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ON HART'S WAYS: LAW AS REASON AND AS FACT

JOHN FINNIS

I

I remember Hart saying to two or three of his colleagues, over tea and biscuits in the Senior Common Room, that every ten years or so, going back a long way, he read the whole of Proust's *À la recherche du temps perdu*. I don't think he said why—Why should he have?—but central to what led him, repeatedly, through all seven of these novels, on the long way from *Du côté de chez Swann* to *Le Temps retrouvé*, will surely have been their reflexive, self-referential deployment and exploration of interiority, of the first person singular. As Neil MacCormick justly says in the first edition of his *H.L.A. Hart*, the “fulcrum” and “central methodological insight” of Hart's “analytical jurisprudence” is that, as a “descriptive legal or social theorist,” one can and must “[hold] apart one's own commitments, critical morality, group membership or non-membership,” and “portray the rules for what they are in the eyes of those whose rules they are.”¹ One's account of law, as Hart himself puts it in *The Concept of Law*, must “refer to the internal aspect of rules seen from their [the members of the group's] internal point of view” and “reproduce the way in which the rules function in the lives” of those members, that is, in their “claims, demands, admissions, criticism... all the familiar transactions of life according to rules,” life as led by those for whom the rules count as reasons for action, and violations of those rules count as a reason for hostility.²

Somewhat less well known than Hart's prioritizing of the internal attitude or attitudes to law are his works on self-reference (especially self-referring laws³), and on intention (especially in relation to criminal liability, and to human causation). But these aspects of interiority are as central to his thought. In response to a remark of mine about, I think, how significant self-referential consistency is to the testing of philosophical positions,⁴ he told me that what started his interest in philosophy, as a boy, was the breakfast cereal packet.

1. Neil MacCormick, *H.L.A. Hart* (London: Edward Arnold, 1981), 37-8.

2. H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994), 90 [88] (hereafter cited as *CL*², with bracketed numbers giving the pagination in the first edition, 1961).

3. On self-referring laws, see H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 15-16, 170-178.

4. See, latterly, Finnis, “Self-referential (or Performative) Inconsistency: Its Significance for Truth” *Proceedings of the American Catholic Philosophical Association* 78 (2004) 13-21.

From the 1890s, I have subsequently discovered,⁵ packets of Quaker oats have depicted a substantial Quaker man holding a Quaker oats packet depicting a substantial Quaker man holding a packet of Quaker oats... (and so on “to infinity,” claims someone talking about these packets in Aldous Huxley’s 1928 novel *Point Counter Point*⁶). In relation to crime and punishment, causation, and self-referring laws, Hart’s attentiveness to our inner lives of thought, judgment and decision was a motive for, and supplied arguments to advance, his resistance to more or less behaviourist currents of (as he often put it)⁷ “scepticism” about central aspects and institutions of law, a resistance which has been generally decisive for subsequent legal theory: a great legacy. In summing up his vindication of responsibility against the sceptic Barbara Wootton, he articulates what he calls “an important general principle”:

Human society is a society of persons, and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other’s movements as manifestations of intention and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects.⁸

This talk of intention and choice complements and corresponds to what *The Concept of Law*, published in the same year, says about the

whole dimension of the social life of those [who] ... look upon [the red traffic light] [not merely as a sign that others will stop, but] as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation.⁹

Here Hart italicizes *signal for*, and later on the same page he italicizes its equivalent: “*reason for*.” “Reason” is italicized more than any other noun in the book;¹⁰ it signifies practical reasons, the propositional element in thoughts of the form appropriate to guiding deliberation and eventual (possible) action. The first and fourth of the book’s five italicizings of “reason” are to make the argument that Hart was so eager, indeed impatient, to put forward even while

5. I knew what he meant, because an Australian cereal packet in the 1950s had the same feature, but with frog not Quaker.

6. *Point Counter Point* (London: Chatto and Windus, 1928), 294.

7. See my review of his *Punishment & Responsibility* in *Oxford Review* 8 (1968) 73-80; the word “scepticism” appears in virtually every one of these essays.

8. H.L.A. Hart, *Punishment & Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), 182 (lecture delivered in 1961).

9. *CL*², 89 [87-8].

10. See *CL*², 11 [10], 55 [54], 90 [88], 105 [102], 194 [189].

he was setting up the three “recurrent issues” about law—the argument that is his answer to the “realist” scepticisms which reduce law to prediction. Sceptical “realism” is poor as legal theory because it shuts one’s eyes to the fact that “the judge, in punishing, takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender”;¹¹ a “judge’s statement that a rule is valid is an internal statement . . . , and constitutes not a prophecy of but part of the *reason* for his decision.”¹² By the time of *Essays on Bentham*, twenty years later, Hart had recast his theory of authority and law so as to emphasize yet further the centrality to it of reasons for action (peremptory and content-independent reasons).

...an authoritative legal reason... is a consideration (which in simple systems of law may include the giving of a command) which is recognized at least in the practice of the Courts, in what I term their rule or rules of recognition, as constituting a reason for action and decision [, a reason] of a special kind. Reasons of this kind... constitute legal guides to action and legal standards of evaluation.¹³

Now reasons of this kind, *as* articulated in commands or *as* manifested verbally or non-verbally in the practice of the Courts, are historical facts. Like other historical facts about thoughts, decisions and actions, they can, and often must, be understood, thoroughly, without being endorsed or approved, condemned or disapproved—just understood and faithfully described. Adulterating one’s understanding of other people’s valuations (or of one’s own past evaluations) with one’s own present valuations is sheer folly for the general, the advocate, the detective, the assessor (judge of fact), the historian. There should be no question here of “interpretative charity” or “making it the best of its genre,” let alone morally best.¹⁴ As Hart puts it in the posthumous *Postscript*, “Description may still be description, even when what is described is evaluation.”¹⁵ True, to bother investigating and describing *this* evaluation by *this* person or group, from among all the welter of other facts available for investigation and description, presupposes an evaluation by the investigator,

11. *CL*², 11 [10].

12. *CL*², 105 [102].

13. *Essays on Bentham* (Oxford: Clarendon Press, 1982), 18. Here Hart uses “evaluation” much more broadly than “statements of value” in his contrast of the latter with “statements of validity” at *CL*², 108 [104-5] (see text and note at n. 56 *infra*).

14. All this has been clear to me since I read R.G. Collingwood’s 1939 *Autobiography* in the early or mid 1950s. See William Twining, “R.G. Collingwood’s *Autobiography*: One Reader’s Response,” *Journal of Law and Society* 25 (1998) 603-620, 603.

15. *CL*², 244.

not to mention the audience.¹⁶ But that presupposed evaluation remains external to the evaluative thought—the concept, action or practice—described. So description can and, for many purposes, should be value-free even when it describes the values and consequent actions of persons—of others or of oneself giving an account of one’s own beliefs and conduct.

But Hart went further, both in the *Postscript* and earlier. As he puts it in the *Postscript*:

...the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the insider’s internal point of view or in any other way to surrender his descriptive stance.¹⁷

Here there has been a shift which Hart never seems to have attended to, and perhaps would simply deny is a shift, from the description that is the stock in trade of the detective, the assessor, the translator, or the historian to what Hart calls “descriptive general theory.”¹⁸ This shift is both real and important. I am not going to dwell upon it in this paper; it is the burden of chapter I of *Natural Law and Natural Rights* and of a number of recent writings of mine.¹⁹ One’s aspiration as a *theorist* about law and legal systems is to identify and affirm *general* and warranted propositions about a human practice or institution thoroughly shaped by thought. Developing a general theory requires one to select among all the particular and very various vocabularies and concepts that have been employed in social life both to shape and to describe the various practices or institutions which, as a theorist, one judges it accurate, illuminating and theoretically fruitful to call and treat as instances of (say) law or legal system. This theoretic judgment is not settled by the concepts or criteria articulated and/or used by those whose thought and practice is being named and treated in this way—taking those one by one, or taking the whole disorderly series of them. It is a judgment that requires one as a theorist to select and adopt one’s own concept and criteria, and to do so

16. “It is the historian’s judgments of value that select from the infinite welter of things that have happened the things that are worth thinking about.” R.G. Collingwood, *The Principles of History and Other Writings in Philosophy of History*, ed. W.H. Dray and W.J. Van der Dussen (New York: Oxford University Press, 1999), 217. Weber’s version of this thought is better known.

17. *CL*², 242.

18. See *CL*², 239-240.

19. See “Law and What I Truly Should Decide,” *American Journal of Jurisprudence* 48 (2003) 107-29, 115-125; “Natural Law Theories of Law,” sec. 5 in *The Stanford Encyclopedia of Philosophy (Spring 2007 Edition)*, Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2007/entries/natural-law-theories/>>.

for reasons, as Hart does in working up his theory of law in *The Concept of Law*.²⁰ What he offers us in that book is a *new and improved concept* of law, corresponding closely to the concept of law already employed in societies he thought reasonably organized and reasonably and critically self-aware. But even in relation to the concepts widely employed in such societies, Hart's concept of law did "add value," that is, provided an improved understanding of the cluster of features he identifies as the central idea and reality of law, and of why those features can well cluster together—an understanding of the social functions which that kind of clustering serves and promotes, in remedying defects and affording facilities for advancing human purposes.

