The Concept of Law

Third Edition

H.L.A. HART

With an Introduction by Leslie Green

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THE CONCEPT OF LAW

THIRD EDITION

By

H. L. A. HART

With a Postscript edited by
Penelope A. Bulloch and Joseph Raz
And with an Introduction and Notes by
Leslie Green

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TO J.H.

PREFACE

My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena. Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law. The lawyer will regard the book as an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal policy. More over, at many points, I have raised questions which may well be said to be about the meanings of words. Thus I have considered: how 'being obliged' differs from 'having an obligation'; how the statement that a rule is a valid rule of law differs from a prediction of the behaviour of officials; what is meant by the assertion that a social group observes a rule and how this differs from and resembles the assertion that its members habitually do certain things. Indeed, one of the central themes of the book is that neither law nor any other form of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called 'internal' and 'external' and which can both be made whenever social rules are observed.

Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J. L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena'.

I am heavily and obviously indebted to other writers; indeed much of the book is concerned with the deficiencies of a simple model of a legal system, constructed along the lines of Austin's imperative theory. But in the text the reader will find very few references to other writers and very few footnotes. Instead, he will find at the end of the book extensive notes designed to be read after each chapter; here the views expressed in the text are related to those of my predecessors and contemporaries, and suggestions are made as to the way in which the argument may be further pursued in their writings. I have taken this course, partly because the argument of the book is a continuous one; which comparison with other theories would interrupt. But I have also had a pedagogic 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 who read, the educational value of the subject must remain very small.

I have been indebted for too long to too many friends to be capable now of identifying all my obligations. But I have a special debt to acknowledge to Mr A. M. Honoré whose detailed criticisms exposed many confusions of thought and infelicities of style. These I have tried to eliminate, but I fear that much is left of which he would disapprove. I owe to conversations with Mr G. A. Paul anything of value in the political philosophy of this book and in its reinterpretation of natural law, and I have to thank him for reading the proofs. I am also most grateful to Dr Rupert Cross and Mr P. F. Strawson, who read the text, for their beneficial advice and criticism.

H. L. A. HART

EDITORS' NOTE

(Written for the Second Edition)

Within a few years of its publication *The Concept Of Law* transformed the way jurisprudence was understood and studied in the English-speaking world and beyond. Its enormous impact led to a multitude of publications discussing the book and its doctrines, and not only in the context of legal theory, but in political and moral philosophy too.

For many years Hart had it in mind to add a chapter to *The Concept of Law*. He did not wish to tinker with the text whose influence has been so great, and in accordance with his wishes it is here published unchanged, except for minor corrections. But he wanted to respond to the many discussions of the book, defending his position against those who misconstrued it, refuting unfounded criticism, and—of equal importance in his eyes conceding the force of justified criticism and suggesting ways of adjusting the book's doctrines to meet those points. That the new chapter, first thought of as a preface, but finally as a postscript, was unfinished at the time of his death was due only in part to his meticulous perfectionism. It was also due to persisting doubts about the wisdom of the project, and a nagging uncertainty whether he could do justice to the vigour and insight of the theses of the book as originally conceived. Nevertheless, and with many interruptions, he persisted with work on the postscript and at the time of his death the first of the two intended sections was nearly complete.

When Jennifer Hart asked us to look at the drafts and decide whether there was anything publishable there our foremost thought was not to let anything be published that Hart would not have been happy with. We were, therefore, delighted to discover that for the most part the first section of the postscript was in such a finished state. We found only hand-written notes intended for the second section, and they were too fragmentary and inchoate to be publishable. In contrast the first section existed in several versions, having been typed, revised, retyped, and rerevised. Even the most

recent version was obviously not thought by him to be in a final state. There are numerous alterations in pencil and Biro. Moreover, Hart did not discard earlier versions, but seems to have continued to work on whichever version was to hand. While this made the editorial task more difficult, the changes introduced over the last two years were mostly changes of stylistic nuance, which itself indicated that he was essentially satisfied with the text as it was.

Our task was to compare the alternative versions, and where they did not match establish whether segments of text which appeared in only one of them were missing from the others because he discarded them, or because he never had one version incorporating all the emendations. The published text includes all the emendations which were not discarded by Hart, and which appear in versions of the text that he continued to revise. At times the text itself was incoherent. Often this must have been the result of a misreading of a manuscript by the typist, whose mistakes Hart did not always notice. At other times it was no doubt due to the natural way in which sentences get mangled in the course of composition, to be sorted out at the final drafting, which he did not live to do. In these cases we tried to restore the original text, or to recapture, with minimum intervention, Hart's thought. One special problem was presented by Section 6 (on discretion). We found two versions of its opening paragraph, one in a copy which ended at that point, and another in a copy containing the rest of the section. As the truncated version was in a copy incorporating many of his most recent revisions, and was never discarded by him, and as it is consonant with his general discussion in the postscript, we decided to allow both versions to be published, the one which was not continued appearing in an endnote.

Hart never had the notes, mostly references, typed. He had a hand-written version of the notes, the cues for which were most easily traced in the earliest typed copy of the main text. Later he occasionally added references in marginal comments, but for the most part these were incomplete, sometimes indicating no more than the need to trace the reference. Timothy Endicott has checked all the references, traced all that were incomplete, and added references where Hart quoted Dworkin

or closely paraphrased him without indicating a source. Endicott also corrected the text where the quotations were inaccurate. In the course of this work, which involved extensive research and resourcefulness, he has also suggested several corrections to the main text, in line with the editorial guidelines set out above, which we gratefully incorporated.

There is no doubt in our mind that given the opportunity Hart would have further polished and improved the text before publishing it. But we believe that the published postscript contains his considered response to many of Dworkin's arguments.

Penelope A. Bulloch
Joseph Raz
1994

PREFACE TO THE THIRD EDITION

The Concept of Law is based on introductory lectures in jurisprudence that Herbert Hart gave to law students at the University of Oxford. After its first publication in 1961, it quickly became the most influential book in legal philosophy ever written in English. Scholars in law, in philosophy, and in political theory continue to develop, build on, and criticize its arguments. At the same time, it remains a widely used introduction to its subject and is read by students, whether in the original or in one of its many translations, around the globe.

