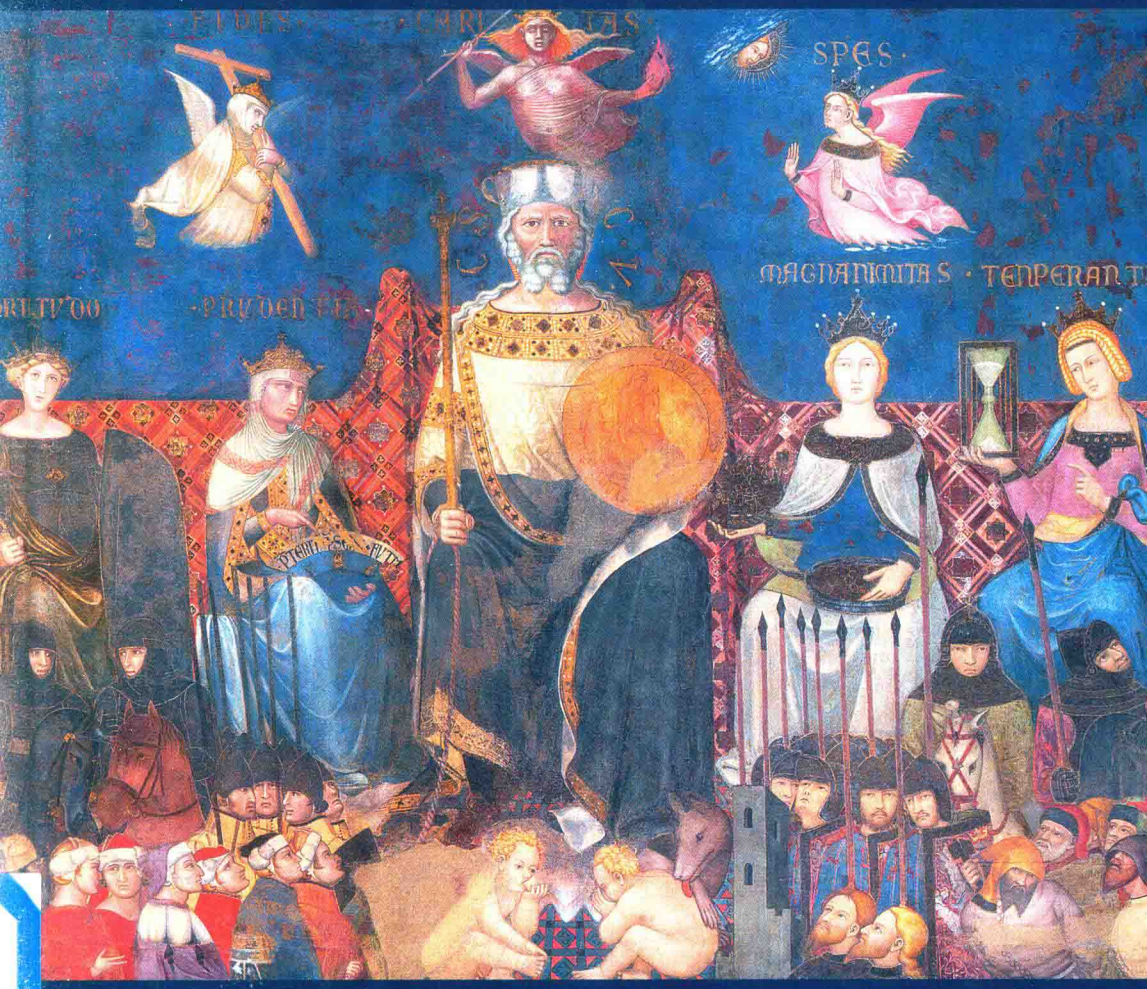
# Dimensions of Politics and English Jurisprudence




