A BRIEF REJOINDER TO PROFESSOR MULLOCK

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MULLOCK on Summers on Hart is bad enough, but Summers on Mullock on Summers on Hart is worse. Fortunately or unfortunately, there is no rule (primary or secondary) entitling either of us to vouch Professor Hart into the proceedings.[1] With all due respect to Professor Mullock (and to me, of course), I fear the two of us may be compounding erroneous interpretations of Professor Hart's work. Sans Hart, I shall exercise admirable restraint and not argue over the meaning of the scripture. Regrettably, Professor Mullock and I are both defenders of the faith; I had hoped to draw the fire of a non-Christian.

I

UNION OF RULES

In *The Concept of Law*,[2] Professor Hart, among other things, analyzes concepts.[3] In analyzing concepts, Professor Hart dis-

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[1] *Cf.* UNIFORM COMMERCIAL CODE § 2-607 (5).

[2] The title of Professor Hart's book may be unfortunate for two reasons. To speak of *the* concept of law begs the question at the outset. On analysis, it may turn out that there is no single unifying concept, but rather many different concepts. Also, much of the book is concerned with the analysis of concepts much more specific than "the concept of law." Perhaps, however, we should not expect too much from a title.

[3] Professor Hart often substitutes "elucidate" for "analyze." What is conceptual analysis? This question can be divided into at least three questions. First, what are the aims of conceptual analysis? These are many and varied, but commonly it is said that clarification is the prime objective. Occasionally it is also said that the aim is to "give us information in depth about phenomena, knowledge of their inner constitution." Second, what are the techniques of conceptual analysis? These, too, are many and varied. Sometimes it is said that the "essence" of conceptual analysis is description of the actual uses of words and formulation of principles or criteria actually governing their use. This is obviously an oversimplification. For a description of some of the methodological ideas, techniques, and distinctions involved, see Summers, *Professor H. L. A. Hart's Concept of Law*, 1963 DUKE L.J. 629, 661. Third, how does conceptual analysis differ from other kinds of analysis? Conceptual analysis is sometimes analogized to scientific analysis, *e.g.*, the kind of analysis done by chemists. As is often the case with comparisons, the differences are more instructive than the similarities. Chemists

tinguishes between legal and nonlegal concepts and between specific legal concepts, *e.g.*, a legal obligation, and general legal concepts, *e.g.*, the legal system. He utilizes various "tools" in his analysis, one of which is his "combination of primary and secondary rules."[4] At one point, he says:

> If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.
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> Not only are the specifically legal concepts with which the lawyer is professionally concerned, such as those of obligation and rights, validity and source of law, legislation and jurisdiction, and sanction, best elucidated in terms of this combination of elements. The concepts (which bestride both law and political theory) of the state, of authority, and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated.[5]

In the article of mine to which Professor Mullock addresses himself, I said:

> But is it a *combination* of primary and secondary rules that enables Professor Hart to clarify such basic and important concepts as legal validity and obligation? He *uses* only the notion of a "primary rule" to elucidate the concept of obligation. He *uses* only the notion of a "rule of recognition" to elucidate the concept of legal validity. In fact, he does not use a *combination* of primary and secondary rules to elucidate any specific concepts.[6]

In view of Professor Mullock's remarks, do I continue to stand by what I said? Yes, but with additional critical comment.

Whether or not Professor Hart uses a combination of primary and secondary rules to analyze specific legal concepts depends partly upon what he means by "combination," partly upon what I mean by "uses," and partly upon other factors. Professor Mullock con-

analyze substances, and substances exist in the physical world. All things which can be "analyzed" do not exist in this way. Concepts do not. Furthermore, although the chemist, by separating substances into their component elements, adds to our knowledge of the world, it is often contended that conceptual analysis, while it may "sharpen our awareness of phenomena," cannot give us new facts. See generally, Lazerowitz, *Moore and Philosophical Analysis*, 33 PHILOSOPHY 193, 198 (1958).

[4] In Professor Hart's book, this combination of rules has a dual status: it is both a datum to be analyzed and a tool of analysis.

[5] HART, THE CONCEPT OF LAW 95 (1961) [hereinafter cited as HART].

