Legal Validity and Judicial Ethics

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Working Paper Number 2002/13

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It is commonplace to say there is a judicial duty of make decisions according to law. This refers in part to a duty to follow the relevant adjectival law according to the procedures laid down for law in law. The telos of such 'due process' is the identification and application of the relevant substantive law and the application of this corpus to the facts, as they are found to be by the court following the appropriate legal procedures. Arguably, this duty to make decisions according to law is the core judicial contribution to the rule of law and the grounds of many other judicial duties.

This construction of judicial ethics is threatened by radical disagreement as to what it means to make decisions in accordance with law. And without agreement on this, there can be no basis for criticising adjudicative conduct, provided that it can be presented as a manifestation of a good faith endeavour to put into practice some conception of 'in accordance with law'. If there is no basis on which judges (and others) can reach justified agreement as to the content and application of this norm, then no judge can properly be held accountable for failure to conform to it, and the foundation of judicial ethics, even the judicial raison d'etre, collapses.

The concept of legal validity comes into play in the analysis of what is involved in identifying applicable law. In the positivist tradition from which the term emerged 'validity' is used to signify the authoritative criteria that determine what is and what is not 'the law' in a particular jurisdiction, that is the criteria that judges ought to follow in their adjudicative determinations. According to Hart, for instance, the concept of validity is grounding in the social fact that judges deploy a 'rule of recognition' to find and establish the legal or non-legal status of possible candidates for having the status of law. The model here is of a 'rule' that lists the criteria that are either necessary of sufficient for being deemed to be 'valid' law, that is judged actually to be rather than just aspire to be law.

For Hart, 'validity' is distinguished from desirability, in that meeting the criteria of validity determines whether something is law rather than whether it is good or bad law. On some views, including Hart's own as expressed in the Postscript of the 2nd edition of *The Concept of Law* (1994), desirability can feature in the criteria of a particular rule of recognition, but, because it need not do so, the idea of validity is distinguishable from that of desirability as such. This has come to be known as the 'separability thesis', since the contention is that law and morality are not necessarily connected. Indeed, the point of the language of validity is precisely to be able to make the distinction between formal and material standards, and so between law and good law. The parallel is with logic, where the validity of an argument is a matter of its form and the interrelations of its parts, while the truth of its components and its conclusions is another matter. There are valid arguments that lead to erroneous conclusions, as when one or more of the premises are factually wrong. Similarly, there are valid laws of dubious content, as when their application leads to undesirable outcomes.

Now, the rule of recognition is a 'secondary' rule, used to identify or validate those ('primary') rules that apply to ordinary non-legal conduct. The rule of recognition is a rule about rules, and makes sense only in the context of its role in a system in which it has a gate-keeping function for primary rules. It follows, as Hart points out, that a rule of recognition cannot itself be valid, at least not as a rule of the system of which it is the gate-keeper. In this respect, it has the status of a primary rule, applying, in this case, directly to judicial conduct, by laying down what it that judges ought to take into account when determining what is and what is not law in a jurisdiction. But, unlike other primary rules, it cannot itself become law through the operation of a rule of recognition. It must always remain a non-legal rule with respect to its own system (although it may of course be incorporated into the primary rules of another legal system). A rule of recognition may be, for instance, a political, or an ethical or a prudential, but not a legal rule.

The perspective I adopt is of rules of recognition as ethical rules, part of an institutional morality containing norms for the conduct of judges. From this perspective I argue that judicial ethics requires some such concept as a rule of recognition if there is to be an operative system of law that fulfils the basic requirements for a legal system that is sufficiently law-like to fulfil the functions that render law valuable. Any such system, I argue, must be able to distinguish between appropriate and inappropriate adjudication, and any working conception of adjudicative appropriateness requires being able to test judicial conduct in this sphere against the guidelines provided by rules of recognition. Without a way of distinguishing between decisions made in accordance with law and decisions not made in accordance with law, the core of judicial conduct is normless, and such distinctions cannot be drawn without a rule of recognition.

