

The Minimum Content of Natural Law

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1. Hart's argument.

Is there such a thing as Natural Law? The question is old, almost as old as philosophy itself, and it has been at the centre of a heated debate among two competing doctrines or schools, the advocates of Legal Positivism and those of Natural Law. The persistence of the disagreement might be regarded as surprising, and hence calling for an explanation. As far as mainstream Natural Law theory is concerned, contrary to what some people rather hastily say, the disagreement is not about the existence of a body of rules created by the ruler (or the rulers) of a political community. Given the relevant factual circumstances, it would be foolish (and indeed imprudent) to deny that such body of rules exists¹. To mention just one example, Thomas Aquinas, a paradigmatic advocate of Natural Law, acknowledged that there is a Positive Law, and that its rules are among the grounds a person should take account of when deciding how to behave. A superficial glance to some of the features of Aquinas's theory of law is indeed useful to illustrate the non-factual nature of the disagreement among some Legal Positivists and their adversaries. As pointed out by John Finnis, Aquinas should be read as asserting that the legal validity of a positive law is derived from its rational connection with Natural Law, and this connection holds good if, and only if, the law (i) originates in a way which is legally valid, and (ii) it is not materially unjust either in its content or in the relevant circumstances of its creation. According to Finnis, 'legally valid' should be understood differently in Aquinas's thought when used in the statement of his general thesis on legal validity or in the formulation of its first conditional clause. This is legitimate, and it is not an instance of confusion on Aquinas's part,

¹ John Finnis, 'The Truth in Legal Positivism', in Robert P. George (ed. By), *The Autonomy of Law* (Oxford: Oxford University Press, 1996), pp. 195-214.

because 'law' has different uses, which should be reconstructed around a focal meaning². The word 'law' should be used to designate a rule of right reason, but it might be used also to talk about the provisions of a ruler. It is in the first sense that its legal validity is derived from its rational connection with Natural Law; whereas in the second (restricted) sense its validity depends only on its having been issued by someone which is in a position of political authority. Careful analysis of what Aquinas meant by "rational connection" between Natural and Positive Law, shows that the legal positivist's charge that Natural Law would make Positive Law redundant is not granted either. According to Aquinas, Natural Law should not be conceived as a complete body of rules providing for each possible circumstance. The art of ruling is like that of building in that it leaves room to the exercise of judgement on the best way to implement its general provisions. Positive Law is necessarily different from Natural Law, in its being more specific, and cannot be substituted with it³. The issue of obedience itself, a typical focus of disagreement among Legal Positivists and advocates of Natural Law, could not be disposed of as easily as someone might think. There might be circumstances in which one should comply with a rule that is contrary to the conclusions of right reason, or issued by a ruler which has no authority to make law, simply because it is better, in such circumstances, to have a bad rule than no rule at all. A belief in Natural Law is compatible with the idea that there is a specific good of authority and, therefore, of obedience⁴. This is not the place to spell out fully Aquinas's arguments or to assess their weight. I have mentioned some fairly uncontroversial interpretations of his thought simply as evidence that, contrary to what many people have thought on the matter, there is no slippery slope leading from the affirmation that there is such thing as Natural Law to the denial of the factual existence of a body of rules created by the ruler (or the rulers) of a political community.

The object of the disagreement is rather the evaluation of such body of rules. Such statement should be qualified though. Whether some people are inclined to think that, as far as the law is concerned, there is no standpoint other than the criteria of legal validity of the system itself one might adopt in order to judge of the defects of such system of rules as a legal system; there are others who would say that there is a natural function of law, and that such function sets the conditions that any legal system should fulfil in order to have a claim to be recognised as "law"

² John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 27.

³ John Finnis, *Natural Law and Natural Rights*, p. 28.

