

January 1999

H.L.A. Hart and the Hermeneutic Turn in Legal Theory

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Recommended Citation

Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167 (1999)
<https://scholar.smu.edu/smulr/vol52/iss1/17>

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H.L.A. HART AND THE HERMENEUTIC TURN IN LEGAL THEORY

*Brian Bix**

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I. INTRODUCTION

ONE of H.L.A. Hart's most significant contributions to Anglo-American legal philosophy was the introduction of the participant's perspective into descriptive legal theory. The "internal aspect of rules" and the "internal point of view" were central to Hart's critique of the earlier legal positivism of John Austin and the construction of Hart's alternative form of legal positivism. Hart's move can be seen as

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a kind of "hermeneutic turn" in legal philosophy.¹

The extent to which this "hermeneutic turn," on the one hand, can be sustained and, on the other hand, is appropriate, are central inquiries in determining whether currently influential forms of legal positivism can withstand the challenges of modern natural law theory and Ronald Dworkin's interpretive approach.² Additionally, the viability of a hermeneutic approach may be central to determining whether, or to what extent, a descriptive theory of law (or, indeed of any complex social practice) is possible. This Article will use the development of Hart's theory, and some of the more recent critiques of that approach, as an opportunity to offer an overview of these basic questions.

Part II discusses the approaches to law and legal theory to which Hart was responding. Part III summarizes Hart's theory, with emphasis on the internal aspect of rules and the internal point of view. Part IV outlines alterations and improvements on Hart's internal viewpoint suggested by the legal positivist Joseph Raz and the natural law theorist John Finnis. Part V considers recent critical evaluations by H. Hamner Hill and Stephen Perry, challenging the extent to which Hart's hermeneutic turn is stable and tenable. Finally, Part VI discusses Frederick Schauer's recent proposals, which advocate that legal theory turn away, at least in part, from (one understanding of) Hart's "hermeneutic turn" and go back towards a simpler form of legal positivism.

II. BACKGROUND

The distinctive view (and the point and purpose) of legal positivism is that it is both feasible and valuable to have a descriptive-explanatory theory of law, separate from theories about what the legal system should contain or how citizens and legislators should act within the legal system (the latter two both being foci of traditional natural law theory³). A

1. Hart does not use the term "hermeneutic" in his earlier writings, but he uses the term in later descriptions of those works. See, e.g., H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 1, 14 (1983) (describing his earlier work as a "hermeneutic approach").

As one reference text states, hermeneutics is "the art or theory of interpretation, as well as a type of philosophy that starts with questions of interpretation. Originally concerned more narrowly with interpreting sacred texts, the term acquired a much broader significance in its historical development." *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 323 (Robert Audi ed., 1995) (defining "hermeneutics"). For a good overview of the historical origins and present variations of hermeneutic thought, see *THE HERMENEUTICS READER* (Kurt Mueller-Vollmer ed., 1985).

2. On the "modern" natural law theorists (and how their approaches differ from "traditional" natural law theory), see Brian Bix, *Natural Law Theory*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 223, 223-40 (Dennis Patterson ed., 1996). On Dworkin's interpretive approach to law and legal theory, see RONALD DWORKIN, *LAW'S EMPIRE* (1986).

3. Two prominent examples of traditional natural law theorists are Thomas Aquinas, see ST. THOMAS AQUINAS, *THE TREATISE ON LAW* (R.J. Henle ed. & trans., 1993) (containing Questions 90-97 of the *SUMMA THEOLOGICA*), and John Finnis, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). For a summary-overview of natural law theory, see Bix, *supra* note 2.

prominent early legal positivist, John Austin, offered the following, which works well as a kind of summary or dogma of legal positivism:

The existence of the law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.⁴

To say that there is or should be a descriptive theory of law, however, is not thereby to reveal anything about its contours. The history of legal positivism has reaffirmed this fact: among the better known legal positivists, John Austin's austere command theory⁵ bears little resemblance to Hans Kelsen's neo-Kantian theory,⁶ and both are quite different from H.L.A. Hart's work.⁷

Some of the early work within legal positivism seems to carry the influences of ideas generally prevalent in the social sciences of that time. In the late nineteenth century and early twentieth century, there was pressure generally on social theory, felt by legal studies, to make such endeavors more "scientific," on a par with physics or biology.⁸ What was meant by "scientific" in this context is that descriptions be made in relatively objective, relatively empirical terms, such that "observations" made by one theorist could be confirmed (or rebutted) by others. There was a hope that human behavior and human institutions, if subjected to the same approach used in the study of nature, might yield the same amazing progress in knowledge that the scientific method had brought to the natural sciences.⁹ We would then, the hope was, be able to shape and improve society through the means of science, rather than the crude intuitions and random guesses that had guided government in past ages.

One by-product of this science-enviuous approach to law was Christopher Columbus Langdell's introduction of the Case Method, in which cases were to be treated as legal "data" to be studied, as though in a

4. John Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 157 (Wilfred E. Rumble ed., Cambridge Univ. Press 1995) (1832) (Lecture V).

5. While Jeremy Bentham (1748-1832) was arguably the first elaborator of modern legal positivism, most of his writings on the subject were not published during his lifetime. John Austin (1790-1859) was a student of Bentham and occupied the first Chair in Jurisprudence at the newly formed University College of London. Six of Austin's lectures, explaining and defending a command theory of law (similar, but not identical, to Bentham's position), were published in 1832 as *THE PROVINCE OF JURISPRUDENCE DETERMINED*. See AUSTIN, *supra* note 4; see also *infra* notes 13-14 and accompanying text.

6. See, e.g., HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* (Bonnie L. Paulson & Stanley L. Paulson eds. & trans., Oxford Univ. Press 1992) (1934).

7. On Hart's theory, see *infra* Part III.

8. See, e.g., PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* 66-80 (2d ed. 1990) (focusing on John Stuart Mill's approach to social theory).

9. See, e.g., AMERICAN LEGAL REALISM 232 (William W. Fisher III et al. eds., 1993) ("In their own discipline, the social scientists' grand dream, as Huntington Cairns put it at the time, was 'to duplicate in the statement of social laws the tremendous success of the natural sciences in formulating the laws of nature.'" (footnote omitted)).

scientific laboratory, to try to discover the basic legal principles.¹⁰ Another likely by-product of the move towards a more "scientific" attitude towards the law, one more important for present purposes, was the tendency of legal theories to be couched in terms that seemed "objective" and subject to "confirmation" by other observers of those social practices.

However, normative language and behavior does not fit easily, if at all, with a more scientific approach to description.¹¹ Obligations and rights are not matters one can see with one's eyes or test with laboratory equipment. Therefore, those theorists who were tempted towards a scientific approach to law often tried to restate normative phenomena in factual terms.¹²

Hart later criticized just this tendency within Austin's command theory. Austin had argued that positive law was best understood as the commands (direct or indirect) of a sovereign.¹³ Austin's concept of "command," and the more narrow concept, "legal obligation," were defined in terms of the likelihood of sanction if a request by a superior was not followed.¹⁴ Regarding Austin's equation of legal obligation with commands, Hart states:

[This] treats statements of obligation not as psychological statements but as predictions or assessments of chances of incurring punishment or "evil." To many later theorists this has appeared as a revelation, bringing down to earth an elusive notion and restating it in the same

10. See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 11-12 (1973) (quoting Langdell's introduction to his casebook and a speech Langdell gave on the 250th Anniversary of the founding of Harvard College). Langdell also suggested that it is only because law is a science that universities teach it. He wrote: "If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it." *Id.* at 11 (quoting Langdell in his Harvard College speech).

11. The Scandinavian Legal Realists similarly attempted to reduce all normative language (which they considered too "metaphysical") to something more "empirical"; they included reports of individuals' attitudes and perceptions in the latter category. Alf Ross, a prominent exponent of that approach to law, thus explained a statement saying that "this legal rule exists" as meaning (1) a prediction that the judges under certain circumstances would apply that rule, or make prominent reference to it; and (2) the judges will do so because of an emotional experience of "being bound." See HART, *supra* note 1, at 165 (summarizing Ross's view, as part of a review of ALF ROSS, ON LAW AND JUSTICE (1959)).

12. Some commentators have labeled these claims to be able to explain or re-characterize normative concepts in factual terms, without loss, as "material reductionism." See, e.g., H. Hamner Hill, *H.L.A. Hart's Hermeneutic Positivism: On Some Methodological Difficulties in THE CONCEPT OF LAW*, 3 CAN. J. LAW & JURIS. 113, 118-19 (1990).

13. For Austin, the sovereign is that figure in society whom the bulk of society are in the habit of obeying, but who is not in the habit of obeying anyone else. See AUSTIN, *supra* note 4, at 166 (Lecture VI).

14. See, e.g., AUSTIN, *supra* note 4, at 25 (Lecture I). ("When I am talking *directly* of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term *duty*, or the term *obligation* . . .").

At times, Austin seemed to have ambitions for legal theory beyond the empirical solidity of the physical sciences, seeking out the abstract perfection of mathematics. "He seems to have wanted the 'leading terms' of his explanatory system to have the 'simplicity and definiteness' found in the 'method so successfully pursued by geometers.'" FINNIS *supra* note 3, at 5 (quoting from AUSTIN, *supra* note 4).

clear, hard, empirical terms as are used in science.¹⁵

As will become clear, this is ironic praise, both for the theorist and for the enthusiastic recipients of the theory. As shall be discussed later, Hart preferred an approach to law that did not try to reduce all of its normative aspects to matters of empirical fact.

In addition to the tendency in some social theories to try to appear more “scientific,” there was (and is) a tendency, a pressure, in all forms of theory to seek the simplest, most elegant model of the matter being studied, as such models appear, by their simplicity, to offer key insights.¹⁶ Thus, for legal theory, we have the nineteenth century legal positivist John Austin stating that all legal phenomena can be reduced to commands of the sovereign; and the twentieth century legal positivist Hans Kelsen saying that all legal phenomena can be reduced to authorizations to officials to impose sanctions.¹⁷

III. HART’S HERMENEUTIC TURN

The radical nature of Hart’s theory can be understood in the context of what came before: as discussed in Part I, the tendency towards theories that seemed “objective” and “scientific” and theories that tried to reduce all of legal phenomena to one basic foundational type.¹⁸

Hart’s hermeneutic response to earlier empirical theories is the main subject of this Article, and Hart’s full theory will be summarized throughout the remainder of this part. Here, I will only touch upon Hart’s response to the second tendency, that towards reduction. Hart emphasizes the variety of legal rules and the quite different roles such rules play within a legal system and within the lives of its citizens. Thus, trying to reduce all legal rules to one type would inevitably lead to ignoring or being unable to explain basic aspects of how the legal system works and how it is experienced.¹⁹ Most prominently, Hart writes of the difference between primary rules and secondary rules, and between duty-imposing and power-conferring rules.²⁰ Whatever the deceptive power may be of

15. HART, *THE CONCEPT OF LAW* 83-84 (2d ed. 1994); *see also id.* at 99 (“There is a constant pull towards an analysis of [various legal concepts] in the terms of ordinary or ‘scientific’, fact-stating or predictive discourse. But this can only reproduce their external aspect . . .”). The significance of the “internal” versus the “external” aspect of these phenomena will be discussed *infra* Part III.A.

