only a long tradition of meditation and explanation, but also the advice of a living Church; not only sense of the Christian community in which one lives, but also the resources of personal meditation and insight. It may be noted that Christ, as God, is omniscient about all facts relevant to the situation; and hence those who would imitate him must be as diligent as possible in learning about all aspects of the events in which they find themselves: the scientific not least. Wherever they close their eyes, stilling the desire for full understanding, there they fall off from the imitation of Christ.

The principle, the norm, the center, and the goal of Christian Moral Theology is Christ. The law of the Christian is Christ Himself in Person. He alone is our Lord, our Savior. In Him we have life and therefore also the law of our life. Christian life may not be viewed solely from the standpoint of formal enactment of law and not even primarily from the standpoint of the imperative of the divine will. We must always view it from the point of the divine bounty... In Christ, the Father has given us everything. (p. vii)

Härning's treatment is sometimes too ecclesiastical, too smug or apologetic in reference to Catholics, too simplistic and brief with non-Catholic thinkers. But the larger movement of his thought is by no means ungenerous. It may be hoped that his work soon becomes the standard Christian moral text. It is a solid step toward that Christian humanism, that relation between nature and grace, which the Renaissance fumbled for and missed.

Michael Novak


At the center of this significant contribution to jurisprudence is the contention that a proper analysis of law begins with a consideration of the viewpoint of the community whose law it is. It is only from this "internal" standpoint that the functions of law may be understood. Thus viewed, law may be broken into two elements: primary rules and secondary rules. Primary rules are standards of behavior for a society: they impose obligations which are "accepted" by a substantial part of the community as binding apart from sanctions. If they existed alone, they would be largely indistinguishable from morals. Secondary rules supply the obvious deficiencies that attend a set of primary rules alone. Secondary rules perform three main roles, distinct from each other and from the creation of obligations. One kind of secondary rule, "the rule of recognition," identifies the primary rules so that they are marked off from morals, etiquette, or private wish. Thus, in England the rule of recognition prescribes that statutes enacted by the Queen in Parliament are law, decisions of courts are law, duly enacted municipal ordinances are law. A second group of secondary rules provides for change in primary obligations. These rules include both those which permit the making of new public laws and those, such as the law of contracts or wills, which give private parties the right to create or alter primary obligations.
A third branch of secondary rules deals with the tribunals to determine the violations of primary rules and with the application of sanctions for their breach.

The author comments on this model: "If we stand back and consider the structure which has resulted from the combination of primary rules of obligation and the secondary rules of recognition, change, and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist." (p. 95) This combination of primary and secondary rules is the "key to the science of jurisprudence." (p. 79)

The author's exultation is justly founded, in large measure, on the advance he has made from the sterile pattern of analysis of law in terms of force with which Austin is so much associated. For Austin the law consisted in commands to which sanctions are annexed, or, as Hart bluntly puts it, in "orders backed by threats," "the gunman situation writ large." This simple description, Hart notes, fails to account for the whole class of laws identified by him under the head "rules of change."

Is the essence of Austin saved in the more sophisticated model of Kelsen? Hart next inquires. Kelsen, in an analysis not without influence on Hart, has contended that "command" is at most metaphorical when used to refer to law. He has gone on to find that law consists in "impersonal and anonymous commands," called norms, which stipulate sanctions. "It is the task of legal science," Kelsen has stated, "to represent the law of the community . . . in the form of statements to the effect that 'if such conditions are fulfilled, then such and such a sanction will follow.' " Thus the law of contracts is analyzed as follows: "If two parties make a contract, and if one party does not fulfill the contract, and if the other party brings an action against the first party in the competent court, then the court shall order a sanction against the first party."

As Hart notes, by greater elaboration of the antecedent or "if" clauses, all his secondary rules could be restated in the form of conditional directions to officials to apply sanctions.

