Introduction

1. The Story of Political and Legal Philosophy

This book is prompted by the uncomfortable conviction that there is something very wrong with the modern conception of political and legal theory. The conviction, to which I have reluctantly and only gradually come, is that we do not understand the most basic features of our political or legal obligations to one another. This is because modern theorists have adopted an understanding of the political and the legal that is fundamentally wrong.

It is not easy to capture this mistake or to present it in simple terms. This is in part because the mistake infects the terminology that we use to describe the political and legal realms. In fact, it infects the terms 'political' and 'legal' themselves. Because of this, while one could well say that the problem with the modern view is that it wrongly thinks that the political is exhausted by politics and that the legal is exhausted by the law, this will not make much sense to the reader, at least not until she has finished reading this book.

It is possible, however, immediately to give the reader a glimpse of the error. This is because the mistake lies in wrongly insisting on the adoption of one particular point of view from which the political and the legal are to be analysed. What is that point of view? In short, it is the state.

Writing on social, political, or legal philosophy today is all but exclusively concerned with the state and with the issues that emanate from that concern. For all the diversity of this material, the state is its

modern obsession.[1] For instance, political philosophers argue about the demands of distributive justice, ie how the state ought to distribute benefits and burdens; political and legal philosophers debate the justification of 'constitutional' rights thought to be beyond legislative encroachment; social theorists dispute the character of the modern state, whether it is, for example, as disciplinarian as Foucault maintains; and legal positivists analyse law from the perspective of the 'officials'. All of this analysis is state oriented. It gets its point of view from the state, from the society taken as a unit, and from distributive justice.

The aim of this book is not to challenge any specific modern theory. Moreover, though it calls into question some parts of some of those theories, the majority is left untouched. Rather, the point of the book is to reject the idea—so ubiquitous that it has become unconscious—that this is *the* point of view from which to understand the political, the social, and the legal. Certainly, the state's point of view is a valid one, but it is only one of two relevant points of view. What is more, the second, the one we have forgotten, is by far the most fundamental.

The goal of the first two parts of this book is to present that point of view. But let me now provide a glimpse of it.

Even very young children know that they should not hit each other or take each other's toys. Whether this is learnt or innate need not concern us.[2] But the sense of injustice burning on a toddler's face when he is hit or when a toy is grabbed out of his hands can be palpable. What is this sense? When the toddler feels it, what is he feeling?

To put it simply, the toddler feels that he has been wronged. Now, of course, that does not mean that the toddler is remotely able to articulate that feeling, let alone justify it. But nor would it be right to say that the toddler is merely reacting to an unwanted event. It is plain that the toddler can see that something happened to him that should not have happened.

Just as obviously, the toddler does not have this feeling because he possesses some dim awareness that his playmate is distributing burdens throughout society unjustly or because he has a right in accordance with just distribution that has been violated. Nor is it because the

[1] As Skinner, 'The Idea of the State: A Genealogy' highlights, relying on the development of transnational bodies, some modern theorists have predicted the decline of the state. However, as Skinner argues, as this view ignores the fact that the state is the major player in international relations, this view is 'inattentive'. What is more, a theory of the decline of the state is of course deeply concerned with the state.

[2] For an interesting discussion of like issues, see Bloom, 'The Moral Life of Babies'.

toddler has some grasp of the fact that the state or society has prohibited behaviour of the kind in question. Rather, the toddler feels wronged by his playmate without any conception of society at all.

And while it is tempting to say that children learn these responses from the behaviour of their parents, it is also telling that—unless the parents are legal or political philosophers, and probably not even then—they did not have these social ideas in mind either. As I write, my one-year-old son has developed a habit of whacking his three-year-old brother, a habit we are trying to cure. But though I recognize the social aspects of this behaviour, the main and most important reason I want him to stop is that I regard his actions as wrongful toward his brother. I can also see that idea written very powerfully on his brother's face.

