The Vantage of Law

Its Role in Thinking about Law, Judging and Bills of Rights

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Preface

This book attempts to combine bits of legal philosophy and bits of constitutional law, wrapping them up together by stressing the importance of vantage in thinking about certain of the key issues they raise. It attempts that very tricky task of trying to say something at least partially new, and preferably in an interesting and enjoyable way.

The bulk of this book is brand new and started from scratch, though some of the ideas I have had for some time and have expressed in various ways in various publications over the years. In Chapters 3, 4 and 5, however, I reworked in small part bits of recent articles and chapters of mine and combined this with the general flow of my argument. So in Chapter 3 I made use of my 'The Travails of Justice Waldron' from (G. Huscroft, ed.) *Expounding the Constitution: Essays in Constitutional Theory* (CUP, New York, 2008); in Chapter 4 'Thin Beats Fat Yet Again – Conceptions of Democracy' (2006) 25 *Law & Philosophy* 533 and 'Jeremy Waldron and the Philosopher's Stone' (2008) 45 *San Diego Law Review* 133; and in Chapter 5 'Rights, Paternalism, Constitutions and Judges' from (G. Huscroft and P. Rishworth) *Litigating Rights: Perspectives from Domestic and International Law* (Hart, 2002) and 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century?' (2006) 17 *King's College Law Journal* 1.

I owe thanks to my friends and colleagues in Australia and overseas who read earlier versions of this book and offered comments, criticisms and suggestions. Thank you. And I owe a debt of gratitude, as always, to my wife, Heather, and our children, Cameron and Bronwyn.

James Allan
December, 2010

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Introduction

This is not a book that aims to construct an all-elucidating, philosophically sophisticated theory of law. Nor will it urge some particular, grand, unifying concept of law. Frankly, I am sceptical that there is any such all-encompassing theory or concept of law – one preceded by the definite article 'the' – that can be persuasively generated by analytical or conceptual argument or by empirical data, or by some combination of the two. The one, single, general theory of law for the modern age that was the subject of William Twining's satire back in 1978[1] is no less a mirage or dream three decades on. That, at any rate, is my view.

That having been made clear, the astute reader may already have noted that the title of this book intentionally alludes to H.L.A. Hart's *The Concept of Law*, to my mind (and many others') the best book available to introduce the reader to the central and persistent questions and problems of legal theory. Indeed, it is a *tour de force*, focusing as it does on three questions: *1)* How do legal obligations (and law) differ from, and seem similar to, orders backed by threats (or law as the gunman writ large)? *2)* How do legal obligations and legal rules relate to, and differ from, moral obligations and moral rules? *3)* What are rules and to what extent is law a matter of rules? In giving his answers to those three recurrent issues or questions Hart spawned a voluminous literature and provided many major insights, stretching from the distinction between core and fringe applications of a rule, to the notion of a rule of recognition, to an argument for why law (and legal obligations) should be kept separate from morality (and moral obligations).

Yet while it is true that Hart at one point claims that his 'analysis in these terms of primary and secondary rules has this explanatory power',[2] and even that the 'union of primary and secondary rules is at the centre of a legal system',[3] he goes on explicitly to say that his analysis 'is not the whole',[4] and earlier on says that the book's 'purpose is not to provide a definition of law ... [but to] provid[e] an improved analysis of the distinctive structure of a municipal legal system'.[5] Frederick Schauer goes further. In the course of claiming that Hart's *Concept of Law* is his signal work, a lasting achievement, Schauer argues, convincingly to my mind, that '[i]t is not at all apparent that *The Concept of Law* was very much

1 See William Twining, 'The Great Juristic Bazaar' (1978) 14 *Journal of the Society of Public Teachers of Law* 185.

2 H.L.A. Hart, *Concept of Law* (Oxford: Oxford University Press, 1961), p. 95.

3 *Ibid.*, p. 96.

4 *Ibid.*, p. 96.

5 *Ibid.*, pp. 16–17.

focused on actually delineating the concept of law. It is not even clear that its goal was to provide any concept of law at all.'[6]

So while Hart can be read as offering a series of highly perceptive, discerning and thought-provoking insights into *the* concept of law, he can also be read as offering these powerful, useful insights without staking his all on there actually being any such single, grand, 'definite article' variety concept or theory or conception of law.

Whether that outlook, of being sceptical of unifying, all-explaining concepts and theories, is the most convincing way to read Hart or not, it will most definitely be the basis on which this book proceeds.