It is not necessary to construe legal validity in this way. Hart's purpose in explicating his model of the union of primary and secondary rules was self-consciously explanatory, perhaps with an unacknowledged evaluative agenda. Others analyse validity in a detached conceptual manner, often as part of the exercise of ascribing meaning to the world 'law'[1], as Dworkin wrongly interprets Hart as doing.[2] However, I am interested in exploring validity as a concept of judicial ethics. I do this by placing the discussion of validity within a normative (or ethical) account of law generally. This discussion is directed towards defending the intelligibility and attractions in the context of the debates that have followed the publication the Hart's Postscript.

Hart's Rule

[1] Thus, Jules Coleman, 'Negative and Positive Positivism' 11 Journal of Legal Studies (1982) 139-164 at 147: 'Legal Positivism makes a conceptual or analytic claim about law, and that claim should not be confused with programmatic or normative interests certain positivists, especially Bentham, might have had'.

[2] R.M.Dworkin, *Law's Empire.* Liam Murphy identifies the difference between Dworkin and Hart as being whether the 'appeal to political considerations by lawyers and judges is properly understood as part of an argument about what the law (already) is. Thus we have a genuinely conceptual question, a question about a concept: does or should our concept of law allow that legal questions are answered in part by reference to political consideration': 'The Political Question of the Concept of Law', in Jules Coleman, *Hart's Postscript*, Oxford: Clarendon 2002, 372. See also J.Raz, *The Authority of Law,* Oxford: Clarendon Press, 1979, 37-8.

I start my exposition and defence of these propositions with a discussion of Hart's views, which is appropriate given that he could make a legitimate claim to substantial intellectual property in this area. In particular it is important to explore his standpoint according to which a rule of recognition is an element in a theory that seeks to provide sociological explanation and understanding of law and to see how this relates the possible normative uses of his concept. Hart holds that, if we see law as a union of primary and secondary rules, then we will be able to better understand the inner workings of developed legal systems. Where and insofar as we have a community of judges or legal officials that use a common rule of recognition to identify and interpret the rules that are binding on a populace, and are typically followed by that populace, then we have law in a sense familiar to educated citizens of contemporary societies.

A common but mistaken criticism of Hart is to say that a rule that describes judicial practice is not a rule but a description, and therefore, in his own terms, lacking in normative force.[3] This is to misrepresent both Hart's use of the rule of recognition in his descriptive sociology and his account of social norms. To start with the second misrepresentation, the existence of a social rule does presuppose a regularity of conduct in the relevant group. This regularity, however, is on the manifestation of a rule, if it comes about because the regular behaviour is the result of rule-following, that is a process whereby individuals are aware of having an obligation to act in that particular way and act accordingly, either out of a belief in the importance of the rule or as the result of social pressure. Further, a rule is a social norm of a group only if non-conformity to the rule is met by a degree of adverse reaction from other members of the group. Seeing a rule of recognition as a social norm, therefore, assumes a measure of conformity to a pattern of judicial decision-making, but, equally importantly, it requires conscious following of the rule and, as important, critical reaction to departures from it. This is what gives it normative force in that society. And this is what provides the basis for the description/explanation offered in Hart's descriptive sociology.

This model of a rule of recognition may, of course, be challenged on many counts. Descriptively, no significant regularity may be observed, little rule consciousness may be apparent and there may be a general absence of critical reaction to any pattern of absence of pattern in judicial decision-making. Hart cannot make an a priori judgment that every legal system has a rule of recognition in advance of an empirical study to see if this is in fact the case. Normatively, it may be argued that the conformity and reactions to non-conformity are mistaken, in that they are not justified. Indeed it would be a fallacy to which positivists must be particularly sensitive, to argue that because something is done with approval and not done with disapproval that such approval and disapproval are justified.

Hart would simply reject the second objection as irrelevant to his purpose. The empirical normativity with which he is concerned – how norms exist and function in social life – makes no presupposition about the correctness of the norms in question, which is a separate matter of critical morality. As to the first objection, relating to descriptive accuracy, he would agree that the existence or non-existence of a rule of recognition is a matter of degree that varies with the extent of the conformity, together with the strength and distribution of the beliefs and reactions in question. He readily

[3] For a sophisticated form of this criticism, see Stephen Perry 'Hart's Methodological Positivism' in Jules Coleman, *Hart's Postscript*, Oxford University Press, 2001, 311-54.

acknowledges that the sort of developed legal system he has in mind is something that has gradually emerged from a system that lacked precisely these features with respect to secondary rules and can be gradually lost through lost as a legal system degenerates.