The extent to which Hart's descriptive explanation of law depends for its explanatory power on presuppositions about good and bad in human affairs was hidden from Hart in some measure by, it seems to me, some assumption he made or thesis he held about *concepts*. In the notebook which seems to record the genesis of key parts of *The Concept of Law* the word "Concept" appears a number of times in large capitalized form.²¹ It was as if, in these preparatory thoughts, the investigation or identification of a Concept somehow lifted one's understanding, one's account, one's theory, above an investigation of what particular people or groups (or any merely statistical-frequency-based selection of them) have meant, or have intended, above their conceptions of

20. In his Introduction to *Essays in Jurisprudence and Philosophy*, Hart accepts, as part of his correction of what he had come to consider errors involved in his "early invocation in jurisprudence of linguistic philosophy" (p. 5), that "the methods of linguistic philosophy, which are neutral between moral and political principles and silent about different points of view which might endow one feature rather than another of legal phenomena with significance" were, precisely by reason of that neutrality and indifference to non-neutrality,

not suitable for resolving or clarifying those controversies which arise, as many of the central problems of legal philosophy do, from the divergence between partly overlapping concepts reflecting a divergence of basic points of view or values or background theory.... For such cases what is needed is first, the identification of the latent conflicting points of view which led to the choice or formation of divergent concepts, and secondly, reasoned argument directed to understanding the merits of conflicting theories, [or] divergent concepts or sets of rules... (p. 6)

Though it is not entirely clear how far this passage refers to concepts of law itself (the nature of law), the passage fairly clearly accepts the reality of and need for selection of concepts for use in a general theory of a subject-matter instantiated in varying forms because of the varying concepts (ideas) of those persons and groups in whose life that (range of) subject-matter(s) is instantiated.

21. For one instance ("the *Concept* of law") see the transcription of an important passage from the 1950s notebook in Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004), 222. With that passage's account of how to identify "a *standard* legal system... without *prejudiced* description" compare the late-1985 ms note at *ibid.*, 351, and the similar passage published in 1983 and quoted, *supra*, note 20.

what it is important to promote as desirable (good) and avoid as undesirable (bad), and above the theorist's own "pre-theoretical" judgments about importance and desirability (good and bad), into a realm of timeless – truly *general*—essences or forms somehow available for adoption on inspection, a neutral, value-free and "theoretical" perception. This, I believe, is nowhere affirmed in *The Concept of Law*; if it is implied, as I think it is (and not only by the notebook and the book's title), it can and should be regarded as a philosophical myth, an illusion. In this respect, I think Hart's ideas about method in legal theory regressed from the position he had affirmed in 1953: that "the fundamental issues of legal philosophy" are those "discussed and reflected upon" by intelligent students of (and surely because they are issues raised and discussed in) Plato's *Republic* and Aristotle's *Nicomachean Ethics*.²² Hart knew what he meant: he lectured in 1951 on Plato's ethical and political theory, where, as in Aristotle too, whatever is said or implied about the concepts, nature or essence of government, constitutionality, law and so forth is controlled by the respective philosophical author's *normative* moral and political theory. As Plato and Aristotle make clear, a theorist's judgments that certain conceptions of political community, government, constitutionality and law should have primacy in the theoretical description, and the strongly evaluative (morally evaluative) grounds that Plato and Aristotle adduce for those judgments, in no way block the theorist's descriptions of other conceptions of polity, government, and law. In particular, those philosophers of human affairs can, and did, provide careful and illuminating accounts of the defective and inferior kinds and conceptions of polity, government and law that are so frequently articulated or manifested, despite their normative inferiority (sometimes gross immorality), in the life and history of the human groups available for empirical study in their day.

II

Instead of pursuing further that well-trodden path, I want to turn in this paper to another question arising out of Hart's interest in the internal point of view and consequently in law's character as one kind or family of reason(s) for action. The question is this: Even when his account in *The Concept of Law* is enhanced by his adoption of something tantamount to Raz's concept of the detached professional perspective, neither external nor internal, in the central senses of those terms, *how well do Hart's accounts enable us to understand that kind of point of view and that kind of reason for action?* The issues I want

22. Hart, "Philosophy of Law and Jurisprudence in Britain (1945-1952)," *American Journal of Comparative Law* 2 (1953) 355-364, 357.

to explore are not precisely those taken up by Neil MacCormick in the appendix to his *Legal Reasoning and Legal Theory*, where he disambiguates what he calls cognitive and volitional elements run together in Hart's relatively undifferentiated "internal attitude." But, while nervous lest there be a Humeian implicature to his distinction between cognition and volition, I take for granted, and accept, the many clarifications with which MacCormick there and in chapter 3 of his *H.L.A. Hart* (1981) equips us for understanding what Hart was trying to articulate in his over-simple distinction between "the internal" and "the external" points of view.²³

In January 1958, Stuart Hampshire and Hart published in *Mind* "Decision, Intention and Certainty." Though Hampshire's name comes first, perhaps as alphabetically prior, it is certain that Hart fully owned the paper's argument: while in Harvard the previous academic year, he had not only worked on the article²⁴ but spoken at a philosophy seminar on "Knowing what you are doing,"²⁵ which is the article's theme and thesis. That thesis is: One has a knowledge of, and certainty about, what one is doing, one's own voluntary actions, which is not an observer's knowledge, and is not based like the observer/spectator's on empirical evidence or on the observation of one's own (the acting person's) movements: it is *practical* knowledge.²⁶ First-person statements about an action have the same meaning as third-person statements, but as with "many concepts involving reference to states of consciousness" there is an "asymmetry between first-person and third-person statements" about actions, corresponding to the radical difference between the "means of verification" of the respective statements, the kind of knowledge they articulate.²⁷ For the same reason, the article contends, there is a "necessary connexion"²⁸ between intending to do something and certainty about what one will do—certainty based not on reflection upon and induction from the evidence of one's experience (as might be the case with one's more or less *involuntary* behaviour), but instead on one's having reasons for doing what one has decided to do: "practical certainty about what to do."²⁹

23. For my own, overlapping clarifications, drawing like MacCormick's on work by Raz, see *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 233-7.

24. Lacey, *supra*, note 21, 190.

25. *Ibid.*, 187.

26. Stuart Hampshire and H.L.A. Hart, "Decision, Intention and Certainty," *Mind* 67 (1958) 1-12, 1, 5, 6, 8-9. The thesis can also be found prominently in G.E.M. Anscombe, *Intention* (Oxford: Blackwell, 1957), but unlike Hampshire and Hart she proceeds to a robust examination of practical reasoning and its upshot, intention.

27. Hampshire and Hart, *supra*, note 26, 10.

28. *Ibid.*, 1.

29. *Ibid.*, 4, 5, 12.

Although neither “internal” nor any cognate appears in the article, it is plainly a portrayal and exploration of what *The Concept of Law* will call the internal attitude or point of view as it bears, not on rules or rule-guided action, but on any sort of voluntary action. It explores other truths important to *The Concept of Law*: the importance of distinguishing that first-person perspective from the perspective or viewpoint or “attitude”³⁰ of any observer or spectator, and the parallel difference between stating an intention—thereby evidencing one’s acceptance of reasons for action—and making a prediction that one will act. The article is illuminating and sound, furthermore, in much that it stresses about the empirical reality of practical knowledge and “free-will,” and about the connection between freedom of decision and having reasons for decision.³¹ But it has deep and pervasive mistakes, which shed much light on some principal features of contemporary legal philosophy, features manifested in and partly shaped by *The Concept of Law*.

At the very point where Hart and Hampshire bring us face to face with the reality and distinctness of one’s practical knowledge of what one intends to do, or is doing, they mix up that practical knowledge with certainty; worse, the certainty they speak of is predictive. Moreover: since *will*, which culminates in choice (what they call decision), is really part and parcel of *reason* (for willing is one’s responsiveness to what one believes to be reasons), it is unsurprising that, having conflated practical knowledge and predictive certainty, they make X’s choosing consist in (be “constituted” by) “becoming certain”³² about “what he will do.”³³ Just when they are announcing that reason can be practical as well as descriptive/predictive, they dissolve its practicality into the descriptive/predictive. One’s decision, like one’s consequent intention (and thus of course one’s disposition to act and one’s action), is unhinged from the reasons that precede, and in an unexplored sense result in,³⁴ the deciding/choosing.

Though it is true that, as the authors underline,³⁵ someone who has not yet decided between two or more courses of action must be uncertain about what he will do, it is fallacious to conclude, as they do, that deciding is constituted

30. *Ibid.*, 5.

