requires some acts, prohibits others, and leaves some to individual choice. Of course, there are other sorts of legal norms, according to Hart, such as those that confer legal powers. Hart conceives of this content as determined by a set of norms that he calls rules. Rules have general application and have implications for particular cases. Most legal rules have legal standing within a system because they satisfy certain criteria that have been incorporated into the system. These criteria can be thought of as collected in "rules of recognition," which can then be thought of as applicable in determining what other rules exist within the system.

Two qualifications should be added. First, rules must have some significant measure of determinate content, but they are always to some extent vague or "open textured." This applies to all rules within a system, including its rules of recognition. So the normative content of a legal system at any given time is somewhat determinate and somewhat indeterminate. Second, each system has some basic rules, including a fundamental rule of recognition, whose existence is determined not by such criteria but rather by their being accepted as fundamental to the system by officials within the system, who regularly apply the standards that these fundamental rules may be thought of as including. So law is a matter of rules, but it is also, on Hart's view, a matter of fact. It is a matter of empirical fact that certain fundamental rules are accepted by officials; that, by the crite-

2. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961).

ria included in those rules, other rules exist; and that the various rules within the system are generally observed by those to whom they apply.

Furthermore, Hart makes clear that this conception of law has the virtue of respecting the distinction between what the law requires or allows and how officials decide questions that arise under the law. It makes sense not only to think of officials making law as they decide cases (when, for example, the law is insufficiently determinate to decide a case) but also to think of officials acting contrary to law, making legal mistakes, and so on. Law provides a standard for appraising much official as well as private behavior.

Morison believes that Hart places too much emphasis on rules and the systematic character of a legal system. In part this seems motivated by Morison's misplaced concern that Hart is committed to acknowledging some fictitious nonempirical reality when he suggests that norms require a special logic. Another reason is that Morison believes that law is not as centralized as Hart's approach implies. I believe this second reason likewise rests on a misconception. Hart would say, I think, that legal systems may be more or less centralized, compatibly with his general analysis of law. How centralized a legal system happens to be depends on how legal authority within it is centralized. Nothing in Hart's general approach implies that legal authority cannot be divided and dispersed.

Morison also suggests that in place of rules we should think of authoritative legal decisions as generating "commitments" to deal with cases in a certain regular way (p. 181). What Morison leaves unclear is whether these "commitments" have implications for official behavior which respect the distinctions emphasized by Hart, between determinate and indeterminate law, on the one hand, and between sound and unsound official decisions, on the other.

Morison's alternative approach to legal theory is somewhat unclear because it is embedded within a larger program for studying decisionmaking processes within communities, following proposals that he attributes to Lasswell and McDougal. The theory of law is seen as an integral part of a more general study.

The idea that legal theory needs integration into a broader study of human institutions makes perfectly good sense. It does not follow, however, that we can understand law better by ignoring concepts that are embedded in the law. For these help to determine the character of the institution that is there to be studied. It may turn out that some of the ways in which jurists look at the law are distorted by preconceptions or illusions. But this can only be shown by first identifying the various ways in which jurists look at the law and demonstrating that they distort empirical reality. A consistent empiricism can proceed in no other way.