Special Issue
The Many Fates of Legal Positivism

The Nature of Law: Three Problems with One Solution

By N.E. Simmonds[*]

A. Introduction

Whether or not we have ourselves studied the philosophy of law, most of us are familiar with the fact that philosophical debate concerning the nature of law has been around since Ancient Greece. In much the same way, there have been long-running philosophical debates concerning justice, truth, reason and a host of other issues. The debate concerning law is in some respects different, however. For it is not too difficult to see how the nature of justice or truth or reason could give rise to a specifically *philosophical* debate, while it is far from clear why the nature of law should generate any philosophical puzzlement at all.

For present purposes, we might say that the hallmark of a philosophical question is to be found in an initial sense of bewilderment that overcomes us when we first encounter the question. It is not simply that we have been asked a question to which we do not know the answer. Rather, we have no idea of how one might start looking for an answer, or indeed of what sort of thing an answer might be.

Take the question of the nature of justice. We think of justice as an abstract standard that can be invoked in the criticism or evaluation of human actions and institutions. The content of justice is thought of as independent of all such actions and institutions: the fact that we punish criminals does not, in itself, show that it is just to punish criminals, for example. Nor can justice be regarded as simply a matter of conventional belief: the fact that people believe that it is just to punish criminals does not, in itself, make it just (someone who thinks otherwise has clearly failed to understand what justice is).[1] But, if the content of justice cannot be inferred from our knowledge of any human action, practice or widely-accepted belief, from whence can it be derived? We are faced by a question (what is justice?) but have no idea how one could set about answering it, or even what an answer would look like.

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[1] Some theories might wish to claim that justice does depend upon conventional beliefs. Such theories will either derive that conclusion from deeper non-conventional standards or they will be skeptical theories that are really denying that there is such a thing as justice, claiming that there are only groundless beliefs about justice. *See* THOMAS HOBBES, LEVIATHAN Chapters 14–15 (1651) (illustrating the way that Hobbes' conclusions depend upon his "Laws of Nature").

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Distinctively philosophical problems tend to concern our most fundamental intellectual and moral criteria. They may often be bound up with issues of reflexivity. For example, they may involve questions about the status or content of a criterion, while the questions can be answered only by reliance upon (some version of) the criterion in question. Suppose that we want to know what truth (or reason) is. What we want to know is the truth about truth. We want a reason for choosing this account of reason rather than that one. Sometimes, philosophical inquiries can be clear about their own status only when the principal problem of the inquiry has been successfully resolved.[2]

When, by contrast with these debates, we turn to the philosophical debate concerning the nature of law, everything seems at first to be different. The terrain can appear to be flat and dull, devoid of reflexivity or any other interesting problems. Far from not knowing how we might proceed with our inquiry, the path ahead seems all too obvious: so obvious, indeed, that we wonder how the debate could have endured so long. For law, we assume, is a social institution that is open to straightforward observation and description. Scholars such as doctrinal experts, historians and social scientists know about its various features. If you are puzzled about its nature, why not ask them? What can the *philosopher* have to contribute here?

Our confidence that the philosophy of law addresses some genuinely difficult problems, on a par with those explored in other areas of philosophy, will not be strengthened if we examine some influential modern accounts of the core issues. Take, for example, H.L.A. Hart's account in the opening chapter of his classic work *The Concept of Law*.[3] There, Hart tells us that the long-running debate concerning the nature of law has been driven by three recurring issues. The first two of these issues concern the relationships between law and morality (on the one hand) and law and "orders backed by threats" (on the other). Hart explains that in some respects law resembles morality (it consists of a body of prescriptions and employs a similar vocabulary to morality) and in some other respects it resembles orders backed by threats. What we are looking for (in Hart's view) is a clear understanding of these resemblances and differences.

As an account of either the fundamental goal or the starting point of our inquiry this leaves a lot to be desired. Indeed, it does not really succeed in identifying a philosophical problem at all.[4] Explaining how one thing resembles but also differs from two other things

[2] *See* NIGEL SIMMONDS, LAW AS A MORAL IDEA 1 (2007) ("Consequently, jurisprudence can fully understand its own status only when it has solved its central problem, by answering the question 'What is law?'").

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

[4] This is, of course, not to deny that there is a philosophical problem in the vicinity of Hart's remarks, but Hart has failed to put his finger upon it in a way that can be expected to enlighten the reader.

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is not, without more, a philosophical enterprise. Until we are told more (about, for example, the special character of the objects to be compared) the task seems to call for careful description rather than philosophical reflection. If, therefore, we set out not understanding how the philosophy of law can call for more than careful description of the observable phenomena of law, Hart's account will not help us.

In philosophy of law as in every other field of philosophical inquiry, it is both easy and common for philosophers to conflate the intractable problems that they are meant to be addressing with much easier problems that they know how to solve. When this happens a lot, the inquiry can start to founder. People begin to lose any sense of what the questions really are; or they start to think that the questions have now been solved; or they doubt that there were really any questions there in the first place. Some brief reminders of what those questions are can always be useful. I will offer some such reminders in the next section of this essay.

B. Three Problems

Suppose that we begin from our initial assumption that law is a social institution. This seems to entail the thought that laws are made by human beings. Indeed, this latter thought seems at first so appealing that we may wonder how anyone could doubt it. Yet we also tend to assume that human actions can create law only if they are authorised so to do by the law itself. And here is the difficulty. For, if all laws are made by human actions, and human actions can make law only when legally authorised so to do, we seem to be faced by an infinite regress.

Austin tried to address this problem by abandoning the assumption that all law-making acts must be legally authorised: according to him, the law-making acts of the sovereign are grounded in the facts of power, not in any authorising law.[5] This response to the problem sounds promising but proves, in the end, not to be very successful.[6] Another response abandons the assumption that all laws are made by human actions: it postulates "natural laws" that are made by no one but that ground the authority of the supreme law-maker. At first this sounds deeply implausible, for we find ourselves asking "where could such natural laws come from?" Once we scratch the surface of the position and start to examine it closely, however, it begins to look more convincing.

Kant, for example, tells us that one might have a system of wholly posited laws (laws established by a lawmaker) but a natural law (not made by any such lawmaker) would still

[5] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); H.L.A. Hart, *Introduction* to JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1954).

[6] HART, THE CONCEPT OF LAW, *supra* note 3; *see also* H.L.A. HART, THE CONCEPT OF LAW (1961).