SEAN COYLE

CAMBRIDGE

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521196598



First published 2013

Printed and bound in the United Kingdom by Clays, St Ives plc

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Coyle, Sean.
Dimensions of politics and English jurisprudence / Sean Coyle.
pages cm
Includes bibliographical references and index.
ISBN 978-0-521-19659-8 (Hardback)
1. Jurisprudence–Great Britain. 2. Jurisprudence–United States.
3. Law–Philosophy. 4. Liberalism. I. Title.
KD640.C69 2013
349.41–dc23
2012047170

ISBN 978-0-521-19659-8 Hardback

# DIMENSIONS OF POLITICS AND ENGLISH JURISPRUDENCE

Understandings of law and politics are intrinsically bound up with broader visions of the human condition. Sean Coyle argues for a renewed engagement with the juridical and political philosophies of the Western intellectual tradition, and takes up questions pondered by Aristotle, Plato, Augustine, Aquinas and Hobbes in seeking a deeper understanding of law, politics, freedom, justice and order. Criticizing modern theories for their failure to engage with fundamental questions, he explores the profound connections between justice and order and raises the neglected question of whether human beings in all their imperfection can ever achieve truly just order in this life. Above all, he confronts the question of whether the open society is the natural home of liberals who have given up faith in human progress (there are no ideal societies), or whether liberal political order is itself the ideal society?

SEAN COYLE is Professor of English Laws at the University of Birmingham.

To my parents

'I think we have real progress in philosophy when a disputant thinks little of victory as compared with the discovery of what is just and true'
– attributed to Licentius
(Saint Augustine, *Contra Academicos*, Bk 1.3)

# PREFACE

The origins of this book lie in an ambition to explore a sceptical attitude toward modern jurisprudence and political thought. Modelled upon a kind of Academic scepticism (avoidance of positive doctrines), the intention was to subject key aspects of legal and political thought to question. This gave the book as initially conceived a somewhat looser structure, as a series of more or less independent arguments addressed to each subject in turn. As the book progressed, I decided to change this strategy. Increasingly, there were arguments or ideas that demanded to be affirmed. They could be subjected to question, but not denied. Positive doctrines began to assert themselves in the book's main line of analysis.

As a result of this, I decided (at quite a late stage) to rewrite the book almost from the ground up. I am grateful to Cambridge University Press for allowing me the extra time it took to complete this process. The result is a book that is more cohesive, but which perhaps retains vestiges of its earlier incarnation. The relationship between the chapters, particularly in the second part of the book, now resembles more a series of reflections upon a body of interrelated ideas: law, liberty, order, community, justice (and others). Each dimension of law and politics is pushed temporarily into the foreground, to be examined and then replaced, whereupon another is called forth. The reflections are underpinned by a vision of law and politics that is developed in the Introduction and the early chapters of the book. The book's overarching concern, though I did not know it at first, is with justice.

It was necessary to restrict the scope of the book. I consider first and foremost the legal and political experiences of the liberal social order. I have very little to say about established criticisms of liberalism, such as communitarianism, preferring to develop my own line of criticism. My question is above all whether liberalism represents a deepening of man's moral predicament or, as some liberals seem to suggest, a resolution.

I would like to take this opportunity to thank a number of people whose input has been invaluable to me over the course of writing the

book. For discussions of some of the book's ideas, I am grateful to audiences at the University of Antwerp's Centre for Law and Cosmopolitan Values, Birmingham Law School, the University of Minnesota School of Law, LSE, and Emory University. I owe special thanks to John Witte Jr and colleagues at the Center for the Study of Law and Religion, Emory University, for hosting me as a visiting scholar during April 2010, and for a very illuminating debate on some of the book's concerns. Brian Bix, Anna Grear, Joel Hanisek, George Pavlakos, the late Amanda Perreau-Saussine, Esther Reed, Veronica Rodriguez-Blanco, Nigel Simmonds and Melanie Williams read and commented upon a number of chapters. Tobias Schaffner offered some very helpful suggestions on two key chapters, and I am grateful for a very interesting correspondence on justice and virtue. Fiona Smith and Margaret Martin read virtually the whole of the manuscript, sometimes in successive versions, and were an unfailing source of encouragement and ideas. I am grateful to my editors at Cambridge University Press, Finola O'Sullivan and Richard Woodham, for their advice and support, and their patience. Finally, but most of all, Allison. I thank you all.

