H L A HART, LEGAL POSITIVISM AND POST-WAR BRITISH LABOURISM

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Introduction

Perhaps the most striking feature of the voluminous literature (both critical and commendatory) that has grown up around H L A Hart's legal philosophy is the glaring absence of any real attempt to explain his work in terms of politics. Commentators generally seem to have done nothing more than accept at face value Hart's self-characterisation of his work as "an essay in descriptive sociology".[1] Such criticism as has been penned has, on the whole, been in the order of noting how Hart's theory fails to identify certain aspects of *what law is*. Dworkin argues that Hart's theory ignores the role that "principles" play in judicial decision-making.[2] MacCormick suggests that Hart's typology of primary and secondary rules exhibits "vagueness and imprecision".[3] Lloyd criticises his "rule of recognition" as an inadequate conceptual tool for explaining legal institutions.[4] Implicit in these charges is a conception of legal philosophy as disinterested reflection on the nature of law and legal institutions, as a value-neutral attempt to appropriate the essence of law. And where analytical jurisprudence *is* seen to be tainted by politics, as for instance by Summers, such taint is confined to long-since crafted theories like that of Hobbes, who is seen to sacrifice epistemological purity for the grinding of

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1. H L A Hart *The Concept of Law* (Oxford: Clarendon, 1961) vii.
2. R Dworkin *Taking Rights Seriously* (London: Duckworth, 1977).
3. N MacCormick *H L A Hart* (London: Edward Arnold, 1981) 106.
4. Lord Lloyd of Hampstead *Introduction to Jurisprudence* Fourth Edn (London: Stevens, 1979) 195-197.

an axe, specifically the urge to impose an all- powerful sovereign to allay civil strife and turmoil.[5] Alternatively, a more recent critique of the political dimensions of analytical jurisprudence sees it as largely sharing the same values as contemporary natural law theory.[6] But this approach, too, fails to take politics seriously for it avoids examination of what *particular* political imperatives are entailed by any specific theory.

The argument of this paper is that legal theory cannot be adequately understood as a purely value-free and therefore apolitical contemplative exercise, as traditional philosophy would have it, thereby separating *theory* from *practice*. Rather than being just thinking and perceiving, philosophy is a *theoretical* activity necessarily involving an implicit or explicit critique of false theories. But equally every philosophical theory has practical (political/moral) imperatives inscribed within it, for the very reason that "to criticise a belief or theory is ipso facto to criticise any action informed or practice sustained by that belief or theory".[7] This perspective might form the basis of a more probing analysis of the realm of legal theory for it induces us to ask:

(a) what forms of political/moral imperatives and thus practices, must a particular legal theory contain; and relatedly,
(b) how must those imperatives explain the critique and rejection of other theories?

Thus we can begin to ask, for example, what politics, values and ideological messages are embedded in Hart's legal theory and how might those messages explain Hart's rejection of Austinian positivism, not merely for the latter's explanatory inadequacy but particularly for the political imperatives it insinuates. Once this point is made another question quickly follows: how can those imperatives be explained in terms of the broader political landscape? In other words, what factors might explain the appearance of this theory at this time, and, further, what interests can be identified, firstly,

5. R Summers "The New Analytical Jurists" in R Summers (ed) *Essays in Legal Philosophy* (Blackwell: Oxford University Press, 1968) 1.
6. T Kaye *Natural Law Theory and Legal Positivism. Two Sides of the Same Practical Coin* (1987) 14 Journal of Law and Society 303.
7. R Bhaskar *The Possibility of Naturalism: A Philosophical Critique of the Contemporary Human Sciences* (Sussex: Harvester, 1979) 83.

in the theorist's arguments, and secondly, in the broader acceptance and approval which the theory encounters. This paper attempts such an examination of Hart's jurisprudence suggesting that the entire thrust of his legal positivism can only be fully explained when seen in the context of that set of discourses elsewhere described as "post-war British Labourism".[8]

Post-war British Labourism

The phrase "post-war British Labourism" is intended to capture the essence of the policies, the philosophy and the world-view of the dominant elements in both the British Labour Party and sympathisers in the Conservative and Liberal Party in the 1950's and 1960's.[9] This paper attempts to chart the hegemonic role mapped out by the leading intellectuals whose thinking had affinities with Labour Party policy at the time, among whom Hart was prominent.[10] To do this a brief historical sketch is needed.

Despite its landslide victory in 1945, the Labour Party found itself once more in opposition after the 1951 election. This trauma was repeated in 1955 and once more in 1959. These defeats had a profound affect on the debates on its overall direction. Unsurprisingly these debates focused on the politics of electoral support.[11] What could the party do to win? Above all in this endeavour was a realisation that the party needed to construct a new historical bloc from the newly developing social strata of the time. This project was Labourism. The new strata emerged with the new so-called post-capitalist society, with its watchword of Keynesian economic interventionism, the effect of which was to produce "new managerial elites, the technical strata of labour, the 'middle' intelligentsia and the affluent worker — the new bourgeoisie and the newly em-

8. S Hall "Reformism and the Legislation of consent" in National Deviancy Conference (eds) *Permissiveness and Control The Fate of the Sixties Legislation* (London: Macmillan, 1980) 1.
9. This coalescence of forces is commonly referred to as the social-democratic consensus but that usage is avoided here because it is considered too general to suffice as a tool of analysis for the specific ideological configurations of the time.
10. MacCormick supra n 3, 10-12.
11. See, for example R Jenkins *The Labour Case* (Hammondsworth: Penguin, 1959), D Jay *Socialism in the New Society* (London: Longmans, 1962); A Crosland *The Future of Socialism* (London: Cape, 1956).

bourgeoisified."[12] These were the targeted constituency then, but this project involved, correlatively, overcoming both the traditional left and right of the party at the time. In Hall's view, the aspirations of the traditional left involved:

> ...nationalisation, creeping collectivism, a militantly gradualist economism. But it was also sharply distinguished from the traditional right of the Party, committed as it was to the dismal Puritanism of an obsolescent Fabianism.[13]

Both extremes were seen by the progressives in and around the party to constitute a stumbling block to a broader electoral appeal, for external changes had called forth a different form of political and cultural hegemony.[14] These changes, in brief, were as follows. On the economic level, during the gestation period of Hart's philosophy, there was a 'boom'. Its effects were:

(a) to fuel rapid social mobility on a large scale;
(b) to create a consumerism more extensive than at any other time in history; in particular, it entailed the appearance of a working class "rapidly adopting a style of life based on mass production";[15]
(c) to radically alter, but not, of course, eliminate, the class structure of British society; and
(d) to usher in a new managerial and technical class whose economic interest lay not so much with private industry, but with the expanded interventionist state.

