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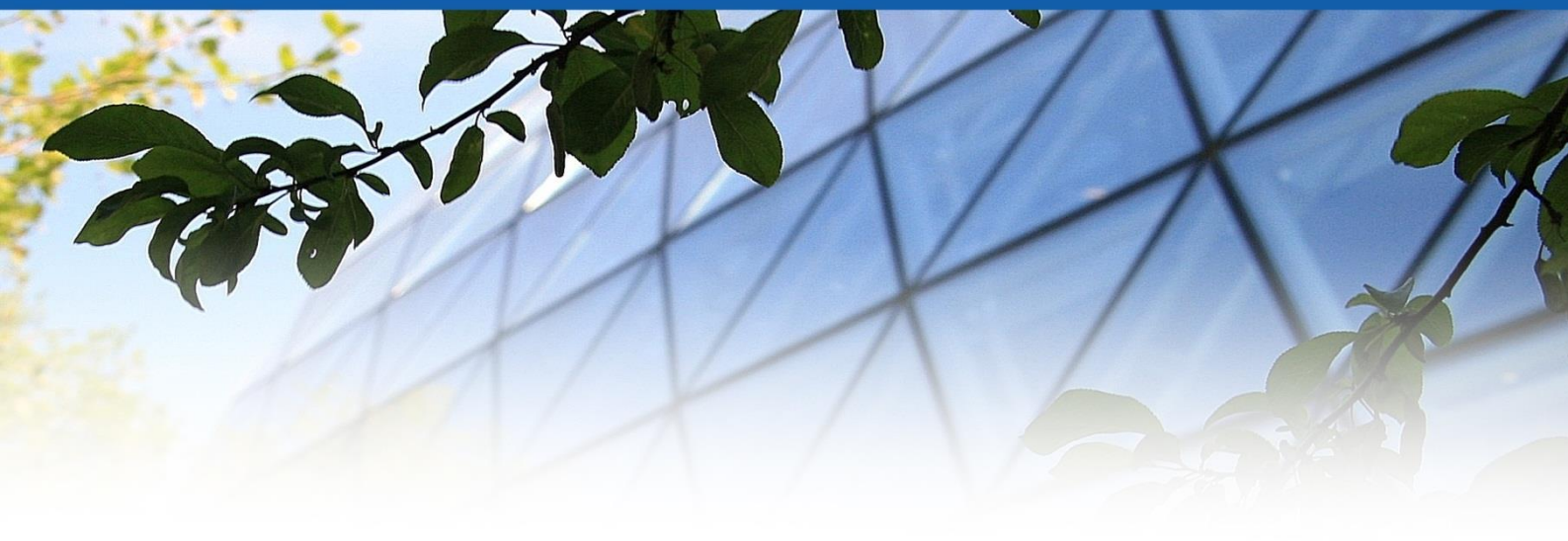

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Matthew H. Kramer

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POWER-CONFERRING LAWS AND THE RULE OF RECOGNITION

Matthew H. Kramer*

As every reader of *The Concept of Law* is aware, H.L.A. Hart severely criticized John Austin for failing to take account of the operativeness of power-conferring laws in legal systems. Given the trenchancy of Hart's animadversions on Austin's disregard of power-conferring norms, it is surprising that Hart himself omitted to take account of such norms at some key junctures in his theorizing. Quite a few examples of his neglect of power-conferring norms could be adduced here, but – to keep this paper within the prescribed word limit – I will confine myself to one especially important instance. After exploring that major instance of Hart's inattentiveness to power-conferring norms, I will explore how the power-conferring aspect of the Hartian Rule of Recognition has been denied or obscured by many present-day legal philosophers (including John Gardner). Though the Rule of Recognition does impose duties, it also confers powers; it authorizes as well as obligates legal-governmental officials to ascertain the law of their jurisdiction in accordance with certain prescribed criteria. In the final few sections of this paper, I will maintain that some recent objections to Hart's conception of the Rule of Recognition are misconceived precisely because they overlook the hybrid character of the Rule of Recognition as both duty-imposing and power-conferring. As my citations and quotations will suggest, some of the arguments advanced in this paper align me with positions taken by Gardner, whereas other arguments herein are opposed to Gardner's stances.

