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THE CONCEPT OF LAW REVISITED

*Leslie Green**

THE CONCEPT OF LAW. Second Edition. By *H.L.A. Hart*. With a Postscript edited by *Penelope A. Bulloch* and *Joseph Raz*. Oxford: Clarendon Press. 1994. Pp. xii, 315. \$26.

Law is a social construction. It is a historically contingent feature of certain societies, one whose emergence is signaled by the rise of a systematic form of social control and elite domination. In one way it supersedes custom, in another it rests on it, for law is a system of primary social rules that direct and appraise behavior, together with secondary social rules that identify, change, and enforce the primary rules. Law may be beneficial, but only in some contexts and always at a price, at the risk of grave injustice; our appropriate attitude to it is therefore one of caution rather than celebration. Law pretends, also, to an objectivity that it does not have, for whatever judges may say, they in fact wield serious political power to create law. Not only is law therefore political, but so is legal theory — there can be no pure theory of law; concepts drawn from the law itself are inadequate to understand its nature. Legal theory is thus neither the sole preserve, nor even the natural habitat, of lawyers or law professors: it is just one part of a general social and political theory. We need such a theory, not to help decide cases or defend clients, but to understand ourselves, our culture, and our institutions, and to promote serious moral assessment of those institutions, an assessment that must always take into account the conflicting realities of life.

Those are the most important theses of the late H.L.A. Hart's *The Concept of Law*, published originally in 1961. Like some other great works of philosophy, however, Hart's book is known as much by rumor as by reading, so it will be unsurprising if, to some, that does not sound like Hart *at all*. For what circulates as his views — particularly, I am embarrassed to say, in law schools — is often quite different. Isn't Hart the dreary positivist who holds that law is a matter of rules that rest on a happy social consensus? Doesn't he think that law is objective, a matter of fact? Doesn't Hart celebrate the rule of law and take its rise as an achievement, a mark of pro-

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gress from “primitive” to modern society? Doesn’t Hart think that liberty and justice are possible only through the certainty that clear law provides? And isn’t his whole theoretical perspective straight-jacketed by a disproved, or at least outmoded, distinction between fact and value? Isn’t Hart concerned more with semantics than politics?

Between those conflicting readings of — maybe I should say “attitudes toward” — Hart’s book, there also lies a realm of consensus about the way *The Concept of Law* changed the direction of Anglo-American legal theory. For one thing, it introduced and clarified a set of questions that came to dominate the literature: Is law always coercive? What are legal rules? Do judges have discretion? Is there a necessary connection between law and morality? Hart also coined the idiom in which we debate the answers to such questions: “the practice theory of rules,” “the internal and the external point of view,” “primary and secondary rules,” “the rule of recognition,” “core and penumbra,” “content-independent reasons,” “social and critical morality.” These terms and distinctions are now part of cultural literacy for legal theorists writing in English.

How then can there be such a wide divergence in views about Hart’s theory, such confusion about his central claims? It is impossible to put it down to style. Hart is a clear and honest writer: every technical term is purchased in the coin of necessity; the occasional obscurity of language is never a cover for shallowness of thought; humor and irony he uses to lighten, not conceal. In part, it may just be that the *Zeitgeist* has moved on.

The Concept of Law is a book of its time. The book’s language, examples, and method rest in England and, more specifically, Oxford of the fifties.¹ Here I want to try to bridge the gap not only, as I have done in the opening paragraph, by connecting Hart’s concerns with some more recent ones, but also by reexamining the 1961 work in light of some themes in its newly published Postscript.²

The second edition of *The Concept of Law* consists of the original text together with a reply to critics that Hart left unfinished at the time of his death in 1992. The editors, Penelope Bulloch and Joseph Raz, have done an invaluable job of preparing this Post-

1. Contrary to what often is said, however, the book is not an exercise in linguistic philosophy — though Hart was influenced by linguistic philosophy and, in his book with TONY HONORE, *CAUSATION IN THE LAW* (1959), demonstrated his facility with it.

2. As Hart advised the student:

In the case of any important jurist, it is frequently profitable to defer consideration of the question whether his statements about law are literally true or false, and to examine first, the detailed reasons given by him in support of his statements and, secondly, the conception or theory of law which his statement is designed to displace.

script for publication. Two parts were projected by Hart. The first, published here, is mainly a reply to the criticisms of Ronald Dworkin. The second, which never got beyond fragmentary notes, sought to counter other critics — Raz among them, no doubt — who, Hart concedes, found points of “incoherence and contradiction” in his work (p. 239). Hart chose to add a postscript, rather than revise the text of the book, because, as the editors note, he “did not wish to tinker with the text whose influence has been so great.”³

It is not, of course, as if Hart waited thirty years to reply to his critics. He was a lively polemicist, and the points of refinement in this Postscript are less significant than a number of the essays he published after *The Concept of Law*.⁴ The Postscript brings no major surprises or recantations, and some of Hart’s responses to Dworkin are already well-established in the literature: there is no categorical distinction to be drawn between legal rules and principles (pp. 260-63); principles can be comprehended in the rule of recognition (pp. 265-66); judges do exercise discretion, even when they carry forward by analogical construction the underlying spirit of the law, for at some point a choice among analogies cannot be avoided (p. 275); and positivist legal theory has never been a matter of semantics (pp. 245-47). Here, I want to focus on some other points, in particular some of Hart’s last thoughts about rules, power, the connection between law and morality, and about the nature of legal theory, for there we find some of the most enduring themes, and problems, of his work.

I. LAW AS SOCIAL CONSTRUCTION

A. *Antinaturalism and Antiessentialism*

Constructivism is now wildly popular in the social studies, where the term has expanded to refer to almost any antirealist, antiessentialist, or antideterminist view of social life.⁵ Some of this argument is substantively idle, for it challenges no descriptive or normative thesis about its objects. If *everything* of interest is a social construc-

3. P. vii. It is too bad that the publisher did not share fully Hart’s view, for the new edition of this widely cited classic has inexplicably been repaginated, so that the legal theorist’s professional tools are now a copy of the first edition, together with a photocopy of the new Postscript.

4. Most of these are reprinted in his *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983). Attention also should be drawn to *Natural Rights: Bentham and Mill, Legal Duty and Obligation*, and *Commands and Authoritative Legal Reasons*, all in his *ESSAYS ON BENTHAM* (1982); and to his brief *Comment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY* (R. Gavison ed., 1987).

5. For some typical discussions see DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (1989) or *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* (Edward Stein ed., 1990).

tion, if there is no unconstructed reality, then nothing follows from claiming that something is a social construction. Race is a social construction; and so are racism, poverty, and bullets. This might sound like a potent theory, but it is not. It is like being told that God does not exist, only to find out that the interlocutor does not believe in the existence of dogs either. Once we lose the terms of implied contrast and everything is on an ontological par, there is no critical bite to the claim.

At a lesser level of generality, constructivism sometimes simply amounts to the thesis that the object in question has a history. Here, we need to distinguish the claim that our discourse about an object has a history from the claim that the object itself does. (That the word "electron" was invented in 1890 does not suffice to show that electrons were.) The significance of constructivism about our objects of inquiry depends on whether anyone might deny the latter thesis. It is trivial to speak of the social construction of intolerance, as it is undeniably obvious that tolerance and intolerance are matters of human thought and practice. It is more interesting to speak of the social construction of race, because many people still believe that the classification of people into races is a natural one, and constructivism challenges that belief. The most potent forms of constructivism are thus those that promise to surprise us with the news that a certain object of attention owes its very existence to social history.⁶

Should we thrill to hear that law is a social construction? If that is just a consequence of the general thesis that everything is constructed, or that the word "law" is, then we more profitably may pass on to other business. If it is the claim that law is a phenomenon with a history, then we will have at the very least a challenge to certain arguments that associate law with reason out of time, with what P.F. Strawson once called the core of human thought that has no history.⁷ Some forms of ancient and medieval natural law theory might then be under threat. For example, no longer could we say, with Cicero, that

[t]rue law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting We cannot be freed

6. Ian Hacking, one of the most sophisticated constructivists, puts it this way:

I respect someone who can argue that quarks are socially constructed: this is a daring and provocative thesis that makes us think. I feel a certain guarded admiration when a fact whose discovery was rewarded with a Nobel Prize for medicine is described as the social construction of a scientific fact; anyone who shares my respect and admiration for fundamental science has to sit up take notice. I do not find it similarly thrilling to read about the social construction of events that could occur only historically, only in the context of a society.

