HUMAN AGENCY IN LAW AND JURISPRUDENCE

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ABSTRACT

This dissertation explores the way in which different conceptions of human agency have helped to shape the course of jurisprudential thought. The overarching aim is to bring to the surface the deeper commitments of Hartian positivism in its various engagements with rival accounts of the nature of law. In particular, I argue that although contemporary positivists take their account of law to be metaphysically noncommittal, views of what it is to be a human agent continue to motivate, if implicitly, their positions on such enduring jurisprudential questions as the nature and source of law's normativity, the relationship between law and morality, and so on. In order to better understand these debates, we must therefore understand better the relationship between a theory of law and the conception of human nature that drives it.

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DECLARATION OF ACADEMIC ACHIEVEMENT

The following is a declaration that the content of the research in this document has been completed by Jessica Murphy and recognizes the contributions of Dr. Stefan Sciaraffa, Dr. Wilfrid Waluchow, in both the research process and the completion of the thesis.

Introduction

This dissertation is intended as a contribution to philosophical debates about the relationship between law and morality. My basic claim is that this relationship is importantly illuminated in various ways and at different levels by an understanding of the way in which a theory of law necessarily incorporates a metaphysics of human nature. As we will see, sometimes this incorporation is explicit, as when Jeremy Bentham's psychological hedonism gives rise to an understanding of law's bindingness as grounded in peoples' causal history with incentives. More contentiously, I argue that though contemporary positivists take their account of law to be metaphysically noncommittal, views of what it is to be human agent continue to motivate, if implicitly, their positions.

This is the case, I suggest, with H. L. A. Hart's analysis. I argue that Hart, in his various engagements with rival jurisprudential theories, draws tacitly on an underlying ontology of human agency. Likewise, these rival accounts often have reasons for rejecting Hart's analysis that go deeper than can be addressed at the level of substantive theory. In order to properly understand these debates, I suggest, we must understand better the relationship between a theory of law and the conception of human agency that underlies it.

Right away it may be objected that Hart is, in various places, candid about the metaphysics to which he subscribed, including certain claims about the nature of human beings. Perhaps most famously, there is his discussion in *The Concept of Law* of "the salient characteristics of human nature,"[1] from which he draws his minimum content of natural law – the basic rules regulating violence, promises, and property that law must have "if it is to serve the minimum purposes of beings constituted as men are."[2] And in his later writings, he speaks openly about the nature of moral and evaluative judgment, endorsing a kind of moral non-cognitivism along the lines of Bernard Williams' claim

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[1] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 189.
[2] Ibid., 195.

that ethical sentences are essentially first-personal, true or false only perspectivally.[3] But while it is true that Hart is open about these commitments, he also maintained their relative independence from his theory of law, on which he saw their impact as minimal or nil: the rejection of ethical non-cognitivism, e.g., "leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws,"[4] and the minimum content doctrine is a mere statement of fact, the observation of certain reliable failings or weaknesses in human nature combined with "the simple contingent fact that most men most of the time wish to continue in existence."[5] One of the primary aims of this thesis, then, is to show the way in which some of these background assumptions bleed into theory, so that the success or plausibility of certain theoretical claims depends on our adopting certain views about the nature of human action and human moral agency.

My analysis centres on Hart's statement of law as essentially a system of rules. Formally, Hart and others acknowledge that this account speaks to a certain view of the capacities of legal subjects: it presupposes, minimally, that they are rational agents capable of understanding and responding to norms. One reason that contemporary positivists have tended to neglect the ontological levels of their theory, I think, is that such a claim seems rather underwhelming: against the fully articulated ontologies of the classical positivists and natural lawyers, the observation that people follow rules in their acting does not seem a very robust or interesting statement of human nature. My claim is that the conception of human beings implied by the rule-based model is bound up with logical consequences at various levels of theory, as the view of agency it puts forth places explanatory pressures on the form that descriptions of law and legal practice can take. I

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[3] See, e.g., H.L.A. Hart, "Legal Duty and Obligation," in *Essays on Bentham* (Oxford: Clarendon Press, 1982), 159-161, and his review of Williams' book *Ethics and the Limits of Philosophy*: "Who Can Tell Right From Wrong?," *New York Review of Books* (17 July, 1986).

[4] Hart, "Positivism and the Separation of Law and Morality," *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 83-4. This is because the question of the cognitive status or objective standing of moral values bears only on the question of whether the immorality or stupidity of these law could be rationally demonstrated.

[5] Hart, *CL* (Oxford: Clarendon Press, 1961), 187. In *The Morality of Law*, Lon Fuller notes that Hart probably overestimated how uncontroversial the claim that the "[p]roper end of human activity is survival." As he writes: "This, I think, cannot be accepted. As Thomas Aquinas remarked long ago, if the highest aim of a captain were to preserve his ship, he would keep it in port forever." Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 185.

suggest that contemporary positivists have for the most part failed to follow through on the implications of the theory's ontology, in particular as it competes with other conceptions of the nature of human agency.

Before moving on to chapter overview, we might note that it is not difficult to see why Hart, in his concern for the descriptive accuracy and generality of his theory, would seek to minimise his reliance on any robust conception of persons. Apart from being inevitably contentious, such claims will seem to spoil the neutrality of theory, by building into one's account of law presuppositions about human needs and interests which the practice is meant to serve. Where a theory of law is strongly informed by an account of what human beings are like, there will be substantial overlap between the factual and the normative elements of theory – between the description of what law *is* and the ideal for what it *ought* to be – because the conception of human nature it puts forth will have implications for our understanding of law's purpose or value in human life. Thus we might think that the mistake of the early positivists, such as Hobbes and Bentham, was precisely to build into their accounts too robust a notion of human nature and the state of human collective existence: the view of the human condition as one of conflict and compromise among atomistic beings gives rise to an understanding of law's proper function as one of restraining people in their more anti-social tendencies, i.e., as channeling or re-directing self-interest through the application of sanctions. I argue that contemporary rule-based positivism also rests upon a robust view of human nature: a conception of people as active, meaning-giving, and free. The second half of this dissertation argues that this view of people comes with its own set of logical implications for determining law's value.

Chapter Overview

Chapter one begins by examining Hart's rejection of early positivist analyses of law in terms of threats and sanctions. On the typical recounting of Hart's critique, the conflict between rule-based and sanction-based accounts of legal duty is seen as one purely at the level of substantive theory, i.e., as competing accounts of the same legal

concepts understood in largely the same way.[6] I argue that there is a deeper disagreement here, reaching to the level of methodology and ultimately, I suggest, to ontology – to the theorists' conflicting views as to the nature of human action and the appropriate categories for explaining it. The rule-based model conceives rationality as basic to human nature and human physiology as merely derivative, a prioritisation that is punctuated by Hart's repeated descriptions of the physical natures and circumstances of people as "simple contingent facts."[7] Yet it is not inevitable that we should we conceive of human beings in this way, and it is not without consequence to the methodology of legal theory that we do. In particular, where human beings are differently conceived – where, e.g., their physiology is taken as fundamental and their rationality derivative – our concern will not be with reasons for action but with the causes of behaviour. In that case, the account of legal duty will take a different shape as well; it will be a reductive one on which law's bindingness derives from our causal history with behavioural incentives. This, I suggest, is what unites the predictive theories of Oliver Wendell Holmes and Alf Ross, and these with the sanction-based theories of the early positivists Thomas Hobbes, Jeremy Bentham, and John Austin: a reductive-scientific view of human agency that is fundamentally at odds with that presupposed by the rule-based model. Taking Bentham's reductive analysis of legal obligation as illustrative of the underlying commitments of the imperative theory in general, I argue that what is more basically at stake between sanction-based and rule-based analyses of law are two competing accounts of the nature of human action. The disagreement about how law binds is thus at bottom a disagreement about what we take to be an adequate description of human agency: is normativity basic to human action or a mere epiphenomenon to be explained away by deeper, physical or behavioural facts?

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[6] As Jules Coleman writes, "Hart faulted Austin's substantive theory of law, not his methodology." Coleman, "Methodology," in *The Oxford Handbook of Jurisprudence*, ed. Jules Coleman, Kenneth Einar Himma, and Scott J. Shapiro (Oxford: Oxford University Press, 2004). Coleman is here contrasting a justificatory methodology with a purely descriptive one, but, as my argument in chapter one shows, these do not exhaust the available methodological positions in jurisprudence.

[7] See, e.g., Hart, *CL*, 190, 191, 195.

In chapter two, I suggest that Lon Fuller's claim that the formal features of law exhibit an internal morality can be seen as drawing out the implications of Hart's anti-reductionist conception of human agency. I argue that the full force of Fuller's position consists in understanding the way in which law might be understood non-instrumentally, as a particular form of moral association for a certain type of being. On the prevailing instrumental view of law as a social means, the legal order is a kind of passive medium for discrete acts, i.e., for individuals' pursuit of personal and common ends. For Fuller, this was to overlook the way in which law participates in the structuring of human activity and relationships, and is therefore capable of being understood as itself an end or product of human striving. Law is not just any way of getting human beings to act, but rather the distinctive mode of governing rational beings offered by general rules. It operates by harnessing peoples' capacity for intelligent agency, and so respects their humanity in a way that does not get recognised on a purely formal definition of law as a certain set of formal features in a certain relationship with one another. Insofar as this respect is something we value in our relations with one another, legal order is not a mere framework in which goods are pursued but rather forms part of the good itself. To suppose that the instrumental conception of law is inescapable is thus to overlook the distinctiveness of this mode of social order, its contribution to the kinds of beings we are.

One of the takeaways from chapter two is that a proper understanding of social institutions softens the sharp distinction between means and ends in the explanation of human activity: institutional forms embody ideals or values, and are therefore capable of being understood as both means to the realisation of external goals and as ends in themselves. Chapters three and four are devoted to examining the implications of this conclusion for the methodological debate about the role of values in legal theory. In particular, the idea that law embodies moral standards seems to pose a threat to so-called "methodological positivism,"[8] the thesis that it is possible to provide a complete description of law without reference to its value.

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[8] Stephen Perry, "Hart's Methodological Positivism," in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Ed. Jules Coleman (Oxford: Oxford University Press, 2001).

In chapter three, I examine an argument by Jules Coleman which suggests that methodological positivism is not incompatible with the claim that there are necessary moral properties of law. In short, Coleman's claim is that a description of law entirely in terms of law's formal features does not rule out the possibility that those features might be shown to be valuable or to contribute to human fulfillment. The descriptivist claim that it is possible to offer a purely descriptive account of law is therefore compatible with the suggestion that law is able to fulfill human interests in certain beneficial ways. Crucially, however, for Coleman there is nothing in the concept of law itself to determine the outcome of any subsequent valuation: this is a matter of matching up the necessary features of law and legal order with certain facts about human beings, i.e., their interests, needs, etc., "none of which are part of the concept of law."[9] I challenge Coleman on two points. First, the idea that a theory of law presupposes nothing substantive about human beings is, of course, in direct tension with the central claim of this thesis, and so Coleman's argument offers an opportunity to defend my claim that an account of the nature of law necessarily incorporates a metaphysics of human nature. Second, I argue that Coleman's exclusive focus on the instrumental value of law means that he fails directly to confront Fuller's claim that certain of law's purposes are internal to, or constitutive of, legal order. Coleman's position then also provides an opportunity to further clarify Fuller's claim that law bears a non-instrumental relation to moral values.

Coleman's argument is intended to show that the divide between descriptive and normative theorists over the role of values in legal theory need not correspond to a first-order disagreement about the value or non-value of law. In chapter four, I examine the viability of the descriptivist position once we admit the full force of Fuller's claim that law itself embodies a moral ideal. On the standard treatment of the debate, the argument for the impossibility of a morally neutral jurisprudence is seen as resting on a kind of logical mistake: the attempt to derive a claim about what *ought* to be from a statement of what *is*. I argue that the descriptivist position is most intuitive on a view of the concept of law as morally neutral. In particular, where goods are understood as internal to practices,

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[9] Coleman, "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence," in *Oxford Journal of Legal Studies* 27 (2007): 607.

a stronger statement of the nature of evaluative judgment is needed to maintain the illegitimacy of the move from fact to value: the claim must be not just that facts cannot entail evaluations, but that evaluations cannot be descriptive of facts. In keeping with the central theme of this thesis, then, I suggest that there is something deeper at stake between normative and descriptive theorists than appears on the dominant treatment of this debate. The question of the role of values in legal theory is, at bottom, a question of the conditions of intelligible agency, with the two competing methodological positions corresponding roughly to the traditional poles in the debate about the nature of practical reason. While Finnis is candid about what these conditions are on his own account (i.e., that understanding human action means grasping the rationality of ends), I suggest that Hart and others have failed to recognise the extent to which the descriptivist position rests on a substantive rejection of that view, i.e., on the denial that there are objective standards of good and bad.

Chapter One

The Nature of Human Agency:

Competing Analyses of Rule-Based and Sanction-Based Theories of Law

1.1. Introduction

In a recent exchange, Stephen Perry and Scott Shapiro have offered competing interpretations of Hart's rejection of the sanction theory of law which, despite significant points of disagreement, share the view that his move to a rule-based account did not represent a significant methodological break within positivism. I argue that both Perry and Shapiro fail to capture the nature of the disagreement between rule-based and sanction-based theories of law, and offer an alternative reconstruction of the debate which places Hart's argument for the irreducibility of legal obligation in the context of the broader methodological debate between normative-teleological and reductionist-mechanical analyses of human action. Once we understand the deeper, metaphysical claim made by reductive analyses of legal obligation, we can see what is really at stake between classical and contemporary positivism: two competing conception of the human being and of the nature of human action which place different requirements on explanation, in the sense of placing limitations on the types of entities and relations to which the theory can refer. Adjudicating between these two accounts of the nature of law thus means adjudicating between conceptions of human agency.

My argument proceeds in several steps. In section one, I briefly contrast the sanction-based analyses of the classical positivists and legal realists with Hart's rule-based account of law. In section two, I summarize the exchange between Perry and Shapiro about Hart's use of the internal point of view in his critique of Oliver Wendell Holmes' predictive account of legal duty. In section three, I use Bentham's analysis to bring out the way in which the sanction theory is supported by an underlying ontology. Finally, I suggest that Hart's claim that our normative concepts are integral to a proper understanding of law carries with it its own view of the nature of human agency, one that

is incompatible with that presupposed by the classical positivists and legal realists. The conflict between reductionism and non-reductionism, between sanction-based and rule-based theories of law, is thus a genuine one between theories whose fundamental posits are incompatible with one another.

1.2. Classical Positivism, Legal Realism, and Hartian Legal Theory

Before H. L. A. Hart, the alternative to a natural law understanding of legal obligation seemed to be the classical positivist view of law's bindingness as purely sanction-based or prudential – as the compulsion of an order backed by a threat. In John Austin's classic statement of the command theory, law was the coercive command of a sovereign, while in Bentham's (more suggestively utilitarian) phrasing, it was "artificial consequences":[10] it simply established consequences of pleasure and pain (and principally pain) in order to produce the desired behaviour. One of the attractions of the account was its promise of a *scientific* jurisprudence, in part because there is little mystery to the prudential source of obligation: the ground of law's normativity is our own familiar instinct for self-preservation.[11]

This promise of an empirical analysis of law was one of the main attractions of Austin's thought to later legal realists like Holmes, for whom the foundation of law lay in facts of public force. Holmes sought to extend Austin's thought to a political context much different from that of the early positivists: the compulsory power of nineteenth century America took the form of a republic of divided powers and not of a monarch delivering royal prerogatives in the wake of social and economic upheaval. The realist definition of law as simply the prediction of judicial decisions was meant to maintain Austin's basic insight that force is what animates law – what makes its directives operative in the world – without his problematic reliance on the assumption of a single, fully empowered sovereign from whom all law originates. What the realists shared with

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[10] Jeremy Bentham, *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press, 1996), 156.

[11] For an account of Austin's perceived contribution to the science of law, see Wilfred E. Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth Century England* (London: Continuum, 2004), 102-118.

the classical positivists was an understanding of legal rules as simply *imperatives*: whether it is the commands of a single will, or, as Chipman Grey memorably put it, "the opinions of a half-a-dozen old gentlemen"[12] in the highest court, law emerges only within a context of domination, a superior exerting an influence on an inferior, where that relation is understood strictly in terms of the ability of the former to compel the latter to act by means of threatened force. But while Austin had in his writings stressed the relation of the abstract concepts of rights and duties to the status of persons affected by them, the realists argued that he had not been scientific enough: the real object of empirical study was not the static normative limits set by legal rules, but rather the *rules in action* − the actual operations of the law as it acts upon individuals, "[i]nfluencing conduct by motives, and applying consequences."[13] As Holmes famously summed up, "[t]he prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[14]

H. L. A. Hart's fundamental complaint about the imperative account of law and legal obligation is by now familiar: while Bentham and Austin had appreciated rightly that law makes certain behaviours non-optional, they had misunderstood the nature of the bonds it imposed. Where orders inspire us to do things, they do so by the manipulation of behavioural incentives and not by the imposition of duties; as Hart put it, we might feel *obliged* to conform to the threats of a gunman, but nothing *obligates* us to do so. What is distinctive of the legal order, by contrast, is the normativity of its directives: apart from a few "hardened offenders" who reject outright the constraints of public order, people tend to look upon their behaviour as *required*, with demands for conformity seen as legitimate both by those making them and those to whom they are addressed.[15] It is this attitude of practical acceptance that distinguishes normative, rule-guided activity from habitual or reflex behaviour; as Hart famously put it, those who accept the rules from an "internal point of view" see the rules as reason-giving in virtue of them being rules rather than in virtue of the punishment that might be visited upon them for non-compliance. Practiced

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[12] John Chipman Gray, *Nature and Sources of the Law* (Boston: Beacon Press, 1921), 84.
[13] Oliver Wendell Holmes, "The Theory of Torts," in *The American Law Review* 7 (1872-1873): 655.
[14] Holmes, "The Path of the Law," in *Collected Legal Papers* (The Lawbook Exchange, Ltd., 1920), 173.
[15] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 55.

social rules then share with habits an external aspect "which consists in the regular uniform behaviour which an observer could record,"[16] but they also have an "inside" which is unavailable on a purely physical or behaviouristic description of that activity: "This consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity."[17] Attending only to the outside of behaviour – to "observable regularities of conduct, predictions, probabilities, and signs"[18] – the early positivists and realists collapsed the distinction between habits and rule-governed behaviour, and so failed to capture "the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society."[19] In order to understand the full significance of rules as they figure in human activity, the theorist must adopt "a 'hermeneutic' method which involves portraying rule-governed behaviour as it appears to its participants, who see it as conforming or failing to conform to certain shared standards."[20]

Hart's discussion of the internal point of view in *The Concept of Law* marked a sort of sea change in Anglo-American jurisprudence, with theorists largely abandoning empirical science as an appropriate model for understanding the nature of law.[21] But despite the enthusiastic uptake of the notion of the internal point of view by contemporary philosophers of law, it remains controversial as to what, precisely, Hart meant by the phrase. In what follows, I examine Perry and Shapiro's competing interpretations of Hart's use of the internal point of view in his critique of the imperative theory of law, with particular attention to what I take to be a shared but mistaken assumption: that rule-

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[16] Ibid.
[17] Ibid.
[18] Ibid., 87.
[19] Hart, *Concept*, 86.
[20] Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1993), 15.
[21] One notable and outspoken exception is Brian Leiter, who has advocated for a naturalized jurisprudence as a corrective to what he takes to be the linguistic method's overreliance on appeals to intuition. See, e.g., Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007).

based and sanction-based theories of law share a common methodology, and so stand or fall by the same criteria of success.

1.3. Stephen Perry and Scott Shapiro on the Internal Point of View

Perry's argument in "Holmes versus Hart: The Bad Man in Legal Theory" attempts to show that Hart's use of the internal point of view in his critique of the predictive account of legal obligation cannot be justified on purely descriptive grounds but must contain an implicit value component. The problem, Perry argues, is that Hart's critique of "external" analyses of legal obligation is crucially ambiguous between two understandings of the distinction between internal and external theories of law. The first is a distinction between two kinds of substantive theory: between theories that characterize obedience to law in terms of external incentives for law-abidingness (i.e., sanctions), and theories that see legal rules as internally motivating or reason-giving in themselves. The second is a more general methodological distinction between explanatory standpoints: between extreme empiricist theories that attend only to the "outside" of law-abiding behaviour – to the observable fact that people do tend to obey legal rules with regularity – and "hermeneutic" theories that seek to understand the way law is experienced from the "inside" of legal practice, i.e., the way it enters into peoples' deliberations about what to do. As Perry notes, there seems to be no necessary relationship between these two different senses of the external point of view: the move from an external methodology to an internal one need not entail a move from a prudential to a rule-guided model for understanding obedience to law. This is because it might be that, from the point of view of participants in the practice, the reasons provided by the law are actually prudential ones. Hart's justification for giving explanatory priority to the point of view of what Perry calls the "socialized" participant in the legal system – the participant who sees the rules as reason-giving in themselves – thus cannot be that it is entailed by a proper attentiveness to subjects' own reasons for action.[22] According to Perry, then, Hart is only able to identify a distinct "legal point of view" by conflating the

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[22] Perry, "Holmes versus Hart," 169.

two senses of the external point of view, running together the first-person prudential perspective with the methodological one which he rejects as inappropriate to the study of human practices. But since it is not the case that a hermeneutic methodology entails a theory of law that treats legal obligations as standards of conduct rather than as predictions of sanctions, Hart needs some other reason for favouring the socialized viewpoint on law; the prudential one "cannot be ruled out, contrary to what Hart implicitly suggests, on methodological grounds alone."[23]

Perry cites Holmes' analysis as one on which an "internal" approach to explaining law yielded a predictive theory of legal obligation.[24] Holmes famously argued that law should be characterized from the perspective of the "bad man" who conforms to law's demands for reasons of pure self-interest; as he wrote, "[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[25] In his criticism of Holmes' theory, Perry writes, Hart seemed to assimilate the perspective of the bad man with that of the external observer, dismissing both the Holmesian and the extreme empiricist accounts of law for their neglect of the internal point of view. But, as Perry notes, the alienated citizen is as much an insider to the legal system as the socialized one: although the bad man does not regard the law as providing him with independent reasons for action, he may nevertheless take an intense practical interest in law – as Perry puts it, he tries "to decide what he *ought* to do, in a prudential sense, in order to avoid being visited with a fine, imprisonment, or some other form of legally sanctioned unpleasantness."[26] So while the alienated citizen may share with the external observer an interest in the behaviour of the courts – in tracking and predicting what judges do – the former is engaged in an exercise of practical, and not theoretical,

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[23] Ibid., 161.

[24] Perry cites Hobbes as another sanction theorist who was sensitive to the internal point of view (or practical reasoning) of legal subjects: since human nature is self-interested rather than sociable, it is in everyone's strategic best interest that there should be a sovereign who wields absolute power (Ibid., 175).

[25] Ibid., 158.

[26] Ibid., 164.

reason. He represents, in other words, one version of the internal point of view. The result is that Hart's theory appears to rest precariously upon a contingent empirical claim about the prevalence of a certain type of attitude toward legal rules. Perry's conclusion is that Hart's quarrel with bad man theories cannot be purely descriptive but must contain a normative component: if a Hartian jurisprudence is to be preferred over, say, a Holmesian one, it must be because there is moral value to be found in conceiving law as a form of social control that offers guidance to subjects as opposed to mere material incentives to obey.

In response to Perry, Scott Shapiro has offered a different interpretation of Hart's use of the internal point of view which does not invite the need for a normative jurisprudence. Shapiro argues that Hart was not insensitive to the fact that some sanction theories make use of one sense of the internal point of view: insofar as the prudential perspective is one type of normative attitude that one might take toward the law, "bad men" analyses of legal duty represent one attempt to capture the way that law appears to those subject to it. In this sense, Shapiro writes, Holmes' account is "every bit as hermeneutic as Hart's."[27] Hart's unique contribution was to connect the hermeneutic method with a particular *type* of normative attitude – that of a member of a group who "accepts the rules as guides to conduct and as standards as criticism"[28] – which is not captured on the view of rules as simply imperatives or warnings of prudence. In so doing, Hart's aim was not simply to make note of one more practical orientation that one might take toward the law, but rather to clear the way conceptually for the acknowledgment of such a perspective. For Hart, the problem with sanction theories was not simply that they privileged the prudential over the rule-guided model of law-abidingness, but that they lacked the conceptual resources to recognize this latter attitude which people can and often do take toward legal rules. The result, Shapiro argues, is that bad man accounts of legal duty are inadequate as hermeneutic theories; "[t]hough hermeneutic, they are nevertheless myopic."[29] In defining legal obligation in terms of the existence of practiced

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[27] Shapiro, "The Bad Man in Legal Theory," 198.
[28] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2012), 255.
[29] Scott Shapiro, "What is the Internal Point of View?," *Fordham Law Review* 74 (2006): 1158.

social rules, Hart released the conceptual connection between duty and the prediction of punishment, but he nowhere implied that citizens *must* take the attitude of the fully committed participant. Indeed, Shapiro notes, he explicitly allowed that the "good man" may follow the law "based on many different considerations," including "calculations of long-term self-interest; disinterested interest in others; as unreflecting inherited or traditional attitude; or the mere wish to do as others do."[30] On Shapiro's view, there is then no need to see Hart as promoting the moral appeal of a certain function for law – that of "guiding behaviour by means of an internalized form of socialization" – even as we concede the empirical availability of a purely prudential perspective.[31] Since his account takes no position on the motives ordinary citizens have for obeying the law, it need not imply any rejection of Holmes' (or Hobbes') view of human nature, nor the advancement of any "thick" conception of his own.