⁴ John Finnis, *Natural Law and Natural Rights*, pp. 354-366.

in the proper sense of the word. This might help us to clarify which is the object of disagreement among some legal positivists and the advocates of Natural Law. One version of Legal Positivism might be described as the thesis that the criteria of legal validity of a given legal system are the only internal standards available for the evaluation of such legal system as a legal system. It is this version of Legal Positivism that is incompatible with the idea of a Natural Law. Let me clarify this point. It is conceivable that one might argue that there are external standards, say those of a positive morality, one could use to judge if a particular legal system is satisfactory or not from the moral point of view. When the conditions set by those standards are not fulfilled, compliance would be grounded on prudence alone, not on moral obligation. Holding this position is compatible with the idea that there is no such thing as a universal morality⁵. When a legal theorist holding such opinion disagrees with Natural Law theorists, the object of the disagreement is not the existence of non-external standards of evaluation of a particular legal system, but rather the subordination of the legal system to the injunctions of morality. My claim is that this disagreement is trivial. Of course the criteria of legal validity and legal obligation are independent from positive morality's criteria of obligation. From this point of view, the question if one should comply with a law prescribing an action that is contrary to the requirements of morality, is itself a moral question. My point is rather that, if there is such thing as a natural function of law, this means that there are universal standards one might use in order to assess or evaluate the goodness of a legal system as such. These are standards of natural goodness, not of positive morality. This means that the criteria of validity of a particular legal system are not the only, and not even the most important, internal standards of evaluation of the legal system itself. The value of a legal system as an instance of its kind depends also on its capacity to satisfy requirements that are fixed by what might be called "the natural function of law". I shall argue that this position is incompatible with moral subjectivism, but is compatible with legal positivism conceived as the descriptive study of different (more or less perfect) systems of positive law seen as social institutions.

So my claim is that there is a non-trivial interpretation of the disagreement between Natural Law theorists and some Legal Positivists. In my view, the object of such disagreement is whether there is something that we might reasonably call "Natural Law", and whether this Natural Law could give us as a set of standards to evaluate the goodness of a particular legal system. H.L.A.

⁵ Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992), pp. 15-19.

Hart has given one influential answer to these questions in his book on *The Concept of Law*. The core of his answer is in the claim that “[r]eflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control. With them are found, both in law and in morals, much that is peculiar to a particular society and much that seems arbitrary or a mere matter of choice. Such universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name”⁶. According to Hart the connection between such true generalizations concerning human nature and the minimum content of natural law should not be seen as merely affording an explanation of the survival of the communities whose legal systems have the required provisions. Hart’s main aim is not to give an explanation of the considerable overlap among the legal systems of all the communities we know of. His argument is rather that awareness of these facts about human nature should give us reasons to comply with a law that fulfils the requirements that are imposed by the minimum content of natural law. I think that this is one of the most important contributions Hart has given to legal philosophy (and indeed to philosophy in general), and that it is a pity that this part of his work has been less appreciated than it should have done in the recent debate. I think that such failure to appreciate the importance of this part of Hart’s work as a philosopher is due to the fact that the recent agenda of legal philosophy has been very much concerned with the work of Ronald Dworkin (Hart’s successor to the Chair of Jurisprudence in Oxford), and that Hart himself is partly responsible for such relative neglect of this part of his philosophy, because he has devoted most of his energies in the last part of his life to clarify his disagreement with Dworkin and to answer the latter’s criticisms of his work.

According to Hart, the importance of these truisms is not simply that they “disclose the core of good sense in the doctrine of Natural Law”. They are also important in our understanding of law and morality, because they explain why “the definition of the basic forms of these in purely

⁶ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 192-193.

formal terms, without reference to any specific content or social needs, has proved so inadequate”⁷. The allusion is clearly to Hans Kelsen’s pure theory of law and to its incapacity to be faithful to most of our basic intuitions on the nature of law⁸. My aim in this paper will be to reconstruct Hart’s argument on the minimum content of Natural Law, and to assess its importance in our understanding of human nature. In order to do so, I shall first introduce the five “simple truisms” that, according to Hart, should give us a reason to believe that there is a minimum content of Natural Law; and then present some objections to Hart’s claim that this truisms, and their necessary connection with the human aim of survival, are enough to prove his case. My idea is that Hart’s claim that there is a minimum content of Natural Law is sound, but that a fully-fledged account of natural goodness (like the one that might be found in Aristotle and in some of his contemporary followers like G.E.M. Anscombe and Philippa Foot) is necessary to give the minimum content of Natural Law the very same content it has according to Hart. In other words, I shall argue that survival is a genetic or historical explanation of the fact that there are some common features in all legal systems and conventional moralities, but that this fact is not in itself sufficient to give a person the ground to comply with the dictates of Natural Law or to use them as standards to evaluate a particular legal system. Although the main focus of my analysis will be the idea of the minimum content of Natural Law, I trust my argument might help the reader to recognise in Hart’s arguments the traces of a general cast of mind that is typical of most of the Oxford Philosophers of his generation, and which I shall describe roughly as “Aristotelian”. Despite his worries about a metaphysics which “few could now accept”, and all his caveats against a naïve understanding of teleology in nature, I think that the general shape of Hart’s enterprise in *The Concept of Law* bears many signs of the influence of ideas which were the “trade in stock” of Oxford Philosophy at least since the days of John Cook Wilson, H.W.B. Joseph and H.A. Prichard at the beginning of the century. Wittgenstein was a later, and to a certain extent superficial, influence on a group of people whose intellectual outlook was already formed when *The Brown Book* was even heard of. Prominent among these people was J.L. Austin, but one should mention at least J.G. Warnock, P.F. Strawson and Isaiah Berlin. My suggestion, though I can’t argue for it here, is that it is against the background of these people’s work that Hart’s philosophy should be studied.

