

Law and Morality in Patrick O'Brian's Post Captain

Alison M. Sulentic*

I am coming to believe that laws are the prime cause of unhappiness. . . . There are parallel sets of laws in different keys that have nothing to do with one another and that are even downright contradictory. It seems to me that the greater mass of confusion and distress must arise from these less evident divergencies—the moral law, the civil, military, common laws, the code of honour, custom, the rules of practical life, of civility, of amorous conversation, gallantry, to say nothing of Christianity for those who practice it. All sometimes, indeed generally, at variance; none ever in an entirely harmonious relation to the rest; and a man is perpetually required to choose one rather than another; perhaps . . . its contrary. It is as though our strings were each tuned according to a completely separate system¹

I INTRODUCTION

Problems of legal philosophy sometimes surface in the most surprising of seas. Patrick O'Brian's tales of the seafaring adventures of Royal Navy Captain Jack Aubrey and his ship's surgeon, Stephen Maturin, for example, offer a complex discourse on seamanship, naval etiquette, nineteenth-century medical science, entomology and the proper way to prepare figgy dowdy.²

*Assistant Professor of Law, Duquesne University School of Law. A.B., Harvard and Radcliffe Colleges; M.A., University of the Witwatersrand; J.D., Harvard University.

¹Patrick O'Brian, *Master and Commander 318* (W.W. Norton & Co. 1990) (1970) (Stephen Maturin to Jack Aubrey).

²Patrick O'Brian, *Post Captain 92-93* (W.W. Norton & Co. 1990) (1972) (describing the maneuvers of a sea battle as recollected by Jack and his French opponent). See also *id.* at 27 (explaining the proper use of colloquial references to rank), 405-06 (Stephen's study of bees), 269 (figgy dowdy) For a detailed list of the Aubrey/Maturin novels and information concerning their initial publication, see Anthony Gary Brown, *Persons, Animals, Ships and Cannon in the Aubrey-Maturin Sea Novels of Patrick O'Brian 2-3* (McFarland & Co., Inc. 1999). Brown's list does not include a reference to O'Brian's last novel, *Blue at the Mizzen*, which was published in 2000. See Patrick O'Brian, *Blue at the Mizzen* (W. W. Norton & Co. 2000). See generally *The Aubrey Maturin Series 20-volume Complete Cloth Set* (2000) (The complete set includes twenty books of Jack Aubrey and Stephen Maturin's naval adventures.).

While the main course charted by O'Brian's twenty novels follows the relationship between the two central characters, a reader may be enticed into many a side trip into an area of his own interest—whether that be polyphony or the cataloguing of beetles.³ In my case, Jack Aubrey and Stephen Maturin have led me to relive the battle between H.L.A. Hart and Lon Fuller over “law as it is” and “law as it ought to be.”⁴ In this essay, I invite you to join Jack, Stephen and me in searching for the common ground between law and morality.

II BETWEEN TWO WORLDS ABOARD THE *SOPHIE*

The first book of O'Brian's series, *Master And Commander*, introduces us to “Lucky Jack Aubrey,” newly appointed commander of the Royal Navy sloop, *H.M.S. Sophie*, and through him to life in the Royal Navy at the turn of the nineteenth century.⁵ Jack Aubrey's enthusiasm for life illuminates O'Brian's depiction of the Royal Navy. From the moment Jack assumes command of the *Sophie* to the resolution of his court-martial for her loss to enemy hands, O'Brian uses Jack's persona to give life to the Royal Navy in

O'Brian's attention to detail and historical accuracy is a hallmark of his writing and is evidenced in even the most minor details of the novels. Food historians Anne Chotzinoff Grossman and Lisa Grossman Thomas describe O'Brian's description of the preparation of figgy-dowdy, for example, as “a perfectly clear blueprint for the dish.” See Anne Chotzinoff Grossman and Lisa Grossman Thomas, *Lobscouse & Spotted Dog—Which It's a Gastronomic Companion to the Aubrey/Maturin Novels* 86 (W. W. Norton & Co. 1997).

³See generally Dean King, Patrick O'Brian: A Life xi (2001)[hereinafter *Life*] (“[T]he primary fuel of the series is O'Brian's study of the relationship between Aubrey and Maturin.”). For additional commentary on O'Brian's work, see Patrick O'Brian: Critical Essays and a Bibliography (A.E. Cunningham, ed., 1994) [hereinafter *Critical Essays*]; Dean King, *A Sea of Words* (1995); Ken Ringle, *The Aubrey/Maturin Books as Literature* (November 2000) (remarks at a symposium on Patrick O'Brian that was held by the Smithsonian Institute), at <http://www.hmssurprise.org/Ringle_on_POB.html>_ (visited October 16, 2001). Several Internet sources are also of interest. See, e.g., Gibbons-Burke, *A Gunroom Guide to Patrick O'Brian Web Resources*, at <<http://www.io.com/gibbonsb/pob>> (visited August 27, 2001); *The Gunroom*, at <<http://www.hmssurprise.org>> (visited October 16, 2001); *The Patrick O'Brian Web Page*, at <<http://www.wwnorton.com/pob>> (visited August 27, 2001).

For examples of the importance of music to the characterization of O'Brian's protagonists, see *Post Captain*, supra note 2, at 157-58, 236, 448-49.

⁴See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 595 (1958) (describing utilitarian efforts to distinguish “law as it is from law as it ought to be”); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630 (1958). For general commentary on the Hart/Fuller debate, see Joseph Mendola, Hart, Fuller, Dworkin and Fragile Norms, 52 *S.M.U. L. Rev.* 111 (1999); Hamish Steward, *Legality and Morality in H.L.A. Hart's Theory of Criminal Law*, 52 *S.M.U. L. Rev.* 201 (1999).

⁵See *Master and Commander*, supra note 1, at 186; *Post Captain*, supra note 2 at 10 (“. . . Captain Jack Aubrey, Lucky Jack Aubrey, who had set about a Spanish 36-gun xebec-frigate not long ago with the *Sophie*, a 14-gun brig, and had taken her.”).

a manner that is at once analytic and intimate. Moreover, O'Brian's engaging story guides the more land-bound reader to an understanding of the ways of the Royal Navy through the introduction of Stephen Maturin, an endearing, secretive landlubber.⁶ Stephen's utter ignorance of the sea and his odd scholarly ways permit O'Brian to explain the more elusive points of navigation.⁷ Despite the initial indifference of the book-buying public, the felicitous combination of entertainment and education evident in *Master and Commander* earned the attention of prominent writers such as Mary Renault and Iris Murdoch and, in later years, has produced a cottage industry of scholarship to aid O'Brian's readers in pursuing a greater knowledge of the military and social history of the early nineteenth century.⁸

As inviting as *Master and Commander* may be, however, it is *Post Captain*, the second novel in the series, that unveils O'Brian's genius and stakes his claim to recognition as the author of "the best historical novels ever written."⁹ The intricate interweaving of plot lines that trace the personal and professional fortunes of the main characters crosses many of the more traditional categorizations of popular fiction. Unlike *Master and Commander*, in which O'Brian emphasizes the professional lives of his protagonists, *Post Captain* presents an element of romance through the author's introduction of the two principal women characters in the series, Sophia Williams and Diana Villiers.¹⁰ Jack's courtship of Sophia Williams and Stephen's obsession with Diana Villiers are strikingly reminiscent of Darcy's courtship of Eliza Bennett and Wickham's seduction of her sister Lydia in Jane Austen's *Pride and Prejudice*.¹¹ Still, romance is hardly the dominant theme of *Post Captain* and the dimensions of the novel do not fall squarely within its grasp. Stephen's dual role as ship's surgeon and naval intelligence agent unfolds over the course of *Post Captain* in a manner that brings to mind other tales of espionage in general, and the popular novels of John LeCarre in particular.¹² Yet neither category, romance or espionage, fully captures the force of O'Brian's work.

⁶Id. at 411 ("I know very little of nautical affairs . . ."). See also *Post Captain*, supra note 2, at 95 (" . . . he really cannot tell port from starboard, a bonnet from a drabber, though I have explained a thousand times.").

⁷Id. at 36-37 (explaining Stephen's scholarly history), 94-102 (Stephen's tour of the Sophie).

⁸See supra notes 2 and 3. See also *Life*, supra note 3, at 203 (Mary Renault), 259, 263 (Iris Murdoch).

⁹See *Life*, supra note 3, at 211 (describing *Post Captain* as the "one that eventually came to be considered the single most important volume of the Aubrey-Maturin series"); Richard Snow, *An Author I'd Walk the Plank For*, *New York Times Book Review* (January 6, 1991), discussed in *Life*, supra note 3, at xii, 290, 308-09.

¹⁰Id. at 19 (introducing Diana Villiers), 22 (introducing Sophia Williams).

¹¹*Life*, supra note 3 at 209, 211, 237, 270, 293 (noting the influence of Jane Austen's work on Patrick O'Brian's style). See generally *Post Captain*, supra note 2; Jane Austen, *Pride and Prejudice* (Tony Tanner, ed., Penguin Books 1986) (1813).

¹²See *Post Captain*, supra note 2 at 61-62.

Instead, it is the philosophical undergirding of *Post Captain* that transforms a story of love, spying, and sea battles into an arresting meditation on the intersection of law and morality. By chance, I became engrossed in *Post Captain* at a time when the Uniform Commercial Code also demanded my attention. Legal philosophers certainly regard the Uniform Commercial Code as one of the most enduring tributes to Karl Llewellyn and the American legal realist movement's attack on a variety of jurisprudential approaches that might effectively be called positivism or formalism.¹³ Gradually, the two distractions merged and I began to see *Post Captain*, and its protagonists, as inviting a meditation on the nature of law and its relationship to morality.

To test my theory, I read the famous pair of articles published by H.L.A. Hart and Lon Fuller in 1958.¹⁴ Hart defined and defended the philosophy that originated in utilitarianism and later became known as positivism.¹⁵ Fuller proposed an alternative view of the law that borrowed some of the realists' critiques of positivism while remaining rooted in natural law.¹⁶ Side by side, the two articles each pose a fundamental question of legal philosophy lived out in human society: how do law and moral virtue co-exist in human society? Can "law as it is" be separated from "law as it ought to be?"¹⁷ Once I began to read *Post Captain* as a tale of law and morals, Jack Aubrey and Stephen Maturin transformed my assessment of the debate between Hart and Fuller from a matter of academic interest to a passionate assessment of the role of law in the pursuit of moral good.

