The papers were illuminating and, when they disagreed with the book, either rightly looked for further clarification or identified genuine shortcomings with some, but not all, of which I try to deal.

I am very grateful for Guðmundur Heidar Frímansson for his generous and accurate review and particularly for his correction of the assertion made on p.1 of *LJC* that the Law Speaker recited all the laws annually at the *Althingi*, when, in fact, only one third of the corpus was recited annually. I regret and apologise for this mistake.

Finally, I would express my thanks to our editor, Giorgio Baruchello, who has gone to much trouble to publish these essays. I shall respond to them in the order in which Giorgio received them and sent them to me

Hjördís Hákonardóttir: "Equality: A Principle of Human Interaction."

For Hjördís [H] that people ought to be treated equally is a fundamental principle in her idea of human society; she argues "…that *equality* must have an even stronger, and in particular, a more *fundamental* role in a just and flourishing community in which 'we can lead our lives together in peace and justice'." [The internal quotation is from *LJC*.] There seems to be an omission in her written text; it is not said what equality must be stronger than. I understand her to have meant that equality must have an even stronger and more fundamental role than justice. Earlier in her paper she notes correctly that in *LJC* that a right is held to exist only when it is established. With that she disagrees: "I have to doubt that an entitlement to a fundamental right depends on its acceptance; that claim seems to go against the very essence of the nature of fundamental rights."

I think that those disagreements are due to some extent, but perhaps not entirely, to the use

of words, for there is nothing in *LJC* to support the idea the people are to be treated unequally when it is just to treat them equally. Indeed, both Aristotle's and, centuries later, the Roman definition of the just includes the idea that equals are to be treated equally and unequals unequally. Furthermore, if one genuinely holds that two people are for present purposes in all relevant respects equal, it is impossible reasonably to treat them unequally, no reasonable discrimination would be possible and any discrimination between them would necessarily be based upon a criterion that one had claimed to be irrelevant. Bernard Williams, whom H quotes approvingly, does not claim that everyone is to be treated equally; his claim is that, *qua* human, people are to be treated equally and to discriminate between them requires the introduction of a relevant criterion. The most fundamental principle is not that one ought to treat all humans equally, for that principle inevitably evokes the question, Why? And the answer to that question is that humans, in important and fundamental respects, specifically but not exclusively *qua human*, are equal. Accordingly in the respects that they are equal, they ought to be treated equally. That principle evokes no further questions because, as I have said, it is impossible to distinguish between equals; that is simply the meaning of things being equal.[1] The crucial question then becomes how are humans *qua human* to be treated; to which question to say that they are to be treated equally is not a satisfactory answer. The answer that they are to be treated justly is a heuristic answer: a human *qua human* is to given what is due to him or her *qua human*. What that is is not yet known but is the work of justice to discover. However, there are situations in which one does not treat other simply *qua human*; in those situations humans are in very many important and relevant respects unequal and in those respects one ought to treat them unequally. There is, for example, a crucial difference between one accused of a crime, one acquitted of a crime and one convicted of a crime. To claim that the one accused, the one acquitted and the one convicted are to be thought of as in all respects equal and all three to be treated in the same way is unreasonable unless one holds that the manifest differences between them are irrelevant. Many manifest difference are, of course, in some circumstances irrelevant: to the judge on a refugee tribunal, "It is irrelevant whether the claimant is a man rather than a woman; whether he has brown hair; whether he is highly educated; whether he speaks the language of the state where he seeks refuge; and so on indefinitely" (*LJC* ,Ch.6.6. 159). Two manifestly different applicants to a refugee tribunal are taken to be relevantly equal and to be distinguished only on the grounds of fulfilling or not fulfilling the criteria of the Refugee Convention. But citizens, non-citizen residents, temporarily visiting workers, asylum seekers and tourists are usually treated

differently because it is usually held – rightly or wrongly – that to discriminate between them on that set of criteria is just. The rights of citizens and non-citizen residents are not identical precisely because when they are being considered according to that difference they are not then being considered simply *qua* human.

Whatever one's position on the matter of procured abortion, much debate has turned on whether a foetus at one stage of development is relevantly equal to one at a later stage and from a new born infant. The differences between them at the different stages cannot reasonably be denied; the question is whether or not those differences are sufficient for abortion to be morally good at one stage and morally bad at another. In the Twelve Tables, the first law on the fourth table requires that "A notably deformed child shall be killed instantly". Clearly, the makers of that law considered the manifest difference between a well-formed and "a notably deformed child" to be a relevant criterion, and that the two kinds of children were relevantly unequal. In many modern states the manifest inequality between a foetus at one stage and one at another is taken to be a criterion permitting abortion at the earlier stage; none of those states, I think, accepts deformity as a criterion for infanticide. The more basic principle is, therefore, the ancient principle of justice: "treating equals equally and unequals unequally render to each what is due". What constitutes relevant equality and inequality, what is due both in the general case and in the particular circumstances, remains to be settled and is the fundamental business of moral and jural argument. It was not the business of *LJC* whose two authors, Tim Murphy and I, could differ on such questions. From what is said of the argument about abortion and infanticide in this paragraph, nothing about my personal position on either question can be inferred.

H thinks the position taken in *LJC* to be a "down to earth relativistic view". I think it is not; if I am wrong, the book is deeply and irretrievably incoherent. It would be relativistic if, and only if, it included the proposition that there could be no true moral conclusion, a proposition that is most explicitly argued against at pp. 175 -6 but which runs throughout. What is said, on the one hand, is that people have had, have and will continue, for various reasons, to have different and incompatible views, and, on the other hand, that the conclusions that humans reach can be no more than the best available in the light of present

understanding and evidence; some are more tentative than others; and so physicists know that their present conclusions are not "absolutely certainly true". As Victor Hugo wrote "*La science est l'asymptote de la verité, elle approche toujours, elle ne touché jamais*" The evidence for very everyday common sense judgements is often much stronger. No one now reading this essay can reasonably doubt that it is written in English; someone who knew no English whatsoever would simply not know.

The proposition that NN and AA are entitled to be treated equally rests on the underlying presupposition that the situation in which they are to be treated equally is one in which any differences – inequalities – between them are irrelevant and to be ignored. The evidence for the proposition that equals are to be treated equally is the discovered inability of human intelligence to distinguish between A and A, sometimes referred to as the principle of identity. The principle itself – not its theoretical discovery – is a natural and unavoidable characteristic of the human mind. To hold that men and women are to be treated equally is not to hold that men and women are in all respects equal, which manifestly they are not, but that the inequalities (or 'natural differences') between them are to be ignored in the some situations.[2] It is, of course, true and acknowledged in *LJC* , that unjust distinctions on foot of those inequalities have been, still are, and will continue to be made. That differences do not always justify distinctions is a very ancient discovery, for example, the discovery that in a court case the differences between the poor and the rich are not to count. The earliest written expressions of that discovery with which Westerners are familiar are in the Torah (Ex. 23.6; Dt.16.19); when or where it was discovered is unknown but before the rule was written it was already known in practice that it was just to conduct adjudication in that way. The inequality between the litigants was explicitly recognized but in that situation no account was to be taken of it. There are, however, situations in which some inequalities are relevant: e.g., who is entitled to the franchise and who is not depends on what are held to be relevant inequalities – the age at which a person is entitled to the franchise differs from jurisdiction to jurisdiction; but no one suggests that children of three years ought to be enfranchised. Foreigners entitled to residence in a state differ from citizens and whether or not they should be entitled to vote may be disputed. No-one I suspect finds it unacceptable to make those and similar distinctions. The adage – which does not settle how they are to be treated – "equals are to be treated equally, and unequals unequally" may be more clearly, if more pedantically, expressed: "those who are relevantly equal are to be treated equally;

those who are relevantly unequal are to be treated unequally". The question turns on determining who, and in general what kinds of people, and in what kinds of circumstance are relevantly equal or unequal, and about that there will be dispute. And what is the just equal or unequal treatment remains to be discovered.

Women and men are undeniably unequal in very many ways. The question is to determine in which situations some of their inequalities are to be taken into account and in which some or all of their inequalities are to be ignored. Neither H nor I think that the differences between women and men or between landowners and tenants is relevant to granting the franchise but, as everyone knows, that was not always, and even recently, the prevailing view throughout Europe. Did women in the Canton of St Gallen have the right to vote in 1956? The general rule governing the franchise is that in any particular state in which the franchise exists, if only a defined type or kind of person has the right to vote, then only if NN is that type or kind of person is NN entitled to vote. If two men dispute over the ownership of a piece of land, they are to be treated equally in that, for example, their political standing in the society, their physique, or their wealth is not to be taken into account, but when the court, having heard the opposing arguments with equal care, determines that land belongs to NN rather to AA they are no longer to be treated equally so that the land is not to be divided equally between them but be given to NN.[3] What is just is equality and inequality according to a criterion; when people are equal or unequal according to the relevant criterion they are to be treated equally or unequally.

With H, I agree that men and women were once generally thought of as unequal in ways that were mistaken but I find it odd that she quotes Kymlicka apparently approvingly when he writes that 'women have been "associated with the merely animal functions of domestic labour" '. (The internal quotation is from Kymlicka.) Are people – both men and women – who work in the university restaurant engaged in 'merely animal functions'? Preparing food, which in many cultures in the province of women, is a cardinal difference between humans and other animals, and when we eat we are not engaged in a merely animal function. Is feeding babies at the breast a merely animal function? Is the education of babies and small children, a task that has traditionally fallen to a greater extent to women, a merely animal function? In many hunting and gathering communities, women gathered (and, in many

cases, what they gathered provided the main sustenance for the group) and men hunted? Is hunting cultural and gather a merely animal function? Universally, young children learn their language predominantly from women – not necessarily or often only from their mothers – and did they not learn to speak they could not become normal fully developed human adults and human society would not persist beyond one generation. Only if one restricts by arbitrary definition one's notion of what constitutes a cultural goal to what some men rather than women or other men do, and thinking of every other work as the product of natural instinct is it the case that women's activities do not achieve cultural goals.

