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ARTICLES

Is, Ought, and the Limited Competence of Experts

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The moral innovators whom C. S. Lewis criticized in *The Abolition of Man* supposed that they could draw imperatives out of their superior understanding of sentiment and instinct. They assumed that to know what human beings want to do is to know what human beings should do. But people want to do all sorts of things that are irrational, pointless, harmful, and even downright evil. And people want inconsistent things. So the innovators are incoherent. As Lewis correctly affirmed, no amount of knowledge about nature or the world is sufficient by itself to direct us to do what is good and right. "From propositions about fact alone no practical conclusion can ever be drawn," Lewis stated. To reason well, expertise is not enough. We must also know what is good, and we must be capable of exercising right judgment.

Introduction

An old story about the British colonization of India explains how the Brits integrated the common law into the cultures of the Indian subcontinent. The common law, which is in essence the immemorial customary law of England, has proven capable of accommodating a wide variety of local customs wherever it has taken root, in North America, Australia, New Zealand, India, and other former English colonies throughout the world. But it cannot be reconciled with all customs. So, to achieve the rule of the common law, its proponents at times have found it necessary to assert the common law's supremacy over some local customs.

Among the local customs that the common law displaced was that of suttee, the practice of burning a widow on her late husband's funeral pyre. General Charles Napier, Commander in Chief of India, proposed to end the practice of suttee. The priests who carried out the ceremony, and who perhaps profited from it, reportedly objected that any attempt by the British to interfere would be a cultural transgression. Suttee, they explained, was one of their most sacred customs. Napier replied, "Be it so. This burning of widows is your custom; prepare the funeral pile. But my nation has also a custom. When men burn women alive we hang them, and confiscate all their property. My carpenters shall therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs" (Napier 1851, 35). Two very different interpretations of this story spring to mind. The first might occur to a critical legal theorist or other scholar who operates from the assumptions of post-structuralist thought. On this view, Napier asserted his own conventional, discursive regime at the expense of a contrary way of identity and experience. He was able to do so because he had more power. And that's the end of the story. Napier's action is just one instance of English cultural imperialism.

A second interpretation points in a very different direction. On this second view, Napier not only had might on his side but also the right. The customary rights and wrongs of the English common law are not only radically incompatible with but also radically superior to the custom of suttee. Rights of life, limb, and liberty for all, and equal protection of the law for women, are just and morally correct, while immolating widows is not. On this account, Napier's action is a confident assertion of legal justice.

What would enable us to render such a judgment? Nothing in the customs themselves could give us a rational basis to prefer one to the other. About this the post-structuralists and critical theorists are surely correct: Conventional norms enable a person operating within a given convention to render judgment according to the convention but provide no neutral, objective ground to evaluate the relative merits of one convention as compared with an alternative convention.

Legal expertise is powerless to work around this problem. We cannot resolve it by developing a more nuanced, sophisticated, precise, accurate, or complete description of the conventional norms on offer. No matter how well we describe conventional norms and institutions, no intellectual resources within the conventions themselves provide any ground for preferring one set of conventions over another. The fact that a convention exists is one thing. That a convention has value and supplies a reason to act according to the convention is another thing altogether.

In particular, the justice of a law, custom, or other human convention must be evaluated according to some separate reason that is external to the convention and in no way derived from it. Legal justice is partly conventional, to be sure. That the common law guarantees trial by jury means that a common-law state, such as Mississippi, has a duty in justice to provide jury trials to criminal defendants and civil litigants, notwithstanding that a state which received its fundamental customary law from France, such as Louisiana, does not offend legal justice when it resolves cases and controversies by different procedures. But justice is not *entirely* conventional. Legal justice is needed to specify and complete, but can never contradict, the conclusive judgments of natural justice. A law that forbids murder is just; a law that ordains suttee is not.

Just Laws and Unjust Laws

Law can be more or less just insofar as we have reasons to think it is consistent not only with other laws but also with justice. To put it in legal terms, a law may either have or lack a rational basis in the basic goods for the preservation of which lawmakers make laws. The rationality of a law, and thus a law's justice, must be measured according to reasons that are themselves separable from the law, which exist independently from law, to which the law points and for the purpose of which law is reasonably created and obeyed.

