PROFESSOR H. L. A. HART'S CONCEPT OF LAW

ROBERT S. SUMMERS*

I

INTRODUCTION

THIS ARTICLE is a critical exposition of *The Concept of Law*,[1] a book by H. L. A. Hart, Professor of Jurisprudence at the University of Oxford. Published in 1961, *The Concept of Law* is surely the most important book in the field of analytical jurisprudence to appear for many years. In this book, Professor Hart for the first time attempts to state his views on many of the traditional problems of legal philosophy in a comprehensive and systematic way. In preparing this article, I have drawn on writings of Professor Hart that antedate publication of *The Concept of Law*,[2] and have also drawn

* B.S. 1955, University of Oregon; Fulbright Scholar, University of Southhampton, England, 1955-56; LL.B. 1959, Harvard University. Associate Professor of Law, University of Oregon; Visiting Associate Professor of Law, Stanford University, 1963-64; Member, Oregon Bar.

While preparing this article, the author profited from conversations and correspondence with several philosophers, including Frank Ebersole, University of Oregon, and Herbert Morris, University of California at Los Angeles. Responsibility for error or misjudgment, however, remains solely the author's.

[1] (1961). Oxford University Press, 261 pp. All page references in the text of this article are to THE CONCEPT OF LAW. The notes to each chapter, pp. 232-257, are an important feature of the book. For criticisms of Professor Hart's use of the "notes" device, see Blachshield, *Hart's Concept of Law*, 68 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 329, 331 (1962).

[2] In addition to THE CONCEPT OF LAW, Professor Hart's writings in legal philosophy include the following: On philosophy of law generally, *Introduction* to JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE (1954); *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957); *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37 (1954); *Dias and Hughes on Jurisprudence*, 4 J. SOC. PUB. T.L. 142 (1957); *Legal and Moral Obligation*, ESSAYS IN MORAL PHILOSOPHY 82 (Melden ed. 1958); *Philosophy of Law and Jurisprudence in Britain* (1945-1952), 2 AM. J. COMP. L. 355 (1953); *Positivism and the Separation of Laws and Morals*, 71 HARV. L. REV. 593 (1958); *Scandinavian Realism*, 1959 CAMB. L.J. 233; *Theory and Definition in Jurisprudence*, Supp. Vol. 29 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY [hereinafter cited as P.A.S.] 213 (1955). On the subject of causation in the law, HART & HONORÉ, CAUSATION IN THE LAW (1959); *Causation in the Law*, 72 L.Q. REV. 58, 260, 398 (1956). On the jurisprudence of criminal law, PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY (1961); *Acts of Will and Responsibility*, JUBILEE LECTURES OF THE FACULTY OF LAW, UNIVERSITY OF SHEFFIELD 115 (Marshall ed. 1960); *Immorality and Treason*, 62 THE LISTENER 162 (1959); *Legal Responsibility and Excuses*, DETERMINISM AND FREEDOM 81 (Hook ed. 1958); *Murder and the Principles of Punishment: England and the*

on some of the reviews of the book that have appeared in law and philosophy journals.

Unlike many legal philosophers, Professor Hart is a professional philosopher as well as a lawyer.[3] After receiving a B.A. degree in philosophy from Oxford, he studied law, and in 1932, was admitted to the bar. Thereafter he practiced law for nine years as a chancery barrister before becoming associated with the British War Office where he remained during World War II. Following the war, he taught philosophy at New College, Oxford until 1952 when he was appointed Professor of Jurisprudence in the University of Oxford.[4] Many scholars would agree that during the past decade no one has done more original and illuminating work in the field of Anglo-American jurisprudence than Professor Hart. During this period, he adumbrated the central ideas of *The Concept of Law* in a number of articles and essays. With A. M. Honoré, he wrote *Causation in the Law*,[5] a book that appeared in 1959 and was very well received by both lawyers and philosophers. He also, during this period, visited the United States twice, lecturing widely while here.[6]

United States, 52 NW. U.L. REV. 433 (1957); *Negligence, Mens Rea and Criminal Responsibility*, OXFORD ESSAYS IN JURISPRUDENCE 29 (Guest ed. 1961); *Prolegomenon to the Principles of Punishment*, 60 P.A.S. 1 (1960); *Should The Death Penalty Be Abolished?*, 55 THE LISTENER 87 (1956); *The Use and Abuse of the Criminal Law*, 4 OXFORD LAWYER 7 (1961).

For his book reviews, see DEL VECCHIO, JUSTICE (1952), 28 PHILOSOPHY 348 (1953); FRANK, LAW AND THE MODERN MIND (1949), 60 MIND 268 (1951); HAGERSTROM, INQUIRIES INTO THE NATURE OF LAW AND MORALS (1953), 30 PHILOSOPHY 369 (1955); KANTOROWICZ, THE DEFINITION OF LAW (1958), 69 PHIL. REV. 270 (1960); KELSEN, THE COMMUNIST THEORY OF LAW (1955), 69 HARV. L. REV. 772 (1956); LLOYD, INTRODUCTION TO JURISPRUDENCE (1959), 77 L.Q. REV. 122 (1961); WASSERSTROM, THE JUDICIAL DECISION (1961), 14 STAN. L. REV. 919 (1962).

[3] His technical philosophical writings include the following: *A Logician's Fairy Tale*, 60 PHIL. REV. 198 (1951); *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955); *Decision, Intention and Certainty*, 67 MIND 1 (1958); *Is There Knowledge by Acquaintance?*, Supp. Vol. 23 P.A.S. 69 (1949); *Signs and Words*, 2 PHIL. Q. 59 (1952); *The Ascription of Responsibility and Rights*, 49 P.A.S. 171 (1949). Acknowledgments of indebtedness to Professor Hart appear in the prefaces of several recent books of importance in philosophy. See HAMPSHIRE, THOUGHT AND ACTION (1959); HARE, THE LANGUAGE OF MORALS (1952); and STRAWSON, INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS (1959). It is also a tribute to Professor Hart's standing as a professional philosopher that during 1959-60 he was President of the Aristotelian Society, a leading organization of professional philosophers in England.

[4] Over the past one hundred years, the chair of jurisprudence now held by Professor Hart has been held by six other men, including Sir Henry Maine, Sir Paul Vinogradoff, and Sir Frederick Pollock.

[5] (1959). Oxford University Press, 454 pp. For an exceptionally fine review of this book, see Hancock, Book Review, 6 NATURAL L.F. 143 (1961).

[6] In 1956-57, he was a visiting professor at Harvard Law School, and during the fall

In *The Concept of Law* we find the influence of Oxford "linguistic" philosophers.[7] Professor Hart not only puts to good use some of their characteristic techniques of analysis, but also stresses the importance of rules in social life. Of the latter, Professor Hart has said that it has been "only since the beneficial turn of philosophical attention towards language that the general features have emerged of that whole style of human thought and discourse which is concerned with rules . . . ."[8] In *The Concept of Law* we also encounter the influence of an idea prominent in Scandinavian legal philosophy: the idea that there is an important distinction to be drawn between "external" and "internal" points of view toward rules.[9] Professor Hart also advances a novel version of Natural Law that he attributes largely to conversations with the late G. A. Paul of Oxford.[10] The book also reflects the influence of two great analytical jurists: John Austin and Hans Kelsen.[11] However, much of the book is devoted to criticism of the views of these men as well as to criticism of other legal philosophies, especially legal realism.[12]

---

semester of the 1961-62 academic year, he was a visiting professor at the University of California at Los Angeles. At Harvard, he taught a course in jurisprudence in the law school, and, during the spring semester, taught a course and a seminar in the Department of Philosophy in Harvard College. For a description of the jurisprudence course, see Shuman, *Harvard's Jurisprudence Year,* 8 HARV. L.S. BULL. 8 (1957). For interesting reflections on his year in America, see Hart, *A View of America,* 59 THE LISTENER 89 (1958).

During his visits to the United States, Professor Hart delivered lectures at numerous universities, including Yale, New York University, Brown, Wisconsin, Northwestern, Illinois, Duke, University of North Carolina, University of California at Berkeley, University of Washington, University of Oregon, University of British Columbia, and Stanford. A highlight of these appearances occurred on November 17, 1961, when he debated Hans Kelsen before a large audience at the University of California at Berkeley. See Hart, *Kelsen Visited,* 10 U.C.L.A. L. REV. 709 (1963).

[7] On contemporary English philosophy generally, see the following: THE REVOLUTION IN PHILOSOPHY (intro. by G. Ryle, 1957); URMSON, PHILOSOPHICAL ANALYSIS, ITS DEVELOPMENT BETWEEN THE TWO WORLD WARS (1956); WARNOCK, ENGLISH PHILOSOPHY SINCE 1900 (1958); Weitz, *Oxford Philosophy,* 62 PHIL. REV. 187 (1953); and a very good popularization by Mehta, *Onward and Upward with the Arts,* NEW YORKER, Dec. 9, 1961, p. 59. For an interesting description of the way philosophy is taught at Oxford, see Hare, *A School for Philosophers,* 2 RATIO 107 (1960).

Major philosophers who have significantly influenced Professor Hart and many of his colleagues are G. E. Moore (1873-1959), Ludwig Wittgenstein (1889-1951), and J. L. Austin (1911-1960). Moore and Wittgenstein taught at Cambridge, Austin at Oxford.

[8] Hart, *Definition and Theory in Jurisprudence,* 70 L.Q. REV. 37, 60 (1954).

[9] See especially Wedberg, *Some Problems on the Logical Analysis of Legal Science,* 17 THEORIA 246, 252 (1951).

[10] See the preface to THE CONCEPT OF LAW (1961).

[11] See especially JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE (1954 ed.); KELSEN, GENERAL THEORY OF LAW AND STATE (1961 ed.).

[12] See also Hart, Book Review, 60 MIND 268 (1951).

Professor Hart thinks of *The Concept of Law* as a synthesis of his answers to three basic questions: "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) I have divided my presentation and criticism of Professor Hart's answers to these questions into four parts: Nature of a Legal System, Existence of a Legal System, Law and Morals, and Justice. In a further and final part of this article, I have described and illustrated some of Professor Hart's methods of analysis.

II

Nature of a Legal System

Professor Hart claims to have found the key to the science of jurisprudence in what he calls the "combination of primary and secondary rules." (79) His view that law consists largely of rules has also been held by those who have claimed to have found the key to the understanding of law in coercive commands and by those who have claimed to have found it in the relation of law to morality and justice.[13] Thus the revelation that law is largely an affair of rules should startle no one. It is one thing, however, to see that rules are central; it is quite another thing to make use of this fact, as Professor Hart does in *The Concept of Law,* to illuminate the distinctive structure of law and to elucidate such basic legal concepts as sovereignty, legal validity, and obligation.

In *The Concept of Law,* Professor Hart carefully analyzes the notion of a social rule. He distinguishes rule-governed behavior from habitual behavior, and distinguishes legal rules from standards and from orders backed by threats. He also illuminatingly compares legal rules and moral rules, a topic to be considered in Part IV of this article.