A very good example of women being treated differently from women in ways that would nowadays be generally thought unjust is found in Perelman's discussion of women's claim to enter the legal profession as either barristers or solicitors in Belgium between 1889, when it was thought " too evidently axiomatic to require explicit legislation that the administration of justice was reserved to men" and 1946 when "the reasons given by the Cour de Cassation in 1889 seemed to be so contrary to contemporary opinion that they had become ridiculous.". ***[4]***

If those who are relevantly equal are to be treated equally and those who are relevantly unequal to be treated unequally, is equality then no more fundamental than inequality? H agrees with Bernard Williams that, as she writes, "Any difference in the way men are treated must be justified …" I think that to be a crucially important and true statement with which I totally concur. I do not understand anything that I have written here or anything found in *LJC* goes against it. But equality too needs to be justified, for the moral question always is either the particular "What am I to do now?" or the general "What is to be done in this kind of situation?" In the domain of justice those question become "What is now to be rendered to whom? And "In this kind of situation, what is to be rendered to what kind of person?

In our everyday dealings with one another inequalities may be more apparent and the temptation great to take them inappropriately into account when it is to one's profit to do so, as when another's interest clashes with my own and I am tempted in bad faith and

unquestioningly to prefer mine. The virtue of justice demands more of us; the other is a demand to go beyond ourselves. The admonition that the judge must not treat the poor and the rich differently is necessary, not simply because it is good which it is, but because the temptation to do otherwise may be great. The injunction to treat everyone with equality of concern and respect risks becoming vacuous precisely because it is apparently too exact and tends to evoke no further question. What does it mean to say that dictators guilty of genocide – of which in the last century there have been many – are to be treated with the same concern and respect as their victims or opponents? I cannot think of those who joined the Dutch Nazi Party, the NSB, and assisted the "Green Police" – German Police force that concentrated on rounding up Jews for deportation – with the same respect as I think of those Dutch non-Jews who tried to protect their Jewish compatriots; and I do not think that I should. Even when only thinking about other people, the question as to what is due to whom arises? Thus, the injunction to treat everyone justly at once evokes the question as to what in the particular circumstances is just? I do not for a moment think that Ronald Dworkin thinks otherwise; but the adage does not make that clear.

H contends that an entitlement to a fundamental right does not depend on its acceptance; she is, consequently, reluctant to accept the idea in *LJC* that a right exists only if it is acknowledged. Again, the disagreement is, I think, at least in part, a matter of how the words are used. The rules governing citizenship vary from state to state and, within the same state, may vary from time to time. In Ireland, by the Constitution of 1937 it was established that a person born in Ireland was entitled to Irish citizenship irrespective of the citizenship of the parents. By the 27th amendment to the Irish Constitution in 2004, that right was abolished, and the right to citizenship now depends on the citizenship of one's parents – only if at least one parent is a citizen, is the child entitled to citizenship. Those who voted against the amendment – as I did – may think that it was a great and sad mistake to revoke the former right and that the state is the worse for it. The majority was not of that view. But, however one thinks of the matter, in Ireland to be a citizen because one has been born in Ireland is not a right. It once was, I think that it ought still to be, but it is not. The question as to whether or not something is or is not a right or entitlement is a question about present jural fact; a question about what rights actually exist, not about what rights ought or ought not exist.

If one writer uses the word “right” to mean “an entitlement that ought to exist whether or not it does” while another uses the same word to mean “an entitlement that actually exists in a given jurisdiction” they are only apparently contradicting each other and are in fact writing of different things. I think that when H writes of fundamental rights: “I have to doubt that an entitlement to a fundamental right depends on its acceptance…” she is using the word to mean “an entitlement that ought to b”. She gives as examples of “natural” or “human” rights those set down in the *Universal Declaration of Human Rights.* It is true that the rights in that document are set down as they might have been enacted in particular states; for examples, in Article 9 it is asserted that “ “No one shall be subjected to arbitrary arrest, detention or exile”; in Article 21 (1) that “Everyone has the right to take part in the government of his country, directly, or through freely chosen representatives.”; in Article 26 (1) “That everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. …”; and in Article 19 (1) “Everyone has the right to freedom of movement and residence within the borders of each state.”

It is also true that René Cassin and others involved in the composition of the Declaration hoped that it would become law in all states. The status of the Declaration and of the rights set down in it have been discussed at length, and the emergence of a Court of Human Rights and other international courts has established rights that were not until then rights. I shall ask only in what senses and to what extent did the rights in the Declaration exist at the time of its composition in 1948.

It is clear that those who composed the Declaration thought that the rights set down in it ought to exist in the kind of state or communities they had in mind. They were not thinking of those hunting and gathering or nomadic-pastoral societies that still existed in which some of the rights in the Declaration would make little or no sense. It does not make good sense to say that in a small hunting and gathering community education shall be free at least in the elementary stages, when what is meant in the Declaration is that the financial cost of a child’s education will not fall directly upon the parents but upon the state that will pay for it through its power of raising taxes or that (Article 24) “Everyone has the right to rest and leisure and periodic holidays with pay.” Such rights not alone do not, but cannot, exist in a hunting and gathering society. The Ngatatjara of Western Australia are not a state but,

thinking of them as a society, the right to freedom of movement set out in Article 13(1) quite explicitly does not exist since parts of the land that they think of as theirs are forbidden to men and other parts to women. Such rights are simply not applicable to humans as humans but only to humans living in a certain kind of state and, in some cases, (eg Article 24) only to certain kinds of people, namely, paid employees.

The framers of the Declaration were trying to work out a set of rights that would enable the recovery of societies from the experienced but still hardly imaginable collapse of European civilization. The Second World War the European theatre was of two kinds: an imperial war similar to the First World War and other wars with which Europe had for centuries been familiar but it was also the extraordinary, horrifying and scarcely believable Nazi disease that had revealed, to the European self-satisfied moral sense of itself, an unsuspected or not clearly acknowledged evil at the heart of European civilization. Had that disease not been sufficiently widespread in the prevailing communal morality (the living law) of Germany and the countries that it occupied, Naziism would not have succeeded. The rights expressed in the Declaration had not in fact existed in Nazi Germany or in the states that it had overrun. Consider again Articles 9 and 13 (1): “No one shall be subjected to arbitrary arrest, detention or exile.” and “Everyone has the right to freedom of movement and residence within the borders of each state.” H’s doubt has led me to clarify my thinking. A right may be absent in several ways not only one. It may not exist in a community because it has never occurred to anyone to introduce it – I suspect it has never occurred seriously to anyone to give the right to vote to three year old children or to visitors who happened to be present on election day. It may not exist because, although it has been considered, it has been rejected, as the right to citizenship by birth in the state has been rejected in Ireland. It may not effectively exist because, although it is formally established, it is not honoured, as it is alleged that, during the war in Irak, the right of prisoners not to be tortured (Article 5) was not honoured by the UK, the US, the other states that allowed their aeroplanes carrying prisoners to land on their territory, and, obviously, the states, such as Libya, on whose territory and by whose servants the alleged torture occurred.

What was the status of the right set down in Article 9 “No one shall be subjected to arbitrary arrest, detention or exile”? It may once have been, but in 1948 was not, a new and

surprising thought. There had no doubt been in the past, and still were, states where arbitrary arrest, detention and exile at the whim of the ruler were commonplace and at least acquiesced in by those who could do little about them, but, for centuries, that the ruler's authority was limited had been accepted in theory in Europe. Europeans had begun to assume, more or less confidently, that they enjoyed that right – it was part of the rule of law. Until Naziism and Stalinist Communism. There had been times when people had not the right to freedom or thought or religion [see Articles 18 and 19 of the Declaration] and to an extent that situation remained as in Francoist Spain. It had at times been forbidden to be Catholic or Protestant or Jewish or Islamic or Atheist … but never, until Naziism, had it been the case that some people were forbidden not only not to be themselves but, quite simply, not to be. There had been massacres and various kinds of killing had been legal but never before had it been law that a particular race was to be eliminated. The Nazi state had removed, from a kind person, not because of what that person thought but because of what that person unchangeably was, the right to exist. Here, perhaps, is the core of the ambiguity. Dutch Jews that were sent to the transit camp at Westerbork and thence to Auschwitz or other extermination camp were not treated with a concern and respect to which other Dutch citizens had a right; under Dutch law they had the right not to be exterminated; under Nazi law they ought to have had that right but had not. The verbal ambiguity arises because we can, somewhat confusingly, describe that situation in the sentence: "It was not right that the Jews had not that right". Where Dworkin writes of "a natural right of all men and women to equality of concern and respect …simply as human beings…" I should write that when I deal with human beings simply as human beings I ought to treat them with equal concern and respect – although it is yet to be discovered what that concern and respect requires – and that at that level everyone ought to be so treated and to have that right acknowledged in the law, but when I think of Hitler, Goering, other dictators and their followers I think of them not "simply as human beings" but a men and women who did things for which I cannot respect them. Men and women arraigned before a war crimes tribunal are not simply human beings but are accused of crimes and ought, as accused not simply as human beings, to have the right to be properly judged and to be convicted only if the available evidence is sufficient. But once convicted they are no longer treated as accused; and the rights of the accused and the convicted are different. They remain human beings and what rights they have simply as human beings remain. Two people thought of simply as human beings are equal – just as Q and Z considered simply as letters are equal – and cannot be treated unequally for to treat them unequally is inevitably

to introduce a distinguishing criterion.

This question remains: did Jews in Nazi Germany and in the occupied countries have the right to live? That they ought to have had that right is to me and, I suspect, to all readers, correct. But that is not the question. The question is one of fact: did they in fact have that right? The answer to that question is that they did not. They had had it; they no longer had. There is a further question: did many know that Jews ought to have retained that right? Certainly some did and for them a practical question – sometimes called a question of conscience – arose as to what they were to do about it. It was to a situation of that latter kind that Chaim Perelman referred when he wrote in the passage quoted in *LJC* (fn 53, p.158): "When clearly iniquitous legislation prevents him, for whatever reason, from carrying out his task in accord with his conscience, the judge is morally obliged to resign. He is not merely a calculating machine; and if by his participation he contributes to the functioning of an iniquitous order, he cannot hope to evade his personal responsibility." That crux applied and applies to each one of us. Suppose another possibility. Suppose, which was not the case, that everyone – other than Jews – had been convinced that it was right to eliminate Jews and that the very idea that Jews might have the same right to live as others simply did not occur to anyone; what then is to be said of a Jew's right? Not alone do they not then in fact have the right but now it occurs to no-one – except themselves – that they ought to have it. When, because of what they believed, Catholics were killed by Protestants, Protestants by Catholics, Cathars by Christians , Jews by Christians … it seems that few thought those actions wrong; people were thought not to have the right to "freedom of thought, conscience and religion …" (Declaration Article 18 and see Article 10 of the *Déclaration des droits de l'homme et du citoyen*"). Those who thought that people ought not to have the right to freedom of thought … were wrong to think so but they did think so, and the right did not exist. Similarly, and this we all too easily forget, convinced Nazis thought that Jews did not have the right to live; they were wrong to think so, but they did think so. The great horror of the Shoah is not only that so many Jews (and others) were exterminated but also that many thought it was good (right) to exterminate them.