So the evaluation of laws as just and unjust is possible only if justice is not entirely a product of law, customs, and other conventions. To begin to see how such an evaluation is possible, call the total coppice of separable reasons the "universal good" (Aristotle 1908, I.6) or "common good" (Aquinas 1920–1922, I-II, q. 90, a. 2). Suppose that the common good is common in two senses.

First, it is accessible to the practical reason of all human beings, no matter which discursive regime they live and communicate within and no matter which customs and conventions they employ to order their lives and communities. Every tribe and nation can recognize the common good as good. Indeed, everyone is without excuse for not recognizing it.

The most basic principles of the common good—the most fundamental reasons that people have to act or refrain from acting in certain ways—are self-evident and indemonstrable (Aquinas 1920–1922, I-II, qq. 90–97). They cannot be proven by reference to reasons more basic than themselves, but they require no such proof. By insight and experience we come to know that knowledge is better than ignorance, that good is to be done and wrongdoing is not, and that every human being is a bearer of intrinsic dignity and not mere instrumental utility. In our practical reasoning we show that we know these principles to be true even if our professional theoreticians devise clever arguments to fertilize our skeptical denials.

The self-evident principles of practical reason make up an important, if not often noticed, theme of C. S. Lewis's influential book *The Abolition of Man*. The book is justly celebrated for its explanation of the virtues and their importance for connecting the human capacity to reason with the appetites that reason is to govern. But Lewis also makes important observations about practical reason itself. He teaches that our reason is capable of knowing what is good and right to do. And he helps us understand why this capacity to reason toward the good and the right is in all human beings, not just experts and well-educated elites. Indeed, expertise is a different kind of reasoning, entirely distinct from practical reason. We go wrong if we confuse one with the other.

In our exercise of practical reason, in thinking about and solving the myriad practical questions we confront each day, we demonstrate our own awareness of practical reason's first, most basic reasons. In *Abolition* Lewis listed some of the names that practitioners of theoretical reason have assigned to those true reasons: "Natural Law or Traditional Morality or the First Principles of Practical Reason or the First Platitudes." Ecumenically, Lewis famously referred to the first principles and their directly derived moral judgments as "the *Tao*" (Lewis 1947, 43, 18).

The first principles of the *Tao* direct a truly rational actor to act for the common good, toward the end of what is truly good and not merely immediately satisfying or useful to those in power. Lewis called this idea the

"doctrine of objective value." As Lewis explained, the *Tao* entails that some acts are more reasonable than others, and some are never reasonable at all. Human motivations, such as emotions, "can be reasonable or unreasonable as they conform to Reason or fail to conform" (Lewis 1947, 18, 19).

This doctrine entails that reason can direct us toward what is good to do. The illustrations of the *Tao* that Lewis included in his appendix to *Abolition* are all about how to live together in community. They direct us to do what is good and right with respect to each other. Thus the common good is secured, and the lives of those in the community go well, when we allow the *Tao* to direct our choices and actions. Things go badly when we do not. Lewis warns that the result of an education that debunks the *Tao* "must be the destruction of the society" (Lewis 1947, 27).

Second, suppose that the common good is common in the sense of being shared. Each instance of the common good—every human life, expression of truth, job well done, and virtuous act—is good for everyone within the community where it is found. It provides to each and every member of that community a reason for acting in its favor and to refrain from acting against its flourishing. In cases of extreme necessity and lethal threats, Lewis taught, it can supply what expertise cannot—a reason to die for one's country.

The common good supplies a conclusive reason never to act with an intention to destroy what is good. One man's life has intrinsic value not only to himself but also to his wife, children, neighbors, friends, coworkers, and fellow Kiwanis Club and Veterans of Foreign War members. And his bodily existence is always a reason for every member of his political community to refrain from acting for the purpose of his destruction. And, conversely, every other member of the political community has intrinsic value not only for each of them but also for him.