Nevertheless, Hart has considerable confidence that rules of recognition exist. On what is this confidence based? No doubt partly on his personal observation of legal practice during his experience as a working lawyer. In the world of judges and other legal officials and commentators, criticisms are made of judicial practice in identifying or failing properly to identify law, particularly by other judges. Judges do have working criteria of what counts as a source of law and can formulate them when asked.

Yet how can Hart react to the fact that these phenomena vary from legal system to legal system and that there is considerable disagreement in particular jurisdictions when it comes to making explicit its rule of recognition? Here, it seems, his sociological jurisprudence must move from hermeneutics to functionalism. Law, functionalists would claim, cannot fulfil its function in a complex society, unless there is a working consensus as to a one and only rule of recognition, which does operate in the way he describes. If there is no such rule of recognition there can be no unity and cohesion to a system, and all the benefits that derive from being able to settle disagreements about competing primary rules, having ways of settling disputes about their application and seeing to their predictable enforcement, would be lost.

Functionalist theories of this sort are explanatory if the function is one that is consciously sought, especially if it has to be fulfilled, certainly for the social group in question to survive, but perhaps simply to continue in its existing form. Functional societal relationships may also feature as the basis for critical normative reflection. Thus, if the existence, or the existence of a group in a particular form, is thought desirable or undesirable, then the functional explanations can be transmuted into instrumental recommendations or condemnations.

Notice here that the object of critical evaluation may not be the content of a rule of recognition, but the having or not having one - perhaps any one. We need a rule, any rule, to control and deal with disputes. It is therefore possible to criticise departure from an established rule of recognition without thinking that the rule in question is a good one. The values of coordination, order, peace and the efficient pursuit of individual and collective shared goals may not dictate any particular content for rules of recognition. If you like, the validity of a rule has a moral importance that is not derived from its truth-value.

Hart himself does not take the matter further, being content to note that the descriptive and the prescriptive exercises are quite different in kind. However, continuing disquiet is expressed with this situation. Some of this disquiet is justified, but much of it is not.

Thus, it is well argued, that the content of some rules of recognition renders them less efficient in relation to the functional values than they would otherwise be. Any criterion that is less than clear cut in that its use may give rise to reasonable disagreement, is to that extent undesirable because it undermines the utility of the rule in relation to its functions. This is a formal matter, insofar as it does not depend on

the way in which clear-cutness is achieved, but it does make the content of a rule of recognition relevant to its capacity to operate as a rule of recognition.

In one way, all that Hart has to concede here is that there are empirical limitations to what can serve as a rule of recognition. As a descriptive sociologist he will certainly not want to say that a legal system is somehow not a legal system simply because it does not have a highly effective rule of law. Acknowledging that there are thresholds and extremes here, he can be fairly relaxed about empirical variations of this sort for his broad sociological thesis.

But he does take issue on those cases where so-called rules of recognition are not rules at all. Thus, what, it may be asked, are we to make of a rule of recognition that says that whatever the judge decides is law is law, a hypothesis that is by no means a mere flight of fancy. Of this Hart is inclined to say, in his criticism of Legal Realism, that this is not a rule that a judge could follow, and so it is not a rule at all. A scorer cannot act as a scorer if he has to make up what counts as a score each time she makes a decision about what the score is. Yet it is a rule that a judge can follow. The rule is that she must decide the case in one way or another. However, as Hart notes, it then becomes impossible to criticise that decision, although it is possible to criticise the judge for failing to make a decision at all. In some situations any decision may be better than none.

Of course, if that is the rule of recognition it will be unlikely that there is a legal *system* in the sense that there need not be any consistency between judges and indeed between the judgments of each individual judge. If we want a less chaotic law, and one that does not need constant litigation, we had better get another rule of recognition.