Earlier incarnations of some of the book's arguments have appeared in print elsewhere. An early version of Part I, Chapter 1 was published in *The Canadian Journal of Law and Jurisprudence*, 2010. Elements of Part II, Chapters 7 and 8 appeared in a long article in *The Australian Journal of Legal Philosophy*, 2010. Two articles in the 2009 *Northern Ireland Legal Quarterly* contain earlier versions of the arguments in Part II, Chapter 10 and Part III, Chapter 13. Part III, Chapter 15 appears in *New Blackfriars* in 2012. I am grateful to the editors of those journals for permission to reprint or adapt material.

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# INTRODUCTION

This book aims to illuminate various dimensions of politics and English jurisprudence. The terms 'politics' and 'jurisprudence' do not have a constant meaning in the Western intellectual tradition. In the Hellenic philosophies of the classical period, the associations of law and politics were considerable: they pointed simultaneously to the context of the city, the Latin *civitas* which Hobbes later identifies with 'that great Leviathan called a Common-wealth, or State',[1] and inwardly to the constitution and dispositions of the soul. If justice depended upon the development of proper order in the soul, nevertheless it could only be positively beneficial to the individual if it sprang from a decorous and principled political regime.[2] The city itself demanded attention not as a physical, but as a metaphysical, entity, which if natural and belonging to the natural order, nevertheless has to be built by the efforts of men. Politics gestured toward heaven as well as to the material fate of the earthly life. These ideas achieved their highest expression in the Catholic scholastic philosophy of the Middle Ages, culminating in the works of Aquinas. The English jurisprudential tradition of the common law in particular, witnessed a remarkable flowering of Thomist ideas in Henry de Bracton's influential *De Legibus* (1235), Fortescue's *In Praise of the Laws of England* (*c.*1470), and Saint Germain's *Doctor and Student* (1518).[3] Centuries later, these associations remain visibly present in the work of the greatest English political philosopher, Hobbes, where they are the subject of intense anxieties. Of the possible states of existence in the sublunar world, it is only the condition of civic peace that offers an experience of justice.[4]

[1] Hobbes, *Leviathan* [1651], introduction.

[2] Plato, *Republic*, 427c–445e. See also the Penguin Classics edition (London, Penguin, 2007), xxiii.

[3] See inter alia: HA Rommen, *The Natural Law* (Indianapolis IN, Liberty Fund, 1998), 100ff; N Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge University Press, 1990), 112–13.

[4] Hobbes, *Leviathan*, ch 13.

But whilst the famous frontispiece of *Leviathan* restricts the experience of justice to a commonwealth composed of both sword *and* sceptre, civil *and* ecclesiastical authority, that of *De Cive* suggests a more complex and ambivalent relationship between *imperium*, the state of civic peace, and the final justice of the Last Judgment.[5]

At the hands of Locke and Hume, the province of jurisprudence progressively narrowed in order to accommodate a more austere depiction of the possible boundaries of human understanding. Increasingly it is artifice, in place of nature, that is to provide the form and limits of these ideas.[6] Building upon their efforts in the eighteenth century, Bentham thunders his disapproval of the entire natural rights tradition.[7] By the middle of the twentieth century, HLA Hart quietly dismisses these questions from reflection upon law as being 'too metaphysical for modern minds'.[8] More recently, legal philosophers barely whisper criticisms of a dead tradition, limiting their attention to a call for 'constructive' interpretations of law as an expression of liberal values, or insisting upon the separability of the very concept of law even from these thin associations.[9]

Are these arguments and interpretations actually significant to the main questions and fears of our times? Do we clearly perceive our own modernity? The liberal order is endlessly debated, but are the nature of its blessings fully understood? Thinkers who dwell upon the interpretation of law as the seed-bed of liberal values have shown remarkably little interest in the ultimate direction of liberalism. One might put this down to the character of liberalism itself, in being non-directive; but this would not explain why the plurality of directions is not the subject of lively debate. Thus we are drawn to a fundamental ambivalence in liberalism's deeper characteristics: liberalism has both a pessimistic version (there are no ideal societies or better forms of life, merely endless alternatives) and an optimistic version (the liberal order is *itself* the ideal society). In the face of this ambivalence, it is necessary to consider what the purpose of

[5] Hobbes, *De Cive* [1642], frontispiece.