31. See *ibid.*, 4-5.

32. *Ibid.*, 3.

33. *Ibid.*, 2.

34. *Ibid.*, 3: “The [agent’s] certainty [about what he will do] comes at the moment of decision, and indeed constitutes the decision, when the certainty is arrived at ...as a result of considering reasons, and not as a result of considering evidence. ... When he has made his decision, *that is*, when, after considering reasons, all uncertainty about what he is going to do has been removed from his mind, he will be said to intend to do whatever he has decided to do....”

35. *Ibid.*, 2.

by becoming certain about what one will do. Indeed, it is not even true that my deciding to do X entails, as they assert, that I am “certain that I will do this, unless I am in some way prevented.” For I know that I may change my mind, reverse my decision, make a contrary choice. Hart and Hampshire, without signalling their shift, later acknowledge this, saying that once I have made my decision, which occurs when “all uncertainty about what [I am going to do] has been removed from [my] mind, I will be said to intend to do whatever [I have] decided to do, unless either [I fall] into uncertainty again, as a result of further reasons suggesting themselves, *or until [I] definitely [change my] mind.*”³⁶ But neither the conditionality of conditional intentions³⁷ nor the standing significant possibility of change of mind (reversal of decision) is elucidated or even discussed by Hart and Hampshire.³⁸ The authors are left both asserting and denying that to decide and intend is to make a prediction (become certain) about what one will do.

The truth is that choosing, forming a definite intention, is settling not the indicative-future question “What will I do?”, but the gerundive-optative, *practical* question “What am I to do?”, “What, in these or more or less specific future circumstances, *should* I do?”, “What is-to-be done [*faciendum, agendum*]?” It is compatible with uncertainty about the merits of the option chosen, and in that sense, compatible with uncertainty about *what to do*. For choice between alternative options, in the focal sense of “choice” (*electio*, selection and resolve) is really only necessary when (so far as the chooser can see) the reasons in favour of one option are not all satisfied, or as well satisfied in all dimensions of intelligible good, by the other option(s).³⁹ Choosing is also compatible with uncertainty about what one will do; for, especially when the carrying out of one’s intention is conditional on contingent future circumstances, one can reasonably be alive to the possibility that one will sometime before then find reason to reverse one’s choice (perhaps even

36. *Ibid.*, 3.

37. See Finnis, “On Conditional Intentions and Preparatory Intentions” in *Moral Truth and Moral Tradition: Essays in honour of Peter Geach and Elizabeth Anscombe*, ed. Luke Gormally, 163-76 (Dublin, Four Courts Press, 1994).

38. They pertinently put to themselves the objection that, because “deciding” and “changing my mind” represent an act, something that I *do*, “deciding cannot be adequately characterized as simply becoming certain about one’s future voluntary action after considering reasons, and not considering evidence.” But their response restricts itself to asserting that it is unclear what is meant here by “do,” and never confronts the core objection.

39. See further Finnis, “Natural Law and Legal Reasoning,” in *Natural Law Theory: Contemporary Essays*, ed. Robert P. George, 134-157 (Oxford, 1992), 146-47; “Commensuration and Public Reason,” in *Incommensurability, Comparability and Practical Reasoning*, ed. Ruth Chang, 215-33, 285-89 (Cambridge, MA: Harvard University Press, 1997), 219-20.

reasons that one had considered when making one's original decision). Hart and Hampshire were right to point out the certainty one can and normally does have about what one is doing, but wrong to extrapolate to certainty about the future fulfilling of one's intentions; their error leads them to substantial self-contradiction about the allegedly predictive character of statements of intention, and to belated and unintegrated acknowledgement of changes of heart/mind.

Nor do they adequately explicate one's certainty about what one is doing. One knows what one is doing, I would say, because one's doing (in the case of fully voluntary actions) is the *carrying out of* the proposal/plan that one adopted in one's decision/choice. A plan is a rational structure, in thought, of ends and means. As Aristotle and Aquinas have brilliantly illuminated, each end except the one most ultimate (relative to some particular behaviour) is also a means to some more ultimate end, and each means, except the exertion involved in the very behaviour itself, also stands as an end relative to the means next more proximate to that exertion.⁴⁰ Moreover, in the deliberation that shapes alternative proposals for choice, ends and means figure propositionally, as reasons for the respective courses of action envisaged in the rival proposals. Each reason articulates a supposed benefit, a supposed intelligible good, promised (not guaranteed!) by the proposed course of action supported by that reason. Within each proposal that one shapes for oneself in deliberation, every means (and thus virtually every end) is transparent for the end which gives point to that means. So too, when one has chosen one proposal in preference to the other(s), the reasons favouring that proposal and course of action remain in play, giving one reason to exert oneself to carry out the chosen action, whether now or when appropriate circumstances arise. The propositional expression of this is not Hart-Hampshire's "I am certain that *this* is what I will do," but Aquinas's *imperium*, "*This* is the thing for me to be doing—what I should be doing" (not necessarily a moral "should")—the directive (*imperium*, command), from oneself as rational self-determining chooser to oneself as rational agent,⁴¹ to do what it takes to achieve the

40. On their understanding of means as nested ends, see e.g., Finnis, "Object and Intention in Moral Judgments according to St. Thomas Aquinas," *The Thomist* 55 (1991) 1-27; slightly revised version in *Finalité et Intentionnalité: Doctrine Thomiste et Perspectives Modernes*, ed. J. Follon and J. McEvoy, Bibliothèque Philosophique de Louvain No. 35, 127-48 (Paris: J. Vrin, 1992); Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 58-71, esp. 64 n. 20.

41. On the important and neglected reality of *imperium* in personal choice and action, see *Natural Law and Natural Rights*, 338-40. Hart, in conversation with me (again in the tea room), once lightly mocked my account as replacing "push" theories of motivation (and obligation) with a "pull" theory. But in understanding practical reason, and willing (which is *in it, in ratione*), we must in the last analysis treat as misleading all metaphors borrowed from sub-

intelligible benefits with an eye to which one chose (adopted the proposal one did), benefits one believed and believes attainable by or in such conduct (attainable if one's means prove to have the efficacy one envisaged for them in one's plan/proposal).

Under pressure of Hobbesian, Humeian and Kantian misunderstandings of practical reasoning, choice and (consequently) action, all this was much neglected in the period when Hart was turning his philosophical attention to the relation between reason and action, and correspondingly to the way in which behavior becomes intelligible when understood as it is understood by the acting person, that is, "from the internal point of view." But as the role of reasons, though constantly pointed out, remains essentially unanalyzed and incompletely integrated in the Hart-Hampshire treatment of intention and practical knowledge, so their role, though again constantly signalled, remains incompletely analyzed and integrated in *The Concept of Law* and even, I think, in the later work explicitly focused on peremptory content-independent reasons for action.

III

Consider Hart's canonical account or definition of the internal attitude. As it bears on rules, it is the attitude of those who "accept and voluntarily cooperate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules."⁴² And, says Hart, "the acceptance of the rules as common standards for the group may be split off from the *relatively passive* matter of the ordinary individual acquiescing in the rules by obeying them for his part alone."⁴³

What should strike us, however, is the relatively passive character of even the officials' internal attitude as characterized by Hart. True, they accept the rules not simply as commonly accepted standards but as common standards *for themselves and others*;⁴⁴ they use the rules to appraise their own and others'

rational motivation, let alone those from subhuman forms of motion. Reason's directiveness, in practical as in theoretical reason, is *sui generis*, and so, accordingly, is willing, one's responsiveness to reasons (intelligible goods).

42. *CL*², 91 [88]; see also 90 [87-8], 98 [96], 102 [99]; 109-10 [106-7], 115 [112], 116 [113], 201 [197].

43. *Ibid.*, 117 [114] (emphasis added).

