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HART'S METHODOLOGICAL POSITIVISM

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To understand H.L.A. Hart's general theory of law, it is helpful to distinguish between *substantive* and *methodological* legal positivism. Substantive legal positivism is the view that there is no necessary connection between morality and the content of law. Methodological legal positivism is the view that legal theory can and should offer a normatively neutral description of a particular social phenomenon, namely law. Methodological positivism holds, we might say, not that there is no necessary connection between morality and law, but rather that there is no connection, necessary or otherwise, between morality and legal theory. The respective claims of substantive and methodological positivism are, at least on the surface, logically independent. Hobbes and Bentham employed normative methodologies to defend versions of substantive positivism,¹ and in modern times Michael Moore has developed what can be regarded as a variant of methodological positivism to defend a theory of natural law.²

In the first edition of *The Concept of Law*³ Hart offered an extended defense of what has become an extremely influential version of substantive legal positivism. The core of the substantive theory is the fairly straightforward idea that law consists of a union of two types of rules: (i) secondary (meaning second-order) rules, which are rules that have been accepted as binding by judges and other officials, and (ii) primary rules, which are rules that have been identified as valid by a particular secondary rule called the rule of recognition.⁴ At a methodological level, however, Hart's views are somewhat less easy to discern. In the Postscript to the second edition,

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1. On Bentham, see particularly Gerald Postema, BENTHAM AND THE COMMON LAW TRADITION 328–36 (1986).

2. Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY 188 (Robert P. George ed., 1992). But see *infra*, note 32.

3. H.L.A. Hart, THE CONCEPT OF LAW (1961). In this essay, all citations to this work are to the second edition, and are given by parenthetical page references in the text. H.L.A. Hart, THE CONCEPT OF LAW (P. Bulloch & J. Raz eds., 2d ed., 1994).

4. As other commentators have observed, Hart draws the distinction between primary and secondary rules in at least two different ways. See P.M.S. Hacker, *Hart's Philosophy of Law*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 1, 19–21 (P.M.S. Hacker & J. Raz eds., 1977). At one point Hart draws the distinction in terms of the rules' supposed normative function: primary rules are said to impose duties, whereas secondary rules are said to confer

responding in large part to the challenge of Ronald Dworkin's interpretivist approach to legal theory, Hart has made some of his methodological presuppositions more explicit.

In a section of the Postscript entitled "The Nature of Legal Theory," Hart describes the type of theory that he had intended to provide in writing *The Concept of Law*. The theory is supposed to be both general and descriptive. "It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect" (239). The theory is *descriptive* "in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law" (240). Hart notes that legal theory thus conceived "is a radically different enterprise" from Dworkin's conception, which is said to be in part evaluative and justificatory—that is, it is not purely descriptive—and also to be addressed to a particular legal culture—that is, it is not general. Hart goes on to observe that "[i]t is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conceptions of legal theory" (241).

Hart's claim in the Postscript that he had intended to provide in *The Concept of Law* a theory that is both general and descriptive is very good evidence that he meant to adopt a framework of methodological positivism. I shall argue that in developing his substantive theory Hart in fact combines elements of two distinct methodological approaches, which we can call the descriptive-explanatory method and the method of conceptual analysis. Of these, only the first can appropriately be said to involve a form of methodological positivism. The second, when understood and analyzed in its own terms, turns out in all significant respects to be Dworkin's interpretivism under a different name. The two different strains in Hart's methodological

powers (81). At another point he writes that secondary rules "may all be said to be on a different level from the primary rules, for they are all *about* such rules" (94). This second distinction is a logical one: secondary rules are in effect characterized as second-order rules that in some way operate on, or permit operations with, primary rules; primary rules are then simply the rules at the first level in a logical hierarchy. It seems clear that the second of these distinctions, based on logical type, is the more appropriate way to understand the difference between primary and secondary rules. (Even so, it is necessary to regard the notion of one rule being "about" another in a fairly loose sense.) The most important secondary rule, the rule of recognition, is duty-imposing rather than power-conferring, and the primary rules it identifies as valid could be either power-conferring or duty-imposing. A second ambiguity still remains, however. Hart sometimes uses the term "primary rule" to refer to a rule that is, according to some rule of recognition, *valid*. A primary rule in this sense could, presumably, be either duty-imposing or power-conferring. But sometimes Hart uses the term "primary rule" to refer to a duty-imposing *social* rule—meaning a customary rule—that either stands alone or forms part of a "regime" of primary rules (92). "Regime" here simply means a non-systematic set of duty-imposing social rules that exist together in a community that does not have any secondary rules. In this essay I will follow Hart in using the term "primary rule" in both these senses; the context should always make clear which is intended.

thought produce tensions in his substantive theory, and to resolve these it is necessary to opt for one or the other of the two methodologies. The descriptive-explanatory approach is appropriate if one intends to do science, but for jurisprudence, which is a branch of philosophy, the most appropriate procedure is conceptual analysis. When jurisprudence is understood in this way, and gives up trying to borrow inappropriate elements from the descriptive-explanatory approach, it can be seen that particular theories of law must be offered from the internal point of view and must be defended, in part, by resort to moral argument. The result is the complete abandonment of methodological positivism.

I. THE GENERALITY OF LEGAL THEORY

Hart maintains that his theory is general in the following sense. It is supposed to describe an institution that, "in spite of many variations in different cultures and in different times, has taken the same general form and structure" (240). This immediately raises the question of how we know or could come to know that these manifold social practices are in fact manifestations of *the same* institution, namely law.⁵ A related question—perhaps at bottom it is the same question—concerns the status of propositions asserting that law *necessarily* does (or does not) possess such-and-such an attribute. Consider, for example, the soft positivist claim—one element of Hart's substantive positivist theory—that the criteria for identifying the content of law can in some legal systems be partly moral in nature, but are not necessarily so in all legal systems. What kind of necessity is at issue here, and to what domain of actual or possible practices does it apply?

There seem to be two main possibilities concerning how we could come to know which (actual or possible) social practices are instances of law. The first supposes that what does and does not count as law is determined by applying the scientific method to come up with a so-called descriptive-explanatory theory.⁶ The idea would be to study those social practices that we call law, but from an external perspective. Taking a certain kind of familiar social practice—for example, those practices Hart refers to as "modern municipal legal systems"—as a tentative starting point, a theory of this kind would develop its own internal descriptive categories. These categories would not necessarily correspond to what "we"—participants, in some appropriately loose sense, in modern municipal legal systems—have in mind,

5. Cf. John Finnis, *NATURAL LAW AND NATURAL RIGHTS* 1–6 (1980). My thinking about methodology in legal theory has greatly benefitted from Finnis's general discussion of this topic, and in particular from his illuminating critique of Hart. *See id.* at 1–22.

6. *See, e.g.*, W.J. Waluchow, *INCLUSIVE LEGAL POSITIVISM* 19–29 (1994). Waluchow clearly believes that Hart is a proponent of the descriptive-explanatory method. *Id.* at 14–15. In Stephen R. Perry, *The Varieties of Legal Positivism*, 9 *CAN. J. L. & JURIS.* 361 (1996), I criticize Waluchow's application of the descriptive-explanatory approach to jurisprudence in general. In Section II of the present essay I argue that Hart cannot be understood as employing that approach, at least in anything like a pure form.

either explicitly or implicitly, in speaking of "law." To the extent that a descriptive-explanatory theory used the term "law," it would have to be regarded as a term of art. Its meaning and extension would be determined by the relative explanatory power of accepting one way of categorizing and describing social practices over another, where "explanatory power" would in turn depend on such standard metatheoretical criteria as the following: predictive power, coherence, range of phenomena explained, degree of explanatory unity, and the theory's simplicity or elegance. It thus might turn out that the initial examples of law on which we tend to focus at a pretheoretical stage—modern municipal legal systems, let's say—are, from the perspective of the best descriptive-explanatory theory, just a minor variant within a wider class of social practices. The theory might, for example, regard the difference between modern municipal legal systems and instances of so-called primitive law as theoretically insignificant because a taxonomy of the social world that ignored that distinction turned out to have greater explanatory power.

The second possibility concerning how we could come to know which actual or possible social practices constitute "law" would require us to analyze our own concept of law. We would inquire into the manner in which we conceptualize our own social practices so as, presumably, to clarify the concept and to come to a better understanding of the practices themselves. The notion of "necessity" involved in such statements as "Law necessarily does (or does not) possess such and such a characteristic" would then be conceptual rather than scientific necessity.

There are a number of indications, in both the original text of *The Concept of Law* and in the Postscript, that might be taken to suggest that Hart intended to adopt something like a descriptive-explanatory methodology. He says in the Preface, for example, that the book can be regarded as "an exercise in descriptive sociology." In the Postscript he speaks of a "descriptive jurisprudence" in which an "external observer" takes account of or describes the internal viewpoint of a participant without adopting or sharing that viewpoint (242–43). At many other points, however, Hart states, as the title of his book in fact suggests, that his primary methodology is conceptual analysis. In the Preface he writes that "[t]he lawyer will regard the book as an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought." (He then goes on to say that the book may *also* be regarded as an essay in descriptive sociology.) The main features of Hart's substantive theory of law are said to be "the central elements in the concept of law and of prime importance in its elucidation" (17). And in the Postscript he formulates the main thesis of substantive legal positivism in terms of conceptual rather than scientific or empirical necessity: "[T]hough there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality" (268).

I will argue in subsequent sections that while it is possible to discern

elements of the descriptive-explanatory method in Hart's approach to doing legal theory, there are good reasons for believing that he does not in fact employ that method, or at least that he does not employ it in anything like a pure form. The most important such reason is that Hart adopts the particular characterization of law that he does, expressed in terms of a union of two types of rules, on the basis of evaluative judgments that have nothing to do with the metatheoretical criteria for assessing theories that were discussed above. I will also argue that there are good reasons for believing that the most fundamental aspect of Hart's primary methodology is conceptual analysis. The type of conceptual analysis he advocates is meant to be based on an external rather than an internal perspective, and in that respect resembles the descriptive-explanatory method. For present purposes, however, the details of Hart's particular conception of conceptual analysis are not of paramount importance. Our concern is with Hart's claim that his theory of law is "general." It is clear enough what "generality" would mean in a pure descriptive-explanatory theory: the theory would apply to whatever range of social practices that its own categories of description, derived on the basis of their explanatory power, picked out. But what does it mean to say that legal theory is general when your methodology is some form of conceptual analysis?

It is worth emphasizing that Hart's starting-point in elucidating the concept of law is not an assumed pretheoretical knowledge of criteria that are capable of picking out, from among the social practices that have existed somewhere, sometime, in the history of the world, those that constitute "law." As he says in the Postscript, "[t]he starting-point for this clarificatory task is the widespread common knowledge of a modern municipal legal system which on page 3 of this book I attribute to any educated man" (240). At the specified point in the text Hart lists as follows the "salient features" of a legal system that an educated person might be expected to be able to identify:

They comprise (i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones. (3)

Hart is clearly not saying that a social arrangement that failed to possess all these features could not be a legal system. In fact, according to his substantive positivist theory, which defines law in terms of a union of two types of rules, only features (i) and (iv) appear to be necessary for the existence of law. Rather, Hart's rationale for beginning with the salient features of a modern municipal legal system would seem to be this. He is

pointing to these features as (possibly conceptually contingent) attributes of a certain type of social institution that is, *for us*, a clear central case of *our* concept of law. He will then focus on that type of institution as he undertakes the task of clarifying that concept. Once this task has been accomplished and we have a more satisfactory grasp of our own concept, we will be in a better position to say whether or not various other types of social practice—for example, so-called primitive legal systems, international law, historical practices of one kind or another, contemporary foreign practices quite different from our own, etc.—are instances of law, that is, instances of law according to our own lights. As Joseph Raz puts the point, “[t]here is nothing wrong in interpreting the institutions of other societies in terms of our typologies. This is an inevitable part of any intelligent attempt to understand other cultures.”⁷

What the process of conceptual analysis involves will be examined in greater detail in subsequent sections. For the moment, I wish only to emphasize the following point. Although the clarified concept of law that is supposed to emerge from Hart’s process of theorizing will in one sense be general—once we have the concept, we can use it to elucidate radically different foreign or historical practices and classify them as being, from our perspective, law, non-law, or perhaps something in-between—there is nonetheless a clear sense in which the genesis of the enterprise is “local.” Hart begins with the knowledge that he takes to be common to educated persons in modern societies of an institution that holds a central place within those societies. A modern municipal legal system, as described by Hart, is a relatively specific type of institution that is located within the framework of a fairly recent historical innovation, namely the state. Hart does not claim that all instances of what we would and should call law are in all respects like modern municipal legal systems, but even so his project of conceptual clarification takes this local manifestation of the concept as its starting-point.

