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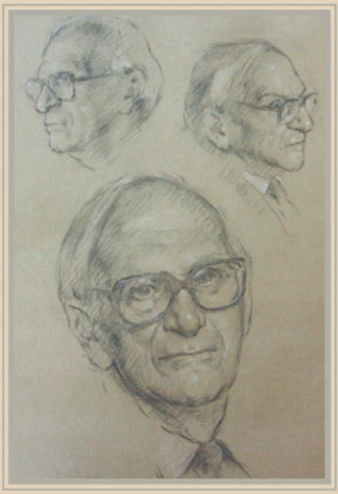
THE LEGACY OF H. L. A. HART

Legal, Political, and Moral Philosophy



Edited by
Matthew H. Kramer, Claire Grant, Ben Colburn,
& Antony Hatzistavrou

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Preface

This book arises from a British Academy Symposium on 'The Legacy of H.L.A. Hart' held at Churchill College, Cambridge, in July 2007, under the auspices of the Cambridge Forum for Legal & Political Philosophy. Early versions of the essays in this volume were written as papers for presentation at that Symposium.

We are very grateful to the British Academy for their support and generous sponsorship; we owe special thanks to Onora O'Neill, Angela Pusey, and Joanne Blore. We are likewise greatly indebted to the contributors to this volume for their fine essays and for their admirable cooperativeness at the Symposium and in the preparation of this book. Also deserving of warm thanks are Trevor Allan, Tony Honoré, Serena Olsaretti, Onora O'Neill (again), and Quentin Skinner, who chaired panels at the Symposium. We are delighted that Hart's son Charlie and grandchildren Justin and Tanya were able to attend part of the proceedings. We are much obliged also to Hart's daughter Joanna for her kind and enthusiastic support of the venture. We are likewise extremely grateful to the numerous people who attended the Symposium as delegates, and we extend our apologies to the many people who could not be taken off the waiting list. The presence of delegates at the Symposium from every continent except Antarctica is indicative of the global reach of Hart's influence.

We extend glad thanks as well to four Cantabrigians who handled a number of logistical matters: Christopher Arias, Kiersten Burge-Hendrix, Rupert Gill, and Mark McBride.

Many people at Churchill College helped to make the Symposium a great success. We are especially grateful to the bedmakers, catering staff, handymen, and porters, and we owe particular thanks to the following individuals: Paul Barringer, Alison Barton, Shirley Blackley, Jillian Blaine, Tim Cooper, Ian Douglas, Dean Flack, Martin Haydon, Paul Howitt, Rosetta Kyriakou, Ivan Martin, Richard Mee, Sandra Parsons, Angela Railton, Steve Ridyard, Carol Robinson, Michelle Tuson, and Paul Willimott. We are also much obliged to several people at the Cambridge University Law Faculty for their extremely valuable assistance: Elizabeth Aitken, Daniel Bates, Matthew Martin, David Newton, and Norma Weir. Hearty thanks are due as well to several people at the Cambridge Centre for Research in the Arts, Social Sciences, and Humanities: Catherine Hurley, Mary Jacobus, and Michelle Maciejewska.

At the Oxford University Press, John Louth and Alex Flach and Lucy Stevenson have been gratifyingly enthusiastic and adroit in their handling of this book. We

are very pleased that the OUP, as the publishers of every one of Hart's books, have been so helpfully supportive of this project.

Matthew H Kramer
Claire Grant
Ben Colburn
Antony Hatzistavrou

September 2007

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Introduction

Matthew H Kramer and Claire Grant

Herbert Lionel Adolphus Hart was the world's foremost legal philosopher in the twentieth century, and was also a major figure in political and moral philosophy. Born in the first decade of that century and living until its final decade, he was centrally responsible for reviving the philosophy of law from the doldrums in which it had lain for many years. Both through his own brilliant work and through his mentoring of some of the twentieth century's other great jurisprudential thinkers, he exerted a far-reaching influence on legal philosophy that was comparable to the influence of his friend John Rawls on political philosophy. His work has often been tellingly criticized—indeed, one of the marks of his intellectual excellence lay in his encouragement of students who took strong exception to many of his ideas—but the magnitude of his achievements is beyond any reasonable doubt.[1]

An especially impressive feature of Hart's writings is the breadth of the topics which they encompass. Unprecedentedly, the essays in this volume together cover all the main areas of his philosophical work: general legal philosophy and legal positivism; criminal responsibility and punishment; theories of rights; causation in the law; toleration and liberty; and theories of justice. Though Hart is most famous for his work in the first of these areas—as the greatest proponent of jurisprudential positivism since the days of Jeremy Bentham and John Austin—his publications in the other areas are themselves sufficient to earn him a place in the pantheon of the twentieth century's leading thinkers. Consequently, while the present volume devotes more attention to legal positivism and general legal philosophy than to any of Hart's other concerns, it also examines those other concerns in some depth.

As the title of this book suggests, the contributors focus more on Hart's legacy than on the man himself.[2] Although most of them discuss his writings quite sustainedly, every essay in the volume is predominantly philosophical rather than predominantly exegetical. While paying tribute to Hart at numerous junctures—and while taking issue with him at other junctures—the

[1] Our own admiration for Hart, huge though it is, has been far from uncritical. See, for example, Kramer 1998, 69–70, 81–82; Kramer 1999, 21–36; Kramer 2003, 312–13; Kramer 2004, 249–94; Kramer 2005; Grant 2006; Grant 2008.

[2] Hart's life has been the subject of a major recent biography; see Lacey 2004. See also MacCormick 1981.

contributors look principally toward the future rather than principally toward the past. They tackle philosophical problems that preoccupy contemporary thinkers. Hart, who memorably warned against the notion that 'a book on legal theory is primarily a book from which one learns what other books contain' (Hart 1994, vii), would doubtless have approved of this way of exploring his legacy.

*****

At the July 2007 British Academy Symposium from which this book has emerged, several legal practitioners as well as numerous philosophers were in attendance. One of the practitioners, Stephen Hockman, asked a particularly perceptive question about the applicability of Hart's abstract categories to the more concretely focused endeavours of people who participate in the operations of legal and governmental institutions. Such a question well captures an important aim that Hart pursued. On the one hand, Hart during his academic career was a philosopher who remained at high levels of abstraction in his analyses of legal and social institutions. Some of his concerns as a philosopher were quite remote from the everyday activities of lawyers and governmental officials. On the other hand, he spent several years as a practicing barrister and was thus in a position to develop a vividly informed sense of the characteristic objectives and interests of people who deal with the pressures of practical affairs. A salient element of his thought in every area of philosophy explored by this book is his emphasis on the outlooks of the participants in the practices which he discussed.