An important feature of social rules can be brought out by comparing behavior according to rules with habitual behavior. To the "external" observer, these types of behavior are indistinguishable, for to him each appears to be regular and uniform. Professor Hart stresses, however, that rules, unlike habits, also have an "internal aspect"; from the "internal point of view" of those who abide by them, rules are generally regarded as reasons or justifications for

[13] What follows in the remainder of this part of the paper is set forth in detail in chs. 2-6 of The Concept of Law.

action, and violations thereof are generally open to criticism. Thus, for Professor Hart, rules are "normative"; habits are not. This means, among other things, that rules can confer rights or authority; mere habits cannot.

A legal rule may be thought of, therefore, as a "standard" of behavior to which people are supposed to conform.[14] There is another use of the word "standard" known to legal thinkers. Thus we sometimes speak of "due care" and "commercial reasonableness" as standards. Such standards are typically vague and may be applied to highly variable states of fact. Professor Hart says standards are necessary in our law because, in view of the highly variable nature of possible combinations of circumstances, it is not always possible to identify in advance the relevant features of cases to which *rules* might be applied. A formulation incorporating a highly vague standard applicable to unique states of fact is not, in Professor Hart's terms, a rule but is, instead, a standard. Others might say that such a formulation is, nonetheless, a rule, though a very indeterminate one.

According to one tradition of jurisprudence, legal rules are essentially orders backed by threats. And there is an analogy here. One who threateningly orders another to do something renders the latter's conduct in some sense "non-optional" or "obligatory," and, where there is law, human conduct is similarly made in some sense non-optional or obligatory. But Professor Hart takes pains to distinguish legal rules from orders backed by threats. Rules, he tells us, apply to classes of persons and to general courses of conduct. Orders are ordinarily individuated, face-to-face directives enjoining particular courses of conduct. Orders are also ordinarily temporary in duration—their point is gone once they have been executed. But rules of law are of a more enduring character—*continued* adherence to them is the very point of their existence. Orders customarily apply only to the "orderee," whereas legal rules usually apply to the lawmaker as well. Orders are deliberate acts. Some legal rules, e.g., those consisting of or based on custom, do not always come into existence as a result of a single, deliberate act.

For Professor Hart, perhaps the most significant differences between legal rules and orders are these: (1) orders direct people to do or refrain from action, but many legal rules do not do this—

[14] For an illuminating discussion of Professor Hart's views on standards, see Morris, Book Review, 75 HARV. L. REV. 1452 (1962).

instead they empower people to act in various ways, e.g., to legislate, to make wills and to make contracts; and (2) orders connote the threat of a sanction for non-compliance, but failure to comply with many legal rules is not followed by the imposition of sanctions. For example, the effect of failure to comply with the Statute of Wills is nullity. Many other examples could be cited. Of course, though the importance of sanctions has often been exaggerated, they do have their place in a system of law. They serve, says Professor Hart, "not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not." (193)

Professor Hart argues that legal rules are normative, that they may be thought of as differing from standards such as "due care," and that they cannot be plausibly viewed even as *general* orders backed by threats. In comparing legal rules with orders, he has highlighted the important distinction between the type of rule that directs people to act or refrain from acting, and the type of rule that empowers people to do such things as legislate and make wills and contracts. He generally marks this distinction between these two types of rules by using the terms "primary" and "secondary" respectively. What he calls a "union" of these two types of rules constitutes for him the "heart" of a legal system.

In Professor Hart's scheme, primary rules are "rules of obligation," *i.e.,* rules that impose duties. As examples of such duties, he cites those imposed by criminal and tort law, and says that under such rules "human beings are required to do or abstain from certain actions, whether they wish to or not." (78) He contrasts legal obligations arising under primary rules with the notion of being "obliged to" do something for fear of a sanction, and with the legal realists' predictive theory of obligation. The principal factors that make a rule conceived and spoken of as imposing an obligation are (1) the "inner" point of view that human beings take toward it, *i.e.,* their general demand for conformity to the rule, and (2) the serious social pressure human beings bring to bear on those who deviate or threaten to deviate. Obligation does not, however, consist essentially in *feeling* "obliged to" act or refrain. Professor Hart points out that there is no "contradiction" in saying of some hardened swindler that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so. "To *feel*

obliged and to have an obligation are different though frequently concomitant things." (86)

The legal realists' predictive theory of obligation, according to which a person has an obligation if and only if "hostile reaction" to deviation is predictable, distorts the characteristic "internal" use of statements of obligation which is not to predict but to say that a person's case falls under a rule. The predictive theory limits itself to the "external" point of view towards rules which is, in turn, limited to the outward, observable regularities of social behavior. According to Professor Hart, this view simply cannot reproduce the way rules of obligation function in the lives of those who live under the rules and use them as guides to conduct *and* as the bases for claims, demands, admissions, criticism, or punishment.

I have explained the substance of Professor Hart's analysis of obligation and have explained that his "primary" rules are rules of obligation which impose duties, *i.e.,* require people to do or abstain from certain actions, whether they wish to or not. Such rules are to be contrasted with secondary rules under which human beings "may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations." (79) There are several types of secondary rules in Professor Hart's scheme: rules specifying criteria for identification of valid rules of the legal system, rules empowering legislators and courts to legislate and adjudicate, and rules specifying sanctions. In essence, primary rules impose duties while secondary rules "confer powers, public or private." (79)

Conceivably, a society could have primary rules of obligation but no secondary, "power conferring" rules. This appears to be true of some primitive societies. Such a society is held together only by that general attitude of the group toward its own standard modes of behavior (the inner point of view) in terms of which Professor Hart has characterized rules of obligation. Because of the nature of human beings and because of the nature of the human condition, we would expect to find that in such a society its rules of obligation consist largely of rules restricting the free use of violence, theft, and deception. Humans are tempted to such conduct, and these temptations must be repressed if they are to live together in society. But even if such rules were adhered to, such a society would, says Professor Hart, have to be small and closely knit. Under any other conditions, such a simple form of social control would prove defec-

tive in several important ways. In what might be viewed as the most original part of *The Concept of Law,* a part that extends over only seven pages, (89-96) Professor Hart identifies the ways in which such a simple form of social control would be defective and advances his thesis that these defects are to be remedied by the introduction of what he calls secondary rules. The introduction of such rules is, in his words, to "be considered a step from the pre-legal into the legal world." (91)

In the first place, in a regime of primary rules doubt might arise as to whether a rule is a rule of the regime. In modern systems, such doubts are resolved by reference to what Professor Hart calls a "rule of recognition." This rule specifies criteria for identifying which rules are to count as rules of the system. But since such a rule is not a duty-imposing rule, not a primary rule of obligation, it cannot, by hypothesis, exist in the simple regime of primary rules. The effect of this is that in such a regime there may be persistent *uncertainty* as to what the rules are. By introducing a rule of recognition, this defect is remedied; moreover, the primary rules of obligation are given a common or identifying mark and thus come to form a system.

Professor Hart stresses that the puzzling concept of legal validity is to be analyzed in terms of the use by officials of the system of a rule of recognition specifying criteria by which the rules of the system are to be identified. Others have sought to analyze this concept in terms of whether the rules in question constitute commands of a sovereign habitually obeyed. Professor Hart shows that the simple notion of a habit cannot yield the concept of legal validity. It cannot account for the persistent validity of laws long after their sovereign creator has died. Nor can it account for the continuous validity of laws following the onset of a new sovereign who has not been sovereign long enough for habits of obeying him to develop. The persistent and continued validity of laws can only be explained in terms of the acceptance and use of a rule identifying the criteria of valid laws.

Professor Hart acknowledges that in modern systems the rule of recognition is highly complex, and is seldom formulated as such. He shows, too, how the "sources of law" idea is to be explained. The criteria of legal validity may take one or more of a variety of forms such as reference to an authoritative text, to legislative enactment, to past decision, to customary practice, or to general declara-

tions of a specified person. Ordinarily, these criteria are hierarchically ordered in the rule of recognition. Some criteria supersede others in cases of conflict.

A second major defect of the simple regime of primary rules of obligation is that the regime is static—there is no way to introduce new rules or change old ones. In modern systems, there are secondary rules conferring powers on officials, e.g., legislators, and on private individuals, e.g., contracting parties, which enable these people to introduce new rules and change old ones. But since such secondary rules are not duty-imposing rules, not primary rules of obligation, they cannot, by hypothesis, exist in the simple regime. The effect of this is that the regime is highly *static*—each individual merely has fixed obligations to do or abstain from certain things. The remedy for this defect is the introduction of "rules of change": rules which empower people to legislate and to enter private transactions for the purpose of varying their rights and duties.

Professor Hart claims that the concept of legislation can be best elucidated in terms of secondary rules of change. Legislatures are creatures of law. Accordingly, he suggests that the institution of a legislature can be reduced to rules for the identification of legislators, rules specifying the manner of legislation and rules circumscribing the scope of legislative power.

The third major defect of a simple society "governed" solely by primary rules is that in such a society there is no agency specially empowered to ascertain finally and authoritatively the fact of violation of primary rules. In modern legal systems, secondary "rules of adjudication" empower courts to make such determinations and to apply sanctions. But since such secondary rules are not duty-imposing rules, not primary rules of obligation, they cannot, by hypothesis, exist in the simple regime. As a result, there is unresolvable *uncertainty* as to the applicability of primary rules and an inefficient diffusion of the social pressure by which such primary rules are maintained. The remedy for this defect is the introduction of secondary "rules of adjudication," rules empowering persons authoritatively to apply rules and sanctions.

Professor Hart claims that the concept of adjudication can be best elucidated in terms of secondary rules of adjudication. He views courts as creatures of law, and sometimes appears to suggest that the institution of a court can be reduced to secondary rules of

adjudication specifying qualifications for judges, conferring jurisdiction, prescribing procedure, etc. (94, 29)

We can now see what Professor Hart means when he speaks of a *union* of primary and secondary rules. By introducing into a regime of primary rules such secondary rules as rules of change, rules of adjudication, rules relating to sanctions, and a rule of recognition, a "union" of primary and secondary rules is formed in two ways. First, the sheer introduction of such rules into the regime is a combination or "union" of these rules with primary rules. Secondly, the secondary rule of recognition "unites" all the rules of the regime in that all satisfy the criteria of validity specified by this rule.

For Professor Hart, this "union" of primary and secondary rules is at the "centre" of a legal system. He admits, however, that it is not the whole, and says that "as we move away from the centre we shall have to accommodate . . . elements of a different character." (96) Though Professor Hart is not entirely clear about this, it appears that the other "elements" to which he refers include (1) the "open texture" of legal rules and (2) the distinctive relationships of law to morality and justice. The latter topic will be considered in Part IV of this article. Professor Hart recognizes the open texture of legal rules as an additional element in a system of law apparently because he is aware that rules alone do not solve all legal problems. Rules are "open textured"; they have a penumbra of uncertainty. At the borderlines, officials must take into account a variety of factors to determine what should be done. This is a fact that has led some legal realists to become highly skeptical of the very existence of rules, a view which Professor Hart ably criticizes.[15]

So much for Professor Hart's picture of a legal system. In an article such as this it is of course not possible to do justice to the richness and complexity of Professor Hart's analysis. I believe, however, that I have fairly summarized his view of the nature of a legal system. Now for criticism.