16. *See, e.g.*, W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* 19-21 (1994) (discussing the value of simplicity in legal theory and in theory generally).

17. *See generally* Austin, *supra* note 4; KELSEN, *supra* note 6.

18. A tendency and temptation that Hart’s writings by no means extirpated. One can still find such approaches in recent writings of other legal theorists. *See, e.g.*, J.W. HARRIS, *LAW AND LEGAL SCIENCE* (1979) (all of law reducible to duties).

19. Not long before Hart, Ludwig Wittgenstein was making a similar argument in the area of philosophy of language: that trying to reduce language and meaning to a single type of phenomenon fails to capture the different roles sentences play in different contexts (different “language games”). *See* LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 1-65 (3d ed., G.E.M. Anscombe trans., 1958).

20. Primary rules are rules of obligation aimed directly at citizens. Secondary rules are “rules about rules” (e.g., how to apply, interpret, or amend rules) that are primarily aimed at officials. *See* HART, *supra* note 15, at 91-99. Similarly, rules can be divided based on

declaring that “law is basically . . .”—a matter of duties or authorizations or whatever—such reductions for Hart sacrifice too much by way of explanatory accuracy. Too much of the way people experience law is left unaccounted for in a reductive theory. The theme of theory needing to account for the way law is actually experienced will recur, with emphasis, throughout this Article, as it is central to Hart’s rejection of a scientific/empirical approach to law.

A. THE VALUE OF ADDING AN INTERNAL PERSPECTIVE

The question is: what is wrong with trying to make legal theory more “scientific,” in the sense of emphasizing “facts,” matters which could be subject to easy measurement, ratification, or falsification? Hart’s basic response is that a scientific approach to law will fail, and fail badly, to capture much of what goes on within a legal system, and much that is important.²¹

Consider a basic point of social description.²² Sometimes people do the same activity over and over again (whether the same time every week, or each time they come to a particular place, or the like). They go to the neighborhood bar every Friday night, or they go to see a film every Saturday night. Similarly, sometimes a large number of people will do the same activity at a given time or a given place. In crowded sidewalks and hallways people may all veer to their right when encountering someone coming in the other direction. These convergences of behavior are sometimes mere coincidence, or, for a given person over time, merely a matter of habit. If so, the convergences have no apparent significance.²³ I just happen to rent a movie video every Saturday afternoon. Or, five of us have just gotten into the habit of going to the local bar every Tuesday evening to watch basketball. As a mere habit, there is nothing more to report. If one Saturday I fail to rent a video (perhaps because I have work I need to complete), I feel no remorse and no need to justify to myself or to others my deviation from past practice. Similarly, if one of our group of five does not show up one Tuesday night, the remaining four

whether they impose duties or confer powers. *See id.* While the distinctions overlap—most primary rules are duty-imposing, and many secondary rules are power-conferring—the overlap is far from perfect. Rules of contract and wills, for example, confer powers on citizens, and there are numerous rules that impose duties on officials. Within Hart’s theory, the most important secondary rule is the “rule of recognition”: a rule that prescribes the criteria according to which rules are (or are not) part of the legal system. *See id.* at 94 (defining the “rule of recognition” as one which “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”).

21. *See* HART, *supra* note 1, at 13 (“For the understanding of [law or any other normative social practice] the methodology of the empirical sciences is useless; what is needed is a ‘hermeneutic’ method which involves portraying rule-governed behaviour as it appears to its participants . . .”).

22. *See* HART, *supra* note 15, at 55-58 (discussing the difference between habits and rules).

23. Mere habits and inclinations may reflect some psychological truth about the actor, but that is a matter far afield from the current inquiry. *See id.*

may be curious, and we may make inquiries, but it will not be an occasion for criticism.

In other contexts, the convergences of behavior may go beyond habit. Perhaps I set aside every Sunday morning to write, knowing that I have too many other demands during the week and that if I do not write every Sunday morning, nothing will ever get written. Also, among the five of us who watch basketball on Tuesday nights, our being there may be a matter of habit, but we have a more serious attitude towards who pays for the drinks. We may take turns paying for rounds of drinks, and there may be a fairly standardized order among us. To take a quite different example, in some houses of worship everyone uncovers their head as a sign of piety, while in other houses of worship, everyone covers their head. In both cases, these are unlikely to be merely coincidental convergences of behavior.

Where the behavior is not mere happenstance nor mere habit, consequences follow when deviations occur. If I made a point about writing on Sunday mornings, and then one time I let myself spend a full Sunday morning sleeping or watching television, I would likely berate myself later. Similarly, if someone misses her “turn” to pay for drinks on a Tuesday night, one of the others will inevitably remind that person of her responsibilities.

The difference is one between habits and rules: things we just happen to do as against things we do because we are following a rule. When we are following a rule, the rule is the explanation or justification we give for our behavior when asked, and when there is non-compliance, the rule is also the grounds offered for criticism for that deviation. This is what Hart calls the “‘internal aspect’ of rules.”²⁴ Deviation from habits usually does not warrant criticism (though it may lead careful observers to seek an explanation).

Thus, we see how much of what is significant to social behavior cannot be explained in an adequate way on external observation alone—at least where we have only observations of non-expressive physical actions.²⁵ Once we add in the participants’ attitude towards their behavior—their reference to rules to explain and justify, and their criticism of deviations from what the rules require—we can have a much more nuanced view of human action. Hart thus distinguishes what he called “the external point of view” (the viewpoint of an observer) from “the internal point of view” (the point of view of someone who accepts the group’s rules and uses them as guides to conduct).²⁶ The external point of view may seem more

24. *Id.* at 56-57.

25. See *infra* notes 109-10 and accompanying text (it may be possible for a more sophisticated form of external observation, one that takes into account verbal behavior, to account for normative behavior (or at least to come close)).

26. HART, *supra* note 15, at 88-90; see also *infra* Part III.E (Hart uses “external” to mean a range of somewhat different perspectives, not just the extreme observers’ perspective .).

“scientific,” but it is an inferior form of explanation.²⁷

Similarly, from an outside observer’s point of view, it is hard to distinguish between someone acting because she felt obliged versus someone acting because she had an obligation.²⁸ The former indicates action out of fear of the consequences. For example, we handed over our money because the robber threatened us with violence if we did not. Similarly, many of the citizens of Stalin’s Soviet Union and Nazi Germany obeyed the evil laws of those regimes because, and only because, they feared the consequences for their life and liberty if they did not obey.²⁹ Of course, it is not only in evil regimes that obedience may be based only on fear of the consequences. Even people who perceive the United States as a generally just society, with a generally just legal system, may obey the speed limit or the tax rules only out of fear for the penalties they might face if they are caught (a fact indicated by the willingness of many people to break those laws without hesitation, and without remorse, in circumstances where they are confident that they will not be caught).

On the other hand, there are times when we do something simply because the relevant rule tells us to do so. We may well be aware of the sanction that could apply in the case of non-compliance, and this may give an additional reason for compliance, but we would obey (and we do obey) even in situations where non-compliance is unlikely to be observed. When we are asked why we do not park our car in a handicapped zone, even after being assured that the chance of a sanction (a parking ticket) is very low, we might reply, “because it is the law.” In this circumstance, the prohibition itself, and not (or not merely) the sanction attached to it, gives us our reason for action.

Along the above lines, Hart distinguished those within a legal system who look upon its rules “from the internal point of view as accepted stan-

27. See HART, *supra* note 15, at 99:

There is a constant pull towards an analysis of these [concepts related to secondary rules] in the terms of ordinary or ‘scientific’, fact-stating or predicative discourse. But this can only reproduce their external aspect: to do justice to their distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers, and other ‘acts-in-the-law’ are related to secondary rules.

Id.

28. See *id.* at 89-91. While Hart’s basic point, summarized above, is that an extreme external point of view has trouble accounting for rule-following behavior, one might go further and argue that such a perspective would have trouble accounting for all forms of human agency—all forms of actions for reasons, purposive action. See Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *LAW AND INTERPRETATION* 97, 108-09 (Andrei Marmor ed., 1995).

29. Two further differences: (1) it would seem paradoxical, if not self-contradictory, to say that someone was *obliged* to act in a certain way, but in fact did not do so; by contrast, it would be both sensible and, unfortunately, commonplace to say that someone did not do something despite having an obligation to do it; and (2) one would not speak of someone being “obliged” to act in a certain way, if there was no chance of that person’s contrary actions being found out (and a sanction imposed), while it is perfectly sensible to speak of having an obligation to act in a certain way, despite a low possibility of discovering the non-compliance. See HART, *supra* note 15, at 82-83.

dards of behaviour” as against those who “are concerned with rules merely as a source of possible punishment,” who see the rules only “as reliable predictions of what will befall them, at the hands of officials, if they disobey.”³⁰ Hart is careful here to define “the internal point of view” broadly: officials may treat the system’s rule of recognition³¹ as establishing valid moral obligations, but they may also “accept” the rule “out of fear of the consequences, or from inertia.”³²

Hart does not focus too closely on the psychology or motivation of the citizens and officials within the society. From the perspective of legal theory, and a certain approach to rules and rule-following, all that is important is whether the people in question “treat [the] rules as rules, i.e., as standards by which [they] guide[] and evaluate[] conduct.”³³ “It is crucial to the understanding of Hart’s position to understand that his notion of acceptance or endorsement of a rule does not entail moral approval of it.”³⁴

Putting aside questions of whether and when we should treat the law as giving us (moral) reasons for action³⁵ beyond the prudential reasons given by sanctions, the fact is that acting under an obligation (“because we ought to” or “because the law says so”) is distinctly different from acting because one feels obliged (“bad things will happen if I don’t”), and any theory that cannot take this distinction into account is, for that rea-

30. HART, *supra* note 15, at 201.

31. *See supra* note 20.

32. HART, *supra* note 15, at 115; *see also* H.L.A. HART, *ESSAYS ON BENTHAM* 157-61 (1983) [hereinafter HART, *ESSAYS*]; H.L.A. Hart, *Postscript*, in HART, *supra* note 15, 238, 257. There is a troubling ambiguity in the way Hart talks about “accepting” the rule as offering reasons for action. Hart appears to believe that concepts like “duty” and “obligation” have a different meaning in the legal and moral contexts and that one can speak of social obligations (of which legal obligations would be an instance) which are not moral obligations. *See* HART, *ESSAYS, supra* at 127-61 (“Legal Theory and Obligation”), 243-68 (“Commands and Authoritative Legal Reasons”).