I will also follow Hart's *Concept of Law* practice of keeping footnotes to a minimum, reserving the noting of related readings and references to a section at the end of the book. I think the absence of numerous footnotes and their tangential arguments and digressions and appeals to authority can make a book better, and certainly make it more readable. Those who disagree or disapprove will, I hope, bear with this practice.

Lastly, as regards any further parallels to *The Concept of Law*, I note that Hart there shunned adopting the appeal court judge's vantage or perspective – one which is so often the implicit vantage or viewpoint in legal writing today (and more so even in legal education today where students often are fed little more than a steady diet of highest appeal court cases). Recall that up to chapter nine of *The Concept of Law* Hart wrote from the vantage of the outside observer, the visiting Martian. In these chapters, as I indicated above, Hart described how legal rules differ from, and are similar to, orders backed by threats. He described the extent to which legal obligations can be understood as flowing from and comprised of a system of social rules of a particular recognized or validated sort. He even pointed out the ways in which legal rules can differ from, and be similar to, moral rules.

His interest thus far was to describe aspects of any legal system. It was broadly descriptive, on the plane of the copula 'is'. Nothing thus far involved Hart or his readers adopting the judge's vantage. Indeed, even in the little bits of chapter seven where Hart did discuss adjudication – where he noted that the vast preponderance of disputes simply do not end up before a court let alone an appeal court, that the core applications of legal rules generally do not admit of the sort of uncertainty needed to lead people to spend the vast amounts of money required to take those disputes to court, and that in those extremely rare instances where the application of a legal rule does fall into what he termed 'the penumbra of doubt' so that a dispute might end up in court and a point-of-application judge might have discretion – even in that discussion of adjudication, Hart did not adopt the vantage or perspective of the judge.

This forswearing of the judge's perspective did not end when, part way into chapter nine of *The Concept of Law*, Hart no longer wrote from the vantage of the

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6 Frederick Schauer, '(Re)Taking Hart' (2006) 119 *Harvard Law Review* 852, at p. 880.

visiting Martian. Hart certainly shifted perspective in chapter nine. He nowhere there argued that people do – as a matter of widespread fact – separate law and morality. Instead, he argued that people *should* separate them. He shifted to the plane of the copula 'ought'. But even here he did not adopt the judge's vantage. Rather, he adopted the vantage of a citizen within a legal system, someone who has a Benthamite concern for the gradual, piecemeal reform of his or her legal system. From that participant's vantage – *not* some appeal court judge's vantage overlooking the few unusual disputes passing that way where the legal rules regularly leave the outcome uncertain and unresolved by settled expectations – Hart argued that it is good to keep separate law and morality, 'law as it is' and 'law as it ought to be'.

I will return in Chapter 1 to the arguments for that 'should' claim. Here, I simply wish to emphasize the extent to which Hart shunned the judge's vantage, and so relatedly left largely unexamined the sort of issues involved in any theory of adjudication, in favour of first the visiting Martian's vantage and latterly the concerned citizen's.

This book, too, is concerned with vantages. Unlike Hart in *The Concept of Law* it will not wholly shun the judge's vantage. But neither will it make that vantage pre-eminent, explicitly or implicitly, as seems so often the case these days. In fact, the centrality and importance of vantage in understanding law, and in assessing bills of rights, and in deciding on how one wants judges to interpret and resolve cases, and much else besides, will be the cornerstone claim of this book. It will be the basis for any interesting insights that follow.

One final preliminary point or warning. As far as possible I will avoid labels, and arguments over whether or when or how labels do or do not fit. My goal is not to argue for the merits of some single, all-elucidating understanding of law. But neither is it to argue that some label or other is best understood as comprising positions A through E rather than positions C through H or B through G.

Take the various ongoing debates about the merits and deficiencies of legal positivism. My view on this is one I imagine might be shared by Ronald Dworkin, whose substantive views otherwise generally leave me cold. It is that too much of the debate within and about legal positivism has become almost scholastic. One reads about Kramer on Raz on Perry on Hart or about Dyzenhaus on Dworkin on Fuller on Hobbes or about Waluchow on Coleman on, well, whatever. Of course, this is a caricature. But not one that is unrecognizably related to reality. At the same time, more and more effort is expended on labels and categorizations. To the non-aficionado, even to the rather well-informed jurisprude, the important issues at stake can often seem obscured by the insularity of the terms of debate. One is reminded of substantive debate conducted between American (or for that matter Canadian) constitutional law scholars – there is so much dispute about texts and terms and authorities and the meaning of those authorities that the reader can easily lose sight of the substance of the disagreement. By then, of course, any interest the reader had has long since dissipated.