⁷ H.L.A. Hart, *The Concept of Law*, 199.

⁸ P.M.S. Hacker, ‘Hart’s Philosophy of Law’, in P.M.S. Hacker and Joseph Raz (eds.), *Law, Morality and Society* (Oxford: Clarendon Press, 1977), p. 10.

2. Essence, point and evaluation.

Before moving on to the exposition and criticism of Hart's argument on the minimum content of Natural Law, I shall say something more to elucidate the claim that there are universal standards one might use in order to evaluate the goodness of a legal system as such, and that these are standards of natural goodness, not of positive morality.

In order to clarify this point, I shall introduce the distinction (which I borrow, with some amendments, from Daniel Brudney) between (i) the conditions something should fulfil to be recognised as an instance of a practice or a kind of object, and (ii) its axes of evaluation *qua* instance of that practice or kind of object. It is easier to introduce such distinction thinking to simple objects or practices. For an object to be recognised as a knife, for example, it should be made in such a shape and with such a material as to be capable of cutting. Cutting is the minimal requirement for an object to be recognised as a knife, but its being capable of cutting is by no means the only quality a knife should or might have. There are many different axes of evaluation of a knife, *i.e.*, its being sharp, its being well balanced, its being resistant, its being nice; and they are not all necessarily related to the conditions it should fulfil to be a knife at all. For example one might evaluate differently a knife with respect to its dimensions or design relative to one's practical concerns or tastes. As shown by the example, there are axes of evaluation that might be said to be "internal" to the kind of object as individuated by the conditions that an item should fulfil in order to be an instance of such kind, and axes of evaluation that are external to it, and which might be rightly regarded as contingent. It is to those internal axes of evaluation that one is looking for when assessing the goodness of a knife as a knife. A knife, which is ugly, or old, or difficult to use in particular circumstances, is nevertheless a knife so long as it cuts, and a good knife if it cuts well. It is this internal evaluation which is meant when it is said of something that is "good of its kind". It is not unconceivable that a person learns which are the conditions something should fulfil in order to be recognised as a knife, without being aware of all the axes of evaluation of a knife. This ignorance might be relatively trivial, and inconsequential, when such axes are external. An ugly knife is still a knife for all the relevant purposes. But it might be momentous when it is the awareness of one or another of the internal axes of evaluation that is defective. A knife that is not sharp enough to carve a joint is very likely to fail to do the job.

A word of comment might be helpful here. The conditions something should fulfil to be recognised as an instance of a kind are said to be sufficient because they are known to be enough to perform a certain task. But they might be insufficient if we want a tool that is optimal in the sense that it might be used to perform the same task in different circumstances. The property of being sharp-edged might be sufficient to recognise something as a knife, a cutting object, but it might be nevertheless insufficient if the knife is made of glass, and the task we should perform is cutting a piece of meat or wood. A knife made of glass might be good as a paper-cutting tool, but it is less than optimal in most situations in which we need a knife. The kind of competence we need to evaluate a knife is wider than the capacity to recognise a cutting object in particular circumstances. What we need is a sophisticated understanding of the relations between the solidity and sharpness of different materials and their capacity to cut. The same holds for a practice such as, for example, the equal distribution of the shares of a cake among the participants to a dinner. There is a set of sufficient conditions to be fulfilled for a distribution of the shares of a cake to be recognised as an equal distribution of such cake, namely that each participant has his or her equal part of the cake. There are different axes of evaluation of the equal distribution of a cake as a practice of equal distribution in this case as well. Some are internal to it, like the efficiency with which the shares are distributed or the precision with which the slices are cut; others are external to the practice itself like the elegance of the movements in performing the distribution, or the speed in achieving the aim of the distribution itself. A person which is not aware of some of the internal axes of evaluation of the practice, might end up with a performance which is elegant and, nevertheless, bad for not having achieved its task efficiently. If the equal shares of the cake are distributed so slowly that, when reaching their destination, they are well beyond the point in which they are eatable, it is not unreasonable to say that something went wrong. I think these distinctions are helpful in making sense of the intuitive difference there is between being able to pick up something as an instance of a kind, and having a fuller knowledge (or, one might say, understanding) about that kind.