* Professor of Legal and Political Philosophy, Cambridge University; Fellow of Churchill College, Cambridge. E-mail: mhk11@cam.ac.uk

1. Hart's Neglect of Power-Conferring Norms: The Internal Point of View

At one juncture when contesting the idea that power-conferring laws are components or fragments of duty-imposing laws, Hart adverted to the internal viewpoint of power-holders (1994, 41). Quite striking, then, is the fact that he never presented an account of the internal viewpoint of power-holders. His exposition of the internal point of view – one of his most important contributions to the philosophy of law – was focused squarely on duty-imposing norms and not on power-conferring norms (nor on immunity-conferring norms). With that exposition he purported to be recounting the perspective of anyone who accepts social norms, but in fact he was recounting only the perspective of anyone who accepts social *duty-imposing* norms.

In the fourth chapter of *The Concept of Law*, Hart delineated the critical reflective attitude that is the hallmark of the internal point of view (1994, 55-7). Though the critical reflective attitude is an affect, it manifests itself as a trio of behavioral dispositions. (The internality of the internal point of view is internality to a norm or practice or institution in response to which the specified behavioral dispositions are elicited.) A person who evinces the critical reflective attitude in relation to some norm N is generally disposed to comply with N's requirements, and is also generally disposed to criticize any contraventions of those requirements by other people, and is likewise generally disposed to acknowledge the appropriateness of censure directed against her on any occasions when she herself has – perhaps unwittingly – contravened N. These dispositions can be underlain by various motivations, as Hart persistently emphasized (1994, 197, 231-2).

Now, in the present context, what is disconcerting about Hart's otherwise insightful analysis of the internal point of view is that the analysis applies only to duty-imposing norms

and not to power-conferring norms.[1] Throughout his discussion of social norms and the internal point of view, Hart was envisaging the categorical requirements established by duty-imposing norms. As he wrote, "where there is [a social norm,] deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity" (1994, 55). In other words, the social norms contemplated at this juncture by Hart were markedly different from the power-conferring norms which he envisioned when he contended that the role of many of those latter norms is to provide the structures or frameworks of sundry legal arrangements rather than to deter people from engaging in modes of conduct that are perceived as wrongful. He did of course advert elsewhere in *The Concept of Law* to power-conferring social norms such as uncodified rules of games that specify how goals or runs are to be scored, but he omitted to cover such norms in his exposition of the critical reflective attitude. Similarly, although he invoked the viewpoint of power-holders in his endeavors to highlight the functional differences between power-conferring laws and duty-imposing laws, he did not elucidate that viewpoint with an analysis comparable to his analysis of the critical reflective attitude that is displayed by anyone who accepts a duty-imposing norm.

This lacuna in Hart's theory is significant not only because it aligns Hart *malgré lui* with the throng of other legal philosophers who have overlooked the roles of power-conferring norms in systems of law, but also because his account of the internal perspective that pertains to duty-imposing norms is not straightforwardly modifiable into an account of an internal perspective that pertains to power-conferring norms. Though there will be some clear parallels between the former account and any satisfactory account of the latter kind, there will also have to be some major dissimilarities between them. Let us, then, consider two pathways for an exposition of the internal perspective of a participant in relation to

[1]One of the very few commentators to notice this point is Stephen Perry. See Perry 2009, 308-9. However, Perry interweaves this point with some badly mistaken claims about Hart's legal philosophy.

power-conferring norms. These pathways are not mutually exclusive, and will probably have to be combined in an appositely thorough approach to this matter.