As the fiftieth anniversary of the first publication of the book approached, Oxford University Press approached me about the possibility of preparing a new edition. A posthumous second edition, published in 1994 under the editorship of Penelope Bulloch and Joseph Raz, included a Postscript based on Hart's unpublished replies to Ronald Dworkin. That edition set off a new wave of debate about Hart's theories and about jurisprudence in general. After several more reprints, it was time to correct a few errors in the text and to redesign the book. This opened the door to the possibility of including some new material.

Although *The Concept of Law* needs no apology, after half a century it is no longer true that it needs no introduction. In the one that follows I highlight some main themes, sketch a few criticisms and, most important, try to forestall some misunderstandings of its project. Hart had added notes giving references, elaborating points, and suggesting further readings. These have been left intact. But many of those readings have been superseded and many later books and articles take up his arguments. A fresh set of notes has therefore been added to point students in the direction of some key debates. Finally, although earlier works do give citations to the pagination of the first edition, fewer and fewer copies of that edition are still in circulation. (And fewer and fewer people familiar with its pagination are still in circulation.) I therefore decided to follow the pagination of the second edition.

The Introduction draws on material previously published in my paper 'The Concept of Law Revisited' (1997) 94 *Michigan Law Review* 1687. I am very grateful to Alex Flach of Oxford University Press, who first proposed this project and who gave valuable advice at many points. My colleague John Finnis helped with corrections to Hart's text; Tom Adams assisted with research for the Notes: warm thanks to both of them. And thanks especially to Denise Réaume, who read and commented on the Introduction.

Leslie Green
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CONTENTS

INTRODUCTION, *by Leslie Green* xv

1. Hart's Message xv
2. Law as a Social Construction xvii
3. Law and Power xxvii
4. Law and Morality xxxiii
5. Fact, Value, and Method xliv
6. The Point lii

I. PERSISTENT QUESTIONS 1

1. Perplexities of Legal Theory 1
2. Three Recurrent Issues 6
3. Definition 13

II. LAWS, COMMANDS, AND ORDERS 18

1. Varieties of Imperatives 18
2. Law as Coercive Orders 20

III. THE VARIETY OF LAWS 26

1. The Content of Laws 27
2. The Range of Application 42
3. Modes of Origin 44

IV. SOVEREIGN AND SUBJECT 50

1. The Habit of Obedience and the Continuity of Law 51
2. The Persistence of Law 61
3. Legal Limitations on Legislative Power 66
4. The Sovereign Behind the Legislature 71

V. LAW AS THE UNION OF PRIMARY AND SECONDARY RULES 79

I. A Fresh Start 79
2. The Idea of Obligation 82
3. The Elements of Law 91

VI. THE FOUNDATIONS OF A LEGAL SYSTEM 100

1. Rule of Recognition and Legal Validity 100
2. New Questions 110
3. The Pathology of a Legal System 117

VII. FORMALISM AND RULE-SCEPTICISM 124

1. The Open Texture of Law 124
2. Varieties of Rule-Scepticism 136
3. Finality and Infallibility in Judicial Decision 141
4. Uncertainty in the Rule of Recognition 147

VIII. JUSTICE AND MORALITY 155

1. Principles of Justice 157
2. Moral and Legal Obligation 167
3. Moral Ideals and Social Criticism 180

IX. LAWS AND MORALS 185

1. Natural Law and Legal Positivism 185
2. The Minimum Content of Natural Law 193
3. Legal Validity and Moral Value 200

X. INTERNATIONAL LAW 213

1. Sources of Doubt 213
2. Obligations and Sanctions 216
3. Obligation and the Sovereignty of States 220
4. International Law and Morality 227
5. Analogies of Form and Content 232

POSTSCRIPT 238

Introductory 238
1. The Nature of Legal Theory 239
2. The Nature of Legal Positivism 244
3. The Nature of Rules 254
4. Principles and the Rule of Recognition 263
5. Law and Morality 268
6. Judicial Discretion 272

Notes 277
Notes to the Third Edition 309
Index 327

INTRODUCTION

Leslie Green

1. HART'S MESSAGE

Law is a social construction. It is an historically contingent feature of certain societies, one whose emergence is signalled by the rise of a systematic form of social control administered by institutions. In one way law supersedes custom, in another it rests on it, for law is a system of primary rules that direct and appraise conduct together with secondary social rules about how to identify, enforce, and change the primary rules. A set-up like that can be beneficial, but only in some contexts and always at a price, for it poses special risks of injustice and of alienating its subjects from some of the most important norms that govern their lives. The appropriate attitude to take towards law is therefore one of caution rather than celebration. What is more, law sometimes pretends to an objectivity it does not have for, whatever judges may say, they in fact wield serious power to create law. So law and adjudication are political. In a different way, so is legal theory. There can be no 'pure' theory of law: a jurisprudence built only using concepts drawn from the law itself is inadequate to understand law's nature; it needs the help of resources from social theory and philosophic inquiry. Jurisprudence is thus neither the sole preserve, nor even the natural habitat, of lawyers or law professors. It is but one part of a more general political theory. Its value lies not in helping advise clients or decide cases but in understanding our culture and institutions and in underpinning any moral assessment of them. That assessment must be sensitive to the nature of law, and also to the nature of morality, which comprises plural and conflicting values.

These are the most important ideas of H. L. A. Hart's *The Concept of Law*, one of the most influential works in modern legal philosophy. Like some other important books, however, Hart's is known as much by rumour as by reading. To some who know

of it, but do not really know it, the precis I just gave may sound unfamiliar. What they have heard makes them wonder: doesn't Hart think law is a closed logical system of rules? Doesn't he think law is a good thing, a social achievement that cures defects in other forms of social order? Doesn't he think laws are mostly clear and to be applied by courts without regard to moral values? Doesn't he think law and morality are conceptually separate and to be kept apart? And doesn't he think jurisprudence is value-free, and that its truths can be established by attending to the true meaning of words like 'law'?