If the common good is truly common in both of those senses, then it is not contingent upon convention or upon individual assent. The various aspects of the common good, such as human life, virtue, work well performed, and knowledge of truth, are good for everyone whether or not any individual happens to prefer them to their alternatives—death, vice, sloppiness, and ignorance—whether or not any person considering the common good happens to live in a society whose culture places value on them, and whether or not the law ordains their destruction.[1]

1 This is not to deny that culture and law can make it either easier or more difficult to perceive the common good clearly and act in its favor. Indeed, the common good itself provides powerful reasons to believe that culture and law matter precisely because they shape the possibilities and options for choice and action and thus influence the practical reasoning of a community's members, for good or ill. And as people reason and choose, they shape their own future ability to reason and choose well. So a person who lives within a culture that celebrates vice and enforces unjust laws will find it more difficult to live virtuously and justly than a person whose surrounding culture celebrates virtue and imposes liability on those who perform unjust acts. See generally George (1993).

Now we are getting somewhere. We can compare the customs of suttee and murder prosecutions according to a common standard that is separate from both customs and not contingent upon either. Customs that treat human life as a mere instrument or that measure its value as contingent on its utility to the powerful are objectively less reasonable than customs that take every human life to be a reason for action in its own right, without any further evaluation of its utility. Customs that enable men to indulge a vicious disregard for the inherent dignity of the widows of other men are objectively less reasonable than customs that give men external motivations to internalize respect for all human beings, especially the vulnerable among them.

Fact *and* Value—Reality *and* Reasons

In *Abolition* Lewis teaches us how to discern that common standard according to which we can evaluate our conventions and actions. We must look to truths about the world, to what is the case. And we must also look independently to truths about the ends of human acts—what is good and right to do.

To enable practical judgments, such as that a particular law is just, at least some of the reasons that comprise the common good must be practical reasons and not mere facts. For murder to be inherently wrongful, it must be the case that a human being exists and has a given nature that is intelligibly, inherently, and noncontingently different from the nature of plants and animals. But it must *also* be the case that human life is intrinsically good, that every human being is a reason to act (to preserve life) or to refrain from acting (to destroy life) in his or her own right, no matter how useful they are. If we are to judge homicide laws as rationally preferable to suttee, and if we are to employ such laws in our practical deliberations in order to render judgments about the choices and actions of murderers, it must be the case that life and virtue are basic reasons for choice and action.

To be sure, we must also know what suttee is before we can render valid judgment upon it. And we must know something of how the Brits plan to investigate, prosecute, convict, and punish alleged murderers. To mischaracterize the customs of a people group is to go wrong in one's thinking (and may also be an act of injustice). But we also need some account of legal and natural justice to which we can compare both customs. To render correct judgment, then, we need *both* an accurate description of what people do in fact *and* an accurate statement of what is good and just for people to do.

In the terms of the intellectual tradition stretching back from Lewis, Elizabeth Anscombe (1981), and John Finnis (2011, 260–90) through Aquinas (1993, 87–88, 637) to Aristotle, we need both sound theoretical reasoning about what is real in the world and sound practical reasoning about what is rationally desirable to do and bring about. And we cannot get either one as a derivative of the other. Each originates in its own, self-evident first principles. The principles that make theoretical reason coherent and descriptions of reality possible include the principle of noncontradiction and the other principles of logic,

observation, and inference. Those principles neither are derived from nor do they yield as derivatives the first principles of practical reason, such as the self-evident practical truths that good is to be done and evil is not to be done and that knowledge of truth is better than ignorance and confusion.

There is no avoiding the parallel demands of reason. To understand is one kind of act of reasoning. To deliberate and render judgment for the purpose of acting is another. Both are necessary for reasonable human action in the world. Neither is alone sufficient. And neither is reducible to the other, for human choice and action intervene between what is the case and what is to be done or not done. In *Abolition* Lewis uses the example of an instinct for self-preservation. Human instincts are facts about human experience that we can understand. But they cannot by themselves tell us what a person should do when he is called upon to defend his homeland against attack by a foreign enemy. "From the statement about psychological fact 'I have an impulse to do so and so' we cannot by any ingenuity derive the practical principle 'I ought to obey this impulse'" (Lewis 1947, 35).