As *Post Captain* opens, we are introduced to Jack Aubrey returning home to England as a guest on another Royal Navy vessel.¹⁸ The opening scenes of the book place Jack in both his elements: the ever-changing sea and the rigid legalism of the Royal Navy.¹⁹ At sea, Jack is a "taut" captain who runs his ship in conformity to the edicts of the Admiralty.²⁰ On land, we quickly

¹³See generally William Twining, *Karl Llewellyn and the Realist Movement* 270-340 (Weidenfeld and Nicolson 1973).

¹⁴See Hart, *supra* note 4; Fuller, *supra* note 4.

¹⁵See Hart, *supra* note 4 at 594-600 (tracing utilitarian roots of positivism).

¹⁶See Fuller, *supra* note 4. See also Lon L. Fuller, *The Morality of Law* 96 (rev. ed. 1969) ("Do the principles expounded in my second chapter represent some variety of natural law? The answer is an emphatic, though qualified, yes.").

¹⁷Compare Hart, *supra* note 4, at 594 with Fuller, *supra* note 4, at 647.

¹⁸*Post Captain*, *supra* note 2, at 10. Dean King's examination of Patrick O'Brian's early drafts of *Post Captain* indicates that the manuscript originally began with Jack's horse ride through Polcarray Downs. The passage describing his voyage home on the *Charwell* was a later addition to the original draft of the book, presumably added to introduce new readers to the characters at sea, which, of course, is the setting that provides the backdrop for the greater part of the series. See Life, *supra* note 3, at 208-09.

¹⁹*Post Captain*, *supra* note 2, at 7-13.

²⁰*Id.* at 47, 240.

learn, he is “not quite the thing.”²¹ Indeed, his failure to attend to legal formalities on land is the heart of two of the book’s richest subplots.²² Jack, an essentially upright and judicious disciplinarian at sea, cannot balance law and morality on land. At home, the failure of Jack’s prize agent and his own imprudent spending have Jack at bay by bankruptcy sheriffs.²³ Meanwhile, the fact that he “may not attend to the fifth commandment quite as he should” keeps him in trouble in his professional and personal life.²⁴ Jack pays a professional penalty for having conducted an illicit affair with an admiral’s wife.²⁵ Similarly, he pays a personal penalty when he jeopardizes his relationships with Sophia Williams and Stephen Maturin by dallying with Diana Villiers, Sophia’s cousin and Stephen’s love.²⁶

In contrast and in complement to Jack’s status as the embodiment of the law at sea and a fugitive from the law on land, Stephen Maturin presents himself as a landlubber, “a philosopher, a student of human nature.”²⁷ Unlike Jack, Stephen moves with impunity on land, sometimes because he abides by the law and sometimes because he gives the appearance of abiding by the law.²⁸ A self-professed philosopher, he consciously seeks wisdom and he works, sometimes openly and sometimes secretly, for moral values that are often in conflict with established legal authority.²⁹ Stephen has little compunction about lying, spying, or voicing illegal thoughts when he feels wis-

²¹Id. at 28.

²²See generally *id.*

²³Id. at 66 (“Mr. Jackson, his prize-agent, one of the most respected men in the profession, had failed. He had bolted, run off to Boulogne with what remained of the firm’s cash, and his partner had filed his petition in bankruptcy. . . .”), 72 (“You fling your money about. . .”).

²⁴Post Captain, *supra* note 2, at 28. Since the numeration of the ten commandments differs among the different religious traditions, the reference, in this context, to the fifth commandment is somewhat obscure. See generally *The Catholic Study Bible - Personal Study Edition* 83, n.20 (Jean Marie Hiesberger, gen. ed., 1995) (“The precise division of these precepts into ‘ten commandments’ is somewhat uncertain.”). Admiral Haddock has just explained that there are “[m]any complaints about [Jack’s] lack of discipline—independence—obeying orders.” Post Captain, *supra* note 2, at 28. It is conceivable that, by referring to the fifth commandment, the Admiral is indicating that Jack is inattentive to the respect for hierarchy that is sometimes suggested in interpretation of the commandment to “[h]onor your father and your mother:” Exodus 20:12, Deuteronomy 5:16. On the other hand, the Admiral’s subsequent remarks suggest that he is alluding to the prohibition against adultery. Jack’s liaison with Molly Harte, wife of a vindictive superior officer whose jealousy remains the bane of Jack’s existence long after Mrs. Harte has broken off their affair. See *Master and Commander*, *supra* note 1, at 18 (“whether he suspected him of carrying on an intrigue with his wife, it was all one—there was a strong antipathy between them, and it was of long standing.”); Post Captain, *supra* note 2, at 29. However, this remark also foreshadows Jack’s disastrous covert affair with Diana Villiers. *Id.* at 341 (“It is time we had a clear explanation about Diana Villiers. . .”).

²⁵Id. at 28-29. See also *Master and Commander*, *supra* note 1, at 344.

²⁶Post Captain, *supra* note 2, at 97, 341.

²⁷Master and Commander, *supra* note 1, at 43.

²⁸Post Captain, *supra* note 2, at 95 (describing Jack’s incredulity at the suggestion that Stephen might be spying rather than bird-watching).

²⁹Id. at 238-39.

dom dictates and morality is better served.³⁰ Yet aboard ship he is—so to speak—at sea. His wisdom, functioning largely outside the law, simply does not appreciate the order that law can impose in tumultuous circumstances. In the precise terms of the plot line of *Post Captain*, he knows Sophia better than Jack, but he does not yet love the sea or the Navy; nor does he hear the voice of the siren that harkens Jack back to *H.M.S. Sophie*.³¹ His task is to square his moral conscience with the wisdom of the law of the sea.

Over the course of *Post Captain*, both Jack and Stephen come to know wisdom in a way that profoundly alters the approach each takes to the intersection of law and morality. It would be folly to assert that O'Brian saw his protagonists as symbols of any particular philosophical viewpoint and an even greater impertinence to suggest that twentieth-century debates over the philosophy of law would be anything other than an anachronism in a novel set in 1802. O'Brian himself was meticulous about historical accuracy and would hardly be likely to forgive the suggestion that his plot hid an anachronistic philosophical inquiry.³² Moreover, as Dean King has revealed in his recent biography, O'Brian was a private, even secretive, man, whose actions sometimes defied explanation and whose motives would be at best difficult to discern and almost impossible to confirm.³³ Nor do I venture to assert that the historical structure of the Royal Navy actually mirrored a positivist world view; that is a task that historians and political scientists could better address.³⁴

Allow me to suggest, instead, that the questions that Hart and Fuller and others debated in more recent times, and with which the courts struggle even today, can be illustrated in O'Brian's grand novel of yesteryear.³⁵ I am confident of being in good company in reading the tales of old through modern lenses. Indeed, as O'Brian's characters would say, a glass of wine should certainly be raised to the numerous scholars who teach modern lessons through historical allegories, fictional and otherwise.³⁶ To phrase my obser-

³⁰Id. at 86, (“ . . . I am not unaccustomed to deception. . . ”), 233 (“As for mutinies in general,’ said Stephen, ‘I am all in favour of ‘em.”). See also *Master and Commander*, supra note 1, at 43, 93 (Stephen's intentional lie concerning his past relationship with James Dillon in the Irish revolutionary movements).

³¹See generally *Post Captain*, supra note 2, at 461 (“Miss Williams, whom Stephen knew a good deal better than Captain Aubrey”).

³²See *Life*, supra note 3, at 210 (describing O'Brian's efforts to avoid anachronisms in his writing).

³³Id. at xviii.

³⁴For a study of the social history of the Royal Navy, see N.A.M. Rodger, *The Wooden World—An Anatomy of the Georgian Navy* (W. W. Norton & Co., 1986).

³⁵Compare Hart, supra note 4 with Fuller, supra note 4.

³⁶See, e.g., Robert Coles, *The Call of Stories: Teaching and the Moral Imagination* (1989); Martha Craven Nussbaum, *Love's Knowledge* (1990); William H. Simon, *The Practice of Justice* 109-137 (1998); James Boyd White, *Acts of Hope: Creating Authority in Literature Law and Politics* (1994). See also Symposium: Admiralty Law in Popular Culture, 31 *J. Mar. L. & Com.* (2000). For a criticism of the extent to which legal knowledge may be extrapolated from literary works, see Richard A. Posner, *Law and Literature* (1998).

vations in the cant more familiar to law professors and their students, the facts set out in *Post Captain* and the progress of its characters have posed a hypothetical that has made the critique of positivism come alive for me in an engaging and, indeed, delightful way.

The key to unlocking the philosophy of law at work in *Post Captain* is O'Brian's deliberate conceit of giving Jack's first ship and his future wife the same name.³⁷ The identification of *H.M.S. Sophie* and Sophia Williams is readily apparent to all of the principal characters and many of the minor ones who know of Jack's infatuation.³⁸ It takes no great linguistic insight to observe that the Greek roots of the word "philosophy"—*philo* and *sophia*—translate literally to "the love of wisdom."³⁹

Through *Post Captain*, O'Brian invites Jack and Stephen to learn to know and to love wisdom. While *H.M.S. Sophie* is the lodestar guiding Jack's success at sea, his quest for Sophia's hand is the task he has set himself on land.⁴⁰ Conversely, Stephen easily befriends Sophia, but must transform his Platonic love of wisdom to a passion for the sea and an understanding of *H.M.S. Sophie* and the world she represents. Jack learns that law at sea and morality on land must be tempered with wisdom as he learns to love Sophia; Stephen comes to understand that wisdom can lead to a love of the law, as he grows to understand navy life and to love the sea on which the *Sophie* had sailed.⁴¹

That the name *Sophia/Sophie* is of such significance to the growth of both characters is reminiscent of O'Brian's own belief that the story of Jack and Stephen was a story of a man and himself.⁴² The suggestion that both men are journeying to the same destination—wisdom in the discernment of the relationship between law and moral virtue—is implied the more clearly when we reach the final pages of the novel and discover, with Jack, that he shares his newly won rank of post captain with Stephen.⁴³ It is a surprise to

³⁷See generally *Post Captain*, supra note 2, at 10 (introducing Jack as the captain of the *Sophie*), 22 (introducing Sophia Williams), 68 (setting out an early conversation between Jack and Sophia Williams: "Sophie—I may call you Sophie, mayn't I? I always think of you so—when I was in my Sophie, my sloop, I took a couple of neutrals sailing into Marseilles.")

³⁸See id. at 66, 64-65 ("So then the toasts went round, and when George gave 'Sophia' up starts your Captain Aubrey. 'Oh,' cries he, 'I will drink that with three times three. Sophie is a name very dear to my heart.' . . . 'It was the name of his ship, you know, his first command,' said Diana quickly. 'Of course I know it,' said Sophia with an unusual flush. 'We all know it.'")