If we can see some of the strengths and weaknesses of particular ways of understanding how law relates to morality or whether a bill of rights is desirable or how a judge ought to decide cases (and more) then what tag to attach to any particular understanding is, at most, of secondary concern, and one I leave for others. The problem is not simply that labels for virtually all abstract, complex notions (think of 'Christianity' or 'feminism' or 'jazz music') will be for essentially contested concepts[7] – concepts where what falls within their proper ambit or aegis is open to reasonable disagreement amongst smart, well-informed, reasonable, even nice people – or, put differently and in more Hartian terms, will have 'a core of settled meaning'[8] and a 'penumbra of doubt'[9] or 'uncertainty'[10] (where there would be good grounds for saying that the label did apply and good grounds for saying it did not). No, a further problem with over-great concern about classification and labels and the attendant contrast and critique of competing positions is that it is prone to distorting simplification. Go back to Twining's satire on teaching and learning legal philosophy (or perhaps 'jurisprudence', to make the same point about labels):

> The first lesson was entitled Cocktail Party. Each student was provided with a list of 100 jurists and, associated with each name, a single word or phrase – for example, Kelsen – basic norm; Savigny – *volksgeist*; Hart – union of primary and secondary rules. As the title suggested, students were required to circulate and engage in interchanges which took the form of student A dropping the name of a famous jurist and student B responding with a key word, or *vice versa*. There was a strict system of scoring. For a correct reply, according to the list, a student would be awarded one mark. But if, for example, a student in response to the key word 'principles' were to say Pound, Llewellyn, or Bentham, instead of the correct answer, Dworkin, he would be fined 3 marks.[11]

With those preliminaries out of the way, let me say something more about the structure of this book. To begin, and as I noted above, it is concerned with vantages. What effect does one's vantage or perspective or standpoint have on how one understands, say, the desirability of a bill of rights or the best way for judges to decide cases or whether law is – and whether it should be – separate from morality? Of course pointing out the importance of vantage is by no means novel. Here, though, if not always the central focus it will certainly be the motivating consideration throughout this entire book.

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7 See W.B. Gallie, 'Essentially Contested Concepts' (1965) 56 *Proceedings of the Aristotelian Society* 167.

8 Hart, *Concept of Law*, p. 140, *inter alia*.

9 *Ibid.*, p. 119, *inter alia*.

10 *Ibid.*, p. 131, *inter alia*.

11 'The Great Juristic Bazaar', *op. cit.*, p. 190.

More importantly, I will make explicit the various vantages I ask the reader to adopt or imagine as we consider a number of different legal topics or issues in turn. The first vantage I propose to use is that of the concerned citizen. This is the person who has a stake in the legal system in which he or she lives; this concerned citizen is neither morally perfect nor immorally wicked nor even amorally indifferent. He or she is the average citizen, of limited (but by no means insignificant) altruism and sympathy, who in the vast preponderance of circumstances is law abiding.

And then there will be the judge's vantage. Normally we can take this as a judge on an appeal court, if not on the highest court of the jurisdiction. This judge will be one of a very small handful of point-of-application interpreters of the country's statutes and constitutional provisions. When in the majority in deciding a case over the meaning of some disputed provision or section, or indeed how to understand some case law precedent, what this judge says the law or Constitution is, it is. Put more brusquely, but only from one other than that judge's vantage, the Constitution or statute is what the judge says it is. And where that decision or determination involves the judge having to make – or being free to make – more or less unconstrained moral evaluations or judgments, then one can go even further. In such circumstances one might say that 'the Constitution (or statute) is what the judge thinks it should be'. In marked contrast to the concerned citizen, the judge's opinion on what should be the case can become what is the case.

And then the Holmesian Bad Man gives us a third vantage. This is the person made well known by the Legal Realists, the amoral actor whose decisions, choices and motivations are unaffected by morality. He is not immoral, just indifferent to the claims of morality *per se*. Law, though, and legal rules, constraints and obligations are decisive factors in what he does and how he acts.