To this "formidable" recasting of Austin, Hart rightly brings a fundamental objection: the theory distorts the way law actually functions. Hart's inclusion of sanctions among the secondary rules means that he does not reject Kelsen's statement that "coercion is an essential element of law." But neither does he admit that coercion is the typical function of law. Public prosecution or private litigation resulting in official application of sanctions is an ancillary device invoked when the law has failed to function in its primary purpose of creating standards. It is a mistake to think of law only from the viewpoint of the bad man who seeks to avoid punishment. A better understanding of the law can be had by looking at it as "a puzzled man" or "an ignorant man" trying to channel his activities. The principal function of law is observed socially not in the infliction of penalties but

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1. **John Austin**, *1 Lectures on Jurisprudence* 182 (1869).
2. The "gunman" metaphor was used by Hart to criticize Austin in *Positivism and the Separation of Law and Morals*, 71 *Harvard Law Review* 593, 603 (1958), an article in which a number of ideas in *The Concept of Law* were first adumbrated.
4. *Id.* at 53.
5. *Id.* at 25.
“in the diverse ways in which the law is used to control, to guide, and to plan life out of court.” (p. 39)

Hart's analysis offers an equally effective critique of such formulae of Legal Realism as "law is what the courts will do" or "law is what courts do." These formulations fail to account for Hart’s secondary rules. Even excluding these rules from the scope of law, these theories fail because they confuse prediction with the community's acceptance of rules which makes prediction possible. In a particular game, Hart observes, the score is what the scorer says it is or what he will record. But in scoring, the scorer applies a rule independent of his will. An ordinary game is not a game of "scorer's discretion," of arbitrary calls; and if a player remarks that he has won a point, this observation is not merely a prediction of what the scorer will do, but an assessment of the applicability of the rule from the viewpoint of one who accepts the rule. Similarly, in a case, "the adherence of the judge is required to maintain the standards, but the judge does not make them" (p. 142) — a statement reminiscent of the nineteenth century assertion that a judge only finds the law, but qualified in Hart's book by his insistence on the creative role of the judge in the penumbra of uncertainty and novelty which attend the application of any definite statutes. Even here the judge refers to standards marked out by the community. A statement that a particular result will occur in a case is not only a prediction of the judge's behavior, but a reference to a rule accepted apart from this behavior. (pp. 143-144)

Hart's criticisms are penetrating, vigorous, and convincing. But a book offering "the key to the science of jurisprudence" provokes as many questions as it offers answers. Does Hart seriously share the belief of Austin, whose phrase he thus adopts, that there is a science of jurisprudence? It would seem probable that he does, particularly as he speculates as to why there is such debate as to the subject matter of this science in comparison with the generally undisputed subjects of medicine or chemistry. (p. 1)

Hart's book has the "scientific" purpose of advancing "legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion and morality, as types of social phenomena." (p. 17) But is this modest purpose of analysis feasible without examination of the larger purposes to which the legal structure is believed to be directed?

Other sciences may be more easily circumscribed. Their subject matter is defined by the Baconian purpose for which they are normally pursued: the prediction

7. Hart has not yet met head-on Fuller's contentions that no statutes are interpreted word by word and that even the simplest statutory phrase for the "clearest cases" requires a decision as to the purpose of the statute. See Fuller, Positivism and Fidelity to Law — A Reply to Professor Hart, 71 Harvard Law Review 630, 661-667 (1958).
8. The last chapter of the book is an especially effective critique of the Austinian notion of sovereignty in international law. While this notion has caused much harm in international affairs (see F.S.C. Northrop, Philosophical Anthropology and Practical Politics 179-180 [1960]), it is increasingly under attack by general theorists, e.g., Charles De Visscher, Theory and Reality in Public International Law 93 (trans. Corbett, 1957), and specialists, e.g., B. A. Wortley, Expropriation in Public International Law 13.
and control of the properties of a particular kind of physical matter. It would appear that a similar ambition to achieve prediction and control "like a science" may have animated such Austinian offshoots as Legal Realism. But it would not seem that this narrow goal was Hart's. If science is not meant in its normal sense, perhaps all that is intended by Hart is "an analysis free of personal commitment." Yet, as Polanyi has so vigorously shown, 9 even practitioners of the stricter kind of science bring value commitments to their work. In the looser sciences such as sociology some of the best authorities have made plain that not only do personal value judgments necessarily guide the sociologist, but that the most conscientious course with such value judgments is to hold them consciously and state them explicitly. 10 In the "science of jurisprudence," a looser science still, can one undertake any analysis without a moral purpose, without evaluation of the uses of law, without commitments as to what law should be? Is not analysis clarified, if these purposes, values, and commitments are explicitly recorded?

