Introduction

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Inquiry into the nature of law as a form of social ordering, including the values it ought to serve, threads a long and complex path through the great classics of Western philosophy. Plato's *Republic* and *Laws*, Aristotle's *Nicomachean Ethics* and *Politics*, Cicero's *De Officiis*, St Thomas Aquinas' *Summa Theologiae*, Thomas Hobbes' *Leviathan*, Immanuel Kant's *The Metaphysics of Morals*, and G.W.F. Hegel's *The Philosophy of Right*, all engage with questions that form part of such an inquiry. But even though many of the chapters in this volume display an acute sensitivity to this history, with some authors explicitly situating themselves in a specific tradition of philosophical thought, they all share a determinedly contemporary focus. The contributors to this volume were not invited to provide overviews of the history of ideas, but rather to identify what they judge to be the key questions for us today, and the most compelling lines of approach to those questions, in relation to topics such as the aims and limits of law; what makes for sound legal adjudication; the scope of justice and the place of human rights; the concepts, institutional structures, and values that unify individual departments of law such as crime, contract, and tort; and the prospects for transnational legal order. This contemporary focus is neither a mere accident nor an instance of sheer parochialism.

Partly this focus is a matter of our special moment in the history of legal philosophy. Since the middle of the twentieth century, legal philosophy in the English language has experienced a bright Silver Age – we can leave it as a matter of speculation when the Golden Age of the subject occurred. There were twin engines powering this development. The first was the emergence of legal philosophy as a serious strand within what is broadly known as 'analytic philosophy' after the Second World War, a development associated to a considerable extent with the pioneering work of H.L.A. Hart, Professor of Jurisprudence at the University of Oxford from 1952 to 1969, especially his seminal 1961 text

The Concept of Law,[1] and that of his pupils and interlocutors who became leading figures, such as Ronald Dworkin, Joseph Raz and John Finnis. The second was the re-emergence of political philosophy as a flourishing discipline after a long period of torpor during which scepticism about objective inquiry into matters of value, largely associated with the logical positivist school, had seemed to consign it to obsolescence. Here the dominant figure was the Harvard philosopher John Rawls, whose great treatise *A Theory of Justice* (1971)[2] resuscitated political justice as a topic of philosophical investigation, one that was in turn to be taken up by the legal philosophers already mentioned in addition to political philosophers such as Robert Nozick, Michael Walzer, Susan Moller Okin, G.A. Cohen, Amartya Sen and Elizabeth Anderson. The relevance of this second development is due to the intimate connection between the legal and the political, insofar as the former constitutes one manifestation of the latter, taken in a broad sense. These works stand behind, and are the indispensable reference points for, the essays in this volume.

Partly, however, the focus on the contemporary reflects the inevitable responsiveness of a healthy philosophical culture to the changing circumstances and needs of its own times. Legal philosophy's dominant preoccupations, methods and doctrines evolve in relation to developments in philosophy more generally, but also in relation to new ideas, challenges and opportunities sparked by the continual processes of cultural, political, scientific and technological transformation. As a result, the questions we judge to be pressing today – such as the legitimacy of comprehensive forms of transnational legal governance, the impact of digital technology on the rule of law, the tendency of the language of human rights to swallow whole fields of political discourse, and so on – could hardly have arisen with the same urgency in 1971 (the publication date of *A Theory of Justice*), let alone ten years earlier (the publication date of *The Concept of Law*).

Rather than engage in the daunting task of giving a detailed introduction to the rich variety of insights offered by all of the chapters in this book, the rest of this Introduction will instead pick out, and elaborate on, three major themes that this volume exemplifies, each of them emblematic

[1] H.L.A. Hart, *The Concept of Law*, 3rd ed. (with Intro. by L. Green) (Oxford University Press, 2012).
[2] J. Rawls, *A Theory of Justice*, rev. ed. (Harvard University Press, 1999).

of ways in which legal philosophy has evolved in recent decades. These three themes are: (1) the diminishing significance within the field of the traditional rivalry between legal positivists and natural law theorists; (2) the increasing engagement with ethical/political questions regarding the values law should serve, and in terms of which it should be judged, reflecting both the influence of moral and political philosophy and the (potentially conflicting) need to draw upon a plurality of values; and (3) the rise of 'special' or 'particular' legal philosophy, focused on conceptual and normative issues regarding specific domains of law, such as contract law or public international law, and specific legal ideas, such as punishment or responsibility, as opposed to 'general' legal philosophy, which concerns itself with the phenomenon of law as such.