Unlike the physical, chemical, biological or zoological world in which we humans live, and the laws of which apply to us for we are animals, the properly human world is jural. It is the

product of human feeling, thought and decision emergent on that animal base. It is in principle but never wholly in practice what it ought to be. Not alone are we fallible so that any time some of those things that we think ought to be we later discover ought not to be and, perhaps too, ought not to have been but we are also weakwilled – in an older and outmoded terminology "sinful". We do what we ought not to do, and fail to do what we ought to do. Perelman's judge may be "morally obliged to resign" – that is what he thinks that he ought to do – but he may fail, for whatever reason, to do so. A right that ought to exist and that people think ought to exist may not, and one that ought not to exist may prevail. A right that it is thought ought to be but is not, does not exist in practice, but it does nonetheless exist as what is thought ought to exist. It exists as an aspiration or a demand. Whenever anyone is convinced that they ought to do something, that conviction is present in the human world but what ought to be done but is not yet done does not in practice yet exist. There is a critical gap between the judgment that one ought to do something and the decision to do it. In that way, a right that ought to exist does not exist until it is acknowledged. What is demanded but not yet acknowledged is a claim. The seventeen articles in the French Declaration of 1789 were expressed in the indicative mood as rights; they were not yet rights but demands. The rights described in the Universal Declaration of 1948 were rights that its authors thought ought to exist in every state although they knew very well that in many states some at least they did not; it was perfectly evident then, as it still is, that the right expressed in Article 21 (1) "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives", did not, and still does not, exist in many of the member states of the United Nations Organisation. The rebels in the present civil war in Libya intend to establish rights that do not yet exist.

One who holds that a particular arrangement ought to be the case may be mistaken, just as one who holds that a particular factual statement is true may be mistaken. And so, about what ought to be the case there will inevitably be both disagreement, agreement and dispute and in coming to their different conclusions humans may be not alone honestly mistaken, but corrupt.

H early in her paper makes what I found to be an extremely important point about the

"living law" which seems to her not to "*suffice* to promote 'a context in which …we can lives our lives together in peace and justice. ' " (The internal quotation is from *LJC*, xv). She is completely correct and completely at one with what is put forward throughout *LJC.* Neither any living law nor any legislation will produce a perfect human social order because, to paraphrase what she writes, the darker elements at work in humans will influence the order that will always in part be the production of those in power and will almost inevitably illegitimately and to a greater or lesser extent serve their sectional interests: "…the living law is not necessarily right and not necessarily universally shared. No human institution is utterly without bias [that is, without disordered sectional interest] and the living law is not an exception. It is not an unbiased, unchangeable, infallible supervening law but it does express what is, or has been, generally accepted to be good." (*LCJ,* 53-4) "No moral tradition will be in all respects good; it will inevitably be corrupted by individual and group bias. Some powerful individuals or groups of individuals will, given time and opportunity, favour traditions that enhance their power over others…" (*LJC*, 63) The "communal law is not necessarily in all respects good, for in every society there are the relatively more or less powerful, and the more powerful can, and do, to a greater or lesser extent impose their biased and selfish interests upon the less powerful. Societies are at all times and inevitably dialectical" (*LJC*, 261) I should add that development, as distinct from mere alteration, is possible only if the present is imperfect; decline is possible only if it possible to fall away from present true discoveries and present good decisions. If one opinion, one decision, or one state of affairs is a good as any other, neither development nor decline, but only alteration, is possible.

What is crucial is that the living law and customs of a society are not the product initially of legislation, although they may later be taken up in legislation; they are simply the way in which over time and interaction people in a community think that they ought to live; its contents are "those ancient customs that, having being accepted by those who use them resemble written law" (Justinian: Institutes, I.II.9 and cf. Digest 1.3.32 ff) But, as H correctly insists, "it does *not*, …*suffice* to promote "a context in which ….we can lead our lives together in peace and justice." The entire page in which the internal quotation is the final paragraph (*LJC*, p.xv) is dedicated to the proposition that human societies are intrinsically corruptible and will always be to a greater or lesser extent corrupt. The proper function and goal of law is to promote peace and justice but that goal will never be completely attained;

humans remain prone to stupidity, pride, covetousness, anger, gluttony, envy and sloth.

With the proper function of the social order, which is to allow humans to live together in harmony and justice, slavery does not sit well. Slave owners commonly knew that the role of slave was not one that slaves could be expected to enjoy or in which they could fully and freely achieve the human good. And yet slavery existed, by some defended, by others attacked. Already in Aristotle's time the institution of slavery was controversial. Aristotle notoriously defended it and seems to have thought that at least some men and women were naturally slaves whereas others were naturally masters. (The discussion is more subtle than headline condemnation allows.) The Sophists , Thrasymachus, Antiphon, and Lychophron among others argued against it and are said to be those to whom Aristotle refers when he wrote (*Pol.* 1253b20ff) that some "consider that the power of the master over the slave is against nature because it is only by convention that one is a slave and another a master, and that by nature there is no difference between them; and so, because it rests on power, the institution of slavery is unjust." In Justinian's *Institutes* (I.III.2 *Digest* 1.5.4.1) slavery is said to be "an institution of the law of nations (*contitutio juris gentium*) by which one is out under the dominion of another contrary to nature." That is one of the very few passage in Roman Law where the *ius gentium* is distinguished from what is natural. [5](Ulpian's definition of the *ius naturale* (*Inst.* I.II.Preamble) is rarely used and the term is several times identified with the *ius gentium*.). In the book on friendship in the NE Aristotle wrote that the master cannot be friends with the slave *qua* slave but *qua* man he can. [6]

That is an appropriate place to end, for the discussion of slavery shows, I hope, how H's insistence of the natural equality of humans as humans has urged me to clarify some aspects of the idea of relevant equality and inequality. For that urging I am most grateful.

Hafsteinn Thór Haukasson: A few words on authority

Hafsteinn Thór's (HTh) paper discusses Hart and Raz and raises a matter that is central to their work and is discussed but perhaps not concentrated upon in *LJC*: the distinction between moral and legal obligation. In response to HTh I shall discuss this question: how are the propositions "NN is morally obliged to do X." and "NN is legally obliged to do X." related? It is one of the matters in Oran Doyle's paper and I continue the discussion in the response to that paper.

Here, without argument, I take "law" to mean the command of one entitled to command another who is reciprocally obliged to obey. "Law" is not used exclusively in that way in *LJC.*

If NN is commanded by a thief to hand over his money, he is not legally obliged to do so because, by hypothesis, the thief is not entitled to command NN to do so. If NN decides to hand over his money he may later say that he was obliged to do so because he believed that had he not done so he would have be attacked. The thief had threatened him and he had believed the thief. His reason for yielding to the thief's demand was that he preferred to hand over his money than to endure the pain that the thief had threatened. Was he morally obliged to act in that way? The proper answer is that he was if he thought that, in the circumstances, it was the good thing to do, and was not if he thought that, in the circumstances, it was not the good thing to do. Most fundamentally, one obliges oneself; one is obliged by one's moral judgment that X is the good thing for one to do in the present circumstances. A general moral

norm that a particular person accepts expresses what that person thinks that it is good to do either always or for the most part in a kind of circumstance, e.g. it is never good to rape someone; for the most part it is good not to deprive someone of his property.

[7]

Hart's example of the bank robber and my slightly different example of the thief (My example gets over the complication that the bank teller may have instructions to hand over money if threatened.) both make the assumptions that the person demanding money is not alone not entitled to do so but also doing what is wrong. In both cases, the person asked to give the money is asked to give it to someone who is not entitled to have it, and by someone who is not entitled to demand it. The difference between the bank robber who wishes to withdraw money from the bank , and the account holder who wishes to do physically the same thing is that the robber is not entitled to withdraw money whereas the account holder, depending on the state of his account, is.

In the effort to eliminate confusion four cases are worth considering:

[1] AA is not entitled to command NN but, nonetheless, commands NN to do something that NN ought to do whether or not AA commands him to do it.

[2] AA is in general entitled to command NN but commands NN to do what NN ought not to do.

[3] AA is in general entitled to command NN, and commands him to do what NN, absent the command, ought nonetheless to do.

[4] AA is in general entitled to command NN and commands him to do what NN, absent the command from AA, is entitled to do or not do.

The question as to why AA is or is not entitled to command NN is set aside for the moment. If it is assumed that if AA is entitled to command NN, then NN is legally and/or morally obliged to obey and that if AA is not entitled to command NN, then NN is not in principle and in the general case obliged to obey. A command as, for example, in [1] below to return a

stolen wallet may relate to a specific case or may be the general command that stolen property is to be returned to its owner.

I shall consider each case briefly.

[1] AA is not entitled to command NN but, nonetheless, commands NN to do something that NN ought to do whether or not AA commands him to do it.

