Duquesne Law Review

Volume 5 | Number 1 Article 3

1966

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DUQUESNE UNIVERSITY
LAW REVIEW

VOLUME 5 1966-1967 NUMBER 1

THE PLACE OF SANCTIONS IN PROFESSOR H.L.A. HART'S CONCEPT OF LAW

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INTRODUCTION

In his 1958 Harvard Law Review exchange with Lon Fuller, Professor H.L.A. Hart of Oxford University wrote:

> It is surely not arguable (without some desperate extension of the word "sanction" or artificial meaning of the word "law") that every law in a municipal system must have a sanction, yet it is at least plausible to argue that a legal system must, to be a legal system, provide sanctions for certain of its rules.[1]

Three years later Professor Hart published his book, *The Concept of Law*.[2] Widely acclaimed as a significant and important contribution to twentieth-century jurisprudential thought,[3] the book in large part represents an elaboration of the simple idea expressed above. For Hart makes clear that, though he shares with John Austin, Hans Kelsen and legal positivism in general an insistence upon the separation of "is" and "ought" and a high regard for linguistic analysis of legal terms, he rejects their basically common view that no part of law can be understood without reference to the monopolization of coercive power in the hands of an overriding political authority. Whether formulated in Austin's terms that law is essentially and exclusively a system of habitually obeyed commands of the sovereign addressed to his subjects, violation of which will lead to the imposition of sanctions; or in Kelsen's, that law is to be understood as a system of depersonalized directions to officials to impose given sanctions upon the occurrence of certain events (conditions), Hart spurns the imperative analysis as being inadequate to describe the essential

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1. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 621 (1958).

2. H.L.A. HART, THE CONCEPT OF LAW (1961) [hereinafter cited as HART].

3. See *e.g.*, Summers, *Professor H.L.A. Hart's Concept of Law*, 1963 DUKE L.J. 629 (1963); Hughes, *Professor Hart's Concept of Law*, 25 MOD. L. REV. 319 (1962).

features of a developed legal system. For Hart, "law without sanctions is perfectly conceivable."[4]

At the same time, elements of imperativism are not entirely absent from Professor Hart's conception of law. The ingredient of coercion underlying Austin's command theory, for example, forms very much a part of Hart's theoretical structure, although found there in greatly modified guise. Thus, Hart concedes the monopoly of coercive legal rules in what he regards as "primitive" as opposed to "developed" legal systems. Like Kelsen, however, he rejects Austin's concept of "habitual obedience" and its supporting idea that law is addressed by a sovereign to his subjects—finding fault by means of linguistic analysis with the ideas of command, address, and the notion of a continuous and uninterrupted sovereignty, all of which are either expressed or implicit in Austin's work.

Even in his examination of developed legal systems, which is the main focus of his study, Hart would grant considerable importance to the element of force. Here, however, he insists upon two fundamental qualifications. First, he would confine the significance of coercive legal rules or, as he sometimes calls them, "orders backed by threats," to specific areas, such as torts or criminal law, *i.e.*, to those spheres in which the conduct of the populace is subject to constant regulation. In Hart's reconstructed analysis, such coercive rules are characterized as "primary rules of obligation"; they "impose duties, . . . concern actions involving physical movement or change"[5] and make human conduct "non-optional or obligatory."[6]

Of utmost importance to Hart is the necessity to distinguish these primary rules of obligation from other rules of law, described as "power-conferring" rules, which fall into two distinct categories: private and public. In the private sphere, such rules confer power upon people to make contracts, to marry, to bequeath property, to buy and sell goods, and the like. In the public sphere, they are found principally in legal formulations empowering legislators to legislate and courts to adjudicate (and, incidentally, also to engage in law-making).

Reduced to their simplest terms, Hart's views concerning the legal rules he describes as power-conferring may be stated as follows: Where power-conferring rules are operative, it is not the function of law to *force* people to conduct themselves in certain ways; rather, in those areas, law *enables* people to do things and to create relations which, but for the existence of those legal rules, they could not otherwise do or create.

Hart's power-conferring rules, especially those in the public sphere,

4. HART 38.
5. *Id.* at 79.
6. *Id.* at 80.

also provide a springboard for his development of a scheme of "secondary rules of recognition, adjudication and change," with the rule of recognition, a concept not fundamentally distinguishable from Kelsen's *Grundnorm*, occupying a central place in his system.

Affecting the great discoverer's role so characteristic of legal philosophers in general, and of Austin and Kelsen in particular, Hart proclaims repeatedly that the "key to the science of jurisprudence"[7] is to be found in the union of these primary rules of obligation and secondary rules of recognition, adjudication and change. Not unlike Kelsen and his pure theory (nor for that matter, Austin himself), Hart nowhere suggests what lies beyond the doors to be unlocked by his key.

