

8

Legality, Reciprocity, and the Criminal Law on Pitcairn

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In this paper I suggest some arguments in favour of the defendants in the case of *Steven Raymond Christian & Others v The Queen*.¹ My account is of a broad ‘natural law’ sort although I mean by that no more than ‘non-positivist’. (Not that the term ‘non-positivist’ is entirely clear but it is clearer than the term ‘natural law’.) I would add that I do not condone rape or the various sexual assaults as defined by the Sexual Offences Act 1956 which were the basis for the convictions. Nor should I be understood to be in any sense ‘anti-feminist’ when expressing disapproval of the use of the criminal law in dealing with the widespread sexual abuse that occurred on the island for many years. (And so I am neither a cultural nor moral ‘relativist’.) My objections to the prosecutions are primarily on the two non-chauvinist grounds that due consideration should have been given to the crucial requirements of legality before bringing the prosecutions, and that the criminal law was, in the peculiar circumstances of Pitcairn, an inappropriate tool for bringing about the necessary change of sexual culture. On the point of legality, it is important to remember that, outside of very special circumstances such as war, or genocide, we don’t generally think that because someone has acted in an undesirable way (by ‘undesirable’ we could add any number of definitions which might include ‘anti-social’, ‘generally accepted as wrong’, or even just ‘wrong’) that fact is in itself sufficient for us to say it was *illegal*. We may actually go further than this. If someone does something even

¹ [2006] UKPC 47.

seriously contrary to the criminal law it does not follow that there should be a prosecution, let alone a conviction and then punishment. If the investigators or prosecutors do not comply with the correct procedures—as in the most dramatic instance when they obtain cogent and reliable evidence by oppressive means such as torture—the defendant should not be convicted. And it denigrates the importance of the requirement of legality to say, as people do, that such acquittals are ‘technical only’, because although the defendant committed the offence, it is irrational for the prosecutors to treat the defendant in violation of the values *in the name of which* they pursue prosecution and conviction.² If you accept this argument, then I suggest you should accept the possibility that although the defendants on Pitcairn may have done wrong, there still could have been grounds for acquitting them.

With this in mind, I direct my argument to the question whether there was an ‘abuse of legality’ in applying ‘British standards’ in imputing knowledge of the law to the defendants in spite of strong evidence that they lived within a distinctly non-British culture of sexual conduct, encouraged in the absence of law enforcement mechanisms. There were two ‘abuses’ in my view. First, there was a plausible argument that the British Crown lacked jurisdiction over Pitcairn, even though the strong, and prevailing, view in all Pitcairn courts was that the British Crown did have jurisdiction. It was not disputed that Britain had barely contributed materially or spiritually towards its claimed possession in spite of Pitcairn’s economic and social isolation, and special needs. In fact, it begs the question to assume that there was any relationship between the communities at all in calling the British failure to install the trappings of a British legal culture on the island a matter of ‘neglect’, since that word implies that there existed a relationship between Britain and Pitcairn giving rise to specific obligations. It is more realistic to suppose that, if there was neglect, it was that of the New Zealand government, whose officials actually did something from time to time in connection with the island. The nagging doubt that some semblance of a connection—something that would ‘colour the right’—should have existed is something that we cannot merely wish away. I suggest that for Crown

² If, for example, the police assault a suspect and extract a confession, and then use that confession to secure the suspect’s conviction for assault, this makes a mockery of the consistency and moral integrity of the legal system. If the defendant may not assault, neither may the police.

jurisdiction over Pitcairn there should have been argumentative attention paid towards evidence of a more fairly integrated relationship between Britain and Pitcairn than was apparent from the 'paper trail' of constitutional enactment and appointment. The argument concerns the nature of legality and, in particular, why punishing people in the name of law demands something over and above the existence of isolated, unjust acts, albeit that they represented serious breaches of morality.

Second, even if we assume British jurisdiction, it was not clear that the English criminal law was sufficiently brought to the attention of the defendants, this being the issue advanced in *Christian*—at all hearings—that there was insufficient promulgation of the law applying on the island. Relevant content, including penalties, of the Sexual Offences Act 1956 may not have been sufficiently clear to the defendants in a sizeable number of instances given, first, an 'enculturation' in the defendants of 'Tahitian' sexual custom, including a confused belief that even non-consensual sex with girls over the age of puberty was not particularly serious,³ and, second, the absence of police and a court structure, the existence of an unused jail, and almost no sign of willingness on the part of the Pitcairn community or authorities anywhere, either in New Zealand, or Britain, to bring an end to this culture.

Three further points concern the nature of the criminal law. The first is to remind us that the criminal law is a blunt instrument whose purpose is primarily the enforcement of external compliance with a desired social norm. Its job is to announce that certain acts 'not be done' and to furnish a motive for compliance in the form of social stigma or punishment.⁴ Where means less intrusive of personal freedom may be used, it follows that this will be preferable, particularly where a change in *internal* attitude is crucial. The second is an argument against the increasingly popular view that the criminal law should in large part be concerned with justice to the victims of crime. According to this view, victims 'secure justice' only when the perpetrator of the crime against them is pursued and punished. A more emphatic version of that view claims that victims have 'rights' both to the fact of punishment, as well as to its degree. Questions of jurisdiction aside, if the victims had such

³ The only relevant Pitcairn criminal offence was that of 'unlawful carnal knowledge' of girls over 12.

⁴ See, generally, Hart, H. L. A. *Punishment and Responsibility*, revised edn (2008) Oxford: OUP.

rights, that would support the criminal prosecutions. On the other hand, if, as I maintain, victims have no such rights to prosecution or to the punishment of their tormentors but only rights to fair treatment, it is not necessary to suppose that the only way of improving the situation was through the criminal law. Other solutions were an amnesty, followed by counselling and compensation to victims, or even perhaps a South African style 'truth and reconciliation' procedure. The third is an argument that, given the draconian nature of the criminal law, a principle of *certainty* should be observed as much in the criminal law as it is admired in property law. If a person cannot reasonably know what it is they must do—that is, how they should modify their behaviour to avoid conviction—it cannot be fair to convict.⁵

Crown Jurisdiction in Pitcairn: Community and Legal Theory

The jurisdiction of the British Crown over Pitcairn has never been clear because of the ambiguity inherent in the long historical connection between Britain and Pitcairn. The Pitcairn community was tainted with rebellion from the community's formation following the *Bounty* mutiny. That ambiguity remains, the taste of rebellion renewed each year in the ceremonial burning of an effigy of the *Bounty* on the island bay. Yet the islanders refer to themselves as British—as one imagines the original mutineers did—and they display a British-derived flag.⁶ The almost total lack of contact between the island and Britain has been striking. Precisely what one would expect that contact to be is a difficult question, given the isolation, but the reality was, and to a large extent still is, only via some electronic connection (Internet and shortwave radio) and passing cruise ships. The occasional administrative direction comes from New Zealand and not Britain. Any input to law creation through the Island Council was to the laws drawn up by the Island Governor who does so in the British High Commission in Wellington, 2,200 miles to the southwest. The island community is conspicuously small in territory (two square miles) and population (47 people) and there are only four families, with strong evidence of inbreeding.

⁵ This formulation covers strict liability offences; these, in my view, are compatible with responsibility where they reasonably impose duties 'to find out'.

⁶ The flag is a British ensign with a burning *Bounty* imposed on top.

Although it is as small as the tiniest of English villages, that comparison omits its dramatic isolation, for Pitcairn's nearest neighbour is the relatively empty and barely populated Easter Island, over 1,000 miles to the east. Pitcairn Island is generally thought to be the most isolated community in the world.

Imagine a ship that leaves Britain under a naval captain who represents the sovereign at high seas. The ship becomes stalled, radio contact is lost, and the ship roams free like *The Flying Dutchman*. After a long time, when the ship is becalmed, it becomes stuck on a rock, and coral gradually anchors it to the seabed and it becomes a tiny island supporting a tiny population of the descendants of the ship's sailors.⁷ There will come a point in the interpretation of this chain of events that the past becomes only of detached historical interest. Similarly, think of George Washington's axe, the head and handle of which were replaced several times since he chopped down the cherry tree. What principle of historical interpretation should—if it should—link this present axe with the one that Washington once held in his hands? Both analogies suggest that the mere recital of a chain of events is insufficient; that something extra is needed to say why this or that chronology is significant in showing why the island is still ruled by the ship owners, or why this axe is the same as Washington's, or even that certain events constitute a 'chain' or a 'chronology'. As the colour of historical connection fades, the question of the criteria of significance looms. Given that the Pitcairn defendants were charged with criminal offences, and so were potentially liable to punishment, what role do past events play? The answer must lie in an account of the most basic conditions for making a justifiable claim of law; in other words, the answer must lie in a convincing account of the meaning of *legality*. The Pitcairn prosecutions raised this, and related issues, very acutely.