In Oliver Wendell Holmes' 'The Path of the Law',[12] the Bad Man appears as a thinly veiled stand-in for the office lawyer. Lawyers are not paid to give moral advice. They are paid to give legal advice. They tell their clients what the law demands of them (not what morality demands) and what the expected legal outcome is likely to be.

Now the vantages and perspectives of the amoral Bad Man and the client-advising lawyer do not align perfectly; there is not a 1:1 correlation. Lawyers have some constraints imposed on them by professional ethics, by obligations to the court, and by their own consciences (that is, by morality). The average lawyer is not himself or herself a Bad Man and so, at the margins at least, the advice that a lawyer gives to a client will not be wholly, solely and completely a function of what the law allows, forbids or makes possible – at least not in every possible situation.

That point conceded, the overlap between the client-advising lawyer's vantage and the Bad Man's vantage is nevertheless exceedingly large indeed. Both are overwhelmingly focused on what 'the courts will do in fact'.[13] It is law that

12 O.W. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

13 *Ibid.*, p. 461.

concerns them. Morality is only of interest when made so by the law. Hence, except where I explicitly distinguish between them, the Bad Man's vantage will subsume that of the average client-advising lawyer in what follows.

Those are the three primary vantages I will use, the ones I will be dealing with for the most part.

There will, though, be others that will be worth considering at various times. One such ancillary vantage is that of the Visiting Martian. This is the vantage of the descriptive sociologist, the outside observer – a non-citizen with no stake in what is being observed and described other than, perhaps, a desire for accuracy and clarity. This vantage rests as much as any on the plane of the copula 'is', of what happens to be the case or the fact of the matter.

Another is the vantage of the legislator or law maker. This person, as part of the group of all other legislators of some assembly, can turn policy options into law. To the extent that law involves force and duty-imposing rules carrying sanctions for non-compliance, the legislator (with enough of his or her colleagues) can bring these into being. Of course the legislator might look to morality, to wealth creation, to likely future consequences and much more in seeking to create a law. But at least as far as the 'general rules known in advance and applying to all' variety of law is concerned, it is the preserve of the legislator.

There are even more peripheral or ancillary vantages that will, on occasion, be of interest. Let me mention four such vantages now. They can be loosely denominated as the Omniscient Being's Vantage, the Moral Philosopher's Vantage, the Sanctimonious Man's Vantage, and the Law Professor's Vantage. Let us briefly take each in turn.

It will be helpful at times to be able to imagine being in possession of, say, all future consequences of some action or statute or decision, or of what is the morally right thing to do (assuming, for the moment, that moral rightness is a human-independent or mind-independent quality), or even of what some legislator intended when voting to enact the statutory words she did. We can, of course, sometimes only imagine a being in possession of such knowledge, given that we are limited biological creatures. From the Omniscient Being's or God's-Eye Vantage, though, we can at least put ourselves in the position of imagining a being (or Being) with access to all such knowledge. That might prove useful.

As the question of the relation between law and morality will come up – in fact we will start the first chapter on this topic – it might also be helpful at times to look at things through the eyes of a moral philosopher. Setting up this Moral Philosopher's Vantage will be helpful not least as an explicit counterbalance to the Judge's Vantage. Some judges (and some of their more enthusiastic proponents and followers) may think that they are experts in moral philosophy, or alternatively that they have superior moral perspicacity or more finely tuned moral sentiments, than their fellow citizens. Yet the former claim is a claim to professional expertise in moral philosophy – and one that very, very few actual judges (no real-life ones of whom I am aware) could meet by producing their doctorates or published books in some area related to moral philosophy. Meanwhile the latter claims, to

judges' superior moral insight or perspicacity (as opposed to more pedestrian-type arguments for letting judges decide certain things on balance of power or institutional superiority grounds) are downright implausible. Spending three years at law school and then a dozen or more usually practising law in a big law firm or as a top courtroom lawyer is not obviously linked to engendering finer moral qualities in oneself than in those who follow different career paths – just about any alternate career path at all!

Accordingly, and Ronald Dworkin's interpretive theories notwithstanding, we will want to be able to distinguish the Judge's Vantage from the Moral Philosopher's Vantage. And we will want to be able to do this even though we are well aware that moral philosophers – top moral philosophers too – disagree amongst themselves on virtually every important issue, including over the relative merits of moral realism (or moral objectivism) versus moral scepticism (or non-cognitivism) and over the competing attractions of a Humean or Kantian theory of reason. This Moral Philosopher's Vantage is *not* the vantage of someone who has science-like right answers to moral disputes, nor even a science-like method for attempting to resolve such disputes. Its usefulness will lie in showing us what judges lack rather than in providing some technique or method for resolving moral debates by appealing to expertise.