Perhaps most famous is his insistence on the centrality of the internal perspective of participants as an object of investigation by jurisprudential theorists. Without ever losing sight of the importance of other perspectives, he criticized Oliver Wendell Holmes and others for neglecting the ways in which legal concepts are understood and used by the people who run the sundry components of legal-governmental systems. Any satisfactory philosophical account of such systems has to take into consideration not only the external vantage point of an observer but also the internal viewpoint of a committed participant. By rendering salient the latter viewpoint, Hart enriched legal philosophy and helped to underscore the differences between such philosophy and certain varieties of legal sociology. Of course, in so doing, he never maintained that legal philosophers themselves have to adopt the internal perspective of a committed participant in a legal system. Such a methodological claim has been pressed by Ronald Dworkin and his followers, but Hart himself wisely eschewed it. He recognized that legal philosophers' analyses typically stem from a moderately external point of view. Still, that moderately external position is marked not least by an attunedness to the outlooks of the people whose practices are being subjected to philosophical scrutiny.

Hart's work on the other topics covered by this volume is similarly alert to the characteristic concerns and judgments of the participants in various activities. In his massive first book, *Causation in the Law*, co-written with Tony Honoré, Hart sought to systematize the factors that lead juristic decision-makers to attribute responsibility for untoward events to individuals or groups (Hart and Honoré 1959). With a host of fascinating examples to illustrate the distillation of general principles, *Causation in the Law* expounds the ways in which the participants in legal institutions construe the ascription of responsibility. Though Hart and Honoré swept too broadly in classifying many straightforwardly moral questions as questions about causation (Kramer 2003, 312–13), their exposition of the often implicit criteria for the imputation of legal responsibility was a landmark in the philosophy of law and was influential among non-jurisprudential philosophers (Mackie 1974, 117–33).

A cognate focus on the typical point of view of participants informed much of Hart's writing on legal rights. His adherence to the Will Theory of rights—a theory that analyses any rights as essentially involving powers to waive or enforce other people's duties—stemmed partly from his effort to understand why rights would matter from the perspective of somebody who holds them. His emphasis on the choices or opportunities open to individuals who are legally empowered to waive or enforce others' legal obligations is reflective of his concern to make sense of rights through the eyes of the people for whom they exist. Of course, to recognize this facet of Hart's approach is not perforce to endorse his embrace of the Will Theory; we in fact reject such a theory (Kramer 1998; Kramer 2001). Nonetheless, whether or not Hart was correct in thinking that the Will Theory is uniquely suitable for capturing the internal perspective of a right-holder, his striking image of the individual right-holder as a sovereign was indicative of his concentration on that perspective.

A similar concentration is evident in Hart's reflections on basic liberties. As is highlighted in the essay by Philip Pettit in this volume, one of the principal hallmarks of any basic liberty—as understood by Hart or by Rawls—is the significance of the liberty for the typical person who possesses it. Under the approach favoured by Hart and Rawls, then, a political philosopher cannot satisfactorily classify any basic liberty as such without placing herself in the position of a typical person for whom such a liberty is to be safeguarded. Just as a satisfactory analysis of the workings of legal systems must take account of the viewpoint of a participant in the running of such a system, a satisfactory theory of justice must take account of the viewpoint of a person to whom the principles of justice assign basic desiderata.

In Hart's work on criminal responsibility and punishment as well, we find an insistence on fathoming the concerns and motivations of the people directly involved in the practices under consideration. Indeed, any credible theory of criminal responsibility has to enter into the outlooks of the people whose responsibility is at issue. Such an approach is prominent in Hart's agency-focused theory

of criminal responsibility, which requires that 'as a normal condition of liability to punishment, … the person to be punished should, at the time of his offence, have had a certain knowledge or intention, or possessed certain powers of understanding and control' (Hart 1968, 210). This understanding of criminal responsibility was linked to Hart's conception of the basic function of law in guiding human conduct. The very focus of Hart on issues of responsibility in his writings on the philosophy of criminal law is a sign of his attentiveness to the thoughts and objectives of the people on whom legal institutions impinge. Among the conditions that must be satisfied for the proper imposition of criminal penalties is the status of someone as a responsible agent; to ascertain whether that condition is fulfilled in any given context, legal decision-makers (and the theorists who analyse their activities) have to place themselves—not necessarily sympathetically, but always empathetically—in the position of any person whose agency is under scrutiny. To a considerable extent, they must seek to grasp what it was like to be that person in the specified context.

In a largely similar vein, Hart in his political-philosophical work on toleration and liberty called for a more capacious understanding of the outlooks and concerns of the people who fall prey to intolerance. Here, however, he was appealing for a sympathetic understanding as well as for empathy; his endeavours as a political philosopher were predominantly prescriptive. He drew attention to the misery caused by intolerance (especially in connection with the legal proscription of homosexual intercourse and other unorthodox sexual behaviour), and, like Bentham before him, he urged that such misery is unwarranted when the production of it is not necessary for averting or remedying the commission of any wrongs. Whereas Hart's opponents had concentrated on the benefits to a society that stem from the strict enforcement of its code of proper behaviour, Hart highlighted the perspective of the people at whose expense those ostensible benefits are gained. He recognized that deviant conduct may elicit feelings of distaste or offence in others, but he maintained that—without more—those feelings are not enough to justify the suppression of activities that are so important from the viewpoint of the individuals who engage in them. The viewpoint of those individuals should not be obliterated from a liberal-democratic system of criminal law.

In short, in every area of legal and political and moral philosophy covered by this book, Hart sought to emphasize the need for theorists to grasp the ways in which the workings of institutions are characteristically perceived by the people who are involved in those workings. As Hart wrote, for anyone who aspires to come up with an illuminating philosophical exposition of the sundry dimensions of legal-governmental institutions, 'what is needed is a "hermeneutic" method which involves portraying rule-governed behaviour as it appears to its participants' (Hart 1983, 13). Of course, to say as much is scarcely to maintain that the viewpoints of the participants in social practices are the only things worthy of attention in such practices. On the contrary, Hart was keenly alert to the

regularized patterns of interaction that constitute such practices. Those regularities, and the participants' outlooks that shape them and are shaped by them, can always be approached through external critiques that reject the participants' self-understandings. For some purposes, such external critiques are plainly apposite. Nonetheless, no such critique will be minimally satisfactory if it ignores the participants' perspectives. Though the proponent of an external critique might deride those perspectives as deluded or otherwise inadequate, the derision will be superficial and ineffective if the perspectives have not been carefully fathomed.

More broadly, whether a theory of the institutions of law and government is condemnatory or supportive, its cogency will depend on its taking account of the ways in which the people who operate those institutions—and the other people who are affected by them—are reflective beings with characteristic aims and concerns. Hart's insistence on this point was one of his major contributions to legal and political philosophy. Admittedly, his point may sound obvious when it is stated in the abstract. In various contexts, however, it had been neglected by many of the people who write on these matters. One of Hart's great achievements lay in revealing so forcefully the distortions and intellectual impoverishment that ensue from such neglect.

