JUSTICE AND RULES: A CRITICISM

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In the debate with natural law doctrine, H. L. A. Hart regards the central thesis of legal positivism to be "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" ([1]). Hart generally defends this thesis, but he recognizes two significant exceptions. The first consists of the defense of "the minimum content of natural law": given certain features of the human condition (the vulnerability of persons to bodily attack, the scarcity of altruism, etc.) there is a "natural necessity" in having rules that forbid murder, violence, and theft ([2]). The second (which is of interest here) is the claim that "there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles" ([3]). The basis of this claim is the assertion that the notion of general rules (or the notion of rules *per se*, since no other kind of rule is acknowledged) "connotes" the principle of treating like cases alike, which is an essential condition of justice ([4]). Thus, according to Hart, a minimum of justice is necessarily achieved whenever human conduct is governed by rules. I wish to argue that this claim is mistaken.

The feature of legal rules in question has been referred to as the rule's *universality*. By this it is meant that the rule applies without exception to the cases subsumed by the description incorporated in the rule. Richard Wasserstrom claims that a strong argument can be made "for the analytic truth of the proposition that all laws are universal in this sense" ([5]). Yet it is curious that this claim is correct only for a sense of "case" that renders the claim trivial; for any significant sense of "case" the claim is false.

There are three distinct senses of "case" that are relevant

to this issue. According to the first, the term refers to the description itself that is embodied in the rule. Since the universality of a rule has to do with the relation between the description and what it subsumes, Wasserstrom's claim is clearly not directed to this sense of "case". It is essential to note, however, that Wasserstrom conceives of the descriptions in rules ("cases" in this sense) as invariably containing *class terms*. In this he is quite consistent with Hart, who explicitly acknowledges that the necessary connection between the notion of legal rule and the principle of justice presupposes attaching to a legal system "the minimum meaning that it must consist of general rules — general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals" ([6]). What is striking about this presupposition is that, as a matter of historical fact, not all legal rules are couched in class terms. Special, private, and local laws enjoyed a substantial existence in Anglo-American legislation. If in recent times there has been a tendency to prohibit such laws, where feasible, that does not mean that the notion of legal rule excludes them on logical grounds.

Indeed it is possible to take a further step and argue that there may be good reasons, in certain contexts, for not insisting on a definition of "rule" that necessitates the inclusion of class terms. In recent legislation dealing with administrative procedure in the United States, for example, "rule" is defined in such a way that it subsumes agency directives to named individuals for the performance of specific acts, as is involved in the setting of rates or prices ([7]). The advantage of this definition is that it separates out questions to be decided through legislative procedures (such as the holding of public hearings) from questions to be decided by adjudication. As a result, an enactment is not denied the rubric "rule" simply because it lacks generality, and an adjudicative decision is not labelled a "rule" simply because it affects a class of persons. Other features characteristically associated with the notion of rule — such as its being announced prior to its being applied and a violation of it leading to the imposition of a penalty — are retained. These features are problematic in their own way but cannot

be subordinated to the feature of generality, at least without invoking a dubious paradigmatic use or obscuring the diversity of facts. Consequently the claim of a necessary connection between governance by rules and the achievement of justice must be confined to rules of the requisite sort, which does not exhaust all the rules extant in legal systems.

If (in deferrence to common philosophical usage) we confine our attention to rules containing class terms, we may specify a second sense of "case" for which Wasserstrom's claim about universality is correct. According to this sense, a case is an instance (or member) of a class, as in the expression "this is a case of ——," where the blank is filled in by the description included in some rule. In other words, the description in the rule has a class of acts as its extension, which is the class of all acts of which the description is true. It follows, of course, that every act in the class is similar in the way specified by the description. Hence for this sense of "case" (and of "rule") it is true to say that the rule applies without exception to the cases it subsumes and that, as long as the administration of law is impartial, like cases are treated alike.

It is important to note that this second sense of "case" underlies Hart's argument. Thus he clearly asserts that the appropriate descriptions of cases "to which the person who administers the law must attend" are provided by the laws themselves. By way of example, he adds: "To say that the law against murder is justly applied is to say that it is impartially applied *to all those and only those who are alike in having done what the law forbids*" ([8]). It should be evident, however, that as an attempt to achieve justice this procedure won't do. It is not difficult to imagine (or to locate in case books) situations in which the apparent applicability of a law — determined simply by the fitness of the description — is properly superseded by a sense of the injustice that will result if the law is applied, because of attendant circumstances not anticipated by the law. In such situations like cases should not be treated alike. Now one might reply to this point by saying that the situation with unanticipated contingencies is, for that very reason, a *novel* case (not a like case) and so to be distinguished from

other cases that are correctly subsumed under the law in question. But this would be a mistake. For it is entailed by the definition of "case" (in the sense proposed) that the criteria of likeness are supplied by the law itself. Any act is a member of the class specified by the law as long as the description embodied in the law (however minimal) is true of it. Or to make the same point from the opposite side: it could be said that any act is *not* a member of the class specified by the law, since there can always be found *some* property of the act which is not contained in the limited description in the law. One is left with the choice either of saying that no two cases are ever alike (and thereby changing the meaning of "case") or of recognizing that to treat like cases alike may lead to grave iniquities (9).