The second qualification Hart insists upon in his concession to the coercive character of primary rules of obligation in a developed legal system is his idea (based in part upon the theories of the Scandinavian realists[8]) that the element of force inherent in such rules represents only one of their sides, namely, their "external" aspect. Hart stresses that due recognition must also be given to the function served by rules of law in providing a standard which people follow voluntarily, without regard to coercion. This latter side of legal rules Hart characterizes as their "internal" aspect.

Aside from its role relating to primary rules of obligation, Hart's internal-external duality appears in a number of places in *The Concept of Law*, most notably in his analysis of judicial conduct. According to Hart, the significance of the coercion exerted upon judges to conduct themselves pursuant to certain rules is minimal, if not entirely nonexistent. He believes that judges do in fact abide by rules governing their judicial conduct primarily because of their internal aspect—*i.e.*, because those rules provide a standard of behavior which judges recognize as proper and which they follow voluntarily—rather than because they fear that violation of the rules will lead to their being punished.

The combined effect of Hart's theories concerning power-conferring rules and the internal aspect of rules is to minimize the importance of legal punishment, or sanctions, or (more precisely) to minimize their threatened invocation as the motive force in the operation of a developed legal system. For where power-conferring rules are concerned, the threat of punishment for their violation is in Hart's view a meaningless concept. Since Hart regards those rules as enabling people to do certain acts and to create certain relationships, failure to abide by such rules means simply that a person remains in the same position he was in before attempting to create a new relationship or to do a certain act. Not to have succeeded would, in Hart's view, be a far cry from having been punished. As for

7. *Id.* at 79.

8. ALF ROSS, ON LAW AND JUSTICE (1958).

primary rules of obligation, while their coercive character is not denied entirely by Hart (since their violation will clearly lead to legal punishment), it is nevertheless tempered by Hart's theory concerning their internal aspect. That theory holds, in effect, that, though many people in fact refrain from committing certain antisocial acts for fear of being punished, others abstain because the embodiment of a norm of conduct in a legal rule becomes, for that reason alone, a reason for honoring the norm.

Besides developing these ideas, Hart presents his views concerning many other important jurisprudential questions in *The Concept of Law*. In fact, despite the slender dimensions of the volume, few major areas of contemporary legal philosophy escape Hart's scrutiny. The very existence of international law; the claims of the natural-law school of jurisprudence and, in particular, the neo-natural-law ideas set forth by Professor Fuller in his 1958 exchange with Hart,[9] (developed in greater detail in Fuller's later book, *The Morality of Law*[10]); the insistence of some proponents of an extreme form of legal realism that judges follow their own unfettered discretion at all times, with a complete indifference to the content of all legal rules: these are only some of the targets of Professor Hart's critical commentary. These topics and the others in the book are closely interrelated, forming a cohesive whole. Ideally, an examination of some would require an examination of all. Since the scope of the present paper, however, does not permit detailed critical examination of all views expressed by Hart in *The Concept of Law*, emphasis here will be primarily upon Hart's position concerning power-conferring rules and the internal aspect of legal rules. These, in fact, represent the foundation of Professor Hart's whole theoretical structure. Only after he has attempted to break down traditional positivist positions by employing these concepts does Hart begin to construct his system of primary and secondary rules. If, as I believe, Hart's analysis here is faulty, the validity of other portions of his book would also be open to question.

PROFESSOR HART AND "POWER-CONFERRING" RULES

In treating the views of Austin and his followers on the one hand and those of Kelsen on the other, concerning the legal rules Hart designates as "power-conferring," Hart vacillates between viewing them as expressions of the same philosophical outlook—that force is a necessary ingredient of law—and treating them separately. Though Hart does not give this as his reason for doing so, his uneven treatment of their views may merely reflect the fact that, despite apparent differences, Kelsen's views on this

9. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

10. LON L. FULLER, THE MORALITY OF LAW (1964).

point and those of Austin and his followers are not fundamentally dissimilar.

Austin himself, whose legal theory was based on the proposition that the sovereign commanded his subjects under threat of punishment to conduct themselves in certain ways, made no distinction between the varieties of law through which this was done. Whether operating within the sphere of what Hart describes as primary rules of obligation or dealing with the procedures required to enter into contracts, to marry, to bequeath property, to conduct the business of a court system, or to enact or change laws—all these facets of a legal system were either expressly or impliedly viewed by Austin as expressions of the same phenomenon: the sovereign's command to his subjects to follow certain patterns of conduct under threat of being punished if they failed to do so.

