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Anscombe's Philosophy of Law

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Abstract
Is there a necessary connection between law and morality? Elizabeth Anscombe's theory of civil authority provides the basis for a unique intervention into this debate. Her distinction between the rights internal to a practice and the external justification of said practice avoids the traditional objections to both legal positivism and natural law theories.

Résumé
Existe-t-il un lien nécessaire entre la loi et la morale ? La théorie de l'autorité civile d'Elizabeth Anscombe constitue la base d'une intervention unique dans ce débat. Sa distinction entre les droits internes à une pratique et la justification externe de cette pratique évite les objections traditionnelles au positivisme juridique et aux théories du droit naturel.

Keywords: Elizabeth Anscombe; philosophy of law; legal positivism; natural law; civil authority

1. Introduction

One central debate in philosophy of law concerns whether there is a necessary connection between law and morality, or whether laws are merely commands backed by sanctions. Elizabeth Anscombe's theory of civil authority offers the basis for an illuminating intervention into this debate. For her, a legal system is a *practice* in which civil authority commands obedience of the people on pain of punishment. The rights of people exist in relation to this practice. However, the practice is externally justified by the state's task of protecting those in society — which serves a human good. Anscombe's philosophy is then a natural law theory insofar as the

legal system is grounded on ethical considerations. However, the distinction between the rights internal to a practice, and the external justification of said practice enables her to avoid many of the typical objections to both legal positivism and natural law theories.

2. Anscombe's Philosophy of Law

Anscombe never outlined an explicit philosophy of law, although she did offer an account of the nature of civil authority. This enquiry focuses on how a state or government can be justified, especially regarding its authority over society (Anscombe, 1981c, p. 130). State authority is distinguished from that of a voluntary association by unconditionally demanding obedience. Indeed, the "distinguishing mark of the state is the exercise … of institutional violent coercive power" (Anscombe, 1981c, p. 131). Having outlined institutional violence as distinctive of civil authority, Anscombe asks what differentiates a powerful criminal organization from a government exercising civil authority. Notably, this question reflects the notion of the "gunman writ large" introduced by H. L. A. Hart in a critique of John Austin (Hart, 1958, p. 603). Austin argued that laws are commands backed by sanctions (Austin, 1995, p. 22), which would make rules imposed by a ruling criminal organization indistinguishable from those enacted by civil authority. Hart criticized this for equating the authority of a mugger with the state's laws (Hart, 1958, p. 604).

There are two related but distinct questions raised by Hart's and Anscombe's respective discussions of the gunman writ large. First, there is the conceptual question of whether unjust laws should be considered laws at all. Second, there is the normative question of why the law is authoritative while the commands of the gunman are not. Although Anscombe is primarily concerned with the latter question, her philosophy of law contains an answer to both. She begins with this second question of what distinguishes the coercive authority of a criminal organization from the authority of the state, and answers it with her account of practice-internal rights, and the external justification of the law.

By "rights" Anscombe broadly refers to entitlements people have, like the "right not to be molested," such that infringement is a wrong (Anscombe, 1981c, p. 138). However, "[t]he notion of a right is very fundamental and philosophically very intractable" and this intractability is traceable to the "natural unintelligibility" of rights (Anscombe, 1981c, p. 138). Anscombe had previously noted the natural unintelligibility of promises (Anscombe, 1981b, p. 97), and her discussion of rights is similar in structure.

Following David Hume, Anscombe noted two problems regarding how promises constrain action. The first concerns "what sort of beast a promise is" (Anscombe, 1981b, p. 97). Promising is called naturally unintelligible by Hume since any definition or account of the meaning of the term "promise" is self-referential (Nieswandt, 2016, p. 143). If promising is understood as the speaker signifying their duty to bring about a future state of affairs, its definition must account for the nature of this duty, but the account which substantiates the duty is that a promise (i.e., the signification) was given. In other words, to promise is to generate a duty by having promised. This account is circular, and thus cannot advance one's understanding of what sort

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of beast promising is. A parallel problem exists for the notion of rights. If rights are taken as primitive, the definition of a right is self-referential. To claim that one has a right to free speech, for instance, would be merely to claim one is entitled to speak freely. Absent some further explanation, this circularly defines a given right in terms of having that right.

