

# How Fragile is the Legal System? A Centenary Reflection on the 1923 Victorian Police Strike

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The rule of law is for a civilised society what air is to breathing. Its existence is generally assumed, but its absence is at best distressing, and at worst fatal. There are various desiderata which comprise the rule of law, such as that the rules of a legal system be clear, predictable, prospective, publicly available and coherent. There must also be a body of officials who are authorised to make, administer and apply the law, and a professional class of lawyers who know their way around the books and who are available without undue difficulty and expense to advise people who want to know where they stand (John Finnis, *Natural Law and Natural Rights* (OUP, 1980), pp 270–71). And since the 19<sup>th</sup> Century, it has been axiomatic that the rule of law requires the existence of a public police force with responsibility for the enforcement of the criminal law. What would happen if that police force were suddenly to stop doing its job? The question did not seem to occur to those in the United States who called for the de-funding of the police as an element of the Black Lives Matter movement.

Plato considered a similar issue at the philosophical level in Book II of *The Republic*. Glaucon tells the story of the shepherd who discovered the Ring of Gyges, which had the mysterious power of making the wearer of the ring invisible. The shepherd put on the ring and duly approached the king's court, seduced the king's wife, plotted with her against the king, killed him and seized power. Glaucon propounds the argument that no one with such a power would be sufficiently iron-willed to remain within the bounds of justice:

No one could bring himself to keep his hands off other people's possessions, and steer clear of them, if he was free to take whatever he liked without a second thought, in the market-place, or go into people's houses and sleep with anyone he liked; or if he could kill or release from prison anyone he chose, and in general go round acting like a god among men. (Plato, *The Republic* (translated by Tom Griffith), (CUP, 2000), Book II, 360c).

Many will find that an overly cynical view of the darker side of human nature, that wherever anyone thinks he *can* do wrong, he *does* do wrong. Can we dismiss the question merely as a thought-experiment, or does history provide us with empirical evidence one way or the other? Every historian, like every practising lawyer, knows that the horrors of the real world readily outstrip those of our own imagination. And the horrors of the Victorian police strike in 1923 show that some people react in very disturbing ways to the delusion that they are invisible to the legal system, while others will demonstrate their civic virtue to the highest degree.

By late 1923, the police force in Victoria had long been in an unsatisfactory condition. For many years, there had been discontent about rates of pay and pensions, to which was now added a newly-introduced system of control by plain-clothes supervising constables, referred to without affection as “Spooks” – a rather indelicate allusion to their alleged secrecy of movement. On Thursday, 1 November 1923, the night patrol of uniformed policemen at Russell Street refused duty. Other uniformed men refused duty on the Friday. The striking policemen marched around the city of Melbourne in ordered formation, hooting the constables who were still on duty and abusing those who were still attempting to control the traffic at busy city intersections. There was some rioting and rough handling of constables on the Friday evening, but no one seemed to appreciate the potential gravity of the situation. After all, it was an era that was not accustomed to the dark genius of Quentin Tarantino.

The next day, Saturday, was Derby Day. In my short but intense experience of that festivity, Melbournians do not appear to deprive themselves on that Saturday of opportunities for revelry. In the late afternoon, the strikers were engaged in hooting and hustling the men on duty, with the result that the few police who remained loyal were forced off the streets (*Round Table*, London 1923–24, Vol 14, No. 54, pp 385–91; extracted in Frank Crowley (ed.), *Modern Australia* (Thomas Nelson, 1973), Vol 4, p 381). It was therefore well known that Melbourne was without adequate police protection. It also happened to be the era of the so-called “6 o’clock swill”, in which pubs closed at 6pm.

Rioting on the Saturday commenced at about 5pm at the intersection of Bourke and Swanston Streets where a crowd estimated by *The Age* at 2,000 had gathered, and just after

6pm, unrestrained violence set in (Gavin Brown and Robert Haldane, *Days of Violence* (Hybrid Publishers 1998), pp 94 – 95). A tram driver was pulled from his stand, thrown to the roadway and trampled upon, and a civilian seeking to help him met the same fate (*The Age*, 5 November 1923). The fronts of 78 shops were smashed, generally with beer bottles, and special attention was paid by the looters to jewellery and clothing premises (*Round Table, supra*). Shop dummies lay across the streets like corpses. Looters risked their lives by entering the shops under huge pieces of jagged glass. *The Age* reported that:

One man in a blue twill suit had just bent forward to snatch some items of apparel when a huge piece of spiked glass fell from the top of the window, running through his cheek and exposing the jawbone. Staggered, he fell to the ground, blood streaming down his face. The crowd stepped across his body, some persons standing on his legs while battling for an advantageous position in which to secure a prize from the window.

For nearly three hours, the mob was in almost undisputed control (if that is the right word) of the central part of the city. From time to time, police charged the crowds and dispersed them with batons, but their work was hampered by crowds of idle sightseers (*The Age*, 5 November 1923).

The writer Alan Marshall later recorded his observations of the looting by both men and women:

I could feel the crowd's reaction. It was not rage: it was savage, hungry compulsion to smash and destroy. (Extracted from *This Is the Grass* (1962) in Brown and Haldane, *supra*, p. 100).