Indeed, the boom itself was heavily due to a restructured state apparatus radically at odds with pre-war thought, in particular, according the labour movement an institutionalised role in policy-making. Alongside this stood a now fully-fledged welfare state. Labourism involved a commitment to, and belief in, all of these. How do these elements relate to, even more explain, something as apparently arcane as legal theory? Let us first look at the methodological and epistemological innovations introduced to legal theory by Hart.

12. Hall supra n 8, 31.
13. Ibid.
14. Hegemony here is used in the sense developed by Gramsci as the passage of a crisis from its material base in productive life through to the complex spheres of the superstructures. A Gramsci *Selections from the Prison Notebooks of Antonio Gramsci* ed and trans by Quintin Hoare and Geoffrey Nowell-Smith (New York: International Publishers, 1971).
15. E Hobsbawm *Industry and Empire* (London: Weidenfeld and Nicolson, 1968) 246 cited in S Hall supra n 8, 22.

Hart's legal positivism and ordinary language philosophy

What distinguishes Hart's analytical jurisprudence most of all from that of his predecessors is its methodology and epistemology. Under the twin influences of Wittgenstein and J L Austin the techniques of linguistic analysis form the basis of Hart's inquiry into the essence of law. In the process there is a wholesale debunking of the theory of language informing earlier legal theories. A tradition stretching as far back as St Augustine theorised words as "standing for" objects. In other words, Hart attacks the denotative theory of meaning which characterised in different ways both empiricist and rationalist foundations of prevailing jurisprudential orthodoxies. It cannot be doubted that, in the English-speaking world at least, the pre- eminent popularity of this mode of analysis has served to pave the way for *The Concept of Law's* widespread and enthusiastic acclaim. I have argued elsewhere that some of the more general tenets of linguistic analysis, in particular "ordinary language philosophy" — the type preferred by Hart — are beset by serious flaws.[16] However, the more relevant question here is this: can it be that there was something about the general tenor of post-war British Labourism that might explain, first, how those flaws were arrived at, and second, why those flaws just did not come under more critical scrutiny from the "public" whom Hart addresses? Before this question can be addressed, a brief outline of the major features of ordinary language philosophy is needed, in conjunction with some consideration of what I see as its central weaknesses.

Ordinary language philosophy emerged with the later work of Wittgenstein from the earlier school of analytical philosophy inspired by the German empiricist philosopher Gottlob Frege and his English successors G E Moore and Bertrand Russell. Analytical philosophy generally sought to identify many central problems of knowledge as being in essence problems of language. Hart follows Wittgenstein by asserting at the very beginning of *The Concept of Law* that the functions of language extend far beyond naming or denoting objects and that recognising this multi-faceted nature of language opens up many fruitful ways of looking at law. He then

16. B Edgeworth "*Legal Positivism and Ordinary Language Philosophy A Critique of H L A Hart's 'Descriptive Sociology'*" (1986) 6 Legal Studies 115, 125

proposes a connotative theory of meaning to supplant the traditional denotative one. Accordingly, the meanings of words are not captured by finding appropriate objects to match them. Instead, they are to be found by looking at the way in which they are employed in various typical contexts. Their true meanings therefore lie in common usage. Hart is thus emphasising the advantage to be gained by abandoning the attempt to define single words in favour of the elucidation of words in characteristic legal contexts. This philosophical perspective urges a collapse of epistemology into methodology, for to find out what law is, we adopt the techniques of examining how the word is employed in common usage. The potential problem of incompatible usages, or to put that another way, the fact that usages might not be *common*, is summarily dismissed by the suggestion that "the day-to-day use of the word in question" can be readily spotted from the utterances of the "really loose thinker".[17] Having laid this groundwork, ordinary language philosophy provides the means to differentiate law from gunmen's commands — we use the expression "being under an obligation" for the former and "being obliged" for the latter. Austin's model of law is seen to be fatally defective insofar as its emphasis on law as command really sees law as the "gunman situation writ large".

Against this, it can be argued that there is no empirical evidence whatever given for these claims about ordinary language use. One is surely justified in suggesting that rather than using *different* words (oblige/obligation) in these contexts it is equally likely that, in terms of ordinary language at least, the *same* verb — "to have to" — would be more common. Moreover, this argument reveals a further key weakness. If there are a number of incompatible expressions applicable to any situation in popular discourse on what basis does one choose between them? Which language one chooses seems to depend on criteria that ordinary language philosophy does not provide. Relatedly, the way "we" would describe an actual context in which a word was used is subject to considerable variation. Furthermore, the process whereby expressions become "current" or "common" does not occur naturally, and thus cannot without detailed analysis be held to have escaped prejudices, superstitions, gross

17 Hart supra n 1.

misconceptions or inequalities of power. However, no such political, sociological or, particularly, historical consciousness is in evidence in the analysis of common usage by ordinary language philosophers. Why did these flaws not fuel a vigorous assault on *The Concept of Law* from its first appearance? Again, the dominant ideology of post-war British society offers some clues as to why there was this absence, and might also provide a few general insights as to the uncritical, though widespread, acceptance both of this philosophy and the legal theory that has made most use of its methods.

