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H.L.A. Hart on Justice

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set of antecedent factors would not be closed to additional members. Its not being closed to them means that antecedent factors other than *B* are possibly relevant to the occurrence of *E*, whose cause is sought. But if even a single additional antecedent factor is possibly relevant to *E*'s occurrence, then jointly to assert the other premises and to deny the conclusion is not self-contradictory.

Applying this analysis to Stebbing's example, we recognize that in that example it is *known* that the only consequent events are the two pointer readings on a scale, that the only antecedent factors are the weighing of an empty cardboard box and then of the same box filled with candy, and that the weighing of the empty box causes one of the pointer readings. Because all this is known, none of it being merely assumed, the argument is deductive.

Now, Mill himself wrote of the Method of Residues:

As one of the forms of the Method of Difference, the Method of Residues partakes of its rigorous certainty, provided the previous inductions, those which gave the effects of [all but one of the antecedent factors], were obtained by the same infallible method, and provided we are certain that [one particular antecedent] is the only antecedent to which the residual phenomenon . . . can be referred; the only agent of which we had not already calculated and subducted the effect. But . . . we can never be quite certain of this (III, viii, 5).

This passage makes it clear that Mill distinguished between two moods of entertaining the proposition that the antecedent factors of an allegedly causal sequence are the only antecedent factors. Although he distinguished them merely as *being certain* and as *not being certain*, the context in which he did so indicates that what he had in mind was, on the one hand, knowing that the proposition is true, and, on the other, assuming that it is true. Hence, the logic texts are mistaken in stating that Mill's Method of Residues is a form of deductive argument.⁴

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H. L. A. HART ON JUSTICE

MY aim in this note is to discuss Professor Hart's views on justice, as embodied in his recent book, *The Concept of Law*.^{*} Hart's fellow lawyers, such as myself, are likely to be especially

⁴ It does not follow that Mill was right in stating that it is inductive. Since the method involves no generalization whatever, it would be best, I think, to characterize it as being abductive. See Charles Sanders Peirce, *Collected Papers* (Cambridge, Mass.: Harvard University Press, 1931-1935), 2.636 and 5.171.

^{*} Oxford: At the Clarendon Press, 1961. x, 263 p. 21/. To be reviewed.

interested in his views on justice, since he analyzes 'just' and 'unjust' as these terms are used in appraisals of laws and the administration of laws. Philosophers, too, should be similarly interested, inasmuch as Hart is both a philosopher and a lawyer.

For Hart, to say that a law is justly administered is to say that it is impartially applied to all those and only those who are "alike in the relevant respect marked out by the law itself" (156). Thus, it is possible for an unjust law to be administered justly; e.g., there could be enforcement against all non-whites of a law allowing only whites to ride buses. Likewise, it is possible for a just law to be administered unjustly; e.g., there could be prosecution of only Negro proprietors who violate laws designed to prevent racial discrimination in public restaurants.

Hart says that the laws themselves may be unjust either because they do not distribute burdens or benefits fairly or because they do not afford compensation for harm done by others. Examples of "distributive injustice" might be the failure to allow both Negroes and whites to ride buses, the failure to exact taxes according to ability to pay, or the failure to distribute "poor relief" according to need. Examples of "compensatory injustice" might be the failure to allow compensation for wrongful physical harm, for invasions of privacy, or for the value of benefits conferred and unjustifiably retained.

Hart suggests that there is one leading "principle latent in . . . (the foregoing) diverse applications of the idea of justice" (155). His thesis is that "the structure of the idea of justice . . . consists of two parts: a uniform or constant feature, summarized in the precept 'Treat like cases alike (and different cases differently) . . . and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different" (156). He says, further, that "the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society" (158).