The short answer is 'no', Hart does not think any of those things. These garbled versions of Hart's message have three sources. The first is a difficulty familiar throughout philosophy: the problems he addresses are complex, and the space between truth and falsehood is often a subtle, or easily overlooked, distinction. (For example: to claim that law and morality are separable is not to claim that they are separate.) The second is historical: after half a century, the book's language and examples feel socially, and sometimes philosophically, remote. Not many of us would still refer to customary social orders as 'primitive', or call an account of the nature of something an 'elucidation' of its concept. The third has to do with the audience's expectations. Each book has, as they say, an 'implied reader': Hart's is someone who is philosophically curious about the nature of one of our major political institutions and about its relations to morality and coercive force. That is not always his actual reader. Some turn to jurisprudence looking for practical help—for instance, they want to know how we should interpret constitutions, or what kind of people to choose as judges. They imagine that a book on the theory of law will stand to law as a book on the theory of catering might stand to catering—a general 'how-to' applicable to a range of different occasions.

Hart's book is clear enough to need no summary, but an exploration of some of its themes might help guard against misunderstandings like those. I'm going to examine his views about the law and social rules, coercion, and morality, and then briefly glance at some methodological points. I make no effort to remain neutral: Hart's theory of law is correct in part, mistaken in part, and, here and there, a bit obscure. But what follows is

not an assessment. I highlight areas where people tend to go, or to be led, astray, and I make critical comments on a few points; but an appraisal is work for the reader.

2. LAW AS A SOCIAL CONSTRUCTION

Laws and legal systems are not matters of nature but artifice. We might say they are social constructions. Does that mark any contrast worth mentioning? Some think law is a social construction because they think everything is: '*il n'y a pas de hors-texte*', Derrida used to tease. Were that intelligible it would be irrelevant. Imagine someone said 'race is a social construction', only to follow up by clarifying, 'just like truncheons and prisons'. It would be like being told God doesn't exist, only to find out that the interlocutor doesn't believe in the existence of dogs either. When I say law is a social construction, I mean that it is one in the way that some things are *not*. Law is made up of institutional facts like orders and rules, and those are made by people thinking and acting.[1] But law exists in a physical universe that is not socially constructed, and it is created by and for people who are not socially constructed either. Perhaps this is banal. One might, to sound trendy, talk about the 'social construction of etiquette', but there isn't much point, since everyone already knows that manners are conventional.[2] They depend on common practice, they have a history, and they vary from place to place. Isn't it blindingly obvious that law is like that too? Well, consider this famous summary of a Stoic 'natural law' view:

> True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting . . . [T]here 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 for all times. . . .[3]

[1] See eg. John Searle, *The Construction of Social Reality* (Allen Lane, 1995); and Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007).

[2] Cf. Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999).

[3] Cicero, *De Re Republica* III. xii. 33, tr. C. W. Keyes (Harvard University Press, Loeb Classical Library, 1943) 211.

This eternal and universal law isn't something anyone made up and, we are told, it isn't something anyone can change. Natural law is not a matter of will but reason. It is hard to find legal theorists who still believe all of this,[4] but there are many who believe some of it. Ronald Dworkin, for example, argues that our law includes not only norms found in treaties, customs, constitutions, statutes, and cases, but also moral principles that provide the best justification for the norms found there.[5] On his account the *things justified* by moral principles are socially constructed, but the justifications themselves are not. It is important to bear in mind that a justification is not an event; it is an argument. Believing, or accepting, or asserting a justification are events. But Dworkin does not say that law consists of the constructed stuff plus things people believed to be, or accepted as, or asserted to be justifications for it. He says it consists of the constructed stuff plus moral principles that *actually are* justifications for it. If you believe that it is sufficient for something to be law that it is, or follows from, the best moral justification for something else that is law then, just as much as Cicero did, you believe there is law that owes its status to the fact that it is a requirement of 'right reason'. Since nothing we do can turn a justification that is sound into one that is not, you are also committed to the existence of law we cannot change. And since whether a moral principle justifies some arrangement does not depend on anyone knowing or believing that it does, there can be law—lots of law—that no one has ever heard of. Depending on the prospects for moral knowledge, there can be law that is not even knowable.

Hart's approach rejects all that. Anything in the law is there because some person or group put it there, either intentionally or accidentally. It all has a history; it all can be changed; it is all either known or knowable. Some of our laws have good justifications, some do not, and justifications do not anyway suffice to make law. To do that, we need actual human intervention:

[4] Perhaps John Finnis comes closest, in his *Natural Law and Natural Rights* (2nd edn., Oxford University Press, 2011).

[5] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), chap. 4; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), chaps. 2–3.

orders need to be given, rules to be applied, decisions to be taken, customs to emerge, or justifications to be endorsed or asserted.

Legal philosophers often use an antique term to cover things set by human interventions like that: they say they are 'posited'. Someone who thinks all law is posited is a *legal positivist*, of which social constructivists are one kind. Not all positivists are social constructivists, however. Hans Kelsen was not. He thought that all laws are posited, but he also thought that every legal system contains at least one norm that is not posited but only 'presupposed'.[6] A legal norm, Kelsen said, exists only if it is valid, where 'valid' means its subjects ought to conform to it. He followed Hume and Kant in holding that there can be no 'ought' from an 'is' alone; hence, no social construction, or bunch of them, can ever add up to a norm. If they are to produce norms, fundamental law-making processes in a society must therefore be presupposed to be valid. The original constitution needs to have genuine authority or nothing below it does, so if we are to regard materials created under its ground rules as law, we need to presuppose that the original constitution is binding. Now, a presupposition is no more an event than a justification is. Kelsen did not deny that if we want to know what law requires we need to know what people have actually posited. But he argued that if we want to know the product of their activities *as law*, then we need to add something that is not social or historical. So while Kelsen is a legal positivist he is not a social constructivist. That is why he regards the ways we study socially constructed norms—including sociological, psychological, and historical inquiry—as 'alien elements' in jurisprudence.[7]

Hart rejects Kelsen's view, too.[8] The ultimate basis of law is neither a justification nor a presupposition but a social construction that arises from people thinking and doing certain things. Jurisprudence explains what this construction is and how it is built up from more mundane social facts. Hart goes so far as to

[6] Hans Kelsen, *Pure Theory of Law* (Max Knight tr., 2nd edn., University of California Press, 1967) 193–205.

[7] Ibid. 1.

[8] See below, 292–3, and Hart's essays 'Kelsen Visited' and 'Kelsen's Doctrine of the Unity of Law' in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983).

call his account of this 'an essay in descriptive sociology' (vi).[9] That is probably going too far. It is an essay in analytic legal philosophy, but it is one that draws on concepts that a theoretically astute sociology of law could profitably use. The most important of these is the concept of a social rule.