[6] See e.g. Locke, *An Essay Concerning Human Understanding* [1690], III.5; Hume, *An Enquiry Concerning the Principles of Morals* [1777], III.2.

[7] Jeremy Bentham, 'Nonsense Upon Stilts', in P Schofield et al (eds.), *Rights, Representation, and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution* (Oxford University Press, 2002), 317–35.

[8] HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Clarendon Press, 1994), 192.

[9] See e.g. R Dworkin, *Justice in Robes* (Cambridge MA, Harvard University Press, 2007); J Raz, *Between Authority and Interpretation* (Oxford University Press, 2009).

liberal politics is. In an address to Western politicians, business leaders and intellectuals in 1997, the President of the Czech Republic, Vaclav Havel, said: 'It cannot suffice to invent new machines, new regulations, new institutions. It is necessary to understand differently and more perfectly the true purpose of our existence on this Earth, and of our deeds.'[10]

It is with these questions, and others which arise from them, that this book is concerned. One might say that it attempts to put modern juridical and political culture 'in context'. This is a difficult task if only because liberalist philosophies reject the idea of context. The eyes of the Christian jurists had fastened upon heaven as the final end of politics and of all human endeavour. The liberal jurists lowered their gaze, looking around themselves, and to man himself as the source and architect of future possibilities. Liberalism implies a more open view of the future, but what does this imply about the human condition? One of the principal ideas of liberalism is that of the human being as an 'individual', who has escaped the tyranny of class, of nature and of church. The condition that is 'proper' to this being is one, not simply of 'free will', but of freedom. But how should one respond to this sense of propriety? Is it an achievement of liberal society, or its goal? Concrete experience or nebulous piety? A feast for the soul, or apocalyptic emptiness?

## English jurisprudence

What will help us understand the situation with which we are presented? One may be tempted to turn to Kant, following a familiar route. The profundity of what Kant has to say about the condition of individuality is such that his vision of the autonomous self might almost be equated with the liberal subject itself. But Kant himself casts doubt upon the reliability of this equation, for he in fact has very serious doubts about the possibility of human beings ever achieving anything close to 'autonomy'.[11] A politics premised upon the attributes of this character is therefore inappropriate to enduring realities of the human condition, and must in some ways distort our understanding. Kant's remarks nevertheless coincide with the liberal political tradition in associating the 'properness',

[10] Vaclav Havel, Address to FORUM 2000 Conference, Prague Castle, 4 September 1997.

[11] Kant, 'Religion Within the Boundaries of Mere Reason', in AW Wood (ed.), *Religion and Rational Theology: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996), 39–216.

and thus the phenomenon, of freedom with the characteristics of the individual as such. But if freedom is 'proper', it nevertheless requires a nexus of rules and entitlements to define and sustain it. If attributed to individuals, this cannot be in sheer recognition of their individuality, for it concerns their interrelations and thus presupposes an already-instituted community. To speak of freedoms, or of rights, is always to implicate the institutional realities which support them. England and its philosophies did indeed succeed in displacing the historical condition of its subjects. The liberal state is no longer responsible for the articulation and defence of revealed truth, but the defence of the individual himself (through his property). The freedom of the individual was therefore created institutionally. It is as inhabitants of Western democracies that we have become more autonomous.