Responding to Austin's critics, who asserted that these various types of activities should rightfully be differentiated, Austin's followers developed the idea of "nullity as a sanction." According to them, failure to abide by a legal rule in the area of contracts or wills, for example, though it does not ordinarily result in a judgment for damages or imprisonment, nevertheless leads to real punishment by the sovereign in the form of nullifying one's attempted acts carried out in contravention of those rules. This view, as will be seen, is heartily condemned by Hart.

Kelsen, on the other hand, distinguishes the rules Hart calls "power-conferring" (calling them "rules of competence") from those in the area of criminal law or torts. This does not mean, however, that Kelsen's position and the concept of nullity as a sanction are incompatible. For the effect of Kelsen's theory is to avoid a direct collision with the idea of nullity as a sanction by characterizing rules of competence (*i.e.*, Hart's power-conferring rules) along with the rules of criminal law and torts, as not true rules at all, but rather as mere "fragments" of rules. In conformity with Kelsen's general theory that the only true rules of law are those which prescribe the sanction to be administered by public officials upon the existence of certain conditions, Hart's "power-conferring" rules (or Kelsen's "rules of competence") merely represent, for Kelsen, the conditions or events upon the occurrence of which those officials are directed to apply the physical force of the state to assist one or more parties to a dispute.

Reconciliation of the concept of nullity as a sanction with Kelsen's position can be effected, however, if the word "nullity" is understood as meaning: "a condition of legal fact whose existence does *not* permit officials to apply the physical force of the state on behalf of one whose purported acts are deemed null and void under law."

To illustrate: The Statute of Frauds requires an agreement for the

sale of real property to be in writing. Buyer and Seller agree orally that within ten days Buyer will pay $10,000 and Seller will convey Blackacre. Ten days later, Buyer tenders payment but Seller refuses to convey. Buyer then sues for specific performance or, in the alternative, damages for Seller's breach. Because of a failure to conform to requirements of the applicable statute, the court refuses to grant Buyer any relief.

Under those circumstances, those who hold with the idea of nullity as a sanction would say that Buyer has been punished for having failed to perform his duty—which arose when he purported to contract for the purchase of Blackacre—to embody that agreement in writing. Kelsen, however, would say that a court of law has refused to apply the physical force of the state on behalf of Buyer because the conditions which would bring that force into play have not occurred.

Moreover, if Buyer, despite this judicial determination, or without having first applied to a court, should enter upon Seller's land with the intention of occupying it as if it were his own, and if Seller should apply to a court (either by means of a personal suit or through the intervention of a public prosecutor on the criminal side) the physical force of the state would be applied to eject and possibly imprison Buyer. To Kelsen, this would mean that conditions necessary for the application of force by public officials *against* Buyer had occurred. For proponents of the theory of nullity as a sanction, this would represent a consequence of the punishment meted out to Buyer for having failed to conform to the statute's requirements.

Two common ideas underly both theoretical approaches: (1) force or coercion is central to the idea of law, and (2) the aim of law is to bring about patterns of conduct which would probably not occur in the absence of law. This latter function of law, at least insofar as it is found within Kelsen's analysis, is ignored by Hart. Yet, despite that part of his theory which sees law as directed at officials rather than at the populace, Kelsen has made it clear that he regards the function of law in any society as aimed at bringing about "desired social conduct of men through the threat of a measure of coercion which is to be applied in the case of contrary conduct."[11]

To the extent that Hart does separate Kelsen and Austin on this question, he dismisses Kelsen's position out of hand as a "distortion." As for the position of Austin and his followers, however, Hart analyzes these so-called power-conferring rules at great length, rejecting their indiscriminate assimilation with all other rules of law. Above all, Hart dismisses as meaningless the concept of nullity as a sanction and undoubtedly had

11. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 18-19 (1946); see also DENNIS LLOYD, INTRODUCTION TO JURISPRUDENCE 324 (1959).

this in mind when, in his 1958 Harvard Law Review article, he referred to a "desperate extension of the word 'sanction.' "[12]

Despite the apparent lucidity of Professor Hart's writing, analysis of his treatment of these rules reveals that he either inadvertently or deliberately—but consistently—misdirects his attention. Throughout his entire discussion of this matter, Hart appears to have his eyes focused upon the wrong end of the problem. Thus, from the very beginning, where he describes power-conferring rules as providing

> individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law. . . .[13]

Hart focuses his attention upon those who in fact benefit from power-conferring rules rather than those who are injured by them, *i.e.*, those who conform to those rules and are thereby entitled to invoke the assistance of the sovereign in their disputes with third persons, rather than those who fail to conform to those rules. No great feat of logic is required to look upon this same phenomenon from an entirely different vantage point. Instead of viewing laws of this kind as creating powers in those who abide by them, it is equally plausible to regard them as creating duties on the part of all persons not to convey property, not to enter into marriage, not to contract in any way or form other than that prescribed by law.