To say that 'the law says', or that 'the defendant has contravened a legal provision, or committed a legal offence' must, I suggest, be to claim wrongful non-compliance on the part of some person with a requirement that is in some sense issued on behalf of—or in the name of—a community. It would follow that to make a *legal* claim in Pitcairn's case would be to announce that the community represented by

⁷ The analogy is apt given the British propensity for having treated remote islands as ships; examples are: HMS Diamond Rock, a lump of granite in the Grenadines; the HMS Atlantic Isle, which was, both before and after the Second World War, Tristan da Cunha. Most well known is Ascension Island, originally known as HMS Ascension.

the British Crown was justified in applying coercive power against the defendants (we may leave open, for now, what that community was). We should note, of course, that the legal claim is different from the announcement that the defendants had acted wrongly. The 'legal' claim requires something more than that, the focus being not on the wrongness of the act itself—for acts can be wrong but not illegal—but on a community's collective right to use its coercive powers. Further, in any legal system, the claim of legality will imply some minimal relationship between the body making the claim and the people to whom that claim is directed. Even in uncivilized legal systems in which there are absolute monarchies and dictatorships, the fact that the monarch or the dictator 'has spoken' means they 'speak for' the state. Again, that claim is different from the bare claim that the subject did something wrong. In civilized legal systems, I believe it is reasonable to conclude that a claim of law has the colour of a *moral* claim, for instance, that the ruler acts with moral legitimacy, say, in accordance with principles of decency, or in recognition of fundamental rights, or principles of democracy. If so, we may learn from those legal theorists who emphasize links between governments and the communities they purport to govern. One such theorist was Lon Fuller who consistently maintained that we cannot make any sense of legal systems unless we understand them to aspire to certain ideals of morality.⁸ (And, in the example of uncivilized legal systems above, what sense can we truly give to the idea that community-wide obligations are imposed by mere claims?) The most abstract formulation of Fuller's ideal was what he referred to as the necessity of 'reciprocity of expectation' between law-makers and those subject to laws, disparagingly terming the idea of law as a one-way set of orders as 'law as managerial direction' only. The clearest statement of his view is in his *The Morality of Law*,⁹ where he argued that the more a community loses 'interactivity' or 'reciprocity of expectation' between ruler and ruled, the more a legal system's moral power to impose obligations and confer powers declines: '... the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order'.¹⁰

⁸ Fuller founds his theory on a distinction between the 'moralities' of 'aspiration' and of 'duty'. See Fuller, L. L. *The Morality of Law*, revised edn (1969) New Haven and London: Yale University Press, chapter 1.

⁹ 'Reply to his Critics', in Fuller, L. *The Morality of Law*, note 8.

¹⁰ Ibid.

Fuller leaves the territorial and communal reach of this view unspecified. But the thrust is clear, and the contrast between the 'relatively stable reciprocity of expectations' between the British Government and people in Britain and the conspicuous absence of such expectations on Pitcairn must cause us to pause on the question of British jurisdiction. In considering this, we should realize that Fuller thought that such expectations, based on fairness between rulers and ruled, went directly to the question whether there was law or not. For his theory is one of what legality, properly understood, means.¹¹

A not dissimilar view concerning the moral background to legality is advanced by Ronald Dworkin and in some variants by others, including this author.¹² While also viewing law as an 'aspirational' concept, Dworkin is more direct than Fuller, proposing that the importance of legality lies in the relatively conservative idea of uniting of a community's past with its present. It follows, he says, that the best view of law is through the means by which that ideal would be best achieved. We should do this by interpreting the legal practices of the community as morally coherently as we can. For him, this means reading those practices on the assumption that they treat all members of the community as

¹¹ Ibid. Other similar quotations are: '...the basic difference between law and managerial direction [is that] law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another.' (210). '[T]he Rule of Law demands of a government that it...legitimate its actions towards citizens.' (211). 'The publication of rules plainly carries with it the "social meaning" that the rule maker will himself abide by his own rules.' (217). '[W]e must not ignore the reality of the commitment implied in lawmaking, nor forget that it finds expression in empirically observable social processes.' (218). '[T]he functioning of a legal system depends upon a cooperative effort—an effective and responsible interaction—between the law-giver and subject.' (219). 'If we could come to accept what may be called broadly an interactional view of law, many things would become clear that are now obscured by the prevailing conception of law as a one-way projection of authority.' (221). Compare this with the German jurist Jürgen Habermas who goes a little further in claiming that: 'The modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the laws to which they are subject as addressees.' *Beyond Facts and Norms* trans. Rehg. (1996) Cambridge, Mass: MIT, 449.

¹² Allan, T. *Law, Liberty and Justice: the Legal Foundations of British Constitutionalism*, (1993) Oxford: OUP; Ashworth, A. *Principles of Criminal Law* (2003) Oxford: OUP; Dworkin, R. 'Political Judges and the Rule of Law' in Dworkin, R. *A Matter of Principle* (1985) Cambridge, Mass: Harvard University Press, 9–32; Dworkin, R. *Justice in Robes* (2006) Cambridge, Mass: Harvard University Press; Guest, S. 'Why the Law is Just' [2000] 31 *Current Legal Problems*; Tamanaha, B. *The Rule of Law* (2004), Cambridge: CUP; Tribe, L. 'Revisiting the Rule of Law' (1989) 64 *New York University Law Review* 726.

having moral rights to be treated as equals, and that they 'speak' to all members of the community 'with one voice', that assumption providing us with the critical tool to ensure whether the community acts 'on principle'. There is clearly a relationship between treating all members of the community as equals, and Fuller's idea of a reciprocity, since the moral entreaty to treat the ruled as equals would require a two-way response between rulers and ruled (in Dworkin's account, it requires the reciprocal relationship of a democracy). If there is insufficient reciprocity, or insufficient 'treatment as equals', then the conditions of legality are insufficiently met for both distinguished jurists. In an early account of legality, found in his Maccabaeian lecture to the British Academy in 1977, Dworkin contrasted two versions of legality, one a 'formal' or 'rule-book' version that depended on the law being identified without moral judgement, and the other that depended on identifying law only through the moral rights it enforces. The moral conception is the more 'ambitious', he says, because:

It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law. . . The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary, it requires, as part of the ideal of law, that the rules in the rule-book capture and enforce moral rights.¹³

Claims of law must conform to a set of moral principles which together constitute what we mean by the 'rule of law', he says. These principles are the abstract and familiar personal rights to dignity, equality, and freedom, and support the democratic legitimacy of the community. Although this account relegates non-democratic legal systems to a lesser status of legality or even to a failure of legality, we can still trace a connection to the uncivilized rule of absolute monarchs and dictators. As I have pointed out, in common with democratic laws and dictatorial decrees there is reference, albeit often cynical, to the points of view of those subject to it (Hitler: 'I speak on behalf of the German people'). This argument is not a sleight of hand, for our language is sufficiently flexible and rich to enable us to understand a dictator's commands as law in some sociological sense, that is, without our having morally to justify

¹³ Dworkin, R. 'Political Judges and the Rule of Law', note 12, 12; Habermas, J., note 11.

it. If we accept the collection of moral principles behind the rule of law, then these principles will colour the significance with which we both regard and interpret law. It must follow that we reject *as law* the idea of those 'laws' that do not embody such principles. Where this leaves Pitcairn is to some extent problematic; both jurists propose theories that place the Pitcairn prosecutions only at the margin of legitimate legality.

There is little in the cases or the Pitcairn recent history to indicate that relevant officials in Britain, New Zealand, and Pitcairn discerned a connection between British neglect and British jurisdiction. But there was a prevalent view that British neglect was one of the causes of continuance of the sexual culture. Lord Hope in the Privy Council said: '[T]he fact that this scale of offending... was tolerated for so long in such a small, isolated and closely knit community is an indication of the poor state of supervision exercised over its affairs by the colonial authorities.'¹⁴ Similarly, the Legal Adviser to Pitcairn in a letter written in 2000 to the Acting Governor of Pitcairn said: '[I]t is possible, although perhaps unpalatable, to attribute a degree of responsibility for the unbridled sexual licence of Pitcairn men over past generations to the absence of any meaningful civil authority and actual system of justice representing the guidance and supervision of the colonial power.'¹⁵ But British neglect did not affect the question of British jurisdiction. Lord Hope thought British law applied, in spite of neglect, asserting that 'long standing practice has established Pitcairn's status as a settled colony', and so he was not willing to question the Governor's 'legislative authority' to incorporate such law onto the island.

It is a shame that there was no discussion of the relevance of colonial neglect to the question of jurisdiction. To take the extreme case, let us imagine that Britain had no legitimate claim over Pitcairn, and Pitcairn is a foreign state, as foreign as France, or the United States. What, then, would Britain be doing there? It would have as much right to prosecute as would a French prosecuting authority, or the Santa Barbara District Attorney's office. The British Crown needed to argue the case other than through historical chronology, as the examples of the marooned *Flying Dutchman* and George Washington's axe show, and both Fuller's and Dworkin's suggested connection between legality (establishing

¹⁴ *Christian*, 2006, para. 56.

¹⁵ A letter from the legal adviser Paul Treadwell to Karen Wolstenholme, the Acting Governor of Pitcairn, whose office was in Wellington, dated 29 April 2000. See Appendix II, Document (b).

jurisdiction) and moral legitimacy seems to me to be a very plausible way of doing that.

There is a contrasting theoretical account of law, particularly useful because it explains a mode of reasoning permeating decisions at all levels in the Pitcairn courts. It is a very English account, traceable to the legal positivist school deriving from Bentham's teachings and, in the twentieth century, from its foremost scholar, H. L. A. Hart. While appreciating the importance of moral reflection upon the law, this school's main thesis was, to quote Hart, 'that it is by no means a necessary truth that laws reproduce the claims of morality although they have often done so'.¹⁶ The coherent message of this school, and the one popularly understood, is that to identify laws we need to determine whether they meet the criteria of valid law identifiable from an empirically described official practice of identifying law, a process sometimes referred to as identifying the law's 'pedigree'.¹⁷ Bentham, as well as his protégé John Austin, claimed that this pedigree was located in the 'command of the sovereign'—a description suiting the rule of monarchs and dictators. Hart thought that the pedigree of law lay in his 'rule of recognition'—a rule formulated from an 'empirical' and 'factual' description of what judges accepted as constituting the criteria of legal validity. And agreeing with Hart, Raz described the facts that gave rise to the rule of recognition as the 'social sources' of law, those practices of legal officials in identifying and applying law.¹⁸ According to these philosophers, to claim that some requirement had 'legal validity' meant no more than it met the criteria actually in use by legal officials. Accordingly, because the British legal officials as a matter of practice recognize statutes and other constitutional instruments, the British Crown clearly had the *legal* authority, in their eyes, to impose its laws by virtue of its incorporation by the Pitcairn Governor. In practical 'real' terms, the theory says that working out what British rules applied on Pitcairn was a matter of finding a 'paper trail'.

Consider the nature of historical analysis implied by this theory, which focuses on the tests for law in an empirically described official practice. This mode of argument is apparent in all the judgments, including the Pitcairn Court of Appeal, its Supreme Court, and in the Privy Council. The judgments trace the historical derivation of British

¹⁶ Hart, H. L. A. *The Concept of Law*, 2nd edn (1994) Oxford: OUP.