³⁹See 7 *The Oxford English Dictionary* 781 (1933); *The Oxford Dictionary of English Etymology* 675 (1966).

⁴⁰*Post Captain*, supra note 2, at 57, 82, 97.

⁴¹Consider, for example, the scene in *Master and Commander* when Stephen looks for *H.M.S. Sophie* by asking where "Sophia" is docked. See *Master and Commander*, supra note 1, at 66.

⁴²See *Life*, supra note 3 at xvi.

⁴³*Post Captain*, supra note 2, at 393 (Jack's promotion to the rank of post captain), 475 (Stephen's appointment as post captain).

the reader to learn that the book's title, *Post Captain*, describes not only Jack's struggle to attain that rank, but also the only reward that Stephen will accept from the Royal Navy in recognition of his intelligence activities—a secret temporary ranking as post captain that will allow him to share in the ship's prize money.⁴⁴ We knew that Jack was advancing in the naval ranks, but we are surprised to learn that Stephen has journeyed by a different path to the same point.

Post Captain is no mere romance or spy novel. It is instead the story of wisdom and the law and how we come to understand its role in the moral life.⁴⁵ It is a critique of the separation of law and morality, of “law as it is” and “law as it ought to be.”⁴⁶ The critique of law separated from morals is found in Jack's inability to reconcile life at sea with life on land, in the foils that O'Brian sets up for Jack in Parker (first lieutenant of the *Polychrest*), Christy-Palliere (a French navy captain), and Scriven (a pathetic landsman). It manifests, perhaps most self-consciously, in Stephen Maturin's outsider's view of in the Royal Navy.⁴⁷ *Post Captain* also offers a critical assessment of a life of moral searching unbounded by law. This critique emerges from Stephen's unhappy pursuit of the “purity of wild grace” in Diana Villiers and his loss of her to a life outside the conventional bounds of legal matrimony.⁴⁸ Yet, for all this, *Post Captain* does not constitute a critique offered without the suggestion of a resolution—the love of wisdom. The Book of Proverbs tells us that “to get wisdom is to love oneself.”⁴⁹ If O'Brian was right (as, of course, he surely must have been) that Jack and Stephen represent different parts of the same man, then the genius of *Post Captain* is proverbial in its depiction of the pursuit of wisdom by both law and morality.

⁴⁴Id. at 476. For an example of the allocation of prize money, see Patrick O'Brian, *Men of War - Life in Nelson's Navy* 83-86 (W. W. Norton & Co. 1995)(1974) (describing the actual allocation of prize money earned as a result of the capture of the *Hermione* in 1762 and a later ship captured in 1804).

⁴⁵Again, the choice of the name “Sophia” is felicitous, particularly in relation to the struggle between morality and law. The juxtaposition of Sophia and Diana calls to mind the images of wisdom and folly in the Book of Proverbs. Proverbs 14:1 tells us that “wisdom builds her own house, while folly tears it down with her own hands.” Viewed in this light, Sophia and Diana experience their own struggles about the interplay of law and the moral order. Sophia, as a symbol of wisdom, learns to stretch convention to win Jack's pledge and establish her own home. *Post Captain*, supra note 2, at 449, 447-48, 459-60. At the same time, she watches her cousin Diana reject conventional matrimony and “[go] into keeping” with Canning, a decision that places her outside the bounds of recognized society. *Id.* at 446.

⁴⁶Compare Hart with Fuller, supra note 4.

⁴⁷See generally *Post Captain*, supra note 2.

⁴⁸Id. at 472. This loss is, of course, temporarily remedied when Stephen and Diana marry in *The Surgeon's Mate*, but throughout the Aubrey-Maturin series, the tensions in their friendship and marriage remain a constant theme.

⁴⁹Proverbs 19:8.

III

LUCKY JACK AUBREY AND THE SPIRIT OF POSITIVISM: LAW AS IT IS

In his essay *Positivism and the Separation of Law and Morals*, H.L.A. Hart traced the origins of positivist thought to the utilitarian movement of the late eighteenth and early nineteenth centuries.⁵⁰ More strikingly, for one who examines *Post Captain* through Hart's lenses, the world that Jeremy Bentham and John Austin knew was also the world of Jack Aubrey and Stephen Maturin.⁵¹ In fact, Hart describes the great utilitarian thinker, Jeremy Bentham, as

an anxious spectator of the French revolution [who was aware that] the time might come in any society when the law's commands were so evil that the question of resistance had to be faced, and that it was then essential that the issues at stake at this point should neither be oversimplified nor obscured.⁵²

To Hart, "Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned."⁵³ To the contrary, they wanted to illuminate "the precise issues posed by the existence of morally bad laws" and "the specific character of the authority of a legal order."⁵⁴

Hart reduced the classical utilitarian analysis of the intersection of law and morality to two assertions associated with Bentham and Austin:

[F]irst, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.⁵⁵

Hart stressed that two additional doctrines squared off the foundation of traditional positivist thought: first, "the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was . . . vital to our understanding of the nature of law" and, second, "that law is essentially a command."⁵⁶ As Fuller pointed out, of course,

⁵⁰See Hart, *supra* note 4, at 594-600.

⁵¹Compare Hart, *supra* note 4, with *Post Captain*, *supra* note 2.

⁵²See Hart, *supra* note 4, at 597. John Stuart Mill saw Bentham as "the great questioner of things established." See J.S. Mill, 2 *Dissertations and Discussions*, 332 (1859), cited in Asa Briggs, *The Age of Improvement 1783-1867* at 178 n.2 (1959). As historian Asa Briggs puts it, Bentham "came to believe that political reform was the precondition of all other reform, including reform of the law" and that government must be reformed "on the grounds that men's interests must be artificially identified." *Id.* at 178-79.

⁵³See Hart, *supra* note 4 at 596.

⁵⁴*Id.* at 597.

⁵⁵*Id.* at 598.

⁵⁶*Id.* at 601. See John Austin, *The Province of Jurisprudence Determined* 21 (Wilfred E. Rumble, ed., Cambridge Univ. Press 1995) (1832).

Hart himself found aspects of this definition unappealing, particularly in its emphasis on command and coercion, and he instead refined the concept of law to focus on “fundamental accepted rules specifying the essential law-making procedures.”⁵⁷

The more primitive conception of positivism which Hart and Fuller criticized in different ways is nonetheless useful as an artificial model of a system that values law for its own sake. The raw elements of a positivist legal system, then, consist of general commands issued by a sovereign and obedience to those commands induced by habit or by punishment.⁵⁸ These elements are readily identifiable in O’Brian’s portrayal of the Admiralty and the rule of law at sea. In Jack’s world, if not in the world at large, the Admiralty is the direct representative of sovereign authority, and the Articles of War and the orders of the Admiralty are the “laws” through which the commands of the sovereign are conveyed.⁵⁹ The identity of the Admiralty—or, at sea,

⁵⁷Id. at 601-03; see also Fuller, *supra* note 4, at 638-39. For a discussion of Hart’s concern that the notion of a command did not fully square with the concept of law, see H.L.A. Hart, *The Concept of Law* 16, 48-49, 61, 70-71, 77-78, 79 (2d ed. 1994) (1961) [hereinafter, *The Concept of Law*].

⁵⁸See Hart, *supra* note 4, at 603; see also *The Concept of Law*, *supra* note 57, at 25 (“... there must, wherever there is a legal system, be some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This person or body must be internally supreme and externally independent.”).

⁵⁹In the real world, George III was, of course, the sovereign and his Cabinet served executive functions. Parliament, composed of the House of Commons and the House of Lords, approved the passage of laws and controlled funding decisions. See John B. Hattendorf, *The Royal Navy during the War of the French Revolution and the Napoleonic War*, in Dean King, *A Sea of Words*, *supra* note 3, at 6-8. In formal terms, the Royal Navy was a servant of the sovereign crown. United under the Crown, the English legal system in its historical context thus illustrates Hart’s notion that the legal system of an individual state was “characterized by a certain kind of supremacy within its territory and independence of other systems. . . .” *The Concept of Law*, *supra* note 57, at 24.

In practical terms, for Jack and the other navy officers in the fictional world of *Post Captain*, it was the First Lord of the Admiralty who governed life. See generally *Post Captain*, *supra* note 2, at 69-73 (illustrating Lord St. Vincent’s authority over Jack and other naval captains). For a discussion of the organization and authority of the Admiralty and naval administration in the eighteenth century, see generally *The Wooden World*, *supra* note 34, at 29-36.

The treatment of royalty and aristocracy is an interesting subtheme in the book’s treatment of sovereignty. While the royal language is used throughout the book to describe the relationship of the Admiralty to the officer or the captain to his ship, I do not believe that this suggests that, in Jack’s world, true sovereignty lies with the monarchy. Indeed, the monarchy and the Parliament often seem like supplicants to the Admiralty’s authority. For example, Lord St Vincent, the First Lord, refuses a promotion to a member of the aristocracy who has been recommended by “the Prince of Wales, Duke of Clarence, Duke of Kent, and Duke of Cumberland.” The applicant “‘is grave and enterprising, but like the rest of the aristocracy, he thinks he has, from that circumstance, a right to promotion, in prejudice of men of better service and superior merit, which I will never submit to.’” *Id.* at 70. It seems clear that the elevation of Admiralty over monarchy is not merely an exercise of Whiggish politics; even Lord Melville, St Vincent’s Tory successor, ignores the Duke of Clarence’s repeated requests for Lieutenant Parker’s promotion, and gives Lieutenant Parker his “step” only after Jack has offered a somewhat insincere assurance that he is fit to command. *Id.* at 393.

the person of the ship's captain—with the concept of sovereignty is quite clear.⁶⁰ Stephen observes “that in many ships the captain played the part of a monarch and officers that of a court.”⁶¹ Jack accepts the temporary command of the *Lively* knowing that “[a]ll ships were to some degree separate kingdoms.”⁶² This fictional portrayal of the Royal Navy paints in more colorful pictures the same image that Hart used when he expressed his misgivings about the “more radical defect” of the command theory of law in its portrayal of “a simple relationship of the commander to the commanded, of superior to inferior, of top to bottom.”⁶³ Jack's world, as portrayed in *Post Captain*, rests on the validity of this “simple relationship.”⁶⁴

O'Brian shows us that the function of the Admiralty and of the Articles of War (the statutory provisions governing the Royal Navy) is to preserve order in the naval ranks.⁶⁵ To use the words of an American judicial opinion roughly contemporary to O'Brian's fictional world, the function of British naval law is “to retain and preserve the ancient supremacy of the British seas, and the official rules of admiralty.”⁶⁶ The concept of law validated through command and obedience is persistently illustrated and probed throughout *Post Captain*. Indeed, the limits of obedience and disobedience, of command and punishment, sound a recurring theme throughout the Aubrey-Maturin series, whether comic relief or moral challenge. In the opening scene of the novel,

Moreover, the brief appearances of royalty are rarely afforded great respect and certainly little authority. The unnamed royal who attends the opera with Canning and Diana as they publicly defy matrimonial convention, for example, is “stupid, uncomprehending; but pleased, almost lively” at Diana's attentions. *Id.* at 471. The Duke of Clarence is described in *Master and Commander* as a “singularly unattractive hot-headed cold-hearted bullying Hanoverian.” See *Master and Commander*, supra note 1, at 273.

