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EXPLICATING THE INTERNAL POINT OF VIEW

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THE Concept of Law is the most important book in twentieth-century analytic jurisprudence.[1] Its importance is a function of many things, not the least of which is the fact that Hart's approach to jurisprudence was forged at a time of great intellectual ferment in analytic philosophy.[2] *The Concept of Law* was written during a period when analytic philosophy's commitment to language as the focal point of philosophical reflection had been firmly cemented.[3] At the time he wrote *The Concept of Law*, Hart was in a unique position to take advantage of then-recent work in philosophy of language. Yet, when the book was published, no one could foresee just how sharp the linguistic turn in philosophy would be. I would suspect that even Hart, prescient as he was, could not have predicted the depth and breadth in the expansion of language as the central focus of philosophical activity.

Like any great work, there is much in *The Concept of Law* that demands attention and explication. Before I introduce the topic on which I will focus, I would like to say a few things about how I see the book. First, it is properly located in the tradition of analytic jurisprudence known as positivism. Central to positivism is the idea that the true ground of legal obligation—the source of validity for what is referred to as "law"—is an origin. This notion, central to the thought of Hobbes and John Austin, is contemporarily expressed in Joseph Raz's felicitous phrase, the "sources thesis." For a norm to be law, it must be the case that it originates in an act of some official, that possesses the requisite authority.

John Austin gave expression to this idea in the nineteenth century when he argued that the best way to think of law was as the imperative of a sovereign backed by threat of reprisal for non-compliance. Hart famously demolished this conception by pointing out that on Austin's picture of the nature of law, there is no material difference between "the

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1. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

2. An excellent discussion of the intellectual history of the period is found in P.M.S. HACKER, WITTGENSTEIN'S PLACE IN TWENTIETH-CENTURY ANALYTIC PHILOSOPHY (1996).

3. For an account of the rise of analytical philosophy, especially philosophy of language, see MICHAEL DUMMETT, ORIGINS OF ANALYTICAL PHILOSOPHY (1994).

law" and the command of a gunman to turn over one's purse.[4]

Paying attention to Hart's critique of Austin leads me to see *The Concept of Law* as a book in two parts. The first part—the first six chapters—is dedicated to two tasks. The first is the articulation and demolition of the Austinian conception of legal obligation. From the vantage point of the present, there can be little question that Hart's critique of Austin is successful.

The second major theme in *The Concept of Law* is the advancement of Hart's account of the nature of law: the notion that law is a matter of rules. According to Hart, law has a nature that is best thought of in terms of a distinction between two sorts of rules: primary and secondary. Primary rules are rules of obligation. Secondary rules are rules of change. Taken together, these rules comprise the genetic structure of the legal system.

But what is the (validating) source of primary and secondary rules? What makes these rules valid? Hart says that a "master rule"—the Rule of Recognition—is the validating source for all other secondary rules and primary rules. Hart's discussion of the Rule of Recognition completes his analysis of the nature of law.

We turn, then, to the second part of *The Concept of Law*, chapter seven, which contains Hart's much-discussed comments on the discretion, as well as one of the clearest examples of the influence of linguistic philosophy, the distinction between core and penumbral meaning.

Does chapter seven constitute a "theory of adjudication"? I certainly believe it does, but some dispute this.[5] Perhaps it is safe to say that if one is ever to find a theory of adjudication in Hart's ouvre, this is the best place to look.[6] Chapter seven of *The Concept of Law* has been the focal point of discussion in analytic jurisprudence since Ronald Dworkin first called into question Hart's account of the role of discretion in deciding

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4. *See* HART, *supra* note 1, at 82.

> A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. Legal obligation is to be found in this situation writ large; A must be the sovereign habitually obeyed and the orders must be general, prescribing courses of conduct not single actions. The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was 'obliged' to hand over his money.

Id.

5. *See* Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871, 1901 (1997) (reviewing DENNIS PATTERSON, LAW AND TRUTH (1996)).

> This aspect of law is often held to show that any elucidation of the concept of law in terms of rules must be misleading. To insist on it in the face of the realities of the situation is often stigmatized as 'conceptualism' or 'formalism,' and it is to the estimation of this charge that we shall now turn.

Id. (citation omitted).

