

*Law and Justice in Community* provides an account of law that privileges the role of custom, which the authors characterise as the living law. In this paper, I argue that the authors' account of law observes the same features as those observed by Hart in his *Concept of Law*. However, Hart viewed all law through the lens of state law, with the result that he did not identify the purpose of law. Conversely, Barden and Murphy view all law through the lens of the living law, with the result that they do not identify some of the most acute issues raised by pervasive state law. Ultimately, each account is helpful as a corrective to the other.

## I. Introduction

*Law and Justice in Community* addresses the perennial issues of jurisprudence: the nature of law, obligation, authority, legitimacy, morality, natural law, etc. These are the issues that have most concerned Anglo-American jurisprudence over the past 50 years: Hart, Dworkin, Finnis and Raz (to name but a few) have all focused on these issues. But *Law and Justice in Community* lies in a different intellectual tradition. It draws principally on the ideas of Aristotle and Aquinas, combined with an account of justice honed through a consideration of Roman law. This leads to some novel insights. In particular, the book provides an account of law that privileges the ongoing role of custom (or the living law) in opposition to what the authors characterise as positive or state law. The authors' elision of positive and state law is less than helpful, for present purposes. Legal positivists would tend to include custom or the living law within the scope of "positive law", on the basis that it can be objectively identified by reference to social fact without recourse to value. The real point of comparison lies between the living law and the law that comes about where one has a state, a municipal legal system. In this article, I propose to explore what the authors take to be the living law and to assess its descriptive and normative significance. I shall do this by comparing Barden and Murphy's work with the work of HLA Hart who privileged the role of state law in his *Concept of Law*.

## II. Barden and Murphy's concept of the living law

### II.1 Images of the living law

At the start of their book, Barden and Murphy refer to a common understanding of law as involving state law. Examples of this are constitutional law, enacted legislation, judge-made law and perhaps at least some elements of international law. However, this is not the understanding of law that Barden and Murphy adopt. By "law," they mean "those judgments and choices that in recurrent kinds of circumstances are generally accepted and approved in a particular community." (LJC, 3) They use a number of interchangeable words for this phenomenon: "living law," "communal moral law," "communal law," "custom," "moral tradition." (LJC, 3-4) The living law is originally unwritten; it is generally accepted as what constitutes the community. Interestingly, Barden and Murphy describe the living law also as the set of communally accepted norms that express how, in certain types of situation, members of the community are

*obliged* to act. (LJC, 4) They recognise that in communities some norms will be treated as being of greater importance. Failure to act in accordance with some norms will occasion significant disapprobation; disregard of others might meet only with mild disdain. (LJC, 4) Nevertheless, it appears that all such norms are part of the law, in the sense in which Barden and Murphy use that term.

In Chapter 2, Barden and Murphy explore the origins of the living law. In this regard, they are primarily concerned to reject the idea of society as an organisation, contract-based or the result of a conscious decision. Instead, they argue that society is a spontaneous order. They note that Aristotle, Aquinas and Hobbes all considered that humans needed to live in community. Again, they present a picture of the living law emerging as the views in a community of how things should be done. They identify customs, practices, well known and accepted procedures, and mutual expectations that establish the jural relationships particular to any community. (LJC, 22) This notion of jural relationships is crucial. As well as the observable, empirical reality, there is a jural reality. At this point in the book, it is unclear whether these obligations are merely obligations from the perspective of the community or true obligations, *ie* moral obligations that do truly apply to us. Setting aside the moral status of these obligations, Barden and Murphy emphasise that the obligations are legal in their sense of the term, and only extra-legal in a narrower state-law sense. The basis for jural relationships is positive: “those judgments and choices that in recurrent types of circumstances are generally accepted and approved of in a particular society” (LJC, 22), but it may be that some true moral obligation accompanies this. This arises because a civil society is maintained when those within it act well; it is undermined when those within it act badly. The honest man will choose not to steal because he respects the owner's interest. It therefore appears that there is an inbuilt bias, at the very least, to true obligation (in Barden and Murphy's usage, values that should prompt reasonable people to view themselves as under an obligation) because the living law that provides obligations for the community would start to fall apart if those obligations did not, by and large, tend towards truly just outcomes that allowed people to live together.