As far as the Labourist vision was concerned, the classless society had all but arrived. The dominant contemporary sociological perspectives hymned praises to the newly emergent post-capitalist societies. The key concepts in this world-view were those of a unitary "value system", "tension management" and "dysfunctions". Totally banished were the notions of "contradiction" and "ideology". In the same way that consumerism increasingly incorporated the traditional working class into the socialised processes of the market, likewise mass society would swamp the specificity of working class traditions with mass culture. Not surprisingly, the model mass society, the United States, provided these sociological tools with Parsonian structural functionalism the most popular model. If the social being of the post-war British citizen were a singular one, would it not be logical to conclude that its correlate was an equally singular social consciousness?

This has obvious resonances in the theory and practice of ordinary language philosophy. A social theory without a concept of class makes for ready acceptance of a philosophy which presumes that language itself is classless. Further, it is incapable not just of resolving, but even "thinking" the fact that, say, "paying fair wages" might be equally, and incompatibly, and *is* regularly, described in ordinary language as "being ripped off", or perhaps not so commonly "extracting surplus value". One other factor which obstructed such questions being asked was the particular intellectual culture of the time. Perry Anderson, in a masterful survey of British national intellectual culture, has pointed to the absence of any sense of totality from the humanities in British Academe.[18] He argues

18. P Anderson "*Components of a National Culture*" (1968) 100 New Left Review 1.

that a vigorous oppositional radical theory of culture this century, such as had emerged in Continental Europe, would have torpedoed any notion of a homogenised, collectivised, universal common linguistic usage. Antonio Gramsci, for example, had effectively refuted any such idea in his *Prison Notebooks* where he argues that "common sense", as articulated linguistically, is invariably a multiform jumble of superstitious myths, contradictory notions — anything but common, in fact — and in perpetual flux; a site where competing groups struggle for the marginalisation of other competing meanings.[19]

One other feature of the dominant post-war ideology that clearly underpins the epistemological and methodological assumptions of ordinary language philosophy is its evolutionism. In this respect J L Austin's work differs somewhat from Wittgenstein's. In Austin's presidential address to the Aristotelian Society in 1956, his explanation of the origins of contemporary ordinary language owes as much to Darwin as it does to Whiggish historiography, for he concludes:

> Certainly ordinary language philosophy has no claim to be the last word, if there is such a thing. It embodies, indeed, something better than the metaphysics of the Stone Age, namely...the inherited experience and acumen of many generations of men [sic].[20]

The affinities between this and the influential Labourist manifestos of the time are clear enough. For the latter, the post-war period was characterised as a time when prehistory was finally vanquished, the primary indices being classlessness, abundance and leisure. If the economy could iron out oppositional and contradictory industrial cultures, could not multiform languages similarly become "Language" with a capital "L"?

Interventionism and welfare state

It was Keynesianism that above all inspired economic thinking in the post-war period. This affected the structure of the state and the nature of law in a number of ways. Firstly, the state came to be involved in wholesale planning and intervention in the mechanisms of the market, ushering in the mixed economy. The nationalisation of a number of essential industries further immersed

19. Gramsci supra n 14.
20. J L Austin "A Plea for Excuses" *Proceedings of the Aristotelian Society 1956-1957* Vol LVII 1, 11.

the state in the process of production. This, in turn, radically upset the nature and balance of that trinity of discrete institutions characteristic of the liberal state: the legislature, executive and judiciary. The legislature, and with it the role of the Member of Parliament, so pivotal in the parliamentary democracy of laissez-faire, became increasingly marginal in the face of the burgeoning bureaucracy and technocracy of an expanded state apparatus. More fundamentally from the viewpoint of law, the functions of the judicial arm were markedly transformed. A whole range of issues previously the domain of Dicey's "ordinary courts of the land" became a matter for tribunals, the relevant Secretary of State, or lower ranking officials. The snowballing mass of social legislation, underpinned by an express or implied notion of public interest and directed at interference and regulation in previously private realms such as economy and family, involved the courts in resolving issues which the older canons of statutory interpretation (forbidding reference to parliamentary debates, select committee reports and like sources) seemed singularly ill-equipped to deal with. The older discourse of legal formalism — the notion that judicial reasoning is a self-contained body of principles with its own immanent logic[21] — came to be seen by progressives (Hart included) as outdated and inappropriate. Why? Because the essence of this new state form was co-operation for the purpose of fostering the efficiency so crucial to more central state planning and regulation. More specifically, the classic metaphor employed to describe the operation of the separation of powers — a system of checks and balances — connotes a *resistance* as between the discrete arms. Hart's analysis of secondary rules, it should be emphasised, has quite the opposite import. Officials, whether judges, bureaucrats or politicians, *share* an internal attitude, a commitment to stick to the rules, to use the rules as guides for behaviour. The post-war state therefore represents a re-worked social contract but not in the traditional Benthamite and Austinian mould whereby the formally untrammelled legal authority of the sovereign was to be counterbalanced by the political sovereignty of the democratic process. Rather, the parties were now the organs of the state: executive, legislature and judiciary.

21. See, for instance, H Kelsen *The Pure Theory of Law*, Second Edn, trans by Max Knight (Berkeley: University of California Press, 1967).

This element of co-operation in relation to the judiciary and its development of legislative capacities will be addressed in more detail below. Suffice it at this stage to suggest that the social-democratic changes in the post-war British state (otherwise described as "post-liberal society")[22] required an explanation and justification of newly emerging practices.

Hart's emphasis on a shared corporate ethos as being a necessary ingredient of law (his "internal aspect" — the self-disciplining ideology of officials in all parts of the system) clearly exemplifies this justificatory dimension. Further, it can hardly be doubted that Hart's unique conflation of the personnel in the different branches of the state as "officials" reflects this very breakdown of divisions between the functions which hithertofore were seen, and in significant measure *were*, exclusive. His theory therefore offers some theoretical support to the interventionist dissolution of the liberal state's traditional separation of powers doctrine which above all emphasised a hierarchical ordering: legislature at the top feeding directives in different ways to both judicature and executive. With the transformed functions of the post-war interventionist state, the traditional bureaucracy was called on to play an increasingly active role in the resolution of social problems, allocation of resources and the (re)organisation of production. Thus, the unidirectional command-model clearly misses the point for it dramatically underplays the way in which state activities, legislative, judicial and executive have come to be perceived as legitimate in terms of achieving results. Where bureaucrats are insensitive to these needs, public administration becomes tarnished by a "rationality deficit".[23]

There is a further dimension which relates to the dichotomy of primary and secondary rules. For Austin, an essential element of law was coercive sanction which necessarily entailed a limitation of individual will. Following Bentham, Austin's legal positivism insisted on maintaining a rigid distinction between "law as it is" and "law as it ought to be". The science of jurisprudence, to retain its scientific credentials, had to confine itself to the former endeavour.