One might quarrel with the characterization of “modern municipal legal systems” in general as “local,” but Hart clearly begins with the institutions most familiar to his readers—in chapter 1 of *The Concept of Law* he discusses the knowledge that English people will have of the English legal system—and then assumes that in other countries “there are legal systems which are broadly similar in structure in spite of important differences” (3). At a certain point, as we encounter foreign institutions that are more and more different from our own, this assumption might come to beg the question. But the concern here is with a question of judgment that arises in the process of investigation rather than with a denial of the idea that legal theory must begin locally: how much do the practices of foreign societies or cultures have to differ from our own before we ought to regard them as something other than mere variants on our own practices?

7. Joseph Raz, *THE AUTHORITY OF LAW* 50 (1979).

Once we see that the starting-point of Hart's legal theory is local in the way just described, the distance between his jurisprudential methodology and Ronald Dworkin's begins to lose the appearance of an unbridgeable gulf. Dworkin's theoretical point of departure is the "collective" identification of "the practices that count as legal practices in our own culture": "We have legislatures and courts and administrative agencies and bodies, and the decisions these institutions make are reported in a canonical way."⁸ This collective and rather rough-and-ready singling out of familiar institutions as the initial focus of jurisprudential inquiry is very much reminiscent of Hart's reliance on the knowledge that he says any educated person will possess of his own legal system and of others that are plainly similar to his own. The following description that Dworkin gives of this process of identification also seems to be very much in the spirit of Hart's enterprise, at least if we replace the phrase "the interpretive problem" by "the task of conceptual clarification":

It would be a mistake . . . to think that we identify these institutions through some shared and intellectually satisfying definition of what a legal system necessarily is and what institutions necessarily make it up. Our culture presents us with legal institutions and with the idea that they form a system. The question which features they have, in virtue of which they combine as a distinctly legal system, is part of the interpretive problem.⁹

In Sections VI and VII I shall argue that, if we press hard enough on the notion of conceptual analysis, the result is not far removed from what Dworkin means by interpretation. For the moment, however, my concern is with the related issues of where legal theory starts and how general it is. Dworkin's starting-point is a set of institutions that he says is presented to us as a system by our culture; at other points in *Law's Empire* he speaks of interpreting our *legal* culture. While Dworkin clearly does not associate "our" legal culture with the legal system of any single country, Hart is probably right when he asserts in the Postscript that the initial scope of Dworkin's theorizing is limited to something like Anglo-American law (240). Even so, as I hope the preceding discussion makes clear, all that really seems to be at stake here is a difference of opinion about the following question: To what extent should we assume, on the basis of superficial resemblance alone and in advance of actually formulating a theory of law, that foreign institutions really are similar, in every respect that might turn out to be theoretically relevant, to those institutions that in our own societies we call "law"?

Dworkin is more cautious than Hart in the implicit answer that he gives to this question, but that by itself is hardly indicative of a deep methodological divide between the two. Both theorists begin locally; they just have different views on what should count as local. Where Dworkin begins with

8. Ronald Dworkin, *LAW'S EMPIRE* 91 (1986).

9. *Id.*

common law systems, Hart's point of departure is the broader notion of a modern municipal legal system. Perhaps Hart can be understood as bracketing the common law with the civil law and then treating this single category of system as his starting-point, since most clear instances of a modern municipal legal system either derive directly from, or were significantly influenced by, one or the other of these two traditions. But the common law and civil law have the same historical roots: they are two strands within a larger historical tradition. Whether one begins one's theorizing with the common law or with the broader tradition of which it is a part might conceivably have an influence on the content of one's substantive theory, but regarded strictly from the point of view of methodology this does not seem to be a matter of great significance. The underlying issue is, in Dworkin's words, "[w]hich [historical] changes are great enough to cut the thread of continuity"?¹⁰ This question is undoubtedly an important one, but it arises *within* a methodological approach in which the need to begin locally is already a given.

Both Hart and Dworkin go on to suggest that we can make use of the theories of law that each will develop from his respective starting-point to make sense of social practices that truly are different from our own. Naturally, a difference of opinion about the scope of the starting-point also represents a difference of opinion about which foreign practices should be treated as truly different from our own. Dworkin initially excludes Nazi Germany from the scope of his theorizing, for example, but holds that we can use the theory of law he ultimately develops to see that there is a sense in which the Nazis had law as well as a sense in which they did not. Hart, on the other hand, assumes from the outset, apparently as a pretheoretical matter, that the Nazis really did, by our lights, have law. For the reasons already given, however, that difference should not, without more, be taken as an indication that Hart's theoretical project is radically different from Dworkin's. Of course I have not shown that their projects are not in the end radically different because I have only addressed the issues of starting-point and generality. I have said nothing about Hart's claim that his theory of law, unlike Dworkin's, is "descriptive," and it is to that issue that we must now turn.

II. THE DESCRIPTIVENESS OF LEGAL THEORY

Hart says in the Postscript that his theory of law is meant to be descriptive in the following sense: "[The theory] is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law" (240). To assess this set of claims it will be helpful to look at the substantive content of Hart's theory in somewhat greater detail than we have so far done. The two

10. *Id.* at 69–70.

minimum conditions that Hart specifies as necessary and sufficient for the existence of a legal system are (i) the acceptance of certain types of secondary social rules by officials, the most important of which is a rule of recognition laying down criteria of validity for so-called primary rules, and (ii) general compliance on the part of the population at large with the primary rules these criteria identify as valid (116–17). Of these two conditions, it is the first that lies at the core of Hart's theoretical account of law. Law, he says, "may most illuminatingly be characterized" as the union of primary and secondary rules (94), a union that, borrowing a phrase from Austin, he further describes as "the key to the science of jurisprudence" (81). Occasionally Hart puts his point in terms of the rule of recognition in particular, rather than in terms of secondary rules generally: "[It is] the . . . complex social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation . . . which deserves, if anything does, to be called the foundations of a legal system" (100).

The rule of recognition is said by Hart to be a social (or customary) rule. Such rules are constituted both by a regular pattern of conduct and by "a distinctive normative attitude" that Hart refers to variously as the phenomenon of "acceptance" (255) and as the rule's "internal aspect" (56). The internal aspect concerns the fact that "if a social rule is to exist, some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole" (56). The point of view of such persons is referred to by Hart as the "internal" point of view; it is the point of view of one who accepts the rule as a guide to conduct and as a standard of criticism both for himself and for others in the group (89). It is important to note that those who take up the internal point of view adopt an attitude of *shared* acceptance (102), and they look upon the rules as standards that are "essentially common or public" (116). Their acceptance takes the form of "a reflective critical attitude" to the relevant pattern of conduct, and is given characteristic expression through the use of normative terminology such as "ought," "must," and "should" (56–57). In the case of certain social rules, including in particular the rule of recognition, the terminology of "obligation" takes hold: "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great" (86).

The notion of a rule of recognition is the cornerstone of Hart's theory of law. In a given legal system this rule exists simply because it is accepted by officials (in the sense of "acceptance" that emerges from Hart's characterization of social rules in general), so that its existence is said to be "a matter of fact" (110). The theory thus characterizes law in purely factual, non-normative terms. Clearly this aspect of the theory is part of what Hart has in mind when he writes in the Postscript that he had intended to provide a theory of law that is descriptive. Hart also seems to be suggesting, however, that it is not just his particular theory that possesses this attribute, but the general enterprise in which he is engaged. Legal theory, or at least

the type of legal theory that Hart has opted to pursue, is itself descriptive in character. In other words, Hart appears to be claiming to be a methodological as well as a substantive legal positivist.

The most straightforward understanding of methodological positivism would look to what I earlier called the descriptive-explanatory method. Legal theory is, on this view, a form of scientific enterprise the point of which is to advance, from an external viewpoint, descriptive, morally neutral theories of the social world. A particular theory adopts the characterization of empirical phenomena that it does because the theory's proponents believe that characterization has explanatory power. As was noted in the preceding section, explanatory power is most plausibly understood as referring to metatheoretical criteria for assessing scientific theories: predictive power, theoretical simplicity, and so on. On the descriptive-explanatory interpretation of Hart's methodology, the reason for equating "law" (understood now as a term of art internal to the theory) with social systems based on a rule of recognition would be that one has grounds for believing that such a characterization has explanatory power in the sense just described.

There is something to be said for the descriptive-explanatory interpretation of Hart's methodology. For one thing, it is consistent with Hart's avowedly external theoretical perspective; as he says repeatedly, his theory is intended to take account of the internal point of view, but not to be offered from that point of view. For another, this interpretation offers a sensible understanding of the *sort* of claim Hart seems to be making when he places the notion of a rule of recognition at the center of his theory of law. Hart's assertion that all instances of the type of institution that he initially sets out to study—viz, modern municipal legal systems—contain a rule of recognition is, on the face of it, an empirical rather than a conceptual claim. Empirical claims are exactly what one would expect to find in a descriptive-explanatory theory. Moreover, Hart appears to treat this particular empirical claim as *novel*. Seen in that light, the claim does not seem to be plausibly regarded as an analysis of the concept of law (i.e., it does not seem to be plausibly regarded as figuring in our shared conceptualization of the practices that *we* call law). On a descriptive-explanatory approach, however, there is no necessary reason why the theory's categories should track the concepts of the participants in the social practices under study.

There are, however, serious problems with the descriptive-explanatory reading of Hart's methodology. As we have seen, the substantive theory he advances characterizes the phenomenon of "law" in terms of the notion of a rule of recognition. On a descriptive-explanatory approach the reason for adopting such a characterization would be its explanatory power in a scientific sense. But Hart does not give us any reason to believe that his theory of law is superior, in terms of explanatory power thus understood, to what he calls radically external theories. He does not argue that theories of the latter kind, which look at social phenomena in purely behavioristic terms and treat the internal point of view as epiphenomenal at best, must necessarily be

deficient in predictive power, for example. Nor does he make such an argument about the possible class of theories that take Hart's own notion of acceptance as their basic explanatory category and treat the distinction between primary and secondary rules as theoretically unimportant. Hart does invoke the notion of explanatory power, but not in the ordinary scientific sense. He is interested, rather, in the power of a theory to elucidate concepts: "We accord this union of elements [i.e., primary and secondary rules] a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought" (81). Because the social practices under study are our own, the apparent claim is that Hart's theory will clarify our understanding of our own conceptual framework.

Hart offers, in effect, two answers to the question of why secondary rules generally, and the rule of recognition in particular, are of key importance in legal theory. The first is an elaboration of the idea just discussed—namely that at least one goal of legal theory is conceptual clarification. Hart argues that both the idea of a social rule and the associated notion of the internal point of view are required to analyze the basic concepts of obligation and duty. But there is, he says, a range of other legal concepts, such as authority, state, official, legislation, jurisdiction, validity, and legal power, that must be analyzed by reference to the internal point of view of a particular type of social rule, namely secondary rules that have been accepted by a certain subgroup within society ("officials") (98–99). Hart's critique of Austin's theory of law as orders backed by threats is, in essence, that it does not have the internal resources to elucidate these concepts. However, the concepts of authority, state, legislation, etc., are *our* concepts, where "we" must be understood as referring to participants in—or at least the subjects of—modern municipal legal systems. These are, in other words, the notions that we use to conceptualize certain of our own practices. This lends support to the suggestion that, when he speaks of conceptual analysis, Hart has in mind the clarification of the conceptual framework that we apply to certain aspects of our own social behavior. This is not, however, a standard goal of descriptive-explanatory theory. A radically external theory that transcended or ignored the participants' conceptualization of their own practice might well have greater explanatory power in the usual scientific sense. Degree of conceptual clarification appears, in fact, to be the sole basis by which Hart would judge the success of particular theories of law. Conceptual analysis is apparently an end in itself, and not just an extra criterion of adequacy that has been conjoined with explanatory power as ordinarily understood.