(i) *Law, Rules, and Conventions*

Hart came to think that rules are the most important building blocks of law after rejecting an earlier positivist account found in Hobbes, Bentham, and Austin. They thought that law is constructed from commands, threats, and obedience. A sovereign is a person or group who enjoys the habitual obedience of most others but does not habitually obey anyone else. Law is a general command of a sovereign backed by threat of force.

In 1977 Michel Foucault said, 'What we need ... is a political philosophy that isn't erected around the problem of sovereignty.... We need to cut off the King's head: in political theory that still has to be done.'[10] News of regicide must not have crossed the Channel, for Hart had long finished the job. In Chapters III and IV he shows that not all laws are commands; that a legal system need not have any person or group with the attributes of a sovereign; that law continues after its creators have perished; and that while threats can oblige people to do things, they cannot create obligations to do them. At bottom, what is missing from the sovereignty account is the concept of a social rule. Once we understand rules we will find that they are the key to explaining many phenomena in law, including sovereignty, powers, jurisdiction, validity, authority, courts, laws, legal systems—and even, argues Hart, one kind of justice. Law itself is a *union* of social rules: primary rules that guide behaviour by imposing duties or conferring powers on people, and secondary rules that provide for the identification, alteration, and enforcement of the primary rules. Among the secondary rules, the ultimate *rule of recognition* has special importance.

[9] Parenthetical page references are all to this volume.

[10] Michel Foucault, 'Truth and Power' in his *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Colin Gordon ed., Vintage, 1980) 121.

A customary practice of those whose role it is to apply primary rules, a rule of recognition provides criteria of legal validity by determining which acts create law. So the fundamental constitution of a legal system does not rest on moral justifications or logical presuppositions, but on this customary social rule created by 'a complex . . . practice of the courts, officials, and private persons' (107). Hart suggests that the rule of recognition in the United Kingdom is something like this, 'Whatever the Queen in Parliament enacts is law'. Parliamentary enactments are law, then, not because of their moral credentials, or because of any logical presupposition, but because an actually practised customary rule recognizes them as such.

So law is constructed of social rules. What about rules themselves? They too are social constructions, and Hart says they are made up of practice. (This is often called the 'practice theory of rules'.) Customary rules have an 'external aspect' in behavioural regularity: people act in a common way. (Depending on the rule, this may involve conforming to what it requires, or applying it to others.) Rules also have an 'internal aspect' involving a complex attitude Hart calls 'acceptance': a willingness to use the regularity as a standard to guide and appraise behaviour, especially to commend conformity and criticize breaches, and to treat such commendation and criticism as appropriate. Acceptance does not require approval; it is not a matter of how people feel about the rule but of their willingness to use it. People can accept rules in Hart's sense because they think they are good rules, or to please others, or out of fear or conformism (56–7, 115, 257). If Milton is to be believed, Satan could even accept a rule on the ground that it is a bad one: 'Evil be thou my good'. All that matters is that people converge on a standard and use it as a guide to conduct and in that way treat it as normative.

The practice theory of rules is controversial. Let us notice a few difficulties, and then turn to Hart's attempt to deflect certain objections. Hart wants a test for the existence of a rule that discriminates between rule-following and accidental or purely habitual patterns in behaviour, and he wants to explain what it is for a customary rule to be obligatory or binding.

However, the practice theory fails to deliver.[11] There are rules that are not social practices (e.g. an individual's rules); there are accepted social practices that are not rules (e.g. the common and accepted practice of surrendering one's wallet to a robber rather than resisting); and citing a rule can be offered *as* a justification for one's behaviour, not merely a sign that one supposes *there is* some justification for it. None of this fits the practice theory. Moreover, it is not clear that we need the concept of a social rule to understand the idea of obligation: one can believe that one has an obligation to purchase carbon offsets against air travel without supposing there is a common practice of doing it.

In the Postscript to this book, Hart tries to meet such criticisms by confining his account. Not all rules, he now admits, are practice rules, but *conventional* rules are and they form the basis of law. A rule is conventional provided 'general conformity of a group to them is part of the reasons which its individual members have for acceptance . . . ' (255). The rule that one must drive on the right is a convention because people wouldn't follow it if most others didn't. The rule that one must not drive when sleepy is not a convention in the relevant sense, because on a road with lots of sleepy drivers you have more, not less, reason to stay awake. Hart holds that the ultimate rule of recognition is a convention: '[S]urely 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' (267). Law rests on 'a mere conventional rule of recognition accepted by the judges and lawyers' (267). We should delete the word 'mere' in the second formulation. It is not plausible to think that the only reason officials conform to a rule of recognition (or other fundamental rules) is that others do so. Recognition rules are rarely believed to be wholly arbitrary (even if they are believed to be arbitrary at the margins). In the United Kingdom, for example, the supremacy of parliamentary statutes as a source of

[11] See Ronald Dworkin, *Taking Rights Seriously* (rev. edn., Harvard University Press, 1978) 48–58; Joseph Raz, *Practical Reason and Norms* (2nd edn., Oxford University Press, 1999) 49–58.

law may rest, not only on a common practice of treating them as supreme, but also on a belief that this practice is democratic or is central to our culture. In the United States, the supremacy of the Constitution may rest, not only on common practice, but also on a belief that it sets up a just form of government, or that it was ordained by wise people with whom it is important to keep faith. Such beliefs do not have to be correct, and they do not have to be uniformly shared, but some such beliefs are typically present along with reasons based on common practice. What is needed for a rule of recognition to be conventional in Hart's sense is that, whatever other reasons officials have for applying it, they would not do so unless there was also a shared common practice to that effect.

Allowing for this modification, there is another problem to confront.[12] The rule of recognition is an obligation- or duty-imposing rule: it not only identifies the sources of law; it directs judges and others to apply the law so identified. According to the practice theory, a social rule imposes a duty if and only if (a) the rule is believed socially necessary, (b) it is reinforced by serious social pressure, and (c) it can conflict with the norm-subject's immediate self-interest (86–8). Are these conditions met here? The conditions are factual, so in any given case we would need to investigate. It does seem probable that courts and others will think it necessary to have settled tests for law, and that significant deviation from these would be reinforced by serious pressure to conform. (Imagine the reaction if, for example, a US district court simply ignored all rulings of the Supreme Court, or started to apply Sharia as a binding source of law.) But it is harder, in the case of a conventional rule, to see why condition (c) would be satisfied. The more important a conventional standard is believed to be, the less temptation there is to non-conformity, assuming it is known to be conventional. We could all drive on the left, or on the right, but when there is a common practice there isn't much temptation to break ranks and drive on the wrong side.