AA commands NN return the wallet that NN has stolen from MM. NN ought to return the stolen wallet irrespective of AA's command. AA is not entitled to command NN. NN returns or does not return the wallet. If he does not return it, he will have failed to do what he ought to have done, what, as the term is used in *LJC*, "he was morally obliged to do." If NN thinks that he ought to return the wallet and yet fails to do so, then he has failed to do what he thinks he ought to have done – what he thinks he was morally obliged to do. If he does return the wallet he does what he ought to do; if he returns the wallet and thinks that is what he ought to do, then he does what he thinks he ought – is morally obliged – to do. If NN does return the wallet, we may yet ask why he did so. He may have done so simply because he regretted having stolen it, had become convinced that to have stolen it was wrong, and that now the right thing to do – what he ought now to do, what he is now morally obliged to do – is to return it. He may return the wallet for a very different reason. Although he knows that AA is not entitled to command him, NN may nonetheless return the wallet simply because AA has commanded him and he is afraid of what AA will do if he disobeys. In this case, NN ought to do what AA commands but it is not because AA commands it that he ought to do it, and yet it is because AA commands him that he does it. Although he is "morally obliged" to return the wallet he is not "legally obliged" by AA's command simply because the relation of commander to commanded (ruler to subject) does not exist between AA and NN.

[2] AA is in general entitled to command NN but he commands him to do what NN ought not to do.

AA is entitled to command NN, that is, the relation of ruler to subject exists between AA and NN. As I have said above, I do not ask here why that relation exists or whether or not it ought to exist. I prescind from those questions and consider only the case where it does exist, and when both AA and NN accept that it does.

In general, AA is entitled to command NN. NN is, therefore, legally obliged to obey AA. The legal character of the obligation is based on the reciprocal entitlement of ruler and subject. To be legally obliged to do what another commands is simply a way of saying that the person commanding is entitled to command the person to whom the command is given. If AA is entitled to command NN but not entitled to command MM, NN is legally obliged to obey AA's commands, whereas MM is not. That is what the terms "legally obliged" and "legal obligation" mean.

The question raised in [2] is whether or not AA who is in general entitled to command NN is entitled to command him to do what he ought not do. A presupposition of the question is that it would be possible for AA to command NN to do what he ought not do. Another version of that presupposition is to say that what NN ought to do or not do is not defined by what AA may command him to do. Yet another version is that what NN is morally obliged to do is not defined by what he is legally obliged to do. Legal obligation has nothing to do with the moral character of the action commanded. Unless that is presupposed it will evidently be impossible for AA to command NN to do what NN ought not to do because, by hypothesis, NN ought to do whatsoever AA commands.

The matter, already discussed by Plato in *Eutyphro* and in *Protagoras*, became acute in the later middle ages in the dispute between Aquininans and Occamites when it was asked if what God commanded was commanded because good or good because commanded by Him. (*LJC,* pp. 194-5) On both sides of the debate, it was agreed that God was entitled to command whatever He willed. If a divinely commanded act was good only because commanded then what the person commanded ought to do was defined by what was commanded. The good, that which ought to be done, was identified with what was commanded by God, and could not be known otherwise than in the command. If that is

translated from divine to human ruler, then what the ruler commands defines what is good. But even some who thought that God commanded an act because it was good were not wholly free of the sense that, even so, what was good could be known only because God's command had been revealed; certainly, not to steal was commanded because not to steal was good, but was known to be good because God had commanded it to Moses on Sinai. One knew that one was obliged not to steal because God had revealed it in the Decalogue. The rhetoric of the five books of laws, the Torah, is a rhetoric of command: "These are the commandments that the Lord gave to Moses for the people of Israel on Sinai."[8] Implicit in the Torah is that their Lord's command obliges the people and is sufficient reason to obey. The Israelites are legally obliged; there is no further question; either there is no other kind of obligation or legal and moral obligation fuse into one. The story of Abraham who was commanded to sacrifice Isaac, his son, provided powerful support for one side of the debate, and an awkward difficulty for the other. The authority of the Lord, their God is absolute; there are no exceptions. The rhetoric of command in the Torah – with the specific statutes removed – is the rhetoric of a pure legal and moral positivism.[9]

God, as all the mediaeval theologians, although for different reasons, agreed, could not command evil. But in the entire history of European reflection – my ignorance confines me to the European tradition – few have suggested that the human ruler could not command evil. Few have unequivocally suggested that there is no difference between good and evil or that what the ruler commands is by definition, and so necessarily, good. St Augustine is thought to have held that a law that commanded evil was not a law, that a command that enjoined the person commanded to do evil was simply not a command. (I am not convinced that Augustine thought so, but it is a question in interpretation that I am incompetent to answer.) Cicero, Aquinas and others held that an unjust law – one that commanded evildoing – was a corruption of law but still a law: AA who is in general entitled to command NN is not entitled to command him to do evil. AA is not so entitled precisely because NN is, irrespective of the command, obliged not to do evil. When AA commands NN to do evil the more original obligation not to do so over-rides the command.

How, when a command conflicts with that original obligation, are we to speak of obligation? I think it is clearest to say that when AA commands NN to do evil, NN is legally obliged

because the command is addressed to him by AA who is in general entitled to command him but not morally obliged to obey. If AA is entitled to command NN, NN is legally obliged to obey – that means simply , that AA and NN are in the relation sovereign and subject. When AA commands NN to perform an act that is either now morally required independently of the command (viz. not to steal) or is now morally neutral independent of the command (viz. drive on the right rather than on the left side of the road) NN is not only legally but morally obliged to perform that act. When the act commanded is morally repugnant, then NN remains legally obliged but either not morally obliged to perform it simply because it is commanded (he may be morally obliged for some other reason as the bank clerk might well be) or morally obliged not to perform it. To say that NN is legally obliged to do X is to say that the injunction to do X is issued by one entitled to issue it and that it applies to him. To say that NN is morally obliged to do X is simply to say that NN is convinced that X is what he ought to do.

[3] AA is in general entitled to command NN and commands him to do what NN, absent the command, ought nonetheless to do.

If no-one in a particular society thought that, absent any command, X ought to be done, or not done, in Y circumstances, then there would be no obligation on anyone to do or not do X in those circumstances, for no-one is obliged to do what he does not think he ought to do or to refrain from what he does not think ought he ought not to do. If, on the other hand, NN is convinced that he ought to do or not do X, he is obliged to do or not do X, whether or not he is commanded by another, or whether or not it is generally accepted in his community that X ought or ought not be done. That is the meaning of “moral obligation” or “the primacy of conscience”.

Whether or not a particular proposition is true is independent of NN’s judgment – in other words, NN can be mistaken and hold that the proposition, P, is true when it is in fact false, or false when it is in fact true. But if NN is convinced that a proposition is true, then, whether or not it is true, he cannot fail to hold that it is true. Judgments about what ought or not be done – moral judgments or judgments within the moral domain – may be true or

false (*LJC, passim &* esp. pp 175-6). Accordingly, when NN judges that he ought to do X he may be mistaken – in other words, that he is convinced of the truth of his judgment does not make the judgment true – but it is, nonetheless, his present judgment about what he ought to do or not do that binds.

Judgments about what ought to be done are of two kinds: judgments about what ought to be done now in these circumstances, and judgments about what ought to be done in kinds of circumstances. Laws, whether customary or legislated, state what ought to be done in kinds of circumstances; the law being, as Aristotle wrote in his discussion of equity "… universal …[and] takes the general case." (NE, 1137b10 cf. *LJC*, p.138). For it to be generally accepted in a particular society that X ought to be done or not done in a particular case, it must be communally known and so becomes the law, customary or legislated, written or unwritten, natural or conventional, of the society. If there are actions that ought to be or ought not to be performed whether or not they are required or forbidden in the prevailing law, there seems to be no reason why at least some of them would not be found in that law. For example, the universal or general norm that promises are to be kept in principle obliges each one of us but that is not a reason for it not to be made explicit in a society's laws. So, if AA commands NN to keep his promises, NN is legally obliged to do what he is already in principle morally obliged to do; on the other hand, if AA simply does not issue that command to NN, then NN remains in principle morally obliged but is not legally obliged by AA. Still, when we consider that the communally accepted moral norms are communally known moral norms and hence form the communal moral law, it will be possible, and almost inevitable in a complex modern society, that a particular person or set of persons will accept additional other laws. When more formal legislation emerges to complement the then prevailing communal law, it will often both include many of the provisions already present in that law, and add further detailed ordinances at least some of which may well be in tension with the prevailing communal law and practice. With the emergence of an increasing formal jural practice and legislation, the term "law" is often used to refer exclusively to that practice and the term "custom" increasingly used to refer to the prior law, as appears in Justinian's *Institutes* and *Digest* (*Inst.* I.II.9; *Dig.*I.3.32). In those passages from Justinian the reference to the role of popular consent – *Ex non scripto jus venit, quod usus comprobavit. Nam diuturni mores consensus utentium comprobati legum imitantur* (Right that usage has settled comes from what is unwritten. For ancient customs approved by those who have

used them are like laws.) – is significant and is fundamental to the account of both unwritten law – custom or living law – and legislation in *LJC*. That law is accepted is one of the pillars upon which the actual authority of law depends. Hobbes was mistaken to think, if in fact he did so think, that there had been an historical original agreement but he was right to suspect that in the longer period no authority can survive too much disagreement.

[4] The fourth case is when AA is in general entitled to command NN and commands him to do what NN, absent the command, is entitled to do or not do.

Many customs and state legislated ordinances require or forbid actions or establish rights that would otherwise be left to the choice of those to whom the set of customs or ordinances apply. These are often referred to as "conventional laws" and, by Aristotle in *NE*. 1134b19, as "*tò ?è nomikón* (variously translated as "conventional", or "legal"), and roughly correspond to Gaius' *iura gentium*. There is no suggestion in Aristotle or Gaius that such laws are randomly made or unintelligent; they are solutions established as reasonable answers to problems peculiar to the particular society at that time. It is utterly crucial to remember that the division into natural and conventional is a *post-hoc* theoretical distinction. Still, by whatever words one chooses to make a distinction between levels of laws, it is obvious that the detailed maritime rules governing the carrying of lights at night which, equally obviously, could have differed somewhat from what has been settled, are at a different level from the underlying rule that collisions are to be avoided.

