

THE LAW IN SPITE OF ITSELF

THE LAW IN SPITE OF ITSELF:
AN INQUIRY INTO THE TENSION
BETWEEN RIGHTS AND LEGAL OBLIGATION
IN MODERN LEGAL POSITIVISM

By

JOSHUA MILDENBERGER, B.A. (HONS.)

A Thesis

Submitted to the School of Graduate Studies

in Partial Fulfillment of the Requirements

for the Degree

Master of Arts

McMaster University

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MASTER OF ARTS (2007)
(Philosophy)

McMaster University
Hamilton, Ontario

TITLE: The Law in spite of Itself: An Inquiry into the Tension
 between Rights and Legal Obligation in Modern Legal Positivism

AUTHOR: Joshua Mildenberger, B.A. (Hons.) (University of Regina)

SUPERVISOR: Prof. Wilfrid J. Waluchow

NUMBER OF PAGES: v, 77

ABSTRACT

This thesis is an attempt to show the legitimacy and, in many cases, the natural necessity of entrenched constitutional rules, or of constitutional conventions having the same effect. I begin with an analysis of W.J. Waluchow's common law approach to constitutionalism in making a case against the anti-constitutionalism characteristic of Jeremy Waldron. I also draw on the right-based theory of Alan Gewirth, ultimately arguing that any agent should be able to accept (or at least not reasonably reject) the justifiability of a robustly liberal and universally egalitarian constitution. This, I argue, ought to be viewed as justifiable on the basis that nothing less may suffice if we are both truly concerned with rights in general, and with accurately describing the nature of our own right-claims in particular. Thereafter, I expand on H.L.A. Hart's 'minimum content of natural law' thesis, particularly in light of Joseph Raz's theory of authority. Regarding the former, I argue that it is unclear that the validity of any given law obtains just because an otherwise valid authority deems it so, even if Hart's own criteria for the existence of a legal system are apparently met. Regarding Raz's theory, I argue that if certain laws as put forth by such a sovereign are conceptually incapable of allowing agents to better conform to their own reasons for action, they are therefore conceptually excluded from his own "normal justification" and "dependence" theses—and thus from the nature of (even potentially) authoritative judgment—to begin with.

In these ways, I argue that the positivist criterion of legal validity should be narrower than is normally acknowledged, on the basis that the bare conceptual *possibility* (even if not the necessity) of a law's being authoritative is surely something which, if lacking, undermines that law's validity to a similar extent. In other words, it is only through the *potential* coherence of laws with agents' reasons for action that there could be any coherent normative duty to obey the law (in particular or in general) to begin with, insofar as we want to claim that a law can actually obligate (rather than merely oblige) any agent over whom it claims authority.

ACKNOWLEDGMENTS

A great debt of gratitude is owed to Wil Waluchow, whose lucid advice and background in legal philosophy helped to both clarify and strengthen my thoughts on the matter and the positions outlined herein. I am also indebted to Matt Grellette, Kristin Hrehor, and Frank Jankunis (among others, to be sure), whether for insightful discussions on matters of legal theory or for similarly insightful comments on earlier drafts of parts of this thesis, both being instrumental in this project coming to fruition. Also, an earlier version of the first chapter was presented at the Canadian Philosophical Association 2007 Congress, where the responses of the commenter and attendees provided me with the chance to acknowledge objections I hadn't foreseen. Finally, my greatest debt of gratitude is owed to my family, whose support and encouragement for my pursuit of whatever happened to interest me has ultimately led to my embarking on a hopefully fulfilling career as a student of legal philosophy.

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INTRODUCTION

This thesis is an attempt to show the legitimacy and, in many cases, the natural necessity of entrenched constitutional rules, or of constitutional conventions having the same effect. In Chapter 1, I build on W.J. Waluchow's common-law approach to constitutionalism in making a case against the anti-constitutionalism characteristic of Jeremy Waldron. To this end, I draw in part on the strong rights-based approach of Alan Gewirth, while also referring to more prosaic right-based conceptions of fairness and autonomy (both personal and collective) in order to show that the various values and arguments put forth by anti-constitutionalists may just as easily favour constitutionalism, depending on the particular circumstances of a society. I conclude that we would generally do well to entrench certain constitutional rules, both for the fact that doing so may be the only robust way to protect rights, as well as because we fail to inhabit the immutable utopia of good faith disagreement that Waldron requires in order to make his case. I also consider whether the content of such rules may be derivable (and justifiable) from the perspective of any given agent, were he or she sufficiently informed about both the nature and the consequences of his or her right-claims. As Gewirth argues, if one accepts the fact that any agent's alleged claim-rights to the basic goods of freedom and well-being arise solely due to his or her being a mere human agent, one should therefore be able to accept (or at least not reasonably reject) the justifiability of a robustly liberal and universally egalitarian constitution, for nothing less may suffice if we are truly concerned both with rights in general, and with accurately describing the nature of our own right-claims in particular.

Such an approach, however, may appear to raise the question of whether the aforementioned models of fairness and autonomy (and the rights they appears to justify) can trump competing views without reference to an ultimately contestable form of natural law. In response to this concern, I concede that the conclusion arrived at in Chapter 1 may indeed need to rest on a deeper foundation than the colloquial practice of respect for rights—yet I also think that it is no deeper of a foundation than is required by the nature of legal agency and/or of legal duties themselves, even as encompassed within modern forms of legal positivism. In Chapter 2, I thus expand on H.L.A. Hart's 'minimum content of natural law' thesis using various insights provided by Joseph Raz's theory of authority. In this way, I contend that even a staunch positivist may have to concede that one can provide not only practical, but *conceptual* support for such claims as made in Chapter 1, without appeal to any more of a natural conception of law than that which Hart himself acknowledges is plausible. Particularly when taking Raz's theory of authority into account, I argue that it is unclear that *any* law obtains validity just because an otherwise valid authority deems it so, even if Hart's own sufficient conditions for the existence of a legal system are otherwise met.¹ Without any delimiting of these criteria, I argue, we allow for the conceptual inclusion of cases that Hart aims to exclude in the first

¹ Namely, that a sovereign internalizes a social rule and that a bulk of the population obeys said rule (Hart 1997, p. 114).

place: Austinian gunman situations,² albeit where the gunman happens to internalize his or her commands and think that a group of coerced agents would in fact do well to follow them. Or, in pithier terms, when Hart recognizes that “what we are concerned with [in the practice of law] are establishing rules for continued social existence, not those of a suicide club”,³ this may very well entail the invalidity of establishing rules for continued social existence for oneself (and one’s co-conspirators), while nonetheless coercing others into following the rules of a suicide club. I thus argue that the commands of an Austinian gunman gain no more claim to legal validity just in case he or she happens to internalize them, even if the latter is normally sufficient for deeming that person a legal official in Hart’s theory.

In Chapter 3, I go on to question not only whether (as argued in the previous chapter) some putative laws are of the sort that no given agent who values his or her ends could assent to them (as an empirical matter of sorts), but also whether this sort of natural response directly relates to the concept of law, itself—e.g., insofar as law is a practical and social feature of human existence, that any law’s claims must be at least minimally relevant (however so construed) to any given agent’s behaviour and/or practical reason in the first place. I then introduce in more detail Gewirth’s naturalistic derivation of rights, and explore the possibility that his theory could act as a suitable description of why most agents would naturally declare certain laws invalid⁴ were they aware of what justifies them in the first place. As well, particularly under the rubric of Raz’s theory of authority, I argue that if such laws are conceptually incapable of allowing agents to better conform to their own reasons for action, they are therefore conceptually excluded from his own “normal justification” and “dependence” theses—and thus from the nature of (even potentially) authoritative judgment—to begin with.⁵ I thus argue for a richer sense of validity than most positivists would normally adhere to, on the basis that the bare conceptual *capability* (even if not the necessity) of a law’s being authoritative is surely something which, if lacking, undermines that law’s validity to a similar extent, as well as on the presumption that a fully informed legal agent would view validity in a similar manner.⁶

I then expand my critique of Hart’s claim that a legal system exists wherever (i) legal officials view their declarations as binding and (ii) a bulk of the population obeys them, in asking whether the acquiescence to such rules is the ultimate criterion on which the latter criterion should be based, as well as whether just any proposition can be coherently viewed as justifying any given law. In so doing, I outline other concerns with the Razian project, e.g., whether assenting to an authority entails granting it *carte blanche*,

² I.e., where law is nothing more than commands backed by sanctions, where the latter may mean nothing more than the threats of a gunman coercing other agents into obedience (cf. Austin 1954 and Hart 1997).

³ Hart (1997, p. 192).

⁴ In light of the right- and duty-claims they purport to implement.

⁵ Cf. Raz (1994, p. 214).

⁶ In other words, that law need not be authoritative is one thing (e.g., dead letter law); that it *could not* have conceptually been so to begin with is another—and the latter seems to be a necessary condition of legal validity, even in our colloquial sense of how the law works (i.e., is it ever reasonable to say that *x* is a law, even if *x* is recognized to be conceptually incapable of implementing an actual duty to obey it?)

even with regard to matters over which no one intended to grant it authority in the first place and, if not, whether this means that certain declarations *ipso facto* arise outside the bounds of legitimate authority to begin with. Alternatively, even if agents do endorse granting authority to a seriously tyrannical regime, the fact that they may thereby assent to laws that are conceptually incapable of enabling them to better realize their reasons for action may indicate not that such laws are valid in any relevant normative sense, *per se*. Rather, since such acceptance involves a shirking of their own legal agency, the concept of legal validity cannot even coherently apply to such a relationship between governor and governed, for the latter would lack any significant criteria with which to judge the merest merits of any given law in the first place.⁷

My conclusion in Chapter 3 is thus four-fold: (i) brute submission to authority is antithetical to the concept of individual or collective legal agency. While Hart might suppose that a society analogous to a shepherd leading sheep to the slaughter-house suffices for a legal system,⁸ the counterargument is that such agents as sheep-like automata cannot accurately be described as duty-bound in any relevant sense (even if only in a legal sense), since actual normative bindingness presumably requires the availability of such minimal rational agency as could dissent to (or even just critique) taking upon such obligations to begin with. (ii) Even with this aforementioned condition satisfied, it remains unclear that laws founded on an undue level of ignorance can be incontestably valid. For if it is the case that all agents would fail to accept the validity of a law were they informed of its content and justification,⁹ there is a clear sense in which legal validity can be judged which may need to be added to the minimum conditions of a legal system that Hart notes.¹⁰ (iii) While the aforementioned compliance or ignorance, if truly voluntary, may nonetheless suffice for the legal validity of the rules to which the populace responds despite any categorical irrelevance to their reasons for action (as one may have to concede), the declarations of a government that (overtly or covertly) attempts to ensure that such properties¹¹ apply to the governed would seem to be of tenuous validity on the same aforementioned grounds. That is, if a populace would naturally declare certain laws invalid were they fully informed of the (descriptive) facts behind a government's declarations, there is a strong case for claiming that any government that actively shrouds the grounds on which a populace would otherwise

⁷ In other words, it is spurious to declare all laws valid on this model just because there is no distinction between validity and invalidity.

⁸ Hart (1997, p. 117).

⁹ I.e., if all possible 'rules of recognition' within any society composed of rational, conative agents would preclude the validity of rules lacking a non-negative conceptual relationship to their own practical reason.

¹⁰ And it is no response to say that if the justification of a government's actions are unknown to a populace (intentionally or not), their declarations attain validity simply on the grounds that the populace is unaware of the facts that would—perhaps by necessity—cause them to dissent to such declarations (or regard them as irrelevant). For if full awareness of the facts would cause any given agent to deny the status of validity to certain laws, maintaining that such laws are nonetheless valid potentially separates legal validity from the actual attitudes that agents in fact would take vis-à-vis such assertions of validity, were they aware of all the relevant descriptive facts.

¹¹ I.e., being coerced into compliance, or ignorant of the facts that would necessarily cause one to resist such compliance.

dissent does not self-generate and then spontaneously satisfy the terms of legal validity. Rather, it seems more accurate to say that such a government thereby shrouds the criteria of legal validity, themselves. (iv) Lastly, even if Hart wants to claim (vis-à-vis bad laws) that it is no better to say “‘This is in no sense law’ rather than “‘This is law but too iniquitous to obey or apply”,¹² a revised version of the latter might be stated as “this is law but too irrelevant to agents’ reasons for action to plausibly generate even the most basic duty to obey”.¹³ Such a reformulation, however, *does* seem to substantially undermine some crucial, non-moral criterion of legal validity, in that even if law need not conform to some stipulated morality *proper*, it may have to conform—in some minimal, conceptual sense—to practical reason generally, in order to make coherent the claim that law creates *actual* normatively-binding duties (even if only legal ones).¹⁴

In Chapter 4, I attempt to make practical sense of these questions by considering whether there is an innate *telos* (as it were) within the nature of law, as my elaboration of the Hartian and Razian projects suggests: e.g., that there at least be a bare conceptual possibility that agents will be better able to conform to their own reasons for action by following any law in question than not. This suggests that there is an ideal, natural constitution of sorts, based on the fact that submission to legal authority (and cognitive adherence to any terms of legal validity) is justified only insofar as that authority is at least conceptually capable of allowing one to better conform to one’s own reasons for action. While ignorance (voluntary or not) may cause some agents to accept the terms of any given law, the fact that they accept a given law on the bare pronouncement of a legal official gives them insufficient grounds to dispute a more informed citizen’s claim that such a law is invalid (for they should, on their own grounds, just as easily have accepted the contradiction of the authority’s pronouncement).¹⁵ And if it is indeed the case that any agent would naturally view certain laws as invalid were he or she fully informed of their content, we can conclude that because full knowledge of the descriptive facts justifying a government’s declarations will inevitably cause those declarations to be viewed (in certain cases) as patently unacceptable and conceptually external to an informed conception of law, such laws are invalid in a descriptive sense (i.e., being a description of how laws are conceived by any given fully-informed agent). And this is consistent with the tenets of legal positivism, for the only sort of ‘naturalism’ required is in the adherence of law’s own inherently normative justification¹⁶ to the concept of law, itself, as that concept exists in the minds of legal agents—such justification, as I understand it,

¹² Hart (1997, p. 210).

¹³ And while it may *oblige* someone to obey, say, through implicit or explicit threats of force, Hart’s own project precludes such a fact from sufficing for legality.

¹⁴ I.e., while the Razian project may entail that legality in some sense supervenes upon morality and that legal norms *need not*, in practice, be reducible to moral norms (1994, Chs. 9, 10), the project might still be undermined if one *cannot* (even in theory) reduce any particular legal norm to a moral norm (or to practical reason generally), for even the supervenient relationship would thereby be severed.

¹⁵ In other words, there is no tenable distinction between validity and invalidity in such passive compliance, for the terms of validity are beyond any sort of minimal empirical or logical critique.

¹⁶ I.e., its own structure of duties (and correlative rights), which purports to justify any given duty in particular and/or the duty to obey the law in general.

originating in and obtaining validity only vis-à-vis the internal, normative perspectives of legal agents, themselves.

Of course, there remains a question of whether there are any explicit practical conclusions that we can draw from this: e.g., could there be a law (or collection of laws, constitutional or not) that, if followed for perpetuity, would provide for the possibility of agents' better conforming to their own reasons for action? — In other words, is there a natural constitution?¹⁷ I conclude that if there is, it must be inherently vague insofar as situations (whether manmade or natural) do tend to arise which necessarily pit right-holders against one another. As surmised in Chapters 1 and 2, respect for rights may demand striving for the best outcome in the face of adversity (all else being equal), whether this means demanding, e.g., that some citizens in a state submit to military conscription in order to save a populace from a threat of annihilation (if said threat actually exists) or demanding that agents take on various roles in society to, say, rescue those agents in dire need or to provide children with adequate shelter, nourishment, education, etc., wherein the aforementioned acts only temporarily restrict one agent's rights while indefinitely prolonging the rights of another.¹⁸ This fact about both mankind and nature entails that if there is any natural constitution, it must cohere with the fact that even if rights are in some sense absolute, they can be overridden (or tempered) by other absolutes. This, in turn, demands the implicit use (or explicit recognition) of some mediating principle, whatever that might be, which acknowledges the justifiability of a rather wide authoritative domain on behalf of a governing power.¹⁹

Given this, and given the conclusions drawn in Chapter 3, we might only be able to say that any sort of natural constitution must be primarily negative in form. That is, it may be unable to delineate any specific, positive rules to which any legal declaration must adhere in order to be valid, and may only entail the invalidity of any such legal or political procedures as those which *conceptually* cannot fulfil the bare requirement of allowing any given agent to better conform to his or her own reasons for action. This, in turn, entails that a government may be justified in arranging points of coordination anywhere it so chooses within a vast and nearly boundless realm, the validity of which may be incontestable for the most part. Vast and boundless as it may seem, however, there remain many ways in which the aforementioned extremely basic prescriptions cannot even conceptually be satisfied, and I take legal validity to be delimited by such a fact.

¹⁷ Or, in Hartian terms: is there a 'minimum content' of constitutions?

¹⁸ Moreover, such commands may be justifiable vis-à-vis any given agent's own internal perspective, generally (even if dissented to circumstantially), for it is clear that it is only through the restriction of others' liberty (e.g., through others' providing one with adequate material resources as a child and, in extreme cases, through taking upon themselves the risk of death in fighting an invading army) that one attains the proximate conditions necessary for even *existing* as a human agent in a less-than-utopian world; and surely this fact is no less relevant for any other agent than it was for oneself (cf. Fuller on 'reciprocity' [1969, Ch. 1] and Gewirth's notion of the 'community of rights' [1998]).

¹⁹ As but one historical example of such recognition, s. 1 of the Canadian Charter of Rights and Freedoms asserts the inviolability of rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Even if rather vague in particulars, the general point (and implicit necessity) of such an arbitrating clause is apparent.

Thus, I conclude that both constitutions and any conception of legal validity are justifiable if and only if they adhere to this basic foundation. However, with respect to the more political issue raised in Chapter 1, anti-constitutionalism may also be a justified practice, if it is only through that method that rights are indeed better respected (given the contingent circumstances of a society). If, as Gewirth argues, recognition of our own intentionality and of the sufficient reasons on which we claim rights to freedom and well-being demand that we universally respect the rights of all agents insofar as this is possible, there is a firm foundation in our normative conceptual thought that grounds respect for rights, regardless of whether we'd prefer constitutional rules to be entrenched or not. The correlation of this fact to the justifiability of a constitution, then, depends simply upon whether having such a document in place will enable rights to be better respected. The more important point, however, is that whatever the circumstances, such a position need not rest on an essentially contestable political foundation, as respect for rights (as argued in Chapter 1) comes prior to any given implementation of political procedure.²⁰

Correlatively, with respect to the concept of law itself, we need not conclude that such norms as might be enshrined in constitutional laws or anti-constitutional conventions are inherently positive. That is, the aforementioned facts seem to entail that the value of rights exists prior to the implementation of any political *or* legal procedure, i.e., prior to the granting of authority by any agent to any other, whether the latter be a legal official or not. That is, the implications of the Razian approach entail that legitimate political and legal authority is heavily circumscribed by the inherent bounds of any given agent's reasons for action, which are the ultimate source of authoritative legitimacy. Yet, as I have argued, this circumscription is not merely *initial*, but (at least in some minimal sense) remains *throughout* any authoritative procedure, and is necessary to make coherent any claims of normative obligation, which are presupposed by the very concept of legal validity.²¹ That is, insofar as submitting to an authority in one area doesn't necessarily entail giving that authority *carte blanche* to govern every aspect of one's life (say, even to the extent of claiming to legitimately end it), we see that even if only in the rarest of cases,²² laws that exist for little more purpose than to revoke and violate the rights of others (thus precluding any potential reason for them to conform their reasons for action to a duty to obey) are invalid, for they were never sanctioned by the terms of the authoritative relationship to begin with. In other words, it is only through this *potential* coherence of laws with agents' reasons for action that we can claim there is any sort of duty to obey the law (in particular or in general) to begin with. We might conclude, therefore, that there is a natural constitution of sorts that exists as a foundation prior to any implementation of political procedure or positive legal rules (constitutional or not) that might be derived thereupon, and it is only through a minimal coherence with this foundation that positive legal rules can attain any real sense of validity.

²⁰ For example, *contra* Waldron, there need not be any necessary deference to the value of democracy (and its supposed *telos* of settling disagreements), for the possession of a democratic system might very well *not* lead to any given agent's ability to better conform to his or her own dependent reasons.

²¹ In lieu of the rights and duties that the law purports to implement.

²² I.e., those lying outside the realm of the reasonable to-and-fro of mediating between conflicts of rights.

CHAPTER ONE:

GETTING RIGHTS RIGHT

In this chapter, I intend to address the political debate between constitutionalists and anti-constitutionalists and defend the former from certain objections proposed by the latter. I approach the issue from the perspective that since human agents tend to view their own basic rights as having near-paramount value,¹ no agent can be expected to assent to a political process that declares their valuing of such rights to be of no direct or substantive concern to that process, despite the supposed fairness thereof. Nor can any agent be expected to assent to a process that accords their rights too little value, if it indeed accords them any. Given the great importance placed on rights by any agent, then, a strong case for the constitutional protection of those rights may result, despite even the right-based concerns of anti-constitutionalists.²

In other words, from the perspective of any agent, certain material conditions (i.e., the attainment of basic freedom and well-being) must categorically hold, insofar as these conditions are necessary for the free exercise of human agency and the potential success of any goal-directed behaviour.³ While the composition of any given societies' political and legal systems may differ, it is clear that if the aforementioned conditions are either unachievable or unsustainable without the entrenchment of certain constitutional rules, political agents who prefer conceptions of fairness and autonomy that take their rights into account are therefore compelled to hold that both the existence of constitutional rules and the institutional means necessary to enforce them (e.g., strong judicial review) are justified.

1.1 *Rights and Liberalism*

I begin with such strong right-based concerns in order to provide a potential counterpoint to two recent legal theories: the democratic majoritarianism of Jeremy Waldron and the 'common law constitutionalism' of W.J. Waluchow. As will be shown, the right-based approach I have in mind is intended to challenge Waldron's strong democratic majoritarian position insofar as such majoritarianism provides (all else being equal) a rather weak and contingent foundation for the sustained protection of rights. As well, though Waluchow provides the groundwork for a similar counterargument against Waldron, I worry that his position does not go deep enough; i.e., it might not adequately

¹ E.g., rights to freedom and well-being, which, as Gewirth (1978) describes them, are necessary preconditions for any instance of intentional behaviour. An implicit and categorical demand (*qua* claim-right) for such basic rights is therefore entailed by any goal-directed action whatsoever.

² Waldron (1993), for instance, presents an anti-constitutional argument based on the premise that since rights are of such importance to us, it is similarly important that we retain the ability to democratically deliberate on their content, rather than entrenching potentially flawed conceptions of rights within a constitution and delegating their protection to a largely unaccountable set of trustees (e.g., a judiciary).

³ Cf. Gewirth (1978, pp. 61-64).

accord rights the importance that moral agents take them to have. As such, I aim to extend Waluchow's argument to include a deeper and more generic foundation (viz., conative human agency) than the beliefs of political agents, even if widely held and deeply shared, while maintaining (i) that this will provide a more robust case for the constitutional entrenchment of rights, (ii) that such a foundation is ultimately consistent with the implicit claim-rights generated through any given agent's behaviour, and (iii) that it should therefore be justifiable to them on those grounds.

In Waluchow's theory, a sound justification for the entrenchment of constitutional rules may rest on the deep moral commitments (rather than the quotidian opinions) held by a community of agents in any liberal democracy, even if the latter gain apparent approval through a majoritarian political procedure. He says:

[O]n many questions of political morality that arise within Charter challenges there is some measure of overlapping consensus within the relevant community on norms and/or judgments concerning justice, equality, and liberty that would emerge upon careful reflection.⁴

With such a consensus, we would appear to have a plausible justification for entrenching certain constitutional rules, despite the qualms of anti-constitutionalists, based upon what Waluchow calls the 'constitutional morality' of a society: i.e., the longstanding and authentic views of what counts as justice, equality, liberty, etc.⁵

However, while certainly taking better account of the possible existence and (more importantly) the relevance of agents' shared core beliefs to the issue of constitutionalism than Waldron (who, by contrast, presumes that core beliefs diverge so greatly that we lack justification for constitutionally entrenching any of them),⁶ Waluchow's approach may not yet go deep enough. That is, while his concept of constitutional morality calls for basing the legitimacy of an entrenched constitution on the fact that most agents in any given liberal egalitarian society assent to a general set of core principles, nothing in this theory demands that such principles be either liberal or egalitarian to begin with.⁷ Nor, of course, does any demand for a tangible liberalism or egalitarianism arise in Waldron's theory, which, in holding the 'right of rights'—i.e., the right to political enfranchisement—as paramount, entails that political decisions having illiberal or inegalitarian consequences can be entirely legitimate, as long as the process by

⁴ Waluchow (2007, p. 222).

⁵ See Waluchow (2007, Ch. 6, esp. pp. 219-230).

⁶ See Waldron (1999).