44. MacCormick, *H.L.A. Hart*, 34-5, begins his explanation of the "stronger case" of acceptance of a rule, "willing acceptance": "Not merely has one a preference for observance of the 'pattern', but one prefers it as constituting a rule *which one supposes to be sustained by a shared or common preference* among those to whom it is deemed applicable" (emphasis added). Later, p.41, he adjusts this to make the more important point: "the element of 'preference' involved in the 'internal point of view' tends to be conditional: one's preference *that a given*

conduct. But in Hart's account they at most cooperate in *maintaining* rules that Hart's account treats as out there, available for acceptance and maintenance. What is striking is the contrast between this and the classical theory of law which treats as central and primary the *positing* of legal rules, and—rightly, I believe—takes their epistemologically and ontologically primary mode of existence to be their existing as a proposal adopted by the choice/decision of their maker; adopted, that is to say, as a plan of conduct for the community and its members and officials. Once made, promulgated, the rules will of course have to be maintained. But this very maintaining is to be understood as a kind of (re)novation of the making. That understanding is in line with Aristotle's definition of the citizen as one who is entitled to share and does share in governing the political community. Hart's notion of accepting rules *as common* standards for oneself *and others* is the nearest his core legal theory gets to the classical notion of law's existence: as a kind of extending of the law-making activities of the rulers, an extending by a kind of interior personal re-enactment, person by person, of the ruler's or rulers' legally decisive adoption of their own legislative or other law-positing proposals.⁴⁵

pattern of action be adhered to by all may be conditional upon the pattern's being and continuing to be supported by common or convergent preferences among all or nearly all the parties to the activity contemplated" (emphasis added). This justified adjustment is carried forward on p. 43: "Where there is common acceptance of certain standards envisaged as being shared or conventional standards, those who accept them belong to a 'group' but so 'from the internal point of view' of these accepters do all those to whose conduct they deem the standards applicable, and commonly that in turn depends on the possession by human beings of some characteristic which is not necessarily a voluntarily acquired characteristic. Hence Hart's crucial conception of a 'group' appears not to be prior to or definable independently of his conception of a rule." This is illuminating, though the final "hence" is not altogether clear to me, since members of a group of the kind in which the central case of law is instantiated are characteristically able to identify their group (nation) even when a good many rules, including at least some of the group's former rules of recognition, have broken down.

45. Finnis, *Aquinas*, 254-6: "Aquinas proposes and argues for a definition of law: an ordinance of reason for the common good of a [complete] community, promulgated by the person or body responsible for looking after that community. But in supplementing and explicating that definition, Aquinas immediately stresses that law—a law— is 'simply a sort of prescription {dictamen} of practical reason *in the ruler* governing a complete community', and that 'prescriptions' are simply universal propositions of practical reason which prescribe and direct to action. His explications also add that government (governing, governance) by law means, equally concretely, that these practical propositions conceived in the minds of those responsible for ruling must be assented to by the ruled, and adopted into their own minds as reasons for action. The assent may have been induced only by fear of sanctions, though such unwilling (reluctant) assent cannot be the central case of cooperation in government by law. ... the present point is simply that law needs to be present in the minds not only of those who make it but also of those to whom it is addressed—present if not actually, at least habitually—as the traffic laws are in the minds of careful drivers who conform to them without actually thinking

A law may, of course, as the classics constantly remind us, be a barely articulate belch of malevolence against a minority (or indeed a perhaps sheeplike majority), a decree mouthed by the terrorist ruler or rulers to a group of henchmen officials and “people’s” judges, and communicated by these officials only fragmentarily and in deliberately confusing form to the subjects, perhaps to induce some self-herding towards the slaughterhouse. But it would advance no theoretical purpose to take *such* decrees and such forms of governance as representative laws and legal governance when asking why it makes sense to transit from Hart’s “pre-legal” form of governance to what he calls the central case of law and legal system, or when reflecting on what would be lost in transiting from law to Marxian post-legal society, or when considering the point and worth of the principles “which lawyers term principles of legality,”⁴⁶ or joining the millennial debate about the respective advantages of the rule of law and the rule of legally unfettered rulers.

But leave that aside. After all, everyone knows that there have been and are—it’s a matter of fact—rules laid down as laws, and described by makers and subjects alike as law, which were and are deeply unreasonable, unjust, immoral; it can happen that some of them do not even profess to be reasonable, just or morally decent. That fact has nothing like the theoretical significance Hart thought it did. As a matter of *fact*, there is no necessary connexion between arguments and logic or validity as argumentation; arguments worthless as argument—as *reasons* for a conclusion—can be found all over the place. As a matter of *reason*, an invalid argument is no argument. Again: As a matter of *fact*, there is no necessary connexion between medicines and healing; countless medicines do not heal and many of them in fact do nothing but damage health. As a matter of *reason*, such deleterious medicines are not medicines and are not referred to in discussions of whether there is good reason to devise medicaments and make them available. So too: As a matter of *fact*, there is no necessary connexion between law and reasonableness, justice or morality; irrational and unjust laws abound, as natural law theory insists from earliest time until today. As a matter of

about them. The subjects of the law share (willingly or unwillingly) in at least the conclusions of the rulers’ practical thinking and in the plan which the rulers propose (reasonably and truthfully or unreasonably and falsely) as a plan for promoting and/or protecting common good. For just as an individual’s choice is followed and put into effect by the directive {imperium} of that individual’s reason, so a legislature’s or other ruler’s choice of a plan for common good is put into effect by way of citizens taking the law’s directive {imperium; ordinatio} *as if* it were putting into effect their own choice. The central case of government is the rule of a free people, and the central case of law is coordination of willing subjects by law which, by its fully public character (promulgation), its clarity, generality, stability, and practicability, treats them as partners in public reason” (notes, citations and cross-references omitted).

46. *CL*², 207 [202].

practical reason, unreasonable (and therefore unjust and immoral) laws and legal systems are not what we are seeking to understand when we inquire into the reasons there are to make and maintain law and legal systems, and what features are essential if law and legal systems are to be acceptable—worthy of acceptance—and entitled to the obedience or conformity of reasonable people. (Of course, the study of arguments as reasons will include a study of fallacious arguments, the study of pharmacology will include the study of bad medicines, and a study of law, legality and the rule of law will include a subordinate study of the ways in which bad laws and official abuse of legality and legal institutions corrupt law, legality and the rule of law and need to be guarded against by laws and legal institutions designed for the purpose.)

In that light, we can see that laws and law-makers systematically offer their subjects *at least* four different kinds of reason for compliance.⁴⁷ (It goes without saying that, as Hart constantly said, laws like every other social fact provide the occasion for many other kinds of motivation for doing the same thing as the law requires to be done: conformism and conventionalism, careerism and cowardice, to name some of the motives, which Hart gave other names.⁴⁸) Where the posited law attaches definitions and either penalties or other negative consequences to *mala in se* (say, rape), it invites its subjects to treat abstaining from these forbidden kinds of act as something required by the very same practical reason that the law-maker judged inherently sound and sought to refine and reinforce, *as well as* by the next three kinds of reason. Secondly, when we are in the zone of, broadly speaking, *mala prohibita*, the posited law offers to promote common good (including, as common good always does, what justice demands as proper respect for rights) by forbidding or requiring some kind of act which is not already, as such, or always and everywhere, excluded or required by well-judging practical reason. In this zone the law offers its subjects the opportunity to accept and comply with it both (a) for the same sufficient though often *not* rationally conclusive, dominant or compelling reason(s) as the law-maker(s) *decided* to give effect to in preference to the competing reasons for some competing alternative legislative scheme, and (b) for the next two kinds of reason.

Thirdly, then, in the same zone of *mala prohibita* or “purely positive” laws, the rules in the second of these four categories are also held out to subjects who consider the reasons in favour of the rule insufficient to warrant the law-

47. I discuss here only obligation-imposing norms/rules, and leave aside both (a) power-conferring norms/rules and (b) the question of the collateral moral obligation (not to be seen to defy the positive law) that may subsist *in some of the instances* of laws so unjust that their legal validity is deprived of the moral entailment that, presumptively and defeasibly, it would otherwise have (*Natural Law and Natural Rights*, 361).

48. See *CL*², 231 [226], 203 [198], 114 [111].

maker's adoption of it; for such subjects there remains, nonetheless, a kind of reason, often sufficient, to accept the rule as a common standard for themselves and others in the same country, the reason afforded by the fact that the rule is a valid part of the country's legal system.⁴⁹

Fourthly, in respect of *mala in se* and *mala prohibita* alike, the law usually though not invariably offers its subjects, public or private, the kind of reason afforded by the prospect (and undesirability) of undergoing punishment or other penalties or authorized kinds of negative consequence. That kind of reason differs markedly from the reasons which the law-maker has for threatening and (usually different reasons) for imposing such penalties, and the reasons that people amenable to the first three kinds of reason have for complying with the rule to which the penalty is attached. For as Hart points out in the clearest of his rather slender explorations of law's place in the flow or network of practical reason(s),

'Sanctions' are ... required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system.⁵⁰

This passage, illuminating though it is, is not very clear, for it shifts to and fro, without signalling, from viewpoint to viewpoint. Its first and third sentences address the perspective of the law-maker, and of the subject (citizen or friendly alien resident) who shares the law-makers' perspective; the first sentence also *alludes to* the perspective of those (who may even be the "normal" majority) for whom the normal motive for obedience *is* fear of sanction. The passage's second sentence addresses the perspective of the subject as subject, contemplating obedience or disobedience. The passage's conclusion, about what "reason demands," presupposes, strikingly but ineluctably, that the designer of the legal system, and anyone willing to adopt the designer's viewpoint and purposes, envisages (has as an end or objective) a system with a content (including forms and procedures) worthy of the *voluntary* cooperation of a *reasonable* subject. Hart here takes for granted that law, the central case legal system that is the real subject-matter of *The Concept of Law*, is an arrangement rationally prescribed, by those responsible for the

49. This is explored in some depth in Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory," *Notre Dame Journal of Law, Ethics and Public Policy* 1 (1984) 115-137 (the analysis is defended against Raz's critique, in Finnis, "Law as Coordination," *Ratio Juris* 2 (1989) 97-104).