Criticism of a work such as *The Concept of Law* is difficult for two reasons. First, the work is on the whole very well done; thus the critic must often be reduced to comments that to some may seem insignificant. Secondly, there is difficulty in identifying relevant and fair standards of criticism. I have sought to solve this second difficulty by focusing on Professor Hart's own statements of purpose and claims for his analysis and also by analyzing his criticisms of

[15] See especially ch. 7.

others to determine what standards he considers appropriate. In this section of this article, my criticisms consist first of an effort to show that Professor Hart has claimed too much for his union of primary and secondary rules, and secondly, of an effort to show that Professor Hart is himself guilty of some of the same "reductionist" tendencies for which he sometimes criticizes others.

Professor Hart does not claim that his union of primary and secondary rules is to be found wherever there is a regime called law. He does, however, claim that:

> If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.
>
> Not only are the specifically legal concepts with which the lawyer is professionally concerned, such as those of obligation and rights, validity and source of law, legislation and jurisdiction, and sanction, best elucidated in terms of this combination of elements. The concepts (which bestride both law and political theory) of the state, of authority, and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated. (95)

But is it a *combination* of primary and secondary rules that enables Professor Hart to clarify such basic and important concepts as legal validity and obligation? He *uses* only the notion of a "primary rule" to elucidate the concept of obligation. He *uses* only the notion of a "rule of recognition" to elucidate the concept of legal validity. In fact, he does not use a *combination* of primary and secondary rules to elucidate any specific concepts.[16]

Moreover, it seems appropriate to say that what is both important and relatively new in Professor Hart's approach to the analysis of such basic concepts as legal validity and obligation is his use of the distinctions between internal and external points of view toward standards of behavior and internal and external statements about rules. At one point, he appears to admit as much. (96)

To me, the chief merit of Professor Hart's analysis of law as a union of primary and secondary rules is this: by setting forth a pic-

[16] Professor Hart might mean only that one or the other of the two types of rules is needed to elucidate *specific* concepts such as obligation and legal validity. See HART, THE CONCEPT OF LAW 151. If this is his point, it should not, for the reasons given in the text, be made by stressing the union of primary and secondary rules. This union, in his analysis, is relevant only to the elucidation of the *general* concept, the "Legal System."

ture of a regime of primary rules with all its defects of uncertainty, staticity, and inefficiency, and by introducing "secondary" rules to remedy these defects, Professor Hart throws into bold relief the distinctive contribution of secondary rules and the distinctive contributions of different secondary rules to social life under law.

As Professor Hart moves away from the center of the legal system to accommodate elements of law other than rules, he comes across the "open texture" of rules and the distinctive roles of morality in the legal order. But should these features be thought of as "elements" of a legal system? For one thing, most rules, legal or otherwise, are open textured.[17] Isn't it better to think of open texture simply as a characteristic of the rules rather than as another "element" of law? So far as morality is concerned, though it is true that law and morality are variously related, this is also true of law and other social phenomena. Why single morality out as another "element" of law that must be accommodated as we move away from the center of the legal system? It would seem worthwhile for Professor Hart to make clear what he means by "element" of law. Of course, I am not suggesting that the open texture of law and the relationships of law to morality do not deserve consideration in a study of the concept of law. My only objection is to Professor Hart's characterization of the way these phenomena fit into his picture.

"Reductionism" has long been familiar in legal philosophy, and Professor Hart is aware of the risks of distortion that accompany it. Thus, for example, we find him criticizing Kelsen and others for trying to reduce all consequences of non-compliance with rules to one single form: the imposition of sanctions. This, he points out, obscures the distinctive character of nullity as a concomitant of non-compliance with some rules. (33) Thus to be in the position of charging Professor Hart with reductionism seems somewhat paradoxical. The paradox is even greater in view of the severely anti-reductionist tendencies of much contemporary Oxford philosophy. It has been said that Oxford philosophers have made a cult of Bishop Butler's dictum: "Everything is what it is, and not another thing."[18]

Can laws be reduced to rules?[19] The anti-reductionist might

[17] Perhaps it is better to think of terms within the rules as open textured.

[18] See the title page in G. E. MOORE, PRINCIPIA ETHICA (1956 ed.).

[19] Professor Hart does not specifically say that *laws* can be reduced to rules, and I do not mean to imply this by my question. He does, however, frequently speak of laws as rules. More important, Professor Hart does not say that *law* can be reduced to rules; he stresses that law involves other "elements" as well, though he does not fully consider what these are.

say: "No, laws are laws, not rules." In support of his case, he might point out that while laws have much in common with rules, e.g., rules of games, laws are also very different from such rules (and a fortiori different from other kinds of rules). Laws are made, changed, interpreted, and applied in ways characteristic only of laws. Moreover, the anti-reductionist might point out that there are risks of distortion in thinking of laws as rules. This way of looking at laws invites identification of laws with rules such as rules of games. Playing a game is very different from life under law, notwithstanding adherents of the sporting theory of justice. Games are for fun; law is not. This means that many of the considerations affecting the formulation of rules of games will differ radically from the kinds of considerations affecting the formulation of laws. Finally, much of our life under law cannot be reasonably thought of in terms of an analogy to rules. Not only must "standards" of discretion be "accommodated," but a place must likewise be made for orders: judicial orders, executive orders, legislative orders—all of which have the force of law.[20] And what of the voluminous regulations of administrative agencies? And what of general "principles" such as the principle that one should not unjustly benefit at another's expense? Are orders rules? Are regulations rules? Are principles rules? Each is a part of law. Perhaps law is law, and not another thing.

Can all rules be reduced to two classes: primary or "duty-imposing" rules and secondary or "power-conferring" rules? The rules Professor Hart calls primary rules do all appear to be duty-imposing rules. But the rules he calls secondary are certainly not all power-conferring rules. Thus, for example, his rule of recognition does not confer power, but rather specifies criteria.[21] Many of the rules that he says "lie behind" courts do not *confer* power. This is true of rules of procedure and rules of evidence. "Confer" is an active verb. Rules specifying the way a valid will is to be made do not *confer* power. There are, however, "true" power-conferring rules, rules of jurisdiction and constitutional rules conferring legislative power.

Perhaps secondary rules have nothing in common as a class, ex-

[20] Hans Kelsen has argued that it is misleading to characterize law in terms of rules precisely because such a characterization cannot account for judicial orders. See KELSEN, GENERAL THEORY OF LAW AND STATE 38 (1961 ed.). See also Singer, *Hart's Concept of Law*, 60 J. OF PHILOSOPHY 197, 210 (1963).

[21] See Cohen, Book Review, 71 MIND 395, 408 (1962).

cept that they are non-duty imposing rules.[22] But Professor Hart suggests that such rules may be reduced to a single type also because they are alike in that the legal effect of non-compliance therewith is nullity. This may be disputed. The result of failure to comply with the Statute of Wills *is* nullity. But judgments in excess of jurisdiction stand until quashed. (Professor Hart acknowledges this, but calls it a "complication.") Unconstitutional statutes are given effect until declared unconstitutional. Void marriages are not always void *ab initio*.

Before we turn to the next point, it should be observed in fairness to Professor Hart that, in his view, a "full detailed taxonomy of the varieties of law . . . still remains to be accomplished." (32) He also acknowledges that his categories of "duty-imposing" and "power-conferring" rules are "very rough." (32) This being true, he might well have chosen a different terminology.

Can Professor Hart's secondary rules be reduced to three types: a rule of recognition, rules of change, and rules of adjudication? Within his scheme of secondary rules, Professor Hart does not consistently identify the rules specifying sanctions as separate from rules of adjudication. The former are independent of the latter. Although in most modern legal systems the same body has the power both to adjudicate and to direct the application of sanctions, this need not be the case. Further, the functions of these two types of rules differ significantly, and for Professor Hart the test for a difference in type is a difference in function. (38) Rules of adjudication cure the defects of uncertainty and inefficiency that result from the absence of an authoritative mechanism for resolving doubts about the applicability of rules. Rules specifying sanctions have the effect of centralizing and ordering the administration of force and other forms of pressure. In the absence of an official monopoly of sanctions, widespread use of self help would be inevitable, and this in turn would result in violence.

Can the various criteria for identifying valid rules of the system be reduced to and formulated as a single "rule of recognition"? Professor Hart speaks sometimes of *a* rule of recognition and sometimes of *rules* of recognition. The latter formulation is preferable.

[22] Even this is questionable. Arguably, some secondary rules, e.g., rules conferring jurisdiction, not only confer power but also impose duties. Professor Hart does not explain precisely how *official* duties arise. Nor does he account for the important fact that "misexercises" of private powers are seldom thought of as breaches of legal duties, while "misexercises" of public powers often are thought of in this way.

He warns against distorting the character of aspects of law in modern systems. (67) The effect of trying to reduce to one rule the various criteria of legal validity in the United States would surely be either a gross distortion or a rule so general as to be of little practical value. Secondly, can the various sources of law in a legal system such as that of the United States be reduced to the form of an ordered hierarchy? Yes, this is possible, and the order would be something like this: constitutional rules, legislation, case law, etc. There is no harm in setting up this logical structure, provided it does not lead anyone to think that the most common relationship between these sources is one of conflict in which one source must give way to a superior source. In fact, the relationship is much more often one of "co-operation" in which several non-conflicting sources of law are relevant to the solution of the legal problem at hand.[23]

Can courts, legislatures, administrative agencies, prosecuting agencies, and the police, be reduced to rules? We have seen that Professor Hart believes that such legal institutions are creatures of law and that he tends to think of legal institutions only in terms of certain rules which "lie behind" them. Thus he reduces courts to such rules as those that confer jurisdiction, specify procedure, etc. But perhaps Professor Hart really needs at least two basic concepts: the concept of rule, and the concept of institution. There is some evidence that earlier in the development of his thought he was inclined to find parallel places for these two concepts. Thus, in 1955, he said:

> It is worthwhile perhaps just reminding ourselves of the complexity of the notion of a legal system by listing the main elements which are present in the standard case of a municipal legal system of an advanced modern society.
>
> (1) Courts.
> (2) Rules conferring jurisdiction on Courts and providing for the appointment and conditions of tenure of judicial office.
> (3) Rules of procedure of Courts.
> (4) Rules of evidence for Courts.
> (5) Substantive civil laws.
> (6) Substantive criminal law.
> (7) A Legislature.
> (8) Constitutional rules providing criteria valid for the system for the identification of the rules of the system (sources of law).
> (9) Sanctions.
> (10) Possibility of argument.
> (11) Universality of scope.[24]

[23] See Ross, Book Review, 71 YALE L.J. 1185, 1186 (1962).