⁷ Of course, Waluchow's argument is primarily addressed against the Waldronian position, which claims that constitutions are illicit in societies with strong liberal democratic precommitments (see, e.g., Waldron 2006, p. 1360). This, then, leaves the case of less well-ordered societies undetermined. However, one of the central aims of this essay is to extend the Waluchovian project to include a plausible justification for constitutions even in societies lacking any shared liberal/egalitarian/democratic commitments, while nonetheless remaining consistent with any given agent's own personal precommitments. The latter, I think, can rest on recognition of the fact that any given agent only claims rights to generic goods—i.e., freedom and well-being—on the sufficient condition of being a human agent, rather than on the subsidiary and circumstantial facts of being of a certain race, social class, etc. The latter qualities, being extraneous to one's agency, thus have no bearing on what one claims due to the former and which applies to all human agents equally (cf. Gewirth 1978, pp. 105-135).

which those results are reached is fair.⁸ Yet, given the great concern with which any agent views his or her own rights (as outlined above), it seems implausible to attempt to justify rights on no more stringent grounds than one in which they might be nothing more than, on Waluchow's model, a conglomeration of fundamental beliefs—even if deeply shared—or, on Waldron's, figments of occasional ballots cast by a group of citizens who happen to constitute a majority, yet for whom concern with the rights of others is (at best) a mere subset of what determines their vote.

In both Waluchow's and Waldron's arguments, then, and despite the fact that Waluchow's position takes the possibility of shared precommitments seriously, there is a tenuous and contingent foundation that, I argue, does not entirely cohere with the substantial value that human agents accord to their own basic rights. Despite the apparent justification of each author's favoured political procedures, surely the vast majority of individual moral agents regard the justified protection of (at least their own) basic rights as far more than a function of the deeply shared beliefs of a society, particularly when such beliefs are often archaic and uninformed (even in some arguably liberal societies). That is, no agent takes the ultimately circumstantial fact that the longstanding and authentic beliefs of the society to which he or she belongs just *happen* to be liberal and/or egalitarian as a necessary precondition for the due justification of his or her own rights (whether conceived of as legal or pre-legal). In other words, one should think that the justification of one's rights and the due protection thereof is far more than a matter of the fortuitousness of living in a society under which those rights happen to be protected.

Indeed, to think otherwise tends toward a reversal of the popular understanding of rights (whether legal or non-legal),⁹ in that both the Waldronian and Waluchovian positions entail that rights are legally (even if not morally) justified insofar as they happen to be deemed so by a society, whether instantaneously or conventionally (respectively). Yet, do we not, rather, view rights as worthy of protection only because we take them to have prior, non-circumstantial justification? Even Waldron, in recognizing that we should be wary of the potential deleterious effects on our rights by our entrenchment of a constitution, is presuming the value of rights prior to the practical issue of whether to entrench such a document or not.¹⁰ Presumably, however, such prior conceptions of rights must have at least *some* minimally-definable crucial substance, else we would not be concerned with Waldronian political procedure (or any other, for that matter) to begin with—for it would lack the normative momentum with which to justify its own implementation in the first place.

As with Waluchow's model, then, Waldron's approach generates a similar concern: despite the fact that the latter's theory is putatively fair and egalitarian in its foundation of popular majoritarianism (which I contest below), surely no agent regards the protection of his or her basic rights as justifiable only by mere *fiat*, e.g., insofar as a majority of one's fellow citizens happen to elect candidate *x* to office rather than candidate *y*. Surely, if we were to think that nothing more than a vote cast on a variety of

⁸ See Waldron (1999, Ch. 11).

⁹ As trumps, one might say (even if it is acknowledged that they can be trumped by other trumps); cf. Dworkin (2005).

¹⁰ See Waldron (1993).

distinct (and often trifling) issues¹¹ suffices to justify the difference between one's basic rights being protected and those rights being potentially (and perhaps irreparably) violated, we would be placing so little importance on our own rights as to raise the question: do we really value them to begin with if we would let them fall by the wayside so easily? Should we not, on the other hand, desire some tangible assurances that certain basic rights are never going to be rescinded by a governing body, even if we grant that that body is deserving of our respect?

Waldron may, of course, try to pre-empt any such questions by presuming that "there is a strong commitment on the part of most members of the society we are contemplating to the idea of individual and minority rights".¹² But this seems too idealistic for our purposes here, i.e., it is far from clear that this presumption widely and consistently holds in most contemporary liberal societies, and even less clear that it will hold in these societies in the future. And given the importance of the issue, we would surely do well not to presume away pertinent facts from the outset of our investigation. My argument thus approaches the issue from the more prudent assumption that it simply *might not* be the case that most agents are committed even "to the idea of individual and minority rights" (much less their realization), nor that there will be "persisting, substantial, and good faith disagreement about rights" in all cases brought before an electorate or a legislature.¹³ Furthermore, even if there always were good faith, I assume that we don't require, shouldn't want, and needn't presume that we're *entitled* to political *carte blanche* in order to exercise it, given even a minimal recognition (i) of our own fallibility, (ii) of the fact that egregious mistakes can still be made in such faith, and (iii) that having unrestrained political powers may only serve to compound their negative effects—even unto the point of undermining the value of popular majoritarianism to begin with.

1.2 Deep Disagreement

1.2.1 Fairness v. Fairness

One mode of anti-constitutional response to these concerns, however, has been to argue that even though human agents may regard their own basic goods as worthy of substantial concern, such concerns are ultimately subsidiary to the practical matter of implementing democratic decisions, which requires that the preferences of some be trumped by the preferences of others. In other words, successful legislation in the circumstances of politics requires "action-in-concert in the face of disagreement".¹⁴ As well, it is said that since "there is a theoretical connection between respect for people's

¹¹ And which can regularly hinge on less than one percent of the votes of the electorate, and, in states with non-proportional representation, can entail that the popular vote be trumped by a minority vote. (In the latter case, one could even describe constitutions as potentially protecting the majority from a minority, in apparent contrast to the 'standard case' for constitutions [cf. Waluchow 2007, pp. 97-117]).

¹² Waldron (2006, p. 1364).

¹³ Waldron (2006, p. 1364).

¹⁴ Waldron (1999, p. 108).

rights and respect for their capacities as political participators”, any political process deserving of our respect will have to be one in which “everyone affected by a problem has a right to a say in its solution”.¹⁵ Popular majoritarianism is thus seen to be the only fair option, despite the qualms of constitutionalists.¹⁶

As hinted above, though, it is not entirely clear that such a process *is* fair (all things considered), at least not in a way that any agent considers fairness relevant to politics. While there may indeed be, as Waldron says, “a theoretical connection between respect for people’s rights and respect for their capacities as political participators”, this entails neither any *practical* connection nor any equivalence between respecting people’s rights *in toto* and granting them a right to unrestricted suffrage on any given issue. In practice, for instance, do human agents (whether individually or collectively) not normally accord some rights far more weight than others and/or take them to justifiably withstand mere *disagreement* regarding whether their rights have been legitimately accorded to them?¹⁷ Surely they do. And even if we give Waldron some benefit of the doubt and presume that human agents *would* in fact take their right to political enfranchisement to be their sole basic right, surely this entails something a bit more concrete than valuing a political process that has the potential to remove said right from themselves just in case a majority happens to think it justified. We may disagree on some matters of rights (even most), but surely no rational agent cares to leave his or her right to political enfranchisement (let alone more basic rights) up for grabs.¹⁸

Indeed, to call a process that entails the possibility of revoking the ‘right of rights’ from some agents ‘legitimate’ seems to contradict an initial premise: that the paramount importance of *that* very right is appealed to as a necessary condition of the justification of the Waldronian conception of fair procedure, itself.¹⁹ As Samuel Freeman argues, “if we conceive of democracy as a form of sovereignty and not merely a form of government” (as we do when we take our own rights to political enfranchisement seriously), then certainly the constitutional entrenchment of rights and the strong judicial review of legislation can plausibly “be construed as a shared precommitment by free and equal citizens to *maintain* the conditions of their sovereignty”.²⁰ And surely it is plausible that nothing less than such maintenance is demanded by valuing the ‘right of rights’ (among others) as paramount in the first place.

¹⁵ Waldron (1999, pp. 106, 110).

¹⁶ Again, for this strict requirement of majoritarianism to obtain, we must presume (*contra* Waluchow) that there can be *nothing* antecedently agreed upon, i.e., that there is “disagreement all the way down” (Waldron 1999, p. 282).

¹⁷ As opposed to, say, a conflict of rights based on grounds more substantial than mere opinion (even if ardently held).

¹⁸ I.e., even if we *would* risk such a right, surely it would only be risked as a last resort, just as the basic goods necessary for the actualization of human agency (viz., freedom and well-being) tend to be risked only as last resorts.

¹⁹ Granted, it is surely legitimate for an agent to, say, surrender his or her own rights for some real or perceived higher end, given due deference to individual autonomy. Yet, I wonder, is it really no less legitimate (even within the ‘circumstances of politics’) to *demand* (legally or politically) the surrender of another’s rights on those very same grounds?

²⁰ Freeman (1990, p. 329, emphasis added).

Contra Waldron, then, it would seem that if we want to justify a fair and legitimate political process, we would do well to do so on more stringent grounds than one in which any person or group is granted an equal yet unrestricted voice in any political decisions, especially when such decisions have the potential to be capricious and to lead to the loss of any given agent's (even one's own) basic liberties—some so basic that they are categorically necessary for the power to exercise one's 'right of rights' in the first place. It is, I argue, only through taking a rather unconventional view of fairness (and a rather pessimistic view of the circumstances of politics) that we would think that everyone having nothing more and nothing less than an equal say in a political procedure is both necessary and sufficient for its legitimacy.²¹

Of course, the popular majoritarian might try to defend such a process by reasserting that "everyone affected by a problem has a right to a say in its solution",²² but this presumes that everyone is relevantly affected to begin with. There are myriad ways in which participants can be affected differently by problems, *if at all*, whether prior to, during, or after the implementation of a political process, and a purely procedural form of majoritarianism would appear unable to adequately (i.e., *fairly*) address this fact.²³ And to ignore this distinction is far too reckless for an alleged politics of fairness, particularly when one can predict the maintenance of pre-existing unfairness and indignity in advance.²⁴

So, although Waldron may claim that

[O]ther political systems have all the legitimacy-related dangers of popular majoritarianism: they may get things wrong; they may have an unjust impact on certain individuals or groups; in short, they may act tyrannically... [However,] they have in addition one legitimacy-related defect that popular majoritarianism does not have: they do not allow a voice and a vote in a final decision-procedure to every citizen of the society,²⁵

this in no way precludes the justifiability of entrenching constitutional rules, in no small part due to it being a false dichotomy to claim that since we'd prefer not to suffer under a constitutional regime lacking in certain areas of legitimacy, we are compelled by the rubric of fairness to implement nothing more stringent than popular majoritarianism,

²¹ I.e., is a process by which agent *A* happens to harm agent *B* (intentionally or not) inherently fair just because *B* had an equal ability to do the same to *A*? Even if such a process is (relationally) egalitarian and *prima facie* fair, one might still wonder: is it really politically illegitimate for *B* to claim it unfair for certain egregiously harmful options to be at anyone's disposal to begin with and to thereby demand that an alternative process be implemented?

²² Waldron (1999, p. 106).

²³ Consider, in my above example (*supra* note 21), *B* could have been affected (either circumstantially or endemically) by the initial, *pre*-procedural circumstances of the situation in a much different way than *A*, e.g., by being weaker (collectively or individually), by standing far closer to a dangerous outcome, etc., all of which serve to undermine all but the most illusory and *ad hoc* conceptions of fairness.

²⁴ This, in turn, may leave the impression that such a procedure is little more than a thickly-veiled façade, catering solely to the whims and/or the traditions of those who merely *happen* to compose the majority (i.e., by circumstance rather than by natural right), persistently leaving minorities with little to no chance of successfully realizing their ends.

²⁵ Waldron (1999, p. 299).

which clearly lacks in other areas.²⁶ Surely there is some room for compromise between such extremes. For instance, even if we grant that most instances of disagreement should be deliberated upon and resolved by a legislature rather than by a judiciary, this entails neither that there should necessarily be no trumping of majoritarian decisions (say, given grave concerns) nor that we ought to presuppose all cases of rights to be deeply disagreed upon to begin with. Yet, these minimal (and surely reasonable) positions open up the door between the two aforementioned extremes. And if we are truly concerned with rights (as even Waldron claims to be), we might do well to prefer a regime in which our rights are granted the greatest protection, all else being equal—even if we disagree about whether some of what we protect are legitimate rights—than a regime which defines the content of all rights by fiat and leaves all supposed non-rights by the fire. Or, in other words, prudence is surely not inimical to fair or legitimate political procedure (at least as moral agents understand those concepts), despite what an anti-constitutionalist would have us suppose.

Thus, even though Waldron may attempt to rest his case on the premise that “[b]ecause rights are important, it is likewise important that we get them right”,²⁷ surely this laudable goal of accuracy may just as easily preclude a decision-making procedure that allows our ignorance about rights to get them wrong (irreversibly in some cases), particularly when such mistakes are preventable by only slightly tempering our political capabilities. Failure to take even a modest bit of temperance into account seems both speculative and headstrong, insofar as such failure appears to generate a rather tenuous supposition: viz., that we can only retrospectively determine whether a right was violated, as though having the liberty to define away (and then violate) underdetermined rights grants us some extraordinary insight into their nature, whereby we can only realize *post facto* (e.g., after our mistake is acknowledged in a later legislative session) that what we violated *were* actually rights, after all. If we want to shirk this implication (as we should want to, I argue), we ought to acknowledge that getting rights right (as it were) surely entails a process far more substantial than Waldron envisions.

1.2.2 Open Questions

All that said, it remains rather unclear whether there is in fact “disagreement all the way down” on every significant issue to begin with.²⁸ Waldron may suppose there to be, yet suppositions cannot carry the day.²⁹ If deep disagreement is thus *absent* on any

²⁶ Moreover, it’s a specious and insubstantial equivocation to argue that all political systems have *n* problems, save for popular majoritarianism, which has *n* - 1.

²⁷ Waldron (2006, p. 1373).

²⁸ Waldron (1999, p. 282).

²⁹ Of course, some (e.g., Andrei Marmor) may suppose positions such as Waluchow’s (and very likely the position I advocate) to assume an equally tenuous foundation, since such an argument, it is said, “does not really address the argument from pluralism, it simply assumes it away” (Marmor 2007, p. 89). However, to make the Waluchovian case, we need presume nothing substantive about the existence (or absence) of deep disagreement. We need only hold a hypothetical, viz., that the constitutional entrenchment of any right is justifiable if (and likely only if) deep consensus on the content of that right obtains.

given issue, we are left with a very open question of whether our ambitions of political legitimacy do in fact incontrovertibly disallow us from taking Waluchow's approach, which (by contrast) acknowledges the possibility that a considerable amount of overlapping consensus can be found on certain fundamental issues. For all Waldron's worry about fairness, such consensus (should it exist) would surely provide suitable justification for the entrenchment of constitutional rights on grounds at least as fair as those upon which popular majoritarianism is based—if not far more so—for it does nothing more than represent the popular will, albeit in a potentially far deeper manner than (say) a quadrennial dependence on the ballot box may be able to determine. Thus, even if there is plenty of disagreement on most issues, we are left asking whether it is always implausible that there nonetheless be some (even if only minimal) agreement at the core of any given issue. If there is, it seems nothing less than fair to take a 'bottom-up' approach to those issues and constitutionally entrench what we do agree upon (and work from there), even if this isn't much. Moreover, doing so requires nothing more than, as Waluchow says, "a mixture of only very modest pre-commitment and confidence, combined with a considerable measure of humility", being "fully aware that we do not have all the answers", rather than (as a Waldronian would charge) "a naïve overconfidence in our judgments of political morality".³⁰ Or, in other words, there is surely plenty of middle ground between rejecting the unqualified fallibilism of anti-constitutionalism and endorsing an unabashedly hubristic form of constitutionalism.

That is, although it would appear that "[t]he fact that there are rights in the foundation does not mean that there must be rights, so to speak, all the way up", this in no way precludes there being rights *part* of the way up (so to speak).³¹ And while there may be disagreement all the way down on most issues, it is unclear whether there will be on *all*, especially when we delve into the core of any given issue. Even most constitutionalists may accept that, as Andrei Marmor observes, even if "we all share the view that murder is a serious wrong and ought to be prohibited... this general agreement cannot possibly settle the controversy over the permissibility of abortions".³² However, this still does not entail an anti-constitutional position across the board at all levels of the broader issue, for we might not be similarly divided over more basic issues (e.g., as he says, that "murder is a serious wrong and ought to be prohibited") And presumably even this basic consensus can entail the justified preclusion of certain actions on the part of a governing body, rather than simply of individuals.

Of course, Marmor responds that any deep Waluchovian value-judgments are "too general and abstract to settle particular moral and political controversies that tend to arise in constitutional cases".³³ But, one might still ask: are they really of no practical consequence, even if they happen to be general? For example, we may have broad and intractable disagreement on the periphery of what constitutes legitimate behaviour (as

³⁰ Waluchow (2007, pp. 213, 271); cf. Marmor (2007, pp. 91-92) and Waldron (1993, p. 28). For a discussion on the merits of a 'bottom-up' approach to such issues, see Réaume (2002, pp. 115-123) and Waluchow (2007, pp. 194-215, 258-270).

³¹ Waldron (1993, p. 22).

³² Marmor (2007, p. 90).

³³ Marmor (2007, p. 90).

Waldron asks, “‘Is pornography speech?’ ‘Is burning a flag speech?’ ‘Is topless dancing speech?’ ‘Is pan-handling speech?’ ‘Is racial abuse speech?’ and so on”).³⁴ Yet, the fact that this disagreement is broad in no way entails that it must therefore be deep. Consider the possibility of a government’s prohibition of friendly greetings or muted prayers in public places in a particular group’s native tongue or the wearing of ultimately innocuous clothing which just happens to have religious connotations, based on nothing more than the unsubstantiated fears of a majority?³⁵ It is very far from unlikely that laws prohibiting such harmless behaviour might be enacted, even in otherwise liberal and egalitarian societies, given the occasionally superficial concerns of an electorate and/or the persons who represent them. Nor is it unlikely that such decisions might be accurately viewed as contradicting the deeper and widely shared beliefs of that electorate, once rational deliberation is allowed to supersede less germane legal or political motives, yet before another legislative election takes place that could—but by no means necessarily will—lead to the changing of our laws to reflect the beliefs that the majority has towards others.³⁶ As Waluchow says,

[W]e should continue to bear in mind... that sometimes our actions towards individuals and minorities are more ‘wolflike’ than ‘sheeplike’; that sometimes our wishes are inauthentic; that sometimes these wishes war with our more settled beliefs, preferences, and convictions – that is, that they sometimes conflict with our true commitments, with what we, as a community, find *truly acceptable* – or *would* find acceptable if we were better informed about, or appreciative of, the nature or consequences of our proposed actions. If we can develop criteria of legal validity that are workable in the circumstances of politics, consistent with our democratic commitments, and sensitive to these lessons, then surely we would be well advised to consider them very seriously.³⁷

Thus, even if we concede there to be deep disagreement on nearly all issues, this entails nothing conclusive against the constitutional entrenchment of rules about which there is a consistent *lack* of such disagreement, or about which there *would be* such a lack, were we to more carefully think things through. And providing that nothing prevents our ability to distinguish between the presence and the absence of deep disagreement, there seems no clear objection against implementing (say) a system of strong judicial review that defers to the legislature on controversial matters, but maintains supreme authority regarding matters that happen to be *uncontroversial*, justifiably possessing the ability to strike down a law that violates a deeply shared commitment of society. As but one example of such a commitment, our very deep concern with the right of political

³⁴ Waldron (1993, p. 26).

³⁵ Cf. Waluchow (2007, pp. 97-106). To be fair, of course, Waldron acknowledges that “[i]t may still be the case that judicial review is necessary as a protective measure against legislative pathologies relating to sex, race, or religion in particular countries” (Waldron 2006, p. 1352). Yet, if ‘particular’, here, can accurately be replaced with ‘many’, ‘most’, or (more pertinently) ‘*our*’, Waldron’s argument ends up far too idealized for what ought to concern us.

³⁶ This being particularly worrisome where a vast majority remains unharmed and has no personal stake in realizing any remedy to what they may even fully acknowledge was a mistake.

³⁷ Waluchow (2007, pp. 193-194).

enfranchisement (among others) may very well compel us to adopt, as Freeman argues, a political process based

not upon individuals' unconstrained preferences and their equal consideration in (maximizing) the aggregate satisfaction of interests, but upon the capacity and interest of each person to rationally decide and freely pursue his interests, and participate on equal terms in political institutions that promote each person's good.³⁸

Given deep enough concern with the right to political enfranchisement (the 'right of rights') by enough agents in a society, then, they may do well to constitutionally entrench the right of suffrage, if not far more than that (e.g., rights to those goods necessary to actually exercise the right of suffrage) and grant a judiciary the power to strike down those laws which contradict that commitment.

Of course, there does remain a crucial question whether the judiciary is the better arbiter of such matters. However, using this practical and open-ended concern as an objection merely confounds the issue of whether judicial review is justifiable in principle. Ultimately, it would seem that (i) if we do have consensus on any given issue, (ii) if a judiciary can be a better arbiter of such issues (even if only the most basic), and (iii) particularly if such arbitration is more prompt and expedient than a regular electoral process, it would be unduly coercive and restrictive of a citizenry's autonomy to disallow them the institutional recognition of these facts and to therefore deny them the right to see their political will realized in *that* way, just because that way happens to go against the received wisdom of popular majoritarian theory.

1.2.3 *Dead Hands (Past and Future)*

This brings us to the last objection I will address: namely, that the constitutional entrenchment of rights "permits the 'dead hand of the past' to determine our choices today, a situation that undermines the very notion of self-government".³⁹ To be sure, it does seem rather illegitimate (*prima facie*) for present or future agents to have their political autonomy limited just in case prior generations thought it appropriate, as though future generations were to become either incapable or undeserving of self-government. However, the implications of this objection are not as exclusively anti-constitutional as they have been taken to be.

Given that even the most liberal societies occasionally enact (or at least have the capacity to enact) illiberal or inegalitarian policies which go against their longstanding commitments, and because they may continue to do so in the future, a vast contemporary majority may very well believe that a rule ought to be entrenched in order to disallow their legislature from committing similar wrongs in the future. If the anti-constitutionalists have their way, however, they will be unable to do so. But will either they or future generations, both of whom are deeply concerned with their autonomy, not

³⁸ Freeman (1990-1991, p. 331).

³⁹ As described by Waluchow (2007, p. 135).

feel deeply wronged by being prevented from enacting such rules (or, in the latter's case, from having such beneficial rules enacted on their behalf), particularly when—as argued in the last two subsections—such rules can be both fair and legitimately based on deeply shared commitments about rights?

Moreover, it would seem that disallowing the present entrenchment of constitutional rules would pre-emptively limit a populace's own autonomy simply on the grounds that some future generation *might* not want to be limited in such a way. Aside from the conspicuous harm thereby done to a present generation's autonomy, justifying such a prohibition seems unduly speculative. Yet, surely Waldron's distaste for speculative counterfactuals regarding past decisions (being “extraordinarily difficult proposition[s] to assess”)⁴⁰ would just as easily disallow the more capricious venture of limiting a society's own autonomy based on the assessment of the beliefs that future generations will allegedly have. That is, why should any given populace ignore its own deeply shared beliefs about justice and fairness just in case future generations *might* disagree?⁴¹ Should they really allow the live hands of the present to be bound by the vague and indefinable hands of the future? Correlatively, if they are unequivocally prohibited from entrenching constitutional rules at present, might future generations complain that they had thus been ruled by the *anti*-constitutionalists' dead hand of the past, insofar as that hand had continually berated anyone who deviated from the majoritarian line and attempted to entrench a deeply shared value?

To be sure, I engage in my own speculation here. However, my point is merely that various circumstances might obtain when a society is faced with the issue of whether to entrench a written constitution, e.g.:

- i) They entrench a constitution and future generations *praise* them for doing so;
- ii) They entrench a constitution and future generations *berate* them for doing so;
- iii) They reject constitutions and future generations *praise* them for doing so; or
- iv) They reject constitutions and future generations *berate* them for doing so.

In cases (i) and (iii), no substantive problems of disagreement about common values or fair procedure arise. In case (ii), though, future Waldronians would charge a past generation with limiting the autonomy of their own generation (whether on procedural or substantive concerns)—yet, were the past generation to do otherwise, they would be shirking our *own* autonomy on speculative grounds. In case (iv), on the other hand, future

⁴⁰ Waldron (1999, p. 288).