The second answer that Hart gives to the question of why the rule of recognition should have a key role to play in legal theory concerns certain defects that he says are associated with a simple regime of primary rules. Such a regime is said to be, as compared to a system containing secondary rules, uncertain, static, and inefficient (91–94). This list of defects is best understood as a reference back to an earlier statement by Hart that "[t]he principal functions of the law as a means of social control are . . . to be seen in the

diverse ways in which the law is used to control, to guide, and to plan life out of court" (40). As Hart puts the point in the Postscript, the "primary function of the law [is] guiding the conduct of its subjects" (249). While a regime of primary rules guides conduct, it does not do so *well*. A system containing secondary rules (of recognition, change, and adjudication) is better at this task because it is more certain, the content of the rules can be deliberately changed, and the rules can be more efficiently enforced (94–99). Thus, secondary rules, according to Hart, remedy the defects of a simple regime of primary rules.

This second argument for the centrality in legal theory of secondary rules is not coterminous in scope with the first argument. The first argument is that the notion of a secondary rule is necessary for the analysis of certain specific legal concepts, such as authority, legislation, and legal power. The second argument is that the notion of a secondary rule is necessary for the proper analysis of the more general concept of *law*. Thus, even if the first argument is correct in its claim about the concepts of authority, legislation, and so forth, it leaves open the possibility that the overarching category of "law" should abstract from the distinction between primary and secondary rules. As was suggested earlier, it is at least conceivable that the primary theoretical indicator of "law" might be the general phenomenon that Hart describes as the acceptance of social rules. The significant feature of those systems of rules that counted as law might then be, not whether they contained secondary rules, but rather whether they were backed by serious rather than trivial social pressure. On an understanding of law along those lines, social systems based on the union of primary and secondary rules would count as law, but so would certain systems consisting of primary rules alone.¹¹ Hart's second argument is intended to show that systems of the former type are in fact the paradigm of law, and not just a special case.

The statement that a regime of primary rules has defects, like the statement that these defects are remedied by the introduction of a rule of recognition and other secondary rules, is an evaluative claim. The values in question relate, as I have said, to the guidance of conduct, which means that they have a normative dimension. The descriptive-explanatory method assesses theories by means of criteria that are properly called evaluative, such as predictive power and simplicity, but the values in question are applicable to all scientific theories, and they are not normative in character. Moreover, Hart is making evaluative claims not about theories but about the very social practices he is studying. It does not, however, seem consonant with the descriptive-explanatory method (i.e., with the scientific method)

11. In speaking of regimes of primary social rules that are backed by physical sanctions administered by the community at large rather than by officials, Hart says that "we shall be inclined to classify [such] rules as a primitive or rudimentary form of law" (86). The characterization of such a regime as "primitive" is pretheoretical and potentially question-begging. By itself, it cannot bear the weight of a fundamental theoretical demarcation between the simpler social arrangement and systems based on a union of primary and secondary rules. It is for that reason that Hart requires the argument that a regime of primary rules is in certain respects defective.

that the descriptive categories adopted by a particular theory should be based on evaluative judgments of this kind. Hart's theoretical enterprise thus cannot plausibly be regarded as grounded in that method, or at any rate in a pure version of it.

The nature of the two arguments that Hart advances for the centrality in legal theory of the notion of a secondary rule—that this notion is required for the analysis of specific legal concepts such as authority and legislation, and that it is required for the analysis of the general concept of law—enable us to reach the following two conclusions about his methodology in legal theory. First, he has not adopted anything like a pure descriptive-explanatory approach; he is not doing science in the usual sense. Second, his main methodological technique is conceptual analysis, by which he means the clarification or elucidation of our manner of conceptualizing our own social practices. We must, of course, inquire more closely into what this technique involves, and one way to do this is to return to Hart's claim in the Postscript that his intent was to provide a theory of law that is "descriptive." What does this term mean when it is applied to conceptual analysis?

One thing the term "descriptive" might mean in the context of conceptual analysis is that the concept of law—either the concept that emerges from Hart's theorizing or, to the extent that this turns out to be different, our general, shared concept—has a certain type of content: it picks out social practices as "law" on the basis of purely factual, non-normative criteria. As was noted earlier, this is clearly a claim that Hart does wish to make, at least so far as his own theory is concerned. The particular conceptualization of law that he defends characterizes law in terms of two types of rules, which are in turn characterized by reference to various kinds of social fact.¹² Understood in that way, however, the claim that legal theory is descriptive is not methodological in nature. It is simply a claim about the content of the concept of law. It is a claim, in effect, that that concept is not thick; it picks out social practices on the basis of purely factual criteria, rather than, say, mixed moral and factual criteria. It is, in effect, just a way of stating the main thesis of substantive legal positivism.

But when Hart writes in the Postscript that his aim was to provide a "descriptive" theory of law, he seems to be making a claim about methodology and not just about the content of his own theory; he is, in effect, holding himself out to be both a methodological and a substantive legal

12. The point here is that Hart claims that law as a general type of institution is identifiable solely by reference to various kinds of social fact; thus, the general concept of law is non-thick. But, as Hart makes clear in the Postscript, he does not think that each valid law within a legal system must be identifiable solely in social terms; the rule of recognition can adopt moral as well as social criteria of validity. This soft or incorporationist version of positivism is to be contrasted with the sources thesis defended by Raz, which holds that all laws must be identifiable as such solely by reference to social facts and without resort to moral argument. It will not be necessary, for purposes of this essay, to decide between these two versions of positivism. For the best recent discussion of incorporationism, see Jules L. Coleman, *Reason and Authority*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 287 (R. George ed., 1995). On the sources thesis, see Joseph Raz, *Authority, Law and Morality*, 68 *THE MONIST* 295 (1985).

positivist. The methodological claim is not, presumably, that the concept of law is *necessarily* non-thick—that we could not have a concept of law that included normative or moral considerations among its identifying criteria—because there is no good reason to think that such a claim is true. The more plausible way to understand the methodological claim is that Hart is simply setting out to *describe* the conceptual scheme that we apply to certain of our own social practices (those that can be identified on a pretheoretical basis as “modern municipal legal systems”). Such a project can presumably be carried out in a morally neutral manner whether the relevant concepts turn out to be thick or non-thick. On this view, Hart is simply describing the content of the relevant concepts and the relationships between them, whatever that content and those relationships turn out to be. This interpretation of Hart’s methodological positivism is also consistent with the external perspective from which the theory is clearly meant to be offered. The idea is to describe and elucidate our conceptual scheme from the outside, as it were. In that way the theorist can remain neutral with respect to such questions as whether the social practice in question is justified, valuable, in need of reform, and so forth. He or she can simply describe what is there.

I believe that the interpretation of Hart’s methodology that was sketched in the preceding paragraph captures fairly accurately Hart’s own understanding of what is involved in doing legal theory. He intends to engage in conceptual analysis, but from the outside rather than the inside. It is important to emphasize that this is not just an application of the descriptive-explanatory method of ordinary science. The starting-point of inquiry is the participants’ own conceptualization of their practice, and from the perspective of the descriptive-explanatory approach that is an arbitrary limitation. Beyond that, Hart seems not to be particularly interested in the predictive power of his theory, or in other aspects of explanatory power in the usual scientific sense. Most importantly, his characterization of the general concept of law relies on evaluative judgments that simply have no place in the descriptive-explanatory methodology. Hart is engaged in a particular type of conceptual analysis that can appropriately be described as descriptive, but which is nonetheless distinct from the standard methodology of science. At this point it becomes necessary to inquire more closely into the nature of external conceptual analysis, as we might call this approach. That is the task we undertake in the following four sections.

III. DESCRIPTION VERSUS ELUCIDATION: THE PROBLEM OF NORMATIVITY

In work published subsequent to *The Concept of Law*, Hart has written as follows: “For the understanding of [not only law but any other form of normative social structure] the methodology of the empirical sciences is useless; what is needed is a ‘hermeneutic’ method which involves portraying rule-governed behavior as it appears to its participants, who see it as con-

forming or failing to conform to certain shared standards."¹³ Hart's rejection of the "methodology of the empirical sciences" might be read narrowly, as a rejection of behaviorist or radically empiricist methods of inquiry that forbid the theorist from taking account of mental states and attitudes.

In light of the discussion in the preceding section, however, I believe the better view is that Hart is simply not employing the scientific method at all, at least in anything like the usual sense. He has not set out to offer a descriptive-explanatory theory, the adequacy of which is to be judged by standard metatheoretical criteria such as predictive power. Instead, he has deliberately invoked the notion of *verstehen* from the hermeneutic tradition in the philosophy of social science, which suggests that his theoretical goal is to understand how the participants in a social practice regard their own behavior. But Hart does not want to go as far as those hermeneutists who, like Peter Winch, think that the theorist has no choice but to "join the practice" and theorize about it from the participants' point of view.¹⁴ Hart's project involves "clarifying" or "elucidating" the participants' conceptual framework, but from an external perspective. This can, perhaps, be viewed as a hybrid methodology. As in the hermeneutic tradition Hart aims to understand how the participants regard their own behavior, but he hopes to achieve this understanding by taking up an external, observational stance reminiscent of that adopted by pure descriptive-explanatory theories.

That this is the best interpretation of Hart's claim to be doing descriptive legal theory, and hence the best way to make sense of his methodological positivism, is suggested by the following passage from the Postscript. The passage is long, but worth quoting in full:

[Dworkin's] central objection [to descriptive legal theory] seems to be that legal theory must take account of an internal perspective on the law which is the viewpoint of an insider or participant in a legal system, and no adequate account of this internal perspective can be provided by a descriptive theory whose viewpoint is not that of a participant but that of an external observer. But there is in fact nothing in the project of a descriptive jurisprudence as exemplified in my book to preclude a non-participant external observer from describing the ways in which participants view the law from such an internal point of view. So I explained in this book at some length that participants manifest their internal point of view in accepting the law as providing guides to their conduct and standards of criticism. 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, as indeed I have attempted to do in this book. It is true that for this purpose the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or endorse the insider's internal point of view or in any other way to surrender his descriptive stance. (242)

13. H.L.A. Hart, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13 (1983).

14. Peter Winch, *THE IDEA OF A SOCIAL SCIENCE* (1958). Hart cites Winch as holding a similar view to Hart's on the internal aspect of rules (289).

In this passage Hart emphasizes the theorist's role in *describing* such facts as that participants accept rules as guides to conduct and standards for criticism. It is, of course, quite possible to describe social phenomena in a more or less value-neutral fashion, as Hart wishes to do. But it is worth bearing in mind that any given social phenomenon can be accurately described in an indefinitely large number of ways. Descriptions will differ from one another, for example, in the level of generality at which the practice is described (e.g., descriptions of individuals one by one, versus generalizations about all individuals in the relevant group). Different descriptions will individuate practices and sub-practices in different ways. There will also be differences in degree of selectivity, as every description inevitably fails to include some attributes of the object being described. Descriptions thus differ from one another with respect to what and how much they leave out, or, to put the point more positively, they differ insofar as they focus on or highlight different aspects of what is being observed. Thus, in observing one and the same social practice one onlooker—call him Oliver—might call attention to the existence and motivating force of punitive sanctions, while another—call him Herbert—might emphasize that at least some people are moved to act because they accept the practice, internalize it, and treat it as a guide to proper conduct. Some descriptions, taking what Hart calls an extreme external point of view (89), will characterize a social practice behavioristically, without reference to anyone's mental states. Other descriptions, like Hart's, will bring in the participants' attitudes and reasons for action. And so on.