Here Hart simply backs off. He accepts that rules of recognition are more diverse than he made out them to be. They contain reference to morality ('soft' or 'inclusive' legal positivism), they allow for a measure of 'scorer's' discretion , and they may vary from judge to judge in the same system. What matters is that whether or not something is a law depends on some social fact and not directly on a moral judgment that has not been incorporated in law, as when moral judgment are licensed by a rule of recognition.[4] As matters of fact he can hardly deny these evident truths. And it does not endanger the general success of his descriptive/explanatory venture for him to acknowledge them. While his objective remains descriptive, he perforce must remain a soft legal positivist.[5]

Yet there is no reason why he should not be more ambitious than this, as he is from time to time when noting the benefits of a system of law that gives clear guidance as to the sources of law but permits a degree of judicial flexibility in how the rules are interpreted. Indeed it is clear that his conceptual preference for an analysis of law that excludes direct appeals to morality that are not authorised by a rule of recognition are political in that he commends such an concept as helping to make it clear that, just because something is the law, this does not mean that it is morally justified, thus encouraging a critical attitude to law.

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[4] The terminology is derived from Raz, *The Authority of Law*, 37.
[5] See Coleman in Coleman, *Hart's Postscript*.

He may, and perhaps to some extent he does, go further than this and argue for the desirability of hard legal positivism. His theory provides adequate foundations for a prescriptive version of legal positivism according to which critical reasoning is brought to bear on what constitutes a good rule of recognition, one that is effective in ending disputes, economical in the demands it makes on judicial expertise, readily accessible to ordinary citizens for their own use, good at encouraging and sustaining cooperation and effective in the process of ensuring equity in punishment and the deterrence of undesirable conduct.[6]

To take such a line opens up the possibility of hard prescriptive positivism, a theory which says that the best rule of recognition is one that judges and citizens can apply without involving themselves in making controversial moral or other speculative judgments.[7] This leads to a more effective system in relation to the goals of order, dispute resolution, conduct control and coordination, and may be seen as particularly appropriate in a democratic system where contentious moral and factual issues call to be decided by debate and decision-making involving, in so far as is possible, all those affected by the decisions in question.

This is an approach I call 'ethical positivism' because it is explicit in the moral judgments that it makes in relation to the professional roles of judges, lawyers, police and citizens.[8] It is an approach that has deep roots in legal theory and political philosophy[9] but one that is strongly resisted or evaded within the ranks of legal academia.[10] The reasons for this resistance or evasion are presented as primarily intellectual but they may also be ideological, for prescriptive hard positivism threatens to curtail the significance of judges, lawyers, legal academics in the name of democratic governance and the rule of positive law.

Problems for Ethical Positivism

The publication of the Postscript to Hart's Concept of Law in a 2nd edition edited by Joseph Raz and P.A.Bulloch, has sparked a flurry of essays dealing with the nature of legal theory generally and Hart's contribution in particular. In all this the idea that Hart is, despite his disavowals, engaged in an enterprise that is at least partly evaluative with respect to the form of law, gets relatively little attention. In a recent

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[6] Liam Murphy points out that Hart offers moral reasons for adopting a concept of law that makes political considerations part of law only if the use of political arguments is validated by a rule of recognition. *Hart's Postscript* 371-409. However he claims that, despite some ambiguity, Hart's functionalist claims need not be taken as endorsing any moral views, 378. See See Ronald Dworkin, 'A Reply' in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984, 250-52; also Perry, 'Hart's Methodological Positivism' , Coleman, op cit, 311-54; and Michael Moore 'Law as a Functional Kind' in Robert P. George ed., *Natural Law Theory*, Oxford: Clarendon Press, 1992, 188-242.

[7] Tom Campbell, *The Legal Theory of Ethical Positivism*, Aldershot: Dartmouth, 1996; see Raz's sources thesis that 'its existence and content can be identified by reference to social fact alone, without resort to any evaluation', Authority, Law and Morality, 195.

[8] This position is variously labelled 'normative' and 'ethical' legal positivism. See Jeremy Waldron 'Normative (or Ethical) Positivism in Coleman, *Hart's Postscript*, 411-33.

[9] Particularly in Bentham. See G.Postema, *Bentham and the Common Law Tradition*, Oxford: Clarendon 1996, 328-40.