6. In the Postscript to THE CONCEPT OF LAW, Hart said that while he did speak to the topic, he "said far too little . . . about the topic of adjudication and legal reasoning." HART, *supra* note 1, at 259.

cases.[7]

Let us return to the issue of the nature of law. As I mentioned, the first six chapters of *The Concept of Law* are an articulation and critique of Austin's account of the nature of law, followed by the advancement of Hart's alternative account of the nature of law as a system of rules. The intellectual pedigree of this argument is important to a full understanding of Hart's project.

Central to legal positivism is the denial of any necessary conceptual connection between law and morality (the separation thesis). In simple terms, the idea is that there is a logical distinction between statements of what the law is or requires and statements about whether the law is good or just. Put differently, nothing follows from a statement of what the law requires: to state the law is to take no position on whether the law should be obeyed. To state the law is neither to endorse it nor criticize it.

One of the tasks taken up by legal positivists is articulation of the grounds of law. This enterprise is an effort to identify the "normativity" of law.[8] Bentham, Hart informs us, failed in this undertaking because he reduced the normativity of law to social facts, specifically the acts of legislative officials.[9] Bentham's error, Hart maintains, is the reduction of statements of the law to statements about the law.[10]

But what, exactly, is the problem of the normativity of law? For Hart, the problem is explaining the evaluative dimension of legal language while remaining true to the separation thesis.[11] In *The Concept of Law*, Hart explained this in terms of what he referred to as "internal points of view"[12] toward law. In using the language of legal obligation, officials were exhibiting a discernible attitude towards the law, one of endorsement. This attitude, Hart maintains, explains the normativity of law without sacrificing the separation thesis.

Hart's account of the internal point of view as the key to explaining legal normativity was criticized[13] as insufficiently sensitive to the variety of statements one can make when speaking of law. Internal statements

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7. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31-39 (1977).

8. Hart puts it this way in describing the shortcomings of the Imperative Theory of law:

> The Imperative Theory . . . fails to account for a feature of statements of legal obligation which cannot be characterized by the aid of Bentham's conceptual resources of command and habit of obedience. This feature is what is now called the 'normativity' of such statements and statements *of the law* or the legal position of individuals under the law.

H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 144 (1982).

9. *See id.* at 144-45.

10. *See id.* at 144.

11. *See id.*

12. HART, *supra* note 1, at 89-90.

13. Hart cites the following from Raz: JOSEPH RAZ, PRACTICAL REASON AND NORMS 123-29, 146-48, 162-77 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 153-57 (1979); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 234-38 (2d ed. 1980). Hart's citation appears in HART, *supra* note 8, at 153 n.73.

(statements of law) are normative in that they express the speaker's endorsement of the rules. By contrast, moderate external statements are in the nature of reports about what participants in a legal system believe about their own legal standards. External statements are not comments on the quality or character of internal statements; they are merely descriptions of the beliefs of others.

In response to criticism of the distinction between committed statements and reports, Hart adds a third category or dimension of normativity, the category of "'detached' judgements," which are "statements of law or legal obligation *from the point of view* of one who accepts or regards as valid the laws in question, but without committing the speaker to that point of view."[14] The distinction between Hart's original external point of view and the newer "detached" external point of view is a matter of the difference between description and commitment. The point of the detached external point of view is to be able to say something true from the point of view of law without implying a "commitment . . . to the truth or validity of the claims made by committed speakers."[15] In short, Hart now wants to differentiate use[16] of the (normative) language of a system like law from endorsement of the system of legal rules.

Can one make a statement like "x has an obligation to y" which is true without thereby endorsing the standard under which x's obligation falls? In other words, is it not possible to state correctly what the law is without thereby being committed to the view that the law correctly deals with the issue in question? The entire point of Hart's newly-minted conception of the external perspective is designed to do just that: to make it possible to state the law without either endorsing it (the original internal point of view) or merely describing it (the original external point of view).

As background for Hart's discussion, one must be mindful of the thought of Professor Dworkin, for whom a statement of the law is not possible without endorsing it.[17] Hart wants to preserve the essential positivist point that a statement of the law carries with it no commitment to principles that may underwrite or justify it.

Do Hart's final distinctions render any clearer our picture of the internal point of view? Neil MacCormick, one of our finest commentators on Hart's work suspects not. MacCormick begins with the observation that the law on any given question varies from one jurisdiction to the next.[18]

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14. Gerald J. Postema, *The Normativity of Law*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 83 (Ruth Gavison ed., 1987).