First, we might hold that somebody has adopted the internal viewpoint of acceptance in relation to some power-conferring norm PN only if (1) she is generally disposed to recognize the effects produced by any acts of exercising the power(s) which PN has bestowed, and she is generally disposed to recognize the non-occurrence of such effects when attempts to exercise the power(s) in question are unsuccessful; (2) she is generally disposed to criticize or correct other people who fail to recognize the occurrence or non-occurrence of the aforementioned effects; and 3) she is generally disposed to acknowledge the appropriateness of criticism directed at any failures of her own to recognize the occurrence or non-occurrence of those effects. Each of these three elements is, patently, a counterpart of each of the three elements in Hart's explication of the critical reflective attitude. However, instead of being oriented primarily toward PN itself, each element is oriented primarily toward acts of exercising the powers that have been conferred by PN. Recognizing the effects of any acts of exercising those powers is both a cognitive matter and a behavioral matter. One recognizes the effects by apprehending them whenever one has any occasion to apprehend them, and by adjusting one's conduct and decisions in response to them. Of course, the adjustments in one's conduct and decisions might be utterly routine and unreflective in many contexts. Still, insofar as one fails to undertake those adjustments when one has any occasion to undertake them, one is pro tanto failing to adopt the internal viewpoint of acceptance in relation to PN – unless one promptly corrects one's lapses either as a result of self-criticism or as a result of remonstrations from others.

Second, we might hold that somebody has adopted the internal viewpoint of acceptance in relation to PN only if (1a) she is generally disposed to exercise some power bestowed on her by PN, in contexts where her exercising of that power will plainly be

beneficial; (2a) she is generally disposed to criticize other people who have persistently omitted to exercise some power bestowed on each of them by PN, in contexts where the exercising of that power would plainly have been beneficial; and (3a) she is generally disposed to acknowledge the appropriateness of objections directed against her own persistent failures to exercise the aforementioned power in contexts where her exercising of it would plainly have been beneficial. Again, of course, each element in this triadic distillation is a counterpart of an element in Hart's explication of the critical reflective attitude.

Somebody might worry that the foregoing two paragraphs have not expounded the internal point of view in relation to power-conferring norms, and that they have instead expounded the internal point of view in relation to certain duty-imposing norms. According to such a line of thought, the penultimate paragraph above has distilled the internal viewpoint of a person who accepts a norm that imposes a duty to recognize the effects of any acts of exercising some specified power, and the last paragraph above has distilled the internal viewpoint of a person who accepts a norm that imposes a duty to exercise some specified power in contexts where doing so will plainly be beneficial. Readers inclined to raise this worry will thus presume that I have not managed to provide an account of an internal perspective that applies to power-conferring norms.

Two rejoinders to such a query are pertinent here. In the first place, even if we were to grant *arguendo* that each of my explications of the viewpoint internal to a power-conferring norm PN has specified the viewpoint internal to a certain duty-imposing norm, we should continue to maintain that those explications have together recounted the internal viewpoint of anyone who accepts PN. Given that the relevant duty-imposing norms pertain either to recognizing the effects of exercises of powers or to exercising those powers, the specifics of the critical reflective attitude in relation to each such norm will coincide with the specifics of the internal viewpoint in relation to PN. Someone who adopts the internal

perspective that consists in accepting one of the relevant duty-imposing norms will *pro tanto* have adopted the internal perspective that consists in accepting PN.

Also militating against the worry outlined in the penultimate paragraph above is that my explications of the internal viewpoint of someone who accepts PN are more capacious than the worry implies. Each of those explications does recount a viewpoint internal to a certain duty-imposing norm, but each of them also ranges more widely. My first account covers any situation in which the criticism to which the account adverts is concerned not with a breach of duty but with an instance of intellectual obtuseness. Similarly, my second account covers any situation in which the criticism to which the account adverts is concerned not with a breach of duty but with an instance of imprudence. In other words, somebody can adopt the internal perspective of acceptance in relation to PN without being under a duty to recognize the effects of any acts of exercising the powers conferred by PN, and without being under a duty to exercise any of those powers in contexts where the exercising of them would plainly be beneficial. Hence, my distillation of the internal perspective of somebody who accepts PN is not reducible (in either of its two versions) to a distillation of the internal perspective of somebody who accepts a certain duty-imposing norm.