22. See R M Unger *Law in Modern Society. Toward a Criticism of Social Theory* (New York: Free Press, 1976) 192.
23. J Habermas *Legitimation Crisis* (London: Heinemann, 1976).

In other words, the process of identifying what the law was, was seen to involve no evaluative or normative messages whatever. However, once law is characterised by command by a superior which limits freedom, then the consequent connotative elements are clear enough: that law is controlling, coercive and in a real sense, *repressive* in its operation. Significantly, these negative valuations are banished in Hart's work. For Hart, while some laws are coercive, imposing obligations, vast domains of law are otherwise. They provide opportunities, they advise the puzzled, they confer facilities and they manifest "the great contribution of law to social life".[24] This is not just the case with specific areas of private law, such as Hart's favourite example, section 9 of the United Kingdom Wills Act 1837. Public law is also cast in this mould. Thus the rules specifying the appropriate procedures for enacting legislation are law in this secondary, facilitative sense. The connotative dimensions of this formulation are, in contradistinction to Austinian theory, that law is not repressive, but a positive social boon, a means to further freedom, almost a pandora's box wherein lie the formulae for the achievement of social welfare. Hart here can be seen to have shown the ambiguity of Benthamite utilitarianism. Committed as it was to limited legislative intervention given its belief in the efficiency and abundance of the free market, its injunction to legislators to work for the "public good" would always give them free rein where the market proved not to be the most productive social mechanism. As will be argued later in respect of the law and the enforcement of moral issues, this rediscovery of utilitarianism is a pervasive element of Labourism generally.

Another dimension of the answer to the jurisprudential question "what is law?" is a rose-tinted conception of the nature of the post-war welfare state. The state now was seen not so much as a locus of discipline and power as in the Austinian mould but rather a provider, a manager, a non-authoritarian resolver of social problems. In this way, importantly, the welfare state was seen to be the modern counterpart of the primitive, repressive liberal state — at least to the extent that Hart sees the need for a "new start" to break with the model of the "gunman-writ- large" state. More

24. Hart supra n 1, esp ch III.

specifically, one pervasive notion in this perspective is that the welfare state, quite apart from modifying if not effacing its disciplinary predecessor, was in fact no longer located in a class society. It should be remembered that the Labour Party was the party of the working class, born of overt class conflict, the central plank of whose constitution was the collectivisation of the means of production, consumption and exchange. Moreover, the shift to the left in the Conservative Party of the fifties, with its open embrace of a Keynesian mixed economy platform under MacMillan and Butler, the emergence of the affluent society, and a socially upwardly mobile working class, all led to the widespread belief that class, and with it class exploitation, had been rendered obsolete. This, surely, goes some way to explaining how left of centre intellectuals sympathetic to the Labour Party came to be able to define "law" in an abstract, non-class way; in particular, that those facilitative secondary rules did not have, necessarily, coercive, exploitative, or oppressive consequences. This point will be developed below in detail in the context of Hart's discussion of judicial practice.

Modernism and functionalism in Hart's jurisprudence

In attempting to identify evaluative components in Hart's reformulated answer to the question, "what is law?", it is of paramount significance to spell out its modernism. Before this can be done, an explanation of what is meant by modernism is called for. In its most general sense modernism is that set of discourses which celebrate the achievements of most recent times, which tends to see the history of human endeavour in terms of a qualitative progress, which sees the past in terms of crudeness, and which differentiates it from the comparative sophistication of the present. This bears centrally on Hart's legal philosophy. One cannot read Hart's work, particularly *The Concept of Law*, without sensing his effulgent fondness for the present and how it has transcended the inadequacies of the past. For instance, Hart's history of law, or perhaps more accurately his legal anthropology, is encapsulated in a simplistic dichotomy: legal systems are divided into "primitive" and "advanced". Quite apart from the obviously value-laden terms here, there is also the question of the analysis applied. "Primitive" legal systems are seen to be essentially repressive, the rules thereof being of a strictly "primary" kind, with chiefs named Rex issuing commands,

left, right and centre. The lack of rules of adjudication prevent an "efficient" division of labour — the community is condemned to decide problem cases for itself. Hart claims that specially delegated agencies prevent a "waste of time in the group's unorganised efforts to catch and punish offenders".[25] Furthermore, he adds that without rules of change and a rule of recognition which "is introduced" to specify which rules are binding and which body is authoritative there will be pervasive "stasis" and "uncertainty".[26]

It is important to note the central concepts in this theory. "Defects", "remedied", "inefficient", "primitive" — all manifest a confidence, a complacency almost, about "advanced legal systems". This is one central ideological message behind this notionally scientific, value-free theory of law and was in keeping with a heady confidence in progress at the time, as well as pervasive colonialism later to be manifested in a wide range of draconian immigration legislation. But more than this, the notion of rules of recognition "being introduced" has the effect of concealing the element of struggles for power from law. This again is part of the perspective that reformists then and now had on the law: it was no longer to be restrictive but liberatory; and, additionally, perhaps, is evocative of British colonial constitutionalising at the time. As Anthony Skillen suggests in this context "[h]e writes as if 'the authorities', recognisable, conspicuous, were ready to move in with their constitution-filled briefcases".[27]

At this juncture a few points about Hart's treatment of Austin's work are in order. As Moles has convincingly argued in his recent book, *Definition and Rule in Legal Theory: A Reassessment of H L A Hart and the Positivist Tradition*[28] Hart caricatures rather than characterises Austin's position in consequence of a range of complete misunderstandings and misreadings of his Lectures. First, he suggests that when Austin used the term "command" he actually meant "order backed by threats". Yet Moles's meticulous examination of Austin's Lectures reveals that in his analysis of the relation-