[24] Hart, *Theory and Definition in Jurisprudence* (Part II), Supp. Vol. 29 P.A.S.

In 1961, Professor Hart's picture of a legal system consists essentially of a union of primary and secondary rules. The "reductive" shift is substantial. Does the process of reduction involve any risks of distortion? First, there is some risk that what is truly primary and what is truly secondary will be inverted. A court, for example, *is* a creature of law in that it can be dissolved into such rules as rules of jurisdiction and procedure. In this sense, the rules may be thought of as primary. But in another sense, what is primary here is the need for an institution to perform a certain function, e.g., the resolution of disputes, a need which courts are introduced to satisfy. Rules alone cannot do the job; and they are only means to the end—they merely specify who is to do the job and how it is to be done. Secondly, if legal institutions are thought of as aggregations of rules, there is some danger that this may "obscure the distinctive characteristics of law and of the activities possible within its framework." (41) Thus, for example, if courts and administrative agencies are compared as functioning institutions we will readily see that administrative agencies typically have much more "leeway" within the legal framework than do courts. This difference is in many ways an important fact and is obscured by viewing courts and agencies not as functioning *institutions* but as aggregations of *rules*. Thirdly, to concentrate on the rules is to obscure the role of the personalities of the officials who administer the system. This may be unimportant in analytical jurisprudence. But Professor Hart *is* interested in how individual officials *can* affect the operation of the system. Possibly there is something in the *spirit* of legal realism. The role of individual officials *qua* individuals is surely significant in the area of what Professor Hart considers the open texture of rules. This domain is worth study if we are to understand life within a framework of law.[25] Fourth, emphasis on the concept of rule rather than on the concept of a functioning social institution may, in some cases, obscure the true character of "legal" action. Some actions of legal institutions are, in a sense, beyond the rules. Thus courts resolve uncertainties in the "rule of recognition." When

239, 252 (1955). It is to be noted, too, that Professor Hart himself sometimes uses the word "institution," however generally disdainful of it he may be. The word appears at least once even in THE CONCEPT OF LAW (at p. 94). See also THE CONCISE ENCYCLOPEDIA OF WESTERN PHILOSOPHY AND PHILOSOPHERS 200 (Urmson ed. 1960); Hart, Book Review, 70 L.Q. REV. 115, 118 (1954).

[25] For illuminating comments on what might be called the "rule" and the "non-rule" approaches to the description of life under rules, see BENN & PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 236 (1959).

this involves a judgment that the court itself has power to decide, and when there is no higher court of appeal, we should here view the court's action as that of a social institution successfully bidding for power rather than as the action of a creature of law dissolvable into rules of jurisdiction. (144-50)

III

Existence of a Legal System

In *The Concept of Law,* Professor Hart does not attempt to answer the question—what is law?[26]—though efforts are made to answer this question in virtually all texts on jurisprudence. Rather, he analyzes the concept of a legal system in the manner just set forth. It is one thing to provide such an analysis and quite another to explain what is involved in an assertion that a legal system exists in a particular society. Professor Hart distinguishes between these two problems, and separately undertakes the task of specifying necessary and sufficient conditions for the existence of a legal system (108), a task that is not undertaken in texts on jurisprudence.

If, in a particular society, there were no secondary rules but only primary rules of obligation, would a legal system exist? To this question, Professor Hart's answer is no. Such a body of rules would not constitute a system, but would be a mere "set" of rules. To constitute a system, there would at least have to be a secondary rule of recognition "uniting" the primary rules. A "set" of primary rules alone would "exist" if (and only if) the citizens viewed these rules from the internal point of view, *i.e.,* only if such rules were consciously regarded as standards of behavior and deviations therefrom were subjected to criticism. If this internal point of view were not widely disseminated, there could not, according to Professor Hart, "logically" be any rules of obligation. (114)

With the introduction of secondary rules, we may not only speak of a system of rules and of the relationship of citizens to secondary as well as to primary rules, but we may also speak of *officials* and of their relationship toward these two types of rules. It is in the "relationships" of citizens and of officials to primary and secondary rules that Professor Hart finds his criteria for the existence of a legal system.

[26] For the view that although Professor Hart expressly denies that he is "defining" law, he is, nevertheless, proposing a "definition" of law, see S. Brown, Book Review, 62 Phil. Rev. 250 (1963).

If the officials of the system, e.g., judges and legislators, accepted and used a complete set of secondary rules, but the citizenry generally disobeyed applicable primary rules of obligation, would such a system constitute an existing legal system? Professor Hart's answer to this question is no. His first "necessary condition" for the existence of a legal system is that the *citizens* must generally *obey* the primary rules of obligation that are valid according to the system's ultimate criteria of validity. In contrast to what is required for the existence of a simple regime of primary rules, however, it is not necessary that the citizenry consciously view such primary rules as common standards of behavior, violations of which are to be criticized. Here the citizenry need not take an "internal point of view." It is enough if they merely obey the rules and for whatever reason: fear of force, calculations of self interest, an unreflecting inherited attitude, etc.

It is not enough, however, for the officials of the system merely to "obey" the secondary rules, for whatever reason. *They* must take an inner view of these rules, and here, in this relationship, we encounter Professor Hart's second "necessary condition" for the existence of a legal system. If the officials of the system identified and used the secondary rules solely because of a fear, for example, that they would be punished if they did not, the system would not be an existing legal system even though the citizenry generally obeyed the primary rules of obligation. Official compliance with the rules must be the result of (1) a conscious acceptance of these rules as common standards of official behavior, and (2) a conscious desire to comply with these standards as such. (113)

Thus, to determine whether a legal system exists, we must inquire whether the primary rules of the system are generally obeyed and we must inquire whether (1) the officials recognize the secondary rules as such and (2) recognize such rules for the right reason. For Professor Hart, the existence of a legal system is therefore a question of fact. Some, like Hans Kelsen for example,[27] have thought that the existence of the secondary rule of recognition was not a question of fact. One virtue of Professor Hart's analysis is that he enables us to see that the existence of secondary rules cannot be settled without making relevant factual inquiries.

Professor Hart recognizes that there are standard and borderline cases of the existence of legal systems. Thus he notes that in such

[27] See KELSEN, GENERAL THEORY OF LAW AND STATE 110-24 (1961 ed.). See Professor Hart's comments thereon in the notes to THE CONCEPT OF LAW at 245.

borderline cases as governments in exile and revolutionary juntas it may be difficult to identify the stage at which a legal system has ceased to exist or has come into being.

How can Professor Hart's analysis of what it is for a legal system to exist be criticized? I have four comments. First, it seems doubtful that anything is gained by specifying what Professor Hart calls "necessary and sufficient" conditions for the existence of a legal system. Surely it is enough for the purposes of analysis and clarification simply to identify the common features of the ordinary cases in which we say a legal system exists. Professor Hart acknowledges that unusual cases might arise, e.g., governments in exile and revolutionary juntas, in which we would still say a legal system exists even though one or the other (or both?) of his "necessary and sufficient" conditions was not clearly met. Professor Hart's use of the language of necessary and sufficient conditions seems more likely to confuse than to clarify analysis of borderline cases.[28]

Secondly, has Professor Hart identified what is commonly present in the standard case of an existing legal system? Do officials of the system comply with the secondary rules because (1) they consciously accept such rules as common *standards* of official behavior and (2) they consciously desire to comply with these rules as such? Graham Hughes has pointed out, and surely it is true, that the desire for honor, respect, and financial, and perhaps personal, security may alone account for the compliance with secondary rules of many officials of the system.[29] How did Professor Hart lapse into this error? Perhaps in his zeal to show the importance of the inner point of view, he has here overstressed it.

Thirdly, Professor Hart does not clearly distinguish between the problem of determining the criteria for the existence of particular rules and the problem of determining the criteria for the existence of the legal system itself. Clearly, for a rule of the system to exist, the system must exist. He frequently says that one of the conditions for the existence of the system is that the primary rules of obligation must be "generally" obeyed by the citizenry. Does this mean that each of the rules must be generally obeyed? If so, one "unobeyed"

[28] In an earlier piece of work, Professor Hart stressed that "there are characteristics of legal concepts which make it often absurd to use in connection with them the language of necessary and sufficient conditions." See Hart, *The Ascription of Responsibility and Rights*, 49 P.A.S. 171, 173 (1949).

[29] See Hughes, Book Review, 25 MOD. L. REV. 319, 330 (1962). See also Morris, Book Review, 75 HARV. L. REV. 1452, 1459 (1962).

rule would undermine the very existence of the system. It seems clear that Professor Hart does not intend this. He seems to mean only that most of the rules must be obeyed by most of the citizens. What, then, is the criterion for the existence of a rule of the system? It seems only necessary that the rule satisfy the accepted rule of recognition. Professor Hart does not point out that to the legal realist this criterion would seem highly unreliable so far as "unobeyed" rules are concerned. And perhaps there *is* no point in saying that a rule exists if it is persistently disregarded.

Fourth, there appears to be an inconsistency between Professor Hart's position that for a legal system to exist the *officials* thereof must take a "critical reflective attitude" toward the rules (an inner point of view), and the position he adopts at a later point in *The Concept of Law* that the "allegiance of *those* who accept the system" may be based on many different "non-moral" considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. "There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so." (198-99) Here Professor Hart might only be speaking of the citizenry and not of the officialdom, but he does not make this clear. It might be, too, that the "critical reflective attitude" of officials of the system should not be classified as a "moral" attitude, but this leads us to the next topic.

IV

LAW AND MORALS

This section is divided into three parts. The first part is a summary of Professor Hart's illuminating comparison of legal and moral rules. The second part consists of a discussion and evaluation of his views on "necessary interconnections" between law and morals. The third part represents an effort to explain and evaluate his reasons for insisting that law and morals should be sharply distinguished.[30]

A. Similarities and Differences

Unlike many legal philosophers, Professor Hart does not compare and contrast "law" and "morals." Rather, he identifies similarities

[30] For further views of Professor Hart on law and morals, see his recent book, LAW, LIBERTY AND MORALITY (1963).

and differences between legal rules that impose duties and that segment of morality consisting of rules that also impose duties. Although such moral rules are not the whole of morality, they are the bedrock of morality, and as rules, they invite comparison with legal rules.[31]

For Professor Hart, the significant similarities between legal and moral rules are the following:[32] both have a common core of content, e.g., both prohibit killing and interference with property. Both are generally believed to be essential to the maintenance of social life or some feature of it, and both generally concern what is to be done or not to be done in circumstances constantly recurring in the life of the group. Within the community there is general demand for conformity to both types of rules, and such conformity ordinarily requires no special skill or intellect. Although conformity to both types of rules sometimes calls for sacrifice, this conformity is generally not a matter for praise, but is "taken as a matter of course." Behind both kinds of rules there is serious social pressure, though of varying kinds. Finally, the vocabulary of rights and duties is common to discussions of both kinds of rules.