Barden and Murphy then explore the function of law: it an original unchosen but given social order, the further development or decline of which depends upon the choices of those who live within it. The maintenance of good order is the common good. Both the living law and positive law contribute to this. The common good is not an aim but a framework. (LJC, 30) They return to the notion of a jural order as a network or bundle of entitlements, some derived from the living law and some from the positive law. The jural order is chosen to the extent that each member of the community chooses to act in a way that respects others' rights. In Roman law, it was recognised that every society was governed partly by laws which were peculiarly its own (*ius civile*) and partly by laws which were common to all mankind (*ius gentium*). The *ius gentium* is discovered as common, not invented. Some laws are fundamental in that they are essential to communal life: were people not to act for the most part in accord with them, Barden and Murphy say, jural order and the social order could not survive. All societies need laws against random and indiscriminate killing and rules of ownership. Further conventions are needed to give effect to detailed rules (this is *ius civile*), but they cannot undermine the *ius gentium*. (LJC, 31-32)

Barden and Murphy conclude chapter 2 with a useful synopsis of the picture being presented:

In sum, then, we suggest that communal living is natural to humans and that within the

community the living law and the positive or state law share the function of sustaining a peaceful order. Any jural order requires a common core of some fundamental human customs and practices. That is the *ius gentium* of Roman law. Generally speaking, other more detailed customs and laws select and enjoin one way of acting rather than another when there are several, often disputed, possibilities. These conventions include detailed rules of law – the rules of the *ius civile* - and differ from jurisdiction to jurisdiction. But the detailed rules cannot coherently undermine or conflict with the fundamental customs and practices, which express an understanding of common and necessary social practices without which any society would disintegrate. (LJC, at 39)

## II.2 The interaction between the living law and state law

Barden and Murphy return to the distinction between state law and the living law in chapter 2. They emphasise that state law includes the formulation or expression of living law. The formulation expresses an understanding of some, but not all, social practices. However, as state law presupposes a state and will partially set out the relationships between people and the state, it cannot be solely an expression of the living law that pre-existed the state. (LJC, 24)

Barden and Murphy note that others accept some role for custom (as a source of the content of much of positive law, for instance), but Barden and Murphy want to emphasise a greater role. Judicial decisions that adopt customs do not supersede customs: the customs remain customs. The living law generates the positive law on an ongoing dialectical basis. They also suggest, relying on Porter, that state law will have no purchase on a community unless it reflects custom in some way.<sup>[1]</sup> Furthermore, various customary rules are necessary to allow the positive law to function – customary rules concerning institutions, interpretation, etc. (LJC, 25-26) Barden and Murphy also say that a human society could exist without positive law (LJC, 34). However, it could only be a small community, and close-knit.

Barden and Murphy's consideration of the interaction of state law and the living law reveals a number of important features. First, the living law is chronologically antecedent to state law. One can have communities that are not states, although they must be small and close-knit. All communities must have the living law, because the living law is simply that set of more or less shared, more or less specified norms that govern community interaction. However, only states need state law. Second, one chooses neither one's community nor one's state. Communities and states neither come into existence nor continue in existence by reason of deliberate choice, but instead evolve as a way of solving the problems of living together in community. Third, the non-chosen character of states can be obscured by the way in which modern states present their origins as being a result of a foundational act of law-making. However, even when one examines a complicated, modern, municipal legal system, it becomes clear that the supposed self-sufficiency of state law is actually underpinned by a whole range of living law concerning both the method of appropriate interpretation and, crucially, the basis for ultimately identifying state law as law at all. In this way, living law is not just chronologically antecedent to state law, but is also normatively antecedent to state law. Fourth, it is clear that state law can, in substance, supplement and alter the living law. However, Barden and Murphy suggest that state law must reflect the living law of the community if it is to have purchase within the community.

This suggests that there are limits to how far the state can go in stipulating norms that differ from those at which the community has arrived naturally.