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have to precede the system, by establishing the authority of the lawmaker.[7] What Kant has in mind is a good deal less mysterious than one might at first think. His thinking might be explained as follows. Positive laws are invoked (by, for example, judges) as a justification for the imposition of coercive sanctions. Laws must therefore be the kind of thing that is capable of justifying coercion: decrees that do not in fact justify coercion would be mere *simulacra* of law. If coercion is sometimes justified, there must be some principles that determine when it is justified. These are (in Kant's view) the principles that determine when "the choice of one can be united with the choice of another."[8] The totality of such principles then forms the "natural law" grounding the authority of the supreme lawmaker. As Kant puts it, the principles "establish the basis for any possible giving of positive laws."[9]

Kant does not think of the relevant principles as something like a complete code of human conduct that the law merely has to reflect. Rather, legislative decision-making is essential to establish the full set of conditions within which "the choice of one can be united with the choice of another." Thus, we might say that, for Kant, the supreme act of positive law-making derives its legal authority from its success in realising the value (joint possibility of choices) that is, in his view, central to the nature of law.

The first problem we have identified concerns the basis of fundamental law-making authority. It exhibits some of the features that are commonly found in philosophical problems. Thus, some attempted solutions that might at first seem tempting tend to founder in familiar philosophical dead ends, such as reductionism (e.g. Austin's attempt to reduce legislative authority to the facts of power) or infinite regress (if every law-making act is authorised by a higher law that itself was created by a law-making act) or circularity (if, somehow, lawmakers can authorise themselves). Meanwhile, other (potentially superior) solutions turn out not to be self-contained but to be tangled up with otherwise distinct philosophical problems. This is the case with Kant's solution. For Kant's proposal is intimately bound up with another puzzle that must be confronted by the philosophy of law: the problem of law's justificatory force.

Laws are typically invoked by judges as a reason or justification for imposing a sanction. Any theory of law needs to accommodate this fact. For example, one of Hart's numerous reasons for rejecting Austin's theory of law concerns Austin's analysis of "legal obligation." Seeking clearly to distinguish law from morality (the latter being, for Austin, embodied in the principle of utility) Austin viewed statements of legal obligation as statements concerning the likelihood of suffering a sanction in certain circumstances. Hart rejected

[7] Immanuel Kant, *The Metaphysics of Morals, in* PRACTICAL PHILOSOPHY 353, 379 (Mary J. Gregor ed., 1996).

[8] Kant, *supra* note 7, at 387.

[9] *Id*.

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this analysis on the ground that it would render unintelligible the judge's invocation of legal obligations as *a reason for imposing* a sanction.[10] Hart thereby acknowledges that a theory of law must explain how laws can intelligibly be invoked as a justification for imposing sanctions.

This gives rise to the question of what "justification" means in this context. Is justification here a matter of *moral* justification? Or can there be some form of justification that is "technical" and "confined" in so far as it consists in the subsumability of a case under a rule without regard to the question of whether the application of that rule to this case is morally appropriate or permissible?[11] The great philosophers of law, such as Hobbes and Kant, tended to assume that what was in question here was some form of moral justification. Thus, their accounts of the nature of law formed an integral part of broader political philosophies. They asked, in effect, what must law be that it can provide a justification for the use of coercive force? Any attempt to answer this question is of necessity bound up with other philosophical inquiries, into justice and the authority of states.

We have identified two philosophical problems of the nature of law: the problem of fundamental law-making authority, and the problem of law's justificatory force. Now let us note the existence of a third, which I shall call (for want of a better label) the problem of the ideality of law. The problem arises from a simple yet pervasive feature of legal discourse: lawyers frequently offer differing accounts of the law's rules and principles even when they are fully and equally familiar with all of the statutes, cases and other relevant materials.[12] Lawyers therefore seem to be working with a conception of law that cannot straightforwardly be equated with the totality of rules explicitly established in statutes and cases. We may therefore ask what conception of law that is, and how does it relate to the authoritative pronouncements of the lawmakers?

[10] *See* HART, THE CONCEPT OF LAW, *supra* note 3, at 84 ("[W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.").

[11] H.L.A. HART, ESSAYS ON BENTHAM 266 (1982).

[12] *Cf*. RONALD DWORKIN, LAW'S EMPIRE 3–6 (1986) (explaining the disagreement about law).

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C. Hart's Solutions

In *The Concept of Law*[13] and subsequent writings, H.L.A. Hart offered a set of elegant solutions to the three problems identified above (in spite of failing, in his opening chapter, to identify the problems in a fully enlightening way). We will briefly summarise his solutions before turning to their deficiencies.

Let us begin with the problem of the basis of supreme law-making authority. The problem arises, it will be recalled, if we assume that all laws are made by human acts and that human acts can create law only if legally authorised so to do. This seems to generate an infinite regress. We may be unwilling to abandon the thought that all laws are made by human acts, and may therefore be tempted to follow Austin in a reductionist approach that grounds ultimate law-making authority directly in the facts of coercive political power. However (as Hart amply demonstrates) such an approach is unable to offer an adequate analysis of law-making authority, or of the meaning of propositions of law. Adequately to grasp these notions we need to see law-making authority as an authority conferred by rules. What then is the status of these authority-conferring rules?

Hart's solution is to say that the rules in question are rules *accepted* by officials. The rules exist in so far as the officials accept them and act in accordance with them: they are in that sense rules created by human action (not natural laws). But the rules are not *enacted* by anyone, and their creation therefore does not require legal authorisation. The solution depends upon Hart's notion of the "rule of recognition": a rule, accepted by officials, that identifies other rules (such as rules enacted by lawmakers) as "valid" rules of law. On this account, legal rules generally exist in the sense of being "valid": which is to say that they satisfy whatever criteria are set out in the rule of recognition of the system in question. The rule of recognition itself, however, is neither valid nor invalid: it is the ultimate criterion of legal validity. It exists in so far as the conduct of officials exhibits a regular pattern of conformity (in, presumably, deciding disputes by reference to certain rules and sources of rules) that Hart calls the "external aspect" and the adoption of an attitude (whereby the regular pattern of conforming conduct is viewed as a standard that one ought to comply with) that Hart calls the "internal aspect."

Thus, for Hart, all laws are *created* by human actions, but not all laws are deliberately enacted. Acts of deliberate lawmaking require legal authorisation[14] before they can successfully create law. But the rule of recognition provides the necessary authorisation without itself requiring authorisation.

[13] HART, THE CONCEPT OF LAW, *supra* note 3.