Professor Hart suggests several ways in which legal and moral rules imposing duties differ. First, he says that although the status of a rule as a legal rule is unaffected by community attitudes towards its importance, this is not true of a moral rule. It would be "absurd" to think of a rule as a part of the morality of a society even though no one thought it any longer important or worth maintaining. A second difference is that moral rules are immune from deliberate change. There are no moral legislatures or moral courts. However, Professor Hart acknowledges that legal enactments sometimes set standards of honesty that ultimately "raise" the current morality. A third difference is that violations of moral rules are always excusable in those cases in which the violator shows that "he could not help it," while violations of legal rules are not always thus excusable, *i.e.*, liability may be "strict." Fourth, Professor Hart states that unlike the pressure exerted in support of legal rules, the pressure exerted to secure compliance with moral rules characteristically consists of "emphatic reminders of what the rules demand, appeals to conscience, and reliance on the operation of guilt and re-

[31] Moral *ideals* constitute another significant component of morality. See Strawson, *Social Morality and Individual Ideal*, 36 PHILOSOPHY 1 (1961).

[32] See chs. 8-9.

morse . . . ." (175-76) Finally, Professor Hart says that legal rules are identifiable by reference to a basic rule of recognition specifying the criteria for valid rules of the legal system. Moral rules are not thus identifiable.

B. "Necessary Interconnections"

Are law and morals necessarily interconnected? Much of the confusion in discussions of this question stems from failure to clarify what is meant by "necessarily interconnected."[33] One who uses this phrase might intend one or more of several meanings. Thus, for example, he might intend to assert (1) that law in fact embodies moral ideas (a simple assertion of fact), or (2) that law and morals are interdependent (also an assertion of fact), or (3) that law ought to embody morality (a value judgment), or (4) that morality influences law (a causal assertion), or (5) that law, by definition, in some way embodies morality (here the asserted interconnection would be a "logically" necessary one), or (6) that, given certain facts about human nature and the world man lives in, moral and legal rules having a minimum common content are necessary. (Professor Hart calls this interconnection one of "natural necessity.")

Professor Hart does not sort out these possible meanings suggested by the phrase "necessary interconnection." He does, however, examine several different arguments desigued to establish some kind of "necessary interconnection" between law and morals. (198-207) Insofar as these arguments are advanced to establish logically necessary interconnections, he convincingly and instructively refutes them. My aims here are to restate some of these arguments and his refutations thereof, and secondly, to explain Professor Hart's own novel version of natural law, a version that embodies a necessary interconnection between law and morals in sense (6) above.

One who asserts that some interconnection between law and morals is logically necessary is really only saying that, by definition, law embodies morality. Thus, some have suggested that an evil law is a contradiction in terms.[34] On this view it is logically self-contradictory to say X is a rule of law although X is immoral; a law by definition cannot be immoral. To refute this kind of argument, it

[33] See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

[34] Fuller, *supra* note 33, at 630. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 482-85 (1954).

is necessary to examine the "definition" involved. If, within a particular legal system, applicable criteria of legal validity (pertinent definitions) do not require that laws have moral content, "immoral law" is not, within that system, a contradiction in terms.

Since social control through law can function only if laws are intelligible, within the capacity of most to obey, and generally prospective, some have argued that law has an "inner morality" and that law and morals are therefore necessarily interconnected. To this, Professor Hart says that "if this is what the necessary connexion . . . means, we may accept it. It is unfortunately compatible with very great iniquity." (202) Here he is only insisting on the facts. He is only insisting that social control through law cannot function effectively where laws are generally retroactive, unintelligible, and beyond the capacity of most to obey. He is not conceding that these facts can be properly described as a "logically necessary interconnection" between law and morality.

Some have contended that because law is "open-textured" so that judges must often make choices, and because these choices should be impartial and reasoned, law and morals are necessarily interconnected. True, judicial decisions ought to be impartial and reasoned. But from this, it does not follow that "legal system" or "law" refers, by definition, to a system in which decisions are made in this way. Professor Hart appropriately points out that in many legal systems, impartiality and rationality have been honored nearly as much in the breach as in the observance.[35]

Another argument that law and morals are necessarily interconnected is the argument that "a legal system must rest on a sense of moral obligation or on the conviction of the moral value of the system, since it does not and cannot rest on mere power of man over man." (198) This argument not only depends on erroneous definitions, it is also wrong on the facts. The implicit disjunctive premise of this argument is that the acceptance of a legal system can be based only on force or on moral worth. This is untrue. Professor Hart observes that allegiance to the system may be based on many different considerations, including calculations of self interest, disinterested interest in others, habit, and the mere wish to do as others do.

[35] For Professor Hart's views on the nature of legal reasoning, see especially Chapter 7. See also Hart, *supra* note 33, at 610, and Hart, *Theory and Definition in Jurisprudence*, Supp. Vol. 29 P.A.S. 239, 258 (1955). See also Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Summers, *Logic in the Law*, 72 MIND 254 (1963); Summers, Book Review, 37 N.Y.U.L. REV. 962 (1962).

Although most classical natural law theorists have claimed that law and morals are somehow necessarily interconnected, Professor Hart does not subject their views to detailed criticism. Rather, he offers his own version of natural law. (189-195) The "necessary interconnection" between law and morals embodied in this version is not based on definitions and is therefore not logically necessary. He states that so long as men wish to survive, so long as survival is possible only through mutual association, and so long as human nature and the human condition remain unchanged, moral and legal rules must be interconnected in the sense that they must have a common core of content. He calls this interconnection a "naturally" necessary one. Men naturally wish to survive. It is also true that they are, by nature, vulnerable and at the same time aggressive and destructive. Because of these natural facts, moral and legal rules proscribing violence and destruction are "necessary." And because resources are scarce, some minimal form of the institution of property is necessary. Finally, since existing conditions require a division of labor, rules for the enforcement of promises and rules that enable men to transfer, exchange, or sell their products are also necessary.

Professor Hart believes that his theory of natural law represents the "core of good sense" in the classical theories. His version is a highly attenuated one, and he acknowledges this. Unlike Aristotle's, in which disinterested cultivation of the human intellect is the highest good, Professor Hart's version introduces no debatable concepts of human nature or the good for man. However, his view obviously differs from the view of Positivists who contend that "law may have any content."

C. Should Law and Morals Be Sharply Distinguished?

This issue was central to the now very well known exchange between Professor Hart and Professor Lon Fuller that appeared in the *Harvard Law Review* in 1958.[36] Parts of *The Concept of Law* may be viewed as a continuation of that exchange. In this section of this article, I shall first set forth and evaluate three of Professor

[36] See the articles cited in note 33, *supra*. For more extended treatment of the question whether it is in fact possible always to separate the "is" from the "ought," see Fuller, *Human Purpose and Natural Law*, 3 NATURAL L.F. 68 (1958); Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NATURAL L.F. 77 (1958); Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L.F. 83 (1958); and Nagel, *Fact, Value, and Human Purpose*, 4 NATURAL L.F. 26 (1959). See also Summers, *Is and Ought in Legal Philosophy*, 13 PHIL. Q. 157 (1963).

Fuller's arguments that law and morals should not be sharply distinguished. Each of these arguments was advanced by Professor Fuller in criticism of Professor Hart's views. I shall then turn to a discussion and evaluation of Professor Hart's arguments that law and morals should be sharply distinguished.

First, Professor Fuller has contended that judges and lawyers *ought not* to draw such a distinction, for if they do, judicial decisions will, in some cases at least, be unenlightened. If this position is sound, it is vitally important.

Professor Fuller says:

> Let us suppose the case of a trial judge who has had an extensive experience in commercial matters and before whom a great many commercial disputes are tried. As a subordinate in a judicial hierarchy, our judge has of course the duty to follow the law laid down by his supreme court. Our imaginary Scrutton has the misfortune, however, to live under a supreme court which he considers woefully ignorant of the ways and needs of commerce. To his mind, many of this court's decisions in the field of commercial law simply do not make sense. If a conscientious judge caught in this dilemma were to turn to the positivistic philosophy what succor could he expect? It will certainly do no good to remind him that he has an obligation of fidelity to law. He is aware of this already and painfully so, since it is the source of his predicament. . . .
>
> Is it not clear that it is precisely positivism's insistence on a rigid separation of law as it is from law as it ought to be that renders the positivistic philosophy incapable of aiding our judge? Is it not also clear that our judge can never achieve a satisfactory resolution of his dilemma unless he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be?[37]

The foregoing argument is based on an example that is not developed in detail. This does not, however, fortify the argument against the following criticisms. First, it is at least a distortion to say that the is-ought distinction is the source of Scrutton's predicament. The source of his predicament is a combination of two different factors: the bad law made by his appellate court and the operation of the common law doctrine that trial judges are bound by appellate decisions. Secondly, if Professor Fuller is suggesting that Scrutton ought to be bound only by those commercial decisions of his appellate court that appear sound to him, Professor Fuller may be inviting a form of judicial anarchy. Thirdly, if he is only suggesting that Scrutton ought not to be bound by unusually bad

[37] Fuller, *supra* note 33, at 646-47.

commercial decisions, I would say that Scrutton ought to leave it to the legislature or the appellate court to change such decisions. Otherwise, how are lawyers to advise their clients? There are ways of getting around bad law, but even these might well be thwarted if the trial judge might at any time substitute his "law" for the bad law of the appellate court. Fourth, since the ultimate source of Scrutton's predicament is that the appellate court has made bad law, we must ask whether drawing the distinction between bad law and the law that "ought to be" is more likely to get bad law off the books than not drawing this distinction. Presumably, to be consistent, Professor Fuller would not draw it. But surely this is not the path to reform. Appellate courts are empowered to over-rule bad law. Obviously it is more likely that Scrutton's appellate court will take steps to get its bad law off the books if the distinction between that law and what the law ought to be is sharpened.

Secondly, Professor Fuller has suggested that insistence on the distinction between the law as it is and the law as it ought to be leads to "literal," as opposed to what might be called "purposive," judicial interpretation of statutes.[38] To use an illustration that in legal philosophy is rapidly becoming as shopworn as "No married men are bachelors" has become in logic, assume that a statute is passed which reads: "No vehicles shall be taken into the park." Assume further that the purposes of this statute are to reduce noise and promote safety. Now, "What . . . if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial an eyesore, support their stand by the 'no vehicle' rule?"[39] Presumably Professor Fuller would say that since the purposes of the statute are to reduce noise and promote safety, and since the memorial would not interfere with these purposes, the memorial could be lawfully erected. On the other hand, Professor Fuller suggests that those who insist on the distinction between the law and what the law ought to be would say that the memorial could not be lawfully erected because "vehicle," literally interpreted, means *vehicle,* and everybody knows a truck is a vehicle.

Some may doubt whether literal interpretation is always bad. But if we assume it is, does insistence on the is-ought distinction in

[38] Fuller, *supra* note 33. This is one of the central themes of Professor Fuller's article.