The question of purpose is central to the discussion Hart undertakes of the intersecting points of law and morals. Morals influence statutory law; they may, though they need not, guide a judge making case law; law may be criticized from a moral point of view. Beyond these points of contact, which he says almost any school of "legal positivism" would admit, 11 Hart notes a further substantial overlapping of law and morals; for a society to be viable, for a legal order to exist, there is what the author considers a limited moral structure built into the law:

1. The law must have at least what is here denominated "legal justice," that is, law must be applied impartially to like cases; it must be intelligible, within the capacity of most subjects to execute, and generally not retroactive.
2. The law must provide some restriction on the free use of violence.
3. The law must protect property and secure promises. (pp. 189-195, 202)

These minimum requirements for the content of law are based on undisputed, universally existent facts as to men and their environment. The requirements could change if man's nature as we know it changes. Given this nature and the present environment, these elements constitute what the author calls "the core of good sense" in the natural law position.

I shall come back to the derivation of these requirements and shall focus now only on Hart's explicit refusal to incorporate another moral element into his notion of law: the requirement that a law be just. His contention is that though a law must be applied impartially to like cases, a community may determine what are "like cases" in a way that seriously discriminates against a class or race or group. Such unfair legislation will be one example of unjust but existing law. This position, it is clear, may make sense if the purpose of Hart's analysis is to describe a model of law which may be indifferently applied without normative implication to every society which has existed — a purpose not without its usefulness. It is obvious, for example, that a large number of legal orders — Greek,

Roman, early American — have enforced slavery by laws which would be considered unjust. If analysis of the law of such societies is to be made, it appears pointless to deny the character “law” to the unjust statutes imposing or regulating servitude.

Even here, however, contemplating a “purely descriptive” model, there must be some doubt as to whether there would not be a gain in analytic insight if just and unjust laws were distinguished. The way laws function socially is for Hart the ultimate test of the validity of his distinctions. Following his protest against distortion of the social functioning of law by easy cataloguing, might one not feel that lumping under a single heading of “primary rules” all obligations, however accepted by their subjects, was itself a fundamental distortion? Is it not likely that the way law functions for slaves is substantially enough different from its functioning for even the bad free men of a community to warrant a distinction between law set for free men and law set for slaves? In short, if “social function” is the refutation of Austin and of Kelsen, social function also suggests that a basic differentiation should be made in theory between laws which are regarded by their subjects as directed to a moral human end (even if the subject is a bad man who will not obey or a dissident who believes the law unwise) and laws regarded by their subjects as iniquitous and inconsistent with human nature. The distinction, based on the social functioning of law, might be drawn at the point where the subjective view of those bound by the law was that it was inhuman. It might be marked more boldly by one more confident of his values at the point where in fact, regardless of the subject’s views, the law was inconsistent with human nature and so worked at cross-purposes with the basic tendencies of man.

At either point the distinction would reflect a change in the operation of the law as real as, say, the difference between rules of change and rules of adjudication.