Practical reason is a radically different kind of reason from all of the theoretical and scientific forms of reason because human action is a radically different kind of cause than all other causes in the world. It is contingent upon and determined by human choice. In turn, it determines what is contingent upon it, namely a person's character, virtues and vices and other habits. It shapes that part of a person's action which, as Aristotle put it, stays within the acting person (Aristotle 1908, I.1).

Practical truths are thus different from truths about existing reality not in degree; they are different in kind. C. S. Lewis was standing squarely within the great tradition of thinking about rational thought when he affirmed in *Abolition* the classical distinction between theoretical and practical reasoning. "From propositions about fact alone no *practical* conclusion can ever be drawn," Lewis stated (1947, 31). In this one sentence, Lewis revived an insight that many people had forgotten. Knowledge of what *is* in the world, which comes from sound theoretical (or descriptive) reasoning, is one kind of knowledge. Knowledge of what is good and right *to do*, which comes from sound practical (or normative) reasoning, constitutes another kind. And theoretical reason alone, no matter how sound, cannot yield practical reason.

Of course, both kinds of knowledge bear upon one another. And both kinds of reasoning mutually assist each other. One cannot do theoretical reasoning well without a commitment to sound practical reasoning—for example, a belief that knowledge is *good* to attain and a conviction that one *should* be rational and obey the principle of noncontradiction because coherent propositions are a means that we use to acquire knowledge of truth. And one cannot reason practically without knowledge of what exists and how it functions—for

example, that human beings alone throughout all creation have the capacity for rational choice, virtue, and language, and are therefore radically different beings than other animals.

Nor are fact and practical proposition separated at the level of ontology. The distinct domains of theoretical and practical reasoning are domains of knowledge, in which we learn and know what is true. What is good (or bad) for a human being to do (or refrain from doing) is inherently connected to the kind of being that a human being is. If a human being were not human, then goods such as knowledge and friendship would not fulfill human beings and enable us to flourish.

Nevertheless, no amount of knowledge about nature or the world is sufficient by itself to direct us to do what is good and right. We must also know what is good and we must be capable of exercising right judgment. Facts about the world cannot alone differentiate good from bad human actions. Nor does all the expertise in the world move a person one step closer to the ability to exercise sound judgment in difficult cases. Lewis rightly insists that the objects with which experts concern themselves—truths about what is found to be the case in the world—lie exclusively in the domain of theoretical reason. "[N]either in any operation with factual propositions nor in any appeal to instinct can the [moral] Innovator find the basis for a system of values" (Lewis 1947, 39).

The moral innovators whom Lewis criticized in *Abolition* missed this. They confidently and foolishly supposed that they could draw imperatives out of their superior understanding of sentiment and instinct (Lewis 1947, 31–37). They assumed that to know what human beings want to do is to know what human beings should do. For anyone who accepts the authority of practical reason's first principles, to state the moral innovators' view clearly is to refute it. People want to do all sorts of things that are irrational, pointless, harmful, and even downright evil. But even the moral innovators, who refuse to acknowledge the basic principles of practical reason, must see that they have failed to say anything coherent. People want inconsistent things. What one person is driven to desire by sentiment or instinct is often incompatible with what other people want in that moment, and indeed is inconsistent with what the same person may want in the next moment. As Lewis observed, "Our instincts are at war" (1947, 36).

Some scholars who are newly or casually interested in natural law also miss the distinction between *is* and *ought*. But the distinction is not peripheral or incidental to the intellectual tradition of natural justice, natural law, and the common good. It is central and critical. And for those who care about such things, it has an ancient and venerable pedigree in classical philosophy and jurisprudence. The differentiation between theoretical and practical reasoning, which has come to be known as "Hume's guillotine" and associated with the Enlightenment, was old news centuries before David Hume wrote his famous aphorism (Hume [1739] 2004, III.1.1).