[12] For other doubts about Hart's argument on this point see Leslie Green, 'Positivism and Conventionalism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35; and Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27 *Oxford Journal of Legal Studies* 373.

A temptation to defect is characteristic of rules of other sorts, especially those that support public goods that are subject to free-riding. But when a rule is conventional, duty and desire pull in the same direction; there isn't 'the standing possibility of conflict between obligation or duty and interest' (87). As I said above, judges may have preferences among recognition rules, preferences that reflect views about legitimacy and so forth. But if the predominant attitude of each were a desire to run with the crowd, then the familiar sense of normative push and pull we find with obligations would be unusual. On this point, Hart came nearer the truth the first time round: breaking ranks can be tempting, even for judges, but it is also an occasion for criticism and serious pressure to conform. Alas, that also holds where there is no rule at all, but only a reason of general application. Debate about the precise characterization of social rules therefore continues, and there are other options that could fit within a broadly Hartian account of law.[13] But neither the simple practice theory, nor Hart's conventionalist revision of it, will work on its own.

(ii) *The Reach of Rules*

An independent source of doubt about a rule-based theory of law has to do with its scope. Supposing social rules prove necessary to understand legal phenomena, are they sufficient? They are not, for several reasons.

The first is stressed by Hart himself. Not all systems of primary and secondary rules are legal systems. The National Hockey League has a system of rules: primary rules that direct the conduct of players, officials, and the Commissioner, together with secondary rules of recognition, change, and adjudication that operate on the official rules. Yet the hockey rules are not a legal system. (Of course, they are a lot *like* a legal system; no one denies that.) What is missing? Hockey rules

[13] For example: Joseph Raz, *Practical Reason and Norms*; Frederick F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based Decision-making in Law and in Life* (Oxford University Press, 1993); Andrei Marmor, *Social Conventions: From Language to Law* (Princeton University Press, 2009); Scott J. Shapiro, *Legality* (Harvard University Press, 2011).

are special-purpose: they regulate one game, whereas law can regulate much of life. And the legal system regulates hockey, including the hockey rules, but the hockey rules do not regulate the law. Hart further argues that, not only *can* law regulate comprehensively, a system of rules is not a legal system unless it actually *does* regulate a wide range of things including property, agreements, and the use of force (193–200). Hart calls this the 'minimum content' of a legal system, and he thinks that since regulating that content promotes human survival, and since human survival is (he assumes) morally good, all legal systems are oriented to some sort of good. Hence, there is no question of having a 'formal' test for legal systems. That is one of the reasons why, as I said at the outset, it is mistaken to think that Hart's theory represents legal systems as being like some kind of formal system in logic or mathematics. And this point packs an even bigger punch. Because nothing is a law that does not belong to some legal system, there can be no purely formal test for law either. Laws are rules that play a role in a particular *kind* of normative system, one distinguished in part by its content.

A second point leads to a clarification. Some writers think Hart's account is incorrect or incomplete because not everything in a legal system is a rule. It is said that we find other kinds of norms as well, for example, 'standards' or 'principles'.[14] As we have seen above (xviii), if these are supposed to pick out moral justifications for laws then, on Hart's account, they are not part of the law unless they are somehow officially adopted or endorsed. But 'standards' and 'principles' are also in common use to pick out general legal norms that are flexible or defeasible. Understood in this way, they fit easily with Hart's theory. To know the bearing of the law on some issue one needs to know the net effect of many different rules that intersect and may conflict, and there may be more than one permissible way to resolve that conflict. That is one source of

[14] A distinction between rules and standards is drawn in Henry M. Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (W. N. Eskridge, Jr. and P. P. Frickey eds., Foundation Press, 1994) 139–41. A distinction between rules and principles is drawn in Ronald Dworkin, *Taking Rights Seriously* 22–8.

defeasibility. Another flows from the fact that, as Hart explains in Chapter VII, every rule is somewhat vague and open-textured. There are cases to which it clearly applies and clearly does not apply, but there are also cases to which it arguably applies, and a lot of work, especially in appellate courts, involves arguable but legally uncertain cases. Although legal indeterminacy in one sense occurs at the margins of a rule, it is not a marginal phenomenon. It is a feature of every legal system and of every rule in that system, with the consequence that 'a large and important field is left open for the discretion of courts and other officials' (136). Courts have a special task in making authoritative applications of law, but they also have another task they share with legislatures, that of creating new law. Knowing when and how to use this law-creating power is mostly not about applying rules of any kind; it calls for practical judgement. The role of courts in resolving indeterminacy means that it would be misleading to develop a general theory of law by looking only, or mainly, at the work of appellate courts, or indeed any courts. Owing to a 'selection effect' one would be over-emphasizing legal uncertainty. Many who find the very idea of a rule too cut-and-dried to capture the fluid and controversial character of law fall into this trap. They don't notice the fairly settled rules that constitute courts themselves, or the ordinary legal rules that people use to determine what to do without going near courts at all. Drivers know that 'Stop' on a road sign means 'Stop the car', not 'Stop blinking'. No one needs a judicial ruling on the point, and this is a typical case of law in action.

A third point reminds us that not everything in a system of legal rules is a rule of any kind. Section 6 of the UK Human Rights Act 1998 says, 'In this section "public authority" includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature. . . .' Is that a rule? It is a definition; but perhaps a definition is a rule for using words? If so, it is a rule that is not a norm, since it does not require or empower or permit any action. The legal role of definitions is explained by showing how they work *along with* rules that are norms, including the norm in Section 1 of that Act: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right,' and the remedies for unlawful action provided elsewhere. This does

tell people to do things (though implicitly: you need to know what 'unlawful' means in a context like this). And this is also how we should approach materials in law that are norms but are not rules. For example, a judicial decision often ends with a particular order: a directive telling someone or other to do something, or pay something, or suffer something. A one-off order is not a rule; it is an individual norm. It is practically impossible to govern by using individual norms alone; but it is logically impossible to govern without them. For courts to be able authoritatively to determine people's legal positions they need to issue rulings that bind particular people.