The first theme is the downgrading of the clash between 'legal positivist' and 'natural law' theories that has occurred in the last few decades. Many students in the recent past were taught legal philosophy largely through the prism afforded by this supposedly decisively important philosophical rivalry. One of the most distinguished legal philosophers of the last fifty years, Tony Honoré, captured this view of the subject in a vivid image:

> Decade after decade Positivists and Natural Lawyers face one another in the final of the World Cup ... Victory goes now to one side, now to the other, but the enthusiasm of players and spectators alike ensures that the losing side will take its revenge.[3]

But just over a decade after these words were originally published (in an essay of 1973), they had already begun to lose the ring of truth. To some extent, the downgrading of the significance of this debate was the upshot of a process of disaggregation. As Hart had already observed in *The Concept of Law*, legal positivism is not historically a label given to a single doctrine, but to a multiplicity of quite distinct theses.[4] By the same token, those usually described as 'legal positivists' and 'natural lawyers' did not simply address a single question, but rather an array of quite different, loosely related questions. These questions focused very broadly on law, morality and their relations, and included the following: (1) are there any objective moral values discoverable by the use of reason? (2) Does a law or

[3] A.M. Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford University Press, 1987), 33.
[4] Hart, *Concept of Law*, 302.

legal system, simply in virtue of its status as a law or legal system, possess some moral value? (3) What makes for a good law, either in general or with respect to a particular department of law, such as criminal law? (4) When, if ever, is there a genuine reason to obey the law, one that rises to the level of imposing a moral obligation of obedience? (5) What are the respective roles of legal and moral considerations in good legal adjudication? And (6) how is the existence and content of a valid law to be determined, and does moral judgement inevitably play a role in this process of identification?

Once these distinct questions – and others besides – were clearly disentangled, it emerged that self-styled legal positivists increasingly came to regard their self-defining doctrine as predominantly, if not exclusively, an answer only to question (6).[5] The positivist view held that the existence and content of law was exclusively, or at least ultimately, a matter of social fact, so that its identification as valid law did not require the making of a moral judgement. Law was *posited*, a social creation, a matter of what had been duly enacted by a properly constituted legislature, or a decision laid down by a court, or a customary practice within a community, and so on. All of these are matters of social fact that require no moral judgement in their discernment. The 'natural law theorist', by contrast, contested this claim, insisting that moral judgement is indispensable in some manner to the identification of the existence of laws and the specification of their content.

These moves deflated the significance of the legal positivist/natural law debate for a number of reasons. First, in terms of scope, legal positivism now manifestly addressed only one out of the myriad questions arising within the philosophy of law – question (6) – and not obviously the most momentous question. To that extent, legal positivism could not purport to be 'complete' as a theory of law, in contrast to the more comprehensive ambitions of most natural law theorists. Moreover, even with respect to question (6), both positivists and their natural law opponents have tended to accept some version of the hermeneutical thesis, powerfully articulated by H.L.A. Hart, that a theory of the nature of law must be duly sensitive to the 'internal' point of view of those who accept legal standards as genuine reasons for action. In this way, the methodology of legal philosophy is

[5] See, for example, J. Gardner, 'Legal positivism: 5½ myths', *American Journal of Jurisprudence* 46 (2001), 199–227 and L. Green, 'Legal positivism' in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Stanford University, 2003), https://plato.stanford.edu/entries/legal-positivism/.