Even beyond merely reversing the telescope through which these rules are viewed, one may ask a more fundamental question: Do so-called power-conferring rules really *confer* power, or is their function in fact to grant legal *recognition* to, or withold it from, pre-existing powers which reside in the populace independently of any legal system?

Consider, for example, the situation of A and B, heads of two primitive families living in adjacent caves. A agrees that in return for B's helping him dislodge a heavy rock he will assist B in removing a similar rock on the following day. B performs. A then refuses to fulfill his part of the bargain. B then demands five gourds as compensation. A refuses. From what we know of the human spirit, it is not inconceivable that B will now feel that he should take whatever steps are necessary to right the situation. He may decide to go into A's cave and forcibly take the five gourds from A's mate; he may decide to steal upon A while he is asleep and crush his skull with an axe; he may decide instead to wreak greater havoc upon A's entire family. If B should resort to any of these acts, it is clear that in

12. *Supra* note 1.
13. HART 27.

the absence of an organized legal system, he will not be punished,[14] (although he may be dealt with, in turn, by A's kin or acquaintances). Thus, upon A's refusal to carry out his promise, the availability of self-help to B still confers a measure of effectiveness upon the A-B agreement.

True, once an organized legal system has come into operation, B will have other means to effectuate his agreement with A. But the legal rules which tell B that he can be made whole upon A's refusal to perform, by means of a suit at law or relief in equity, for example, do not *make* that agreement effective; they merely substitute other ways of effectuating it. Admittedly, the existence of a legal order might be said to render such an agreement *more* effective than when only self-help was available to B; self-help is self-limiting, since B may one day find that he himself has become the victim of another's self-help or revenge. The fact remains, however, that a "power" to have A perform resided in B without regard to the existence of a legal system. Once that system arises, all it does is to grant or withhold recognition of B's power of redress, which is substantially different from conferring that power upon B.

Furthermore, the power-recognizing and power-denying functions of legal rules—as opposed to the power-conferring character Hart attributes to them—are not insisted upon without an awareness of the essential differences between legal and factual powers. Clearly, Hart, like Hohfield, Salmond and others, is talking about legal power, whereas the power of self-help, among others, is factual. At the same time, it must be borne in mind that one of the first functions of an organized legal system is to remove from all the availability of self-help as a means of righting wrongs. The goal of primitive law (*i.e.*, law in its "First" stage) was "to keep the peace, especially to prevent the blood-feud by setting up a tariff of compositions for the redress of injuries."[15] Only at the expense of

14. Hart himself recognizes that "there could be no crimes or offences and so no murders or thefts if there were no criminal laws of the mandatory kind which do resemble orders backed by threats." HART 32.

15. EDWIN J. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 513-514 (1953) (characterizing Roscoe Pound's analysis of a legal system's developmental stages); see also Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195 (1914):

At pp. 198-199: "In the beginnings of law the idea is simply to keep the peace. In primitive law justice, in the sense of the end of the legal system, was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. The law existed as a body of rules by which controversies were adjusted peaceably. At first therefore, it attempted nothing more affirmatively than to furnish the injured person a substitute for revenge."

At p. 199: "Along with religion and morality, [law] is a regulative agency by which men are restrained and the social interest in general security is protected. *And it retains this character of a regulative agency and of a means of which the end is a peaceable ordering, although other ends become manifest as it develops.*" [Emphasis supplied.]

And at p. 203: "[Primitive law] . . . is made up of regulations as to self-help . . .

forfeiting one form of a power to right wrongs (albeit an imperfect and often an ineffectual one) are other forms of power recognized.

That legal rights or powers may pre-exist their recognition by the sovereign is not a novel idea. The views of Gierke in regard to corporate personality, for example, represent an example of this approach. Thus, Gierke's theories concerning legal associations have been characterized, in part, as follows:

> . . . The life of an association does not depend upon state recognition. The legal statute which bestows legal personality merely has declaratory significance, in so far as it declares the general conditions of juristic personality to be applicable to a particular association. But it does not create that association, either socially or legally.[16]

> This capacity to will and act [of a collection of individuals] is the basis of legal personality. Legal recognition follows upon it, but does not create it.[17]

Thus, it is evident that the vice in Hart's formulation concerning "power-conferring" rules lies in the word "confer." For if the analysis is correct, legal systems do not confer rights; they merely recognize some and refuse to recognize other pre-existing rights or powers. This is true of all types of state-created legal sanctions—punishment or damages, as well as nullity. By requiring that those rights may be exercised only pursuant to certain procedures and forms (*e.g.*, statutes of frauds requirements, licenses to marry) legal rules create disabilities. They announce that recognition will be withheld from certain relationships and acts unless they are created or carried out in accordance with legal prescriptions or, if you will, the sovereign's command. In Kelsen's terms, this means that the sovereign will not apply force to aid one who asserts rights that are not established in accord with legal requirements.