⁶⁰When Jack Aubrey takes command of the *Polychrest* in 1802, he does so in the midst of an historical period during which the Admiralty was weaning itself from dependence on cooperation with senior officers and centralizing authority in the office of the First Lord. See N.A.M. Rodger, *The Naval World of Jack Aubrey*, in *Critical Essays*, supra note 3, at 58.

⁶¹*Post Captain*, supra note 2, at 343.

⁶²*Id.* at 407.

⁶³See Hart, supra note 4, at 604.

⁶⁴See generally *Post Captain*, supra note 2; see also Hart, supra note 4, at 604.

⁶⁵For O'Brian's description of the Articles of War, see *Master and Commander*, supra note 1, at 92-93. The Articles of War set forth disciplinary provisions for the conduct of navy officers and sailors. See generally *Jane's Dictionary of Naval Terms* 10 (Joseph Palmer, ed., 1975); *The Oxford Illustrated History of the Royal Navy* 66-67 (J.R. Hill and Bryan Ranft, eds., 1995). For a brief explanation of the Articles of War, see *A Sea of Words*, supra note 3, at 80-83. For a scholarly analysis of the weaknesses of the Articles of War of 1749, see generally *The Wooden World*, supra note 34, at 221-23. A copy of the Articles of War of 1749 (later amended) is available on the Internet at <<http://www.io.com/gibbonsb/articles.html>> (visited April 6, 2000).

In analyzing the history of punishment in the Royal Navy in this era, N.A.M. Rodger notes that the centralization of the Royal Navy “weaken[ed] the old personal bonds of mutual obligation between officers and their followers which had been one of the major cohesive forces of the Service in earlier years, and replace[d] them with an artificial discipline.” Rodger, supra note 60, at 58.

⁶⁶*Delovio v. Boit*, 7 F. Cas. 418, 420 (D. Mass. 1815) (No. 3,776).

O'Brian's exposition of the Royal Navy begins the juxtaposition of disobedience and punishment on a light note.⁶⁷ The first words spoken by a naval officer (Captain Griffiths of the *Charwell*) note a breach of order and the promise of punishment: "'Silence there, God damn you,' cried Captain Griffiths. 'Mr. Quarles, take that man's name.'"⁶⁸ Moments later, Griffiths erupts again when he sees a man who has failed to doff his hat in compliance with Admiralty regulations:

'Take it off, sir,' cried Captain Griffiths, flushing dark red. 'Take it right off your head. You know Lord St Vincent's order—you have all of you read it—you know how to salute . . .'⁶⁹

O'Brian's light-handed treatment of the interplay between authority and punishment helps us to see the irony and the humor in such moments; in others, it invites us to see what might be called the joy of discipline. The customary proclamation of authority, the expectation of obedience and the threat of punishment that accompanies naval orders—"fail not as you will answer the contrary at your peril"—are received almost joyfully when a new commission is announced.⁷⁰ Indeed, Jack's recollection of the *Sophie* as "an efficient, happy ship, if ever there was one" and his observation of the *Lively* as "a crack frigate: her sailing qualities were quite out of the ordinary, and the smooth quiet discipline of her people was beyond anything he had seen . . ." are joined in the cheerful observation that the "cat"—the means through which a severe flogging was administered—was rarely used aboard these ships.⁷¹ These ships pose no challenge to the smooth functioning of the command theory of law.

The role of punishment in preserving order, however, is nonetheless a dark theme that haunts *Post Captain*. The Admiralty, the officers, and the sailors all see punishment as crucial to naval discipline.⁷² Jack, for example, insists on informing his lieutenant in the *Lively* that he is "no great friend to the cat" but is desirous of conforming to the ship's normal disciplinary standards in order to keep order.⁷³ Jack himself regards punishment as a utilitar-

⁶⁷Post Captain, supra note 2, at 7-9.

⁶⁸Id. at 8.

⁶⁹Id. at 9.

⁷⁰Id. at 202; see also Master and Commander, supra note 1, at 13.

⁷¹Post Captain, supra note 2, at 292, 415.

⁷²Even in the midst of "growing class-consciousness," the value of naval discipline was not necessarily rejected by the crew. See Rodger, supra note 60, at 57. As N.A.M. Rodger explains in his historical analysis of the Royal Navy during this period, ". . . the cat remained as it had always been the good man's defence against his idle, troublesome, or thieving shipmate; it was the growth of casual and indiscriminate brutality which aroused so much resentment." Id. One incident of this use of the punishment system is illustrated in *Post Captain* when Jack is called to adjudicate a dispute between two seamen who each claim that the other has stolen a shriveled ape's head from him. See *Post Captain*, supra note 2, at 418-21.

⁷³Post Captain, supra note 2, at 419.

ian tool to achieve adherence to naval standards. He does not exact punishment beyond the amount necessary for order; nor does he condone punishment for vengeance.⁷⁴ He is “not a preachee-flogee captain: I will have a taut ship, by flogging if need be, but I will have no unnecessary brutality.”⁷⁵ He astonishes his lieutenant on the *Polychrest* when he determines that punishing mutineers out of anger will not succeed in creating order on the ship and instead leads them into action with the specific orders that no punishment be imposed.⁷⁶ Punishment exists not for its own sake, or for morality’s sake, but to back up the Admiralty’s specific commands and its general regulations for conduct aboard ship: men must be punished for deliberately defying their duty, but “. . . it is useless and detrimental to the good of the service to beat them until they know what is required of them.”⁷⁷

Despite Jack’s essentially utilitarian view of punishment, his overriding objective is always the preservation of naval law, a goal that sometimes leads him to condone in the name of order the more extreme form of punishment that he privately condemns. Consider his reluctant yet firm determination to establish “an unquestioning discipline” and to establish the authority of his officers on the *Polychrest*:

The grating was rigged, the bosun’s mates stood by, the master at arms brought up his delinquents, a long tally charged with drunkenness—gin had been coming aboard from the bum-boats, as it always did—contempt, neglect of duty, smoking tobacco outside the galley, playing dice, theft. On these occasions Jack always felt gloomy, displeased with everybody aboard, innocent and guilty alike: he looked tall, cold, withdrawn, and, to those under his power, his nearly absolute power, horribly savage, a right hard horse. This was early in the commission and he had to establish an unquestioning discipline; he had to support his officers’ authority. At the same time he had to steer fine between self-defeating harshness and (although indeed some of these charges were trivial enough, in spite of his words with Parker) fatal softness; and he had to do so without really knowing three quarters of his men. It was a difficult task, and his face grew more and more lowering. He imposed extra duties, cut grog for three days, a week, a fortnight, awarded four men six lashes apiece, one nine, and the thief a dozen. It was not much as flogging went; but in the old *Sophie* they had sometimes gone two months and more without bringing the cat out of its red baize bag: it was not much, but even so it made quite a ceremony, with the relevant Articles of War read out, the drum-roll, and the gravity of a hundred men assembled.⁷⁸

⁷⁴See generally *id.*

⁷⁵*Id.* at 2401.

⁷⁶*Id.* at 364. See generally Rodger, *The Wooden World*, *supra* note 34, at 210-11 (“In reality, when brutality occurred, it tended to destroy naval discipline, which rested on unstated consent, not force.”).

⁷⁷Post Captain, *supra* note 2, at 240.

⁷⁸*Id.* at 282.

To Jack, punishment, even if rarely used, is a necessary component of a happy and efficient ship. The most dramatic illustration of Jack's utilitarian view of punishment follows a confrontation between the *Polychrest's* first lieutenant, Parker, and Stephen Maturin. Stephen incurs Parker's wrath when he halts the gagging of a disobedient hand and denounces it "as a piece of extreme brutality."⁷⁹ The reader knows that Jack suspects Parker of having "no sense of the men" and "no sense of the sea either."⁸⁰ He

. . . suspected, more than suspected, that Parker's was the little discipline, the hazing discipline; that under Parker uncontrolled the *Polychrest* would be a flash ship, all paint outside and no order within, the cat in daily use and the crew sullen, unwilling and brutal—an unhappy ship, and an inefficient fighting machine.⁸¹

Yet despite his private condemnation of Parker's methods, Jack, "larger than life, hard, cold, and strong with a hundred years of tradition behind him, utterly convinced that he was right," backs his lieutenant's actions and orders Stephen to apologize.⁸² In the face of Stephen's direct protest that the punishment was inhumane, Jack insists that it was nonetheless legitimate, "a customary punishment, awarded by an officer."⁸³ For Jack, Stephen's argument against the punishment as an occasion of "extreme brutality" is wrong and inconsiderate in Stephen's ignorance of the "reason for the punishment."⁸⁴ Thus, morality (the "law as it ought to be") is irrelevant to a punishment imposed through the proper procedures for proper reasons (the "law as it is").⁸⁵

O'Brian's presentation does not miss the irony present in a utilitarian system that substitutes sovereign fiat for moral authority. The juxtaposition of naval authority and religious authority is a frequent illustration of the discomfiture of the Royal Navy with external moral imperatives. The sailors think it is unlucky to carry a parson on board and, indeed, Jack finds the *Lively's* parson's interest in naval affairs irritating and oppressive.⁸⁶ When

⁷⁹Id. at 241.

⁸⁰Id. at 281.

⁸¹Id.

⁸²Id. at 241.

⁸³Id.

⁸⁴Id.

⁸⁵See id. For Jack, the distinction between moral and legal authority mirrors the argument set forth by Hart. See generally *The Concept of Law*, supra note 57, at 268 (" . . . though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality; and hence morally iniquitous provisions may be valid as legal rules or principles.").