50. *CL*², 198 [193].

community, for the common good of its members: *ordinatio rationis ad bonum commune, ab eo qui curam communitatis habet promulgata*.⁵¹

Notice that Hart does not specify what is bad in the “danger” that those who voluntarily cooperate would “go to the wall”; the passage gets much of its force from the plausible implication that it is, in some large part, the evil of unfairness to them (for the disobedience of the scofflaws would, by hypothesis, be going unpenalised). It is like the passage earlier in the book,⁵² stating the “defect” for which the “remedy” is courts and “secondary” rules of adjudication. For though Hart labels it inefficiency, what makes the absence of *judicial* means of resolving disputes about rule-violation a defect is surely, in some large measure if not predominantly, the unfairness to the party whose wronging causes the dispute and/or who, being the weaker, would probably be wronged if the dispute were ended by some non-judicial means. In each of these cases, the fairness being appealed to just beneath the surface of Hart’s text is essentially the justice that he elucidates in his account of the justice of compensation for injury: the injury upsets the “artificial equality” or “equilibrium” established by moral (and, Hart should have added, legal) rules which put the weak and simple on a (normative) level with the strong and cunning; the upset is itself unfair/unjust, and it would be unfair/unjust to leave it unrectified by compensation.⁵³

To understand Hart’s legacy, however, one needs to notice that he never invites his readers to reflect on the relation—within the one book *The Concept of Law*, let alone within his writings as a whole—between what he says there about justice, what he says about reason, and what he says about the central case of law and the “defects” it “remedies” and the “amenities” it provides. This neglect of pertinent questions parallels other refusals to raise questions. When judges around the English-speaking world needed the help of legal theory to respond to the juridical challenge of *coups d’état* and revolutions, they could find nothing illuminating in Hart’s theory of the rule(s) of recognition.⁵⁴ For though that “ultimate” rule is explained by Hart as the

51. Aquinas, *Summa theologiae*, 1-2, q. 90 a. 4c; see Finnis, *Aquinas*, 255-6.

52. *CL*², 93-4 [91].

53. *CL*², 164-5 [160-161]. Hart should have recalled all this when considering the justice of retribution as a general justifying aim of punishment, but seems never to have done so: *Natural Law and Natural Rights*, 262-4; *Aquinas*, 210-15.

54. So they turned, albeit inappropriately and fruitlessly, to Kelsen, whose general theory at least attempted to give a juridical account of the source of the validity of an existing constitution, i.e. of the relation between a “momentary” legal system and the diachronic legal system in which each momentary system takes its place. See Finnis, “Revolutions and Continuity of Law,” in *Oxford Essays in Jurisprudence: Second Series*, ed. A.W.B. Simpson, 44-76 (Oxford: Oxford University Press, 1971); J.M. Eekelaar, “Principles of Revolutionary Legality,” in *ibid.*, 22-43.

answer to a question, namely the question—which follows fittingly the lawyer’s sequence of inquiries seeking the reason for the validity of by-laws and ministerial legislation—why a parliamentary enactment is valid, the answer, namely that the courts and officials (if not also private persons) *have the practice of using* the rule that what Parliament enacts is to be recognized as law, is treated by Hart as “a stop in inquiries.”⁵⁵ What he has in mind is *not only*, as he reasonably says, a stop in inquiries seeking further, more ultimate posited rules, *but also*, as he disappointingly takes for granted, inquiries seeking other *juridically relevant* reasons for continuing, discontinuing, or modifying the practice in which the rule of recognition consists. When we entertain, for reasonable affirmation or denial, the proposition that the rule (and the system based on it) is “worthy of support,” we have simply moved, according to Hart, “from a statement of validity to a statement of value.”⁵⁶

In the idiom of the book, that is a way of saying we have moved outside legal theory, outside the law, outside the juridical, and have nothing to offer the judge who is asking, as judge, whether and when and how a successful *coup d’état* alters the law of the land. Nor anything, indeed, to say to judges who, in altogether ordinary times, ask themselves why they should continue their practice of using the rule(s) of recognition and the criteria of legal validity and juridical argumentation embodied therein or pointed to thereby. For the book’s legal theory, its account of law and the juridical, includes no systematic engagement with “value”—only episodic forays into disintegrated topics such as a justice, and later a minimum natural law for “survival,” which have no articulated connection with each other or with the explication of what makes law law.

In short: *The Concept of Law*, the *Essays on Bentham*, and Parts I-III and V of *Essays in Jurisprudence and Philosophy* display a legal theory or general jurisprudence that, having identified its own descriptive dependence on the

55. *CL*², 107 [104].

56. *CL*², 108 [104-5]. After delivering this paper, I read N.E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007), which at 126-36 develops a valuable complementary critique of Hart’s truncation of “the domain of the juridical” (126). There is much illuminating argument and reflection in the book; it is mistaken, however, in saying (56 n. 28) that, in the theory of law developed in the central chapters of my *Natural Law and Natural Rights*, the treating of the common good as central to the understanding of law is “a consequence of” the methodological claims I advanced in chapter I about descriptive general theory. Though chapter I of my book treats general legal theory which is descriptive in purpose as a legitimate enterprise (provided it acknowledges its dependence on evaluations internal to its method of concept-selection), the later chapters on law do not have a descriptive purpose, but (for reasons underlined in my “Law and What I Truly Should Decide,” *supra*, note 19) are normative/evaluative in purpose as well as method, and are not at all dependent on the argument of chapter I.

internal point of view and attitude (in which rules are reasons for action), leaves those reasons largely unexplored, and rests largely content with reporting the fact that people have an attitude which is the internal aspect of their practice. Having so fruitfully gone beyond the observer's or spectator's perspective on bodily movements and behaviour, it rests officially content with a *report* that the participants have reasons for their behaviour and their practice. It does not seek to understand those reasons as reasons all demand to be understood—in the dimension of soundness or unsoundness, adequacy or inadequacy, truth or error. To have been consistent in its abstinence from engagement with that dimension—from “statements of value”—Hart's method should have restricted him to the observation that people often think they have reasons, that many people think or have thought that a pre-legal set of social rules is defective, think that secondary rules are the remedy, and so forth. But his book's engagement with its readers would then have been very different. And, since by no means everyone everywhere has the same beliefs about reasons, the question why select for report *these* supposed reasons rather than others would have become deafening; it would have broken up the party.

IV

Before turning, finally, to the question why Hart so truncated his enquiry into legal reasons, I should say a word about what Hart's successors, in their reflections on the nature of law, have made of his legacy. (Perhaps the word “legacy” in this conference's title was intended, not in the lawyer's sense of what the testator chose to give, maybe with latent defects of which he was unaware—the sense on which I've been relying—but in the loose sense of what his successors made of it all.) Some have maintained (LP1) that “in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).”⁵⁷ Others have maintained (LP2) that “determining what the law [in a given time and place] is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances.”⁵⁸ The first thesis (LP1) seems the more strenuous: “never by reference to merits” is a stronger claim than “not necessarily by reference to merits,” and that helps explain why John Gardner, sponsor of (LP1), ascribes

57. John Gardner, “Legal Positivism: 5½ Myths,” *American Journal of Jurisprudence* 46 (2001) 199, 201. This seems to be practically equivalent to Raz's “sources thesis”, often called by others “exclusive positivism.”

58. Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001), 71.

to the thesis, and to its approach to law, “comprehensive normative inertness.”⁵⁹ It corresponds to Hart’s sharp distinction between “statements of validity” and “statements of value.” But in Hart that distinction seemed to have the purpose, and more clearly had the effect, of restricting the theory of law to accounting for social-fact-source-based validity without proposing any statement of value.⁶⁰ In Gardner, however, as in Leslie Green’s similar account of legal theory, and Joseph Raz’s, in his own way,⁶¹ too, the affirmation of this sources thesis, (LP1), is said to be in no way “a whole theory of law’s nature.” (LP1) is compatible, they affirm, “with any number of further theses about law’s nature, including the thesis that all valid law is *by its nature* subject to special moral objectives and imperatives *of its own*,”⁶² and compatible with the thesis that “in some contexts ‘legality’ ... names a moral value, such that laws may be more or less valid depending on ... their merits”, and with the thesis that “one must capture this moral value of legality... in order to tell the whole story of law’s nature.”⁶³ It thus becomes clear that (LP1) can and should be formulated more precisely, converting its universal quantifier to an existential one: (LP’) There is a “technically confined”⁶⁴ and “intra-systemic” sense of “legal validity” such that validity in this sense can be predicated of a supposed rule by reference only to social-fact sources,

59. Gardner, *supra*, note 57, 203; cf. my comparison of his and Brian Leiter’s uses of this phrase in my “Law and What I Truly Should Decide,” *supra*, note 19, 115-128.