[14] There are perhaps some exceptions that do not affect the present argument. *See* HART, THE CONCEPT OF LAW, *supra* note 3, at 153 (discussing the contexts where judges create law and then get their power to create it accepted after the event). As Hart puts it, "all that succeeds is success." *Id*.

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Hart's solution to the first problem brings us to his solution to the second problem: that is, the problem of the law's justificatory force. For, in order for the rule of recognition to exist, the officials must take "the internal point of view" towards the regular pattern of conforming official conduct. The internal point of view incorporates the belief that the regular pattern of conforming conduct ought to be followed, and that deviation from it should be criticised and the criticism viewed as justified. The "ought" here need not, according to Hart, be any sort of moral "ought": the officials may take the view that they "ought" to follow the rule of recognition for purely prudential reasons, such as a desire to maintain the power of an exploitative regime from which they benefit. When officials apply the laws to individual citizens, and regard the laws as "justifying" the imposition of sanctions, the "justification" that is involved here can be purely "technical": simply a matter of showing that the individual case falls under the legal rule, without regard to the question of whether application of the legal rule is morally right or permissible. In this way, Hart believes that his theory captures the normative, action-guiding, justificatory aspect of law without needing to base law upon morality in any way.

What of the third problem, which I have called the problem of the ideality of law? Hart's writings contain two different, although mutually compatible, responses to the problem. His principal response[15] suggests that the assumption that law somehow goes beyond the authoritative materials of the law is a kind of illusion that arises if we ignore the "open texture" of rules and assume that every case can be resolved by applying the rules of the system. In fact, as Hart points out, rules always give rise to "penumbral cases" where the rules give no determinate answer. Cases where the lawyers appear to be disagreeing about what the law requires are therefore, very often, cases where the rules are indeterminate in their application to this particular case: the case cannot be resolved one way or the other by applying the rules, and the disagreement between the lawyers is, in substance though not in form, a disagreement not about what the law is but a moral or political argument about how a gap in the law should be filled.

D. Where Hart Goes Wrong

Amongst Hart's critics, the writer who has attracted the most attention is Ronald Dworkin. Dworkin focuses his attack primarily on Hart's account of penumbral cases. He points out that, in such cases, lawyers think of themselves as offering legal arguments, not as offering extra-legal moral or policy considerations. We should try to find a conception of law that makes sense of the lawyers' assumptions, and only adopt Hart's view if the lawyers' ordinary assumptions prove to be indefensible. Dworkin believes that he has constructed

[15] I set on one side for present purposes the "inclusive" aspect of Hart's legal positivism. *See* HART, THE CONCEPT OF LAW, *supra* note 3, at 250 (explaining the inclusive aspect of Hart's legal positivism).

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a suitable account of law that captures the juridical character of doctrinal arguments in contentious cases, and is in all other respects more enlightening than Hart's theory.

My own theory also aims to contest Hart's account of penumbral cases, but it opens its attack on Hart at a different point in the argument. Instead of examining Hart's response to the problem of the law's ideality, let us examine his response to the problem of the law's justificatory force.

Hart attempted to steer a middle course between reductionism and the rejection of legal positivism. John Austin's version of legal positivism was essentially reductionist: it analysed propositions of law (such as propositions concerning legal obligation) as statements regarding the likelihood of suffering a sanction. Reductionism of this sort, Hart felt, was unable to capture the prescriptive, action-guiding character of propositions of law. Yet the alternative to reductionism, Hart felt, need not be a rejection of legal positivism: a theory can accommodate the prescriptive or normative character of law without grounding law in morality.

The rule of recognition is the key to Hart's solution. For the rule of recognition to exist (and, therefore, for a legal system to exist) the officials must adopt the internal point of view towards their shared pattern of convergent conduct: they must regard that pattern as a standard that "ought" to be complied with. But the "ought" need not be a moral "ought": officials may believe that they should follow the rule of recognition for non-moral reasons of self-interest, for example. Given the rule of recognition, we can grasp the nature of law's normativity while setting on one side all questions about *why* the officials adopt the internal attitude. Their reasons may be moral or non-moral: it makes no difference.

Consider the analogy of a game. I may play a game for many different reasons: to keep a promise, to pass the time, to please a friend, to earn money, to humiliate an enemy. Within the context of the game, however, my actions must be guided by the rules. The rules give me reasons for action that are partially independent of my reasons for playing the game in the first place. Thus, we do not need to say whether reasons-within-the-game are moral reasons or prudential reasons: the game is a domain of reasons that enjoys a degree of autonomy *vis a vis* our moral or prudential reasons for playing the game. In the same way, the normativity of law is a matter of the law offering reasons for action that need not be reduced to moral or prudential reasons.

This provides us with Hart's response to the problem of justification. When the judge sets forth, in his judgment, the propositions of law (propositions concerning, for example, the defendant's legal obligations) that justify his decision, he is offering a justification that is "technical" in so far as it invokes neither moral nor prudential reasons for the decision: it invokes *legal* reasons that are not directly reducible to either of the two more familiar

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categories of reason. Hart's theory in this way hopes to enable us to understand what these legal reasons are and how a fully intelligible human activity gives rise to them.

We may say that Hart regards law as a partially autonomous domain of normative reasoning. It is a domain of normative reasoning, in so far as propositions of law do not (for example) *predict* the incidence of sanctions or the probable reaction of courts, nor do they *describe* events such as the issuing of commands or states of affairs such as the existence of regular patterns of human conduct. Rather, propositions of law have their sense within the realm of reasons and prescriptions, not predictions and descriptions. To say that someone has a legal obligation is to express a conclusion about the applicability of a rule that *prescribes* his or her conduct, and gives a judge a *reason* for imposing a sanction.

This domain of normative reasoning is *autonomous* to the extent that it is not reducible to either moral or prudential reasoning. But the autonomy is only *partial* for a combination of two different reasons. In the first place, legal reasons can only possess practical force in so far as one has reason to be guided by the law (just as the reasons internal to a game have practical force only if one has reason for playing the game): such reasons could be either moral or prudential. Secondly, penumbral cases cannot be resolved by exclusive reference to the law, but only by reliance upon considerations (of morality or policy, for example) that lie beyond the legal rules.