[10] For exceptions, see N.MacCormick,'A Moralistic Case for A-moralistic Law' Valparaiso University Law Review 20 (1985). And Stephen Perry, 'Interpretation and Methodology in Legal Theory' in A. Marmor, ed., *Law and Interpretation: Essays in Legal Philosophy*, Oxford: Clarendon Press, 1997.

collection edited by Jules Coleman only one essays, by Jeremy Waldron, directly addresses the idea of normative, or ethical, positivism, although another, by Stephen Perry, attributes evaluative and justificatory approaches to Hart and Liam Murphy makes a case for political motivations at work in Hart's conceptual analysis of law. Moeover, there are many themes in that book, and in many other places, that demonstrate the weight of opinion behind the neglect or dismissal of ethical positivism.

Some of the most interesting debate centres round whether Hart, or any theorist seeking to build on his insights, was right to opt for soft positivism in response to Dworkin's persuasive demonstration that actual legal reasoning seems to involve a great deal of appeal to principles that, to say the least, look moral, and seem to operate in a justificatory way different from how rules operate. Hart's easy answer is to say that such norms are legal norms if their use is validated by the rule of recognition, thus maintaining both the 'separation thesis' (that a rule of recognition need not involve moral criteria) and the 'social thesis' (that what counts as law is a matter of social fact).

One argument against a positivist making this concession is that it is not compatible with the basic functions of law, as legal positivists see them. If the point of law is to provide an objective way of settling disputes, coordinating activities, guiding conduct, and so on, law must provide a way of dealing with the moral disagreements that pervade all complex societies. Admitting moral criteria into the rule of recognition undermines this function by bringing back in the very disagreement that law is set up to deal with. In other words legal system are defective in so far as they operationalise soft positivism.[11]

Hart's response, of course, is to say that he is not seeking to distinguish between defective and effective legal systems but to explain the distinctive features of all developed legal systems, and the presence of moral reasoning in actual legal systems cannot be denied.

The trouble with this approach is that it threatens to undermine the claim that every legal system has a rule of recognition for it would appear that the adoption of criteria that invite judges to draw on their own moral judgments seems to be functionally equivalent to saying that, to the extent that they do so, there is no rule of recognition. The social thesis may be preserved by saying that there is general acceptance and approval of judges using their own moral opinions in making legal judgments, but effectively the source of law thereby become judicial subjectivity.

It is considerations of this sort that lead Joseph Raz to adopt hard legal positivism on the basis that only that is compatible with the law's claim to legitimate authority, a claim that depends on seeing law as an objective way of settling disputes, and so on.[12]

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[11] See Scott J Shapiro, 'On Hart's Way Out', in Coleman, ed, op.cit, 149-92 at 177-78: 'Inclusive rules of recognition do not tell judges which moral rules they should apply – they simply tell judges to apply moral rules. These rules cannot give epistemic guidance because judges are left to figure out for themselves what these rules are. Vis-à-vis such rules, they are like ordinary citizens.'

[12] 'Authority, Law and Morality ' 68 *Monist* (1985) 199: 'every legal system claims that it possesses legitimate authority'.

If this line of thought is convincing it puts ethical positivism on the spot. On the Razian line, ethical positivism would seem to be a conceptual truth and therefore to be redundant as a prescription for how legal systems ought to operate. If hard positivism is a conceptual truth it necessarily applies to all legal systems and its recommendations are otiose.

On the other hand, if Hart is right and legal systems do in fact incorporate moral reasoning and this means retreating from the universality of rules of recognition in legal systems, then it seems pointless to criticise actual legal systems for having the wrong sort of rule of recognition if they do not have one in the first place.

However, an ethical positivist need be phased by none of this. In response to Razian conceptualism, either it can be affirmed that claims to legitimacy can be made without being justified, or it can be argued that it is not impossible to conceive of legal systems that make no such claims. If the Razians stick to their position and we want to continue communicating with them, we may be forced into saying that many of the social phenomena that we normally regard as legal systems are not in fact legal systems at all, at least on Raz's perhaps stipulative definition. In which case the prescriptive force of ethical positivism is to urge non-legal systems to become legal ones.