Certainly, the modern philosopher will be untroubled by these observations. Perhaps her reply will be that the entitlements and obligations referred to above are neither political nor legal but moral or ethical. The toddler, then, may have some sense of his moral entitlements (through nature or nurture), but has no understanding of the political or legal.

But what does it mean to say that an entitlement or obligation is moral *rather than* political or legal? The answer to this question is likely to beg all of the questions that prompted the writing of this book. It will have the form, 'Political and legal obligations emanate in some way from the state or society, but moral obligations are or can be independent thereof.' That, I think, is the wrong answer, but it will be of more use now specifically to consider the nature of moral obligation.

It is often said that moral obligations are about the agent, about the individual. Kant's moral theory is traditionally understood in this fashion. It is thought to be a theory about what constitutes a good person. On this view, then, morality demands that people not hit each other because doing so is inconsistent with being a good person. That formulation might sound too solipsistic to be plausible. It appears to suggest that a person concerned about morality is interested only in her own moral integrity. But the idea need not be understood in that fashion. Part of being a good person is having the right attitudes and feelings towards others, and so the moral person could not be self-obsessed. Nevertheless, the idea is that morality is focused on individuals as such.

But the thing to notice is that this point of view does not match the one encountered above. It is certainly true that my youngest son

will not grow up to be a good person if he keeps hitting people, but I do not see that thought reflected on his brother's face after he has been hit and, though I am cognizant of it, it is not at the front of my mind either.

Two points are relevant here. First, the norm in question is not merely moral in the sense used above. The fundamental reason my youngest son should not hit his brother is the same reason I should not hit my wife, and it would be odd to think that this reason was moral rather than political. Moreover, the feeling is not about my youngest son. If our interest were solely in the agent, then the fact that my son hits *his brother* would be merely a detail. The idea is that he acts immorally (or would do so were he older) because he acts as a good person would not have done *by hitting his brother*. As it were, 'his brother' is a placeholder, a variable, that could in principle be replaced by someone else: 'his mother', 'his sister', 'his cousin', 'his other brother', etc. But again, that is not the thought I see burning on his brother's face. *He* felt wronged. What is more, I agree. I feel that my son wronged *his brother*. In other words, the feeling to which I am drawing attention is not about my youngest son. It is about both of my sons.

Now, modern philosophers have thought that this move involves a shift from morality or ethics, with its focus on the good individual, to the political, with its emphasis on the state and society. But that is surely a step too far. My oldest son feels that he is being wronged by his brother, but that is not because he thinks that his brother is breaching some kind of social convention or the like. It is because of the immediate experience he is having. He feels the pain, sees that his brother has caused it intentionally, and feels that to be wrongful (he feels quite differently about accidents). He does all this without any reference to the social at all. His feeling is based entirely on the interpersonal, on the interaction between his brother and himself. It is also noteworthy that I am sure my wife would feel the same way were I to hit her. Her response would not be of the kind: 'Stop distributing burdens unfairly' or 'Don't you realize I have a right not to be hit because the existence of that right is a necessary condition for fair distribution?'[3]

My son's feeling is about him and his brother. My wife's would be about her and me. The feelings are not about anyone else. And

[3] In case this sounds too implausible to be taken seriously, the position that these rights are based on distributive justice is advanced in, for example, Cane, 'Distributive Justice and Tort Law', 415. It is the standard position taken in modern legal analysis.

though I interfere to prevent my son hitting his brother, I do not do so because I feel that I am somehow being wronged, that the wrong committed encompasses me or any such thing. I interfere because, as a parent of the two boys, I feel a responsibility to prevent them wronging each other. The norm in question is of concern to me, but it does not involve me.

Now, this leads to the second possible way in which the modern philosopher might choose to deal with these cases. She might maintain that, though the feelings in question have the character I have described, the actual norms involved can be justified only in accordance with distributive justice or the like. That might turn out to be the case, but it ought to strike us as odd. If children can understand that they should not wrong each other and yet have no idea of the state or society, then it is natural to think that the first thought does not rely on the second. The argument of this book is that this is right.