What does it mean that an evaluation is internal in the relevant sense? An evaluation is internal if it is made along one of the axes which depend on the conditions the object evaluated should fulfil in order to be a good instance of the kind of object it is. Being sharp or being resistant are qualities relevant for the goodness of a knife as knife because they are necessary means to the end of cutting that is the *telos* of knife as a kind of object. Being nice, or being old,

are not internal in this sense. Again, the same might be said for a practice. Being effective in achieving its task, accounts for the goodness of an equal distribution of a cake as an equal distribution, whereas its being performed without noise, despite its being a quality which might be appreciated by some, is not relevant for its evaluation as an equal distribution. An internal evaluation relies on one's grasping the point of a practice or the essence of a kind of object, and it is made possible by the knowledge of what is the valued thing. Knowledge of the sufficient conditions for something to be recognised as an instance of a practice or a kind of object would not be enough for such evaluations because one might be aware of such conditions without knowing what counts as a good specimen of that practice or kind of object. For example, one might know that something is a horse because it is born from another horse, and it is alive, without being aware of which are the qualities of a good horse. The fuller knowledge or understanding that goes with the awareness of the internal axes of evaluation of a kind of object is dependent on the capacity to give an explanation, an account, of which are the features that are essential to that kind of object. An artefact, such as a knife, is a good example to understand this idea because it has a single function, that of cutting, which could be used also to pick up an instance of such object. The same might be said about the simple practice of distribution mentioned in the above example.

Things are more complicated with a living being, such as a horse, that can't be said to have a function in the same way as a knife has a *telos*. The criteria we use to pick up an instance of a species are not the same an expert will enumerate, on reflection, as being distinctive of its kind. The conditions to pick up an instance of a species, such as a horse or a rabbit, might have only a partial overlap with the set of criteria the same individual should fulfil to be a member of those species. This can be shown by pointing out that we might acquire the ability to recognise horses by learning the criteria which are normally sufficient to pick up one of these animals among the others, without having a fuller knowledge of what a horse is. We might be ignorant of most of the information that is relevant to know why a horse has a particular development of certain muscles, or which are the features of its mating or eating behaviour; and nevertheless we shall be able to recognise a horse when we see one of these animals. Living things don't have a single *telos* like a knife or our practice of distribution. They are more like bundles of functions organised

around what I shall call (following Michael Thompson) their “life form”⁹. It is this life form, as described by the natural history of a species, that give us clues to identify, in an individual, life activities such as eating or reproduction. And it is only relative to such life form that we can evaluate the goodness of an individual as an instance of a species. Take for example wolves. Their hunting habits are distinctively social, it is part of their life form that they cooperate in the pursuit of food. A wolf that does not cooperate in the search for food is defective with respect to standards we use to evaluate the goodness of the members of such species. In such circumstances, we might say that a non cooperative wolf is not good of its kind. The goodness we ascribe to a cooperating wolf is “natural” because it depends on some objective facts about the life form of wolves, and it is not a matter of subjective appreciation. It might be useful to point out that the kind of superficial knowledge that consists in being able to pick an instance of a kind without having fuller knowledge of it, is typically present in children while they learn a language. A child learns to use the word ‘father’ early in his life, much before having full mastery of the complicated set of criteria, social as well as biological, that give its fuller content to our use of the notion of father. Aristotle’s reflections on homonymy are particularly useful here¹⁰. The child might learn to use the word ‘father’ before he is aware of the possible biological implications it has, and when he does not have the knowledge that is necessary to assess the performance of the person he has learned to call “father” as a father. It is a sad fact of life that we learn relatively late in life that one’s father may not be the best one. Only a fuller account of the sort of things a father is supposed to do in the different circumstances of his son’s life might give the latter the ability to make such judgement. The evaluation of a living being as a member of a species, or that of person as performing a social role is more complicated, but is not radically different from the “nursery room” examples of evaluations that were our starting point. What we need, to claim that the same kind of evaluation might be extended to legal systems, is to show that there is a significant analogy between living things and political communities. Despite its being alien to the modern frame of mind, with its understanding of political community as a voluntary association, the idea of political communities as the natural form of life for human beings was one of the key ideas of Aristotle’s philosophy, and it has much to commend itself also to the contemporary reader, once he frees himself from the weight of the ideology of the social contract tradition. Political communities are organisms of sorts, and their survival depends, among the other things,