IAN HACKING, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND SCIENCES OF MEMORY* 67 (1995) (footnotes omitted).

7. See P.F. STRAWSON, *INDIVIDUALS* 10 (1959).

from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times⁸

But even if there exists such a timeless and universal natural moral law, practically everyone agrees that human law, our law, has a history, that it is a product of human thought and practice. Naturalisms denying that are very much out of fashion among theorists — though some judges have been known to flirt with them when they run out of arguments.

Hart's theory places law firmly in history. According to him, that there is law at all follows wholly from the development of human society, a development that is intelligible to us, and the content of particular legal systems is a consequence of what people in history have said and done. Moreover, he maintains that even the normativity of law, its action-guiding and action-appraising character, is a social construction to be understood as a function of people's actions and their critical reactions to the behavior of others. For Hart, however, this is all part of the specific nature of law; it is not merely a consequence of some form of general philosophical nominalism. He theorizes law as a social construction, but it is one that emerges in a field of unconstructed reality including even certain unconstructed constraints of the human condition (p. 192).

It is tempting to see Hart's constructivism simply as a reflection of his positivism; but that would be wrong, for one of the most sophisticated positivists, and one whose influence on Hart was significant, denied parts of the constructivist thesis. Hans Kelsen held that law is a system of norms, which are not historical things at all.⁹ Kelsen did think that jurisprudence should restrict its attention to positive law — human law rather than natural law — but he did not study law under its empirical aspects. Rather, he proposed to study it as a system of norms that, according to Kelsen, exists only if it is valid. "Validity," in turn, entails bindingness, in other words, that people ought to behave as the norms require. Historical facts — such as the fact that someone said this, or ordered that, or was disposed to behave thus — can never validate norms, for an "ought" cannot be derived from an "is." The reason for the validity of a norm can be only another norm, and thus the ultimate reason for the validity of law must be a norm rather than a matter of fact. This "transcendental-logical presupposition" Kelsen called the *Grundnorm*.¹⁰ So while Kelsen is a positivist — law may have any

8. CICERO, *DE RE PUBLICA* III.xxii.33 (T.E. Page et al. eds. & Clinton Walker Keyes trans., 1928).

9. See HANS KELSEN, *PURE THEORY OF LAW* 193-205 (Max Knight trans., 1967).

10. See *id.* at 201.

content and there is no necessary connection between law and morality — he is not a social constructivist. For Kelsen, law-as-norms is not really part of the social realm at all, and the tools with which we study historically situated norms — sociology, psychology, political theory, economics, etc. — are for him all “alien elements” that lead only to the “adulteration” of a pure theory of law.¹¹

For Hart, in contrast, law is a social construction in two senses of the term. First, law has a history. It is an institution that did not always exist, that emerged for special reasons, and that takes the form it does, including its normative character, only as a result of human action. In fact, law is a social construction of social constructions, not of brute facts but of institutional facts — namely, rules comprised by social practice and enforced by social pressure.¹² Second, Hart’s resulting concept of law is antiessentialist: Though there are central cases of legal systems, and central features of those cases, there are also borderline cases and analogical cases when without impropriety we still may speak of law.¹³ For Hart, there is no essence to the phenomena we call “law” and, although legal theory is right to strive to understand law’s central features, knowing these will not give us the key to all the sound generalizations about legal systems. There is no essence of law, the understanding of which can replace the hard historical, sociological, or, if you like, genealogical task of explaining law as a social phenomenon. Thus, although the term would be foreign to him, there is no coherent way for a legal theory to be more constructivist than Hart’s.

B. *Law and Social Rules*

One familiar hesitation about social constructivism and its attendant suggestion of constructing or building a reality is that it sounds all too deliberate or voluntaristic. Gender is a social construction, some even say a performance, yet people sometimes feel bullied and constrained by gender roles, and these roles often seem to resist revision. Giving adequate weight to both agency and structure, to the willed and the unwilled, was one of Hart’s major tasks in replying to the classical positivists.

11. See *id.* at 1.

12. For a general account of the nesting of social facts, see JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 79-126 (1995).

13. Hart writes that:

The uncritical belief that if a general term (e.g. “law,” “state,” “nation,” “crime,” “good,” “just”) is correctly used, then the range of instances to which it is applied must all share “common qualities” has been the source of much confusion. Much time and ingenuity has been wasted in jurisprudence in the vain attempt to discover, for the purposes of definition, the common qualities which are, on this view, held to be the *only* respectable reason for using the same word of many different things . . .

Laws, said Thomas Hobbes, Jeremy Bentham, and John Austin, are expressions of will: they are the general commands of a sovereign.¹⁴ But as Hart saw, such a conception of law cannot explain the variety of forms of law, nor how sovereigns can be bound by their own rules, nor how law survives the death of the commander (pp. 26-78). Above all, it cannot explain the normative character of law, the fact that it purports to impose obligations on us (pp. 82-91). A person's say-so has such normative power only when that person somehow is authorized to make norms. Most sovereign bodies are, of course, legally authorized to make law, but we need to explain the laws authorizing the sovereign as much as any other law. So if there is a norm, or norms, at the root of the legal system, it cannot be a legal norm. Then what is it? Hart rejected Kelsen's theory of the unconstructed, unsocial *Grundnorm* and its mysteries.¹⁵ Instead, he argued that fundamental lawmaking power rests on a customary social rule and has the kind of normative force that such rules have. Law, Hart argued, is a union of social rules: primary rules that guide behavior by imposing duties on people, and secondary rules that provide for the identification, change, and enforcement of the primary rules (pp. 90-99). Among the secondary rules, the so-called rule of recognition has special importance. A customary practice of those whose role it is to identify and apply primary rules, the rule of recognition provides ultimate criteria of legal validity by determining which acts create law. The rule of recognition itself is neither valid nor invalid; it simply exists as a matter of social fact or it does not. But when it does exist, and when people use it as a standard for appraising behavior, then the language of validity and invalidity comes to life, and a legal system is born.

What are these social rules of which law is constructed? Hart's account, the "practice theory," holds that there is a rule among a group *P*, whenever there is a regularity *R* in their behavior such that: (1) most people in *P* conform to *R*; (2) lapses from conforming to *R* are criticized; (3) the criticism referred to in (2) is in turn regarded as justified; and (4) *R* is treated as a standard for the behavior of people in *P*. Rules are present when there is a certain kind of social practice, regular behavior together with the set of attitudes that Hart calls "acceptance" of the rule, which consists of using it as a standard for one's own behavior and that of others. Rules are to be identified and understood from the "internal point of view," the point of view of one who uses the rules as a standard,

14. See, e.g., THOMAS HOBBS, *LEVIATHAN* 311-35 (C.B. Macpherson ed., 1968); JEREMY BENTHAM, *OF LAWS IN GENERAL* (H.L.A. Hart ed., 1970); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfred E. Rumble ed., 1995).

15. For Hart's objections see pp. 292-93, and the essays *Kelsen Visited* and *Kelsen's Doctrine of the Unity of Law*, in HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 4.

though of course from the "external point of view" they merely appear as behavioral regularities (pp. 88-91).