[39] *Id.* at 663.

some way *logically entail* what Professor Fuller calls "wooden literalness" or "law is law formalism" in the interpretation of legal terms? I think not, for to insist that "the law" be distinguished from what the law "ought to be" is to say nothing at all with respect to how "the law" is to be determined in the first place. Thus, it is entirely open to those who insist upon distinguishing between the law and what the law ought to be to say that the law is to be determined in part by reference to the purposes for which the law was formulated. Hence, in the foregoing example, those who insist on the distinction might well interpret "vehicle" in terms of the purposes for which the word was used, and thus determine that "the law" does not exclude the proposed war memorial.

Although there is no logical connection between insistence on the is-ought distinction and interpretational literalism, there may be a *causal* or *practical* connection between the two. To establish such a connection would be very difficult, and to my knowledge no one has yet done this.

Finally, Professor Fuller has also contended that law is more likely to become good law, if, instead of distinguishing between the law as it is and the law as it ought to become, we look upon law as in a process of "becoming," working "itself pure from case to case." How insistence on the is-ought distinction would necessarily interfere with this process of "working pure" is not clear. But even assuming that it might, Professor Hart has suggested that the law might just as well "work itself pure from case to case toward a more perfect realization of iniquity."[40] To this Professor Fuller has said:

[40] These are not Professor Hart's words; Professor Fuller uses these words to characterize Professor Hart's position. See Fuller, *supra* note 33, at 636. Compare:

"Mr. Muirhead certainly cannot mean that, whatever men in point of fact become or develop into, they *ipso fact ought* to become or develop into. What a thing is to be is probably identified by him with what it tends to become, and this, again, is identified with what it is fitted to become by its own proper and distinctive nature. In this sense we might say metaphorically that an acorn ought to become an oak, because otherwise it fails to develop the capabilities which belong to it *quâ* acorn. The real as distinguished from the metaphorical "ought," is on this view to be found in the development of those capabilities which belong to the proper and distinctive nature of human beings as such, *i.e.*, the development of the unity of reason and of feeling as determined by reason amid the growing manifold of presentations and desires.

But . . . the difficulty becomes accentuated when we consider that human nature as such is capable of vice and moral degradation as well as their opposites, just as living organisms are by their distinctive nature capable of death, decay, and disease, as well as of life and healthy growth." Stout, *Symposium—Is the Distinction Between "Is" and "Ought" Ultimate and Irreducible?*, 2 ARISTOTELIAN SOCIETY PROCEEDINGS (Old Series) 1891-1892, at 98-99.

[C]oherence and goodness have more affinity than coherence and evil. Accepting this belief, I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are. Accepting these beliefs, I find a considerable incongruity in any conception that envisages a possible future in which the common law would "work itself pure from case to case" toward a more perfect realization of iniquity.[41]

But is there sufficient basis for Professor Fuller's belief that "coherence and goodness have more affinity than coherence and evil"? Surely there are such things as coherent patterns of evil, and in our own time we have seen such patterns pervade whole legal systems on a horrifying scale.

Let us turn now to Professor Hart's own arguments in support of his view that law and morals should be sharply distinguished. The first two of these arguments, advanced by Bentham and the Utilitarians, have been adopted by Professor Hart.

First, Professor Hart argues that if law and morality are not sharply distinguished, existing law might supplant morality as a final test of conduct and thereby escape criticism.[42] Without criticism, the law will not be changed, for change is born of dissent and not of agreement. Thus, insistence on the distinction aids the cause of reformers and frustrates the "cause" of reactionaries. An additional point that Professor Hart does not make is that morality is probably slower to change than law, so that if law is generally identified with morality the whole process of reform may be slowed up in spite of whatever criticisms of law that are nevertheless made.

One assumption Professor Hart makes here is that it is insistence on a distinction between law and *morals* that aids the reformer. But what of legal rules and moral rules having the same content, e.g., those prohibiting certain sexual activities between consenting adults? Would it be appropriate to view a reformer who wanted to abolish such laws as insisting on a distinction between law and *morals*?[43] It would seem more appropriate to say, as Professor Hart *sometimes* does, that the distinction to be insisted upon is one between existing

[41] Fuller, *supra* note 33, at 636.

[42] Hart, *supra* note 33, at 598.

[43] Professor Hart has himself advocated reform of certain legal rules which in fact embody prevailing morality. See DEVLIN, THE ENFORCEMENT OF MORALS (1959), criticized in Hart, *Immorality and Treason*, THE LISTENER, July 30, 1959, pp. 162-63. See also Rostow, *The Enforcement of Morals*, 1960 CAMB. L.J. 174; Wollheim, *Crime, Sin and Mr. Justice Devlin*, ENCOUNTER, Nov. 1959, pp. 34-40.

law and the "law that ought to be" rather than between law and morality. Now if this be considered the proper characterization, is there any evidence that one who confuses law and morals is likely also to confuse the difference between existing law and what law ought to be? There is very little evidence available either way.

Secondly, Professor Hart argues that insistence on the distinction between law and morals tends as a matter of fact to preserve order.[44] He is concerned about the anarchist who, confusing law and morals, argues that: "This ought not to be the law, therefore it is not, and I am free not merely to censure but to disregard it." But in practice is the anarchist really a legitimate concern? At least in most contemporary societies such "anarchists" seem few and far between, and legal philosophers may safely disregard them!

Thirdly, Professor Hart argues that citizens will be more likely to recognize their duty not to obey morally iniquitous laws if they distinguish sharply between law and morals than if they do not. This is because, in Professor Hart's view, the sense that the official certification of something as lawful does not entail a duty to obey is "surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law." (206) The importance of this argument is very difficult to assess, precisely because the relevant empirical evidence is not readily available.

Professor Hart's fourth and final argument is that unless our concept of law "allows the invalidity of law to be distingnished from its immorality," citizens, judges, and lawyers may oversimplify or obscure the issues at stake in particular cases. The example he cites to support this contention and his discussion thereof should be fully quoted:

> It may be conceded that the German informers, who for selfish ends procured the punishment of others under monstrous laws, did what morality forbad; yet morality may also demand that the state should punish only those who, in doing evil, did what the state at the time forbad. This is the principle of *nulla poena sine lege.* If inroads have to be made on this principle in order to avert something held to be a greater evil than its sacrifice, it is vital that the issues at stake be clearly identified. A case of retroactive punishment should not be made to look like an

[44] Hart, *supra* note 33, at 598. For valuable discussions of the obligation to obey the law, see Bedau, *Civil Disobedience,* 58 J. OF PHILOSOPHY 653 (1961); Wasserstrom, *Disobeying the Law,* 58 J. OF PHILOSOPHY 641 (1961).

ordinary case of punishment for an act illegal at the time. At least it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this offers no disguise for the choice between evils which, in extreme circumstances, may have to be made. (207)

One of the criticisms of this analysis advanced by Professor Fuller is that it poses an unmeaningful dilemma: an interest must be of some value before it can be "sacrificed" and the interest of the wicked informers in the foregoing example was wholly unworthy. To say that a court called upon to punish such people faces a dilemma "is like saying I have to choose between giving food to a starving man and being mimsy with the borogoves."[45] But Professor Hart is not arguing that the interest of the informers is worthy. He is only saying that insistence in such cases on the distinction between law and morals assures a more forthright analysis and enhances the likelihood that all possible interests will be considered. The question whether an interest is worthy or unworthy can arise only after that interest has been identified.

V

JUSTICE

Professor Hart analyzes "just" and "unjust" as these terms are used both in appraisals of the content of laws and in appraisals of the administration of laws.[46] For him, to say that a law is justly administered is to say that it is impartially applied to all those and only "those who are alike in the relevant respect marked out by the law itself." (156) Thus, it is possible for an unjust law to be administered justly, e.g., enforcement against all non-whites of a law allowing only whites to ride buses. Similarly it is possible for a just law to be administered unjustly, e.g., prosecution of only Negro proprietors who violate laws designed to prevent racial discrimination in public restaurants.

According to Professor Hart, laws themselves may be unjust *either* because they do not distribute burdens or benefits fairly *or* because they do not afford compensation for harm done by others. (159) Examples of "distributive injustice" might be the failure to allow both Negroes and whites to ride buses, the failure to exact taxes according to ability to pay, or the failure to distribute

[45] Fuller, *supra* note 33, at 656.

[46] I have already discussed some of Professor Hart's views on justice as set forth in THE CONCEPT OF LAW in my article, *H. L. A. Hart on Justice*, 59 J. OF PHILOSOPHY 497 (1962).

"poor relief" according to need. Examples of "compensatory injustice" might be the failure to allow compensation for wrongful physical harm, for invasion of privacy, or for the value of benefits conferred and unjustifiably retained.

After setting forth the notion of justice in the administration of laws and the notions of distributive justice and compensatory justice, Professor Hart argues that one leading principle explains these diverse applications of the "idea of justice": the principle "Treat like cases alike and different cases differently." He adds that the criteria of what constitutes *like* cases will often vary with the moral outlook of a given person or society.

Thus, he concludes that

> the structure of the idea of justice . . . consists of two parts: a uniform or constant feature, summarized in the precept 'Treat like cases alike' [and different cases differently] and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different. (156)

There is considerable merit in Professor Hart's analysis of the notion of justice. The principle "Treat like cases alike and different cases differently" *is* frequently invoked in assessments of the justice or injustice of the administration of law. Thus we demand that like cases be treated alike *before* the law. Similarly, this principle *is* often invoked in appraisals of the justice or injustice of laws distributing burdens and benefits within society. Thus we criticize laws perpetuating racial discrimination on the basis that these laws do not "treat like cases alike." But Professor Hart's analysis of justice *can* be criticized in several ways, and the first of these is that the principle "treat like cases alike" cannot, without distortion, be invoked to explain the uses of "just" and "unjust" in appraisals of the content of laws that provide or fail to provide compensation for harm. Professor Hart, acknowledging that the relationship between the principle and compensatory injustice is "indirect," thinks it exists. He argues that when, for example, a moral code forbids the use of superior strength for the purpose of harming another, the weak are put on an equal footing with the strong. The moral code thus creates "among individuals a moral and, in a sense, an artificial equality to offset the inequalities of nature." (160) When the strong harm the weak and thereby upset this moral equilibrium, justice then requires that this moral *status quo* should be restored by the

wrongdoer. Thus laws that provide compensation where justice demands it "recognize indirectly the principle 'Treat like cases alike' by providing for the restoration, after disturbance, of the moral *status quo* in which victim and wrongdoer are on a footing of equality and so alike." (161)

At least when lawyers invoke the principle "Treat like cases alike," they ordinarily use "like cases" and "alike" differently from the way in which Professor Hart appears to be using these terms in the foregoing analysis. For him, the "like cases" appear to be the victim's "case" *and* the wrongdoer's "case." But when lawyers (and many others) speak of like cases, they refer to likenesses between the victim's case and decided cases of similarly situated victims *or* to likenesses between the wrongdoer's case and decided cases of similarly situated wrongdoers. Furthermore, if, to use Professor Hart's analysis, we say we are treating the wrongdoer's case and the victim's case "alike" by requiring the former to compensate the latter, we also use "alike" in an extraordinary way. At least most lawyers would consider it linguistically very odd to say of a plaintiff recovering damages for harm that he and the defendent were somehow being treated "alike."