Aquinas most clearly articulated the differences between theoretical (what most of his translators refer to as "speculative") reason and practical reason. As he explained in his *Commentary on Aristotle's Nicomachean Ethics*,

> [I]n the speculative sciences where we seek only the knowledge of the truth, it is sufficient to know what is the cause of a determined effect. But in the practical sciences whose end is action, we must know by what activities or operations a determined effect follows from a determined cause. [Aristotle] says then that the present study, moral philosophy, is not pursued for the sake of the contemplation of truth like the other studies of the speculative sciences, but for the sake of action. In this science we seek a definition of virtue not only to know its truth but also to become good by acquiring virtue. ... [W]e must thoroughly inquire about the actions we ought to perform because, as we have already observed, actions have influence and control over the formation of good and bad habits in us. (Aquinas 1993, 8)

By our theoretical reasoning we come to know what is the case. By our practical reasoning we come to know how to act. And by our actions human beings have the power not only to remake some part of the world but also to remake some part of ourselves in the process. Sound theories are those that describe the world as it is. By contrast, sound reasons for action are those truths that motivate human actions toward some possible good end, good in the sense of being consistent with the common good and in the sense of bringing about good dispositions in the person who acts to bring about the common good. They concern not what *is* but rather what *can be* and what *will not be* but for the choice and action of the person who chooses to pursue them.

Failed Legal Theories from Flawed Theories about Practical Reason

The distinct rational origins of *ought* and *is* have real consequences in the world. The recent success of the pro-life movement is one example of the significance of practical reason's separate domain. The facts of human embryology matter to the abortion question. But they cannot by themselves tell us what makes a person. Science is indispensable to our thinking, but it cannot give us reasons to maintain moral respect for human life. To act justly toward the most vulnerable among us, we need both a true understanding that all human beings are genetically distinct and self-directed beings and a reason to think that every human being is a natural person whose life and well-being is to be counted as equal to and irreducible to the life and well-being of every other natural person. So the pro-life movement became most effective when it called attention to human personhood as a reason for action—for example, by promoting legislation that prohibits sex-selective abortions, partial-birth abortions, and other discriminatory uses of abortion procedures.

More recently, public health experts have tried to draw duties out of facts, to the detriment of everyone. During the novel coronavirus pandemic, they acted as though correct judgments could be derived from expert knowledge of the effects of COVID-19 and the efficacy (or inefficacy) of various prophylactic and therapeutic responses to COVID-19. And they convinced public officials to impose their judgments on everyone without regard to the costs and risks of the loss of educational progress, economic well-being, and overall health.

Nowhere have the real-world stakes been higher than for theories about law. The collapse of *ought* into *is* produced most of the bad legal philosophies of modern times. German (Kelsen [1934] 1967) and English legal positivism (Bentham [1945] 1970) and American legal realism (Llewellyn 1930) all shared a dogmatic commitment to reduce law to a fact, specifically the fact that a putative law was posited by some person or group in power. From this fact the modern theorists assumed that they could derive laws.

Those legal philosophies rationalized many of the worst injustices of modern times, from Black Codes and eugenics to the Holocaust and racial segregation. They coddled jurists in their belief that the fact of a law's having been posited by some sovereign power is the only criterion of a law's efficacy to direct the practical reasoning of a community's members. Sovereign powers then acted enthusiastically under the cover that modern jurists provided, shamelessly marketing their perversions of law as "laws" and enforcing them with vigor.

Modern legal theories reduce even mundane laws to power. Consider a simple hypothetical involving an implied contract. Bob walks into Abigail's deli. Abigail's sign board advertises ham sandwiches for five dollars.[2] Bob lays five dollars on the counter and asks for a ham sandwich. Why? Because he is hungry and he understands that the ham sandwich will provide the sustenance he needs to remain in good health. Abigail accepts the duty to make the ham sandwich. Why? Because the money Bob is willing to pay for the sandwich is useful to sustain her life and health and all the activities in her life that make it worthwhile. Bob and Abigail made an implied contract for the sale of a ham sandwich because each had practical reasons to make and perform the agreement. The contract exists because two people agreed that it would be good for both of them to make the contract and because they chose to do so.

Notice that classical jurisprudence would take it for granted that Bob and Abigail had good (pre-moral and moral) reasons to form a contract. But classical jurisprudence does not, and need not, attempt to derive the law from moral reasoning. Because the contract exists, we can now describe it without reference to the underlying reasons that motivated its creation. If we follow the classical jurisprudential approach, the approach shared by every jurist from

2 Perhaps somewhat unrealistically in our time, I have located Abigail and Bob in a hypothetical political community with a sound fiscal policy that is not overcome by unsustainable inflation.