### II.3 The justice of the living law

Barden and Murphy define justice, in formal Roman law terms, as the giving to each what is her due. They identify a number of different aspects of the living law that bear on its justice. Barden and Murphy speak of living law as expressing the approved and expected ways of acting; the living law is an expression of what is held to be just. Viewed in this way, no particular justice attaches to the living law. Those whose practices have led to the evolution of a living law believe it to be just (otherwise, their practices would be perverse), but this is no guarantee that a living law is just: the members of the community may be mistaken about justice.

However, Barden and Murphy identify the “key element” of the living law as follows:

the tendency of this law to cultivate a moral context within which others' interests are to be considered and the related idea that this moral context is itself an expression of what is naturally just. (LJC, 27)

Viewed in this way, the living law is not simply a set of propositions about justice; it is a context that requires the consideration of the interests' of others and, by extension, which is itself an expression of what is naturally just. Barden and Murphy equate this with golden rule in the Judeo-Christian tradition and with Cicero's notion of justice as a communal virtue. They argue that the fundamental moral choice is between taking account of others' interests and allowing one's own interests absolute primacy. The reasonable conclusion to the question of how we should live is that in our decisions and actions we should take account of others. Because the living law is the context in which we do this, it has an in-built bias towards justice. It requires us at least to ask the right question (how can we live together?) increasing the possibility that we might reach the right answer.

But asking the right question does not *guarantee* the right answer. Barden and Murphy accept that living law is not necessarily just. They express this point in slightly different ways at different points of the text. The following extract, from the end of chapter 3, is probably the strongest formulation of the point:

Because moral traditions are necessary in human society, and because without them we could not live together, it is easy to be tempted to imagine such traditions as in all respects good or just, but this is not the case. The inevitable moral tension between taking only one's own and taking others' interest into account cannot but exist in human societies and therefore in its living law. The living law in a community is what is in that community taken to be just. A custom is no more than an accepted practice: to say that something is a custom is not to assign a moral value to it.

No moral tradition will be in all respects good; it will inevitably be corrupted by individual and group bias. Some powerful individuals or groups of individuals will, given time and opportunity,

favour traditions that support and enhance their power over others. (LJC, 62-63)

They give a few examples of this: slavery, refusal of suffrage, ostracism of unmarried mothers and their children, discrimination.

One can thus make three observations about the living law. It is an expression of what a community takes to be just. Because communities, like humans, are fallible, the living law may in fact be unjust. However, because the living law is not a set of stipulated propositions but rather a set of evolved solutions to the challenge of living together, there is a likelihood that the living law will be just.

This dual nature of the living law, in general tending towards justice but potentially unjust in any of its particulars, re-emerges much later in the book:

The communal or living law – like language – is a context within which people communicate with one another more or less well, more or less ambiguously, more or less controversially. It expresses the communal values upon which in practice depends the survival of the order within which people can live together and pursue their several goals in peace. In principle, therefore, it commends actions that realize those values and forbids those that tend to undermine them. The source of many of the particular provisions of the communal law is the evolving practices of those who live together; the practices that become, for a variety of sometimes antagonistic reasons, sufficiently acceptable to survive; and not alone communally acceptable but communally required.... We argued that the living law or communal moral law tends, generally speaking, to cultivate a moral context within which others' interests are to be considered and this moral context is itself an expression of what is just. When others' interests are considered, and not merely one's own, the tendency is to give to others what is their due. The desire to live peaceably brings with it the requirement of neighbourliness: each person realizes, albeit to a greater or lesser degree, that in order for his interests to be considered by others, in order for him to get what is his due in the community, he must reciprocate and respect and consider others' interests. We argue in favour of the judgment, which we take to be prevalent, that we should take account of others. We think of it as a reasonable conclusion to the question as to how we should live, and suggests that the unreasonableness of the opposite conclusion – that we should take no account of others – is discovered naturally by humans living together. The principle that one should act taking others into account becomes, more or less explicitly, communally accepted as part of the living law. (LJC, 177)

However, Barden and Murphy immediately accept that this general principle is limited; one cannot take for granted that these moral traditions are in all respects just. It will inevitably be corrupted by individual and group bias.