Whether we judge this account satisfactory depends on what we expect of it. What is a "theory of rules" anyway? Here are some things we might want to know about: What are rules? What is it to follow a rule? What does it mean to say that a rule "exists"? What is the relationship between rules and reasons for action? Hart's theory does not answer all of these questions, perhaps because his original ambitions were limited somewhat. He sought to distinguish rules from other regularities of behavior, in particular from habits and predictions; to explain, as a social matter, the binding force of rules; and to set out the existence conditions for social rules. His main dispute was with two forms of reductionism: the coercion-based theories of classical positivism, which conceived of rules as orders backed by threats, and the behaviorist accounts influential among legal realists, which conceived of rules as predictions of official action. Against these, Hart's arguments are decisive. So the practice theory may be judged as a set of existence conditions for social rules, as a test for the presence of rules, whether or not it offers an analysis of rules or a full account of what it is to follow a rule. A good set of existence conditions should turn up rules when practiced, and not otherwise, but it need not itself tell us everything, or even much, about the nature of rules any more than a litmus test for the presence of an acid will tell us much about what acids are.

Hart's theory has, however, met with much criticism.¹⁶ There seem to be rules that are not social practices (e.g., individual rules); there are social practices that are not rules (e.g., certain common openings in chess that are not among the rules of chess); and citing a valid rule is often itself meant as a justification for one's behavior, not merely a sign that there is some other acceptable justification for it. The practice theory accommodates none of this. Moreover, matters of duty and obligation — which according to Hart amount to rules with a certain content¹⁷ that are enforced by serious social pressure — in some cases appear not to depend on rules at all. One certainly can believe that one has an obligation to save a drowning person without believing there is a social practice of doing this, nor even that there should be such a practice.

Dworkin argued against Hart that some rules are a matter of *concurrent* practice when people converge for common reasons independent of their agreement, and that at best Hart's theory must

16. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 48-58 (1977); LESLIE GREEN, THE AUTHORITY OF THE STATE 44-49 (1988); JOSEPH RAZ, PRACTICAL REASON AND NORMS 49-58 (1990).

17. They are believed important and may conflict with immediate self-interest. See pp. 86-87.

be restricted to *conventional* practices, when the fact of agreement in action is essential to the rule.¹⁸ So, for example, it is a merely conventional practice that in the United States people normally drive on the right because it is a sufficient reason for conformity that each expects everyone else to do the same. It is, however, a concurrent practice that people refrain from torturing others; they judge it wrong for reasons independent of what others are doing. We might add another distinction: there are also *coincidental* practices that are agreement independent, when people do the same thing for different reasons.

Dworkin attempted to confine the practice theory to conventional rules and then argued that, even there, endemic controversy about the scope of rules shows that duties must have another foundation. Conventional practice, he argued, never constitutes a normatively binding rule; it is relevant only because of the way it expresses attitudes, gives rise to expectations, etc. that may figure in the justifications for such rules. Dworkin thought that he thus had proved that judicial duty cannot be limited to the scope of a practice rule.

In the Postscript, Hart accepts Dworkin's distinction and now proposes to confine his theory to conventional rules only and to abandon the rule-based explanation of all duties. He maintains, however, that the practice theory gives a good account of conventional rules, including the rule of recognition, "which is in effect a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts" (p. 256). There are no a priori limits, however, on the content of such a rule, and Hart suggests that Dworkin's holistic interpretive theory might be understood as "merely the specific form taken in some legal systems by a conventional rule of recognition whose existence and authority depend on its acceptance by the courts" (p. 267).

There are a number of difficulties here. For one, the distinction between conventional and concurrent reasons for conformity does not map onto a distinction between two kinds of rules, for both kinds of reasons may be present in one rule. Indeed, it is hard to think of practiced rules that have *only* concurrent reasons for conformity: even a prohibition on murder must, at the margins, draw certain conventional lines around the definition of murder. Hart says that a rule is conventional provided "the general conformity of a group to [it] is part of the reasons which its individual members have for acceptance" (p. 255). To be "part of" the reasons for acceptance is a weak condition that is satisfied by all the mixed cases. Indeed, in view of the fact that general conformity with law is a

18. See DWORKIN, *supra* note 16, at 53-58.

public good, conventional reasons for conformity are normally present. For example, even people who think considerations of justice a very good reason for treating the requirements of the Internal Revenue Code as action-guiding typically conform their behavior to it only if they believe most other people will too.

In these examples, concurrent reasons are present along with conventional ones. Sometimes Hart seems to have something else in mind. For example, at one point he calls the rule of recognition "a mere conventional rule accepted by the judges and lawyers of particular legal systems" (p. 267). Is a rule a "mere" convention only if there are no concurrent reasons for compliance? It seems very unlikely that the rule of recognition is purely conventional; officials normally have moral views about the propriety of legislative power. Yet Hart says:

Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial consensus. That it does so rest seems quite clear at least in English and American law for surely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a source of law having supremacy over other sources includes the fact that his judicial colleagues concur in this as their predecessors have done. [pp. 266-67]

Judicial recognition may, however, *include* that fact as a necessary but insufficient condition, such that each judge recognizes the Constitution as supreme law only because other judges do too and also because she for her part thinks that the Constitution is just. Hart would say that this is possible, but not necessary, for acceptance of a conventional rule can rest on anything whatever. He therefore rejects not only Dworkin's claim that there must be good moral grounds for doing what the rule says, but even the weaker thesis that people must *believe*, rightly or wrongly, that there are good moral grounds for doing what it says.

In the case of purely conventional rules, what motivates conformity? Despite Hart's suggestion that it may be anything whatever, I think that it must rest on something like an overlapping mutual interest¹⁹ and that the content of convention, contrary to Dworkin, fulfills not a justificatory function, but the identificatory function of showing *which* of the possible ways of conforming is the one that will be practiced and thus serve that interest. People typically do, of course, have preferences among alternative common ways of acting. They do not regard them all as equivalent and the differences among them are often important; but if the rule is to be purely conventional, then at some point these differences must overwhelm the divergence of interest. The worry, however, is that when we come to fill out the idea of a mutual interest in conformity

19. See my *Authority and Convention*, 35 PHIL. Q. 329 (1985).

we may end up without an obligation-imposing rule. It is odd to think, for instance, that there is an *obligation* to eat with one's knife in the right hand, even when it is conventional to do so. In reducing the rule of recognition to a *purely* conventional rule, Hart ends up without an adequate account of its binding force, not even one consistent with his own theory of social obligation.

None of this has anything to do with any indeterminacy or controversiality of conventions; the problem arises even when they are quite clear. In fact, as Hart says, indeterminacy and controversiality are side issues. The idea that controversiality of some legal decisions disproves the existence of a generally accepted rule of recognition

rests on a misunderstanding of the function of the rule. It assumes that the rule is meant to determine completely the legal result in particular cases, so that any legal issue arising in any case could simply be solved by mere appeal to the criteria or tests provided by the rule. But this is a misconception: the function of the rule is to determine only the general conditions which correct legal decisions must satisfy in modern systems of law. [p. 258]

That is right, though it is put somewhat loosely, for whether a legal decision is "correct" will depend on a great many things: whether the judge can read English, follow logic, reason morally, and so forth. The rule of recognition, at least as originally conceived by Hart, did not purport to set any such conditions, generally or otherwise. It purported only to identify which of various social standards are legally relevant — which are sources of law. Because these are sources that judges are legally bound to apply, however, any analysis of the fundamental rules of a legal system still must be consistent with their obligatory force. Unlike Kelsen and Dworkin, who are on this point in agreement against him, Hart is a social constructivist about obligation itself. But his view that the fundamental rules are "mere conventions" continues to sit uneasily with any notion of obligation.

II. CONSENSUS, DOMINATION, AND POWER

So law, for Hart, is socially constructed from rules, which are themselves constructed from individual practice. That may sound, to some, like a rather complacent and comfortable view of an institution that is an instrument of social control, for accepted social rules are the sort of things that we ordinarily find in the discredited "consensus" theories of the social functionalists and systems theorists. What about conflict and power?