Kant's philosophy is not as insensitive to this point as may be supposed, for he is above all a *juridical* philosopher. But if we want to understand the extent and meaning of liberal freedom fully, asking what it means to exhibit this condition, it is necessary to turn elsewhere. If we look to recent writing in the Anglo-American tradition of jurisprudence, we appear to encounter the suggestion that one must at all costs avoid contextualizing the problem historically or institutionally. Raz, for example, equates the truth of philosophical ideas with their universality: '[philosophical] theses, if true, apply universally, that is, they speak of all law, of all legal systems; of those that exist or will exist, and even of those that can exist or never will. Moreover, [such] theses are advanced as necessarily universal.'[12] An incautious reading of this statement can encourage the belief that philosophies of law and politics, in being concerned with questions and standards that are universal or categorical, are *not* directed toward specific arrangements: that philosophy 'must transcend the local concepts of a particular place and time.'[13]

What is meant by the statement that philosophy must 'transcend' particular arrangements? Obviously, philosophy seeks to uncover the nature of the human being and of the human condition in its fullest sense, and not merely that of particular historical conditions. Philosophical reflection involves the 'expansion and clarification of consciousness' in a way that 'helps to distance us from the concealed assumptions and prejudices characteristic of our own place and time, and so to get a

[12] Raz, 'On the Nature of Law', *Archiv fur Rechts und Sozialphilosophie* (1996), 1.

[13] R Tur, 'The Notion of a Legal Right: A Test-Case for Legal Science', *Juridical Review*, 21 (1976), 183.

critical purchase on them'.[14] If the liberal subject is free, it is because *man* is free. Liberalism may set him free, but he possesses freedom because his soul is in every way unspecified. Passages such as Raz's can lead us to assume that the questions raised by the philosopher are in some sense prior to the questions asked by the political historian, the cultural anthropologist, or the lawyer. But if we think of law and politics as being unconditioned by contextual possibilities, we risk the propulsion of analysis into an unhelpful abstraction to which it is constantly vulnerable. Plato reminds us that in the case of the philosopher, 'only his body has its place and home in the city and can be found there, while his mind disdains all these matters, seeing them as petty and worthless, and is borne in all directions, as Pindar says, "from beneath the earth to above the heavens"'.[15] This is a correct image, of an embodied state comprehending its true and fullest meaning in reaching beyond itself. If we are not careful, it is possible to distort this insight into its opposite: the city becomes irrelevant, the enquiry begins and is conducted in the abstract, and all values are deciphered and settled so that they do not become circumstantially or historically negotiable.[16] How much blood will be spilt in the defence of freedom and justice, when interpreted in this way!

The transcendence of philosophical questions is not the same as their priority. Certainly the issues which preoccupy the writer of a scholarly text on the English law of property (for example) are not directly philosophical, even if they are acknowledged as sometimes raising philosophical questions. On these occasions, the legal writer feels justified in placing such questions to one side. But the implication of this ought to be obvious: the philosophical enquiry *arises from* the lawyer's concepts and classifications, it consists in an extension and a deepening of his activities and suppositions. It is not an enquiry that is logically *prior to* such activities, the lawyer innocently continuing about his business until instructed by the philosopher that his suppositions are ill-founded. In an early essay on the philosophy of law, HLA Hart recognized that:

> [n]o very firm boundaries divide the problems confronting [the doctrinal lawyer] from the problems of the philosophy of law. This is especially

[14] H Meynell, 'In Defence of the Humanities', *New Blackfriars*, 81 (2007), 327.

[15] Plato, *Theaetetus*, 173e.

[16] It is interesting to observe how short is the journey from the supposed consensus of the 'original position' in *A Theory of Justice* to the aggressive defence of American foreign policy against 'outlaw states' in J Rawls's later work, *The Law of Peoples* (Cambridge MA, Harvard University Press, 2001).