15. *Id.*

16. In Hart's original formulation of the normativity of law, a speaker had only two choices: employ legal language and, thereby, endorse it (propositions of law), or merely describe or report on the use of legal language by others (propositions about law).

17. *See* RONALD DWORKIN, LAW'S EMPIRE (1986). For a similar reading, see HART, *supra* note 1, at 253 ("[F]or Dworkin the truth of any proposition of law ultimately depends on the truth of a moral judgment as to what best justifies and since for him moral judgments are essentially controversial, so are all propositions of law.").

18. *See* Neil MacCormick, *Comment*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 105-13 (Ruth Gavison ed., 1987).

He provides the following example, one taken from comparative law:

> Scottish testators have neither right nor power to disinherit their children at law, and the executors of their estate are duty-bound to secure the legal rights of the children against the estate. English and *a fortiori* North Carolinan testators have such right and power and their executors are subject to no such duty.[19]

Of the variety of legal norms just described, MacCormick asks the following: "[I]s it possible that somebody somewhere has made a mistake about law, legal rights, legal powers, or legal duties?"[20] The answer is "No." One can only agree with MacCormick's observation that "even the most perfervid jusnaturalist, acknowledges the possibility of variance in positive laws."[21] Thus, MacCormick argues, we are compelled to draw the conclusion that legal validity is "a jurisdictionally relative concept."[22] Whether the legal rights of a child in, say, Scotland, are morally preferable to those of a child in North Carolina is a conceptually distinct matter. As MacCormick puts it, "legal rights and obligations can vary or be varied without corresponding variance in moral rights or obligations."[23]

What is the issue here, and why is it important? Why should we be clear about the relationship of legal norms to the attitudes of those who use them to appraise the conduct of others? Part of the problem in discussing this question is getting clear about what is at stake. For Hart, the issue is one of explanation.[24] What does it mean to explain the law? The explanation is an explanation of the normative aspect of legal rules. This is an explanation of the meaning of legal norms. Thus, the question of the normativity of law is, at bottom, a question about the nature of explanation of legal meaning.

Dworkin once said that jurisprudential questions are ultimately questions in the philosophy of language.[25] If we follow Dworkin here, we would have to ask whether the meaning (normativity) of legal language could be illuminated by recourse to the attitudes of speakers (Hart's claim). We might want to ask to what extent the meaning of legal discourse turns on the attitudes of those using the terms.

The gravamen of the idea of the internal point of view is that the meaning of terms is a function of something within the legal system itself. In other words, the question whether someone is making a true or correct statement of law is determined by resort to something within a particular legal system.

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19. *Id.* at 105-06.
20. *Id.* at 106.
21. *Id.*
22. *Id.* at 107.
23. *Id.* at 107-08.
24. *See* HART, *supra* note 8, at 147-48.
25. *See* R.M. Dworkin, *Introduction*, *in* THE PHILOSOPHY OF LAW 1 (R.M. Dworkin ed., 1977) ("Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.").

The debate over the question of attitude toward legal statements—the question whether a statement of the law is an endorsement of the law—is really a question about the ultimate meaning of the terms involved. The only reason we are interested in the statement—endorsement distinction is because we harbor the view that some statement of the law may appear correct but is, in fact,[26] incorrect. In short, a statement of the law may be incorrect because the meaning of the statement involved is other than what the speaker supposes it to be.

As we have seen, Hart tried to make sense of the distinction between internal and external from the point of view of attitude. As the important work of other analytically-minded legal philosophers shows,[27] Hart was on to something important with the internal-external (inside-outside) distinction. Driving Hart's analysis is the need to answer the question what, if anything, makes legal statements unique? Put differently, the question is what, if anything, makes a proposition "legal" and not a proposition of some other sort (e.g., moral).[28]

I want to join Neil MacCormick in his puzzlement about the merit of Hart's final effort to express his view about the normative character of law. MacCormick's point is that legal rights are jurisdictionally-relative. As such, statements of the law are true only within jurisdictional boundaries. Thus, legal truth, like legal rights, is (jurisdictionally) relative. The reason MacCormick finds Hart's final effort puzzling, I suspect, is that he does not see that Hart's final distinctions illuminate this relativity.