Shapiro goes on to argue that Hart's principle target in his critique of the imperative theory was not Holmes' analysis but rather those "extremely reductive accounts"[32] of the Scandinavian Realists like Alf Ross, who really did explain law in the crudely empiricist terms described by Hart. Where Holmes' analysis was driven by his attention to one type of normative attitude toward law, Ross was motivated by the desire to naturalize law's ontology – to reduce law and legal concepts to a single plane of concrete reality. The demand was then for some way to account for the ordinary view of law as a source of "objective" reasons for action – i.e., for how rights and duties can be created by operative facts such as verbal declarations – in a way consistent with the unity of all "modern empirical science"[33] and the priority of the causal order. As Shapiro notes, Hart's accusation of behaviouristic reduction is here accurate: the explanation of behaviour is entirely "in terms of observable regularities of conduct, predictions, probabilities, and signs."[34] Between Holmes and Ross, Shapiro argues, we thus have very similar substantive accounts of law motivated by very different methodologies: the

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[30] Hart, *Concept*, 198.
[31] Perry, "The Bad Man in Legal Theory," 170.
[32] Shapiro, "The Bad Man in Legal Theory," 204.
[33] Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), 30.
[34] Hart, *Concept,* 89.

predictive account "can be endorsed either by hermeneutic theories such as Holmes' or naturalistic theories such as Ross'."[35]   Both fail as descriptions of the nature of law, however, and for the same reason: they are unable to make intelligible the "thoughts and discourse"[36] of those who regard the law as creating reasons for action.   As Shapiro writes,

> Is it intelligible for anyone to regard the threats of the sovereign as creating obligations? Again, the answer is clearly no. Since one does not look upon the sovereign as having the right to rule, one does not regard his words as creating standards of conduct. If one believed it possible to escape punishment, then he would regard himself free to disobey. Nor would he criticize anyone else for disobeying. However, those who respond to the directives of the sovereign not simply as threats, but as rules, do conceive of themselves and others as obligated to act accordingly. They accept the words of the sovereign as setting new standards of conduct and evaluation, as guiding them not just with accurate warnings of evil, but with legitimate demands of conduct.[37]

I think Shapiro is right that, for Hart, the basic problem with the sanction theory was its conceptual shortcomings and not (or not primarily) its empirical inadequacy: the disagreement between Hart and Holmes is not best understood as one between different models of motivation for law-abidingness. With Perry, however, I think that there is something deeper at stake between the two analyses than is captured on the usual recounting of the debate, wherein the early positivists and legal realists simply failed to notice that the language of the law is normative. What unites the predictive accounts of Ross and Holmes, and these with the sanction-based analyses of the command theorists Bentham and Austin, I argue, is a certain view of the nature of human action that is fundamentally at odds with that presupposed by Hart – a view on which objects and agents, events and actions, are explicable by the same descriptive (physical or mechanistic) vocabulary. With Perry, then, I think that "Holmes was convinced that the notion of the bad man captured something fundamental about human nature;"[38] but it was something more fundamental than the claim that people are naturally bad or good, self-

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[35] Shapiro, "The Bad Man in Legal Theory," 203.
[36] Shapiro, "The Internal Point of View," 1166.
[37] Ibid, 1167.
[38] Perry, "Holmes versus Hart," 168.

interested or social. Between reductive and nonreductive accounts of law and legal concepts, what is more basically at stake is the question of what it is to be a human agent – what antecedent commitments agency presupposes, what sorts of explanations drop out (or ought to drop out) of this idea, what modes of activity and practice are or are not available to human beings. In what follows, I use Bentham's jurisprudence as an example of an attempted scientific theory of law based on an attempt to naturalize human agency. I argue that Holmes' bad man account is very naturally seen as an extension of Bentham's prudential hedonism. Finally, I suggest that, against this view, Hart's theory can also be seen to contain an (implicit) ontology: his rejection of the command theory in favour of the rule-based one represents a move from a view of people as passive and predictable to active, meaning-giving, and free.

1.4. Bentham's Scientific Jurisprudence

In "Legal Duty and Obligation", Hart himself notes that there seems to be something out-of-bounds about a hermeneutic, ordinary language response to Bentham's reductive analysis. After putting forth a set of "obvious objections" to the predictive theory of legal duty – "based on its divergence, due to its inclusion of a probabilistic relationship between conduct and sanctions, from the standard usage of lawyers and laymen of the expressions 'obligation' and 'duty'"[39] – he goes on to largely withdraw the complaint:

> To all these criticisms, based as they are upon established usage, Bentham I think would have replied in a tough 'rational-reconstructionist' or revisionary manner, since, for all his interest in language, he was no ordinary language philosopher and his standpoint was critical and reformative. 'Our languages, rich in terms of hatred and reproach, are poor and rugged for the purposes of science and reason.' He would, or at any rate could, concede perfectly well that the criticisms based on usage do accurately reflect that usage and so exhibit features of our actual concept of legal obligation. But he could insist

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[39] Like Shapiro, he notes that people often regard themselves as having an obligation to do as the law requires even if they are unlikely to be punished, and that it is not contradictory or nonsensical to say that punishment is unlikely to follow a breach of duty. Nor is it redundant to say that one has an obligation and that one will be punished if one does not meet it. See Hart, "Legal Duty and Obligation," in *Essays on Bentham*, (Clarendon Press, 1982).

that he had a better concept to offer in its place, and he might have invoked in support of its adoption his dual aims and purposes as a utilitarian Censor critical of the law and an Expositor concerned to analyse its structure.[40]

Hart goes on to suggest that in deviating from "our actual concept of legal obligation," Bentham has partially abandoned the role of Expositor of law and stepped into the role of Censor or critic; because the law is a frequent source of suffering for those not in its favour, a revisionary concept of obligation which highlights its relation to coercion as one of its defining features is a useful cautionary reminder of law's potential to harm as well as help. What Hart assumes, in other words, is that a descriptively adequate account of legal obligation must reproduce the content of the ordinary concept, with any deviations from our pre-theoretical understanding justified on pragmatic or moral grounds.[41]

Yet while it is true that one strand of Bentham's defense of his account relies on moral considerations, another independent but mutually supportive strand rests on a systematic examination of the traditional categories of philosophical inquiry – on epistemological, semantic, and ontological premises that he clearly saw as descriptive of the world. As Hart himself notes in the opening pages of the same essay, Bentham's reductive account of legal obligation followed from a number of background commitments: a minimalist ontology on which "real entities include corporeal substances and material things, sensory impressions or ideas";[42] a representationalist epistemology and theory of language according to which nouns are the names of entities, real or fictional; and a method of "exposition" consisting of the techniques of phraseoplerosis and paraphrasis, which analysed nouns representing fictitious entities by discovering their relationship to those representing real entities, and of archetypation, which traced the word back to its roots in some physical image.[43] Given these empiricist commitments, it would be odd of Bentham to give any kind of ontological priority to the structure of

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[40] Hart, "Legal Duty and Obligation," 137.
[41] Jules Coleman has also put forth this view of Bentham's project, characterising it as "an engineering project … in which conceptual analysis is no more than a tool in a practical political agenda." See Coleman, *The Practice of Principle* (Oxford University Press, 2003), 209-210. But this again suggests that Bentham did not see the concepts yielded in his analysis as more faithfully *descriptive* of the world.
[42] Hart, "Legal Duty and Obligation," 129.
[43] Ibid.

language, which misleads us by putting fictitious entities "upon a footing with real ones."[44] As Hart noted, this concern with the obfuscating tendencies of language is partly normative, motivated by an awareness of the power of our concepts as instruments of utility. But it is also a consequence of the requirements of Bentham's theoretical system, i.e. his stock of fundamental definitions, which he was persistently and self-consciously at pains to preserve, and his method for arriving at them.[45] As I argue below, this complex system of mutually-supportive ideas involved the modification of the concept of legal obligation to meet the requirements of a scientific utilitarian mode of thought.

Bentham's concern, then, was not to try to reconstruct the self-understandings of acting agents but to lend an empirical respectability to jurisprudence via a comprehensive utilitarian analysis of human action as the mechanics of pleasure and pain. That is to say, he saw himself as beholden to scientific standards of social theory and not to hermeneutic ones. Hart's objections to Bentham's theory – "based as they are upon established usage" – thus beg all the crucial questions that Bentham wished to pose: they presuppose the legitimacy of our ordinary concepts of duty, authority, right, etc., where it is precisely this understanding of law's normativity that the reductionist wants to call into doubt. Fruitful debate between Bentham's reductive analysis and Hart's non-reductive one must therefore happen at a more fundamental level than Hart supposed: it must address the matter of *why* a theory of law ought to be an attempt to capture and preserve the first-person understandings of participants in the practice. Shapiro's argument above is not so much an answer to this question as it is a restatement of the aims of a hermeneutic theory: understanding social action consists in bringing to light its intelligible (rather than its empirical) character, via the elucidation of social actors' reasons, attitudes, beliefs, etc. Where that explanatory aim is not shared, however, something more is needed than to

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[44] Bentham, *The Complete Works of Jeremy Bentham*, vol. 8, (Edinburgh: William Tait), 219.

[45] As Douglas Long writes, this "high degree of methodological self-consciousness...arose from [Bentham's] determination to place the art of thought itself on a scientific footing. His philosophical nominalism and materialism were embodiments of his faith in Baconian induction as a basis for the accumulation of knowledge and his Newtonian understanding of the nature of human and non-human actions. His philological perspective on epistemological questions was simply an aspect of his 'scientific' empiricism. What others would call the mental process of conceptualization was for him an exercise in critical philology." Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism* (Toronto: University of Toronto Press, 1977), 6.

simply observe that it has not been met – we need some argument for why it *ought* to be shared. This takes place not at the level of substantive theory but at the level of methodology and ultimately, I suggest, of ontology, i.e., the different conceptions of human agency that support the respective accounts of how law binds.

One easy point of access to the claim I am making here is Bentham's theory of language. For Bentham, words, in order to be meaningful, had to bear a relationship to the world: they had to refer either directly or indirectly to physical objects. The basic unit of language was the proposition, which had to contain the name of a subject, the name of a predicate or quality, and a copula, i.e. the "sign of the act of the mind by which the attribution or ascription is performed." Language is liable to mislead us, however, because the grammatical form of the proposition is the same whether we are referring to a real entity – substances or physical objects, which, for Bentham, are "the only objects that really exist" – or to a fictitious one or abstraction for which no corresponding physical object exists:[46]

> Words, viz. words employed to serve as names, being the only instruments by which, in the absence of the things, viz. the substances, themselves, the ideas of them can be presented to the mind, hence, wheresoever a word is seen which to appearance is employed in the character of a name, a natural and abundantly extensive consequence is – a disposition and propensity to suppose the existence, the real existence, of a correspondent object – of a correspondent thing – of a thing to which it ministers in the character of a name.
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> Yielded to without sufficient attentive caution, this disposition is a frequent source of confusion: of temporary confusion and perplexity, and not only so, but even of persisting error.[47]

Bentham's method of analysis made it an explicit requirement that such entities be expounded by demonstrating their relationship to words representing real entities; although fictitious entities are "the necessary fruits of the imagination without which, unreal as they are, language could not ... be carried on," they are meaningful only insofar as they are traceable back to their "real source" in the idea of some actually existing

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[46] Bentham Papers, University College London Library (2 October, 1814), lxix. 241.
[47] Bentham, *Works*, vol. 8, 262.

object.[48] Unlike words denoting real entities, which can be grouped under some superior genus in the traditional Aristotelian mode of definition *per genus et differentiam*, the name of a fictitious entity "has not any superior in the scale of logical subalternation"[49] and so must be defined by other means. For this task, Bentham introduced the technique of paraphrasis, which translated sentences making reference to fictitious entities into sentences where all the referents are real entities: "that sort of exposition which may be afforded by transmuting into a proposition, having for its subject some real entity, a proposition which has not for its subject any other than a fictitious entity."[50] Words representing fictitious entities are embedded in propositions – what Bentham calls the operation of phraseoplerosis, or "completion of the phrase"[51] – exposing the hidden modifiers implicit within the expressions themselves. The complementary technique of archetypation brings fictional terms and opaque metaphors into focus on sensory experience, by tracing the lines of reference to archetypes, i.e. actual or observed bodies

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[48] Bentham Papers (25 July 1814) ci. 95.

[49] Bentham, *Works*, vol. 8, 246.

[50] Ibid. Hart's definition of paraphrasis in "Legal Duty and Obligation" – "that is to find a translation of this whole sentence into one or more sentences in which the word 'obligation' does not appear" (p. 130) – is broader than this in that it omits the requirement that the propositions yielded in analysis must have for their subjects some real entity. This omission somewhat obscures the relationship between the method and his ontology, and leads Hart to identify paraphrasis and phraseoplerosis as precursors to the later analytical method of "definition in use". I follow Philip Schofield in suggesting that this as a misleading identification once we understand the relationship between Bentham's ontology and his philosophy of language. The oversight allows Hart in his inaugural lecture to at once praise Bentham for his the insight "that we should not, as does the traditional method of definition, abstract words like 'right' and duty', 'State', or 'corporation' from the sentences in which alone their full function can be seen, and then demand of them so abstracted their genus and differentia," and, at the same time, to identify as a major source of confusion in the philosophy of law our tendency to view meaningful words as names signifying objects, without acknowledging the relationship between the two in Bentham's thought [See Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 31]. Insofar as Bentham's method of analysis can be said to have a "contextual" component, it is one carried out in service of his referential view of language: once words representing fictitious entities are embedded in propositions, their descriptive tie to the world of concrete objects can be more readily seen and their meaning thereby revealed. The much later "definition in use" method of analysis inspired by Wittgenstein's later work was a reaction to this purely designative view of language – the idea that every word has a meaning correlated with it, and that this meaning is the object for which the word stands – and the corresponding view of knowledge as fundamentally propositional. Bentham's overall theory is therefore more accurately aligned with those theories and tendencies of thought that provoked the method of "definition in use" than it is with the tradition of ordinary language philosophy that made use of it.

[51] Bentham, *Works*, vol. 8, 247.

at rest or in motion.[52]   Bentham's language is highly suggestive that the analysis by means of paraphrasis and archetypation "fixes" the meaning of the concept in question rather than merely providing an alternate interpretation of it.[53]   The reason for this is simple: if we already understand the meaning of the term, then further analysis is unnecessary or redundant.[54]   The result is to either bring down to earth those words of which "the meaning had been floating in the clouds"[55] or else to expose them as nonsense with no ties to the real or perceptible.

Simply put, then, the real world of Bentham is a world of material objects existing in nature and names or words denoting those objects.[56]   All other entities referred to in language are fictions – mental constructions whose existence is dependent upon the activity of the mind operating through language.   Fictitious entities are ordered around real entities at various removes, "distinguished by their respective degrees of vicinity to the real one."[57]   First-order fictions include motion, matter, space and time; at one further remove are second-order fictions, such as qualities and aggregations; beyond that are even more abstract fictions of the social and ethical realm, such as obligations, rights, liberty, and justice.[58]   Between the abstractions of the first and second order and the higher-level action concepts of the third, the requirements of explanation are the same: for all fictitious entities,

> the nature of the case affords but one resource; and that is, the finding some class of real entities, which is more or less clearly in view as often as, to the name of a class of fictitious entities, any clear idea stands annexed – and thereupon framing two propositions; one, in which the

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[52] As Hart notes, Bentham's archetypal image of obligation "is that of a man lying down with a heavy body pressing upon him." Bentham, *Works*, vol. 8, 247.

[53] See Ross Harrison, *Bentham* (Taylor and Francis, 1999), 51-52: "For example: 'Of either the word obligation or the word right, if we regarded as flowing from any other source, the sound is mere sound, without import or notion' (*Nomography*, III 293); or, as it is put in *Of Laws in General* of the same words 'take away the idea of punishment, and you deprive them of all meaning' (136n)."

[54] See Harrison, 51-52.

[55] Bentham, *Works*, vol. 3, 286.

[56] "The only objects that really exist are substances – they are the only real entities. To convey any notion by words which are the names of objects [other] than substances, we are obliged to attribute to such objects what in truth is attributable only to substances: in a word we are obliged to feign them to be substances. Those others in short are only fictitious entities." Bentham Papers, lxix. 241.

[57] Bentham, *Works*, vol. 8, 325.

[58] Ibid.

> name of the fictitious entity is the leading term; the other, in which the
> name of a corresponding class, either of real entities, or of the
> operations or other motions of real entities, is the leading term: – this
> last so ordered, that, by being seen to express the same import, it shall
> explain and make clear the import of the first. This mode of exposition
> has been termed paraphrasis – paraphrase: giving phrase for phrase.[59]

For lack of awareness of their status, our temptation is to try to define words like right, power, liberty, duty, and so on in terms of one another: "Instead of a superior genus, what on this occasion has been brought forward has been some term of other bearing in its import such a resemblance to the term in question as to be capable of being, one some occasions, with little or no impropriety, employed instead of it. *A right is a power – or a power is a right* – and so forth; shifting off the task of definition from one word to another; shifting it off thus at each attempt and never performing it."[60] Such a technique, though common and often acceptable at the level of ordinary discourse, is clearly fruitless for the purposes of analysis when the referent of one word is as elusive as that of the others. In denying the reality of the object corresponding to a fictitious concept like *right*, however, Bentham does not mean to deny it another sort of reality, insofar as they are traceable back to their very real "efficient causes" pleasure and pain.[61] The law, acting directly on real entities – persons and things – creates a complex pattern of rights and duties, powers and restraints, which in practice are real enough as protected or forbidden modes of action enforced by the application of sanctions. The action of the law against persons and things takes the form of the creation of offenses against specified persons or classes of them; rights are the created effects of these offenses, which prescribe for specified individuals "personal security and protection" and for "the rest of the community, restraint."[62]

For Bentham, then, what distinguished higher level concepts like duty, right, power, and so on, from lower-level stimulus-response reactions is simply distance from

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[59] Bentham, *Works*, vol. 3, 594.

[60] Ibid.

[61] The "efficient causes" of political and legal fictions are "pleasures and pain, but principally pain." Bentham, *Works*, vol. 8, 206.

[62] Bentham, *The Limits of Jurisprudence Defined: Being Part Two of An Introduction to the Principles of Morals and Legislation* (Greenwood Press, 1970). Quoted in Long 132**.**

original source; the former represent the internalized lessons of one's environment while the latter are immediately compelled by it.[63] It is only by tracing the fictitious expressions of ordinary legal discourse back to their foundations in real entities that we are able to expose them as guides to real knowledge rather than empty sophistry. There is then a level of reality beneath ordinary language to which our use of words may or may not correspond. To determine which is the case for a given use of a fictitious term like obligation, we must return the term to the concrete situation in which it applied – to the parties involved, the acts in view, and the circumstances described in a given case in which one is said to have an obligation to do or refrain from doing something. As Bentham put it, the use of a fictitious entity in "common speech" is then "a kind of allegory;"[64] it is "a riddle of which the solution is not otherwise to be given than by giving the history of the operations which the law performs in that case with regard to certain real entities."[65] In this way, "[t]hese phantastic denominations are a sort of paper currency: if we know how at any time to change them and get sterling in their room, it is well: if not, we are deceived, and instead of being masters of so much real knowledge as by the help of them we mean to supply ourselves with, we possess nothing but sophistry and nonsense."[66] The nature of the law is clarified by breaking through the "barrier" of ordinary language, replacing fictitious expressions for combinations of real ones;[67] for "it is to this abstract way of speaking, there fictitious entities alone that the law owes all its obscurity. Avoid them or explain them by the relation they bear to real ones and the law is clear."[68]

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[63] "The fictitious entities which compose this group [of the fictitious entities obligation, right, etc.] have all of them, for their real source, one and the same sort of real entity, viz. *sensation*, the word being taken in that sense in which it is significative not merely of perception, but of perception considered as productive of pain alone, of pleasure alone, or of both." Bentham, *Works*, vol. 8, 247. Punishment then acts to influence behaviour in two ways: directly, by direct physical compulsion, or indirectly, by the manipulation of the will.

[64] Bentham, *Of Laws in General* (London: Athlone Press, 1945), 251. Quoted in Long, 128.

[65] Ibid. And again, on common language: "The ingenuity of the first authors of language which if not compelled by necessity was at least invited by convenience, has thrown a kind of mystery over the face of every science, and over none a thicker than over that of jurisprudence." Ibid.

[66] Ibid.

[67] Ibid.

[68] Ibid., 252.

1.5. Legal Obligation and Human Agency

Already a different picture of the human being than the one implied by Hart's rule-based account of legal obligation has begun to emerge. Bentham's theory of fictions, whose purpose it was to resolve abstract ideas like obligation into heuristic shorthands for combinations of real entities, minimized the role of the faculty of the understanding which dominated nineteenth century philosophy of psychology, negating the independent status of cognition by giving it a physiological basis. As Douglas Long puts it, the result was to "resolve Locke's duality of sensation and reflection into a unity wherein sensation is the cause even of reflection," thus converting "the temporal sequence of sensation-reflection into a causal sequence."[69] By identifying only sensations as the springs of action, and not intangible abstractions or the specialized work of the understanding, Bentham's motivational theory posited a tight relationship between stimulus and response that put human beings on a level with natural and mechanistic systems. Human beings' capacity for memory allows the causal efficacy of sensory stimuli to be extended through time: "[H]uman motivation was physical-sensibility, given temporal extension by the human capacities for memory and anticipation."[70] What distinguishes human action from natural or mechanical processes is the involvement of the will, which is itself determined by its environment as "a branch of the appetitive faculty;"[71] both are explained in terms of bodies at rest or in motion, with the will entering into the causal sequence of the former: "When considered as the result of motion, any state of things is termed an *event*."[72] Considered as the outcome of volition, "an event is itself termed an action, or is considered as having action, an action, for its cause."[73] The result was to embed actions within the framework of Newtonian causation: just as mechanical causation determines the future condition of the universe as a function of its condition at an earlier time, so too are all future actions determined by the previous state of the material world acting upon

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[69] Long, 24.
[70] Ibid., 34.
[71] Bentham, *Works*, vol. 8, 279.
[72] Ibid., 300.
[73] Ibid.

our innate physiological nature – our natural subjection to the dictates of pleasure and pain.

In the area of law, the relationship between sovereign and subject – and the "ought" of legal obligation – follows directly from this earlier requirement: "the reduction of the social side of human psychology into a mere matter of physiology ('physical sensibility')."[74] In keeping with his rejection of the will as a source of freedom, Bentham rejected libertarian accounts of the nature of political society and defined it instead in terms of power and subjection. Rather than positing, with the contract theorists, an act of reasoned consensus as the basis of political authority, Bentham made physical sensibility the grounds of law with the notion of a "habit of obedience" to powerful persons.[75] While the contractual model was an abstraction found nowhere in the real world, human beings' natural subjection to superiors was a matter of obvious empirical fact, exemplified not only "in our own and every other civilized nation that we know of,"[76] but also in the structure of authority of that most ubiquitous of social institutions: the family.[77] Sir Robert Filmer's patriarchal theory of governmental authority provided the inspiration and sociological backing for Bentham's own account,[78] whereby human beings' experience of domestic authority as children eases them into a state of political subjection as adults:

> Under the authority of the father, and his assistant and prime-minister the mother, every human creature is enured to subjection, is trained up into a habit of subjection. But, the habit once formed, nothing is easier than to transfer it from one object to another. Without the previous

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[74] Long, 211.

[75] "When a number of persons (whom we may style subjects) are supposed to be in a habit of paying obedience to a person, or an assemblage of persons, of a known and certain description (whom we may call governor or governors) such persons altogether (subjects and governors) are said to be in a state of political society." Bentham, *Works*, vol. 1, 263.

[76] Bentham Papers, University College London Library (2 October, 1814), lxix, 203-4, quoted in Long, 34.

[77] "Filmer's origin of government is exemplified everywhere: Locke's scheme of government has not ever, to the knowledge of any body, been exemplified any where. In every family there is government, in every family there is subjection, and subjection of the most absolute kind: the father, sovereign, the mother and the young, subjects." Bentham's manuscript, "Locke, Rousseau and Filmer's Systems," printed in Elie Havély, *La Formation du Radicalisme Philosophique*, vol. 1, appendix 3, 312, quoted in Long, 34.

[78] Long, 34.

establishment of domestic government, blood only, and probably a long course of it, could have formed political government.[79]

In both the domestic and political contexts, the habit of obedience is established and secured in the same way, i.e., by the organization of the hedonistic social environment via the manipulation of pleasures and pains. Forgetting this early stage of his development, Locke had reversed the proper order of priority as between government and contracts:

> Locke had speculated so deeply, and reasoned so ingeniously, as to have forgot that he was not of age when he came into the world. Men according to this scheme come into the world full grown, and armed at all points like the fruit of the serpent's teeth sown by Cadmus at the corners of his cucumber bed. Warned by the fate of the children of the Serpent, Locke's children, having got Ovid's *Metapmorphoses* by heart before they were born, chose King and Queen, before they sat down to their twelfth cake, and made a bargain with his Majesty for his governing them. But why be at the trouble to make a bargain? What sort of thing was a bargain? What reason had they for expecting that if made it would be kept?... These were questions which it never occurred to him to ask himself. If it had, he would have found no answer till he came to *government*, and thus he would have found, if contracts capable of binding are what is meant (and what is a contract good for that does not bind?) it was contracts that came from government, not government from contracts.[80]

Bentham's derisive response to the contractual theory mocks the inflated sense of freedom and distance from the natural order that civilization allows us. To him, Filmer's generalization of the concept of "paternal authority" to explain the nature and origins of government had provided "a complete refutation to the doctrine of universal and perpetual equality;" with it, he had proved "the physical impossibility of absolute equality and independence by showing that subjection and not independence is the natural state of man."[81] For Bentham, human nature is hedonistic in a more fundamental sense than it is political, the political being simply the accumulated result of so many reflex adaptations to the environment. As Long puts it, the point is that "political authority in general (or in its essence) depends on historical or sociological factors extrinsic to law for its

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[79] Bentham, "Locke, Rousseau, and Filmer's Systems," 312.
[80] Ibid., 312.
[81] Ibid.

stability."[82]   The habit of obedience is thus revealed as the real source of popular acceptance of the obligation to keep contracts, and to obey the law more generally.

1.6. Naturalism and Normativity

This limited sketch of Bentham's sanction-based account of legal duty is meant to give a sense of why the normative dimension of law and legal concepts – and of human action more generally – was so peripheral to the theories of the early positivists. Simply put, they did not see any interesting philosophical problem here. This is because they never doubted the possibility that all human activity, even at the higher levels of social and cultural practice, could ultimately be reduced to its more basic, constitutive components. To those caught up in the reductionist spirit of the seventeenth and eighteenth centuries, every major breakthrough in scientific understanding seemed to have resulted from the conceptual-explanatory reduction of concepts, laws, and relations to more fundamental terms, which in Bentham's time meant spacial, mechanistic terms. Given the extraordinary power of this model for explaining and controlling the natural world, Hobbes, Bentham, and others, including the later behaviourists and logical positivists, quite sensibly supposed that our understanding of human action and psychology would benefit from integration into that same system. Normativity is a blind spot on this model because the possibility of empirical reduction acts as a kind of pre-commitment of theory construction, part of the unqualified applicability of science – and hence of causal descriptions – to all aspects of the world, including human life. For Bentham, this meant a faith that his utilitarian insights could illuminate the darkest corners of "the universe of human actions" in a way continuous with the Newtonian laws of motion, by relating every kind of activity back to its causal origins in human physical sensibility.[83]   His elimination of abstract ideas from the realm of real entities, and thus

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[82] Long, 34.