radically distinct from that of the natural sciences, since atoms or quarks (for example) do not have a point of view that needs to be taken into account in explaining their behaviour. Indeed, many critics of legal positivism, such as Dworkin and Finnis, have presented their anti-positivist views as flowing from a more thoroughgoing effort to take seriously this 'internal' point of view on the very point of legal ordering. Second, insofar as legal positivists did address questions such as (1)–(5) listed above, they frequently found themselves allied with self-described natural law theorists, for example, on whether moral values are objective or on the qualities that make for a good law or morally binding law. Finally, the positivist thesis that law is a matter of social fact was not only championed in (often subtly) different versions by legal positivists, but at a very general level – the idea that law depends for its existence on social fact, such as enactments of legislatures or decisions by courts, and in that sense cannot be grounded on value judgements alone – it was also affirmed by leading natural lawyers from Aquinas to Finnis. In light of this situation, it is perhaps not surprising to find the most influential 'legal positivist' today responding to yet another attempt to 'refute' that doctrine by suggesting that '[p]erhaps it is not time to refute legal positivism, but to forget the label and consider the views of various writers within that tradition on their own terms'.[6]

Intersecting in complex ways with the de-emphasis of the legal positivism/natural law debate in recent decades has been scepticism about the idea that inquiries into the nature of law should be framed, either exclusively or predominantly, as exercises in 'conceptual analysis', a theme taken up in the chapter by Grant Lamond. The privileging of conceptual analysis is itself a legacy of the language-focused approach of the school of analytical philosophy. Thus, leading legal positivists, such as Joseph Raz, have presented their investigation of the nature of law as a form of conceptual analysis, aiming to limn the essential features of our concept of law and, as a result, to identify those features all legal systems necessarily possess. Their claim is that some version of the legal positivist thesis – that law's existence and content is identifiable independently of moral judgement – constitutes one of the necessary features of law.[7] Some critics

[6] J. Raz, *The Authority of Law*, 2nd ed. (Oxford University Press, 2009), 335.
[7] J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009), chs. 2–3.

have questioned, in the name of a naturalistic approach to legal philosophy continuous with the methods of natural science, the very idea of an objective inquiry into the concept of law.[8] Others, who conceive of law as an inherently value-laden, interpretive concept, have questioned the utility of conceptual analysis.[9] Still other, more moderate critics, have argued that conceptual analysis is only one strand of inquiry into the nature of law, and that it either needs to be subordinated to, or at least supplemented by, a substantive account of the moral value of law[10] or an empirical investigation into culturally and historically variable facts about how law operates.[11]

The second general theme foreshadowed above is an increased engagement with questions about the ethical values law should serve, and in terms of which it should be judged, rather than with any purely conceptual or descriptive enterprise. There is no doubt that an important influence here has been the revival of moral and political philosophy addressing *normative* questions – what is morally right and wrong, as a general matter, and in relation to specific ethical conundrums such as abortion or capital punishment – as opposed to *meta-ethical* questions addressing the metaphysics, epistemology or semantics of moral claims or else purely conceptual questions. One factor explaining the lively state of normative ethics and political philosophy in recent decades is the revival since the 1970s of broadly objectivist views of moral judgements, according to which they can be true, in some mind-independent sense, and also capable of being known. It is a striking fact, in this connection, that the most prominent 'legal positivist' of our day, Joseph Raz, and the most prominent 'natural lawyer', John Finnis, are both squarely in the objectivist camp in meta-ethics, even if they differ quite markedly on some of the normative questions they have addressed. This objectivist revival came after a long period of dominance of subjectivist views of ethics, most notably those of the logical positivist school, which largely limited the domain of objective truth to that of empirical investigation, paradigmatically in the natural sciences.

It is worth noting, however, that embracing ethical objectivism is something that both Hart and Rawls, in different ways, sought to avoid. Hart

[8] B. Leiter, *Naturalizing Jurisprudence* (Oxford University Press, 2007).
[9] R. Dworkin, *Justice in Robes* (Harvard University Press, 2009), chs. 6–8.
[10] J. Finnis, 'The nature of law', in this volume.
[11] F. Schauer, 'Social science', in this volume.

was throughout his career drawn to a broadly Humean, subjectivist view of the ethical, which he combined with the belief that in articulating a general theory about the nature of law one should remain studiously agnostic as to meta-ethical questions.[12] Rawls, meanwhile, came in the latter phase of his career to argue that political justification is an exercise in public reason, drawing on values and ideas implicit in the liberal democratic tradition, but scrupulously avoiding entanglement with 'comprehensive' ethical, philosophical or religious doctrines, such as those relating to the objectivity of value, on which reasonable persons inevitably differ.[13] Obviously, the non-objectivist and non-committal stances, respectively, of Hart and Rawls did not prevent either of them from engaging with some of the deepest moral questions relating to law, from the obligation to obedience to the justification of punishment. Whether these stances benefited their engagement with those questions, however, is another matter.