At this point we must call to mind one of Hart's criticisms of Austin. Austin had claimed that a statement to the effect that a certain person has this or that legal obligation is really asserting that the person in question is likely to suffer a sanction if they act in a certain way (that is, a way of acting that violates the obligation). Hart pointed out that Austin's analysis is unable to explain the way in which judges invoke legal obligations as a justification for imposing sanctions. When the judge orders X to pay damages, and cites X's legal obligations as a justification for so ordering him, the judge can scarcely mean, by his invocation of X's obligations, to assert that X is likely to suffer a sanction: the likelihood of suffering a sanction can hardly be offered as a justification for imposing a sanction.[16] By offering this argument, Hart in effect concedes that he regards it as a requirement of an adequate theory of law that it should be able to explain how law (e.g. the defendant's legal obligations) can intelligibly be invoked as a justification for the imposition of a sanction. The question that *we* must ask is whether Hart is really any more successful in satisfying this requirement than Austin was.

[16] *See id*. at 84 ("[W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.").

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Let us begin with a few reminders of our ordinary understandings. We ordinarily assume that the judicial judgment is a setting forth of the justification for the judge's decision (a decision which may involve ordering the deployment of the state's coercive force against an individual). We also assume that, within the judgment, the law will play a key role: we assume, in fact, that the judge will cite certain propositions of law as central to the justification for his or her decision. These rules of law are cited not because they are just or wise or otherwise desirable, nor because the judge approves of and endorses them: they are cited precisely because they are law within the relevant jurisdiction. Now let us see how successful Hart's theory is at capturing these familiar features of the judicial judgment.

According to Hart, the justification offered by the judge for his or her decision is "technical" and "confined."[17] When the judge invokes the defendant's legal obligations as a justification for imposing a sanction, the judge is operating with reasons that are internal to the domain of law: the judge has a *legal* reason for imposing a sanction. Of course, for this *legal* reason to possess real practical force (and so be a genuine reason for action) the judge must have reason to guide his or her conduct by law. But such judicial reasons for being guided by law could, Hart tells us, be either moral reasons or prudential reasons. The judge might have purely *prudential* reasons of self-interest for following the rule of recognition, yet these would nevertheless be sufficient to give a practical force to the propositions of law invoked in the judgment.

Suppose that a judge sentences me to prison, citing a certain rule as the justification for my punishment. I protest and demand to know how the existence of the rule serves to justify sending me to prison. The judge explains that the rule is a valid rule in so far as it is derivable from the rule of recognition, a rule that he and his fellow judges accept. I continue to protest: why should I care about what rule he and his colleagues accept? What does that have to do with me?

Now the coherence and intelligibility of the judge's justification will scarcely be increased if he goes on to add further explanation along Hartian lines, explaining that he and his colleagues accept the rule of recognition for self-interested reasons: clearly I will feel that the judge's self-interest cannot possibly provide an intelligible justification for sending me to prison. Let us suppose then that the judge accepts a friendly suggestion from Neil MacCormick, even if the suggestion comes at the cost of strict adherence to Hart's legal positivism. MacCormick pointed out that the justification provided by invocation of the rule of recognition could be complete and transparent[18] only if framed in terms of moral

[17] HART, ESSAYS ON BENTHAM, *supra* note 11, at 266.

[18] NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 139–40 (1994). I phrase MacCormick's point in my own words here, which seem to me to capture his point better than his own formulations (which leave something to be desired).

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considerations supporting the judge's acceptance of the rule of recognition (MacCormick called these "underpinning reasons").

The judge would now be saying "I am justified in sending you to prison because that is required by a rule that stems from a rule of recognition I and my fellow judges accept for good moral reasons." The justification has now become fully intelligible. But it still fails to capture one of the settled understandings mentioned above: the understanding that the judgment is a justification of the decision by reference to the *law* and not simply by reference to the rules that the judge considers wise or desirable or just.

At this point you may think that I have gone astray. For, surely, if the rule invoked by the judge is derivable from the rule of recognition, it must indeed be a law. But this is not so. For one can have a system that successfully maintains order by enforcing rules derived from a basic rule of recognition, and yet it does not constitute a system of law. Suppose, for example, that the rules of the system are all kept secret; or that they change on an hourly basis; or that all of the rules, rather than prescribing duties for citizens, simply confer upon officials extensive powers to employ coercive force whenever the officials think best. We would not, I think, regard these systems as systems of law.[19] Consequently, we cannot say that all rules derived from the rule of recognition (in a system that is effectively in force) are necessarily legal rules. For they will only be legal rules if the rule of recognition from which they are derived is the rule of recognition of a system of law. Since one of our settled understandings of the judicial judgment is that it justifies the imposition of the sanction by invoking the law, we must say that judges can never justify their decisions simply by invoking the rule of recognition without addressing, or at least assuming an answer to, the question of whether the system as a whole is a system of law.

E. Reflexivity in Law

In Hart's view, the rule of recognition represents an outer bounding limit upon the juridical domain. Adjudicative legal thought is at its core a matter of applying the rule of recognition and the valid rules that stem from it (beyond the core, adjudicative legal thought is a matter of deciding, on extra-legal grounds, matters that fall within the penumbra of uncertainty of the rules and so are left undetermined by the existing law). Once we reach the rule of recognition itself, we have reached the ultimate basis of legal validity and legal justification. Of the rule of recognition itself one can ask factual questions (e.g. how secure is its acceptance by officials?) or moral questions (e.g. is it a good rule?) but one cannot ask juridical questions. To ask, for example, whether the rule of recognition is "legally valid" is to ask a meaningless question: being the ultimate basis of legal validity, the rule of recognition is itself neither valid nor invalid.[20]

[19] LON FULLER, THE MORALITY OF LAW (Revised ed. 1969).

[20] HART, THE CONCEPT OF LAW, *supra* note 3, at 100–23.

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Can we not then ask whether the rule of recognition is the rule of recognition of a system of law? Such a question does not seem to lack sense for, as we saw above, one could have a system that failed to amount to law in spite of possessing a rule of recognition. Hartian legal positivists would in all probability agree that such a question (unlike a question concerning the validity of the rule of recognition) is perfectly meaningful; but they would also insist that it is essentially a *classificatory* question the answer to which forms no part of the justificatory reasoning underpinning a judicial judgment. Raz, for example, has insisted that the judge's duty is simply one to apply the rules of the system under which he or she was appointed, without regard to the question of whether or not the system is a system of law.[21]

The insistence that the rule of recognition bounds the limit of the juridical domain in this way is intended, amongst other things, to police a distinction between legal doctrinal questions concerning the content of the existing law (on the one hand) and jurisprudential questions concerning the nature of law (on the other). Jurisprudence, in Hart's view, does not contribute to the justification of judicial decisions nor offer guidance to the judge: it is an essentially descriptive enterprise concerned to note the resemblances and differences between different phenomena (as he explains in the opening chapter of *The Concept of Law*). As explained above, we might well feel a sense of dissatisfaction with this account of the nature of jurisprudence, since it fails to identify an intellectual project of an unambiguously philosophical character.