The underlying rule that collisions are to be avoided – which I think of as a natural law of the sea so obvious to sailors that it is rarely expressly stated – is supported by the "practice of seafarers" and, in the United Kingdom since the Steam Navigation Act of 1846, by the detailed collision regulations including those concerning Lights to be shown by night and Shapes by day. One regulation requires the carrying of a sternlight: a white light showing at night between sunset and sunrise over an arc of 135° astern.[10] Before either the practice of seafarers or the Navigation Acts had introduced a rule, it was not a rule, and so no-one was legally obliged; it is an intelligent but detailed solution to a recognized problem. The purpose of the light is to show vessels whether another vessel is coming towards or going

away from them. Perhaps, it would have been equally good to require the light to be carried on the bow, but what would not have served equally well would have been to permit a vessel to carry the light either on the bow or astern. If it be assumed that the 1846 Act is in the position of AA and masters of vessels in UK waters are in the position of NN, then NN is legally obliged to show a white light astern over the required arc at night. A master in such circumstances is morally obliged to do so because he is morally obliged to try to avoid collisions – thus taking the interest's of others into account rather than endangering their lives and livelihoods – and morally obliged to follow the rules because a communally known and accepted way of doing so is needed and the rules state what that way is (the informational character of the law) and that it is to be followed (the command character of the law). Associated with the command is a sanction for breach of the rule (the coercive character of the law).

But if, as in the regulation about the carrying and position of lights, AA is entitled to command NN to do what, absent the command, NN would be legally entitled to do or not do, there might seem to be no limit to what AA is entitled to command except that AA is not entitled to command what is evil. HTh deals with this problem in the final pages of his paper when he discusses Himma's criticism of Raz. That there are, and ought to be, other limits and what those limits are or ought to be, is the matter of the liberal tradition. (*LJC*, esp. Ch.7.5, pp. 183-8 & fn.29 on p.186) HTh in his footnote 30 remarks that "The value and extent of personal autonomy lies at the heart of the differences between competing political theories." I agree and would add that it lies also at the heart of political practice; the setting of the limits is an argument within politics understood neither as an academic discipline, nor as a task to be left to politicians but as the responsibility of each of us in our different ways. On one end of the spectrum there are those who tend to the view that the law should prescribe all virtues and prohibit all vices, (which in practice cannot but mean to prescribe everything that is that the influential findvi rtuous and to prohibit all that the influential find vicious) and at the other end of the spectrum are those who hold that freedom or liberty ought to be the basic (or, in the technical language familiar from computing, the default) position from which to begin the argument so that the limitation of liberty not its extension is to be argued for. In *LJC* the focus is on the common good, that is the order in which people can live together in peace, but what that in its detail and in particular circumstances is must be the topic of perennial argument, or, as Isaiah Berlin wrote, the topic of perennial

haggling. I should add only that the common good demands that argument be permitted, and that it occur.[11]

I have set down here some reflection occasioned by my reading of HTh's paper. I am very grateful to him for his presentation in Reykjavík and for the paper published here.

Oran Doyle: The Significance of the Living Law.

Oran Doyle [O] in his reading of *LJC* asks several related and very important questions. I shall respond only to two, and leave others, no less important, to another day. The two questions are these: first, are the provisions of the communal or living law – O points out correctly that several terms are used interchangeably: "communal moral law", "custom", "moral tradition" – "merely obligations from the perspective of the community or true obligations, *ie* moral obligations that do truly apply to us?" and, secondly, does the set of customs, the prevailing living communal law, of a society have secondary rules in Hart's sense of that term?

I

First, then, are the rules of the living law, the communal moral law, obligations only from the perspective of the community or obligations that do truly apply to us. O stresses that it is "At this point in the book " that the answer is unclear; I want to address the question itself because of its great importance. Later in the book it does I think become clear – as O accepts – that the provisions of a society's living law will not be in all respects good and, therefore, do not impose true moral obligations: "This communal law is not necessarily in all respects good, for in every society there are the relatively more and less powerful and the more powerful can, and do, to a greater or lesser extent, impose their biased and selfish

interests upon the less powerful. Societies are at all times, and inevitably dialectical." (*LJC*, Conclusion, p. 260) My answer now, and the answer we gave in the book is, therefore, unequivocal: the living law imposes legal obligations on the members of the community but not all those obligations are in O's sense true moral obligations, and some may be legal obligations that one may be morally obliged not to respect. It is, however, imperative to recognize that obligations that at any time and in any society that are taken to be true cannot but be obligations that are thought to be true, just as factual propositions that are taken to be true are propositions that are thought on the best available evidence to be true. Infallibility is not granted to humans and " 'Nothing is more unfair,' as an English historian has well said, 'than to judge the men of the past by the ideas of the present.' "[12] That there are true and false judgments in a recurrent theme in *LJC*; that space was thought to be absolute in Newtonian physics was an historically understandable, almost inevitable, mistake but a mistake nonetheless; that slavery was once thought to be good, did not make it good.

A presupposition of O's question is that there are true moral obligations. I, too, make that presupposition and it is one that runs through the book, but, as well as being a presupposition, it is a proposition in support of which some arguments are adduced. Of these the most fundamental is that for humans to live is a value; that they cannot live otherwise than socially,;that they cannot live socially otherwise than in a jural world in which the rules governing how to live in that world are known to them, and, if followed, allow them, more or less well, to live and realize their individual values in communal peace and harmony. Human societies are dialectical; some people – and all at least sometimes – will choose to realize individual values that cannot be realized without overriding the interests of others – the thief who chooses to steal another's money realizes his individual value to have the money but does so only by overriding the owner's value to keep what belongs to him. To say that one value is better than another, that, for instance, the owner's value is better than, and ought to prevail over, the thief's and that the thief ought to respect it is to say in O's words, if I understand them correctly, that the law which forbids theft expresses a true moral value and requires behaviour that is a true moral obligation. One who would claim that there are in principle no true moral obligations is committed to the assertion that in principle no value is better or more worthwhile than any other. Because individuals and groups of individuals are biased they become morally myopic and, at some

level of bad faith, see their own interests as paramount and to be realized irrespective of others; they will tend, if they are powerful enough to do so, to introduce customs and laws that favour the realization of those interests. They may even manage to convince themselves, at least for a time, and try to convince their subjects that they are "morally right". The laws that they introduce and defend are imposed upon those that the laws oppress, and a rhetoric is devised to justify the laws. [13] Those to whom the laws apply are legally bound by those laws but not morally bound by them and whether or not to obey them is a different question from the question as to whether or not to obey laws that bind both legally and morally as I argued in the response to HTh's paper.

For true values actually to exist in a society they must be known, just as for true factual propositions actually to exist in a society they must be known. For true values effectively to exist in communal life they must not only be known but be, sufficiently often, chosen. Thus, if in a society in which no-one knows that it is wrong to steal the true value that theft is wrong does not actually exist in that society; if in a society people know that it is wrong to steal but nonetheless steal whenever it suits them to do so, the true value that theft is wrong does not there effectively exist.

If, on the other hand, there are in principle no true values, no true moral obligations, or if, in one's analysis, one prescinds from any discussion of true value, then the question that remains concerning a purported law or set of laws is whether or not it is a law or set of laws and, accordingly, legally binding. The question as to whether or not it is morally binding simply does not arise. However, even if there are neither true not false values, a law necessarily includes a value for to enact that X is to be done is to be done is to say that it is valuable to do X. The extermination of Jews was a Nazi value. If there are no true or false values, then that it was a value is all that is to be said about it.

II

In about half an hour the untidy girl, not yet dressed for her evening labours, brought him his chop and potatoes, and Mr Harding begged for a pint of sherry. He was impressed with an idea, which was generally present a few years since, and is not yet generally removed from the minds of men, that to order a dinner at any kind of inn, without also ordering a pint of wine for the benefit of the landlord was a kind of fraud; not punishable, indeed, by law, but not the less abominable on that account.

Anthony Trollope, *The Warden*, (1855) Ch. XVI.partially

Whatever one's position on the matter of true moral value, the question as to whether what purports to be a law is in fact a law properly arises. That I take to be the matter of Hart's distinction between primary and secondary rules. I shall try to develop an answer in the light of what seems to me to be either explicit or implict in *LJC.*

The clearest discussion of the matter is in footnote 43 on page 257: "A bank clerk illegitimately commanded under threat of serious injury is not morally obliged, that is, not obligted , by the illegitimate command but he may well be morally obligated to hand over the money because he judges that the value of his staying alive or unharmed outweighs the value of giving the money. The crucial point is that he is not *obligated by the command*. Similarly, one living under a regime *de facto* in power but illegitimate may for his own reasons consider himself to be obligated to act in accord with, but not obligated by, its illegitimate commands."

Whenever AA tells NN to do something, that is, whenever AA commands NN, the question as to whether or not AA is entitled to do so arises. And for the command to be recognized by NN as authoritative – that is, as a command properly addressed to NN and issued by one who is recognized by him as entitled to issue it – NN must recognize AA as entitled to command him. The difference, as Lichtenberg's aphorism has it, between a prince and a lunatic is that other people recognize the prince. (There is an ambiguity there that I hope to go some way towards resolving but what seems clear is that NN must be able to distinguish between a command from an entitled or authoritative source and one from a non-entitled

source. The crucial feature of the bank robber is not that he can support his command by threat of force but that, whether he can or not, he is not entitled to command the clerk. If NN does not accept that AA is in principle entitled to command him, then he thinks of AA as the bank clerk thinks of the robber.)

As children grow up they are told to do things by adults who, by giving their instructions, present themselves as entitled to do so. As they grow older the children may begin to distinguish between those adults (for example, their parents), whom they recognize as entitled to command them, and those whom they do not. My grandson when he was about four years of age once said to me when I had instructed him to do something: "You're not the boss of me. My mum is the boss of me." I took his response as a perfect example of a rule of recognition. The rule that his mother was entitled to give him instructions was a secondary rule in the light of which her specific instructions were primary rules. Between him and his mother a legal system had been established in which she was lawgiver and he the person to whom the laws were properly addressed. Within that small familial legal system as he understood it, there were no other legitimate lawgivers; within that familial system others, as Aquinas wrote in answer to the question as to whether or not anyone whomsoever could make law, were advisors whose advice did not have the force that law properly should have (*non habet vim coactivam; quam debet habere lex, …*Sum.Theol. I.II.90.3 ad 2). [14]

Hart sometimes contrasts the secondary rules of recognition, change and adjudication with the primary rules of obligation, which may give the impression that the secondary rules are not rules of obligation, which, in fact, they are. When I am told that parliament is entitled to make provisions that I am legally obliged to accept, what I am told, in effect, is that I am legally obliged to accept the terms of whatever provisions are made by that body and that apply to me. Similarly, if I am told that the law courts are entitled to determine what is just in case of dispute, I am in effect told that I must, in certain circumstances, submit to that institution and accept its determinations. Both primary and secondary rules of a given society may be communicated to someone who is merely enquiring about the society, as might an anthropologist, and to whom neither set of rules applies. If I correctly understand Hart, it seems that with his distinction he has shed considerable light on what a significant

part of jurisprudence had for centuries been about. To state that custom is like law, or that the decision of the Emperor has the force of law, is to state a secondary rule, but, before the secondary rule that custom is like law is formally articulated, it is known in intelligent practice that custom is law.