⁸⁶Post Captain, supra note 2, at 426-28. The sailor's uneasiness with organized religion is threaded throughout the novel's description of daily life. In port on a Sunday, for example, Stephen observes the juxtaposition of land-based organized religion against the sailor's life: "The scene had changed: church going was over, and the respectable part of the town had vanished behind doors, into an odour of mutton; now groups of sailors straggled up and down, walking wide, like countrymen in London . . ." Id. at 203. See also *Master and Commander*, supra note 1, at 19 (Jack's refusal of a chaplain unless he can "hand, reef and steer").

rigging church, Jack often follows the naval tradition of reading the Articles of War in addition to scripture.⁸⁷ In fact, his own occasional appeal to traditional religious values is akin to his approach to punishment. Determining that scripture, like punishment, may sometimes serve the good of the service, Jack decides to preach a sermon, using as a text

the one about I say come and he cometh; for I am a centurion. I want them to understand it is God's will, and it must be so—there must be discipline— 'tis in the Book—and any infernal bastard that disobeys is therefore a blasphemer too, and will certainly be damned. That it is no good kicking against the pricks; which is in the Book too, as I shall point out.⁸⁸

In later books, the parson who most frequently sails with Jack and his crew is Martin, whose passion for science and music complements his uninspired performances as a preacher, making him a tolerable shipmate.⁸⁹

In addition, the elasticity of the more abstract concept at the heart of the Admiralty's internal self-discipline—"for the good of the service"—also falls victim to O'Brian's wit.⁹⁰ Orders issued by the Admiralty and the application of the Articles of War are routinely dispensed "for the good of the service."⁹¹ As Jack explains:

"They don't like you to pick and choose. The good of the service must come first, they say: and they are perfectly in the right of it."⁹²

Yet the good of the service hardly provides a consistent moral center for independent decision-making. Jack occasionally uses the phrase as an admonishment for adherence to the Admiralty's commands. Sometimes, however, the good of the service is merely a formula that converts an otherwise improper action into a lawful command. For example, Jack worries about providing the *Livelies* with sufficient training in firing the great guns within the supply limitations authorized by the Admiralty, noting that "a broadside from the *Lively* would cost ten guineas."⁹³ When the *Lively* has succeeded in overpowering a small French battery of guns through a per-

⁸⁷Id. at 263.

⁸⁸Id. at 264. Note that Jack refers to the biblical depiction of a centurion's explanation of authority: "For I am a man set under authority, with soldiers under me: and I say to one, 'Go,' and he goes; and to another, 'Come,' and he comes; and to my slave, 'Do this,' and he does it." See Luke 7:8. See also id. at 133 ("A lucky shot. How he prayed for it—every time he laid his guns he prayed for it. 'The name of the Father, the Son, and the Holy Ghost.'").

⁸⁹See generally Patrick O'Brian, *The Ionian Mission* 79 (W. W. Norton & Co. 1992) (1981). See generally Brown, *supra* note 2, at 209-10 (detailing Martin's role in the Aubrey-Maturin series).

⁹⁰Post Captain, *supra* note 2, at 155.

⁹¹Id.

⁹²Id.

⁹³Id. at 438.

fectly legitimate use of Admiralty resources, Jack decides that “the good of the service requires us to batter the battery a little more.”⁹⁴ In fact, he concludes “[w]e must salute every French battery we pass like this—so much more fun than firing at a mark—and our affectionate friends [the Admiralty] cannot handsomely object.”⁹⁵ One interpretation of Jack’s quip might suggest that Jack himself is offering an ironic indictment of the formalism for which positivism is sometimes criticized. In Hart’s words, “what is . . . stigmatized as ‘mechanical’ and ‘automatic’ is a determined choice made indeed in the light of a social aim, but a conservative social aim.”⁹⁶ A more plausible explanation is to suggest that Jack is simply availing himself of the authority which Austin suggested that a judge might exercise in a “penumbral situation” in which “judges must legislate”; moreover, one could hardly accuse Jack of the sin of “legislating feebly,” or disregarding the kind of societal needs that might be observed from a utilitarian perspective.⁹⁷

One of the criticisms that may be levied against positivism is the potential for inconsistency among laws that are validated not because they derive from moral foundations, but simply because they exist. Strictly speaking, of course, it is not true in historical terms that the civil laws of England were grounded in a sovereignty apart from that which governed the Royal Navy; the Crown was the Crown, whether it exercised its sovereignty through the Admiralty or through the other dimensions of British law.⁹⁸ In a positivist sense, therefore, a civil law of bankruptcy and a naval law should be equally valid, providing that their claims to sovereign origin and legislative process are deserved.⁹⁹ However, much of the plot line and the character development of *Post Captain* focus on the differences between life on land and at sea. Through O’Brian’s characterization of Jack, we explore a world of differences. The world of *Post Captain* is a world of dualism: with Jack, we learn that a man who succeeds at sea does not necessarily do so on land.¹⁰⁰ Jack’s acceptance of “law as it is” in the Royal Navy is a sharp contrast to his flight from the bankruptcy system at land.¹⁰¹ The legal conventions which challenge Jack—the law of bankruptcy and the law of the sea—may have been historically rooted in the same sovereign authority, but throughout the book they have unique and often opposing effects on him.

⁹⁴Id. at 442.

⁹⁵Post Captain, supra note 2, at 442.

⁹⁶See Hart, supra note 4, at 611.

⁹⁷Id. at 609 (explaining Austin’s views on the vagueness of language).

⁹⁸See The Concept of Law, supra note 57, at 24-25.

⁹⁹Id.

¹⁰⁰Post Captain, supra note 2, at 88 (“‘I cannot tell you what a relief it is,’ [Jack] said, . . . ‘to be at sea. It is so clear and simple. I do not mean just escaping from the bums; I mean all the complications of life on shore. I do not think I am well suited to the land.’”).

¹⁰¹See generally id.; see also Hart, supra note 4.

While Jack is a part of the hierarchy that defends and enforces naval law, he is law's fugitive on dry land.

That the values of land and sea are in conflict is immediately apparent in the opening scenes of the book.¹⁰² War, for example, brings prosperity and good fortune to officers at sea—the prospects of employment, the possibility of promotion within the Naval ranks and the potential for gaining wealth through prize-taking increase immeasurably when the nation is at war. Jack is astonished that Stephen has not noticed “how blue everyone has always looked this war, when there was any danger of peace[.]”¹⁰³ Indeed, the bond that draws sea officers together and crowds out landmen extends beyond the patriotic duty to country. Both Jack and his French counterpart, Christy-Palliere, “a man devoted to his navy and of course to France, but unhappy in his rulers,” agree that “it would be wicked to pray for war” but “follo[w] exactly the same course” in wishing “oh to be afloat.”¹⁰⁴

Moreover, the dualism extends beyond the contrast between civil law and naval law and that between Jack's relationship to society aboard ship and on land; indeed, it extends to Jack's very person. As the admiring midshipman William Babbington explains,

He is a prodigious man. Though by land, you know, he is quite different. You would take him for an ordinary person—not the least coldness or distance. Oh, we all love him, ma'am, although he's so taut at sea.¹⁰⁵

Jack himself professes his relief at being at sea and observes, “I do not think I am well suited to the land.”¹⁰⁶ It is in Jack's life as “an ordinary person” that he confronts some of the most brazenly positivist aspects of this portrayal of the British legal system.¹⁰⁷ Early in the novel, we learn that Jack has invested the *Sophie's* prize money with an agent who has failed, absconded with the remainder of his firm's cash, and left his partner to file for bankruptcy.¹⁰⁸ The same post informing Jack of these events also brings him the news that the neutral vessels he had taken in the *Sophie* were not legally cognizable as prizes and that he is to repay all the funds previously dispensed to him.¹⁰⁹ The consequence for Jack is a new status within a different system of laws: that of fugitive from the bankruptcy laws.¹¹⁰

¹⁰²Post Captain, *supra* note 2, at 13.

¹⁰³*Id.*

¹⁰⁴*Id.* at 93-95.

¹⁰⁵*Id.* at 46-47. See also Patrick O'Brian, *H.M.S. Surprise 18* (J.B. Lippincott & Co. 1973) (Stephen notices that “Sophia was not wholly persuaded that Jack at sea and Jack ashore were two different persons.”).

¹⁰⁶See Post Captain, *supra* note 2, at 88.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 66.

¹¹⁰Post Captain, *supra* note 2, at 86-87.

Shortly after learning of his financial distress, Jack begins the first in a series of odd maneuvers to avoid being arrested for debt. In a highly formalistic structure, arrest for debt is valid if a “tipstaff” manages to touch a debtor with a pole.¹¹¹ The strategies which Jack adopts in order to avoid being “tipped” verge on the ludicrous, and their humor mocks the formalism of the bankruptcy system. He flees to France in order to avoid arrest in London only to find that when war breaks out the only way to freedom is to travel over the mountains to Spain while disguised as a dancing bear.¹¹² He slouches low in carriages in London and darts from the Admiralty to the carriage door with his face hidden.¹¹³ He leaps from the roof of an inn into a crowd of sailors who encircle him and beat off the tipstaff with oars.¹¹⁴ He tries to walk on one side of the street in order to avoid being arrested for debt if he crosses to the other side.¹¹⁵ Jack, who regards the neutrality of the prizes and his subsequent indebtedness as a “damned lawyer’s quibble,” watches “his naval and legal business [grow] steadily darker and more complex.”¹¹⁶ In contrast to his role at sea, where he enforces the Admiralty’s laws and administers naval justice, he is now driven to absurd lengths to avoid compliance with laws that, from a positivist perspective, are certainly valid laws supported by customary means of enforcement.

Jack’s guide to evading the bankruptcy laws is Scriven, the fallen law copyist and aspiring, though unsuccessful, footpad. Scriven fails in his attempt to rob Jack and earns himself both a beating and Jack’s protection in return.¹¹⁷ If Parker, the stern lieutenant who issues “[a]n incessant barking flow of orders, threats, insults, diversified with kicks and blows,” is the foil to Jack’s more judicious enforcement of naval law, Scriven is the model against which Jack’s life outside the bankruptcy laws must be measured.¹¹⁸ Recalling that Jack feels that he is “not well suited to the land,” one can see that Scriven is in a sense the archetypal landsman—someone who is living outside the formal system of naval law that Jack understands.¹¹⁹ Measured by

¹¹¹Id. at 213-14 (“... the bailiffs struggled in the confusion, reaching out their staffs with ludicrous earnestness, trying to touch him . . .”). See also id. at 160 (“Arrest for debt was very common . . . but it had never happened to him personally and his knowledge of the process and of the law was vague.”).

¹¹²Id. at 102-14.

¹¹³Id. at 153 (“Jack . . . sat huddled low in the corner, . . . seeing a bailiff in every full-grown man.”).

¹¹⁴Id. at 214-15.

¹¹⁵Post Captain, *supra* note 2, at 400.