Given those starting points, for Hart it might make sense to speak of someone who both sees the law as creating obligations for her that she “ought” to obey and, at the same time, does not see the law as creating moral obligations for her. This is a complicated position, one which most theorists have found to be untenable. *See, e.g.*, Joseph Raz, *Hart on Moral Duties and Legal Duties*, 4 OXFORD J. LEG. ST. 123, 129-31 (1984); Gerald J. Postema, *The Normativity of Law*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY* 81, 81-104 (Ruth Gavison ed., 1987); *see also* Perry, *supra* note 28, at 97, 106, 116, 126 (summarizing Hart’s position, comparing it with Raz’s critique and re-characterization, and arguing for the latter).

33. Scott Shapiro, *The Bad Man and the Internal Point of View*, in *THE LEGACY OF OLIVER WENDELL HOLMES: “THE PATH OF THE LAW” AND ITS INFLUENCE* (S.J. Burton ed., forthcoming 1998) (manuscript at 9, on file with author).

34. JOSEPH RAZ, *THE AUTHORITY OF LAW* 154-55 (1979).

As will appear a number of times in this paper, much appears to turn on the apparently slight difference of whether or not “accepting” the rules entails moral endorsement. *See, e.g.*, *infra* notes 154-70 and accompanying text.

35. The question of whether or when there is a general, prima facie obligation to obey the law is a rich and controversial topic. For a variety of views on the subject, *see, e.g.*, M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law*, 82 YALE L.J. 950 (1973); M.B.E. Smith, *The Duty to Obey the Law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 465-74 (Dennis Patterson ed., 1996); and RAZ, *supra* note 34, at 233-89; J.L. Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143 (1981).

son, a lesser theory.³⁶ An external observer cannot tell when someone is complying out of obligation rather than because she felt obliged; we can only distinguish the two types of behavior when the participant's attitude towards her own behavior is taken into account.

B. THE INTERNAL PERSPECTIVE AS "HERMENEUTIC"

Hart's approach, with its emphasis on the internal aspect of rules and of law, is "hermeneutic" in the sense that it tries to understand a practice in a way that takes into account the way the practice is perceived by its participants. In studying the physical world, a theory that can adequately explain past movements of objects or changes within them, or predict future movements and changes, is a successful theory. However, actions within social practices have an additional element: the actions are done with intention and purpose. The participants reflect on their actions.

The best social theory will thus be one which not only can account for what did happen (or what will happen), but can also account for the understanding the participants have of those events. The point is well-made by two contemporary theorists. Joseph Raz writes: "[U]nlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves."³⁷ A similar judgment from John Finnis:

The actions, practices, etc., are certainly influenced by the 'natural' causes properly investigated by the methods of the natural sciences, including a part of the science of psychology. But the actions, practices, etc., can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc.³⁸

A theory of law that could predict or explain people's behavior within a legal system would nonetheless seem a failure if its account for why people behaved as they did varied considerably from the people's own understanding of their actions.³⁹

36. The importance of an internal perspective can reach beyond descriptive legal theory. See, e.g., Linda Ross Meyer, *Just the Facts?*, 106 YALE L.J. 1269, 1297-99 (1997) (book review) (arguing for an approach to tort theory which properly values the internal standpoint).

37. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 221 (1994).

38. FINNIS, *supra* note 3, at 3.

39. This may be as good a point as any to note that there are a number of what might be called "anti-hermeneutic" theories of human behavior, theories apparently indifferent to the fact that the explanations they give for certain behaviors are flatly inconsistent with the explanations offered by the subjects themselves. For example, certain kinds of economic and sociobiological theories characterize a variety of behaviors as self-interested in a basic way where participants would likely characterize the action quite differently. See, e.g., EDWARD O. WILSON, *SOCIOBIOLOGY* 559-64 (1975) (offering a Darwinian explanation for culture, religion, and ethics); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 175 (5th ed., 1998) (explaining norms and laws against polygamy as redistributions of wealth to "younger, poorer men"). Also, certain kinds of psychological theories that posit "subconscious" motivations for actions are contrary to the "conscious" rationalizations for the

C. DETAILS WITHIN HART'S APPROACH

Hart believes that while some small communities could survive with only a network of primary (duty-imposing) rules, modern societies require a combination of primary and secondary rules.⁴⁰ The existence of secondary rules remedies problems of uncertainty, lack of flexibility, and inefficiency that would afflict a community trying to get by on primary rules alone.⁴¹

Additionally, according to Hart, for a legal system to be said to exist, the citizens must generally obey the bulk of the system's laws,⁴² and the officials must accept (have an internal perspective toward) the system's secondary rules (the rules governing the adjudication of disputes, the rules for changing existing law, and the rule of recognition—the rule which states the system's criteria of validity).⁴³

It is worth noting how Hart does not claim that (all or most) citizens taking an internal perspective on the rules is a precondition to the existence of a legal system. Hart's conclusion that general obedience is sufficient is comparable to the conclusion reached by the other great normativity-focused legal theorist, Hans Kelsen, who concluded that the validity of a legal system requires (only) that the system attain some threshold level of "efficacy."⁴⁴

Among the other important aspects of Hart's theory (whose detailed consideration must await another occasion, as it would take us too far

same behavior. See, e.g., SIGMUND FREUD, *GENERAL PSYCHOLOGICAL THEORY* 116, 116-50 (1963) (Paper 6: "The Unconscious"). And, certain leftist and feminist theories characterize people as having "false consciousness," with perceived desires and interests varying from "real" desires and interests. See, e.g., Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE SIGNS READER* 139, 139-68 (Elizabeth Abel & Emily K. Abel eds., 1983) (women's heterosexual desires, and their denial of homosexual desires, are often the result of male violence, social and economic discrimination against lesbians, and a pervasive ideology of "women-hatred").

I do not mean to claim that theories which proffer explanations contrary to the subject's own characterizations can never be justified; however, such theories have strong burdens of proof: showing that their explanations of action are superior to those offered by the participants themselves. There may be at base no difference in approach between the hermeneutic and "anti-hermeneutic" theorists, in that both could be taken as accepting that the starting point should be the participants' own explanations, and that other explanations should be sought only where self-explanation is inadequate. The only difference in the end may be in how, or how often, one concludes that the explanation given by participants is inadequate.

40. See HART, *supra* note 15, at 91-99 (On the nature of primary and secondary rules, see *supra* note 20). While Hart was reluctant to offer a "definition" of law, he did state that the "union of primary and secondary rules is at the centre of a legal system" and "explains many aspects of law." *Id.* at 99.

41. See *id.* at 91-95 (describing the three "defects" of a regime with only primary rules).

42. According to Hart, the basis or motive of this obedience is not important, *cf. id.* at 91 (at any given time, a society will be divided between those who "accept and voluntarily co-operate in maintaining the rules" and those who attend to the rules only "as a sign of possible punishment"), but in "healthy" societies citizens will obey because of their internal point of view on the legal rules, seeing them as creating valid obligations. See *id.* at 116.

43. See *id.* at 112-17.

44. See KELSEN, *supra* note 6, § 30, at 62.

afield) is the argument that judges inevitably do (or should) have discretion because of the "open texture" of legal rules specifically, and law in general.⁴⁵

D. INTERNAL ASPECTS AND MORAL NEUTRALITY

Hart is careful to insist that legal theorists could incorporate analyses in terms of "internal viewpoints" into their theories without compromising their claim to be doing morally neutral descriptive work.⁴⁶ It is easy enough to see why someone might think otherwise. To take into account the perspective of someone who has an internal viewpoint on legal rules is to take the perspective of someone who accepts the law, who acts as though she ought to do as the law states. It seems a short step indeed for a theorist to go from there to believing (and asserting) that the legal system is worthy of obedience (it would be an even shorter step to the extent that those who "accept" the law also view it as creating valid moral obligations). However, Hart argues, the theorist can retain her neutrality and objectivity, for she need not accept the legal system she is describing, nor need she agree with those who see the legal system as morally obligatory.⁴⁷ The role is reportorial.

There is a slight additional complication that Hart recognizes in a later discussion: there is a limited sense in which one must think like the people on whom one is reporting.⁴⁸ Consider: one might have difficulty understanding and reporting on the internal aspect of religious belief, for example, if one was not, and never had been, a believer. A theorist must at least have a sense of what it might mean to have the normative views in question; the practice must be intelligible to the theorist. A theorist of modern legal systems must understand what it means to treat legal standards as binding law (and, arguably, must understand also what it would mean to treat such standards as morally obligatory). However, that is still some distance from endorsement of the particular views in question.⁴⁹

45. See HART, *supra* note 15, at 124-36 (The Open Texture of Law). For a detailed (perhaps too detailed) analysis of Hart's concept of "open texture," see BRIAN BIX, *LAW, LANGUAGE AND LEGAL DETERMINACY* 7-35 (1993) (H.L.A. Hart and the 'Open Texture' of Language).

46. See Hart, *supra* note 32, at 243: "[T]he descriptive legal theorist may understand and describe the insider's internal perspective on the law without adopting or sharing it." Hart continues: "Even if (as Neil MacCormick and many other critics have argued) the participant's internal perspective . . . necessarily also included a belief that there are *moral* reasons for conforming to law's requirements and *moral* justification of its use of coercion, this would also be something for a morally neutral descriptive jurisprudence to record but not to endorse or share." *Id.* (footnote omitted).

47. See, e.g., H.L.A. Hart, *Comment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY* 35 (Ruth Gavison ed., 1987); Hart, *supra* note 32, at 242-43.

48. See Hart, *supra* note 47, at 36-40.

49. See *id.* at 39. The extent to which *understanding* a view requires or does not require *endorsing* that view will be discussed further, in *infra*, Part V.A.

E. VARIATIONS OF "EXTERNAL"

As will become clearer in the following sections, when we consider some of the writers who have elaborated, defended, or criticized Hart's view, Hart is not always as precise and consistent as one might like in discussing the distinction between "internal" and "external" perspectives on rules and on law.⁵⁰

In Hart's sense, "external" sometimes refers to physical distance, sometimes to the means used to analyze behavior (whether the participants' "internal perspective" is taken into account), and sometimes to the attitude towards the rules or system in question. One could be an observer far removed from the practice, trying to learn what one can simply by watching for regularities of physical action. There is an important variation: one could be an observer, but willing to take into account the reports and comments of the participants regarding their activities.⁵¹

There are other differences that seem to relate to "internal" vs. "external." Here is a factor obvious to us, but not emphasized by Hart: one could be an outsider to the practice or legal system, or one could be a participant in the practice, a citizen within the community governed by the legal system.⁵² One more dimension of "internal" v. "external" discussed by Hart: as someone within the practice or community, one could treat the law only as a basis of predicting the imposition of state sanctions, or one could "accept" the law.⁵³

The variations of "internal"/"external" become important as one considers Hart's argument that a legal theory must take into account the internal perspective,⁵⁴ and the claim (by Hart and others) that certain things follow from this requirement. The problems that follow from the lack of precision regarding "internal" vs. "external" will be considered in greater detail in Part IV.