Three men were killed on the Saturday evening in addition to about 200 casualties. One of those killed was an ex-serviceman and railway worker, William Spain, who was found outside Wirths Circus near City Road at about 11pm after being brutally murdered by being bashed with bottles. Spain had been attacked by three men and robbed of two bottles of beer. At the subsequent inquest, a witness whom the victim had asked for help stated that the victim said that the offenders thought they could do what they liked because the police were on strike (*ibid*, p. 103). The murderers were never identified.

To my mind, one of the most alarming features of the riots is that there does not appear to be any evidence that the rioting was organised, or that organised criminal gangs were the instigators (*Round Table*). Indeed, Brown and Haldane have analysed the records of those arrested and charged, and concluded that nearly all the young men charged had no prior convictions (Brown and Haldane, *supra*, p 105). In other words, the rioters seem to have been first-time offenders, people who ordinarily were law-abiding citizens.

In short, there is abundant evidence for the prosecution of Glaucon's model of the unjust man, who seems to be rendered invisible to the law by the Ring of Gyges. But the empirical evidence also gives us a ray of hope for the imaginary just man; in Glaucon's words: "a simple and honourable man who wants...not to appear to be good but to be good" (Plato, *The Republic*, Book II, 361c). On the Saturday, a Citizens' Protection Committee was convened by the Lord Mayor elect, Sir William Brunton, and included General Sir John Monash and Brigadier General Pompey Elliott. The Committee proposed the formation of a voluntary emergency Special Constabulary Force. A message was screened in the cinemas asking returned soldiers to rally at the Town Hall and act as special constables. They responded in droves, and soon the so-called "specials" were out in the streets wearing arm-bands and hat-bands with the letters "SCF" for Special Constabulary Force and armed with batons, vigorously dealing with the unruly elements (*Round Table*). An announcement was made during dinner at the Naval and Military Club on the Saturday evening, and the Club emptied rapidly with members reporting to Generals Monash and Elliott at the Town Hall (Brown and Haldane, *supra*, at p. 245). By Sunday evening over 2,000 special constables had been sworn in, and every sign of disorder received what might euphemistically be called immediate attention (*ibid*). By Tuesday, there was an organisation of 5,000 special constables, most of whom had seen war service (Brown and Haldane put the proportion as 56% who had served in the First World War, while a further 37% of the volunteers had been unable to serve because of age or had been rejected: *ibid*, p. 263). As Monash put it, "at a word, the AIF sprang to life again" (quoted in Geoffrey Serle, *John Monash* (Melbourne UP, 1982), p. 467). Plainly enough, they were men who knew their business and were not to be trifled with when it came to protecting the country's hard-won freedoms. In addition, volunteer carpenters worked through the night on the Saturday night to barricade shops and other businesses.

Ten thousand meals per day were provided for the so-called “specials” at the Town Hall. Amateurs might talk about strategy and tactics, but professionals talk about logistics. Volunteers also provided motor vehicles. The Defence Department’s vehicles, which acquired the name of “tanks”, were particularly effective in dispersing the rioters in the suburbs (*Round Table*). By Monday evening, the “specials” were in full control (*ibid*). Suburban trains and trams were stopped after 7pm, which prevented the gathering of sightseers, whose curiosity had increased the weekend’s disorder. Pubs and bottle shops were closed within 5 miles of the city at 2pm on the Tuesday.

And on the Tuesday afternoon, the favourite won the Melbourne Cup in perfect weather before an orderly crowd of 125,000 people.

It is surprising that the 1923 Victorian police strike is not better known. For the historian, it provides a striking illustration of the worst, but also the best, in Australian society a century ago. For the psychologist, it reveals much about human motivation in exercising, or not exercising, self-control over strong passions and self-interest as individuals in society. For the sociologist, it shows the importance of authority in enabling society to exist in the first place. And for the film-maker, and I am not trying to sell any film rights, it would provide the perfect three-act structure: orientation, complication and resolution.

My interest in the events, however, concerns the light it throws on some fundamental questions of legal philosophy concerning the fragility of any legal system, and in particular the extent to which a robust legal system depends on the allegiance of ordinary citizens, as distinct from the officials who are authorised to make, administer and enforce the law. These issues were explored by H.L.A Hart in his seminal work *The Concept of Law*, which revolutionised the study of jurisprudence on its publication in 1961. Herbert Hart would have been quietly delighted to know that his work is being discussed by the Anglo-Australasian Lawyers Society, having been a life-long friend of Senator William Wentworth since their undergraduate days together at Oxford, and having counted such exceptional Australians as

John Finnis and David Hodgson among his most outstanding students as the Oxford Professor of Jurisprudence.