What I have dubbed the Sanctimonious Man's Vantage is the vantage of the man or woman who is wholly self-assured in his or her moral judgments or evaluations. This person is convinced that he or she has a pipeline to God on all important moral issues; this person's evaluation or judgment on any contentious moral issue – same-sex marriage, headscarves in schools, euthanasia, affirmative action, capital punishment, anything at all – is always the right one. Or rather, *mirabile dictu*, this person is always wholly convinced that it is. So when his or her view fails to prevail in the legislature, or in the courts, our Sanctimonious Man tends to attribute the outcome to the moral blindness or stupidity or wickedness of some, or all, of those who disagreed.

The last peripheral or ancillary vantage I mention here is the Law Professor's Vantage. I include this perspective not because I am one, or because many readers of this book are likely to be one, or even because it is wise to flatter those whom you are trying to win over. (Well, these are not the only reasons for including this vantage.) To the extent that law professors indirectly sway the odd judge who happens to read one of their articles or books, or manages to shape future lawyers when educating them, or even contrives to influence a few citizens at large in, say, a newspaper column, this vantage is worth marking out.

So that makes three main vantages and some ancillary and even more ancillary ones that I have tentatively, and in a preliminary way, set out – those of the Concerned Citizen, the Judge, the Bad Man, the Visiting Martian, the Legislator, the Omniscient Being, the Moral Philosopher, the Sanctimonious Man and (perhaps leastly) the Law Professor. Yet a book concerned with the importance of vantage or perspective or standpoint in understanding legal debates, in giving grounds for preferring some interpretive theory or judicial approach to another,

in thinking about whether law and morality should largely be kept separate, in pondering how best to appoint judges, in detailing the pros and cons of a bill of rights, and more, needs also to place those vantages in context. Not everyone lives in a nice, benevolent, liberal democracy where the vast preponderance of citizens think their system's laws not only are overwhelmingly good ones but also that they have come into being through a process that is by and large a morally good one too. Theories of law or of adjudication that presuppose (explicitly or implicitly) a nice, benevolent, liberal democracy may not transfer well – or at all – to less salubrious surroundings. And let us recall that for most of mankind's life in society the governing legal and political regime, at least from our perspective here today, has been something less than benevolent (to put it as kindly as possible). In terms of that same time-frame, democracy is a newborn baby, with a version that enfranchised only a very few emerging in classical Greece, then disappearing for millennia until the more modern, more enfranchising version showed its head little more than two centuries ago. And, of course, billions of people today still do not live under legal systems that could remotely be described as democratic.

Likewise, slavery has been a common practice in human affairs until extremely recent times – condoned by the Catholic Church, practised widely, including in Islamic countries and in some of the newly independent American colonies, and still alive today (albeit kept out of sight as much as possible).

My point is that any theory of adjudication, say, or of how law and morality do, and should, interact that necessarily positions itself in a thinly disguised modern-day United States or United Kingdom or Canada or jurisdiction in western Europe will be a most provincial one, even as regards the way the world is at present. In historical terms it will be of fringe interest at most. To discount, or be able to discount, the role of fear and violence in the operation of a legal system indicates good fortune, no doubt, but also the limited applicability of what is propounded.

That means that in addition to vantage, the sort of legal system can matter too. A concerned citizen in a nice, benevolent, liberal democracy might well come to different conclusions about the interrelationship of law and morality, for instance, or the advantages of a bill of rights than would a concerned citizen in a brutal dictatorship or cleric-dominated one (where law is given, or said to have, divine warrant and antecedents) or even one under direct threat of invasion or wartime attack.

I want to leave myself room to consider not just how vantage matters, but how the sort of legal system in place might matter too. My default assumption or position will be that we are in fact discussing what I have loosely called a nice, benevolent, liberal democracy. Yet for the purposes of clarifying what is at stake, and even of making certain claims more widely applicable, I will moot three other sorts of legal system. One is the Wicked Legal System. At its worst this could be a Hitleresque or Stalinesque or Maoist dictatorship under which tens of millions and more end up dead and violence and fear is pervasive. Less brutally and lethally (far less so in fact), it might be an apartheid South Africa-type regime or something along the lines of Mugabe's Zimbabwe or Milosevic's Serbia.