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Because the principal essays in this volume are grouped under the areas of scholarship mentioned at the outset, we shall not prolong this Introduction by seeking to summarize each of them separately. Readers should be able to locate quite readily the chapters that are of most interest to them. Suffice it for us to say that the contributors to this book are among the most eminent writers on their topics, and that they have adopted a variety of approaches in their discussions of those topics. We are delighted to present their essays as a collective tribute to Hart.[3] That tribute is paid even by the chapters which are

[3] Of course, to state as much is hardly to suggest that we agree with everything in each of the essays. We disagree strongly with some of the analyses in some of the essays. We shall here mention only one small point. Leif Wenar, in footnote 11 of his chapter, insinuates that Matthew Kramer has displayed inconsistency by 'appeal[ing] to the purpose[s] of legal norms to make sense of [certain] cases . . . , where a few pages earlier he had said that purposes had no "determinative bearing" and were "quite immaterial" in his theory'. In fact, there is no inconsistency whatsoever between the two passages (in Kramer and Steiner 2007, 289–90 293–4) to which Wenar refers. In the passage from which Wenar takes his snippet quotations, Kramer is denying that a *necessary* condition for the conferral of a legal right upon some person *X* by a legal norm is that the underlying purpose of the norm is to benefit *X* or people like *X*; the existence of such an underlying purpose is not a *necessary* condition for the conferral of a right upon *X*. By contrast, in the passage that appeals to the purpose of a law *L*, Kramer is maintaining that that purpose can combine with the terms and the predictable effects of *L* to constitute a *sufficient* condition for the holding of a right by *X* thereunder. In circumstances where the terms and the predictable effects of *L* are not themselves enough to form such a condition, they can be supplemented to that end by *L*'s purpose. In short, contrary to the impression conveyed by Wenar with his snippet quotations, the passages to which he adverts are perfectly compatible.

sustainedly critical of him or which say little directly about him, for the former chapters fully recognize his towering stature as a thinker, while the latter chapters address problems on which he produced trailblazing work. This collection as a whole reveals how richly multifarious and stimulating the legacy of H.L.A. Hart is.

PART I

LEGAL POSITIVISM AND GENERAL JURISPRUDENCE

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1

On Hart's Ways: Law as Reason and as Fact

John Finnis

1

I remember Hart saying to two or three of his colleagues, over tea and biscuits in the Senior Common Room, that every ten years or so, going back a long way, he read the whole of Proust's *À la recherche du temps perdu*. I don't think he said why—why should he have?—but central to what led him, repeatedly, through all seven of these novels, on the long way from *Du côté de chez Swann* to *Le Temps retrouvé*, will surely have been their reflexive, self-referential deployment and exploration of interiority, of the first person singular. As Neil MacCormick justly says in the first edition of his *H.L.A. Hart*, the 'fulcrum' and 'central methodological insight' of Hart's 'analytical jurisprudence' is that, as a 'descriptive legal or social theorist,' one can and must '[hold] apart one's own commitments, critical morality, group membership or non-membership', and 'portray the rules for what they are in the eyes of those whose rules they are' (MacCormick 1981, 37–8). One's account of law, as Hart himself puts it in *The Concept of Law*, must 'refer to the internal aspect of rules seen from their [the members of the group's] internal point of view' and 'reproduce the way in which the rules function in the lives' of those members, that is, in their 'claims, demands, admissions, criticism . . . all the familiar transactions of life according to rules', life as led by those for whom the rules count as reasons for action, and violations of those rules count as a reason for hostility (Hart 1994, 90).

Somewhat less well known than Hart's prioritizing of the internal attitude or attitudes to law are his works on self-reference (especially self-referring laws [1]), and on intention (especially in relation to criminal liability, and to human causation). But these aspects of interiority are as central to his thought. In response to a remark of mine about, I think, how significant self-referential consistency is to the testing of philosophical positions,[2] he told me that what started his interest in philosophy, as a boy, was the breakfast cereal packet.

[1] On self-referring laws, see Hart 1983, 15–16, 170–8.
[2] See, latterly, Finnis 2004.

From the 1890s,[3] packets of Quaker oats have depicted a substantial Quaker man holding a Quaker oats packet depicting a substantial Quaker man holding a packet of Quaker oats . . . (and so on 'to infinity', claims someone talking about these packets in Aldous Huxley's 1928 novel *Point Counter Point*)[4]. In relation to crime and punishment, causation, and self-referring laws, Hart's attentiveness to our inner lives of thought, judgment, and decision was a motive for, and supplied arguments to advance, his resistance to more or less behaviourist currents of (as he often put it)[5] 'scepticism' about central aspects and institutions of law, a resistance which has been generally decisive for subsequent legal theory: a great legacy. When summing up his vindication of responsibility against the sceptic Barbara Wootton in a lecture delivered in 1961, he articulates what he calls 'an important general principle':

> Human society is a society of persons, and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of intention and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects. (Hart 1968, 182)

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

> whole dimension of the social life of those [who] . . . look upon [the red traffic light] [not merely as a sign that others will stop, but] as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation. (Hart 1994, 89)

Here Hart italicizes *signal for*, and later on the same page he italicizes its equivalent: '*reason* for'. 'Reason' is italicized more than any other noun in the book (Hart 1994, 11, 55, 90, 105, 194); it signifies practical reasons, the propositional element in thoughts of the form appropriate to guiding deliberation and eventual (possible) action. The first and fourth of the book's five italicizings of 'reason' are to make the argument that Hart was so eager, indeed impatient, to put forward even while he was setting up the three 'recurrent issues' about law—the argument that is his answer to the 'realist' scepticisms which reduce law to prediction. Sceptical 'realism' is poor as legal theory because it shuts one's eyes to the fact that 'the judge, in punishing, takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender'; a 'judge's statement that a rule is valid is an internal statement . . . , and constitutes not a prophecy of but

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

[4] Huxley 1928, 294.

[5] See my review of his *Punishment & Responsibility* (Finnis 1968); the word 'scepticism' appears in virtually every one of these essays.

part of the *reason* for his decision' (Hart 1994, 11, 105). By the time of *Essays on Bentham*, twenty years later, Hart had recast his theory of authority and law so as to emphasize yet further the centrality to it of reasons for action (peremptory and content-independent reasons).