A. Hart's Whig History

It is unfortunate that Hart introduces his concept of law through a somewhat wooden, fictional history of social development, tracking the change from what he sometimes calls a "primitive" form of community based solely on rules of obligation to a different form of social organization based on primary and secondary rules (pp. 91-99). It is perhaps these passages more than any others that have contributed to his undeserved reputation as an enthusiast of the rule of law, for on a casual reading it seems like a Whig history of progress, from primitive to modern, from custom to law. On this reading, we begin with a primitive society in which social order rests on a broad consensus about the so-called primary rules of obligation that are maintained by diffuse social pressure. But these societies are static, inefficient, and fraught with uncertainty. Law emerges to — maybe even emerges *in order to* — cure these defects. Thus in a "developed," "complex" society things are better. We gain certainty, dynamism, and efficiency through the introduction of rules of recognition, change, and adjudication. That is a common reading, but it is mistaken, and the mistake easily can corrode one's understanding of Hart's theory. So let us take it more slowly.

For Hart "primitive" here just means simple. The reason that such societies do not have law is that they do not need it: nothing in human nature or society requires that we have law; many people have gotten along well without it (p. 91). A legal system, with its institutionalized means of social control, is "not a necessity, but a luxury" (p. 235). What then does Hart mean when he speaks of the "defects" that the secondary rules cure? It is crucial to his argument that simpler forms of social order do work, but only in certain contexts. He writes: "only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules" (p. 92). Despite this real viability, "[i]n any other conditions such a simple form of social control must prove defective and will require supplementation in different ways" (p. 92; emphasis added). It follows, then, that the "defects" that law "remedies" are not defects in simple, transparent forms of social order. They are, in a sense, defects in us. These problems arise when we try to apply those informal solutions native to a world of transparent solidarity to *our world*, a world of few or repudiated kinship ties, in which sentiments are not shared, in which the environment is a maelstrom of change, where, as Marx says, "all that is solid melts into air."²⁰ So Hart's targets here are not simple, transparent forms of social

20. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1872), reprinted in THE MARX-ENGELS READER 476 (Robert C. Tucker ed., 2d ed. 1978). For a

order. It is the mistaken drive to apply techniques of governance appropriate to those targets to a more opaque world of strangers — the mistake of a Rousseau or of some modern communitarian political theory. It is also the mistake, I think, of Dworkin when he suggests that political obligation may rest on fraternal “obligations of community.”²¹

It needs to be said, however, that Hart’s discussion in these pages is not exactly paralyzed with rigor. As many commentators have noticed,²² his classification of rules as primary and secondary is deployed here in a number of inconsistent ways: to mark a distinction of social importance (necessary vs. optional), of genesis (first vs. later), of normative type (duty-imposing vs. power-conferring), and of object (rules about behavior vs. rules about rules). These distinctions are neither the same nor extensionally equivalent — they will carve up the territory in different ways. Moreover, it seems unlikely there have existed societies that had rules of obligation, yet had no ways to create, extinguish, or vary such obligations. Hart focuses on a simple regime that regulates “free use of violence, theft, and deception” (p. 91), but surely the human condition also requires that any society find some way to regulate property and kinship. That suggests that well before the emergence of the systematizing rules of a legal order secondary rules in some of Hart’s senses already would have existed.

We can remedy this defect easily enough, and when we do so Hart’s theory clearly carries no significant bias in favor of modern legal orders. Paradoxically, the bias more often lies with those who detect in Hart’s argument a form of modernist triumphalism, for plainly what irks them about Hart’s story is the thought that, if a society lacks a legal system, then it lacks one of the achievements of modernity — that it is uncivilized. Because it would be parochial and demeaning to think “primitive” societies uncivilized, by *modus tollens*, they must have legal systems. Hart’s account, in failing to acknowledge these as legal systems, therefore improperly must favor modern or Western law. The logical form of this argument is a bit startling, as it attempts to deduce an “is” from an “ought,” but quite apart from that it simply relies on a premise that Hart strenuously rejects: Law is *not* a mark of civility or justice, or anything of the kind; it is just one way in which a complex society copes when

brilliant discussion of this theme, see MARSHALL BERMAN, *ALL THAT IS SOLID MELTS INTO AIR* (1982).

21. See RONALD DWORKIN, *LAW’S EMPIRE* 190-216 (1986). I have criticized Dworkin’s attempt to derive the duty to obey the law from communal obligations in *Associate Obligations and the State*, in *LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM?* 93-118 (A. Hutchinson & L. Green eds., 1989).

22. See, e.g., C.F.H. Tapper, *Powers and Secondary Rules of Change*, in *OXFORD ESSAYS IN JURISPRUDENCE*, 2d ser. 242-77 (A.W.B. Simpson ed., 1973).

the direct, transparent form of social order no longer works very well.

B. *Elite Domination*

Hart argues against John Austin, who had a top-down, pyramidal view of law as the orders of a sovereign generally obeyed and backed up by threats.²³ It commonly is acknowledged that Austin's was a crude theory, but some feel that it was at least realistic and that Hart, while making positivism more subtle, also loses its punch. For now law must rest, ultimately, on a form of social consensus, and that idea obscures the ways in which law in fact is rooted in social power.

Perhaps the most misunderstood part of Hart's view is the way in which law is, and is not, related to social consensus. Dworkin persistently has maintained, for example, that Hart cannot properly explain the depth and nature of controversy about law.²⁴ For Hart, law may be controversial because it is a matter of open-textured social rules that, though they have a "core" of settled meaning, also have "penumbral" areas of doubt in which the applicability of the rule is, as a matter of practice, indeterminate (pp. 124-54). This is as true of the rule of recognition as it is of any rule identified by it. It too has a penumbral area of discretionary judgment, unregulated by law, but where decisions still may be appraised as better and worse by other relevant standards, including those of critical morality.

How much consensus does law in fact require? Many people would accept something like Dworkin's précis of Hart's theory:

[T]he true grounds of law lie in the acceptance by the community as a whole of a fundamental master rule (he calls this a "rule of recognition"). . . . For Austin the proposition that the speed limit in California is 55 is true just because the legislators who enacted that rule happen to be in control there; for Hart it is true because the people of California have accepted, and continue to accept, the scheme of authority in the state and national constitutions.²⁵

The problem with that as a *theory* is obvious enough. First, it is a fantasy: many people in California have no idea what the "scheme of authority in the state and national constitutions" amounts to. Some are not even aware that there *is* a state constitution, so the sense in which the community "accepts" it is pretty attenuated. Second, and worse, the "people of California" is an abstraction, or a legal concept itself: the irrelevance of the attitudes of those living in Tijuana is something that needs to be explained,

23. See AUSTIN, *supra* note 14.

24. See DWORKIN, *supra* note 21, at 3-11, 37-43; DWORKIN, *supra* note 16, at 31-45.

25. DWORKIN, *supra* note 21, at 34.

not assumed, by a theory of law. Beyond these two problems with the theory suggested in that passage, however, there is also something wrong with it as an exposition of Hart, something worse than mere imprecision.

Hart knew that the United Kingdom, for example, has power to make law for Northern Ireland. He also understood that it would be wrong to characterize this as a situation in which that latter community accepts the scheme of constitutional authority, for it is notorious that a large minority in Northern Ireland neither accepts, nor acquiesces in, that authority. Indeed, if we take the notion of acceptance at all seriously it must be the case that general acceptance of law's authority is pretty rare. Yet far from being an objection to Hart's theory, this is an entailment of it.

The idea that the social foundations of law rest on "acceptance by the community as a whole of a fundamental master rule" seriously distorts Hart's view. According to Hart, a regime of general social consensus is what *precedes* a legal regime. Law has a complex relation to conventional, customary rules, partly recognizing them, partly replacing them. The existence of the rule of recognition explains why there is law in California, in Northern Ireland, or in Quebec — a functioning legal system even though there is in those jurisdictions no broad social consensus on the overall scheme of authority. Hart writes:

In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behavior of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules. *But where there is a union of primary and secondary rules*, which is, as we have argued, the most fruitful way of regarding a legal system, the acceptance of 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. In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system. [p. 117; emphasis added]

This passage illuminates one of the central ways that power relations emerge with law. Both social morality and custom, Hart notes, are immune to deliberate change; they evolve only gradually (p. 175). We almost might say that the emergence of law signals that a society has acquired a new capacity deliberately to control its common life, that, in a certain way, the community has come to self-consciousness. Customs and norms now can be changed forthwith, by the say-so of the rulers, by majority vote, or whatever. The

crucial fact is therefore institutionalization: the emergence of specialized organs with power to identify, alter, and enforce the social rules. This "advance," however, brings both gains and costs: "[t]he gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not" (p. 202). These risks are real and sometimes have materialized. So, for Hart, the only consensus necessary for law is a consensus of elites; that is a direct and potent consequence of the fact that law is an institutionalized normative system.