Most of these possible descriptions will be of absolutely no interest to us, scientifically, philosophically, or otherwise. A set of descriptive statements is not, by itself, a *theory* of any kind, and that is so even if the statements are in certain respects general (i.e., apply to more than one occasion, or to more than one person). In ordinary science, a set of statements becomes a theory by making (preferably testable) predictions and/or by conceptualizing the world in a novel or abstract way. Hart, however, is not apparently interested in predictive power, and the whole point of his approach is to describe existing conceptualizations rather than to create new ones. To find a set of descriptive statements that constitutes the basis of a meaningful (non-scientific) theory, it is first of all clear that we must be observing the practice with a particular purpose in mind. Hart's purpose is, as I have said, to offer an external analysis of the participants' conceptualization of their practice, which means looking at that conceptualization from the outside.¹⁵ Thus, Hart's particular descriptive account of law, focusing as it does on the phenomenon of acceptance, presumably becomes transformed into a theory because, as Hart emphasizes at a number of points throughout *The Concept of Law*, the account is supposed to "elucidate" or "clarify" the concepts that participants use: "We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought" (81).

15. "For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from the outside refer to the way in which *they* are concerned with them from the internal point of view" (89).

It bears emphasis yet again that this notion of elucidation cannot simply be another term for explanatory power in the scientific sense. If that were the case, then Hart's theory would have to compete in the forum of predictive power with, for example, theories of social behavior that abstracted from the participants' own conceptualization of what they were doing and used different categories of description altogether. Of course, one of Hart's claims is that behaviorists and radical empiricists are wrong to insist that mental states and attitudes should as a matter of methodological principle be excluded from theories of social behavior, but it does not follow that there cannot be behaviorist theories, let alone that a behaviorist theory could not have greater explanatory power in the scientific sense than Hart's theory. Hart, however, does not even address this issue, and that must be because he understands "elucidation" in a very different way. At this point we must therefore inquire more closely into what Hart means by this notion, asking in particular whether the goal of conceptual elucidation is consistent with a background methodological framework that insists on accurate external description.

Scientific theories are capable of transforming the way that we look at the world; they can lead us to reject old conceptual schemes and to adopt new ones. But Hart does not purport to be offering a scientific theory, at least not in the usual sense, and in any event the object of his descriptive efforts is itself an existing conceptual scheme. Because a primary goal of description is presumably accuracy, one would have thought that the external observer should simply describe what is there, confusions, obscurities, and all. The description should, so to speak, be passive, mirroring whatever the observer finds; the aim should not be to transform, even in so apparently an innocuous way as by "clarification," that which is being observed. Thus, if, as Hart claims, participants in modern municipal legal systems, or at least some of those participants, are unclear what they mean when they speak of rules, obligations, authority, sovereignty, and so on, an accurate external description should surely just report that fact. If different people have different understandings of the relevant concepts, that fact too should simply be reported. Naturally, I do not mean to deny that an observer's external description of even a very familiar social practice like law could not give rise to new knowledge. For example, Hart would claim that the statement that all modern municipal legal systems possess a rule of recognition is an empirical observation.¹⁶ If it is an empirical observation it is a novel one, and if it is true we have learned something. But producing new empirical knowledge is not

16. Hart would claim this because he holds (i) that the term "modern municipal legal system" has a generally agreed-upon pretheoretical meaning and extension, and (ii) that statements about the existence of a rule of recognition are simply statements of fact. I shall suggest in Section V, however, that to support the claim that even a particular legal system possesses a rule of recognition requires normative argument; *a fortiori*, the same would be true of the claim that all modern municipal legal systems possess such a rule. A less controversial example of how external observation could produce new knowledge might be the empirical demonstration or refutation of the claim that, say, all modern municipal legal systems permit greater penalties to be imposed for completed crimes, as opposed to attempts.

the same thing as analyzing, elucidating, or clarifying a concept. The latter terms all suggest that Hart is employing a methodological technique that goes beyond, and perhaps is in some tension with, the passive external description of an existing conceptual scheme.

Let us suppose Hart is right in thinking that the statement "All modern municipal legal systems possess a rule of recognition" is a straightforward empirical observation. Even if that is so, Hart's theoretical claim that all instances of *law* possess a rule of recognition is not empirical in character, or at least it is not merely empirical. It is a conceptual claim of some kind that has, presumably, been produced by Hart's technique of conceptual analysis. Because this conceptual claim is, like its empirical counterpart, also novel, it is natural to ask whether the technique that produced it is consistent with the goal of accurate external description. Has the theory, through "clarification," in some way transformed the concept that it was supposed to be describing from the outside? A rule of recognition is not, after all, one of those "salient features" of a modern municipal legal system that Hart says would be known to any educated person. Indeed, the originality of Hart's substantive theory of law might be said to consist in part in the claim to have brought to light a previously unnoticed empirical fact about modern municipal legal systems, namely that they all contain a rule of recognition. But that means, among other things, that Hart cannot respond to the concern that he has, in clarifying our concept of law, effectively transformed it by maintaining that he is simply picking out a known feature of modern legal systems that is, as it were, particularly salient. Pushing this point a bit further, it is not immediately clear how drawing attention to a hitherto unnoticed empirical fact could even figure in a piece of conceptual analysis, external or otherwise.

It will be helpful at this point if we ask just why Hart thinks that external conceptual analysis is a theoretically fruitful enterprise in the first place. Put slightly differently, in what respect does he believe that the concept of law stands in need of clarification or elucidation? Hart's response to this question begins to take shape early on in *The Concept of Law*, when he discusses the suggestion that nothing more is required by way of an answer to the question "What is law?" than an enumeration of those features of a modern municipal legal system that are, according to Hart, already known to most educated persons. (Such an enumeration is, of course, a good example of passive external description). This suggestion will not do, he says, because it fails to throw any light on what it is about law that has always puzzled legal theorists (5). As to what the sources of puzzlement are, Hart points to "three recurrent issues": "How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules, and to what extent is law an affair of rules?" (13).

The point to notice here is that all three of these issues are aspects of, or involve possible solutions to, a more general problem, which we might label

the problem of the normativity of law. In speaking of the normativity of law, I mean to refer to two facts: first, legal discourse is pervaded by such normative terms as "obligation," "right," and "duty"; and second, legal authorities and officials—metaphorically speaking, the law itself—purport by their actions of legislation, adjudication, and so on to place us under obligations that we would not otherwise have. Hart, possibly speaking loosely, expresses this latter point in terms not of purported but actual obligation: "The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some sense obligatory*" (6, cf. 82). In speaking of the *problem* of the normativity of law, I mean to refer to a congeries of questions of the following kind: How is the concept of legal obligation to be analyzed? How is the concept of legal obligation related to that of moral obligation? What does it mean to claim authority over someone? Can law in fact give rise to obligations, either moral or of some other type, that people would not otherwise have? Clearly, Hart's "three recurrent issues" belong to this congeries.¹⁷

It is plausible to think that the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task. In speaking of an "account" of the normativity of law I am being deliberately vague, so as to subsume such disparate views as, on the one hand, the natural law thesis that every law properly so-called is morally binding and, on the other hand, the Holmesian thesis that legal obligation is an empty concept. Whatever the nature of the particular account that a theorist offers, however, the central questions he or she must confront are these: Does law affect persons' reasons for action in the way that it claims to, namely by giving them obligations that they would not otherwise have? If law does so affect persons' reasons, what is the philosophical character of the resulting obligations and under what circumstances do they arise? It is because of this focus on the (apparent) reason-givingness of law that jurisprudence can plausibly be thought to be a *philosophical* discipline: it is, in effect, a branch of practical philosophy (i.e., the philosophy of practical reason). Hart is thus on strong ground in apparently placing the problem of the normativity of law at the heart of his own theoretical project. It is, moreover, very plausible to think that an inquiry into the normativity of law is, at least in part, a *conceptual* inquiry. Most people subject to modern municipal legal systems would probably identify as central to their experience of law the law's claim to authority—its claim, that is, to place us, through the actions of officials, under obligations that we would not otherwise have. (Many persons, but by no means all, would go on to add that the law succeeds in this endeavor.) The idea that the law purports to bind us by exercising authority over us is thus very plausibly regarded as an element of the concept of law. Hart implicitly makes this claim, and here, too, he is on very strong ground.

17. This point is obvious in the case of the last two issues. It holds true of the first issue as well because Hart's concern there is with Austin's reductive analysis of the concept of legal obligation (i.e., with the analysis of legal obligation in terms of orders backed by threats).

Viewed in methodological terms, then, Hart's project appears to be to clarify, from an external perspective, our shared concept of law, focusing in particular on the idea that law purports to bind us through authoritative acts. The substantive theory itself falls into three related parts. First, there is the general account of obligation, which Hart analyzes in terms of social rules. Second, there is the account of the family of legal concepts like authority, state, legislation, validity, and legal power, which Hart analyzes in terms of a particular type of social rule, namely secondary rules accepted by officials. Third, there is the analysis of the concept of law itself. Here Hart's account is that law is the union of secondary rules, and in particular the rule of recognition, with those primary rules that the rule of recognition identifies as valid. To arrive at a better understanding of what Hart has in mind when he speaks in general of analyzing or elucidating concepts, it will be helpful to examine in turn each of these three specific instances of analysis.

IV. EXTERNAL CONCEPTUAL ANALYSIS: OBLIGATION

As already mentioned, Hart analyzes obligation, including legal obligation, in terms of social rules. A social rule exists when (some appropriate but unspecified proportion of) the members of a group accept a general pattern of behavior as a common standard of conduct for all members of the group. Deviations from the pattern are regarded as justifying demands for conformity and warranting criticism that is typically expressed in the normative language of "right," "ought," "should," etc. (55–57). In the *Postscript*, Hart has made clear that his account is meant to apply only to *conventional* rules—that is, rules for which the general conformity of the group constitutes at least part of the reason for individuals' acceptance of the relevant pattern as a common standard of conduct (255–56).

A social rule is spoken of as giving rise to an *obligation* when the social pressure underlying the rule is particularly serious or insistent (86). Hart mentions two other characteristics of obligation that he says "go naturally together with this one." First, "[t]he rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it" (87). Hart gives the examples of rules that restrict the free use of violence, require honesty, and enforce promises. "Secondly, it is generally recognized that the conduct required by these rules may, while benefitting others, conflict with what the person who owes the duty may wish to do" (87). Hart goes on to observe that obligations are thus commonly thought of as involving sacrifice or renunciation. Even so, those who accept an obligation-imposing rule need not do so because they regard it as morally binding. Acceptance can also be 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" (203, cf. 257).

The essence of Hart's response to the problem of the normativity of law is thus to point to the phenomenon of acceptance, where acceptance need not be grounded in moral reason. The majority (or some other appropriate minimal proportion) of a group's members regard a general pattern of conduct from the internal point of view, meaning they regard the conduct as a general standard that is binding or obligatory for everyone in the group. It is in these terms that Hart wishes to account for the normativity of social rules, and law involves a special case of a social rule, namely the rule of recognition. It is, however, not entirely clear whether Hart believes that acceptance of a social rule gives rise to an *actual* obligation for the relevant group's members. He plainly does not think that acceptance creates a moral obligation, but at various points he can be understood as suggesting that it gives rise to what might be called a social obligation. The basis and character of such an obligation would be rather mysterious, however,¹⁸ and in any event the focus of Hart's theory is clearly on the external descriptive statement that people *regard themselves* as obligated by the rule.

We must now ask the following question: To what extent can this external

18. See Ronald Dworkin, *The Model of Rules II*, in *TAKING RIGHTS SERIOUSLY* 46 (rev. ed. 1977). In a previous article I interpreted Hart as making the claim in *The Concept of Law* that social rules do create a special form of non-moral obligation, but Jeremy Waldron has convinced me in conversation that this reading is probably mistaken. See Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *LAW AND INTERPRETATION* 97, 105, 115–16, 122 (Andrei Marmor ed., 1995). It is, however, true that in later work Hart speaks of the rule of recognition as giving judges what he calls "an authoritative legal reason." H.L.A. Hart, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 160 (1982). The general tenor of the discussion in that work suggests that Hart thinks judges really do have such a reason and not simply that they regard themselves as having one. If Hart did believe that social rules give rise to actual (non-moral) reasons for action, that would be, for reasons that will become clearer below, the first step toward a theory of law advanced from the internal point of view. But until normative argument were offered to support the otherwise mysterious claim that actual reasons for action are created, the theory would remain incomplete.