¹⁷ See Dworkin, R. *Taking Rights Seriously* (1977) London: Duckworth, chapter 2.

¹⁸ Raz, J. 'The Rule of Law and its Virtue' in *The Authority of Law* (1979) Oxford: OUP.

jurisdiction through application of the British Settlements Act 1887 as purely an algorithmic exercise. Notable is Lord Hoffmann's remark that the Pitcairn situation fell squarely within the 'doctrine' that what is a territory of the Crown is a matter of which the Court 'takes judicial notice'. He thought that constitutional instruments such as directions made in 1898 by the Secretary of State as well as various Orders in Council would be the subject of such judicial notice.¹⁹ He assumed, in other words, that a 'paper trail' of historical documents was conclusive evidence of the legal position. This approach makes quite irrelevant any discussion of neglect of the island by the British Crown. It also appears to deny the possibility of *interpretation* of these constitutional instruments.

It is important to consider, first, whether it is fair to legal positivism to charge it with supporting 'paper-trail' type judgements about law. But Hart is clear, time and again, that the determination of the criteria of legal validity in any legal system amounts to no more than a report (which may be complex, of course) of the observable practice of 'officials', 'officials' referring in large part to judges.²⁰ One might wonder in relation to Pitcairn what those facts of official practice would be. Was the question whether British laws applied to Pitcairn merely a matter of reporting—a 'reading off'—what British legislation *said*, since that legislation appears to meet the positivist criteria? Pitcairn makes us question this seeming orthodoxy, for the circumstances there make it easier for us to sense that something is going on that transcends the mere recording of 'what official British practice was' and 'what the British laws say'. Any judge, any official, would reasonably be expected to go beyond that suspiciously clear-seeming enterprise and, rather, try to make some sense of that practice (for example, ask whether it makes sense for it to extend to Pitcairn, given the circumstances there).²¹ At

¹⁹ A judge must of course take 'judicial notice' of all laws (Ordinances, Orders in Council, and the Sexual Offences Act 1956, for example) and consider himself bound by them; but he must interpret them first before he can say what they are conclusive of.

²⁰ See *The Concept of Law*, 2nd edn (1994), note 16, 12, footnotes to chapter V.

²¹ A useful case—one which demonstrates the damage that can be caused by supposing that law may just be 'read off' the paper—is *Al-Kateb v Godwin* 208 (2004) ALR 124. Justice Kirby's dissenting judgment has great power (see 156). He condemns the expressed view of the majority that because the statute was 'clear' any attempt at interpretation by judges as to its meaning would undermine the legislature. Justice Kirby must be right in thinking that to declare a statute as having any meaning, clear or unclear, is still to engage in an act of interpretation. That an interpretation is 'clear' could mean a number of things but not that interpretation was unnecessary. Justice Kirby thought that judges should interpret statutes in the light of prevailing principles (in his case, drawn from international law).

any rate, an appreciation of the difficulties in this point should draw us to non-question-begging questions about the lack of significant connection between officials in charge of the day-to-day administering of Pitcairn and those 'officials' who regularly apply tests of legal validity.

The positivist must maintain that certain mechanisms of law are in place, namely, that there are appropriate 'officials' actually operating something that can be interpreted as a 'system' in which there is both the creation and application of rules over a relatively well-defined 'territory', and over which the rules are relatively 'effective'.²² Using the *Flying Dutchman* example once more, legal positivism, viewed as a descriptive account of law, appears less compelling the more the ship's crew and passengers regard the historical origin of the regulations governing them as insignificant, and the more they are ready to discard the authority of the captain to be that of the British Crown. Taken to the extreme, is it unquestionable that we must characterize anyone as a legal official under British law if no one at all on the island regarded such a person as an official? Maybe the naked claim of the British Crown to be the official legal authority is sufficient, but one feels the need for more.²³ While the making of the claim might be a necessary condition for the Crown's legal authority, it is difficult to see how it could be any more than that, and it is certainly not sufficient. In any case, what 'claiming authority' means is a highly moot point. It seems possible for someone to be an official (such as a much-loved charismatic ruler, for example) without anyone having to contend that such an official has 'claimed' authority. In sum, in the story outlined so far, the question of legal authority over Pitcairn is not clearly settled. That is a matter of interpretation of the facts of settlement, and there is no obvious reason why Crown jurisdiction obtains by a default 'because the paper trail says so'.

²² These are common (and sensible) requirements of, anyway, Austin, Kelsen, Hart, and Raz.

²³ See Raz's various comments concerning the relationship between 'claiming' authority and 'having' authority in 'Authority, Law and Morality' in his *Ethics in the Public Domain* (1994) Oxford: OUP. He says, for example, that 'the law must be, or at least be presented as being, an expression of some people or of some institutions on the merits of the actions it requires'. He goes on to say: 'Such attributions can only be based on factual consideration. Moral argument can establish what legal institutions should have said or should have held but not what they did say or hold.' (215). Note that his clearly positivist account still requires a separate 'factual consideration' as to whether the 'expression' of an institution applies appropriately to a remote territory. Raz must have in mind the usual sort of legal system in which the connection between 'officials' and subjects is relatively uncontroversial.

One way to probe jurisdiction is to distinguish the criteria of legal validity from the conditions under which we would identify legal systems. First, 'saying so does not make it so'.²⁴ Hart took this line in criticizing Hans Kelsen's doctrine that municipal legal systems are a subset of an international legal system.²⁵ To use Hart's now-dated example, if the UK legislature passed a 'Soviet Laws Validity Act' which purported to validate the law of the Soviet Union by providing that laws currently effective in the Soviet territory are valid, that would not mean that Soviet law 'derived its validity' from the UK, or that UK law was 'the reason for the validity' of Soviet law. Hart thought this argument was 'clear and compelling': the courts and law-enforcing agencies of the Soviet Union would not recognize the force of that UK law. He concluded that the criteria for the identity of a legal system are different from those identifying the 'relationship of validating purport':

No doubt we could collect all laws between which the relationship of validating purport holds, irrespective of the legal system from which they come, and call the group of laws so collected 'a single legal system'. This would be to introduce a new meaning for the expression 'legal system'; for a group of laws lined together solely by the relationship of validating purport would not correspond to the concept of a legal system that lawyers and political theorists or any serious thinkers about law and politics actually use ... *recognition by the law-identifying and law-enforcing agencies effective in a given territory is of crucial importance in determining the system to which the laws belong.*²⁶

It is important to disentangle threads here by emphasizing that the point of my introducing this particular argument is to draw attention to the possibility of Pitcairn's having a distinct legal system. For, under Hart's account, British law could still extend to Pitcairn. He thought the question of legal validity was a matter of conformity to the criteria of legal validity evidenced in the 'facts' of what 'officials' of the British legal system declared it to be, and so British laws *could* apply to Soviet territory (and, as they do for murder, apply all over the world). On the other hand, legal systems, he thought, were defined in a different kind

²⁴ Britain's attempt to deny that there were any laws made in Southern Rhodesia is a good example. See the Southern Rhodesia (Constitution) Order 1965.

²⁵ Kelsen, H. *Introduction to the Problems of Legal Theory*, ed. & trans. Paulson (2002) Oxford: OUP.

²⁶ Hart, H. L. A. 'Kelsen's Doctrine of the Unity of Law' from *Essays in Jurisprudence and Philosophy* (1983) Oxford: OUP, 335–336. My emphasis, to bring out what is relevant to Pitcairn.

of way, not by 'chains of validity' but by a 'descriptive sociology' of officialdom and effectiveness.²⁷ So we should not take more from Hart than he suggests. On the other hand, if there was a separate operating legal system on Pitcairn—and that idea, as I have suggested, appears to have initial plausibility—the view of what was legally valid from the point of view of Pitcairn could have been at odds with the British law, and the official British view of things. Of course, how a genuinely separate and distinct Pitcairn legal system would view things is a problematic—and probably unanswerable—question given that the judges, and Office of Public Defender, created to represent the defendants if they so wished, were appointed by the British Crown, to enforce 'the law applying to Pitcairn'. The ambiguity in that idea is very difficult to disentangle if, indeed, it can be disentangled. And we should not assume that legal positivism is right in its insistence on drawing a distinction between the criteria of legal validity and the conditions at the root of defining a legal system.

How, without begging questions as to their status, did those officials administering Pitcairn law—those 'on the ground'—view the English criminal law? The islanders themselves, and so presumably the Island Magistrate, always spoke in terms of 'Island law'; so there was at least no clear evidence that the island administrators believed themselves to be acting purely within the scope of jurisdiction granted to them by the British Crown. Pitcairn was (and is) not that sort of place. 'Island law' was understood to be that which was written out in a special book of summary offences, available on the island and created by the island Governor, and it included various laws written by ship captains, notably the captain of the HMS *Fly* in the early nineteenth century. In this context, the English common law was clearly not understood to be part of 'Island law'. I cannot further see how simply renaming certain courts in New Zealand as being 'Pitcairn Courts' (and 'giving' them retrospective jurisdiction)²⁸ could answer that fundamental problem unless judges were prepared to go beyond the paper trail. To repeat: mere historical chronology does not seem sufficient to the task. In clear cases, I believe, the moral judgements are buried, although present, but in a

²⁷ For the same thesis, see Raz, J, *The Concept of a Legal System* (1970) Oxford: OUP.