Hart began by dismantling the view of Jeremy Bentham, John Austin and Hans Kelsen that law consists of commands backed up by sanctions; that is, a set of coercive orders which produce habits of obedience through fear of threatened consequences (*The Concept of Law* (OUP, 1961), chapters II to IV). That view had dominated jurisprudence for at least 150 years but probably since Thomas Hobbes 150 years before that. In its place, Hart focused on the central idea of rules (*ibid*, pp 8, 78-79). What is it that distinguishes a rule from a habit? For a habit, mere convergence of behaviour is sufficient. The generality of a habit is simply a fact about the observable conduct of most of the group (*ibid*, p 55). But where there is a rule, deviations are regarded as faults open to criticism and pressure to conform, and deviations from the standard are generally regarded as a good reason for making the criticism (*ibid*, pp 9-11, 54-59). If a rule is to exist, some people at least must look upon the behaviour in question as a general standard to be followed by the group as a whole (*ibid*, p 55).

Hart called that the *internal* aspect of rules; that is, the point of view of someone who accepts and uses the rule as a guide to conduct. That viewpoint is structurally similar to the attitude of players in a game of chess: there is no umpire, and the legislator is unknown and long dead, but the players themselves treat the rules as a good reason for acting as they do, and admonish any opponent who departs from them. By contrast, the *external* aspect of rules is the point of view of someone who observes the rules without actually accepting them, for example as a sign of possible punishment (*ibid*, pp 54-59, 86-88). This is, in effect, what Oliver Wendell Holmes called the bad man's point of view, to which Holmes regrettably gave explanatory priority ("The Path of the Law" (1897) 10 Harv. L. Rev 457 at 460-2).

It is self-evident that officials who are appointed to make, administer and enforce legal rules must adopt the internal viewpoint (*ibid*, p 113). As judges, our professional task is to accept and use the relevant legal rules as the definitive guide in assessing the conduct of fellow citizens and others, and in regulating the process of decision-making itself. But Hart recognised that in a healthy society the general body of private citizens also share the internal

point of view (*ibid*, p 113). Having said that, Hart was concerned to analyse the concept of law at all times and in all places not merely in healthy societies where the legal system is in relatively good shape. Accordingly, Hart considered an extreme case where the internal point of view might be confined to the official world, such that only officials might accept and use the system's legal rules as guides to conduct. Hart says, I suspect with one eye on the then recent experience of Nazi Germany and the Soviet Union, that the society in which that was so might be deplorably sheep-like, and the sheep might end in the slaughter-house, but there is little reason for thinking it could not exist or for denying it the title of a legal system (*ibid*, p 114).

Looking more closely at the more familiar setting in which a substantial proportion of private citizens do share the internal viewpoint of accepting and using the rule of the legal system as a guide to their conduct, Hart recognised that the internal viewpoint in fact embraces a range of very different viewpoints. Thus, Hart said that allegiance to the legal system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do (*ibid*, p 198). But Hart firmly refused to identify the central or focal case of the internal viewpoint from what may be regarded as peripheral cases.

John Finnis took up that point and criticised Hart's refusal to prefer any one or more of the diverse range of internal viewpoints, as involving a refusal to attribute significance to differences that any actor in the field would count as practically significant (*Natural Law and Natural Rights*, p 13). The person who is moved by calculations of self-interest or the person who acts out of dull conformity, for example, waters down any concern for the functions of law as an answer to real social problems. As Finnis says, that person dilutes his or her allegiance to law with doses of that very self-interest which it is an elementary function of law to subordinate to social needs (*ibid*, p 14). Accordingly, Finnis argues, we should recognise as the central case of the internal viewpoint the treatment of legal obligations as a moral obligation (at least presumptively), and we should similarly regard the establishment and maintenance of legal order as a moral ideal if not a compelling demand of justice (*ibid*, p 14).

In my view, Finnis has the better of this argument, and the 1923 Victorian police strike furnishes us with striking empirical evidence in support. The rioters and looters who took advantage of the sudden absence of an effective police force were prime examples of those who hold the external viewpoint. The law was not accepted and used by them as a guide to conduct but merely as a sign of possible (and as they saw it, very unlikely) punishment. The AIF veterans and others who volunteered in the hastily assembled Special Constabulary Force were prime examples of the internal viewpoint. They were private citizens with a genuine commitment to restoring legal order because of a deep-seated belief in the legal system as essential to a society in which individuals can flourish. Their conduct could not have been motivated by self-interest, or dull and unreflecting conformity, and I do not think that order would have been restored as rapidly as it was if their internal viewpoint had been based on such diluted and peripheral concerns. So Plato was only partially correct. He did not allow for the fact that, in a society where people are suddenly free from the enforcement of law by officials, ordinary citizens might step into the breach, and even the shepherd himself who discovered the ring of Gyges might prove to be on the side of self-discipline and social cohesion.

In short, as unfashionable as it may be in intellectual circles to regard the rules and very existence of the legal system as carrying moral force, the stability of the legal system depends on a depth of allegiance by ordinary, private citizens. The veterans of the AIF were great men, who did great things, extending well into the years after the war had ended. I began with a reference to ancient Greece, and I will end with a reference to ancient Rome. In my view, the 1923 Victorian police strike shows the force of the opinion of Tacitus as to the chief function of history: “to ensure that virtue is remembered and to terrify [those responsible for] evil words and deeds with the fear of posterity’s damnation” (*Annals*, Book III. 65).