This is something that we all knew as children. But when we became theorists, we were taught to forget it. I suppose it is meant to be unsophisticated and childish. But my contention is that the children are right and the (modern) philosophers are wrong. In short, a theory that cannot accommodate the thoughts enunciated above, having to translate them into social concerns or arguments of distributive justice, is seriously deficient. It has forgotten one of the most fundamental elements of our moral lives.

It is also worth noting that many of our so-called moral utterances have the double nature encountered above: they are about being a good person and about behaving rightly with respect to others; they are about the personal and the interpersonal. If I see my son grabbing a toy from his younger brother, I might tell him to stop being selfish. My concern with his selfishness is in part a concern with his character, but it is also in part a concern with the interaction between him and his brother. I feel that his brother should have the toy quite independently of either of my sons' moral characters. Moreover, that feeling has nothing to do with distributive justice. Similarly, the golden rule in part reflects an idea about what constitutes personal goodness, but it also suggests how others should be treated independently of the moral character of either party.

If the children are right, if interpersonal moral norms exist that rightly govern our behaviour, then it is natural to think that those norms lie at the basis of our political and legal obligations. That, no doubt, will sound strange to many. But, as I show in this book, it was

accepted by a great many of our leading political philosophers and until comparatively recently was accepted as a piece of common sense.

This book tells a story: the story of the discovery, establishment, and decline of the view glimpsed above—what I call the traditional view.[4] It first attempts to enable the modern reader to see the political world through the eyes of the traditional theorists. This is no small task. The modern view places a veil over all our thought that is very hard to lift. I try to do so by examining the issues that led the traditional thinkers to their views. The idea is to follow them down the paths that they took and thereby, with luck, learn to see the vistas that they saw open before them. It then explores the decline of the traditional view after the convulsion set off by Hobbes and the English Civil War. As is stressed, this decline was not the result of a confrontation between the traditional and the modern view won by the latter. It was rather because of a 'paradigm shift' in the way that people thought about politics, effected by historical and intellectual events. The result is that the traditional view has been not defeated, but simply forgotten. This book is an attempt to remember.

A second theme of this book concerns the relationship between politics and law. To the modern mind, that seems unconnected with the material discussed above. But as we will see, these issues are thoroughly intertwined. To the modern thinker, 'law is the offspring of politics',[5] and so the study of law is necessarily conceptually posterior to the study of the political. But the traditional theorists did not share this view. For them, it is rather that politics is the offspring of law. It is law, then, that has conceptual priority.

Now, the claim is, of course, not that *all* law is prior to politics. Much law is the product of political institutions. But the traditionalist holds that far from being such a product, some law provides the basis for those institutions. And what is perhaps even more remarkable, this law is *private*, not public, law. Accordingly, in the following I place much

[4] I do not mean to imply that there is only one line of thought that could be described as traditional. Nor do I claim that the history of the ideas I label traditional and modern is linear in this regard. In fact, it is clear that it is not. The decline happened twice, the first time during the renaissance. See Tuck, *Natural Rights Theories*, ch 2. This, then, is an appropriate subject to test the reversal of Marx's maxim: 'Hegel remarks somewhere that all great, world-historical facts and personages occur, as it were, twice. He has forgotten to add: the first time as [farce], the second as [tragedy]' (Marx, 'The Eighteenth Brumaire', 594).

[5] Waldron, 'Kant's Legal Positivism', 1538.

emphasis on the place of private law in the theories of the thinkers examined. Most modern political philosophers have no theory of private law at all; a fact that is generally regarded as insignificant, even natural. But the traditional theorists began their discussions of politics with an analysis of that law and built their political theories on it. Our task is to understand why this was and what this difference reveals about the wider differences between traditionalists and moderns.

2. The Structure of this Book

The first chapter of this book describes something with which we are familiar but, due to its ubiquity, seldom contemplate: the modern conception of the nature of political and legal theory. It examines the general structure of this conception in order to contrast it with the traditional view developed in later chapters.