⁹ Michael Thompson, ‘The Representation of Life’, in Rosalind Hursthouse, Gavin Lawrence and Warren Quinn (eds.), *Virtues and Reasons. Philippa Foot and Moral Theory* (Oxford: Clarendon Press, 1995), pp. 247-296.

¹⁰ Christopher Shields, *Order in Multiplicity* (Oxford: Clarendon Press, 1999).

from their capacity to come with an environment that is likely to be hostile. Developing certain patterns of associate behaviour is necessary for the survival of a human group in the same way as the habit of hunting in packs is necessary for group of wolves to achieve the same objective.

A legal system might be described as a practice, or, rather, as a set of practices. But one should also point out one relevant difference between a legal system and our birthday party example of a practice, namely, the equal distribution of a cake. The equal distribution is what I shall call, following Thomas Morawetz, a closed practice. This means that it bears its point written on its face, one might say, in the same set of rules that constitute its identity. After all, it is an “equal” distribution, and this tells us already which is its point. The practice has a goal, and the explicit formulation of the rules of the practice is the specification of how to achieve such goal. A legal system is not a closed practice. It is an open one because its rules don’t specify which is the goal, or, rather, the goals that it is supposed to achieve. As a matter of fact, it is a traditional aim of legal and political philosophy the inquiry on such goals. One might conceive the theory of Natural Law as the attempt to give an answer to the question on the goals, not of a particular legal system, but of the law as such. This inquiry is independent from the inquiry in the recognised conditions of membership of a rule in a legal system, which is the sort of thing legal positivists are concerned with. One might know that a rule is a legal rule, and by addition that a body of rules is a legal system, without knowing if it is good of its kind. Only internal evaluation of the legal system might give an answer to such question. Of course one might say, and I would endorse this statement, that knowledge of the conditions something should fulfil to be an instance of a practice or a kind of object without knowledge of the point of that practice or the essence of that kind of object is somehow defective. It is non-defective knowledge that is the aim of philosophical inquiry, whose outcome might be described as understanding.

My suggestion is that Hart’s enterprise might be understood as an attempt to articulate the idea that there is a point of law, which could be distinguished from the point of a particular legal system. A particular legal system might have a point which consists in furthering a set of values, like liberty or equality, according to its constitution. Hart’s thesis on the minimum content of natural law is the articulation of the point of law as such, an attempt to elucidate which are the functions that law itself is supposed to further. This is the reason why we might use, talking about such point of law as such, the expression “natural function” of law. There is an obvious

connection between the idea that there is a natural function of law that gives us standards to evaluate the goodness of a legal system as such, and the reasons we have to comply with the rules of Positive Law or rather, in case of conflict, with those of Natural Law. If a legal system can be judged as being more or less good, as legal system, according to the degree to which it fulfils the natural function of law; this means we have standards to assess the reasons we have to comply with a particular rule of law. I think this fact captures our intuition that a certain degree of defect is tolerable (or even inevitable), even if it might call for political action on behalf of reform, and that obedience to a bad law might be wise; but that, if the level of badness falls beyond the limits of what might be recognised as a (at least minimally) flourishing human life, then it is revolutionary action what it is called for. In other words, my claim is not simply that there is such thing as a bad law, but also that there are intolerably bad legal systems, those where disobedience and fight are the only possibilities of a human being.

3. Five simple truisms.

The inquiry into the standards of evaluation of legal system as an instance of its kind is pursued reflecting on some truisms regarding human nature and the world in which we live. I shall give now a brief summary of the five truisms:

(i) Human vulnerability. This is the first truism. Human being are notoriously vulnerable to attacks from other human beings which might wound or kill them. No human society can survive and prosper without prohibitions regarding the use of force, and rules licensing excusable or justifiable aggression. The presence of such rules is a requirement for the viability of society which might be regarded as a standard of evaluation of a legal system.

