THE ABOLITION OF LAW AS A STANDARD IN LEGAL DECISION-MAKING

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I contend that the ultimate, ideal ethical limit of law is a society in which laws would no longer be needed, and that legal decisions often are, and always should be, made in accordance with this standard. The following remarks constitute a short elaboration on these contentions. They are intended to stimulate possible further discussion, rather than to be definitive.

First, some preliminary comments. I take the expression, "legal decisions", to refer to decisions within at least two quite different kinds of institutions with which we are at present familiar — namely, judicial decisions and legislative decisions. But that these two do not exhaust the varieties of legal decisions — even with reference to present social structures, to say nothing of past or of possible future ones — becomes clear if we consider, for instance, the typical decisions that are constantly being made today in the rapidly growing area of administrative law, with its tendency to allow greater play to the exercise of discretion, as opposed to the application of already existing rules. For my purposes, it is important from the outset to be fully aware of the extent of ambiguity implicit in the concept, "legal decisions", and consequently in any philosophical consideration of how they are or might be justified.

As a second and final preliminary set of remarks, I would like to justify my use of the word, "standard". This use is the result of a fairly voluminous literature inspired by Hart's *The Concept of Law*. The essential point, for present purposes, is that Hart's "rules" approach to law is, taken by itself, inadequate to do justice to the dimension of *purpose*, with which a more sociologically- and historically-oriented treatment of legal phenomena must inevitably deal (1). On way in which

the discussion of this has been advanced has been through an internal critique of Hart's book, beginning with the fact that he sometimes uses the word, "standard", to refer to legal criteria other than rules, although his usage is casual, not highly self-conscious, and hence not strictly consistent. In attempting further to sort out terms, Ronald Dworkin treats "standard" as the generic concept, of which rules constitute one species, and "principles" and "policies" are taken to be other noteworthy species ([2]). Without endorsing every aspect of Dworkin's lexicography, I may note that the sort of standard that I take the abolition of law itself to be comes closest to this term, "policy", but seems to me to be a more pervasive aspect of legal decision-making, one common to more different systems, than any particular policy, at least in the usual sense of that word, could be.

Clearly, on the surface, the assertion implicit in the title of this paper is paradoxical. For one thing, it would appear to be contrary to the self-interest of those engaged in various law-related professions — legislators, judges, and even philosophers of law — to work towards the abolition of the institution that sustains them. More importantly, our century in particular has witnessed innumerable calls, some of the most vociferous in the past year having originated in my own country, for a greater strengthening of what is termed "law and order". Thus, it would seem that the opposite of this supposed standard of which I am speaking attracts the more outspoken, if not the more numerous, advocates. Indeed, in the United States opposition to the advocacy of "more law and order" is sometimes said to be as unpopular and as irrational as an attack on motherhood would be; in view of contemporary concerns about the increase in world population, this analogy may prove — much to the discomfort of those who have drawn it — to be more apt than it at first appeared.

That the abolition of law both is and ought to be an ultimate, though indefinitely long-range, standard in legal decision-making, despite all the apparent evidence to the contrary, becomes plausible when we reflect on the following considerations. Law — meaning legal rules, institutions, and procedu-

res, taken as a whole — can under no circumstances appropriately be regarded as anything more than an instrument, a means for achieving certain desired social states of affairs. To erect it into an end-in-itself, an object of reverence for its own sake, is to be guilty of the most flagrant fetishism, or mystification, by valuing a product of human activity more highly than human individuals. In an age in which all valid law was regarded as a kind of emanation from the Deity, this mystification could at least be supported by theoretical arguments that were plausible within a framework of unquestioned broader assumptions. Today, however, it seems to me that most of those involved in making legal decisions would, if required to reflect sufficiently on the matter, find themselves forced to admit that law's values can only be instrumental ones.

This point now leads immediately to another. If, in principle, any or all of the desirable social ends for the achievement of which law exists were to be attainable through more direct, efficient means than that of legal processes, then, *ceteris paribus,* those alternative means would be preferable, and the legal processes should be bypassed. This principle, when generalized, would give us the total desuetude or, since it amounts to the same thing in practice, the abolition of law as an ultimate standard. Moreover, it seems to me fairly safe to assume that, in any particular situation in which law is brought into play, it is always possible to *imagine* a more direct and efficient means of bringing about an optimal future state of affairs than the use of legal procedures.