60. The *Postscript*’s embrace (250-54) of soft or inclusive positivism does not significantly qualify this restriction, since it is a social-fact source that, in such a view, licenses the jurist to look beyond such sources to moral standards, and the legal *theory* of the kind that Hart undertook is restricted, by the descriptive purpose so emphasized in the *Postscript*, to reporting the social fact that the societies under study bring to bear, at this point in their legal reasoning, the relevant moral beliefs they have and are licensed to refer to.

61. See his distinction between applying the law (restricted to social-fact sources) and judicial argument *according to law* (which properly embraces moral reasons and reasoning about maintaining, developing or amending the law): e.g. Raz, “the Autonomy of Legal Reasoning,” *Ratio Juris* 6 (1993) 1-15.

62. Gardner, *supra*, note 57, 210 (emphases added).

63. *Ibid.*, 226. Green, in the final paragraph of his “Legal Positivism,” *The Stanford Encyclopedia of Philosophy* (Spring 2003 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>>, similarly affirms: “Evaluative argument is, of course, central to the philosophy of law more generally. No legal philosopher can be only a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied?); of what claim law has on our obedience (is there a duty to obey?); and also of the pivotal questions of what laws we should have and whether we should have law at all. Legal positivism does not aspire to answer these questions, though its claim that the existence and content of law depends only on social facts does give them shape.”

64. See text at note 7 *infra*.

without reference to what ought to be the law (or the sources of law) according to some standard not “based on” social-fact sources.

(LP’) is entitled, it seems to me, to the assent of everyone everywhere.⁶⁵ Certainly it is what was taken for granted by those who said *lex injusta non est lex*, which, understood as its authors understood it,⁶⁶ asserts that if a rule which is legally valid in the (LP’) sense is sufficiently unmeritorious it lacks the entitlement to be counted as personally decisive for them by judges, officials and citizens, an entitlement to directive decisiveness that is central to the reasons we have for establishing and maintaining legal systems.

V

I return to the rule of recognition, which exists—and is the answer, ultimate for Hart’s legal theory, to the question “What is the reason for the validity of the highest rule of change, if not of all the rules, of this legal system?”—by being used as such in the practice of courts and other officials.

Like any other fact about what happens or is or has been done, *practice*, whether idiosyncratic, widespread or universal, provides by itself no reason for its own continuation. From such an *Is* no *Ought* (or other gerundive-optative) can be inferred without the aid of another *Ought* or gerundive-optative *Is-to-be-pursued-or-done*. The fact that it is raining is in itself no reason to carry an umbrella, no reason at all, even in conjunction with the fact that without an

65. See *Natural Law and Natural Rights*, 290; “Natural Law: The Classical Tradition”, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman & Scott Shapiro, 1-60 (Oxford: Oxford University Press, 2002), 8-15; “Law and What I Truly Should Decide,” *supra*, note 19, 128-9; and more precisely “Natural Law Theories of Law,” *supra*, note 19, at sec. 3.1,

66. Nothing could be stranger than Hart’s decision to treat the saying as an invitation to treat all positive law as morally binding: *CL*², 210-11 [205-6]; for my critique, see *Natural Law and Natural Rights*, 364-6; for Hart’s reply, *Essays in Jurisprudence & Philosophy*, *supra*, note 3, 11-12. Yet MacCormick is right to give prominence to the thought that motivates Hart in his attempted critique of the tradition, the thought that we must “[hold] all laws as always open to moral criticism since there is no *conceptual* ground for supposing that the law which *is* and the law which *ought* to be coincide”, with the result that “the ultimate basis for adhering to the positivist thesis of the conceptual differentiation of law and morals is itself a moral reason...to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in face of the law which is”: *H.L.A. Hart*, 24-5; see likewise the opening paragraph of MacCormick, “Legal Positivism: Hart’s Last Word,” paper presented like the present article at “The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy,” conference sponsored by the Cambridge Forum for Legal and Political Philosophy, Churchill College, University of Cambridge, 27 July 2007. Since that moral concern was fully shared by the tradition assaulted by so many theorists calling themselves legal positivists, much of the history of jurisprudence over the past two hundred years or more is a tale of wasted zeal.

umbrella I'll get wet. But facts like these can play their part in the reason, the warranted conclusion (that I should [had better] carry an umbrella) which gets its directive or normative element from some practical, evaluative premise such as: it's bad for one's health to get wet, or: it's bad for one's ability to think and function to get uncomfortably wet and cold. *By virtue only of that* or some similar truth (as one supposes) about good and bad, the plain fact that an umbrella can prevent these evils by keeping me dry can contribute to the normative conclusion that I have reason to, or ought to, carry an umbrella. Though David Hume himself thoroughly misunderstood and frequently ignored or violated it,⁶⁷ the inaptly named "Hume's Law" remains valid and indispensable for an understanding of reason and normativity, ethical or otherwise.

In his last writings, Hart identified accurately enough the way in which his legal theory is enmeshed in something much more truly Humeian: Humeian psychology, Humeian conceptions of practical reason, and Humeian scepticism. His essay "Commands and Authoritative Legal Reasons," the last (no. 10) of the *Essays on Bentham* (1983), concludes that "judicial statements of the subject's legal duties need have nothing directly to do with the subject's reasons for action," a conclusion he rightly anticipates will seem paradoxical, confused, and open to the objection that it "whittle[s] down the notion of [say, the judge's] *acceptance* of the legislator's enactments as reasons for action" to something very different from the essay's own explanation of what it is to accept some directive as a content-independent peremptory reason for doing what the directive directs—an objection which Hart virtually concedes, professing a lack of "sufficient grasp of the complexities which I suspect surround this issue."⁶⁸ The objection can be reformulated: as against the thesis of *The Concept of Law*, that at least officials (including presumably judges) must accept the rules as common standards for their own *and others'* conduct, this final essay holds that judges (and presumably other officials) need not do more than speak (and think!) in "a technically confined way," that is "as judges, from within an institution which they are *committed* as judges to maintain," stating not what the subject has reason to do but only "what...may legally be demanded or exacted from him."⁶⁹ But commitment, and appointment and practice as a judge, are all just facts, which of themselves afford no reason to act, no reason to stay committed or practice as a judge. So

67. See the detailed but evidently much ignored section II.5 in *Natural Law and Natural Rights*, 36-42, along with 33-36 and 47-8.

68. *Essays on Bentham*, 267 (emphasis added).

69. *Ibid.*, 266 (emphasis added).

the account strips away not only (as Hart admits) the subject's reasons for compliance with law but also (as Hart does not signal) the judge's reasons.

Admittedly, this paradox or confusion *partly* arises from something distinct from the issues of reason and fact that concern me here, something only methodologically significant: namely, Hart's disorderly neglect of central-case analysis, his resort, pervasive in these late essays, to the question whether judges, officials or anyone else *need* do or think or say such and such. To this question the answer will usually and all too easily be "No, that way of acting, thinking or speaking is not necessary." After all, countless kinds of less than fully reasonable ways of acting, thinking and speaking can and sometimes or even often do occur. But insistence that nothing save the logically or ontologically necessary can be given any descriptive-explanatory priority would devastate descriptive social theory, leaving it babbling about what is possible and silent about the important, central and fully rational, and the main ways of diverging from that.

However, undiscussed retreat from central case analysis is only one of the causes of Hart's final position about the internal attitude on which he had built his legal theory. That position can be reformulated as the claim that the central case of law, as also of adjudication, involves no proposing, not even a pretended proposing, of reasons for the subject's deliberation and action. But that more focused formulation still leaves it indeed a paradoxical position, and one that *misdescribes* what it is for judges to *accept* a rule in their practice of adjudication. Of course, Hart formulated it as a thesis not about judicial acceptance or attitudes, but about judicial speech. However, before judges can speak, in a technically confined way or otherwise, to litigants, witnesses, counsel and spectators, they must resolve, in deliberation, in the presence, so to speak, of their own consciences, whether and how to speak. "They are committed as judges", as Hart observes right here, to maintain the legal institution within which they work, and in the last analysis their work is not mere speech but interpersonal action which harms some and helps others in very palpable ways. What are they to *say to themselves*, one may ask, about their commitment?⁷⁰ The plain fact that they made that commitment, publicly

70. It might seem as if Hart himself, on the previous page, had raised or identified this very question, when he says (*Essays on Bentham*, 265) "...it would be extraordinary if judges could give no answer to the question why in their operations as judges they *are disposed to* accept enactments by the legislature as determining the standards of correct judicial behaviour and so as reasons for applying and enforcing particular enactments" (emphasis added). But their question, if it is pertinent, should and will rather be of the form—or at least should rather have the meaning—"Should I be disposed to accept, apply and/or enforce particular enactments...? Are there sufficient reasons for my doing so, and if so what are they?" [Simmonds, *supra*, note 56, 129-35, takes the decisive question to be, not what reason judges have for applying the law,

and no doubt privately, by itself settles nothing, nothing at all, about what they have sufficient *reason* to do, that is, about what is to be done, had better be done, and in any relevant sense ought to be done by them. No *Ought* from a mere *Is*.