A theoretical distinction between just and unjust law is, it should be noted, all that the traditional exponents of natural law theory have sought. The issue is not, as Hart appears to conceive it to be, the banishment of “unjust laws” from the consideration of the “science of jurisprudence” to become the unhappy objects of “some other science.” (p. 205) The fundamental distinction suggested is much like a distinction which might be drawn by a person studying the varieties of love. Such a student might apply the term to the love of God, to the love of neighbor, to marital love, to romantic love, to the love of a parent for a child. He might then say, recognizing a common thread in the function of love in this variety, that these constituted species of “true love.” He might at the same time hesitate to include within the meaning of love the vast variety of perversions which characteristically bear some resemblances to his true species, but which

12. Such classic philosophical defenses of slavery that some men are naturally slaves (Aristotle, Politics I:2) or that some men will benefit from the guidance of a wise master (Thomas Aquinas, Summa Theologica II-II, Q. 57, art. 3, ad 2) do not seem to have much relation to the laws instituting and maintaining slavery in any given society.

13. For example, Thomas Aquinas still treats of “unjust laws” in his “Treatise on Law” while saying a man is “not bound to obey [such] law, provided he avoid giving scandal or inflicting a more grievous hurt.” Summa Theologica I-II, Q. 96, art. 4, ad 3. He also speaks of a tyrannical law as “not a law, absolutely speaking, but rather a perversion of law.” “It has the nature of a law” because it is “an ordinance made by a superior to his subjects.” Ibid., Q. 92, art. 1, ad 4.
might function in a markedly different fashion. A student of love might enrich
his comprehension of his subject by an exploration of these perversions and the
reasons for their deformity, but he would not be prevented from this exploration
because he had chosen to distinguish between love, false and true. Law, too, may
be distinguished as good and bad without limiting its analysis.

If there are serious reasons to question the suppression of difference between
just and unjust law when what is at stake is a model for analysis of dead societies,
the doubt becomes more acute when one treats of living social orders. Here a
jurisprudential may wish to analyze with the purpose of guiding the community
creatively. Is it helpful to his purpose to deny him a radical distinction between
just laws and laws which will, so he says, function to the damage or destruction
of the community? Does not the evident answer to this query suggest that Hart's
"key" is not useful in this area of jurisprudential activity? Can the province of
jurisprudence be thus limited?

Leaving the task of description, Hart has argued further that his rejection of
justice as an essential element of law also stands on practical grounds: (1) There
is no evidence that men will resist unjust laws more often because they believe
"an unjust law is no law"; and (2) such a belief would obscure the dilemma of
the kind that confronted the postwar German courts of not punishing an evil act,
legal under Nazi law, or punishing it retroactively.

As to the first point, Radbruch's testimony stands against it, as does a common
sense appraisal of what must have been the effect of German positivism on Ger-
man judges and lawyers.14 The evidence is, indeed, far from complete; certainly
none is adduced by Hart. As to the second point, the German courts can be con-
sidered to have been in no greater dilemma than were the Allied military tribunals
punishing crimes "against peace and humanity" which were defined by no statute
at the time of their accomplishment. Both sets of courts had to leave evil acts
unpunished or apply retroactive law. The heart of their problem was: Can
criminal law ever be retroactively applied? If there is any moral justification for
such application, does it not rest on the contention that any ordinary human
being performing acts for which he is later held criminally accountable should
have realized at the time of the acts that they were seriously immoral or "un-
natural"? If this justification does not hold, then it would seem wrong to invoke
a sanction retroactively. If it does hold, I cannot see that the existence of an evil
statute commanding or permitting the action in any material way affects the
resolution of the problem. If a person is held accountable for his evil act, he must
equally be held able to see the evil of the statute. The existence of the statute
makes the problem more acute only if one believes that law, whether good or
bad, has some moral weight of its own. This proposition does not seem to me

14. See Fuller, op. cit. supra note 7, at 636-659. Compare The Justice Case, III Trials
of War Criminals before the Nuernberg Military Tribunals (1951), especially
testimony of Defense Witness Professor Jahreis, p. 257, 277, 282. Note in particular such
examples of belief in the magic power of a statute to convert wrong into right as the case
of Curt Rothenberger, president of the district court of appeals at Hamburg, 1935-1942, who
opposed denying Jews the right to proceed in forma pauperis while "a direct legal basis is
missing," and at the same time urgently recommended issuance of a legal directive to
achieve this denial. (Ibid., pp. 1111-1113)
one Hart is prepared to defend, although it is a proposition which is perhaps implied by Hart’s view of the value of the law being faithful to itself. The significance of law thus giving itself a value, apart from other human ends, may now be considered.