Alternatively, we can interpret Raz as having a theory that is grounded in those beneficial effects of having legal systems to which he draws attention. His own view is that what he is doing is explicating our understanding of law, bringing out what it is that we consider important and distinctive about law. But important for what? If this is important in relation to the desirable consequences of having a legal system, then this seems equivalent to the version of ethical positivism that it is better to see this exercise as identifying the features of a formally good legal system. This turns Raz's conceptual hard legal positivism into a version of prescriptive ethical positivism.

With respect to the other side of the coin, the dissolution of legal positivism through its dilution to soft or inclusive legal positivism, all that the ethical positivist need do is to accept that being 'legal' can be a matter of degree. If there is no rule of recognition then we cannot envisage anything that anyone would be likely to describe as law, but weak and partial rules of recognition can provide sufficient basis for discerning elements of law in a formally imperfect legal set up.

The ethical positivism can therefore be seen as making one or both of two sorts of recommendation about such partially legal systems. Either that it would be good if the rule of recognition was improved, or it would be good thing if a legal system were brought into operation.

This may seem to render ethical positivism ambiguous as between its statements that certain legal systems are formally defective, and its statements that the postulated 'legal systems' are not in fact legal systems at all. These may be seen as simply alternative ways of saying the same thing. However, some theorists think that there is something at stake in choosing between the conceptual alternatives of saying that moral reasoning in legal context can be part of a legal system and saying that it cannot. Indeed it is claimed that Hart himself is very much committed to saying that it

is not, so as to maintain a clear distinction between what laws ought to be and what they actually are, from the moral point of view.

This, of course, runs counter to Hart's statement in the Postscript that his theory 'is morally neutral and has no justificatory aims'[13] but Liam Murphy argues persuasively that Hart is morally evaluative when it comes to espousing a particular conception of law (although not in relation to substantive matters of law). According to Murphy, Hart's methodology is political with respect to just this conceptual preference for excluding moral argument as a source of law because it diminishes our capacity to accept that bad laws exist and ought to be changed. In Murphy's terminology what amounts to soft legal positivism encourages 'quietism'. Murphy denies that Hart's model of law as a combination of primary and secondary rules is itself evaluative, for it can accommodate undoubtedly evil legal systems, but he points to the evidence that the early Hart at least commended the sources thesis in his argument with Radbruch over the role of legal positivism in the aftermath of the Nazi regime in Germany. According to Hart, in discussing the punishment of those who took advantage of evil laws, a 'concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issue; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them'.[14] Murphy does not find this particular argument convincing but he does endorse Hart's other argument to the effect that legal positivism encourages us to take a critical moral attitude towards existing law and the methodology in acknowledging that the choice between these competing conceptions of law includes consideration of political consequences of the choice.[15]

This seems to open the way for seeing Hart as an ethical positivist but Murphy does not go that far. The pragmatic argument for not treating moral reasoning as a form of legal reasoning does not take him so far as to condemn the use of moral reasoning in law. He explicitly distinguishes his enterprise from my own in this respect, but allows that 'one might be politically opposed to judges appealing to moral considerations when deciding cases, and if so one would be in favour of a theory of adjudication that disallows this' but this is another matter.[16]

But why not go this step further and take on board the many political considerations that bear on such matters as the separation thesis, the social thesis and the sources thesis? There is no big philosophical step here between accepting moral arguments for the sources thesis and soft positivism (eg Murphy's quietism argument) and accepting arguments for prescriptive hard positivism. Murphy makes an argument for the danger of quietism amongst the population but is dubious about the relationship between legal positivism and judicial conduct. Yet, whether or not the claims of Dyzenhaus, for instance, are empirically controversial, it is as appropriate an enquiry as his own and may provide arguments for or against ethical positivism.[17]

[13] *Concept of Law,* 240.
[14] *Concept of Law,* 211.
[15] Concept of Law, 210. See Murphy 'The Political Question' 387 'Hart follows Bentham. Bentham attacked Blackstone for the spirit of obsequious quietism that seems constitutional in our Author that "will scarce ever let him recognize a difference between what is and what ought to be"' (quoted in Hart 'Positivism and the Separation of Law and Morals', 53-4).
[16] 393.
[17] David Dyzenhaus, *Hard cases in Wicked Legal Systems*, Oxford: Clarendon Press, 1991; see Anton Fagan, 'Delivering Positivism from Evil' in Dyzenhaus, *Recrafting the Rule of Law*, 81-112.