The argument of the book begins in earnest in Part I. This part explores the origins of the traditional view in the writings of Plato, Aristotle, and Cicero. Part II examines the traditional view in the fully developed forms found in the theories of Aquinas, Pufendorf, and Kant. Part III then discusses the decline of the traditional view and its replacement with the modern, paying particular attention to the theories of Hobbes, Locke, and the utilitarians. Part IV explores some of the important differences, not already examined in previous chapters, between the traditional and modern views and discusses the way in which the modern conception has affected our understanding of political and legal reality.

As indicated above, this book is intended to present the story of the birth, development, and death of an idea. Because of this, the book does not examine the theories it considers in great detail. It is not, for instance, a comprehensive account of Plato's *The Republic* or Aristotle's *The Politics*. Obviously, it would have been impossible to present comprehensive accounts of all the works examined here. For this reason also, though I have been much influenced by the wealth of secondary literature covering these thinkers, I mention very little of it.

Moreover, while I hope to convince the reader that the traditional view is attractive and has much to recommend it, I have not attempted to provide a rigorous philosophical defence of that view. Likewise, while I suggest difficulties with the modern view, I present

no knockdown argument against it. I wanted to write a story that was engaging enough to be read, that opened up for the reader a new (or rather an old) way of thinking about political and legal reality and that led her to ponder whether the deep questions of political and legal thought might be answered in different ways. If I have succeeded at all in this, it is because of my focus on the general and thematic, rather than on detail and rigorous proof. The latter is needed, of course, but must be provided elsewhere.

I feel it also important to say that, in the interests of (relative) brevity and ease of exposition, I have ignored some thinkers who must be regarded as central to the traditional view: Gratian, Cajetan, Grotius, Fichte, and Hegel amongst others. I assure the reader that I have done so only after giving the matter much thought (Grotius, for instance, is too unclear about the foundations of his view and Fichte and Hegel are already a little too obsessed with the state). I have also bypassed thinkers important to the third part of this study: Hume, Rousseau, Burke, and Paine, for example. My neglect of those thinkers implies only that I wanted to keep the book short enough to be read.

Also worth stressing is that, though I claim that the traditional view is forgotten today, I do not mean that it is *entirely* so. On the contrary, some thinkers hold a version of the traditional. Not coincidentally, these thinkers are strongly attached to the philosophers examined in Part II of this book. The most important include John Finnis (Aquinas) and Ernest Weinrib (Kant). It is in no small part because they espouse versions of the traditional view that their theories are often met with considerable miscomprehension.[6]

3. The Nature of the Modern Conception and Traditional View

A crucial point that needs to be stressed from the outset is that neither the modern conception nor the traditional view is to be understood as a theory. On the contrary, modern and traditional thinkers propound

[6] Other thinkers are also important. One can discern the influence of the traditional view on authors such as Peter Benson, John CP Goldberg, James Gordley, Stephen R Perry, Arthur Ripstein, Robert Stevens, Martin Stone, Richard W Wright, and Benjamin C Zipursky, for instance.

distinct and often contrasting theories. What holds the modern and the traditional views together is that they share not a theory, but an outlook on the nature of politico-legal theorizing.

For all their differences, modern thinkers hold that the point of view from which to analyse the politico-legal is the state. And for all their differences, the traditional thinkers disagree. Thus, to put this another way, the fundamental difference between the traditional and the modern views lies in their conception of the central questions of political philosophy and how those questions relate to each other and to other politico-legal issues. For the modern, for instance, the state comes first and the law last; for the traditional, it is the other way around.

4. Terminology

When attempting to understand the views of those who lie on the other side of a paradigm shift, one of the greatest problems concerns terminology. The problem is that the paradigm shift not only produces a new understanding of a subject matter, but also entails that words are used with different meaning. Part of the difficulty, of course, is that this difference in meaning is usually not immediately apparent.

With respect to the issues examined in this book, the chief difficulty is with the use of the term 'law'. This, as we see, is no coincidence. The shift between the traditional and the modern view is primarily a shift in the understanding of the nature of law. Though I do not concentrate on this aspect of the issue, it is noteworthy that the shift has produced an understanding of law conducive to legal positivism.