Understood in that way, it would be impossible for there to be a law without secondary rules.

Without secondary rules the bank clerk would have been unable to distinguish between the command of the robber and any other command. If it is true that there must be secondary rules, it is true that they must be more or less explicitly known. To the extent that a command binds because it is a command, it must be that the person bound knows and accepts that the commander is entitled to command and that this particular injunction comes from the source, and for people in any society to know and accept that they are bound whether by the laws of Hammurabi, or the Torah, or Solon …they must know not only the detailed rules of, say, Hammurabi's code, but also know and accept that they are bound by them. The many detailed statutes and ordinances in Leviticus are primary rules; they are recurrently prefaced by the refrain: "The Lord spoke to Moses saying: speak to the congregation of the people of Israel and say to them: (then follows a statute or set of statutes)" and conclude with the refrain "I am the Lord, your God." (Lev. 19.1-2 & 4 but found *passim*). The refrains are secondary rules stating why the statutes and ordinances bind. One of the functions of the secondary rules is to distinguish between commands that are simply sentences in the imperative mood addressed by one person to another and grammatically similar sentences in the category established by the secondary rules.

All societies are, and must be, governed by primary rules that have both an informative and a compelling function. The rule informs in as much as it tells what in a kind of situation is to be done, and compels in as much as the commander or those whose task it is to ensure that the rule is observed will compel those to whom it is addressed to act in that way in that kind of situation or mete out punishment if a person is found guilty of breach. All societies have secondary rules that tell both how the secondary rules are to be distinguished from commands that are no more than sentences in the imperative mood or commands given by

parents to children, and why it is that the primary rules bind.

O writes that in *LJC* it is held that "…the living law is just at much at work" in what Hart thinks of as "[a system] that does not count as law at all". O is correct. The question arises as to whether the difference between the position in *LJC* and the position in Hart's *The Concept of Law* is more than verbal. O writes that Hart "imagines a society without a legislature, courts or officials of any kind" and "refers (without citation) to studies of primitive communities which depict in detail 'the life of a society where the only means of social control is that general attitude of the group towards its own standards of behaviour in terms of which we have characterized rules of obligation.' (CL.91)

I do not think that such communities exist but what is true is that in all communities there are expected standards of behaviour that are controlled to a large extent by "the general attitude of the group" that is, by the group that as a matter of social fact exerts some influence on the person tempted to act otherwise than in the approved manner. The rules of polite behaviour are enforced in that way. The example of the teenager who would in other circumstances prefer to pay his bus fare but decides not to in order to avoid his companions' 'scorn and derision' is not quite the same. (*LJC*, p. 222) In that story, the teenager had a private preference for paying the bus fare and would in other circumstances have done so but knows that, in the group to which he wants to belong, to do so is disapproved on pain of a sanction that he would avoid. If he decides not to pay the fare, he is acting in accord with the prevailing law of the group, but reluctantly from fear of punishment which might be not only scorn but expulsion from the group – the ancient punishment of exile. What Aquinas wrote applies to him: "just as some are not interiorly disposed to do spontaneously and of their own accord what the law commands, they must be exteriorly constrained to bring about the just result that the law intends. That is what happens when the fear of punishment makes them act in accord with the law, in a servile manner not freely. " (Sum.Con.Gent. III.128.7) It is likely that many readers will be inclined to say that the teenager would have been right to pay, and was wrong not to pay, the fare. The example is chosen in the hope of that response; the story is intended to show that a purely structural examination of law, sanction, and action is possible. The teenager is a member of a community which has, as do all communities, laws that express the values approved in the community – were the values

not expressed they would not be known. A law that commands an action (Bus fares are not to be paid.) expresses a communally held value (It is good that bus fares not be paid.). Obedience to the law brings about that value (The bus fare is not paid.). Within the teenager's community, that law is a primary rule. But he must know that it is a communal rule; he must be able to distinguish it from other expressions in the imperative mood that are not rules of his community and may, indeed, command precisely the opposite action (Bus fares are to be paid.) The rules that show him how to recognize the rules that apply to him as a member of the community are secondary rules; they may be more or less formally expressed but they must exist, they must be known, and to be known, they must be promulgated. Because over time, within the "same" community – there is no-one now living in Iceland who lived there 170 years ago and yet we talk of the Iceland community changing and not simply of one set of people being replaced by another entirely different set of people – and even when at least some members of the community at the later time were members at an earlier time, communal values change, the laws that express them change and so there is in every community some way, more or less formal, of bringing change about.[15] Disputes arise between people within the community. Someone accuses the teenager of having paid the fare. He claims that did not pay and is not guilty of the offense. In response to this problem there will at once arise a way of trying to ascertain the truth, for if he did not pay his fare it is unjust to sneer at him or to expel for having done so. "And therefore it is of the Law of Nature, *That they that are at controversie, submit their Right to the judgement of an Arbitrator.*" (Hobbes, *Leviathan*, 15, 213 [78]; *LJC,* 145, & fn. 27). As are Hobbes' other "natural laws", that one is simply the intelligent solution to a problem that is likely to arise. "for there may …arise questions concerning a man's action; First, whether it were done or not done; Secondly, (if done) whether against the Law, or not against the Law." (*ibid., loc.cit.*) Finally, there is the cardinal rule: The values of the community are to be realized and are expressed in The Law and the specific laws that intend their realization are to be obeyed.

The cardinal rule is both ambiguous and contestable: ambiguous because what in any specific case the community is, or can be, uncertain; contestable because there is always at least the possibility, and commonly the reality, of tension between some of the values expressed in the laws and some other values in the community. (Commonly flouted regulations are examples.) And so, the cardinal rule, Kelsen's *Grundnorm*, becomes rather

this: the values expressed in The Law is to be realized and the specific laws that intend their realization are to be obeyed. Values are always expressed by people, and so two questions arise; first, as to their goodness or badness; secondly, as to the legitimacy of the legislator. Those are not Hart's question and I shall leave them aside; they are discussed in the eleventh chapter of *LJC*.

Hart discovered the important distinction between primary rules, that authoritatively guide the actions of those to whom they are addressed, and secondary rules that enable people to distinguish between those primary rules and other commands that may be addressed to them, that inform of them how disputes are to be settled, of the sanctions that may be imposed in case they break the rules, how rules are changed and who is entitled to change them. O suggests that Hart suppose that the existence of secondary rules in a particular social order distinguishes that order, from one from one that lacks secondary rules. What I have suggested here is that both kinds of rule are found in every society, for in every society it will be possible for AA to give a command to NN without being entitled to do so and correspondingly possible for both to know that.

Hart distinguishes between legal systems on the criterion of the presence or absence of secondary rules; I incline to distinguish them according to the comparative complexity, explicitness and clarity of the prevailing secondary rules, and according to the importance and character of the distinction between relatively insignificant and significant rules. Everyday rules of polite behaviour exist in every society and breach of them incurs often only an everyday sanction such as disapproval but murder and theft, for example, are never dealt with only in that way. It can and does happen that actions that were once dealt with in a formal way no longer are but fall into the category of actions dealt with by more everyday sanctions; few Europeans now remember a time when adultery was a crime in most European jurisdictions, and many find it most odd that it in some non-European jurisdictions it remains one.[16]

A secondary rule that specifies who, or what institution, is entitled to make primary rules, is critical. From the secondary rule that the decision of the Emperor has the force of law

follows that a particular decree of the Emperor legally binds those who are in principle legally bound by Roman law. But secondary rules need not be so formally expressed and, indeed, the formal expression of the secondary rule that the Emperor's enactment was law followed already established and accepted practice. Similarly, the secondary rules that informs the members of a society that primary rules of a particular living law bind them is present in intelligent practice before it is formally expressed. A particular custom is customary law because the members of the community accept it as such even if they have only a hazy idea or none at all as to why some customs oblige and others, more transient, have some social influence but are perhaps merely fashion. Before Hart's discovery the distinction and its importance was theoretically unnoticed.

So far, so good. As far as the analysis has gone the effort has been to distinguish law from not-law, and there has been no need to distinguish between good and bad law or to distinguish between laws that bind independently of the command and laws that bind only because properly commanded. Nor has there been any need to raise the question as to why someone or some institution who claims to be the legislator is entitled to be. Hart's analysis is, as he said, sociological, a description of jural fact.

There are two questions: first, is AA the legitimate ruler? Secondly, does AA remain the legitimate ruler if he becomes a tyrant and enacts evil laws? In *LJC* (257) it is suggested that "The entitlement of legislators to legislate and the entitlement of judges to adjudicate are *for the most part* accepted, and in that acceptance they are established. That is 'the social contract'. Legitimacy in the end rests on its being accepted." In many – but not all – modern states, the legislator is parliament to which actual legislators are elected and adjudication of disputes whether civil or criminal is undertaken by a corps of judges, either elected or appointed, in a system of hierarchically ordered courts. That system is in fact either accepted or acquiesced in, by the vast majority of citizens, and it is on that acceptance or acquiescence that the legitimacy of the parliament and judiciary rests. When acceptance and acquiescence sufficiently diminish, the state tends towards collapse. There are and have been other systems of government and they too may be legitimate: a president for life to be succeeded by the nominated heir is not necessarily illegitimate. In the period of kingship in Europe the reigning king or queen was accepted as the legitimate ruler and there were

rules governing the succession, sometimes more or less quietly accepted by those who had much interest in, and were affected by, the matter although many, often the majority, as Machiavelli knew, had often little interest in the storms on Olympus provided that they were left to carry on their lives in relative security. Nowadays the influence of rulers, of whatever kind, on the lives of all members of the society is much greater and correspondingly greater is the interest of the ruled.