25. Ibid, 91.
26. Ibid, 90.
27. A Skillen *Ruling Illusions* (Hassocks: Harvester Press, 1978).
28. R N Moles *Definition and Rule in Legal Theory: A Reassessment of H L A Hart and the Positivist Tradition* (Oxford: Blackwell, 1987).

ship between sovereign and subject he emphasised how "I proceed to distinguish sovereignty from other superiority or might"[29] by examining the nature of command, duty, sanction, sovereign, subject and independent political community. Moles concludes:

> Is it possible that Austin in explaining each individual aspect and its relation to the whole in some 250 pages of text, actually intended to refer to the gunman situation (but only mistakenly called it command), the aspects of which situation Hart himself states are so obvious that they are in need of little or no explanation? One only has to ask the question to see its absurdity.[30]

Second, Austin, practising as an Equity draftsman, was well aware of the distinction between different types of rules. Indeed, he even uses the expressions "primary" and "secondary" to describe those of a different nature of rights in his discussion of the Law of Things, though not, as Moles adds, in the same way as Hart does.[31] Nonetheless, it is clearly mistaken to conclude that he saw all laws as commands. Third, Austin's perspective on the judiciary has much more to commend it than Hart's. This issue will be pursued below.

Another integral element of Hart's theory is its sociological functionalism, that is, its assumption that social institutions can only be understood in terms of being functionally necessary for the continued viability of societies; and that changes in those institutions are responses to deal with real and perceived dysfunctions in the system. Such functionalism inevitably favours the status quo because the very idea of dysfunction suggests something going wrong — obstructed development. The metaphorical elements of functionalism are very much in the order of history as improvement, social change as progress, new eras as transitions to higher forms of life. According to this perspective law and development are functionally interdependent. Social systems are no longer seen to be self-sustaining (the perspective of traditional functionalism) for the simple reason that non-development itself is seen to be a dysfunction in the system. In this Hart was very much in tune with the dominant contemporary American sociological functionalism, which had changed tack in the post World War 2 period to give implicit

29. J Austin *Lectures on Jurisprudence or the Philosophy of Positive law* Fifth Edn ed by Robert Campbell (London: John Murray, 1885) 220.
30. Moles supra n 28, 47.
31. Ibid, 68.

support to the welfare state and economic management, through a progressive identification of imbalances, inequities and destabilising factors in the system.[32] The problems of "primitive" societies outlined by Hart exactly reproduces this world view.

Indeed, the fact that Hart calls his work "an essay in descriptive sociology" is itself significant. Anderson has characterised, with justice, the historical contribution of the British intelligentsia to sociology as "the sociology of no sociology".[33] Anderson's explanation for this — that the systematic absence of a significantly influential left intelligentsia meant that representatives of the status quo never needed to develop a social theory to defend their position — might suggest a somewhat simplistic Marxist functionalism, but it is undoubtedly true that the dynamic of post-war modernisation in Britain really did call forth theories which identified those policies that functioned well and those that did not. To that extent, sociology was for the first time seen as necessary and important. Hart's endorsement of a functionalist non-critical "descriptive sociology" is a measure of the extent to which his legal theory is attuned to that general project.

The Judiciary, adjudication and legislation

Hart's work on the judiciary, too, articulates concerns which are central to his broader political vision. Perhaps it is this aspect of his theory which has evoked the most academic discussion over the last couple of decades or so due to his vigorous debate with the American legal philosopher Ronald Dworkin. Hart's "interpretation" of judicial practice is perhaps best described in his own terms as an attempt to elucidate a middle position between the Scylla and Charybdis of theories of judicial practice: namely, formalism (as one distinct branch of legal positivism) and realism, or rule scepticism.[34] The former asserts that judges merely apply the law; they are engaged in an essentially mechanical deductive exercise, finding the correct decision in law applicable to any particular fact

32. See generally A Gouldner *The Coming Crisis of Western Sociology* (London: Heinemann, 1971) 341-351.
33. P Anderson "*Components of a National Culture*" (1968) 50 New Left Review 3.
34. See generally Hart supra n 1, Ch VI.

situation. In contradistinction, realists maintain that judges have considerable flexibility to come to a particular result, that rules are never so fixed that judges have no discretion and, most importantly, that each decision by the courts is not a discovery of the precise application of a pre-existing law but, rather, is itself a law-making act. This view, therefore, sees courts as essentially exercising a legislative function. Hart rejects this as too crude for it ignores, he insists, the way in which judges internalise legal rules and how their critical and reflexive attitude gives rise to a corporate ethos which keeps their would-be renegade colleagues in line. But he seeks to distance his approach from formalism as well, for he maintains that while judges are "in the vast majority of cases constrained by precedent and clear words in a statute"[35] there are nonetheless occasions where the existing law points equally to (at least) two conclusions. In these situations judges not only do but — here is *his* preference — should assess the impact of their decisions on the general community welfare.

The reasons for supporting this legislative dimension to judicial practice are, for Hart, as follows: "that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of the circumstances, between competing interests" and "[t]he vice known as formalism...succeed[s] in settling in advance, but also in the dark, issues which can only be settled when they arise and are identified."[36] Thus, Hart sees the courts as akin to administrative agencies exercising delegated legislative power. The Labourist aspect of this lies in the implicit theory of the state which underpins it and, more particularly, the way in which this differs from the classical conception of the liberal state.

As noted above, the core of the liberal state is the rule of law. That state had been radically transformed in post-war Britain by the massive expansion on the one hand of legislative activity and, in direct consequence of that process, executive action on the other. This transformation had a corrosive effect on the rule of law: more and more decisions affecting peoples' lives were removed from

35. H L A Hart *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983) 156.
36. Hart supra n 1, 126.

judicial review with the geometric increase in delegated legislation and bureaucratic discretion. Connected with these changes, and, in part, as a result of them, the traditional, formalistic style of legal reasoning which insisted on the invocation of abstract rules in judicial decision-making and formal deduction from them to the facts of instant cases, in isolation from considerations of policy, came under great pressure. The welfare state necessarily comes to collide with this style of reasoning, and, instead, shifts towards a purposive style of legal reasoning. A purposive style of legal reasoning involves a judgment as to whether a particular decision is the most effective way of achieving the purposes which gave rise to the rule in the first place. But how specifically does the emergence of the welfare state do this?