Although rules are necessary to understand laws and legal systems, they are therefore not sufficient. We also need to know what the rules are about and what they are expected to do; we need to know about other materials that fit together with rules, and we need to know about legal decision making that is not rule-governed. Hart spends more time on some of these topics than on others, but all of them can be accommodated within the theory. Contrary to a common misunderstanding, Hart never says that law is *simply* a matter of rules, or that rules explain *all* legal phenomena. Indeed, he cautions against that error: 'though the combination of primary and secondary rules merits, because it explains many aspects of law, the central place assigned to it, this cannot by itself illuminate every problem.... [It] is at the centre of the legal system; but it is not the whole....' (99). There are many other things of interest, and jurisprudence needs to take account of them.

3. LAW AND POWER

So we have this: law is a construction of social rules, which are themselves constructed from practice. That may sound like a rather complacent view of an institution that is, in the end, an instrument of social control. What about conflict, coercion, and power?

(i) *The Division of Labour in Law*

Hart argues against Austin's top-down, pyramidal view of law as orders of a sovereign backed by threats. It is widely acknowledged

that that view was crude, but some may feel that it was salutary and that Hart, while making legal positivism more subtle, loses some of its punch. Law is not just about consensus and agreement, it is also about conflict and disagreement.[15] Now, if this is the familiar claim that a lot of activity in appellate courts is highly politicized and consists not of applying settled law but settling arguable cases, there is no reason to dissent. We have just seen how that fits Hart's theory. He does, however, require a degree of consensus at other points if things are to get off the ground: at least the rule of recognition needs to rest on agreement about which activities make law. But whose agreement? Here is Dworkin's rendition of Hart's theory:

> The 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.[16]

What is wrong with that as an account of the 'grounds' of law is obvious enough. 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. There is also something wrong with it as an interpretation of Hart's theory. In a pre-legal society, social norms can exist only with broad support. 'In the simpler structure [before the emergence of law], since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules (117).' Customary rules require general buy-in. However,

> …where there is a union of primary and secondary rules … the acceptance of rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing

[15] On other aspects of this theme see Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).

[16] Ronald Dworkin, *Law's Empire* 34.

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 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 validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system (117).

I have quoted this passage at length because the point it makes is critical to understanding the nature of law and also the political significance of the fact that law has that nature. Custom and social morality, Hart notes, are immune to deliberate change; they evolve only gradually. For a small and stable community, they are fairly good ways of running things—throughout much of private life that is how we normally run things—but large and complex societies also need deliberate mechanisms of social control that enable customs and other norms to be publicly ascertained and to be changeable forthwith, by the say-so of the rulers, by majority vote, or whatever. This is made possible by institutionalization: the emergence of specialized organs with power to identify, alter, and enforce the rules. The resulting division of normative labour is a mixed blessing, bringing both gains and costs: 'The gains are those of adaptability to change, certainty, and efficiency … 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' (202). So law is *not* universally good or good without qualification. Its institutional character makes certain gains possible, but it also makes certain costs possible, costs that a society without law is unlikely to bear. Even short of the limiting case Hart discusses above, a typical society under law depends less on a broad social consensus than it does on a narrow official consensus.[17] What the existence of law requires

[17] This skates over the question of precisely which officials matter, and of how the role of 'official' should be characterized. Generally speaking, Hart means to include at least judges and legislators, and 'official' takes a socio-political rather than legal definition.

of the population in general is little more than acquiescence with respect to the mandatory norms of the system.

There is, then, nothing cosy or communal about the consensus on which law rests. It does not presuppose an agreement on values; it does not exclude significant dissent in the operation of law. And this shows why the romantic belief that every legal system necessarily expresses the values of its community is incorrect. Even a just and valuable legal system can end up arcane, technical, and remote from the lives of those it governs. Owing to the division of normative labour, law runs a standing risk of becoming, in a word, legalistic. Every legal theorist acknowledges that law is morally fallible. Hart's special contribution here is in showing that some of the ways law can fail are intimately connected to its nature as a social institution.

(ii) *Coercion and Power*

The idea that law is essentially a coercive apparatus resonates with the layperson's view and has been popular in jurisprudence. Hart thinks it mistaken. Every legal system contains some norms that are not coercively enforced, and it is conceivable that a legal system might be composed entirely of such norms (199–200). What would be the point of sanction-free law? The same as the point of law with sanctions: to direct people how to behave. Sanctions are the law's Plan B. Plan A is that its subjects should conform to it without further supervision. Where a need for direction exists without a need for reinforcing motivation it is not so uncommon to find laws without sanctions. The United States Code, for example, contains norms telling people how to show respect for the flag. ('The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.'[18]) Yet it provides no penalties for breach of these norms. Were human nature other than what it is, all legal norms could be like that.

Even with human nature being what it is, many legal norms are not reinforced by sanctions. One important class is power-conferring norms, legal rules that create the capacity

[18] 4 U.S.C. § 8 (h).

to change legal norms and statuses, for example the rules that empower people to legislate, incorporate, contract, or marry. Where the powers in question are voluntary (as these examples generally are), people are free to exercise them or not at their option. Someone who does not follow the law's recipe for legislating, incorporating, contracting or marrying fails to do so, and the resulting 'marriage', for example, would be null and void. But no one is punished for failing. Or should we say that nullity is itself a kind of punishment and that these are, after all, coercive laws? Hart explains why we should not: we do not have two distinct things here, an order to do something and a sanction for disobedience. There is no order at all, and the 'sanction' is nothing other than the power-conferring rule itself. Kelsen proposed a work-around to save the coercion theory. He said power-conferring rules are really only fragments of laws, so it isn't surprising that the sanction isn't found in them: they are tucked away elsewhere in the legal system. There are sanction-bearing rules requiring one to support one's spouse; what the power-conferring rules of marriage do is tell us whether someone has a spouse and, if so, who it is. One way or another, it is all eventually linked back to coercion. Hart's reply to this move is revealing. He does not say that Kelsen's reconstruction is impossible or illogical. He says that it is unmotivated and at variance with a methodological constraint on jurisprudence:

> 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 (40).