A second basic criticism of Professor Hart's analysis is that the principle "Treat like cases alike and different cases differently," does not appear to be consistent with another important usage of "just" and "unjust" in the criticism of laws. We frequently say that a law is unjust even though it is uniformly applied, *i.e.* even though all cases are treated alike. Thus we say such things as: "Our penal code is unjust, for the prescribed punishments do not fit the respective crimes," and "This law is unjust because it restricts freedom to change jobs." Professor Hart does acknowledge that a "law might be unjust while treating all alike." But then he goes on to say that "The vice of such laws would then not be the maldistribution, but the refusal to all alike, of compensation for injuries which it was morally wrong to inflict on others." (160) For example, should the "vice" of an irrational scheme of punishment or undue restrictions on freedom be described in terms of "the refusal to all alike, of compensation for injuries"? It seems more appropriate to say simply that the vice of such laws is that they fail to conform to accepted standards of justice.

This leads to a third criticism of Professor Hart's analysis. Professor Hart asserts that what constitutes *like* cases will often vary with

the moral outlook of a given person or society. If this is but another way of saying that standards of justice will vary with the moral outlook of a given person or society, then it does not seem wholly consistent with his view that the laws of a society must have a certain minimum content, e.g., prohibition of violence and destruction, if they are to conform to natural law (as he reinterprets natural law). (189) Traditionally, violation of natural law has constituted one of the chief criteria for the use of "unjust." This being true, it seems that Professor Hart would want to stress that standards of justice may vary, but only *within limits.*

Finally, the point should be made that there may be no single principle that explains the diverse applications of "just" and "unjust."[47] The drive to find such a principle is illustrative of the influence of the reductionist impulse in legal philosophy. We shall probably find that justice cannot be reduced to a single principle. The study of justice is a large and important subject on which much remains to be done. After a period of relative neglect, there appears to be a revival of interest in the analysis of the concept.[48]

VI

Professor Hart's Methods of Analysis

Since Professor Hart is a professional philosopher as well as a lawyer, it is not surprising that he uses many of the same methods of analysis that are to be found in the technical writings of many of his philosopher colleagues. Although some scholars have noted this similarity of method, no one has heretofore attempted to explain the methodological ideas, techniques, and distinctions involved.[49] My aim in this final section is to describe and illustrate (but not to criticize) some of these ideas, techniques and distinctions. This task is worth undertaking for at least two reasons. First, Professor Hart's

[47] A. M. Honoré, Professor Hart's colleague and co-author of Causation in the Law, has recently said: "Perhaps the greatest single obstacle to the analysis of the notion of justice is, indeed, the belief that a single formula can and must be found which will express a principle applicable to those various circumstances in which the allocation of advantages is in question." Honoré, *Social Justice,* 8 McGill L.J. 77, 79 (1962). Earlier in the development of his thought, Professor Hart was less inclined to say that the concept of justice could be analyzed in terms of *one* principle. Hart, *supra* note 33, at 624.

[48] For this observation, I am indebted to Professor Hugo Bedau, Reed College. See Justice and Social Policy (Olafson ed. 1961); Social Justice (Brandt ed. 1962).

[49] See especially Hart, *Definition and Theory in Jurisprudence,* 70 L.Q. Rev. 37 (1954). For brief but helpful comments on "analytical" methods, see Fried, Book Review, 61 Colum. L. Rev. 1384 (1961).

methods no doubt account in part for the high quality of his work. Since these methods have not gained currency in the field of legal philosophy, their importance may not yet be widely understood among legal philosophers. Secondly, an understanding of several of these methodological notions is valuable background for those who wish to study Professort Hart's work.

A. Language and Reality

Certainly one of the most significant single influences on Professor Hart's way of doing legal philosophy is the doctrine that a "sharpened awareness of words [can be used] to sharpen our perception of phenomena." (14) Philosophers who have subscribed to this doctrine, particularly the late J. L. Austin,[50] have sometimes been pejoratively identified as "linguistic" philosophers. The following quotations from *The Concept of Law* illustrate how such "lingnistic philosophy" might sharpen our awareness of phenomena:

> The difference between the two social situations of mere convergent behaviour and the existence of a social rule shows itself often linguistically. In describing the latter we may, though we need not, make use of certain words which would be misleading if we meant only to assert the former. These are the words 'must,' 'should,' and 'ought to,' which in spite of differences share certain common functions in indicating the presence of a rule requiring certain conduct. There is in England no rule, nor is it true, that everyone must or ought to or should go to the cinema each week: it is only true that there is regular resort to the cinema each week. But there *is* a rule that a man must bare his head in church. (9)
>
> . . .

[50] J. L. Austin, *A Plea for Excuses,* 57 P.A.S. 8 (1956). Austin was White Professor of Moral Philosophy in the University of Oxford from 1952 until his death in 1960, at the height of his powers. Although his influence has been very substantial, he published little during his lifetime. The following works have been published in book form since his death: How To Do Things with Words (1962), Philosophical Papers (1961), and Sense and Sensibilia (1962). A reviewer of the last two of these books has said of Austin that one reason why he succeeded where others failed "was that he was so much more thorough. On the first day of the term he would read out the first two pages of Ayer's *Foundations of Empirical Knowledge,* in which the Argument from Illusion is summarized. Then he would begin to scrutinize it, sentence by sentence, often word by word, sometimes devoting three or four lectures to a single word. Two months later he might still be commenting on these two pages. So went the most exciting and entertaining, as well as most important, philosophical lecture course of the twentieth century." Matson, Book Review, Northwest Rev. 127 (1962). There are those who think less of "linguistic philosophy." Thus, one writer has recently warned of the possibility that "the sharp outlines of American thought are being gradually eroded into more pleasing shapes by the gentle yet persistent flow of 'ordinary' language across the Atlantic. Erosion being what it is, we may all sink into the sea together." Peterson, Book Review, 12 The Phil. Q. 377 (1962).

The radical difference in function between laws that confer . . . powers . . . [for example, to make wills] . . . and the criminal statute is reflected in much of our normal ways of speaking about this class of laws. We may or may not 'comply' in making our will with the provision of s.9 of the Wills Act, 1837, as to the number of witnesses. If we do not comply the document we have made will not be a 'valid' will creating rights and duties; it will be a 'nullity' without legal 'force' or 'effect.' But, though it is a nullity our failure to comply with the statutory provision is not a 'breach' or a 'violation' of any obligation or duty nor an 'offence' and it would be confusing to think of it in such terms. (28)

B. Rules

The notion of a rule has always played a central role in the thought of lawyers. For example, lawyers find, construct, interpret, apply, compare, evaluate, draft, negotiate, and advocate rules. For the legal philosopher, then, the notion of a rule has always been a tool close at hand. Paradoxically, however, no one before Professor Hart has seen so clearly that the concept of a legal system cannot be satisfactorily elucidated without using the notion of a rule. He says of the work of John Austin that:

The elements he uses do not include the notion of a *rule* or the rule-dependent notion of what *ought* to be done; the notions of a *command* and a *habit* however ingeniously combined cannot yield them or take their place though Austin often uses the word 'rule' and defines it as a kind of command. This accounts not merely for the dogmatic insistence that every law must derive its status as law from an express or tacit prescription and for minor distortions such as the analysis of duty (a notion essentially connected with that of a rule) in terms of the chance or likelihood of incurring a threatened evil in the event of disobedience, but also for Austin's oversimplification of the character of political society. A legal system is a system of rules within rules; and to say that a legal system exists entails not that there is a general habit of obedience to determinate persons but that there is a general acceptance of a constitutional rule, simple or complex, defining the manner in which the ordinary rules of the system are to be identified. We should think not of sovereign and independent *persons* habitually obeyed but of a rule providing a sovereign or ultimate *test* in accordance with which the laws to be obeyed are identified. The acceptance of such fundamental constitutional rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course evidenced by obedience to the laws. Political society is not susceptible of a simple top and bottom analysis.[51]

[51] Introduction by Hart to JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE, xi-xii (1954 ed.).

Professor Hart has observed that it has been only since the turn of philosophical attention towards language that the features have emerged of that whole style of human thought and discourse that is concerned with rules.[52] Today professional philosophers seeking to elucidate the meaning of a word frequently speak of the "rules for its use" instead of its meaning.[53] Moral philosophers now devote considerable attention to the use and function of rules in moral discourse and other moral activity.[54] The philosopher interested in logic today often speaks of "rules of inference."[55] To cite a final example, Professor Hart has himself sought to show that a sound analysis of the concept of a human action is possible only if the difference between the latter and mere physical movement is explained by reference to social rules for ascribing responsibility.[56]

C. Sentence Classification

There are many kinds of sentences and many uses to which a sentence can be put. Among the important contributions of the late J. L. Austin to contemporary philosophy was his "discovery" of sentences that are "performatory" and therefore more like actions than like descriptions. Thus Austin said "when I say 'I promise,' a new plunge is taken: I have not merely announced my intention, but by using this formula (performing this ritual) I have bound myself to others . . . ."[57] Professor Hart has also identified a class of sentences, e.g., "He did it.", "They did it.", etc. that he has called "ascriptive" rather than descriptive, and which, he says, function as ascriptions of responsibility for action rather than as descriptions of such action.[58]

How might an awareness of the varieties of types of sentences and a sensitiveness to the different uses that may be made of the same sentence be useful to a legal philosopher? At the very least, such awareness might enable him to avoid mistakes of the character of those made by the Swedish jurist, Axel Hagerstrom, when he attempted to explain the important fact that sentences of the form

[52] Hart, *supra* note 49, at 60.

[53] Midgley, *Linguistic Rules,* 59 P.A.S. 271 (1959). For recent criticism of this view, see Brown, *Meaning and Rules of Use,* 71 MIND 494 (1962).

[54] Cooper & Edgley, *Rules and Morality,* Supp. Vol. 33 P.A.S. 159 (1959).

[55] STRAWSON, INTRODUCTION TO LOGICAL THEORY (1952).

[56] Hart, *The Ascription of Rights and Responsibility,* 49 P.A.S. 171 (1949).

[57] *Symposium, Other Minds,* Supp. Vol. 20 P.A.S. 122, 171 (1946). See AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

[58] Hart, *supra* note 56.