50. See, e.g., Perry, *supra* note 28, at 110 ("It is thus clear that, even apart from the possibility of engaged external statements, Hart's notion of the external point of view is systematically ambiguous."); Thomas Morawetz, *Law as Experience: Theory and the Internal Aspect of Law*, 52 SMU L. REV. 27, 33-37 (1999) (listing four variations on the internal/external characterization).

51. This variation will be relevant to an analysis of Hamner Hill's argument. See *infra* text accompanying notes 103-12 and accompanying text.

52. There is also a sense in which mere citizens of a community are further "outside" the legal system than are the officials of that system. See, e.g., Morawetz, *supra* note 50, at 35-36.

53. See HART, *supra* note 15, at 91. One can further multiply the number of categories by including the different senses in which someone can "accept" the law.

54. I do not have time in this Article to consider Jack Balkin's interesting suggestion that jurisprudence should "employ[] ideological critique to reflect on our internal experience of law," and that we should consider the way in which the internal perspective could be said to "constitute[] law rather than simply mirror[ing] it." J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 110 (1993).

F. THE OPPOSITION

It may be useful to understand the views about law that Hart was arguing against in order better to understand the position he was putting forward. I have already mentioned the early legal positivists. Another position with which Hart was anxious to contrast his views were various forms of natural law theory.⁵⁵

The basic point of natural law theory is that one cannot or should not separate morality from law. For the traditional natural law theorists, this meant that the primary question was how to live a good life, and questions about law were secondary, derivative from the primary inquiry (one would ask: what does morality require of us if we are legislators?; or what does morality require of us as citizens—e.g., as citizens who may have to act under an unjust regime, or in reaction to particular unjust laws?).⁵⁶ Traditional natural law theorists were not prominently discussed in Hart's work. The extent to which a traditional natural law theorist would, by her views, need to, or even be inclined to, disagree with Hart's ideas about the internal perspective, is far from clear. That said, a natural law theorist who had been a student of Hart's, John Finnis, did offer suggestions regarding the internal perspective; suggestions which will be discussed below (in part IV.B).

The most prominent natural law theorist at the time Hart wrote his most important works was Lon Fuller, a "modern" natural law theorist.⁵⁷ Modern natural law theorists, like legal positivists, but unlike traditional natural law theorists, are concerned primarily with creating a theory of law, not just a theory of morality with implications for law.⁵⁸ Contrary to Austin's legal positivist dogma quoted earlier,⁵⁹ "natural law" theorists do not believe that a good theory of law can be constructed separately from moral considerations.⁶⁰ While Fuller offers a general challenge to

55. This is most obvious in the debates with Lon Fuller. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); see also HART, *supra* note 1, at 343-64 (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)). In *THE CONCEPT OF LAW*, Hart also argues against the Scandinavian Legal Realists and the American Legal Realists. See, e.g., HART, *supra* note 15, at 10-12, 278-79 (discussing Scandinavian Legal Realism); *Id.* at 136-47 (discussing American Legal Realism). See also HART, *supra* note 1, at 126-32 (discussing American Legal Realism); *Id.* at 159-78 (Part III: Scandinavian Jurisprudence). However, the beliefs of the Scandinavian Legal Realists are too hard to explain briefly, cf. M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 731-82 (6th ed. 1994) (summarizing the views of the Scandinavian Legal Realists and offering excerpts from their works), and Hart's understanding of the American Legal Realists may not have been entirely accurate. Thus, in both cases, it would take too long to explain the connections between those groups and Hart's views.

56. See AQUINAS, *supra* note 3; Bix, *supra* note 2, at 223-30 (summarizing traditional natural law theory).

57. See LON L. FULLER, *THE MORALITY OF LAW* (rev. ed., 1969); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

58. Fuller's notion of an internal morality of law serves a quite different function within Fuller's approach to law. See FULLER, *supra* note 57, at 33-94 (*The Morality that Makes Law Possible*); see also BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 79-86 (1996) (summarizing Fuller's views).

59. See *supra* quotation accompanying note 4.

60. See Bix, *supra* note 2, at 230-37 (summarizing modern natural law theory).

the legal positivist project (the possibility and value of a morally neutral legal theory, based on separating “what law is” from “what law ought to be”), he did not offer any criticism aimed specifically at the idea or use of an internal point of view.⁶¹

In later years, Hart defended his approach to law against Ronald Dworkin, whose work can be characterized as a form of modern natural law theory, but who is often considered as advocating an approach distinct from either legal positivism or natural law theory—Dworkin’s later works, in particular, are often characterized as offering an “interpretive” approach to law.⁶² Dworkin’s approach was directly and indirectly in competition with Hart’s. Dworkin’s early work in legal theory involved a construction of a legal theory out of a criticism of Hart, just as Hart’s theory had earlier been built out of a criticism of John Austin.⁶³

While Dworkin does not focus specifically on Hart’s use of the “internal point of view,”⁶⁴ the approach to law in Dworkin’s later writings has been seen as offering an interesting alternative to an approach based on Hart’s perspective. Many commentators see Dworkin’s interpretive approach as taking an “internal point of view” one step further: the Dworkinian theorist is advised not merely to take into account the perspective of the participant, but to act as though she were a participant.⁶⁵

As will become clearer later in this Article, much of the critical discussion of Hart’s work (whether offered as friendly amendment or as competing alternative) tends to accept the main point of Hart’s approach: legal theory needs to be built around, or at least incorporate, the internal perspective of participants. The disagreement tends to be at the other end of the argument: (1) that perhaps the perspective of participants needs to have a more central role than Hart allows; or (2) that the type of legal theory Hart (properly) advocates precludes other claims Hart made for (his) legal theory—(a) that it was merely descriptive; and/or (b) that

61. When Fuller does discuss a particular concept within Hart’s theory, it is “the rule of recognition.” See FULLER, *supra* note 57, at 133-45.

62. See DWORKIN, *supra* note 2; see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, RIGHTS]; RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

63. See DWORKIN, RIGHTS, *supra* note 62, at 14-130 (first criticizing Hart’s version of legal positivism, and then presenting an alternative built on those criticisms).

64. Dworkin’s focus within Hart’s theory was primarily on the rule of recognition, the practice theory of rules, and on the “open texture” of legal rules as a justification for judicial discretion. See *id.* at 14-80.

65. See DWORKIN, *supra* note 2, at 14 (“This book takes up the internal, participants’ point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face.”); cf. Perry, *Interpretation*, *supra* note 28, at 99-100, 121-35 (contrasting Hart’s “internalist” approach to legal theory with Dworkin’s “strong internalist” approach); Hill, *supra* note 12, at 114-15, 128 (describing how Hart has tried to distance his approach from that of Ronald Dworkin and Peter Winch, but arguing that Hart’s other commitments lead to just such positions). I will discuss Hill’s and Perry’s critiques in later sections. See *infra* Parts V.A, V.B.

law can be conceptually separated from morality.⁶⁶ These claims will be considered in greater length later in this Article.

G. OVERALL CONTEXT: THE PROJECT OF CONCEPTUAL ANALYSIS

The evaluation of H.L.A. Hart's theory, as well as that of Hart's predecessors, later elaborators, and critics, takes place against the larger context of conceptual analysis. The difficulties that come with this context are rarely discussed and can only be hinted at briefly here.

There are peculiarities to the whole idea of conceptual analysis, especially in its application to social practices.⁶⁷ In fact, there are important commentators who assert that conceptual analysis is inappropriate for legal theory.⁶⁸

There are two basic questions involved here, each of which deserves (and has been given) substantial consideration, but in this piece can only be flagged and then passed by. First, to what extent does it make sense to have a general theory of law?⁶⁹ To assume that there should be a general theory of law seems to presume that there is something that can be said about the common nature or common essence or shared characteristics of a wide variety of systems and institutions, across societies across history. One could be skeptical on either of two grounds: (a) that law is not a "natural kind," and therefore it makes no more sense to create a theory of law than it would to create a theory of all objects which begin with the letter "N"⁷⁰; and (b) even if there are things that can be said about legal systems as a group, any claim that would be true of all systems across nations and across history would likely be so general as to be without interest.⁷¹ Second, to what extent can or should a general theory of law be constructed from conceptual analysis, and to what extent should or

66. In some ways, claim 2(b), above, can be seen as just a different characterization of claim 2(a). There may be some conceptual space between the two: in that one might be able to argue for the possibility of a purely descriptive legal theory, while denying the legal positivist separation of law from morality (the separation of "what law is" from "what it ought to be"). See Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CAN. J.L. & JURIS. 361, 361 (1996) (book review) (distinguishing "methodological positivism" from "substantive positivism").

67. See Brian Bix, *Conceptual Questions and Jurisprudence*, 1 LEGAL THEORY 465, 465-79 (1995), reprinted in modified form in Bix, *supra* note 58, at 15-32.

68. See, e.g., Brian Leiter, *Naturalism and Naturalized Jurisprudence*, in ANALYZING LAW 79, 79-104 (Brian Bix ed., 1998). Professor Leiter's argument comes as part of a larger argument that conceptual argument is inappropriate generally, not just for legal theory or for social theory. See *id.*

69. For discussions regarding the possibility of general theories of law, see, e.g., Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY 188, 193-208 (Robert P. George ed., 1992); Bix, *supra* note 58, at 7-10.

70. See Frederick Schauer, *Critical Notice*, 24 CAN. J. PHIL. 495, 508 (1994) (suggesting that the category "law" may be no more philosophically interesting as a class than "residents of London" or "foods that begin with the letter 'Q'"); see also Perry, *supra* note 66, at 369-74 (discussing some problems with an analysis based on the "essence" or "nature" of law); Bix, *supra* note 58, at 7-10 (discussing some problems with an analysis based on the "essence" or "nature" of law).

71. This appears to be Ronald Dworkin's position. See Ronald Dworkin, *Legal Theory and the Problem of Sense*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 9, 16

must the theory be grounded in the (quasi-) scientific observation of actual practices?⁷²

These are difficult questions and central ones—though their centrality is belied by the relative silence, until recently,⁷³ on the subject by theorists in the field. The point is while it is entirely proper to focus primarily on (e.g.) what Hart meant by his concept of the internal perspective or on whether Hart's approach is the best one, we must occasionally look up from this more detailed work to consider the larger questions which underlie the viability of the entire theoretical enterprise.

IV. SUGGESTED REFINEMENTS BY RAZ AND FINNIS

A. JOSEPH RAZ

Joseph Raz offers some suggested refinements on Hart's concept of "internal point of view" meant largely to respond to one problem associated with that concept. As noted earlier,⁷⁴ there is a concern, appreciated by Hart, that incorporating an internal point of view into one's theory seems awfully close to endorsing the values entailed by that perspective. Raz's discussion seeks to clarify the way in which one can discuss a normative point of view without simultaneously adopting or endorsing the normative claims involved.