Justinian to Robert Jackson, we can identify the law at work by placing the practical reasoning of the parties within the legal concepts that made their practical reasoning effective. We can state the joint intention of the parties to the contract at the time of contract formation—the meeting of the minds, in legal parlance—as its own thing whose existence is now distinct from the parties themselves. We know that this is a contract for a ham sandwich. We can state the consideration for the contract, the five dollars that Bob paid in response to Abigail's sign. We can identify Abigail's offer in her sign board and Bob's act of acceptance in his laying the money on the counter. A lawyer would say that Abigail and Bob have satisfied the formal requirements for an enforceable contract and that an enforceable contract now exists.

But if we accept the dogmas of modern positivist and realist theories, is that contract a law? More precisely, does the contract impose on Abigail a duty to make and deliver to Bob a ham sandwich? Modern legal theorists deny that there are duties apart from exercises of sovereign power. A promise is not a reason for action in itself, even when backed by consideration and even when another person relies upon it to his detriment. Only the consequences resulting from some exercise of disparate power or sovereignty can adequately direct human action as binding law. Might makes right.

So the modern legal theorist must say that, no, Abigail and Bob's contract is not a law, at least not unless some powerful person or officer of the political sovereign coerces Abigail to make the sandwich. As Oliver Wendell Holmes Jr., the grandfather of American legal realism, explained more than a century and a quarter ago, a contract is not a source of legal duty unless and until its breach is remedied by a sovereign power. In his particular theory, the power is a court of law exercising jurisdiction. Holmes provocatively explained,

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, —and nothing else. If you commit a tort [a legal wrong such as punching or defaming a person], you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. (Holmes 1897, 462)

Those whose nostrils Holmes supposed were so afflicted want to put just enough ethics into their legal theories as the law in fact contains. Common lawyers and natural-law theorists do not impose ethical obligations on

contracting parties. Instead, they attempt to identify and describe the duties that contracting parties have in reality as a result of their own deliberations, choices, and actions.

Resistance to sovereign-command theories and other consequentialist legal theorists is motivated not by a desire to get lots of ethics into the law but rather by a recognition that law itself is good and important to have because it enables people to coordinate their actions for a common good. The law can be described as law precisely because it is *not* the job of the lawyer, jurist, or legal theorist to decide which promises should be enforced. People who make contracts do so for practical reasons. Lawyers and legal theorists do their jobs well when they declare those contracts accurately as a matter of theoretical reason. The task of the lawyer is to perform sound theoretical reasoning about the role that law plays (or does not play) in other people's practical reasoning.

By contrast, the dominant, fashionable legal theories of the last century and a half all founder upon the unbridgeable divide between fact and value. They want law to contain all objective fact and no objective value. And they want only the fact that someone has power. But practical questions require practical answers. People who live in communities with each other need to coordinate their practical reasoning and act on conclusive reasons in order to achieve a common good. Someone must decide. That is the function of law; it is how law necessarily works.

So modern legal theorists did not eliminate—were not capable of eliminating—value from law. Instead, they arrogated from the people who are governed by law all of the power to decide legal questions, to make value judgments for the community. Modern legal theorists conveyed the powers of self-governance to sovereign elites, who alone are entrusted to engage in practical reasoning. Now they advise people to stop trying to govern themselves, to wait around for ruling elites to tell them what the law is. They reversed the practice of law. Legal experts perform all the practical reasoning; the reasoning of the people is reduced to a speculative inquiry about the sovereign's will.

The radical distinctiveness of *is* and *ought*—theoretical and practical reasoning—is the chief obstacle to the success of English and German legal positivism, American legal realism, and critical legal studies. All of those theories identify law as a product of some exercise of power and identify law's authority with the facticity of its being posited by the person or persons in power. They differ as to who exercises the power. But they are united in their conviction that people have no practical reasons to obey law as such; all of law's normative directiveness comes from the sovereignty or superior power of the persons who made it.