[6] Summers, *supra* note 3, at 639.

cedes that when he analyzes the concept of legal validity, Professor Hart uses only the notion of a secondary rule of recognition.[7] When he analyzes the concept of *social* obligation,[8] Professor Hart uses the notion of a primary rule of obligation without invoking secondary rules. However, when he analyzes the concept of *legal* obligation, does Professor Hart use a combination of primary and secondary rules? A case can be made each way. First, it might be said, with Professor Mullock, that an obligation imposed by a social rule is not a legal obligation unless the rule is a legal rule, *i.e.*, a valid rule of the legal system. Thus, to analyze "legal obligation," it is necessary to invoke both primary rules of obligation and secondary rules of recognition specifying criteria of validity. Second, and alternatively, it might be said that an analysis of legal obligation is really an analysis of two distinct concepts, obligation and legal validity, and that in analyzing the former, Professor Hart uses primary rules of obligation but not secondary rules, and in analyzing the latter, he uses secondary rules of recognition but not primary rules.

But whether two separate concepts or only one basic concept is being analyzed is less important than the correctness of Professor Hart's overall analysis of the concepts of obligation and validity. In addition to the criticisms I made in my initial article, I would now make three further points (tentatively, and without attempting to develop them in detail). First, in analyzing the concept of obligation, Professor Hart assumes that primary rules imposing obligations can exist in the absence of secondary rules specifying criteria for the identification of valid primary rules. But is this not a *logical* impossibility?[9] When we say "X has an obligation," me mean *both* that there is a primary rule imposing a duty on X *and* that this rule is recognized as valid.[10] To recognize a rule as valid is implicitly to invoke criteria of validity, criteria which, if embodied in rules at all, must, in Professor Hart's scheme, be embodied in secondary rules of recognition. Thus, unless we say merely that a regime of primary rules of obligation with criteria of validity *unembodied* in rules

[7] Mullock, *Some Comments on Professor Hart's Legal System—A Reply to Professor Summers*, 1965 DUKE L.J. 62, 64.

[8] HART 79-88.

[9] I am indebted to Professor Donald Davidson of the Stanford University faculty for stimulating me to think about this question, but I assume sole responsibility for the tentative answer I give here.

[10] This certainly seems true if we are speaking of legal obligation; with moral rules, however, it is difficult to set up a heirarchy of primary and secondary rules without artificiality.

can exist, we must conclude that a regime of primary rules of obligation without accompanying secondary rules of recognition is a logical impossibility.

Second, Professor Hart's failure to perceive the logical impossibility of his regime of primary rules may explain his apparent failure to understand Hans Kelsen's characterization of the rule of recognition as a "postulated ultimate rule." Professor Hart says Kelsen's characterization "obscures . . . the point . . . that the question what the criteria of legal validity in any legal system are is a question of fact."[11] Really there are two questions here, and Kelsen addresses himself to one and Professor Hart to the other. The first question is: What is logically presupposed in talk about legal rules? To this Kelsen would say, a "basic norm" (a rule of recognition). A second and different question is this: What is the rule of recognition in a given legal system? We may, with reservations,[12] agree with Professor Hart that this is an "empirical, though complex, question of fact."[13]

Third, even if it be granted that Professor Hart's regime of primary rules is a logical possibility, the question remains whether this regime is to be called law. Professor Hart is not consistent. At one point, he speaks of this regime as "pre-legal";[14] at another place, he acknowledges the possibility of "rudimentary law."[15] My preference is the latter characterization, but the propriety of calling a regime a regime of law is, of course, less important than an awareness of the actual similarities and differences between the ordinary cases in which we say there is law and borderline cases in which we might say there is law.

II

REDUCTIONISM

Reductionism is but one of many sources of error in legal philosophy.[16] But what is reductionism? Professor Mullock says I have

[11] HART 245.

[12] I am not prepared to state these reservations here. For useful comment, see Cameron, *Observations on the Concept of Law*, 1963 JURIDICAL REV. 101, 109; Hughes, Book Review, 9 NATURAL L.F. 164, 168 (1964); Singer, *Hart's Concept of Law*, 60 PHILOSOPHY 197, 212 (1963).

[13] HART 245.

[14] HART 91.

[15] HART 84.