Raz first introduces a distinction between two kinds of normative statements about law: (1) those "made by people who believe in the validity of the legal point of view . . ."; and (2) statements made "about people's beliefs and attitudes [towards] norms."⁷⁵ Raz equates these two perspectives with Hart's internal and external points of view respectively.⁷⁶

Raz then offers that normative statements relating to the law are often made that do not seem strictly to fit either the internal or external point of view: "ought" statements that refer to legal norms without appearing to endorse those norms.⁷⁷ Raz calls these statements from a "legal point

(Ruth Gavison ed., 1987) ("Interpretive theories are in their nature addressed to a particular legal culture . . .").

72. See Leiter, *supra* note 68; Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *ANALYZING LAW* 257, 278-85 (Brian Bix ed., 1998) (responding to Leiter).

73. For some recent investigations of the topic, see, e.g., Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 *LEGAL THEORY* 533 (1998); Jules L. Coleman, *Incorporationism, Conventionality and The Practical Difference Thesis*, 4 *LEGAL THEORY* 381, 387-95 (1998); Perry, *supra* note 28, at 97-102; Perry, *supra* note 66, at 369-74; and Bix, *supra* note 67.

74. See *supra* Part III.D.

75. JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 171-72 (1990) (emphasis added).

76. See *id.* at 211 n.3.

77. See *id.* at 172-77. Raz argues that "statements [from a legal] point of view" are neither statements from an internal point of view nor statements from an external point of view, but "belong to a third type which is logically related to the basic ones, but is not identical with them . . ." *Id.* at 211 n.3. Raz disclaims full credit for the analysis, arguing that it is merely an adaptation of an idea present in Hans Kelsen's work. See RAZ, *supra* note 34, at 157.

of view."⁷⁸ Lawyers make such statements all the time. The lawyer need not believe that the legal system creates moral obligations, but even without such beliefs she can still inform an interested client what the client can and cannot do if the client wants to stay within the law.⁷⁹ Such statements presuppose the existence of a normative system,⁸⁰ but do not expressly or implicitly accept it as binding upon the speaker. Whether such "statements from a legal point of view" succeed in holding the middle position, capturing the viewpoint of those who accept the law, while maintaining the theorist's neutrality, remains a matter of controversy.⁸¹

B. JOHN FINNIS

John Finnis, in *Natural Law and Natural Rights*,⁸² argues for a small, but significant correction to Hart's position on the internal perspective. It is useful to note the slightly different context in which Finnis discusses the issue (to phrase the same point another way: that Finnis comes at the internal perspective from a different direction, as an answer to a different set of problems). For Finnis, the initial question is: how does one construct a descriptive theory of law, when "law" names a wide variety of quite different social practices (across cultures and over time)?⁸³ Finnis rejects the approach of the theorist Hans Kelsen, who believed that the various forms of law could only be described by a legal theory that summarized what was common to all of them.⁸⁴ Instead of seeking what is typical, what is the "lowest common denominator," Finnis argues that an

78. See RAZ, *supra* note 75, at 170. Raz points out that these sorts of statements are often made in the context of other normative systems which we understand, but do not necessarily endorse. Thus, I can tell a vegetarian friend, "you should not eat this," when referring to a dish that I know to contain meat, even though I am not a vegetarian, and I may myself see no moral reason to avoid eating dishes with meat in them. See *id.* at 175-76; see also RAZ, *supra* note 34, at 153-59 (summarizing the concept of "statements from a point of view"). In *THE AUTHORITY OF LAW*, Raz sometimes uses the slightly different label, "detached legal statements." *Id.* at 153.

79. See RAZ, *supra* note 75, at 176-77. Raz does not understate the conceptual complexity hidden within these sorts of statements: "[Detached normative statements] show[] that normative language can be used without a full normative commitment or force. But on the other hand it is far from easy to explain what sense normative utterances have when they do not carry their full normative force." RAZ, *supra* note 34, at 154.

80. It is an interesting question whether asserting the existence of a normative system also asserts the existence of some core of people who accept that system (that is, who see it as creating reasons for action for them). The fact that we can speak sensibly about the requirements of ancient Roman law need not be conclusive on the question. In that case, we have long years of practice and commentary upon which to draw. A quite different question might be raised regarding (hypothetical and fictional) normative systems which have never had adherents. Raz suggests that detached normative statements would make sense even as regards a hypothetical legal system, e.g., one proposed by a reform movement. See RAZ, *supra* note 75, at 174-75.

81. See ROGER SHINER, *NORM AND NATURE* 137-45 (1992) (arguing that detached legal statements do not adequately explain law's normativity for participants).

82. FINNIS, *supra* note 3.

83. See *id.* at 3-6 (defining the problem).

84. See *id.* at 5-6. Finnis also raises the methodological question of how we know which social systems to include in the category "law," given that the participants in the various systems *might not see themselves* as taking part in the same kind of activity. See *id.* at 4, 6.

explanation should focus on "the central case," the flourishing case, the highest example of the type.⁸⁵ This approach to explanation and to social theory, he argues, was that of Aristotle and Max Weber, and also that of Joseph Raz and H.L.A. Hart.⁸⁶

For Finnis, the function of the internal point of view is to help determine what will be the focal case and what will be the peripheral cases when looking at the variety of social systems. The connection is indirect: according to Finnis, the internal perspective is the guide for determining what is important and significant in legal systems, criteria which can then be used to differentiate central from peripheral senses of "law."⁸⁷

Finnis proposes a modification of Hart's internal point of view. Finnis agrees that a legal theory should be built around a particular perspective, and the perspective ought to be that of a citizen who is not merely obeying the law out of fear. However, Finnis argues that Hart's internal point of view entailed a variety of quite different points of view; Finnis argues further that there were reasons for preferring some of these views over others.⁸⁸ As mentioned earlier,⁸⁹ Hart does not distinguish among those who used the legal rules as standards. He concedes that some who take an internal viewpoint on the law might be doing so based on "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."⁹⁰ However, to Finnis, this is treating as the same viewpoints which are significantly different.⁹¹

Finnis offers two distinctions to be added to Hart's analysis: (1) preferring the viewpoint of those who follow the law ("in which legal obligation is treated as at least presumptively a moral obligation") because "the establishment and maintenance of legal . . . order [as separate from other social practices and social institutions] is regarded as a moral ideal if not a compelling demand of justice . . .,"⁹² as contrasted with those who take an internal point of view for other (lesser) reasons; and (2) preferring the viewpoint of those who are "practically reasonable" (that is, good evalu-

85. *See id.* at 9-11 (discussing "central case" and "focal meaning"). One advantage of this approach is the ease with which it handles borderline cases like international law, and problem cases like the legal systems of evil dictatorships. A central case analysis will say that these instances are "law," but are "law" in a peripheral or diminished sense of the term. *See id.* (discussing such cases); *see also* RAZ, *supra* note 75, at 150:

It would be arbitrary and pointless to try and fix a precise borderline between normative systems which are legal systems and those which are not. When faced with borderline cases it is best to admit their problematic credentials, to enumerate their similarities and dissimilarities to the typical cases, and leave it at that.

Id. (footnote omitted).

86. *See* FINNIS, *supra* note 3, at 9-11, 19-20 (summarizing and citing sources).

87. *See id.* at 11-12 (internal perspective as guide to importance and significance); *see also id.* at 3-4 (the necessity to focus on purpose in a descriptive social theory).

88. *See id.* at 12-13.

89. *See* text accompanying notes 31-33.

90. HART, *supra* note 15, at 203.

91. *See* FINNIS, *supra* note 3, at 13-14.

92. *Id.* at 14.

ators of moral questions).⁹³

The significance of Finnis's distinctions, in particular the second one, is that it pushes the theorist towards, and, arguably, over the line of moral neutrality. For the theorist to be making judgments about which perspective is the most practically reasonable (more or less the equivalent of saying which perspective gets the moral-ethical questions right) is for the theorist to be making moral judgments. This is not tragic in itself; pretty much everyone would concede that moral judgment is valuable. However, the claim is that moral evaluation of this sort is inconsistent with the stated purpose of legal positivism: to offer a morally neutral, descriptive theory of law.

V. HILL AND PERRY ON THE INTERNAL ASPECT AND THEORETICAL METHODOLOGY

A. H. HAMNER HILL

H. Hamner Hill argues that Hart's position methodologically is an unstable compromise between an empirical (scientific) approach to the social sciences on the one hand, and a fully hermeneutic approach (the *Verstehen* approach) of the kind advocated by Peter Winch on the other hand.⁹⁴

Under Winch's *Verstehen* approach,⁹⁵ different communities are, in a sense, different worlds: people have different values and different ways of organizing their observations, perceptions, and experiences. To understand another community, one must get inside that community's particular (and comprehensive) form of life. It is a short series of steps from talking of different forms of life to the argument that it is improper (or nonsensical) to bring one's own values (including one's own ideas about rationality) to criticize the views or practices of another community. Winch wrote:

[C]riteria of logic are not a direct gift of God, but arise out of, and are only intelligible in the context of, ways of living or modes of social life. It follows that one cannot apply criteria of logic to modes of social life as such. For instance, science is one such mode and reli-

93. *See id.* at 15.

94. *See* Hill, *supra* note 12; WINCH, *supra* note 8. Hart cites to Winch in support of his discussion of the internal aspect of rules. *See* HART, *supra* note 15, at 289 (citing WINCH, *supra* note 8, at 57-65, 84-94).

95. "In the *verstehen* tradition [human activities] are understood from within, by means that are opposed to knowing something by objective observation, or by placing it in a network of scientific regularities The exact difference is controversial: one approach is that understanding a human expression is a matter of knowing what in oneself would gain expression that way, and 're-living' by a process of empathy the mental life of the person to be understood." THE OXFORD DICTIONARY OF PHILOSOPHY 393 (Simon Blackburn ed., 1994) (defining "*Verstehen*"); *see also* MARTIN HOLLIS, THE PHILOSOPHY OF SOCIAL SCIENCE 155-60, 239-41 (1994) (discussing Winch's ideas). Blackburn points out that the *Verstehen* approach is not original to Winch, but is connected, in one form or another, with the hermeneutic theorist Wilhelm Dilthey and the social theorist Max Weber. *See* THE OXFORD DICTIONARY OF PHILOSOPHY, *supra*, at 393.

gion is another; and each has criteria of intelligibility peculiar to itself. So within science or religion actions can be logical or illogical: in science, for example, it would be illogical to refuse to be bound by the results of a properly carried out experiment; in religion it would be illogical to suppose that one could pit one's own strength against God's; and so on.⁹⁶

The relevance to Hart's project is as follows: (1) we can only understand normative behavior, including law, by understanding the operation of rules⁹⁷; (2) part of the understanding of rules is understanding the internal aspect of rules, the reflective attitude groups have to the rules accepted as binding on the group; and (3) understanding the beliefs of the participants, their internal perspectives on the legal system, requires adopting or endorsing those beliefs.⁹⁸

Neither Hart nor any of his supporters would be likely to disagree with numbers one and two, above. It is number three that is controversial. Hart did not endorse it; in fact, his comments are generally directly to the contrary: that taking into account the internal perspectives of participants does *not* require any endorsement by the theorist.⁹⁹ It is additionally controversial, both as a description of what is entailed by Hart's approach (whether or not such entailments reflect Hart's own views),¹⁰⁰ and as a statement of what the truth is regarding social theory (it should be pointed out that there are important theorists who disagree with the view that one cannot or should not criticize the values and practices of another community).¹⁰¹

To make his point, Hill moves the focus for a moment from the participant's perspective to the theorist's perspective.¹⁰² Hill notes that in discussing the theorist's perspective in constructing a theory of law, one must consider both the point of view used in gathering the social science data and the point of view used in evaluating the data. Hill's argument is that Hart is focused only on the second task when the first task is equally significant and equally telling.¹⁰³

96. WINCH, *supra* note 8, at 100-01.

97. Notice that the claim is generalizable: applying to all forms of normative behavior, including the moral beliefs of societies, social groups, or religions.