Successful invaders, from Europe, North Africa and Asia sought, often very dubious, legitimating reasons that they hoped would sometimes genuinely, more often conveniently, convince those upon whom, in the longer term, the success of their invasion depended. William, Prince of Orange, could not have defeated James to become ruler of the three kingdoms of England, Scotland and Ireland had not he been supported by a sufficiently powerful alliance of domestic nobles. In the end, the right of conquest, or the attainment of power, more or less admittedly, commonly and everywhere, underlay the claim to legitimacy. Castile and Aragon became the legitimate rulers of Andalus when, having defeated the equally legitimate Visigoth rulers who preceded them, they found sufficiently acceptance. The same is true of the Celtic, Roman, Anglo-Saxon, Danish and Norman invasions of England and Wales, the Norse invasions of Western France and the later Norman invasion of Southern Italy and Sicily, the Ottoman Empire, the Manchu invasion of China … But, as civilizations became more advanced, rarely, and more rarely still as different ideas about legitimacy developed, was success given as the sole legitimating reason. Most present states have their origins in force and fraud.

In the tradition of practical politics the question of legitimacy in Europe increasingly concentrated on the legitimacy of the present incumbent often against the claims of a pretender supported by the incumbent’s opponents. Usually the pretender and supporters, who, to succeed, had to rely on force, provided reasons to show that the pretender, rather than the incumbent was the legitimate ruler. Might may well make right but tends to be accompanied by more or less good, more or less spurious, legitimating reasons; *ragion di stato*. Machiavelli and Giorgione are the great theorists – not necessarily the defenders – of this tradition

The practical dispute was between claimants: which one was the legitimate ruler? Theoretical discussion, as in Plato's *Statesman*, was largely about what type of person the ruler ought to be, what knowledge and virtues the ruler ought to have. That there ought to be a ruler was for the most part taken for granted. Aquinas, in a set of questions that one might expect to have little to do with jurisprudence, asks in the first part of the Sum.Theol. (I.96.4) whether or not in the state of innocence – the state in which humans would have lived had not their first ancestors been expelled from the garden of Eden – there would have been one who ruled over others.[17] His answer is the in Eden humans would have been social animals; that social life is impossible unless one person who intends the common good presides, for many intend many things but one intends one thing. In that place he refers to Aristotle who "in the Politics says that when many are ordered to a single goal, one is always found who is principal and governs." Aquinas' background context is his own society and so he has in mind a single person as ruler, as, indeed, has Plato in *Statesman* whereas Aristotle writes of different types of rule (*Pol.* I.I.1252a10) but all three think of some type of governance as necessary for the wellbeing of the community "for every community is constituted with a view to some good" (*Pol.*I.I.1252a1). In *LJC* the good is the communal order in which everyone, each pursuing their own ends can live in peace and harmony and of which the sustaining virtue is justice. It is not a particular end to be achieved as the end to be achieved by group of walkers coming down a mountain in a fog might be to reach home safely or, to take Aquinas' own example, as the end to be achieved by an army is victory. Those examples do not illustrate the common good of a society; a society is not an organisation with that kind of goal in view, although in extreme cases and temporarily, as when a city is attacked, the defeat of the enemy can become to an extent a goal of that kind. As I write, in August 2011, there is civil war in Libya; the "common good" of Colonel Gadhaffi's state – that is, the good shared by its supporters – is its survival; the "common good" of its opponents – the good shared by the rebels – is its overthrow. But the common good of whatever society survives the war is an order within which each person, while caring for the good of others, freely pursues his own goals. A society is an order that ideally is the just interaction between its members; its common good is the order in which that interaction can take place. To have confused and to continue to confuse, both theoretically and practically, these two very different senses of the single term, remains the bugbear of jurisprudence and political philosophy generally.

That order is in part given, and in part continually chosen. It is given in as much as we are animals and live in a given order as chimpanzees, gorillas and other animals do. That order is what Ulpian in his immensely illuminating and sadly neglected insight called the *ius naturale.* Human social orders are continually chosen by people living in a way that allows others to live; that is how I understand Hjördís' insistence on the importance of equality. Human social orders will be in part common and in part peculiar to the particular order; the attempt to work out and communicate what is common resembles Gaius' *ius gentium*; what is peculiar to a particular order is his *ius civile.* Because, and to the extent that, the human order is subject to deliberation and choice, humans ask questions, share answers and make both individual and communal decisions and so continually choose the order within which they live. But they do so in two distinct ways. First, each single person and each smaller group, chooses how to live in the order in which they finds themselves. To the extent that it is an object of choice the human social order is a moral order. Secondly, each knows that order only by being educated into it; we learn our order as we learn our language. We learn the rules of the order before we learn that some are thought "conventional" and some "natural". The Icelandic child does not learn that "takk fyrir" means "thanks" but how and when to use "takk fyrir" and only later that others make a different sound or word, and say "thanks","go raibh maith agat" or "grazie" in the same circumstances. Every language is rule governed and speakers follow those rules but they do not theoretically know them; somewhat similarly every human society is rule governed and its members follow or fail to follow them without necessarily knowing them abstractly and theoretically. A language and a society are orders that allow humans to become fully human.

It is evident that in a non-literate society none of the rules governing the prevailing order are written. It is equally evident that the specifically human rules – i.e. rules at the level of deliberation and choice and not those 'natural practices' of which Ulpian wrote – must be communicated whether or not they are properly of the *ius gentium* or of the *ius civile*. Certainly a child learns how to behave in part through language: "Give Etty back her toy; it is hers and you may not take it home " but usually not by being told "Thou shalt not steal". Thus, a child learns what property is, what it means to own something, how to use such words as "mine", "yours", 'hers", "his", "ours", "theirs", and that it is wrong to steal. The child learns, sometimes in words, sometimes as a result of a parent's response, that breach of the rule not to steal, if discovered, brings about disapproval and perhaps some further

punishment.

The injuction against theft is only one of the many primary rules that the child learns. The secondary rule is the authoritative context within which the child learns them. That authoritative context is the relation between child and parents or other significant adults and which, in part, is the human transformation of the similar relation between parent and infant chimpanzee or gorilla. As the child grows that authoritative context is further transformed as the child learns how to think of the relation between him and his parents. He learns to feel about himself as one bound to obey parents and some other adults. He learns that and other primary rules as authoritative commands and gradually takes himself to be subject and the adult to be sovereign. As the child grows up he discovers in his practical intelligent everyday living that adults, too, are subject to a law that is sovereign. Only later, if ever, does he learn, and think explicitly think of, the rule as requiring reasonable behaviour. That the law binds, what the law enjoins, how it is known, how breaches are dealt with are secondary rules that are necessarily present and part of the law of every human society.

There is in some societies an explicitly identified lawgiver – not one who is thought only to tell the laws; a lawspeaker – but one from whom the laws are imagined to emanate. That image of the lawgiver dominates the European jurisprudential imagination from at least Plato's *Statesman*. In societies where there is no clearly identifiable lawgiver from whom the laws emanate, and in which the prevailing laws are simply unquestionably present and binding, the laws, particularly those thought to be most imortant, are often imagined as mysteriously sovereign and often from a mysterious and superhuman source, as Antigone says in Sophocles: "For neither to-day nor yesterday, but from all eternity, these statutes live and no man knoweth whence they came." (*Antigone* I.XIII.2) In Hammurabi and in the Torah, the laws emanate from God. Hávamál, although a compilation of wise sayings rather than laws, is from the high Norse god, Odin. In aboriginal Australia "the law" is from the ancestor human/animals in the original time when animals and humans were one, as they originally had been before the present fractured time; to keep the law is to bring to the present the sustaining power of the origin.

The idea of a legislator and the practice of legislation was already developed when Plato wrote. The tension in *Antigone* is between the laws that live "from all eternity …and no man knoweth whence they came" and the laws of the Creon, the legitimate lawgiver. In *Leviticus* the tension is between the laws given by Yahweh to the people of Israel through Moses – who in the Torah is a lawspeaker only – and the abominable practices of their enemies: "Defile not ye yourselves in any of these things: for in all these the nations are defiled which I cast out before you. … Ye shall therefore keep my statutes and my judgements. " (Lev. 18. 24 & 26) The tensions are different but in both the idea of an authoritative lawgiver is present.

Plato in *Statesman* takes the presence of an identifiable lawgiver or legislator for granted but raises explicitly the question of the truth of the laws. Laws expressed as commands are neither true nor false. "A dead man shall not be buried or burned within the city" (Twelve Tables, X,1), understood as an imperative, is neither true nor false but underlying it is the unexpressed proposition: "It is good that a dead man be not buried or burned within the city". That proposition is either true or false. One possibility is that its truth or falsity cannot be known or can be believed only in authoritative revelation. Plato thought that underlying commands were true or false propositions that could in principle, but with difficulty, be discovered to be true or false. If that is accepted, a new explicit criterion of legitimacy arises: a law based on a true proposition is good; one based on a false proposition is bad. The case of a law that commands what is, absent the command, more or less indifferent – a 'conventional law' in one of the senses of the adjective – is correctly understood differently; a conventional law in that sense is one that is a law only because it is enacted. (Aristotle, NE,1134b,18 & Rhet. 1373b, 2ff.)

It is important to notice that a true proposition upon which an expressed law rests is not yet a law for the assertion that "P is true" has this difficulty: if I assert that Archimedes' law of the lever is true, I do not mean that it became true when I asserted it. But that is ambiguous. Was it true before anyone knew that it was? I think the clearest solution to what may seem to be an aporia is this: before anyone knew that Archimedes' law was true, it was neither true nor false simply because the law expressed in a mathematical proposition did not yet exist; but it is true that the world was such that it was governed by the law that

Archimedes later discovered. Levers were widespread and in common use before their principle or law was discovered.

A "conventional" law, as Aristotle used the term in both the *Rhetoric* and the *Nicomachean Ethics*, is one that rests upon a proposition that it would be good to enact that X be done or that Y be done and to do both together would be unwise or, in the limit, impossible. What Aristotle, in those places, calls a "natural" law is one that rests upon the proposition that X is the nature or character of the case, as that in most circumstances contracts are to be honoured.