### **III. Hart's concept of a municipal legal system**

#### **III.I The focus of Hart's inquiry**

It is clear from the outset of Hart's book that he is focused on the law of a municipal legal

system – state law, to use Barden and Murphy's term. In the first chapter of his book, Hart addresses the difficulties in attempting to define law. He rejects the existence of “primitive law” as a reason for the difficulty. The fact that primitive law lacks a legislature and a system of centrally enforced sanctions means that it is a deviation from the standard case of a modern legal system which has such features. This is why we hesitate to apply the word “law” to primitive law. In contrast, for Barden and Murphy it is primitive law (custom) which is the standard case, both chronologically and normatively antecedent to state law.

This use of standard case methodology comes to the fore when Hart presents his union of primary and secondary rules. This performs two functions in his book:

If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.... The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate, in ways indicated in later chapters, elements of a different character. (CL, 98-99)

The union of primary and secondary rules thus performs two functions: it is both the heart of a legal system and an analytical tool with which to address the borderline cases. The import of this, however, is that the modern legal system is used as the analytical tool for the understanding of all other manifestations of law. The result is that other manifestations of law will appear peripheral and less true to the real nature of law than does the municipal legal system. Hart's focus is therefore very different from that of Barden and Murphy. He observes the same features as do Barden and Murphy, but in a different way.

### III.2 Hart's account of the living law

In *Concept of Law*, Hart offers an account of custom and social rules that is, in many respects, very similar to Barden and Murphy's account of the living law. (CL, 55-57) Hart's starting point is a comparison between habits and social rules. He notes that both depend on a general convergence of behaviour. However, for a social rule to exist, general convergence or even identity of behaviour is not enough. Deviations from the regular course must generally be regarded as lapses or faults open to criticism. Threatened deviations meet with pressure for conformity. Moreover, not only is such criticism made, but deviation from the standard is generally accepted as a good reason for making the criticism. There need not be uniform convergence. Finally, social rules have an internal aspect, whereby those who comply with them feel, in some sense, under an obligation to do so. Somewhat later in the book, Hart distinguishes between social rules which impose duties and obligations, and those which do not. (CL, 85-88). In Hart's view, this particular type of social rule is distinguished by three features: (a) the general demand for conformity is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great; (b) the rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life; (c) the conduct required by these rules may conflict with what the person who

owes the duty may wish to do. It is instructive to quote some passages from *Concept of Law* to illustrate the similarity of language with Barden and Murphy, as well as some points of difference:

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin: there may be no centrally organized system of punishments for breach of the rules; the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals' respect for the rule violated; it may depend heavily on the operation of feelings of shame, remorse, and guilt. When the pressure is of this last-mentioned kind we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligation. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law. (CL, 86)

It seems to me that Hart perceived the same social phenomenon as Barden and Murphy, although they would disagree over the appellation. The last sentence of the above quotation tends to show Hart associating the idea of law with the idea of a legal system embodied in a state of some kind. It is the primitive legal system that has socially administered sanctions rather than a caste of officials. Less concerted enforcement mechanisms do not count as law at all. In contrast, Barden and Murphy would see the living law just as much at work in the latter scenario. This is an important difference in appellation, however, as it leads to a very different explanatory emphasis when drawing the parameters of the concept of law.

There are several other points of comparison between Hart and Barden and Murphy. Consider Hart's view that all legal systems necessarily contain certain types of rules:

Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control. With them are found, both in laws and morals, much that is peculiar to a particular society and much that may seem arbitrary or a mere matter of choice. Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have been proffered under that name. (CL, 192-193. Emphasis original.)

This is closely equivalent to Barden and Murphy's account of the *ius gentium* and the *ius civile*. Hart identifies his minimum content of natural law both at a metaphysical level (while certain truisms hold good, societies must maintain certain rules of conduct in order to be viable) and at an observation level (such rules do in fact constitute a common element in the law and conventional morality of all societies). The latter approach is also the way in which Barden and

Murphy identify the *ius gentium*: the discovery of laws that are in fact common.