¹¹⁶Id. at 73, 78.

¹¹⁷Id. at 178-79.

¹¹⁸Id. at 334.

¹¹⁹Id. at 195. Scriven can also be viewed as a counterpart to Stephen, in that they are both characterized as “literary men” of uncertain parentage who do not understand the sea. Scriven, for example, requires a naval dictionary to translate a book of sea adventures from French to English. The similarity between Scriven and Stephen (who “feel[s] a certain sympathy for him”) underscores the important role Scriven plays as a counterfoil to Jack. Id. at 195.

naval standards, Scriven is a failure; he certainly represents the kind of failure that Jack does not even understand. The fact that it is Scriven, with his close understanding of the land-based law of bankruptcy that is so troublesome to Jack, who provides Jack with the knowledge of how to avoid arrest for debt underscores even further the alienation between the law of land and sea. Scriven is the unacknowledged son of a father “said to have been a judge.”¹²⁰ “[B]orn in a debtor’s prison,” he knows few things better than the law of bankruptcy.¹²¹ He literally contaminates his benefactors: when Jack carries him home to receive Stephen’s care, he discovers that Scriven has given him lice.¹²² For “Lucky Jack Aubrey” to depend on the advice of such a man demonstrates the gap that divides Jack from life on land.

Scriven is an essentially amoral character, a person who knows the limits of the law but does not subject those limits to moral scrutiny. Indeed, the choice of his name, both in its own etymological origins and in its allusion to Melville’s story, *Bartleby the Scrivener*, mirrors the choice of his profession.¹²³ Scriven copies or translates other people’s texts. The distinguishing characteristic of Bartleby the scrivener is his refusal to participate in tasks otherwise viewed as appropriate to his calling (“I would prefer not to”), while Scriven is characterized by his willingness to copy or write without moral scrutiny of his actions.¹²⁴ Scriven avers, “I always kept my promised day, the printers could read my hand, and I corrected my proofs as soon as they came.”¹²⁵

It is Scriven’s amorality that permits him to perform two critical services for Jack, each of which is critical to Jack’s success outside the law on land and as a successful administrator of the law at sea. First, through Stephen, Scriven conveys to Jack the limits of the jurisdiction of the bankruptcy courts on land.¹²⁶ Second, at Jack’s request, Scriven draws up the poster that brings a crucial number of hands to the *Polychrest* through a promise of prizes that both Scriven and Jack know to be exaggerated.¹²⁷ Each of these

¹²⁰Post Captain, supra note 2, at 182.

¹²¹Id. at 184.

¹²²Id. at 180-81.

¹²³See Herman Melville, *Bartleby the Scrivener in Law and Literature - Text and Theory* 256 (Lenora Ledwon, ed., 1996). Unlike Melville’s character, whose title might roughly be construed as the noun “writer,” O’Brian’s Scriven has a name that suggests the descriptive adjective “written.” In a sense, the creativity still present in Bartleby as a “writer” is extinguished when one views Scriven as one who is “written.” To my reading, this suggests Scriven’s passive acceptance of “law as it is,” or perhaps “law as it is written.”

An alternative explanation of the source of Scriven’s name is offered in Brown’s *Perons, Animals, Ships and Cannons*. Brown notes that Geoffrey Chaucer addressed a poem “to his copyist, ‘Adam the scriveyn’ on whom the poet wishes a plague of lice for the poor quality of his work. See Brown, supra note 2, at 286.

¹²⁴Compare Melville, supra note 123, at 262 with Post Captain, supra note 2, at 183.

¹²⁵See Post Captain, supra note 2, at 183.

¹²⁶Id. at 184, 192, 195-96.

¹²⁷Id. at 206-07.

acts lacks a moral foundation other than the fulfillment of a request for services; yet, in a sense, each act relies on adherence to “law as it is” in order to validate Scriven’s choices. When Scriven informs Jack of the literal geographic boundaries within which he may move without being arrested, his actions enable Jack to evade apprehension by adhering to the letter of the law.¹²⁸ Even though Scriven’s actions are sympathetic to Jack’s supporters, their moral basis is obscure. Scriven is not helping Jack out of moral conviction and, in fact, although we sense that Jack is unlucky in the failure of his prize agent, there does not seem to be an explanation in conventional morality for Scriven’s assistance of Jack. He does it simply because he is asked to show the limits of the formal law. Likewise, Scriven draws sailors into the *Polychrest*’s crew by representations that he crafts with a certain amoral indifference.¹²⁹ Again, he does it simply because he is asked to do so. Scriven, who lives outside the boundaries of the law, in fact demonstrates the kind of obedience to “law as it is” that positivism demands without reflecting on the morality of the law or how it ought to be.¹³⁰ Scriven’s recitation of the law is creditable not because it is moral, but because it is accurate.

Jack is such a likable character and Scriven such a pitiable man that it seems implausible that Jack could be as void of moral fibre as Scriven. Towards the end of the novel, we receive some assurance that even though Jack has become “a better officer and a duller man, it is not because he lacks a sense of “law as it ought to be.”¹³¹ A powerful swimmer, Jack is known to have rescued a score of men from a briny death, and his cruise on the *Polychrest* provides him with yet another opportunity to do so.¹³² This is not a service that is commanded or even commended by the Royal Navy. Indeed, in a hierarchical organization which buys its success at the price of the lives of some of its men, one could question whether a strictly utilitarian analysis would suggest that a ship’s captain should risk his life to rescue a floundering tar. Yet Jack persists in following his native moral instinct to rescue anyone or anything that he can. In one of the few moments when O’Brian uses the word “wise” to describe Jack, we learn that Jack has determined that “in the article of pulling people out of the sea, virtue is its own reward.”¹³³ For all his participation in the Royal Navy system, Jack Aubrey is “wise” when he acts on grounds that can only be substantiated by moral virtue.

¹²⁸Id. at 184.

¹²⁹Id. at 206-07.

¹³⁰See generally Hart, *supra* note 4, at 612.

¹³¹Post Captain, *supra* note 2, at 454.

¹³²Id. at 299.

¹³³Id. at 301.

IV

STEPHEN MATURIN AND THE SPIRIT OF MORALITY: LAW AS IT OUGHT TO BE

The responses to positivism have drawn from many different schools of philosophy and lived experience. In his reply to H.L.A. Hart, Lon Fuller offered a defense of the integration of law and morality.¹³⁴ Some of his response has sources in realist critique, some in concepts reminiscent of natural law. The unifying principle, however, is that law cannot be administered separately from an acknowledgment of certain moral precepts.¹³⁵ Fuller found the positivists' attempts to define the notion of "law" unhelpful as a "guide to conscience" that would clarify "the obligation of fidelity to law in times of trouble."¹³⁶ Fuller suggested instead that the infusion of morality into law would likely "pull those decisions toward goodness," while consciously separating law from morality would be unlikely to protect against "immoral morality."¹³⁷ Law concluded Fuller, "cannot be built on law" because it must be supported by an internal morality validated by external moral attitudes.¹³⁸

Fuller offered a multi-faceted critique of positivism in general and of Hart's conception of positivism in particular, and a full examination of these critiques would be beyond the scope of this essay. However, as one who reads *Post Captain* as a critique of the separation of law and morality, I find fascinating Fuller's suggestion that the flaws of positivism might be revealed if we

were . . . transported to a country where our beliefs were anathemas, and where we, in turn, regarded the prevailing morality as thoroughly evil. No doubt in this situation we would have reason to fear that the law might be covertly manipulated to our disadvantage; I doubt if either of us would be apprehensive that its injunctions would be set aside by an appeal to a morality higher than law. If we felt that the law itself was our safest refuge, would it not be because even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerance, and inhumanities into law? And is it not clear that this hesitancy itself derives, not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess?¹³⁹

¹³⁴See Fuller, *supra* note 4, at 645.

¹³⁵*Id.* at 672 (describing "the pretense of the ethical neutrality of positivism").

¹³⁶*Id.* at 634. In *Master and Commander*, Jack playfully calls Stephen an "antinomian" when he voices a similar criticism. See *Master and Commander*, *supra* note 1, at 319.

¹³⁷See Fuller, *supra* note 4, at 634.

¹³⁸*Id.*

¹³⁹*Id.* at 637.

Again, of course, I must stress that it is hardly conceivable that Patrick O'Brian would have had Fuller's question in mind when he created the character of Stephen Maturin. Viewing *Post Captain* as a hypothetical against which one might measure the interplay of law and morality, however, it is certain that in Stephen we can see the Royal Navy from the perspective of a person who is alien to the governing regime in the disposition of his person, his religion and his conception of morality.¹⁴⁰ Stephen is not the only character in the Aubrey-Maturin series who is given to ruminating on philosophical questions, but among these characters he is the most consistently disposed to philosophical critique of the naval system and the one who is most easily able to convey his criticisms to Jack. He plays the pivotal role, then, in articulating the criticism of life and, for our purposes, law as the Royal Navy recognizes these ideas.

Our first glimpse of Stephen Maturin immediately establishes him in a capacity that might best be described in anthropological terms: he is a participant observer.¹⁴¹ He is of the Royal Navy and yet he is also apart from it. O'Brian goes to some length to establish both Stephen's proximity to and his distance from naval society, all the while weaving Stephen's private moral anguish into his essentially happy life at sea. Stephen's credibility as a participant in the Royal Navy system is impeccable. We know that he is devoted to his profession: "in what he conceived to be his duty as a medical man, Stephen Maturin would not budge for man, God or beast."¹⁴² Moreover, he revels in the position of ship's surgeon:

He had hardly closed his door before a hundred minute ties began to fasten insensibly on him, drawing him back into the role of a responsible naval surgeon, committed to complex daily life with a hundred other men.¹⁴³

Secure as we are in our certainty of his devotion to his appointment as ship's surgeon, however, we know that Stephen is also not quite like the other sailors in the Royal Navy. In contrast to the glorious uniforms of the sailors aboard the *Charwell*, his appearance, from his threadbare attire to his pale unnatural eyes, marks him as a man apart.¹⁴⁴ Moreover, we know his public

¹⁴⁰Stephen does not hide the fact that he is a Catholic in the midst of a community composed largely of members of the Church of England or other Protestant denominations. *Post Captain*, supra note 2, at 330. For a description of the conventional views of Catholicism among British seamen, see generally id. at 107-08, 114-15, 147. This attribute is reminiscent of Fuller's portrayal of a "man without religious beliefs living in a community of ardent Protestant Christian faith." Fuller, supra note 4, at 671. Suggesting that such a man might learn to accept a community prohibition against playing golf on Sundays, he notes that a statute compelling him to pray might instead be perceived as a "direct affront to my integrity as a human being." Id.