[83] As Long writes, "[t]he study of law thus led to the study of politics and beyond it to the study of society as a web of human interaction. Why? Because Bentham's study of the law was, from the beginning, simply a focusing of his basic interest in the 'science of human nature.' From the beginning, when he determined to his satisfaction that physical sensibility was the ground of law, the enterprise of correlating an anatomy of human physical sensibility and a 'universal map of jurisprudence' beckoned to him.

from his list of "the springs of action," followed from his view of the individual as a sensory organism obedient to the dictates of his own physical constitution – a view that was itself a product of the naturalistic assumption that normative facts could be analysed without remainder into non-normative ones. There is then no significant epistemological difference between statements about agents or action and any other scientific statement: what is for Hart an irreducibly normative fact – legal obligation – is on Bentham's theory an abstraction come loose from its empirical base but nevertheless traceable back to its foundation in observed phenomena, i.e., in human reactions to external stimuli.

My suggestion now is that we might understand the role of the bad man in Holmes' analysis along these same lines. What motivates Perry's argument is that he cannot understand the appearance of such an "overtly normative"[84] figure on a scientific theory: "From a scientific point of view," he writes, "there is no obvious or necessary rationale for bringing in the concept of a reason for action at all here."[85] But it is not so difficult to understand on an analysis like Bentham's, where a consideration of the "springs and motives of all our actions" is part of the naturalization of human agency: if human behaviour can be treated as akin to the motion of physical systems – as the determined effect of fixed inputs – then the study of social phenomena can be reduced to a problem in human mechanics. We might compare, for example, Bentham's statement that if we "take away pleasures and pains," then the concepts of duty, right, etc. "are so

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However this could remain no simple exercise in legal theory. It constituted a systematic social theory, presupposing on one hand the discovery of a logic of human action and on the other an exhaustive analysis of the nature of law in its broadest sense as social imperation, a theory of politics, and more. It presupposed a systematic examination, of the traditional categories of philosophical inquiry as they applied to social phenomena: a metaphysics, an epistemology, a logic, and an ethics of human action and motivation. In short, the completion of Jeremy Bentham's grand intellectual enterprise presupposed the creation of a philosophy of social science." Long, 208.

[84] Perry, "Holmes versus Hart," 167.

[85] Ibid., 167. Robert Gordon has emphasized that Holmes began "The Path of the Law" not as an essay on jurisprudence but as a speech, and a speech for a particular ceremonial occasion – the vocational address. In a setting meant to celebrate the value of the lawyer's work, Holmes may have relished the opportunity to remind his audience of this less exultant of the lawyer's roles: paid counsel to the miscreant. See Robert W. Gordon, "Law as a Vocation: Holmes and the Lawyer's Path," in *The Path of the Law and Its Influence*, ed. Steven J. Burton (Cambridge: Cambridge University Press, 1998).

many empty sounds"[86] with Holmes' description of a legal right as "an empty substratum … to account for the fact that the courts will act in a certain way":

> So we prophesy that the earth and the sun will act toward each other in a certain way. Then as we pretend to account for that mode of action by the hypothetical cause, the force of gravitation, which is merely the hypostasis of the prophesied fact and an empty phrase. So we get up the empty substratum, a *right*, to account for the fact that the courts will act in a certain way. We have got used to our phaseology and might find it hard for a time to do without it; but in that as in other cases I think our morally tinted words have caused a great deal of confused thinking.[87]

"Leaving aside the bad physics," Perry writes, "the point here is clearly that the concepts of legal right and duty are at best redundant and at worst a source of confusion."[88] But what if the bad physics are not beside the point? Apart from raising doubt as to the meaningfulness of our "morally tinted words" in the realm of law, the point of the mechanical analogy is to substitute the observable for the unobservable: the movements of bodies for the force of gravitation, facts plus legal consequences for rights. In this sense, the passage links up with one of the major themes in Holmes' thought: "Subjectivity in the form of actual intentions is supressed and replaced by a description of observable, outward facts."[89] As I noted above, Perry's misgivings about the scientific interpretation of Holmes' analysis are motivated by the apparent incongruence of the figure of the bad man with this kind of purely "external" methodology. As he writes, the bad man, no less than the good or socialized man, acts on the basis of intentional entities such as reasons, purposes, desires, etc., which then operate as motivational premises in the theorist's practical arguments for making sense of what he does. What we might notice from Bentham's analysis, however, is the readiness with which such entities drop out where "every motive is the expectation of some pain or pleasure"[90] – where the defining feature of agents is their hedonistic single-mindedness. Where the real source of action is not the actor himself but the reward contingencies to which he is subject,

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[86] Bentham, *Works*, vol. 4, 161.
[87] Holmes to Pollock, quoted in Perry, 184.
[88] Perry, 184.
[89] Robert Gordon, "Holmes' Common Law as Legal and Social Science," *Hofstra Law Review* 10 (1982): 725.
[90] Bentham, "Locke, Rousseau, and Filmer's Systems," 312.

subjective explanations in terms of inner purposes are straightforwardly redeemable for objective ones in the language of environmental causes and their behavioural effects.[91]

Another way to put this point is that, between reductionist and anti-reductionist accounts of human action, it matters where we locate the *source* of behaviour. As Skinner saw it, a properly "scientific" analysis of motivation relocates the origin of action from the "autonomous agent" – to whom "behaviour has traditionally been attributed" – to "the environment ... in which the behaviour of the individual is shaped and maintained."[92] In the study of law, the demand is then for an account of the *cause* of law-abidingness, i.e., of the underlying causal or generative mechanisms that compel obedience to legal rules. Hart's suggestion that rules themselves can be reasons for action moved legal theory away from such a search for causes, but it could only do so attended by a very different picture of human beings as, in some genuine sense, sources of action themselves. Human agents are beings who really act, who really choose between alternatives, who are sometimes motivated by reasons and not by causes. In a revealing passage, Hart points to the "important general principle" which underpins both the hermeneutic method of his descriptive jurisprudence and the requirements of justice that attach special significance to actions voluntarily performed:

> Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of intentions and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects…. If as our legal moralists maintain it is important for the law to reflect common judgments of morality, it is

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[91] The question of whether human behaviour can be fully captured in mechanistic terms – whether purposive explanations are, in principle, reducible to mechanistic ones – is, of course, a controversial one, but reductionist efforts have historically been underwritten by the principles of utilitarianism in the way described above: as Bentham put it, the "final causes" pains and pleasures are also capable of being understood "in the character of *efficient* causes or means." Bentham, *Works*, vol. 1 (1838) 14. As neo-classical (Benthamite) economist Francis Edgeworth wrote, the hope was explicitly that "the *conception of Man as a pleasure machine* may justify and facilitate the employment of mechanical terms and mathematical reasoning in social science" [Edgeworth, *Mathematical Psychics*: An Essay on the Application of Mathematics to the Moral Sciences (London: Kegan Paul and Co., 1881) 16].

[91] B. F. Skinner, *Beyond Freedom and Dignity* (Hackett Publishing, 2002) 184.

> surely even more important that it should in general reflect in its judgments on human conduct distinction which not only underly morality, but pervade the whole of our social life. This it would fail to do if it treated men merely as alterable, predictable, curable or manipulable things.[93]

What we might notice about the bad man, then, is that there is nothing distinctively *human* about his obedience to law. He obeys legal rules as a dog responds to the commands of his master. Legal rules then have a kind of derivative normativity insofar as they are accompanied by threats of force, but they are not "overtly normative," to use Perry's phrasing – they have no irreducible normativity of their own. For one concerned only with the material consequences of his actions, law operates solely as a kind of pricing mechanism, altering the social environment by raising the cost of noncompliance (or lowering the cost of compliance) in such a way as to produce the desired behaviour. Hart's claim that rules themselves can be reason-giving was, by contrast, the claim that normativity is basic to human agency – that human agency (as opposed, e.g., to animal agency) is marked by its sensitivity to rules and standards.[94] The view of law as a system of rules thus released the conceptual connection between legal obligation and sanctions, but it also loosened the hold of the environment on human action more generally: it went

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[93] Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) 182. In *The Common Law*, Holmes also notes our impulse to punish intentional wrongs more severely than nonintentional ones and suggests that law reflect "the actual feelings and demands of the community," but his justification is more pragmatic than moral: "If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus to avoid the greater evil of private retribution." Holmes, *The Common Law* (The Lawbook Exchange, Ltd., 2005) 41. More famously, however, he argued that "the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise." Holmes, *The Common Law* (Belknap Press of Harvard University Press: 1963) 88.

[94] Hart has a curious footnote drawing support for his idea of the internal point of view from two seemingly opposed sources: Peter Winch, *The Idea of a Social Science* (1958), and Ralph Piddington, "Malinowski's Theory of Needs" in *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski* (London: Routledge and Kegan Paul, 1957). The point of agreement between these otherwise largely incompatible works is their emphasis on the irreducible normativity of human (as opposed to animal) activity. For Winch, a rule is a standard reflectively applied, and rule-following an essentially human activity: animals act habitually and not by reflectively applying rules (Winch, 57-60). For Piddington, too, human activity is "determined by a fixed system of values, which defines how individuals should or should not behave. These values are crystallized in a system of symbols which enables individuals to evaluate the behaviour of others, irrespective of whether they are or are not themselves affected or involved" (Piddington, 36-37).

along with conception of human beings as autonomous and responsible centres of action capable of recognizing and responding to norms.[95]

What Hart fails to acknowledge in the above passage, in other words, is that the early positivists and legal realists generally – and often quite pointedly – did not shrink from the implications he took to be damning of the imperative theory: its failure to capture "the whole distinctive style in human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society."[96] Could Holmes, with his mechanical analogies for human behaviour,[97] his comparison of people to dogs and seals,[98] his flat refusal to ground legal rules in the free and self-determining nature of the human personality,[99] really be disturbed by the accusation that he had failed to capture what is distinctive about human beings? How deeply the reductionist strand runs through Holmes' thought is, of course, a matter of interpretive debate, but the point can be put more generally as well.[100] What often gets

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[95] Hart is careful to note that this does not commit him to any ultimate position on the existence of free will in the metaphysical sense, and his descriptions of free or voluntary action his writings on responsibility are deliberately compatibilist [e.g., a movement is not involuntary unless it occurred "though the agent had not reason for moving his body in that way." See Hart, "Legal Responsibility and Excuses," in *Determinism and Freedom in the Age of Modern Science*, ed. Sidney Hook (New York: NYU Press, 1958)]. See also *Causation in the Law*, (co-authored with Tony Honoré): a human agent is "most free when he is placed in circumstances which give him a fair opportunity to exercise normal and physical powers and he does exercise them without pressure from others." Hart and Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959) 138. Hart's understanding of free action is, however, at least incompatible with the extreme reductive-mechanistic understanding of human behaviour wherein reasons are reducible to causes – as Hart puts it above, with the view of "men merely as alterable, predictable, curable or manipulable things" (*Concept*, 86).

[96] Hart, *Concept*, 86.

[97] See Holmes letter to Pollock above, quoted in Perry, "Holmes versus Hart," 184. Perry also cites a 1914 letter to Chipman Gray in which Holmes characterizes the normative language of rights and duties as a kind of idle wheel, appearing to have some causal role in action but doing no essential work: "I became convinced that the machinery of rights and duties was a fifth wheel." Quoted in Perry, "Holmes versus Hart," 184.

[98] Holmes, *The Common Law*, 213.

[99] Ibid., 206-215.

[100] I agree with the observation of Max Lerner, Robert Gordon, and others that Holmes seemed uncertain himself: as Lerner writes, "[w]e have here the behaviorist definition of law, squeezing it dry of all morality and sentiment; and we have also the attempt to bring in the element of faith and energy as a natural part of the human mind. I tend to agree with [Lon] Fuller and some others that Holmes did not adequately bridge the gaps between the two worlds. There was in him a deep conflict between skepticism and belief, between mind and faith, between a recognition that men act in terms of a cold calculation of interests, and a recognition also that they are moved by symbols which, if you squeeze the life and energy out of them, become merely tinsel and rag. He tried to construct a legal theory, as he tried to construct a philosophy of

overlooked on reconstructions of the disagreement between rule-based and sanction-based theories of law is that all have the same raw data in common: even Ross, the most extreme of the "extremely reductive" realists, frequently noted the "disinterested attitude of respect for the law" that commonly "acts as a motive to lawful behaviour,"[101] but he saw these "existing attitudes" as "merely the raw material that must be refined" and not as theoretically basic themselves.[102] As he put it, the question is "whether the attitudes are conditioned by an inadequate conception of reality and thus need correction in the light of a more adequate scientific insight."[103] That people see themselves as bound by law is thus not something Bentham or Austin or even Ross need dispute, just as Hart need not deny that people sometimes obey the law prudentially or by sheer force of habit. The difference between the two concerns rather the deeper, conceptual question of what constitutes an adequate description of the subject matter – of what is explanatory or recalcitrant among the widely shared data.

All this is not to suggest that there are not good reasons for rejecting the reductive account of law and legal obligation in favour of a fully normative one, but rather to show the depth of the disagreement between these two views. As Philip Schofield writes,

> Bentham's concern was not to find a morally neutral language by which law might be described, still less to reconstruct common usage, but to relate the names of fictitious entities, which 'abound so much in ethics and jurisprudence', to their 'real source'.... Bentham went so far as to argue that it was his invention of new techniques of exposition which had led to discoveries in the fields of morals, law, politics, and economics, and had thereby given 'a distinct and fixt meaning ... to a numerous tribe of words of which ... the meaning had been floating in the clouds'. This helps to explain why Bentham grounded his legal theory in the habit of obedience, a fictitious entity which might be explained by reference to the actions of really-existing persons, rather

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life for himself, which would allow him to take account of both strains. He was not wholly successful logically in the attempt, but he made a going concern of it" [Max Lerner, *The Mind and Faith of Justice Holmes* (New Brunswick, NJ: Transaction Publishers, 1989), p. 372-73]. See also, Robert Gordon, "Holmes' Common Law as Legal and Social Science," *Hofstra Law Review* 10 (1982).

[101] Ross, *On Law and Justice* , 160. Jeremy Waldron has made the same observation about Austin, pointing out that Austin was as willing as Hart to recognize the internal point of view with regard to the rules at the foundations of law (see, e.g., Austin, *The Province of Jurisprudence Determined* (Noonday Press, 1954) 215-6). Waldron, "Are Constitutional Norms Legal Norms," in *Fordham Law Review* 75 (2006), 1700.

[102] Ibid., 370.

[103] Ibid.

> than something like Hart's normative conception of content independent and peremptory reasons. In short, it is the different ontological theories of Bentham and Hart, a difference which Hart glosses over, which is responsible, to some extent at least, for their differing explanations of the nature of law.[104]

We gloss over the deep differences between the accounts if we think that our ordinary normative concepts can by themselves provide the justificatory grounds for rejecting Bentham's account in favour of Hart's. For Bentham, we saw, our normative discourse concealed a deeper reality in which the display of rule-following or normative behaviour can be accounted for in terms of an individual's ongoing relationship to her natural environment. The notion of obeying rules in a normatively guided sense is thus replaced by an account in which patterns of behaviour are reinforced in connection with features of the environment. What is suggested, then, is that normative rules be redescribed as, or seen as shorthand for, descriptive generalizations about self-interested or self-preserving behaviour. This kind of obscuring of the distinction between a norm and an empirical claim was, for Hart and the ordinary language theorists, a fundamental mistake of reductive accounts of human activity; to "externalize" a relation was to take the grammatical or the criterial for the empirical. The point of internalizing the relation between rules and practices was to resist the naturalistic urge to assimilate normative compulsion to causal compulsion, by challenging the associated view of rules as themselves as normatively inert. For Hart, sanction theories that defined legal duty in terms of the power of the state to enforce sanctions must have begun from precisely this misplaced starting point: the question of how normative relations get introduced into a normative void. On the ordinary language account, the question was misplaced because there never is such a void: human action is essentially and irreducibly normative, always subject to evaluation in terms of failure and success. In taking the normative as *sui generis*, then, Hart made such normative concepts as right, obligation, ought, etc. basic to the analysis of law and other social phenomena, but he could only do so accompanied by his own image of human beings as more than bundles of conditioned responses to their

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[104] Phillip Schofield, "Jeremy Bentham and H. L. A. Hart's 'Utilitarian Tradition in Jurisprudence'," in *Jurisprudence* 1(2010), 162.

environments – an image that took seriously the claims to agency, to self-determination, to responsibility embodied in the language of our social practices. Thus, as Richard Bernstein writes,

> [i]n the tangle of subtle issues concerning the status of human action, we catch a glimpse of what has certainly been a primary issue for philosophy: Just what sort of creature is man? If it is possible, even in principle, to give a fully adequate account of man in terms of concepts and laws available to the physical sciences – ideally to tell the complete story of what man is in the language of physics – then one need not countenance any special types of concepts or new types of laws in order to describe and explain human action. Such a view is a necessary (although not yet a sufficient) condition to support the thesis of the mechanistic materialist that man is *nothing but* a complex physical mechanism, differing in degree of complexity but not in kind from other physical mechanisms. But if the new teleologists can make out their case – in particular, that teleological concepts are not reducible to mechanistic concepts and are essential to account for human action – then the thesis that man is nothing but a complex physical mechanistic is false, and we can know a priori that it is false.[105]

Contra Perry, then, it is not that Hart must take a normative turn because he shares with the predictive account a common methodology. Rather, when the possibilities for comparative evaluation are limited by different and incommensurable methodologies, we arrive finally at the following question: what kind of explanation is appropriate to the study of the subject matter?

1.7. Conclusion

The main problem with Perry's approach is that it sets up the available methodological positions in such a way as to leave no available ground between an "extreme external" account and a hermeneutic one: hermeneutic theories are defined so broadly as to include any analysis that recognizes human motivation at all, and naturalistic ones so narrowly as to rule out any possibility of a scientific consideration of

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[105] Richard Bernstein, *Praxis and Action*, (University of Pennsylvania Press, 1977), 238. Bernstein goes on to object to what he sees as the unacknowledged *a priori* bases of both reductionism and ordinary language philosophy.

motivation.[106] Perry's mistake is then to think that Holmes is better protected from Hart's criticisms of the sanction theory by being placed with him in the hermeneutic tradition, but this only invites Shapiro's easy rejoinder, i.e., that Hart simply had the better hermeneutic theory. My examination of Bentham's jurisprudence was meant to offer a third methodological alternative to the two here: Bentham's theory represents an attempted scientific analysis of law that is not strictly limited to "observable regularities of conduct, predictions, probabilities, and signs,"[107] but that nevertheless offers an account of law in which peoples' own understanding of their activity is superseded scientifically. Unlike on a hermeneutic account, then, such analyses are not vulnerable in any straightforward way to the criticism that they stray from our ordinary understanding of things or from established uses of language.[108] As Hart observed, there are significant costs to the reductionist approach, since it precludes us from talking meaningfully about areas of our lives that are crucially important to us. But if one is willing to accept this price – as, I have argued, many of the classical positivists and legal realists were willing –

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[106] See, for example, Perry's original statement of the problem in the opening pages of his article: he asks, was Holmes "putting forward a theory of law in a jurisprudential sense, as opposed to a would-be scientific theory of some kind or a pure exercise in realpolitik and demystification? Is there, implicit in the various theoretical-sounding but discrete observations about the law that Holmes offers in his essay, a theory of law that can be said to join issue with the preceding theories of Hobbes, Bentham, and Austin, or with the contemporary theories of H. L. A. Hart, Joseph Raz, and Dworkin?" ("Holmes versus Hart," 160). Perry's intended distinction here is between "anti-theoretical" and "theoretical" propositions about law (ibid., 159), but the result is to collapse together the very different approaches of the classical positivist (who, we have seen, also had scientific or "debunking" ambitions) with those of contemporary hermeneutic theorists.

[107] Hart, *Concept*, 89.

[108] By the time Hart argued for the irreducibility of legal obligation via an analysis of our normative vocabulary "'ought', 'must', and 'should', 'right' and 'wrong'," such a refrain was already familiar in mid-century philosophy of action as a response to the type of linguistic empiricism inspired by Wittgenstein and practiced by philosophers like J. L. Austin, Gilbert Ryle, etc. J. C. C. Smart makes the point:

> That a set of concepts seems "natural" within a particular culture has little theoretical significance. Suppose that a couple of hundred years ago someone had said: "The set of concepts in terms of which the explanation of gravitational attraction is naturally given is radically different from those of geometry." Two hundred years ago this pronouncement would have been right, but if the same thing were said now it would be false: Einstein has replaced the Newtonian explanation of action at a distance by a theory in terms of the geometry of space-time. So it seems to me that the fact that it is not at present "natural" to explain behaviour in terms of physiology and related sciences has very little bearing on whether the correct or most satisfying explanation of behaviour should be in such terms. J. C. C. Smart, "Symposium: Causality and Human Behaviour," in *Aristotelian Society Supplementary Volume 38* (1964), 143.

then the debt is paid in full: the reductionist does not owe the anti-reductionist an account in which our ordinary understanding of agency is left intact.[109]

The disagreement between reductionism and non-reductionism, between sanction-based and rule-based theories of law, is in this sense a paradigm case of deep disagreement: not only do we disagree as to the details of a substantive theory, but we also lack common resources for how the dispute might be settled. It does no good for Hart to argue that, if reductionism entails that there is no such thing as legal obligation *really*, then reductionism must fail as a descriptive theory, since we really do have legal obligations. For here Hart's modus ponens is the realist's modus tollens: if reductionism entails that really there are no legal obligations, then in fact there are none, as reductionism is true. My goal in this chapter was not to argue that there then are no good or reasonable grounds for deciding between these two analyses, but rather to suggest that such grounds are not located where we might have expected them; what mediates the link between theory and methodology is a certain view of the nature of human agency which sets the terms for how we talk about people and their activities. It was also to show, therefore, that Hart's positivism is not as metaphysically abstemious as he and others have supposed. In chapter two, I explore the implications of this latter conclusion for Hart's rule-based account of law.

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[109] There is another argument that is often made against the reductive account; this is that we cannot help but employ intentional language in speaking about action. See, e.g., Daniel Dennett, "Intentional Systems," in *Brainstorms: Philosophical Essays on Mind and Psychology* (MIT Press, 1981), 13-4. But this is different than arguing that it does not recognize entrenched conceptual distinctions, which the reductive theorist need not accept as necessary or inescapable.

Chapter Two

The Hart-Fuller Debate:

Hart and Fuller on Law as General Rules

2.1. Introduction

In chapter one, I argued that implicit in Hart's anti-reductionism is a particular ontology: to assert the primacy of normativity over causality in the explanation of human activity is to put forth a particular view of human beings as genuine agents, as the bearers of unique powers in the world. In this chapter, I use this conclusion to shed light on Lon Fuller's elusive claim that law exhibits an internal morality. For Fuller, the view of law as a system of general rules involved a recognition that law operates by recognizing the essential humanity of subjects, harnessing their capacity for rational self-determination and voluntary self-control in relation to norms they can understand. Hart's rejection of the sanction theory in favour of a rule-based one was thus bound up with the idea "that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."[110] The morality of law arises from this special connection between the principles of rule-making and the fate of persons, since good legal craftsmanship will be associated with such values as respect for others, self-restraint, and a concern for reasoned justification. Fuller's goal in constructing a jurisprudential theory was thus to connect the description of the nature of law with the conditions of the possibility of law so described. His fundamental criticism of Hart was that he had failed to fully recognise what these conditions were with respect to his rule-based account of law, what sorts of capacities are presupposed as belonging to participants in a social order that relies fundamentally on the self-application of general rules.

In section one, I outline the famous exchange between Hart and Fuller as it is most often reconstructed in the literature. I argue, in section two, that a proper engagement with Fuller's thesis has been undermined by the tendency to cast it in the instrumental

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[110] Lon Fuller, *The Morality of Law* (Yale University Press), 162.

terms set by Hart, as a claim about the effectiveness of rule-based governance for achieving contingent political goals. In section three, I suggest that Fuller's account represents a genuine alternative to the instrumental conception of law as simply a means for the attainment of social ends; certain ideals are expressed by law itself, and in that sense are not detachable from our understanding of the legal form as the means by which they are manifested and pursued. In section four, I explore further the conceptual claim put forth by Fuller that law is internally related to morality, as relates to the way that the form of law instantiates respect for the legal subject. Once we understand the centrality of the relationship between law and agency in Fuller's thought, we can better appreciate why he insisted that his eight principles of legality are criterially related to law, and why they should also be regarded as moral.

2.2. *Fuller on the Rule of Law*

The famous exchange that came to be known as the Hart-Fuller debate began in 1957, when Hart delivered the Oliver Wendell Holmes lecture at Harvard Law School. As the story goes, Fuller, then the Carter Professor of General Jurisprudence at Harvard, became visibly agitated as he listened to Hart speak. He demanded a "right of reply" from the *Harvard Law Review*, which published his "Positivism and Fidelity to Law – A Reply to Professor Hart" alongside Hart's lecture in its 1958 volume. In his paper, Fuller challenged Hart's distinction between law and morality by calling attention to the moral significance of the legal form; his argument was that a necessary connection between law and morals obtained in the requirements of good law-making – principles requiring prospectivity, coherence, publication of laws, and so on – which he famously called the "inner morality of law." The controversial (and ambiguous) claim was that there exists a relationship of some sort between the observance of these principles and the quality of external ends pursued by a given system: a healthy rule of law is linked with morally sound substantive law, while injustice and oppression will tend to be accompanied by marked failures in legal morality. To this end, Fuller emphasized the gross violations of legal principle that had accompanied the evils of rule by the Nazis, the irregularities of

form and procedure that removed inhibitions on state power and left people at the mercy of an arbitrary and malicious government. Hart, in his narrow focus on formal criteria of validity, had too readily conceded that the horrors committed during this period were lawful – as if "the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman."[111] In response, Fuller put forth two claims. First, he suggested that attention to these formal and procedural irregularities might affect our willingness to describe Nazi rule as rule by law, since they significantly affected people's ability to govern their interactions via the use of rules. Second, he argued that these departures from the rule of law can themselves be seen as moral violations, independent of the heinous acts the rules prescribed.