Where is this debate going? MacCormick claims "[c]onventionalism is all that we should need in order to account for the possibility of true detached statements of law for a given jurisdiction at a given time."[29] I think he is right in this, and I would like to explain why.

The core of MacCormick's criticism of Hart's final reformulation of the internal-external distinction is the idea that the truth of a proposition of law is jurisdictionally relative. In the language of detachment, a statement of the law presupposes it to be a statement of the law in a particular legal system at some particular time. When one says, "The law permits disinheritance of one's children," the question naturally arises, "Where is that type today"?

MacCormick says that "[t]o be detached in legal matters is precisely to discover what the correct view of the law somewhere is."[30] He also states that to acknowledge the correctness of a statement of the law is "to make

26. This is where the idea of "grounds of law" becomes important. The truth of a legal proposition requires identification of the proper grounds of law.

27. *See, e.g.*, Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371 (1992).

28. I take Dworkin's work to be both a critique of this view (the separation thesis) as well as an alternative to that view. Dworkin's alternative view is that law and morality are not separate discourses but are, in fact, joined at some deep, conceptual level (the relational thesis).

29. MacCormick, *supra* note 18, at 112.

30. *Id.* at 109.

a cognitive commitment."[31] In other words, there is a fact of the matter about (at least some) legal questions. Two questions (at least) arise: what does it mean to say there is a fact of the matter about law and how does this impact Hart's distinction between internal and external points of view?

In a recent work, I argued that the best way of understanding truth in law was in the use of forms of legal argument.[32] Very roughly, I said that law has its own argumentative grammar, and that it is through the use of this grammar that the truth of legal propositions is shown. An assertion like, "In Scotland, it is legally possible to disinherit your children," can be shown to be true or false by employing the familiar forms of legal argument. It is in the use of forms of argument that the truth of legal propositions is possible. In other words, outside these forms, there is no legal truth.

I think Hart was right to say that acceptance is a large part of the normativity of a legal system. But what is accepted in law is not only a system of rules but forms of argumentative appraisal. When a lawyer points to a statute to make the case that a particular legal assertion is true, that text must already be regarded (accepted) as authoritative for the gesture to be meaningful. If lawyers did not already agree in their modes of appraisal (forms of argument), legal argument simply would not be possible.

What does this have to do with the internal point of view and Hart's efforts to respond to his critics? I think Hart was right when he said that the task of jurisprudence is the description of our legal practices. He made the hermeneutic point[33] that the key to this understanding is explicating how participants in legal systems coordinate their rule-following behavior. In short, when Hart describes his "practice theory of rules,"[34] he is identifying what holds the practice together. He thought it was attitude. I think it is forms of argument.

Despite this difference, I join Hart and others[35] in denying any entailment between legal truth and moral truth.[36] People who want the entailment relationship to hold usually argue the connection from the point of view of legal concepts.[37] They say that the meaning (and, hence, truth) of legal assertions depends upon getting clear about the real content of the concepts implicated by our words. In other words, the key to legal truth

31. *Id.*

32. *See* DENNIS PATTERSON, LAW AND TRUTH 169-79 (1996).

33. First observed by Peter M.S. Hacker. *See* P.M.S. Hacker, *Hart's Philosophy of Law*, *in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 9 (P.M.S. Hacker & J. Raz eds., 1977) (relating the internal point of view to the claim of hermeneutics that to understand human phenomena one must understand the practice or activity from the point of view of participants).

34. HART, *supra* note 1, at 255.

35. *See, e.g.*, Postema, *supra* note 14; MacCormick, *supra* note 18.

36. *See* MacCormick, *supra* note 18, at 110.

37. A recent example is NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996).

lies in uncovering the objective meaning of our concepts (legal and otherwise).

This way of putting things confirms that attention to the philosophy of language can engender progress in legal theory. As I have said, I think Dworkin is correct in this.[38] That said, where does this leave us with respect to Hart's last effort to express the significance of the internal point of view? It leaves me convinced that Hart was right to look for the uniqueness of law— its normativity—in the intersubjective relations of legal actors. More needs to be done in explicating and developing Hart's important insight.

38. *But see* Anne De Moor, *Nothing Else to Think? On Meaning, Truth, and Objectivity in Law*, 18 OXFORD J. LEGAL STUD. 345 (reviewing STAVROPOULOS, *supra* note 37) (expressing skepticism that legal theory can benefit from advances in philosophy of language).