For one thing, the philosophy underpinning much legislation in the welfare state rejects notions of formal justice: the belief that treating individuals as formal equals is the essence of just conduct. The keynote of the welfare state is redistribution which involves exactly the opposite process. Whereas the former enshrines, pre-eminently, *equality* of treatment, ignoring outcomes, the latter attempts exclusively to redress inequalities of outcome. Welfare state legislation, by virtue of this concern with inequalities, has to dispense with formal and generalised rules, because

> [w]hen the range of impermissible inequalities among social situations expands, the need for individualised treatment grows correspondingly...it can be achieved only by treating different situations differently.[37]

In consequence, courts are increasingly forced to consider the consequences of their decisions and

> [i]n the absence of belief in the naturalness of existing hierarchies of power or distribution, the legitimacy of governmental, including judicial, activity comes to depend increasingly on the welfare consequences of that activity.[38]

It is hard to see Hart's open approval of limited judicial legislation along the lines of the quotations above as being anything other than in conformity with advocating and accelerating this process of development from a formalistic style of legal discourse to that of a policy-oriented legal discourse. Indeed, an examination of some

37. Unger supra n 22, 198.
38. Ibid, 196-197.

appellate court decisions today, not to mention the content of a substantial proportion of law school curricula, bear rich testimony to the extent of this process, as indeed does the "law and society" movement as a whole.

Another Labourist dimension to his argument is a refusal to recognise the essentially political dimensions of such judicial practice, an issue that figures prominently in Dworkin's attack on Hart's legal positivism. The traditional liberal political theory which underpinned the notion of the rule of law was based on a belief in the incommensurability of legislation and adjudication because, above all, all values are considered subjective. Legislation being an act of will is subjective; adjudication is deductive and therefore objective. What Hart presents is a reworking of the purity of this dichotomy. Firstly, "objective" adjudication becomes mixed with an element of "subjective" legislation. Secondly, and in many ways this is more significant, it involves an objective element in legislation too: it represents, in a certain sense, the depoliticisation of politics. For, as Hart's "striking a balance...between competing interests" and "the general community welfare" are in a real sense rendered unproblematic in his work, so the connotations clearly present are that the process of legislation itself might involve the same exercise of technical (and essentially technocratic) balancing. To develop this point it will be necessary to look again at the social democratic repertoire of Labourism.

As noted above, the temporary blurring of class distinctions with the onset of the "age of affluence" in the 1950's suggested to the intellectuals associated with the Labour Party at the time that the class war really was at an end. Thus both Crosland and Jay in their respective Labourist manifestos,[39] devote a great deal of space to emphasising the "datedness" and irrelevance of Marxist analyses and critiques of the dimensions of this new "affluent society". The essence of this society for Labourism, in its more optimistic variant, was a belief in the possibility that all could be comfortably off, or, at least, that significant redistribution of wealth was taking place. Management of production on the one hand and management of welfare on the other were seen to have made this possible. The cor-

39. Supra n 11.

responding political culture was one which emphasised balancing, consensus and above all, efficiency. Political philosophies of left and right were seen to be outdated due to their focus on the reality of a by-gone era. However, the middle ground was seen to need more than raw judgement. As the Franks Report[40] on the Civil Service in 1957 emphasised, the age of the "gifted all-rounder" had gone. In order for the organs of the state to be marshalled to achieve maximum efficiency they would need to be more professional, skilled and expert. The civil service, then, was to be modelled on the new advanced corporate enterprises with their managerial elites. Hart's jurisprudence can be seen as a similar message (though concealed as "description") for the legal system.

The prescriptive elements are further exemplified by the novelty of the legitimating symbols in this theory, for it

> entails a shift from science to professionalism as the source of elite legitimation; the rational and empirical components of science are not eliminated but, rather, fused with a moral component, professionalisation.[41]

Hart's endeavour is the proposal of a concept of law radically at odds with Austin's "command model" which derived its legitimacy from claiming to be wholly scientific in method and relying on the centrality and absolutism of the coercive power of the state. Furthermore, Austin's indivisible sovereign becomes increasingly irrelevant in a society where legal power-centres become dispersed throughout a range of agencies, bureaucracies and regulatory bodies. Law now comes to be thought of as a combination of the actual practices of officials within the system and their sense of corporate professional identity (the critical and reflexive attitude to the rules they follow). A related development is that the legitimacy of judicial practice is seen to reside not merely in a mechanical and rigid legal hermeneutics, but rather in an updated style which is capable of giving positive effect to and enlightened modification and revision of the sovereign will. The judiciary are thus required to play a different role. In partnership with the other branches of the state, their legitimacy is increasingly seen to hinge on a capacity to deliver rather than in terms of their keeping within the pre-ordained confines of a formalist technicism.

40. *Committee on Administrative Tribunals and Enquiries* (1957) Cmnd 218 (*Franks Report*).
41. Gouldner supra n 32, 346.

It is important to note at this point the implicit political messages that flow from this in respect of Hart's reading of Austin's theory. Hart does not engage in *any specific political* criticisms of Austin. However, once he suggests that simple networks of command are analogous to, alternatively, gunmen's threats or primitivism, and it is recognised that the actual nature of law in the liberal state was, in fact, *closer to that of the command model* — due to there being less delegation to the executive and a lack of purposive reasoning — Hart's position is clear. His theory represents a reworked legal professional ideology as well as a plan for a remodelled legal system.