It is worth remarking that the claim that social rules necessarily give rise to actual (non-moral) reasons for action would yield a very strong form of internal theory. A weaker internal theory would argue that the concept of law, properly analyzed, sets out the *conditions* under which law is in principle capable of giving rise to new reasons for action, but without claiming that such reasons are necessarily always (or even ever) created in fact. See further the discussion in Section VII below. As I note later in the text of the present section, Hart begins in the Postscript to offer a conventionalist account of law that can plausibly be interpreted as an internal theory in this weaker sense. In other work Hart has, of course, offered an account of political obligation that centers on the so-called principle of fair play. See H.L.A. Hart, *Are There any Natural Rights?* in *THEORIES OF RIGHTS* 77 (J. Waldron ed., 1984). If that account were correct, it would show that certain kinds of joint enterprise give rise to obligations that people would not otherwise have. But, as Waldron has recently emphasized, Hart does not think that instances of law are necessarily joint enterprises in the requisite sense. See Jeremy Waldron, *All We Like Sheep*, *CAN. J. L. & JURIS.* (forthcoming). Going beyond this empirical point, it is clear that Hart also rejects the idea that our *concept* of law implicates the principle of fair play. This rules out the possibility of an internal theory—even a weak internal theory—that takes that principle as its starting-point.

descriptive account of obligation be conceived as an analysis or elucidation of our common concept? Typically, the philosophical analysis of a concept attempts to make explicit what the theorist claims is in some sense already implicit in our common understanding. This can take the form of drawing attention to propositions that the theorist argues are either implicitly presupposed or necessarily entailed by the concept's having the content that it has. It can also take the form of an attempt to show that, properly understood, the concept is equivalent in either meaning or use to some other concept or concepts. Sometimes such an analysis will be explicitly and trivially semantic—for example, the statement that the concept "bachelor" comprehends the concept "unmarried"—but in interesting cases it will amount to a more ambitious philosophical attempt to *reduce* one concept to a logical configuration of others. Austin, for example, famously advanced a reductive analysis of obligation that Hart, in an equally famous critique, thoroughly demolished. The precise nature of a reduction is controversial, but perhaps we can say that it consists in an attempt to make explicit an alleged implicit equivalence in meaning between the concept being analyzed and the concepts to which it is ostensibly being reduced.

Finally, conceptual analysis can take the form of argument, within an established intellectual and cultural tradition, about the meaning and significance of the concept and its relationship to other concepts.¹⁹ Sometimes such argument will be normative in character. But this does not involve us in any confusion because, as Joseph Raz points out, in the case of certain concepts "there is an interdependence between conceptual and normative argument."²⁰ Raz's example is authority, but the point is equally true of obligation. In fact, in the legal context, the two concepts are closely intertwined, as it is by means of the exercise of authority that the law claims to create new obligations. I will have something to say in the following section about the nature of legal authority. For now, it will suffice to point out that an analysis of the concept of obligation might well take the form of normative argument attempting to establish the conditions under which obligations are not just claimed to exist but really do exist (focusing, perhaps, on obligations of a particular sort, such as conventional obligations, or obligations ostensibly created by authority). An alternative analysis might be similarly normative but with a skeptical outcome, arguing that there are no obligations of the kind in question.

Hart's externally oriented, descriptive account of obligation cannot be said to offer an analysis of that concept in any of the senses discussed in the preceding two paragraphs. It does not offer a normative argument as to when, if ever, social rules really do create obligations, as opposed to the perception of obligations. Certainly the descriptive statement that people *regard* themselves and others as obligated by a general practice cannot,

19. Cf. Joseph Raz, *THE MORALITY OF FREEDOM* 63–64 (1986).

20. *Id.* at 63.

without more, tell us if and when they are in fact so obligated. If, on the other hand, we try to interpret Hart as offering either a semantic or a reductive analysis of obligation, the account is plainly deficient. If the members of the relevant group regard themselves as obligated in the sense of obligation that is supposedly being analyzed, then the account is circular. If they regard themselves as obligated in some different sense then, as Hart does not specify what that different sense is, the account is incomplete. In any event the only plausible candidate for that different sense would be moral obligation, and Hart is clear that those who adopt the internal point of view do not, or at least do not have to, regard themselves as obligated morally.

As it happens, Hart's account of obligation does not suffer from circularity or incompleteness, but that is because it cannot be regarded as a proper analysis. At its core it is simply a descriptive statement that (a certain proportion of) members of the relevant group regard themselves and all others in the group as obligated to conform to some general practice. This statement uses rather than analyzes the concept of obligation. In the original text of *The Concept of Law* Hart in effect maintains that officials regard themselves and all other officials as obligated, in that unanalyzed sense, by the general practice that constitutes the rule of recognition. To those who so regard themselves, this presumably does not come as news. If they or others want to know whether they are in fact under such an obligation, and if so why, enlightenment is not forthcoming. Precisely because Hart's account of obligation is descriptive and external, it cannot be said to have succeeded in clarifying or elucidating the concept in any significant way.

In the Postscript, Hart specifies that social rules must be understood as conventional practices. This means that members of the group (have reason to) regard themselves as obligated, at least in part, precisely because there is general conformity to the pattern of conduct that constitutes the social rule. We have here the beginning, but only the beginning, of one possible philosophical analysis of the concept of legal obligation. A complete analysis would need to tell us why and under what conditions the mere fact of general conformity to a pattern of conduct can help to create a reason for action, amounting to an obligation, for individuals to conform their own conduct to the pattern. While there are well-known philosophical accounts of conventionalism that attempt to answer these questions,²¹ the thesis that law is underpinned by a conventional rule is nonetheless a controversial one. Dworkin famously disputed it in "The Model of Rules II," for example.²² This particular debate between Hart and Dworkin is philosophical in nature, not empirical. As I will argue more fully in the following sections, normative argument, probably of a moral and political nature, will be required to settle it. For now, I simply wish to draw attention to two points. First, the thought that such a debate might be required to settle an

21. Some of these are discussed very briefly in the following section.

22. Dworkin, *supra* note 18, at 53–54, 59–61.

important question in legal theory suggests that more is at issue here than the neutral description of a social practice. Second and relatedly, such a debate seems best construed as taking place not between two outside observers but rather between two insiders, participants in the practice who disagree, on philosophical rather than on empirical grounds, about the practice's fundamental nature.

Recall that Hart was originally motivated to produce his theories of obligation, authority, and law by puzzles concerning the normativity of law. The essence of the problem of the normativity of law is philosophical: Does law in fact obligate us in the way that it purports to do? This is an issue that arises within the philosophy of practical reason, and it would seem inevitable that its resolution will require normative and probably moral argument. An external description of the practice, to the effect that people *regard* themselves and others as obligated, is not likely to succeed in elucidating either the general concept of obligation or the specific claim that the law creates new obligations that would not otherwise exist.

V. EXTERNAL CONCEPTUAL ANALYSIS: AUTHORITY

The second part of Hart's substantive theory of law is the account he gives of such concepts as authority, legislation, and validity. These concepts must be understood, Hart argues, by reference to secondary social rules. The basic idea is that officials accept, and thereby regard themselves as obligated by, the rule of recognition and certain other secondary rules that Hart calls *rules of change* and *rules of adjudication* (91–99). All of these are second-order rules—that is, they are rules about (primary) rules.²³ Rules of change confer authority on legislatures and perhaps courts to create new primary rules and repeal or amend old ones. Rules of adjudication confer authority on courts to determine whether a primary rule has been broken. The rule of recognition provides authoritative criteria for identifying primary rules as valid, and imposes a duty on courts and perhaps other officials to apply those rules. Hart notes that close connections exist among these various types of secondary rule. The rule of recognition will necessarily make reference to any rules of change, and a rule of adjudication, conferring jurisdiction on courts, will in effect be a primitive form of a rule of recognition. Hart clearly regards the rule of recognition as the most fundamental secondary rule in a legal system.

As in the case of Hart's account of obligation, it is not clear that his account of the concepts of authority, validity, and so on is in any significant sense properly designated an *analysis*. This is so, at least, as long as he insists on sticking with an external, purely descriptive theoretical perspective. To see this, notice first that Hart maintains that statements *about* rules of recognition, to the effect either that they exist or that they possess or fail to possess

23. See *supra*, note 4.

value of some kind, are necessarily external in character (107–10). But there is no reason why participants in a social practice should have to hold a particular external view of their practice, or indeed any external view of it at all. As Hart notes, “[f]or the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons and their advisers” (101). All that need necessarily be the case, apparently, is that a certain subgroup within the larger society—the so-called officials—regard themselves as bound by a rule that the externally observing theorist, but not necessarily the officials themselves, can characterize as both a social rule and as a rule of recognition. Neither officials nor others within the larger group require the general concept of either type of rule, which consequently need not enter—indeed, given Hart’s insistence that statements about rules of recognition are necessarily external, perhaps cannot enter—into whatever conceptualization of their practice that they hold. The *idea* of a rule of recognition appears to be an external theoretical notion, an instance of which has, from outside the practice, been observed within it. But simply to make such an observation does not, without more, constitute a clarification or elucidation of the participants’ own conceptual scheme.

This is not to deny that participants, upon being told by the friendly neighborhood legal theorist that their practice contains a rule of recognition, would not learn something about themselves. But they would come by that knowledge, and in the process master the new concept of a rule of recognition, *qua* external observers of their own practice. Their new knowledge could therefore not be said to elucidate or clarify—to offer an analysis of—their internal conceptual scheme. Of course, the natural response at this point is to argue that, even though the participants did not previously possess the concept of a rule of recognition, that concept was implicitly presupposed by their internal concepts of authority, validity, legal power, etc. Even though the participants might not have realized it, their internal conceptual scheme had already committed them to the idea of a rule of recognition. When this commitment is made explicit, the conceptual scheme is thereby clarified or elucidated. This is a perfectly reasonable characterization of how conceptual clarification might take place. The difficulty, however, is that the claim that the participants’ existing conceptual scheme implicitly presupposes the idea of a rule of recognition looks more like an internal than an external statement. It is not a passive description offered from without, but rather an active clarification offered from within. As for the possible suggestion that statements about rules of recognition can be both external descriptions and internal clarifications, that might well be true. But if, as Hart states, the primary purpose of his theorizing is conceptual clarification, then for theoretical purposes it is the internal statement that matters, not the external one. If Hart’s theory is to succeed in achieving this purpose, then it must be an internal rather than an external theory.

Consider once again the debate between Dworkin and Hart that was mentioned briefly in the preceding section. Hart argues that law is underpinned by a conventional social rule, whereas Dworkin maintains that the foundation of law might be a concurrent rather than a conventional normative practice. A concurrent normative practice is one in which the members of a group "are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of agreement as an essential part of their grounds for asserting that rule."²⁴ In the case of convention, the fact of agreement does count as an essential part of the case for accepting the rule. How would the debate to settle the question of whether law is a conventional or a concurrent normative practice proceed? One might begin by looking to the reasons that officials and others actually give, or would be prepared to give, for accepting the authority of law. This would be an empirical and a descriptive enterprise, and one that could be carried on from an external perspective. Moreover, it is at least conceivable that the members of the community under study might be in substantial and explicit agreement that theirs was a conventional practice in the sense just defined. If so, Hart could claim at least a limited victory in the debate. He would have succeeded in giving an external, purely descriptive account of a social practice that was, as advertised, conventional in character. At least in the special circumstances envisaged, the suggestion of the preceding paragraph that Hart must "go internal" seems to be mistaken.