> . . . an authoritative legal reason . . . is a consideration (which in simple systems of law may include the giving of a command) which is recognized at least in the practice of the Courts, in what I term their rule or rules of recognition, as constituting a reason for action and decision [, a reason] of a special kind. Reasons of this kind . . . constitute legal guides to action and legal standards of evaluation.[6]

Now reasons of this kind, *as* articulated in commands or *as* manifested verbally or non-verbally in the practice of the courts, are historical facts. Like other historical facts about thoughts, decisions and actions, they can, and often must, be understood, thoroughly, without being endorsed or approved, condemned, or disapproved—just understood and faithfully described. Adulterating one's understanding of other people's valuations (or of one's own past evaluations) with one's own present valuations is sheer folly for the general, the advocate, the detective, the assessor (judge of fact), the historian. There should be no question here of 'interpretative charity' or 'making it the best of its genre', let alone morally best.[7] As Hart puts it in the posthumous *Postscript*, 'Description may still be description, even when what is described is evaluation' (Hart 1994, 244). True, to bother investigating and describing *this* evaluation by *this* person or group, from among all the welter of other facts available for investigation and description, presupposes an evaluation by the investigator, not to mention the audience.[8] But that presupposed evaluation remains external to the evaluative thought—the concept, action, or practice—described. So description can and, for many purposes, should be value-free even when it describes the values and consequent actions of persons—of others or of oneself giving an account of one's own beliefs and conduct.

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

> . . . the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the insider's internal point of view or in any other way to surrender his descriptive stance. (Hart 1994, 242)

[6] Hart 1982, 18. Here Hart uses 'evaluation' much more broadly than 'statements of value' in his contrast of the latter with 'statements of validity' at Hart 1994, 108 (see text and n 25 below).

[7] All this has been clear to me since I read R G Collingwood's 1939 *Autobiography* in the early or mid 1950s. See Twining 1998, 603.

[8] 'It is the historian's judgments of value that select from the infinite welter of things that have happened the things that are worth thinking about' (Collingwood 1999, 217). Weber's version of this thought is better known.

Here there has been a shift which Hart never seems to have attended to, and perhaps would simply deny is a shift, from the description that is the stock in trade of the detective, the assessor, the translator, or the historian to what Hart calls 'descriptive general theory' (Hart 1994, 239–40). This shift is both real and important. I am not going to dwell upon it in this paper; it is the burden of chapter I of *Natural Law & Natural Rights* and of a number of recent writings of mine (Finnis 2003, 115–25; Finnis 2007, § 5). One's aspiration as a *theorist* about law and legal systems is to identify and affirm *general* and warranted propositions about a human practice or institution thoroughly shaped by thought. Developing a general theory requires one to select among all the particular and very various vocabularies and concepts that have been employed in social life both to shape and to describe the various practices or institutions which, as a theorist, one judges it accurate, illuminating and theoretically fruitful to call and treat as instances of (say) law or legal system. This theoretic judgement is not settled by the concepts or criteria articulated and/or used by those whose thought and practice is being named and treated in this way—taking those one by one, or taking the whole disorderly series of them. It is a judgement that requires one as a theorist to select and adopt one's own concept and criteria, and to do so for reasons, as Hart does in working up his theory of law in *The Concept of Law*.[9] What he offers us in that book is a *new and improved concept* of law, corresponding closely to the concept of law already employed in societies he thought reasonably organized and reasonably and critically self-aware. But even in relation to the concepts widely employed in such societies, Hart's concept of law did 'add value', that is, provided an improved understanding of the cluster of features he identifies as the central idea and reality of law, and of why those features can well cluster together—an understanding of the social functions which that kind of clustering serves and promotes, in remedying defects and affording facilities for advancing human purposes.

[9] In remarks published in 1983, Hart accepts, as part of his correction of what he had come to consider errors involved in his 'early invocation in jurisprudence of linguistic philosophy' (Hart 1983, 5), that 'the methods of linguistic philosophy, which are neutral between moral and political principles and silent about different points of view which might endow one feature rather than another of legal phenomena with significance' were, precisely by reason of that neutrality and indifference to non-neutrality, not suitable for resolving or clarifying those controversies which arise, as many of the central problems of legal philosophy do, from the divergence between partly overlapping concepts reflecting a divergence of basic points of view or values or background theory.... For such cases what is needed is first, the identification of the latent conflicting points of view which led to the choice or formation of divergent concepts, and secondly, reasoned argument directed to understanding the merits of conflicting theories, [or] divergent concepts or of rules. (Hart 1983, 6)

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

The extent to which Hart's descriptive explanation of law depends for its explanatory power on presuppositions about good and bad in human affairs was hidden from Hart in some measure by, it seems to me, some assumption he made or thesis he held about *concepts*. In the notebook which seems to record the genesis of key parts of *The Concept of Law* the word 'Concept' appears a number of times in large capitalized form.[10] It was as if, in these preparatory thoughts, the investigation or identification of a Concept somehow lifted one's understanding, one's account, one's theory, above an investigation of what particular people or groups (or any merely statistical-frequency-based selection of them) have meant, or have intended, above their conceptions of what it is important to promote as desirable (good) and avoid as undesirable (bad), and above the theorist's own 'pre-theoretical' judgments about importance and desirability (good and bad), into a realm of timeless—truly *general*—essences or forms somehow available for adoption on inspection, a neutral, value-free and 'theoretical' perception. This, I believe, is nowhere affirmed in *The Concept of Law*; if it is implied, as I think it is (and not only by the notebook and the book's title), it can and should be regarded as a philosophical myth, an illusion. In this respect, I think Hart's ideas about method in legal theory regressed from the position he had affirmed in 1953: that 'the fundamental issues of legal philosophy' are those 'discussed and reflected upon' by intelligent students of (and surely because they are issues raised and discussed in) Plato's *Republic* and Aristotle's *Nicomachean Ethics* (Hart 1953, 357). Hart knew what he meant: he lectured in 1951 on Plato's ethical and political theory, where, as in Aristotle too, whatever is said or implied about the concepts, nature, or essence of government, constitutionality, law and so forth is controlled by the respective philosophical author's *normative* moral and political theory. As Plato and Aristotle make clear, a theorist's judgments that certain conceptions of political community, government, constitutionality, and law should have primacy in the theoretical description, and the strongly evaluative (morally evaluative) grounds that Plato and Aristotle adduce for those judgments, in no way block the theorist's descriptions of other conceptions of polity, government, and law. In particular, those philosophers of human affairs can, and did, provide careful and illuminating accounts of the defective and inferior kinds and conceptions of polity, government, and law that are so frequently articulated or manifested, despite their normative inferiority (sometimes gross immorality), in the life and history of the human groups available for empirical study in their day.

[10] For one instance ('the *Concept* of law') see the transcription of an important passage from the 1950s notebook in Lacey 2004, 222. With that passage's account of how to identify 'a *standard* legal system . . . without *prejudiced* description' compare the late-1985 ms note at ibid, 351, and the similar passage published in 1983 and quoted above in note 9.