⁴¹ Indeed, future generations may very well *praise* past generations for entrenching substantially beneficial rights. However, even if they do not, this approach may still be defensible by some form of the doctrine of double effect: i.e., even if future generations may feel unduly limited by a past generation's constitutional activities, this is surely not the intent of most constitutional motives; nor is it clear that such a harm would be greater than the substantial benefits that may be afforded a present generation due to the constitutional entrenchment of rights. This is particularly apparent where the ‘harm’ of possessing inaccurate but entrenched conceptions of rights is redressable, but its opposite not. That is, no entrenched constitutional laws are immune from being amended by a polity (or even jettisoned entirely), yet it is impossible for some instances of basic rights violations to ever be remedied—at least for those to whom the rights matter most.

generations may claim that some of their options had been limited due to former *inactions* (say, by lacking liberal or egalitarian rights that benevolent prior generations would have otherwise secured for them).⁴² Waldron would surely take that point as irrelevant, however. That is, for Waldron, it is irrelevant to the legitimacy of a political process that an individual or group “disagrees with the outcome”, as long as they are “able to accept that it was arrived at fairly”.⁴³ Yet it is unclear, then, whether one should not also declare the outcome in case (ii) irrelevant, particularly when anticipating such a complaint on behalf of future generations may ultimately be nothing more than an ‘outcome-based’ concern, given the real possibility that disagreement is not nearly as pervasive and immutable as supposed by Waldron. And if not, the entrenchment of constitutional rules can potentially be “arrived at fairly” (as argued previously).

That is, it would seem that the entrenchment of shared core values (should they exist) must be permitted on grounds of both fairness and collective autonomy. Furthermore, as argued above, the legitimacy of a process, itself, may entail far more than just the formalistic shell of fair procedure, potentially allowing the entrenchment of substantial constitutional values (if deeply and widely shared). If so, objecting to such a procedure based on the anticipation of future dissensus as to the legitimacy of a constitution may be unable to rest exclusively on considerations of fair procedure, at least as fairness is presently understood. Such anticipation becomes either an outcome-based concern or (at best) a dispute between the requirements of fairness that a present generation endorses and the potentially conflicting views that a future generation *might* have on the issue. In the end, allowing the latter to trump the former would surely be unreasonable and would violate the very purpose of representative democracy, that is, to represent the views that the *present* generation holds with regard to issues of justice, equality, liberty, etc., and the resultant conceptions of legitimate government and fair procedure that these entail, even if future generations may potentially disagree.

Given these considerations, it would thus seem that the practice of deeming all entrenched constitutional rules illicit is impugned on one of the very reasons that the anti-constitutionalist criticizes constitutionalism, for his or her position entails nothing less than ruling present generations with the ineffable hand of the future and (*mutatis mutandis*) future generations with the dead hand of the past, albeit with the invisible bindings of anti-constitutional conventions. Such generations might very well justifiably complain that certain rules should be (or would have been) enacted towards ends which are (or were) widely agreed upon, were anti-constitutionalists not to have reared their skeptical heads and demanded that the right of rights not be exercised in *that* way. Dead

⁴² That is, even if a past generation’s failure to implement constitutional rules allows any subsequent populace *in toto* to do whatever they please, future individuals may not be so free—this being no minor dilemma for any agent concerned with his or her own rights. E.g., if a large group of individuals is disenfranchised by an unjust law, they may then be unable to participate in the making of a liberal, egalitarian constitution that they could have otherwise made, were a past generation to have entrenched a universal right to political enfranchisement (for example). So, even if the dead hand of the past might bind a future generation writ large, it may—*by that very same action*—free future individuals from being bound by whatever harmful rules a future government might otherwise try to put forth.

⁴³ Waldron (2006, p. 1387).

hands can bind in many ways, not exclusively through the positive and overt entrenchment of constitutional rules. Restrictions on autonomy are created by any moral or legal prescription and, more importantly, such prescriptions can be as entrenched as any constitutional law or convention, despite not being traditionally conceived of as such.

Because of this, we might say that the success of the anti-constitutional project would entail nothing less than an entrenched constitutional convention (as opposed to a written rule) that prohibits the entrenchment of written constitutional rules. Yet, as Waluchow notes, constitutional conventions may in some cases have as much binding force as written constitutional rules—if not more.⁴⁴ As such, the moral agent concerned with his or her own political autonomy would do well to view the anti-constitutionalist's position with no less suspicion than that of the constitutionalist. And although anti-constitutionalists may attempt to evade this critique on the grounds that (a) present-day anti-constitutionalists “do not purport to have *authority* over future generations” and (should the anti-constitutionalists succeed) (b) future societies will be nonetheless free to enact whatever rules they like,⁴⁵ these rebuttals are false insofar as the Waldronian demand to never delimit the right to political enfranchisement⁴⁶ is, itself, (a') a moral prescription asserting moral (and effectively legal) authority, combined with (b') a very real potential for palpable, autonomy-limiting effects, whether in present or future generations. Thus, although one might fault the constitutionalist for attempting to “legally bind future generations... to certain conceptions of good government and just laws”,⁴⁷ the anti-constitutionalist commits an analogous fault in attempting to entrench (even if non-legally) just such conceptions—ones in which good government and just laws conform unerringly to the popular majoritarian model.⁴⁸

Of course, while all of this does not, in the end, necessarily entail that constitutionalism is an overt victor over anti-constitutionalism, it clearly suggests that it is in no way easily defeasible, given the possibility of the existence of deeply-shared values and the resultant conceptions of fairness which can justify (and may even require)

⁴⁴ That is, despite the fact that such conventions are *legally* unenforceable, it is nonetheless possible that a “political community observes these conventions and does so with the clear understanding that strict conformity is not only the norm but also mandatory” and, in some cases, “at least as important as, if not *more important* than, constitutional laws” (Waluchow 2007, pp. 28,29; cf. Reference re: *Resolution to amend the Constitution [of Canada]*, [1981] 1 S.C.R. 753, p. 883).

⁴⁵ Marmor (2007, p. 76).

⁴⁶ Except, as it were, through the exercise of that right.

⁴⁷ Marmor (2007, p. 76).

⁴⁸ For related discussions regarding how Waldron, in attempting to deny the legitimacy of constitutional strictures on a presumption of deep disagreement, advances his own contestable normative constraints (thus apparently leading to self-contradiction) see, e.g., Thomas Christiano (2000, p. 538): “[Waldron’s] own position must inevitably lead to limitations on democratic rule or fall into incoherence... [whereby] we are in danger of a regress as a result of disagreements about equality, democracy, and even the value of the theses that Waldron himself proposes”. Similarly, David Estlund argues that Waldron “must either think consensus among reasonable citizens is possible on some fundamental matters, or accept philosophical anarchism” (2000, p. 124). And Aileen Kavanagh writes, “if disagreement about the best means of protecting rights is the ground on which we should reject the institution of judicial review, then it is difficult to see why it does not impugn participatory majoritarianism on the very same grounds” (2003, p. 467).

entrenching those values in a constitution. As well, given the facts that representative legislation is most directly concerned with present generations (rather than future ones and their hypothesized dissent) and that present generations are concerned about maintaining an absence of restriction on their autonomy (including the liberty to determine what this concern should entail), we seem required to allow such a community to entrench a constitution, should they so desire, at least when done of their own accord and based on values that they happen to deeply share.

1.3 *Concluding Remarks*

Overall, I have argued (among other things) that blanket prohibitions on the constitutional entrenchment of rights and the correlative advocacy of popular majoritarianism might only be superficially fair or legitimate, at least insofar as political legitimacy and fairness (at least as popularly conceived) are not entirely separable from consequential concerns. This is particularly evident where ignoring these concerns leaves us ignorant of the pre-existing unfairness and inequality that may have undue bearing on a political system and predetermine the outcomes of what would only *otherwise* be a fair procedure. Moreover, it is apparent that liberal autonomy is realizable in myriad ways, not merely through an unrestrained right to political enfranchisement. As Aileen Kavanagh writes,

Having the ability to express myself in the public domain, associate with others and vote in elections is just one element in my capacity to have an autonomous life. Our intuitions rebel against the view that this element is of exclusive, or even overriding, importance.⁴⁹

While a substantive implementation of the right to vote is obviously important, it is often justifiably superseded by concerns regarding more basic rights, such as those entailing the freedom to not have one's options unduly limited by the will of others (whether such others compose a majority or not).⁵⁰ In other words, while politics may require "action-in-concert in the face of disagreement", respect for rights may demand prudence-in-concert in the face of disagreement. These are not necessarily incompatible.

As well, cases may arise wherein deep consensus on certain matters exists, as the Waluchovian project suggests. As such, there is no unduly prescriptive way of denying a populace the power of self-determination in the pursuit of their own freely chosen and widely shared ends. Certain issues (even most) may generate deep disagreement, yet this in no way entails that all will. Furthermore, nothing apparent prevents us from empowering the judiciary to strike down only those laws that violate rules on which there is overlapping consensus, leaving issues of deep disagreement to pan out in the halls of the legislature.

Most importantly, the binding of hands can occur in a negative as well as a positive manner, and there seems no clear reason not to view anti-constitutionalist

⁴⁹ Kavanagh (2003, p. 486).

⁵⁰ Even if only those options more valuable than having both an equal *and* an unrestricted political voice.

decrees as attempting to entrench negative duties. Nor, therefore, is there any reason to grant such decrees immunity from censure, for they may limit both individual and collective autonomy just as much as positive duties (if not more), even if more rarely and obliquely. That is, present anti-constitutional prescriptions morally, and in effect legally, bind both present and future generations against a potentially freely-chosen entrenchment of constitutional rules; yet, it is patently unclear whether this moral prescription (perhaps even being a constitutional convention) is any less egregious than its opposite is claimed to be, particularly when the rights of human agents are on the line.

(i) All of these observations thus point towards the possibility that anti-constitutionalism may be unfair and restrictive of human autonomy. As argued above, there is a strong case for the protection of rights that transcends even the anti-constitutionalist's exaltation of the 'right of rights', since human agents tend to regard fair political procedure as consisting of far more than giving *carte blanche* to whomever pulls the first punch (or, of far more than a procedure that allows for the possibility of such). And while we shouldn't want to presume that people are either Hobbesian predators or incompetent blunderers in order to justify disallowing them the availability of certain political options,⁵¹ we should also be wary of presuming them to be saints, as we must do in order to justify leaving *all* options open to them, and it's a false dichotomy to suppose that we must view them as one or the other. As H.L.A. Hart said:

[I]f men are not devils, neither are they angels, and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible... [and] life itself depends on these minimal forbearances.⁵²

Because even the most cautious and considerate human beings make mistakes, recognition of their good faith disagreement about rights need not negate the possibility that it nonetheless be entirely fair for others to want to protect themselves from harmful contingencies (even if only those more harmful than having one's opinion circumscribed by serious moral or political concerns). As such, while we surely should not want a constitution entrenched full of unabashed hubris,⁵³ we needn't occupy the opposite extreme, which entails an entrenched (anti-)constitutional convention replete with fallibilism and unsurety. Surely the proper forbearance lies somewhere in between.

(ii) In addition, it is clear that the inherent inequalities and prejudices that exist prior to the adoption of an otherwise fair political procedure do not spontaneously combust upon its adoption. Therefore, human agents who are concerned with their basic rights may just as well view anti-constitutionalist demands that one *not* protect one's rights, just because others (including those in indefinable future generations) might thereby disagree, as no less restrictive (and far less prudential) than the constitutionalist demand that they be permitted to do so. This would be the case if our demands for freedom and well-being, which are categorically necessary for the pursuit of our own ends, are in some crucial sense apolitical (or *pre*-political, as the case may be). That is, in

⁵¹ Waldron (1993, pp. 27-28); cf. Waluchow (2007, pp. 235-236).

⁵² Hart (1997, p. 196).

⁵³ Waldron (1993, p. 28).

extreme cases, agents take their claim-rights to freedom and well-being as transcending matters of political enfranchisement (and the disagreements thereby generated), as shown by the arguably deeply shared preference of a loss of a negligible amount of political power⁵⁴ to a loss of life or liberty, all else being equal. We may engage in politics as a means to protect our rights, but no one takes their rights to be definable and legitimated only in that way.

(iii) Lastly, inasmuch as Waluchow's position of common law constitutionalism (and its foundation of constitutional morality) was critiqued due to its potential illiberalism (that is, if it might be taken to justify the entrenchment of illiberal constitutional rules based on an overlapping consensus of illiberal beliefs), my concerns regarding it may turn out to be trivial. This would be the case were it shown that part of the constitutional morality of any given society can be cogently viewed as a function (say) of the constitutive features of human agency as conceived of by rights-theorists such as Alan Gewirth. Were it shown that the deeply shared constitutional morality of any given society consists, *inter alia*, in certain implicit right-claims made by any conative human agent, which, on grounds of logical consistency, necessitate his or her acknowledgment that the negative rights to freedom and well-being of all innocent human agents are inviolable,⁵⁵ we would thus have an argument for constitutionalism that could transcend contingent political circumstances.⁵⁶ We may then be able to show that all agents are committed, on grounds of self-consistency, to acknowledge and (insofar as they are able) constitutionally entrench the basic rights of all human agents, insofar as they implicitly and necessarily claim stringent rights for themselves on the sufficient condition of their being conative human agents. Of course, this presumes that such a conception of rights is "what we, as a community, find *truly acceptable* – or *would* find acceptable if we were better informed about, or appreciative of, the nature or consequences of our proposed actions".⁵⁷ Yet, if so, this would entail that any dissensus regarding at least the most basic liberal and egalitarian rights is both logically vacuous and politically illegitimate. Thus, despite the fact that certain illiberal beliefs may exist within a society and may be taken by some as indicative of that society's constitutional morality, such an argument would show, rather, that since illiberal rights are not among

⁵⁴ Particularly of those capabilities which we wouldn't be using anyway, if Waldron is at all correct about us being "essentially... thinking agent[s], endowed with an ability to deliberate morally and to transcend a preoccupation with [our] own particular and sessional interests" (Waldron 1993, p. 27). Presuming that we hold it to be *good* that we are thinking agents, we are therefore (at least indirectly) committed to holding that it be similarly good for us to never make use of some of those capabilities. The justifiability of a constitution based on "a mixture of only very modest pre-commitment and confidence, combined with a considerable measure of humility" thus seems entirely consistent with—and is arguably required by—such a sentiment (Waluchow 2007, p. 217).

⁵⁵ With the exception, perhaps, of cases of extreme necessity, e.g., of the survival of a state, or even of an individual in limited instances—the latter even being recognized as grounds for an individual's legal exculpation in certain jurisdictions (cf. Ghanayim 2006).

⁵⁶ Though it may thereby divorce a society's constitutional morality from the received tradition of their common law, in apparent opposition to Waluchow's project (if, that is, a society's common law tradition is the *only* identifier of its constitutional morality, rather than simply a normally very accurate one).

⁵⁷ Waluchow (2007, pp. 193-194).

those claimed by necessity,⁵⁸ no self-consistent agent can take contingently-claimed illiberal or inegalitarian rights as trumping the former—and which just happen to be liberal and egalitarian by nature, for they consist most directly in negative rights and because purposive agency is not a property possessed by any mere subset of humanity.⁵⁹ Whether an argument along these lines can be conclusively justified is what concerns the rest of this project.

⁵⁸ As opposed to the generic rights to freedom and well-being, which must be at least implicitly claimed by any agent engaging in any goal-directed action whatsoever.

⁵⁹ Cf. Gewirth (1978, pp. 105-135).

CHAPTER TWO:

LEGAL POSITIVISM

AND THE INTERNAL PERSPECTIVE

In this chapter, I would like to outline some basic concerns that any agent concerned with his or her own autonomy should have with regard to modern legal positivism. My intent is simply to clarify what conditions are sufficient to justify the claim that any given moral agent (or group of agents) is normatively bound or obligated by a legal duty. While legal positivism, historically, has provided some compelling accounts of what suffices for the creation of legal obligations,¹ I intend to show that these accounts may be descriptively inaccurate insofar as they understate the practical limits of what can be accepted as obligatory from the perspective of any agent. However, rather than approaching the issue from the perspective of either natural law or legal interpretivism (as might be expected), I intend to approach the issue as a positivist, working from within the framework of H.L.A. Hart's and Joseph Raz's own characterizations of positivistic legal theory. In so doing, I will attempt to show that both Hart's characterization of the "minimum content of natural law"² and Raz's theory of authority³ commit legal positivism to acknowledging more limitations on the potential validity of legal rights and duties than has thus far been acknowledged.

2.1 *The 'Minimum Content' of Hart*

Hart begins his discussion of the 'minimum content' of natural law by taking 'legal positivism' to mean "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality".⁴ However, when analyzing the potential minimum content of any given legal system, Hart finds that all legal systems seem to require that certain conditions (which some theorists might want to claim are moral conditions)⁵ must be fulfilled in every case in order for a system of law to sustain itself. Nonetheless, because such conformance with these necessities (moral or not) is not conceptually necessary for the existence of a legal system (for things could have been otherwise), he argues that we need not adhere to the natural law thesis.⁶ Moreover, this remains true even if it is *practically* necessary to adhere to something like a natural law in

¹ Most notably in H.L.A. Hart's *The Concept of Law* (2nd ed., 1997).

² Hart (1997, Ch. 9, s. 2).

³ Cf. Raz (1994, Ch. 9, 10).

⁴ Hart (1997, p. 186).

⁵ E.g., Lon L. Fuller (1969).

⁶ I.e., the thesis that states "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid" (Hart 1997, p. 186).

certain cases, for nothing in the *concept* of law, proper, necessitates that adherence to such norms be a condition of legal validity.

Hart's analysis thus leads us to acknowledge that even if such limitations are necessary, they are only so in a contingent practical or structural sense, i.e., in which such rules can perhaps be entirely devoid of any specific or traditional conception of morality, just as long as they provide whatever suffices for the existence and sustenance of a minimal legal system. As he says:

We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity*... For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for [those statements] the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.⁷

Given this, we can still claim that there are "certain rules of conduct which any social organization must contain if it is to be viable",⁸ even if such rules are based solely on the contingencies of human existence.⁹ However, being ultimately contingent (*sub specie aeterni*, as it were), such rules are not conceptually necessary. Nor do they need to (even if they may) be moral.

2.1.1 Hartian Concerns

However, one might argue that the possibility of such rules has broader implications than Hart realizes, even when we are forbidden by the tenets of positivism from referring to moral norms as necessary for legal validity.¹⁰ As discussed above, Hart takes into account the broad necessities of, say, the fact that certain conditions must obtain in order for a legal system *in toto* to exist (and *a fortiori* to sustain itself). Given this, we see that it is plausible to claim that laws must revolve around "the tacit assumption that the proper end of human activity is survival, [which rests] on the simple contingent fact that most men most of the time wish to continue in existence".¹¹ Or, in more basic terms, we can say that the law must be concerned "with social arrangements for continued existence, not with those of a suicide club".¹²

Yet, what does this say of less macroscopic conditions, one might wonder, especially those pertaining not just to the wholesale sustenance of a system writ large, but the localized conditions of any agent being duty-bound by any given law? Is a legal

⁷ Hart (1997, pp. 199-200).

⁸ Hart (1997, p. 193).

⁹ This surely being the foundation of *any* normative framework we have (legal or otherwise).

¹⁰ The debate being open, however, on whether moral criteria *can* (even if not by necessity) be a condition of legal validity (cf., e.g., Waluchow [2003] and Raz [2002] for affirmative and negative responses, respectively, to that question).

¹¹ Hart (1997, p. 191).

¹² Hart (1997, p. 192).

system's possession of rules necessary for the mere continued existence of a society sufficient for the 'minimum content of natural law', at least as human agents themselves (i.e., individually) conceptualize the nature of legal validity? That is, does a legal system meeting the condition of sustainability thereafter have the unrestricted normative capacity (even if only within its own legal bounds) to generate rights and duties on the part of its citizens, just as long as such decrees do not lead to sheer anarchy—even if, say, no agent could conceptually and/or practically grant his or her assent to certain potential laws? This is not so clear, for there seems to be a missing premise: e.g., that a society's rule of recognition¹³ is identical both before *and after* the enactment of any given law (as well as that the legal system maintains its identity), no matter how terrible that law might be.¹⁴ That is, even if a government has the legal ability to enact laws generating rights and duties on its citizens' behalf, might it be the case that it nevertheless fails to thereby actually *create* such rights or duties even if it intends to do so, even if only in the rarest of cases¹⁵—that is, insofar as its assertion of 'duty' actually refers to a normatively binding obligation, i.e., one that bears a justifiable relation to any given agent's practical reason? If so, we can accept Hart's proviso that "it does not follow from [the claim that there are practical necessities within the law] that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice",¹⁶ yet maintain nonetheless that there might be additional considerations (being neither the broad conditions he takes into account *nor* references to morality or justice) that must obtain in order for the perceptibly valid creation of a right or duty to occur.¹⁷

Specifically, my concern lies in the relationship of the "internal perspective" vis-à-vis the law—the perspective from which, according to Hart, one generates those statements such as "I (you) have an obligation to act thus' [and from] which [one] assesses a particular person's situation from the point of view of rules accepted as guiding standards of behaviour".¹⁸ While Hart seems to require, as sufficient for legality, that the internal perspective need only be adopted by those agents acting in the capacity

¹³ I.e., "a rule for conclusive identification of the primary rules of obligation" (Hart 1997, p. 95).

¹⁴ And such a premise would be rather tenuous, given that a society's rule of recognition is a function of social facts. Given that the enactment of any given law can dramatically change social facts, it can surely therefore change the terms of a society's rule of recognition.

¹⁵ Say, if it attempts to create a duty the fulfillment of which is logically impossible (presuming, of course, that one cannot be obligated to do what one cannot, i.e., that 'ought implies can').

¹⁶ Hart (1997, p. 185).

¹⁷ And while the staunch positivist may want to claim that anything beyond Hart's minimum content provisions must *ipso facto* defer to some moral ideals, it seems that one must adopt an overly-broad sense of 'moral' in order to do so—such that 'moral' can refer not just to those criteria which have the capacity to affect other human agents, but also to the very basic Razian 'reasons for action', which exist simply through the act of valuing any end sought through one's action (cf. Raz 1985 and Gewirth 1980, pp. 38-39, 49). Whether such valuing is 'moral', in the sense that a positivist (acting in a descriptive manner) would be justified in conceptually excluding it from his or her inquiry, is an open question, however. On the other hand, though, if such valuing occurs in all cases as a matter of fact, a positivist may be obliged to include it in his or her analysis.

¹⁸ Hart (1997, p. 218).

of public officials¹⁹ and that a bulk of the population obeys those officials,²⁰ a problem arises, I think, when we fail to bridge a crucial, conceptual link between the internal perspectives of the governing and the internal perspectives of the governed (or between right-bearers and duty-bearers, as it were). This problem arises most clearly when an agent (particularly when acting in an official capacity) claims a right correlative to a duty that he or she recognizes no other agent could reasonably accept (whether on conceptual or practical grounds),²¹ such that the internal claim “(you) have an obligation to act thus” thereby fails to obtain. As Lon Fuller argues, “there is a notion of reciprocity in the very notion of duty”, entailing that

[S]o soon as contributions are designated and measured—which means so soon as there are duties—there must be some standard—however rough and approximate it may be—by which the kind and the extent of the expected contribution is determined.²²

In other words, it would seem inherent in any coherent model of rules asserting some manner of normative obligation (legal, moral, or otherwise) that there be some maximal limit as to what can be claimed to be a justified duty on behalf of any agent.

While one might respond that a legitimate legal official’s mere assertion can suffice for the creation of a legal duty, regardless of its particular content, I (as above) intend to use the rubric of legal validity in a minimally richer sense from this point on, based on the presumption that no legal agent would ever actually conceive of legal validity as satisfied through nothing more than a mere assertion (even if pursued through the proper channels) in certain instances.²³ That is, if all agents would naturally view certain legal declarations as spurious, incapable of creating any reasonable sense of legal duty, and thus as lacking a necessary part of what it means to be a valid law, I argue that we should be using *that* criteria in our analysis of the concept of legal validity, rather than something potentially practically devoid of the normative obligatoriness that law necessarily claims.

¹⁹ I.e., society’s “rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials” (Hart 1997, p. 116).

²⁰ I.e., “[s]o long as the laws which are valid by the system’s tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists” (Hart 1997, p. 114).

²¹ Presuming, that is, that legal rights and duties are correlative, such that it is inconsistent to assert the existence of a right while being unable to cogently assert the existence of a correlative duty (or vice versa) (cf. Hohfeld 1964).

²² Fuller (1969, pp. 21, 22).

²³ E.g., if those declarations arise so far outside the bounds of the apparent limits of legal authority as to negate any plausible claims to the effect that (a) the authority was in fact authorized to make such a claim and (b) that such a claim implements an actual normative duty bearing some minimally-justified relation to the practical reason of the governed.

2.2 *The Authority of Raz*

By the terms of his theory of authority, Joseph Raz arguably allows for a resolution of this dilemma, as it is far from apparent that just any legal authority possesses valid legal authority from the perspective of any agent (even if it possesses *de facto* authority). In his model, Raz advances three theses which must normally obtain for one to claim that one (or others) are bound to accept the judgments of an authority. These are as follows:

The normal justification thesis: The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly... [I.e., such directives] are meant to reflect dependent reasons in situations where they are *better placed* to do so.²⁴

The dependence thesis: All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives. Such reasons I shall call dependent reasons.

The pre-emption thesis: The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.²⁵

With these theses in mind, however, Raz notes that there are “two kinds of reasons for not having authority”: (i) “the moral or normative conditions for one’s directives being authoritative are absent” or (ii) “one lacks some of the other, non-moral or non-normative, prerequisites of authority, for example, that one cannot communicate with others”.²⁶ These provisos thus show the general (even if not the particular) limits of what can be accepted as a (legal) authority by any agent and, therefore, what can be accepted as legally binding (i.e., *as law*) by any agent.