(ii) Approximate equality. Despite all their differences of physical and intellectual strength, human beings are never so strong and clever as to be able of being completely self-sufficient. Even the strongest or the cleverest is liable to ill-health or fatigue, and in such situations he might need to be looked after or to have rest. In such circumstances he is as vulnerable as anybody else in the same group. This is a second factor that accounts for the need of forbearance from all the members of a group in their mutual dealings with each other. Also in this case prohibitions are necessary to achieve the goal, and the presence of rules

prohibiting the aggression of the defenceless is a second standard of evaluation of a legal system.

(iii) Limited altruism. Man are not devils, but neither are they angels. Their capacity for altruism is limited. Without rules providing for this weakness a flourishing human life would be inconceivable. In this case as well, the form of such rules is most likely to be that of prohibitions of certain behaviours likely to produce harm. But it is not necessarily so. Positive performances might further this specific aim alongside with prohibitions. The presence of rules addressing this weakness is another standard of goodness of a legal system.

(iv) Limited resources. Human beings need food, shelter and other facilities to survive and prosper. Hence rules providing for some system of allocation and for the circulation of such resources is necessary for the survival and flourishing of a human society. The presence of rules establishing property rights and means to create obligations (like the institution of promising) is another standard of goodness of a legal system.

(v) Limited understanding and strength of will. Most human beings are reasonable enough to see for themselves that respect for the aforementioned rules is necessary. But some of them are not. Sanctions are therefore needed to provide not just a motive of obedience for the recalcitrant, but also a guarantee that those who would comply voluntarily will not be unfairly harmed by the behaviour of “free riders”.

4. Hart's argument assessed.

As I have said, it is difficult to believe that these truisms, despite their being true, are sufficient to carry the weight of the idea that there is minimum content of Natural Law. I shall try to explain why. According to Hart, “it is important to observe that in each case the facts mentioned afford a *reason* why, given survival as an aim, law and morals should include a specific content”. The formulation is ambiguous. A reason for doing what? And, besides, a reason for whom? A plausible reading would be that awareness of these facts should afford us a reason to believe that there is a minimum content of Natural Law. Nobody should fail to see, exposed to these simple facts, that there are minimal conditions each system of rules should met in order to

qualify as a legal system. Without provisions for, say, the protection of human life or the recognition of promises as a source of obligation, there would be no law. In other words, the satisfaction of these conditions could give us a way of distinguishing a defective, but, nevertheless legal, system, from the arbitrary and capricious exercise of power of a gang of thugs. The trouble is that Hart seems to give a stronger interpretation of his statement. He says that “[t]he general form of the argument is simply that without such content laws and morals could not forward the minimum purpose of survival which man have in associating with each other. In the absence of this content man, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible”¹¹. So it seems that the simple truisms should give us not just a reason to believe that they set conditions that are necessary for each system of rules to fulfil to be a legal system, but also that they give us reasons to comply with the requirements of positive law, and to cooperate in its application. Self-interest, as brought about by the satisfaction of the conditions set by the five simple truisms, would be sufficient to give us reasons to comply with the legal system. Hart develops further his argument drawing a distinction between his theory about the reasons we have to recognise as legal, and comply with, a system rules that satisfies the conditions set by the truisms; and the causal explanation of the fact that people comply with systems of rules satisfying the same conditions. The second is a causal explanation because it does not rest on the truisms nor is mediated by conscious aims or purposes. The two approaches are compatible, but different. The first is supposed to produce reasons to act in certain ways, the second not. This is highly disputable. Think for example to the obligation to keep one’s promises. Why should I have a reason to comply with a promise if I know that it is not anymore in my self-interest to do so? Someone might say that it is a good strategy to act on a rule that would normally produce good consequences. But, what shall we say of the case in which it is certain that there will be no consequences whatsoever if someone does not comply with a rule? The strategy proposed by such person rests on the un stated assumption of publicity, *i.e.* on the fact that a violation of a rule would be perceived and recognised by one’s fellow human beings and produce retaliating behaviour. We know that this might happen, but it is not necessarily so. Let’s assume, for argument’s sake, that the publicity condition does hold most of the cases, shall we nevertheless say that we comply with our obligation because it is right to do so, or just out of

¹¹ H.L.A. Hart, *The Concept of Law*, 193.

fear of the consequences for not having done so? It seems that a different kind of consideration, independent from self-interest, is doing most of the work here. According to Philippa Foot, “[i]t matters in a human community that people can trust each other, and matters even more that at some basic level humans should have mutual respect. It matters, not just what people do, but what they are”¹².