2

Instead of pursuing further that well-trodden path, I want to turn in this paper to another question arising out of Hart's interest in the internal point of view and consequently in law's character as one kind or family of reason(s) for action. The question is this: even when his account in *The Concept of Law* is enhanced by his adoption of something tantamount to Raz's concept of the detached professional perspective, neither external nor internal, in the central senses of those terms, *how well do Hart's accounts enable us to understand that kind of point of view* and that kind of reason for action? The issues I want to explore are not precisely those taken up by Neil MacCormick in the appendix to his *Legal Reasoning and Legal Theory*, where he disambiguates what he calls cognitive and volitional elements run together in Hart's relatively undifferentiated 'internal attitude' (MacCormick 1978). But, while nervous lest there be a Humean implicature to his distinction between cognition and volition, I take for granted, and accept, the many clarifications with which MacCormick there and in chapter 3 of his *H.L.A. Hart* equips us for understanding what Hart was trying to articulate in his over-simple distinction between 'the internal' and 'the external' points of view.[11]

In January 1958, Stuart Hampshire and Hart published in *Mind* 'Decision, Intention and Certainty'. Though Hampshire's name comes first, perhaps as alphabetically prior, it is certain that Hart fully owned the paper's argument: while in Harvard the previous academic year, he had not only worked on the article but spoken at a philosophy seminar on 'Knowing what you are doing', which is the article's theme and thesis (Lacey 2004, 187, 190). That thesis is: one has a knowledge of, and certainty about, what one is doing, one's own voluntary actions, which is not an observer's knowledge, and is not based like the observer/spectator's on empirical evidence or on the observation of one's own (the acting person's) movements: it is *practical* knowledge.[12] First-person statements about an action have the same meaning as third-person statements, but as with 'many concepts involving reference to states of consciousness' there is an 'asymmetry between first-person and third-person statements' about actions, corresponding to the radical difference between the 'means of verification' of the respective statements, the kind of knowledge they articulate (Hampshire and Hart 1958, 10). For the same reason, the article contends, there is a 'necessary connexion' between intending to do something and certainty about what one will do—certainty based not on reflection upon and induction from the evidence of one's

[11] For my own, overlapping clarifications, drawing like MacCormick's on work by Raz, see Finnis 1980, 233–7.

[12] Hampshire and Hart 1958, 1, 5, 6, 8–9. The thesis can also be found prominently in Anscombe 1957, but, unlike Hampshire and Hart, Anscombe proceeds to a robust examination of practical reasoning and its upshot, intention.

experience (as might be the case with one's more or less *in*voluntary behaviour), but instead on one's having reasons for doing what one has decided to do: 'practical certainty about what to do' (Hampshire and Hart 1958, 1, 4, 5, 12).

Although neither 'internal' nor any cognate term appears in it, the article is plainly a portrayal and exploration of what *The Concept of Law* will call the internal attitude or point of view as it bears, not on rules or rule-guided action, but on any sort of voluntary action. The article explores other truths important to *The Concept of Law*: the importance of distinguishing that first-person perspective from the perspective or viewpoint or 'attitude' of any observer or spectator (Hampshire and Hart 1958, 5), and the parallel difference between stating an intention—thereby evidencing one's acceptance of reasons for action—and making a prediction that one will act. The article is illuminating and sound, furthermore, in much that it stresses about the empirical reality of practical knowledge and 'free-will', and about the connection between freedom of decision and having reasons for decision (Hampshire and Hart 1958, 4–5). But it has deep and pervasive mistakes, which shed much light on some principal features of contemporary legal philosophy, features manifested in and partly shaped by *The Concept of Law*.

At the very point where Hart and Hampshire bring us face to face with the reality and distinctness of one's practical knowledge of what one intends to do, or is doing, they mix up that practical knowledge with certainty; worse, the certainty they speak of is predictive. Moreover: since *will*, which culminates in choice (what they call decision), is really part and parcel of *reason* (for willing is one's responsiveness to what one believes to be reasons), it is unsurprising that, having conflated practical knowledge and predictive certainty, they make the acting person's choosing consist in (be 'constituted' by) 'becoming certain' about 'what he will do' (Hampshire and Hart 1958, 3, 2). Just when they are announcing that reason can be practical as well as descriptive/predictive, they dissolve its practicality into the descriptive/predictive. One's decision, like one's consequent intention (and thus of course one's disposition to act and one's action), is unhinged from the reasons that precede, and in an unexplored sense result in,[13] the deciding/choosing.

Though it is true that, as the authors underline (Hampshire and Hart 1958, 2), someone who has not yet decided between two or more courses of action must be uncertain about what he will do, it is fallacious to conclude, as they do, that deciding is constituted by becoming certain about what one will do. Indeed, it is not even true that my deciding to do *phi* entails, as they assert, that I am 'certain that I will do this, unless I am in some way prevented'. For I know that I may change my mind, reverse my decision, make a contrary choice. Hart and

[13] Hampshire and Hart 1958, 3: 'The [agent's] certainty [about what he will do] comes at the moment of decision, and indeed constitutes the decision, when the certainty is arrived at . . . as a result of considering reasons, and not as a result of considering evidence. . . . When he has made his decision, *that is,* when, after considering reasons, all uncertainty about what he is going to do has been removed from his mind, he will be said to intend to do whatever he has decided to do . . .'

Hampshire, without signalling their shift, later acknowledge this, saying that once I have made my decision, which occurs when 'all uncertainty about what [I am going to do] has been removed from [my] mind, I will be said to intend to do whatever [I have] decided to do, unless either [I fall] into uncertainty again, as a result of further reasons suggesting themselves, *or until [I] definitely [change my] mind*' (Hampshire and Hart 1958, 3). But neither the conditionality of conditional intentions (Finnis 1994) nor the standing significant possibility of change of mind (reversal of decision) is elucidated or even discussed by Hart and Hampshire.[14] The authors are left both asserting and denying that to decide and intend is to make a prediction (become certain) about what one will do.

The truth is that choosing, forming a definite intention, is settling not the indicative-future question 'What will I do?', but the gerundive-optative, *practical* question 'What am I to do?', 'What, in these or more or less specific future circumstances, *should* I do?', 'What is-to-be done [*faciendum*, *agendum*]?' It is compatible with uncertainty about the merits of the option chosen, and in that sense, compatible with uncertainty about *what to do*. For choice between alternative options, in the focal sense of 'choice' (*electio*, selection and resolve) is really only necessary when (so far as the chooser can see) the reasons in favour of one option are not all satisfied, or as well satisfied in all dimensions of intelligible good, by the other option(s) (Finnis 1992, 146–7; Finnis 1997, 219–20). Choosing is also compatible with uncertainty about what one will do; for, especially when the carrying out of one's intention is conditional on contingent future circumstances, one can reasonably be alive to the possibility that one will sometime before then find reason to reverse one's choice (perhaps even reasons that one had considered when making one's original decision). Hart and Hampshire were right to point out the certainty one can and normally does have about what one is doing, but wrong to extrapolate to certainty about the future fulfilling of one's intentions; their error leads them to substantial self-contradiction about the allegedly predictive character of statements of intention, and to belated and unintegrated acknowledgement of changes of heart/mind.