Similarly, at other points,²⁷ Raz acknowledges that the personal deliberative stage (i.e., of considering one’s own reasons for action, including the reasons for accepting an authority as legitimately pre-empting one’s own reasons in the first place) can re-emerge after the executive stage (of having that authority implement such pre-emptive reasons) has supposedly superseded it.²⁸ Thus, in its most precise phrasing, Raz’s argument entails that “authorities are legitimate *only if* their directives enable their subjects to better

²⁴ Raz (1994, pp. 214, 215, emphasis added).

²⁵ Raz (1994, p. 214).

²⁶ Raz (1994, p. 218).

²⁷ E.g., “[t]hose subject to [executive considerations] are not *normally* allowed, by the social institution concerned, to challenge or query their validity or conclusiveness” (Raz 1994, p. 207, emphasis added). As well, “the arbitrator’s word... can be challenged and justifiably disobeyed in certain circumstances” (Raz 1994, p. 213).

²⁸ See Raz (1994, Ch. 9, 10).

conform to reasons”.²⁹ The question remains, though, whether, on any particular instance *after* the legitimacy of an authority has been accepted, the Razian framework allows for a declaration of *illegitimacy* on the part of any given declaration that that otherwise legitimate authority might put forth.

Indeed, there is an occasional practical conflict surrounding this issue within Raz’s argument, given that it is inherent in the concept of authority that “[t]hose subject to the authority are not allowed to second guess the wisdom or advisability of the authority’s directives”.³⁰ Of course, it could only be in bad faith that we would defer to an authority on an issue, all the while intending to reject the authority’s decision if it fails to be in our favour. One might wonder, though, how far this supposition of (more or less) good faith in Raz’s argument extends. To be sure, we are generally bound by our own dependent reasons to obey the declarations of authorities even if, in many cases, they superficially conflict with our reasons for action. I.e., in many cases, authoritative judgments act as points of coordination necessary for the continued functioning of many agents in a complex social web, where individuals in any localized instance may be made worse off, but where each is nevertheless better off in the end (all things considered). In many of these cases, the authority simply has a better epistemic grasp of all the relevant details which should factor into one’s reasons for action.³¹ And, in the end, as the normal justification thesis states, what justifies submission to authority is simply that by doing so, one is (on the balance) able to conform to one’s own reasons for action better than if one had attempted to proceed alone.

2.2.1 Razian Concerns

Still, however, there is a potentially serious conflict, I think, between the stated validity of any authoritative legal declaration and cases wherein said declaration (even if enacted by valid authorities through valid means) *necessarily* cannot replace our dependent reasons.³² Are we still then disallowed from “second [guessing] the wisdom or advisability of the authority’s directives” even if in certain cases we can’t realize that (say) “the moral or normative conditions for one’s directives being authoritative are absent” until *after* they institute patently unacceptable laws (i.e., after we justified allowing a governing body to make authoritative declarations and, in turn, the ability to make law)? To use a ubiquitous example: the laws of the Nazi regime may have been validly enacted by a valid authority, being accepted as authoritative by a bulk of the

²⁹ Raz (2006, p. 1018, emphasis added).

³⁰ Raz (2006, p. 1018).

³¹ Cf. Raz (1994, pp. 347-348).

³² Consider, also, that if a judgment is egregious enough, not only might one be justified in refusing to submit to the authority in a given instance, but (depending on the content of the directive) it may be that the *totality* of beneficial judgments that a regime had ever made could not even outweigh the harm of the single judgment at hand. In other words, there seems to be no small conflict between the assertion that authorities are legitimate “only if their directives enable their subjects to better conform to reasons” and the fact that this entirety of such legitimacy might be undermined in one fell swoop (Raz 2006, p. 1018).

population (if not all, before certain laws were enacted).³³ Yet, is it sufficient to say that just because the bulk of agents accepted the authority as valid,³⁴ the declarations that it created therefore achieved an incontestable legal status vis-à-vis all agents?³⁵ That is, does this claim of legal validity still hold even if some agents are *unequivocally* unable to accept the terms of such validity (even if only *post facto*)?³⁶ It seems that it must, Raz would surely respond, if the law “must be [identifiable] by means other than the considerations the weight and outcome of which [the legal authority] was meant to settle”³⁷ — unless, that is, that we can maintain a strong proviso throughout, such as that the potential occurrence of the internal perspective is necessary for legal validity with respect to *any* agent (rather than just by legal officials, as Hart claims).³⁸ In this way, we could hold that if legal authoritativeness can be severely lacking (or non-existent) vis-à-vis some agents, a law that claims otherwise might not be unequivocally valid just because this fact is ignored under the rubric of the aforementioned ‘sources thesis’. Such a result is a plausible possibility, I think, even if only in those rare cases in which it is in fact impossible for an agent to reasonably acquiesce to the authority of a given law, and in which this fact is recognizable by any agent (even a legal official).

³³ These reasons being sufficient for a Hartian (and, generally, a Razian) to declare that such laws were valid. Of course, Raz grants legal validity on the sufficient condition that an authoritative judgment (of law) is handed down to those agents who granted the authority the power to do so to begin with. Yet this raises two questions: (i) first, is it really plausible that such agents intended to give, or in fact *gave*, an authority *carte blanche* in their granting of legitimacy to that authority—and if not, whether declarations that step outside the intended legitimate domain would not be *ipso facto* illegitimate (as one might think); and (ii) secondly, if illegitimate in this sense, does the fact that the other declarations are still legitimate due to at least their minimal conformance with agents’ reasons for action (combined with the fact that they are thus taken as authoritative) suffice for calling such an approach ‘positivist’? If it does, we are left not only with a conception of legal validity that supervenes upon morality (that being the manner in which Raz derives his ‘sources thesis’ [see *infra* note 37]), but one that is heavily circumscribed by that normative framework, both *ante* and *post facto* (the latter, I argue, should it be realized that the authority reached far beyond its legitimate domain).

³⁴ Or, perhaps, that all agents happened to accept an authority insofar as it hadn’t *yet* created laws that undermined any possible reasons for submitting to the authority in the first place.

³⁵ I am presuming here that even though the authoritativeness and the validity of law are argued by some to be separable, validity is in some minimal and enduring sense parasitic on authority, e.g., on a legal declaration’s bare conceptual ability to allow any given agent to better conform to his or her own reasons for action. This is contrary to how Raz may conceive of validity, in that all a legal authority need do is *claim* authority, even if it fails to possess it (cf. Raz 1994, pp. 205, 211). However, while this may seem to be a richer conception of validity than most positivists would accept, I argue in the next chapter that it is no richer than any given legal agent would naturally accept, were he or she informed of (say) a given law’s utter inability to even possibly satisfy the normal justification or dependence theses.

³⁶ Such potential acceptance being necessary, I argue, for a coherent claim that a duty actually exists.

³⁷ Raz (1994, p. 219).

³⁸ And though Raz would likely defer to the claim that in such cases law remains authoritative, but we simply choose to let moral rules trump (or grant the judiciary ‘directed powers’ to do so [1994, Ch. 11]), this does nothing more than beg the same question that the exclusive legal positivist wants to avoid. That is, is it any more plausible to treat the system of legal authority *in toto* (and its consequent ability to create normatively binding rules) as dependent upon satisfying moral norms than it is to treat any given rule’s validity as so dependent?

The dilemma, then, is whether we ought to claim that such directives as those which fail even the most minimal test of authoritativeness can ever coherently be said to count (or have counted) as law in the first place, even if they adhered *prima facie* to all antecedently recognized conditions for legal validity (i.e., were sanctioned by the rule of recognition). In other words, can laws exist regardless of the fact that certain agents who are unduly harmed by such laws have neither any practical or conceptual justification for acquiescing to the duties it purports to implement—particularly if all other agents (even those unaffected by a certain harmful duty) have the capacity to realize this fact?³⁹ That is, (i) if such internal assent is recognized as impossible (on whatever grounds),⁴⁰ (ii) if the supposed authoritativeness of a command asserting otherwise is recognized as impossible,⁴¹ and (iii) if such a fact can be recognized *descriptively*, it would seem curious for any agent (even a positivist) who recognizes these facts to maintain that a legal duty has nonetheless been created (even if attempted through valid means and by an otherwise valid authority).⁴²

2.3 Internal Necessities

This, I think, leads to an important conclusion. While Hart accepts natural, structural necessities as part of the potential minimum content of law,⁴³ his conception of law precludes denying law its validity on the grounds that some agents will be unable to accept its judgments. Writes Hart: “though a society to be viable must offer *some* of its members a system of mutual forbearances, it need not, unfortunately, offer them to all”.⁴⁴ Similarly,

[A] society with law contains those who look upon its rules from the internal point of view as accepted standards of behaviour... But it also comprises those upon whom, either because they are malefactors or mere helpless victims of the system, these legal standards have to be imposed by force or threat of force.⁴⁵

³⁹ Of course, we should want to acknowledge the possibility that an agent can voluntarily assent to harmful duties, as well as the possible existence of harmful *involuntary* duties (e.g., military conscription necessary for the state—and therefore its own citizens’—survival). However, I think that the latter case can only arise on grounds of self-consistency, and that one cannot think that such duties arise when (say) no conceptual form of self-reflexivity can be relied upon to justify such a duty-claim. That is, one can claim that another has a duty to be conscripted on grounds of self-consistency, viz., that other agents have had to risk their lives in the past and that it is only through the *in rem* duty of all eligible agents to do likewise that we maintain self-consistency with that fact. However, such grounds clearly do not encompass all grounds on which some agents think that others ought to perform harmful duties. At its base, my argument at least precludes (say) the possibility that a person has a valid legal duty to do *x* based *solely* on others’ say-so (or any other unduly weak grounds), which the agent would otherwise necessarily reject.

⁴⁰ E.g., if the law demands that one do two incompatible actions simultaneously, or demands that one give up one’s life on grounds that no rational agent would accept.

⁴¹ Even if specific to a single agent.

⁴² Cf. *supra* note 22.

⁴³ I.e., those necessary for the mere sustainability of a legal system.

⁴⁴ Hart (1997, p. 201).

⁴⁵ Hart (1997, p. 201).

Thus, despite the fact that the law can endorse and carry out serious harm against some agents (to say the least), the fact that it is internalized as valid by officials and routinely obeyed by a populace would be sufficient to deem the law valid, for Hart.

Still, even though Hart recognizes that the legal obligation to obey a law can be overridden by countervailing moral duties,⁴⁶ is it not rather odd to claim that such ‘helpless victims’ are *bound* by such laws (or, in Hart’s own terms, *obligated* rather than merely *obliged*)⁴⁷ and that they therefore have some sort of duty (even if only a legal duty) to, say, be harmed just because (i) certain people (i.e., officials) happened to internalize the laws that endorsed harm for them, and (ii) a bulk of the population happens to obey those laws? If this seems conceptually unacceptable (for it severely contrasts with the common-sense notion of duty),⁴⁸ we might do well to take Raz’s lead on the issue of what makes an authority’s declarations legitimate to begin with. In this way, we can discern whether law, even if being valid on paper and accepted as valid by the bulk of the population, is conceptually capable of binding others to egregiously harmful duties—and if it isn’t, whether the validity of that law is therefore impugned, insofar as it fails in what it purports to, viz., create binding normative duties on behalf of those agents whom it purports to govern.

However, even Raz’s conception of (legal) authority has limits along these lines, leading to certain practical and conceptual confusions. If we consider (say) the situation of the Jewish people living under the Nazi regime, it would of course be highly dubious to claim that they accepted the terms of legal validity that the bulk of the population did (at least once it was realized what certain of the authority’s enactments entailed). Clearly, the normal justification thesis could not have been satisfied for those seriously harmed; and, with respect to the most egregious laws, that thesis may have even *categorically* failed to obtain from the perspective of those agents. What is curious about this analysis, however, is that for those whose reasons for action could (and would) have been justifiably pre-empted (i.e., the bulk of the non-harmed population), it would seem that the law nonetheless *did* attain authoritativeness (and, of course, validity). But it seems even stranger than the conclusion we derive from Hart⁴⁹ to claim that the laws of a persecutive regime can be authoritative vis-à-vis some agents (even the majority), yet not even minimally authoritative for others—as though the authority of law can at once

⁴⁶ Cf. Hart (1997, pp. 203, 210-212).

⁴⁷ Cf. Hart (1997, pp. 82-91).

⁴⁸ One might even argue that it is little more than an Austinian gunman-situation writ large, wherein the gunman’s rules just happen to entail “a combination of regular conduct with a distinctive attitude to that conduct as a standard”, i.e., a “critical reflective attitude to certain patterns of behaviour as a common standard, [displaying] itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified” (Hart 1997, pp. 85, 57). The question for Hart, therefore, is: if these conditions obtain, i.e., if a gunman just happens to bring about “the existence of social rules” to back up his threats, is there any greater basis for claiming that those agents who are unduly harmed by certain legal rules are, in fact, *obligated* to conform to such rules, rather than merely being obliged to do so under threat of force (this being the same basis on which Hart attempts to rebut Austin) (Hart 1997, p. 85)?

⁴⁹ I.e., that the law can create ‘normative’ duties, no matter how unacceptable to any given agents.

obtain and radically *fail* to obtain (even if with respect to different groups of agents). This result, although arguably more nuanced with regard to the internal perspective of agency than in the previous analysis of Hart, again leaves us lacking something crucial, insofar as we want to claim (in the manner of Hart's argument against Austin) that the agents for whom law asserts a duty can, in fact, be *obligated* by that duty (say) by having it grounded in a coherent normative framework, rather than merely being *obliged* by force where no reasonable justification for the legitimacy of the alleged duty is apparent (and, in the cases I envision, not even possible).

2.4 A Positivist's Alternative

Given these problems, I would like to tread a third path regarding this issue while nonetheless attempting to adhere to the positivist line. I allege that rather than accept what appears to be entailed by either the Hartian or the Razian approach, it is in fact more descriptively accurate to claim that such laws were/are not laws in the way that law is traditionally conceived (even by Hart and Raz). My claim is merely that if it is categorically impossible for an agent to assent to a legal duty from within his or her internal perspective, i.e., to a duty with which it is impossible for him or her to conform (and particularly when legal officials are capable of recognizing this fact) the law thereby fails to obtain even its *own* conditions of success—that is, if it indeed intends that such a duty be created. For example, if a law should purport to create a duty on the part of person *B* to simultaneously perform both *x* and $\sim x$,⁵⁰ it therefore fails to create a duty, for the fulfilment of that duty can never (practically *or* conceptually) be realized.⁵¹ Given the correlativity of rights and duties, it also fails to create a right (say) on behalf of agent *A* (even if a legal official) that person *B* perform the aforementioned action,⁵² *even if* person *A* could otherwise assent to the law.⁵³ This is because *A*, on pain of inconsistency, should be unable to accept the validity of his or her own right that *B* perform a correlative duty, on the grounds that *B* is practically incapable of fulfilling that duty and/or rationally incapable of granting that duty his or her internal assent.⁵⁴ In other words, if one realizes that no rational agent could be normatively bound by duty *x*, one must therefore hold that no rational agent could think there to be a right *y* correlative to *x*. Thus, one cannot rationally hold that one ever has right *y*. And this fact, I argue, entails that there are certain rights that even Hartian legal officials cannot coherently hold as obligating (rather

⁵⁰ I.e., a logically contradictory duty to which no minimally rational person can grant his or her assent (let alone actually fulfill the performance of).

⁵¹ Insofar as 'ought', in a minimal practical or logical sense, implies 'can'.

⁵² Whether we define *A* as an individual agent and the correlative duty as *in personam*, or *A* as the governing authority and the correlative duty toward it (and other agents) as *in rem* (cf. Feinberg and Narveson 1970).

⁵³ For, not being required to perform the impossible, such a law can easily satisfy the normal justification thesis vis-à-vis that agent.

⁵⁴ That is, insofar as there are not other relevant circumstances which weigh into whether an agent's reasons for action will be justifiably pre-empted, such as that it is in their interest or that they are bound by self-consistency (as all agents may be) to ensure that the continued existence of society obtains.

than merely obliging), insofar as the internal perspective is rationally incoherent when thereby applied⁵⁵ and insofar as the correlativity of rights and duties is accounted for.

In this way, then, I think we can maintain a “concept of law which allows the invalidity of law to be distinguished from its immorality”⁵⁶ (such aforementioned considerations being separate from any sort of morality, proper) while coherently answering *yes* to such questions as:

Should informers who, for selfish ends, procured the imprisonment of others for offences against monstrous statutes passed during the Nazi regime, be punished? Was it possible to convict them in the courts of post-war Germany on the footing that such statutes violated the Natural Law and were therefore void so that the victims’ imprisonment for breach of such statutes was in fact unlawful, and procuring it was itself an offence?⁵⁷

That is, presuming that no one can conceptually have the duty to do the impossible (or, in practical terms, that no agent can be normatively bound to perform a duty to which he or she could not rationally grant his or her assent),⁵⁸ no other agent can maintain that he or she possesses a correlative right to either actively or passively see the fulfilment of such duties realized. As such, (i) supposing that it is inherent in the concept of law that law is capable of creating rights and duties in any instance when it in fact intends to do so, and that (ii) it fails to do so when no agent can think it rationally coherent for either themselves or others be normatively bound to perform a particular duty, we are therefore compelled to conclude that the law can conceptually fail in that attempt, despite its intent. And while even if a Razian positivist would hold that the authority and validity of law are separable, the response is that if we view it to be in the nature of law that it be able to create duties that are not *categorically* trumped by other normative and/or rational considerations from the get-go, we should modify the Razian view to exclude those laws which are not just contingently, but *necessarily* unauthoritative. A failure to do this is especially problematic if we view it to be in the nature of legal declarations that they *do* claim authority (just as Raz does), insofar as we think that legal authorities must at least conceptually be able to make good on those claims.⁵⁹

2.5 Objections

Of course, one might still charge that I beg the question: i.e., on what grounds are even the worst laws of the Nazi regime akin to those which it is conceptually impossible for an agent to obey (such as blatantly logically contradictory laws)? My response, I suppose, will have to defer to a conception of morality, very broadly construed, as in the rights-theory of Alan Gewirth.⁶⁰ That is, in order to make this case, we need defer to no

⁵⁵ I.e., the perspective that grants “I (you) have an obligation to act thus”.

⁵⁶ Hart (1997, p. 211).

⁵⁷ Hart (1997, p. 208).

⁵⁸ And which are in no plausible way necessary for the continued existence of society.

⁵⁹ Cf. Raz (1994, pp. 205, 211).

⁶⁰ Gewirth (1980).

transcendent claims of moral or political absolutes. Rather, we need only defer to the bare fact that any agent, in valuing his or her own ends (as is entailed by any intentionality whatsoever), is implicitly committed to valuing those means generically necessary for the realization of those ends. As such, no agent can coherently assent (from his or her own perspective) to the imposition of a duty the fulfilment of which would necessarily negate the possibility of the continued existence of his or her agency, at least insofar as these are proposed without even a basic, reasonably compelling argument that shows that the agent is *obligated*, rather than merely *obliged* to follow them.⁶¹

Even if this conception is not ultimately grounded in some immutable, transcendent foundation, it need only inhere within the internal perspective of any legal official or citizen who would therefore be prohibited (on pain of inconsistency) from maintaining that any agent is obligated to perform a duty to which no normal agent would grant assent. Such a proviso would also entail that the law is more than just a display of brute force, *even if* the officials in that system happen to think it legitimate and normatively binding for it to be so, and even if a bulk of the population happens to acquiesce. Rather, I argue that the Hartian project must be extended on its own grounds (i.e., the very same ones on which Hart rejected Austin's command theory) to the claim that even legal officials have to justify the normative bindings they create vis-à-vis *any* given agent in order for them to legitimately claim that such agents are thereby *obligated* to obey that law rather than merely *obliged* to do so under threat of force.

2.6 Comprehensive Positivism

What does this mean for positivism, then? I argue simply that it is more descriptively accurate to keep the aforementioned distinctions in mind when analyzing the ways in which agents actually approach hard legal issues. Moreover, in taking such an approach, we see that we need not necessarily be bad positivists⁶² in punishing offenders for following what we take to be egregiously immoral rules which nonetheless seemed to satisfy a rule of recognition. Nor do we need to claim (if we take an external perspective to such a situation) that we are conceptually failing to follow a purely legal model in doing so. Rather, this approach allows us to describe ourselves as *legally* punishing offenders of certain inherent provisos in the law, on the grounds that even though the legal authority at the time claimed that such laws were valid,⁶³ they in fact created no real

⁶¹ E.g., again, that risking one's life is necessary for the survival of the state, which is in turn necessary for one's own survivability—or that, even if it is unnecessary for one's own sustenance, the fulfillment of such a duty by others *was* so necessary, and the only way to maintain normative coherence with that fact is to claim that there is therefore an *in rem* duty of all to do likewise.

⁶² In the sense of declaring our legal theory to be true, yet punishing people under a purely moral rubric when the law turns out to offend us, despite it giving what we as positivists declare to be *valid* results, as though 'valid' were nothing more than a purely theoretical modifier, rather than something with even the most minimal practical import (such as being conceptually related to the 'authoritative nature' of law, only the latter of which can ground an actual duty to obey in practical reason).

⁶³ To be sure, one might claim that such laws may have even antecedently *been* valid (say, until actually enforced). But, again, just because a declaration happens to satisfy a rule of recognition in the past does not

duties on the part of certain agents to be harmed, nor rights on the part of others to harm them. We therefore need not act as moral experts when we feel that a law was so bad that, even though legal, it shouldn't have been obeyed; rather, if a law exists such that there is overwhelming evidence that no rational agent (not even a legal official) could assent to the duty that the law purports to create, were he or she to be bound by it, we necessarily grant that no rational agent has grounds for thinking that a correlative right exists (nor *a fortiori* that a law which claims as much can conceivably *create* any sort of right or duty to that effect).

My claim, then, is simply that we can maintain both a conceptual and a practical positivist ethic (rather than only the former, as when we purport to step outside legality and declare that we are authorized to punish violators of the moral law on moral grounds alone)⁶⁴ by declaring not merely that *x* was a morally bad law (and therefore not one to which any agent *should* have thought him or herself bound, or at liberty, to obey). In addition, the positivist can declare that because it is apparent, with respect to certain purported laws, that (say) the normal justification and dependence theses *categorically* cannot be satisfied vis-à-vis some agents, the *conceptual* (and perhaps moral) conditions of legal validity (as I have set them out) therefore fail to obtain. In such a way, we can justifiably punish agents who harm others egregiously—even if they do so under the guise of legal sanction, and even if the legal authority still stands as authoritative for *them*; but we need not defer exclusively to moral grounds as justification. That is, we need not necessarily step back from the law in order to implement a successive institution of coercion. Rather, with the approach I advocate, we can maintain the conceptual framework of legal positivism and yet eschew the practical and conceptual dissonance that comes with saying:

“Though you were legally authorized to do *x* at the time (and perhaps even legally bound to do so) we are going to punish you nonetheless. We recognize that your actions were completely sanctioned by valid legal rights and duties, but that doesn't really matter: those rights or duties didn't give you sufficient grounds to actually conform to them, even though when we attempt to justify the coercive nature of the law on any other day, we assert that it is inherent in the authoritative nature of law *to do just that*.”

Instead, I think, we can say that since such persons had the capacity to recognize that no agent could assent (say) to a duty to be killed (absent duly justificatory reasons to the contrary), they could have recognized that it was incoherent to claim that they had either a right or a duty to see others be so harmed. The law, though it existed on paper, created no *binding* legal rights or duties, for even the legal officials had no coherent grounds for claiming that any other agents had such a duty. If so, i.e., presuming that the transgressor was capable of recognizing that fact and yet failed to do so, we can thus justifiably punish

necessarily entail that it will satisfy that rule in the future (for, say, epistemic premises may become clearer and practical circumstances may change in an instant, such that the rule of recognition *itself* changes).

⁶⁴ As though we were/are incapable of describing such situations in positivistic legal terms.

them—though, again, not merely on moral grounds—simply for the fact that they egregiously harmed other agents in the absence of legal sanction.⁶⁵

2.7 Concluding Remarks

Does all this require, in any sense, that we should reject (or delimit) what Hart called “the great battle-cries of legal positivism”, i.e.,

‘The existence of law is one thing; its merit or demerit another’; ‘The law of a State is not an ideal but something which actually exists... it is not that which ought to be, but that which is’; ‘Legal norms may have any kind of content’,⁶⁶

once the aforementioned nuances of the relationship between legal positivism and the internal perspective are taken into account? Not necessarily. With respect to traditional normative grounds (i.e., those of moral or political ideals) these adages hold strong. We can say that the law’s moral or political merit or demerit is still (more or less) irrelevant to legal validity. We can still say that bad laws are laws nonetheless. But, what we cannot say is that these phrases are true in terms of the internal structural features that law must conceptually have, on the contingent basis of there only being certain ways in which human agency comprehends practical reason and rights and duties, whether the latter be legal, moral, or otherwise. I.e., if we evaluate the merit or demerit of a law in terms of its bare potential either (i) to be granted assent from within the Hartian internal perspective by any agent to which it purports to apply, or (ii) to be at all capable of replacing an agent’s Razian ‘reasons for action’,⁶⁷ we find that, even if most laws do, *not all* do. And this counts more than has been thought.