²⁸ For Pitcairn, a community of only 47, to have its own separately identifiable three-tier system of judicial appeal—a Court of Appeal, a Supreme Court, and then recourse to the Privy Council—seems ludicrous.

case of Pitcairn's complexity, some willingness to be explicit on the moral position would have helped immensely in sorting out the question of legitimacy, including the Crown's right to govern, its right to institute courts, and ultimately, its right to punish.²⁹

Mala in se

Let us assume that these suggestions have merit and that the British Crown had no jurisdiction over Pitcairn, or that there was insufficient promulgation of the Sexual Offences Act 1956 to make it a valid law or to make the prosecutions fair, or that the English common law of rape had not been exported to Pitcairn. Even then, it remains an important question whether criminal liability could be imposed on the defendants by *anyone*. That any legal system would have no criminal provision for serious sexual offences is an odd idea, and one that throws light on the startling omission in the island law for sexual offences against children under 12 (there were sexual offences against children over that age). Can we say that some acts are either so morally pernicious that their legal status is assured independently of having been adopted or claimed as offences by any particular community? Or, perhaps, that their very perniciousness alone outweighs the requirement of legality? Perhaps we can learn a lesson from Fuller, who thought that the more wicked the act, the less need there would be for publication. There are difficulties in the approach. One is over what counts as a 'wicked act'—an act that is 'wrong in itself' or *mala in se*—because of the variation of that idea from culture to culture (in the Muslim world, the depicting of Muhammad is regarded as a wicked act) and so the idea that there is 'world interest' in imposing criminal liability on Pitcairn for the doing of 'wicked' acts requires something more. In practical terms, adding a requirement of being common to all legal systems would perhaps suffice. More important, however, is the general undesirability of the idea, already discussed, that because an act is wicked, or immoral, it *therefore*

²⁹ Note Dworkin, R. *Justice in Robes* (2006) Cambridge, Mass: Harvard University Press, at 170:

'We understand legal practice better, and make more intelligible sense of propositions of law, by pursuing an explicitly normative and political enterprise: refining and defending conceptions of legality and drawing tests for concrete claims of law from favored conceptions. There is no question of taking theories of law constructed in this way to be merely "descriptive".'

should be regarded as illegal and criminal. (It is through this thought, as I have discussed, that we arrive at the importance of legality).

In some cases—extreme ones—it is reasonable to suppose that right-minded people think that certain acts such as genocide, the waging of aggressive war, and torture are so very bad that it is difficult to imagine a legal system in which such offences could never be prosecuted as a *matter of law*. The idea of crimes ‘against humanity’ makes good sense in this context. It is not just that the acts are *mala in se* but that they are of such a nature that the world community can condemn them *in its name*; this is what gives it the quality of legality, and it explains why we are minded to say such crimes are ‘against humanity’ and constitute a breach of ‘universal laws’. We may answer the objection that Nuremberg-type defendants are then prosecuted retrospectively either by arguing that these universal laws existed before concretization for specific purposes or, more simply, by the argument that these crimes were so terrible that the moral importance of prosecution outweighed the moral principle of *nulla poena*.³⁰

Did the sexual abuse on Pitcairn fall into the same category as crimes against humanity? The question might reasonably be disputed. Of special significance would be the *weight* attached to the particular circumstances, for there is a difference in seriousness between rapes as there is in murder; a statutory rape (as in some jurisdictions) between two consenting fifteen-year-olds is clearly different in kind from a non-consensual and violent rape between strangers, or a young girl or woman and a much older man. Murder clearly comes in different degrees (once described that way), and it is not too difficult to draw a line between the sorts of violent and sadistic murders committed in Nazi concentration camps and some forms of kindly intentioned euthanasia.

The situation in Pitcairn should make us confront the genuine question whether there was a different set of sexual norms that prevailed in the ‘pre-political correctness’ period of the 1960s, 70s, and early 80s, and whether ‘Pitcairn sexual norms’ were different from those existing in Britain. It seems to me that it could be unfair to make a retrospective judgement about the extent of how bad or reprehensible the defendants’ conduct was in 1963 (when the first alleged offence occurred) by the later norms of 1999 and after, particularly on the basis of the significantly developed mainstream views on sexual abuse that had

³⁰ See Hart, *The Concept of Law*, note 16, chapter 9, particularly the last sentence.

developed in the interim in Britain. It is not necessary for this argument to absolve the defendants of *all* moral blame, for there is evidence of admissions amongst them that they believed that what they were doing was wrong at the time.

To explore how we might view our treatment of moral wrongness in another culture, imagine that in a remote British settlement, officials discover a tribe whose predominantly male culture endorses female circumcision, and decide to prosecute the tribal elder who performs ritual circumcisions. We think of him as unfeeling, and ignorant of the damage he does; but we can also see that he is not motivated by malice, and only performs the procedures because it is so much part of his culture; he has done it many times, over many years. I suggest it is not a simple matter of showing that he has met the conditions required by section 18 of the Offences Against the Person Act 1861; that it would not be fair to charge him with the standard offence of maliciously³¹ causing grievous bodily harm, with intent to do such harm, although clearly, had he performed ritual circumcision in Surrey, he would have committed the offence. There would be an air of inappropriateness about such a prosecution in spite of his having the *mens rea* and, it is suggested, the criminal law would be inappropriate for dealing with the situation. Because the culture so permeates the tribal elder's actions, it does not seem fair to prosecute him. It would not occur to him that what he did matched, say, the violence the young men of his tribe inflict on one another. He is wrong to think this, but our realization does not remove our feeling that there exists a degree of ignorance in his actions that deserves something less than the full operation of section 18. I would emphasize, though, that these remarks do not endorse cultural and (therefore, some might think) moral relativism. Rather, my view is that a sensitive and sympathetic appreciation of personal responsibility in morally bad cultures should encourage the shifting of the burden of correction away from the processes of the criminal law.

The importance of promulgation

The answer may lie in the attention we should pay to promulgation. The case of the 'different culture' indicates that, where someone is

³¹ 'Malicious', of course, has a standard meaning for s. 18 of having an intention or being reckless. That the tribal elder is not malicious in the popular sense would not save him from criminal liability.

enculturated to a lesser degree of understanding of wrongness, a greater degree of promulgation is required; in order for the criminal law to announce that certain acts 'not be done'—to use Hart's term—extra effort needs to be put into carrying that message more clearly to the enculturated intended addressees.

And so, in Pitcairn, the suggestion that there was a different prevailing sexual culture may determine the degree and kind of promulgation required. There was some attempt at engaging with the problem in 1970 during discussion at an Island Council where the Deputy Governor and others raised the matter of sexual conduct towards the island children. But it was a feeble attempt at altering behaviour; in any case, no one pursued the matter. That little was done for the following 29 years speaks volumes about the existing culture.³² The view that there were different sexual mores in Pitcairn from those in England is supported by the report of a study carried out by Neville Tosen, the island's pastor, in 2000. He confirmed anecdotal evidence that most women had their first child between the ages of 12 and 15. Clearly Tahitian influence from the genesis of human habitation on Pitcairn permeated island culture, and it is a fairly persuasive argument that the historical background to the sexual practices of the island was Tahitian—where it is widely known (Gauguin is a good reference) that sex was 'freer'.³³

Aside from questions of a theoretical nature, concerning both positivist and non-positivist accounts of jurisdiction, there was the particular legal question raised and discussed in all the Pitcairn courts: whether there was sufficient 'promulgation' of the English Sexual Offences Act, 1956. In some sense, of course, the defendants 'could' have found out what this statute said. They were not incompetent, and it was physically possible to obtain the knowledge by shortwave radio, or by letter. And it is true that there was a public notice displayed on Pitcairn for some time (although faded by weather) stating, in as many

³² Acknowledged, too, in official correspondence, eg, that between the Island Governor (Williams) and the Foreign and Commonwealth Office in 2000, speaking of two cases of sexual misconduct on the island: 'I have no doubt that these are not unique cases. It is far more likely that they are a continuation of a pattern that has been going on for 200 years.' Vol. 8b of the Pitcairn Privy Council Record, 3668 (PC disk).

³³ Marks, K. 'The Paradise That's Under a Cloud' *The Independent*, January 23, 2002. A significant proportion—perhaps as much as half—of the original eighteenth century inhabitants were from Tahiti, as either wives of the *Bounty* mutineers, or brought for work.

words, that British law, both statutes and the common law, applied on Pitcairn. What was the reality, however? Pitcairn was even more isolated 20 years ago than it is now, with only recent Internet connection, and available well after any of the alleged offences occurred. It was then an extraordinarily isolated community only remotely in touch with the 'host' kingdom through shortwave radio and contact with the occasional cruise ship. The islanders were, significantly, not conversant with law other than 'Island law', and they had little knowledge of how law was generally viewed, administered, policed, enforced, and discussed in Britain.

Nevertheless, the Pitcairn courts made findings of fact that there was sufficient promulgation, and so it was relatively easy for Lord Hoffmann to conclude that it was unnecessary to discuss 'the philosophical basis of legal limits' of the principle.³⁴ Can one truly set 'philosophical' questions aside like this? Possibly Lord Hoffmann meant to imply, as Fuller was explicit, that the more serious the offence the less there was a need for detailed promulgation, because he went on to say that these were 'serious offences', and so the balance came down 'firmly in favour of bringing them before a court of justice'. But he certainly took no account of anything like 'enculturation', from which a plausible Pitcairn perspective existed that these were less serious offences.