A paradigm example of this confusion is found in HLA Hart's interpretation of Augustine's maxim, '*Lex iniusta non est lex*' as implying 'a twofold contention: first, that there are certain principles of true morality or justice …; secondly, that man-made laws which conflict with these principles are not valid law'.[7] Hart rejects this view on the ground that many unjust laws, Nazi laws for instance, were valid laws.

Augustine's maxim means that an unjust law is not a law. But when Augustine made this statement, he meant by 'law' what he

[7] Hart, *The Concept of Law*, 156.

meant by 'law'.[8] But, as positivists are unfortunately inclined to do, Hart insists on reading 'law' his way. In effect, Hart forces Augustine to 'say' that those things that we moderns call laws that are also unjust are not valid examples of those things that we moderns call laws. Hart has no difficulty dismissing that view.

The traditional theorists did not share the modern understanding of law. Nor did they all agree with each other about the nature of law. But they did all agree that law is in its essence concerned with legitimate coercion.[9] In particular, all held that coercion is legitimate only when it is justified by law. Note that this does not mean, as we are inclined to read it, that coercion is just only if it is sanctioned by a body with sovereign authority. That position is impossible because sovereign authority is itself coercive and we need to know what justifies it. For the traditional thinkers, the law—the natural law, that is—justifies the sovereign. And that means that the law is prior to the state. The law is what gives the sovereign his authority to govern. It also gives the sovereign the authority to make new laws—positive laws—that also must be obeyed.

Another difficult term is 'politics'. If, as the tradition holds, sovereign authority is based on law, then it is possible to think of this law as part of politics. This is how some in the tradition thought of it. But we are now tied up in knots. We are asked to think of law as grounding politics and as being part of politics.

In order to avoid this confusion, it is necessary to adopt definitions of 'law' and 'politics' that prevent equivocation. I begin with the latter.

The *Oxford English Dictionary* defines the relevant sense of 'politics' as: 'The theory or practice of government or administration…The science or study of government and the state.' That is the sense adopted here. As we might say, politics is concerned with the direction of the community.

In the light of what has gone above, this raises the question: does politics exhaust the realm of legitimate coercion? In other words, is the only possible justification for coercion political? As we will see, the modern answer to this position is basically 'yes', but the traditional

[8] For a developed analysis of this point, see Orrego, 'Classical Natural Law Theory', 299–302.

[9] Hence, Augustine's motto means something more like: 'A purported piece of legitimate coercion that is unjust is not really a piece of legitimate coercion.'

is 'no'. For the traditionalist, some justified coercion is warranted by politics, but some is warranted by another area of moral concern.

Because of this, we require a term to refer to all norms that relate to justified coercion. Because the modern thinker holds that justified coercion is exhausted by the political, she needs no term other than 'politics' itself. But because the traditionalist thinks otherwise, a new term is required. But what could it be?

On the face of it, 'natural law' suggests itself. In fact, however, it is not at all appropriate. We are looking for an umbrella term to refer to all norms concerned with legitimate coercion. Now, certainly, the thinkers examined in the second part of this book hold that all legitimate coercion is ultimately justified by the natural law. But any norm that legitimately coerces is a norm of the kind in question, not only those norms that ultimately justify coercion. Thus, a legitimate positive law falls under the umbrella.

As noted above, the term actually used by the thinkers examined in this book is 'law'. However, as we moderns tend to use that term to refer only to the positive law, and as I will generally use that term in that way in this book, the term will not do here. No term suggests itself. I have considered using foreign expressions—*ius*, *droit*, *Recht*, etc—but that strategy is beset with obvious problems. Instead, I am forced to use the neologism: 'politico-legal'. Any norm that relates to justified coercion is politico-legal.

A final point of terminology concerns the contrary of the term 'state of nature'. Different authors use different terms. For convenience, I use only one: the term Kant adopts—'civil condition'.