The second problem concerns how promises or rights generate obligations. For example, suppose one were to promise to pay their taxes. While this statement "is a sign signifying a will to be constrained" (Anscombe, 1981b, p. 98), the question remains as to whether there is any real constraint. What stops a person from failing to pay their taxes? With respect to rights, the question may be reframed as whether any obligation is generated by the mere assertion of a right to respect said right. What is stopping someone from violating another's rights? It is not that all significations of an obligation or constraint are unintelligible. A contract signifies that its signatories have some rights and obligations, but these obligations are generated by a legal system that subjects violators to "the terror of the law" (Anscombe, 1981a, p. 19). The same is true of a game like chess, where violation of the rules will result in ejection. The constraints indicated by the rules in these cases are generated and enforced by a mechanism external to the sign itself. Consequently, with promising and rights, it is unclear how signs create obligations without an external referent to substantiate the obligation.

As rights suffer from the same problems of natural unintelligibility as promises, Anscombe turns to the same solution for rights as she does for promises. She begins by drawing one's attention to modals, which "come in mutually definable related pairs" (Anscombe, 1981b, p. 100, cf. Anscombe, 1981c, p. 138), such as must/must not or necessary/possible. The special class of modals Anscombe designates as relevant here are "stopping modals," which place constraints on one's actions. The positive counterpart to these stopping modals, meanwhile, are "forcing modals," which instead oblige one to follow through on a given course of action. When someone says that you "cannot" break your promise, or "must not" violate someone's rights, they invoke a stopping modal. Yet, this returns us to the unintelligibility of promises and rights, since people *can* in fact break promises or violate another person's rights. Stopping modals designate actions that *can* physically or logically be done, but *ought* not to be. For Anscombe, rules, rights, and promises are thus created by the grammar of our language, not simply expressed through language (Anscombe, 1981c, p. 141). The creation of these modals and their attendant necessity does not occur apropos of nothing, however. The modals arise in relation to certain social practices.

Anscombe defines "practices" as being akin to language-games. A child is taught that upon saying "bump," and following it with a description of a future state of affairs, they are obligated to bring about that state of affairs (Anscombe, 1981a, p. 16). Subsequently, they are reproached for failing to live up to their "bumps," and the theme of the reproach is that it was necessary to follow through with the action because they "bumped" said action. Anscombe suggests that the learner will quickly realize how to use the sign to extract commitments from others while being able to reproach them if they fail. This is comparable to "the game played with small children where several players pile their hands on top of one another" (Anscombe, 1981b, p. 101). If a child pulls their hand out from the bottom, they

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are told they "must" place it on top of the pile, and after a few rounds of learning the rules, they help to enforce them. A stopping modal thus derives its necessity from the practice or game in which it stands in some relation. There is then a certain kind of "conventional necessity" associated with rules internal to a practice.

The upshot for Anscombe's philosophy of law is that the particular rights or laws within a society should be understood as rules internal to the *practice* of a legal system (Anscombe, 1981c, 141). Outside of the context of this practice, specific laws have no force. This amounts to positivism at the level of individual laws, as laws do not depend for their existence on a necessary connection to morality. Despite this, Anscombe avoids certain problems facing positivistic definitions of individual laws. For instance, Austin's definition of laws as commands backed by sanctions fits criminal law, but fails to account for other types of laws that "create structures of rights and duties for the conduct of life" like "enabling individuals to make contracts, wills, and trusts" (Hart, 1958, p. 604). As laws are the rules internal to the legal system, for Anscombe, her theory has no difficulty accommodating different types of laws. Laws that impose sanctions, and those that grant positive rights, are equally part of the system. However, this does not explain why civil authority is different from the gunman writ large. For that, we must turn to Anscombe's account of the external justification of practices.