We now have a further reason for questioning Hart's account of the nature of jurisprudence. For we have seen that, if the judicial judgment is to be understood in a manner compatible with our settled understandings, it cannot be construed as simply relying upon the rule of recognition and its valid progeny without explicitly or implicitly addressing the question of the status as law of the system as a whole. We ordinarily take the judgment to be a setting forth of the justification for the judge's decision, addressed to the litigants amongst others; and we assume that, within such justification, the status of certain rules as law will play a key part. Indeed, these assumptions seem to be quite central to our understanding of the justification that is offered. A judge cannot intelligibly justify a decision (perhaps involving the ordering of coercive force against the defendant) by citing a rule that he accepts for self-interested reasons. While the invocation of moral reasons (McCormick's "underpinning reasons") here might reduce our sense of bewilderment, they would still not capture our normal understanding of the judicial judgment. For we ordinarily assume that judges do not justify the imposition of sanctions by reference to their own moral or political views, but by reference to what they claim to

[21] JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 84–85 (2009). For criticism, see N.E. Simmonds, *Reflexivity and the Idea of Law,* 1 JURISPRUDENCE 1 (2010).

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be the law. Making sense of this claim has always been one of the central tasks for jurisprudence.[22]

What this suggests is that the philosophical problem of law's nature does not spring, as Hart seems to think, from a need for the careful description of resemblances and differences between different social phenomena, but from the *reflexivity* of legal thought. That is to say, legal thought is always guided and informed by reflection upon the *idea* of law, and it is the task of jurisprudence to investigate that idea.

F. The Idea of Law

Legal thought is guided by the idea of law. As Lon Fuller expressed the point, the law is always "in quest of itself."[23] Many lawyers will react to this claim with incredulity. Surely, they will say, whatever its faults, Hart's theory that lawyers are guided by a basic rule of recognition is more plausible than this! After all, lawyers do not think of themselves as engaged in a philosophical inquiry, nor do they daily reflect upon such an abstraction as "the idea of law."

To dispel the incredulity, we should first notice that being guided by reflection upon the idea of law is not incompatible with being guided by a basic rule of recognition. What it does exclude is the thought that the basic rule of recognition is an outer bounding limit on juridical thought, beyond which lie factual and moral questions, but no juridical questions. In fact, we can only capture our settled understandings of the nature of judicial judgments (i.e. the understandings that (i) the judgment sets forth a justification of the decision, addressed amongst others to the litigants; and (ii) that, in that justification, the status of certain rules as law plays a central role) if we treat the judgment as assuming that the rule of recognition in question is the rule of recognition of a system of law. The rule of recognition can acquire an appropriate justificatory relevance only on the assumption that it grounds a system of law; and, in certain circumstances, this assumption could be rendered questionable and problematic.

Once we have seen this point we start to appreciate the extent to which the concept of "law" is not one that simply *describes* a familiar social phenomenon: the concept also plays

[22] Might one object that, since Hart's project is a purely descriptive one, he need not explain how the imposition of sanctions is to be justified? Such an objection would be misguided. Hart's theory "is concerned with the clarification of the general framework of legal thought." H.L.A. Hart, *Preface* to H.L.A. HART, THE CONCEPT OF LAW, at vi (2d ed. 1994). Hart would readily concede that this requires him to be able to explain how laws *can intelligibly be invoked* as a justification for the judicial decision, even if they do not in fact succeed in justifying the sanction. After all, it is on precisely this basis that Hart rejects Austin's analysis of "legal obligation" in terms of the likelihood of suffering a sanction: one cannot intelligibly invoke the *likelihood of suffering* a sanction as a reason for imposing a sanction.

[23] LON FULLER, THE LAW IN QUEST OF ITSELF (1940).

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an indispensable role *within* that phenomenon. Judges do not justify their decisions by reference to the rules that they accept for whatever reasons, or the rules that they consider to be wise or just: they justify their decisions by reference to the law, and the status of the relevant rules as law is regarded as essential to the justification of the decision. Similarly, legislators do not issue commands: they enact laws, and the fact that their enactments are law is regarded as essential to the claim that they make upon the citizen's conduct. The practices of law are practices oriented towards an idea of law.

This is not to say, of course, that lawyers are constantly pondering on the idea of law. The daily reality of law is a matter of unreflective conformity structured by a range of settled and unquestioned assumptions: philosophical problems arise when we try to assemble these understandings into a coherent picture of law's nature, as we occasionally need to do even to address the practical issues that the law confronts.

How then are we to proceed in investigating the idea of law? The philosophy of law is a battlefield where almost no ground seems uncontested. From what starting point, then, can our inquiry proceed?

In his *Essay on Philosophical Method,* Collingwood offered the following description of "a method repeatedly used throughout the history of philosophy":

> To define a philosophical concept . . . it is necessary first to think of that concept as specifying itself in a form so rudimentary that anything less would fail to embody the concept at all. This will be the minimum specification of the concept, the lower end of the scale; and the first phase of the definition will consist in stating this. Later phases will modify this minimum definition by adding new determinations, each implied in what went before, but each introducing into it qualitative changes as well as additions and complications.[24]

Collingwood described philosophical reflection as an activity that we are always "trying to bring into conformity with an idea of what it ought to be."[25] Something similar is true of law. For legal thought, like philosophical reflection, is also always "trying to bring itself into conformity with an idea of what it ought to be." But a philosophy of law should not be a product of the utopian imagination: it should be a reconstruction of the ideas and conceptions structuring the form of association that we think of as a legal order. The

[24] R.G. COLLINGWOOD, AN ESSAY ON PHILOSOPHICAL METHOD 100–01 (1933).

[25] *Id*. at 4.

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trouble, of course, is that the ground is contested, and has probably been contested as long as there has been anything that we could recognize as legal thought. Law exists only in so far as a great many people share certain understandings and expectations. But which understandings are essential to the existence of law, and which are peripheral? Which understandings are soundly based and which are misguided products of intellectual confusion or wishful thinking? The ground having always been so hotly disputed, there seem to be no uncontentious points from which an argument can proceed, at least if the argument aspires to pass beyond purely banal and unhelpful propositions. Collingwood's observation offers us a possible procedure for addressing the problem. Can we begin by identifying a "minimum specification" of the concept of law, in the form of a set of conditions without which nothing could count as law at all? From such a minimum specification, can we proceed in some orderly and intellectually defensible way towards "later phases" of the concept, with their "qualitative changes as well as additions and complications"? The possibility is worth exploring, however unfashionable may be the philosophical viewpoint from which it springs.

