

**TEXTE HART (1958)**

So the contrast between the mechanical decision and the intelligent one can be reproduced inside a system dedicated to the pursuit of the most evil aims. It does not exist as a contrast to be found only in legal systems which, like our own, widely recognize principles of justice and moral claims of individuals.

An example may make this point plainer. With us the task of sentencing in criminal cases is the one that seems most obviously to demand from the judge the exercise of moral judgment. Here the factors to be weighed seem clearly to be moral factors: society must not be exposed to wanton attack; too much misery must not be inflicted on either the victim or his dependents; efforts must be made to enable him to lead a better life and regain a position in the society whose laws he has violated. To a judge striking the balance among these claims, with all the discretion and perplexities involved, his task seems as plain an example of the exercise of moral judgment as could be; and it seems to be the polar opposite of some mechanical application of a tariff of penalties fixing a sentence careless of the moral claims which in our system have to be weighed. So here intelligent and rational decision is guided however uncertainly by moral aims. But we have only to vary the example to see that this need not necessarily be so and surely, if it need not necessarily be so, the Utilitarian point remains unshaken. Under the Nazi regime men were sentenced by courts for criticism of the regime. Here the choice of sentence might be guided exclusively by consideration of what was needed to maintain the state's tyranny effectively. What sentence would both terrorize the public at large and keep the friends and family of the prisoner in suspense so that both hope and fear would cooperate as factors making for subservience? The prisoner of such a system would be regarded simply as an object to be used in pursuit of these aims. Yet, in contrast with a mechanical decision, decision on these grounds would be intelligent and purposive, and from one point of view the decision would be as it ought to be. Of course, I am not unaware that a whole philosophical tradition has sought to demonstrate the fact that we cannot correctly call decisions or behavior truly rational unless they are in conformity with moral aims and principles. But the example I have used seems to me to serve at least as a warning that we cannot use the errors of formalism as something which per se demonstrates the falsity of the utilitarian insistence on the distinction between law as it is and law as morally it ought to be.

H.L.A Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review*, 71/4, 1958.