While Anscombe claims that rights gain their normativity from the conventional necessity internal to a legal system, her ethical theory includes another form of necessity external to practice. This "Aristotelian necessity" refers to "that without which some good will not be attained or some evil avoided" (Anscombe, 1981b, p. 100; cf. Nieswandt, 2016, p. 152), and is the basis upon which human practices can be externally evaluated. Anscombe follows Aristotle in believing there are naturalistic human goods the pursuit of which facilitates human flourishing. For instance, Anscombe discusses the example of child rearing as a practice that is "necessary because of a general or particular human need" (Anscombe, 1981c, p. 145). This example illustrates the relation between the right and the good in Anscombe. The practice of child rearing is externally necessary to achieve a *good*, while certain associated *rights* are necessary for the practice's functioning, like parents' right to demand obedience from children.

Consequently, one source of authority is a task that serves some human good (Anscombe, 1981c, p. 135). The difference between the authority of the gunman writ large and a civil authority is this external justification. More precisely, Anscombe says that the justification of the legal system "can only be the protection of people" (Anscombe, 1981c, p. 148).[1] A legal regime erected by the gunman writ large is not designed to protect people from violence. The positive law enacted by the ruling criminal syndicate confers only customary rights that arise from the

[1] One might worry that the "protection of people" is too narrow a basis to justify all of the laws in our existing legal systems. For instance, laws that facilitate contracts or promote welfare might not be justified by this good. However, on a broad enough construal, laws concerning contracts or the promotion of welfare may be understood as protecting people from particular harms, such as not having agreements respected or having their wellbeing decline. It may also be the case that the overall legal system is justified in terms of the protection of people, but some specific laws have as their justification some other human good. I am thankful to the anonymous reviewer who raised this question.

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practice of the legal system, which lacks the authority that comes from having an ethical foundation. There remains the possibility that a crime syndicate could become an actual civil authority if its legal system evolves to protect the people (Anscombe, 1981c, p. 154), but the reverse is also possible if a legal system loses its ethical basis and lapses into banditry. Anscombe's philosophy of law is then a natural law theory, given the external ethical justification of the system. However, Anscombe's combination of positivism at the level of rights and an ethical foundation for the system enables her theory to surmount objections that are fatal to its competitors.

3. Advantages of Anscombe's View

As a natural law theory, Anscombe's view faces the objections to such theories posed by legal positivists. For instance, in *The Concept of Law*, Hart attacks the idea there is a link between law and morality such that unjust laws are not laws: "the assertion that 'an unjust law is not a law' has the same ring of exaggeration and paradox, if not falsity, as 'statutes are not laws'" (Hart, 1961, p. 8). In addition to being paradoxical, Hart identifies a theoretical and practical problem with natural law's connection between law and morality. From a theoretical standpoint, this "would lead us to exclude some rules even though they exhibit all the other complex characteristics of law" (Hart, 1961, p. 205). Similarly, there is the practical problem of people inferring that they can disregard laws that seem immoral, or infer that something is morally right simply because it is included in the law (Hart, 1958, p. 597).

Recall that, for Anscombe, a legal system is a *practice* akin to a language-game (Anscombe, 1981c, p. 141). The particular laws or rights that exist are those that emerge in the context a legal system, so the body of law *is* the positive law. When faced with Hart's argument that "an unjust law is not a law" is paradoxical, Anscombe can agree. A given law does not derive its necessity from its justice, but from its relation to the overall system. Hence, an unjust law will nevertheless possess the necessity conferred on it by the practice.[2] Anscombe can similarly dispense with Hart's theoretical and practical problems. Anscombe's theory does not hold that unjust laws are not laws, so there is no theoretical problem.[3] Likewise, an individual cannot disregard an immoral law as the law retains the necessity granted to it by the overall practice, and someone cannot infer from the existence of a law that something

[2] Some participants at the 2022 Annual Meeting of the New Mexico — Texas Philosophical Society asked what Anscombe's philosophy of law would have us do when we are facing an unjust law, given its claim that we have a general obligation to follow the law. There are two points to consider. First, if the injustice of a law is such that the legal system fails to serve the Aristotelian good of protecting society's members, the practice loses its external justification, and there is no longer a general obligation to follow the law. Second, there are other practices apart from the legal system with an external Aristotelian justification. Where the rules of another justified practice conflict with the law, one might be justified in disobeying the unjust law.