98. See Hill, *supra* note 12, at 121.

99. See Hart, *supra* note 47, at 39 ("But [the theorist] need not share or endorse their beliefs or regard his descriptive account as also claiming that their conduct is justified."); see also Hart, *supra* note 32, at 242 ("Of course a descriptive legal theorist does not as such himself share the participants' acceptance of the law in these ways, but he can and should describe such acceptance . . .").

100. See Hill, *supra* note 12, at 122, 125-28 (arguing that argument number three above is entailed by Hart's other positions, though Hart himself expressly disclaims it).

101. See, e.g., CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* 116-51 (1985) (arguing against Winch's views); HOLLIS, *supra* note 95, at 224-47 (Chapter 11: Rationality and relativism) (providing a general overview of the debate).

102. Stephen Perry makes a comparable move in his critique of Hart. See Perry, *supra* note 28, at 121 ("Hart's theory . . . do[es] not attribute a point to law *from the participant's perspective*. . . . [T]he resulting concept of law is the theorist's concept, not the participants'").

103. See Hill, *supra* note 12, at 123.

The question is how the legal theorist goes about gathering social science data, in particular, on normative matters. "How . . . is an observer to come to know that norms exist within a given society?"¹⁰⁴ Hill suggests we exclude, for the moment, consideration of our reports regarding our own legal system.¹⁰⁵ In such circumstances, we bring an "internal perspective" with us: we know about our system from having lived in it and, for lawyers and judges, from being trained within it.¹⁰⁶ It is a better example to consider the anthropologists who have studied the dispute-resolution systems of societies quite different from their (and our) own.¹⁰⁷

An anthropologist/legal philosopher dealing with an unfamiliar legal system must try to understand how that normative system operates for (is perceived by) its participants. Hill points out two possibilities. First, it might be sufficient to be a good observer: to watch for regularities of behavior, and to pay attention to the self-reporting of the participants regarding their own attitudes, beliefs, and values.¹⁰⁸ However, if this is the case, it simply means that, contrary to Hart's position, an external observer, using empirical facts, can construct an adequate account of normative behavior. Hart's particular reductionist target, John Austin's theory, may itself be too simplistic to do the work (it had no way of incorporating the participant's self-reporting of attitudes and motivations), but a better and more sophisticated fact-based theory may do the trick.¹⁰⁹

If, on the other hand, an observer-based, empirical-fact-based approach, however sophisticated, is not sufficiently adequate, then what is the alternative? The alternative is for the theorist/researcher to put herself in the place of a participant: to "participate meaningfully in the behaviors"; to "belong," where "belonging presupposes acceptance of the way things are done, that is, a denial of . . . analytic detachment . . ." ¹¹⁰

In other words, there is no middle ground, at least in the gathering of data: it is either sufficient to be an external observer, who can capture and explain normative behavior in empirical terms, without loss; or one

104. *Id.* at 125.

105. *See id.* Hill also suggests exclusion of our consideration of legal systems which are quite similar to our own, or are generally perceived as such—as in an American scholar considering the United Kingdom. *See id.*

106. *See id.*

107. *See id.*

108. *See id.* at 126-27.

109. *See id.* at 127. Hill suggests the Scandinavian Legal Realists as possible examples of empirical approaches to explaining normativity sufficiently sophisticated as to be worthy of serious consideration. *See id.* *See, e.g.,* KARL OLIVECRONA, *LAW AS FACT* (2d ed. 1971).

110. Hill, *supra* note 12, at 127 (footnote omitted). Stephen Perry reads Hill as simply denying the possibility of detached normative statements. *See Perry, supra* note 28, at 128 n.73. As indicated by the above summary, that is a slight, but telling, misreading. Hill allows for (and supports) detached normative statements in the evaluation of social science data. *See Hill, supra* note 12, at 124-25. What Hill doubts is the ability to gather social science data in a way which similarly straddles the boundaries between purely empirical work and full participation. *See id.* at 126-27.

must resort to acting as a full participant, that is, someone who accepts the rules and values as valid and binding. Hill's purpose in the article is not to say that either approach is valid; rather, Hill's point is to emphasize that Hart has unsuccessfully sought to keep a middle position where no middle position was possible. To the extent that one accepts Hart's emphasis on the internal point of view in explaining normativity, then one must accept a Winch-like *Verstehen* approach.¹¹¹

Hill's work, in a sense, shifts the focus from the problem of theory to the problem of knowledge: not "how does one create a theory of a social institution that is different across societies and changes over time?"; but instead, "how can someone (theorist or otherwise) know the attitudes of another person, especially when that person lives in a distinctly different culture?" Hill offers the problem of knowing other minds. He says that if there is no real problem, then the ability to understand other minds likely undermines the arguments Hart uses to defend his particular approach to legal theory. However, if there *is* a problem of understanding other minds¹¹² (or at least when the other minds are those from another culture), then the theorist must give up the task of understanding from "outside," and in its place the theorist must act as a participant. The choice Hill offers legal theory—based, again, on questions of epistemology more than questions of theory-construction—could be summarized as a choice between Austin¹¹³ (an outsider's empirical approach) and Dworkin¹¹⁴ (an as-if-participant approach).

B. STEPHEN PERRY

Stephen Perry argues that Hart's approach to law must fall short on its own terms, as an attempt to offer a morally neutral, descriptive theory of law.¹¹⁵ When the problems in the theory are corrected, Perry claims, the result is closer to the morally committed interpretive approach of Ronald Dworkin.

Perry's analysis begins by focusing on the following key moves or claims within Hart's theory: (1) there is an important difference between an internal and external point of view; (2) some matters can only be properly understood when seen from an internal perspective; and, thus, (3) legal theory should be built around the internal perspective.¹¹⁶ Perry's

111. See Hill, *supra* note 12, at 128.

112. Hill notes: "One must be careful here not to assume that behavioral access to attitudes involves a strict reduction of attitudes to behaviors or dispositions. All that one need be committed to is the belief that regularities of behavior provide adequate grounds for the attribution of particular mental states . . ." *Id.* at 126 n.71.

113. See *supra* text accompanying notes 13-15; HART, *supra* note 15, at 18-25 (summarizing Austin's views). See generally Austin, *supra* note 4.

114. See Hill, *supra* note 12, at 114, 126-28. See generally DWORKIN, *supra* note 2.

115. Perry, *supra* note 28, at 100. A recent article by Gerald Postema presents a critique similar to Perry's (though on some points Postema is importantly different). See Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 LEGAL THEORY 329, 329-57 (1998).

116. See Perry, *supra* note 28, at 102-06.

argument—emphasizing a point already mentioned a number of times in this Article¹¹⁷—is based on the claim that there is an important ambiguity and conflation going on in Hart's use of "internal" and "external" in reference to perspectives.¹¹⁸ Because of this ambiguity, legal theory can be built around an internal perspective, only if it first makes a (non-morally neutral) choice among available internal perspectives.¹¹⁹

If one equates the "external" perspective with an extremely disengaged observer who cannot take into account participants' attitudes towards their actions (and thus, as discussed above,¹²⁰ cannot distinguish habits from rule-following, or acting because obliged from acting out of obligation), then Perry agrees that theory must be built around a perspective that is "internal," in the sense that it is not external in that disengaged way. However, when Hart refers to building legal theory around an "internal" point of view, he means the point of view of someone who accepts the law. Perry seeks to argue that there are other types of "internal" perspectives available.

Well between the "internal" perspective of someone who accepts the law and the "external" perspective of the disengaged observer is the perspective of someone who complies with the law (when she complies with the law) only out of fear of the sanctions that would be imposed for non-compliance. This is Oliver Wendell Holmes's "bad man, who cares only for the material consequences such knowledge [of the law] enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."¹²¹ Perry offers Holmes's "bad man," which Perry re-labels the "prudential perspective,"¹²² as offering a perspective that Hart's theory cannot gracefully handle. Hart wishes to reject that perspective,¹²³ but, Perry maintains, Hart cannot do so while remaining true to the claim of offering a purely descriptive theory of law.¹²⁴

Perry's point is that the perspective of Holmes's bad man is also an "internal" point of view, in the sense that it is in sharp contrast to the external, extremely disengaged view described earlier.¹²⁵ The bad man is like the true believer who accepts the law in that he uses the law to give him reasons for actions, though the type and timing of the reasons varies between the two. The true believer does something because the law tells her to do so; the bad man does something if the law tells him to and he believes that there is a significant chance of suffering sanctions for non-compliance.¹²⁶

117. See, e.g., *supra* Part III.E.

118. See Perry, *supra* note 28, at 107-12.

119. See *id.*

120. See *supra* Part III.A.

121. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

122. Perry, *supra* note 28, at 110.

123. See HART, *supra* note 15, at 39, 239-40.

124. See Perry, *supra* note 28, at 110.

125. See *id.* at 111-12.

126. See *id.* at 111-13.

Perry reads Hart as justifying the focus on the internal perspective on the need to explain the normative nature of law: the fact that law gives people reasons for action.¹²⁷ However, Perry asks, if the focus is on the way that the law can give people reasons for action, and both the true believer and the bad man believe that the law gives them reasons for action, on what grounds can Hart select the former and reject the latter as the base around which legal theory should be constructed?¹²⁸

Perry's conclusion is that Hart's approach to law can be favored over the prudential approach only by first making an argument for one kind of internal perspective over another, one kind of reason for action over another. This sort of choice, however, Perry insists, requires a choice between different conceptions of law and its function(s). That is, the theorist must offer a moral argument for one conception of law's purpose over another (the conception that matches Hart's theory over the conception that matches Holmes's prudential perspective, or, for that matter, the perspective in Ronald Dworkin's theory).¹²⁹

Perry's argument derives in part from an initial conclusion that Hart, in *The Concept of Law*, was trying not merely to create a good descriptive theory of law, but also to come up with a philosophical explanation of the normativity of law.¹³⁰ A later section will consider the problems and possibilities of such an ambition.¹³¹

In answer to Perry, an alternative reading of Hart characterizes the theory in a less ambitious, but also less problematical way. If Hart is seen as being concerned primarily with descriptive social theory, and not primarily with having a theory of obligation, then much of Perry's critique falls away. This reading does not say that Hart has nothing to say about obligation. His "social theory" or "practice theory" of rules¹³² was a stab at a theory of norms and normativity. However, in his later writings, Hart was repeatedly willing to concede the criticisms Raz and Dworkin offered to his social theory of rules,¹³³ without conceding (or even hinting) that this created problems for his general project (which he described as an attempt to offer a descriptive theory of a social practice).¹³⁴ Of

127. See *id.* at 98-100 (explaining the connections between the need to explain the normative nature of law and Hart's emphasis on the internal point of view).