C. *Coercion and Power*

While the institutionalization of law creates elites who may come to dominate society, Hart also argues that law is not, of its nature, coercive, at least not in the sense that all laws somehow amount to coercive threats. Hart denies that it is possible to reduce all power-conferring rules to sanction-prescribing rules (pp. 26-49). One relatively unsophisticated form of such reductionism goes like this: Rules empowering people to do things — e.g., to legislate, to contract, to make wills, to marry, to amend a constitution — specify ways in which these things must be done in order for the power to be exercised validly. Failure to conform in the relevant ways means that the purported exercise of power fails: the action in question is a mere nullity; it lacks the legal effect it purports to have. But is this nullity not essentially the same as the sanctions imposed by criminal law? After all, nullity can be as inconvenient, distressing, and expensive as some penalties.

Hart decisively campaigns against such reasoning (pp. 34-35). First, the undesirability of nullity is purely contingent; it may sometimes be a benefit to find that, for example, a certain contract is void. Second, and more important, the reductionist account falsifies the nature of power-conferring rules. In the case of a duty-imposing rule we can distinguish two different elements: the required standard of behavior (e.g., refrain from assault) and the reinforcing sanction (e.g., or else pay a fine or go to jail). These elements, however, are not similarly present in the case of a power-conferring rule. For example, promises that are neither under seal nor given for consideration are not something to be *abstained* from. In so defining contractual powers, the law does not have it in mind that people should either make valid contracts or refrain from promising. The provision failure to comply with which results in nullity is not a separable part of the rule; it constitutes the rule itself. To the Kelsenian suggestion that they are fragments of rules

that direct the courts to apply sanctions, Hart replies that this too distorts the way law really works:

It is of course very important, if we are to understand the law, to see how the courts administer it when they come to apply its sanctions. But this should not lead us to think that all there is to understand is what happens in courts. The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court. [p. 40]

This passage nicely illustrates Hart's contextual approach to legal theory. There is no metaphysical answer to the question of the individuation of laws. To understand the law is just to explicate how power-conferring rules are used by those who use them: "Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?" (p. 41).

Those are certainly relevant considerations. But not only are power-conferring rules valued for special reasons, sometimes they also are *feared* and *resented* for special reasons. For Austin and Kelsen, reductionism springs from the assumption that to have a duty or obligation is to be subject, directly or indirectly, to coercion. The salience of coercion in their theories is underwritten by the significance it plays in our lives: we normally seek to avoid it. To this, Hart replies that coercion is real but secondary (pp. 199-200). First, it is needed only when law fails in its primary task of giving standards for guiding and appraising behavior. Second, it is conceivable that a legal system might not need coercive sanctions at all; their presence in all actual legal systems results not from the nature of law but from the exigencies of human nature.

There is, I think, yet another reason for attending to the coercive character of law: it is the most dramatic way in which law exercises power over people. Some, though not all, laws are coercive; but many more laws, though not coercive, are forms of social power. That is true even of those power-conferring rules that Hart generally refers to in a positive-sounding way as providing "facilities." Consider, for instance, the legal power to marry. It is granted subject to conditions that, even in so-called liberal regimes, normally include the requirement that the union be concluded between people of different sexes. Same-sex marriages are legal nullities. Now, it would, for the sort of reasons Hart gives, be misguided to think that what is going on here is a direct or indirect form of *coercion*, that people are being forced into the paradigmatic heterosexual union. There is, after all, no requirement to marry and, a fortiori, no requirement to marry one of the opposite sex. In most

jurisdictions it is not even wrong to purport to marry someone of one's own sex, and no punishment is given one who purports to conduct such a marriage; yet such marriages are null. There is, I think, something important here, and one who fails to notice the specific ways in which the legal system at this point embodies and exercises power fails to notice something specific about legal regulation. Heterosexist marriage laws exercise power in different ways from, say, criminal prohibitions on sodomy. The latter attempt to guide people's behavior by removing options or rendering them infeasible. The marriage laws do not do that. While they do not remove anyone's options, they do give options to some and withhold them from others, and they do so in circumstances in which many other legal and social consequences follow in train.

That law is in such ways deeply involved in social power will come as a surprise to few. Marxists, critical legal scholars, and feminists all have noticed it; Foucauldians revel in it. Few, however, have given enough thought to the ways in which the specific character of law contributes to its power.²⁶ It is not enough to remind us of the facts of class, hierarchy, patriarchy, or disciplinary regimes. We also need to know how these express themselves through the different forms of law and how the legalization of, for instance, power-conferring rules affects the power distribution in society. Many other examples exist: laws create classifications, declare statuses, etc. True, these cannot be reduced to the coin of coercion, but one of the reasons for worrying about coercion, that it is a form of power, extends also to cases when power is exercised noncoercively. Thus classification systems and so forth may be productive uses of power: they create subjects, kinds of people, who then can be regulated in other ways. Of course, the informal social order does this too, but when productive power becomes imbued with the authority of law it raises the stakes enormously.

Hart's view about law and power was not at all rosy. He wrote: "So long as human beings can gain sufficient cooperation from some to enable them to dominate others, they will use the forms of law as one of their instruments" (p. 210). But the way the forms of law interact with social power, both repressively and productively, is something on which we need a good deal more work.

26. Among the Marxists, only Pashukanis clearly saw that we need an account of law's specificity as a means of social control.

If . . . we forgo an analysis of the fundamental juridical concepts, all we get is a theory which explains the emergence of legal regulation from the material needs of society, and thus provides an explanation of the fact that legal norms conform to the material interests of particular social classes. Yet legal regulation itself has still not been analyzed as a form . . .

EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 55 (C. Arthur ed. & B. Einhorn trans., 1978).

III. LAW AND MORALITY

A. *Soft Positivism*

One important point of clarification in the Postscript is that Hart now explicitly says that he is a "soft positivist":²⁷ he thinks that while there may be some legal systems in which the fundamental test for law is wholly a matter of social fact, there are others in which it requires moral judgment (p. 250). He only denies that moral judgments are *always* required to know the law. That, of course, is to deny Dworkin's central thesis, that the law is whatever is entailed by the moral and political theory that both fits and best justifies the legal institutions in question.²⁸

In response to Dworkin's objections to the claim that the rule of recognition is a matter of "pedigree,"²⁹ Hart says that he never intended to limit its content in this way, that it may go beyond the mode of creation or adoption of rules and include also among its criteria both matters of fact not properly thought of as pedigree (e.g., the substantive constraints of the Sixteenth Amendment to the U.S. Constitution) and matters not of fact but of moral value (p. 250). Indeed, he says that this was *always* his view, and refers the reader both to the text of *The Concept of Law* and to an earlier article in which he claims to "state . . . that in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional constraints" (p. 247). Acceptance by the courts and its reflection in practice is always a necessary element of the rule of recognition, but what they accept may include moral principles.

The passage that Hart cites in defense of this interpretation of his earlier work is, however, a reply to the Austinian view that a supreme lawmaking authority necessarily must be absolute, that it can make and unmake any law whatever, and that thus there is always an unlimited sovereign behind a legally limited legislature. Hart draws his important distinction between the presence of an enforceable duty not to legislate in a certain way — arguably inconsistent with supreme authority — and the absence of a legal power to legislate in a certain way. Yet this reference is somewhat puzzling if it is supposed to demonstrate Hart's allegiance to soft positivism. On Austin's theory, the sovereign is not to be identified

27. The best and most extensive defense of soft positivism is W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994). Earlier discussions include Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); David Lyons, *Moral Aspects of Legal Theory*, 7 MIDWEST STUD. IN PHIL. 223 (1982); Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977).