What does this all mean, then, particularly for Hart and Raz? Their positions may still stand strong, for, providing that their positions maintain coherence with the sociological descriptions of human behaviour, they remain factually correct. All I intend to show is that it is dubious to think that a legal official can actually *obligate* (rather than merely *oblige*) an agent to conform to certain legal rules, when the import of Hart’s conception of the internal perspective is taken more broadly into account. In other words, I want to exclude (as Hart does) those Austinian-gunman situations in which all the gunman’s commands succeed in doing is instituting a regime of brute force, but also (as

⁶⁵ Of course, this raises the question: exactly how can we *legally* punish such an offender if their law was void on the issue? Perhaps we cannot, if their law *were* actually void. However, if such a regime did have laws which prohibited violence toward others (*ceteris paribus*) and which maintained legal status (as well as authoritativeness, for the normal justification thesis is easily satisfied for all agents with respect to such laws), then the commission of violence against others may simply have been in violation of their own law. And on *those* grounds can that person justifiably be punished, these happening to be legal, not moral, grounds (rather than those of ‘Natural Law’) (cf. Hart 1997, p. 208).

⁶⁶ Austin (1954, Lecture V, pp. 184-5), Gray (1909, s. 213), and Kelsen (1945, p. 113), as cited in Hart (1997, p. 207).

⁶⁷ At least one of these being necessary to make coherent claim that the law (even in the most minimal sense) actually creates normatively binding rights and duties.

Hart declines to do) those situations wherein the gunman is delusional and happens to (i) think that his or her commands actually institute a supervening system of binding moral norms that rational agents would do well to accept and (ii) cause a bulk of a population to acquiesce to those commands (such that a Hartian legal system thereby obtains). In this way, we can resolve the main dilemma arising in Hart's theory, i.e., thinking that those 'helpless victims' of a coercive regime are actually normatively bound (even if only in the weak, legal sense of such obligation) to follow certain laws.

Lastly, I have attempted to argue that if this is the case, we need not have recourse *solely* to contestable moral norms in justifying the punishment of agents who seemed to be doing what was legally sanctioned. Rather, there are instances wherein we can claim, from within the positivistic framework of any legal system, that certain laws, by the very fact of their conceptual incapability of cohering with the internal perspective (or with the Razian reasons for action) of any particular human agent, never institute any legal rights or correlative duties vis-à-vis such an agent to begin with. As such, it may be conceptually incoherent for any agent to think that he or she has a right to egregiously persecute and harm others, even if the law appears to endorse such a practice. And this is what I think Hart's minimum content thesis and Raz's theory of authority entail for legal positivism.

CHAPTER THREE:

THE NECESSITY OF RIGHTS

At this point, I would like to turn my attention away from what has been an essentially reactive defense of constitutionalism, i.e., one that has been defending a strong sense of rights from those objections which would preclude their potential (or even implicitly necessary) justifiability in the first place. As we have seen, such objections can arise through the practical concerns regarding constitutionalism's supposed devaluing of democratic ideals, or through the theoretical concerns of positivist legal theory, the latter of which may nevertheless want to declare egregiously unjust rules legally valid insofar as they appear to satisfy a society's extant rule of recognition.

Now, however, I would like to take a positive approach to the issue in giving one possible explanation of why human agents take rights to matter and of why only some right- and duty-claims (and the laws that purport to legitimize them) can be granted any minimal sense of social justifiability (legal or otherwise). As well, I approach this issue with the presumption that, were agents informed of the merits and consequences of their right claims, they would view the necessity, justifiability, and universality of rights in a relatively similar manner. If so, a strong case will exist that they would then view certain laws which fail to provide even the barest justification for restricting their (or others') autonomy, not only as something with which they don't *want* to comply, but as something external to the concept of law and of legal agency, insofar as law is taken to require at least a modicum of relation to agents' reasons for action (or to practical reason, generally). It is only through relation to the latter, I argue, that any sort of social rule, legal or otherwise, attains the sort of normative foundation that justifies the validity of its right- or duty-claims to begin with.

3.1 *Generic Necessities*

3.1.1 *Rights and Agency*

I have proceeded thus far with a methodology analogous to that of Alan Gewirth. A brief explanation of his project is therefore necessary, I think, both for showing why this approach seems so compelling and why I think a strong case exists for claiming that any given agent would subscribe to such a view, were he or she informed of the relevant facts behind both his or her right-claims and the potentially conflicting duty-claims made by the legal officials of a society.

Gewirth's derivation of what he calls the "principle of generic consistency" (hereafter: *PGC*) is an attempt to derive a theory of rights and duties, of which no rational agent can deny the validity without self-contradiction. The derivation of the *PGC*, briefly, is as follows: because to be an agent is to act conatively, i.e., it is to strive at (and *ipso facto* value, even in the most generic sense) one's own ends (whatever they might happen to be), any agent is bound to recognize, at least from within his or her own internal

perspective, that there are certain basic goods (viz., freedom and well-being) which are generically necessary for the performance of any and all of that agent's actions. That is, the agent

regards his purposes as good according to whatever criteria (not necessarily moral ones) are involved in his acting to fulfill them. Hence, the agent also a fortiori regards as necessary goods the proximate necessary conditions of his acting to achieve his purposes. These conditions, which pertain alike to all actual or prospective agents, are freedom and well-being, where freedom consists in controlling one's behaviour by one's unforced choice while having knowledge of relevant circumstances, and well-being consists in having the other general abilities and conditions required for agency".¹

As such, through engagement in any action whatsoever, an agent implicitly claims that since those goods are generically necessary for the pursuit of any and all actions, they *must* be accorded to the agent.² That is, not having basic freedom and well-being is non-optional, insofar as the agent even minimally values the potential chance of successfully realizing his or her own ends. Says Gewirth:

In saying that freedom and well-being are necessary goods for him, the agent is not merely saying that if he is to act, he must have freedom and well-being; in addition, because of the goodness he attaches to all his purposive actions, he is opposed to whatever interferes with his having freedom and well-being... [H]is statement is prescriptive and not only descriptive... setting forth a practical requirement he endorses, that other persons not interfere with his having freedom and well-being. This requirement constitutes a strict practical 'ought' in the view of the agent.³

Such an imperative is thus categorically binding upon all other agents, even if only from within the agent's own perspective, and the claim-rights made to freedom and well-being thereby entail (again, even if only internal to the claimant's agency) a *prima facie* duty-claim on behalf of all other agents to at least refrain from removing those goods from the agent.⁴

However, since such claim-rights for oneself and strict correlative duties claimed on behalf of all others arise on the sufficient grounds of being a "prospective purposive agent",⁵ any agent must then view such a conception of rights and duties as inhering (and just as justified as his or her own) within the perspective of any other human agent.⁶ As

¹ Gewirth (1982, p. 199).

² Gewirth (1978, pp. 61, 64). In Kantian terms, freedom and well-being would appear to be "true needs", i.e., "ends that it is not possible for any rational agent to forgo", as Barbara Herman says. To that end, "[e]nds... that are necessary to sustain oneself as a rational being cannot (on rational grounds) be given up. Insofar as one has ends at all, one has already willed the continued exercise of one's agency as a rational being" (Herman 1993, pp. 52, 55).

³ Gewirth (1978, p. 79).

⁴ On the correlativity of rights and duties, cf. Hohfeld (1964).

⁵ In other words, the agent claims these rights insofar as he or she is, will be, or will continue to be, an agent (fulfilling the condition of prospectivity) and is conative/intentional/purposive, by virtue of valuing his or her own purposes, whatever they might be (Gewirth 1982, p. 120).

⁶ Gewirth (1978, pp. 67-68).

such, one is bound to recognize that even if one must categorically claim certain rights due to the valuing of one's own ends and, correlatively, that all other agents are bound to respect such claims (insofar as they are able), the fact that such claims arise on the sufficient grounds of being a "prospective purposive agent" entails that one is just as bound to respect the right-claims of all other agents as all others are (taken to be) of oneself.⁷ In other words, one could say that since claiming rights to freedom and well-being is only necessitated (and only conceptually possible, moreover) due to the sufficient condition of one's being an agent, it is nothing more than a category mistake to think that one's skin colour, wealth, social class, et al. either necessitates—or has any conceptual bearing whatsoever—on one's need and subsequent claim-rights to freedom or well-being. A strictly egalitarian conception of rights thus results, which is internal to any given agent's own agential perspective, and which provides for Gewirth's "Principle of Generic Consistency", which derives the following prescription based on nothing more than the simple, cognizable foundation of any given agent's own implicit intentionality: "Act in accord with the generic rights of your recipients as well as of yourself".⁸

For the agent to not act in accord with the basic rights of others creates (again, even if only internally) a logical contradiction insofar as the agent both recognizes that agency is sufficient for *his* or *her* legitimate claiming of rights⁹ while nonetheless claiming the *insufficiency* of agency for the possession of rights on behalf of the agent(s) thereby harmed (intentionally or not). As Gewirth writes:

On pain of self-contradiction, every agent must accept the generalization that all prospective purposive agents have the generic rights, because, as we have seen, he must hold that being a prospective purposive agent is a sufficient condition or reason for having the generic rights.¹⁰

In failing to respect the rights of others, then, the agent undermines his or her own putative justification of the right that supposedly permitted harming others' basic freedom or well-being in the first place. That is,

[F]or any agent to deny or violate [the principle of generic consistency] is to contradict himself, since he would then be in the position of holding that rights he claims for himself by virtue of having certain qualities are not possessed by other persons who have those qualities.¹¹

Thus, every agent is in the position of being rationally bound to hold that all agents have rights to those goods necessary for at least the attainment and maintenance of their agency. Moreover, given that all subsequent rights require the fulfilment of these generic rights, the latter at least *prima facie* supersede all other goods and any rights thereto (e.g.,

⁷ Or, conversely, that other are only as bound to respect one's own rights as one is of theirs.

⁸ Gewirth (1978, p. 135).

⁹ Again, being of a certain race, creed, social class, etc. necessitates no further claim-rights to freedom or well-being, since these are qualities contingent on historical circumstances having no bearing on what one claims due to one's agency.

¹⁰ Gewirth (1982, pp. 199-200).

¹¹ Gewirth (1978, p. 135).

to property, suffrage, etc.), even from within the internal perspective of a solitary agent,¹² for it is rather apparent that one cannot exercise one's right to (say) democratic suffrage or property ownership if one's more basic rights—such as those to freedom and well-being—are not at least minimally respected.

3.1.2 *Political and Legal Validity*

In some crucial sense, then, other rights are simply not justified at the same level as the more basic rights to freedom and well-being. And what this seems to entail is that (as supposed near the end of Chapter 1) some rights are taken by any agent (or would be taken, were they so informed) as *pre-political*, based on the prosaic truth that one necessarily requires certain qualities (e.g., minimal freedom and well-being) in order to even think about engaging in politics in the first place (much less to actually do so). Moreover, because of what has been argued in Chapter 2, we see that such rights may even be conceived of as *pre-legal*, again for the mundane fact that one can't even be a respondent to any particular agent or government's legal claim-rights (whatever those might be) without first being an agent that exists in the world, possessing the basic goods of freedom and well-being necessary for even the bare capacity to respond to others' claim-rights. This, I think, suggests that even if law can be theoretically conceptualized in myriad ways, there are only so many ways in which human agents *do* (or even *can*) in fact conceptualize it as pertaining to their practical reason (i.e., to what they actually ought to do). And asserting that certain laws can nonetheless attain validity may entail that one's legal theory is separable from any conception of human agency (including legal agency) to begin with, despite the latter being the ultimate source of any reasons for action and (*pro tanto*) of any reasons for complying with any given law in the first place.¹³

3.1.3 *Fuller's Internal Morality of Law*

What may also be evident by now is that my project is concerned with deriving what could (though need not) be called an 'internal morality' of law, much in the same way that Lon L. Fuller has attempted. Fuller, in *The Morality of Law*, outlines eight distinct, though interrelated aspects in which a legal system could fail so radically in what it intends to do that we should not thereby *want* to grant it the status of law. These eight aspects are as follows:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make

¹² I.e., one cannot will that one's property rights can supersede these generic rights, since this would entail (say) preferring to be rich but deceased rather than alive but even slightly less rich. Of course, some acceptance of a reasonable level of risk could temper the claim just mentioned; yet it is clear that only some risks are rationally acceptable by any agent who values his or her own ends.

¹³ In other words, human agency is both the impetus for, and terminus of, any normatively binding duty.

available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.¹⁴

Hart's response to any such model of rules, however, is simply that, structurally necessary as they may be to the internals of a legal system, there still remains no necessary connection between them and any sort of morality proper. He says,

[O]ne critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connection between law and morality, and suggested that they be called 'the inner morality of law'. Again, if this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.¹⁵

That is, even if a legal system satisfies each and every one of Fuller's provisos, it may quite readily satisfy them in an egregiously immoral or unjust way, in which their injustice and coerciveness is overtly displayed in their practices and in their laws.

However, I think that there is much more that can be said about a Fullerian style of legal provisos, particularly if we consider not whether moral agents *should* call *X* a legal system (i.e., that which is composed of valid laws), but rather whether moral agents *would* call *X* a legal system were it recognized to be seriously deficient in certain ways. While it is surely open to the positivist to claim that the vast majority of morally iniquitous laws are nonetheless valid (which shows the compatibility of Fuller's model with great iniquity), it is still an open question whether those laws that show the greatest iniquity would be considered so by any agents, were they better informed of the nature and consequences of such laws. And this is most problematic, I think, with respect to laws that hold no functional social role that any agent could reasonably accept, having either a categorically negative bearing—or perhaps no bearing at all—on the practical reason of any given agent to whom they purport to apply. This may arise from the fact that no moral agent would conceive of law's validity (its form, if you will) as being categorically separable from some sort of essential content that they view as inherent in it.¹⁶ A serious problem with this approach lies, of course, in deciding where the line between the form of a law and such essential content is to be drawn; another in defining what that content actually is. But I think it plausible to claim that, for the most part, minimally-informed agents hold (or at least presuppose) the law to be conceptually capable of offering at least *some* justified pre-emption of their reasons for action, even if

¹⁴ Fuller (1969, p. 39).

¹⁵ Hart (1997, p. 207).

¹⁶ Such as, as I argue is entailed by the Razian project, that it have at least the bare conceptual possibility of satisfying the normal justification or dependence theses for any given agent to whom it purports to apply.

it may rarely seem to do so on any given instance,¹⁷ and this is in some sense a necessary condition of any given law's validity.

That is, given that law is a social construct, it must be taken to have some sort of bearing on persons' social behaviour (for better or for worse) for it to have any describable social content in the first place. However, given that it is also in the business of *changing* said persons' behaviour, and if we want to conceive of the validity of laws as somehow (even minimally) related to the internalities of human agency,¹⁸ there are good conceptual grounds for not conceiving of it in a way that lends itself to being perhaps *only* explicable from an external view (say, with human agents as sheep being led around by legal officials as their shepherds). Without a possible description of a justified normative relationship between governor and governed, what we thus describe might be nothing more than an oblique reference to a regime of pure force or coercion. Yet, as argued in Chapter 2, this is something that even Hart should want to reject, even if such brute commands are issued on a broad scale and internalized by the commanders, much as shepherds might be mesmerized by and then internalize the waving of their crooks, believing themselves to have thereby created certain duties, based on nothing more than the apparent causal relationship between the waving of a crook and the behaviour of sheep who prefer not to be beaten with it.

With something like this in mind, I think that a ninth proviso could be added to Fuller's list of the ways in which a legal system might fail to attain validity: that law in some sense must be minimally connected to (and either supportive of, or neutral towards) agents' reasons for actions in the first place,¹⁹ else it provides no reason (perhaps not even a *prima facie* one) for any agent to believe the law's claim that its own enactment actually creates a normatively binding duty on behalf of the agent(s) whom it purports to govern. This, I think, may be ultimately founded on the ways in which rational agents conceive of the relation of form and content vis-à-vis law (as will be explored below). And since Hart has already established that something that merely takes the form of a legal command need not properly be considered law²⁰ for it lacks some essential social features,²¹ the largest advance has already been made. I simply want to extend this claim to include the possibility that no moral agent would rationally think that just *anything* that happens to be internalized by a governor and obeyed by a populace thereby attains the status of being legally valid.²²

¹⁷ I.e., even if many minor laws restrict one's liberty individually, but *in toto* enable one to prosper.

¹⁸ I.e., even if "the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone", we are left asking whether (as explored in Chapter 2) whether there still needs to be some *possible* minimal sense in which an agent could view a legal pronouncement as creating a real obligation (even if only a legal one), rather than merely obliging him or her through threats of force (Hart 1997, p. 117).

¹⁹ Of course, it is unclear whether sheep actually have reasons for action. But, then again, sheep are not legal agents.

²⁰ E.g., a command of a *de facto* authority backed by force.

²¹ I.e., those of internality on behalf of the governor and general obedience on behalf the governed.

²² And if this minimal proviso should be attached to a Fullerian conception of 'internal morality', it may be that any law must therefore be capable of providing at least *some ultima facie* reasons for obedience that could be acceptable to non-sheep. This suggests that such an internal morality would not, in fact, be

3.1.4 *Practical Limits*

Before continuing, however, two possible objections must be addressed: first, a Hartian might want to respond to such a project with the pragmatic accusation that

It seems clear that nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting [a] narrower concept [of legal validity]: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law. Nothing, surely, but confusion could follow from a proposal to leave the study of such rules to another discipline...

[Rather, a] concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.²³

This suggests that there is very little to be gained in terms of conceptual clarity by granting further gradations to law than those of unqualified validity and invalidity *qua social* (rather than moral) fact.

However, this conclusion seems to rest in no small part on defining ‘morality’ (or any attempt at a natural sort of law) in a rather loaded, historical way—say, as something almost epistemically indeterminate by definition, carrying with it various dogmas that must be believed nonetheless. Yet, I think it is in fact unnecessary that what we conceive of as normatively value-laden (even as it relates to legality) must lie within the conceptual realm of traditional morality proper. As such, it is dubious whether we will in fact necessarily lose *any* conceptual clarity in recognizing (if it is indeed the case) that all reflective agents view law as a functional social norm having some minimal and innate *telos*, e.g., that it be at least conceptually capable of performing the function of granting agents pre-emptive reasons for action that they could, say, not reasonably reject.²⁴ Rather than think that “nothing is to be gained” by analyzing law in this way, one might think that such a basic and crisp nuance with respect to the perceived *telos* of law—especially if accepted by most (if not all) agents²⁵—allows nothing to be lost, and much to be gained. For even if morality (traditionally conceived) entails lofty and indeterminate speculations, a practical, clearly cognizable consideration of the reasons that any agents have for acting is a narrower conception of legal validity that in fact *fails* to justify Hart’s expansive concern with the inclusion of necessary moral norms into the rubric of legality. In other words, viewing law as having certain inherent moral criteria *need not* (even if it often has) turn our prowess at legal reasoning into a sort of bumbling idiocy, whereby empirical descriptions of sociological fact are replaced with the speculative musings of ivory tower eggheads. Given that this result is by no means inevitable, it remains plausible to claim both that morality, in some minimally definable sense, is necessarily

compatible with “very great iniquity”—at least insofar as such iniquity isn’t freely chosen by any agent who “most of the time wish[es] to continue in existence” (Hart 1997, p. 191).

²³ Hart (1997, pp. 209, 211).

²⁴ Cf. Scanlon (2000).

²⁵ And despite the fact that it may be ultimately defined as ‘moral’, in some sense.

encompassed by law, and that attempts to clarify what this implication entails may actually lead to greater clarity. One could even argue that it's a false dilemma to claim otherwise.²⁶

In fact, Hart's own argument seems to allow for this possibility, in its supposition that what is sufficient (and presumably necessary) for recognizing where a legal system exists lies in realizing

where there is a union of primary and secondary rules... the acceptance of [which] as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone.

That is, if we can recognize the internal property of any given agent "obeying [legal rules] for his part alone", and if we want to distinguish between obeying rules out of some minimal sense of their legitimacy and obeying them solely due to threats of harm—as we surely need to be able to do if we are to exclude Austinian gunman situations from our analysis—we already presume that there *can* be a minimal, cognizable moral criterion that all agents require in order to make sense of the law's claim of legitimacy,²⁷ and that this fact, itself, is recognizable.

While Hart may, in turn, respond that it is unlikely that many agents will (or would be able to) understand the complexity of any given legal system and its laws, this does still not negate the aforementioned fact. This is because even if

those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials²⁸

and that

[this] first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever²⁹

²⁶ Indeed, Fuller could have just as easily critiqued Hart on these very same grounds, viz., that nothing is to be gained by conceiving the internalization of legal norms on the part of officials as a necessary condition for legality, for legal agents may be able to internalize *anything*, even blatantly contradictory propositions or those unrelated in any reasonable way to the fact that a populace happens to obey that official. E.g., a deluded official may think that a populace is obeying him because of the munificent wisdom of command x, whereas the populace is only obeying him for being prodded by his bayonet. Given this possibility, confusions as to legality proper (even if this just means discovering a society's rule of recognition) may no more necessarily result by including normative considerations in the concept of law than by including Hart's concept of internalization, itself.

²⁷ E.g., that, if informed of the law's justification and content, such law mustn't be something that they would otherwise necessarily dissent to for its providing no reasons for changing their behaviour other than those provided by brute force, which Hart has already tried to show the insufficiency of (for legal validity) in his critique of Austin.

²⁸ Hart (1997, p. 116).

²⁹ Hart (1997, p. 116).

we are left with an open question. That is, even if citizens (due to the complexity of the system) *need not* satisfy the latter condition, do we still want to maintain that legal validity plainly obtains even if such agents *would not* (or perhaps even *could not*) satisfy the latter, were they so informed of the relevant justification of their government's pronouncements?³⁰ This conclusion would seem suspect, especially if all agents *would* take it as a minimal criterion of their conceptions of the law's justification that it, even if only in the most minimal sense, be able to satisfy the normal justification and dependence theses, allowing them to (even if only potentially) better conform to their own reasons for action. And even if rare, I think that there are cases in which agents *can* know the justifiability of any given law (even if they don't at present) and *would* exclude certain laws from the meagre rubric of possessing some minimal sense of justified social coercion beyond that of unjustified brute force. And it is a problem, I think, to claim (even if only implicitly) that this fact is patently irrelevant to legal validity. I shall attempt to outline certain reasons for this below.

Secondly, a more practical objection may also be raised: that many fully rational agents can still reasonably accept a high (or even certain) risk of basic rights-violations in order to secure some subsidiary good, even if they take it as unreasonable to undertake a duty that bears *no* relation whatsoever to one's (or anyone's) pursuit of their ends (whatever those ends might be). E.g., if we conceive of such risks in the economic terms of opportunity cost, rights-violations may be just one potential cost among many, and can therefore be coherently weighed against potential benefits. If so, the law can thus be separated from even the basic sense of a necessary relation to practical reason that I advocate, as many agents may just take 'morality' (or 'reasons for action') to be a simple placeholder for whatever an agent happens to value, some things potentially being valued even more than their own rights.

However, the response to this is that even if agents would accept such terms of legality, this still entails far more than claiming that *anything* goes, for the acceptance of those terms entails (at a minimum) that the agent must claim the right to at least potentially realize whatever benefits they happened to choose, rather than having such potential realization unnecessarily pre-empted by another agent (or by a government). More importantly, the acceptance of such rights and correlative duties is still based on the agent's own reasons for action, in that it is the agent him or herself that is making the ultimate determinant of legitimacy, rather than someone else imposing ends upon him or her. Whether they wish to risk certain basic goods for the chance of achieving more valuable goods (as they see it) may still preclude the validity of the utter *trumping* of such wishes by a 'higher' authority. E.g., even if, as Hartian sheep, agents might accept the

³⁰ Consider this: if person *x* (formerly a mere citizen) is elected to legal office (thus becoming a legal official) and, while there, discovers that one of the rules he or she formerly and uncritically acquiesced to is based on (or *is*) a pure logical contradiction that he or she cannot rationally internalize, Hart's position leads us to conclude either that (a) that person is not a legal official (even if duly elected), for he or she does not take the internal perspective vis-à-vis that law (perhaps even *all* laws, if they are of this sort) or (b) such laws are in some sense radically deficient. I merely assume that, at least in some cases, it makes a bit more sense to reject the former claim than the latter, even if this appears to introduce more substantive constraints on legal validity than Hart would otherwise acknowledge.

end of being led to the slaughter-house, they may very well *not* accept the legitimacy of a barrage of serious rights-violations on the way there.³¹ And if they naturally *wouldn't* rationally or prudentially accept such a result, this seems to delimit not only what human agents would accept as law in any practical instance, but how they in fact *conceive* of the legitimate aims of law to begin with—i.e., that it is *their* reasons for action on which legal authority is based, and that a strict conceptual severance of such a necessary link is inconsistent with the legitimate aims of law (i.e., its validity) to begin with.