Now, although I have just sought to rebut a query about my two expositions of the perspective that is internal to power-conferring norms, I have not propounded either of those expositions as a definitive formulation. Rather, each of them is meant to be suggestive and to stimulate further thinking about this matter. As I have already mused, the two expositions will probably have to be combined in any full treatment of this problem; each of them articulates a necessary tripartite condition, rather than a sufficient tripartite condition, for the existence of an internal point of view in relation to PN. Of key importance for our present purposes is simply the fact that Hart neglected power-conferring norms (and immunity-conferring norms) in his analysis of the internal point of view. Quite remarkable is such an

oversight by a philosopher who did so much to draw the attention of his fellow philosophers to the import of power-conferring norms.

2. The Power-Conferring Dimension of the Rule of Recognition

As I have argued elsewhere (2004, 104-5; 2013, 28-30), the Rule of Recognition in any society is a complicated array of norms – some of which are power-conferring and some of which are duty-imposing. Quite a few commentators have submitted that the Rule of Recognition is solely duty-imposing or solely power-conferring,[2] but neither of those positions is correct. Instead, the Rule of Recognition is a hybrid composed of both duty-imposing norms and power-conferring norms. Let us mull over this topic by first looking at a few of Hart's statements on the matter, and by then considering some arguments in favor of the proposition that the Rule of Recognition is a complex normative hybrid.

Hart sometimes wrote as if the Rule of Recognition were only power-conferring and not duty-imposing. For example, when discussing the so-called rules of adjudication, he commented: "Like the other secondary rules [including of course the Rule of Recognition] these are on a different level from the primary rules: though they may be reinforced by further rules imposing duties on judges to adjudicate, they do not impose duties but confer judicial powers" (1994, 97). When focusing on the Rule of Recognition itself, he declared: "Nor does the word 'obey' describe well what judges do when they apply the system's rule of recognition and recognize a statute as valid law and use it in the determination of disputes" (1994, 113). If we recall Hart's ruminations on the differences between power-conferring norms and duty-imposing norms, we can notice that the language in this latest quotation

[2]For the most notable expression of the view that the Rule of Recognition is solely power-conferring, see Fuller 1969, 137. For some examples of the view that the Rule of Recognition is solely duty-imposing, see Gardner 2012, 103-5; Lamond 2013, 101, 114, 115; MacCormick 2008, 32-3; Perry 2009, 296; Raz 1979, 93; Raz 1980, 199; Shapiro 2009, 239-40; Shapiro 2011, 85.

echoes his remarks about the distinctiveness of power-conferring norms. As Hart said in those remarks, people who exercise powers by following some prescribed procedures are not thereby "obeying" the prescriptions which specify the procedures. With his extension of that observation to the implementation of the Rule of Recognition, he was strongly suggesting that the Rule of Recognition is power-conferring and not duty-imposing. Indeed, his point in the quoted statement about the term "obey" was to assimilate the Rule of Recognition to the paradigmatically power-conferring norms that prescribe the conditions for the enactment of statutes. Just before that statement, he had written: "In no ordinary sense of 'obey' are legislators obeying rules when, in enacting laws, they conform to the rules conferring their legislative powers, except of course when the rules conferring such powers are reinforced by rules imposing a duty to follow them" (1994, 113). By denying that the language of "obedience" is applicable to the endeavors through which the officials in a legal system give effect to the system's Rule of Recognition, Hart was apparently indicating that those endeavors consist in the exercising of powers rather than in the fulfilling of obligations.