Nor do they adequately explicate one's certainty about what one is doing. One knows what one is doing, I would say, because one's doing (in the case of fully voluntary actions) is the *carrying out of* the proposal/plan that one adopted in one's decision/choice. A plan is a rational structure, in thought, of ends and means. As Aristotle and Aquinas have brilliantly illuminated, each end except the one most ultimate (relative to some particular behaviour) is also a means to some more ultimate end, and each means, except the exertion involved in the very behaviour itself, also stands as an end relative to the means next more proximate to

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

that exertion.[15] Moreover, in the deliberation that shapes alternative proposals for choice, ends and means figure propositionally, as reasons for the respective courses of action envisaged in the rival proposals. Each reason articulates a supposed benefit, a supposed intelligible good, promised (not guaranteed!) by the proposed course of action supported by that reason. Within each proposal that one shapes for oneself in deliberation, every means (and thus virtually every end) is transparent for the end which gives point to that means. So too, when one has chosen one proposal in preference to the other(s), the reasons favouring that proposal and course of action remain in play, giving one reason to exert oneself to carry out the chosen action, whether now or when appropriate circumstances arise. The propositional expression of this is not Hart-Hampshire's 'I am certain that *this* is what I will do,' but Aquinas's *imperium*, '*This* is the thing for me to be doing—what I should be doing' (not necessarily a moral 'should')—the directive (*imperium*, command), from oneself as rational self-determining chooser to oneself as rational agent,[16] to do what it takes to achieve the intelligible benefits with an eye to which one chose (adopted the proposal one did), benefits one believed and believes attainable by or in such conduct (attainable if one's means prove to have the efficacy one envisaged for them in one's plan/proposal).

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

3

Consider Hart's canonical account or definition of the internal attitude. As it bears on rules, it is the attitude of those who 'accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms

[15] On their understanding of means as nested ends, see eg Finnis 1991; Finnis 1998, 58–71, esp 64 n 20.

[16] On the important and neglected reality of *imperium* in personal choice and action, see Finnis 1980, 338–40. Hart, in conversation with me (again in the tea room), once lightly mocked my account as replacing 'push' theories of motivation (and obligation) with a 'pull' theory. But in understanding practical reason, and willing (which is *in* it, *in ratione*), we must in the last analysis treat as misleading all metaphors borrowed from sub-rational motivation, let alone those from sub-human forms of motion. Reason's directiveness, in practical as in theoretical reason, is *sui generis*, and so, accordingly, is willing, one's responsiveness to reasons (intelligible goods).

of the rules'.[17] And, says Hart, 'the acceptance of the rules as common standards for the group may be split off from the *relatively passive* matter of the ordinary individual acquiescing in the rules by obeying them for his part alone' (Hart 1994, 117, emphasis added).

What should strike us, however, is the relatively passive character of even the officials' internal attitude as characterized by Hart. True, they accept the rules not simply as commonly accepted standards but as common standards *for* themselves *and others*;[18] they use the rules to appraise their own and others' conduct. But in Hart's account they at most cooperate in *maintaining* rules that Hart's account treats as out there, available for acceptance and maintenance. What is striking is the contrast between this and the classical theory of law which treats as central and primary the *positing* of legal rules, and—rightly, I believe—takes their epistemologically and ontologically primary mode of existence to be their existing as a proposal adopted by the choice/decision of their maker; adopted, that is to say, as a kind of plan of conduct for the community and its members and officials. Once made, promulgated, the rules will of course have to be maintained. But this very maintaining is to be understood as a kind of (re)novation of the making. That understanding is in line with Aristotle's definition of the citizen as one who is entitled to share and does share in governing the political community. Hart's notion of accepting rules *as common* standards for oneself *and others* is the nearest his core legal theory gets to the classical notion of law's existence: as a kind of extending of the law-making activities of the rulers, an extending by a kind of interior personal re-enactment, person by person, of the ruler's or rulers' legally decisive adoption of their own legislative or other law-positing proposals.[19]

[17] Hart 1994, 91; see also 90, 98, 102, 109–10, 115, 116, 201.

[18] MacCormick 1978, 34–5, begins his explanation of the 'stronger case' of acceptance of a rule, 'willing acceptance': 'Not merely has one a preference for observance of the "pattern", but one prefers it as constituting a rule *which one supposes to be sustained by a shared or common preference* among those to whom it is deemed applicable' (emphasis added). Later, at p 41, MacCormick adjusts this to make the more important point: 'the element of "preference" involved in the "internal point of view" tends to be conditional: one's preference *that a given pattern of action be adhered to by all* may be conditional upon the pattern's being and continuing to be supported by common or convergent preferences among all or nearly all the parties to the activity contemplated' (emphasis added). This justified adjustment is carried forward on p 43: 'Where there is common acceptance of certain standards envisaged as being shared or conventional standards, those who accept them belong to a "group" but so "from the internal point of view" *of these accepters* do all those to whose conduct they deem the standards applicable, and commonly that in turn depends on the possession by human beings of some characteristic which is not necessarily a voluntarily acquired characteristic. Hence Hart's crucial conception of a "group" appears not to be prior to or definable independently of his conception of a rule.' This is illuminating, though the final 'hence' is not altogether clear to me, since members of a group of the kind in which the central case of law is instantiated are characteristically able to identify their group (nation) even when a good many rules, including at least some of the group's former rules of recognition, have broken down.

[19] Finnis, 1998, 254–6: 'Aquinas proposes and argues for a definition of law: an ordinance of reason for the common good of a [complete] community, promulgated by the person or body responsible for looking after that community. But in supplementing and explicating that definition, Aquinas immediately stresses that law—a law—is "simply a sort of prescription {dictamen} of practical reason *in the ruler* governing a complete community", and that "prescriptions" are

A law may, of course, as the classics constantly remind us, be a barely articulate belch of malevolence against a minority (or indeed a perhaps sheeplike majority), a decree mouthed by the terrorist ruler or rulers to a group of henchmen, officials, and 'people's' judges, and communicated by these officials only fragmentarily and in deliberately confusing form to the subjects, perhaps to induce some self-herding towards the slaughterhouse. But it would advance no theoretical purpose to take *such* decrees and such forms of governance as representative laws and legal governance when asking why it makes sense to transit from Hart's 'pre-legal' form of governance to what he calls the central case of law and legal system, or when reflecting on what would be lost in transiting from law to Marxian post-legal society, or when considering the point and worth of the principles 'which lawyers term principles of legality' (Hart 1994, 207), or joining the millennial debate about the respective advantages of the rule of law and the rule of legally unfettered rulers.