As noted above, Barden and Murphy commented that there could be a society without positive law, but it would have to be small and close-knit, and “one where the degree and force of approval and disapproval – approbation and disapprobation, scorn and derision, and so on – would have to be significant indeed.” (LJC, 34) This has close parallels with Hart’s account of a society with only primary rules. Hart imagines a society without a legislature, courts, or officials of any kind. He refers (without citation) to studies of primitive communities which depict in detail “the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation.” (CL, 91) He rejects the appellation “custom” as it may wrongly imply that customary rules are very old and supported with less social pressure than other rules. Anticipating Barden and Murphy, he says, “It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules.” (CL, 92)

### III.3 Hart's account of state law

Hart, of course, characterised the emergence of a legal system as the elaboration of secondary rules to remedy the defects of uncertainty, stasis and inefficiency of enforcement that attend a society bound only by primary rules of obligation. Rules of recognition and adjudication allow for resolution of disputes as to what the law is – there is no longer any need for communal agreement. Rules of change allow for the deliberate alteration of rules; rules can be changed suddenly to address changes in the world – there is no longer any need to wait for custom to evolve. Rules of enforcement grant to a particular entity the task of ensuring compliance with the law – there is no longer any need for the community to perform this task collectively. Irrespective of the empirical basis for the evolution that Hart describes, one can quickly see the distinction that is being drawn between a slow-moving, consensual community and a faster-moving, possibly of necessity authoritarian, state. Without secondary rules, one can have law of a primitive type. With secondary rules, one can have a *legal system*. Hart views the rules of recognition as introducing, in embryonic form, the idea of a legal system: the rules are not just a discrete unconnected set but are, in a simple way, unified. (CL, 95) Consider what Hart says about rules of authoritative determination:

Again these rules, like the other secondary rules, define a group of important legal concepts: in this case the concepts of judge or court, jurisdiction and judgment. (CL, 97)

Contrast these comments with Barden and Murphy's account of the state-function:

Legislation introduces sovereign and subject, legislative authority and power, and so there emerges within the social order a new element: the state or state-function. (LJC, 178)

Secondary rules are rules about rules: they govern how rules are made, changed, identified as rules of the system and enforced. With the idea that rules govern rules, there comes into being a disembodied entity, known as the state. The legal subject is no longer the only agent

operating within a realm of practices that are taken to define obligations. There are two new agents: the authoritative law-giver and the authoritative law-interpreter. What the authoritative law-giver says now has salience not only for the legal subject but also for the authoritative law-interpreter. The law-interpreter is, in principle at any rate, just as bound by the stipulations of the authoritative law-giver. The law-enforcer's job is to give effect to what the law-giver has determined. Both the legal subject and the law-interpreter need to know what the laws are. This signals the arrival of the autonomy of law: the content of laws now has an existence independent of community practice, opening up a standing possibility for conflict between what the law requires and what the community thinks to be just.

It is unhelpful to question whether it is the state that creates the secondary rules or the secondary rules that create the state. What we can say is that the state is constituted by, or consists of, secondary rules. As with custom, Hart and Barden and Murphy have similar things to say about state law. The significant difference, however, between Hart's account and that of Barden and Murphy concerns the explanatory emphasis to be placed on the secondary rules of state law.

#### **IV. Comparison of the two concepts of law**

##### **IV.1 The advantages of Barden and Murphy's concept of law**

Barden and Murphy's approach foregrounds an account of law's purpose. The living law is presented not as a data set but as an endeavour. The living law is simply those set of practices that emerge when a people try to live together in community, and that come to be seen as binding. These practices are, in general, oriented towards justice but may, in any of their particulars, be unjust. However, their whole purpose is to facilitate people in living together. This enriches our understanding of all law, including state law. We can view the customary rules of recognition that underpin the coherence of state law as also serving the general purpose of helping people to live together in community.

In contrast, Hart's view of law's purpose is more difficult to ascertain. Finnis suggests that Hart considers that the purpose of law is to provide rules for the guidance of officials and citizens and that the purpose of a legal system is to remedy the defects of a pre-legal regime consisting solely of primary rules.<sup>[2]</sup> Finnis also characterises Hart as saying that the law must have a minimum content of natural law in order to ensure the survival of society and to give its members practical reason for compliance with the law. However, this relates solely to the purposes of particular laws, rather than the overall purpose of law. This is underscored by the manner in which Hart treats the minimum content almost as an afterthought, a modest concession to natural law theory rather than something elucidating the core nature of law. Gardner suggests that Hart's account of law is non-purposive, in the sense that it is not law's purpose that distinguishes it from other normative systems. Nevertheless, Gardner (perhaps endorsing Hart) appears to view guidance as a good candidate for the purpose of law.<sup>[3]</sup> Hart does offer an account of the purpose of secondary rules. As noted above, these are portrayed as coming into existence in order to remedy the defects inherent in a community governed by customary rules. Whether this ever happened in the chronological way suggested by Hart does