Another feature worth noting under this heading is a growing sensitivity to the plurality of values that need to be considered in the evaluation of law. Part of the context here is that Rawls' *A Theory of Justice* was crucial in rehabilitating broadly deontological approaches to moral and political philosophy. Unlike the previously dominant utilitarian approaches, which conceived of morality as essentially concerned with the maximisation of overall welfare, deontological approaches sought to elucidate norms of justice, equality, obligation and rights whose basis did not lie in welfare or its maximisation. Ronald Dworkin fused these two strands of thought by famously characterising rights as 'trumps' against the pursuit of general utility. A beautiful statement of the dialectic between these two views is Hart's essay 'Between utility and rights', first published in 1973.[14] But since that time we have seen the emergence of moral theories that transcend the utilitarian/deontological divide, including the development, by philosophers such as Philippa Foot and Alasdair MacIntyre, of virtue ethics, which draws inspiration from Plato and Aristotle in according

[12] Hart's endorsement of an official stance of meta-ethical neutrality in general philosophy of law can be found in Hart, *Concept of Law*, 168. His anti-objectivist sympathies in moral philosophy are evident in H.L.A. Hart, 'Who can tell right from wrong?', *New York Review of Books*, July 17 (1986).

[13] J. Rawls, *Political Liberalism* (1993); see also the discussion in J. Stanton-Ife, 'The ends and limits of law', in this volume.

[14] H.L.A. Hart, 'Between utility and rights' in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983).

centrality to the virtues of character needed for a flourishing life. Martha Nussbaum's discussion of legal adjudication in this volume is largely structured around a contrast between utilitarian and common law approaches, where the latter is taken as a form of 'Aristotelian rationalism' that stresses the importance of case-by-case judgement against the background of a tradition that embodies the accumulated wisdom of past generations. Additionally, more thoroughgoing forms of pluralism have been advanced that recognise a variety of moral values, often with a basis in deep human interests or needs, but which are not amenable to complete subsumption under a utilitarian, deontological or virtue-ethical framework. A version of this sort of pluralism, one that conceives of values such as knowledge, friendship and health, as incommensurable, hence as not amenable to maximisation, is advocated in the chapter on civil rights and liberties by Sherif Girgis and Robert P. George in this volume.[15]

Part II of this volume is concerned with articulating specific ethical and political values relevant to the assessment of law, such as justice, legitimacy, autonomy, rights and the rule of law. Central here is the value of justice, which has long been thought to be intimately connected with law. Yet, assuming that justice is not synonymous with the whole of interpersonal morality, the question as to which subset of moral norms it encompasses is a difficult one. Onora O'Neill's chapter gives an account of justice as largely comprising those moral obligations that are appropriately enforced through law, supplemented by the idea that the core standards of justice are those 'perfect' obligations that are owed to some determinate right-holder. The fact that the revival of political philosophy has taken place under the stimulus of Rawls' *A Theory of Justice* has not prevented ongoing obscurity as to the boundaries of the concept of justice. However, commanding a clear-sighted view of those boundaries is vital to two key concerns. The first is that of identifying the extent to which justice conflicts with other values, such as mercy or economic prosperity, and may have to be compromised in order to make room for their demands.[16] The second is the extent to which justice itself may depend, both for the

[15] Philosophers such as John Finnis, James Griffin, Amartya Sen, Bernard Williams and Susan Wolf are also notable exponents of this pluralist tendency.

[16] Notable here is G.A. Cohen's critique of Rawls' difference principle as not truly a principle of justice, since it involves compromising the egalitarianism required by justice in order to take on board other considerations, such as prosperity; see G.A. Cohen, *Rescuing Justice and Equality* (Oxford University Press, 2008), ch. 7.

formulation and successful realisation of its demands, on a broader spectrum of obligations and ethical ideals that are not themselves matters of justice, such as norms of civility or public service. The second theme features prominently in O'Neill's chapter.