A couple of pages later, Hart again proclaimed that the term "obedience" is "misleading as a description of what legislators do in conforming to the rules conferring their powers, and of what courts do in applying an accepted ultimate rule of recognition" (1994, 115). However, at that slightly later juncture in his text, what becomes clear is that – despite the initial appearances to the contrary – he was not really denying that the Rule of Recognition is duty-imposing. Instead, he was aptly denying that it is *solely* duty-imposing, and he was likewise denying that the duty-fulfilling aspect of the law-ascertaining activities undertaken by the officials in a legal system is exclusively a matter of obedience. Officials fulfill their duties under the Rule of Recognition not only by adhering to certain criteria for determining what counts as law, but also by displaying the full critical reflective attitude in relation to those criteria. As Hart stressed, their adoption of the full critical reflective attitude

is vital for the functionality of their legal system (1994, 116):

> [T]he ultimate rule of recognition in terms of which the validity of other [legal] rules is assessed[,]…if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from [the criteria in the Rule of Recognition] must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of…the existence of a single legal system. If only some judges acted "for their part only" on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this [criterion] of recognition, the characteristic unity and continuity of a legal system would have disappeared.

In this passage as in quite a number of other passages, Hart overemphasized the role of adjudicative officials and thus neglected the role of administrative officials. Nevertheless, he here perceptively captured why the Rule of Recognition has to be duty-imposing as well as power-conferring – and why the critical reflective attitude that prevails among the officials in a legal system is not only a product of the duties incumbent on them under their Rule of Recognition but is also the provenance of those duties.

Within the pages of *The Concept of Law*, then, there are ample grounds for concluding that the Rule of Recognition in any legal system is both power-conferring and duty-imposing. Furthermore, such a conclusion is justified philosophically as well as exegetically – for the duty-imposing character of a Rule of Recognition ties in directly with its power-conferring character. A legal system's Rule of Recognition lays obligations on the

system's officials to treat certain sources of law as dispositive, and it bestows powers on the officials to engage in acts of law-identification which fulfill those obligations and which are binding on citizens. Whereas norms of law-application empower officials to ascertain authoritatively whether any violations of the prevailing laws have occurred, the Rule of Recognition empowers the officials to ascertain authoritatively the existence and contents of those very laws. (Of course, law-ascertaining determinations are essential for any violation-detecting determinations. Consequently, when something of the former kind takes place, it often is an element of something of the latter kind. Nonetheless, the two types of determinations can be distinguished analytically, even though differentiating between them in practice will sometimes be fiendishly difficult.) Precisely because the law-ascertaining endeavors of the officials are legally decisive – that is, precisely because the officials legally bind citizens and other officials with their findings, and because they thereby alter people's legal positions – their engaging in those endeavors of law-ascertainment consists in their exercising of legal powers vested in them by their Rule of Recognition.

Were the Rule of Recognition not duty-imposing, the officials in a system of governance would be legally at liberty to identify any norms at all as the laws of their system. Were the Rule of Recognition not power-conferring, the officials would be unable to identify the law in a legally binding fashion and would thus be unable to carry out their adjudicative and administrative responsibilities as officials. They would not be able to undertake authoritatively the processes of law-ascertainment which they are duty-bound to undertake in accordance with the requirements which their Rule of Recognition imposes upon them. In short, only the hybrid composition of a Rule of Recognition provides both the structured constrainingness and the dynamic operability of a legal system.

3. Interdependent but Distinct: A Riposte to Shapiro

While arguing that any Rule of Recognition is only duty-imposing and not power-conferring, Scott Shapiro declares that the attribution of a power-conferring dimension to the Rule of Recognition would conflate its standards with the secondary norms of change (2009, 239-40):

> Is it possible, then, to understand the rule of recognition as either a power-conferring or a duty-imposing rule? I think that the first option cannot be Hart's position. For if we suppose that the rule of recognition in Britain is "The Queen in Parliament has the power to create British law," we inadvertently convert Britain's rule of recognition into its rule of change. Moreover, the rule of recognition can validate certain types of customs [as laws], and since customs need not be (and usually are not) created through the exercise of legal authority, the rule that validates them cannot be power-conferring. The only alternative, then, is to treat the rule of recognition as a duty-imposing rule.