Promulgation and *ignorantia*

It is common for legal systems to enshrine a principle that defendants may not offer as a defence that they were ignorant of the law that purportedly governed their conduct (*ignorantia juris non excusat*). It is a well-established principle of the English criminal law. We might be seduced into thinking this principle covers the situation of inadequate promulgation simply because, as a result of poor or non-existent promulgation, the defendants are ignorant of the law. But if the promulgation could not have been reasonably known, the principle of *ignorantia* may not be so straightforwardly applied, because we could then say that the defendant's ignorance of the law is reasonable where the law is inadequately promulgated. The ignorance of the law principle is still one of personal responsibility. It creates a duty in the defendants

³⁴ *Christian*, 2006, para. 24. His position reflected his argument concerning judicial notice of the 'fact' of British jurisdiction.

to have reasonably considered the lawfulness of their actions. Where that duty is discharged, any remaining ignorance should in fairness excuse. It is instructive to see the intimacy of the link between fairness and promulgation here. Because (as it were) unreasonable promulgation makes ignorance of the law reasonable, whether someone is criminally liable in such cases is a direct question about what is fair in the circumstances, and whether it is fair to prosecute. We can enhance the intimacy by imagining what sort of community it would be where little or no regard is paid to promulgation. Try to imagine, as Fuller did, a legal system in which there were no publicly expressed laws at all, one in which all laws are secret and unpublished; even if one could construct such a system on paper, it makes absolutely no sense in the real world. And so it must be a virtue of the 'natural law' approach that this seemingly intimate connection between law and morality is more easily explained.³⁵

What about the 'positivist' approach, given its connection with the 'paper trail' method of establishing jurisdiction on Pitcairn? Some theorists professing a 'positivist' position and often called 'soft' positivists (or 'inclusive' positivists, or 'incorporationists')³⁶ *do* acknowledge the intimacy of law and morality in difficult cases. But it is precisely because they do, that their theory becomes destructive of their goal of maintaining a separation between morality and law. For they claim that moral argument only becomes part of the law when particular moral rules and principles are identifiable by reference to a non-morally defined and descriptively identified 'social source' of law such as a judicial decision, a statute, or general recognition by judges. In such cases, these 'soft' positivists argue, the law 'includes' or 'incorporates' morality but not in other cases; so since morality is only there, as it were, at the 'invitation' of law, the distinction between law and morality can be maintained, even though the

³⁵ See Aquinas, T. *Summa Theologica* (c. 1266–1273), Vol. 28, Question 90, Art. 4. Also see Fuller, L. *The Morality of Law*, note 8, 49, and Hobbes, T. *Leviathan* (1651) ch. 31 para. 20 (quoted by Lord Hope in *Christian & Others v R* Judgment of the Privy Council, 30 October, 2006 [2006] UKPC 47, para. 48).

³⁶ 'Soft' positivism is first referred to by Dworkin in *Law's Empire* as 'soft conventionalism'. Hart in his *Postscript to The Concept of Law*, note 16, uses 'soft positivism' in his defence of his theory against Dworkin. The same idea has variously been adopted as 'incorporationism' by, for example, Coleman, J. *Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001) Oxford: OUP, and as 'inclusive positivism' by, for example, Waluchow, W. *Inclusive Legal Positivism* (1994) Oxford: OUP.

identification of law, because a controversial question in the difficult cases, remains 'soft'.

This argument cannot work. First, we are struck by a virtue of clarity in positivism's apparently bright line between the law's requirements and morality's requirements. Clarity in that distinction would assist the criticism of law, and it would also encourage the understanding of law in those to whom it is addressed.³⁷ But soft positivists do not appear to think that their theory has practical virtue. Rather, they view the theory as only 'descriptive' of law (as Hart in his *Postscript* claimed) and so, for them, the 'descriptive fact of the matter' is just that there are no 'bright lines'. A second point is fatal, however. Soft positivism has a Trojan virus. Once morality is incorporated into law, its power becomes unstoppable. No 'social source' fact can restrain it from undermining the authority of the social source itself. Take the favourite of all positivist accounts, the morally evil system. Imagine that the judge is required to give effect to a barbaric statutory provision—one, say, like that of the 1935 Nuremberg decree that prohibited marriage between Jews and German citizens—and to do so, as we can easily hypothesize, 'with due attention to equity and justice'.³⁸ Soft positivism provides no reason why that requirement, of making moral judgements relevant in determining the question of *law*, would prevent the judge from concluding that the law of barbaric content was itself contrary to 'equity and justice'; indeed, soft positivism can offer no reason that would prevent the judge from concluding that the institution issuing the law—that body identified by the relevant social source—lacked all the legal authority to make any such law. The point fatal to all versions of soft positivism is that morality is not a kind of 'add-on' to other systems but is a free-standing generator of first-order universal judgements which are morally sovereign. Coming to this argument from the other end, since there seems no reason why the legal incorporation of moral standards should not be *implicit*, as something to be 'read into' the 'social sources' of law, soft positivism cannot tell us why moral standards are not fundamental to identifying law in all cases.

³⁷ Two arguments used by Bentham in favour of a positivistic account (see later).

³⁸ Even the supposed Law for the Protection of German Blood and German Honour of 1935 appeared to allow that innocent marriages between Jews and German citizens (ie, ones that were not intended to evade the prohibition) would be recognized if they were celebrated outside Germany; that spark of recognition of personal responsibility—of morality—could be kindled to good use.

Two values of promulgation and legal positivism

We should therefore look for better versions of positivism to understand the significance of promulgation. 'Harder' versions claim as a virtue the clarity—the 'non-softness'—of the distinction between law and morality; the metaphor urges the idea that law is a 'hard' object, ultimately identifiable by reference to an empirically describable social source such as a practice amongst judges.³⁹ The value of the clarity in distinction is, I suggest, two-fold: it aids the *efficiency* in carrying out the law's purposes, and it establishes the *moral independence* of the addressee of law.

Efficiency requires promulgation because the addressees of law have to be aware of what it requires or empowers them to do. According to this interpretation of positivism, the argument is not to say that laws are 'invalid' because they are not promulgated. Rather, it is that a failure of efficiency represents a failure of law in a respect that legal positivism, under this interpretation, makes significant; it is a defect that goes to the heart of what this form of positivism says is law's inherent aim. Bentham stressed that framing laws was not enough, and that the legislator also had to attend to making those laws clear to those affected.⁴⁰ He also thought that the law should pursue utilitarian ends: if most of us accepted that law could be identified and dealt with independently of morality, the clarity of mind and subsequent critical awareness we would gain would contribute to the greater happiness of the greatest number.⁴¹

A second practical virtue of legal positivism, also present in Bentham's work, is that through the clarity of hard positivism's distinction, the moral independence of individuals is preserved in the intellectual

³⁹ The most well-known 'hard' positivist is Raz, J. 'Authority, Law and Morality' in his *Ethics in the Public Domain* (1994) Oxford: OUP, and Raz, *The Authority of Law* (1979) Oxford: OUP, chapter 3, especially at 50–52. The only sensible interpretation of Hart's theory, I believe, is that it is one of 'hard' positivism. Waluchow, note 36, uses the term 'exclusive' for 'hard' positivism, to distinguish it more sharply from 'inclusive' positivism.

⁴⁰ He did this by likening the unmindful legislator to the ostrich which '... leaves its eggs in the sand, unmindful that the passing foot may crush them ... the legislator who, after having framed his laws, abandons their promulgation to chance, and thinks that his task is finished when the most important of his duties has only begun, would have been represented by the ostrich'. 'Of promulgation of the law and promulgation of the reasons thereof.' Vol. I *Bowring Edition of Bentham's Works* (1843) Part I. Texas CUWS website.

⁴¹ See Postema, G. *Bentham and the Common Law Tradition* (1986) Oxford: OUP. Note Postema's reference in chapter 9 to Bentham's remark in a letter to Voltaire of 1776: 'I have built solely on the foundation of utility.'

separation of the state's legal demands from those of individual conscience. This value supports promulgation because it requires that people know the law in order to be able, morally, to detach themselves from it. Once more, this is not to say that an unpromulgated law is not a valid law, but to emphasize that the lack of promulgation expresses a failure in a fundamental defining aim of this version of positivism. In the event of failure, of course, a question concerning the fairness of prosecution under such a law needs resolving. Hart was particularly clear about how he perceived this particular moral value of his theory in *The Concept of Law*.⁴² In chapter IX, he explicitly chooses between two conceptions of law: one which combines law with moral judgement (a 'narrow' conception), and a 'wider' one which distinguishes sharply between the two. He chooses the latter way to characterize law on the explicit ground that there are 'practical merits' in thinking that law could be wicked. His summing up is in a passage stating most forcefully what is, in my view, the central thesis of *The Concept of Law*:

What surely is most needed in order to *make men clear-sighted in confronting the official abuse of power*, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to moral scrutiny.⁴³

Hart's insight is that if we can clear-sightedly identify law we can more easily distinguish its specific demands from those of our personal moral conscience. In civilized communities, these two requirements are, for the vast majority, merged within one rough set of convictions; most people accept in these cases that the community is entitled to make reasonable, and sometimes disagreeable, demands. But the theory requires the distinction, and this leaves space between saying what the community has demanded, and what the individual's own moral convictions demand. Where people are not given that chance of 'clear-sighted' identification of the law's demands, their inability to scrutinize what the community demands again raises the issue whether it was fair to prosecute.

This argument is morally significant when compared with efficiency. Efficiency seems compatible with morally unjustifiable ends whereas the

⁴² *The Concept of Law*, note 16.

⁴³ *Ibid.* Emphasis added.

enhancement of moral independence is not. It is one matter for a legal system to be inefficient but another that a legal system fail to place the issue of legality before an individual recognized as personally responsible to their own conscience, and capable of confronting 'the official abuse of authority'. If we constantly defer to the law for what we must morally do, then we will begin to assume that we should just accept what is 'handed down from on high'. This is what tends to occur in totalitarian systems, or in religious oligarchies, under which the individual has continually to guess what the state wants. It was against this sort of reductive and illiberal thinking that Hart, I believe, evolved his analysis and endorsement of legal positivism. For him, the virtue of requiring law to be clear and certain was paramount, and so, too, a recognition that this virtue would come at a 'cost', that of allowing people to be free unless there were clarity and certainty about what the state required of them.