Another is the theocracy or caliphate-type regime, what I will call the Theocratic Legal System. Here, law is asserted to have an explicitly divine origin, and hence for all who accept such assertions is by definition wholly moral. If God is the ultimate author of this jurisdiction's laws, then those laws (ignoring interpretive disputes for the moment) cannot diverge from what is morally good and right nor command anything morally repugnant. 'Law as it is' correlates perfectly with 'law as it ought to be' because law, in this jurisdiction, has been laid down by God.

The benevolent, the wicked and the theocratic by no means exhaust the general sorts of legal systems on offer, or of those that have actually existed. One more will suffice for our purposes. Let us call this the So-So Legal System. In comparative historical and world terms things here are pretty good. But they are noticeably worse than in our nice, benevolent, liberal democracy. Perhaps we can think of Russia or Venezuela today or Britain in the eighteenth century as exemplars of a So-So Legal System (by our standards today, of course).

In addition to those vantages sketched above, then, I will also make use of these four sorts of legal system – the Benevolent Legal System, the Wicked Legal System, the Theocratic Legal System, and the So-So Legal System.

That leaves me only to introduce the topics I will discuss in this book. Broadly speaking, there are three. The first is a much-discussed one, which might be subsumed under this question: Is it good or desirable to keep separate law and morality, 'law as it happens to be' and 'law as it ought to be'? This is a 'should' question, not an 'is' question about the extent to which morality in fact is or is not interwoven into law. This claim or insistence, that what law is and what it ought to be should be kept separate, lies at the heart of the Benthamite project. You need to know what you have before you can improve it, reform it and make it better (and that holds true even if one is not inclined to measure 'betterness' in terms of increased utility or welfare or happiness).

Here's how Jeremy Bentham's disciple John Austin frames the issue:

> The existence of law is one thing: its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard is another enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate approbation and disapprobation.[14]

Now that particular formulation, in severing so fully the 'is' question or questions ('Do people, as a matter of widespread fact, keep separate law and morality and in what ways do legal rules have moral components or involve moral evaluations at the point-of-application?') from the 'ought' question or questions ('Should people keep separate law and morality and should legal rules have moral components or involve moral evaluations at the point-of-application?') may oversimplify things.

14 John Austin, *The Province of Jurisprudence Determined* (Rumble, ed., Cambridge: Cambridge University Press, 1994 – first published 1832), p. 157.

For instance, as far as the amount of moral input or evaluating at the point-of-application is concerned, the 'should' question may be one of degree. Do we prefer our judges to have lots, some or as little as possible moral input, given that we live in a world where legislatures sometimes enact statutes that do little more than set out a moral test (e.g. 'best interests of the child' or 'good faith bargaining') and where many constitutions have bills of rights which, in effect, set out a series of vague, amorphous moral entitlements in the language of rights? Put differently, the live debate (as we know from an 'is' judgment) may not be whether we should eliminate *all* dependence by judges on moral evaluations but rather whether we should aim to *minimize* that dependence.

In any event, this book begins with issues related to that broad topic of the separation of law and morality. Perhaps approaching these issues from some of the different vantages sketched above will be of some interest.

The second broad topic I will tackle is judges and judging. Here we will need to consider the extent to which we can expect or rely on unelected judges to constrain themselves, the appointment of judges, the tensions between the demands of certainty and flexibility, the notion of the rule of law, the desirability of referring to (and deferring to) foreign law, democracy and more. Again, vantage will be stressed.

The third and final topic will be bills of rights. Connected or related subjects will include ways of understanding rights, their connection to paternalism, a brief mapping exercise, the issue of their interpretation, a digression on statutory bills of rights, and how these instruments appear from the various vantages.

Each of these three broad topics – the desirability of separating law and morality, judges and judging, and bills of rights – is clearly related to the others. The first two have been perennially important; for better or worse all three are in today's world.

Chapter 1
Separating Law and Morality – I

There are various ways to ask about the relationship between law and morality. The sort of question you ask might affect the answer you receive. Who asks the question might also affect what answer seems most plausible or appropriate.

The old-fashioned Benthamite question might be any of these: Is 'law as it is' distinct from or separate from 'law as it ought to be'? Is it good or desirable to keep separate law and morality, 'law as it happens to be' and 'law as it ought to be'? Should we insist that what law is be kept separate from what law ought to be?