Shapiro's reasoning goes awry because of his misrepresentation of the ways in which a Rule of Recognition is power-conferring. Shapiro has failed to note that the criteria in a Rule of Recognition which specify the authoritative sources of law for some society are embedded in the power-conferring norms and duty-imposing norms that constitute the Rule of Recognition. Thus, the portion of the British Rule of Recognition that pertains to enactments by Parliament is not correctly formulated as "The Queen in Parliament has the power to create British law." Instead, the correct formulation is "Every legal-governmental official in the United Kingdom is empowered as well as obligated to hold authoritatively that any norms enacted by Parliament as statutes are laws which belong to the UK's system of governance and which are therefore to be given effect by legal-governmental officials in the UK."[3]

[3]This formulation prescinds from various complexities. For example, whereas certain enactments by Parliament are applicable to the whole of the United Kingdom, other such enactments are applicable to only some of the four main components of the United Kingdom (England, Wales, Scotland, and Northern

Likewise, in a somewhat simplified version, the portion of the English Rule of Recognition that pertains to customary laws is correctly formulated as follows: "Every legal-governmental official in England is empowered as well as obligated to hold authoritatively that customary norms endowed with certain properties – such as longstandingness, reasonableness, and prevalent operativeness within this jurisdiction – are laws which belong to the English system of governance and which are therefore to be given effect by legal-governmental officials in England."

As these formulations make clear, the powers directly conferred by the Rule of Recognition are powers of law-ascertainment rather than powers of law-alteration. In other words, once the norms that bestow those powers are correctly encapsulated, we can see that Shapiro errs when he contends that any ascription of a power-conferring role to the British Rule of Recognition would efface the distinction between two types of secondary norms. To be sure, the components of the British Rule of Recognition that have been distilled here also nicely reveal how intertwined that Rule of Recognition is with other secondary norms. Each of those components presupposes the operativeness of some secondary norms of law-application which confer powers on certain people as officials who give effect to norms that belong to the relevant legal system as laws thereof. Furthermore, the first component also presupposes the operativeness of some secondary norms which confer legislative powers on Parliament and which specify the qualifications for membership in Parliament. Still, although the interdependence of the Rule of Recognition and other secondary norms is manifest in the strands of the UK's Rule of Recognition that have been formulated here, the distinctiveness of the Rule of Recognition is also evident in those strands. The power-conferring and duty-imposing constituents of the Rule of Recognition establish powers and

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Ireland). Providing a full and precise account of any of the strands in a real-world Rule of Recognition is no easy task, as is evident in the classic essay by Kent Greenawalt on the Rule of Recognition in the United States. See Greenawalt 1987.

duties that are specifically concerned with the ascertainment of legal norms.

In short, my rejoinder to Shapiro's mischaracterizations of some power-conferring elements in the British Rule of Recognition has underscored the correctness of John Gardner's observation that "a legal system's ultimate rules of recognition, change, and adjudication…cannot but cross-refer, and hence depend on each other for their intelligibility, yet each has its own normative force." As Gardner adds: "Each regulates different actions, or different agents, or the same actions of the same agent in a different way. Each is therefore a distinct rule" (2012, 106).