Fuller's discussion of the inner morality of law takes its most familiar form in Part II of *The Morality of Law*, where he outlines what he calls "The Morality That Makes Law Possible."[112] These desiderata are expounded by way of contrast with eight ways in which a lawmaker might fail to bring a functioning legal system into existence: (1) failure to achieve rules at all, so that every decision must be made on an *ad hoc* basis; (2) failure to publicize, or at least make available, the rules that people are expected to observe; (3) the abuse of retroactive legislation; (4) failure to make the rules intelligible; (5) enactment of contradictory rules; (6) enactment of rules that require conduct beyond the capacities of the affected parties; (7) too-frequent change of the rules so that subjects cannot orient their behaviour by them; (8) lack of congruence between the rules as announced and their actual administration.[113] Corresponding to these failures "are eight kinds of excellence toward which a system of rules may strive."[114] The aspirational ideal is one in which a balance is achieved between these sometimes conflicting standards, in a way that optimizes the health and success of law in its fundamental task of subjecting human conduct to the governance of rules. Crucially, for Fuller the eight principles did not simply describe an ideal of good legal craftsmanship but were criterially related to the concept of law itself: "A total failure of any of these eight directions does not simply

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[111] Ibid., 650.
[112] Fuller, *Morality of Law*, 33 (title of Chapter II).
[113] Ibid., 33-39.
[114] Ibid., 41.

result in a bad system of law; it results in something that is not properly called a legal system at all."[115]

In *The Morality of Law*, Fuller persisted in arguing that Hart had overestimated the practical compatibility between the rule of law and the pursuit of iniquitous ends. At the very least, the claim calls for some "significant examples of regimes that have combined faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare."[116] Hart's use of the case of the Nazi grudge informer was overly simplistic, insofar as it failed to take adequate account of the escalating administrative and interpretive excesses that contributed the progressive derogation of legal principle and the gap between these laws and treason as ordinarily understood. On Fuller's account, it was "more than an accident" that the grossest violations of justice under Nazi rule were accompanied by the most significant violations of conventional standards of legality – by the tendency toward secrecy, retroactivity, and a general disregard for legal restraints on power:

> It was in those areas where the ends of law were most odious by ordinary standards of decency that the morality of law itself was most flagrantly disregarded. In other words, where one would have been most tempted to say, "This is so evil it cannot be a law," one could usually have said instead, "This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law." I think there is something more than an accident here, for the overlapping suggests that legal morality cannot live when it is severed from a striving toward justice and decency.[117]

The point to be examined, of course, is just what this "more than accidental" relationship between law and justice comes down to. Perhaps the most enduring impression of Fuller's contribution to the debate is that, despite his dogged insistence that a faithfulness

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[115] Ibid., 39. In his later "Reply to Critics," Fuller went on to suggest that the most important principle is that of congruence between declared rule and official action: in the legal context, this principle forms the basis for a relationship of reciprocity between law-giver and citizen that is essential to law.
[116] Ibid., 154.
[117] Fuller, "Fidelity," 661. Some critics have taken Fuller's reference to faith here as an admission that he had no real argument for this claim. See, e.g., Matthew Kramer, *In Defense of Legal Positivism* (Oxford: Oxford University Press, 2003), 44: "In 'Positivism and Fidelity to Law,' he simply asserted a link between coherence and goodness, without argument ('Positivism', 636); he was correct to think that such an assertion would seem naïve."

to the principles of legality alleviates the risk of morally compromised law, he seemed at a loss to explain just what the relationship between the internal and external morality of law consisted in conceptually; in the end, he at one point suggests, it must rest on "a belief that may seem naïve, namely, that coherence and goodness have more affinity than coherence and evil."[118] At times, the suggestion seems simply to be that people do not like to articulate their bad intentions, and so will tend toward secrecy, retroactive enforcement, etc. in carrying them out − a claim that, even if plausible, is also contingent, and so without real consequence to the positivist thesis that "it is in no sense a *necessary* truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[119]

As I noted above, Fuller puts forth two controversial claims. The first is the assertion that the eight principles are criterially related to law, such that there comes a point in a system's failure to observe them in which we would have to say that it does not qualify as a legal system at all. While Hart seems to acknowledge that there is a threshold below which this form of social control ceases to function, he also tends to treat the principles less as existence conditions for law than as practical constraints on the lawmaker's ability to effectively carry out his will.[120] There thus remains considerable conceptual space between the claim that the legal system exists and the claim that it satisfies the criteria of legality, though it is not always clear how much.[121] More

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[118] Ibid., 636.

[119] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 181. (Emphasis added). As Fuller put it, "[w]hen men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are." "Fidelity," 636.

[120] In *The Concept of Law*, Hart writes that if social control by general rules "is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be." *CL*, 202. But in his review of Fuller's book, he catalogues the principles under "the notion of efficiency for a purpose," seeming to characterise them as simply principles for the efficient pursuit of a given end. Hart, "Book Review: "The Morality of Law," in *Harvard Law Review* 78 (1965): 1285. For Fuller, this latter view eliminated the reciprocity that is essential to law and distinguishes it from managerial direction, where the generality of rules is simply a matter of practical efficiency allowing a superior to give effect to his own will. The difference is that the principles of effective management can be overridden as expediency requires without damaging the basic relationship between ruler and subject.

[121] In his 1958 Holmes Lecture, for example, Hart calls the prospectivity requirement "a very precious principle of morality endorsed by most legal systems," but does not speak of it as being connected in any

controversial is Fuller's second claim that the eight principles are moral in character, but this too is difficult to deny completely: contemporary positivists – including, at times, Hart – have tended to acknowledge that the rule of law is of moral significance for the qualitative difference in makes in people's lives, viz. their ability to coexist and plan their lives in circumstances of trust.[122] As Jeremy Waldron notes, the way that positivists reconcile their qualified acceptance of Fuller's two claims their rejection of his conclusion – i.e., that the law is internally moral – is to suggest that the principles of legality have "contingent moral significance" for their relationship to properties or outcomes that are morally valuable by virtue of some other moral principle.[123] What remains up for grabs between Hart and Fuller, then, is whether the moral values served by law – autonomy, dignity, welfare, etc. – are internal to the concept, such that there exists a moral threshold below which the legal system becomes impossible, or external purposes contingently pursued by law.[124] The former is, of course, Fuller's position in arguing that

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special way to the concept of law. Hart, "Positivism and the Separation of Law and Morals," in *Harvard Law Review* 71 (1958): 619. Jeremy Waldron has also noted Hart's indecision on this point and the one to follow. See his "Positivism and Legality: Hart's Equivocal Response to Fuller," in *New York University Law Review* 83 (2008).

[122] In his review of *The Morality of Law*, Hart notes Fuller's complaint that legal positivism lacks resources to explain what is wrong with lapses in the principles of legality and seems to respond that the wrong would be distinctly moral:

> Why, to take the simplest instances, could not writers like Bentham and Austin, who defined law as commands, have objected to a system of laws that were wholly retroactive on the ground that it could make no contribution to human happiness and so far as it resulted in punishments would inflict useless misery? Why should not Kelsen or I, myself, who think law may be profitably viewed as a system of rules, not also explain that the normal generality of law is desirable not only for reasons of economy but because it will enable individuals to predict the future and that this is a powerful contribution to human liberty and happiness." Hart, "Book Review," 1290-91.

As Waldron notes, "given Hart's insistence here on the moral character of his own use of principles of prospectivity and generality in the evaluation of law (or Bentham's, or Kelsen's), it is now difficult to see why Hart thought himself entitled to say that Fuller's insistence on the moral character of these principles is like talking about the morality of poisoning." Waldron, "Hart's Equivocal Response," 1155-56.

[123] Waldron, "Hart's Equivocal Response," 1165.

[124] Waldron notes that Hart at various points seems to hold both that the principles of legality are criterially related to the idea of a legal system and that the principles of legality are genuinely moral, though he takes care to separate his endorsement of the former claim from his acceptance of the latter: "The assents tend to occur in different writings; when they occur in the same article (as in the review of Fuller's book), he makes sure that there are a few pages separating them. That way he can give the impression that when he assents to [the latter claim], he is conjoining this with a negative answer to [the former], and vice versa." Waldron, "Hart's Equivocal Response," 1160.

the law itself embodies an internal morality. The latter is the claim, now generally accepted by positivists, that law has some defeasible moral value for the way it facilitates life planning and thereby contributes to the autonomy of subjects.[125] What Fuller saw as law's intrinsic value is then cast from the concept of law itself and located rather in the desirable conditions it helps to secure.[126] As Jules Coleman sums up the position, "autonomy, dignity, and welfare … are external to the concept of law; law happens to be the kind of thing that can serve them well."[127] The argument thus concedes the intuitive points of Fuller's claim while resisting its more contentious conclusion, viz. the noncontingency of the relation between law and moral values. In what follows, I explain this argument as it is put forth by Hart and Leslie Green. I go on to suggest that the dominant positivist interpretation of Fuller's claim, upon which the effectiveness of the response relies, is mistaken.

2.3. Law, Morality, and Legal Positivism

Hart set the stage for the positivist treatment of Fuller's claim in his 1958 article "Positivism and the Separation of Law and Morals." In it, we see Hart developing the position that was to become familiar with the publication of *The Concept of Law*: his concern is to offer a non-reductionist account of legal obligation that does not threaten the traditional positivist distinction between law and morality. On the question of whether a

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[125] See e.g., Joseph Raz, noting that legality – what he calls "the rule of law" – is valuable for the way it provides "stable, secure frameworks for one's life and actions," and also "treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action." Raz, "The Rule of Law and Its Virtue," *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 210, 221-2. Raz thus concedes that the principles of legality have some moral value for subjects, even as he insists in the same paper that the virtue of the rule of law is nothing more than "the virtue of an instrument as instrument." Ibid., 226. Jules Coleman also accepts the claim that there is something "necessarily valuable or desirable" about governance by law, though he argues that it is nevertheless possible to give a fully adequate account of the concept that does not make reference to this value. See Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001), Chapters Eleven and Twelve, and his "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence," in *Oxford Journal of Legal Studies* 27 (2007): 581-608. I examine Coleman's argument in Chapter Three.
[126] As Coleman sums up, law may have the "inherent potential" to realize "an attractive moral ideal of governance," but "[n]othing follows from this about the content of our concept of law." Coleman, *The Practice of Principle*, 194.
[127] Ibid., 195.

given social order must satisfy a moral minima to be considered a legal system, he acknowledges that there must be certain moral restraints on law's content – the "basic moral principles vetoing murder, violence, and theft" – if collective survival is to be possible.[128] He also concedes that there is an element of justice in the fact that law must consist of general rules, since those rules must lay out the criteria for when cases are alike, and "one essential element of the concept of justice is the principle of treating like cases alike."[129] In the end, however, Hart maintains that these loose points of contact between law and moral standards do not threaten the positivist separation of law and morality in its most significant sense – what in *The Concept of Law* he identifies as "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so"[130] – since even the most meticulous construction and application of rules cannot guarantee that the political conditions they create are not oppressive or unjust to those who must live under them: "This is so because a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive, and might deny, to a rightless slave population the minimum benefits of protection from violence and theft."[131]

In *The Concept of Law*, Hart summarizes his position in what is perhaps his best-cited reply to Fuller, where he considers, in the course of his discussion of the relevance of morality to an analytic conception of law, the suggestion by "one critic of positivism" that certain features of "control by rule" might reflect some minimum, emergent form of justice. As he writes,

> one 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'. Again,

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[128] Hart, "Positivism and the Separation of Law and Morals," in *Harvard Law Review* 71 (1958) 623. The fact "that all legal systems in fact coincide with morality at such vital points" Hart calls "a 'natural' necessity." Ibid.

[129] Ibid., 624. Hart goes on: "So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles." Ibid.

[130] Hart, *CL*, 181-2.

[131] Hart, "Positivism and the Separation of Law and Morals," 624.

> if this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.[132]

For Hart, the principles Fuller had identified concerned the effectiveness of rule-based governance for achieving contingent political ends; taken by themselves, they are morally indifferent as to the substantive aims of any particular system. In Hart's hands, the question then becomes one of whether we can expect any sort of causal relationship to hold between Fuller's principles of legality and the content of law, i.e. whether the system can enact laws that violate substantive morality. His familiar response is that a legal rule is valid if enacted in accordance with "fundamental accepted rules specifying the essential lawmaking procedures," and not by virtue of its moral content.[133] At the same time, Hart is careful to acknowledge the sense in which there might be something valuable – a "germ at least of justice" – in the observance of these principles, insofar as they help to ensure that "those who are eventually punished for breach of the rules will have had the ability and opportunity to obey."[134] Again, if this is what the necessary connection between law and morality comes down to, we may accept it, but we must not let it inure us to the important sense in which law and morality are distinct, i.e., that of law's serviceability for any type of outcome, good or evil.

On the surface, Hart's response appears to dispense with everything that seemed at stake between the two theorists. On the one hand, it is hard to deny that certain features of control by rules are desirable for the qualitative difference they make to our lives, e.g., by establishing a stable framework of expectations in which those who remain within set parameters can avoid interference by the state. On the other hand, Hart notes, this minimal overlap with justice will be cold comfort to those who must endure the abuses and exclusions of an oppressive system. On Hart's reconstruction, then, all that remains controversial between the two theorists is the amount of moral importance to be

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[132] Hart, *CL*, 202.

[133] Hart, "Positivism and the Separation of Law and Morals," 603. In his Postscript to *The Concept of Law*, Hart went on to emphasise that this was not to say that rule of recognition cannot place moral conditions on law's content. Hart, *Postscript to The Concept of Law* (Oxford: Clarendon Press, 1994).

[134] Hart, *CL*, 202. Elsewhere he writes that generality is valuable from the point of view of the citizen because it gives him information about what others are likely to do, and so "increases the confidence with which he can plan his future." Hart, "Philosophy of Law, Problems of," in *Encyclopedia of Philosophy*, ed. Paul Edwards, vol. 6 (London: Macmillan, 1967), 274.

assigned to the formal aspects of rule by law relative to the substantive ends pursued by it; for Hart, the benefits of the former are effectively cancelled out in an unjust system where not everyone falls under the protection of law: "Only if the rules failed to provide these essential benefits and protection for anyone – even for a slave-owning group – would the minimum be unsatisfied and the system sink to the status of a set of meaningless taboos."[135] In the absence of some further argument as to why the eight requirements of legality – unlike the efficacy requirements of any other technical craft – are to be considered moral standards, Fuller's claim to have discovered a necessary connection between law and morality thus remains incomplete.

The effect of Hart's critique was thus to lay the burden on Fuller to show that the observance of Fuller's eight requirements precludes the possibility of unjust outcomes. In disposing of the argument, then, it might seem that we need go no further than to point out Fuller's admission that the internal morality of law is, at least in principle, "indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficiency."[136] The value of the legal order arises from how it serves the efficacy demands of the lawgiver, with moral value contingent upon the quality of the ends pursued; in Joseph Raz's famous analogy, the ultimate virtue of the rule of law in its contribution to law's capacity to guide behaviour "is the virtue of efficacy; the virtue of instrument as instrument"[137] – just as sharpness is the virtue of a knife in allowing it to cut. Following Leslie Green, I call this the "instrumental conception" of law: the connection between law and morality is conceived as one between a tool and the (moral or immoral) ends it helps pursue.[138] As I noted above, there is consistent with this view an account on which legality has some (defeasible) moral value for the way it impacts

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[135] Hart, "Positivism and the Separation of Law and Morality," 624. As Pauline Westerman puts it, on this reconstruction of the debate, "[t]he only difference between the two is that whereas Hart regards the guidelines for successful craftsmanship as ethically neutral, Fuller maintains that they together form an 'internal morality.'" Pauline Westerman, "Means and Ends," in *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, ed. Willem J. Witteveen and Wibren van der Burg (Amsterdam: Amsterdam University Press, 1999), 147.

[136] Fuller, *The Morality of Law*, 153.

[137] Raz, "The Rule of Law and Its Virtue," 226.

[138] Leslie Green, "Law as Means," *Legal Research Paper Series* (Paper No. 8: March 2009). Available at http://www.udg.edu/Portals/89/Filosofia%20Dret/textos%20seminaris/Green.%20Law%20as%20Means.pdf (accessed June 20, 2012). Reprinted in *Hart-Fuller at 50*, ed. Peter Cane (Oxford: Hart Publishing), 2010.

subjects' lives, e.g., by facilitating life planning and allowing people to coexist in relative trust. But this is not the conceptual claim that reciprocity is internally related to law as the moral foundation of its legitimacy. As Colleen Murphy sums up, "absent some…connection with a morally important purpose, the function facilitated by the rule of law, namely, guiding behaviour, remains itself morally indifferent. In the Razian view, then, respecting the rule of law achieves nothing of non-instrumental moral significance."[139]

On Green's account, neither traditional natural law nor Fuller's procedural account represent an alternative to the instrumental view; much confusion, he argues, has resulted from "the false association between an instrumental conception of law and legal positivism."[140] For him, what distinguishes Hart from Fuller is not the latter's rejection of the view of law as primarily a means to ends, but rather Hart's adoption of what Green calls the instrumentalist *thesis*, "the claim that *within* an instrumental conception, law can only be identified by focusing on its (species-typical) means rather than its (variable) ends."[141] Only the latter is controversial between positivists and natural lawyers; for where the instrumental conception is simply the common sense view of law as belonging to "the meaningful world of means and ends,"[142] one's acceptance of the latter thesis will turn on the question of whether there is some unique institutional end to which law is directed, as a matter of practical or conceptual necessity. For Green, the real source of the disagreement between Hart and Fuller is their different answers to this question. In contrast to Hart's version of instrumentalism on which law is ostensibly open to all manner of political outcome, he argues, Fuller offers a kind of "teleological instrumentalism" in the spirit of classical natural law theory.[143] Green cites the following passage by Aquinas as representative of this kind of instrumentalism on which law is seen as "a means in the service of a particular end:"[144]

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[139] Colleen Murphy, 248.
[140] Green, 6.
[141] Ibid.
[142] Ibid., 4.
[143] Ibid., 6.
[144] Ibid., 5.

> Whenever a thing is for an end, its form must be determined proportionately to that end; as the form of a saw is such as to be suitable for cutting. Again, everything that is rules and measured must have a form proportionate to its rule and measure. Now both these conditions are verified of human law: since it is both something ordained to an end; and is a rule or measure ruled or measured by a higher measure.[145]

For Green, there are a number of reasons for legal theory to resist assigning a generic end to law "as a whole."[146] For one, a cursory historical or cross-cultural survey shows that the legal form does not correspond to any one particular political or social arrangement; nor, we saw Hart argue, do we seem to find any immediate incompatibility, either empirical or conceptual, between law and immoral political outcomes.[147] The first problem, then, is that it is not at all clear what type of end we should assign to law.[148] Green then suggests that Fuller's assignment of a generic end to law is attributable to an easily corrected mistake: the assumption that we cannot account for the structural uniformities of law without the notion of a unique end for which it exists.[149] For Green, the instrumental conception is the best candidate for explaining "Fuller's observation that, when legal philosophers try to distinguish legal order from 'the gunman situation writ large,' they fail to see that 'It is...precisely because law is a purposeful enterprise that it

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[145] Saint Thomas Aquinas, *Summa Theologica*. I-II 95 art 3. Quoted in Green, 5.

[146] Green, 2.

[147] As Green writes, "it is perhaps a warning sign that many of the candidate that have been offered for law's generic end (e.g., protecting human rights, securing respect for persons, keeping the peace) are attractive ideas for law and are neither common to all legal systems nor unique to them, while others (e.g., maintaining order, co-ordination activity) are so vague as to be useless to jurisprudence and, when specified more precisely, quickly lose their claims to universality." Ibid., 25.

[148] Green considers two possibilities. The first, which he dismisses, is that Fuller took governance by rules, principles, etc. as itself law's proper end. The effect is to render the teleological claim true but trivial, for Fuller's mistake in that case was to take as an aspirational ideal what everyone else takes to be law's species-typical means. For Green, however, Fuller's repeated reference to the interaction between the internal and external morality of law implies that he did not commit such a glaring conflation; for in that case "he would not have gambled so much on his fragile claim that there is a *correlation* between law's means being in good order (inasmuch as they satisfy the desiderata of law's 'inner' or 'internal' morality) and law satisfying its proper ends as identified by 'external morality.'" Green, 23. On Green's account, the only alternative here is to assimilate Fuller's claim about the connection between law and morality into that of the natural lawyers: "I tend to think that Fuller is simply groping towards the point we took from Aquinas: 'Whenever a thing is for an end, its form must be determined proportionately to that end; as the form of a saw is such as to be suitable for cutting.'" Ibid., 24.

[149] Green writes: "Perhaps Fuller assumes that unless law serves a *generic* purpose – an overall end that itself distinguishes law for other social institutions, law's very *own* end – then law's means would not be 'constancies' but variabilities. Without a generic end, there would be nothing to explain why law has the means it has, nothing to unify them, and nothing that makes them features of law *as such*." Ibid., 24.

displays structural constancies which the legal theorist can discover and treat as uniformities in the factually given.'"[150] Green's response is that these regularities – the fact that law consists of general rules that we can grasp and follow – are accounted for by the fact that we use law to bring about a variety of goals and conditions for ourselves. Once we see that "different mid-range ends can do the work piecemeal,"[151] the hypothesis of a grand generic end is no longer required: "The fact that law contains the sort of rules that are potentially knowable by their subjects, can be explained if we assume that law aims to help a variety of people attain a variety of ends."[152] Finally, he notes that the idea that law tends to be oriented toward certain (plural) ends is not something the positivist need reject. Hart, for one, famously argued that law must have a certain basic content in order to ensure basic survival, embodying the minimum forms of protection for persons, property, and promises. To go beyond this minimum biological aim, however, is to add an unneeded layer of speculation and controversy to what is already a complete description without it.

For now, the point to take away from this discussion is that on the dominant treatment of Fuller's claim, his disagreement with Hart is not a very deep one. On both accounts, the connection between law and morality is conceived as one between a tool and the ends it helps us to pursue; the difference is that, where on Fuller's theory law inherits positive moral significance from the moral values to which it is teleologically oriented, for Hart there is no single purpose to be assigned to law "as a whole." The question of whether a necessary connection between law and morality obtains in the form of law might then turn on the question of how the rule of law is related to external morality in empirical terms; for example, whether the leaders of oppressive regimes are sufficiently motivated by the guidance potential of well-made law to observe Fuller's eight requirements in the construction and application of unjust laws.[153] The lawmaker's

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[150] Ibid.

[151] Ibid., 24-5.

[152] Ibid., 25.

[153] The debate between Matthew Kramer and Nigel Simmonds takes this form, with Kramer arguing that departures from the rule of law will tend to weaken incentives for compliance, and Simmonds arguing that Kramer underestimates the coercive potential of arbitrary terror for subduing the public and securing obedience. See Kramer, *Law Without Trimmings,* 37-77, and Nigel Simmonds, "Straightforwardly False:

decision whether to make rules public, to ensure intelligibility, etc. will then involve some weighing of the effectiveness of the rule of law relative to arbitrary terror for achieving political ends, but there is no reason in principle why the guidance function of rules should not be equally available to both the virtuous and the vicious lawmaker.[154] Put in these terms, Fuller appears as simply naïve about the degree to which the observance of the principles of legality secures humane treatment for those subject to the rules.

As I argue below, there are good reasons to reject this understanding of Fuller's argument, on which the aims of law are seen as wholly external to legal forms of ordering. The first and most glaring is that it obviates the view that certain of law's purposes are internal to – unique to or distinctive of – the legal order; as Kenneth Winston puts it, "[o]bviously an instrumental conception precludes Fuller's view that the law itself embodies moral aspirations."[155] Equally curious is the suggestion that, within the instrumental conception, what separates Fuller from Hart is the former's rejection of what Green calls the instrumentalist thesis – the view that law is best illuminated by an understanding of its nature as a distinctive social means. Given his attention to the formal aspects of the legal order – the constraints on form that must obtain in order for it to be considered as such – there is nothing to suggest that Fuller viewed law's purposiveness in terms of the primacy of ends over institutional means. Indeed, Fuller's complaint was that the instrumental conception takes inadequate account of the constitutive features of the legal form of ordering, considered as not just a system of rules but a system of rules of a certain quality. That neither the acceptance of the instrumental conception nor the rejection of the instrumental thesis fits squarely with Fuller's own statement of his theory suggests that we need an alternate model for understanding the claim that the legal order itself instantiates a moral value. In what follows, I suggest that this comes by way of his

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The Collapse of Kramer's Postivism," in *Cambridge Law Journal* 63 (2004): 98-131; *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

[154] Kramer argues that because a lack of congruence between established expectations and official action will tend to weaken subjects' incentives for obedience, "compliance with each of Fuller's principles of legality is necessary for any benevolent regime's attainment of morally vital desiderata and also for any evil regime's fulfillment of nefarious purposes on a large scale over a long period." Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007), 77.

[155] Kenneth Winston, Introduction to *The Principles of Social Order: Selected Essays of Lon L. Fuller*, by Lon L. Fuller, ed. Kenneth Winston (Durham: Duke University Press, 1981), 45.

rejection, primarily in his writings on eunomics, of the simple means-end model for understanding human action and institutions, and his corresponding insistence that the distinction between fact and value breaks down in the explanation of purposive activity, where a purpose is at once a fact and a standard for judging facts. Once we get a better handle on Fuller's notion of the purposiveness of human institutions, we can more clearly understand the way in which his view of law differs from the instrumental conception. In particular, it is not a teleological end that gives law its shape, even in its barest form of human survival, but capacities of human beings as they are embodied in the institutionalized practice.

2.4. Fuller and Green on Means and Ends

To some extent, the instrumental interpretation of Fuller's argument is invited by the centrality he gives to the notion of purpose in law. His claim was that once we understand the purposive aspect of human institutions we come to see that law, in order to be such, must exhibit law-like qualities beyond formal enactment – the requirements of legality that together make up the internal morality of law. Since Hart, the tendency has been to treat this purposiveness as simply goal-directedness, the orientation of human activity toward projected ends – in other words, as observing what Green takes to be the basic insight at the heart of the instrumental conception: "the fact that we can make sense of a lot of human action by understanding it as adopting means to achieve certain ends in light of the situation as the agents see it."[156] As we saw above, Fuller's suggestion that the rule of law has internal moral value is thus cast as a failed attempt to establish a relation of entailment between the requirements of legality and a certain quality of political outcome. His mistake is then twofold. First, he takes moral value to inhere in the concept of law itself, when it really resides in the desirable conditions it helps to create.[157] There is nothing moral (or immoral) about goal-oriented behaviour *simpliciter*; what is potentially good or bad are particular actions or rules in pursuit of particular

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[156] Green, 4.