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

simply universal propositions of practical reason which prescribe and direct to action. His explications also add that government (governing, governance) by law means, equally concretely, that these practical propositions conceived in the minds of those responsible for ruling must be assented to by the ruled, and adopted into their own minds as reasons for action. The assent may have been induced only by fear of sanctions, though such unwilling (reluctant) assent cannot be the central case of cooperation in government by law. . . . the present point is simply that law needs to be present in the minds not only of those who make it but also of those to whom it is addressed—present if not actually, at least habitually—as the traffic laws are in the minds of careful drivers who conform to them without actually thinking about them. The subjects of the law share (willingly or unwillingly) in at least the conclusions of the rulers' practical thinking and in the plan which the rulers propose (reasonably and truthfully or unreasonably and falsely) as a plan for promoting and/or protecting common good. For just as an individual's choice is followed and put into effect by the directive {imperium} of that individual's reason, so a legislature's or other ruler's choice of a plan for common good is put into effect by way of citizens taking the law's directive {imperium**;** ordinatio} *as if* it were putting into effect their own choice. The central case of government is the rule of a free people, and the central case of law is coordination of willing subjects by law which, by its fully public character (promulgation), its clarity, generality, stability, and practicability, treats them as partners in public reason' (notes, citations, and cross-references omitted).

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

In that light, we can see that laws and law-makers systematically offer their subjects *at least* four different kinds of reason for compliance.[20] (It goes without saying that, as Hart constantly said, laws like every other social fact provide the occasion for many other kinds of motivation for doing the same thing as the law requires to be done: conformism and conventionalism, careerism and cowardice, to name some of the motives, which Hart gave other names.[21]) Where the posited law attaches definitions and either penalties or other negative consequences to *mala in se* (say, rape), it invites its subjects to treat abstaining from these forbidden kinds of act as something required by the very same practical reason that the law-maker judged inherently sound and sought to refine and reinforce, *as well as* by the next three kinds of reason. Secondly, when we are in the zone of, broadly speaking, *mala prohibita*, the posited law offers to promote common good (including, as common good always does, what justice demands as proper respect for rights) by forbidding or requiring some kind of act which is not already, as such, or always and everywhere, excluded or required by well-judging practical reason. In this zone the law offers its subjects the opportunity to accept and comply with it both (a) for the same sufficient though often *not* rationally conclusive, dominant, or compelling reason(s) as the law-maker(s) *decided* to give effect to in preference to the competing reasons for some competing alternative legislative scheme, and (b) for the next two kinds of reason.

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

[20] I discuss here only obligation-imposing norms/rules, and leave aside both (a) power-conferring norms/rules and (b) the question of the collateral moral obligation (not to be seen to defy the positive law) that may subsist *in some of the instances* of laws so unjust that their legal validity is deprived of the moral entailment that, presumptively and defeasibly, it would otherwise have (Finnis 1980, 361).

[21] See Hart 1994, 231, 203, 114.

adoption of it; for such subjects there remains, nonetheless, a kind of reason, often sufficient, to accept the rule as a common standard for themselves and others in the same country, the reason afforded by the fact that the rule is a valid part of the country's legal system.[22]

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

> 'Sanctions' are… required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system. (Hart 1994, 198)

This passage, illuminating though it is, is not very clear, for it shifts to and fro, without signalling, from viewpoint to viewpoint. Its first and third sentences address the perspective of the law-maker, and of the subject (citizen or friendly alien resident) who shares the law-makers' perspective; the first sentence also *alludes to* the perspective of those (who may even be the 'normal' majority) for whom the normal motive for obedience *is* fear of sanction. The passage's second sentence addresses the perspective of the subject as subject, contemplating obedience or disobedience. The passage's conclusion, about what 'reason demands', presupposes, strikingly but ineluctably, that the designer of the legal system, and anyone willing to adopt the designer's viewpoint and purposes, envisages (has as an end or objective) a system with a content (including forms and procedures) worthy of the *voluntary* cooperation of a *reasonable* subject. Hart here takes for granted that law, the central case legal system that is the real subject-matter of *The Concept of Law*, is an arrangement rationally prescribed, by those responsible for the community, for the common good of its members: *ordinatio rationis ad bonum commune*, *ab eo qui curam communitatis habet promulgata*.[23]

Notice that Hart does not specify what is bad in the 'danger' that those who voluntarily cooperate would 'go to the wall'; the passage gets much of its force from the plausible implication that it is, in some large part, the evil of unfairness to them (for the disobedience of the scofflaws would, by hypothesis, be going unpenalized). It is like the passage earlier in the book (Hart 1994, 93–4), stating the 'defect' for which the 'remedy' is courts and 'secondary' rules of adjudication.

[22] This is explored in some depth in Finnis 1984 (whose analysis is defended, against Raz's critique, in Finnis 1989).

[23] Aquinas, *Summa Theologiae*, 1–2, q. 90 a. 4c; see Finnis 1998, 255–6.

For though Hart labels it inefficiency, what makes the absence of *judicial* means of resolving disputes about rule-violation a defect is surely, in some large measure if not predominantly, the unfairness to the party whose wronging causes the dispute and/or who, being the weaker, would probably be wronged if the dispute were ended by some non-judicial means. In each of these cases, the fairness being appealed to just beneath the surface of Hart's text is essentially the justice that he elucidates in his account of the justice of compensation for injury: the injury upsets the 'artificial equality' or 'equilibrium' established by moral (and, Hart should have added, legal) rules which put the weak and simple on a (normative) level with the strong and cunning; the upset is itself unfair/unjust, and it would be unfair/unjust to leave it unrectified by compensation.[24]

To understand Hart's legacy, however, one needs to notice that he never invites his readers to reflect on the relation—within the one book *The Concept of Law*, let alone within his writings as a whole—between what he says there about justice, what he says about reason, and what he says about the central case of law and the 'defects' it 'remedies' and the 'amenities' it provides. This neglect of pertinent questions parallels other refusals to raise questions. When judges around the English-speaking world needed the help of legal theory to respond to the juridical challenge of *coups d'état* and revolutions, they could find nothing illuminating in Hart's theory of the rule(s) of recognition.[25] For though that 'ultimate' rule is explained by Hart as the answer to a question, namely the question—which follows fittingly the lawyer's sequence of inquiries seeking the reason for the validity of by-laws and ministerial legislation—why a parliamentary enactment is valid, the answer, namely that the courts and officials (if not also private persons) *have the practice* of *using* the rule that what Parliament enacts is to be recognized as law, is treated by Hart as 'a stop in inquiries' (Hart 1994, 107). What he has in mind is *not only*, as he reasonably says, a stop in inquiries seeking further, more ultimate posited rules, *but also*, as he disappointingly takes for granted, inquiries seeking other *juridically relevant* reasons for continuing, discontinuing, or modifying the practice in which the rule of recognition consists. When we entertain, for reasonable affirmation or denial, the proposition that the rule (and the system based on it) is 'worthy of support', we have simply moved, according to Hart, 'from a statement of validity to a statement of value'.[26]

[24] Hart 1994, 164–5. Hart should have recalled all this when considering the justice of retribution as a general justifying aim of punishment, but seems never to have done so: see Finnis 1980, 262–4; Finnis 1998, 210–15.