4. Interdependent but Distinct: A Riposte to Waldron

Shapiro is not the only prominent legal philosopher who has misguidedly declared that the Rule of Recognition somehow collapses into norms that confer legislative powers. In quite a different manner, Jeremy Waldron (2009) has reached just such a conclusion. The gist of his reasoning is as follows. According to Hart, the fundamental norms of a legal system are social rules that exist if and only if they are accepted and implemented among the group of people to whom they are addressed. Suppose that the fundamental norm of change in a legal system invests a monarch or a legislature with the power to alter citizens' legal positions through the issuance of statutes. That norm of change prescribes the procedures that are to be followed for the enactment of such statutes. Now, if that norm of change is existent as a fundamental norm of the system, it is accepted and implemented by the legal-governmental officials to whom it is addressed. Yet, if the officials accept and effectuate that norm, there is no real work to be done by a Rule of Recognition. When the officials ascertain that a statute has been passed through the prescribed procedures, and when they accordingly administer that statute in conformity to its terms, they are giving effect to the fundamental norm of

change which they accept. Their acceptance of that fundamental norm consists in just such law-ascertaining and law-administering behavior. Consequently, Waldron maintains, the role of the Rule of Recognition in providing for the ascertainment of laws is redundant. Because such a role is integral to the fundamental norm of change as an accepted and practiced norm, there is no need for a Rule of Recognition to perform it – or so Waldron argues.

The fatal weakness in such a line of reasoning is that it leaves Waldron unable to explain how a fundamental norm of change – a norm that confers law-making powers on a monarch or legislature – would exist. Let us recall that Hart's model of social norms, with its focus on the critical reflective attitude as the hallmark of people's acceptance of such norms, is apposite solely for norms that impose duties. Without supplementation, the model does not extend to power-conferring social norms (or immunity-conferring social norms). Hence, without supplementation, it does not extend to the fundamental norm of change envisaged by Waldron.

Suppose that that fundamental norm of change does exist in some society because it is accepted and regularly implemented by most of the officials there, and suppose that a few maverick officials quite frequently decline to recognize the normative alterations that are produced when the legislative powers conferred by that norm of change are exercised. Suppose further that, among the many officials who do accept the fundamental norm of change, some occasionally fail to identify correctly those normative alterations. Both the maverick officials and the occasionally wayward officials will be subject to censure from their fellow functionaries. Objections addressed to them will be framed at least partly in deontic terms. That is, the maverick or occasionally wayward officials will be reproached for contravening some of the duties which they bear. What is the source of those duties? Given that the fundamental norm of change is a power-conferring norm only, it cannot be the source of the duties incumbent on officials to recognize that norm itself and to recognize the

normative adjustments produced when the legislative powers which it establishes are exercised. Instead, those duties are imposed by the officials' Rule of Recognition, which – as this paper has emphasized – is made up of duty-imposing norms as well as of power-conferring norms. Whether the obligations imposed by the Rule of Recognition are explicitly invoked or are tacitly taken for granted as presuppositions, they are the guiding points of reference for the dispositions of officials to condemn any of their fellow officials who decline to acknowledge the existence and effects of the fundamental norm of change in their jurisdiction.

What is crucial here is that the dispositions just mentioned are indispensable as elements of the collective attitudes (among officials) that constitute the existence of the fundamental norm of change. Both in Hart's model of the acceptance of social norms and in my outline of the internal point of view for power-conferring norms, dispositions to take exception to deviant behavior are vital. In the absence of such dispositions on the part of all or most officials, the fundamental norms of a legal system would not be accepted by the officials and would therefore not exist. Hence, in the absence of such dispositions on the part of all or most officials, Waldron's fundamental norm of change would not be accepted by the officials and would therefore not exist. Yet those dispositions, oriented as they are toward the duties of officials to recognize the existence and effects of that fundamental norm of change, are underlain by the Rule of Recognition – since the Rule of Recognition, rather than the fundamental norm of change itself, is the fount of such duties. Ergo, contrary to what Waldron repeatedly suggests, the role of the Rule of Recognition in providing for the ascertainment of legal norms is not redundant. Only because the Rule of Recognition is operative in legally obligating as well as legally empowering officials to ascertain such norms, are all the dispositions operative that constitute the fundamental norm of change. The fundamental norm of change on its own does not account for some of the dispositions that

amount to its being accepted. Without the Rule of Recognition, the fundamental norm of change does not suffice to account for its own existence.[4]