128. See *id.* at 110 ("Given that the rationale for taking account of the internal point of view in theorizing about social practices like law is precisely to elucidate the reason-giving character of those practices, one would have thought that the prudential perspective should, rather than being conflated with the extreme external point of view, be treated as a second kind of *internal* point of view.").

129. See *id.* at 112-21.

130. See *id.* at 98 ("Hart attempted, within the bounds of a single theory, both to resolve the methodological questions that jurisprudence has inherited from the social sciences, and at the same time to show how and why law is a normative phenomenon.").

131. See *infra* Part V.D.

132. See HART, *supra* note 15, at 9-12, 55-58.

133. See Hart, *supra* note 32, at 254-59 (responding to RAZ, *supra* note 75, at 49-58; DWORKIN, RIGHTS, *supra* note 62, at 48-58).

134. See Hart, *supra* note 32, at 239-59 (defending his approach to legal theory, and then, in a later part of the discussion, accepting many of Dworkin's criticisms of his theory of rules); Hart, *supra* note 47, at 36-40 (distinguishing his own descriptive project from

course, the fact that Hart does not himself think that his theory of rules was central to his (descriptive) project need not be conclusive on the question. However, it should create some doubt on the historical-exegetical question of what Hart is trying to accomplish, and at least open the question of how the various parts of Hart's project hang together.

C. REFLECTIONS

The basic problem raised, directly or indirectly, by Raz, Finnis, Hill, and Perry, is that it may not be enough merely to say that theorists should take into consideration the perspective of a participant in the practice. Choices must be made about *which* perspective or, to put the same matter another way, about *which* participant.

To say that we should take into account the perspective of a participant for whom the legal rules give reasons for action, does make a selection, excluding many possible perspectives of participants, but it does not finally determine the proper perspective. There are indeterminacies; there are choices still to be made.

For example, though two citizens might both believe that the rules of their legal system give them reasons for action, they might disagree sharply, even at a quite general level, regarding which rules give which reasons. It might be that one believes that the country's written constitution is paramount, trumping even the interpretations of the document by the highest court. Someone else might take the opposite position, believing that one must do as the highest court says when it is acting in interpretation of the constitution, even if one believes that the constitution properly understood means (and "clearly means") something else.¹³⁵

A second type of question is how central and determinative the participant's perspective should be. Hill argues that Hart's project is built around the idea that legal theorists "must explain a legal system *as it is experienced by those bound by it*,"¹³⁶ but that Hart's theory itself does not live up to that principle.¹³⁷ Perry takes a somewhat different view: (a) arguing, contrary to Hart's position, that legal theories require moral choices regarding the point or value of law; and (b) noting that these choices can be taken from the theorist's perspective or the participant's perspective; and, while Hart appears to favor the theorist's perspective, the citizen's perspective is the better one for the central jurisprudential goal of explaining the normativity of law.¹³⁸

Dworkin's evaluative and justificatory project, while conceding that some details of his own theory might be subject to criticism and improvement).

135. Compare *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land . . .") with Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) ("Once again, we must understand that the Constitution is and must be understood to be superior to ordinary constitutional law.").

136. Hill, *supra* note 12, at 122.

137. See *id.* at 122-28 (explaining how Hart's approach commits him to a *Verstehen* approach, though Hart distances himself from that approach).

138. See Perry, *supra* note 28, at 121-34.

These theorists are raising basic issues regarding the hermeneutic approach to legal theory, issues which are still to be mined—questions which are still being intricately dissected four decades after Hart opened the discussion.¹³⁹

D. EXPLAINING NORMATIVITY

A third issue raised by the commentators previously discussed is the difficult and telling ambiguity of the phrase and concept “explaining normativity” or “explaining the normative nature of law.” It is the different and contrary interpretations of that task that probably explain a good part of the divergence between those who are interpreting, elaborating, defending, and criticizing Hart’s work.

The starting point is that it is a significant part of the practice of law (as it is experienced by those who participate in that practice) that the law purports to give its officials and its subjects reasons for action, and those officials and citizens who “accept” the law¹⁴⁰ view the law as giving them such reasons. If this is a central part of the practice of law, a theory that could explain it is thereby a much better theory of law than one that cannot explain it. Again, though, what does it mean to “explain” the normative aspects of law?

“Explaining normativity” seems an awkward combination of description and evaluation: one purports to offer neutral insights into an activity which is the polar opposite of description. One can imagine comparable tasks: “explaining morality” and “explaining religious faith.” In all those cases, it is difficult to determine whether one can describe without taking sides, without participating oneself. One possible interpretation of “explaining normativity” would be to view it as a sociological or psychological exploration on why people treat legal rules as giving them reasons for actions.¹⁴¹ A second interpretation would be to view it as determining when and under what conditions legal rules do in fact give reasons for action—in a sense, when obedience to the law is warranted. The first approach seems contrary to legal positivism because it is not general¹⁴² or conceptual.¹⁴³ The second approach seems contrary because it makes

139. For some of the important and diverse contributions in the past year alone see Shapiro, *supra* note 33; Morawetz, *supra* note 50; Coleman, *supra* note 73; Postema, *supra* note 115.

140. Putting aside for the moment the ambiguities in what it means to “accept the law.”

141. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

142. It seems likely that the frequency of different reasons for compliance will vary both from society to society and over time.

143. H.L.A. Hart and many of his followers argue for the possibility and value of a legal theory that is descriptive and conceptual. Some recent commentators appear to be following this tradition only in part. Brian Leiter advocates a legal theory that is descriptive but not conceptual (if “conceptual” is equated with “*a priori* conceptual analysis”; what Leiter does could be characterized as “*a posteriori* conceptual analysis”). Leiter, *supra* note 68 and articles cited therein. On the other side, Stephen Perry, *see supra* Part V.B, seems to be arguing that while legal theory should be conceptual, it cannot be purely descriptive. See generally Coleman, *supra* note 73, at 388 n.18 (summarizing some of the distinctions among current legal theorists).

moral judgments of the laws or the legal system as a whole.¹⁴⁴

The tension within and about the idea of an “explanation” of a normative practice is what has created the quite different reactions of Peter Winch and Stephen Perry discussed earlier: Winch claiming that a full understanding of a normative practice entails its endorsement; Perry does not go quite that far, but does state that a theory of a normative practice requires taking some normative positions, entailing some, but not all, of the issues on which participants take positions. To explain further: for Winch, the theorist is endorsing the practice, like the participant does. Winch thus sees the relationship between the participants and the practice in rather simple, almost “on-off” terms. For Perry, different participants may have quite different attitudes towards the practice, and the theorist must choose one set of responses over another.

It may be that a fresh start on this question would be helpful. Raz offered the following approach to “[t]he problem of the normativity of law”:¹⁴⁵ (1) to say that legal reasons are norms is to say that they are reasons for action, and (2) the inquiry must be as to what justifies using normative language to describe the law.¹⁴⁶ The fact that there is a large overlap between law and moral standards—and thus, we often have good (moral) reasons to do what the law requires—is not sufficient (even if it could be said of every legal rule), for it does not explain why something is being required by law creates a reason for action. “We want to know what difference the fact that a norm belongs to a legal system in force . . . makes to our practical reasoning.”¹⁴⁷

Raz makes the interesting point that the fact that legal rules may be valid norms, or exclusionary reasons for action, does not sufficiently ex-

144. Roger Shiner argued that it was the attempts of the more sophisticated forms of legal positivism to account for the normativity of law which made those theories verge on, or be vulnerable to attack from, natural law theory. See Schauer, *supra* note 70, at 497 (1994) (summarizing ROGER SHINER, *NORM AND NATURE: THE MOVEMENT OF LEGAL THOUGHT* (1992)).

As Perry points out, we must distinguish theories which use moral evaluations in constructing the theory—moral judgments about the relative importance of different functions of law—from those theories that make moral evaluations *of the laws themselves*. See Perry, *supra* note 66, at 361 (distinguishing the claiming of necessary connections between morality and theories of law, and claiming such connections between morality and law). A number of commentators seem willing to argue that the former, which exhibits evaluative aspects of theory-construction, is consistent with legal positivism, while the second position seems clearly outside the boundaries of legal positivism, in the territory of natural law theory. See, e.g., RAZ, *supra* note 37, at 195 (accepting that evaluative, if not necessarily moral, judgments will be necessary in the construction of theories of law); Hart, *supra* note 47, at 39 (distinguishing the claiming of necessary connections between morality and theories of law, and claiming such connections between morality and law).

145. RAZ, *supra* note 75, at 154.

146. See *id.* at 155.

147. *Id.* Raz offers a complicated series of arguments for why a focus on legal sanctions is also insufficient to explain the normativity of law. The key point of the argument appears to be that sanctions, or more precisely, fear of sanctions, can at most be a first-level reason for action, while true norms provide second-level reasons—reasons to exclude or override the consideration of other reasons. See *id.* at 73-84 (mandatory norms as exclusionary reasons), 155-62 (legal sanctions as creating only first-order reasons).

plain the use of normative language with regard to law. The use of normative language reflects that people believe legal rules to be valid norms, a question different from, but, one hopes, related to, the question of whether those rules in fact *are* valid norms.¹⁴⁸ This, in turn, leads Raz to a discussion of “statements from a legal point of view,” a concept which was discussed earlier.¹⁴⁹

The complications and confusions that follow from trying to “explain normativity” have led some commentators to claim that this was no part of Hart’s project,¹⁵⁰ while others, like Frederick Schauer, have argued that whatever the past of legal positivism, the project of “explaining normativity” should have no part in its future. I turn to Schauer’s approach in the next section.

VI. A RETURN TO AUSTIN?

In recent articles,¹⁵¹ Frederick Schauer has suggested that legal positivism should turn its back on attempts to explain the normativity of law based on the “internal aspect” of rules and of law.

Schauer takes some of legal positivism’s arguments against natural law theory and uses them against more modern (in Roger Shiner’s terminology, more “sophisticated”¹⁵²) forms of legal positivism. If we want to separate determinations of what the law is from its moral merit, Schauer asks, why should we build into our theories the perspectives of citizens who view the law as though it were legitimate?¹⁵³ Legal positivists, qua legal positivists, make a point of not accepting or evaluating the participants’ perspective that the law warrants treatment as normative; but, under the approach of most legal positivists, it is still the case that the perspective of those who see the law as binding has a central role in the construction of the legal theory and “the legal theory point of view.”