not really matter: the account still works as an explanation of the purpose of secondary rules. However, this does not amount to an account of the purpose of law itself. If secondary rules emerge to resolve defects in a primitive system of primary rules, it must be the case that the primitive system was not adequately performing its function: this raises the question of the function of law. Insofar as Hart attempts to answer this question, it is that law's purpose is to guide behaviour. But this is a very thin account of law's purpose. Why should law seek to guide behaviour? What purpose is achieved by guidance? Barden and Murphy's account of the living law offers an answer to this question, an answer that is consistent with Hart's account of law: the purpose of law is to allow people to live together in community – this is why it seeks to guide.

Ultimately, Barden and Murphy's more purposive approach provides a deeper understanding of law. Where Hart was prepared to observe merely that "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great" (CL, 86), Barden and Murphy offer an account of *why* the general demand for conformity is insistent. They identify Hart's social rules (their living law) as an attempt by the community to live together and to live together justly. In this comparison, I am reminded of Fuller's criticism of Hart for treating law as a social fact, a mere datum projecting itself into human existence rather than a purposive endeavour.<sup>[4]</sup> Fuller made this criticism in an effort to show how his *desiderata* of the rule of law (mostly relating to the secondary rule issues of promulgation, application and enforcement) were part of the concept of law. It seems to me that, if we place Barden and Murphy alongside Hart, they are making the same complaint but along a different vector. Hart has noticed the living law but, treating it as a datum of human experience rather than a purposive endeavour, he has misunderstood its significance. He has treated it as a primitive fore-runner of the core case of a legal system rather than as something that has ongoing relevance and helps to explicate the purpose of law as a whole. In doing so, he has not merely misunderstood the living law, but has also failed to identify a basic purpose for the municipal legal system.

#### IV.2 The disadvantages of Barden and Murphy's concept of law

The disadvantages of Barden and Murphy's account in a way mirror the disadvantages of Hart's account. By giving descriptive priority to the living law, they have failed to pay enough attention to state law despite the fact that they accept that such state law is prevalent. I can identify only one point at which Barden and Murphy give detailed consideration to a secondary rule. They comment that "all legislation must have some content requiring that, in specified circumstances, something specific should be done, or that certain situations should be jurally understood in a specified way." (LJC, 185) This identifies a crucial feature of state law, namely that disputes are to be resolved by reference to legally stipulated norms and not by (direct) reference to the community's evolving sense of justice. It is in this way that state law may require a resolution that offends the living law.

As noted above, the emergence of secondary rules marks the emergence of state agents: the authoritative law-giver and the authoritative law-interpreter. Thereby emerges a concept of law's

autonomy, with a need to ascertain what the law means and what are the implications of the law for conscientious citizens and officials. This situation is considerably more complex than that which pertains in a system of purely living law. In a community governed by living law, the only difficulty was posed by the potential divergence of the personal sense of justice and the community's sense of justice. Given the need for a high level of consensus for the living law to emerge, such divergence would be unlikely although of course possible. However, in a community governed by both living law and state law, there are far more questions. Not only can there be divergence between the personal and the communal sense of justice, either (or both) of those could itself diverge from the law's sense of justice. The law, although it can be quickly changed, cannot be seamlessly updated to respond to situations that have already occurred. This raises all sorts of questions about the obligations that attach to the legal subject: must the legal subject act in accordance with the law, the community's sense of justice, or her own sense of justice? The questions for the legal agents are even more difficult. If the autonomy of law is to mean anything, it surely must mean that law-interpreters must apply the law. Accordingly, even if the legal subject can disobey the unjust law, is the law-interpreter at large to disapply it? This requires us to draw a series of distinctions between law and the community's sense of justice and, in turn, between different people's obligations in respect of the law. In my view, Barden and Murphy fail to focus on these questions because they fail to focus sufficiently on state law, the relevance of secondary rules and the autonomy of law.