I thus intend by the end of this essay to show that it is troublesome for positivist legal theory to allege that 'any law is law nonetheless' if some laws would, in fact, inevitably be declared as non-binding by any agent were they fully informed of the reasons behind the law's creation and of the irrelevance of those laws to the achievement of their ends—whatever those ends might be—for it is only through some minimal relation to those ends that agents take to be worthy of pursuit that they view law as acquiring its capacity to justifiably influence their behaviour in the first place. In other words, the fact that each legal agent may follow a law "for his part alone" may indicate not that the agent need be (conceptually) nothing more than a sheep-like automaton, but that he or she implicitly presumes that the law will allow him or her to better conform to his or her own ends.

3.2 *Naturalism and Description*

As argued thus far, it may be generically necessary that law be at least conceptually capable of pre-empting any given agent's reasons for action. In other words, for any given law, it may be a conceptual requirement from the perspective of any agent (i.e., how they conceive of law in the first place)³² that it be able to at least *conceivably* pre-empt his, her, or any other agent's reasons for action. If this is the case, one cannot then hold that a law that is conceptually incapable of satisfying something like the Razian normal justification thesis can actually attain legal validity, for it denies the very theoretical foundation on which the concept of law is built (viz., any given agent's own reasons for action and, thus, any possible reason for subscribing to the barest of duties to obey). Furthermore, nothing even in the Razian theory of authority clearly grants that such a law could be a justified result in the first place—presuming, that is, that the fact

³¹ Or, in pithier terms: the claim that one's own suicide is legitimate doesn't entail that a homicide to secure that same end is legitimate, even if the end result in either case would be identical.

³² That is, I presume that the concept of law must cohere somewhere in its foundation with the concepts used by *both* the agents *governing* and the agents *governed* by a legal system. As such, an unduly external concept of law may ultimately ignore some crucial sociological facts, particularly insofar as it might remove so many necessary features as to make it accurately descriptive of the relationship between real sheep and shepherds (cf. Hart 1997, p. 117). Were a populace sufficiently sheep-like, however, they would never be accurately described as being governed by rules, for legal agency (at least in some minimal sense) is surely required for there to be any conceptual normative bindingness to duties in the first place (even if this just means a legal duty, rather than a moral one). In other words, one must at least *suppose* that sheep are legal agents in order to think that legal duties actually apply to them; yet it is no small problem to base a theory on this supposition if it is false, i.e., if sheep are not in fact capable of legal agency (which I suspect they're not).

that certain laws will in no way allow any given agent to better conform to his or her own reasons for action is in some sense realizable.

In any case, one further reason that I think my approach should be acceptable to a positivist is that (as Gewirth intends with his project) it is intended to be nothing more than descriptive in its foundation (viz., any given agent's own reasons for action), even if it derives apparently contestable prescriptions thereupon. And despite it being arguably naturalistic (as with Gewirth's theory), its method need not correlate to a natural law position in legal theory—at least as popularly conceived, i.e., as grounding itself in some robustly indeterminate metaphysic—any more than the Hartian or Razian positions do. This is because the 'moral' foundation in such an approach is just as positive as any; it simply rests atop the value imbued upon various ends sought after by agents, themselves (whatever those ends might be), given the simple fact that to have ends is to desire (i.e., *value*) the realization of that end. Furthermore, because this foundation is one *internal* to any given agent's own perspective (vis-à-vis the law and its potential validity), one can thereby make a strong case for at least a general conception of what should and should not be conceptually acceptable to any agent.³³

As explained earlier, the Gewirthian project entails that when any given agent is made aware of their reasons for performing any given action and for the justification of any necessary claim-rights arising from those reasons, it will be apparent that such claim-rights arise from a foundation generic to all human agents. A minimally reflective agent should thus be able to realize that is not one's race, wealth, religion, social class, etc. that necessitates (or even has any conceptual bearing whatsoever on) any claim-rights to freedom or well-being. Rather, it is simply one's agency that necessitates those claims, and since agency is a property that applies to all humans equally,³⁴ one must recognize that one's claim-rights to freedom and well-being have no greater social (or *pro tanto* legal) justification outside one's own mind than anyone else's do and, correlatively, that no other agents' claims to their freedom or well-being have any *prima facie* justification for trumping one's own rights. And in many cases, they will have no *ultima facie* reasons either, even if some sort of justification attempts to show otherwise.³⁵ And this applies just as much if one is a legal official as if one is not.

As such, particularly if one is a legal official and if (as Raz points out) authority is by definition that which claims to give those agents it purports to govern some peremptory reasons for action, any legal rule which *by necessity* is unrelated to any given agent's reasons for action (i.e., their reasons for claiming rights in the first place) therefore fails to obtain even its own conditions for success vis-à-vis that agent. And

³³ In other words, the fact that the naturalistic fallacy is committed need not lead a positivist to reject any theory which takes this into account, for it is the *individual* (rather than the theory) that commits it, and this can both (i) be accounted for as a simple, descriptive psychological or sociological fact and (ii) bind said individuals on grounds of self-consistency to certain implications entailed by their commission of said fallacy.

³⁴ Or, rather, all "prospective purposive agents", to use Gewirth's phrasing.

³⁵ I will expand on this claim below, as it is apparent that some claims may circumstantially require trumping by others, in order for there to be any real resolution to a conflict of rights (such a resolution, however, being more consistent with agents' rights *in toto* than perpetual conflict would be—and thus potentially justifiable to them, for its being ultimately based on their own reasons for action).

while any instance of referring the ultimate decision in a conflict of rights to an authority will entail that one claim-right will likely prevail over another, there are surely some minimal provisos that enter into such referring in each and every case, e.g., that there be some minimal level of good faith on behalf of the authority, such that (i) it not have decided the outcome *ante facto*, (ii) that its decision-procedure bear some minimal level of competency and impartiality, or (iii) that its outcome will have some relevance to the initial conflict at hand.³⁶ The absence of any of these factors would surely preclude the justifiability of submitting to an authoritative decision. That is, their violation—even if only at the conceptual, rather than circumstantial, level—would do nothing less than undercut the very concept of authority, insofar as any rational agent thinks there to be some crucial, minimal distinction between *de facto* and *de jure* authority.³⁷ And it is implausible to think that agents do not (or would not) hold this distinction as precluding certain claims to legal validity (say) should an authority be merely *de facto* rather than *de jure*. Cases of the former, I think, might arise where it is clear that *no* minimally rational agent would have accepted the terms of an authoritative decision-procedure to begin with, were they have to have known its terms (and the outcomes thereby generated) in advance.³⁸ Furthermore, it is only through ignorance of these facts, I want to argue, that any agent would claim that a law (or an authoritative decision-procedure) that fails to meet the aforementioned provisos would be in any sense capable of granting valid results—for the criteria of legal validity would thus rest, in no small part, on simply *not knowing* that such terms of validity have not been met. Yet, if such *is* knowable (particularly if very simply so), it seems troublesome for positivism, at least as described by Hart, to potentially rest the concept of a legal system on an appeal to ovine ignorance. Rather, I think that a positivist can take an alternative tack and claim that legal validity is based not merely upon what agents *do* accept, but on what agents *would* accept were they even minimally aware of the inner workings of their legal system and the reasons for which they've assented to any given law. And such an approach, I think, is amenable both to the Hartian model of positivism and to the descriptive sociological facts of the matter.

3.3 *The Law in spite of Itself*

By now, I hope to have made some headway into showing that my project can be conceived of (more or less) as a description of sociological facts. Indeed, as argued in the last chapter, it is nothing more than a clarification of the implications of both the Razian theory of authority and the Hartian theory of legal validity. With respect to the former, we see that (even if rare) there will be cases in which it is a categorical truth with respect

³⁶ Raz's own examples including, e.g., that "the arbitrator was bribed, was drunk while considering the case, or... new evidence of great importance unexpectedly turns up" (1994, p. 213).

³⁷ Instances of the former perhaps being nothing more than Austinian gunmen writ large.

³⁸ I.e., even if they would have agreed to the terms of authority, most (if not all) agreement to the terms of authoritative legitimacy does not include granting that authority *carte blanche* to arbitrate in areas unrelated to those for which arbitration was initially sought.

to certain logically contradictory or practically unconformable laws—or to those authoritative declarations that arise through nothing more than a sham decision-procedure that no agent would assent to in the first place—that the normal justification and dependence theses fail to obtain. With respect to Hart's 'descriptive sociology',³⁹ we see that it must be complemented with a descriptive psychology (as it were) if we want to adhere to Hart's own claim that "[l]aw surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion".⁴⁰

The problem, I think, lies in whether it makes a difference to any agent's conception of legal validity whether brute compulsion is at the barrel of a gun or at the oblique and figurative barrel of the law's much more powerful (and occasionally unwieldy) gun. As Fuller argues, "[l]aw as something deserving of loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials".⁴¹ Though we might want to shirk questions surrounding Fuller's morality of achievement,⁴² we cannot do the same to the question of whether law—even as complex as is defined in Hart's post-Austinian theory—can still attain validity solely by fiat, because a fiat does not simply vanish due to its being shrouded by the nuances of an apparent rule of recognition and/or the internalization of that fiat by legal officials.

The key to understanding legal validity with this in mind arguably lies in understanding both (a) that such validity is parasitic on the internal normative conceptions that any given agent has thereof (however so construed) and (b) that it is a social phenomenon parasitic on the justifiability of rules *between* agents. In other words, (a') were it not an internal normative concept at any level, moral agents would *ipso facto* act with no regard to the law whatsoever (aside from acquiescing to its brute force).⁴³ The law would thus fail to exist even as a normative concept (at least one having any relation to empirical fact) and a descriptive sociologist would have nothing to describe. That is, law's (or legal authority's) ability to influence agents' behaviour depends precisely on its *potential* (even if not actual) acceptability to them; and if it lacks this bare potential, it seems plausible to claim that its pronouncements lack the bare normative capacity for creating any rights or correlative duties whatsoever, regardless of officials' intentions to the contrary.⁴⁴ And this is the case even if the conflict between validity and acceptability only exists at an extremely basic level and not on the more mundane level of disagreements about proper implementation and points of coordination (the latter comprising the bulk of the law, to be sure). That is, where law is concerned with arranging points of coordination, even in the most flippant or heavy-handed manner,

³⁹ Hart (1997, p. vi).

⁴⁰ Hart (1958, p. 603).

⁴¹ Fuller (1958, p. 634).

⁴² See Fuller (1969, Ch. 1).

⁴³ As Raz says, "law is a normative system. If it were not, it would be incapable of having practical authority" (1994, p. 216).

⁴⁴ Furthermore, if it is a condition of law's success that it *actually* create obligations having some minimal relation to practical reason, we can clearly say that a conceptual lack of such success undermines even its claims of *validity* (i.e., not only its authoritativeness) to a similar degree.

there is surely some minimally definable realm with which those points of coordination must cohere, for outside of it, coordination itself may be conceptually impossible.⁴⁵

And (b') with regard to the second aforementioned proviso (viz., that law is a social phenomenon parasitic on the justifiability of rules *between* agents), we see that were law not so in some minimal sense, *any* declaration combined with that declaration's ability to change the behaviour of others could count as law—e.g., Austinian gunmen would be *ipso facto* legal officials, as would those more sophisticated gunmen who happen to internalize their beliefs and think that the barrels of their guns both define the boundaries of rules of recognition and spontaneously generate legal duties. Yet, as I have attempted to argue (in Chapter 2), this view is mistaken.

3.3.1 *Acceptability and Legality*

Of course, this all depends on what is acceptable to human agents, and acceptability is an exceedingly broad rubric, to be sure. This is surely (at least in part) due to the indeterminacies of our epistemic knowledge of the world and the consequent breadth of epistemic claims that any given agent may be able to (quite reasonably) believe to be true, and which may therefore provide support both for any given legal rule and any given justification to abide by that rule. As Hart claims, it is surely plausible that a populace might accept the most monstrous legal rules. He says,

In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In the more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reasons for thinking that it could not exist or for denying it the title of a legal system.⁴⁶

Still, however, this is a far cry from the claim that *any* law is law nonetheless, in the sense that the aforementioned view entails no absolute, *a priori* claim about some conceptual fact of the matter. Rather, its claim can still be delimited on the basis that law is a social construct, requiring the actual existence of at least two interacting agents or groups of agents, neither of which can be a pure Austinian commander who defines legal validity by his or her terms alone. Legal officials must (as Raz recognizes) at least *feign* that their commands have some sort of legitimacy beyond that of brute force, and the governed must at least believe as much to be the case, even if it ultimately isn't.⁴⁷

⁴⁵ E.g., a law that severely punishes me for a crime may be unacceptable to me *qua* criminal, but if it would be acceptable were I an innocent citizen (presumably deserving of having my freedom and well-being protected from the actions of criminals), it is easily justifiable. On the other hand, though, a law that punishes with summary execution anyone merely *accused* of a crime could not be acceptable to the latter even if he or she the most innocent of angels, insofar as he or she prefers to continue in existence.

⁴⁶ Hart (1997, p. 117).

⁴⁷ Cf. Raz (1994, p. 205): "[An authority's] very utterance of its opinion is claimed by it to be a reason for following it"; (p. 211): "[*De facto* authority] either claims to be legitimate or is believed to be so... But it does not necessarily possess legitimacy".

When stated like this, however, it seems suspect to call *x* a law if those agents governed by *x* either cannot accept the terms of a law's validity or (if they accept that a law *appears* to have more merit than a simple brute command) *wouldn't* deem it valid were they to know that it is in fact nothing more than such a command (particularly if they come to realize that command *x* cannot even *potentially* allow them to better conform to their reasons for action). In such cases, it would seem more apt to claim that such agents and governments are carrying out the motions of a legal system (much like sheep and shepherds might), but fail to recognize its internal contradictions and/or its utter inability to satisfy the normal justification and dependence theses.⁴⁸

Of course, if truly wilful, the merits of being ignorant of the aforementioned facts may enter into the equation as reasons for action (it sometimes being preferable to remain in ignorance than to know certain terrible truths, for example) and, as such, one could plausibly describe such authoritative declarations as plainly valid. Yet, in this case, the reasons for declaring it valid still stem from an agent's *own* reasons for action, such that even certain authoritative declarations that presuppose ignorance on behalf of the populace may easily satisfy the pre-emption thesis.⁴⁹ If *not* wilful, however, it seems more accurate to describe such a system as a treacherous charade than as a legal system proper. The latter, however (as explored in the previous chapter), seems to require the at least the bare possibility that the normal justification, dependence, or pre-emption theses could conceivably be satisfied for any agent vis-à-vis any given law. Yet with regard to some laws, it seems safe to say that even this minimal requirement can never obtain.

3.3.2 Authority and Pre-emption

What law is, then (and the reason that law can take any conceptual form *atop* this foundation), seems to rest upon what human agents can accept *as* law. Yet, as we have seen, this is very distinct from a claim like 'any law is law nonetheless', and might admit of more nuances than first thought. As raised the last chapter, consider what happens when a populace accepts a pure contradiction as part of their law: have they accepted *A* & \sim *A* itself (unaware that it is a contradiction) or have they also accepted \sim (*A* & \sim *A*) which is logically entailed by (and perfectly contradicts) what was initially accepted?⁵⁰ Or consider the following, as it pertains to the Razian conception of authority: what if a populace presupposes law *x* to be valid *if and only if* law *x* enables them to better conform to their own reasons for action? And what if it is later realized that it in no way does—or, worse yet, that there was no conceptual possibility that it could have to begin with? Granted, we should want to be able to call *x* a law if duly enacted, even if it turns out to circumstantially violate the Razian theses, provided that this fact was not clearly foreseeable at the time.

However, if a law, as it turns out (or as should have been realized at the time of its enactment) violates the most basic of its own conditions of legitimacy, we should want to

⁴⁸ Cf. *supra* note 30.

⁴⁹ I.e., rather than an authority's claim that "you simply ought not to know the justification behind this".

⁵⁰ Cf. Fuller's fifth internal requirement of law (1969, p. 39).

declare it null and void *ex post facto*, i.e., that it was in some crucial sense *wrong* (in undermining the entire foundation on which it was built), as opposed to the vast majority of laws which may later be viewed as ‘wrong’ in a far more trivial sense (e.g., being non-optimal, outmoded, moderately unjust or immoral) and which are then replaced by ‘better’ laws.⁵¹ For example, rather than being of the sort that could in some sense legitimately pre-empt any given agent’s reasons for action, some laws purport to create duties which no rational agent would ever view as capable of furthering their ends. Hart might want to say that this doesn’t negate the fact that, if promulgated in accord with an extant rule of recognition, such laws *were* law prior to the realization of their deficiency (and their being struck down), much in the way that he says that the succession of political regimes doesn’t negate the fact that their predecessor’s laws were nevertheless laws.⁵² Yet it is not significant that this is precisely what many polities seem to do with respect to their own laws (or would do were it not for unwanted practical repercussions such as an admission of the wrongful conviction of an entire class of criminals),⁵³ and this can surely be encompassed under the rubric of a rule of recognition.⁵⁴ Moreover, it may even be necessary that they view this as the proper way for law to function, given the presumptions that went into any declarations of legal validity in the first place—that is, if what Raz appears to be aiming at is indeed an accurate conception of valid legal authority, and if the fact that the utter absence of any potentially justified pre-emption of reasons for action through the enactment of *x* would thus preclude the reasonableness of claiming that *x* was law, to begin with. Given this, it would seem that the claim, ‘any law is law nonetheless’ attains soundness, but only because it isn’t even coherent to call certain laws ‘laws’ in the first place, except within the speculative context of legal theory.

⁵¹ I take it that to maintain that the former were (even antecedently) valid creates an internal contradiction with a foundational premise; and while we may of course hold that such validity *held* due to the fact that we could not have known better at the time, there remains a serious, non-temporal distinction between the former and the latter sort of laws: we can still (at present) legitimately put forth non-optimal laws as valid, but we cannot for such laws that we now realize patently contradict the foundations of our system. In other words, even if our *post facto* declarations of validity may be spurious, the fact that we cannot, from this point on, put forth such laws as the former seems to indicate some crucial sense in which we are *discovering* the terms of legal validity. (Or, in abstraction: even if the positivist thesis always holds vis-à-vis past laws, e.g., that ‘any law as put forth by a legitimate authority *was* valid’, it is untenable if restated as a future hypothetical, say, that ‘any law as could be put forth by a legitimate authority *will be* valid’).

⁵² Cf. Hart (1997, Ch. 10).

⁵³ However, even if this is admitted, there is still a strong case for a government to justifiably punish those who violated the law as stated, if the government wasn’t in abject error in implementing the faulty law to begin with. Yet, this conclusion relies less on the fact that the law was *per se* valid (a fact it might not rely on at all) than it does on broader considerations of social order and the rule of law, and using the latter considerations to bolster one’s claims for the former seems questionable, at best.

⁵⁴ As well, there is a strong case for claiming that it will be *inevitable* that such terms of validity will be eventually encompassed within any society’s rule of recognition, given realization of the fact that law (as a social function) requires its declarations to be minimally acceptable to any given agent if it is not to ultimately be a function of brute (rather than legitimate) authority.

3.3.3 *Objections*

Of course, there are a few concerns that must be addressed before I proceed: for example, one might claim that these *ex post facto* declarations of nullity make all of our laws contingent, and this is a serious practical problem. Citizens might cease to obey any given law on the presumption that it probably violates the normal justification or dependence theses in some way, yet before this fact has been recognized by a legal authority. The law (and legal authority) thus loses even its perceived authoritativeness since its claims are admitted to be ultimately fallible.

The response to this, however, is that law can still be authoritative even if fallibilistic, for it is through granting an authority its power to generate points of coordination even in situations of doubt that one is able to better adhere to one's own reasons for actions. Indeed, this is why submission to authority is justified in the first place—because we don't know where the points of coordination ought to lie. To be sure, doubt as to the proper means of satisfying the governed's reasons for action exists on behalf of the government as well as the governed. But so long as there remains a (more or less) greater likelihood that the government will do a better job in efficiently setting even ultimately uncertain points of coordination than one could oneself, there is an overwhelming justification both for (i) allowing it to attempt as much and (ii) for complying with what it commands as a result—even if mistakes are made here and there. Thus, recognition that any given law *might* not satisfy the Razian theses does not affect the justifiability of submitting to an authority in any way (nor of declaring its declarations valid).

However, there remain cases, I argue, in which no reasonable person would doubt that a law fails to satisfy any of the Razian theses. Even if extremely rare, such cases do seem to delimit the bounds of minimal legal authoritativeness.⁵⁵ And even with various indeterminacies within the attempted justification of legal authority, I think that at least one area exists in which any given agent is competent to judge a law's ability to satisfy the normal justification and dependence theses, and this is in regard to his or her own agency and the goods necessary for its sustenance.⁵⁶ Of course, it may be the case that one is an expert in a given area, yet reasons remain for complying with the law even when it contradicts one's own wisdom.⁵⁷ However, where the latter sort of reasons are absent (even conceptually so), it seems nothing less than reasonable to hold that a law that purports to claim otherwise is invalid, for it fails to fulfil even its own standards of justification (those that allowed it to be considered as something more than a mere command in the first place).

⁵⁵ And, *pro tanto*, the bounds of legal validity, insofar as I take legal validity to be (even if only in the most minimal sense) parasitic on its potential authoritativeness.

⁵⁶ This also likely leads to certain jurisdictions' granting legal excuses for cases of necessity (and why this is so rare—because it is only in extremely limited cases that the violation of a specific other's basic rights is definitively necessary for the saving of one's own).

⁵⁷ E.g., it may be practically impossible for a sovereign to recognize one's expertise, or to grant one expert exculpation while not granting the same for all experts in their own respective fields.

Moreover, I take this fact to indicate that the concept of law is thereby delimited, insofar as the concept of law depends in some sense on what agents *can* conceive of as justified legal authority. And while this may admit of myriad nuances and result in various contingent cases of one not being better able to conform to one's reasons for action while the law remains nonetheless valid,⁵⁸ there remain definite cases where certain laws *cannot* satisfy the normal justification or dependence theses—not even conceptually so. Thus, even if a legal authority must be granted an extremely broad domain, and even if some rights must trump others (some reasons for which to be explored in the next chapter), other cases remain wherein no rational agent would take certain declarations by legal officials as in any way indicative of actual legal validity (examples of the latter to be explored in the next section).

This fact, in turn, seems to indicate that any validity the law might claim to possess is, at its base, of an entirely separate sort than what has been taken to be the normal, positivist sense of legal validity, for it seems that even the normal Hartian conditions of legality are entirely based on more foundational reasons than (a) that commands are internalized by a few and (b) that they are obeyed by many. Rather, there appears to be an additional feature inherently necessary in the concept of law: (c) that agents normally conceive of such declarations as valid and freely follow them⁵⁹ if and only if they have some minimal, conceptual, and unrestrictive relation to their more basic reasons for action.

3.4 *The Law in spite of Legal Agency*

In the worst cases, I think, the only reasons a populace might take validity to mean something separable from the aforementioned proviso (c) might be because those agents are unduly (i) compliant, (ii) ignorant, or (iii) coerced, such that they actually happen to think that following such unjust laws as put forth by an essentially Austinian sovereign is justifiable in some greater normative sense than that derived through the prodding of a bayonet. And while the Hartian line may be to take the fact that a populace responds to a sovereign in such a manner as grounds for declaring that relationship to be a legal system (provided that the sovereign thinks the populace is obligated to abide by his or her rules), I want to argue that there are reasons for declaring it to be quite the opposite, for facts correlative to the above: i.e., that (i') being unduly compliant suggests that one lacks either agency itself, or sufficient freely-chosen reasons for action that would justify calling one an agent. In other words, it seems insufficient to say that a duty exists *de jure*⁶⁰ in lieu of the fact that various automata follow it *de facto*. Rather, we should want

⁵⁸ Due to shoddy legislative workmanship, for example, or due to the fact that in conflicts of rights, some agents' rights must prevail over others if *anyone* is going to be better able to conform to their own reasons for action.

⁵⁹ In the non-Austinian sense where 'freely' changing one's reasons for action when faced with the barrel of a gun is insufficient for legality.

⁶⁰ In the (minimally) richer sense that I advocate, viz., of not being conceptually trumped by the barest considerations of practical reason from the get-go.

to also claim that if such agents are to be, in some minimally relevant sense, *normatively bound* by such a duty, they must be assumed to have the capacity to assent or dissent as to the justifiability of such compliance—and it is not so clear that compliance with just any law is.⁶¹ As well, (ii') there are surely some limits as to the reasonability of remaining ignorant of the merits of an authority's declarations (e.g., regarding whether their declarations can practically or conceptually satisfy the Razian theses). Even if ignorance can be deemed to be a good thing in certain circumstances (as suggested at above at one point), this does not impugn the overall claim that any given law's validity is in some sense minimally contingent on how any given agent would conceive of it were they to be informed of the relevant variables behind its initial promulgation. This is because such sheer ignorance as that which results in blind obedience is, again, more characteristic of automata than of legal agents proper, and the concerns outlined above in (i') apply just the same. And lastly (iii'), as argued in Chapter 2, brute coercion need not be overt, and may arise through the pronouncement of a law that violates any given agent's rights without any reasonably compelling argument to justify that violation (e.g., that it is necessary to uphold the rights of others). In a similar manner, I think, if the coercion of a populace causes either of the two previous conditions to apply to them (i.e., undue compliance or ignorance), whether through overplaying the duty to obey the law or through failing to provide the governed with the justification behind a given law's legitimacy,⁶² such coercion therefore undermines the necessary relationship between legal validity and legal agency (as I understand it), for the same reasons outlined in (i') and (ii').