A brief excursus would be helpful. It is widely believed that Hart's theory of law is a purely descriptive one, not intended to impute to law any particular value. The argument is sometimes confused between the question whether this was what Hart intended or whether his theory makes best sense as a descriptive theory, although it is mostly concentrated on the former question, and supported by well-known remarks by Hart both in the early stages of *The Concept of Law* and his posthumously published *Postscript*. If it is true that it is merely a matter of 'descriptive fact' that law is efficient, and that it enhances moral independence, then where the law is unclear there is nothing to say about it, except that 'the law is like that' as 'a matter of fact', or that this is 'just how law is' at its descriptive 'fringes' or 'penumbra' (Hart's words). I don't believe this argument is sustainable.⁴⁴ Imagine a society where people believe and live according to a conception of law that God is the source of all of our obligations, including our legal obligations. We may also imagine that priestly 'interpreters' of God's law inconclusively identify these obligations, and there is perhaps evidence for them in a Holy book. It is, in fact, a sketch of the ideal Islamic system of law. Hart's account of law fails to describe this system centrally as law

⁴⁴ Nor does Finnis, in *Natural Law and Natural Rights* (1980) Oxford: OUP, chapter 1, nor Dworkin, in *Law's Empire* (1986), Cambridge: Harvard University Press, chapter 1.

because one of the significant features of his central case will be missing; now, the ultimate source of our legal obligations is God's commands, and not a factually identifiable human 'rule of recognition'. I should add that it would be facile to say, in defence of Hart, that the rule of recognition is the concordant and factually identifiable practice amongst human officials in identifying God as the source of law. If we identify God's commands with the requirements of morality then we would not be able to distinguish them from law, which distinction is the mark of legal positivism. (It would also, very probably, be highly blasphemous to declare that God's authority to make law derived solely from human will).

If we take the practical—non-descriptive—interpretation of Hart to be the better one, legal positivism sits very well with the liberalism rightly associated with the rest of Hart's work, on criminal responsibility, on punishment, on the enforcement of morality, and other matters. This liberalism relies on the view that our moral obligations are a function of our independently conceived personal consciences, a characteristic thought of the Enlightenment, and the basis of our conception of personal responsibility. Understood in this straightforward way, Hart's *The Concept of Law*, far from being a 'morally neutral and descriptive theory', *joins sides*. It says that on occasions it will be morally good to *break* the law, an idea that is surely inconceivable in the purely Islamic legal system, because it would praise disobedience to God. In essence, Hart's book enjoins you, the emancipated individual, to ignore the law where your personal convictions demand it. In fact, my personal impression of Hart was that this was his moral take on law. I personally believe the *Postscript* to be an unfortunate aberration that was wrong-headedly aimed at winging Dworkin. It is better, in my view, that Hart be remembered as presenting the best interpretation of Bentham's positivist doctrine, one that has a clear moral point.

Return to Pitcairn

If these arguments are correct, and positivism's only coherent justification lies in its promoting efficiency and moral independence through the clarity of its famous distinction, those twin values needed more recognition in the particular circumstances of Pitcairn. For the evidence of promulgation was some distance from achieving efficiency in effecting change or ensuring the moral independence of the defendants.

One of the more interesting items in this hugely documented case⁴⁵ is the extensive cross-examination by the Pitcairn Public Defender of the Pitcairn Island legal adviser, Paul Treadwell, who was a solicitor practising in a small town about 150 miles north of Auckland in New Zealand, and some 1,800 miles from Pitcairn.⁴⁶ (I mention distances and geographical locations to emphasize the element of surreality in this case.) The line of questioning was designed to show that since the official Pitcairn legal adviser was not himself aware of what law applied on the island—for example, he admitted he was unaware of the English Sexual Offences Act 2003—in order to show that it could hardly then be said that the defendants were or could be assumed to be aware of the relevant law. It was only after Mr Treadwell had consented to being legal adviser that he discovered that he had the powers, in relation to Pitcairn, of the Attorney-General of England and Wales. It was revealed that he had not given any legal advice to the Island Magistrate, although he knew at the time that the Island Magistrate was only a layperson, the island's teacher. And although Mr Treadwell had asked whether he might visit Pitcairn, this request was apparently refused. In 1997, his expressed view to the Governor of Pitcairn in Wellington was that the only law the islanders were aware of in relation to sexual assault was section 88 of the Justice Ordinance, passed by the Pitcairn Governor, which made it an offence to have intercourse with a female of or over the age of 12.⁴⁷ He thought it 'a very unsatisfactory situation' that offences against girls under 12 were covered by an English act, and that offences against those of 12 or over was the subject of a local statute. More to the point, he thought that even stocking a public library on Pitcairn with the written laws—kept up to date—would not go far enough to inculcate appreciation of what was required in the islanders. He recommended that the Governor should 'provide codes of criminal law, criminal procedure, evidence in criminal cases and a workable system of judicial organisation'. Indeed, he went on to say: 'This may seem like a hefty exercise for such a tiny jurisdiction but

⁴⁵ The Pitcairn case at the Privy Council was the first case in which the full public record of its proceeding was put on disc. It contains an enormous amount of information, much of it providing a detailed documentary history of Pitcairn. The disc contains 1.4 gigabytes of information, translating into many thousands of pages. It is a fascinating read.

⁴⁶ The evidence of this cross-examination was not discussed in the Privy Council because the Privy Council took the Pitcairn Court of Appeal findings as settled.

⁴⁷ An offence apparently referred to on the island colloquially as 'cardinal' knowledge. The Ordinance laws comprised what was known locally as the 'Island laws'. See Appendix II, Document (a) below.

of course it will take only another single incident of serious crime on Pitcairn from which there may well be no simple means of disposal . . . in order to create a situation of great difficulty, expense and perhaps international embarrassment.⁴⁸

Of course, if we reject the idea that positivism must have some practical value, and maintain, as many do, that the theory is intended only to offer a general 'descriptive' account, we may show its support of the 'paper trail' method of establishing Crown jurisdiction (where 'saying so' appears to 'make it so'). Nevertheless, to raise the familiar objection from natural law, it remains for it to be made obvious why a mere description of 'the way things are' gives rise to obligations and powers that are not 'paper only', including, of course, the right to prosecute and punish. The point is that, contrary to what people often think about legal positivism, its account of law—that is to say the conception of law it chooses and invites us to accept—rests firmly on moral beliefs about the right relationship between the citizen and the law-creating state.

We might, therefore, try to put the legal positivist position in two ways, each relevant to Pitcairn. I realize that many positivists will find the argument outrageous here because it will seem like turning positivism into natural law; but this is what I am trying to do. Positivism is a theory of law. If the conditions for law according to this theory are to serve a practical point, the less that point is served, the more positivism must deny its status centrally as law. Positivists can only retreat from this position by claiming the theory to be 'descriptive only'; this position, of course, has its own special difficulties in failing to characterize adequately some aspects of law, particularly the evaluative nature of legal argument (which, as I argued, soft positivism cannot cope with) and the status of purely theistic Islamic-type systems. First, efficiency is

⁴⁸ Letter to the First Secretary of the British High Commission in Wellington dated 5 January 1997. See Appendix II, Document (a). (Recall that the first investigations against the Pitcairn defendants began two years later in 1999 when a member of the Kent constabulary visited the island.) Also note that Karen Wolstenholme who was Deputy Governor until 2002 wrote to the Foreign Office in May 2000 outlining serious deficiencies in the way Pitcairn was governed. She noted that the Governor and other senior officials lived 2,200 miles away, in New Zealand, visiting only 'irregularly' and for short periods. The resident Government adviser, who doubled as the teacher, was not regarded as a figure of real authority. She said that the island lacked 'civil authority' and that it perhaps was 'not altogether surprising if the community does not see the laws as applicable to them'. See the *Auckland Herald* April 22, 2005.

a major aim of law, and so, less efficient law is to that extent *less law*, and completely inefficient law is not law at all. (And so we can say *something* like there is 'less of an obligation' or 'the question of obligation requires something more than an unqualified statement of what has been declared as law'.) If efficiency is necessary to law, or is 'part of the "concept" of law', then where efficiency is lacking, so, to that extent, is it 'less law' or closer to, in Hart's terms, the '*pre-legal*'.⁴⁹ Second, clarity about what the law requires represents a moral value of 'knowing where you stand' so that law that is not particularly clear (eg the common law according to Bentham) is also lesser law, and completely unclear law is not law at all. One way of putting it is to say that the first reason for requiring promulgation—efficiency—looks at the law primarily from the point of view of the legislator, and the second reason looks at the law from the point of view of the legal individual. If Hartian legal positivism includes the proposition that individuals have rights to individual conscience, and that the 'abuse' of the state against conscience is wrong, it is not a big step to say that positivism demands *in some way* that law be fair. Applying this line of reasoning to criminal prosecution, if it is not possible for a person to escape criminal conviction even though he could not reasonably have expected criminal consequences for his conduct, the law fails to meet its own standard of legality. The Rule of Law, according to legal positivism, then, not only requires promulgation but on one strong interpretation does so by making fairness to the Pitcairn defendants relevant.

Fairness

This brings us to the question: what was 'fair' on Pitcairn? Herewith are relevant subsections of section 14 of the Sexual Offences Act 1956:

- (1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.
- (2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.

⁴⁹ *The Concept of Law*, note 16, 94, emphasis added.

We might begin by asking what, according to the English law, was an indecent assault on Pitcairn? Lord Ackner approved a test in 1989 for indecent assault as something that 'taking into account the surrounding circumstances' would be 'regarded by ordinary right-thinking people as an indecent assault'.⁵⁰ Applying this test retrospectively to Pitcairn in 1963, when the earliest of the offences occurred, it is extremely difficult to imagine either the thoughts, or composition, of a contemporary Pitcairn jury (all of whom would be Seventh Day Adventists, of course). It must then be reasonable to ask, in determining the question of sufficiency of promulgation, how precise knowledge of section 14 had to be. We cannot assimilate simple belief that a certain act was 'wrong', to a reasonable understanding of the precise nature of the offence. Take the set of facts giving rise to Dave Brown's 10 counts of sexual assault. These were allegedly committed over the period 1972–1974 when he was aged 15–17 and the victim was aged 12–14, at a time when in other countries, notably Spain, the age of consent was 12. Is it fair to have imputed to him the knowledge that what he was doing was contrary to the particular prohibitions spelled out in section 14 and that whether his victim consented or not was irrelevant? In Lord Hope's terms: 'There is no evidence that anyone on Pitcairn was aware of the provisions of sections 1 and 14 of the Sexual Offences Act 1956 prior to the commencement of the police investigation in 1996.'⁵¹

When coupled with the penalties, there is a degree of specificity to these offences that the defendants could not have known. Were they 'fairly labelled' in the 'reasonable scenario' of the defendants' imputed knowledge? What if someone thought—because of hypothetical lack of cultural awareness—that 'having carnal knowledge' with a girl over 12 was something wrong, but nothing like 'indecent assault' since the idea of indecency never enters their head, nor the idea that there could possibly be an assault simply because the victim apparently consented?