[25] So they turned, albeit inappropriately and fruitlessly, to Kelsen, whose general theory at least attempted to give a juridical account of the source of the validity of an existing constitution, ie of the relation between a 'momentary' legal system and the diachronic legal system in which each momentary system takes its place. See Finnis 1973; Eekelaar 1973.

[26] Hart 1994, 108. [After delivering this paper, I read Simmonds 2007, which at 126–36 develops a valuable complementary critique of Hart's truncation of 'the domain of the juridical' (126). There is much illuminating argument and reflection in the book; it is mistaken, however, in saying (56 n 28) that, in the theory of law developed in the central chapters of my *Natural Law and Natural Rights,* the treating of the common good as central to the understanding of law is 'a

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

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

4

Before turning, finally, to the question why Hart so truncated his enquiry into legal reasons, I should say a word about what Hart's successors, in their reflections on the nature of law, have made of his legacy. (Perhaps the word 'legacy'

consequence of' the methodological claims I advanced in chapter I about descriptive general theory. Though chapter I of my book treats general legal theory which is descriptive in purpose as a legitimate enterprise (provided it acknowledges its dependence on evaluations internal to its method of concept-selection), the later chapters on law do not have a descriptive purpose, but (for reasons underlined in Finnis 2003) are normative/evaluative in purpose as well as method, and are not at all dependent on the argument of chapter I.]

in this volume's title was intended, not in the lawyer's sense of what the testator chose to give, maybe with latent defects of which he was unaware—the sense on which I've been relying—but in the loose sense of what his successors made of it all.) Some have maintained (LP1) that 'in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)'.[27] Others have maintained (LP2) that 'determining what the law [in a given time and place] is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances' (Marmor 2001, 71). The first thesis (LP1) seems the more strenuous: 'never by reference to merits' is a stronger claim than 'not necessarily by reference to merits,' and that helps explain why John Gardner, sponsor of (LP1), ascribes to the thesis, and to its approach to law, 'comprehensive normative inertness'.[28] It corresponds to Hart's sharp distinction between 'statements of validity' and 'statements of value'. But in Hart that distinction seemed to have the purpose, and more clearly had the effect, of restricting the theory of law to accounting for social-fact-source-based validity without proposing any statement of value.[29] In Gardner, however, as in Leslie Green's similar account of legal theory, and Joseph Raz's, in his own way,[30] too, the affirmation of this sources thesis, (LP1), is said to be in no way 'a whole theory of law's nature'. (LP1) is compatible, they affirm, 'with any number of further theses about law's nature, including the thesis that all valid law is *by its nature* subject to special moral objectives and imperatives *of its own*' (Gardner 2001, 210, emphases added), and compatible with the thesis that 'in some contexts "legality" . . . names a moral value, such that laws may be more or less valid depending on . . . their merits', and with the thesis that 'one must capture this moral value of legality . . . in order to tell the whole story of law's nature'.[31] It thus becomes clear that (LP1) can and should

[27] Gardner 2001, 201. This seems to be practically equivalent to Raz's 'sources thesis', often called by others 'exclusive positivism'.

[28] Gardner 2001, 203; cf my comparison of his and Brian Leiter's uses of this phrase in Finnis 2003, 115–28.

[29] The *Postscript's* embrace (Hart 1994, 250–4) of soft or inclusive positivism does not significantly qualify this restriction, since it is a social-fact source that, in such a view, licenses the jurist to look beyond such sources to moral standards, and the legal *theory* of the kind that Hart undertook is restricted, by the descriptive purpose so emphasized in the *Postscript*, to reporting the social fact that the societies under study bring to bear, at this point in their legal reasoning, the relevant moral beliefs they have and are licensed to refer to.

[30] Consider his distinction between applying the law (restricted to social-fact sources) and judicial argument *according to law* (which properly embraces moral reasons and reasoning about maintaining, developing, or amending the law): see, for example, Raz 1993.

[31] Gardner 2001, 226. The final paragraph of Green 2003 similarly affirms: 'Evaluative argument is, of course, central to the philosophy of law more generally. No legal philosopher can be *only* a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied?); of what claim law has on our obedience (is there a duty to obey?); and also of the pivotal questions of what laws we should have and whether we should have law at all. Legal positivism does not aspire to answer these questions,

be formulated more precisely, converting its universal quantifier to an existential one: (LP′) There is a 'technically confined' and 'intra-systemic' sense of 'legal validity' such that validity in this sense can be predicated of a supposed rule by reference only to social-fact sources, without reference to what ought to be the law (or the sources of law) according to some standard not 'based on' social-fact sources.

(LP′) is entitled, it seems to me, to the assent of everyone everywhere.[32] Certainly it is what was taken for granted by those who said *lex injusta non est lex*, which, understood as its authors understood it,[33] asserts that if a rule which is legally valid in the (LP′) sense is sufficiently unmeritorious it lacks the entitlement to be counted as personally decisive for them by judges, officials, and citizens, an entitlement to directive decisiveness that is central to the reasons we have for establishing and maintaining legal systems.

5

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

Like any other fact about what happens or is or has been done, *practice*, whether idiosyncratic, widespread, or universal, provides by itself no reason for its own continuation. From such an *Is* no *Ought* (or other gerundive-optative) can be inferred without the aid of another *Ought* or gerundive-optative *Is-to-be-pursued-or-done*. The fact that it is raining is in itself no reason to carry an umbrella, no reason at all, even in conjunction with the fact that without an umbrella I'll get wet. But facts like these can play their part in the reason, the warranted conclusion (that I should [had better] carry an umbrella) which gets its directive or normative element from some practical, evaluative premise such as: it's bad for one's health

though its claim that the existence and content of law depends only on social facts does give them shape.'

[32] See Finnis 1980, 290; Finnis 2002, 8–15; Finnis 2003, 128–9; and more precisely Finnis 2007, § 3.1.

[33] Nothing could be stranger than Hart's decision to treat the saying as an invitation to treat all positive law as morally binding: Hart 1994, 210–11. For my critique, see Finnis 1980, 364–6; for Hart's reply, see Hart 1983, 11–12. Yet MacCormick is right to give prominence to the thought that motivates Hart in his attempted critique of the tradition, the thought that we must '[hold] all laws as always open to moral criticism since there is no *conceptual* ground for supposing that the law which *is* and the law which *ought* to be coincide', with the result that 'the ultimate basis for adhering to the positivist thesis of the conceptual differentiation of law and morals is itself a moral reason . . . to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in face of the law which is' (MacCormick 1981, 24–5). See likewise the opening paragraph of MacCormick 2007a. Since that moral concern was fully shared by the tradition assaulted by so many theorists calling themselves legal positivists, much of the history of jurisprudence over the past two hundred years or more is a tale of wasted zeal.