[157] This is the above concession, compatible with the instrumental view, that legality has some moral value for the way it facilitates life planning and allows people to coexist in circumstances of trust.

ends.[158] As Hart wrote, Fuller's claim that the law is internally moral thus "perpetuates a confusion between two notions that it is vital to hold apart: the notions of purposeful activity and morality."   Second, Fuller overestimates the degree to which official adherence to the rule of law places substantive moral restraints on the content of legal enactments.[159]   The requirement that laws be made public, that they not demand contradictory or impossible things, etc., does not mean that they cannot establish unjust conditions for those who must live under them. As Joseph Raz writes, "[r]acial, religious, and all manner of discrimination are not only compatible but often institutionalized by general rules."[160] The effect of the two objections together is to dispel moral value from the concept of law itself and to locate it rather in the political or social ends it is used to pursue.

As I suggested above, it is difficult to reconcile this understanding of Fuller's view with his insistence that the very existence of the legal order instantiates a moral value independent of its contribution to efficacy. While it is true that Fuller did sometimes write as though, like Aquinas' saw, is an instrument whose design and proper use is oriented toward a substantive justice, it is also clearly the case that he saw the value of the observance of the principles of legality as irreducible to the instrumental benefits of such observance. That Fuller should be read as rejecting the instrumental conception of

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[158] Kramer writes in a similar vein, "we can dismiss post-haste any suggestion that the sheer purposiveness of a legal system is sufficient to render such a system intrinsically moral. Since purposes and the pursuit of purposes can be moral or amoral as well as morally admirable, the attribute of purposiveness *in abstracto* does not suffice to imbue as institution with any degree of moral legitimacy."   Kramer, *Law Without Trimmings*, 43.

[159] Colleen Murphy identifies these two objections in her "Lon Fuller and the Moral Value of the Rule of Law," in *Law and Philosophy* 24 (2005): 246:

> A proponent of the *first* objection, while accepting Fuller's core principles of the rule of law, would reject the Fullerian analysis of its moral value. Instead, on this view, the value of the rule of law is purely instrumental. Whether the rule of law has moral value in specific circumstances is wholly dependent on the goals the legal system is pursuing. When the system's aims are morally good, then the rule of law is morally valuable in virtue of its role in promoting these aims. When the system's aims are immoral, however the rule of law has no moral value. In contrast, a proponent of the *second* objection would argue that my description of the rule of law is incomplete and, consequently, my account of its moral value too thin…. According to this objection, including substantive constraints on in an account of the rule of law is necessary to make the moral value of the reciprocity underlying respect for the rule of law clearer and more compelling.

[160] Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 211.

law is further supported by his eunomics project, which was explicitly concerned to overthrow the simple means-end model in the human sciences as inappropriate to the explanation of purposive activity. We might compare Aquinas' quote above with this one from John Stuart Mill, which Fuller took to embody all that was misguided about the instrumental view:

> All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and color from the end to which they are subservient. When we engage in a pursuit, a clear and precise conception of what we are pursuing would seem to be the first thing we need, instead of the last we are to look forward to.[161]

Crucial to the instrumental conception is that the ends served by a social institution are severable from the means of their implementation, that they pre-exist the institution itself as its reason for being; as Aquinas put it, "[w]henever a thing is for an end, its form must be determined proportionately to that end; as the form of a saw is such as to be suitable for cutting.'"[162] One of the classic problems with the means-ends distinction is that, in the long run at least, the means determine the ends as much as the ends do the means. Thus, "reversing Mill, we may truthfully say that a social end takes its 'character and color' from the means by which it is realized.[163] In that sense, there is no sharp line between what we consider means and what we consider ends; when confronted with the need to make an actual decision, the two "no longer arrange themselves in tandem fashion, but move in circles of interaction."[164] Fuller's own jurisprudential theory was a reaction against precisely this tendency of mainstream social philosophy to subordinate institutional forms to the ends they pursue, "to assign unconditional primacy to ends over means in thinking about human creative effort."[165] In other words, it was a reaction against precisely the instrumental understanding of law whereby the legal form is treated as a channel or conduit for directing human effort toward pre-selected ends. Social

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[161] J. S. Mill, *Utilitarianism, Liberty and Representative Government*, ed. A. D. Lindsay (New York: Dutton, 1951), 2. Quoted in Fuller, "Means and Ends," in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth Winston (Hart Publishing, 2001), 63.
[162] Aquinas, *ST* I-II 95 art 3. Quoted in Green, 5.
[163] Fuller, "Means and Ends," 55.
[164] Ibid., 54.
[165] Ibid., 65.

theory must be oriented away from its focus on ends in abstraction from means and toward exploring "the ways open to human beings to arrange their mutual relations so as to achieve their individual and collective ends, whatever those ends may be."[166]

In his largely ignored "Means and Ends", Fuller goes on to identify five related "common modes of thought" that have impeded social inquiry. The first is the assumption that the ends served by social institutions are distinct from one another, each capable of separate appraisal; second is the view that the fundamental task of social philosophy is to arrange ends hierarchically; third is the assumption that social institutions can be tailored to any desired end; fourth is the thought that the elements of formal structure are to be found in social means alone, so that the drawing up of a hierarchy of ends is not an exercise in social architecture but simply a ranking of preferences; last is the notion that social means – institutions, rules, etc. – are "necessary evils" that we would do better to avoid, if only social ends were attainable directly.[167] All of these are outgrowths of the narrow understanding of purposiveness as a one-way affair in which human energies are activated by and then channeled toward some projected destination, with social implementation simply a matter of discovering the most direct route. By contrast, Fuller's own approach emphasized the pervasive interaction between means and ends in the articulation and realization of social goals: "Any social goal, to be meaningful, must be conceived in structural terms, not simply as something that happens to people when their social ordering is rightly directed."[168] Human ends like freedom, equality, and so on, are not abstract preferences unrelated to (or else encumbered by) the demands of institutionalized practice, but are themselves forms of social order; they are possibilities for agency and relationships afforded by institutional arrangements:

> A social institution makes of human life itself something it would not otherwise have been. We cannot therefore ask of it simply, Is it good and does it serve that end well? Instead we have to ask a question at once more vague and complicated – something like this: Does this

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[166] Ibid., 63.
[167] Ibid., 68-72.
[168] Ibid., 71.

> institution, in the context of other institutions, create a pattern of living that is satisfying and worthy of man's capacities?[169]

Fuller's avoidance of the language of means and ends does not go entirely unnoticed by Green, who chalks it up to a simple failure to "speak bluntly."[170] What is important to notice, though, is that the argument Green attributes to Fuller – the view that we cannot account for institutional design unless we have clarity at the outset about the precise ends sought – is in direct tension with Fuller's rejection of the above set of assumptions, all based on our tendency to view the relationship between means and ends as "the one way affair implied when Mill wrote that 'rules of action … must take their whole character and color from the end to which they are subservient.'"[171] On Fuller's account, means and end form a much more holistic structure than is acknowledged on the instrumental view, where, as Green defines it, "[w]hat is important is that these instruments are distinct from the ends to which they are put, are capable of being brought under intentional control, and can be assessed as being more or less well adapted to produce their ends."[172] The result is that "the good" is not a moral category that stands fully independent from institutional means; social ordering, in partially constituting these goods, is not a mere framework within which their pursuit is possible but forms part of the good that is being pursued. Following Kenneth Wilson, we can then distinguish loosely between ends that are internal to, or distinctive of, a legal process and purposes that are external to that process:

> The first sort of purpose is cited in response to the question: What is the point of using *this* process [for example, legislation], as opposed to other processes such as contract or managerial direction? The second sort of purpose is cited in response to the question: What can be *achieved* by the use of this process: for example, helping low-income students obtain a college education by making available federally guaranteed loans? It is obvious that innumerable external purposes may

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[169] Ibid., 69.

[170] Green, 7. "Now, 'purposes' and 'enterprises' have, it is true, nuances absent from 'ends' and 'means', and Fuller often prefers the former terms in order to emphasize the special features of his own brand of legal instrumentalism. But at other times he is just as happy to speak bluntly. Of his famous desiderata of legality – the 'inner morality' of law – Fuller simply says, 'All of them are means toward a single end.' Law, on Fuller's account, is an institution on a mission."

[171] Fuller, "Means and Ends," 68.

[172] Green, 9.

be promoted by a single legal process. It is less obvious, I think, how wide the range of possible internal purposes for a single legal process.[173]

The evaluation of the inner morality of law in terms of its efficacy in the pursuit of external ends is almost irresistible if we begin from the unit of the legal rule and progress from there to the idea of a legal system of which particular rules may or may not be a part. The focus is then on whether and how an enactment's moral content goes into determining its status as law, i.e., whether the system can enact laws that violate substantive morality. From here, as Green puts it, the intuition is that, e.g., "the same means that gave us the *Fewer School Boards Act* could also have given us a *More School Boards Act*, or a *School Boards (Restoration) Act*, and all these acts would have been law, and they would have been law in virtue of the means by which they were produced, rather than the character (moral or otherwise) of the ends at which they were aimed."[174] It is only when we turn our attention from the validation of particular norms to the distinctive form of the legal order – to the fact that human association produces general phenomena that persists independently of the specific political and economic organization that happens to prevail – that we begin to see all that is implied in distinguishing law from other forms of order, including that of the gunman situation. As Hart wrote, this meant that certain formal features that law must display derive from

> what is in fact involved in any method of social control – rules of games as well as law—which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be.[175]

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[173] Winston, *Introduction*, 51.

[174] Green, 9.

[175] Hart, *CL*, 202. Waldron writes that Hart's concession to Fuller on the need for certain constraints on the legal form is overshadowed by his concern to squelch "any inference from the principles of legality to a position like Fuller's about law's overall moral potential." Waldron, "Hart's Equivocal Response," 1152. Again, Fuller's mistake was to think that the observance of these requirements necessarily placed any limits on the harm or injustice that could be done under the auspices of the rule of law. For Fuller, this narrow focus on the threat posed to the separability thesis came at the expense of a full exploration of what was involved in his turn away from the command theory.

For Fuller, the conclusion implicit in Hart's observation – the claim that our "aim in making law is to lay down rules by which people may guide their [own] conduct"[176] – is that legislation properly conceived entails the deference of officials to citizens' own powers of self-regulation. This means a recognition that law operates by recognizing the essential humanity of subjects, harnessing their capacity for rational self-determination and voluntary self-control in relation to norms they can understand. Like Bentham, then, Fuller can be seen as offering a theory on which the conditions that make law possible are brought to bear on the idea of law itself. For him, the form of agency embodied by law went beyond the mere capacity to follow rules – it placed constraints on the form that the rules can take.

Thus, for Fuller, the internal morality of law was a logical extension of Hart's own theoretical progression: his rejection of the sanction-centred approach to legal obligation in favour of a rule-based theory on which law is something other than "the gunman situation writ large."[177] This involved the recognition that the conception of the person at the heart of the command theory was much different from that on a description of law as relying fundamentally on the self-application of general rules. The most revealing statement of his view comes in the final chapter of *The Morality of Law*, in the context of his discussion of why the inner morality of law – in particular, the demand for congruence between official action and declared rule – is both conceptually related to law and moral in character:

> I come now to the most important respect in which an observance of the demands of legal morality can serve the broader aims of human life generally. This lies in the view of man implicit in the internal morality of law. I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man itself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.
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> Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions

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[176] Fuller, *Anatomy of the Law* (Harmondsworth: Penguin, 1971), 88.
[177] Hart, *CL*, 7.

> by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination. Conversely, when the view is accepted that man is incapable of responsible action, legal morality loses its reason for being.[178]

The principles of legality are not simply practical requirements for law's efficacy at producing social outcomes, but embody a vision of the person they seek to guide and her capacities for self-directed activity in relation to norms and rules. This is in sharp contrast to a system of direct manipulation or galvanization which operates by undermining the responsible agency of those it controls, offering them no expectation of reliability of official action and therefore no basis for stability of individual conduct. I hope it is not too eccentric to cite a passage from the *Handbook of Applied Dog Behaviour and Training*:

> As the dog commits to a course of action, its attention may be locked or *vectored* on the developing situation and dedicated to the acquisition and processing of real-time information relevant to adjustments conducive to instrumental success. Once launched, highly motivated behaviour may only stop after it is consummated (confirmed), fails (disconfirmed), or is interrupted by the evocation of an antagonistic control incentive having a greater motivational significance and priority.[179]

The vision of the animal embodied in this description is not of a "responsible, self-determining centre of action,"[180] but of a locus of competing affective forces that elicit action on the basis of simple reward contingencies.[181] In Fuller's view, Hart had emphasized that the function of law was to guide behaviour, but in the end had

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[178] Lon Fuller, *Morality of Law*, 162.

[179] Steven R. Lindsay, *Handbook of Applied Dog Behaviour and Training, Procedures and Protocols* (John Wiley & Sons, 2013). Waldron makes a similar point in support of Fuller's claim:

> All this makes law quite different from (say) herding cows with a cattle prod or directing a flock of sheep with a dog. It is quite different too from eliciting a reflex recoil with a scream of command. The pervasive emphasis on self-application is, in my view, definitive of law, differentiating it sharply from systems of rule that work primarily by manipulating, terrorizing or galvanizing behavior. And as Fuller recognizes, it represents a decisive commitment by law to the dignity of the human individual. Jeremy Waldron, "How Law Protects Dignity," in *The Cambridge Law Journal* 71 (March 2012): 228.

[180] Fuller, *Morality of Law*, 163.

[181] In other words, it is not unlike the description of the legal subject on Bentham's theory.

downplayed the distinctiveness of that function in comparison to a system of direct reward and punishment which seeks simply to induce action. For Fuller, however, this contrast went to the heart of what is significant to us about law, revealing in normative terms what it is we value about the former as opposed to the latter. This involved the idea that governance by general rules instantiates a respect for the agency of legal subjects, securing for them a certain quality of position in their relationship with the lawgiver. The result is that, as Jeremy Waldron puts it, "[l]aw itself may be an enterprise unintelligible apart from the function of treating humans as dignified and responsible agents capable of self-control; unscrupulous rulers must make what they can of that fact when they decide, for reasons of their own, to buy into the 'legal' way of doing things."[182]

Fuller then need not (and in fact, does not) deny that legal processes are used to pursue a variety of external ends "of the middle range." The crucial point is that law allows us to pursue these ends in a certain way, one that is intrinsically linked with a certain form of freedom. Guidance by law is not the mere subjection of conduct to the will of others, but also facilitates a certain degree of independence in action, creating meaningful pockets of liberty in what would otherwise be a thicket of competing demands. As Nigel Simmonds writes, "[s]imply in consisting of followable rules…the law must allow me to retain certain optional areas of conduct."[183] This freedom is facilitated by the formal requirements on law (generality, consistency, clarity, etc.) which constitute the conditions for the impersonal direction of citizens' activity, but it is not strictly an "end" of law in the instrumental sense above; for it is not cleanly detachable from the form of law as the means by which it is manifested. Insofar as law relies upon the moral and rational capacities of participants for its existence and functioning, a certain conception of the person is implicit in the legal form itself. Institutional forms and the ends that are internal to them thus become a sort of expressive medium for the capacities and characteristics of human beings as they discover, implement, and reformulate governing principles to facilitate their interaction. As Philip Selznick put it:

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[182] Waldron, "Hart's Equivocal Response," 1167.
[183] Nigel Simmonds, "Law as a Moral Idea" in *University of Toronto Law Journal* 55 (2005): 88.

> The natural order, as it concerns man, is compact of potentiality and vulnerability, and it is our long-run task to see how these characteristics of man work themselves out in the structure and dynamics of social institutions.[184]

For Fuller, the truth imperfectly grasped by natural law theory was that of the legal system's responsiveness to an external reality that is both moral and practical, not as a collection of immutable precepts of transcendent origin but as a set of very human constraints that assert themselves in any effort to organize activity into institutional structures.[185] At the same time, we must not overlook the transformative effect of social institutions on human life; just as institutional forms call upon and reflect the capacities of people for their functioning, so too do these capacities require a certain institutional environment for their cultivation and maintenance.[186] The role of legal theory is then to explore "the ways open to human beings to arrange their mutual relations so as to achieve their individual and collective ends, whatever those ends may be."[187]

2.5. Agency and the Legal Form

For Fuller, then, a genuine agent is a person "capable of purposive action," not simply in the sense of being able to choose effective means to her ends but in the sense of being in possession of certain capacities: the capacities for self-determination, for deliberation and reasoned choice, which form the basis of our dignity and moral agency. Fuller saw these capacities as subject to being either fostered or muted by the social structures in which we live and interact, with the legal order the one most suited to the

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[184] Philip Selznick, "The Sociology of Law," in *Sociology Today: Problems and Prospects*, eds. Robert K. Merton et al., (New York: Basic Books, 1959): 118-119.

[185] In an article for the Harvard Law Review, Fuller imagines the way such structures might take form for a group of shipwrecked men isolated on a desert island. In need of some means of dispute-resolution, the men select one of the group to be an arbiter. From the beginning the arbiter realizes that his decisions cannot be mere expressions of personal preferences: they must be combinations of fiat and reason. In other words, the task itself imposes definite constraints on power and the form the decisions can take. Fuller, "Reason and Fiat in Case Law," in *Harvard Law Review* 59 (1946): 376-95.

[186] As Fuller put it in an analysis of despotic rule: "[I]f humanity has over the centuries shown some slight capacity to outgrow its inclination towards and its dependence on despotism, this growth reflects not only the increasing availability of social alternatives to despotic rule, but also an increasing moral disposition, nurtured by actual experience, to employ these alternatives." Fuller, "Irrigation and Tyranny," in *Stanford Law Review* 17 (1965): 1034.

[187] Fuller, "Means and Ends," 64.

task of realizing agency. This is because the formal features that constitute it are defined by a commitment to addressing the legal subject as a moral agent.

One possibility, then, is that Hart simply underestimated the significance of positivism's turn from a mechanistic theory of action to an (intentional or) rule-based one. In chapter one, for instance, I argued that he did not realize the degree to which his quarrel with Bentham and the early positivists extended to the methodological. Bentham's neglect of the normative dimension of obligation was, I suggested, not an oversight but a logical extension of his more basic theoretical commitments; the claim was that, when placed in their broader, unperceived causal context, actions that seemed to be chosen are revealed to be determined and forced. What distinguishes Hart from Bentham and Austin is then not any disagreement about the way things appear to common sense, but the question of whether those appearances are explanatory primitives to be preserved in the final analysis. The result, I argued in chapter one, is that the disagreement between sanction-based and rule-based theories of law is not resolved by reference to our normative language. The question of whether this language – the use of norms as reasons and justifications for action – is primitive or (always) derivative explananda of a social scientific theory is not one to be settled at the level of substantive theory or even of methodology, but a deeper question reaching ultimately to the level of a theory's metaphysics. The characterisation of the internal point of view as a type of "attitude" is misleading in this regard, in the sense that it makes the debate appear as one between competing psychological mechanisms for compliance and so obscures the relationship between the empirical and conceptual elements of theory.[188] That legal participants see themselves bound by legal rules is not something Bentham or Austin need dispute, just as Hart need not deny that people sometimes obey the law prudentially or by sheer force of habit. The point is rather that, on the reductive account, this "practical attitude of acceptance" can be given a causal story beyond the conceptual range

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[188] From here it easy to conclude that the catalogue of these attitudes must be either empirical/properly scientific or else speculative and/or stipulative – or else, as we saw Perry argue in chapter one, a veiled moral claim about the morally or rationally "best" attitude to have toward law. See Perry, "Holmes Versus Hart: The Bad Man in Legal Theory," in *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.*, ed. Steven J. Burton (Cambridge: Cambridge University Press, 2000).

of actors' meanings, i.e. one in which the threat of sanctions is internalized and consolidated into a popular submission to authority. In other words, it is not primarily the attitude of participants that is at issue between Hart and Bentham, but the form of agency implicated in the theorist's conceptual choices as she deems explanatory variables either fundamental or derivative of the practice.

As Michael Moore writes, it was the tendency of mid-century ordinary language philosophy to see itself "as having no metaphysics, arguing at the level of language alone."[189] It is perhaps to be expected, then, that Hart would have neglected the ontological levels of his account; his intention, like that of his Oxford colleagues, was simply to resist the imposition of scientific models of explanation on what he took to be our already adequate concepts of intention and action. It took a second generation of theorists to point out that there could be no pure self-authenticating language of description; at the most abstract reaches of either approach will be a framework of general assumptions about what gets taken as theoretically significant which cannot be put in a direct empirical test of truth or falsity.[190] In particular, I have argued that against the command theory's thoroughgoing reductionism, the suggestion that that our normative concepts are integral to a proper understanding of law is accompanied by a robust view of the nature of human action that carries with it its own presuppositions about human beings and their place in the world. To claim that natural scientific methodology is inappropriate to the study of human practices is to suggest that human beings stand, perhaps not wholly but significantly, apart from the natural order. It articulates a notion of the will as more than the sum total of desires as the environment acts upon us in determined ways – as responsive to the actor's intentions or reasons, which are not

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[189] Michael Moore, *Educating Oneself Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000), 394.

[190] See, e.g., Charles Taylor, *The Explanation of Behaviour* (Routledge & Kegan Paul, 1964), p. 48: "[T]he fact that we make the distinction we do between action and non-action offers no guarantee that the type of explanation it presupposes is the correct one." At around the same time and in the same spirit, Richard Bernstein objected to what he saw as the *a priori* bases of both reductionism and ordinary language philosophy: "What is particularly relevant for our inquiry is the tendency of both sides to attempt to resolve the issue by a priori fiat: the reductionists arguing that it *must* be possible to perform such reductions, the teleologists arguing that it is logically or conceptually impossible to perform these reductions." *Praxis and Action*, (University of Pennsylvania Press, 1977), 250.

themselves reduced to mere links in the chain of natural causes.[191] To claim, as Hart did, that the language of reasons, intentions, etc. "does mark a vital, factual distinction which [the mechanistic account of action] ignores"[192] is to be committed to a view in which notions of freedom and autonomy have purchase and ascriptions of responsibility are apt and warranted.[193] As I argue in chapter four, it is in this context, released from the natural necessity to which it was subject on the mechanistic model, that the idea of the autonomous will (or the positive concept of freedom) becomes intelligible as an ideal.[194]

Once we reject simple coercion as the grounds of law, a new conception of human agency must come in to take its place, one capable of explaining fidelity to law in a system that relies fundamentally on the self-application of general rules. For many theorists, the appeal of contemporary positivism is precisely its ability to make sense of this kind of mutual coordination on the wider scale – that is, in the absence of some common moral end – without reducing law to a system of pure coercion. The key was Hart's introduction of the rule of recognition, a social rule securing uniformity of official behaviour, whose validity consists in the simple fact of its acceptance by the relevant people. As Raz, Dworkin, Finnis, and others quickly pointed out, however, Hart's account of social rules was "largely vacuous," leaving untouched the question of what justifies people in regarding a rule as a reason for action; as Andrei Marmor writes,

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[191] As the ordinary language philosophers emphasised, when in ordinary contexts we identify an action as caused, what we usually mean to say is that there is no intervention by reasons and so no (or diminished) responsibility on the part of the actor: "These are usually cases of lapses from action or failure to act – when there is some kind of deviation from the purposive rule-following model, when people, as it were, get it wrong…. In such cases it is as if the man suffers something rather than does something." R. S. Peters, *The Concept of Motivation* (New York: Humanities Press, 1958), 10.

[192] Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), 102.

[193] As Hart goes on, "[i]f as our legal moralists maintain it is important for the law to reflect common judgments of morality, it is surely even more important that it should in general reflect in its judgments on human conduct distinctions which not only underly morality, but pervade the whole of our social life. This it would fail to do if it treated men merely as alterable, predictable, curable or manipulable things." Ibid., 182-3.

[194] As I noted in chapter one, this is not to say that Hart took a stand on the ultimate question of the intelligibility of free will in the metaphysical sense – the question of whether we are ultimately at the mercy of natural forces. One might, for example, consider our attitude toward others as free and responsible as pre-theoretical, and so not subject to revision by the outcome of philosophical debate. See, e.g., Galen Strawson, "Freedom and Resentment," in *Free Will*, ed. Gary Watson (Oxford: Oxford University Press, 2003), 72-93.

"[s]imply pointing to the fact that there is a regularity of behaviour, which seems to be suggested by Hart as part of the reason for following a social rule, is clearly the wrong answer."[195] For Fuller it was, moreover, an answer more suited to the command theory – where a central explanatory role is given to the fact of repetitive patterns of behaviour – than one in keeping with Hart's attention to the normative dimension of law.

What distinguished Hart's account from that of his predecessors was, of course, the requirement that the union of primary and secondary rules be supplemented by a "distinctive normative attitude" on the part of officials, i.e., the internal point of view. For Fuller, this suggested that Hart recognized the need for the legal system to be supported by a more robust form of acceptance than is available on a simple imperative theory; but, he argued, Hart had failed to recognize all that was implicated in the idea "that a legal system derives its ultimate support from a sense of its being 'right'."[196] In Fuller's view, the nature of our participation in the legal system implies more than peoples' absorption of a rule or rules for allocating power; it suggests also the existence of tacit expectations and requirements relating to the exercise of that power, in a way that accounts for fidelity to law in a system that relies only derivatively on the use of coercion. Hart had recognized the need for a principle of "external legitimation" by which persons occupying certain titles are empowered to exercise a direction over the conduct of others, but he had overlooked the need for "a second and *internal* standard"[197] by which the government affects its validation by its own legislative acts. It is this second standard which places tacit limits on power and therefore supports the recognition of duty on the part of rational beings. Formal rules of duty and entitlement thus form the most visible layer in the structure of expectation and action that characterizes organized collective living, but such rules draw their support – their authority or well-foundedness – from a network of tacit expectancies, acceptances, and understandings that do not get represented

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[195] Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001), 4. In the Postscript to *The Concept of Law*, Hart clarified his position to suggest that the practice theory of rules was not a general theory of social rules but pertained specifically to one subcategory of social rules, namely, social conventions.
[196] Fuller, Morality of Law, 138.
[197] Ibid., 211.

on the formal definition of legality as a binary feature of norms. Legitimation results from conforming to the moral requirements internal to a legal process, i.e., the moral understandings implicit within specific institutional arrangements that a focus on explicit, made law tends to overlook. An account of authority based wholly on officials' adoption of the internal point of view toward certain rules neglects the conditions that constrain judicial choice of rules and make some decisions more legitimate (in terms of the enterprise in which they are engaged) than others. Hart's mistake, like that of the early positivists, was thus to take an empirically obvious feature of the legal order – the existence of agencies empowered to exercise a direction over people, this time accompanied by a particular type of attitude on the part of officials – as its defining mark.[198]

Because the expectations and acceptances that underlie a government's power lie largely unformulated in the background of our activity, they are easy to overlook in favour of more readily identifiable formal (or, at least, formalizable) rules and obligations. The result – the failure of all definitions of law in terms of its formal source – is an inversion of the true relation between official recognition and the moral ideas incorporated into law. On the positivist account, this incorporation happens when a moral principle is adopted and applied by an official source – say, a judge – who has the power to effect formal recognition of that idea, and its status as law (or as a criterion of review) derives entirely from that recognition. In other words, the criteria employed by judges to determine the validity of laws, and hence the obligations of citizens, gain their authoritative status simply by being "accepted" in the proper way by the appropriate officials. For Fuller, this was indeed one way in which a judicial ruling may be said to be authoritative: any legal order has a need for institutional conclusiveness, and thus a need

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[198] As Philip Selznick, whose own critique of positivism was along the same lines, put it: "The availability of a specialized staff for the enforcement of norms may be highly correlated with the existence of a legal order and thus may serve as a reliable *indicator* of norms that have been selected for special treatment. However, it does not follow that this is what basically distinguishes legal from nonlegal norms and institutions." Rather, acceptance must "be vitalized by an appreciation of the reasons why these rules are necessary." See "The Sociology of Law," *International Encyclopedia of the Social Sciences*, vol. 9 (1968), 51.

for public agencies designed to make pronouncements that limit or bring to a close citizens' own determination of their obligations.[199] Equally present in the legal form, however, is a recognition of the need to temper the element of fiat in legal ordering – a need that Fuller saw embodied in the generality of legal rules and that others have found embodied in its procedural aspects, e.g., in the familiar right of citizens within democratic societies to challenge any accusation of offence.[200] From this perspective, the legality of a judicial decision is a matter of degree, capable of increasing or decreasing according to its well-foundedness, and so the question of whether a law was made in accordance with accepted rules of formation will not exhaust the question of the norm's validity.