And, again, while a populace's brute compliance or ignorance may ultimately be wilful (as we may have to concede, in adhering to the descriptive facts of the matter), it remains plausible to claim that being ignorant of the facts justifying a law's authority in no way grants that law any stronger credence to claim that such a law is thereby valid. At the extreme, as Hart notes, some populaces may be entirely sheeplike. On the other hand, though, there are reasons that we don't view the sheep/shepherd relationship as constituting a legal system. Nor, therefore, do I think we should describe as legally 'valid' certain institutions which are paternalistic to such an absurd degree—voluntary or not—as to raise the question of whether those governed are legal agents in any relevant sense. In other words, it seems that the closer a society becomes to being sheeplike, (i) the closer they are to lacking even the conceptual rubric of a legal system and (ii) the closer the fact of their compliance comes to mean absolutely nothing with regard to the concept of law or legal validity. Ignorance, as it were, is anathema to conceptualization or rationalization, legal or otherwise. And with this in mind, I think, a stronger case can be made for claiming that if a populace were relevantly informed of the merits of any given legal declaration, and if they thereby *would* in all instances declare certain declarations to

⁶¹ I.e., that any minimally reflective rational agent would take it to be so.

⁶² Similarly, if *A* convinces *B* to obey a law by claiming that it is based on grounds *x* (which *B* could accept) when it is in fact based on grounds *y* (which *B* could never conceivably accept), does a valid legal norm thus spontaneously arise?

be of no binding force whatsoever,⁶³ the proper response would be to take such views as indicative that certain laws are beyond the purview of valid law and perhaps even external to the concept of law, itself—at least insofar as the concept of law is derivative on how actual human agents (rather than hypothetical gunman posing as shepherds) conceive of it.

3.4.1 *Criteria of Acceptance*

Again, to take the strict Hartian line, it wouldn't matter whether such people were right or wrong about the aforementioned facts, or whether they were free or coerced; the fact that they accepted whatever claims as put forth by the sovereign (whether through internal assent or external compliance) suffices to show that those rules were legally valid. Yet this, I think, is the wrong approach to the issue, especially when we distinguish between brutish acceptance and a minimally rational, nuanced conception of acceptability.⁶⁴ For instance, Hart might argue that it is wholly possible that people accept as valid (and as justifying similarly valid legal rules) that 2 plus 2 equals 5, that pi is exactly 3, or that 'colorless green ideas sleep furiously'.⁶⁵ Rules grounded in these assertions, if the latter are also accepted, would thus be similarly valid.⁶⁶ And, while one might want to claim (a) that such propositions are contrary to fact or (b) that such propositions are merely hypothetical and (c) that, in either case, nothing substantive (e.g., a duly justified legal rule) can be derived thereupon, these responses must be shirked by the legal theorist attempting to maintain descriptive coherence with the facts of the matter (i.e., to remain a positivist). For even if these propositions are contrary to fact, (a') this in no way prevents them from being accepted as though they were, or as justifying derivative legal rules. Nor does it matter then (were they conceptually possible), that they are merely hypothetical, for (b') legal rules are possible even if never coming into practical effect (say, if the situations they purport to cover never obtain).⁶⁷ All that ultimately matters for the Hartian positivist is that people obey the terms of the legal proclamation, absurd or ignoble as it may be.

However, a crucial question may still remain: even if such derivative (albeit silly) rules are granted acceptability by any given agents (say, those composing a society with which we are now concerned) and even if the foundations of such rules are counterfactual, are we still committed to saying that such rules are legally valid *even if* one of the criteria

⁶³ Say, because they egregiously violate one's rights without compelling justification to the contrary and, as such, fail to satisfy the normal justification and dependence theses to such a degree that the agent neither has any reason to comply with them *nor* any reason to even think that such declarations create any rights or duties whatsoever.

⁶⁴ Or between a rule's *obliging* and its *obligating* conformance.

⁶⁵ In the Chomskian sense of being formally (i.e., grammatically) 'valid', but having a non-sensical semantic content.

⁶⁶ E.g., that interrupting the sleep of a green idea is valid grounds for furious legal retribution.

⁶⁷ E.g., if it were a legal rule that all persons over 12 feet tall are to be given right-of-way at crosswalks, this rule is still perfectly valid even if a society is not (and perhaps never will be) comprised of any agents to whom that description could apply.

necessary for making a valid derivation from the premises to the legal rule, in the minds of the agents concerned, was that the initial premise was in some sense *true*, or that the inference is, itself, argumentatively and logically valid? While it might not matter to the positivist that an initial premise upon which an agent attempts to justify his or her acceptance of a legal rule is false, *per se*, it may very well matter (and may thereby show the validity of a rule to be lacking) if an additional, tacit premise in any agent's acceptance of a legal rule is that the foundational premise be true (*inter alia*). That is, if it is possible to be wrong about some of the possible claims made above (e.g., that 2 plus 2 equals 5) and if legal agents would surely take this potential (and resolvable) erroneousousness as a delimiting factor vis-à-vis the legitimacy of any given law, then surely the legal positivist must take this into account as a descriptive fact about the beliefs of said agents, and about how those beliefs relate to how they conceive of legal validity. My argument, of course, relies on the premise that legal agents *would* think that the validity of certain laws can be impugned in such a way. But I don't think that this is that strong of a claim to make, even if it only applies to the most extreme and rare circumstances.

3.5 Conceptual Delimitation

What I am attempting to argue is that it is not at all clear that the concept of law is conceived of by any given agent in as positivistic of a manner as Hart (or even Raz) makes it out to be. And while the first response might be to claim that it matters not whether any given agent conceives of law in that way and, therefore, that there is a broader conceptual rubric that the *concept* of law refers to, the response is that what we should be concerned with is the concept of law vis-à-vis human agency as it exists in the world, rather than with what forms the concept of law *could* hypothetically have taken. In other words, we need to refer to the *extant* concept of law, rather than the *possible* concept of law. And while there may be a more general response to this concern, i.e., that it does us no good to conceive of law as carrying with it any innate and stringent moral provisos,⁶⁸ there is an even stronger reply in turn: that it both can and does do us good, if our terms are definable, and that this is potentially how human agents conceive of law in any case.

By way of analogy, take Frederick Schauer's extension of Hart's point:

Consider a carpenter constructing a gallows for a lynching... And suppose as well that this gallows, as the carpenter well knew prior to building the gallows, is to be used to hang an innocent man. Now we can ask, "Is this a good carpenter?". And certainly many people would transcend the linguistic ambiguity by responding that this was a good carpenter but not a good person, and that the "good" in "good carpenter" is, semantically, a reference only to the internal standards of carpentry, and not a reference to the moral qualities of the immoral person who happens as well to be a carpenter.

⁶⁸ Again, Hart: "nothing is to be gained by... adopting the narrower concept" (1997, p. 209).

Our conception of the activity is thus a positivist one, for we are comfortable with a distinction between the is and the ought in evaluating carpentry, and comfortable with standards of carpentric evaluation not incorporating moral criteria.⁶⁹

Of course, we should not want to deny the carpenter the status of being (in fact) a carpenter on the tenuous grounds that we consider his or her behaviour to be morally corrupt or that we think the purposes his or her creation is intended to fulfil are likewise morally corrupt (*simpliciter*). However, it is still an open question whether what has been constructed by the carpenter serves the purposes that it is/was understood to serve by those whose lives⁷⁰ it governs. Presuming that a populace intends the gallows to be good at lopping off heads (and even if they hope that it is not their own heads that are to be lopped), there may still be a conceptual problem if what has been constructed is a gallows made entirely of breadsticks and lacquer, which topples at even the slightest test of its functionality. And it is no response for the carpenter to claim something like: “but it possessed the form of a gallows, even if not its functionality, and that is all that the term ‘gallows’ refers to”, for the reply may well be that “we, the people, haven’t defined ‘gallows’ in such a loose way to begin with—and even if we had, our definition has now been changed due to its poor relation to our intentions and/or the realization of our ignorance”.⁷¹ If such a reply arises, I think that there really is something to the claim that *x* is not necessarily a law by sheer virtue of its meeting the requirements that an authority, rather than all agents involved, applies to *x*—as though authorities alone (conceived of here as carpenters) were the sole providers of conceptual clarity and generation.

Of course, while acceding to the Fullerian view that we should, in some sense, take legal validity as we think it *ought* to be, Schauer replies that

[E]xisting institutions of sub-optimal moral character ought to be improved, both by those inside the institutions and by those outside. But existing institutions of sub-optimal moral character, or existing institutions less morally optimal than others, are still just that – existing. ...[and] it seems highly desirable that there be some way of identifying the institutions just so that they can be evaluated from a moral perspective. If the task of identification is itself front-loaded with moral criteria in just the way that Fuller advocated, then the task of our external evaluator will be that much more difficult.⁷²

Yet, these responses raise some of my earlier concerns: first, “existence”, in terms describable or identifiable by a legal theory as ‘law’ is one thing; the conceptual possibility of the existence of justified legal norms in the minds of agents putatively governed is another. That is, legal agents might not take certain facts of social existence (viz., internalized commands by some and brute compliance by others) as indicative of even a minimal, post-Austinian conception of legal validity, at least not once they realize that that is all that some rules are. They may be taken to exist as morally sub-par legal

⁶⁹ Schauer (1994, pp. 302-303).

⁷⁰ Or, in other words: reasons for action.

⁷¹ That is, if it was their intention to construct an item that allowed them to better realize their intentions.

⁷² Schauer (1994, pp. 310, 311).

institutions, one might argue—but they also might be taken to be no legal institutions at all. In other words ‘sub-optimal’ moral character may be entirely permissible within the rubric of the concept of law on the one hand; but on the other hand, a moral character so deficient as to undermine all *ultima facie* reasons for obeying a given law (and perhaps even all *prima facie* reasons) might not be so consistent with even the *concept* of law.

To this end, Mark Murphy provides some interesting analogies:

The defender of the strong [natural law thesis] understands this thesis as of the same sort as *necessarily, triangles have three sides...* [thus] from *necessarily, law is a rational standard for conduct* we can deduce that *if X is not a rational standard for conduct, then X is not law*.

On the other hand,

The defender of the *weak* reading of the natural law thesis, by contrast, does not hold that *necessarily, law is a rational standard for conduct* is a proposition of the same sort as *necessarily, triangles have three sides*: rather, it is of the same sort as *necessarily, the duck is a skillful swimmer*. [And] we can deduce no more than *if X is not a skillful swimmer, then X is not a duck or is a defective duck*.⁷³

Murphy also holds that “the weak natural law thesis is compatible with at least the canonical formulations of the hardest such positivisms out there”.⁷⁴ And, as I have been attempting to argue throughout this chapter (particularly with respect to Hart’s and Raz’s characterizations of positivist theory), law’s claim to

being authoritative [should] not just [be taken as] a feature it has self-reported but [as] a standard to which it has held itself accountable. Because it holds itself to this standard, it can rightly be treated as a *defect* in law if it fails to be authoritative.⁷⁵

Yet, I also think that the term ‘defect’ can only go so far (as with any concept). That is, while the vast majority of discrepancies among (say) proper points of coordination set forth by a legal authority may be excusable (and still legally valid), for perfection is neither possible nor to be expected, certain defects may be so severe as to raise the question of whether something so lacking in the content of what it means to be *x* can still be coherently called “*x*”. For instance, in some cases, upon viewing the relative merits and demerits of law (conceived of *ex hypothesi* as a Murphian duck), the people bound by the commands of the duck might see not merely that the duck is poor at performing duckly functions, but that it is not even a duck at all, despite what had formerly been thought.⁷⁶ So too might a populace, upon realizing that they’ve been coerced into blindly obeying an Austinian commander, deny that such a relationship between governor and governed was ever actually a legal system—even if they believed it to be so at the time.

⁷³ Murphy (2003, p. 253, emphases in original).

⁷⁴ Murphy (2003, p. 255, note 51).

⁷⁵ Murphy (2003, p. 261).

⁷⁶ Perhaps it is a goose, or a person decked out in a duck-suit.

One might respond, of course, that this all seems little more than a matter of revising one's definition *ex post facto* rather than that of conceptualization proper. Yet, still, I think it plausible that calling something a legal system once it is realized that's not what it is (or was) seems no be nothing more than a conceptual or factual mistake, once we in fact realize the nuances of that concept and/or attain a more accurate description of the facts. Or, in other words: that we thought it was a legal system at the time is one thing; that we can even conceive of it as such now that we're better informed is another.

3.6 Concluding Remarks

It seems that it is, of course, at least partially in lieu of some objects' function or content, and not merely their form, that we conceptualize them in a given way. My argument is simply that law is one of these objects. Were law entirely formulaic, where the form is defined in Hartian terms as being accepted and promulgated by few and followed (but perhaps internally rejected) by many, the latter being coerced into such compliance by means that they would never have otherwise accepted, the received positivist definition would undoubtedly stand. Yet it is not at all obvious that this is the way that human agents conceive of law in the first place (or would, were they to realize the reasons for which they initially assent or dissent to any given law).

As regards my assertion that a Gewirthian sort of project is compatible with positivism, I think we only need to minimally extend Murphy's aforementioned assertion that the weak natural law thesis is compatible with various versions of positivism in order to show that this is the case, for the simple reason that it is far from apparent that self-consistency—even to internal normative standards—is beyond the purview of positivistic description. Moreover, a weak version of the natural law thesis does not necessarily suppose there to be a metaphysics beyond the human practice of analyzable legal behaviour, and it is only the latter that could be plausibly taken as 'natural' in this approach. One is left asking, then, whether such an approach is really a natural law thesis after all, if all that is provided is a description of the way human agents both behave *and* conceptualize law. That is, it is in a crucial sense *positive* in that it promotes no particular ends other than those freely chosen by purposive human agents. Yet these same agents may very likely also (if self-reflective enough) take brute submission to a Hobbesian leviathan to be an irrational manoeuvre, and take the resultant relationship between governor and governed to be (at best) carrying out the motions – but lacking the essence – of an actual legal system. Or, in other words, while many agents view some laws as laws proper and some as (say) outmoded, imprudent, immoral, or non-optimal—but nonetheless valid—there still remains a sense in which some laws are so exceedingly incapable of conforming to any given agents' reasons for action that they would be taken to attain no relevant sense of validity whatsoever.⁷⁷ That is, in an informed conception of law as a social construct, the ultimate determinant for such validity (as I understand it)

⁷⁷ For they fail to meet even their *own* conditions of success—that is, if it is in the nature of authority to preempt other agents' reasons for action on grounds consistent with the latter (as is explicitly supposed by Raz's own "dependence thesis").

can supervene only upon at least a minimal connection with any given agent's reasons for action.⁷⁸ And even if what is created are simply legal (rather than moral) rights or duties (as might be objected), the fact that they claim to exist under the rubric of 'duty' entails that if they are not to spuriously take that concept to be devoid of any content *whatsoever*, it must at least be considered a necessity that it adhere in some minimal, conceptual sense to the practical reason that is intrinsic to legal agency.

Is the real conflict between natural law and positivism, then, simply where we draw the line between factual or logical (i.e., 'natural') necessities, and the various contingent and positive declarations that legal agents (including legal officials) make atop this? If so, the problem simply lies in drawing that line accurately, and it is clear that various positivists do so in various ways. Yet, when encompassing more within the natural side of the coin than previous authors, there is a *prima facie* ground for declaring such advances to be based in some contestable, unduly prescriptive and/or metaphysical form of natural law, rather than positive fact. For example, it is likely that Austin would have declared Hart to be a natural lawyer on the grounds that Hart took ultimately contingent features of human behaviour (i.e., that legal officials occasionally view their promulgations from within the internal perspective and that populaces occasionally acquiesce to them)⁷⁹ as a natural and conceptually necessary feature of law and of legal validity. So too might Hart want to declare the Razian gloss of positivism to be a form of natural law, insofar as (at least as I advocate it) it contains an implicit presupposition that laws (or the authority that makes them, rather) be at least capable of satisfying the normal justification, dependence, and pre-emption theses. However, insofar as we can plausibly make such claims under a rubric of description, we are nevertheless justified in calling either of the aforementioned view positivist.

In fact, from Austin to Hart, and from Hart to Raz, we see the essential difference as being an increasing inclusion of the ultimately descriptive fact that legal validity (or legal authoritativeness) is internalized by various agents, with the result that this inclusion is in some sense a necessary determinant of that very validity. I.e., Hart included the fact that legal officials internalize legal validity as necessary for legal validity. Raz, in turn, included the fact that the declarations of legal authority are *initially* based on agents' internal reasons for action as a necessary feature of their validity. I simply want to extend the latter's conception to include the possibility that the validity of the declarations of legal authority must *continually* be, at least conceptually (even if not practically, in any given instance), based on its subjects' reasons for action—if only for the prosaic and descriptive likelihood that no reasonable agent takes their assent to the arbitration of the initial, perceived circumstances of a disagreement to entail their assent to *anything* that an arbitrator might see fit to lay down.

What we see, then, in analyzing the justificatory foundations of Raz's theory, is that positive law does not have its positive foundation exclusively in the declarations of an authority. The latter may well be positive, but are so heavily circumscribed by the

⁷⁸ Coincidentally, it is also those reasons for action which provide the impetus for law as a social institution in the first place.

⁷⁹ Not to mention the contingent necessities, as it were, that he endorses as justifying a minimal sense of the natural law thesis.

foundational, value-laden reasons for action, which all agents have, as to strictly preclude the notion that law obtains validity *qua* nothing more than a *carte blanche* usurpation of power, once two or more legal agents grant a third-party the authority to decide a conflict between them. Given my assumption that, upon suitable reflection, human agents will revert to a relatively universalistic conception of rights and will only be able to judge the merits of a law (and the normative obligations it purports to implement) based on its ability to conform to the reasons for action of *any* agent to whom it applies (rather than just the victor of a spurious arbitration), there is much more that can be said about the bounds of legal validity. Yet this need not make such a project into one of natural law rather than positivism. Rather, I think it to be nothing more than an elaboration (i) of Hart's own recognition of the 'minimum content' of law, (ii) of his critique of Austin's conflation of 'obliging' and 'obligation', and (iii) of Raz's theory of authority.⁸⁰

Of course, we are still left with a puzzle regarding whether, if we are wrong about what we aim to be right about (in this case, with regard to the law), we can still count egregiously bad laws as law, *post facto*. This is perhaps reducible to a question of whether we should draw a legal distinction between what *is* known, what we *think* we know, and what we *can* know (if we can indeed know). If a child draws the conclusion that 5 is the sum of 2 plus 2, his claim is granted no more theoretical validity than the correct claim would have been, just because he didn't know any better at the time. And on the presumption that he could have known better, any claims as to the validity of his mathematical system would be suspect. The same goes for legal validity, I think, if only upon recognition of the fact that any post-Austinian conception of law must derive its foundation not from the fact that *A* internalizes and promulgates an order and *B* obeys, but from the fact that to even *think* that any sort of duty arises such as to normatively bind any legal agents, it must be held as conceptually conformable to their own practical reason, even if only in the most minimal sense.

Given Murphy's aforementioned distinction, we may still view most laws that turn out to be inconsistent with any given agent's reasons for action as laws nonetheless, even if being deficiently so in both a moral and (indirectly) legal respect, such deficiency being excusable at the time by epistemic ignorance or underdetermination. Yet there remain cases that still go beyond this, and surely we wouldn't even think to call these instances 'laws' even *post facto*, once informed of their bare merits. As extreme (yet not implausible) examples, consider: (i) a legal official might attempt to create a duty that categorically violates one's rights (i.e., negates even the conceptual possibility of better realizing one's ends) without even the most basic and reasonable competing claim to the contrary (e.g., necessities of state survival or a real lack of shared resources). For example, a legal official called upon to settle a property dispute between *x* and *y* might order the summary execution of *x*, having decided that particular result by coin toss, the legitimacy of the coin toss as a decision-procedure having arisen through nothing more than that official's say-so. While this would surely solve any potential dispute between *x* and *y*, it does so at so radical of a cost as to undermine either agent's desire to resolve any conflicts in the first place, were they so informed. Yet, the fact that the latter hypothetical

⁸⁰ Each author being thoroughly positivist, to be sure.

can easily be known in advance seems to undercut the claim that the arbitrator had any authority to judge in such a way to begin with. And because such an arbitrating procedure is so abjectly adverse to any reasonable conception of practical reason to begin with, there is no plausible sense in which any normal legal agent would have taken such a result to potentially satisfy even the bare rubric of legal validity in the first place.

More mundanely, (ii) a legal official might create a ruling entirely unrelated to (though perhaps not inconsistent with) the reasons for which a populace requested an authority to judge in the first place. E.g., in a similar dispute to settle property ownership, an authority might give the result that all office workers must spin thrice on their swivel-chairs before engaging in high tea. While the result of such arbitration might have some relation to certain disputes (though even this is unlikely), it bears no rational connection to the matter at hand, which was the only matter for which an authoritative decision was desired in the first place. And given recognition of this fact, no minimally rational agent would think that any *ultima facie* reasons exist for following that order.⁸¹

Given Raz's theory of authority, it seems that the only reasons for obeying either of the two aforementioned duties would have been through the assumption that they had at least the bare conceptual possibility of satisfying the normal justification and dependence theses. However, if the issue put forth to an authority is only done so under the rubric of adhering to that bare conceivable possibility, and yet the output is something such as the above, even the slightest inspection of the decision's merits would seem to cause any potential *prima* or *ultima facie* reason to fall flat and be promptly ignored by a populace—not because they are morally wrong (as Hart or Schauer's words might lead one to think), but because they bear no conceptual relation whatsoever to any agent's reasons for obeying them, whether before or after such arbitration.⁸² It may be a positive declaration, but it has removed itself entirely from the domain of practical reason. And this, I take it, is problematic with respect to positivism, especially when taking a Razian approach to the issue. That is, the only way one would think that they are still obligated to obey such laws is either because they're deluded into thinking that the judgment actually has some sort of broad normative justification, or forget the very conflicting reasons put forth as initial disputes to be settled by an authority,⁸³ and for some reason defer to the not-always-warranted assumption that there always exists either a *prima* or

⁸¹ With the only *prima facie* reason perhaps being that it is the authority's say-so, but even this is terribly weak (all things considered).

⁸² Thus, even if Hart claims there to be no conceptual clarity gained (and much to be lost) by saying that "This is in no sense law" rather than "This is law but too iniquitous to obey or apply", it seems to do *nothing less* than provide more clarity to claim (at least vis-à-vis some laws) that "This is in no *relevant* sense law, for it is too irrelevant to agents' reasons for action to obey or apply; thus granting no justification for the intrinsically normative claim that its respondents are in some sense duty-bound to follow it" (Hart 1997, p. 210). And this is plausible, I think, because we in no way need to refer to the conceptual muddle of morality proper in order to soundly endorse the latter claim.

⁸³ Or perhaps they are plainly incompetent and do not even realize what their own ends are.

ultima facie reasons to obey the law even in the utter absence of all possible reasons that would give support to such a claim.⁸⁴

I do presume, of course, that were agents aware of the relevant reasons that go into the making of such spurious laws, they would neither have followed such a result in the first place, nor have referred to that particular arbitrator's wisdom in that case. In other words, it is a natural reaction to entirely disregard a command that has no bearing whatsoever on the matter at hand, unless one is already unduly compliant, ignorant, or coerced into fearing the outcomes that await anyone who deviates from the party line. And I'm not so sure that the positivist should want to encompass such cases and claim both that 'any law is law nonetheless' and that these commands create a clear legal duty, just because those governed by the law fail to realize the claim's inanity or falsity.⁸⁵ While such instances may characterize Hart's sheep-comment perfectly, I'm not so sure that we should want to claim that these are laws any more than we want to claim that a shepherd's influence over *actual* sheep entails the legal validity of his or her commands, or that the shepherd's crook possesses the normative weight of a judge's gavel. The fact remains that we are not sheep; and even if we were, sheep do not naturally end up in the slaughter-house without the duplicity of other agents ensuring that that becomes the case.

In conclusion, though Hart may have claimed that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality", we see that this may only hold true for morality as traditionally conceived, i.e., as something far too indeterminate for practical, legal purposes.⁸⁶ Yet not all value-theory need be conceived of as ruminating on the nature of the divine or on immutable ethical prescriptions. For instance, given the fact that agents (by sheer virtue of their being agents) value some ends (regardless of how well those ends reflect the sanctioned ends of the received traditions of moral theory) and that by virtue of their striving at any such end, they implicitly claim rights to those goods necessary to achieve that end, we can claim that law need only reflect *that* cognizable fact, rather than adhere to any sort of transcendent moral norm. But this is sufficient to make the case that not just any law can be accepted as valid (even minimally so) by any agent, insofar as it is in the barest *telos* of law (if we can call it that) that it be conceptually capable of performing the weakest social role that agents intend or suppose it to have. When it cannot even fulfil that basic role,⁸⁷ it lacks even the weakest reason for claiming that there is a duty to obey it. And what is a law, if not something that can at least make a minimally plausible assertion that it ought to be obeyed?