One reason for not taking Hartianism down this road is that it may be lead to a slippery slope towards Dworkinianism, not only because it seems to endorse Dworkin's view that the most plausible form of legal positivism is an interpretive form in which legal positivism is a normative theory that makes law out to be the best that it can be, but also because it commits the positivist to abandon the rule of recognition altogether.

Stephen Perry takes us down the first stage of this slippery slope in his interpretation of Hart as a covert methodological positivist. Perry makes this case both on the negative ground that Hart does not go about gathering the sort of evidence that is necessary for a genuine descriptive-explanatory theory and the positive ground that Hart draws on 'evaluative judgments that have nothing to do with the meta-ethical criteria for assessing theories'.[18] What he has in mind in particular is the 'defects associated with the simple regime of primary rules' that lead to the emergence of systems that involve both secondary and primary rules.[19] This shows, according to Perry that Hart 'is arguing for one conceptualization of social practices over others on the basis of normative argument'.[20]

However, the same data, namely Hart's evident use of evaluative arguments, can equally be used to add a version of ethical positivism to what still remains a basically descriptive argument, albeit one whose point sets the scene for the normative theory. Provided Hart sticks with the separation thesis, that what law is and what law is not are logically distinct questions, he can accept that actual legal systems, which are legal systems because of the operation of some sort of partially effective rules of recognition, vary extensively in the actual rules of recognition that they utilise. He, or his followers, can then go on to give reasons why (and also why not) it may be a good idea to have a rule of recognition that fits the sources thesis, according to which such rules should embody only non-moral criteria. This is to adopt the position Waldron Waldron notes: 'Normative positivism might therefore be read as a position that condemns the inclusive possibility that negative positivism leaves space for.'[21]

This does have resonance of Dworkin's thesis that a legal theory must present law as the best that it can be, but Hart can still insist that that there is a major difference between what may be called the ethical positivist element and the descriptive background in which the normative theory makes sense. In no way does or need Hart claim that descriptively hard positivism applies to all legal systems. This is why Dworkin's argument that Hart's approach and legal positivism generally is flawed because of what he calls the 'semantic sting', that is the fallacy of supposing that law can be defined by listing a selection of criteria that license the use of the word 'law'. Hart may claim that all legal systems have rules of recognition but he is not seeking to set up a rule of recognition for legal systems. His account is a more subtle and diffuse sociological analysis with sociological overtones.

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[18] Stephen Perry, 'Hart's Methodological Positivism' in Coleman, ed, op cit, 311-54 at 315.
[19] Op cit 322.
[20] Op cit 343. Compare Tom Campbell, *The Legal Theory of Ethical Positivism*, Dartmouth 1996, 78-85.
[21] Waldron, 414. The passage goes on: 'what I am calling normative positivism *assumes* what Coleman calls negative positivism (i.e. assumes it as a matter of normative pragmatics – there being no point in commending something that is impossible or conceptually incoherent) but *prescribes* something like exclusive positivism'.

Another of Coleman's criticisms is that normative positivism contradicts its own commitment to separating conceptual and normative issues.[22] This need not be the case, provided that the reason for commending the analysis of law on offer is that it makes it possible to assert the evaluative position that drives the theory.

What Dworkin himself repeatedly does is to fuse and confuses the two question of (1) what is a legal system? and (2) what criteria should judges use in identifying valid law? Sociologists are not judges and judges are not sociologists. The criteria that might be developed for an empirical study of legal systems have no direct connection with the criteria that might be developed in a working rules of recognition. When rules of recognition are devised or revised this does not bring about a new sociological definition it simply changes the rule of recognition. A rule of recognition is not a definition of law, it is a device for identifying which rules or norms are to be accepted as the laws of a particular system. Normative or ethical positivism is not attempting a definition of the world 'law'. Hence 'conventionalism' as a label for such a theory is misleading and the 'semantic sting' does not apply. The semantic sting takes Hart to be giving criteria for the meaning of 'law' rather than explaining what it is to be a legal system. This confuses using a rule of recognition to identify particular rules as laws, and having a rule of recognition for law as a social phenomenon. For the latter purpose his 'rule of recognition' is the union of primacy and second rules, something that could not operate for the former purpose.