Hart has also made much of the fact or, more accurately, his opinion, that people actually regard laws in these spheres as creating facilities for doing things. He states, for example:

> Such rules [those "conferring" private powers] are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valid for different reasons. What other tests for difference in character could there be?[18]

One may well question the accuracy of Hart's appraisal of peoples'

[and] a tariff of compositions which the injured person or kindred must accept for the wrongs specified, payment whereof, also, may be compelled . . ."

16. W. G. FRIEDMANN, LEGAL THEORY 187 (4th ed. 1960).

17. *Ibid.*

18. HART 40.

attitudes in this area. Much evidence exists that the legal formalities required for entering into a valid and binding contract, to enter into a marriage relationship, or to will property are often regarded by people as impediments to carrying out their wishes, rather than as vehicles for doing so. The possibility of the state's witholding legal recognition from acts which violate these requirements strikes people as a threatened sanction. Their conduct is in fact influenced by what they regard as possible punishment by the state through nullification of their acts. Indeed, this is the very essence of Kelsen's statement that the aim of law is to bring about "desired social conduct of men through the threat of a measure of coercion which is to be applied in the case of contrary conduct."[19] Unlike the areas of tort and criminal law, where prohibitions against violating certain rules are continuous, the duty to obey certain norms in the areas touched by Hart's power-conferring rules is conditional, *i.e.*, it arises only at the time a person wishes to bring about a certain relationship or do a particular act. At the moment that wish arises, however, he becomes *obliged* to conform to law under threat of being punished.[20] In other words, force will be applied against him if he should conduct himself as if he had created a valid legal relationship without having in fact done so.

Hart of course is not unmindful of the fact that some positivists regard "nullity" as a sanction, and that they assimilate power-conferring rules with coercive rules. Among his objections to their position is his belief that "in many cases, nullity may not be an 'evil' to the person who has failed to satisfy some condition required for legal validity."[21] As an example of the foregoing, Hart writes:

> [A] party who finds that the contract on which he is sued is not binding on him, because he was underage or did not sign the

19. See text at note 11, *supra.*

20. Hart has taken great pains to emphasize a distinction between being "obliged to" and "having an obligation to" do something. HART 79-84. Essentially, his analysis shows that, unlike the meaning of the phrase "to have an obligation to" do a thing, which involves no particular belief on the part of the person having the obligation, the phrase "to be obliged" to do something "is often a statement about the beliefs and motives with which an action is done." HART 80. This distinction provides a further basis for Hart's subsequent development of the internal-external aspects of legal rules. The distinction, while largely unobjectionable, is of limited usefulness if the *conditional* nature of the duty to comply with formal requirements is kept in mind. When that is done, it is evident that for most people long periods of time pass during which they are neither obligated nor obliged to conduct themselves in any particular manner—at least insofar as obedience to formal requirements for legal instruments and the like are concerned. Only when they wish to avail themselves of a certain legal instrument or to do a particular act does the question of following formal requirements ever arise. At that time, however, they can accurately be described as being "obliged to," "forced to," or "under a duty to," behave themselves in the manner prescribed by the legal rules that establish those formalities as necessary conditions for the legal validity of various instruments, acts and relationships.

21. HART 33.

> memorandum in writing required for certain contracts, might not recognize here a "threatened evil" or "sanction."[22]

Here, as in some other examples he gives,[23] Hart looks for the possible effects of a sanction on a person to whom the threat of sanction is not addressed by the legal rule in question. The requirement that both parties to a contract must have reached majority is not aimed at regulating the contractual activities of minors. Instead, its purpose is to regulate the conduct of those who purport to contract with minors. In effect, they are told by the sovereign: "If you want to enter into a valid and binding contract with another, which we will help you enforce, you have a duty, among others, to ascertain that the person with whom you contract has reached a certain age. If you breach that duty, you will be punished by our refusing to recognize any rights you may assert under that contract upon the occurrence of certain events (*e.g.*, the disaffirmance of the contract by the minor before he reaches majority)."