The concern with plotting the boundaries of ethical concepts relevant to law is perhaps especially important in relation to rights (including, notably, human rights). When Hart wrote *The Concept of Law*, the idea of an individual right had only a liminal presence in his elucidation of the conceptions of justice and morality. Today, the discourse of human rights has become the dominant vehicle for formulating politically resonant moral demands in the wider public culture, to the point of sparking worries about the debasement of the language of human rights as a result of this unruly proliferation of human rights claims. In Chapter 8, Jeremy Waldron seeks to inject some rigour into this domain by elucidating rights in terms of obligations that are justified by some valuable feature (e.g. an interest) of an individual taken by itself (rather than as part of an aggregate with other individuals),[17] while human rights are those rights that are possessed by all in virtue of their humanity and should in principle find expression in law.

A similar issue of expansionism arises in relation to the rule of law. My chapter on that topic addresses the rivalry between 'thick' and 'thin' conceptions of that ideal. Hart himself was a proponent of a thin view, according to which the rule of law consists in certain formal and procedural standards, such as clarity, publicity and non-retrospectivity, which are nonetheless compatible with a law's grave injustice in other respects. But in the intervening period, 'thick' accounts of the rule of law, which portray it as encompassing virtually all of the values manifested by good law, have gained widespread currency. All three of these chapters bring into focus the question of the price of this expansionism, of what may be lost when we try to incorporate a near-comprehensive legal ethic into a single concept such as justice, human rights or the rule of law.

By contrast, the topic of the legitimacy of law suffers not so much from the challenge of stemming undue expansion, but from systematic ambiguity regarding what 'legitimacy' means in a given context. Its various

[17] For a discussion of the pros and cons of the rival 'interest' and 'will' theories of rights, and for the thesis that rights are grounded ultimately in the common good rather than individual choices or interests, see Sherif Girgis and Robert P. George, 'Civil rights and liberties', in this volume.

meanings vary from simple empirical readings of the notion as referring to a general belief in, or acceptance of, the moral acceptability or bindingness of the law among a given populace, to normative readings that include, for example, the compliance of the law with certain formal and procedural norms (such as the rule of law) or the existence of good reasons for creating and maintaining in existence a certain law or legal system or for not obstructing its workings. In their historically informed chapter, Christoph Kletzer and Massimo Renzo engage with the recent debates on this topic, focusing on legitimacy as a right to rule that imposes an obligation of obedience on those over whom the authority purports to rule. A notable feature of these debates is that the familiar idea that an authority's right to rule has its source in the consent of subjects is rejected by many of the dominant theories of legitimacy today.

Whether we are bound to obey the law, of course, hardly exhausts the questions of ethical evaluation that the law poses. Even if we are obliged to obey a given law, it does not follow that the law is not defective in some way in achieving its proper ends, such as justice or the promotion of individual well-being. Whether we are ordinary citizens or officials, we need ethical principles to guide us on which domains of activity may be subject to legal regulation, and how to improve the quality of the laws that govern those domains. Here there is a longstanding philosophical concern with the ethical limits on the law's interference with individual choice, especially through forms of coercion, including, at the limit, criminal punishment. This has been one of the liveliest areas of debate in recent decades, and its contours are traced in John Stanton-Ife's chapter. Again, the theme of value pluralism is notable. The chapter shows how John Stuart Mill's famous 'harm principle' is open to multiple interpretations, depending in part on whether its focus is on harm prevention or the promotion of independence. Moreover, legal moralist approaches have arisen which contend that the implementation of morality through law can be reconciled with the Millian emphasis on individual freedom. The more radical of these embrace a radical pluralism that abandons the search for a master principle to govern the limits of coercive legal intervention, and place great stress on sensitivity to real-world conditions that justifiably limit the use of law to promote certain moral goals.[18] Inevitably, the

[18] See also the discussion of the harm principle as a basis for criminalisation in R.A. Duff, 'Criminal law', in this volume.