Notice, however, that Hart could only claim this limited victory in the unlikely event that there existed substantial explicit agreement among participants that theirs was, in fact, a conventional social practice. In that case, the idea of a rule of recognition—understood explicitly to be a conventional, second-order social rule—would already figure in their conceptualization of that practice. They would already possess, internally, the concept of a rule of recognition, although probably not under that name. Their conceptual scheme would therefore not stand in need of clarification or elucidation.

If, however, we assume with Hart that there *is* a need for clarification, and in particular a need to make people aware of a previously unacknowledged conceptual commitment to a rule of recognition, then by hypothesis there is no substantial explicit agreement that the practice is a conventional one. The empirical data underdetermine the theory. Not only does this appear to be the situation that Hart is implicitly assuming to be the case, but it represents by far the most plausible supposition about the way things actually are. Some people will simply not accept the authority of law. Others will do so because they believe that law is a conventional normative practice in something like Hart's sense. Yet others will believe, with Dworkin, that law is a concurrent normative practice. Many, perhaps the vast majority, will accept the authority of the law without any very clear sense of why they are

24. Dworkin, *supra* note 18, at 53.

doing so. And all of this will typically be as true of officials as it is of citizens in general. In light of these facts, Hart's limited victory seems out of reach.

Hart is undoubtedly correct that an important task of legal theory is making clear our implicit conceptual commitments and presuppositions. But the need for clarification only exists if there is confusion, uncertainty, or disagreement of some kind within the internal conceptualization of the practice. Clarification cannot be achieved by an external description, which if it is to be accurate must either mirror the facts of confusion, uncertainty, and disagreement or—and this would be to give up the game altogether—simply avoid the issue by omitting any reference to these facts. (Recall that all descriptions are to a greater or lesser degree selective.) Conceptual clarification is, unavoidably, an internal enterprise. At this point it might perhaps be argued that it does not really matter whether Hart's theory is offered from an internal or an external perspective. What matters is that the theory is *descriptive* in Hart's specific sense of being "morally neutral and [without] justificatory aims" (240). The suggestion is, in other words, that Hart is just making clear our conceptual commitments without either commending or condemning them, in a manner that does not involve moral or normative argument.

If the suggestion of the preceding paragraph were correct, then elucidation of the relevant concepts would have to be essentially uncontroversial. If an instance of conceptual analysis were to be characterizable as simply descriptive and without a normative aspect, it would have to be, once offered, more or less uncontestable; it would simply point out what was there to be seen but had not, for some reason, been previously noticed. The analysis in question would presumably have to take the form of a demonstration that the concepts of authority, validity, legislation, and so on all contain (no doubt implicitly) the notion of a rule of recognition as part of their meaning, or, perhaps, that the use of any of these concepts normally presupposes the existence of a rule of recognition. But both of these claims seem false on their face.

What is *perhaps* true is that the majority of the concepts with which Hart is concerned here, such as legislation, validity, and sovereignty, are all analyzable, in some fairly straightforward and uncontroversial sense, in terms of the concept of *authority*. Authority, in fact, appears to be both the linchpin in this family of concepts and the one whose analysis is key to arriving at a satisfactory philosophical theory of law. This is because, as Hart implicitly recognizes in allowing the problem of the normativity of law to shape his initial theoretical inquiry, it appears to be a core aspect of our concept of law that law claims authority over us. It is part of our concept of law, in other words, that those "in authority" claim to be able by their actions to create obligations for us that we would not otherwise have. But the concept of (political or legal) authority is *not* straightforwardly and uncontroversially analyzable in terms of the notion of a Hartian rule of recognition (i.e., in terms of a social or conventional rule). For one thing, an account of authority

that appeals to a concurrent rather than to a conventional normative practice is, at the very least, arguable. In this context, then, it seems inevitable that conceptual analysis will involve more than just semantic or reductive analysis, or the making explicit of normatively neutral presuppositions.

Dworkin maintains that in order to show that law is a concurrent normative practice rather than a conventional one, he would need to appeal to "controversial principles of political morality."²⁵ He would have to argue, in other words, that law's claim to authority must be understood by reference to some independent moral principle rather than by reference to a convention, where the argument to that effect would itself be moral in nature. This seems basically correct. Authority is in fact Joseph Raz's prime example of a concept whose analysis properly involves normative argument, although he would probably not go so far as Dworkin in saying that such argument must be a matter of political morality. I will have something to say about Raz's own analysis of the concept of authority in Section VII. For now I wish only to point out that our main philosophical reason for wishing to analyze this concept must surely be our interest in knowing what kinds of reason for action the law claims systematically to create, as well as our associated interest in knowing whether or not it in fact creates them. This is the heart of the philosophical problem of the normativity of law, which as we have seen is one of Hart's points of departure in formulating his theory.

Nonetheless, in the first edition of *The Concept of Law*, Hart ultimately ignores both these questions by simply *describing*, from an external perspective, the phenomenon of acceptance. He says that people could accept a rule for any of a number of reasons, including moral belief and self-interest, but implies that these reasons are irrelevant to legal theory. He thereby refuses to look behind the brute social fact of acceptance in order to ask whether and under what circumstances that acceptance is justified. It is, however, only by means of such an inquiry that a solution to the problem of the normativity of law will be found.²⁶ As was noted in the preceding

25. *Id.* at 60–61.

26. Jules Coleman recognizes that a jurisprudential theory must address the problem of the normativity of law, and that doing so requires, among other things, that the theory furnish an account of the concept of authority. He further recognizes that such an account must show whether and under what circumstances the law's claim to authority is justified, meaning it must show whether and under what circumstances the law creates the reasons for action it claims to create. Coleman, *supra* note 12, at 296–305. Coleman holds that Hart's social rule theory "claims that the internal point of view transforms what would otherwise be a non-normative description of a convergent practice . . . into a reason-giving practice . . ." *Id.* at 299. Although I once thought this view of Hart's intent was correct (*see supra* note 18), I now have my doubts. It seems to me that Hart is primarily concerned with describing the practice of law from the outside, and that in consequence he simply sets aside the problem of the normativity of law with which he begins. In any event, Coleman correctly argues that even for officials a rule of recognition cannot be authoritative simply in virtue of being a social rule, because acceptance from the internal point of view does not by itself give anyone a reason for action. He does suggest, however, that such acceptance might be a *reliable indicator* that the practice has independent normative force. This is compatible with its being a concurrent normative practice in Dworkin's sense. Coleman also suggests, as Hart eventually came to accept in the Postscript, that the rule of recognition might be the basis of a conventional social practice. Coleman, *supra* note 12, at 300–2.

section, the descriptive statement that people *regard* themselves as obligated by a general practice cannot, by itself, tell us whether or not the practice really does obligate them.

In the Postscript, Hart in effect begins to offer the outline of an internal account of authority when he says that part of the reason for accepting the rule of recognition is the very fact of its general acceptance. For the reasons given earlier, this cannot be a simple empirical observation about the reasons that either officials or other people might say they have for accepting the authority of law. It must be, at least in part, a philosophical theory about the reasons they really do (or at least might in principle) have, whether they acknowledge it at present or not. The process of conceptual clarification consists precisely in making clear what these reasons are, and that is why Raz is right to say that normative argument is involved. As it happens Hart's theory is incomplete, because he does not say why general conformity could be part of a reason for accepting a rule. There are, of course, well-known answers to this question: General conformity to some practice can solve a coordination problem or serve as a guide to what ought independently to be done.²⁷ General conformity can also make a type of activity that would otherwise be futile—that would be futile, in other words, if undertaken by one person or a few individuals only—morally worthwhile.²⁸

The larger problem with Hart's inchoate internal theory is not its incompleteness in this sense, but rather that it cannot offer an account of the law's claim to authority over *everyone*.²⁹ Hart says that the rule of recognition is a practice defined by the attitudes of officials and no one else; although others in society might also share the internal point of view, it is possible to imagine extreme cases where the rule of recognition is accepted only by officials (117). But a social rule cannot in general give convention-based reasons for action to anyone other than those who belong to the conforming group. The upshot is that the rule of recognition, understood as a conventional practice among officials, can in general give only officials conventional reasons. The general citizenry over whom the law claims authority, or at least those who do not personally accept the rule of recognition as a convention applicable to them, have no such reasons. (Of course, they might have other reasons to obey the law, such as self-interest or independent principles of morality, but these reasons are not claimed to be systematically generated by the rule of recognition.) It is part of our concept of law, however, that law claims authority over everyone, thereby ostensibly obligating them in ways that they would not otherwise be obli-

27. See Coleman, *supra* note 12, at 300–2.

28. Cf. Raz, *supra* note 7, at 247–48. Of course, in this type of case general conformity is only a necessary condition for the existence of a reason for action, and not a sufficient condition; the activity must also be morally worthwhile for independent reasons.

29. Cf. Coleman, *supra* note 12, at 298, 302. See also Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY AND LEGAL THEORY*, 241, 247–48 (D. Patterson ed., 1996).

gated, whether they accept the institutions of the law or not. The theory of the rule of recognition, far from being the sole possible basis for analyzing the concept of authority, thus turns out to be incapable, at least in the form presented by Hart, of providing any viable analysis of that concept. Beyond purporting to impose a duty of enforcement on officials, all the rule of recognition does is set out formal criteria of validity for other rules. As Jules Coleman points out, "[V]alidity is truth preserving [but] it is not authority preserving."³⁰

VI. EXTERNAL CONCEPTUAL ANALYSIS: LAW

The third part of Hart's substantive theory of law is the account he gives of the nature of law itself. The basic claim of that account is, as we have seen, that every legal system contains secondary rules and, in particular, a rule of recognition. Hart argues that the notion of a rule of recognition lies at the core of the concept of law, presumably meaning by this *our* concept. I noted in Section II that even if the argument discussed in the preceding section were correct, to the effect that the concepts of authority, validity, etc., must be analyzed in terms of the notion of a rule of recognition, it would not, without more, entail that that notion is central to the concept of law.

To establish this latter proposition Hart therefore offers the following argument (91–99). He claims that a regime of primary rules is, as compared to a system containing a rule of recognition and other secondary rules, defective in certain respects: more particularly, such a regime is uncertain, static, and inefficient in the application of social pressure. Primary rules might be capable of guiding conduct—this being, according to Hart, the central function of law (39–40, 249)—but they do not do so well. The defects of a regime of primary rules are, however, remedied by the introduction of secondary rules. The status and content of primary rules—meaning now rules that are identified by the rule of recognition as valid—can be more readily determined, and the rules can be changed deliberately and enforced by centrally imposed sanctions. Hart states that consideration of these remedies "show[s] why law may most illuminatingly be characterized as a union of primary rules of obligation with . . . secondary rules" (94).

As was noted in Section II, this defense of the thesis that the concept of law must be understood by reference to the notion of a secondary rule appeals to evaluative judgments. A regime of primary rules is said to be defective, and its defects are said to be remedied by the introduction of secondary rules. Because these judgments are concerned with the guidance of conduct, they are not just evaluative but normative. It is, moreover, the very social practices under study that are being evaluated. By contrast, the metatheoretical criteria that figure in the descriptive-explanatory method are non-normative, and they are used to evaluate only theories, not the

30. Coleman, *supra* note 12, at 298.

subject matter of theories. The fact that Hart appeals to normative judgments does not mean, of course, that the concept of law which rests on those judgments ceases to be descriptive. Hart's concept has the content that it has quite independently of the character of the theorizing he employs to defend it, and, as we saw in Section II, his concept identifies social practices as instances of law on the basis of purely factual, non-normative criteria.

For similar reasons, Hart's reliance on normative judgments at the level of methodology does not call into question the status of his theory as a version of substantive legal positivism. What does seem to be called into question, however, is Hart's claim to be a methodological positivist. Insofar as he defends a particular theoretical characterization of law by appealing to the idea that secondary rules remedy the defects of regimes of primary rules, Hart cannot plausibly maintain that he is simply describing an existing conceptual scheme. He is opting for one conceptualization of social practices over others on the basis of normative argument.