This last argument indicates that there is a third important sense of "case" that needs distinguishing. In this sense the term refers in a general way to a situation or incident, or to a dispute between two parties, as in the expression "the case before the court". Here the term is not bound up with a particular description of the state of affairs and hence sets no limits to the consideration of relevant features. Cases of this sort, in fact, are subject to innumerable descriptions, no two of which are exactly similar. For convenience I shall refer to cases in this sense as "acts" and shall confine the use of "case" to the previous sense. Now it is clear that acts become cases only insofar as the descriptions embodied in legal rules are true of them. But since acts are not tied to determinate descriptions, they necessarily overflow the boundaries within which the rules attempt to confine them. For this reason, the identification of an act as a case does not commit one, on logical grounds, to making the same classification for any other act satisfying an identical description. Since the act necessarily satisfies alternate descriptions, it could as well be subsumed under an alternate rule, or under no rule at all. Thus, as the previous paragraph showed that there is no *moral* necessity in applying to a case a law that may logically be regarded as covering it — rather there may be morally compelling reasons against it — so the present paragraph shows that there is no

logical necessity either. Consequently we may turn around Wasserstrom's claim and say that a strong argument can be made for the claim that *no* laws are universal in any significant sense.

It would be appropriate to inquire how one could have thought otherwise. One plausible defense would consist of the claim that the relation between acts and cases is logically tighter than I have allowed. Relying on an analogy with the rules of games, it could be argued that legal rules create the possibility of certain acts (such as committing a crime or making a will) which could not exist except for their determination by the rules. The legal rules, in other words, are logically prior to the acts; it is only by reference to the rules (specifically, to the case terms they contain) that one can say what the acts are. Unfortunately I do not have the space here either to articulate this thesis or to enumerate its several difficulties ([10]). Suffice it to say that I am convinced that an examination of legal rules reveals that the descriptions of (at least most) acts contained in laws are eliminable, that is, logically independent of any rule in which they might be embodied. If this conviction is correct, an adjudicator with the task of applying rules is not logically committed to the descriptions incorporated in the rules at hand.

In conclusion, an examination of the logical relations between legal rules and the cases they (are made to) subsume fails to reveal any necessary connection between governance by rules and the achievement of even a minimum of justice. Insofar as this result is of importance for the debate with natural law doctrine, it saves legal positivism from a grievous impurity. It does so, however, at the apparent cost of revealing that the principle of treating like cases alike has no warranted application, whether as a matter of logic or justice.

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NOTES

(1) *The Concept of Law* (Oxford University 1961), pp. 181-182.

(2) *Ibid.*, pp. 189-195. A. P. d'Entrève has endorsed Hart's argument as sufficiently strong for a natural law theorist. See "A Case of Good Sense: Reflections on Hart's Theory of Natural Law", 9 Philosophy Today 2/4 (summer, 1965), pp. 120-133.

(3) "Positivism and the Separation of Law and Morals", 71 Harvard Law Review 4 (February, 1958), p. 624. Cf. *The Concept of Law*, pp. 153-157.

(4) Similar claims of a necessary connection between the notion of a rule and the principle of treating like cases alike are made by Isaiah Berlin, "Equality as an Ideal", reprinted in *Justice and Social Policy*, edited by F. A. Olafson (Prentice-Hall, 1961), p. 132, and by John Rawls, "Justice as Fairness", reprinted in the same volume, p. 82.

(5) *The Judicial Decision* (Stanford University, 1961), pp. 110-111. For a more explicit version of this claim, see Chaim Perelman, "Concerning Justice", in *The Idea of Justice and the Problem of Argument* (Routledge and Kegan Paul, 1963), pp. 39-40.

(6) "Positivism and the Separation of Law and Morals", p. 623.

(7) See especially P. R. Dean, "Rule Making: Some Definitions Under the Administrative Procedure Act", 35 *Georgetown Law Journal*, 4 (May, 1947), p. 492.

(8) *The Concept of Law*, p. 156 (emphasis added).

(9) Some philosophers attempt to avoid this dilemma by asserting that the principle of treating like cases alike, at least in the legal context, means only that there is a *presumption* in favor of existing legal categories, but that the presumption may be overridden if there is a good (i.e., just) reason for doing so. Aside from the incoherence of this position (particularly as to the notion of case), it should be observed that the presumption cannot be defended on grounds of *justice*.

(10) For an extended development of this thesis, see John Rawls, "Two Concepts of Rules", 64 *Philosophical Review* (1955), pp. 3-32. I have offered a detailed criticism of the thesis in my doctoral dissertation, "Critique of an Analysis of Formal Justice" (Columbia University, 1970), chapter III.