To say or imply, as Hart does, that a minor might not feel that such a rule threatened him is to knock down a straw man. Rules of this kind are never intended to influence a minor's conduct. Rather, the social evil sought to be curbed by the rule is the practice of mature and knowledgeable adults taking advantage of their superior position by binding immature and inexperienced young persons to unwise contractual obligations.

Similarly, to say, as Hart does, that the person whose failure to sign a written memorandum required by the Statute of Frauds, which results in his not being bound by a contract, would not be chagrined at the prospect, again mistakes the person whose conduct is sought to be regulated by the rule. It is not the nonsigner, but the person who purports to contract with him, who is addressed by the rule. In effect, he is told: "If you want to enter into a valid and binding contract with another for the rental of real property beyond a one-year period, you have a duty to see to it that the other person signs a memorandum in writing to this effect. If you breach that duty, you will be punished by our applying the sanction of nullification; we shall refuse to recognize or enforce any rights you may claim under such a contract."

In the public sphere, two other types of legal rules are, in Hart's opinion, also fundamentally different from orders backed by threats: (1) those regulating the operation of courts of law;[24] (2) statutes conferring legislative powers on a subordinate legislative body.[25]

According to Hart, to judges and legislators rules of this sort represent

22. *Ibid.*
23. See text following note 27, *infra*.
24. HART 29.
25. *Id.* at 30.

formulations of legal "standards," which are followed because of their internal aspect; they are not orders requiring obedience under threat of punishment. Rules setting out the jurisdiction of courts, for example, are not, in Hart's opinion, designed to deter "judges from improprieties but to define the conditions and limits under which the court's decisions shall be valid."[26] As for those governing the conduct of subordinate legislative bodies, Hart states:

> [T]here is a radical difference between rules conferring and defining the manner of exercise of legislative powers and the rule of criminal law, which at least resemble orders backed by threats.
>
> In some cases it would be grotesque to assimilate these two broad types of rule. If a measure before a legislative body obtains the required majority of votes and is thus duly passed, the voters in favour of the measure have not "obeyed" the law requiring a majority decision nor have those who voted against it either obeyed or disobeyed it; the same is of course true if the measure fails to obtain the required majority and so no law is passed. The radical difference in function between such rules as these prevents the use here of terminology appropriate to conduct in its relation to rules of criminal law.[27]

Assimilation of rules of this kind, however, to general orders backed by threats does not present the conceptual difficulties Professor Hart attributes to it—especially if one keeps in mind that the thrust of legal rules may differ from the language in which they are stated. For example, even if one were to grant Hart's point that such rules merely guide courts and legislators and are followed by them voluntarily because of their internal aspect, this does not mean that those rules have the same character for all other persons they affect. As in other areas of the law, rules here have a dual character. Those defining the jurisdiction of courts are phrased in terms of what a court can (may) or cannot (may not) do. Still, they are at least partly directed at potential litigants, *i.e.*, at all those who might at one time or another ask a court to recognize their claims or deny the claims of their adversaries. In effect, these potential litigants are informed by rules which limit the jurisdiction of courts: "If you have a claim you want a court to recognize, you have a duty to bring it before a proper court. If you breach this duty, you will be punished in one of two ways: (1) The court whose assistance you seek will recognize that to grant you relief will violate this rule, and refuse to do so; (2) If that court should mistakenly grant you relief, and if your opponent takes the necessary steps, a second, higher court

26. *Id.* at 29.
27. *Id.* at 31.

will nullify the first court's action. The rule which states that you will be punished by a denial of relief if you breach your duty to bring your claim before the proper court has to be qualified, however, by the existence in many cases of a corresponding rule addressed to your opponent or potential opponents. This corresponding rule tells them: 'Where your opponent has brought his action in the wrong court, he will be punished by the witholding of relief, *provided* that you carry out your duty to remind the court that it is acting in excess of its jurisdiction, if the court does not see this itself. If you breach this duty, which arises only when the action has been brought in the wrong court, you will be punished by our waiving (at times) the rules on jurisdiction.' "

A similar analysis of the rules conferring legislative powers upon subordinate legislative bodies would yield comparable results. Though such rules seem, in form at least, to be addressed only to the legislators themselves, in effect they are also directed toward all people who have an interest in the adoption of particular laws by that legislative body. They are the ones who will be injured by that body's ineffectual adoption of a statute or ordinance for failure to follow formal requirements.