In support of this line of argument, I would note Ashworth's belief that the mere 'announcement in advance' of a set of stable rules would be insufficient for establishing legal liability; he argues for 'greater judicial activism' in developing a richer account of the idea of legislative supremacy and what counts as a fair warning to the addressees of the criminal law. He thinks that attention to the cultural and social values

⁵⁰ *R v Court* [1989] AC 28, 48. He also thought that the question was solely one for a jury.

⁵¹ *Christian*, para. 68.

held within the jurisdiction are relevant to determine liability. Such values are, he says:

[S]ometimes described by the phrase 'the rule of law', but that phrase is unsatisfactory because of its varying uses. In its narrowest, neutral sense it connotes a fairly stable set of clear and general laws announced in advance. More appropriate here is a wider concept which encompasses such values as formal justice (treating like cases alike), respecting vested rights, non-retroactivity, maximum certainty, fair labelling, and the presumption of innocence . . . The values are not absolute *but should be linked to the social and legal culture of the jurisdiction*.⁵²

Of relevance to Pitcairn on this latter point is the question whether sections 1 and 14 of the Sexual Offences Act 1956 constitute 'fair labelling', that is to say, give a fair and accurate description of what, on Pitcairn, constituted an indecent assault, a statutory rape, and a lack of consent.⁵³

Lord Hope came nearest to seeing the difficulty. He was impressed by the idea that there may be some sleight of hand in supposing that the Sexual Offences Act 1956 applied on Pitcairn, providing a strong lead to a major argument of this chapter ('The requirement of the ascertainability is an essential component of the rule of law. But in the case of statutes of general application in force in England, as the Governor should have known, it was incapable of being met on Pitcairn'). He managed to evade the difficulty, however, by arguing that because the 1956 statute was in effect no different from the common law ('they were not creating new crimes') other than prescribing penalties, and, since the common law was known to have been part of the island's law, it did not particularly matter if the defendants were reasonably unaware of the existence or terms of that statute. But with some respect, to substitute the supposedly already existing common law of rape does not circumvent the point. For the concession that the Sexual Offences Act 1956 might not have been sufficiently promulgated because of its over-specificity, does not lead to the conclusion that the common law was sufficiently promulgated, for that, too, is at least equally unascertainable, but through *under-specificity* rather than over-specificity. As a general principle, we can't suppose the common law to be as specific as, or more so than, statute. That is not in its nature (and some would say is its virtue). Lord Hope's instincts seemed right and so it is a pity he failed to take the argument to its predictable conclusion. Rather, he

⁵² Ashworth, A. 'Interpreting Criminal Statutes: a Crisis of Legality' [1991] *Law Quarterly Review*, 419, at 440. Emphasis added. Also see Tamanaha, B. *The Rule of Law* (2004) Cambridge: CUP.

⁵³ See further, Ashworth, note 52, 442.

left that argument when, in discussing Blackstone's argument that uninhabited countries 'discovered and planted' by English subjects were controlled by the common law, he reminded us that, however, in Pitcairn 'the decision was taken to prosecute the appellants under the English statute, not the common law'.⁵⁴

We may wonder also whether we should ignore the general question whether penalties are part of the meaning of an offence for the purposes of promulgation; penalties have the important function of indicating the seriousness of the offence. And there is, of course, the problem with what the common law precisely requires. The power of Lord Hope's argument derives from the fact that rape is a generally recognized moral wrong and so its function in the argument is that rape is a crime of 'natural notoriety'.⁵⁵ Lord Hope's instincts that his argument is not quite satisfactory is revealed in his speech:

As a general rule the prosecutor is tied to the ground that he chooses to fight on. If he decides to prosecute under a statute, it is not open to him to ask for a conviction under the common law unless the statute in question provides for this as an alternative. But I do not need to resolve this issue as I have concluded, although not without difficulty, that as sections 1 and 14 of the 1956 Act were not creating new crimes it was open to the prosecutor to bring the prosecutions under the statute notwithstanding its lack of promulgation.⁵⁶

Imputing knowledge of the common law to the defendants is easier than imputing knowledge to them of the penalty. While the defendants knew that rape was wrong in someone's law (although I'm sure none of them knew what 'common law' meant), it is very doubtful any of them knew, or had reason to know, that the offence was liable to life imprisonment. For all they had experience of, over many years, was the offence of carnal

⁵⁴ *Christian*, para. 71.

⁵⁵ Note Bentham:

There are some laws which seem to have a natural notoriety: such as those which concern crimes against individuals; as theft, personal injuries, fraud, murder, etc. But this notoriety does not extend to the punishment, which, however, is the motive upon which the legislature relies for procuring obedience to the law. It does not extend even to those circumstances, often so delicate, which must be noticed before the line of demarcation can be traced among so many crimes differently punished, nor even to those actions which are either innocent or meritorious.'

Also see Glanville Williams' 'Convictions and Fair Labelling' [1993] *Cambridge Law Journal*, 85, and see Ashworth's reference to the principle of 'fair labelling': Ashworth, A. 'Interpreting Criminal Statutes: a Crisis of Legality', above n 52.

⁵⁶ Para. 86.

knowledge, the penalty for which was—clearly set out in the book of ‘Island law’—only three months’ imprisonment.⁵⁷

It is instructive for my argument how Douglas Husack in his discussion of *ignorantia* echoes Fuller’s sentiments on reciprocity; in fact, he sums up the general position very well:

Deciding how much blame persons deserve for being ignorant of the law without evaluating the quality of the state’s effort to inform persons of their obligations is like deciding how much blame persons deserve for being illiterate without evaluating the quality of the state’s schools. Good citizens make an effort to learn the law of the state. But duties inhere in both directions. Good states make an effort to teach citizens the law.⁵⁸

The Limits of Criminal Law

What is criminal law for? Characteristically, as I said earlier, it announces that various acts should not be done, and supplies reasons for not doing those acts in the form of the imposition of penalties in the case of irresponsible non-observance of its rules. Proceeding by way of penalty, including the stigma of conviction, it is a relatively draconian instrument of social change. Given its connection with punishment, I suggest the criminal law is not suited merely to making announcements ‘for symbolic effect’.⁵⁹ A blanket view of legislation that its point is to ‘send out a message’ is undesirable, because it makes certainty and particularity about the conduct it criminalizes slide to an inferior position to the message, and therefore subverts principled decision-making. Legislation as ‘symbolic of change’ crudely and efficiently—by the writing of some words alone—addresses the often short-term political problem of placating a vociferous section of the public. That can be achieved by the mere publication of the intention to produce legislation, maybe of a non-criminal sort and, unfortunately, an effective means of doing so will be underscoring the announcement with the promise of punishment. But of course there is a sharp distinction between ‘making an example’ of someone in order to ‘make an announcement’ to the community at large that certain conduct will not be tolerated within the community, and the justice of any

⁵⁷ The transcripts of the police interrogations reveal that the defendants were stunned by how seriously their conduct was regarded. There was some feeling of injustice amongst Pitcairn women about the way the defendants were treated: see Marks, K. *Pitcairn: Paradise Lost* (2008) Australia: Harper Collins, especially chapter 16 entitled ‘Interdependence + Silence = Collusion’.

⁵⁸ Husack, D. ‘Ignorance of Law and Duties of Citizenship’ (1994) 14 *Legal Studies*, 105.

⁵⁹ See Fieschi, C. ‘Symbolic Laws’ (2006) 119 *Prospect*.

particular prosecution and conviction. If it were otherwise, prosecution decisions, and convictions, would be justified in proportion to how well the 'message got across'. (And to take this point to its logical conclusion, the conviction and punishment of innocent people could, if concealed, 'send out' the desired 'message'.)

It would be misleading, however, to think that 'getting the message across' by means of punishment was impermissible on all occasions. There are occasions when it must be made clear that prosecutions will be pursued. And in determining criminal sentences, after conviction, sending an 'exemplary' message out may, on some occasions, be justified. Unusually high sentences were handed down to offenders in the Notting Hill race riots in 1958, sentences which were at odds with the sentencing norms of the time; the justification was that a clear signal had to be given that repeat of this conduct was a risky enterprise. But the Notting Hill riots were a different sort of case altogether; racial tension was at a peak and there was a very high risk of escalation. There was nothing of that sort of situation on Pitcairn. Given the smallness of the community, the extensive publicity and investigation, and clear institution of prospective criminal laws were alone likely to have changed the community's future pattern of conduct dramatically (if not, as some prominent officials contemplated, destroy the community altogether). It must be true to say there was a nil risk of reoffending.⁶⁰ The Notting Hill race riots case

⁶⁰ Note Claire Short's letter to Jack Straw (Privy Council disc 8-38832) of 5 August 2001, where she voiced concern that prosecutions might not take place: 'Failure to act means that abuse may well continue and those who have made allegations might be subjected to pressure to withdraw.' See Appendix II, Document (d) below. She was Secretary of State for International Development and the Foreign Secretary at the time. In an earlier letter to Jack Straw (PC disc 8-3860) dated 25 June 2001, she said:

I suggest we need to face up to the reality that the Pitcairn community is probably so socially dysfunctional that we should cease to plan to support and sustain it, and should instead consider supporting resettlement alongside psychological help and counselling for those who need it. I would not favour providing budgetary support.

Her rather drastic view of the island came in for some criticism from Governor Williams in a letter written in response two days later (PC disc 8-3863):

Ms Short seems to have decided already that the islanders are incapable of mending their ways. Is this fair? The visits so far by the social workers seem already to have had an impact. We need to keep up the educational process. But the community should be given the chance to show it can reform with more help from HMG (Her Majesty's Government) than in the past.