While Raz may respond, of course, that it is only in the nature of authority that it *claim* legitimacy, rather than that it actually *be* legitimate,⁸⁸ my response is that if its

⁸⁴ Though, again, as argued above, such brutish compliance is inimical to the concept of being a human, legal agent, unless there are justifiable reasons why one would take upon such a paternalistic relationship vis-à-vis an authority (e.g., if one is a child or mentally challenged, perhaps).

⁸⁵ Even in the descriptive sense of a given law not providing—or in many cases not even attempting to provide—reasons for following it.

⁸⁶ Hart (1997, p. 117).

⁸⁷ Again, providing that no countervailing arguments based on the same premises—though internal to the perspectives of other agents—are advanced, e.g., conflicts of basic rights *actually* necessitating that the rights of some be trumped by the rights of others.

⁸⁸ I.e., it "either claims to be legitimate or is believed to be so" (Raz 1994, p. 211).

subsequent claims are such as to categorically undermine even its foundational 'claims' of legitimacy (or of the beliefs that a populace may have to that effect), those claims lack even the barest *prima facie* case which, I take it, any minimally reflective agent would require for conceiving of such claims as 'law' to begin with. Yet many of the examples given above, I suspect, cannot even satisfy this extremely minimal requirement.

CHAPTER FOUR: CONCLUSION

4.1 *A Natural Constitution*

What this all seems to entail is that despite the fact that the declarations of legal systems may be positive for the most part, there is a crucial sense in which the criteria of legal validity is strictly delineated within the conceptions of any agent (even if this only comes to light in the rarest of cases). And this points toward the possibility that the concept of law delineates for itself a sort of natural constitution, as it were, much in the same way that Hart's analysis of the minimum content of law suggests. Of course, the latter is, for the most part, premised upon "the contingent fact that most men most of the time wish to continue in existence",¹ i.e., that "in general men do desire to live, and that we may mean nothing more by calling survival a human goal or end that men do desire it"—this being a contingent fact about present humanity, rather than a natural fact about its nature.² Yet, as I have attempted to show, even this contingency is in some sense sufficient for such claims as made in Chapter 3. That is, while a contingent fact about humanity (i.e., that "men do desire to live")³ may be unable to ground any conclusive case for a 'minimum content' thesis beyond that which Hart recognizes to be required for the mere sustainability of a legal system,⁴ there seems to be a more foundational basis on which we can rest that thesis: namely, that it is intrinsic to human agency to desire the end towards which one acts (whatever that end might be) and *pro tanto* at least a conceivable chance of successfully realizing that end. To not have ends, or to not act at all towards those ends, is inimical to the concept of agency, whether human in general or legal in particular. Ignorance of this fact within the concept of law, however, potentially separates the concept of legal validity from the concept of legal agency, which is a problem if automata that lack the aforementioned features are not properly called legal agents, and if it is plainly incoherent to think that some sort of normative framework (even if just a legal system) nonetheless applies to them and in any way binds them to the duties it sets forth to create.

¹ Hart (1997, p. 191).

² Hart (1997, p. 192).

³ Though not any more than it is a contingent fact about the human concept of law that it requires the internalization of commands by officials on the one hand and the obedience of a populace on the other (if Hart is correct). That is, if the minimum content thesis is conceptually impugnable on the grounds of contingency, it is difficult to see how Hart's own claim isn't, if we are to simply defer to the claim that 'it could have been otherwise' to escape from any implications of naturalism.

⁴ E.g., "[i]n the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, *coercion of others* who would not voluntarily conform would be impossible" (Hart 1997, p. 193, emphasis added).

These problems require, I think, that we extend Hart's 'minimum content' thesis if we want to claim that law indeed *obligates* (rather than merely obliges) *all* agents that it indeed claims to obligate. Yet, this includes not just those bare conditions which are necessary for a system to survive,⁵ but those conditions which allow us to claim that every governed agent is bound for reasons beyond those of brute force—i.e., by autonomous, self-generated reasons for action—to submit to a law's authority. Of course, what this all means in terms of the definability of such a natural constitution may be another thing entirely. In these outgoing remarks, I will briefly attempt to delineate what a constitution taking the aforementioned concerns into account could look like (if one can exist at all), especially given that it must take into account the very real conflicts in basic rights that occasionally occur between agents; these inevitably requiring that the rights of some be trumped by the rights of others.

What such a constitution would have to include, of course, is at least a tacit preclusion of the validity of the violation of those generic rights to which all agents are entitled (as entailed by my above arguments). In written form, it could surely also include those rights that are created through positive declarations, democratic deliberation, etc. (though these only as positivistic addenda, valid only insofar as they aren't overruled by the former, negative-right-based rules). Yet, even taking into account the stringency of the former rights, it also has to include various provisos to their inviolability, lest it be a utopian manifesto with no possible chance of ever being practically realized. Such provisos may include, as outlined in each of the previous chapters, the right of a state to demand (say) the conscription of all able-bodied persons, if such is indeed necessary for the continued survival of that state (and its inhabitants, to be sure) or the unwanted, but necessary sacrifice of some for the sake of others if there is indeed a lack of shared resources to sustain the entire populace. However, there are real reasons that could justify such duties, and a good case exists for claiming that all agents are reasonably bound to submit to such duties, if (say) it is truly necessary that some agents do so, and insofar as those agents are chosen in a fair and impartial manner, such that no agent can think that he or she was any more wrongly done by than anyone else.

Nevertheless, when taking into account my arguments in the previous chapter, we see that such harmful duties can never coherently rest on a foundation that is inimical or unrelated to agents' reasons for action, for the rules would thus lack even the barest justification for demanding that anyone assent to them.⁶ That is, if a duty to engage in an activity requiring the likely harm (or even the possible death) of an agent is premised on no stronger grounds than the whims or prejudices of a sovereign (even conceived of *qua* entire democratic populace), we see that such a law cannot provide any *ultima facie* reasons for obeying it. In extreme cases, it may not even provide any *prima facie* reasons. Yet, this is troublesome for any post-Austinian theory, since we don't want to claim that (even ultimately harmful) legal duties are generated through nothing more than the

⁵ I.e., those conditions that minimally preclude a society's collapse into anarchy—which, in theory, may necessitate not that a majority is granted reason to conform to the law (and a minority not), but a case wherein a single person, or small group of people, has sufficient wherewithal to ensure the compliance of a vast majority.

⁶ Cf. Hart (1997, p. 193).

prodding of a bayonet, nor, I argue, through more intricate means which ultimately rely on nothing more than that effect. However, unless Hart's minimum content thesis is extended to include the attitudes of *all* agents—and the justifiability of claim-rights thereto—rather than merely those of the officials and the bulk of a population, we cannot claim that those agents egregiously harmed by the system are 'obligated' in anything more than an Austinian sense. Yet this, I take it, is what a legal system is alleged to do; that is, to *obligate* rather than merely *oblige*—and not just for the bulk of the population, but for *all* agents that it purports to govern. My attempt in this thesis has been to show that it is only through a minimal conceptual relationship between such governmental declarations and any given agent's reasons for action that this condition is satisfied, i.e., the condition of obligating *all* legal agents rather than merely *some*.

As before, though, it is clearly possible to relate potentially harmful duties back to agents' reasons for action in the first place and, in this way, I think we can show there to be an obligation (rather than a mere obliging) in some cases, even if this entails a risk of harm (or even death). E.g., if it is indeed the only necessary possibility for the survival of a state, there are grounds for demanding that any potential recruit assent to military conscription, for (presuming that such an agent 'most of the time wants to continue in existence') one's own continued existence may be contingent upon removal of a very real (if indeed real) threat to one's national security (say, by an invading military). And this may in fact require the apparent obliging (by brute force) of any given agent, in order to achieve this end. Yet, insofar as such a duty is related back to the agent's own reasons for actions in a coherent manner, we can conclude that there may well exist a legal obligation to that effect, as well—for such a duty is not conceptually unrelated to the agent's reasons for action in such a situation (even if it would be in others) and is thus in no way precluded by my arguments in Chapter 3. The fact that such a duty can thereby be justified shows that the state may have an extreme amount of leeway in setting up various points of coordination, even if those points are ultimately justified only vis-à-vis their ability to satisfy the normal justification and dependence theses. And these facts, unpleasant as they might be to certain natural lawyers, must be taken into account in defining the wide domain of validity that a legitimate authority can preside over. For while one may take one's own rights to be absolute (i.e., to never be justifiably trumped), it is a fact of social existence that all agents may take their rights to be so, and it is surely within the purview of legitimate government to make decisions that—even if violating the rights of some—are done so through means and anticipated ends that are reasonably acceptable to all in the first place, thus being circumspectively consistent with those very same rights.

4.2 *The Practice of Constitutionalism*

As to what this means politically (particularly with respect to the arguments proposed in Chapter 1), we see that such recognition leads us again to the conclusion that our concern with accurately defining and respecting rights (even legal rights) arises *prior* to the implementation of any particular political or legal procedure. However, we also see why

certain political procedures may be patently unacceptable to begin with, given this right-based foundation. That is, it may be that through allowing for the overly-broad legitimacy of a Waldronian, majoritarian political procedure and its potential creation of laws which give their beneficiaries innumerable reasons to follow it and their victims perhaps not even *one* (and innumerable reasons against it), some *ultima facie* criterion of fairness is violated, no matter how fair and (relationally) egalitarian⁷ the procedure might purport to be. This is analogous to the problem I outline with positivist legal theory, for its apparent entailment that law can be created absent any possible coherence with the reasons that any given agent might have for obeying it. Either of these concerns are, of course, surmountable if one can provide the loser in such disputes other grounds (especially as pertaining to substantive concerns of fairness) to which they are prudentially bound to assent. Yet, again, allowing that this need not be the case vis-à-vis either political or legal validity seems to indicate *not* that we have a broader or clearer understanding of the concepts of legitimacy or validity. Rather, it seems that we have do nothing less than misconceive of them to begin with, in so removing those rubrics (at least conceptually) from the ends that all agents naturally suppose any minimally legitimate political or legal procedure to possess.

With regards to the politics of (anti-)constitutionalism and the circumstances behind it, then, it may ultimately be that if Waldron is correct in supposing good liberal states to act in good faith (and if there exists an extremely compelling reason to suspect that they will continue to do) then his case wins the day. But absent this hopeful occurrence, and given the fact that providing *no* reasons for a victim to assent to a given law introduces a qualitative and opposing distinction between beneficiaries and victims (rather than one merely of the degree of benefits) that no agent would naturally accept, we thereby introduce a possibility that transcends the limits of any minimally reasonable conception of fairness, as well as of any tenable normative relationship between the declarations of a political or legal authority and the potential existence of duties on behalf of the agents whom it purports to legitimately govern. That is, despite that a political or legal authority may *assert* the existence of a political or legal obligation to obey its pronouncements, there are certain ways in which such an assertion may radically fail, such that it isn't even coherent to claim that it carries with it any normative bindingness whatsoever.⁸ In other words, it is inherent in the concept of duty that it *could* normatively obligate. Whether or not it fails to do so in practice is one thing; but the fact that it may conceptually be unable to in certain instances, vis-à-vis certain promulgations, seems to delimit its own bounds. And if my preceding arguments are in any sense sound, there are cases in which otherwise valid legal and political declarations not only fail to achieve authoritativeness contingently, but also fail to achieve it *categorically*, such that the entire concept of duty (i.e., of normative obligation, however loosely defined) is thereby jettisoned. Yet, what is a law (or a legitimate political procedure), I ask, if not something that *could* potentially obligate agents to behave in the way it commands?

⁷ In the sense of treating every agent as an equal, without regard (perhaps) either to particular circumstances or to *how* each agent is being treated.

⁸ A fact which, I think, is very separable from the claim that there may be innumerable moral obligations to disobey such a duty.

As we have thus seen, however, one major problem with such a definition of political or legal validity is in determining whether a rule, for example, *necessarily* violates the Razian normal justification or dependence theses and/or (we might say) any minimally substantive conception of fairness beyond what the anti-constitutionalist purports to provide. Finding these extremes in practice may be more difficult than it appears at first glance, especially when one realizes that these absolute judgments (as it were) may conflict with one another. For example, one major problem with the Gewirthian thesis lies in its Kantian overemphasis on the absolutivity of rights,⁹ while nonetheless supposing, e.g., that there are positive rights to be accorded the various goods necessary for agential self-fulfilment throughout one's life (and that restrictions on various agents' freedom and well-being are thus easily justified). Yet, it is unclear (to say the least) whether the latter can be justified without some flexibility on the former, given the very real possibility that the violation of some persons' rights (even their most basic) may be necessary for the attainment and/or sustenance of one's own (or others') agency. For example, the threat of imminent invasion by a military force is unlikely to be resolved through even the most abundant and vehement inaction, and it is perhaps equally unlikely that it will be resolvable without the outright coercion of a citizenry to protect itself. One is thus committed, *in spite of* any absolute weight that one might want to give to one's own (or others') rights, to acknowledge that certain egregious and otherwise unwarranted means may be necessary (and have been necessary) in order to secure the circumstances in which one can actually exist and enjoy the fruits of rights-possession.

In any case, then (i.e., whether we be constitutionalists or anti-constitutionalists, positivists or natural lawyers), such facts compel that we grant some sort of basic recognition to the values that inform our desire for political ideals (however they might be defined) and delimit what can count as legitimate legal rules to begin with—i.e., what is presupposed by our engagement with political and legal rule-making in the first place. And this, I think, may in fact lead to a clearer conception of what law really is (i.e., how it is really taken to be by any minimally reflective moral agent). What I want to argue is that either an entrenched constitution or an explicit anti-constitutional convention that is recognized to (implicitly) cohere with a more basic and natural rights-based constitution is, all else being equal, demanded by being honest about politics, and not beating around the bush with regard to what could legitimately be valid political or legal structures—especially when we want to view law and politics as something greater than the simple commands of a tyrant. Even if a society's political morality calls for anti-constitutionalism at all levels, there is nothing in that fact that prevents them from acknowledging that their strict moral norms entrench a constitutional convention that says as much, as, in that case, at least the citizens of a state will be aware of what their common goals are (which even the anti-constitutionalists have), whether this be respect for rights, disrespect for rights, utter fallibilism with regard to rights, or anything else they might agree to disagree upon, rather than letting themselves believe that *any* option, no matter how harmful or how much it goes against the foundations of that system or the rights of others, ought to be granted as much practical consideration as any.

⁹ See Gewirth (1981).

4.3 *Final Remarks*

The problem with justifying any sort of natural restrictions on legal validity while nonetheless remaining descriptive about law, then, is a serious one, though there seems to be two possible ways (among others) to do this, as suggested primarily within Chapters 1 and 2, and further delineated in Chapter 3. First, we may attempt to justify constitutions on the basis of their ability to get rights right better than with their absence. And to respond to Waldron's allegations of disrespect to a populace, this can be seen to in fact respect their beliefs, insofar as this may reflect their beliefs about issues of justice, equality, liberty, etc. that are deeply and widely shared (or would be so shared, were they to reflect on the nature and consequences of their actions).¹⁰ As well, since it is surely illegitimate (*prima facie*), even within the realm of Waldronian argumentation, to demand outright that anyone *refrain* from allowing any given agent (or group of agents) to prudently and modestly protect themselves from harm, with little to no negative effect on others, the tables can be turned on the latter's sort of anti-constitutionalism. That is, it may well be that the anti-constitutionalist is left with just as many contestable moral constraints as any other position for or against the entrenchment of constitutions.

Another way to view this, however, is simply to recognize that there are various types of freedoms, many of which are qualitatively different. Even if I have the freedom to advocate the realization of any sort of norm in our legal or political procedures (as, hopefully, do all citizens in a society), it can surely be required that we all do so on grounds of good faith, prudence, and respect for the rights of each other, as well as through the recognition that my freedom to speak my mind about legal and political issues is of a qualitatively different sort than—and is almost inevitably trumped by—my (or anyone's) freedom to continue living, no matter how much I value the sound of my own voice in the chambers of parliament. Some may think certain risks legitimate, but, in nearly all cases, it is only through a reasonable level of restraint (even if this means a tempering of the aforementioned fact) that the rights of all can possibly be respected. In other words, one's negative right to freedom and well-being, the respect of which requires a pittance of effort (if any) on the part of others, trumps others' positive right to have their democratic wishes enforced, particularly if those wishes entail the violation of the negative rights of others. Surely at least this much is seen through any reasonable good-faith analysis of the concept of respect for rights.

The second major theme of these essays has been to show that it is by no means necessary that we take a traditional positivistic stance with regard to legal validity, and I think that these claims go hand-in-hand in proving that there exists something like a natural, right-based constitution, which implicitly prohibits the outright trumping of the rights of anyone who happens to not wield the sword of political authority. Moreover, it would, in a similar manner, preclude the legal view that such a sword (rather than human agents themselves) is either the ultimate or the circumstantial source of legal authority and/or validity, even when it appears to rapidly cut through every extant moral and political norm that could otherwise justify its power. In this way, we may be able to show

¹⁰ Cf. Waluchow (2007, pp. 193-194).

that certain laws (whatever their rank) may be deficient in their status as valid laws, as even the weak natural law thesis suggests.¹¹ In extreme cases, however, such attempts at law may be patently invalid, despite a society's apparent rule of recognition. Yet, we need not defer to a natural law theory (proper) in order to show that this is the case. Rather, it seems to be nothing more than an extension of the idea that law ought to make good on its claim that its declarations do, in fact, *normatively* bind the agents it purports to govern. And this, I think, is required by any model of rules which purports to obligate (even if it only claims to obligate legally), insofar as the concept of duty cannot be conceptually divorced from the concept of practical reason.

My perhaps overly hopeful premise, again, has been that rather than needing to base these claims on some contestable conception of natural law, they can be based on the beliefs of political agents themselves, in a similar manner as Waluchow's approach. That is, this may be "what we, as a community, find *truly acceptable* – or *would* find acceptable if we were better informed about, or appreciative of, the nature or consequences of our proposed actions".¹² I take it that the aforementioned relationship between duty (even if only legal duty) and practical reason may be a necessary one – even if only minimally so – and that all agents would take such a relationship as a criterion of legal validity, were they so informed of what exactly gives a legal institution the authority to normatively bind them and to justifiably change their reasons for action.

However, rather than this foundation being that of a society's deeply and widely shared political or moral beliefs, I think that this foundation goes deeper than that. That is, it is unclear whether a community's *perceived* moral or political beliefs will entail any concern with the "nature or consequences of [their] proposed actions" whatsoever. Rather, what Waluchow's phrasing seems to suggest is that what would be truly acceptable, and what I allege will end up similar to the Gewirthian approach to rights,¹³ is some sort of a universalistic approach to rights (and thereby to constitutions) founded upon the realization (i) that claim-rights to freedom and well-being are the only necessary claim-rights that agents (even oneself) can have, (ii) that these claim-rights trump any subsidiary claims, and (iii) that these claim-rights apply *ex hypothesi* to all human agents, regardless of race, wealth, social class, etc. And this, I think, even when viewed from the perspective of Hart's minimum content thesis and Raz's theory of authority, shows not just that right-based constitutions are justifiable in principle, but that they are in some way inherently required by the very nature of human (and legal) agency, insofar as any and all agents indeed value their own ends (whatever those ends might be). Furthermore, I think that the above arguments show that it is only in this way that we can coherently speak of all agents bound by an authority actually being bound *de jure* by that authority's declarations—and this, I think, is what it is in the nature of law to do, insofar as even its mere *claim* to authority is to be viewed as anything more than spurious bombast, carrying with it no normative weight whatsoever. Thus, I think, insofar as agents are therefore bound to value those generic goods necessary for the achievement of any of those ends,

¹¹ Cf. Murphy (2003).

¹² Waluchow (2007, p. 193).

¹³ Particularly in lieu of its minimalism vis-à-vis contestable normative judgments, i.e., the fewer the better (cf. Gewirth 1978, pp. 20-21).

any political or legal theory¹⁴ that takes this fact to be separable from—and irrelevant to—its own claims of normative obligation may thus sever any necessary link it purports to provide between what the theory claims to be normatively binding, and what any given agent actually ought to do. Any coherent resolution of this dilemma, however, requires showing that such obligation is justified not only with respect to the bulk of a population (as Hart's 'minimum content' thesis suggests), but with respect to each and every citizen that a legal system purports to legitimately govern.

¹⁴ E.g., brute anti-constitutionalism in all but the most robust of liberal egalitarian societies, or a positivism that entails the oblique legitimacy of command theory, respectively.

REFERENCES

- Austin, John. *The Province of Jurisprudence Defined*, ed. Hart, H.L.A. (London: Weidenfeld & Nicolson, 1954).
- Christiano, Thomas. 'Waldron on Law and Disagreement', *Law and Philosophy* 19(4) (2000): 512-543.
- Dworkin, Ronald. *Taking Rights Seriously*. (Cambridge, MA: Harvard University Press, 2005).
- Estlund, David. 'Jeremy Waldron on *Law and Disagreement*', *Philosophical Studies* 99(1) (2000): 111-128.
- Feinberg, Joel and Narveson, Jan. 'The Nature and Value of Rights', *Journal of Value Inquiry* 4(4) (1970): 243-260.
- Freeman, Samuel. 'Constitutional Democracy and the Legitimacy of Judicial Review', *Law and Philosophy* 9(4) (1990): 327-370.
- Fuller, Lon L. *The Morality of Law*. (New Haven, CT: Yale University Press, 1969).
- . 'Positivism and Fidelity to Law – A Reply to Professor Hart', *Harvard Law Review* 71 (1958): 630-672.
- Gewirth, Alan. 'Are There Any Absolute Rights?', *The Philosophical Quarterly* 31(122) (1981): 1-16.
- . *The Community of Rights*. (Chicago: University of Chicago Press, 1998).
- . *Human Rights: Essays on Justification and Applications*. (Chicago: University of Chicago Press, 1982).
- . *Reason and Morality*. (Chicago: University of Chicago Press, 1978).
- Ghanayim, Khalid. 'Excused Necessity in Western Legal Philosophy', *Canadian Journal of Law and Jurisprudence* 19(1) (2006): 31-65.
- Gray, J.C. *The Nature and Sources of the Law*. (New York: Columbia University Press, 1909).
- Hart, H.L.A. *The Concept of Law*, 2nd ed. (Toronto: Oxford University Press, 1997).
- . 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (1958): 593-629.
- Herman, Barbara. *The Practice of Moral Judgement*. (Cambridge: Harvard University Press, 1993).
- Hohfeld, Wesley, N. *Fundamental Legal Conceptions as applied in Judicial Reasoning*, ed. Cook, Walter W. (New Haven: Yale University Press, 1964).
- Kavanagh, Aileen. 'Participation and Judicial Review: A Reply to Jeremy Waldron', *Law and Philosophy* 22(5) (2003): 451-486.
- Kelsen, Hans. *General Theory of Law and State*, trans. Wedberg, A. (Cambridge, MA: Harvard University Press, 1945).

- Marmor, Andrei. 'Are Constitutions Legitimate?', *Canadian Journal of Law and Jurisprudence* 20(1) (2007): 69-94.
- Murphy, Mark C. 'Natural Law Jurisprudence', *Legal Theory* 9 (2003): 241-267.
- Raz, Joseph. 'Authority and Justification', *Philosophy and Public Affairs* 14(1) (1985): 3-29.
- . *The Authority of Law*. (Toronto: Clarendon Press, 2002).
- . *Ethics in the Public Domain*. (Toronto: Clarendon Press, 1996).
- . 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review* 90 (2006): 1003-1044.
- Réaume, Denise. 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law', *Osgoode Hall Law Journal* 40(2) (2002): 113-143.
- Scanlon, T.M. *What We Owe to Each Other*. (Cambridge, MA: Belknap Press, 2000).
- Schauer, Frederick. 'Fuller's Internal Point of View', *Law and Philosophy* 13 (1994): 285-312.
- Waldron, Jeremy. 'All We Like Sheep', *Canadian Journal of Law and Jurisprudence* 12(1) (1999): 169-186.
- . 'The Core of the Case Against Judicial Review', *Yale Law Journal* 115(6) (2006): 1346-1406.
- . *Law and Disagreement* (Toronto: Oxford University Press, 1999).
- . 'A Right-Based Critique of Constitutional Rights', *Oxford Journal of Legal Studies* 13(1) (1993): 18-51.
- Waluchow, W.J. *A Common Law Theory of Judicial Review: The Living Tree* (Toronto: Cambridge University Press, 2007).
- . *Inclusive Legal Positivism*. (Toronto: Clarendon Press, 2003).

Constitutional References

- Canadian Charter of Rights and Freedoms (The Constitution Act, 1982, Part 1)
<http://laws.justice.gc.ca/en/const/annex_e.html>.
- Reference re: *Resolution to amend the Constitution [of Canada]*, [1981] 1 S.C.R. 753
<<http://www.canlii.org/en/ca/scc/doc/1981/1981canlii25/1981canlii25.html>>.