Nor do such rules lack the threat of force insofar as judges and legislators themselves are concerned. Although the law does not make such conduct criminal, the sanctions available against the judge who purports to act in excess of his judicial powers are real, formidable, and—if we recall that a norm of conduct may differ from that derived from a literal reading of the rule involved—evident. For, in the case of the judge himself, the rule defining his jurisdiction can be read as implying the application of sanctions only after *repeated* or *serious* violations. As understood by the judge, the rule could be stated as follows: "You have a duty to entertain only those actions and proceedings we have entrusted to you. We recognize that at times it will be difficult for you to determine whether a particular subject falls within your area of competence. If you err sometimes in cases of that sort you will not be punished. However, if you err consistently, or in cases where reasonable men could not differ, you will be considered to have breached your duty and you will be punished in one of various ways, including your removal from office."

In this connection, Graham Hughes has pointed out that even in the absence of "clearly defined" physical sanctions, judges' compliance with rules may be motivated largely by self-interest,[28] *i.e.*, by a fear of dismissal from office; and that it is "quite possible to see official behaviour as being motivated in no different way from the behaviour of the ordinary citizen."[29]

Again, a similar analysis would yield comparable results in the case

28. Hughes, *supra* note 3.
29. *Ibid.*

of legislators who repeatedly or drastically violated rules governing their legislative competence. Imagine the consternation and anger of the American electorate, for example, if the statutes establishing the federal income tax had been adopted by less than a majority of each federal legislative body—and if those legislators and other public officials had attempted to conduct themselves as if those measures had in fact become law. The sanctions that would have flowed from such breach of a rule would have ranged all the way from refusal to re-elect the legislators, to recall movements, to impeachment proceedings, and, possibly, to the ultimate sanction of violent revolution.

COMMENTS

If, as has been suggested, Hart's analysis of "power-conferring" rules has gone wrong, how can this be explained? Several possibilities suggest themselves. One is that Hart's main goal in *The Concept of Law*, whether he was aware of it or not, was to present his views on the existence of international law.[30] In this regard, to those who say that international law does not exist because neither sovereign nor sanction operate within its sphere, Hart in effect replies: "I have just demonstrated how law may exist in a municipal system without either of these features; *ergo*, international law also exists." In other words, his analysis of municipal law may have been shaped, consciously or unconsciously, by his desire to arrive at the aforementioned conclusions concerning international law.

A second, more fundamental explanation is that despite Hart's protestations to the contrary, his position as a legal positivist is not as pure as he claims it to be. To be sure, Hart asserts his credentials as a legal positivist.[31] He declares repeatedly that his major disagreement with Austin and Kelsen is in their insistence upon command or force as a necessary ingredient of law. He also believes that there is no contradiction in separating "is" from "ought" and rejecting command theories of law.[32] Yet, a close examination of Hart's statements reveals that he often lapses into natural-law patterns of thinking. Indeed, the key to Hart's analysis of "power-conferring" rules can be found in the following statement concerning those rules in the private sphere:

> The confusion inherent in thinking of nullity as similar to the threatened evil or sanctions of the criminal law may be brought out in another form. In the case of the rules of the criminal law, it is logically possible and might be desirable that there should be such rules even though no punishment or other evil were threatened. It may of course be argued that in that case they

30. HART 208-231.

31. Hart, *supra* note 1.

32. *Ibid.*

> would not be legal rules; nonetheless, we can distinguish clearly the rule prohibiting certain behaviour from the provision for penalties to be exacted if the rule is broken, *and suppose the first to exist without the latter.* We can, in a sense, subtract the sanction *and still leave an intelligible standard of behaviour which it was designed to maintain.* But we cannot logically make such a distinction between the rule requiring compliance with certain conditions, e.g. attestation for a valid will, and the so-called sanction of "nullity." In this case, if failure to comply with this essential condition did not entail nullity, *the rule itself could not be intelligibly said to exist without sanctions even as a non-legal rule.*[33] [Emphasis supplied.]

Stripped of its rhetoric, all Hart is saying here is that a rule of criminal law, such as one prohibiting assault, strikes him as desirable (and no doubt compatible with his views concerning the "minimum content" of law expressed elsewhere in the book[34]), whereas one requiring attestation for a valid will does not—and, that even in the absence of law, the former rule would be desirable and reasonable. Is this not the essence of the natural-law outlook? And is this not also the basis of Hart's entire analysis of "power-conferring" rules, the internal aspect of rules, and, as a result, his "union" of primary and secondary rules in a developed legal system?

Hart's error of course lies in ignoring the *purpose* of a rule requiring two witnesses to a will. If that purpose is kept in mind, the rule becomes just as intelligible as one which provides for sanctions to be administered by officials if they find that a defendant has assaulted his victim. That purpose is to satisfy the social interest (to employ Pound's phrase) in giving effect to only those wills which have *in fact* been executed by the person whose will it purports to be. Rightly or not, society has concluded as a result of its experience that a designated number of witnesses to a will is necessary to avoid fraudulent claims that a will has been duly made by the testator, when in fact it was not.