This question of the value and end of law is linked to what was noted earlier as another basic question for Hart, the source for the minimum moral content he finds in law. What is his basis for this moral injection into the legal order? He approaches this question with a classic English distaste for speculation of a metaphysical sort and an understandable desire to reach the plain practical truths on which all sensible men would agree. He reminds us that the natural law, as historically conceived, depends on “a theocratic view” which “few could accept today,” and he offers to disentangle the natural law not only from its theological antecedents, but from any complex metaphysics. (pp. 183-187) He starts with one premise, that “we” are committed to survival, and he finds his minimal natural law, set out above, as a statement of what, given the nature of man and his environment, is necessary for survival. (pp. 188-189)

“Survival,” it will be seen, is made a simple and absolute value in this account. Yet survival has not this simple and undifferentiated character. Whose survival is meant—the individual’s or a society’s? If individual survival is intended, then it is obvious that no society we are familiar with has made survival its governing value or incorporated the requirement of survival of individuals into its basic laws. Not only has a large part of the law of most civilized societies been directed to the conditions and ways in which its young men may be sacrificed in war, but the ordinary laws of domestic society normally are cast on the assumption that individual lives are not our highest value. The whole of automobile tort law rests on the foundation that while one has a primary obligation to drive carefully, one does not have a primary obligation not to use a car; compensation for lives taken is preferred to banning of vehicles which assure the existence of other values more highly prized by the society.

If, then, the notion of individual survival is rejected as a utopian basis on which to account for existing legal orders, the notion we are left with of “survival of a society” involves a number of questions, some of which are far from being academic at the present moment. Does a society survive if only a tenth of its people and none of its educational institutions survive? Is bare survival of some people ever the goal of a society even in its bleakest choices, let alone in the complex functioning of its law? When one speaks of survival of a society, is not what is meant the cultural content of that society—the ideals of the Third Reich or the “American way of life” or English civilization? Once these cultural values are brought into the meaning of survival, the requirements of law to insure the survival of a particular culture are seen as many more and as much more varied than Hart suggests. There is no existing law in which the requirements of survival, abstractly taken, form a minimum vital content of the law, and the use of this abstract notion to form a model of law must result in a serious disfiguration of realities.

Once one embarks on an enumeration of the minimum moral ingredients of law, is one not led, perhaps inexorably, to an enumeration of what one believes
to be the maximum requirement of justice? “Survival” won’t do the job. Other more complex notions, recognizing more human needs, reflecting a richer range of human capacities, are devised. Where does one stop, as one finds that, in fact, different societies have recognized some but not all such needs, have encouraged certain human tendencies and perverted others? Is there any ideal model which will fit all cases, as Hart appears to have assumed with his starting point of survival? It would seem possible that in the search for a general type, one would be led back to the rejected model of just law, which measures law in terms of justice and injustice. This model, with this distinction, is still serviceable for descriptive analysis and may, as has been suggested above, more faithfully reflect social function. Its development, of course, demands a metaphysics, a teleology, and possibly a theology.

Yet if survival does not mean individual or social survival, could not a gloss on “survival” in Hart’s context amend the phrase to “survival of the legal order”? In this way, the moral requirements of law would spring from a categorical imperative that the legal order preserve itself. In Hart’s universe the fidelity of law is to itself. What is commanded as necessary is what is necessary to keep a legal order in being, just as in a game there are minimum moral requirements to keep the game in existence. In any game, the rules must be intelligible, not retroactive, within the player’s capacities, and impartially applied; the free use of violence must be restricted; scores, like property rights, may be changed only in accordance with the rules; and promises or declarations of various sorts must usually be honored. These requirements are a minimum if the game is to be played at all.