My view is that Hart is fully successful in pointing out which is the likely genetic or historical explanation of the fact that all surviving human societies in the long run will have a system of rules (moral or legal, according to the level of complexity of the society itself) that satisfies all, or at least most, of the interests that are exemplified by the truisms. This is not yet a description of why a particular person should think she has a reason to keep one’s promises or to respect someone else’s bodily integrity when it is not in her self-interest to do so. Let me clarify this point. My disagreement with Hart’s conclusions depends on a different understanding of the kind of questions his argument it is supposed to answer. If the question is: ‘why there is law?’ or, ‘why there are some common features that all legal systems share?’, I agree that the truisms can afford us a good explanation of the evolutionary fitness of a form of life that has developed such strategies to cope with its physical (bodily and mental) weaknesses. I am not happy with Hart’s conclusion that these same facts about the human species will (or shall) give a particular human being reason to act in accordance with the requirements of law and morality. I think Hart is not faithful to the prescription to ‘save the appearances’ in a field of inquiry in which the price to pay for not having done so is the disappearance of the field of inquiry itself. There is no doubt that a recasting of the language we use to evaluate human life and action in terms of self-interest is not a representation that is true to the original. Think, for example, of the difference between saying that one’s doing action *x*, that is required by having promise to do *x*, is what one should do because she is under the obligation to keep her promise; and the same person saying that she is doing what she was required to do because it is a good strategy to keep one’s promise. It is not that it would be irrational (according to one interpretation of rationality) to say so. The problem is that it leaves open the question, that one might well ask, what should one do in case it is not in one’s self-interest to do what one is under an obligation to do (because there will be no consequences whatsoever). In a world in which the publicity condition does not hold, there might be situations in which self-preservation calls for cheating, stealing or killing. Hart’s

¹² Philippa Foot, *Natural Goodness* (Oxford: Oxford University Press, 2001), pp. 47-48.

argument has also the further defect of leaving out of the picture an undeniable fact of life: the connection between not having done one's duty and the feeling of regret that is an important part of our inner life. If self-preservation is what gives us reasons to comply with the rules, why should we feel remorse for not having done our duty when this is likely to enhance our capacity for survival? I am aware that the theory of evolution has given an answer to this question. It is the survival of the individual that counts. It is because keeping one's promises is on the whole good for the survival of the human individual that we have developed the idea that keeping one's promises is good. And it is because keeping one's promises is good from the point of view of one's survival and reproduction that we have developed feelings of regret. I do not want to deny these statements. I think they give us good explanations, at least the best explanations so far, of why we (as a species) have developed certain social institutions or feelings. But my question is: 'who are we?'. I think the theory of evolution has given an answer to a different kind of question, one that is certainly relevant, but not sufficient to settle the question of self-understanding that is the main business of philosophy¹³. The kind of understanding we need when our aim is to answer questions on what is morally obligatory or permissible is based on what Wittgenstein called a "perspicuous presentation" of our form of life. Hart's explanation of the overlapping among different legal and moral systems is what Wittgenstein called a "genetic explanation" (nothing to do with genes, here 'genetic' means 'historical'). The two kinds of investigation have a different logical structure. What might be a satisfactory answer to questions of the first kind is not necessarily relevant (though it might be relevant) to those of the second kind. Hart's argument can give us a good explanation of the undeniable fact that there is a considerable overlapping between the legal systems and the positive moralities of all the surviving human communities, but it cannot be used as the premise to give a justification of an action performed in compliance with a moral standard. Hart's argument fails in its attempt to carry the weight of its own conclusions because gives an answer to a different kind of question. Survival is a condition of flourishing, but the survival of many, or indeed even the majority of the members of the human species, is compatible with their living a brutish, nasty and short life. We have done so for quite a long time.

¹³ Philip Kitcher, 'Giving Darwin his due', in Jonathan Hodge and Gregory Radick (eds.), *The Cambridge Companion to Darwin* (Cambridge: Cambridge University Press, 2003), pp. 411-416.