Equally significant, however, is the predominantly formalistic nature of judicial activity according to Hart despite his acknowledgement and endorsement of purposive reasoning. Identifying judicial creativity only in those comparatively rare penumbral regions of meaning, his theory rejects the notion that all hermeneutics is *active interpretation*. Austin himself referred to the notion that judges, in cases where the "core" of a meaning is clear, just apply the law as

> ..the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose from eternity, and merely *declared* from time to time by the judges.[42]

What is of central importance here is how Hart's conception of judicial practice resonated with Labourism, and more particularly its conception of the state. As noted above, Labourism entailed a belief in the withering away of class not so much in the sense of a completed transformation but in terms of an ongoing economic process driven by the specific dynamics of Keynesian interventionism and welfarism. In a curious way this perspective thus replicated the economistic elements of an earlier Marxism. What it clearly failed to do was to question the nature and role of the state. The real engine for social change and improvement was seen to be an enlightened legislature; the remainder of the state apparatus, executive and judiciary was, by contrast, perceived as the conduit for the policy iniatives of the former. Insofar as the judiciary were only rarely engaged in a political (ie law-creating) exercise, the politics of the judiciary were a non-issue. It is only with hindsight that the naivety of that position has been exposed.[43] For Labourism, however,

42. Austin supra n 29, 634.
43. J A G Griffith *The Politics of the Judiciary* (London: Fontana, 1985).

built as it was on a political consensualism where the once antagonistic interests of capital and labour, producer and consumer were finally reconciled, a model of an equally consensualist judicial philosophy prevailed: first, in its overwhelmingly technicist orientation, and second, in the belief in its ability to cut the cloth of penumbral uncertainty to the shape of "general community welfare". Hart's work clearly reflects this just as much as Douglas Jay's *Socialism in the New Society* which, although devoted to the reform of the important institutions in post-war Britain, is utterly silent on the judiciary.[44] As Moles demonstrates, Austin was anything but as complacent about the judges.[45]

Labourism and the enforcement of morals

The Hart-Devlin debate concerning the proper role of the state in the enforcement of morals has generally been treated as a series of issues divorced from analytical jurisprudence proper. However, to the extent to which this divorce implies that the conclusions reached in the separate debates are not necessarily related components of a broader political vision, it is misleading. Accordingly, I propose to argue that Hart's views on how far morals, in particular sexual morals, should be enforced by the criminal law is related to his more general legal philosophy. I do not suggest that moral debates or ethical jurisprudence can be understood in terms of particular positions in analytical jurisprudence. But having made this point, it is not suggested they are autonomous either. Rather, the relationship between the two realms can be understood only by looking at how the changed moral economy and political economy alike exemplify what Gramsci has termed the "educative and formative role of the state...adapting the civilisation and morality of the broadest popular masses to the necessities of the continuous development of the economic apparatus of production."[46]

So how was the field of moral conduct changed and how does this relate to the economic transformations of the time? Hart's position, subsequently endorsed in the United Kingdom Sexual Offences

44. Jay supra n 11. By way of contrast, see R Miliband *The State in Capitalist Society* (London: Quartet, 1973).
45. Moles supra n 28, 230-242.
46. Gramsci supra n 14, 219

Act 1967, was fairly clear. For him, the Wolfenden Report's[47] conclusions rejecting criminalisation of prostitution and male homosexuality were commendable. Homosexual relations between consenting male adults in private, and off-the-street prostitution, were no longer to be the law's business. The reasons as to why this decriminalisation was seen to be necessary were due, as far as the debates were concerned, to a combination of secularism on the one hand and moral agnosticism and pluralism on the other. Thus the Report emphasised the incommensurability of crime and sin. More importantly, however, the Report involved a redrawing of the public/private distinction, tied to a rearticulated set of moral imperatives. As Hall has argued:

> [i]n effect, the Wolfenden Report sanctioned, through its strict application of the key distinction between "public good" and "private morality", the emergence of a double morality. If the judgement of "respectable man" was the standard against which the public conduct of sexual relations were to be measured, the Report, in effect, sanctioned in private a more up- to-date, modern, "liberalised" moral ethic and standard.[48]

Hart's public debate with Devlin clearly demonstrates this dichotomous morality. Thus in *Law, Liberty and Morality* Hart maintains that:

> the fact that the same act, if done in public, could be regarded both as immoral and as an affront to public decency must not blind us to the difference between these two aspects of conduct and to the different principles on which the justification for their punishment should rest.[49]

In contrasting the argument here with the analytical jurisprudential formula of law as the union of primary and secondary rules, and the ideological messages that go with it, an obvious paradox emerges: a political philosophy which insists on piecemeal nationalisation and systematic intervention in the economy is allied to a de-regulation and privatisation of sexual conduct. This position was not that of the Labour Party as a whole. Rather, it was its revisionist wing with significant support from right progressives in the Conservative Party of the time that ensured its ultimate enactment. This much indicates the extent to which the two discourses, economic managerialism and moral reformism were part of the two major parties' political platforms, but how were they related?

47. *Report of the Committee on Homosexual Offences and Prostitution* (1957) Cmnd 257 (*Wolfenden Report*).
48. Hall supra n 8, 13. The following account relies heavily on Hall's analysis.
49. H L A Hart *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) 56.

Alongside an ever-increasing socialised productive base was a correlative rise in importance of the home as a locus for consumption. This private realm thus became a crucial target not only for marketing strategy but also, significantly, as a point of political struggle. The issue became to what extent was it permissible for the state to interfere with the consumer's choice in this area. And it is in this tenor that the Hart-Devlin debate is conducted. Devlin was always on a shaky ground here once he accepted one of the central premises of the Wolfenden Report: namely, the impossibility of equating crime with sin. He was thenceforward thrown onto the essentially Hobbesian basis for legal sanction — that of the need for preserving public order. This contention requires proof that legalised homosexuality really would lead to some form of dissolution of essential social bonds or in Devlin's own words that "a nation of debauchees would not rally" to a leader's call. At least that was the case as far as private immorality was concerned. As far as what happened in public it was Devlin's "man [sic] on the Clapham omnibus" who held sway. In the private sphere so valorised by Labour and Conservative progressives at this time, it was a different, libertarian morality which was to prevail. Moral conduct was therefore split by this debate. Again as Hall suggests:

> [t]he field of moral conduct was not dismantled or overthrown, but it was dislocated, rearranged; it received a new inflection. The pivot of this rearticulation was the public/private distinction. Around this couple, new modalities of regulation were made effective; a new balance was fixed between them.[50]

In particular, Hart's position represents a re-emergence, on the moral plane, of a Benthamite "'economic man' whose practical foundations rest on the exchange in private between equivalences. This morality is more individual — possessively individualist — and more 'modern'. It is modern bourgeois man — *homme moyen sensuel*."[51] The traditional protestant morality of abstinence, hard work and deferred gratification had become outdated: mass production required immediate mass consumption. Significantly, though this modern outlook cannot be wholly explained in terms of the Labour Party of the time because

50. Hall supra n 8, 19.
51. Ibid, 20.

> [f]or the formation of a political bloc in support of the moral reformism whose dominant tendency we have been examining, the convergences between the "Right Progressive" wing of the Conservative Party and the "Revisionist" wing of the Labour Party are more significant than those things which the Conservative Party shared with its traditionalist faction, or those which the Labour Party shared with its traditionalists.[52]

However, it was the Labourist elements who provided the leadership. Hart's arguments lie at the centre of this struggle for it is he who, above all, articulated the philosophy to appeal to those progressive modernist moral undercurrents in both parties. Beyond this, the debate represented a major defeat for Lord Devlin's quintessential citizen, imbued more than anything else with a self-contained petit-bourgeois morality. In point of fact such model citizens were fast disappearing. Inflation nibbled away at their economic base, while the emergence of comparatively affluent sections of the working class on the one hand and the newly emerging managerialist technocracy on the other further depressed their economic position. Socially too, the emergence of clean-handed labour, that ever-increasing white collar class whose allegiance was either to monopoly capital or the state, had the effect of displacing "[t]he central ideal, the key interppelated subject, of traditional Tory discourses the small businessman or shopkeeper"[53] to the margins of the political process.

This in turn undermined their moral world. Quite simply, the secularism, materialism, cultural fluidity and hedonism unleashed by mass-consumption capitalism was rendering their morality obsolete. The right progressives in the Conservative Party soon realised that its traditional constituencies of support were disappearing and that a new historical bloc needed to be formed if Conservatism were to remain a dominant political force and if it were to win over large sections of a more socially mobile society. The result was a gradual shift in the centre of gravity of the Conservative Party of the 1950's away from traditionalism to modernism, closely analagous to the changing balance of forces within the Labour Party at the same time. Devlin can thus be seen to be the champion of a past moral age, characterised by the liberal progressive Labour Home Secretary Roy Jenkins as being "as obscurantist as are to be found anywhere

52. Ibid, 27.
53. Ibid, 29.

in the country".[54] Devlin's "defeat", manifested in the later legislative adoption of the main recommendations of the Wolfenden Report, indicates the extent to which Hart's position successfully shaped and captured the mood of the time. More specifically, as Hall argues, the strategy is best

> seen as one attempt to articulate a culture, a "civilisation", a moral economy for an emergent state capitalism... This programme of moral reformism was no side issue, no icing on the economic cake. Its aim was nothing short of bringing into line and formalising social, moral and ethical trends already set in motion by the reformation of classical capitalism.[55]

The religion of pleasure which underpinned this deregulation of the private sphere cannot be separated from the Keynesian notion that the key to growth lies in the stimulation of demand. To the extent that individualised, privatised consumption was ideologically approved it fitted in neatly with the economic imperatives of mass-production. Furthermore, this message was most vigorously seized upon by the progressive middle classes, the products of the expanded tertiary education sector especially, for it was they who were flooding into the state sector and the large corporations and for whom socially, Hart's philosophy struck particularly sensitive chords. And to this new moral economy was neatly dovetailed the updated legal positivism noted above.

Conclusion

The argument above has sought to identify significant affinities between Labourism and Hart's positivism. The former, reliant as it was on a positive commitment to post-liberal society, entailed support for considerable intervention in the economy and co-operation between the discrete arms of a hugely expanded government. A further central motif in this world-view was a firm belief that that same economy could ensure universal abundance if state, capital and labour were in turn to co-operate, and could only do so if competing traditional conceptions of class, contradiction and capitalism were summarily jettisoned. The state was therefore seen as an active agent of "general community welfare". Hart's legal positivism echoes and measurably replicates the same themes. Law ceases to

54. Jenkins supra n 11 cited in Hall supra n 8.
55. Hall supra n 8, 33.

be merely coercive, as in the Austinian model: secondary facilitative rules allow not just individuals but officials of all kinds within the state apparatuses to give effect to purposes. But these practices, authorised by secondary rules, are absolved from the characteristics of power associated with sanctions and commands. Law, or at least secondary rules, to a considerable degree allow problems to be resolved without any correlative identification of the "implementive devices"[56] associated with such rules. The judiciary are to actively fashion the law — albeit in "penumbral" cases — to achieve "general community welfare". This, for Hayek, is the dreaded "constructivism": the welfare state's quest for "the mirage of social justice".[57] But this same community welfare, contingent on the transformed nature of state and law and its capacity to ensure abundance, mandated a thorough secularism and consequent deregulation of private morals. Equally, the ideology of consumerism with its valorisation of the private sphere ultimately helped to erode the law's perceived function of being, of necessity, a guardian of morals.

All this is not to suggest that Hart's legal philosophy is merely, or at base, a political exercise. The more modest argument is that, as with specific legal rules, legal theory itself cannot be completely understood in terms of the issues it poses itself. Its social, political and historical context has just as much to tell us both to assist our understanding, and perhaps also to move us to approbation or critique, particularly in the context of a very different political climate a quarter of a century on.[58]

56. See A Freiberg *Reward, Law and Power Toward a Jurisprudence of the Carrot* paper delivered at the Third Australian Law and Society Conference, Canberra, December 1985.
57. F A Hayek *Law Legislation and Liberty* (London: Routledge and Kegal Paul, 1983).
58. For a legal theory equivalently distanced from Hart's see Geoffrey de Q Walker *The Rule of Law Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press, 1988).