Because human beings understand themselves to make and obey laws for good reasons, modern legal theories fail even as purely descriptive theories. It turns out that a theory about human actions that tries to have an "is" without the "ought" correctly describes neither the "is" nor the "ought." A theory that tries to read "ought" directly off "is" eliminates the human law that actually exists. And it is blind to the good ends for which law is necessary and useful.

Like any human artifact, law is the product of practical reasoning. As an artifact, it exists and can be described as fact. But because it is an artifact made by human beings for practical purposes, its efficacy and validity are derived from the moral ends for which it has been made. Those moral ends are in no sense derived from human law itself. Nor are they reducible to power. Power, when necessary to enforce the law, is secondary and subservient to the law, which is secondary and subservient to the good ends that the law is intended to achieve. Those good ends *make* a just law fully lawful. They supply the law's rational basis insofar as the law is oriented toward them.

Natural-Law Jurists: The Original Theorists of Positive Law

The irony is that modern legal theorists purport to accept the divide between *is* and *ought*. Indeed, the plausibility of modern legal theories, and their consequent success in shaping legal culture, is precisely their embrace of the *is-ought* distinction to the extent that they have embraced it. As the great English positivist H. L. A. Hart (2012, 185–212) correctly affirmed, law as it is and law as it should be are two different things. For example, that all communities *should* have laws specifying legal sanctions for murder does not by itself entail that any particular community *does* have such laws.

This is the true insight at the heart of legal positivism. But legal positivists were not the first to achieve this insight. In attaining this knowledge, as in so many other realizations of truth, Aquinas and the natural-law jurists beat the moderns by several centuries. In an important sense, Christian natural-law jurists were the first and best legal positivists. Aquinas's distinction between natural law and human law (1920–22, I-II, q. 93, a. 2; q. 94, a. 2), and the jurists' more precise distinctions between *ius naturale*, *ius gentium*, *ius commune*, and *ius civile* (Justinian I 1913, 1985), facilitated the formative juristic treatises of the period from the rediscovery of Justinian's *Corpus Juris Civilis* in the eleventh century until the abandonment of natural law in the twentieth (Helmholz 2015).

Those treatises and the juristic concepts that they imparted to us made it possible for us to achieve the rule of law. They set legal concepts and artifacts apart from the wills of particular sovereigns. That made it possible to think of law as something independent from human volition and political power. And they rooted human law in natural law—in the *Tao*. That made it possible to think of law as something superior to human volition and political power. And this was possible precisely insofar as the jurists insisted that political power, human law, and natural law are distinct things.

Legal positivists and realists were not the first to discover the truth that a norm's rational value does not by itself make it a law. Aquinas taught that law must be promulgated as a human law. Furthermore, most modern legal theorists (not Hart, but others who have failed to attend as carefully to the way in which laws function as practical reasons for action) failed to notice that the same truth works in the other direction. That a community has a positive enactment ordaining suttee does not entail that the enactment is a law. An enactment, custom, judgment, or any other product of legal reasoning is a law insofar and to the extent that it gives people reasons to believe that they have a legal obligation to act or refrain from acting in a particular way. An enactment that directs people to participate in the public murder of widows is defective—a failed attempt at law—because it directs an action that every human being has a conclusive and exceptionless reason never to do. It directly contravenes the obligations of natural and legal justice. It purports to direct people to do what they cannot do in reason.

Natural-law theorists and Christian jurists understand what early legal positivists did not: the fact that a proposition has been posited does not by itself obligate obedience. Legal positivists since Hart have affirmed that something more than positing is necessary to provide a reason to obey law. Echoing Aquinas, Hart affirmed that law is a reason for action that imposes obligation (Hart 2012, 82–91). But what is the source of obligation? Positivists have offered several theories, but none of them explain more than a subset of legal obligations.

Hart proposed that law obligates because of social pressure to obey, perfected into a legal system when the primary rules that create rights and duties are backed and supplemented by secondary rules that allow officials to identify and change the law and adjudicate cases and controversies (Hart 2012, 86, 91–99). But this explanation is under-inclusive in two directions. It fails to account for the public laws of large political communities and the private laws of very small political communities. Social pressure works better in small communities than in large ones. In a large republic where people in one region rarely interact with residents of other regions, social pressure is insufficient, especially when some people believe that the laws made by other people are irrational. And in really small communities, such as the two persons who form a contract, the reason they obey the contract is generally the reason for which they made the contract, not fear of social disapprobation. They trust each other, and each rationally desires what the other has promised to provide.