This can be illustrated by reference to a story that Barden and Murphy relate to illustrate their account of law's authority. Their analysis of authority is complicated and lies beyond the scope of the current paper. For present purposes, I relate Barden and Murphy's account of the story not to provide answers to the questions about law's authority, but to draw attention to the questions about law's authority that Barden and Murphy do not pose. Barden and Murphy relate from Irish Brehon law the story of Cormac Mac Airt's judgment on trespassing sheep. A woman's sheep had broken into the queen's garden and eaten the leaves off the plants. The High King, Mac Con, had ruled that the woman's sheep be forfeit. Cormac pointed out that the judgment should have been one shearing for another: the queen had lost one season's leaves; the woman should lose one season's fleeces. When Mac Con heard of this judgment, he immediately realised that he was guilty of injustice and handed over the kingship of Tara to Cormac. (LJC, 234-235) Discussing this story, Barden and Murphy note that there are a number of material facts and jural facts. The material facts are that the sheep broke into the garden and ate the leaves. The jural facts are that the woman owned the sheep, the queen owned the garden (and leaves); the woman was responsible for the sheep; the sheep ought not to have broken into the garden. It is also settled that the High King is the person who should adjudicate.

Barden and Murphy place heavy emphasis on the fact that Mac Con, on hearing of and agreeing with Cormac's judgment, hands over the kingship. This, say Barden and Murphy, illustrates "implicitly yet clearly ... an important jurisprudential notion of the relationship between the just judgment and the authority of the judge." But this is ambiguous. Mac Con agreed that he should not be a judge, but there is no suggestion that his authority was undermined prior to his handing over the kingship. Nor are we told whether Cormac's judgment was considered authoritative prior to his assuming the kingship. If the judgment that the woman hand over the sheep stood, the most that the story establishes is that just judgment is a desirable, but not necessary, characteristic in an authority. If the judgment did not stand, it follows that the judgment must be correct in order to be authoritative. Whatever the answer, this is the question

that needs to be posed in order to start to unpack the issue of law's authority in the context of state law. For present purposes, it suffices to note that Barden and Murphy appear to have missed a whole set of questions that would arise in the context of state law, a legal system of secondary rules, and law's autonomy. In such a situation, it is not simply a question of reaching the just judgment, but a question of identifying the correct, legal judgment. This may not be just. The role of the High King judge was not simply to identify what was just, but also to identify what was the law. Even if there were no law on the point beforehand, the High King judge's determination would have made the law and should (presumptively at least) be enforced even if later shown to be wrong. That Barden and Murphy fail to address these questions suggests that the lens of the living law may have obscured as much about state law as it revealed.

### IV.3 Synthesis

Both Hart and Barden and Murphy recognise state law and the living law, although their terminology slightly differs. The difference lies in their choice of perspective. Hart chooses to view all law through the lens of state law. Barden and Murphy choose to view all law through the lens of the living law. As a corrective to the perspective dominant in jurisprudence, Barden and Murphy's contribution is welcome. It provides a richer, purposive account of the nature of law. However, both accounts suffer from the same defect. For Hart, the lens of state law became an unwarranted focus on state law at the expense of the living law. For Barden and Murphy, the lens of the living law became an unwarranted focus on the living law, at the expense of state law. The appropriate response is to take the two approaches together. The perspectives offered by both Hart and Barden and Murphy then provide us with a richer and deeper understanding of both law and the modern legal system.

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[1] J Porter, "Custom, Ordinance and Natural Right in Gratian's *Decretum*" in A Perrau-Saussine and JB Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, 2007) 79, at 100.

[2] John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), at 7.

[3] John Gardner, "Laws Aims in Law's Empire" in Scott Hershovitz ed, *Exploring Law's Empire: the Jurisprudence of Ronald Dworkin* (Oxford, 2006) 207, at 207-9.

[4] Lon L Fuller, *The Morality of Law* (2<sup>nd</sup> ed, Yale University Press, 1969), at 95-151.