Hart commits the same error in another context. Referring to the requirements of the Statute of Frauds, he writes:

> In the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage. But how could we consider in this light such *desirable social activities* as men making each other promises which do not satisfy legal requirements as to form?[35] [Emphasis supplied.]

33. HART 34.
34. *Id.* at 189-195.
35. *Id.* at 34.

But in suggesting that contractual arrangements, as compared with criminal conduct, are "desirable social activities" even if they do not satisfy formal requirements, Hart again completely ignores the social reasons for rules requiring formalities as conditions to validity. The Statute of Frauds became law in response to injustices arising when persons, previously found by courts of law to have obligated themselves contractually, turned out later not to have done so in fact. It was to prevent such evils that the statute was enacted. The only fraud that might possibly be related to the statute is that perpetrated by one who claims that another had contracted with him orally to perform an act, when in fact he had not. A more appropriate name for the statute would probably have been a "Statute to Prevent Frauds." The suppression of such *undesirable* practices has always been the main goal of the statute. To achieve its purposes, it became necessary to impose the requirement of a writing even upon those who had contracted orally in fact. In the light of the policy of the Statute of Frauds, however, such contractual arrangements (*i.e.*, oral contracts in the specified areas) were no longer as socially desirable as they had been before the statute's enactment, because of the problems of proof they would present to the courts in the event of a dispute. The social interest in encouraging voluntary private contractual arrangements was outweighed by another social interest in preventing frauds upon individuals or the courts. To this extent, contractual arrangements which did not satisfy the formal requirement that they be in writing became less desirable than they had been prior to the time a writing requirement had been established. That they were not rendered totally undesirable can be seen from the numerous exceptions that have been engrafted upon the Statute of Frauds by subsequent legislation and judicial decisions.

Analyzed in this manner, legal requirements as to form in the private sphere of Hart's "power-conferring" rules are seen as socially necessary. Also, they may be enforced by punishing those who disobey them by the nullification of their acts or, in Kelsen's terms, a refusal to apply the physical force of the state to assist them. The goals of order and predictability in judicial and legislative conduct are also highly cherished social interests. Failure of judges, legislators, or (as discussed earlier) private individuals to comply with legal rules adopted to serve those interests is punished with equal, if not greater, severity.

Finally, Hart's views on the internal-external duality of legal rules also require appraisal. For even if the analysis to this point has demonstrated that, contrary to Hart's position, "power-conferring" rules in the public as well as the private sphere are not essentially different from rules prohibiting crimes, the effect of their internal aspect would still be to weaken imperative theories of law. Though the threat of punishment for their violation accompanied all legal rules, this would be of

limited significance if, in fact, those rules were obeyed—at some times and by some people—without regard to that threat.

Here, as in his discussion of "power-conferring" rules, Hart's analysis is insightful, probing, and a delight to read. Yet, in describing the dual effect of legal rules, Hart ignores the existence of a more fundamental duality: that of the human spirit. One cannot overlook the fact that man—individually and collectively—is at the same time a rational being and a member of the animal kingdom. It is quite possible that whenever the internal aspect of rules are in fact operative, they work on man in his capacity of a rational being. Still, the same person who, *on an intellectual level*, abides by a rule of law without regard to coercion (because, as Hart says, the embodiment of a norm of conduct in a legal rule is for him a reason for honoring that norm) may still need the rule's external aspect, *i.e.*, the threat of being punished if he violates the rule. This is likely to occur when he is confronted with a choice between violating a rule in furtherance of his immediate self-interest or abiding by it and promoting a longer-range interest but disserving one that is clear and present. In Hart's analysis, however, (although not in express terms), the clear implication is that some people are susceptible only to the external aspect of legal rules while others are influenced by their internal aspect. That both aspects may play a significant role in the conduct of the same individual is never considered by Hart.

In addition, Hart ignores entirely the effect that the coercive or external aspect of legal rules has upon the development of peoples' susceptibility to their internal aspect. While many individuals have managed to escape to some extent the demands of self-interest, this has occurred in large part as a result of the *educative* function of law—both within the lifetime of the individual and that of the human race. To the extent that the internal aspect of legal rules influences social behavior, this has been brought about in great measure because of prior experience with, and obedience to, the external or purely coercive aspect of those rules. The heart of the law is still coercion. Not until observance of Kant's Categorical Imperative has become a way of life, rather than a philosophical edict, will it be otherwise.