[3] While individual unjust laws derive their necessity from the overall legal system, and are therefore still laws, the situation would differ for a thoroughly unjust legal system. When a legal system is thoroughly unjust, it might fail to be a legal system for Anscombe. This is because serving the good of protecting people is what distinguishes a legal system from the rules imposed by the gunman writ large. A "legal system" that fails to serve this purpose in general may therefore fail to be a legal system. Denying that the laws of an entirely unjust legal system are in fact laws would be a more controversial claim, but it may also be a merit of Anscombe's view.

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is moral, since the necessity possessed by the law is customary, and not a function of its morality.

Anscombe also solves the chief deficiency of Hart's positivism: his struggle to avoid basing the law on morality. Without a "minimum content of Natural Law" that is "certain rules of conduct which any social organization must contain if it is to be viable" (Hart, 1961, p. 188), Hart says that there cannot be law. These rules are rooted in three features of human nature: vulnerability, approximate equality, and limited resources. Yet, this opens Hart up to his own criticism that laws which fail to meet the minimum content of natural law would fail to be laws. Yet, for Anscombe, the necessity of a given law is internal to the legal system, so their status cannot be called into question for being unjust. Moreover, external justification of the practice corresponds to the minimum content of law necessary for viable social organization (Anscombe, 1981c, p. 145). Anscombe's view thus improves on Hart's by more deftly combining positivism about the content of the legal system with an ethical foundation.[4]

How then does Anscombe's philosophy of law stack up against other natural law theories? I contend that the feature of Anscombe's view that makes it a natural law theory — the Aristotelian justification of practices — improves upon other natural law accounts. To appreciate this, consider Lon Fuller's argument for natural law. Fuller offers a series of thought experiments involving a fictional legal reformer who fails to create a viable legal system (Fuller, 1964, p. 33). For instance, they begin by repealing all laws, and ruling on each case themselves. However, there is no commonality in their rulings, and this failure to generalize the rulings into laws means that the law cannot be followed. These thought experiments illustrate that a legal system must incorporate certain ethical principles, such as formulating its laws as general rules. A system that fails to uphold these principles is not viable.

Fuller's thought experiments make a compelling case that there is some necessary connection between law and morality. He shows that the relevant moral failings are those that undercut the whole legal system, but why is this the case? Anscombe explains why the immorality that undermines the legal system is unacceptable, despite it being possible for specific immoral laws to exist in a basically just legal system. A particular immoral law can have conventional necessity while foundational immorality severs a legal system from its external justification. That is, foundational ethical flaws of the kind noted by Fuller prevent the legal system from achieving the task of protecting the people, depriving it of its authority. Anscombe is therefore able to incorporate Fuller's arguments while explaining the importance of his principles in terms of their relation to the external justification of a legal system.

4. Conclusion

I have outlined a philosophy of law based on Anscombe's writings. For Anscombe, rights are naturally unintelligible, given that the normative necessity associated with them is customary, and arises from stopping and forcing modals associated with specific practices. As a practice, the legal system derives external justification

[4] The first-order ethical theory that most naturally aligns with Anscombe's legal philosophy is neo-Aristotelian ethical naturalism, but it might be possible to wed it to some other moral theory.

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from its task of protecting the people, which serves a human good. I have argued that Anscombe's positivism at the level of rights and external ethical justification of the legal system overcomes various objections to legal positivism and other natural law theories. Her theory is not susceptible to Hart's claim that natural law theory holds that unjust laws are not laws. Moreover, Anscombe's external justification for a legal system satisfies Hart's minimum content of natural law better than his own theory. Anscombe also complements Fuller's arguments by explaining why foundational immorality undermines a legal system: by severing it from the task that justifies its authority. Anscombe's philosophy of law is thus compelling and deserving of critical attention.

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