Hart's positivist theory is not the only one on offer. Some positivist theories, such as that of Hart's protégé Joseph Raz, demonstrate a better understanding of practical reason than others (Raz 1978, 1980). But no positivist theory can explain why people think they have an obligation to obey law unless it accepts that people make and obey laws for the common good. In reality, law-abiding people obey the law because they understand that it is good to obey the law.

All laws are products of practical reasoning. And all just laws are products of sound practical reasoning. Indeed, what makes a law a just law is precisely the closeness of its fit with the requirements of practical reasonableness. Because it is unreasonable to discriminate on the basis of race, race being an arbitrary characteristic that bears no rational relation to the activities of human life, laws authorizing racial segregation are unjust. In terms more familiar to classical philosophers, racial segregation is not aimed at any good end. The motivation for racial segregation is not a reason but some other, subrational motivation, such as fear or prejudice.

Fear, prejudice, racism, and other subrational motivations make up the tumultuous core of a new school of theories that have rapidly displaced modern positivism and American legal realism over the last two decades. Traveling together under the name "critical" theories, they are characterized precisely by their *failure* to be critical in the classical sense, to approach law from the objective standpoint of practical reason's first principles.

Critical theories do not criticize the law. They do not even bother to describe the law. They simply explain law away. They do to law what Lewis feared the moral Innovators would do to human society and reason generally, who, having debunked everything in their path, finally discover that they "have explained explanation itself away" (Lewis 1947, 81).

Critical theories see through the law precisely to this nihilistic end. For critical legal studies theorists, law is raw judicial or political fiat disguised as legal judgment (Kennedy 1979, 1986). For dominance feminists, law is a pretext for masculine domination (West 1988), and for critical race theorists it is a pretext for racial domination (C. I. Harris 2002; Delgado 2011). For gender-identity and queer theorists, law is used to cover up arbitrary and unjust assumptions about sex and marriage and their connection to children (Franke 1997). For Intersectionality theorists, law is a tool of oppression to cover all of those abuses and more (Crenshaw 1989; A. P. Harris 1990; Carbado and Harris 2019).

Critical legal theories represent an improvement upon modern positivist theories and American legal realism in one sense. They are more candid about the inability of raw will or power to make law into a valid reason for action. All law is power, they say. And, they say, so much the worse for law. Law is an implausible fiction used by the powerful to conceal their oppression of the marginalized. Power is the necessary means to elevate marginalized groups over dominant groups. It is better to be open about this and throw off all pretenses.

The Good and the Just

Obviously, critical theories pose an existential threat to the rule of law. They remove law from the office of ruler and rationalize a free-for-all contention among different classes and identity-groups of people. But what is the answer? Not a return to the modern legal theories of the twentieth century. Critical

theories just are the logical entailments of English and German positivism and American legal realism. Nor can we place hope in a more sophisticated sovereign-command theory. Sovereign command is just another exercise of power, and power is arbitrary unless it is exercised for reasons that we can all recognize as good.

The dominant theories of the last century all reduce law to power insofar as they reject the reason for and within law. What we require is an understanding of law's rational point. We need to understand legal justice.

Expertise alone will not get us there. To achieve a just definition of legal "person," "public health," "marriage," "parent," or any other legal concept, it is not enough to get straight the facts of human embryology and development, biological sex, sentience, or human psychology. We must also know what law is good for. We must understand why a legal person is not always the same as a natural person, and why legal artifacts may vary, but we must also understand the reasons why we have to afford all natural persons the equal protection of the law. We must know that every human being is a reason for action in himself, without regard to his instrumental utility.

We must, in short, understand what makes legal justice rationally desirable. And we must learn why law is necessary to achieve legal justice. We must (re)learn what law is *good* for. The moral and jurisprudential innovators of the last century or so have tried to make us forget. Lewis reminds us that we cannot forget entirely. Somehow we still know.

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