[16] A list of other sources of error might include the influence of the criminal law model, the desire for order and system, insufficient clarity of aim, the assumption that

called three different things "reductionism," none of which should be so characterized. First, he says that "the ability to see 'the one in the many' should not be dismissed as reductionism."[17] I was not, however, criticizing Professor Hart's ability to see the one in the many. I was, to use Professor Hart's own words, criticizing his "failure to resist the temptation to oversimplify the heterogenous and complex phenomena of law," a temptation which he himself calls "reductionist."[18]

Second, Professor Mullock says that the activity of *classifying* phenomena should not be dismissed as reductionism. Thus he objects to my two questions: "Can rules be reduced to two classes?"[19] and "Can secondary rules be reduced to three types?"[20] Of course, not all classification is reductionist, but the very examples Professor Hart himself uses to illustrate reductionism are, in Professor Mullock's words, "about classification." Thus, Professor Hart says:

> This oversimplifying "reductionist" drive, so often found to be a snare in many other branches of philosophy, is evident, for example, in Kelsen's insistence that really the "genuine norms" are those rules ("primary norms") which direct officials of the system to apply sanctions under certain conditions, and that the essence of a legal system is best revealed if we restate all legal rules in the form of conditional directions to officials to apply sanctions.[21]

Thus, Kelsen would classify all legal rules into a single category. Professor Hart, or so I thought,[22] would put them into two categories, which for me, still does not do justice to the "heterogenous and complex phenomena of law."

Third, Professor Mullock says that mere *emphasis* upon one feature of what is to be analyzed should not be dismissed as reductionism. Thus, for him, Professor Hart's emphasis upon rules in the analysis of the concepts of court and legislature is not reductionism. Of course, to emphasize is not necessarily to distort, but

what *is* can be understood without seeing *how* it comes to be, the failure to get down to cases, and the "school" scheme of classification. I expect to prepare a paper on this subject during the coming year.

[17] Mullock, *supra* note 7, at 67.

[18] Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 959 (1957).

[19] Summers, *supra* note 3, at 641.

[20] *Id.* at 642.

[21] Hart, *supra* note 18, at 959. See also HART 33.

[22] I now think that I was wrong; Professor Hart should probably be interpreted to allow for more than two basic types of legal rules. See especially HART 32.

when emphasis results in the neglect of significant aspects of what is being analyzed, there is indeed typical reductionist distortion. Professor Mullock does not address himself to the reasons I gave in my article for believing that an analysis of the concepts of court and legislature in terms of rules may distort.[23]

So much for the concept of reductionism. It is, I think, useful to distinguish two varieties of reductionism. What is analyzed may be reduced *down to* its lowest denominator, *e.g.*, the concept of a legal system may be reduced to its bare bones, primary and secondary rules. On the other hand, what is analyzed may be reduced *to another thing, e.g.*, laws may be reduced to something else—rules? In my initial article, I charged Professor Hart with both brands of reductionism, but I obscured the distinction between the two. Professor Mullock's remarks do not incline me to drop these charges.[24]

III

Part IV of Professor Mullock's paper is largely a frolic of his own. While this does not, of course, make Part IV of his paper unimportant, I nevertheless leave it entirely to him with this query: Can mathematical models help us? Indeed, may they not positively mislead us?[25]

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[23] Perhaps one reason Professor Hart overstresses rules is that he is influenced by the desire to show that the legal realists were too extreme. Thus, for example, by analyzing the concept of a court in terms of rules "constituting" it, he reminds the realists that it is not enough to say that the law is what the courts say it is, for we must look to the law first before we can even identify a court.

[24] What I said in my article was intended only to be suggestive; I deliberately refrained from arguing my case in detail.

[25] I here relegate the following comments (quibbles?) to footnote status.

(1)Professor Mullock says: "Professor Summers asserts that in elucidating the concept of validity, Professor Hart uses the notion of a rule of recognition rather than a union of rules. But what else could he use, and what more is necessary?" Mullock, *supra* note 7, at 64. I did not intend to suggest that he could or ought to use more; I was purportedly stating a fact.

(2) I asked, "Can laws be reduced to rules?" Summers, *supra* note 3, at 640. Professor Mullock says: "I have difficulty in understanding what Professor Summers is getting at, for in a footnote he adds that he does not mean to imply that Professor Hart says that laws can be reduced to rules." Mullock, *supra* note 7, at 68. Again, I meant only that Professor Hart does not, in so many words, say that laws can be reduced to rules.

(3) Professor Mullock says: "Therefore, if Professor Summers wants Professor Hart to specify criteria for the existence of a legal system, he is asking Professor Hart to do something other than analytical jurisprudence, for such criteria, as has been indicated, are not to be found within the concept 'a legal system.'" Mullock, *supra* note 7, at 69-70. But Professor Hart himself undertakes to lay down necessary and sufficient conditions for the existence of a legal system, and it was to this effort that my remarks were addressed.