The discussion in the preceding two sections suggests that Hart fails to achieve his goal of elucidating the concepts of obligation and authority, and thus fails to come to grips with the problem of the normativity of law, because he insists on simply describing the phenomenon of acceptance rather than inquiring into the conditions under which acceptance might be justified. That insistence on Hart's part is rooted in his commitment to methodological positivism. It might therefore be thought that, by implicitly abandoning methodological positivism in the development of his general theory of law, Hart has positioned himself to offer an account of the concept of law that is philosophically more satisfactory than those he offers of obligation and authority. That turns out not to be the case, however. The problem is that a satisfactory account of the concept of law must rest on a satisfactory account of the law's claim to authority (i.e., the claim that actions by those possessing authority give us obligations we would not otherwise have). Although Hart appears to abandon methodological positivism in the final stages of constructing his general theory of law, the accounts of obligation and authority upon which the theory builds are themselves developed, as we have seen, in accordance with the precepts of methodological positivism. The ultimate theory cannot transcend this starting-point.

As I shall argue more fully in the following section, a philosophically satisfactory analysis of the concept of legal authority, and hence a philosophically satisfactory analysis of the concept of law that takes the law's claim to authority seriously (as Hart's theory at least purports to do), must be offered from the internal point of view. Such a theory will try to make sense of law to *us*—that is, to those who engage in or are subject to law—by offering an account of whether and how the law's claim to authority over us might be justified. It will do this by attributing a point or function to law and showing how law's serving that function either does give us, or could

under certain conditions give us, reasons for action of a specified type. In specifying one type of reason for action over another the theory will attempt to refine our initial, rough, and partially unclear conceptualization of our own practice. In Hart's terms, "the framework of legal thought" will thereby be clarified or elucidated. It is only in this way—looking at the practice from the participants' point of view, and employing normative argument—that conceptual clarification can take place.

This is not to deny that our conceptual scheme, as it exists at any given time, can be neutrally described from the outside. But such a description must faithfully mirror all confusions and disagreements. It does not clarify anything, and it is not a philosophical theory. A philosophical theory has the capability of clarifying, but it can only do so from the inside. Substantive legal positivism is one such clarifying theory—more precisely, it is a family of related theories—but there are others, such as Dworkin's theory of law as integrity. Skeptical theories, which argue that law has no point or function and is incapable of giving us reasons for action that we would not otherwise have, are also possible. The philosophy of law consists of a debate among proponents of different such accounts that takes place, in effect, within the social practice of law itself.

Now it might seem that, by attributing the function of guiding conduct to certain social practices and then offering an account of law that is based on judgments about how well various of those practices serve this function, Hart has, despite his claim to be offering an external theory, effectively joined the internal debate. The difficulty with this suggestion is that Hart makes no attempt, at least in the main text of *The Concept of Law*, to show how law's serving the function of guiding conduct could give anyone a reason for action.³¹ The explanation for why he makes no such attempt is, presumably, that he insists on describing the phenomenon of acceptance from an external point of view, without considering whether and under what conditions such acceptance might be justified. And the reason that Hart insists on limiting his theory in this way is his initial commitment to methodological positivism. Thus, even if Hart implicitly abandons methodological positivism in the later stages of his theory, his commitment to it at the earlier stages prevents him from offering a theory of law of the kind discussed in the two preceding paragraphs.

Because Hart makes no attempt to show how law's having the function of

31. As was noted in Sections IV and V, Hart begins in the Postscript to offer the outline of an internal theory, based on the idea that the rule of recognition creates convention-based reasons for action. This theory is incomplete and, for the reasons noted at the end of Section V, it is also problematic in its own terms. The important point for present purposes, however, is that this is a theoretical undertaking quite different from Hart's stated aim of simply describing, from the outside, the acceptance of social rules and other, related, social phenomena. The aim now is not simply to describe people's beliefs that law gives them reasons for action, but to show how and why it *in fact* gives them reasons for action. This new theoretical undertaking involves a complete abandonment of methodological positivism and would, if carried to completion, yield an internal theory of law.

guiding conduct could give anyone a reason for action, his attribution of this particular function to law, together with the associated judgments about the remedying effects of secondary rules, are best understood as being offered from an external rather than an internal perspective. Hart construes the guidance of conduct as a form of "social control" (40). The theorist, looking at the practice from the outside, is in a position to assess the (moral) value of social control, to determine which social practices are best able to achieve such control, and to make the judgment that control is only possible if a sufficient number of people internalize legal rules by adopting the internal point of view. But this is to look at the phenomenon of acceptance in a completely instrumental fashion. From the theory's external perspective, it does not matter why people accept the rule of recognition and/or the legal system generally, nor does it matter whether it is possible to justify such acceptance *to them* (i.e., as individuals). All that matters is that they accept it. It is to look at the social practice in question as a kind of invisible hand. The benefits of social control, if any, will be achieved as long as there is sufficient acceptance. The actual reasons for acceptance, and the possibility or impossibility of justifying that acceptance to individuals, are irrelevant. At one point Hart writes that to mention the fact that members of a group look upon a general pattern of conduct from the internal point of view "is to bring into account the way in which the group regards its own behaviour" (90). But to bring into account the way in which the group regards its own behavior it is not enough simply to describe their adoption of the internal point of view. We must inquire into their reasons, actual or possible, for adopting that point of view, and this is precisely what Hart refuses to do.

The argument supporting Hart's general theory of law, on the interpretation of the theory that was advanced in the preceding paragraph, has normative elements. This interpretation supposes that Hart has implicitly abandoned methodological positivism, or at least has abandoned the goal of offering a description of social practices that in no way depends on normative argument, but that he has nonetheless retained methodological positivism's external stance. A theory of law that takes this form is perfectly possible, and is indeed properly characterized as a philosophical theory. Let me call theories like this, which attribute a point or function to social practices from the outside, *external theories*. External philosophical theories can co-exist with internal theories, which attribute a point or function to social practices from the participants' point of view. (There is no reason why a point cannot be ascribed to a social practice both internally and externally.) What an external theory cannot do, however, is claim to offer an analysis or elucidation of the participants' own conceptualization of their practice, which, in the case of law, means an elucidation of our shared concept of law. Only internal theories can do that. If a concept of law can appropriately be said to emerge from Hart's theory, it must be regarded as Hart's concept, not ours.

Moreover, an external theory like Hart's must compete with other external theories, which will conceptualize and perhaps individuate social practices in yet different ways. These theories will either attribute a different point or function to those practices (but always from an external perspective), or else will advance a different view of how social control, say, is best achieved. Holmes' theory of law, for example, can be regarded as an external theory which holds that social control is most readily maintained, not by the internalization of norms, but rather by coercion and the threat of punishment.³² Holmes thus rejects the law's internal conceptual scheme, based on the notions of authority, obligation, and so on, as empty and a sham. As this is an external, normative critique of law, it is not touched by Hart's demolition of Austin's attempt to offer a reductive analysis of these concepts. A different kind of external theory, this time based on a natural law view, would argue that the point or function of law is, when viewed from the outside, to achieve justice, and thus only those social practices (of such-and-such an institutional character) that are in fact just are properly called law. The nature of the philosophical debate among proponents of different external theories is not entirely clear.³³ Perhaps it is a form of pure political theory. At any rate, what it cannot be is a debate about how our shared concept of law should be clarified or elucidated.

VII. INTERNAL CONCEPTUAL ANALYSIS

If we take seriously Hart's apparent goal of analyzing *our* framework of legal thought and *our* concept of law, then we must give up methodological positivism completely. This means abandoning not only the aspirations of methodological positivism to normatively untainted description, but also its external perspective. A philosophical theory that has the goal of clarifying the way we conceptualize our social practices must attempt, from our own point of view, to make those practices transparent to us. In the case of law,

32. Cf. Stephen R. Perry, *Holmes versus Hart: The Bad Man in Legal Theory*, in *THE LEGACY OF OLIVER WENDELL HOLMES: THE PATH OF THE LAW AND ITS INFLUENCE* (S.J. Burton ed., forthcoming).

33. I noted at the beginning of this essay that Michael Moore has adopted what could be regarded as a variant of methodological positivism. See Moore, *supra* note 2. Moore says that the task of jurisprudence is "descriptive," but he clearly includes moral facts about a social practice as among the attributes that can figure in a description. Moreover, he sees the task of legal theory as showing law to be a "functional kind," that is, a type of institution which necessarily, in a metaphysical and not just a conceptual sense, uniquely serves some good. It might be better, therefore, to see Moore as a theorist who is seeking an external theory of the kind described in the text, rather than as a methodological positivist. His characterization of the debate among proponents of external theories would then be that each is putting forward a different understanding of the metaphysical essence of law. This is a coherent methodological view, but, as I have argued elsewhere, there does not seem to be any good reason to regard law as a functional kind in the way that gold and water are claimed by some philosophers to be natural kinds; there is no reason, that is, to view law as a type of entity having an essential nature. See Perry, *supra* note 18, at 124 n. 62.

this means showing that the law's claim to authority over us is always justified, showing that it is justified only under certain conditions (which might not always hold), or showing that it is never justified. In this section I offer a brief overview of this approach to doing legal theory.

A philosophical analysis of the concept of law can be regarded as an attempt to understand the nature of the social practice of law because the concept is very much bound up with our understanding of the practice, and in particular with our understanding of the way in which we take that practice to affect our reasons for action. As Raz has observed, "The concept of law . . . plays a role in the way in which ordinary people as well as the legal profession understand their own and other people's actions."³⁴ Raz goes on to note that "the culture and tradition of which the concept is a part provide it with neither sharply defined contours nor with a clearly identifiable focus"; it is thus the task of legal theory to identify, from among various and sometimes conflicting ideas, "those which are central and significant to the way the concept plays its role in people's understanding of society."³⁵ Raz elaborates on some of the methodological implications of this conception of legal theory in the following passage:

[I]t would be wrong to conclude . . . that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like "mass" or "electron," "the law" is a concept used by people to understand themselves. We are not free to pick any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.³⁶

All this seems correct, and it helps to explain why legal theory does not involve an application of the descriptive-explanatory method of science. But it does not show the precise sense in which philosophical theories that set out to clarify the concept of law are properly called internal. The claim I wish to make is that the "internality" of such a theory derives from the fact that it attempts to clarify the conceptual framework of the law by, among other things, addressing the problem of law's normativity. Such a theory either argues that law does not and cannot give rise to obligations that we would not otherwise have, in which case it is a skeptical theory, or else it attempts to make clear the conditions under which the law's claim to authority could be justified. A theory of the former kind argues, in effect, that law does not have any point or function, at least when viewed from an internal perspective. A theory of the latter kind attributes a function to law and then attempts to show how that function's being served could give those subject to law reasons for action they would not otherwise have. In specifying a particular type of reason for action, it proposes a clarifying

34. See Raz, *supra* note 12, at 321.

35. *Id.*

36. *Id.* at 321–22.

refinement of the law's conceptual framework. Typically, this will take the form of a normative analysis of the concept of legal obligation. Generally speaking, a conception of the person as a practical reasoner will be at least implicit in such a theory, as it must claim that those subject to law are capable of acting upon reasons of the specified type.³⁷ A skeptical theory attempts to show, in effect, that law could never be justified. A non-skeptical theory attempts to show the opposite. In both cases the concern is with justification from the point of view of those who are subject to law: the question is whether law could give *them* (moral) obligations they would not otherwise have. It is in that sense that these theories are internal.³⁸

As I have argued elsewhere, the methodology for legal theory that is outlined in the previous paragraph is, in all essential respects, Dworkin's interpretivism.³⁹ Space precludes an extended discussion, but let me go over some of the main points. Dworkin is, in the first instance, concerned with social practices that manifest a special "interpretive attitude." This attitude has two components:

The first is the assumption that the practice . . . does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of [the practice]—the behavior it calls for or judgments it warrants—are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point.⁴⁰

In cases where the interpretive attitude holds, participants conceptualize their practice in a certain way. They assume that the practice at least potentially has *requirements*, meaning that it gives rise, or could give rise, to reasons for action for them. It thus makes sense that Dworkin speaks of "interpretive concepts" as well as of the interpretation of practices. He is concerned with practices whose associated concepts are, as was suggested earlier to be the case with law, intimately bound up with the way participants understand their own actions. The interpretive attitude is constituted by the following assumptions: first, the relevant social practice has a point or value; and second, the manner in which the practice affects reasons for action

37. For example, a Hobbesian theory of law, under an internal rather than an external interpretation, will adopt a conception of the person as a rational utility maximizer. By contrast, theories that argue that law does or is capable of giving rise to moral reasons for action must suppose that people are capable of acting upon such reasons. See further Perry, *supra* note 32.