5. Interdependent but Distinct: A Riposte to MacCormick

We have just seen that, although the Rule of Recognition and any fundamental norm of change are intertwined, they are distinct. Neither of them is redundant, and neither of them is collapsible into the other. Much the same is true of the relationship between the Rule of Recognition and the norms of law-application. Interdependent though the Rule of Recognition and any fundamental norm of law-application are, neither is subsumable into the other. Instead of *establishing* any powers and duties of law-application, the Rule of Recognition *presupposes* the operativeness of those powers and duties. The powers and duties which it itself establishes are powers and duties of law-ascertainment (the operativeness of which is presupposed by any norms of law-application).

Quite a few philosophers have gone astray in their reflections on this matter,[5] but I will concentrate here on a couple of sentences by Neil MacCormick: "Whereas the secondary rules of adjudication and change are power-conferring, the rule of recognition lays down duties binding on those who exercise public and official power, especially the power to adjudicate…[T]hose who have power to act as judges are also duty bound as judges to *apply* all and only those rules that satisfy more or less clearly specified criteria of validity" (2008, 32-3, emphasis added). MacCormick's conflation of the Rule of Recognition with norms of law-application – his contention that the Rule of Recognition imposes duties of law-

[4] Though the brief critique of Waldron by Gardner (2012, 105) is different from my own critique, the two are complementary.

[5] Hart himself conflated the Rule of Recognition with norms of law-application when he wrote that "[r]ules of recognition accepted in the practice of the judges require them to apply the laws identified by the criteria which they provide" (1982, 156). For some similar missteps, see Gardner 2012, 103-4; Green 2012, xxiii; Lamond 2013, 115; Perry 2009, 296, 297-8, *et passim*.

application rather than, or in addition to, duties of law-ascertainment – was here bound up with his mistaken view that the Rule of Recognition is solely duty-imposing and with his equally mistaken view that the norms of law-application are solely power-conferring. As this paper has already maintained, the Rule of Recognition comprises both power-conferring standards and duty-imposing standards; similarly, the norms of law-application include both power-conferring standards and duty-imposing standards. Whereas the powers conferred and duties imposed by the Rule of Recognition are powers and duties of law-ascertainment, the powers conferred and duties imposed by norms of law-application are powers and duties of adjudication or administration. MacCormick erred in submitting that the Rule of Recognition imposes duties of adjudication. Those latter duties are presupposed, rather than established, by the standards that make up the Rule of Recognition. (The fact that duties of law-application are presupposed by the standards in any Rule of Recognition is evident from the formulations of two such standards in my rejoinder to Shapiro in §3 of this paper.)

Of course, because the duties and powers of law-application are presupposed by the standards in the Rule of Recognition, and because the duties and powers of law-ascertainment are presupposed by the norms of law-application, the Rule of Recognition and the norms of law-application are deeply and complicatedly interdependent – as this paper has emphasized. Moreover, although the activities of law-ascertainment and law-application can be distinguished clearly enough *in abstracto*, one's endeavors to differentiate between them in practice will frequently be much more problematic. Powers and duties of law-ascertainment and powers and duties of law-application are often established simultaneously, and any exercises of the latter powers have to involve exercises of the former powers. At a practical level, as opposed to a philosophical level of analysis, the functions of norms are not readily susceptible to compartmentalization.

Still, despite the messiness of the relevant contrasts in practice, and despite the

intricate interdependence of the Rule of Recognition and the norms of law-application even in theory, a legal philosopher can and should descry their distinctness as well as their complex interwovenness. At the level of high abstraction on which such a philosopher contemplates the nature of law, the difference between duties of law-ascertainment and duties of law-application is clear-cut. By eliding that difference, MacCormick led his readers away from a refined understanding of the structure and functioning of any legal system.

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