G. From Minimum Conditions to Guiding Ideal

The philosophical trajectory described by Collingwood can be pursued from a starting point provided by Fuller. Fuller's famous story of Rex, and his failed attempts to enact law, addresses the first stage of Collingwood's method by identifying the minimum conditions that something must satisfy in order to count as an instance of law. Through the narrative, Fuller presents us with a series of bizarre fairy-tale examples, and invites us to draw clear conclusions about them. In effect he says to us: "If you encountered a system of governance that had no rules at all, you would not regard it as a legal system, would you? Similarly, if you encountered a system where all the rules were retrospective? Or where they were all kept secret?" and so on. In this way Fuller identifies eight desiderata for law:

(1) there must be rules;
(2) which are published;
(3) prospective;
(4) possible to comply with;
(5) intelligible;
(6) free from contradiction;
(7) reasonably stable through time; and
(8) there must be congruence between the declared rules and the official action.

Fuller takes these eight requirements to encompass the traditional rule of law requirement that force should be employed against the citizen only in response to the violation of a law.

It is of great importance that one should notice the wholly uncontentious nature of the understandings that Fuller seeks to isolate and identify here. This is why his story has the

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character of a fairy tale. In the real world, we do not encounter systems where literally *all* of the rules are kept secret, or where *all* of the rules are purely retrospective, or where officials *never* act in accordance with the rules. Yet we nevertheless seem to have firm semantic intuitions concerning such fairy tale imaginings: we clearly would not regard them as instances of law. In this way Fuller seeks to rise above the faction-infested battleground of claims and counter claims concerning the propriety of labeling as law various evil or otherwise imperfect regimes.

However, the stability of the starting point might at first seem to come at the price of sterility. For what could be the interest in establishing that we do have stable semantic intuitions regarding such unreal examples? Fuller's theory becomes interesting when he proceeds to demonstrate that the eight desiderata (identified as minimum conditions), when taken collectively, can be regarded as a guiding ideal for legal thought: the ideal that we usually label "the rule of law."[26] Much of Fuller's book is taken up with showing how legal practices represent, as he puts it, a purposive activity, and how the overall coherence of the activity is revealed by grasping the way in which it serves the idea of compliance with the eight desiderata.

Fuller claimed that his eight requirements represent an "inner morality of law." This claim has been much discussed and widely rejected. Hart's critique of Fuller appeared to suggest[27] that the moral value of compliance with the eight requirements is wholly contingent upon the law's content, and that the eight requirements are more akin to precepts of efficiency than to moral standards. This criticism has been widely endorsed as correct.

In fact, the criticism is not correct. The eight requirements are not principles of efficacy, but (when taken together) represent a moral ideal for legal systems. Considerations of efficacy would, at best, provide a good reason to comply with the eight requirements to a limited extent. If we abstract from the content of governmental objectives, we must say that, beyond a certain point, compliance with the precepts would significantly restrain the ability of a government to pursue its objectives, rather than advance that ability. It is not uncommonly the case that some degree of compliance with moral precepts (such as principles of justice) will be capable of serving a variety of morally neutral or positively wicked goals, but this does not demonstrate that such moral precepts are really only morally neutral principles of efficacy.[28] Nor does the alleged compatibility with evil[29] of the

[26] *See* MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW 108–09 (2007) (disputing this idea). I think, however, that Kramer misunderstands the import of Fuller's observation that the ideal of perfect realisation of the eight desiderata "is not actually a useful target for guiding the impulse towards legality." SIMMONDS, LAW AS A MORAL IDEA, *supra* note 2, at 145.

[27] For discussion, see SIMMONDS, LAW AS A MORAL IDEA, *supra* note 2, at 69–76.

[28] N.E. Simmonds, *Evil Contingencies and the Rule of Law*, 51 AM. J. JURIS. 179 (2006); N.E. Simmonds, *Freedom, Law and Naked Violence,* 59 U. TORONTO L.J. 381 (2009).

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eight requirements demonstrate that they are of morally neutral character: for legal systems, as for people, there may be distinct moral virtues, and virtue in one respect may be compatible with lack of virtue in some other respect.

Nevertheless, it must be conceded that Fuller never really succeeded in giving a clear explanation of the moral status of his eight requirements. It is here that I feel my own work clarifies matters and contributes positively to the debate. It is wise to begin from claims that have traditionally been made for the virtue of the rule of law. Most commonly, those who have sought to extol the virtues of the rule of law have suggested that it is intrinsically connected with liberty. But the claim has tended to attract a curt dismissal from those legal positivists who wish to emphasise (in line with Hart's critique of Fuller) the absence of any *necessary* connection between law and a value such as liberty. They have pointed out that the law may sometimes protect the liberty of the citizen, but may also restrict that liberty very severely: everything depends upon the content of the law, and upon the circumstances. Thus it is perfectly conceivable that someone living under a regime that scrupulously adheres to the rule of law might enjoy less liberty than some other person whose government violates the rule of law extensively.

It should be noticed, however, that this familiar argument assumes that liberty is a matter of the number or extent (and perhaps quality) of the options one has available: to have more options (or more extensive options, or perhaps better options) is to have more liberty; to have fewer options (or less extensive or worse options) is to have less liberty.[30] But this well-established approach to the notion of liberty clearly fails to capture every aspect of the relevant value. For example, few will wish to deny that slavery is inherently violative of liberty. Only someone dogmatically committed to a theoretical agenda could wish to claim that the connection between slavery and lack of freedom is purely contingent and dependent upon all of the circumstances. Yet that is the logical consequence of saying that the notion of freedom is fully captured by the idea of "freedom as available options." The reason is quite simple: a slave may conceivably, in certain circumstances, enjoy more options than a free man: consider a slave whose master gives him very few tasks to perform, by contrast with a free man who has many onerous duties as part of his work, or his family life, or his role as a citizen.

If we want to preserve our sense that slavery is inherently violative freedom we must look beyond "freedom as available options" and must acknowledge that there is another aspect to freedom. We may call it "freedom as independence from the power of another" and it can best be understood by reference to the contrast between the slave and the free man. Whether the slave has many options available to him or very few, those options are all

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[29] HART, THE CONCEPT OF LAW, *supra* note 3, at 207.