> true of the conceptual schemes of classification, definition, and division introduced by the academic study of law ... [I]t is more important to distinguish as belonging to the philosophy of law certain groups of questions which remain to be answered even when a high degree of competence or mastery of particular legal systems of the empirical and dogmatic studies ... has been gained.[17]

Hart is undoubtedly correct. Familiarity with both legal practice and academic legal scholarship shows lawyers demonstrating an interest not only in the interpretation of 'black-letter' rules and the substance of legal doctrine, but also in questions of justice, of the difference between 'good' law and 'bad' law, and of the many and varied political consequences of particular rules and decisions. It is very doubtful whether any set of fixed and (supposedly) universal standards could meaningfully illuminate such questions. Either we will discover them to be of too abstract a character to be genuinely informative for our specific needs, or they will turn out to be, upon reflection, but idealized generalizations of our 'local and particular' concepts. Pierre Manent argues that 'the "methodological" intemperance that characterizes it, and that spreads to the other "human sciences," stems first of all from [a] two-fold contradictory movement: a deliberate and forceful distancing from any familiarity with what is real in order to achieve the distance and height of Science, and a no less deliberate and forceful effort to recover that familiarity'.[18]

Although it is prone to the same abstractionism,[19] Hart's own legal philosophy can be interpreted as a contribution to a long-running argument in English jurisprudence. One might reflect upon the problems of jurisprudence as a series of constantly shifting perspectives on the city and the soul. In *The Concept of Law*, we find Hart seeking to draw out universal or generalized truths from deep reflection upon the conceptual structures and institutions of English law (and not vice versa). In two celebrated essays, we find him at pains to clarify the differences which separate American jurisprudence ('that is, American speculative thought about the general nature of law'[20]) from the English tradition to which he

[17] Hart, 'Problems of the Philosophy of Law', in *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), 88.

[18] P Manent, *The City of Man*, M LePain (trans.) (Princeton University Press, 1998), 55.

[19] See e.g. Hart (above n 8), 240.

[20] Hart, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream', in *Essays* (above n 17), 123. See also '1776–1976: Law in the Perspective of Philosophy', ibid., 145–58.

is conscious of belonging.[21] These passages are suggestive of one who understands that, in deepening our understanding of the historical contexts of philosophical arguments concerning law and politics, we are not thereby led to abandon the idea that such arguments address permanent questions of the world and of the human condition. Our very ideas of politics must begin with an experience of life as inhabitants of a city.

At other times, Hart's reflections seem to point to an entirely different conclusion. His 'analytical' jurisprudence is written in the shadow of Hume and Locke. '[T]here is no view of human life or of the condition of mankind', declares Hume, 'from which, without the greatest violence, we can infer the moral attributes, or learn the divine benevolence'.[22] The very idea of survival itself, Hart tells us, is not 'something antecedently fixed which men necessarily desire because it is their proper goal or end'. Its central place in human thinking is 'a mere contingent fact which could be otherwise'.[23] How does one explain its grip on the mind, on the very being of man? Because it is 'reflected in whole structures of our thought and language, in terms of which we describe the world and each other'. We cannot subtract the wish for survival and leave these structures intact. The fundamental truth about man is that he is a thinker: *homo linguisticus*. Man as an artificer! His emergence can be traced to Locke, who places him in this condition in Book I of *An Essay on Human Understanding* when he pours scorn on the idea of a 'bounteous nature' supplying man with 'general truths' about his condition.[24] Man perceives the world through 'simple ideas' which come to him via the senses: these alone conform to nature.[25] Through the labour of the mind, he transforms these ideas into complex ones, out of which all his understanding flows. Nothing in nature corresponds to 'murder' or 'incest': these are the names of complex associations of ideas, and the relations between them (e.g. pulling the trigger of the gun and the other ideas that make up the act of 'murder') are entirely manufactured by the mind in 'its free choice [giving] a connexion to a certain number of ideas'.[26] On this basis, Locke is able to assert that all of man's ideas are 'arbitrary'. Man's character as a thinker and artificer consumes the whole of his nature.

[21] Though see, interestingly, biographical fragments in Nicola Lacey's book on Hart, which reveal his defensiveness over his Jewishness, and consequent sense of un-belonging: N Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004).

[22] Hume, *Dialogues Concerning Natural Religion* (Oxford University Press, 1993), XI.

[23] Hart (above n 8), 192.

[24] Locke, *An Essay Concerning Human Understanding*, I.2.

[25] Ibid., II.2.

[26] Ibid., III.5. The example is Locke's, drawn from III.9.