28. See DWORKIN, *supra* note 21, at 87-101.

29. See DWORKIN, *supra* note 16, at 17.

with the legislature but with whatever body enjoys habitual obedience while not rendering similar obedience to anyone else. Similarly, on Hart's theory the rule of recognition is not to be identified with the *constitution* but with the practices of recognition that are expressed when the constitution is applied. For whether a written constitution is a source of law is also a question for whose answer we must turn to the rule of recognition.

Hart describes the rule of recognition as a conventional judicial rule that identifies certain things as sources of law. But Hart's own analysis of cases in which a statute is certified as law by the rule of recognition in fact does not suggest that everything that is required for a proper application of the statute counts as law. He considers a case in which the legislature requires an industry to charge only a "fair rate" for its services (pp. 131-32). Although there will be some extreme cases of unfairness that clearly are proscribed by the legislation, there will be many more debatable cases that it would be both impossible and unwise to try to specify in advance. Hart says:

The anticipatable combinations of relevant factors are few, and this entails a relative indeterminacy in our initial aim of a fair rate . . . and a need for further official choice. In these cases it is clear that the rule-making authority must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests. [pp. 131-32]

Law therefore always must strike some compromise between the two aims of settling things clearly in advance and leaving room for later choices in view of the relevant values and contextual facts. Indeterminacy in law is thus not only an ineliminable feature of language, it is also a desirable element of flexibility.

It is interesting to compare this view about statutory interpretation with what Hart says, above, about constitutions. Hart's analysis is that when a statute leaves it open to an adjudicator to determine what is "fair," "safe," "reasonable," and so on, it confers a certain *discretion* — a choice undetermined by law but open to reasoned justification. Yet in his new analysis of constitutional provisions referring to "due process" and "freedom of speech," among others, he imputes the chosen interpretation of those values back into the law *itself*, rather than, as his statutory case might suggest, to the discretionary power of the court. This is Hart's soft positivism.

In reality, the text of *The Concept of Law* is indecisive as between soft positivism and any harder version. It is understandable why Hart felt the urge to find in his book precedent for the views about law and morality that he seemed to hold when he wrote its Postscript. The fact of the matter, however, is that the distinction between stronger and weaker versions of the positivist thesis was

unknown when he wrote the book and was therefore not part of the polemical context of the time. Properly concerned about the natural lawyers on his right flank, Hart did not anticipate the forces also gathering on his left.

The resultant ambiguity means that those who endorse stronger versions of the positivist thesis also can find much of what they want in *The Concept of Law*. Resisting Hart's last suggestion, they can draw from his original text some of the main elements necessary to a unified view of the examples of statutory and constitutional interpretation discussed above. For example, in discussing the idea of the "sources" of law, Hart comments as follows on the somewhat blurry distinction between the formal or legal sources of law, the reason why something counts as valid law, and its material or historical sources, the cause of its existence:

Where [a judge] considers that no statute or other formal source of law determines the case before him, he may base his decision on e.g. a text of the Digest, or the writings of a French jurist. . . . The legal system does not *require* him to use these sources, but it is accepted as perfectly proper that he should do so. They are therefore more than merely historical or causal influences since such writings are recognized as "good reasons" for decisions. Perhaps we might speak of such sources as "permissive" legal sources to distinguish them both from "mandatory" legal or formal sources such as statute and from historical or material sources. [p. 294]

This suggests that, on Hart's account, something may be a good and proper reason for a judicial decision in an unregulated case — it even may be recognized by the courts as such — and yet not be the law precisely because it is not mandated by a binding source. Here, of course, Hart presents such a reason as a different "kind" of source: a "permissive" one. But all we need for a unified account is the idea that there may be mandatory and permissive aspects to a single source, and that the law ends where mandatory direction runs out. And that would give us strong positivism.

Hart's resistance to this, and his attraction to soft positivism, may, I think, result from embracing a false dilemma: either there is some kind of *logical* incoherence in the idea that a rule of recognition could specify moral tests for law, or there is not. If not, then the most we can say is that such tests would be undesirable. Indeed, this sort of argument pervades Hart's defense of a broad concept of law that includes immoral laws and legal systems over a narrow one that does not. He argues forcefully that we may and should distinguish between thinking, for example, that certain legal systems are wicked, and thinking that they are not legal systems at all (pp. 207-12). It is conceivable, though profoundly undesirable, that a legal system might ignore procedural and substantive justice. The other side of this coin is that it is conceivable, though in a dif-

ferent way also undesirable, that a legal system might provide wide-ranging tests of moral rectitude for the validity of law. That appears to be the burden of the following passage:

There is, for me, no logical restriction on the content of the rule of recognition: so far as "logic" goes it could provide explicitly or implicitly that the criteria determining validity of subordinate laws should cease to be regarded as such if the laws identified in accordance with them proved to be morally objectionable. So a constitution could include in its restrictions on the legislative power even of its supreme legislature not only conformity with due process but a completely general provision that its legal power should lapse if its enactments ever conflicted with principles of morality and justice. The objection to this extraordinary arrangement would not be "logic" but the gross indeterminacy of such criteria of legal validity. Constitutions do not invite trouble by taking this form.³⁰

¹ Since this arrangement is, indeed, not prohibited by "logic," it may seem that the only important questions are which indeterminacies cause trouble, and how much trouble we can tolerate. Dworkin complains that if we allow the rule of recognition to be anything other than a "more or less mechanical test" based on "matters of social history rather than matters of policy or morality that might be inherently controversial," then it cannot do what Hart says it does — namely, cure the uncertainty of a pre-legal, customary regime.³¹ In reply, Hart says that Dworkin "seems to . . . exaggerate both the degree of certainty which a consistent positivist must attribute to a body of legal standards and the uncertainty that will result if the criteria of legal validity include conformity with specific moral principles or values" (p. 251). In any case, he continues, "the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition" (p. 251).

These disputes about whether too much indeterminacy would flow from a rule of recognition that comprised moral principles are, however, beside the point. Some moral judgments are more certain, and are subject to broader agreement, than some factual ones. For instance, it may be more certain that it is wrong to torture innocent children for one's own amusement than it is that a legislature intended to promote the welfare of children by enacting a certain statute. The central question, and one that Hart never addresses here, is whether there might be constraints on a rule of recognition that are given neither by "logic," that is, by what is conceivable, nor by what is the most efficient mix of certainty and flexibility.

Consider, for example, the kind of authority that legal rules purport to have. In one of Hart's later papers, he characterizes this as

30. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 4, at 361.

31. Ronald Dworkin, *Reply*, in *RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE* 247, 247-48 (Marshall Cohen ed., 1983).

a claim to provide reasons for acting that are both peremptory — that set aside the subject's own assessment of the merits of what is to be done — and “content-independent” — “intended to function as a reason independently of the nature or character of the actions to be done.”³² This is not a point of logic. There is nothing in the meaning of the word “authority,” nothing in its logical grammar, and nothing in the requirements of reason itself to show that legal authority is understood best in the way Hart suggests. That is a matter of legal and political theory, not logic. And, even if we come, as I think we should, to endorse his view of authority, nothing will follow as a matter of sheer logic about the rule of recognition. The motivation for endorsing that view, however, and most plausible accounts of why content-independent reasons find a place in practical thought, nonetheless may sit uneasily with the idea that the rule of recognition can make *content-dependent* considerations of morality — the force of which depends precisely on that nature or character of the actions to be done — part of the law. Indeed, this is the core of Raz's argument against soft positivism.³³ It may be that those two theses can be reconciled somehow, or that one or the other should be abandoned. But Hart does neither, and that leaves his final commitment to soft positivism unstable.