[30] This summary description of the position obviously skates over a host of questions concerning, for example, the kinds of interferences that will prevent an option counting as being "available."

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dependent upon the will of his master. In the case of the free man, by contrast, the options that he has, and the duties he bears, are never fully dependent upon the will of someone else. This is so, at least, to the extent that the free man lives under the rule of law.

H. Freedom as Independence

To the extent that we are governed by institutions approximating to full compliance with Fuller's eight precepts, we enjoy a degree of freedom as independence that can be enjoyed in no other way. Of course, the law imposes duties upon us and, to the extent that it is effectively enforced, it restricts the options that are factually available to us, as well as normatively available. But to comply with Fuller's eight precepts, the rules must be such that they are possible to comply with. It follows from this that the rules must leave me in possession of certain domains of optional conduct, however restricted those domains may be: even if my life is fully occupied with the performance of my legal duties, I must still have some choices left to me if the duties are to be performable at all (e.g. Should I whistle while performing my duty? Should I wear a blue tie?). Those available options are independent of the will of anyone else to an extent that is impossible, within a human community, in the absence of the institutions of law. The intrinsic moral value of law, therefore, consists in the way in which law secures a degree of freedom as independence that can exist in no other way.

There are two different aspects to this, and they are perhaps worth distinguishing. Any human community will require some procedures or strategies for dealing with disputes, and it is unlikely that such arrangements can ever be wholly optional and voluntary: even when they are not supported by the use of coercive force they will be surrounded by informal mechanisms of social pressure and collective disapproval, so that those who refuse to submit to the dispute resolution process are conceived to have failed in their duties to the community. Where the rule of law does not obtain, these dispute resolution mechanisms subject one to the will of some or all of the other members of one's community. Where the rule of law does obtain, however, one to that extent enjoys a realm that is free from any duty of submission to the wishes of others. This gives us one aspect of freedom as independence. But we may go further. Any government of any orderly society will need to place restrictions upon the use of violence by one citizen against another. Such restrictions will inevitably provide a perimeter of protection[31] for those liberties that stem (as explained above) from the law's performability. Hence, the rule of law provides a degree of protection for the individual, not only from the power of communal dispute resolution and other decision-making processes, but also from the actions of fellow citizens.

[31] HART, ESSAYS ON BENTHAM, *supra* note 11, at 171–73.

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A variety of objections might be made to my argument at this point. Some of them merit more discussion than they can receive here, but I will nevertheless address them briefly at this point.

I. The Will of the Lawmaker

It might be said that my argument ignores the obvious fact that, within a legal system, the citizen's options depend upon the will of the lawmaker. Indeed, one might see legal systems as achieving a particularly thorough subjection of the citizen's options to the will of those who enact the law. The objection ignores the fact, however, that compliance with Fuller's eight desiderata involves the rules being prospective not retrospective. Therefore, at any one point in time, my options will depend upon a law that is already in place, and that law will constrain the powers that the lawmaker, along with everyone else, has in relation to me. It might be said in response that the lawmaker could change the law for the next moment, so that my options are pretty insecure. But it must also be remembered that compliance with the eight desiderata requires that the rules should be reasonably stable through time: a lawmaker who constantly changes the law departs from the eight precepts and undermines freedom as independence to that extent.

II. The Will of Everyone

A slightly more subtle argument points out that the existence of a legal system consists in the adoption of certain expectations, understandings and intentions by a great many people (lawmakers, judges, other officials, citizens). If they were all, simultaneously, to abandon their current understandings, expectations and intentions, the law would cease to exist. Consequently, my "freedom as independence" is always fully dependent upon the will of others, since they could, if they so chose, take it away at a stroke. This argument fails for a quite obvious reason. My claim is not that the existence of a legal system renders one's options wholly independent of the will of anyone else: such a situation can never obtain except for the type of pre-social natural man imagined by Rousseau. Rather, my claim is that, to the extent that the eight desiderata are satisfied, one enjoys *a degree* of freedom as independence that (within the context of a human society) *can be enjoyed in no other way.* This claim is not damaged at all by the objection.

III. "Freedom as Independence" Is Reducible to "Freedom as Available Options"

Here it could be argued that what I am calling "freedom as independence" is really just a matter of the probability or improbability of my being interfered with (and so having my options reduced) in the future. Such an argument has been offered, for example, against the "republican" conception of liberty defended by Philip Pettit and Quentin Skinner.[32]

[32] *See* IAN CARTER, A MEASURE OF FREEDOM 237–45 (1999); MATTHEW KRAMER, THE QUALITY OF FREEDOM 135–49 (2003).

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Now it is true that my conception of "freedom as independence" is quite similar to the republican account developed by Pettit and Skinner.[33] But I have deliberately avoided expressly associating my position with those views for two reasons. In the first place, Pettit and Skinner are inclined at times (quite frequently but not invariably) to conflate the dependence of a person's options upon the will of another with that person's vulnerability to future interference from another. Secondly, my account of "freedom as independence" is presented as an *aspect* of freedom, and an aspect that must be taken into account by any adequate account of the nature of freedom. To the extent that the standard liberal account of negative freedom ignores this aspect, it is deficient. But "freedom as independence" on my account need not be viewed as a self-standing *rival* to the liberal account. In endorsing my account of "freedom as independence" one need not follow the claim of Pettit and Skinner[34] that, when it serves the interests of the governed, the law can reduce people's options without reducing their freedom. One could equally say that, when the law reduces my options, it thereby reduces one aspect of my freedom, even though (to the extent that it satisfies the eight desiderata) it may also respect another aspect of my freedom. Liberals can therefore regard my position as a friendly supplement to their position rather than a rival, thereby reducing the necessity for them to oppose it. But, more fundamentally, I most certainly do not conflate the *status* of "freedom as independence" with a low level of vulnerability to future interference, as Pettit and Skinner are sometimes inclined to do. On my account, a slave is still a slave even if we can be quite sure that his master will never interfere with him.[35]

IV. Too Thin?

People sometimes find my position unsatisfactory in so far as the moral value to which I am connecting law seems very thin and impoverished. Certainly "freedom as independence" is not everything. Some would say it is not much. But they would be mistaken. This aspect of freedom is real and important, and it grounds the intrinsic value of law. Moreover, as we shall see in due course, a full and well-grounded concern for freedom as independence leads us into a concern for justice and principle that may go some way towards satisfying the critic's craving for a richer and more sustaining value at the heart of juridical thought.