Clare Short had earlier, without consultation (according to a letter written to her by Robin Cook, then Foreign Secretary), suspended the £800,000 work on the road (the Hill of Difficulty which traversed the area where the longboats came in to the centre of Adamstown), on the grounds that the community might be disbanded as a result of the impending prosecutions, and that the money might need to be used for various social works. Robin Cook protested in a letter of 23 February 2001 (see PC disc 8-3845).

concerned quantum of punishment rather than the desirability of prosecution, and concerned a situation where there was no doubt that prosecutions were justified. It was also a difficult matter to see what other quick means for preventing violent race riots there were. In the case of Pitcairn, an entirely different situation, it should not be automatically thought that the only way to deal with matters was by criminal prosecution.

If these arguments against 'symbolic' law are valid, then 'making an example' of the Pitcairn defendants 'to send a message' out would not have been justified. It is necessary to labour this essentially simple point for two reasons. First, there is an element of 'political correctness' that inevitably adheres to contemporary understanding of what sexual offences mean in England that was clearly not present in Pitcairn at the relevant times. Second, this motive for understanding legislation as a way of 'getting a message across' is in danger of victimization—treating some people as means and not ends—and so contravenes a basic requirement of fairness.

Rights of victims

It is a popular idea that victims now have rights, not just to prosecution but even to the type and degree of punishment meted out to a defendant. It is a retrograde idea, in my view, an idea that was pleasingly subdued in the history of English criminal law by the emergence of the concept of the 'King's Peace'. Crimes were no longer offences against subjects, but offences against the community at large. But that is not to say that victims have no rights at all in the criminal justice system, just that their rights must be qualified by the rights of decency and equality of respect that all people have, including criminal suspects and offenders. A victim's right to respect cannot include a right to the operation of the criminal law and a particular exercise of the functions of criminal justice. That is not an argument against the bringing of private prosecutions, because the most sensible rationale for this relatively rare procedure is not that it vindicates a victim's right to punishment but that it prevents the arbitrary exercise of a discretion to prosecute; it is thus a right that all citizens have, whether or not victims. A stronger idea is that all citizens—not just victims—have a right that their community not be 'dislocated'. A letter from the British Foreign and Commonwealth Office to the Acting Governor in 2000, reported: 'Ministers want justice to be done fully, freely and without constraint, even if this leads to

the dislocation of the community.’⁶¹ That pursuit of criminal prosecution seems overly single-minded. It is a drastic vision of justice, indeed, that it be pursued at the expense of the stability of the community.

What else could have been done? Some practical solutions were proposed by the Pitcairn legal adviser to the then-Acting Governor of Pitcairn in 2000. In a reflective and perceptive letter,⁶² Treadwell expressed his belief that it was perhaps ‘unpalatable to impose criminal responsibility’ for the sexual behaviour of Pitcairn men ‘in the absence of any meaningful civil authority and actual system of justice representing the guidance and supervision of the colonial power’. He therefore suggested a ‘general amnesty’, or something along the lines of a ‘truth and reconciliation’ procedure as in South Africa,⁶³ a suggestion that the Acting Governor, Karen Wolstenholme, endorsed and communicated to the Foreign Office. The Island Commissioner, Leon Salt, took the same line in a letter to the Governor, Mr M. J. Williams, in 2000.⁶⁴ There was a suggested cut-off date (1 January 2000) and it was suggested that such a procedure could be accompanied by conditions, the first being that it would cease to apply to any recidivist, the second being that the British Government should provide an ongoing professional police presence for the ‘viable future’. The Commissioner also thought that the ‘needs and rights of the victims’ might be addressed by establishing a special commissioner of inquiry ‘to ascertain privately the merits of allegations of sexual offences made’, such a person being a judicial officer who could determine individual claims giving rise to compensation. He thought the inquiries could be private and protected from publication.⁶⁵ It is difficult to see why this sensible and

⁶¹ See the reference to the letter from Stephen Evans of the UK Overseas Territory Department to the Acting Governor of Pitcairn, Karen Wolstenholme (Privy Council disc at 8-3833).

⁶² This is in my view one of the most remarkable documents in the case, worth reading in full. See the Appendix. ⁶³ See Appendix II, Document (b) below.

⁶⁴ See Privy Council disc at 8-3779. Appendix II, Document (b) below.

⁶⁵ Also see the NZ *Listener* 26 July–1 August 2003 Vol.189, No.3298 <http://www.nzlistener.com/issue/3298/features/384/the_pitcairn_problem,2.html> in which it is reported that the education officer and government adviser on the island, Pippa Foley, wrote to the British Government advising that there should be a ‘truth and reconciliation’ commission to which she received only a ‘polite reply’. Also see the account published in *Vanity Fair* of the Pitcairn trials <<http://www.vanityfair.com/culture/features/2008/01/pitcairn200801>>. There it is reported that, in 2000, the British Ambassador to New Zealand, Martin Williams, urged London to devise a Nelson Mandela-type amnesty, and that Baroness Scotland QC, the Minister for Overseas Territories at the time, and an expert on child law, ‘bluntly’ refused the suggestion in a meeting with Williams. (See Appendix II, Documents (a), (b), and (c).) This thoughtful and well-researched article is one of the very few which tries to understand Pitcairn from the point of view of the defendants.

humane proposal, supported by significant officials, close to ground, as it were, was not pursued.

The value of certainty in the criminal law⁶⁶

As a general rule, hard cases would not make bad law if judges fully appreciated that hard cases are hard precisely because they involve issues of principle. The temptation in the very hardest of cases—which Pitcairn exemplifies—is to value decisiveness over a careful examination of the issues. Of course, that is not to say that decisiveness is not a value in itself. An obvious example is the procedural principle of majority rulings; whether or not the reasons that the majority advances (or could have advanced) are the right ones, it is the fact that the predominance of judgment goes in that direction that is decisive. Decisiveness is also a mark of the legal cast of mind. It is not enough to say—as a philosopher, or an historian might—‘well, it could be this, because ...’ or ‘it could be that, perhaps, since ...’, because a decision precipitating immediate consequences not wanted by at least one of the parties to the dispute is required by fairness. And why fairness? First, it is because decisiveness alone cannot be a value, for it is consistent with arbitrary and evil rule. Many a dictator’s political life was marked by decisiveness, but evil is frequently a characteristic of such rule. Second, it is natural to think that the governing principle of judicial decision-making is to be fair to the parties before the court, both in the interpretation and application of the law, and the exercise of judicial discretion when the law permits. Decisiveness will therefore only be a value when there are no reasons available as to why one party rather than the other should win; in rare cases, if they exist, fairness may consist in simply leaving the matter to equal chance, such as by deciding on the toss of a coin. Criminal cases are quite different, however, for fairness would not be served where the reasons were equally balanced and a coin was tossed. The social stigma attached to conviction requires the prosecutor’s case to be free of ‘reasonable doubt’; so in spite of there being good reasons in favour of the conviction of the defendant, the matter should be resolved in such cases in favour of the defendant. That principle states that a defendant should not be liable for conviction on the basis of a law

⁶⁶ We should remind ourselves of the 1966 Practice Statement of the House of Lords in which ‘the especial need for certainty as to the criminal law’ is enshrined: [1966] 3 All ER 77.

the interpretation of which fails to pass a threshold of ambiguity or obscurity to a layperson (since the criminal law is directed to all). It matches the requirement that a defendant should not be convicted on the basis of a reasonable doubt as to the facts that allegedly support conviction, but as I describe it, it applies to questions of law. There seems every reason why that level of reasonableness should match the test for reasonableness in cases of fact.

Summary and Conclusion

Using the popular expression, I have favoured a ‘natural law’ approach because it makes more sense of what legality meant on Pitcairn and, particularly, directly offers fair treatment to the defendants. The opposite approach, legal positivism, would, according to a mainstream understanding of what positivism means, allow the conviction and subsequent punishment of the defendants, through a ‘paper trail’ line of reasoning. But, as I have argued, deeper examination shows that the only credible version of positivism is a non-descriptive, and *practical*, one that favours (that is, this theory makes a significant feature of law in general) both efficiency and fairness, from the same root of clarity that supports paper trail-type law. Because of inefficient promulgation, partly brought about through lack of fair notice to the defendants, constituted by both the absence of precision in the specification of the offences, the likely penalty, and the significant absence of any enforcement mechanism, ‘practical’ legal positivism does not well typify what law was on Pitcairn. Hence my view gains some support—admittedly weaker—from the better interpretation of positivism; there is still valid law, but the theory fails to characterize it as good law. It was a question of abuse of legality and not a question of invalidity, and that was, of course, the Public Defender’s main contention. In sum, although all the arguments are *in* ‘natural’ law, here is an additional argument from the opposite camp providing some support for the same conclusion.

What even very good jurists don’t understand is that legal positivism—the theory of law that says that law and morality are distinct—may be a morally good and practical way of viewing law; that is, a proposal for, and not a description of, how we should view law. The difficulty arises because it is thought ‘how can a theory that separates law from morality be a moral theory?’ But the aroma of contradiction is not the same as contradiction. Bentham clearly thought belief in legal

positivism would further moral aims (he thought that the clear-mindedness that acceptance of positivism would achieve would promote the 'greatest happiness of the greatest number') and that is surely an accessible and highly practical idea, well outside the category of the merely esoteric. All the Pitcairn judges, excepting Lord Hope and Lord Woolf, gave positivist-inspired judgments that had serious effects on the future of the defendants. So legal theory—getting it right about justifying the coercive power of the state—certainly is of great practical importance to this case. One of the perceived attractions of positivism is that judges feel that to 'let in' arguments of 'fairness and justice and morality' would be to make legal argument a dangerous free-for-all. But this is an exaggerated worry, and something less than a free-for-all but much more than the application of a 'paper trail' would have had better effect on the sorry situation on Pitcairn, a situation that, I believe, deserved more sensitive treatment.⁶⁷

⁶⁷ I was British Academy/Leverhulme Trust Senior Fellow while I wrote this paper. I am grateful for their financial assistance.