Moving forward almost two centuries, Hart asked if there were any necessary connections between law and morality, though he argued and concluded that it is good to – hence that we should – keep separate law and morality (which is to answer one of the older Benthamite queries). Hart also asked the far simpler question of whether there were *any* connections between law and morality before answering that, contingently, there could be some. The legislators might draw on their moral convictions when deciding on the need for, and then wording and then enacting a statute. The point-of-application judges, when deciding how to interpret a statute where the application of that statute to the particular facts leaves the outcome uncertain and debatable – where it falls into the 'penumbra of doubt'[1] – might resolve the case and the uncertainty by appealing to their moral sentiments. Indeed Hart could have made the same point as regards the exercise of prosecutorial discretion, say, or the allocation of police resources.

And even in a Wicked Legal System, some few people, such as the top dictator and a few close allies, presumably think the bulk of the laws are good – that the ones facilitating this pogrom or that mass starvation will pave the way to some utopia or an improved racial strain or what have you. And this is true even if the preponderance of the officials in this same Wicked Legal System apply the legal rules solely out of fear or hope of advancement, all too aware that these legal rules they are applying are morally revolting or despicable.

That there can be *some* connections between law and morality for some few people even in a Wicked Legal System makes it extremely likely that there will be more such connections for more people in a So-So Legal System and a Theocratic Legal System, and more still in a Benevolent Legal System.

After Hart, the way to ask about the relationship between law and morality has become more and more conceptual. Rather than the Benthamite focus on separating law from morality for the eminently practical goal of reforming and

1 Hart, *Concept of Law* (Oxford: Oxford University Press, 1961), p. 119 *inter alia*.

improving the former, and so of increasing overall social utility and welfare, the questions asked today are more like these: Is there some possible legal system imaginable where the legality of a norm does not depend on any of its moral properties? Is it necessarily the case that there is no connection between law and morality? Can law be defined in a way that ensures no moral elements are included in it? Is there any conceptually necessary connection between what law commands and what justice demands? Or, back to Hart (who answered this in the negative), is it a necessary truth that laws reproduce or satisfy certain demands of morality?

In addition, especially when considering this issue from the Judge's Vantage, there is an element of intramural squabbling amongst those generally known as legal positivists. Does something, some moral principle say, count as law whenever the Judge appeals to it or relies on it to decide a case? Or is more than that needed? Must what is appealed to have a particular source-based warrant? Must what is observably – albeit, contingently – accepted by a jurisdiction's officials as a valid source of law have incorporated this moral principle into law for it to count (such as where a bill of rights might be said to incorporate certain vague, amorphous moral standards, enumerated in the language of rights, into law)? Or is even that not enough?

To varying degrees, the more conceptual formulations of questions related to the relationship between law and morality all divert attention away from the original Benthamite goal, namely that of reform and of making the law better. Most of today's legal positivists, in other words, are not much (if at all) concerned with whether it is desirable or good to keep separate law and morality, 'law as it happens to be' and 'law as it ought to be'. What is or is not necessary or imaginable or possible or definable can be speculated upon with little, if any, concern for what is desirable and good. On the Benthamite approach, it is the goal of good consequences that drives the analytical concepts and conceptualizing. It is not some stand-alone desire to construct the most philosophically sophisticated or satisfying theory of law that motivates the various concepts, conceptualizing, categorizing, and even intramural squabbling over what amounts to the meaning of the words 'law' and 'legal'. Rather, it is the recognition that law can be bad, and not just in the Wicked or Theocratic or So-So Legal Systems, but on occasion also in the Benevolent Legal System.

This illustrates one of the problems with framing this issue of the separation of law and morality in terms of labels such as 'legal positivism' and 'natural law'. As noted in the Introduction, such abstract, complex notions are both essentially contested concepts as well as ones that inevitably carry with them a penumbra of doubt or of uncertainty – meaning that there will be cases where there are good grounds for saying the label 'legal positivism' *does apply*, just as there are good grounds for saying it *does not apply*.

For instance, someone of the stature of Ronald Dworkin can discuss legal positivism with no mention of (or at the very least with no emphasis on) the old-fashioned Benthamite aspect of whether 'law as it happens to be' should be kept separate from 'law as it ought to be'. For Dworkin, legal positivism is about seeing