There is no essentialist, 'metaphysical', answer to the question of how to divide up the legal material into individual laws; the best approach is one that lets us understand law as it is for those who actually use it, most of whom live outside courtrooms. Power-conferring rules are thought of, spoken of, and used in social life differently from rules that impose duties, and they are valued for different reasons. 'What other tests for difference in character could there be?' (41). This epitomizes Hart's method. To Holmes's 'bad man', law is all about costs to be avoided; to

the lawyer it is all about possible and actual court cases (and legal costs to be earned). Theories of law have been spun out of these cyclopic viewpoints. They treat what is real but marginal as if it were central. Whole dimensions of legal importance are left out of their flat and reductive pictures.

All that is correct as far as it goes. However, if we want to attend to *all* the 'principal functions of the law as a means of social control' we must go further than Hart does here. It is indeed a mistake to try to reduce power-conferring rules to duty-imposing rules, or to represent nullity as a kind of sanction. But it is not a mistake to notice the ways that power-conferring rules are bound up with social power. Why care about coercion in the first place? One answer is connected to responsibility: people who are forced by threat to do things are generally not held responsible for having done them; their will is overborne. Many legal penalties are not that severe, however (short of persistent refusal to pay them). Nonetheless, they still affect people's incentives, and that is true of power-conferring rules as well. Coercion is the hard edge of law's power; the incentivizing and expressive character of legal norms belongs to its soft edge.

Think again of the rules that confer the power to marry. They do so subject to conditions. These used to include (and in some places still include) restrictions on the race or sex of the people one can marry. Marriages between people of different races, or between people of the same sex, were legal nullities. Now, it would be wrong, for the reasons Hart gives, to see this as a kind of coercion, forcing people into heterosexual or homoracial relationships. No one need marry at all. So these laws were not like criminal punishments for homosexual conduct, or like the fugitive slave laws. Still, it was no accident or unintended by-product of the relevant power-conferring rules (or the combination of power-conferring rules and interpretation rules) that rendered these marriages void. That was their purpose. Without resorting to anything as crude as orders and sanctions these laws attempted to shape both individuals' lives and the common culture. They did so with some success. We need to bear this in mind when we think about the functions of rules that Hart benignly refers to as

providing 'facilities'. Not all laws are coercive, but non-coercive laws do something that coercive laws also do: they express and channel social power. They can do it through their content and through more general features. Voluntary powers, for example, parcel out legal control to those who are capable of exercising their will; individual powers parcel it out to individuals. That may not force anyone to do anything, but it does shape the social world in ways that are not only predictable, but often intended by those who create and apply such laws.

4. LAW AND MORALITY

A central problem in this book involves the pluriform relations between law and morality—both customary, or 'social' morality and ideal, or 'critical', morality. Hart is famous for insisting on some kind of disjunction between law and morality—people who know nothing else about his theory know that he holds, as he put it in his landmark Holmes Lecture, that 'there is no necessary connection between law and morals'.[19] We have already seen above, in 3 (i), why law need not reflect the moral values actually endorsed by the population it governs. But what about the moral values that *should* govern them? Does Hart mean to say that there is no necessary connection here either? In *The Concept of Law*, he sometimes formulates the thought differently. At one point he describes the core positivist thesis as holding that, 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality' (185–6). That seems narrower: it is possible that there are necessary relations between law and morality that do not require that all laws 'reproduce or satisfy' sound moral standards.

Hart's first, broader, formulation found little favour, not even among those who share his view that law is a social construction.[20] Surely it is not just a contingent matter that law and morality

[19] H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, at 601 n. 25.

[20] See John Gardner, 'Legal Positivism: 5½ Myths', chap. 2 of his *Law as a Leap of Faith* (Oxford University Press, 2012); and Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *New York University Law Review* 1035.

both regulate human conduct? A system of norms that had nothing to say about how we should live would not be legal norms, and they would not be moral norms either. That suggests one necessary connection between law and morals; there are others. In fact, Hart's mature theory actually endorses two more interesting necessary connections between law and morality, one via the purpose of law and the other via a putative connection between law and justice. It also allows for a contingent connection between law and morality that many other positivists are reluctant to credit. These three claims are as important to Hart's theory as either version of the disjunction thesis. But only the first of them is clearly correct.

(i) *Law's Purpose*

Law is not just a system of rules; it is a system that serves various purposes. Thomas Aquinas thought law also has an *overall* purpose for it is, he claimed, 'an ordinance of reason made for the common good'.[21] Modern suggestions along these lines include the idea that law is made for guiding conduct, or for coordinating activity for the common good, or for doing justice, or for licensing coercion.[22] These claims should be understood, not as suggestions about possible ideals for law, but about *constitutive aims* of law. The basic idea is that a system of social control that did not have these aims would not be a legal system, just as an institution that did not aim at the pursuit of knowledge would not be a university. Having constitutive aims does not establish any connection with morality. That depends on what the aims are. No appliance is a dishwasher unless it is for washing dishes, and its capacity to wash dishes is one of the main criteria for judging whether a dishwasher is good. Washing dishes is not normally a morally significant activity, however, so a good dishwasher is not a morally good dishwasher. The above suggestions for a constitutive aim of

[21] *Summa Theologica* II-I, q. 90 a. 4.

[22] Guiding conduct: Lon L. Fuller, *The Morality of Law* (rev. edn., Yale University Press, 1969); coordinating activity: John Finnis, *Natural Law And Natural Rights* (Oxford University Press, 1980); doing justice: Michael Moore, 'Law as a Functional Kind,' in R. P. George ed., *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992) 221; licensing coercion: Ronald Dworkin, *Law's Empire* 93.

law vary from the morally charged to the morally neutral. Doing justice is morally good; guiding conduct is morally neutral; and licensing coercion is morally ambiguous.[23]

The connection to morality also depends on how far the constitutive aim succeeds. Hart's argument in Chapter IX assumes that human survival is morally good, and that a normative system that did not aim at it would not be a legal system. It also holds that, for a legal system to exist, it must actually deliver the goods, if not to everyone all of the time, then to some people much of the time. Generally speaking, however, a thing with a constitutive aim gets quite a lot of latitude before we disqualify it as a member of the relevant kind. A dishwasher that is defective or broken is still a dishwasher, provided that, if modified or repaired, it would have some capacity to wash dishes. The same holds for legal systems. Unified sets of laws that are very defective at doing what laws are supposed to do can nonetheless count as a legal system. This follows from the fact that to *aim* at something does not require *succeeding* at it.