These two aspects of law – fiat and reason, certainty and arguability – seem to pull in opposite directions, the former suggesting a complete concentration of power in the hands of officials and the latter the answerability of those officials to the expectations and acceptances of citizens. Hart's focus on formal criteria of validity meant that the latter are made derivative of the former, as simply a matter of contingent historical fact: "As though, as Fuller has said, the proposition that laws ought to be clearly expressed were simply a subjective preference of the judges."[201] It is only when we turn our attention away from abstract claims about what is logically necessary for law's existence to the question of *why* we rely on law in a given form that we can see the two as jointly constitutive, mutually reinforcing facets of a complex social practice. Institutional conclusiveness is one social need historically emphasized by positivism, especially in its Utilitarian origins where it formed the basis for the normative point of keeping law and morality distinct: given that social life is a source of tension and conflict for individuals

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[199] "The object of the rule of law is to substitute for violence peaceful ways of settling disputes. Obviously peace cannot be assured simply by treaties, agreements, and legislative enactment. There must be some agency capable of determining the rights of the parties in concrete situations of controversy." Fuller, "Forms and Limits of Adjudication," in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth Winston (Durham: Duke University Press, 1981), 99.

[200] See Fuller, "Reason and Fiat in Case Law," in *Harvard Law Review* 59 (1946): 376-95. Neil MacCormick has also emphasised the legal form's dual commitment to certainty on the one hand and arguability on the other. These two seem to pull in opposite directions – the former suggesting a strict observance of established law, especially by those in authority, and the latter suggesting that any law may be defeated at any time – and it only by seeing law's connection to liberty that they appear as two compatible, mutually reinforcing facets of a single, complex social practice. See Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press, 2009).

[201] Winston, Introduction, 56.

living in close and often unchosen relations, the law should aim to provide a stable framework of expectations regarding the limits of permissible conduct, one which relies as little as possible on the moral judgment of citizens in determining their own obligations.[202]   More recent versions of positivism have for the most part dropped the normative/Utilitarian elements but continue to put primary emphasis on the idea of law as an exercise of authority. For Fuller, what gets lost in this emphasis is the significance of law's *generality*:   law does not tell a person directly what to do to accomplish specific ends desired by the lawgiver but rather "furnishes him with baselines against which to organize his life with his fellows."[203]   As I noted above, for him the problem is not the idea that the source of a norm contributes to its legality but that it is decisive for it, and therefore dispositive of the question of one's legal obligation in that case: "[T]his view overlooks the fact that there are what may be called informal limitations implicit in any attempt to subject human conduct to the control of general rules."[204]   If we accept that the function of law is to provide people with baselines for self-directed activity then certain requirements on the lawgiver come to light, having to do with the establishment of stable "interactional expectancies" between ruler and subject:

> On the one hand, the law giver must be able to anticipate that he citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. On the other hand, the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to judge his actions, as in deciding, for example, whether he has committed a crime or claims property under a valid deed…. [T]he enactment of general rules becomes meaningless if government considers itself free to disregard them whenever it suits its convenience.[205]

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[202] Normative or ethical positivism is the thesis that the separability of law and morality is morally desirable – that "the values associated with law, legality and the rule of law … can best be achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is." Waldron, "Normative (or Ethical) Positivism," in *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'*, ed. Jules Coleman (Oxford: Oxford University Press, 2001), 421. See also Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth Publishing, 1996).

[203] Fuller, "Human Interaction and the Law," in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth Winston (Durham: Duke University Press, 1981), 211.

[204] Fuller, "Irrigation and Tyranny," in *Stanford Law Review* 17 (1965): 1029.

[205] Fuller, "Human Interaction," 211.

Again, the idea is not that people all share a particular sort of attitude toward law, but that these ideas are latent within the practice itself: law would not be possible at all were people not imbued with a set of capacities that could call forth the kind of voluntary coordination and self-regulation that this form of social ordering requires.[206]

2.6. Conclusion

I want to conclude with a final remark on the relationship between the form of law and its substance. In his initial response to Fuller, Hart for the most part assumed these two to be quite distinct: taking Fuller to be asserting a relationship of entailment between the two, he then quite understandably declared this claim absurd. As Hart noted, people in any relatively stable society will often seek to orient their system of law toward ideals of justice, and this overlap in practice can take some credit for the appeal of natural law theory; Austin, for example, spoke of the "frequent coincidence of positive law and morality and attributed the confusion of what law is with what law ought to be with this very fact."[207] The positivist insight was that this coincidence is by no means a necessary one; at most, law and morality bear a contingent, causal relation to one another – an "intersection of law and morals"[208] rather than a necessary connection. In response, I have suggested with Fuller that our understanding of legality does not relate simply to the substantive ends served by rules, but also to the form of law as it manifests ideals concerning the means by which those ends are pursued. There is something at once more flexible and, at the same time, conceptually closer about the "relation" between law and morality than the claim that Green attributes to Fuller, viz., that the former entails the latter as a kind of teleological necessity. Certain ideals are expressed by law itself, and in that sense morality is not something wholly external to law and yet entailed by it. The

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[206] As Jennifer Nadler puts it, "the generality of law not only respects free agency; it presupposes it. Law presupposes human freedom and so too the dignity that flows from that freedom." Nadler, "Hart, Fuller, and the Connection Between Law and Justice," in *Law and Philosophy* 27 (2007): 25. The result is that "[l]aw's purpose is to guide conduct in a manner that fulfills and respects the human capacity for self-determination." Ibid., 30.

[207] Hart, "Positivism and the Separation of Law and Morals" in *Readings in the Philosophy of* Law, ed. Jules Coleman (Taylor and& Francis: 1999), 54.

[208] Ibid.

connection between the two is conceptually more complex than entailment in the sense that each contributes to our understanding of the other, for it is only through our collective participation in social forms that we achieve a rich appreciation of what persons are like, what goods they need in their status as free and responsible moral agents. In chapters three and four, I explore the implications of this claim for the possibility of a purely descriptive jurisprudence. I suggest that it is the vision of the person implicit in a theory of the nature of law that forms the mediating link between description and evaluation in legal theory.

Chapter Three

Fuller and the Morality of Law Itself

3.1. Introduction

One of Jules Coleman's aims in his article, "Beyond the Separability Thesis," is to show that the competing methodological positions in the debate about the possibility of a morally neutral theory of law do not break down neatly into first-order positions on the value (or non-value) of law: one might defend the possibility of a descriptive jurisprudence while accepting that there is something "necessarily valuable or desirable"[209] about legal governance. Crucial to the argument is the claim that a complete description of law can be given entirely in terms of law's formal features, with nothing implied as to the nature of human beings which might influence a determination of law's value. The suggestion that legal practice can be described without presupposing a view of human nature is, of course, in direct tension with the central theme of this thesis. Thus, Coleman's position provides an opportunity to defend head-on the claim that a theory of law cannot help but contain some, at least implicit, ontology of persons. This defense also advances the methodological debate about the role of values in legal theory, since it indicates a point of logical contact between fact and value in the description of legal practice: the view of agents within a given conception of law, and the goods available to them as the kinds of beings they are.

In section one, I explain Coleman's argument that descriptive positivism is compatible with the claim that there are necessary moral properties of law. This argument turns on conceiving law's necessary value as extrinsic to the concept; it presupposes, in other words, the instrumental conception of law which I have suggested Fuller rejects. In section two, I briefly revisit my claim from chapter one that Hartian positivism presupposes a certain conception of the nature of human agency. In section three, I argue that because Coleman fails to adequately address Fuller's claim that law's

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[209] Jules Coleman, "Beyond the Separability Thesis," *Oxford Journal of Legal Studies* 27 (2007): 600.

value is internal to it in a non-instrumental sense, his argument for the possibility of a descriptive jurisprudence is at least incomplete.

3.2. Jules Coleman on Law's Value

As standardly viewed, the debate between legal positivism and natural law theory is about whether there is a necessary connection between law and morality within the concept of law itself. According to natural lawyers, internal to the concept "law" is the notion of a morally legitimate power, while for positivists there is no contradiction or tension implied in declaring a rule (or system) both unjust and legally authoritative. At least since Hart's *The Concept of Law*, however, positivism has also been associated with a methodological position according to which legal theory is "both descriptive and general,"[210] offering descriptions of the nature and functioning of legal institutions that do not depend in any essential way on arguments as to law's moral desirability.[211] Since then, there have been a number of challenges to this self-image of contemporary legal theory as value-neutral. As John Finnis writes in the opening passages of *Natural Law and Natural Rights*, the view is that "no theorist can give a theoretical description and analysis of social facts without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness."[212] Jules Coleman sums up the competing methodological positions:

> Descriptive jurisprudence claims that law can be analysed entirely in terms of its formal features. Normative jurisprudence denies this. It

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[210] Hart, Postscript to *The Concept of Law*, 240.

[211] John Austin's method is often mentioned as a precursor to Hart's project in this regard, for while Hart had rejected the rejected the crudely materialistic or scientific analyses of the early positivists and legal realists, he maintained, controversially, Austin's claim to moral and political neutrality: his claim was that to recognize the robustly normative character of law – including its role in the moral and justificatory discourses of those who use it – was more faithfully *descriptive* of law's bindingness than the narrowly reductive account in terms of brute facts of obedience. Hart himself saw Bentham as his inspiration for what he describes as his "insistence on a precise and so far as possible a morally neutral vocabulary for use in discussion and politics" [Hart, "Bentham and the Demystification of the Law," *Modern Law Review* 36 (1973): 28]. Hart's understanding of Bentham's project as a precursor to his own form of conceptual analysis has been disputed. See e.g., Phillip Schofield, "Jeremy Bentham and H. L. A. Hart's 'Utilitarian Tradition in Jurisprudence'," in *Jurisprudence* 1(2010).

[212] Finnis, *Natural Law and Natural Rights*, second edition (Oxford: Oxford University Press, 2011), 3.

> claims that any theory of law must make reference to material features of law or to the substantive value of living under law.[213]

As Coleman writes, the case for the impossibility of a purely descriptive jurisprudence derives much of its intuitive support from what he calls the "argument from commendation" – the idea that, "given the significant value of law, it is impossible to provide a sufficiently rich or robust characterization of law that did not make reference to its value."[214] One natural response to the normative argument, then, is to deny that we are dealing with an evaluative concept at all: while "[f]or one reason or another, we have formed positive associations about the concept, … this is just an accidental feature of law, and has no bearing on the content of the concept or on the proper method of jurisprudence."[215] On such a view, the proper target of positive and negative moral attitudes is the contingent content of law – the ends pursued by legal rules in any given system – and not the means through which they are carried out.[216] As I noted above, Coleman's aim is to show that there is a viable methodological position between these two poles: it is possible for the descriptive positivist to accept that there are necessary moral properties of law without conceding the need for a normative jurisprudence. This is because, according to Coleman, there is nothing in the commendation argument to show that law's value must be considered as internal to the concept – "that it is impossible adequately to characterize law in terms of its formal features alone."[217] More specifically, it does not follow from the fact that law has the capacity to realize a moral ideal that we must consider its value as internal to it. For Coleman, it is enough to

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[213] Jules Coleman, "Beyond the Separability Thesis," 598.

[214] Ibid., 598. In *The Practice of Principle*, Coleman calls this the "commendation argument," and, citing Fuller, Finnis, and Dworkin as proponents, summarizes it as follows:

> Law is a predicate of weak commendation. This is because it is part of our concept of law that it is morally attractive as such, from which it follows that every instance of law has some morally attractive property M. That property is the inherent potential of law to realize an ideal of governance. The relevant ideal can be specified in different, perhaps competing, ways, and at different levels of generality; but any analysis of the concept of law must invoke substantive moral premises in order to explain the nature of M, and to orient the analysis toward only those practices that have M. Thus, all jurisprudence must be normative. Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001), 194.

[215] Ibid.

[216] We can recognize here the instrumental conception of law described in chapter two.

[217] Coleman, "Beyond the Separability Thesis," 598.

recognize the legal form's *potential* for good governance – an instrumental value which any plausible analysis of law must recognize and accommodate, but which is not itself part of the concept:[218] "[L]aw is necessarily the sort of thing with the inherent potential of realizing a morally attractive form of governance."[219]

The mistake of the normative theorist is thus to misread the significance of the commendation role of "law" in our normative discourse. As Coleman puts it, "the fact that a thing, by its nature, has certain capacities or can be used for various ends or as a part of various projects does not entail that all or any of those capacities, ends, or projects are a part of our concept of that thing." The important point, he argues, is that there is no warranted move from the recognition of the potential of some object X to realize some property P to the conclusion that P must be part of a theoretically useful explication of the concept of X. A hammer, for example, is by its nature "the kind of thing that can be used as a murder weapon, a paperweight, or a commodity;" but this does not mean that any of these instrumental potentials are internal to the concept. Applied to the jurisprudential debate, for Coleman this means that "[t]he only point we must grant about the 'inherent potential' of law to realize an attractive moral ideal of governance is the fact that law is the kind of thing with the capacity to do so."[220] That is, the fact that law is able to fulfill human interests in beneficial ways then does not entail that this "particularly interesting capacity" is part of our concept.[221] Indeed, Coleman suggests, the opposite would seem to be the case: an adequate account of law must be "thin" enough to be available for use

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[218] In *The Practice of Principle*, Coleman distinguishes between predicates of strong commendation that have moral legitimacy as one of their central features – "justice" is his example – and predicates of weak commendation, which imply moral value but not necessarily legitimacy. He suggests that law belongs to this latter category: necessarily valuable but not necessarily legitimate. In his "Beyond the Separability Thesis," he drops the distinction and compares "law" to the concept of justice, but continues to insist on the separability thesis in its most sensible form: the insistence that there is no warranted inference from legality to legitimacy. Part of his reasoning here is to grant the most powerful version of the normative argument and then to show that it fails even in this strong form: "The better argument is always to give the opposition the premises they need and show that even armed with all the machinery they claim to need, the conclusion they seek fails to materialize." "Beyond the Separability Thesis," 605. His claim is then that both "law" and "justice" can be given fully adequate descriptions in terms of their formal features, i.e., without incorporating a conception of human flourishing.
[219] Coleman, *The Practice of Principle*, 193.
[220] Ibid., 194.
[221] Ibid.

by substantially different kinds of political theories, which are in part distinguished by the different values they assign to that form of governance. To make law's value internal to the concept would turn what is supposed to be a social scientific description into a premise in a moral or political theory, and then we could not competently judge whether the practice does actually have the value attributed to it. Coleman calls this a "meta-principle":

> If law is valuable it will be diversely valuable depending on the views one has in political philosophy; and so the last thing one would want to do is to tie a contestable value to law in order to explain what law is. Doing so would make it impossible to explain the differing values and importance of law within different political philosophies. What we want in a theory is *not* the value that law exhibits, but factors that very different theories can point to that are both essential to law and help us to understand the value law has from the point of view of the relevant theory. Take the idea that law consists in rules for example. This is a feature of law that can figure in a number of different kinds of accounts of the value of law from different philosophical perspectives.[222]

We might call the kind of neutrality called for here "implication neutrality": it suggests that a theory of law must have no (political or moral) value judgments among its logical implications. This is because the concept itself contains no evaluative content; the description is entirely in terms of law's formal features, and so gives no information about the needs and interests of the people whose well-being we are considering.[223] In order to arrive at a conclusion about law's value, the identification of these features must be supplemented by some articulated view of human beings which shows governance by law to contribute to human fulfillment: "[A]ny account of the value of law must rely on a number of facts about persons, their projects and goals and so on, none of which are part

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[222] Coleman, "Beyond the Separability Thesis," 607.

[223] Coleman cites Kant as one theorist who analysed such concepts as justice and morality entirely in terms of their formal features, but it is not uncontroversial that Kant did manage to accomplish this. As a number of theorists have pointed out, Kant privileges the formal criterion of universalizability (and self-consistency) by appeal to substantive claims about the centrality of the rational faculty to who we are as human beings. The proceduralist account of practical reasoning is thus informed by a thick conception of human nature and the human good, with the basic anthropological claim enabling him to hold that a substantive understanding of the good could be yielded from the universalisation test given by the categorical imperative. See, e.g., Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1987), 55-64; also Katerini Deligiorgi, *The Scope of Autonomy: Kant and the Morality of Freedom* (Oxford: Oxford University Press, 2012).

of the concept of law."[224] The effectiveness of law for securing these goals belongs to the descriptive realm, to the facts of actual performance, while the values themselves reside in the realm of substantive moral or political theory. According to Coleman, it is then possible for the descriptive positivist to accept that "[g]overnance by law is valuable"[225] while maintaining the division of labour between descriptive and evaluative theory, since that value is open to being fixed "by any number of otherwise incompatible political theories."[226]

Coleman's crucial claim in arguing for the possibility of a purely descriptive jurisprudence is thus incompatible with the central argument of this thesis, i.e., that in setting up the appropriate categories for the explanation of social action, a theory of law already implicates a certain vision of what human beings are like. As I argued in chapter one, the choice between Hart's and Bentham's accounts of legal obligation is, for example, in part a choice between two conceptions of human agency – two accounts of the relationship between behaviour and environment, of the nature and role of internal states, etc. – that are logically incompatible with one another. In what follows, I want to defend this claim against Coleman's argument above, namely, that an account of the human good is wholly extraneous to a description of legal order. If it is the case that theory choice involves conceptual decisions about what human beings are like, then facts about persons – "their interests, the constitutive elements of their welfare, what they want to accomplish jointly and severally, and so on"[227] – are not added subsequent to description as purely external criteria for the appraisal for law, but are partly internal to the theory, taking their departure from what is latent in the description itself. The result, I want to suggest, is a greater continuity between fact and value than is suggested on the descriptivist model: ideals originate from within theories, and so a given description is already laden with evaluative meaning.

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[224] Coleman, ""Beyond the Separability Thesis," 607.
[225] Ibid., 606.
[226] Ibid.
[227] Ibid.

3.2. *Rules and Reason Revisited*

The claim that a jurisprudential theory is politically and morally neutral is most intuitively compelling when we consider some of its detailed findings. To use Coleman's example, it is difficult to see how the idea that law consists in *rules* could have any logical consequences for the values one holds – that it could commit one rationally to the claim that law is good, say. Whether such an observation is considered praise or criticism of the practice will depend on its relationship to human ends, which are not represented on any list of the features themselves. Coleman's example is misleading, however, in the sense that here we are still far from a *theory* of law: the claim that law consists in rules may have no obvious implications for political theory, but it is also quite devoid of content. For no jurisprudential theory tells us simply that law makes use of rules, or that there are no legal rules; rather, it gives rules a certain role in the explanation of human activity. The question, then, is whether the same neutrality can be maintained when these isolated features are given context and meaning as terms in an explanatory theory, which is not simply a collection of "miscellaneous facts"[228] about law or legal order. Again, I want to argue that insofar as an account of law's important features gets its content and significance from an underlying view of human beings, it does not lend itself indifferently to evaluation by all types of political or moral theory. Briefly, then, I want to look once more at the way in which this obvious empirical feature of law takes shape in the context of Hart's account of law and legal obligation. The fundamental point of disagreement between reductive and non-reductive accounts of law, I want to suggest, is not the notion that law makes use of rules but rather the central or derivative place given to them in the explanation of law's normativity and of human action more generally.

As Michael Steven Green writes, there is a sense in which the existence of legal rules cannot be reasonably denied: even the "rule-skeptical" realists acknowledged the existence of statutes and the like that sought to guide behaviour by virtue of their propositional content.[229] What the realists doubted was the robustly normative sense of

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[228] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 17.
[229] Michael Steven Green, "Legal Realism as a Theory of Law," in *William and Mary Law Review* 46 (2005): 1915-2000.

legal rules as providing people with independent reasons for action; they realized, as Hart did, that from the simple fact of a command being issued, nothing follows about what anyone ought to do.[230] As Hart noted in his inaugural lecture, the realists' rejection of the idea of legal obligation was owed in large part to a narrow view of language as primarily designative: so long as we construe meaningful words as names signifying objects, the alternative to a skepticism about rules, rights, duties, etc. can only be a sort of Platonism on which they are given full metaphysical reality as kinds of super-empirical entities.[231] What survived the referential view of language, however, was a deflated sense of rules as simply imperatives – as declarations of will. The question was then how to account for the normativity of law as the transfer of will from one party to another.[232]

For Hart, we saw in chapter one, the mistake of reductive accounts of legal obligation was to take normativity as derivative, as something that must be added to the dead rules in order to bring them to life. It is true that commands by themselves cannot obligate anybody to do anything, but legal rules are not commands – they are not simply declarations of will.[233] When made from the internal point of view, statements of law are made in the indicative, and not the imperative, mood; like the rules of a game, they tell us *how* something is to be done by reporting or describing the way in which we *in fact* do it.[234] The crucial point, emphasised by the ordinary language theorists, is that our

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[230] Green argues that the realists rejected legal rules in this "reason-for-action sense." Ibid., 1922.

[231] Hart, "Definition and Theory in Jurisprudence," in *Law Quarterly Review* 70 (1954): 37, reprinted in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 21.

[232] On the realist account, this is achieved by some combination of rhetoric, which seeks to "objectivize" judicial decisions by dressing them in the language of neutral applicability and political independence, and sanctions, which provide people with a powerful subjective reason to do what the law says independent of their sympathy with its content.

[233] Another way to put this point is that it is a mistaken temptation to take the prescriptive as the central (or sole) case of the normative. See Stanley Cavell, "Must We Mean What We Say?," in *Inquiry* 1 (1958): 172-212: "[I]f a normative utterance is one used to create or institute rules or standards, then prescriptive utterances are not examples of normative utterances. Establishing a norm is not telling us how we *ought* to perform an action, but telling us how the action *is* done, or how it is *to be* done." Cavell, 189. In *Natural Law and Natural Rights*, John Finnis also notes that legislative draftsmen tend to use the indicative rather than the imperative propositional form, but he falls into the same mistake identified by Cavell when he writes that the vocabulary here will not be normative (that, "[i]ndeed, it is quite possible to draft an entire legal system without using normative vocabulary at all"). *NLNR*, 282.

[234] In Finnis' example, "legislative draftsmen do *not* ordinarily draft laws in the form imagined by Aquinas: 'There is not to be killing' – nor even 'Do not kill', or 'Killing is forbidden', or 'A person shall not [may

successful performance of an action depends upon our taking on the ways in which the action is done, upon our adopting and following the ways which are normative for it' there must be specifications of what is to be done if one is to qualify as performing that action at all. As Stanley Cavell put it, it is thus "a confusion to speak of some general opposition between descriptive and normative utterances"; in his example, "'You must (are supposed, obliged, required to) move the Queen in straight paths…' or, "You may (can, are allowed or permitted to) move the Queen in straight paths…' say (assert) no more than 'You (do, in fact, always) move the Queen in straight paths…'."[235] What the student has been told here is a rule governing the game of chess, and if her actions are to count as playing that game, they must conform to that rule (and others). The significance of this – the fact that rules have a double life as descriptive statements – is that normativity is not something that needs to be introduced into human activity: the characteristic feature of action (as opposed, e.g., to the movement of objects or bodies) is that it is *already* normative, that it can – in various, context-dependant ways – go wrong. Assuming that what obligates us must be an imperative, the realists needed some way to explain the bindingness of law as a guide to behaviour, but they also recognised that telling people what to do can never constitute the establishment of a rule or standard. The result, predictably, was a skepticism about the very concept of legal obligation, the idea that law can generate normativity from within its own structure. Again, Hart's insight was that law is normative all the way down: telling people what to do is not establishing a rule to cover the case, but rather presupposes the existence of some rule or rules already in place (including those rules that give some people authority to exercise a direction over others); it presupposes that there is something that it would be correct to do here.[236] No law ensures that one will not act illegally, but its status as a legal rule is unaffected by what one does or does not want to do.

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not] kill'. Rather they will say 'It shall be [or: is] an offence to…' or 'Any person who kills … shall be guilty of an offence." *NLNR*, 282.

[235] Cavell, 193.

[236] This is not to say that people in authority never resort to cajolery or to private persuasion, but such occasions usually represent the breakdown (or transcendence) of rules and not their paradigm instance.

One of my claims in chapter one is we gloss over the deeper commitments of these theories if our complaint is simply that the reductionist overlooks the robustly normative sense of legal rules above. This is because, for the naturalistically-minded realists, a properly scientific account of law would show that there *were* no irreducibly normative relationships; it would show Hart's ascriptions of explanatory priority to be misplaced. One of Fuller's major criticisms about Hart, I suggested in chapter two, was that Hart had failed to notice the extent to which his conceptual choices were tied in with a certain conception of human beings. If law is nothing but a set of commands delivered from sovereign to subject – binding in virtue of the former's monopoly on physical force – then there are no necessary constraints on form or content. Whether I can effectively command depends only on whether I am empowered – by consent, by fear, etc. – to exercise a direction over others, and the only qualities I must recognise in my subjects are those that indicate a disposition or capacity to obey. Rules are different. They do not tell us what we ought to do *if* we are sufficiently motivated, but describe what we *must* do if we are to remain within the bounds of law (or etiquette, or chess, etc.). They engage our rational faculties and not simply our habits of response or our instinct for self-preservation. We can compare telling a dog (or a hostage), "Sit!" with telling a person, "During the ceremony, you must remain seated." As Cavell put it, only the latter "requires that I recognize the object as a *person* (someone doing something or in a certain position) to whose reasonableness (reason) I appeal in using the second person."[237] The question of how law obligates thus opens up the question of the boundary between legislating badly and failing to achieve law at all. For Fuller, it meant that the idea that law consists in rules comes bound up with a logical conclusion: when law no longer engages us rationally, it ceases to be law and becomes something else altogether.[238]

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[237] Cavell, 196.