¹⁴¹*Post Captain*, supra note 2, at 11 (first mention of Stephen Maturin in *Post Captain*).

¹⁴²Id. at 236.

¹⁴³Id. at 355.

¹⁴⁴Id. at 17, 36, 330.

identity challenges the boundaries of conventional naval society. He is Irish, a Catholic, “somebody’s natural son,” a lubber.¹⁴⁵ The public perception of Stephen as an outsider is a theme that persists throughout the book. In an early scene, Jack remarks on Stephen’s persistent inability to master a basic understanding of life at sea:

‘It’s an odd thing about you, Stephen,’ said Jack Aubrey, looking at him with affection. ‘You have been at sea quite some time now, and no one could call you a fool, but you have no more notion of a sailor’s life than a babe unborn.’¹⁴⁶

In the final pages of the book, one of the officers of the *Polychrest* observes Stephen “come up the side like a left-handed bear,” permitting our perception of him as an outsider to remain intact, even though we soon learn that he now secretly holds the rank of Post Captain.¹⁴⁷

Not only does Stephen occupy the position of an outsider privileged to observe the intimate workings of the Royal Navy, but his skill as an observer is brought to the fore in myriad different ways. He is, for example, a student of human physiology and of the natural sciences.¹⁴⁸ The accuracy of his observations of animals and plants, coupled with his hesitancy to venture a definitively expressed opinion based on these phenomena unless fully substantiated, gives us the comfort of knowing that Stephen will report accurately.¹⁴⁹ Moreover, as readers of his diary and having access to his private thoughts, we know he is given to examining his own experiences and his reaction to those experiences with a practiced eye.¹⁵⁰ There are surely few moments in the book more expressly designed to assure us of Stephen’s commitment to the accurate examination of self than his reaction to catching Diana’s scent at the opera and the realization that she has lost the qualities he most prized in her:

Stephen watched with no particular emotion but with extreme accuracy. He had noted the great leap of his heart at the first moment and the disorder in his

¹⁴⁵Id. at 30.

¹⁴⁶Id. at 13.

¹⁴⁷Post Captain, supra note 2, at 474.

¹⁴⁸Id. at 56 (describing the contents of Stephen’s private diary), 61-62 (describing the basis for the Admiralty’s esteem of Stephen’s opinions).

¹⁴⁹One of Stephen’s strangest contributions to dinner conversation aboard the *Lively*, for example, is the observation that “‘Monsieur de Buffon hints that the naked callosities on the buttocks of the hylobates may conceal scent glands, but he does not go so far as to assert it.’” Id. at 424. Although “a chill fell on the conversation” after this comment, it is surely one of the moments designed to provoke the reader to laugh out loud. Id. I think, however, that it does add to our understanding of Stephen and the precision with which he speaks; his remark clearly rests on the assumption that a hint is different from an assertion.

¹⁵⁰Id. at 56-58.

breathing, and he noted too that this had no effect upon his powers of observation. He must in fact have been aware of her presence from the first: it was her scent that was running in his mind before the curtain fell; it was in connection with her that he had reflected upon these harps.¹⁵¹

He will “concentrate his utmost attention upon Diana to prove what he knew to be the fact,” that “[t]he purity of wild grace was gone” and “from now on he must associate vulgarity with his idea of her.”¹⁵² This scene establishes three fundamental characteristics that affirm Stephen’s integrity as an observer: first, the special authority that he commands as someone who values “the purity of wild grace (the moral value of freedom from constraint); second, the accuracy of his observational and analytical skills; third, the willingness to submit to “painful” and “astonish[ing]” emotions in order to “prove what he knew to be a fact.”¹⁵³

Stephen’s commitment to observation extends to the acknowledgment that, in Fuller’s words, “intellectual clarity” may sometimes be “specious.”¹⁵⁴ As the likelihood of Stephen’s winning Diana wanes, so does his trust in the ability of words to express thought. The first doubts about the utility of language surface surrounding his duel with Jack; they come to a head in the scene at the opera when he condemns a “foolish German [who] had said that man thought in words.”¹⁵⁵ To the reader who is familiar with traditional strains of American legal realism, the suspicion of words bears with it the indictment of the positivist belief that legal concepts could be clarified and explicated on their own terms.¹⁵⁶ Stephen, we sense, is no positivist.

It is thus clear that Stephen is a man whose natural disposition places him at odds with a passive acceptance of “law as it is.” Jack knows this, and frequently mediates between Stephen and the naval world, while trying to educate his friend to an easier acceptance of the obedience and conformity necessary to naval life. While much of Jack’s assistance or criticism is lightly proffered, the scene in which Jack forces Stephen to apologize for berating

¹⁵¹Id. at 471.

¹⁵²Post Captain, *supra* note 2, at 472.

¹⁵³Id. at 472. Note that Stephen does not shirk from knowing or acknowledging facts that are painful he faces the knowledge, even when he later treats the pain with laudanum. Id. at 86 (calling laudanum “my bottled tranquility”).

¹⁵⁴See Fuller, *supra* note 4, at 631.

¹⁵⁵Post Captain, *supra* note 2, at 470.

¹⁵⁶See Hart, *supra* note 4, at 606-07; *The Concept of Law*, *supra* note 57, at 126 (“Much of the jurisprudence of this century has consisted of the progressive realization . . . of the important fact that the distinction between the uncertainties of communication by authoritative example . . . and the certainties of communication by authoritative general language . . . is far less firm than this naive contrast suggests.”). See also Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 *Cornell L. Q.* 161, 164 (1965) (“[I]t is men who give meanings to words and that words in themselves have no meaning”).

Parker for the brutal gagging of a wayward hand shows the lengths to which Jack will go in order to ensure that Stephen subordinates his private moral qualms to naval norms.¹⁵⁷ Stephen's open opposition to "authority, that egg of misery and oppression" and his willingness to express theoretical support for "mutinies in general" worry Jack, both for their deleterious effect on the order of the ship and for the consequences that he fears that Stephen may suffer.¹⁵⁸ It is when confronted directly by Stephen that Jack seems most disposed to defend the system of naval law from moral criticism.

What Jack does not know, however, is that Stephen's moral views have led him to espouse two equally secret but seemingly contradictory causes. We know, from *Master and Commander*, that in his youth Stephen had associated with and participated in Irish revolutionary schemes clearly antithetical to the sovereignty from which the Admiralty's authority flows.¹⁵⁹ In *Post Captain*, however, we learn that these same principles and the hope of England's intervention on behalf of Catalan independence have led him to serve the Admiralty as an undercover intelligence officer.¹⁶⁰ As readers, we know the fervor of Stephen's commitment to morality before sovereignty and the law long before Jack learns of the depth of his convictions.¹⁶¹ The very morality that seems to divide Stephen from acceptance of "law as it is" seems to motivate him to serve the Admiralty that promotes that law.

At this point, it is helpful once again to consider Fuller's contribution to our understanding of morality. In *The Morality of Law*, Fuller proposed a distinction between a morality of aspiration and a morality of duty.¹⁶² The morality of aspiration, rooted in Greek philosophy, is "the morality of the Good Life, of excellence, of the fullest realization of human powers."¹⁶³ Decisions that are grounded in the morality of aspiration evaluate "whether . . . an activity [is] worthy of man's capacities" for excellence.¹⁶⁴ Because laws are incapable of forcing a man to fully realize his capacity for moral excellence, Fuller found the morality of aspiration lacking "in direct relevance for the law."¹⁶⁵ In contrast, the morality of duty, which is concerned with "the basic requirements of social living," is the law's "blood cousin" and the means of defining the "workable standards of judgment" that the law expounds.¹⁶⁶ Although Fuller refused to consign the problems of social liv-

¹⁵⁷Id. at 241.

¹⁵⁸Id. at 233.

¹⁵⁹Master and Commander, supra note 2, at 169-179; Post Captain, supra note 2, at 61-62.

¹⁶⁰Post Captain, supra note 2, at 61-62 ("an incomparable agent, sure, discreet, deeply covered").

¹⁶¹Id. at 61-62, 475.

¹⁶²See *The Morality of Law*, supra note 16, at 5.

¹⁶³Id.

¹⁶⁴Id. at 8.

¹⁶⁵Id. at 9.

¹⁶⁶Id. at 6, 9.

ing solely to the province of moral duty rather than the morality of aspiration, he did acknowledge that moral duty is more easily identifiable with the implementation of basic judgments concerning the most elemental requirements of life in society than the more elusive concept of moral aspiration.¹⁶⁷

In Stephen, we find a character who calls himself a philosopher and who understands morality in very much the same terms as Fuller uses to describe the morality of aspiration. Whether in political or private thought, Stephen searches for an ideal that always eludes him, and his search extends beyond the confines of moral duty or law. The most persistent image of the freedom that Stephen chases is, perhaps, Diana. Unlike Sophia, who seems staid in comparison, Diana wins Stephen's attachment because she is "wild, with a certain ram-you-damn-you air."¹⁶⁸ She is unconventional, swearing freely, wearing tropical clothes in Britain; her presence is detected not by concrete signs but by scent.¹⁶⁹ Stephen loves her for the very reasons that she spurns Jack's excuses that he cannot risk arrest by visiting her on a weekday when the tipstaff is working: she lives outside the constraints imposed by traditional law.¹⁷⁰ Stephen's early observation that the "passionate intensity of [his] feeling for Catalan independence" is linked to his love for Diana, his defense of the theory of mutinies, his rejection of Bonapartism all speak with the common voice of freedom.¹⁷¹ In fact, in the hours preceding a duel in which he believes that either he or Jack will die, he meditates on the perfection and clarity of "liv[ing] in the very present moment; liv[ing] intently," when "being is the highest good."¹⁷²

Freedom, like Diana, seems to involve a lack of constraints. In a pure form, freedom may then mean the rejection of the constraints of "law as it is" when they conflict with the imperatives of "law as it ought to be."¹⁷³ Thus, Stephen finds it easy to lie and deceive when the cause of freedom demands. In one simple example, which is in part responsible for moving the two principal characters to a duel that neither of them truly wants, Stephen claims to have been in Ireland in order to cover up the fact that he traveled to Spain in a wild bid to gather intelligence for Britain in return for aid in the name of Catalan independence.¹⁷⁴

¹⁶⁷See *The Morality of Law*, supra note 16, at 12-13.

¹⁶⁸*Post Captain*, supra note 2, at 472, 19.

¹⁶⁹*Id.* at 19, 25, 287, 338, 471.

¹⁷⁰*Id.* at 174.

¹⁷¹*Id.* at 58.