The principle 'Treat like cases alike and different cases differently' is frequently invoked in assessments of the justice or injustice of the administration of law. Thus we demand that like cases be treated alike *before* the law. Similarly, the principle is often invoked in appraisals of the justice or injustice of laws distributing burdens and benefits within society. Thus we criticize laws perpetuating racial discrimination on the basis that these laws do not "treat like cases alike." But can the principle be invoked to explain the uses of 'just' and 'unjust' in appraisals of laws that provide or fail to provide compensation for harm? Hart's answer is yes, although he acknowledges that the relation-

ship between the principle and compensatory justice is "indirect." He argues that when, for example, the moral code forbids the use of superior strength for the purpose of harming another, the weak are put on an equal footing with the strong. The moral code thus creates "among individuals a moral and, in a sense, an artificial equality to offset the inequalities of nature" (160). When the strong harm the weak and thereby upset this moral equilibrium, "justice then requires that this moral status quo should as far as possible be restored by the wrongdoer. . . . Thus when laws provide compensation where justice demands it, they recognize indirectly the principle 'Treat like cases alike' by providing for the restoration, after disturbance, of the moral status quo in which victim and wrongdoer are on a footing of equality and so alike" (161).

At least, when lawyers invoke the principle 'Treat like cases alike', they ordinarily use 'cases' and 'alike' differently from the way in which Hart appears to be using these terms in the foregoing analysis. For him, the "like cases" appear to be the victim's "case" and the wrongdoer's "case." The lawyer ordinarily uses 'case' (in the phrase: 'treat like cases alike') to refer to the case that a claimant is "putting" to a court called upon to decide whether that case is different from or similar to previously decided cases. The wrongdoer in Hart's argument is not "putting" a case for relief but is instead seeking to avoid liability. Likewise, if we say we are treating the wrongdoer's "case" and the victim's case "alike" by requiring the former to compensate the latter, we also use 'alike' in an extraordinary way. At least, most lawyers would consider it linguistically very odd to say of a plaintiff recovering damages for harm that he and the defendant were being treated "alike."

However, the foregoing remarks may not be responsive to Hart's argument. It may be that he is only attempting to show how it is possible to trace some "connection between the justice and injustice of . . . compensation for injury, and the principle 'Treat like cases alike and different cases differently'" (160). Insofar as this is his aim, he appears to be successful.

The principle 'Treat like cases alike and different cases differently' does not appear to explain another important usage of 'just' and 'unjust' in the criticism of laws. We frequently say that a law is unjust even though it is uniformly applied, i.e., even though all cases are treated alike. Thus we say such things as: "Our penal code is unjust, for the prescribed punishments do not fit the respective crimes," and "This law is unjust because it restricts freedom to change jobs." Hart does acknowledge that

a "law might be unjust while treating all alike" (160). But then he goes on to say that "The vice of such laws would then not be the maldistribution, but the refusal to all alike, of compensation for injuries which it was morally wrong to inflict on others" (160). Should the "vice" of, for example, an irrational scheme of punishment or undue restrictions on freedom be described in terms of "the refusal to all alike, of compensation for injuries"? It seems more appropriate to say, simply, that the vice of such laws is that they fail to conform to accepted standards of justice.

Finally, Hart says that justice is a "distinct segment of morality" (153). Usually 'just' and 'unjust' are used as terms of moral appraisal, but there appear to be important exceptions to this. Thus, for example, if a judge mistakenly applied irrelevant law to Jones's case, we should say that this decision was unjust, but it is doubtful that we should say that the decision was morally wrong. We might, however, say it was morally wrong to let the decision stand.

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BOOK REVIEW

ARTHUR KOESTLER, *The Sleepwalkers*. New York: The Macmillan Company, 1959. 624 p. \$6.95.

At the present time, the academic tide is flowing strongly in the direction of specialization. The intellectual field is divided up into "territories," whose boundaries are watched over jealously. But a few subjects resist professionalization and continue to yield fruit to the "generalist," the man with a broad and balanced background, rather than a more concentrated, narrower one; the history of science is a notable example.

A fully qualified historian of science would be an intellectual Hercules. To acquire all the necessary qualifications in one lifetime is, in fact, humanly impossible. That being so, it still remains possible for an amateur who has a sufficient sense of proportion and relevance and who is prepared to go to the original sources with an unprejudiced mind to contribute something worth while and original to the subject—especially if he has had a scientific education. Arthur Koestler, who is best known as a political novelist, took up the history of astronomy with that advantage: he was a scientist by training, and started his career as a science