A good law or set of laws, whether communal or legislated, describes and establishes the good communal order. The presence of the legislator, whether supernatural or human, and the corresponding presence of the person ruled, pervades the European jurisprudential imagination as it pervaded its Middle Eastern influences. So, in Aquinas' in the third article of his question, "Of the Essence of Law" (ST.Ia.IIae.90.3) thinks of legislation and the issuing of commands given by one entitled to command and backed by force – the *vis coactiva*; and Hobbes defines law as "…Command …of him, whose Command is addressed to one formerly obliged to obey him. And as for Civill Law, it addeth only the name of the person Commanding, which is *Persona Civitas*, the Person of the Commonwealth." (*Leviathan,* XXVI, 312 [137]) Bentham and Austin retain that image although they tend to omit the idea of the legislator's entitlement and so, as HTh remarks, "were unable to explain the difference between *the law* and the orders of a gunman…". Part of Hart's task is precisely to explain that difference and so to recover and develop what was at best and inchoate and ill worked out aspect of the tradition.

That image and idea of sovereign and subject is not absent from *LJC* but concentration on the living law and on the similarity between learning our language and our morals brings another image into sharper focus. Humans live in a physical, chemical, biological, zoological and jural world. To conclude this discussion of the authority of law I want to leave aside the question of the particular legislator's authority to concentrate on the authority of the jural world.

When we learn our mother tongue we learn a rule governed communication system that allows us speak to one another, to understand ourselves and the non-human world, to become humanly responsible for ourselves, and to develop into the adults that, at the end of our lives, we eventually become. The rules of our language we take for granted. The rules govern but by what authority? In English, for example, the interrogative "Were you here yesterday? and the indicative "You were here yesterday" are formed by inverting pronoun and verb but the indicative "I saw the boat yesterday" and interrogative "Did you see the boat yesterday" are formed the by the addition of the interrogative form of the past tense of the verb "to do" and a version of the infinitive of the verb "to see". Only with great difficulty can the historical linguist trace the rise of that locution; the child who learns it is uninterested in that history and is content to know that that is what is done, for the child wants to learn how to speak. The proximate teaching authorities are the parents and other speakers, the remote authority is the language itself. Similarly, the jural world is learnt from those who already live within it; the proximate authorities are those who teach it, the remote authority is the jural world itself. The child, whose mother tongue is Icelandic or Italian and who later learns other languages discovers that the rules of other languages differ from those of his mother tongue while still remaining languages. Similarly, the child may learn in everyday experience, that human jural worlds differ from one another while still remaining jural worlds, Languages differ in many ways but there are, and must be, fundamental rules. No language can fail to distinguish between questions and answers, between affirmative and negative assertions …; similarly, as was argued throughout *LJC*, no human jural order can survive the lack of some fundamental rules "…dictating Peace, for a means of the conservation of men in multitudes…" (*Leviathan*, XV,214 [78]). A language allows those who speak it to communicate humanly with one another; a jural order allows those who live within it to do so in peace. The cardinal differences between a language and a jural order, are that no-one in a linguistic community wants to be unable to communicate (the bank robber demanding money wants the clerk to understand the command) whereas in a jural order some are uninterested in whether others live well or badly (the thief or embezzler is uninterested in the plight of the victim) and will either refuse to act in accord with its rules or, if they can, will try tyrannically to impose rules that favour themselves to others' detriment. When the dominant image of law is legislation enacted by the sovereign to bind the subject, inevitably the question of the sovereign's authority and so the authority of law itself arises. If that image is replaced by the image of a jural order which, as expressed in rules, describes the order in which people actually live, then the focus of the

question of the authority of law changes. When a parent tells the child who asks why that is how to say something (“I have made a cake” not “I have maked a cake”) that that is how we speak, or when a child asks why a toy is to be given back to its owner or why it is wrong to suck soup directly from the plate answers “Because it is his toy and that is what we do” or “that is how we eat” the parent is saying something quite profound. A language is authoritative because people speak it; a jural order is authoritative because people live within it.

As societies increase in size and complexity, as their jural orders becomes increasingly complicated, as legislation becomes increasingly formal and a distinction between actions within and without an adjudicative structure with attendant penalties becomes more institutionalized, as enacted laws become the dominant image of law, as the number of laws enacted increases almost exponentially to rule ordinary living in increasing detail, as laws are thought of almost exclusively as expressions of the commands of sovereign to subject, the question of legitimacy tends to be restricted to a question of the sovereign’s entitlement to issue commands to subjects bound to obey. Law begins to be felt and imagined by those who live within the jural order that it partially describes more as an external imposition than as the expression of an order outside which humans cannot live. Still, the idea that the law expresses or should express “ourselves” remains and becomes critical when a practice accepted and even required in one group offends the ideals of another, as has happened recently in France in the dispute over the wearing of the Muslim veil, or when a liberty is demanded by one section of the community and rejected by another as now in Poland concerning procured abortion or when an action is legally permitted that previously was not as in the recent Maltese decision to allow divorce. Below statute are communal attitudes that delay or hasten change whether that change is development or decline. In *LJC* the “living law” is, as O rightly says, is largely conterminous with “the moral tradition”. That can mislead in two ways. First, the impression can be given that the moral tradition is static, which it is not. Very many changes in state law over the past two centuries in many countries have been successfully urged by great changes in the moral tradition. Secondly, and this I think is insufficiently clear in *LJC,* in large and heterogeneous states there is no single moral tradition and so changes in state law have been brought about not by a homogeneous living law or moral tradition but by the one that is for the moment dominant.

[1] If one must choose between what one holds to be equal, and so indistinguishable, alternatives one must resort to an aleatoric method like tossing a coin or drawing a straw.

[2] H quotes (see at her fn 13) Christensen: "…there can be no natural differences between Greek and Barbarian, man and woman, noble and commoner, free man and slave." In two cases the differences are institutional (noble and commoner, free man and slave) in one (Greek and Barbarian) the differences are in part cultural and historical and in part natural – the dark brown people of southern India naturally differ from the lighter brown people of the north in that one group is a darker colour than the other; in one (man and woman) the differences are natural, as, in some accounts, the difference between free-man and slave was wrongly thought to be. The problem, not solved by denying them, is how to deal with the differences between man and woman. What is meant by claims that there are no natural differences between the letters A and R is that the differences between them are not differences as between letters and not-letters. A and R differ from each other but are equally letters within the Roman alphabet. Indian, African Plains and African Forest elephants naturally differ but are equally elephants.

[3] Cf. Aristotle, *NE* 1131a10: " …the just is the equal as all men suppose it to be, even apart from argument." where he discusses some difficulties surrounding the interpretation of that aphorism. He does so at greater length in *Pol.* 1282b14 – 1283b 14 where he asks if the best player or the best looking or the tallest or the wealthiest is to be given the best flute;

[4] Perelman, Chaim, "Le probleme des lacunes en droit Essai de synthese" in *Droit, Morale et Philosophe*, LGDF, Paris 1976, p. 129 – 131.

[5] Strictly speaking , I.III.2 in the *Institutes* contrasts the *ius gentium* with *nature* rather than with the *ius naturale*: *Servitus autem est constitutio juris gentium, qua quis domino alieno contra naturam subicitur.* ("Slavery is an institution of the law of nations by which one m an is made the property of another, contrary to nature.") However, in I.II.2 it is said that "Wars arose and in their train followed captivity and then slavery which is contrary to the law of nature; for by that law everyone is originally born free." [*bella etenim orta sunt et captivitates secutæ et seervitutes, quæ sunt juri naturali contrariæ (jure enim naturali ab*

initio omnes homines liberi nascebantur)] But, to know what is in accord with and what is contrary to nature is to know the *ius naturale*.

[6] In the NE, VIII, 1161b5, Aristotle wrote that a master cannot be the friend of a slave *qua* slave but *qua* man he can. Cf. Pol.I.1255b,10-15.

[7] In the NE, VIII, 1161b5, Aristotle wrote that a master cannot be the friend of a slave *qua* slave but *qua* man he can. Cf. Pol.I.1255b,10-15.

[8] It is also a rhetoric of covenant but I leave that aspect of the Torah aside.

[9] See Ralph Weber/Garrett Barden: "Rhetorics of Authority: *Leviticus* and the *Analects* Compared", *Asiatische Studien/ Etudes Asiatiques,* LXVI.1.2010, Peter Lang, Bern, 173-240

[10] cf. Grime, Robert: *Shipping Law*, Sweet & Maxwell, London, 1978, p.126

[11] Articles 18 and 19 of the Universal Declaration (1948) and the *Déclaration* (1789) are related to this demand.

[12] Tuchman, Barbara W.: *The March of Folly*, Abacus, London, 1985, (orig. 1984) ch.1, 4.

[13] Cf. Garrett Barden, "Rhetorics of Legitimacy", in eds. Dreier, Faralli & Nersessiants, *Law and Politics between Nature and History*, CLUEB, Bologna, 1998, 47 – 55.

[14] Aquinas in that place makes clear that when he writes of the legislator he has in mind one who is entitled to make law for the entire society.

[15] The problem of the "same" is not merely one of usage. For example, a constitution established in a state by popular vote in 1900 is, unless amended, commonly held to govern the same state in 2011 when very few if any of the original electors are still living. That one set of people were held to bind another set was Hume's and Adam Smith's clear and fundamental objection to any kind of original contract. See G.N.Casey, 'Constitutions of No Authority' (2010) 14 *The Independent Review* 325.

[16] As far as I know there remain no European jurisdictions in which adultery is a criminal offence but there are societies in which it is treated as such in a kind of parallel non-state system.

[17] I am indebted to Jean Porter's valuable *Ministers of the Law*, Eerdmans, Grand Rapids, 2010 for this reference. Modern readers must remember that Aquinas wrote of the prelapsarian state described in Genesis 2.4-3.24 before "the Lord, God sent him forth from the garden of Eden, to till the ground from which he was taken. He drove out the man; and at the east of the garden of Eden he placed the cherubim, and a sword flaming and turning to guard the way to the tree of life." (3.23&24) as of an historical event. To us who no longer think that, the passage remains historically interesting in that it shows that Aquinas held the relation of ruler and ruled to be essential to human society in both the prelapsarian and lapsarian condition.