It is the core notion of legal positivism, Schauer contends, “to locate the moral work where it belongs, in the substantive morality of official acts, not in the concept of law.”¹⁵⁴ He maintains that there can be moral reasons for preferring a more minimalist theory: that approach is favorable because it creates greater room for a kind of skepticism about the moral value of existing legal systems (as against forms of legal theory that seem to create a bias or inclination towards concluding that existing

148. *See id.* at 170 (arguing that belief-based explanations come closer to the true explanation of the normativity of law than validity-based explanations).

149. *See supra* Part IV.A.

150. *See supra* notes 132-34 and accompanying text; *see also* Shapiro, *supra* note 33.

151. *See* Schauer, *supra* note 70; Frederick Schauer, *Positivism Through Thick and Thin*, in *ANALYZING LAW* 65-78 (Brian Bix ed., 1998).

152. *See* SHINER, *supra* note 81, at 13 (defining “sophisticated positivism”).

153. “As though it were legitimate,” is the correct and careful phrase when referring to Hart’s view of the internal perspective, where it is sufficient that a party accepts the rules as giving reasons, without that conclusion necessarily being based on a belief that the rules in fact create *moral* obligations. *See supra* notes 30-33 and accompanying text (discussing Hart’s approach).

154. Schauer, *supra* note 151, at 65.

legal systems are legitimate).¹⁵⁵ As Schauer writes, “there are good moral reasons not to resolve the question of law’s authoritativeness at the definitional or conceptual level.”¹⁵⁶ Also, “it is morally important to keep open the possibility that law never has authority, and the possibility that law only has authority by virtue of certain contingent features of certain legal systems in certain societies.”¹⁵⁷

Schauer’s argument is that while most legal positivists are careful to distinguish the theorist’s use of a participant’s “internal perspective” from the theorist’s endorsement of that perspective, the use of the perspective still concedes too much to those who might (falsely) argue the moral merits of particular (perhaps quite unjust) regimes.

Recall that Hart’s view of the legal system was that at a minimum there were primary and secondary rules, and that the officials of the system accepted and had an internal perspective on the secondary rules, including particularly the rule of recognition.¹⁵⁸ Schauer asks us to imagine a legal system that falls short of that standard, in that the judges in the system do not accept the rule of recognition. Instead, the judges are influenced entirely by external incentives (for example, the desire to be praised in the newspapers, or by politicians). The judges in this system may follow the law, and use the law as their guide, but only because they believe that this is the way to gain praise and avoid criticism.¹⁵⁹ Schauer argues that this system deserves the label “law,” despite the fact that authority of law is not based on acceptance, even at the level of the legal officials.¹⁶⁰ Schauer asserts that it would be “socially and linguistically dissonant” not to call this a legal system.¹⁶¹ Once this step is made, we

155. *See id.* at 76-77.

156. *Id.* at 77.

157. *Id.* at 78.

158. *See* HART, *supra* note 15, at 111-14.

159. *See* Schauer, *supra* note 151, at 73-74.

160. Schauer argues that it is insufficient simply to move the locus of the internal point of view, the acceptance of law, to the newspaper reporters, the politicians, or the public, who are the source of the praise the judges seek. For the reason the relevant group (be it the public or politicians or whatever) uses the law as the relevant standard could be entirely arbitrary (Schauer offers a hypothetical of the whole legitimacy of a system being traced a holy man hearing a frog say something that sounded like “follow Parliament”). *See id.* at 74-75; *see also* Schauer, *supra* note 70, at 499-501 (describing another scenario where citizens obey the law only out of fear of sanctions, and officials have an internal point of view of the law not because they endorse the laws but because of external benefits and rewards).

161. Schauer, *supra* note 151, at 75. Schauer consistently argues that the basis of evaluating legal theories must be in large part normative rather than descriptive/ontological; that is, legal theories are to be judged by their (moral) consequences, not by their descriptive truth (narrowly understood). *See id.* at 76 (“All of us [Jules Coleman, Frederick Schauer, H.L.A. Hart, and Lon Fuller] believe that the conception of law we should adopt is not one that we simply find, but rather is a conception that is *selected* for instrumental moral reasons” (footnote omitted)); *see also* Frederick Schauer, *Fuller’s Internal Point of View*, 13 *LAW AND PHIL.* 285, 290 (1994) (“Both Fuller and Hart appear equally committed to the belief that giving an account of the nature of law is not so much a matter of discovery as one of normatively-guided construction, with the best account of the nature of law being the one most likely to serve deeper normative goals.” (footnote omitted)); *cf.* Frederick Schauer, *Instrumental Commensurability*, 146 *U. PA. L. REV.* 1215, 1222-33 (1998) (ar-

have a situation where the existence of a rule of recognition (a central inquiry in a Hartian investigation of whether a legal system exists) is separated not only from its desirability, but also from whether officials in fact take an internal perspective on it, and whether those who do accept the rule do so for rational reasons.¹⁶²

As against the earlier discussion of the need to explain the normativity of law, Schauer takes a contrarian stand, offering in passing support for the type of "simple positivism" found in Austin and other early legal positivists¹⁶³:

I . . . maintain that accounting for law's normativity is less central to legal theory than often supposed, that normativity [as defined by various commentators] incorporates . . . a moral component unnecessary to accounting for the operation of law, and that simple positivism thus stands rejected solely for its inability successfully to address a question about the moral status of law that simple positivism properly does not take to be a question about the *concept* of law at all.¹⁶⁴

What is lost if the perspective of those who obey the law because they endorse it is left out? Schauer says that if the emphasis on the true believers is based on an empirical claim that they are more numerous than others, that empirical claim has not been made out (at least not by the main players in this theoretical debate).¹⁶⁵ If the claim is that legal theory should focus on the true believers' perspective, Schauer's question is "why?" This starting point seems connected with a belief or presumption that there is a moral obligation to obey the law, a belief or presumption Schauer thinks legal theory should avoid (or, at least, not build into its basic definitions).¹⁶⁶

Much in Schauer's critique seems to turn on the conceptual space Hart first created between, on one hand, "accepting" the law and having an internal perspective on it, and, on the other hand, endorsing the law as

guing that "commensurability" and "incommensurability" are often used in a purposive and instrumental way, rather than in a descriptive way).

162. See Schauer, *supra* note 151, at 73-75.

163. Schauer emphasizes that he does not endorse Austin's particular command theory of law; Austin is only being used (in Schauer's work, and in this article) as emblematic of a theory that does not build around an internal point of view. See Schauer, *supra* note 70, at 505 n.14 (rejecting Austin's command theory).

164. *Id.* at 498 (emphasis added).

165. *Id.* at 501-02, 505.

166. See *id.* at 502-03, 505. Focusing legal theory on the perspective of those who morally approve of the law may only encourage the tendency to equate what is with what is right, an accusation to which legal positivists have often been subject, rightly or wrongly. See, e.g., FULLER, *supra* note 57, at 658 (addressing "the question whether legal positivism, as practiced and preached in German, had, or could have had, any causal connection with Hitler's ascent to power"); Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 LAW AND PHIL. 313 (1994) (summarizing the debates regarding legal positivism and the rise of the Nazis).

Schauer adds that it makes for clearer debate if both those arguing for a general, *prima facie* obligation to obey the law and those arguing against it can equally point to "law" as the initially morally neutral subject about which they are disputing. See Schauer, *supra* note 70, at 505 n.13.

creating valid moral obligations. Schauer in fact at one point adopts Hart's weaker view of the "normativity of law" as a version of the normativity of law that Schauer believes can be part of a proper legal theory: that citizens regard the legal rules as "content-independent reasons for action, independent of why an agent would do so."¹⁶⁷

Schauer's perspective is not the radical view it might at first appear to be. It is important to understand what his view is not. It is certainly not a rejection of Hart's basic hermeneutic point that the participants' perspective must be taken into account, at least sufficiently into account to distinguish habits from rules, and being obliged from acting under an obligation. Additionally, it seems at least consistent with Hart's somewhat ambiguous discussion of the internal perspective in *The Concept of Law*, where officials' and citizens' "acceptance" of the law might or might not entail moral endorsement.¹⁶⁸ This is not to say that Schauer's argument is aimed only at straw men. Regardless of the narrow exegetical question regarding Hart's intentions for the concept, many, and perhaps most, commentators describing or using Hart's notion of an internal perspective have viewed it as the perspective of officials or citizens who believe the law creates valid moral obligations.¹⁶⁹ As to whether anything is lost when the moral content is taken out of the internal point of view,¹⁷⁰ the answer will likely depend on one's view regarding whether legal theory in general, or legal positivism in particular, should be in the business of "explaining normativity."

VII. CONCLUSION

In this Article, I have tried to give an overview of the origins and purposes of Hart's "internal point of view," and its treatment by later commentators. Given the central place of Hart within modern English-language legal theory, and the central place of the "internal point of view" within Hart's theory, it is not surprising that this discussion offers, in effect, a brief tour of many of the important themes and directions of modern analytical jurisprudence. Of special emphasis have been the need to choose between an empirical/scientific and a hermeneutic ap-

167. Schauer, *supra* note 70, at 506.

168. Schauer, like Perry, wants to make conceptual room in the legal theory for the participant who follows the rules for prudential reasons. *See id.* at 506-07; Perry, *supra* note 28, at 110-21. The proper response may be that of Scott Shapiro: there is already room in Hart's theory, at least in one tenable reading of it. *See* Shapiro, *supra* note 33.

169. *See, e.g.,* SHINER, *supra* note 81, at 26 (defining the internal perspective as follows: "There are certain characteristic attitudes and commitments on the part of those for whom the law is an enterprise in which they have faith and to which they are dedicated, those for whom law is imbued with a moral character."); Hart, *supra* note 32, at 243 (noting that "many . . . critics" had argued that an internal perspective must entail a belief in the law's creating moral reasons for action).

170. *See* Schauer, *supra* note 70, at 507 ("Thus normativity, like authority and like the internal point of view, can be given a definition that does not incorporate the moral reasons for its own existence.").

proach to law (and other social practices), and the extent to which purely descriptive theory is possible in law (and in other social sciences).

There are other issues of importance hiding just beneath the surface of these discussions, which could only be hinted at in this Article. First is the nature of law—its ontology, if you will. Is law a natural kind or functional kind of which one can sensibly speak of its having a set nature or essence? Second is the uniqueness of law, in comparison with other social practices (and legal theory in comparison with other social theories). There are times when legal theorists act as though law requires a special approach, but this seems at best unlikely and unproven. To the extent that certain approaches are or are not possible for theories of law, they are likely also similarly possible or impossible for other social theories (or at least for other theories involving social practices with normative components). It would seem unlikely that law would require a methodology or approach distinctly different from other normative social practices. The point is that the internal point of view is of value or is not to the extent that it is of value generally for social theory. Legal theorists would do well to pay attention to what is going on elsewhere in social theorists—and other social theorists, likewise, would do well to see what is being proposed and debated in the jurisprudential literature.