These broad generalizations will appear quite plausible if we now apply them to some typical instances of legal decision-making. The initiator of new legislation is obviously motivated by the spirit of the familiar American expresson, "There ought to be a law", with respect to some particular area of human activity; he would probably admit, however, that the procedure of enacting and of enforcing every new piece of legislation consumes considerable time, money, and other scarce human and material resources, so that, in principle, it would be preferable if the needs for which the legislation has been designed

could be met without the use of this complicated legal machinery. The institutions of criminal law are obvious, and even paradigmatic, illustrations of my basic point: the jury, the judge, and other court officials could be freed to engage in more constructive social pursuits if the numbers of crimes and allegations of crime could be reduced to the vanishing point. (Citizen jurors at lengthy trials are in a position to be especially perceptive about this). But even in such other areas as, let us say, the law of contracts, a satisfactory out-of-court settlement of disputes, whenever it can be reached, is preferable to a judicial one for reasons both of efficiency and of the greater satisfaction of the disputing parties that is likely to ensue.

It is comparative truisms such as these that, far more than any amount of moral exhortation, lend some appearance of plausibility to the anarchist's visions. Although a truly conservative temperament would resist the suggestion that a society should work towards divesting itself of any of its established institutions, much of what passes for political conservatism today actually shares in the anarchist's distaste for the trappings of modern legal institutions. The call for "law and order", when interpreted in accordance with the intentions of many of those who issue it, proves to be, in reality, a demand for a certain sort of order even at the expense of the institutions of law.

And this reflection should lead us to realize that the standard of abolishing law can be understood and employed as a guide in two quite opposite ways ([3]). The first way of conceiving of this standard is to take as one's ideal a totally coerced and habituated society (one can imagine using the technology of drugs or of electronic control over brains in order to achieve this effect) in which there was no possibility of choosing alternative courses of social conduct and thus no need whatever for legal institutions — a society of human automata. It is this version of the standard of abolishing law towards which the major proponents of social order for its own sake seem, in their comparatively modest and un-self-conscious fashions, to be pointing. In considering this version, I think that we can

see the danger of accepting without an important qualification the contention, crucial to my earlier argument, that alternative means would be preferable, and legal processes should be bypassed, if the desirable social ends for which law exists were to be attainable through more direct, efficient means. At that time, I employed the familiar qualifying phrase, *ceteris paribus.* We see now what these "*cetera*", these other things, are: a whole set of human values, other than and often in conflict with that of efficiency, that law can and often does preserve and promote, and that the zealots for order would be content to disregard in following their version of the standard of

It is, however, about the *second* version of this standard that I wish to speak in conclusion, for it is this version that interests me more and even attracts me. In this version, the ideal is a society of individuals so enlightened that, while they would still be confronted with rules of conduct of all sorts, they would constantly be making conscious choices as to whether to accept or to reject any one of these rules, and no coercion would be exerted over any member's choice. In such a society, members would settle *all* disputes among themselves, without institutional intervention "from above"; crime would, by definition, be eliminated; and projects for the society's amelioration would be initiated and carried out by self-organized, self-directed, associated groups of members. There would still, *ex hypothesi,* be rules of social conduct, and hence law in *this* sense; society would still be structured — ordered, if you will. But there would no longer be any need for the institutions, procedures, and personnel that together comprise what we take to be modern law; there would be no need for "*legal*" decisions.

Needless to say, this is the merest dream, as far as the foreseeable future is concerned. That is why the objection that I raised earlier, to the effect that it would be against the self-interest of judges, legislators, and legal philosophers to take the abolition of law as an ultimate standard, is irrelevant for present or foreseeable future generations of the individuals engaged in these professions. There is no contradiction be-

tween admitting this and yet regulating one's official conduct in accordance with the recognition that the world would be a better place if, through the evolution of a society of the sort to which I have just pointed, one's services were no longer required.

There is, I believe, an important value in discussing utopian, limiting ideals of this kind, precisely in that they can serve as standards even in the most ordinary practices of decision-making in all legal areas. I have, however briefly, suggested that this ultimate abolition of law of which I have been speaking actually *does* serve, usually in a vague and unclarified way, as one standard to which many judges, legislators and other decision-makers make reference in executing their official responsibilities. My purpose has been, first, to try to clarify this standard by more fully drawing out its implications, as I see them, and second, to advocate its conscious and universal adoption.

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NOTES

(1) See McBRIDE, W. L., *Fundamental Change in Law and Society: Hart and Sartre on Revolution* (The Hague: Mouton, 1970), p. 220.

(2) DWORKIN, "The Model of Rules", in G. Hughes, ed., *Law, Reason, and Justice* (N.Y.: N.Y.U. Press, 1969), p. 13.

(3) The fundamental distinction that I am drawing here closely parallels that between the two possible directions to be taken in superseding politics and establishing a "post-political society" that I discuss in "The Nature of Political Philosophy and the Attempt to Go Beyond Politics", *Akten des XIV. Internationalen Kongresses für Philosophie* V (Vienna: Verlag Herder, 1970), pp. 247-254.