B. *Antifunctionalism*

Inclusion in the ultimate criteria of legal validity is not the only way that morality could have a necessary connection to law. Another argument, at least as popular, rests on the purported social function of law. Lon Fuller, for instance, said that the function of law is to guide human conduct, which it can do only by conforming to certain procedural principles that he called the “inner morality” of law.³⁴ Dworkin says that the function of law is to justify the use of coercion, and thus it must have the features necessary to do that.³⁵ John Finnis says that the function of law is to coordinate action for the common good.³⁶ Roger Shiner says that “the judgement of some system of norms that it is a legal system is at one and the same time a candidate judgement of critical morality that the system fulfills well some moral purpose.”³⁷ Michael Moore says: “If law is a functional kind then necessarily law serves some good

32. H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM*, *supra* note 4, at 243, 254.

33. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 45-52 (1979); Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295 (1985). The argument receives criticism from a soft-positivist point of view in WALUCHOW, *supra* note 27, at 117-40.

34. See LON FULLER, *THE MORALITY OF LAW* (1969).

35. See DWORKIN, *supra* note 21, at 93.

36. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

37. ROGER SHINER, *NORM AND NATURE* 129 (1992).

and thus, necessarily, law is in that way related to morality."³⁸ In their different ways, each of these writers finds in functionalism a link between law and morality.

Hart, while allowing that existing legal systems share a "minimum content" based on what is needed to help secure human survival (pp. 193-200), did not accept any further teleological claims about law's inherent value. First, as he pointed out in his controversy with Fuller, the functional sense of good, as in a "good screwdriver" is not the same as the moral sense, as in "good person." Any purposive and rule-governed human practice has certain goods internal to that practice,³⁹ and this gives rise to a certain objectivity of language about practice-goods. It follows that just as there may be an internal morality of law in Fuller's sense, there also may be an internal morality of murder according to which a good murder is one that scores high on the functional-excellence scale of murder. There is no shortage of nonmoral functions of law, from fairly neutral (e.g., guiding behavior) to most troublesome (e.g., elite domination). These functions all may have their internal "moralities," but none of them establishes a necessary connection between law and moral value.

Second, even if law has social functions that are deemed, at least prima facie, morally good (e.g., maintaining order, making justice possible, etc.), there is but an oblique connection between that and the claim that a particular legal system has those values. The problem is that something may be a functional kind, and yet have minimal or even no actual capacity to perform its characteristic function. Take, for instance, a "printer driver." A computer program is a printer driver if and only if it drives the printer. This is a nearly pure functional kind because it comprises a variety of software and can be instantiated in a variety of hardware. But what of a driver that has a bug and thus fails to drive anything? Does it cease being a printer driver? No, for we know it was designed for its function and, if fixed, still may perform it. Functional kinds need have only something like the capacity, when functioning normally, to perform their functions. So even if the ideal type of law is a valuable functional kind, this does not guarantee that every legal system will have some positive worth.

In the Postscript, Hart adds a third and final step to his argument. He denies that law is a functional kind at all. In response to Dworkin's claim that the function of law is to license the use of coercive power, Hart writes: "I think it quite vain to seek any more

38. Michael Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 221 (R.P. George ed., 1992).

39. This idea was rediscovered by Alasdair MacIntyre. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 175-89 (1981).

specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct" (p. 249). The fact that law has such minimal social functions does not establish that law is a functional kind. For that stronger thesis, we must also show that the law is *distinguished* by its functions. This cannot be done. First, the only universal functions of legal systems are trivial abstractions, such as guiding conduct, maintaining order, and so on. Second, none of these functions is unique to legal systems. So, if law is a functional kind, it is a member of the same kind as, say, "custom" or "morality" or "religion." As Kelsen saw, all of these systems of norms may have similar ambitions or functions;⁴⁰ they all may, for instance, prohibit murder. But they can be distinguished from each other only by their *technique*. Law is thus a *modal kind* and not a functional kind at all; it is distinguished by its means and not its end. The moral value of law depends primarily on the ends to which its means are put, and that is a contingent matter.

Hart's overall message about the relationship between law and morality is thus in one way similar to Hannah Arendt's in *Eichmann in Jerusalem*.⁴¹ What made Arendt's book so controversial was her claim that some Nazi atrocities were not singular, monstrous acts of deeply evil men, but rather the routinized, bureaucratic administration of people as if they were things. Seen from this point of view, Eichmann was the epitome of law-abidingness. What Arendt called the "banality of evil" thus may be seen also as the lawfulness of evil. That is what is so shocking — that law may be, in a phrase that Fuller derided, "an amoral datum."⁴² Some resist this idea so strongly, and are so intent to preserve the halo around the procedural virtues of law, that they are prepared to make its denial an item of faith. In his exchange with Hart, Fuller said: "I shall have to rest on the assertion of a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil."⁴³ That is a faith that Hart, like Arendt, could not share.

IV. FACTS, VALUES, AND THEORIES

Hart's book sought, as he said in its preface, "to further the understanding of law, coercion, and morality as different but related

40. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 20 (A. Wedberg trans., 1945); cf. KELSEN, *supra* note 9, at 60-62.

41. I first realized this on reading Lawrence Douglas's excellent article, *The Memory of Judgment: The Law, the Holocaust, and Denial*, *HIST. & MEMORY*, Fall-Winter 1996, at 100, 107-08.

42. See Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 636 (1958).

43. *Id.*

social phenomena" (p. v). He predicted that lawyers would see his work as an exercise in "analytical jurisprudence . . . concerned with the clarification of the general framework of legal thought rather than with the criticism of law or legal policy" (p. v). He also liked to think of it as "an essay in descriptive sociology" (p. v).

In case it seems obvious that that is what a legal theory should be, it is worth remembering Dworkin's fundamental disagreement. According to Dworkin "[j]urisprudence is the general part of adjudication, silent prologue to any decision at law."⁴⁴ At the opening of *Law's Empire* the chapter title puts the question "What is law?", the subtitle asks "Why it Matters," and the first sentence answers: "It matters how judges decide cases."⁴⁵ On this point Dworkin never wavers. That legal theory is about adjudication is not a matter on which he ever had second thoughts. As early as 1965, he wrote: "What, in general, is a good reason for a decision by a court of law? This is *the* question of jurisprudence"⁴⁶ Hart, the antiessentialist, never thought that anything properly could be called "*the* question of jurisprudence." The first chapter of *The Concept of Law* is entitled "Persistent Questions," in the plural, of which he identifies three as underlying much of the tradition of argument about the nature of law: How is law related to coercive threats? What does the obligatory force of law amount to, and how is it related to moral obligation? What are social rules and in what way is law about rules? (pp. 6-13). None of these is *the* question of jurisprudence, and, interestingly, none of them is Dworkin's question.

In the Postscript, Hart aims for a peaceful coexistence: Dworkin's question is certainly an important one, and legal reasoning and the theory of adjudication were topics on which Hart came to think he should have written more.⁴⁷ But he insists that there remains a role for what he calls a "general and descriptive" legal theory (pp. 239-40). It is general in that it is not tied to any particular legal system or culture, and descriptive "in that it is morally neutral and has no justificatory aims" (p. 240). Hart adds that "it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law" (p. 240).

44. DWORKIN, *supra* note 21, at 90.

45. *Id.* at 1.

46. Ronald Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L.J. 640, 640 (1965).

47. For some influential positivist accounts of adjudication and legal reasoning, see especially, NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978), and RAZ, *supra* note 33, at 180-209.

Is moral neutrality possible in these matters? Here, I think we are often hampered by a rather sparse vocabulary. Having abandoned a crude distinction between fact and value, it is now commonplace for legal theorists to infer that purported statements of fact necessarily presuppose or express moral and political positions. So while we have rejected what Dworkin calls a "flat distinction between description and evaluation,"⁴⁸ we sometimes fall into a casual identification of the evaluative, the moral, and the political.

We should avoid this, first by observing the difference between a description and a statement of a fact. A statement of fact may be appraised as true or false. A description normally is not thought of as being true or false, but as being helpful or unhelpful, illuminating or unilluminating. There is an infinite number of possible descriptions of any object or state of affairs because there are infinitely many facts about each. A description of something is thus never a statement of all the facts about it; it is a selection of those facts that are taken to be for some purposes important, salient, relevant, interesting, and so on.⁴⁹ This is not to say that a description is an appraisal of its object; it is to say that describing is always done from the point of view of certain values and in that way expresses those values.