At this point, just before his admission of the appearance of paradox (which he cannot resolve), Hart suggests that his position would be quite different if legal reasons for acting (often action contrary to one's interests and inclinations) were "objective, in the sense that they exist independently of [one's] subjective motivations."⁷¹ The implication of this and the whole paragraph, that Hart did not believe in objective practical reasons, legal or moral, was to be thoroughly confirmed by the last-written piece of work he published, his hard-working review of Bernard Williams, *Ethics and the Limits of Philosophy* for the New York Review of Books in July 1986. The review firmly endorses Williams's ethical subjectivism, while emphasizing its controversial character. I quote just one passage in relation to which the points I have been making about practices, commitments and the first-person perspective may again seem pertinent:

...the question, "What should I do in these circumstances" is essentially "first-personal" and not a mere derivative of and replaceable by "What should anyone do in these circumstances?" For the "I" of practical deliberation that stands back from my desires and reflects upon them is still the "I" that has those desires, and, *unless I am already committed to the motivations of an impartial morality, reflective deliberation will not lead me to it*. To hold otherwise is to confuse reflection with detachment; and that confusion has encouraged the mistaken idea

but what justification they can offer others, notably the litigants before them, for applying it. I agree that the latter question is of high importance, and very pertinent to the assessment of Hart's position. But the judge's own first-person singular question is *at least* equally important in itself and at least equally relevant to the theoretical debate. Simmonds is (134-5) as relaxed as Hart about the fact that judges' reasons for adhering to the law "may be non-moral reasons grounded in self-interest." Of course they "may" and doubtless often are. But self-interest can never require more of judges than that they *appear* to be applying the law, and the opportunities for plausibly and "deniably" corrupting the law's application are so great that here the first-person question—the question that is conscience—is also of high public importance and decisive for understanding the "archetype" or central case of law and legal system.]

71. *Ibid.*, 266-7: "Of course, if it were the case, as a cognitive account of duty would hold it to be, that the statement that the subject has a legal duty to act in a way contrary to his interests and inclinations entails the statement that there exist reasons which are 'external' or objective, in the sense that they exist independently of his subjective motivation, it would be difficult to deny that legal duty is a form of moral duty. At least this would be so if it is assumed that ordinary non-legal moral judgments of duty are also statements of such objective reasons for action. For in that case, to hold that legal and moral duties were conceptually independent would involve the extravagant hypothesis that there were two independent 'worlds' or sets of objective reasons, one legal and the other moral."

that if our moral beliefs are to be more than mere prejudices they must be regulated by some general ethical theory *au dessus de la mêlée* of our ethical practices.⁷²

The French phrase perhaps recalls the title of a once famous pacifist tract by Romain Rolland, published in 1915 and alluded to directly in the last volume of Proust's great book. Be that as it may, the passage shows again how inadequately Hart's work represents the first-person perspective, in particular the form that reasons take in that perspective (when I am concentrating on reasons in the search for a right answer), and the way in which reasons can lead me to change my mind and, if they are practical reasons, acquire new motivations. The claim that "unless I am already committed to the motivations of an impartial morality, reflective deliberation will not lead me to it" is simply wrong. Could it be plausible to anyone who does not accept the Humeian dogma that reasons cannot motivate?

As a general thesis about reason and will, that dogma is made to seem tolerable, if not credible, by the assumption that the impossibility of rational and rationally motivating *ends* leaves intact motivation by "instrumental reasons," reasons which identify suitable and efficient means to sub-rationally desired (and therefore "subjectively motivating") ends. But that assumption is illusory. If I have no reason for my ends, I have no *reason* for adopting or being interested in instrumental means to them, clever though the techniques embodied in some of those means may be. As I put it recently, adopting an argument of Christine Korsgaard:

... "unless something attaches normativity to our ends, there can be no requirement to take the means to them."⁷³ Such ends, moreover, have to be "*good*, in some sense that goes beyond the locally desirable."⁷⁴ For "I must have something to *say to myself* about why I am [willing an end, and am committed and remain committed to it, even in the face of desires that would distract and weaknesses that would dissuade me]—something better [to say to myself],

72. H.L.A. Hart, "Who Can Tell Right from Wrong?," *New York Review of Books* (17 July 1986) 49-52, 50 (emphasis added).

73. Christine Korsgaard, "The Normativity of Instrumental Reason," in *Ethics and Practical Reason*, ed. Garrett Cullity and Berys Gaut (Oxford: Oxford University Press, 1997), 251.

74. *Ibid.*, 250-251. Korsgaard, at 251, 252, is tempted to resile from this to allow for a "heroic existentialist act" of "just tak[ing] one's will at a certain moment to be normative, and commit[ting] oneself forever to the end selected at that moment", "for no other reason that that [one] wills it so". But she should concede that unless such a person considers that there is something worthwhile in doing so, some good in or reason for doing so, such an "act of commitment" and of subsequent "taking [it] as normative" is not rational but irrational.

moreover, than the fact that this is what I wanted yesterday⁷⁵ (or indeed a moment ago or even, in the struggle of feelings, right now).⁷⁶

What am I to say to myself? That question comes to mind when reading the final section of Hart's review of Williams. Having endorsed the author's main arguments for denying that ethical/moral beliefs have rational foundations, Hart asks "What bearing on practice will and should these arguments have?" His answer begins by noting one of the fears that

have been excited by such skeptical thought. . . [the fear] that if it becomes widespread we shall have nothing—or not enough—to say to the immoralist, whether he is the coldly selfish egoist of private life, or the brutal advocate of oppression in public life. But there is surely something laughable in the idea that anything we could draw from philosophy could weigh with such characters bent on having their way at others' expense. Why should it matter to them that there is a philosopher's proof that, in acting as they do, they are irrational, inconsistent, or flying in the face of some moral truths? As Williams says, "What will the professor's justification do when they break down the door, smash his spectacles, take him away?"⁷⁷

But the interesting question is not: What have I to say to the barbarians to persuade them that they should desist? It is: What have I to say to myself when I ask myself whether I shouldn't perhaps be on the winning side and team up with them?⁷⁸

75. *Ibid.*, p. 250.

76. Finnis, "Foundations of Practical Reason Revisited," *American Journal of Jurisprudence* 50 (2005) 109-131, 113-4. For my criticism of Korsgaard's attempts to develop a non-Humeian conception of practical reason, see *ibid.*, 114-8.

77. Hart, *supra*, note 72, 52.

78. Hart's next paragraph speculates about the reactions not of the immoralist or the egoist but of "more ordinary people who with various degrees of conviction, difficulty, and backsliding manage to live up to the moral standards they have acquired and developed in their social life and to transmit them to their children," and gradually he locates "us", the first-person plural, among them: When they/we discover the truth of ethical scepticism, "the sense of necessity (the moral 'I must') in which the recognition of moral obligation often terminates, will have to be seen as coming not from outside, but from what is most deeply inside us even though it is normally also supported by others who share our practices and beliefs. The fear is that this will not be enough and that when we come to think of our moral standards as resting on no further foundation, we shall disregard them whenever they stand in the way of our getting or doing what we want." Hart's response to this fear begins: "How likely this is, is a question of moral psychology about which we know little enough. . .," and never gets round to considering what one *should* think about the directive force of one's "moral standards" once one discovers, through philosophical argumentation, that they merely "come from what is most deeply inside us" and reflect motivations and "concerns" which one just happens to have but which plenty of other people do not have, and which collide with other motivations and lively interests one has deep inside one.