[238] Finnis' natural law account can be seen as taking this conclusion one step further: there are constraints not only on the form but also on the content of rational deliberation and choice. Thus

> [t]here is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sounds from unsound

In the next section, I want to examine the consequences of this argument for Coleman's neutrality requirement above, the idea that a description of law must have no implications in the realm of political theory. As Coleman writes, there is a clear sense in which the normative theorist must engage in descriptive work: "Part of what distinguishes these theories is that they associate different values with governance by law, and the fact that they are likely to identify some different features of law as essential to having the value that it does."[239] If different normative theories are partly distinguished by the significance they assign to the different features of law, then they will be compatible with certain descriptive theories – i.e., those that concede the reality of the normatively crucial features – and incompatible with others. But Coleman's crucial claim is that the reverse is not the case: even if the political philosopher cannot fail to make descriptive claims about the object of valuation, there is not the same continuance from description to evaluation. In what follows, I argue that insofar as the task of providing a framework of law's essential and derivative features falls to the realm of descriptive theory as well, an explanatory framework cannot help but contain some, at least implicit, conception of human wants, needs, interests, etc. The result is that the two kinds of social inquiry – the descriptive and the normative – are not strictly detachable in the way the neutrality thesis requires. Particular descriptive accounts of the nature of law will go along with particular political theories (e.g., the view of law as a system of general rules for citizens' self-regulation lends itself more readily to a liberal democratic view of good government than it does, e.g., Bentham's systematic authoritarianism) and vice versa (the liberal method of social regulation appears as an arbitrary ideal from the perspective of one who defines law as an exercise of sovereign power). The suggestion is not so much that it is strictly impossible for one to offer a purely descriptive list of law's features, but something more like what Fuller and Finnis claim: the richer and more informative our

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practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular-purpose) and acts that are unreasonable-all-things-considered, i.e. between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of general moral standards. Finnis, *NLNR*, 23.

[239] Coleman, "Beyond the Separability Thesis," 606.

description of human practices, the less distinguishable the two forms inquiry, the more continuity between them.

3.4. Social Practices and Internal Goods

Coleman's account of law as necessarily instrumentally valuable is an attempt to absorb some of the natural lawyer's insights about law's value into the positivist framework. As I noted above, the compromise is to suggest that law acquires moral value from its "inherent capacity" to realize valuable ends, e.g., its "capacity to treat individuals as autonomous, to mediate between persons and the reasons that apply to them, to justify the use of coercive force, and to serve a variety of welfare-enhancing ends."[240] We should not be misled, then, by what seems to be Coleman's full agreement with Fuller in passages like this one:

> The idea of law imposes constraints not only on the ruled, but also on the ruler. To be sure, a legal system need not be effective in constraining the exercise of the ruler's power, and may even stipulate that the law imposes no such constraints; but in so far as a ruler exercises arbitrary power, he or she does not govern by law. Law thus implies a kind of reciprocity between ruler and ruled. Legal rules are, as such, general in their scope and application, knowable in advance, and susceptible of compliance. These features indicate that under law, the governed are, in some perhaps very modest and limited sense, treated as autonomous agents capable of deliberating and acting on the basis of reason. This normative relationship between ruler and ruled under law is morally preferable to alternatives, and this inherent feature of law explains why it is a predicate of commendation.[241]

On Coleman's account, as on Fuller's, what distinguishes law from arbitrary power is a certain quality of relationship between ruler and ruled: where rule by terror or force governs primarily by a top-down projection of power, rule by law is marked by "a kind of reciprocity" between legal subjects and the lawgiver. On his view, it is this potential to secure for people a certain quality of position relative to their government that accounts

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[240] Coleman, *The Practice of Principle*, 193 (footnote 22).
[241] Ibid., 193. Coleman maintains this point in "Beyond the Separability Thesis": "Law regulates human affairs by rules that are reasons for acting. In that sense, governance by law necessarily respects the capacity of those to whom its directive are addressed to act on the basis of reasons. It respects in other words their distinctive capacity for agency." "Beyond the Separability Thesis," 584.

for the commendation role of the concept in our normative discourse. As I noted above, Coleman thinks the commendation argument errs, however, in taking this "particularly interesting capacity" of law to be internal to the concept: as of yet, he writes, no argument has been put forth to show that this is the case, "and none appears to be forthcoming."[242]

As Coleman sees it, then, the disagreement between him and the normative theorist is on the question of whether law's potential to realize a morally attractive ideal of governance is internal or external to the concept. I think there is a more fundamental disagreement here, however, having to do with whether respect for agency is properly called a "potential" of law. Usually, to say that something has value for its instrumental capacity is to say that there is nothing intrinsically desirable about it – that its value derives from its being used toward some valuable end. A thing can be said to have instrumental value when it exists in a context in which its tasks are exogenously imposed. To use a couple of Coleman's examples, "hammer" is not a term of disvalue because it can be used as a murder weapon, nor is "religion" for being "the kind of thing that can stir murderous passions."[243] Despite what he calls the "inherent potential"[244] of these things to be used in value-laden ways, the real object of value (or disvalue) is still the use or ends to which they are contingently put. By contrast, we saw in chapter two, for Fuller law itself embodies moral aspirations independent of the will of the lawmaker; unlike the hammer's capacity to be used as a paperweight or a murder weapon, the internal morality of law does not depend on anyone's decision or intention to use the legal form in a particular way or for a particular purpose.[245]

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[242] Coleman, *The Practice of Principle*, 194.

[243] Ibid. This analogy itself suggests to me that a positive instrumental potential of law is not enough to account for its commendation role in discourse; if it were sufficient, then it seems that many other concepts with such potentials would act as predicates of value (or disvalue). At the very least, it seems the capacity must be fairly central to the concept for it to have such an impact on ordinary use.

[244] Ibid.

[245] Coleman is careful to note that not all functions are intentional in this way; to say that the function of hands is to grasp things, for example, it is not necessary to invoke intention or the notion of divine design – for "we can also tell a causal story that explains how a certain outcome – the capacity to grasp things – is part of a causal-evolutionary explanation of the existence and shape of the hand." *The Practice of Principle*, 206. The examples he puts forth to show that the value of law is not part of the concept, however, are all peripheral or incidental uses that do, in fact, depend on somebody's decision to use a thing

At times, this seems to be Coleman's claim too. As he writes, in regulating human activity by rules that are reasons for acting, governance by law necessarily respects peoples' "distinctive human capacity for agency."[246] But, I think, he misunderstands at least Fuller's argument in characterising this feature of law as instrumental. For Fuller, a sort of reciprocity between ruler and ruled is intrinsic to law not as a thing it can do, but in the sense of being constitutive of it: law just is a particular kind of moral association amongst persons, a distinctive mode of rule that acknowledges in a special way the humanity of those who belong to it. Sharing in common ends is one source of spontaneous voluntary ordering for self-determining beings, but those not engaged in shared projects also need some way of organizing their activity with one another. The problem that Fuller can be seen to be addressing is thus as follows: is there some other way in which peoples' capacity for self-determination can be recognised in their interactions with one another besides that of voluntary or enterprise association? Can we have a form of compulsory association that at once claims authority for itself and recognises the capacity of the agent to intelligently self-regulate? For Fuller, this was the form of freedom constitutive of law, the distinctive mode of governing intelligent beings offered by general rules.

I want to turn to another source here to help shed more light on Fuller's claim that law itself embodies a moral value – Charles Taylor's example of the practice of negotiation. In one sense, negotiation seems obviously a neutral tool for pursuing non-neutral ends. It might be used for good, as when one negotiates a peace between warring parties, or for ill, as when one negotiates a price for a slave. In everyday contexts where the background of understanding is shared, this is a perfectly acceptable way of describing the practice: the concept marks a simple fact of human life – a mode of

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in a certain (non-characteristic) way – and it is this non-centrality of use is what lends immediate intuitive plausibility to the argument that an instrumental potential of a thing is not necessarily part of the concept of that thing. In particular, Coleman's argument cannot be that "particularly interesting" capacities are never included in concepts; surely the "interesting" capacity of hands to grasp things is part of our concept of hands, and the capacity of a knife to cut part of our concept of a knife. Rather, the claim must be that the capacity of law to realize certain values or ideals is not *central enough* to be part of our concept of law, and Coleman offers no argument for this latter claim.

[246] Coleman, "Beyond the Separability Thesis," 583.

interaction where the self-interest of individuals is coupled with the need for collaboration – with no significance beyond what the actors bring to it. What this instrumental understanding of the practice overlooks, however, is the special competence of the social means for ensuring the integrity of outcomes – what we might call the "inner morality" of negotiation: notions of bargaining, compromise, good-faith agreements, of individual autonomy and the separateness of persons, and so on. These are not ideas that people have the option of either adopting or disowning in entering into negotiations with others; whether one has expressly submitted to them or not, they are embodied in the practice itself. To a significant extent, then, the practice determines the attitudes and actions of the participants, who enter into it for their own personal reasons. On a purely negative conception of freedom, this will seem to undermine agency in social encounters, but this is too crude: in order for meaningful interaction to be possible, there must already be forms imposed on peoples' relations with one another, possibilities for action and response that are not chosen or optional. As Fuller put it, "[t]o engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn."[247] We must all draw roughly from the same repertory of foreseeable and acceptable actions. Understanding the practice in purely instrumental terms overlooks the significance of institutional forms as sources of meaning in themselves, as part of a "language of social life" by which people are ultimately comprehensible to one another:

> Our whole notion of negotiation is bound up for instance with the distinct identity and autonomy of parties, with the willed nature of their relations; it is a very contractual notion. But other societies have no such conception. It is reported that the traditional Japanese village that the foundation of its social life was a powerful form of consensus, which put a high premium on unanimous decision. Such a consensus would be considered shattered if two clearly articulated parties were to separate out, pursuing opposed aims and attempting either to vote down the opposition or push it into a settlement on the most favourable possible terms for themselves. Discussion there must be, and some kind

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[247] Fuller, "Human Interaction and the Law," in *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart Publishing, 2001), 213.

of adjustment of differences. But our idea of bargaining, with the assumption of distinct autonomous parties in willed relationship, has no place there; nor does a series of distinctions, like entering into and leaving negotiation, or bargaining in good faith (sc. with the genuine intention of seeking agreement).[248]

In Fullerian terms, then, we might mark off the internal morality of negotiation – honesty, disclosure, good-faith agreement, openness to compromise, and so on – from its external morality, the ends pursued by participants at any given time. The former are goods embodied in the form of the activity itself; they are not "potentials" (or even "inherent potentials") for a producing a certain outcome but requirements that must be met if the practice is to be what it purports be. A total disregard for them does not make an exchange simply a less desirable instance of negotiation, but undermines the very conditions of its existence, i.e., the willed nature of the interaction between two autonomous parties. We would be reluctant to say, for example, that two parties had "negotiated" a settlement if one party deliberately misled the other as to the terms of the agreement. In more complex cases we might be unsure as to whether the term applies – e.g., where one party is in deep economic need or there is some other marked inequality – and the descriptive assessment will then, it seems, shade into the evaluative or moral; it will have to do with our understanding of the nature and conditions of autonomy. For now, the crucial point is that these internal standards are not properly accommodated on the instrumental model, where they are seen primarily as "beliefs and 'values' held by a large number of individuals" – as demands that are processed through rather than embodied in our institutional forms.[249] If goals are fixed externally, then the standards of evaluation will also come from the outside: we apply the evaluative terms "good" or "bad" to those features of an object that promote or frustrate the attainment of those goals. The mistake is when we treat all goals or purposes in this way, and so treat as external criteria of assessment what are in fact the internal qualities of institutional orders. For Fuller, what gets missed on such an account is a richer understanding of the different

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[248] Charles Taylor, "Interpretation and the Sciences of Man," *Philosophical Papers: Volume 2, Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), 33.
[249] Ibid., 46.

forms of meaningful activity, of human agency and social relatedness, which comes from understanding the way in which social institutions are themselves ends – the way in which, "although we make them, they help to make us what we are."[250]

Coleman's suggestion that respect for agency is an inherent potential of law is meant to be a compromise between the two traditional poles in the debate: law's value is external to it in the sense that we need not grasp it in order to understand and apply the concept, but it is more than contingent or accidental in the sense that law just is the kind of thing that can realize a valuable mode of social organisation. In this way, Coleman sees the capacity of law to perform a social function as bound up with the structure of the practice.[251] Fuller's own contribution, I think, is a richer understanding of social structure: institutional forms are made up not only of constitutive features and rules, but also of constitutive norms and values, constitutive roles and relationships, which together emit their own objective environment of constraint.[252] While some of the norms and values internal to formal processes may achieve articulation as distinct rules and standards, for the most part they remain in the background of our activity, a set of tacit understandings that emerge in interaction as people come to "guide their conduct toward one another."[253] The tendency of mainstream legal philosophy, Fuller thought, was to overlook the commitments implicit in social institutions in favour of their more readily formalizable aspects. The effect was to subordinate the facilitative role of legal forms in creating and maintaining social relationships to a more explicit instrumentalism in which

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[250] Fuller, "Human Purpose and Natural Law," *Journal of Philosophy* 53 (1956): 700.

[251] As Coleman writes of Hart's analysis,

> …in positing, as the function of law, that guidance of conduct by rules that are reasons, Hart posits a function that can be understood, perhaps in a variety of different ways, as morally attractive. It has the capacity to treat individuals as autonomous, to mediate between persons and the reasons that apply to them, to justify the use of coercive force, and to serve a variety of welfare-enhancing ends. Coleman, *The Practice of Principle*, 193.

[252] As Fuller put it, legislation and adjudication, along with mediation, voting, contract, etc., "all these serve to impose forms on men's relations with one another." Fuller, "American Legal Philosophy at Mid-Century – A Review of Edwin W. Patterson's Jurisprudence, Men and Ideas of the Law," *Journal of Legal Education* 6 (1953): 477.

[253] Fuller, "Human Interaction and the Law," 194.

law simply intervenes at breakdowns in social order.[254] In his analysis of the different forms of legal ordering, Fuller's own approach thus looked past the most obvious aspects of, e.g., adjudication – its role in resolving disputes at the disintegration of social relationships – to see it as itself a form of social order, distinguished from other orderings by "the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[255] What distinguishes the functions of the judge from those of, say, a baseball umpire is that the latter does not reach his decisions within an institutional framework that invites the disputants to argue their case, e.g., by submitting claims of right and accusations of fault.[256] For Fuller, the point to be emphasized is that the manner in which people are expected to participate in the process – in particular, the "urgent demand for rationality" – places certain intrinsic demands that must be met if it is to function at all.[257] The ideal for adjudication thus take its departure from requirements that are latent within the practice itself, a question of "what results flow from particular forms of order."[258] As Kenneth Winston sums it up, "respect for litigants is optimized when the judge's decision is based, as far as possible, on [their] arguments, [so that] their fate is made to rest on their own efforts and their own understanding of their situation."[259] Understood in this way, a social practice itself can be seen as projecting certain moral ideas about human capacities and characteristics, ideas that make its risks or inefficiencies tolerable and explain why we pursue it as both a social means and as an end in itself.

In the case of law more generally, Fuller saw the same continuity between our description of the legal order and an ideal for political organization, with the mediating link the conception of the person implicit within the rule-based conception of law – its

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[254] Social forms " are generally viewed only in their most obvious aspect, that is, as means to the realization of human ends. But they are also themselves ends…" Fuller, "Human Purpose," 700.
[255] Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978): 364.
[256] Ibid., 365.
[257] Ibid. Optimal conditions bring practice to its highest form, while essential conditions mark the threshold below which the practice ceases to exist.
[258] Fuller, American Legal Philosophy at Mid-Century," 477.
[259] Kenneth Winston, "Three Models for the Study of Law," *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, ed. W. J. Witteveen and Wibren van der Burg (Amsterdam: Amsterdam University Press, 1999): 73.

"commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."[260] The question, as liberal theorist Walter Lippmann put it, is of "the appropriate method [of social control] for a self-governing people to use."[261] For Fuller (and Lippmann, too), the answer was the liberal democratic ideal of collective self-rule: the definition and perfection of reciprocal obligations amongst persons.[262] Fuller's complaint about the instrumentalist theories of his day was not that they missed altogether the importance of reciprocity as something we value in our relations with one another, but that they could not incorporate its meaning as anything other than an end we all happen to share.[263] Reciprocity was a demand to be processed by the legal system rather than its animating principle.

Coleman's more nuanced view, I have suggested, is uncertain on this point. What is introduced as a necessary relationship between law and a form of agency is elsewhere re-described as a merely instrumental one: on the one hand, there is the Fullerian claim that "governance by law necessarily respects the capacity of those to whom its directives are addressed to act on the basis of reasons. It respects in other words their distinctive human capacity for agency;"[264] on the other, there is his continued insistence that "[t]he only point we must grant about the 'inherent potential' of law to realize an attractive moral ideal of governance is the fact that law is the kind of thing with the capacity to do so."[265] The definition expands and contracts as needed to preserve both its necessary connection to moral values – values which Coleman at various points feels free to identify – and what I have called its "implication neutrality," its openness to having its value

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[260] Fuller, *ML*, 62.

[261] Walter Lippman, *The Good Society* (New Brunswick, New Jersey: Transaction Publishers, 2009), 266.

[262] As Lippmann put it, "[i]t is social control, not by authority from above commanding man to do this and that man do that, but social control by a common law which defines the reciprocal rights and duties of persons and invites them to enforce the law by proving their case in court." Ibid., 265.

[263] It is this general tendency taken to its extreme, Fuller writes, which prompted Hans Kelsen to speculate what should happen if people simply stopped calling for the fulfillment of contracts; Kelsen's suggestion is that the state would have to step in to enforce them. But it is hard to imagine what would remain of human relations in such a scenario, where people simply ceased to be interested in such things as promises, contracts, etc. For Fuller, to conceive of reciprocity as one end we all happen to share was distortive of how deeply ingrained this principle is, how much a part of our nature as rational and moral agents.

[264] Coleman, "Beyond the Separability Thesis," 584.

[265] Coleman, *The Practice of Principle*, 194.

determined for it by "the widest range of different political theories."[266]   I think it is difficult to meet both of these conflicting demands at once, and that the latter should fall away. Where a jurisprudential theory is grounded in the nature of the human personality – in part a theory of the subjects of legal rule – it will inevitably shade into the normative. By understanding reciprocity as an organizing principle of the legal order, we can see the relationship between law and morality as at once variable and grounded: the ideal will take its departure from what is latent in the practice itself.

3.5. Conclusion

For Fuller, the effect of all this was to problematize the straightforward distinction between social science and ethics, the former being concerned with the efficacy of means and the latter with the desirability of ends.[267] This is because the description of a social practice will come with its own set of logical implications for how we should determine its value. The liberal democratic ideal of collective self-rule is not a new premise in an independent value position, but arises from our description of the legal order and the expectations it generates. Unlike on Coleman's account, then, there is a sense that a certain description of law might be fundamentally compatible (or incompatible) with a certain political theory. Here, I think, we come to the crux of the debate, and the reason why it has not been resolved to the satisfaction of normative theorists. If a social scientific description is to offer itself impartially to evaluation by a wide range of political theories, then clearly it cannot lend better rational support to any one of them over the others; before any description of law, we must be free to adopt an indefinite number of value positions. We must be free to reject, e.g., autonomy as a value of the legal order if

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[266] Coleman, "Beyond the Separability Thesis," 607.

[267] As he wrote,

> Now if the means-end relation is as simple as it is generally thought to be, then the distinction between science and ethics is equally simple. On the other *hand*, if the distinction between means and end is, as I believe, urgently in need of re-examination, then this is equally true of the distinction between science and ethics. Fuller, "Human Purpose and Natural Law," *Natural Law Forum* 68 (1958): 79.

we are "moved by" [268] something else instead. Ostensibly a logical point – "No *Ought* from a mere *Is*" [269] – the case for descriptivism then really rests on a claim about practical reason: as Fuller put it, the view is that "[t]he validity of human ends and 'values' is not a matter for reasoned demonstration."[270] In the next chapter, I want to examine more carefully the viability of the descriptivist position once we admit the full force of Fuller's claim that the law itself embodies a moral ideal. In particular, I want to suggest that the notion of internal goods poses a challenge to the view that descriptions can never count as grounds for valuations.

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[268] Thus, for Coleman, "[i]f one is moved by the moral ideals of autonomy and dignity, then one can see how the elements of my analysis constitute a thing (law) that has the capacity for accommodating those ideals in ways that other forms of governance cannot. If one is moved by the ways in which effective organization can enhance human welfare, then it is plain to see that law, understood in terms of the analysis I offer, can be conducive to those ends." Coleman, *The Practice of Principle*, 195. My suggestion in chapter four is that the description of law as a system of rules at least narrows the range of potential valuations we can ascribe to it; as Stephen Perry writes, "the ideals of autonomy and dignity are particularly closely tied to the idea that law serves a guidance function, in a way that is not true of welfare." Perry, "Method and Principle in Legal Theory," *Legal Theory* 111 (2002): 1810 (footnote 209).

[269] John Finnis, "A Grand Tour of Legal Theory," *Philosophy of Law: Collected Essays* (Oxford: Oxford University Press, 2011), 112.

[270] Fuller, "Human Purpose," 73.

Chapter Four

Neutrality in Jurisprudence:

Agency and Values

4.1. Introduction

The purpose of this chapter is to examine in a new way the problem of the role of values in legal theory. Dominant treatments of the argument against the possibility of a morally neutral theory of law tend to see it as resting on a kind of logical error: the illicit slide from the claim that something *is* the case to a claim that it *ought* to be that way. The intuitive appeal of the descriptivist position is owed in large part to its denial of the validity of the inference from fact to value. In what follows, I want to suggest, contra Coleman's argument in chapter three, that the force of descriptivism in this form does depend on our adopting a neutral concept of law upon which values are epiphenomenal. In particular, once we admit the internal relatedness of such values as autonomy and dignity to the legal form, a certain conception of practical reason is required to maintain the logical separation between description and evaluation: one on which practical reason is powerless to determine the rationality of ends in themselves. It may be that descriptive positivists are willing to accept this substantive view of what it is to understand and explain human action, but it stands in need of defending against Finnis' alternate view on which reason attaches to the formation of ends as well as the selection of means.

In section one, I set out Julie Dickson's "indirectly evaluative legal theory" as contrasted with what she calls "directly evaluative legal theory." In section two, I explain an analogy put forth by Brian Leiter between the explanation of the concept of a city and the explanation of the concept of law. In section three, I note two potential disanalogies between these two concepts which Leiter's argument overlooks. In section four, I argue that the debate about the role of values in legal theory is not strictly a logical one of the validity of the inference from fact to value, but a deeper disagreement about what it is to understand human action. Finally, in section five I suggest that what is really at stake

between descriptive and normative theorists are two conceptions of the nature of human agency that place different requirements on the explanation of human action.

4.2. Indirectly Evaluative Legal Theory

As Julie Dickson notes in the opening passages of *Evaluation and Legal Theory*, there is an obvious sense in which a social scientific description cannot be completely value free: insofar as any theory aspires to more than the accumulation of data, the theorist does not simply report all observed features of her explanatory object but evaluates it for what is to be taken as significant to it. In this sense, there is no question of any theory being entirely neutral, requiring no value judgments at all on the part of the theorist; as Raz puts it, legal theory is "evaluative, but in the sense that any good theory of society is based on evaluative considerations in that its success is in highlighting important social structures and processes, and every judgment of importance in evaluative."[271] Taking Raz to represent the descriptive pole of the debate, Dickson lays out the considerable common ground between him and Finnis:

> (1)   "Finnis and Raz … both agree that in order to construct an explanatorily adequate legal theory, it is necessary to make evaluations regarding that which is important or significant about the social practice to be explained."[272]

> (2)   "Moreover, this is not merely purely meta-theoretical evaluation which applies in respect of theories in general, but rather is evaluation which is concerned with the particular kind of data with which legal theory deals, i.e. the social practice of law, and with the fact that the nature of that practice, in particular, that it includes people's understandings of themselves in terms of law, has a significant bearing upon what will count as success in legal theory."[273]

> (3)   "In order to construct a successful analytical jurisprudential theory, then, a theorist must make sound evaluative judgments regarding that which is important to explain about law which take adequate account of how law is understood by those living under it, and must offer illuminating explanations of those important features."[274]

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[271] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994), 219.

[272] Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), 44.

[273] Ibid., 44.

[274] Ibid.

Legal theory is thus evaluative in two ways. First, and at the very least, there is the "banal"[275] sense of requiring the theorist to impose constraints on her explanatory object, in the form of independent theoretical and epistemic virtues like "simplicity, clarity, elegance, comprehensiveness and coherence."[276] Dickson calls this "purely meta-theoretical" evaluation, "i.e. because they relate only to the nature of theories in general, rather than to the nature of legal theory."[277] The second constraint relates directly to the explanation of social phenomena: since "law" is a concept used by people to understand themselves, "a theory of law's ability to account accurately for and explain adequately beliefs about and attitudes towards the law on the part of those who are subject to it, and who understand their social world partly in terms of it, is a centrally important criterion in determining whether it is a good account of this of this social institution."[278] This means, as Raz puts it, that

> [i]t would be wrong to conclude … that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us to understand how people understand themselves.
>
> To do so does engage in evaluative judgment, for such judgment is inescapable in trying to sort out what is central and significant in the common understanding of the concept of law.

Defenses of the possibility of a morally neutral theory of law tend to take this form: they accuse the normative argument of offering a forced dilemma between a purely descriptive

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[275] Ibid., 32.

[276] Ibid., 34. Dickson does not take up the question of how decisive we should take these purely meta-theoretical values to be in guiding the formation of theoretical concepts, though she seems optimistic: in response to Finnis' observation that judgments of significance must be made if the theory is to be more than a collection of miscellaneous facts, she suggests that this "merely involves the theorist in purely meta-theoretical value-judgments…." Ibid., 39. I suspect that Finnis and Perry would need more convincing than this, and even in the philosophy of science it is far from uncontroversial. See, e.g., Thomas Kuhn, "Second Thoughts on Paradigms," in *The Essential Tension* (Chicago: University of Chicago Press, 1974), 324: "Two men committed to the same list of criteria for choice may nonetheless reach different conclusions," since they may either interpret the criteria differently or else give the criteria different weights.