¹⁷²*Id.* at 349-50.

¹⁷³See, e.g., Fuller, supra note 4. Like Fuller, Stephen recognizes the reality of "law as it is." However, he is painfully aware that freedom necessarily involves recognizing "law as it ought to be."

¹⁷⁴*Post Captain*, supra note 2, at 342.

In *Master and Commander*, Stephen muses on the inconsistencies between the different “legal” systems to which a person might become subject: “the moral law, the civil, military, common laws, the code of honour, custom, the rules of practical life, of civility, of amorous conversation, gallantry, to say nothing of Christianity for those who practice it.”¹⁷⁵ In some respects, Stephen’s observation is reminiscent of Hart’s warning against thinking “in a too simple-minded fashion” about normative moral standards:

This is not because there is no distinction to be made between law as it is and ought to be. It is because the distinction should be between what is and what from many different points of view ought to be.¹⁷⁶

Resolving this dilemma by cutting morality out from the analysis of the validity of a law hardly seems to answer Stephen’s problem; yet neither does the possibility of elevating the pursuit of morality beyond the constraints of law.

In at least two instances, *Post Captain* suggests that Stephen’s pursuit of moral virtue in the name of liberty must undergo a transformation demanding his acceptance of the constraints of law and its “blood cousin,” the morality of duty.¹⁷⁷ The first is a developing sense that unlimited freedom as a moral aspiration may be incompatible with the happiness he finds in community with other people. In the hours preceding his duel with Jack, he experiences both a profound sense of freedom and a profound regret of lost attachment—“no diminution of interest but no commitment: a liberty I have hardly every known. Life in its purest form—admirable in every way, only for the fact that it is not living, as I have understood the word.”¹⁷⁸ A similar loss occurs when he watches Diana at the opera: he believes, at this point, that his matrimonial aspirations—the legal conventions binding two people in the community of marriage—have been lost, and, with them, “the purity of wild grace” he associates with Diana seems to die as well.¹⁷⁹ Solace is found in the “hundred minute ties” that “fasten insensibly on him, drawing him back into the role of a responsible navy surgeon.”¹⁸⁰

¹⁷⁵See *Master and Commander*, supra note 1, at 318. Note the contrast in Stephen’s broad-ranging use of the word “law” and the narrow use which the positivists defended. Austin maintained that “opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct” were only “improperly termed laws, being rules enforced by mere opinion. . . .” See *The Province of Jurisprudence Determined*, supra note 56, at 20. Austin later referred to such phenomena as “rules of positive morality.” *Id.* at 110.

¹⁷⁶See Hart, supra note 4, at 612-13.

¹⁷⁷See *The Morality of Law*, supra note 16, at 9.

¹⁷⁸*Post Captain*, supra note 2, at 353.

¹⁷⁹*Id.* at 472.

¹⁸⁰*Id.* at 355.

The second transforming moment is the scene in which Stephen, over-hearing himself described as “all right” and “for liberty,” “an Irish person, too,” learns of a mutiny and reports it to Jack.¹⁸¹ This action on Stephen’s part leads to the recognition that his moral aspirations are not necessarily as contrary to the rule of law and legislated moral duty as he had thought. Freedom, as he understands, may come at the price of order, and yet order is simply the result of legal pronouncements that “seek to exclude from [man’s] life the grosser and more obvious manifestations of chance and irrationality.”¹⁸² Hart suggested that when the German thinker Radbruch renounced positivism in the wake of the Nazi regime, he espoused the idea “that every lawyer and judge should denounce statutes that transgressed the fundamental principles not as merely immoral or wrong, but as having no legal character.”¹⁸³ We know that Stephen has flirted with danger in articulating a biting critique of naval life and an endorsement of the theory of mutiny. Yet here he stops. Stephen’s action in denouncing the mutineers to Jack seems to acknowledge a difference between abstract objections to “order” as a goal in itself and a clear valuation of what Fuller called “good order.”¹⁸⁴ To put it differently, Stephen has learned that “law cannot be built on law.”¹⁸⁵ The “moral externalities” that make law possible are in constant dynamic with the “internal morality” that makes order possible.¹⁸⁶

Thus, Stephen, the character who seems at first blush to embody the greatest critique of naval order, also seems to embody a criticism of an unabashed and unabated pursuit of the morality of aspiration in a purely individualistic, abstract sense. It is surely an indictment of an early naive belief in morality independent of the law that is suggested when he fails to win Diana’s hand while watching Jack succeed in his pursuit of Sophia, despite Stephen’s observation that Jack and Sophia both “[feel] that they may not go beyond certain modest limits.”¹⁸⁷

V

JACK, STEPHEN AND THE LOVE OF WISDOM: SOPHIA AND *H.M.S. SOPHIE*

A harsh and simplistic illustration of the conflict between law unfettered by moral analysis and morality untrammelled by legal order emerges when it

¹⁸¹Id. at 361.

¹⁸²See *The Morality of Law*, supra note 16, at 9.

¹⁸³See Hart, supra note 4, at 617.

¹⁸⁴See Fuller, supra note 4, at 644.

¹⁸⁵Id. at 645.

¹⁸⁶Id.

¹⁸⁷Post Captain, supra note 2, at 157.

appears that Jack and Stephen may fight a duel which each of them would prefer to lose. There is no moral basis to justify the duel. Stephen has taken umbrage at Jack's accusation that Stephen has lied (when we know in fact that Jack is correct).¹⁸⁸ Moreover, there is no legal basis to justify the duel. The Royal Navy and its regulations forbid dueling. The duel threatens to kill one or both of the protagonists. If Jack is wise when he saves lives and if Stephen is devoted to preserving life as a physician, the duel seems to be the very opposite of wisdom. If Jack or Stephen dies, neither will come to know wisdom as he wishes.

Yet, in fact, the duel does not take place and both men gain a stronger vision of what wisdom has to offer.¹⁸⁹ If Stephen gains the wisdom of appreciating the order represented by Naval life, it is best illustrated in his growing appreciation of life at sea. By the end of the novel, Stephen, a man who falls into the sea at regular intervals, who is not at home on the sea, who does not understand naval life, learns to feel "a longing for the sea."¹⁹⁰

This morning, when I was walking beside the coach as it labored up Ports Down Hill and I came to the top, with all Portsmouth harbour suddenly spread below me, and Gosport, Spithead and perhaps half the Channel fleet glittering there—a powerful squadron moving out past Haslar in line ahead, all studsails abroad—I felt a longing for the sea. It has a great cleanliness. There are moments when everything on land seems to me tortuous, dark, and squalid; though to be sure, squalor is not lacking aboard a man of war.¹⁹¹

Stephen has learned two lessons: the value of order and the rule of law on the ship and the understanding that such an order, while existing with "squalor," may nonetheless foster "cleanliness."¹⁹²

Stephen's understanding of the rule of law and life at sea—represented by the idealization of *H.M.S. Sophie*—grows in parallel to Jack's understanding of the need for wisdom and reconciliation with life on land—represented by the idealization of the character Sophia. Throughout the novel, it is clear to all but Jack that he will eventually win Sophia's hand.¹⁹³ And yet, even at the novel's close, he is strangely ignorant of who she actually is. On the other hand, he is entirely familiar with *H.M.S. Sophie*. Indeed, quite early in the courtship, he asks, "I may call you Sophie, mayn't I? I always think of you so."¹⁹⁴ The request seems an attempt to gain something akin to the

¹⁸⁸Id. at 342.

¹⁸⁹Post Captain, *supra* note 2, at 355, 384.

¹⁹⁰Id. at 198.

¹⁹¹Id.

¹⁹²Id.

¹⁹³Id. at 57.

¹⁹⁴Id. at 68.

intimacy he feels for his ship. And yet he remains essentially doubtful of her affection and ignorant of her character. He knows Sophia, but he has yet to understand either the woman or the wisdom she personifies.

The final words of the novel convey to me O'Brian's message to his characters. Jack's troubles on land cannot be rectified without an understanding of Sophia. Stated differently, positivism cannot function without wisdom as its basis. The first time that Jack drinks to "three times three," we do not know whether he toasts his ship or his lady.¹⁹⁵ By the end of the book, this ambiguity has been cleared—he toasts Sophia, the personification of wisdom.¹⁹⁶

On the other hand, Stephen is taking a different journey. Stephen loves both *sophia* as a discipline and Sophia as a person, but he does not intimately appreciate the legal imposition of order that is necessary for ships like *H.M.S. Sophie* to be happy. He himself is conscious that there must be a link between his love for Diana and his quest for Catalan independence, but he remains ignorant of the role that order must play until the book's end. In other words, morality that disregards the order needed to run a ship like *H.M.S. Sophie* is unstructured and unproductive. In order to attain Catalan independence, he must conform to the Royal Navy's rules. So when Stephen ends the book with the words, "Sophie—god bless her!," one might justifiably ask whether he is toasting the girl or in fact the ship.¹⁹⁷ It is Stephen, the character far more inclined to introspection and to clear thinking, that ends the book with an ambiguous statement.

VI CONCLUSION

If one reads *Post Captain* as a reflection on law and morality, then, the recurrence again and again of the terms *Sophie* and Sophia, the guiding muses of the protagonists, must force one to consider whether wisdom can unite the dualism suggested in separating law from morality. One must perhaps remember that this is a story of young men. Again and again we are told of Jack's transformation from boyishness to manhood.¹⁹⁸ Stephen's surname, a traditional Irish name that O'Brian had used in earlier novel sounds a great deal like "maturing."¹⁹⁹ These young men move towards wisdom from two

¹⁹⁵Id. at 65.

¹⁹⁶Id. at 496.

¹⁹⁷Id.

¹⁹⁸Id. at 495.

¹⁹⁹See *Life*, supra note 3, at 200 (noting that the surnames Aubrey and Maturin both appear in O'Brian's earlier work, *Testimonies*).

different starting places. Rephrased in terms of “law as it is” and “law as it ought to be,” the inquiry set forth in *Post Captain* does not come with a neat ending. Instead, the novel pushes the debate forward from an immature dualism pitting law against morals to a synthesis that unites order and morality in the pursuit of wisdom.

Fortunately, eighteen more novels follow *Post Captain* in the series, offering plenty of opportunities for Jack and Stephen to discover whether wisdom can lead “a man and himself” to understand how to unite “law as it is” and “law as it ought to be.”²⁰⁰ I, for one, cannot wait to set sail with Captain Aubrey and Doctor Maturin to see how far they travel on this journey, and I invite you to join me in this quest. As Jack and Stephen would say, a glass of wine with you!

²⁰⁰See Life, *supra* note 3, at xvi.