Williams and, more hesitantly, Hart attribute to certain ethical beliefs some measure of immunity from their scepticism: what they call “substantive” or “thick” ethical concepts, as used unreflectively and uncritically in “a simple traditional society”: concepts such as “cruelty, lying, brutality, treachery, and gratitude,” as distinct from “abstract all-purpose evaluative concepts of ‘ought’ and ‘right’ and ‘good’.” But in this marshalling by Hart and Williams of practical predicates for classification between thick and thin we find omitted yet again, as in Hume and Kant and chapter IX.1-2 of *The Concept of Law*, the intelligible goods of knowledge, life and health, friendship, reasonableness in one’s inner life and one’s outer actions, and the other fundamental reasons we all have for choosing and doing anything worthwhile we do or should do. These ends, taken in their fundamental intelligibility as good not only for me but anyone, and all the more when taken in their reflective implications as the elements of human flourishing and so⁷⁹ the key to adequately understanding our nature as persons, are so substantive, “thick,” and so far from being merely “abstract,” that they are the “deep inside” of all that we can and should “say to ourselves” to warrant our decisions as law-makers, law-apppliers (executive or judicial), and citizens. The pursuit of these basic goods needs and can be given rational integration by the Golden Rule and other principles of that reasonableness we call ethical/moral, and by the call of reason to be attentive to architectonic facts such as the possibility of free choice, and the subsisting of personal, familial and (in different ways) national identity (partly given and partly constituted as the intransitive implications of free choices).⁸⁰ Such integration reinforces and makes more pointed the rational directiveness of the initial normativity entailed by the intelligible desirability of the basic human goods, that is, from their priority as reasons both for action and for abstention from what by entailment from them are basic forms of harm by conduct or neglect. These basic reasons for action are the rational ground for the Hartian primary rules restricting violence, theft and fraud, and in their implications are the ground also for the Hartian remedies called secondary rules.⁸¹

Was the moral scepticism to which Hart gives restrained but clear voice in his last work a change of direction for him, something extrinsic to the

79. See Finnis, *Aquinas*, 29-34, 53, 90-92.

80. See Finnis, “‘The Thing I am’: Personal Identity in Aquinas and Shakespeare,” *Social Philosophy & Policy* 22 (2005) 250-282; also in *Personal Identity*, ed. Ellen Frankel Paul, Fred. D. Miller & Jeffrey Paul, 250-82 (Cambridge and New York: Cambridge University Press,, 2005).

81. Hart’s position in the *Postscript*, 249, that it is “quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct”, is simply incompatible with the theory of law set out in *The Concept of Law*: see *Natural Law and Natural Rights*, 6-7. It is part and parcel of the disorderly retreat from central case analysis that we see in *Essays on Bentham* (see text after n. 69 above).

architecture of his main work in the philosophy of law? I feel sure it was not.⁸² In the notebook from which *The Concept of Law* emerges, immediately before the key paragraph beginning “I have the dim...outline of this book in my mind,” are two sentences, on separate lines:

One side saying: you are blind

The other: you are seeing ghosts.

Midway between those years and the final years, his way of articulating the issue, on the one occasion when our conversation touched explicitly on ethical objectivity, was the same: It’s a matter of “You’re blind” versus “You’re seeing things.” The ghosts he had in mind as *The Concept of Law* began to take shape surely included⁸³ the “complex” and “debatable” conceptions of “the human end or good,” conceptions entertained by philosophers before “other thinkers, Hobbes and Hume among them, ...[were] willing to lower their sights.”⁸⁴ And as we know, what Hobbes, not to mention his disciple Bentham, found when the sights were right down and he looked inside was the brute fact of desires, will as no more than the desire that last precedes action, and, to make possible some unified theory, some desire by postulation dominant, such as (in early Hobbes) the desire to surpass others for the sake of surpassing them, or (in later Hobbes) to avoid death.

Trying to understand the internal point of view makes, I would say, no sense as a method in social theory unless it is conceived as trying to understand the intelligible goods, the reasons for action, that were, are and will be available to any acting person, anyone capable of deliberation or of spontaneously intelligent response to opportunities. Once these reasons are understood, along with the accompanying, potentially reinforcing, potentially disruptive, subrational inclinations (passions, emotions), theorists are equipped

82. His official position remained, to the end, that “legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open, as I do in this book ([*The Concept of Law*] p. 168 [164]), the general question of whether they have what Dworkin calls ‘objective standing’.” *CL*², 253-54. But this was always an implicitly partisan neutrality. For, as the review of Williams I think concedes, to withhold the affirmation of such standing is to depart from the internal point of view of those who accept moral standards as binding—depart in a way they would consider fundamental. Joseph Raz, who knew Hart far better, I believe, than I did, speaks less cautiously about Hart’s subjectivist and (not unlike Williams) naturalist (I would say scientific) view on these fundamental matters and about their implications for his jurisprudence, in “Two Views of the Nature of the Theory of Law: A Partial Comparison,” in *Hart’s Postscript: Essays on the Postscript to the “Concept of Law”*, ed. Jules Coleman (Oxford: Oxford University Press, 2001), 4-6.

83. To be sure, the sentences in the notebook (which, though I have seen the notebook, I quote from Lacey, *supra*, note 21, 222) doubtless also refer to the Realists’ view (mistaken, as Hart says) that obligation and associated reasons even for official (e.g. judicial) action are illusory projections of feelings, psychological compulsions, etc.

84. *CL*², 191 [187].

to understand the myriad ways in which the practices of individuals and groups can, do and doubtless will respond, reasonably and more or less unreasonably, in the ever-variable but far from random circumstances of human existence. Social theory may be fundamentally contemplative (“descriptive”) in purpose, or it may be fundamentally practical, intending to guide action—the theorist’s as much as anyone else’s—by identifying at least some outlines and principles of right and wrong, better and worse. But descriptive social theory will be unable to get beyond an endless video of local histories—or a merely statistical ordering of them—unless it makes the judgments about reasonableness that are fundamental to practical social theory. (Hart’s theory makes and relies on some.) And practical, morally oriented social theory will be a half-blind guide unless it profits from the practical insights, and the transmissible experience of inner and outer causes and effects, that are made available by history and social theory, perhaps distilled and by imagination and intelligence enhanced in great works of literary art.

The asymmetry between the first-person and the third-person viewpoint⁸⁵ goes deeper than Hart and Hampshire identified. In the last analysis, it is this: the third-person view terminates in facts, including facts about the beliefs and attitudes, intentions and commitments of other persons; but in the first-person view “I believe that *p*” is transparent for “*p*.”⁸⁶ The “I believe” drops out, leaving “*p*,” usually not just one proposition but a network of propositions some of which are reasons for believing others. One is looking not at oneself, one’s attitudes and beliefs, as facts about oneself, but at the proposition(s) under consideration, the reasons there are for affirming it and the reason(s) it gives for making it one’s belief, one’s attitude, and one’s action, whether the practical-theoretical action of judging it true or the practical-practical action of following and putting into effect the intelligent and reasonable guidance it gives, the good (benefits and goals) towards which it directs one. And because the first-person (practical) viewpoint is concerned not, in the end, with facts about oneself but with reasons (for action) that are both available to and bear on the good of anyone like me (generically, all human beings), it is the domain of *common* good and so the engine-room, the most proximate efficient cause,⁸⁷ of law.

In that perspective there is no reason to be found for stopping at the supposedly “minimum” set of reasons which Hart appeals to, not simply in his

85. See text at n. 27 above.

86. On this transparency, see Finnis, *Fundamentals of Ethics* (Washington, D.C.: Georgetown University Press, 1983), 70-74.

87. In respect of the law’s positivity, it is also the formal (shaping) cause. Even wicked law will almost invariably purport to be for common good, and should be juridically and morally assessed by reference to the standing requirements of the common good that yield the principles of legality or the Rule of Law, and the general principles of law common to civilized peoples.

reflections on the “minimum content of natural law,” but much more importantly in his account of primary rules, private and public secondary rules, and the union of them that constitutes law in its central instantiation and concept(ion). I argued earlier in this long paper that that account gets its persuasiveness partly from its suppressed appeal to reasons which, though largely unarticulated or, where articulated, unintegrated in the legal theory proposed in *The Concept of Law*, are reasons (good and not so good) pervasive in Hart’s other writings and indeed in his own life. His work is a standing invitation to develop legal theory’s critical account and promotion of those considerations of justice, of concern for common good, which include the general principles of legality and law common⁸⁸ to *civilized*⁸⁹ peoples and make law salient⁹⁰ as a means of governance and a reasonable exercise and acceptance⁹¹ of authority.

88. In *Natural Law and Natural Rights*, 286-9 I articulated some of those principles, and did so by reference to public international law. But their primary domain is, and will in justice remain, the legal system of what Hart called *countries*, that is, the nation state, the political community of persons who regard themselves as one people and organize their law and legal system to be theirs as distinct from other peoples’.

89. Failure today to take seriously this qualifier makes freshly resonant the memoir contributed by Lord Wilberforce to the privately printed record of the memorial meeting for Hart in the University Examination Schools, Oxford, in 1993, recalling their friendship in the 1930s: “We shared... a sense of coming disaster which we knew would destroy our way of life. ... In 1938 we were together, with some lawyers and clerks, when the news came that Mr. Chamberlain was returning with ‘Peace for our time’. There was applause, there was talk of going to the airport to cheer him home. We just looked at each other with tears in our eyes—it was unnecessary to speak.”

90. On this salience, see Finnis, “The Authority of Law,” *supra*, note 49 and “Law as Coordination,” *supra*, note 49.

91. On the not merely “conceptual” reasons why authority entails obligation, and an earlier reflection on Hart’s stopping short in the identification of reasons, see Finnis, “On Positivism and the Foundations of Legal Authority,” *Issues in Legal Philosophy: the Influence of H.L.A. Hart*, ed. Ruth Gavison, 62-75 (Oxford: Oxford University Press, 1986).