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[33] For other equally significant connections, see Kant's position as explained in ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2009).

[34] *See* PHILIP PETTIT, REPUBLICANISM (1997); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998).

[35] I am sure that Pettit and Skinner would wish to echo this claim; my point is simply that they sometimes appear to lose sight of it, and as a result, they seem to render themselves vulnerable to the line of attack developed by Carter and echoed by Kramer.

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V. Private Threats to Freedom as Independence?

A more interesting objection to my argument might point out that, even within a sophisticated legal system that complies with the eight desiderata to a very high degree, I may find my options depending upon private institutions and the will of fellow citizens. I may, for example, enter into contracts which have that effect. This is, of course, true. But notice once again that my argument is *not* that the existence of law gives one *perfect* and *absolute* freedom as independence (assuming for the moment that such a concept of perfection is fully intelligible): my argument is that, to the extent that the eight desiderata are realised, one enjoys a *degree* of freedom as independence that can be enjoyed in no other way. Although unsound as an objection, however, the argument points us to an interesting feature of the rule of law, namely its implications for the regulation of private power. Fuller was himself very concerned with the need to think about private power and private institutions in terms of the rule of law, and his insights here have been taken up by others.[36] Indeed, the strong association between "freedom as independence" and the need for an appropriate structure of private rights is a prominent theme in Kant's philosophy of law.[37]

I. The Ideality of Law

Since the judicial decision must be justified by reference to the law, and since (as we have seen) the derivability of a rule from the rule of recognition does not guarantee that the rule is law, we cannot treat the judge's duty as fundamentally a duty to follow the rule of recognition. As Fuller himself emphasised, the fundamental duty of the judge is one of "fidelity to law." We can understand this as "fidelity to the idea of law." The notion of fidelity to law provides us with a vantage point from which Hart's analysis of penumbral cases can effectively be challenged.

Suppose that the law consist of a finite body of rules derived from the rule of recognition. If such rules are exhaustive of the law, the law will, as Hart points out, give rise to "penumbral cases" where there is no determinate legal answer. But might the duty of fidelity to the idea of law have implications for the legal resolution of such supposedly penumbral cases?

The idea of law is the idea of that set of conditions within which citizens can enjoy a degree of freedom as independence. What then is the best that a judge can do to sustain such conditions in cases where the established rules yield no straightforward answer? The answer is: the judge can try to decide the case justly. To decide the case according to principles of justice is to decide according to standards that are independent of the judge's

[36] *See, e.g.*, PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969).

[37] *See* RIPSTEIN, *supra* note 33.

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will or preference (to doubt that this is possible is to say that there is no such thing as justice).

The distinction between the core case (where the rule can be straightforwardly applied) and the penumbral case (where it cannot) is a *continuous* distinction. That is to say, there is no clear boundary between the core and the penumbra. For that reason, the judge cannot adopt a *discontinuous* strategy of adjudication that requires core cases to be decided one way (by reference to the rules) and penumbral cases to be decided differently (by reference to justice). The judge must adopt a strategy of adjudication that addresses all cases in the same way. It follows that the duty of fidelity to law requires the judge, in every case, to construe the law (so far as possible) as just. The texts of the law must be read as texts concerning justice, as if they were intended to put forward a series of propositions concerning justice.

Thus adjudicative judgment must always depend upon the judge's understanding of justice, constrained by the texts that the judge must interpret. This captures many of the features of legal reasoning that are highlighted in Dworkin's theory of law, but without some of that theory's problematic features, such as the need to invoke a special value of "integrity." The present argument requires only the familiar values of "legality" and "justice."

There are other features of the judge's duty of fidelity to the idea of law that point in a similar direction. For example, Fuller's requirement that the law should exhibit reasonable stability through time suggests that, even when specific rules and doctrines change, they should so far as possible respect more fundamental principles that can be thought to underpin the law as a whole.[38] The requirement that the law should be intelligible suggests that it should, so far as possible, reflect moral and other understandings that will be shared by the populace as a whole.[39] And the requirement that the law should be performable suggests that the body of law should amount to a scheme of rules that is compatible with a tolerable communal existence where the most basic human needs are satisfied. Thus, what might at first appear to be the disorderly rag-bag of considerations that inform the interpretation and development of law[40] can nevertheless be best understood as guided by the single idea of law. There is no point at which the judge's duty of fidelity to law can be said to have exhausted its implications.

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[38] *See* N.E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 270–74 (3rd ed. 2008).

[39] SIMMONDS, LAW AS A MORAL IDEA, *supra* note 2, at 161. *Cf*. JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 45 (2007) (explaining the notion of "moral clarity").

[40] *See* JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT (2006).

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J. Conclusion

Underlying the ancient philosophical debate concerning law are three problems. These are not the "three recurring issues" identified by Hart, for Hart fails clearly to identify a philosophical problem here, confusing the real issues with the search for a description of the resemblances and differences between different social phenomena. In spite of his preliminary misidentification of the problem, however, Hart's theory can nevertheless be reconstructed as an attempt to resolve the three key difficulties that I have identified.

Although subtle and ingenious, Hart's analysis fails. His discussion of the internal point of view, for example, explains how officials might have self-interested reasons for following the rules, but is unable to explain how law can intelligibly be invoked as a justification for the sanction. Yet this latter question is at the centre of philosophical inquiry into law's nature: Hart himself tacitly acknowledges this when he rejects Austin's analysis of the notion of "legal obligation" for a similar failure to explain how such obligations can intelligibly be invoked as a justification for the sanction.

To arrive at a better analysis, we need to reject Hart's account of the rule of recognition and to grasp the extent to which legal thought is reflexive: the task of determining the content of law is ultimately guided, not by a basic rule of recognition (such a rule may play a part, but is not fundamental), but by reflection upon the nature of law itself. Philosophical inquiry into law's nature should be understood as an attempt to deepen our understanding of the guiding idea. To this end we can take as our starting point the minimum conditions identified by Fuller, conditions which point towards the ideal of freedom as independence. Law represents the only set of conditions within which people can enjoy, within the context of a human society, a degree of freedom as independence. The value is a distinct, and distinctly precious, one, and its realisation gives to the law its justificatory force. Practices constitute law to the extent that they realise the necessary conditions. The ideality of law is to be explained by reference to the intimate connections between "fidelity to law" and the idea of justice. We have one solution to three problems.

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