Hart’s analysis applies perfectly to games and their rules. This application of it does not involve any of the many complications created by considering the purposes of society in relation to the notion of law. In a game the purpose is to play the game. The players have the option of playing. If they choose to play, they must conform to the rules designed to insure the game’s existence.

But is this snug fit of Hart’s theory to the workings of games a strength or a weakness? The static character of purpose in games marks a fundamental differ-

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15. Games not only have the same moral minima as Hart’s model of law. They may also be analyzed in terms of his primary and secondary rules. Take football for example:

1. Rule of recognition: The official rule book contains all the rules of the game.
2. Rule of adjudication: The officials are empowered to determine all infractions of rules, to decide all disputes, and to impose penalties.
3. Primary rules: Certain members of the team in possession of the ball may carry it forward and will score points if the ball is carried over the opposing team’s goal line. Under certain circumstances the ball may be thrown forward instead of carried, etc. The team with the ball may not hold the other team with their hands, etc.
4. Rules of change: By taking the ball under certain circumstances or by preventing the team with the ball carrying it forward ten yards in four downs, the defending team may gain possession of the ball and the right to score.

The English tradition of analogy between games and law, much favored by Hart, is at least as old as Hobbes: “It is in the Laws of a Common-wealth, as in the Laws of Gaming; whatsoever the Gamesters all agree on, is Injustice to none of them.” LEVIATHAN 232 (Cambridge Classics ed., 1904) A more modern parallel is Wittgenstein’s insight into language as a game. See Helen Hervey, The Problem of the Model Language-Game in Wittgenstein’s Later Philosophy, 36 PHILOSOPHY 333 (1961).
ence between games and law. The other great difference, of course, is that there is no choice as to participation in the world of law. The conscripted participants in this world affect the purposes of the rules, just as the rules interact on them and change their purposes and personalities in a way no game ordinarily does. The participants’ values are inextricably enmeshed not only with the operation of the rules, but with what the rules shall be. The static and abstract model of rules whose end is to perpetuate themselves does not exist in any actual social situation. Hart’s model is Monopoly writ large. It is not an analysis of law in a live society.

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It could be persuasively argued that contemporary thought — at least at its supposedly more sophisticated levels — has been infected by a radical schizophrenia. It has for some time been the dominant fashion in intellectual circles to accept without question or quail the knowledge function and the truth value of certain approved methods of inquiry, and to dismiss as merely “speculative” or “subjective” or “emotive” or “relative” the claims of any discipline that cannot establish its results by these methods. The accepted models of rationality are those of logico-mathematical deduction and controlled empirical verification. When these criteria are applied with a proper mixture of zeal, bigotry, and naivete, they issue in a sharp bifurcation: mathematics and the “descriptive” or “natural” sciences are held in high repute; while other areas of investigation, and especially such “normative” inquiries as have to do with the questions of morals, esthetics, and politics, are denied intellectual respectability on the ground that they are vitiated by the intrusion of “arbitrary,” “personal,” and “variable” factors.

The present book is an attempt to rectify this situation insofar as it pertains to moral theory. This is hardly a novel undertaking; many have chafed under these invidious distinctions and have resisted the restrictions that they place upon inquiry. But the majority of such efforts have been largely critical and methodological in their bearing: they have consisted of arguments against this manner of treatment, attacks on the “most favored discipline” doctrine, and forewarnings of the irrationalism that such a bifurcation threatens and almost solicits. But they have not been outstandingly rich or rigorous in their attempts to justify the claims of the “normative” sciences to be rational disciplines. It is the great merit of Mr. Singer’s book that it is devoted exactly, and exclusively, to this task: it embodies a conscious commitment to establish the rationality of moral theory, and to this end it eschews all other considerations and paths of inquiry, however inviting they may be.

Because of this special and explicit commitment, the book has, in one sense, an extremely limited scope. It altogether ignores many subjects and problems whose treatment is necessary to a complete system of moral philosophy, and which