38. Cf. Finnis, *supra* note 5, at 14–15: "If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation . . . , a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint."

39. See Perry, *supra* note 18, at 121–35.

40. Dworkin, *supra* note 8, at 47.

depends on what that point or value is taken to be. These are also the assumptions that underpin a non-skeptical internal theory of law.

Different "justifications" or "interpretations" of a social practice are, according to Dworkin, associated with different attributions of a point or value to it; in the case of law, these amount to different theories of law. The term "justification" is somewhat ambiguous, but let me suggest that in the present context it refers to a proposal concerning how to make the best possible moral sense of a practice, from the participants' point of view. In Dworkin's terminology, one tries to put the practice in the best possible moral light. This involves showing how the practice, construed in terms of a certain point or function that might plausibly be attributed to it, could under specified conditions give rise to moral obligations for participants that they would not otherwise have. The idea is to make moral sense of the practice by showing people why and under what circumstances they might have reason to comply with it. A skeptical theory will argue that they could never have such reason, but, as Dworkin quite rightly insists, skeptical theories must establish their conclusions by means of moral argument.

It should be noted that offering an internal justification for a practice does not commit a theorist to saying the practice is "justified" in any absolute sense, so that it should not be changed or abolished. A non-skeptical justification tries to make the best moral case that can be made for a social practice. But the fact that such a case can be made, and that the practice should in consequence be regarded as reason-creating, does not mean that it should not be replaced by an even better reason-creating practice. Thus, it does not follow from the fact that an internal justification can be offered for tort law that tort law should not be replaced by, say, a social compensation scheme.⁴¹

I am suggesting, then, that a "justification" in Dworkin's sense is concerned with illuminating the *conditions* under which an existing type of institution could give rise to obligations. It is not *directly* concerned with showing that such obligations do in fact arise, although the more unlikely it is that the posited conditions can exist—or rather, the more difficult it is to bring those conditions into existence—the less morally plausible the proposed justification will be. Thus, Dworkin's own substantive theory of law as integrity does not claim that law necessarily gives rise to what he calls associative obligations. Rather, the claim is that law's point or function is to justify state coercion by creating a certain kind of community, namely one that is based on the political ideal of integrity. This is best understood as a claim about our *concept* of law. Associative political obligations are said to arise in fact only when the conditions of integrity are met. These are, roughly, that members of the community reciprocally accept that they have special responsibilities toward one another, and that they plausibly suppose

41. Cf. Jules L. Coleman, *RISKS AND WRONGS* 401–5 (1992).

that their community's practices manifest an equal concern toward all members.⁴²

It is worth noting that nothing in Dworkin's interpretivism, understood strictly as a philosophical methodology for studying social practices, turns on the use of the word "interpretation" or on the meaning the word bears in other contexts. Thus, nothing turns on whether legal practice can be treated as a "text" in the sense of some more general theory of interpretation. It is possible to make all the methodological claims about legal theory that Dworkin wishes to make without bringing in the idea of interpretation at all, as I showed earlier in my characterization of internal theories. It is true that Dworkin himself maintains that there are connections between interpretivism, understood in the narrow methodological sense, and the interpretation of works of art. But those claims are severable from the case that can be made for the use of the interpretivist methodology in legal theory. It has thus been suggested, plausibly enough, that the goal of artistic interpretation is not to put objects of art in the best possible aesthetic light,⁴³ but it does not follow that the goal of a certain kind of legal theory is not to put the practices of law in the best possible moral light.

Raz's theory of law is an internal theory in the sense I have outlined here.⁴⁴ It is worth briefly elaborating on this point, because as a version of substantive legal positivism the theory bears some resemblance to Hart's, yet it rests on quite different methodological premises. Raz characterizes the function of law, in terms reminiscent of Hart, as the guidance of conduct by means of publicly ascertainable rules.⁴⁵ But Raz, unlike Hart, offers normative argument to show how law's serving this function could give people reasons for action. This argument is initially offered as an analysis of the concept of authority. However, because Raz recognizes that

42. Dworkin, *supra* note 8, at 197–202. The theory of law as integrity is meant to address what Dworkin calls "the puzzle of legitimacy." *Id.* at 190–95. It is possible to imagine "external" accounts of law's legitimacy, which could well be associated with the kind of external philosophical theory that was discussed in the preceding section. These would argue for the moral legitimacy of state coercion without supposing that those subject to coercion have an obligation to comply. See, e.g., Robert Ladenson, *In Defence of a Hobbesian Conception of Law*, 9 PHIL. & PUB. AFF. 134 (1980). But for Dworkin legitimacy is intimately concerned with the question, "Do citizens have genuine moral obligations just in virtue of law?" Dworkin, *supra* note 8, at 191. Dworkin's substantive theory of law can thus be interpreted as an attempt to outline the conditions under which the law's conceptual claim to authority is justified. For Dworkin, however, that claim must be construed in a broader sense than I have construed it elsewhere in this essay. Essentially following Raz, I have supposed that the law's claim to authority is a claim that citizens are obligated by (and only by) the specific acts of those *in authority*. But Dworkin must suppose that law's claim to obligate is broader than this, as his substantive theory argues that citizens are obligated not only by the specific acts of authorities but by the best justification of the settled law. Indeed, it is precisely because Dworkin maintains that the *concept* of law involves the moral idea of "best justification" that his substantive theory is not a positivist one. (He does not become a positivist simply because, recognizing that the conditions of integrity might not be met in practice, he accepts that actual legal systems do not necessarily obligate.)

43. Andrei Marmor, INTERPRETATION AND LEGAL THEORY 52–53 (1992).

44. Cf. Perry, *supra* note 18, at 125–31.

45. Raz, *supra* note 7, at 50–52.

it is part of the concept of law that the law claims legitimate authority for itself—meaning that courts, legislatures, and other legal institutions claim to create, through the issuing of directives, obligations that people would not otherwise have—the normative argument he advances ultimately figures in his analysis of the concept of law itself.

Raz offers what he characterizes as a normative-explanatory account of the concept of authority.⁴⁶ According to this account, which Raz labels the service conception, the law's conceptual claim to possess legitimate authority must be understood in terms of the following thesis. The normal way to establish that one person has authority over another involves showing that the latter is likely better to comply with the reasons for action that apply to him if he follows the former's directives than if he acts on his own judgment (the normal justification thesis). Let me call the reasons that apply to a person underlying reasons. To the extent that the underlying reasons are moral in nature, the law's claim to have legitimate authority will be a moral claim. If the law has legitimate authority in the sense explained, then its directives will be reasons for action in their own right, excluding direct reliance on the underlying reasons. According to Raz, the directives of a legitimate authority *replace* the underlying reasons, and hence are what he calls exclusionary or preemptive reasons for action. This is why the law claims to create obligations or duties, and not just reasons to be weighed in the balance against other reasons. On the question of whether political authority ever is legitimate, Raz concludes that "while [this] argument does confer qualified and partial authority on just governments it invariably fails to justify the claims to authority which these governments make for themselves."⁴⁷

Raz's argument for the service conception of authority is moral in nature. If it is right, then the anarchist thesis that the state could never have the moral authority it claims is wrong. The theory sets out moral conditions of legitimacy that Raz holds are implicit in the concept of law and that must be met if the law is to give rise to obligations that people would not otherwise have. Raz's theory of law is thus also a political philosophy that is in direct competition with, among others, Dworkin's integrity theory (itself both a theory of law and a political philosophy). I am not concerned here to mediate this dispute, but simply to point it out and say something about its nature. The two theories yield rival normative analyses of the concept of legal obligation; in consequence, they also yield rival accounts of how our concept of law should be elucidated and further refined. Raz argues that the law claims to create, in accordance with the normal justification thesis, exclusionary reasons; Dworkin, that it claims to create associative obligations. There is controversy about the appropriate normative and conceptual analysis of legal obligation even among positivists. Thus, Bentham's norma-

46. See Raz, *supra* note 12, at 295–305; Raz, *supra* note 19, at 38–105.

47. Raz, *supra* note 19, at 78.

tively defended version of positivism makes the conceptual claim that legal directives add to, rather than replace, the reasons for action people already have.⁴⁸ Deciding among these various theories is not just a matter of determining which succeeds in better describing a pre-existing but partially implicit conceptualization of a social practice. There is no such conceptualization that, as Hart would apparently have it, can simply be described. This is philosophically contested ground, and the disagreement must ultimately be settled by moral and political argument intended to show which theory makes the best moral sense of the social practice we call law. In this way legal theory inevitably incorporates political philosophy.

VIII. CONCLUSION

Hart makes two very important methodological points in *The Concept of Law*. The first is that a philosophical theory of law involves conceptual analysis, meaning the clarification or elucidation of the concept of law and of "the general framework of legal thought." The second is that a philosophical theory should attempt to come to grips with certain puzzling issues concerning the normativity of law (5–13). I take this second point to mean that a philosophical theory of law should address the problem of the normativity of law. But Hart's own substantive theory does not offer a satisfactory conceptual analysis, nor does it truly come to grips with law's normativity. The reason for this, I have argued, is that Hart is also committed to methodological positivism, which holds that a theory of law should offer external descriptions of legal practice that are "morally neutral [and] without justificatory aims" (240). Hart's own theory of law, being external, is admittedly without justificatory aims: it does not try to show participants how the social practice of law might be justified to them. But the theory is not, I have argued, morally neutral. Even so it does not offer a solution to the problem of the normativity of law in the way that, say, Raz's theory does. One reason for this is precisely that the theory is external; another is that it rests on a purely descriptive account of the concepts of obligation and authority. As far as these latter concepts are concerned, Hart is content simply to make the observation that officials and perhaps others accept the rule of recognition, meaning they *regard* it as obligation-imposing. This is to describe the problem of the normativity of law rather than to offer a solution.

The substantive difficulties that Hart's theory faces thus have methodological roots. The related philosophical goals of analyzing the concept of law and addressing the problem of the normativity of law are plausible and appropriate ones for legal theory, but they cannot be accomplished by taking an external, purely descriptive approach. Hart seems to have borrowed the idea of a purely descriptive theory from the methodology of science, which is a very different kind of theoretical enterprise from phi-

48. See Postema, *supra* note 1, at 323–27.

losophy. The result, from a methodological perspective, is an unsatisfactory hybrid. Of course, I do not mean to deny that it is possible to describe a social practice in a more or less neutral fashion and from an external point of view. As was noted in Section III, there are indefinitely many descriptions that can be offered of any given practice, although most of them are entirely lacking in interest or theoretical significance. If there is conceptual confusion, lack of clarity or disagreement within the practice, an accurate external description must simply report that fact; it cannot offer clarification.

Descriptions that are offered in accordance with the descriptive-explanatory method are potentially of scientific interest, but they will not necessarily track the participants' own conceptualization of their practice, nor will they offer an elucidation of that conceptualization that speaks to them as participants. Descriptive-explanatory theories are not philosophical in nature and, in particular, they do not address the problem of the normativity of law. External philosophical theories are possible, as we saw in Section VI, and Hart's general account of law can be understood in these terms. But such theories, although grounded in normative argument, also do not come to grips with the normativity of law. The predominant tradition in Anglo-American legal theory, from Hobbes and Bentham through Coleman, Dworkin, Finnis, Postema, and Raz (but excluding Austin and Waluchow along the way), has always supposed that the provision of an account of law's normativity has been a central task of jurisprudence. Hart professes to take that task seriously, but his commitment to methodological positivism prevents him from following through.