"X hereby conveys to Y" can have the effect of divesting ownership.[59] Hagerstrom's explanation of this phenomenon was that there existed a supernatural "power belief" embodied in all legal and moral thinking which legal ceremonies or formal legal language liberate. Professor Hart suggests that both ordinary lawyers, using the familiar notion of "operative words" and legal philosophers who might be expected to use the notion of "performatory utterances" would dismiss Hagerstrom's analysis and explain this phenomenon simply by saying that the use of such words *invokes* rules for the divesting of ownership *in that way.*

D. Methods of "Definition"

Many legal philosophers have sought answers to questions of the "What is X?" form: What is justice? What is a legal system? What is law? What is a right? Professor Hart has argued that to put such questions is a mistake. (13) Questions of this form are too imprecise; they do not indicate what it is that we want to know about X. Secondly, this way of putting such questions has tended to suggest answers in terms of an irrelevant mode of definition: the method of defining *per genus et differentia.* This method is suited to the definition of a term such as "chair" which is directly aligued with and so means or stands for a certain type of thing, *i.e.,* a piece of furniture, but it is unsuited to the definition of a notion such as "right" which has no such straightforward connection with a counterpart in the world of fact. Moreover, this method cannot be profitably used unless the term to be defined can be assigned to some genus that is already understood, and in the case of legal terms such as "right" it is the generic conception itself that is puzzling. Finally, Professor Hart has observed that this method can be usefully applied only if instances of the application of the term to be defined have common characteristics, and this is not true of terms such as "right," "justice," and "legal system."

One of the methods Professor Hart has applied to elucidate fundamental legal concepts might be called contextual definition. According to this method, one attempts to identify the conditions under which statements in which such concepts have their characteristic use are true.[60] For example, instead of asking "What is a right?" and proceeding with some kind of general definition, one

[59] Hart, Book Review, 30 PHILOSOPHY 369 (1955).
[60] Hart, *supra* note 49.

attempts to elucidate the expression "a legal right" by setting forth the conditions that are ordinarily present when this expression is actually used, e.g., "Jones has a legal right to that property." Here, such conditions include the existence of a legal system, and the existence of a rule of the system under which some person is obliged to do or abstain from some action.[61]

E. General Terms and Common Qualities

Of profound importance for the analysis of fundamental legal concepts (and others) is the discovery that there may be several reasons why a general term is used for varying phenomena other than or in addition to the fact that these phenomena have common qualities. The late Ludwig Wittgenstein, whose work has influenced the whole course of contemporary English philosophy,[62] showed that the instances to which a general term is applied may in fact have no common qualities:

> Consider for example the proceedings that we call "games." I mean board-games, card games, ball-games, Olympic games, and so on. What is common to them all?—Don't say: "There must be something common, or they would not be called 'games,' "—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that.[63]

The instances to which general terms are applied may be "linked" by common qualities, by analogies, by the fact that they all bear some relationship to a central element, and in other ways.

Professor Hart has suggested that an awareness of the fact that instances of the use of a general term may be linked in ways other than through common qualities is likely to be valuable to the legal philosopher in either or both of two ways. First, he will be less likely to become preoccupied with a search for some feature common

---

[61] *Id.* at 49.

[62] Ludwig Wittgenstein taught philosophy at Cambridge University intermittently from 1929 until his death in 1951. On his life, see MALCOLM, LUDWIG WITTGENSTEIN, A MEMOIR (1958). His work has been very influential. "There can be no serious doubt that the most powerful and pervasive influence upon the practice of philosophy in this country today has been that of Ludwig Wittgenstein." WARNOCK, ENGLISH PHILOSOPHY SINCE 1900 at 62 (1958). "The greatest single influence on English philosophy is unquestionably that of Wittgenstein; his disciples and debtors are everywhere . . . ." POLE, THE LATER PHILOSOPHY OF WITTGENSTEIN 1 (1958). Wittgenstein published very little during his lifetime, and his most influential work was published posthumously. See PHILOSOPHICAL INVESTIGATIONS (1953).

[63] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31 (1953). See also AUSTIN, PHILOSOPHICAL PAPERS 37-43 (1961).

to all the instances to which a legal concept has been applied, and should therefore not be diverted from more important inquiries. For example, when elucidating the concept of possession, he would not search fruitlessly for qualities common to all of the instances to which the concept is applied, but would instead inquire what, within a particular legal system, are the conditions under which possessory rights are acquired and lost, and what general features of this system and what practical reasons lead to diverse cases being treated alike in this respect?[64] Secondly, he should be better equipped to explain complex legal notions more illuminatingly. Thus, for example, when analyzing "right," Professor Hart has made use of the insight that instances of the application of "right" are not related through common qualities or analogy but instead to the central unifying notion of individual choice.[65]

F. Meaning and Criteria for Use

The distinction between the meaning of a term and the criteria for its use is a methodological distinction unfamiliar to lawyers but common in contemporary English philosophy. One philosopher has analyzed one standard use of "good" in terms of an unvarying meaning, *i.e.*, to commend, and varying criteria for this standard use which differ from context to context.[66] Thus when we say that a table or a painting or someone's behavior is good, we commend, but in each of these contexts the factual criteria for our use of the word "good" differ radically.

Professor Hart has contended that this distinction between meaning and criteria can be profitably used in analyzing "legal system":

> We might be able to provide a definition of "legal system" in uniform terms, while also recognizing that the criteria for the application of what constituted a valid law could vary from system to system. Traditional theories of jurisprudence have suffered from failure to recognize this possibility of dealing with what may on the face of it look like ambiguity, but is in fact a structural complexity of certain concepts which need in their analyses just this distinction between definitions and criteria.[67]

G. Standard and Borderline Cases

The lawyer who undertakes to interpret a concept appearing in a legal rule frequently distinguishes between what he calls "clear"

---

[64] Hart, *supra* note 49, at 44 n.9.

[65] *Id.* at 49 n.15.

[66] HARE, THE LANGUAGE OF MORALS 94 (1952).

[67] Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 969 (1957).

cases and "borderline" cases for the application of the concept. Thus "breaking and entering" is a clear case of trespass, but what of flashing a beam of light on another's property?[68] Should the similarities or should the differences between these two cases be decisive? Though practicing lawyers often use this method of analysis, many legal philosophers have, oddly enough, failed to understand its utility in analyzing fundamental legal concepts. Professor Hart has shown that for such concepts we can ordinarily establish standard and borderline cases of their use. The next step is to identify the features of the standard case, and the final step is to "examine the various motives that may incline us one way or the other in dealing with the borderline case."[69]

One of the problems to which Professor Hart has profitably applied this technique is the problem of explaining what it is for a legal system to exist. He has tried to identify the features of the standard case in which we say a legal system exists, and has compared this standard case with such borderline cases as governments in exile and revolutionary juntas. (114)

H. Models

The use of models is commonplace in contemporary English philosophy,[70] and Professor Hart uses them for various purposes. For example, he contrasts his view of law with a model of law as "coercive orders." (19) Beginning with a situation in which A, at gunpoint, orders B to act, he adds to this simple model in various ways for the purpose of making it as similar to the reality of law as possible. He then demonstrates how such a model must inevitably fail to account for such things as the variety of legal rules and for their modes of origin. Thus, it is not possible, without absurdity, to characterize rules such as those that empower individuals to make wills as coercive orders; and laws that originate in custom, for example, are unlike orders since they are not brought into being by explicit prescription.

I. Logical Necessity

For lawyers, an explanation of Professor Hart's methodology should include some account of the way he uses "logical," "follows logically," and allied phrases. His use of these terms is usually the

[68] Amphitheaters, Inc. v. Portland Meadows, 184 Ore. 336, 198 P.2d 847 (1948).

[69] Hart, *supra* note 67, at 968.

[70] See Hervey, *The Problem of the Model Language-Game in Wittgenstein's Later Philosophy*, 36 PHILOSOPHY 333 (1961).

technical philosophical usage according to which B "follows logically" from A if and only if it would be self-contradictory both to assert A and deny B.[71] He sometimes also asserts the existence of this kind of relationship between statements by saying any one of the following: A "entails" B; it would be "absurd"[72] to assert A and deny B; the relationship between A and B is "logically necessary" or "analytic"; it would be a "contradiction" to assert A and deny B. In contrast, lawyers ordinarily use the term "logical" and allied notions to mean "sound" or "reasonable." For example, it might be sound or reasonable to infer, in a particular case, that rain accounted for the dampness of the defendant's premises, but this could not "follow logically" since it is not self-contradictory both to assert dampness of the premises and to deny that rain accounted for this.

The following quotations from *The Concept of Law* illustrate Professor Hart's use of the notion of logical necessity and also illustrate a distinctive style of argument on which he frequently relies:

> There is, however, a second, simpler, objection to the predictive interpretation of obligation. If it were true that the statement that a person had an obligation meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g., to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood. (82)
>
> * * *
>
> The fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feelings of compulsion or pressure. Hence, there is no contradiction in saying of some hardened swindler, and it may often be true, that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so. To *feel* obliged and to have an obligation are different though frequently concomitant things. (85-86)

J. Game Analogies

Another of the telling marks of the influence of the late Ludwig Wittgenstein is the extent to which philosophers now use analogies to games and to the way games are conducted to fortify, criticize, and illustrate philosophical theses. Wittgenstein clarified many important features of language partly by comparing language and the

[71] See generally STRAWSON, INTRODUCTION TO LOGICAL THEORY 19 (1952).

[72] Professor Hart also sometimes appears to use "absurd" to mean unreasonable (see p. 223) and sometimes to mean false (see p. 210).

activity of using language with games and the activity of playing games.[73]

It is not surprising that Professor Hart has made extensive use of game analogies, inasmuch as life under law and the playing of games are analogous precisely in the respect that in both we follow and use rules in a variety of ways. He has argued, for example, that the view that "law is what the courts say it is" confuses finality with infallibility of decision, and he has pointed out that just as in games in which the scorer's rulings may be correct or incorrect though final, so a judge's ruling may be final without being "according to law." (138) He has also pointed out that different kinds of rules in games have their analogues in the law. Thus, there are rules of a game which veto certain types of conduct under penalty (foul play or abuse of the referee) and rules which specify what must be done to score or to win. Likewise, in law there are rules which forbid conduct under penalty and rules which prescribe what must be done to achieve a given result, e.g., creation of a valid will or an enforceable contract. (9)

VII

CONCLUSION

Nine years of law practice and several years as a teacher of philosophy have admirably equipped Professor H. L. A. Hart to grapple with the problems of jurisprudence. Among other things, this background has enabled him to bring some of the techniques of modern philosophy to bear on these problems, something he has done often with conspicuous and illuminating success. Some of his work has been highly original. His view of a legal system as a union of primary and secondary rules and his version of natural law are only two of the many new ideas that he has contributed. In this article, I have not examined his work on causation in the law nor his work on such basic mental concepts as motive and intention as these are used in the law, but his work on these subjects has in fact widened the traditional boundaries of jurisprudence.[74] Finally, Professor Hart writes with a clarity of expression that is surely a virtue in such an abstruse field, and, unlike many of his philosopher colleagues at Oxford, he publishes his views. Another book by him: *Law, Liberty and Morality,* the Camp lectures which he delivered in January of 1962 at Stanford University, has recently appeared.[75]

[73] Wittgenstein, *op. cit. supra* note 63.

[74] See note 2, *supra.*

[75] Stanford University Press (1963). See Summers, Book Review, 38 N.Y.U.L. REV. (Nov. 1963).