When we address the ethical positivist's question of what is the best rule of recognition, we may follow Dworkin's commendation that one which requires the judge to interpret existing legal materials as they best they can be in the light of her own moral values is one that will make for the morally most acceptable political society. But we may argue that such a process will lead to a very unhappy situation in which the advantages of a positivist system of law are lost. The moral view then is that Dworkinianism as applied to judges is a recipe for moral disaster.

What we have here is a straight forward empirical and political disagreement that can be engaged in without banding around competing sociological concepts of law. To recommend the best rule of recognition is not to recommend that that rule of recognition be a Herculean individualist one. We may approve of a political agreement that involved the adoption of a rule of recognition that is best because it enables us to live together in peace despite our moral disagreements. Dworkin misses the full impact of the moral reasons for non-moral legal reasoning. He erroneously believes that because the judge makes the final choice it is his morals that are trumps.

Certainly, ethical positivists may agree with Murphy that 'there is no possible moral order that could make adjudication mechanistic, and thus eliminate the need, in hard cases, for judges to appeal to broader principles of political morality, some of which may have been incorporated into the legal order'[23] but this does not undermine a

[22] Coleman 'the very mistake positivism is so intent on drawing attention to and rectifying'.
[23] Murphy, 393. He goes on 'I also assume that on the best theory of adjudication judicial appeal to principles of political morality that are not incorporated in the legal order should be based on judges' own best judgment, rather than on some speculation about what the community believes; moreover, these appeals to political morality should not be hidden in a sophisticated pretence of formalistic argument'.

commitment to move as far as it is feasible (or desirable) to move in this direction. And the fact that some ‘discretion’ is required does not even entail that this discretion must be exercised by drawing on the judge’s own moral views, and it certainly does not dictate that those moral views must accord precedence to her own morality when it comes to imposing coercive measures on others. What Dworkin comes out with in *Law’s Empire* is a scheme for adjudication that is incompatible with Hartianism either as a basis for describing legal systems (although it seems bizarre that is should be) or if it is used to dictate the content of any rules of recognition that may be left once we have given such an open door to the substantive moral views of individual judges. It may not therefore be possible to agree with Hart that ‘it is not obvious why there should be or indeed could be any significant conflict between enterprises as different as my own and Dworkin’s conceptions of Legal Theory’.[24]

Conclusion

It may be unseemly to squabble over the legacy of Hart’s *Concept of Law* and impertinent to discuss the wisdom of his responses to the Dworkinian onslaught. But it is not a small matter to demonstrate that there is an ethical theory of positivistic legal adjudication that is part of an ethical theory of law that is in tune with important elements in Hart’s theory and to point out the grounds on which he could have adopted it. It is also important to demonstrate that positions such as this are compatible with his own understanding of what he was about, so that good ethical positions on law can be seen as fitting readily into a background of good descriptive and explanatory theory. Within the dry academic debate arising from the Postcript lie very important practical issues. It is important for instance to be able to accept that there are fundamental value judgments to be made about the rule of law, positivistically conceived, that are not imperialistic in threatening to invade and take over reasonable disagreement about the proper content of law from the political process. It is important to know that judges may be allowed a modicum of moral independence in the interpretation of law without making ourselves vulnerable to the very broad scope of Dworkinian judges. Hart, and some of his followers, such as Schauer and MacCormick provide an important service in retaining the intelligibility of making decision in accordance with law in a way that excludes direct application of moral judgment. This gives us a come intellectual confidence in expressing political views about judges that seek to provide them with only a limited role in the law-making that goes on within democratic systems.

[24] Hart, *The Concept of Law*, 2nd edn, Oxford: Clarendon Press, 1994, 241.