Second, we need to remember that not all values are moral values. For example, there are the theoretical values of simplicity, consistency, fecundity, and so on.⁵⁰ There is also a deep evaluative substratum to practical thought that begins with reflection about what is really most salient about the human condition (e.g., the fact that we can reason or feel pain), and what, though true, is marginal (e.g., that we are featherless and bipedal). Here begins the realm of practical value.

An illuminating descriptive account of law will, therefore, implicate values in these two ways. We will be inclined to endorse a theory that is as simple as its subject matter permits, that is consistent with most of the other views we endorse, and that produces interesting new hypotheses about and deeper understandings of law and other related phenomena. Furthermore, because law is part of human thought and practice, we also will prefer to describe it in an anthropocentric way, as it relates to those things we take to be most important about ourselves — the way law embodies power relations that can harm or help people, for instance, rather than its connection to the demand for pulp and paper. In these ways, a general legal theory must have evaluative aspects, but this stops well short

48. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 148 (1985).

49. See AMARTYA SEN, *CHOICE, WELFARE AND MEASUREMENT* 432-49 (1982).

50. Waluchow calls these "meta-theoretical-evaluative" considerations. See WALUCHOW, *supra* note 27, at 19-30.

of the basic features of *moral* evaluation on any plausible account. A moral theory will, of course, strive for some similar theoretical virtues, and any humanistic morality that it systematizes will also begin from some set of salient facts about the human condition; however, the characteristic features of moral judgments — identifying basic goods, expressing approval and disapproval, endorsing universal prescriptions, among others — all involve commitments well beyond those of description. Thus, while descriptions are not value-neutral, they need not be morally fraught either.

This is all that Hart needs. Provided that one may describe a state of affairs without thereby endorsing it, the necessary sort of neutrality is preserved. That is how we should understand his claim that “[d]escription may still be a description, even when what is described is an evaluation” (p. 244). None of the familiar arguments about the theory-ladenness of factual statements, or the value-ladenness of descriptions, undermines this idea.

Hart’s most powerful argument for a general and descriptive theory of law, however, is not the soft-positivist one that holds that a Dworkinian approach is consistent with his own, but rather the potent claim that Dworkin’s theory actually requires something very like Hart’s for its success. Even if we say that moral principles are part of the law because they are entailed by the theory that best fits and justifies the legal institutions as a whole, we still need some way to fix on the relevant institutions in the first place. We can interpret only an object that we can identify. For this reason, Dworkin allows that there must be something called “preinterpretive” law:

[T]here must be a “preinterpretive” stage in which the rules and standards taken to provide the tentative content are identified. . . . I enclose “preinterpretive” in quotes because some kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels. But a very great degree of consensus is needed — perhaps an interpretive community is usefully defined as requiring consensus at this stage — and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.⁵¹

Such preinterpretive agreement is, of course, contingent, local, and open to challenge and change. There must be, however, “enough initial agreement about what practices are legal practices.”⁵² Fortunately, there is; the boundaries are clear to any lawyer who knows the craft. Dworkin just insists that lawyers do not learn them by first sharing a view about what a legal system amounts to, or even

51. DWORKIN, *supra* note 21, at 65-66.

52. *Id.*

sharing "common criteria or ground rules" for knowing which facts about the world are legally relevant.⁵³

These ideas need clarification, for the assertions that there are boundaries but no shared criteria, social rules but no ground rules, are obscure. If the point is merely, as Dworkin says, that neither lay nor professional understandings of law *result* from having a good theory in pocket, then there is no dispute. Everyone admits that the theories arrive late, but what Hart and most other writers assert, and what Dworkin here seems to deny, is that interesting things may be said about "preinterpretive" law, about the very boundaries of legal practice. Dworkin talks of the "consensus," "paradigms," and "assumptions" that form preinterpretive law in a way that suggests that he takes such nodal points of agreement to be surd, unstructured, facts. Hart, in contrast, thinks they are structured and constructed by conventional social rules. Even if Hart is wrong about the character of these rules, I think it premature to conclude that there is no work for theory to do at this level. Can it really be that a consensus of judgment defies explanation? I am inclined to say no.

It is, however, a fair question to ask, as students will: "What is the use of such a theory at such a level of generality?" It is no response to say: "Well, law is interesting, and we might as well have a general theory about it." We do need to explain why these deepest, structural questions about our institutions are interesting and important. Dworkin's answer, that it matters how judges decide cases, will not help at this level, for little in a general theory of law tells us how to decide cases. Nor should we, I think, try to hitch the study to some argument about the value of communing with the Great Books of legal theory. If a general theory of law is of no real use, then we might well question the greatness of these books and direct students to any of the competing bibliographies: Brontë is always a better read than Bentham. In any case, piety about books was not Hart's style.

He argued with his predecessors, but refused to encumber the text with citations. He relegated some modest number of references to the back of the book with instructions that they be read, if at all, later. (The book would now fail as a tenure piece.) In the preface, a little diffidently, he justified this decision by referring to his pedagogical aim:

I hope that this arrangement may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject; and so long as it is held by those

53. See *id.* at 91.

who read, the educational value of the subject must remain very small. [p. vi]

Legal theory has a number of legitimate ambitions, and no one need pursue all of them simultaneously, or even at all. I am sure that the division of labor is part of what has provoked misunderstanding of Hart's views. Another part is the way this division plays out in the structure of legal education at least in North America. If you come to law school with political curiosity but no prior training in the humanities or social sciences, and are then fed the typical first-year diet of doctrine, you are bound to arrive at your first legal theory course aching with hunger. To long for a first chance to debate liberty, justice, or equality and then to be served up the practice theory of rules must be pretty frustrating. All the talk about general theory being the necessary preliminary to evaluation may just sound like more excuse for delay.

There is some justice in this reaction, for description is not exactly a preliminary to evaluation. That view is influenced too much by the old idea of philosophy as underlaborer, clearing away the muddles. Description and evaluation intertwine and, ideally, cooperate. Consider Hart's advocacy of a wide concept of law, one including as full-blooded laws those that are immoral. This is not, he insists, a matter of semantics; we should prefer one concept to the other only on grounds of theoretical fecundity or of usefulness in practical judgements (p. 209). But what he says about theoretical fecundity is brief and question-begging. He thinks it confusing to separate out iniquitous laws from the rest as "non-laws" because they have so much structurally in common with laws, and because no other discipline — such as legal history — has found it profitable to distinguish them so (pp. 209-10). This argument, however, clearly assumes that the structural features of law are the most central, and that is what is at issue. Nor can we say the broad concept is strictly necessary for clear practical deliberation. It is true that matters of political obligation, punishment, and the rule of law raise complex moral issues. If the rule of law is to be sacrificed in order that very great evil be punished, then so be it, is Hart's response.⁵⁴ The idea that we may face a choice of evils, however, can be preserved in other ways too. For example, one might say that there is always a *prima facie* moral obligation to obey the law, and also a *prima facie* moral obligation to do justice. The only sure route from the premise "This is the law" to the conclusion "This must be

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A case of retroactive punishment should not be made to look like an ordinary case of punishment for an act illegal at the time. At least it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this offers no disguise for the choice between evils which, in extreme circumstances, may have to be made.

obeyed" is one that recognizes no countervailing considerations or that holds that the obligation to obey is absolute, but those are not errors inherent to a narrow concept of law. So I don't think that we are going to justify a general theory of law as a sufficient prophylactic to moral and political obtuseness.

The main interest in a general theory of law, I think, rests in the way that it helps us understand our institutions and, through them, our culture. It is only when we move beyond the question of how to decide cases, and even beyond the casuistry of applied ethics, that we begin to appreciate the role of a general theory. What is law that people take such pride in it? Is law a good idea? How and to whom do legal institutions distribute power? Is the rule of law always desirable? Can it help achieve justice? What might we gain, or lose, by limiting the reach of law? Those are deep and urgent questions for political theory, and also for political practice. Anyone who wants answers to them will need the help of a general theory of law. That Hart made such a good start on it is, for us, extremely lucky.