In his last reflections on this problem, Hart seems no longer to think that law need even aim at survival. He joins Max Weber and Hans Kelsen, who deny that law has an interesting constitutive aim of any kind. (Kelsen said 'law is a means, a specific social means, not an end'.[24]) Hart writes, 'I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct' (249). No mention of survival here. But perhaps Hart is not withdrawing his earlier claim that law has the purpose of promoting survival, or other purposes. Perhaps he is denying that law can be *identified* by any such purposes—there is no purpose that is both universal among and unique to legal systems. Law may have the aim of promoting survival; it may have the aim of guiding and appraising conduct. Neither will

[23] Does licensing coercion mean 'providing a justification for such coercion as is going on'; or 'ensuring that no coercion goes on that is not justified' or 'coercing people when it would be justified to do so'?

[24] Hans Kelsen, *General Theory of Law and State* (A. Wedberg tr., Harvard University Press, 1949) 20.

distinguish law from things like custom, religion, and morality; on the contrary, they are points of overlap. Law and morality attend to similar tasks; they do so for related reasons; and they use some similar techniques.

(ii) *Law and Justice*

In Chapter VIII, Hart defends a surprising connection between law and morality. The argument associates rule-following with justice, through the idea that, in both, like cases are to be treated alike. By the practice theory, general rules cannot exist unless they are conformed to or applied with some constancy. But constancy, Hart says, is *itself* a kind of justice: '[T]hough the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice' (206, cf. 160). It follows, then, that every existing legal system does some justice. Not, to be sure, 'substantive' justice. Steady application of an odious law in no way compensates for or mitigates its odiousness. But it nonetheless produces justice in the *application* of law, or as some say 'formal' justice.[25] This requires that a law be applied to all and only those who are alike in the ways that the law itself regards—rightly or wrongly—as relevant to their treatment under that law. And the requirement covers every law, even those that are 'hideously oppressive', or deny to 'rightless slaves' the minimum benefits of any functioning legal system.[26]

I've quoted Hart's words about how bad law can be ('odious', 'hideously oppressive', etc.) to make clear that his 'germ of justice' thesis is a bold one. Constancy in application can seem sensible if one is thinking of laws that are only mildly unjust; say, laws that are over- or under-inclusive with respect to their justifying aims. (A norm prohibiting anyone under 17 from driving allows too few of some, and too many of others, to drive.) Perfection is not to be had, however, and there are plenty of reasons for steadfastly applying laws that fall short

[25] David Lyons criticizes it under that label in 'On Formal Justice' (1973) 58 *Cornell Law Review* 833. Matthew Kramer defends it under the better label of 'constancy': Matthew Kramer, 'Justice as Constancy' (1997) 16 *Law and Philosophy* 561.

[26] H. L. A. Hart, 'Positivism and the Separation of Law and Morals' 593, at 626.

in modest ways. But that will not establish Hart's case. He says that it applies also to odious laws and that even when we allow substantive justice—or equity, or mercy, or sanity—to win out, we do so in the recognition that we have lost something valuable along the way: we have been unjust in at least one respect.

There is something odd in this idea of 'formal' justice. After all, not everything that has *the form of* justice is *a* form of justice, any more than everything that has the form of a camel is a camel. Worse, norms of justice and norms of injustice need not differ in their forms.[27] The norm 'men and women are to be paid equally for work of equal value' is a norm of justice. The norm 'men and women are to be paid unequally for work of equal value' is a norm of *injustice*. They have the same form. What about the norm, 'Apply every rule to all and only those covered by it'? That has the same form as 'Be friends with all and only those people you have already decided to befriend'. Is the second a norm of justice? It seems clear that we can't tell whether a norm is a norm of justice, or injustice, or neither, on grounds of its form alone.

Imagine the case of a judge working in a legal system where adultery is to be punished by stoning a convicted woman to death. Is there any reason to apply this law to everyone covered by it? Perhaps in special cases: his life may be in jeopardy if he doesn't; to refuse may cause riots and the killing of even more women; he may apply it on one occasion in order to secure his credibility long enough to more effectively attack it on another occasion. But is there a reason to be steadfast in the application of such a law on *all* occasions? Here we need more than the principle *nulla poena sine lege*. That tells us *not* to punish people who *have not* broken a law. The condition is met in our hypothetical case. But that principle does not tell us to punish everyone who *has* broken a law. Would refusing to do so be an injustice? If so, to whom? It beggars belief to suppose that other convicted women who are to be stoned to death, or the families of women who already were, are entitled to demand that every other convicted woman be treated just as odiously.

[27] Following John Gardner, 'The Virtue of Justice and the Character of Law', chap. 10 of his *Law as a Leap of Faith*.

Hart may be confusing 'formal' justice with two sound, but unrelated, ideas. One is that there can be justice and injustice not only in outcomes but also in *procedures*. It is a requirement of natural justice, for instance, that both sides to a legal dispute be heard. A procedure that does not provide for that is unjust. But an unjust rule may *itself* prescribe a violation of natural justice: if the law permits the rich to have twice as much time to present their case as the poor, strict application of that law will set back natural justice, not advance it. The other idea in this neighbourhood is that we should be *impartial* in our application of rules, and that those who judge should not act out of 'prejudice, interest or caprice' (161). That is also correct, but there need be no such motivation on the part of one who refuses to apply an unjust law according to its terms. In fact, the odious law may itself be prejudicial or capricious, and selective non-application of it may be done with the best of motivation.

Can we rescue anything from Hart's 'germ of justice' thesis? Perhaps this: once we are attuned to rule-application, we are perforce thinking about how rules ought to be applied *in particular cases*—we are thinking about how people fare or should fare under them. This focuses attention on distributive questions, not just on aggregative questions. It requires us to ask not merely whether enough punishment is being meted out these days, but whether the right people are being punished in the right way for the right offences. To think about how benefits and burdens should be distributed among people is to think about questions of justice. An attentive concern with whether A was treated as A deserves, or whether any difference in treatment between A and B can be justified, is a concern for justice. When we have institutions, such as courts, that have the power to consider and settle such questions we have institutions that are able to do justice. (And, of course, injustice.) Perhaps in a large and complex society, justice cannot be done without institutions like that.

(iii) *Legal Validity and Moral Principles*

The third point of contact between law and morality is different. Hart allows that while moral principles are not necessarily a