[277] Dickson, 34-35.

[278] Ibid., 41.

and purely evaluative jurisprudence. The real point of disagreement, as Dickson frames it, is not whether legal theory is evaluative but whether it is *morally* evaluative – whether the need for evaluative judgment on the part of theorist "renders this type of theory 'normative' in the sense in which this term is usually intended, i.e. to denote the kind of position, adopted by Finnis and Dworkin, which claims that we cannot have an adequate account of law without engaging in *moral* evaluations of it, and, in particular, moral evaluations of law's overall point or function."[279] For Dickson, such a view confuses significance with moral desirability; as she puts it, a proposition "which is of the form 'X is important' is not itself an ascription of goodness to that X, and nor does it entail a proposition which ascribes goodness to that X."[280]

Dickson's "indirectly evaluative" approach is thus thought to evade the normative theorist's critique by avoiding the language of value-freedom without succumbing to the need for a "direct" moral evaluation of law or its features. This is because there is always a logical gap between the description of a feature of law as important – even morally important – and the claim that the feature in question is good (or bad). Importantly, Dickson argues, this in no way precludes one from informing her description with an understanding of law's moral importance. As Leslie Green writes, to avoid moral considerations entirely would be obviously inappropriate where our aim is an understanding of a pervasive – sometimes invited, sometimes unwelcome – feature of the human social world: "[B]ecause law is part of human thought and practice, we also will prefer to describe it in an anthropocentric way, as it relates to those things we take to be most important about ourselves – the way law embodies power relations that can harm or help people, for instance, rather than its connection to the demand for pulp and paper."[281] The crucial point, Brian Leiter writes, is that "one can *describe the value* a practice has for its participants without engaging in the practice of evaluation."[282] In particular, it is

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[279] Ibid., 109.
[280] Ibid., 53.
[281] Leslie Green, "Review: *The Concept of Law Revisited*," Michigan Law Review 94 (1996): 1713.
[282] Brian Leiter, "Beyond the Hart-Dworkin Debate: The Methodology Problem in Jurisprudence," University of Texas Law, Public Law Research Paper No. 34, 22. Available at SSRN: http://ssrn.com/abstract=312781

possible for the theorist to describe the attitude of practical acceptance that people often have toward the law – the internal point of view – without supposing that attitude to be morally or rationally justified; as Neil MacCormick puts it, the theorist can be *cognitively* aware of the fact that agents accept a rule or practice without sharing in the *volitional* component of that attitude.[283]   This ability to describe without moral or practical commitment is problematic for Finnis because it seems to undermine the inevitability of the slide from description to moral evaluation. One might certainly go on to evaluate the "soundness or unsoundness, adequacy or inadequacy, truth or error"[284] of subjects' reasons for acting, but this is subsequent to our acknowledging that they claim to have them.

4.3. Brian Leiter's Objection: The Natural City Theory Argument

Leiter offers the analogy of a general theory of human cities to show that a purely descriptive account is not only possible but required for any subsequent moral evaluation of law. The argument takes the form of an imagined dialogue between a "Descriptivist" – an advocate of conceptual analysis who argues that a general theory of cities need not involve moral evaluation – and a "Natural City Theorist," who argues that moral evaluation is required for the description of any social phenomenon.[285] Broadly, the descriptivist strategy is to proceed from the identification of paradigm cases – from clear, intuitive instances of the concept – from which we can identify its significant, shared features. The analysis will then admit certain forms of social organization as genuine instances of cities depending on the extent to which they fulfill the criteria that constitute the paradigm case. On Leiter's view, there are thus no grounds for Finnis' charge that a purely descriptive starting point must be "arbitrary" or "unstable": insofar as we are interested in analysing *our* concept of a city, for example, "whatever analysis I proffer had better explain the familiar, shared features of New York and London and Tokyo and

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[283] Neil MacCormick, *H. L. A. Hart* (Stanford: Stanford University Press, 2008), 53.

[284] John Finnis, "On Hart's Ways: Law as Reason and Law as Fact," *Philosophy of Law: Collected Essays* (Oxford: Oxford University Press, 2011), 246.

[285] Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), 168-70.

Paris."[286] As Leiter's "Descriptivist" writes, "[t]he main point is that there are real places in the world – what I've been calling 'cities' – that have certain important, common features that make it interesting and fruitful to group them together and ask what they share."[287]

For Leiter, as for Dickson and Raz above, the normative theorist's mistake is to conflate the need for evaluative judgment in the formation of social scientific concepts with the need for *moral* judgment. Like Dickson, he distinguishes between epistemic values – e.g., "evidentiary adequacy ('saving the phenomena'), simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth"[288] – and moral values, "e.g., questions about how one ought to live, what one's obligations are to others, what kind of political institutions one ought to support and obey, and so forth."[289] The non-sequitur at the heart of the normative argument is the slide from the "Banal Truth" that evaluations are essential to the construction of a social theory to the claim that these evaluations must be of the latter sort, that they must incorporate the theorist's own ideals about the best way to live.[290] As long as it is possible to identify clear, intuitive instances of a modern legal system, it will then be possible to construct a descriptive theory by identifying the features they all share. What is more, Leiter argues, the possibility of evaluation presupposes the availability of such a description. We cannot inquire after the desirability of some state of affairs without first having some understanding of the target of that assessment; to meaningfully ask whether one ought to live in a city or a village presupposes already that we understand the difference between the two. The practical question of the ideal way to live is therefore itself "parasitic on a demarcation made based on purely epistemic criteria."[291] Finnis' suggestion that moral or political norms are needed to determine the content of theoretical concepts thus reverses the proper order as

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[286] Ibid., 168.
[287] Ibid., 169.
[288] Leiter, "Beyond the Hart-Dworkin Debate," 24.
[289] Ibid.
[290] Ibid., 25.
[291] Leiter, *Naturalizing Jurisprudence*, 169.

between description and evaluation: in order to judge something "good" or "bad," we must be able to ask *what* it is we are so characterizing, and the answer must inevitably be descriptive of a fact. Leiter wraps up by applying the argument to the jurisprudential debate:

> Now does the Descriptivist fare any worse when we switch from the concept of "city" to the concept of "law"? It is not apparent why he should. So, for example, while it is surely worthwhile to ask whether certain cases of legal systems are just and worthy of obedience – just as it is worthwhile to ask whether life in "cities" is desirable and conducive to human flourishing – that is simply a different question from the descriptive one of what "law" and "legal systems" – or "cities" – are like. And to even ask the practical question it seems we have to have in place a conceptual demarcation of law from other forms of normative control. And so on.[292]

If Leiter's analogy is apt, it would seem to be decisive against the normative argument. It shows that it is not only possible to give an adequate non-evaluative account of a social phenomenon like law but that the nature of the evaluative process depends upon it. As I argue below, this conclusion is too quick. What the argument does, I think, is to narrow the point of controversy between descriptive and normative theorists: it shows that *if* it is always possible to see description and evaluation as two distinct processes in which the legal theorist can alternately engage, then it follows that the act of evaluation will consist of a judgment or series of judgments about the object of the description. The problem is that this leaves untouched the main point of controversy between descriptive and normative theorists, having to do with the self-sufficiency of description: if value commitments play a constitutive role in the construction of a jurisprudential theory, then fact and value are not separable in the way the above response requires. As Fuller put it in his exchange with Ernest Nagel, "[t]he question is whether this separation of the two kinds of accounts is always possible or profitable, and whether accuracy of description is always promoted by eliminating evaluative judgments."[293] In

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[292] Leiter, "Beyond the Hart-Dworkin Debate,"29.

[293] Lon Fuller, "A Rejoinder to Professor Nagel," *Natural Law Forum* 3 (1958): 88. The objection that Fuller is responding to here is the same as that put forth by Leiter, i.e., that there must be something that can be described in non-evaluative terms before evaluation can be performed. As Nagel put it, "[i]n characterizing [an action] as "bad," it is surely pertinent to ask *what* it is we are so characterizing; and the

what follows, I argue that Leiter's choice of analogy begs the question against the normative theorist in two ways: first, it supposes there to be sufficient agreement in the identification of the paradigm case of law to make the grounds of justification for our selection of law's necessary features observational, and second, it takes for granted a conception of practical reason that Finnis rejects. The effect, I think, is to leave open the possibility that a description of law, unlike the description of a city, necessarily incorporates an evaluative element.

4.4. Law and Cities: Two Disanalogies

The two disanalogies are as follows. First, it is a crucial step in Finnis' argument to claim that the theorist's judgments of "conceptual primacy"[294] or "explanatory priority"[295] are underdetermined by the social world. Anyone attempting to describe law from the point of view of participants will be confronted with not one shared mode of participation but rather multiple, incommensurable ways of conceptualizing the practice, based on one's role in the system and the practical concerns that accompany it.[296] A theory of law necessarily offers an edited account of these diverse understandings, with components of the practice selected and structured along set patterns of interpretation. Finnis does not deny that one can offer a purely descriptive account of these conceptions of point, significance, etc. without sharing in them or evaluating them at all: "That is what biographers, military historians, and others do all the time."[297] His objection is rather to the suggestion that any such collection of "local histories" will constitute a *theory* of law, the aim of which is to explain whether and to what extent a given social

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answer must inevitably be descriptive of a fact. Indeed, unless a careful factual account can be given, one that is not colored by surreptitious value imputation, we cannot judge competently whether the act does have the value attributed to it." Ernest Nagel, "On the Fusion of Fact and Value: A Reply to Professor Fuller," *Natural Law Forum* 3 (1958): 79.

[294] Finnis, *Collected Essays*, 215.

[295] Ibid.

[296] For "the principles on which labels are adopted and applied – i.e. the practical concerns and self-interpretations of the people whose conduct and dispositions go to make up the theorist's subject-matter – are not uniform." Finnis, *NLNR*, 4.

[297] Finnis, "Describing Law Normatively," *Philosophy of Law: Collected Essays* (Oxford: Oxford University Press, 2011), 34.

order can be accurately described as legal.[298] According to Finnis, the non-uniformity of participant understandings means that the theorist must choose from amongst multiple points of view, evaluating them for their reasonableness against one's own understanding of what makes it important to have law. The resulting theory will then inevitably be shaped by the theorist's understanding of the human good and the way in which law participates in it. In this sense, we should think of the social theorist as participating in the active *construction* of a theoretical concept, deciding what counts as an instance of the phenomenon to be studied by establishing the terms for what is to be considered relevantly similar. On Finnis' account, then, it is not entirely accurate to see the theorist as offering an account of "our" concept of law, in the sense of mining an established concept for content. What the theorist does is to offer a "new and improved"[299] concept, one that resonates with the self-conscious practices of participants in the legal system but is refined and elevated by the theorist's own understanding of what makes it important to have law, "the things which it is, therefore, important in practice to 'see to' when ordering human affairs."[300]

Second and perhaps more importantly, I want to suggest that Leiter's analogy presupposes or relies upon a particular view of practical reason that Finnis rejects: one in which reason attaches to the choice of means and not the formation of ends, and an action is intelligible to us just so long as we can see it from the point of view of the actor, as effectively pursuing some perceived or projected benefit. To show this is the case will take some drawing out, and I return to the point in section 6 below. For now, we might start with Leiter's casting of the "practical question" – "ought one to be a city dweller, or

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[298] Finnis, *NLNR*, 4. It is worth noting that Leiter himself goes on to reject the argument he has offered on behalf of the descriptivist, and does so for much the same reason. As Finnis notes (pulling quotes from Leiter): "My concern had much in common with Leiter's: the concern that conceptual analysis and appeals to intuition can deliver no more than 'ethnographically relative results,' a lexicography or 'glorified lexicography' or 'pop lexicography' the results of which are 'strictly ethnographic and local,' a banal descriptive sociology of the Gallup-poll variety.'" Finnis, "Describing Law Normatively," 35. So although Leiter's paper is an attempt to defend "methodological positivism" from theorists like Finnis, his case for naturalizing jurisprudence amounts to a rejection of Hart's method.

[299] Finnis, "On Hart's Ways," 233.

[300] Finnis, *NLNR*, 16.

a suburbanite, or a farm inhabitant?"[301] – as an essentially personal one in which a reasoned demonstration of value can only be relative to an individual's desires or immediate likings. This is to say that reasons for action in this case do not exist independently of one's inclinations: whether one "ought" to live in a city can only be a matter of taste where one derives action-guiding conclusions from considerations of one's goals and the available means to them. From here, Finnis' mistake is easily apparent. The normative theorist confuses the conditional "ought" of instrumental reasoning – e.g., "if one likes dense and diverse populations of people, then one ought to live in a city" – with the moral "ought," the question of the best way for human beings to live. The normative argument thus confuses a question of ultimate value with that of choosing the most effective means for realizing an immediate purpose. Leslie Green sums up the error:

> We reason: (1) *L most effectively produces E*, and we enthymematically conclude, (3) *Someone ought to adopt L.* The suppressed crucial premise is (2): *E is worth producing.*[302]

Following G. H. von Wright, we might call the "ought" in play here a technical ought, "a statement saying that a certain measure (action) or a certain state of affairs is necessary to ensure or to avoid something."[303] What is expressed is not a command or prohibition, but simply an instrumental relationship, a programme of action that should be adopted when the goal in question is being pursued. With the argument cast in this form, the descriptivist conclusion follows as a matter of course: the simple fact that an end – life in a city – is pursued or desired by someone tells us nothing about the quality of that end, whether it *ought* to be so desired. The answer to the practical question will depend on a number of facts about the person under consideration – her projects and goals, likes and dislikes, skills and training, etc. – but nothing about the concept itself compels any

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[301] Leiter, *Naturalizing Jurisprudence*, 169.

[302] Green, "Law as a Means," 8 (of the electronic version).

[303] G. H. von Wright, Bedingungsnormen – ein Prüfstein für die Normenlogik (Conditional Norms – A Touchstone for the Logic of Norms), *Theorie der Normen. Festgabe für Ota Weinberger zum 65. Geburtstag*, ed. W. Krawiec at al. (Berlin: Duncker &Humbolt, 1984), 455. Quoted in Ota Weinberger, *Alternative Action Theory: Simultateously a Critique of Georg Henrik Von Wright's Practical Philosophy* (Springer, 1998), 50.

particular answer. That is a matter of matching up personal tastes with what cities, villages, etc. have to offer.

Applied to the realm of social theory, the argument gives one formulation of the neutrality requirement that I want to examine below: it suggests that no theoretical finding can ever vindicate or provide rational grounds for a claim that something is good. Again, I think it stacks the deck in favour of this view to consider a concept that itself is non-evaluative: that cities have large and dense populations may be judged as a reason for visiting them or for avoiding them, but that feature alone does not determine us to accept either of these valuations – it is a simple fact, neutral between them. The problem, I want to suggest, is that this would seem to beg the question against the theorist who thinks that law's value is internal to it – who thinks that law bears a non-contingent relation to autonomy, justice, dignity, or some of other basic human good. These we do not tend to think of as mere preferences, valuable simply because we desire them; we experience them as making claims upon us independent of what we do or do not want to do. We do not say we "like" autonomy (or dignity or justice) in the same way that we might say we like a fast-paced lifestyle or access to museums. The result is to expose a potential disanalogy between the concept of a city and the concept of law, having to do with the idea of "detached" statements about values. Where it is possible to describe the appeal that city life might have for someone – a fast pace, proximity to cultural facilities – without oneself taking it on as a reason for action, it seems less plausible, more strained, to claim that kind of detachment from the goods that feature in our moral codes. At the least, it is a claim that needs defending. For now, we need only acknowledge that it is intuitively less of a logical leap from the claim "*X* promotes autonomy (or dignity, or justice)" to the conclusion "*X* is good," than it is from, say, "*X* has a large population" to that same conclusion. It might seem, then, that what we are calling a methodological disagreement is not a problem of methodology at all, but one of substantive theory: the question of whether the answering of the practical question is always independent of and subsequent to our settling of the factual one seems to concern not the nature of social explanation but the nature of the concept of law. Is it like the concept of a city, with no

inherent normative pull, or like the concept of justice, which is already evaluative or action-guiding?

In chapter three, I addressed an argument by Jules Coleman that the competing methodological positions in jurisprudence do not break down so cleanly into first-order positions on the value – or non-value – of law. According to Coleman, one might defend the possibility of a descriptive jurisprudence while accepting that there is something "necessarily valuable or desirable" about governance by law.[304] In response, I argued that Fuller's conception of internal goods represents a genuine alternative to the instrumental conception of law which sees certain values as flowing from legal order. The value of law is internal to it because law itself constitutes a certain form of freedom, a particular kind of moral association amongst persons that recognizes in a special way their unique capacity for agency. Thus, insofar as Coleman's argument continues to recognise only instrumental value, it is unsuccessful in showing that the debate about the possibility of a value-free jurisprudence is indifferent to the question of law's value. In what follows, I want to look at what is required to maintain the descriptivist position in the face of Fuller's claim that the law itself embodies moral value. In particular, I want to suggest that the descriptivist position – the requirement that a theory of law have no (political or moral) value judgments among its logical implications – rests on a particular view of practical reason that is incompatible with that proposed by Finnis. The debate between normative and descriptive theorists is then not a logical one concerning the validity of the deductive inference from fact to value – a slide that Finnis rejects as well – but one of what it is to understand human action.

4.5. From Fact to Value

As I noted above, the strong intuitive appeal of descriptivism derives in large part from its resting upon a seeming truism: one cannot deduce a claim about the goodness or badness of something from a statement attributing some descriptive property to it.[305]

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[304] Coleman, "Beyond the Separability Thesis, 599.
[305] This, of course, is the so-called naturalistic fallacy, summed up by the slogan, "no ought from is." As Charles Taylor writes, the non-naturalist view, "is supposed to deal exclusively with the logical force and

Thus, we might think, even if we accept that reciprocity and respect for agency are morally important features of law – important for the qualitative moral difference they make to peoples' lives – we still have not arrived at the normative conclusion that these features make law good. This is because it is possible to describe the value some thing or activity might have for someone without oneself taking it on as a reason for action: as Andrei Marmor puts it"[a]n account of the values which make sense of legal practice does not commit one to forming any particular evaluative views about them."[306] The crucial point, Dickson writes, is that "in asserting that '*X* is an important feature,' we are accounting the *existence* of some *X* as significant and hence worthy of explanation, not directly evaluating as good or bad the substance or content of that *X*."[307] The basic mistake of the normative theorist is thus a logical one; as Green notes above, what she takes to be a direct move from the claim "X promotes autonomy (or dignity, etc.)" to the claim "X is good" is really an enthymeme:

> We reason: (1) *L most effectively produces E*, and we enthymematically conclude, (3) *Someone ought to adopt L.* The suppressed crucial premise is (2): *E is worth producing*.[308]

Put this way, we can see in the descriptivist argument a variation of the non-naturalist argument above: where the normative theorist takes a descriptive property of law – its relation to autonomy – as reason for his affirmative view of it, the descriptivist reminds us that it is a reason only because he accepts the suppressed major premise asserting the desirability of that feature ("Autonomy is good" or "Autonomy is worth producing"). For, logically, one might reject this premise, and then the conclusion (e.g., "We ought to have law") would not follow at all. Thus, the claim that some *E* is a reason for judging *L* good depends on the values one already holds: those who are "moved by

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cogency of certain standard arguments used in the realm of morals and politics. Thus, no number of statements of fact, the thesis runs, can entail an evaluative statement…. Such statements can only be deduced from premises which themselves contain at least one evaluative statement; they are in a different logical universe from statements of fact." Charles Taylor, "Can Political Philosophy Be Neutral?," *Universities & Left Review Spring* 1 (1957): 68.

[306] Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing, 2005), 42.

[307] Dickson, 53.

[308] Green, "Law as Means," 8.

the moral ideals of autonomy and dignity,"[309] will have reason for endorsing the conclusion, while the unmoved will not. These values come from the realm of normative political theory, and while one can find reasons for holding them – e.g., facts about human beings, their needs, wants, etc. – our acceptance of these further reasons will always depend on our adopting additional major premise (e.g., "Whatever fulfills human wants, needs, etc. is good") from which the initial one follows as a valid conclusion. However, since no *Ought*-statement is ever entailed by an *Is*-statement, it must be possible to reject this further premise too. Taken to its ultimate conclusion, the view must be that values are not a matter for reasoned demonstration; sooner or later, we reach the end of our reasons and must decide by some pure act of will what our values are – "they are the fruit of a pure choice."[310]

What we might notice is that this has turned out to be a bolder claim than Dickson's observation that there is no deductively valid inference from propositions of fact to propositions of value – from the statement "*X* is important" to the statement "*X* is good". The intuitiveness of this initial argument, I think, owes in large part to the rigours of the deductive form: in concentrating exclusively on the non-existence of entailment relations between descriptive predicates and evaluative claims, it sets a standard of logical determination that we do not expect even scientific hypotheses to meet. As Quine famously argued, the verification and falsification of theories is never done by pure deduction from the evidence – even all the evidence that could ever be gathered – but always relies upon numerous subsidiary hypotheses about how things work; thus any theory can be protected from refutation by adjusting or denying the adequacy of the supplementary hypotheses. From the fact that theories are never arrived at by pure deduction from the facts, however, we are not immediately permitted the conclusion that all hypotheses are evidentially on par – that before any set of facts we are rationally entitled to hold any set of beliefs whatever. The question, then, is why this should be true for values: why should the absence of entailment relations between fact and value

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[309] Coleman, *The Practice of Principle*, 195.
[310] Charles Taylor, "Neutrality in Political Science," *Philosophical Papers 2: Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), 83.

convince us that no interesting relationship holds at all? As Charles Taylor writes, there are lots of interesting forms of inference or relations among statements other than that of entailment, and "[t]he fact that one cannot find equivalences, make valid deductive arguments, and so on, may show nothing about the relation between a given concept and others."[311] Thus even if we accept that practical judgments cannot be *deduced* from non-practical judgments alone, we have not eliminated the possibility of a looser form of inference among claims than that of logical compulsion. To be a unique statement about the relationship between fact and value – and not just a reminder of the limitations of deductive argument as a means of discovery – the claim must be that statements of fact cannot stand in an *evidential* relationship with evaluative claims, i.e., that the former can never contribute to the truth of the latter. This, I want to suggest, is no longer a logical point but a claim about practical reason: the view must be not just that facts cannot entail evaluations, but also that evaluations cannot be descriptive of facts.

Another way to put this point is that it does actually matter what we substitute for *X* when assert the independence of "*X* is important" from "*X* is good." As we saw above, there are certain predicates or descriptions for which it seems obviously the case that no relationship between description and practical judgment holds: the fact that cities have large and dense populations might be taken as a reason for living in one, or equally as a reason for settling in a town or suburb instead. Such *Oughts* do not make claims upon us independent of our subjective desires or interests; the good of city life is, in Finnis' phrasing, "an end established in and by one's desiring it."[312] If we assert that all ends are merely "subjectively motivating"[313] in this sense, however, then we have gone beyond the simple logical imperative that *Oughts* do not follow deductively from *Ises* to a substantive view of the nature of ethical judgment: we have asserted that all practical reasons are first-personal in this way, that they would have no more claim on us if we ceased desiring them. Again, this is clearly true for some of our ends, and this is where the "non-

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[311] Taylor, "Neutrality in Political Science," 88.

[312] John Finnis, "Practical Reason's Foundations," *Reason in Action: Collected Essays* (Oxford: Oxford University Press, 2011), 22. Finnis' discussion here is Hart's endorsement of Bernard William's ethical subjectivism.

[313] Finnis, "On Hart's Ways," 252.

naturalist" intuition comes from: the fact that one wants a cigarette, e.g., goes no way toward establishing that one *ought* to want one. We understand smoking from the beginning as what Charles Taylor calls a "weakly evaluated end."[314] But what of those ends that do not seem like escapable or contingent commitments of will, categorical commitments like justice, autonomy, and dignity – ends that we think people ought to desire even if they do not? If we take entailment relations to exhaust the interesting ways in which fact and value might be rationally related to one another, then we are likely to miss important differences between these "strongly evaluative ends"[315] and our strong personal preferences: we will see all practical reasons as merely expressions of partiality, e.g., on the model of a person deciding where she would like to live. As I suggested above, I think it is possible to read too much into the fact that no particular evaluative conclusion is necessitated by claims about law's relation to such values as autonomy. The question, as Taylor puts it, is not whether the findings of a social scientific theory logically compel any given value position, but whether they "leave us, as it were, as free as before, [whether] they do not go some way to establishing particular sets of values and undermining others."[316] The question, then, is whether we might just as intelligibly reject these values as endorse them.

Certainly many jurisprudential theorists have done this: they have not considered freedom (or autonomy, or dignity) to be "among the principle objects of law."[317] Bentham denied this, and so did Austin and Hobbes. Importantly, however, they did not do so from within the same explanatory framework as those theories we now associate with liberalism; those who denied and those who affirmed the value of liberty did not simply attach different values to the same set of facts conceived in the same way. As we saw in chapter one, Bentham did not challenge the liberal political thought of his day simply because he prioritized other values instead – he repudiated also the truth of certain

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[314] Charles Taylor, "Explanation and Practical Reason," *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995), 37.
[315] Idid., 39.
[316] Taylor, "Neutrality in Political Science," 60.
[317] Bentham, *Theory of Legislation*, ed. Dumont, trans. Hildreth (London: Routledge and Kegan Paul: 1931), 97.

descriptions, having to do with the possibility that the state of freedom envisioned by Locke and others could actually exist. It is less clear, I want to suggest, that the value of liberty can be intelligibly denied from within a theoretical framework like Hart's, where the possibility of autonomy is affirmed from the outset as one of the basic capabilities of human beings.

The crucial point here is that Bentham's denial of liberty as in itself valuable requires special justification in order to be intelligible. From his point of view, the kind of genuine self-government envisioned by the natural rights and the contractual theorists was not seen as having a basis in fact. The source of confusion in Locke's account of human freedom was his belief that the mind possessed an "active power"[318] – i.e., the power to redirect or suspend the activities of the will. Those "whose affections are warm on the side of liberty" thus treated the will as if it were an exception to the natural order – "as though freedom were rendered qualitatively special by the presence of the adjective 'human'."[319] Bentham's own negative conception of liberty was meant to acknowledge our natural subjectedness to forces outside of us; on his view, freedom was not an active power but a passive state, the absence of external interference between one's physical self and the object of one's desire. His definition of self-government was, accordingly, on the cooler side: one is self-governed, he wrote, "when the motive for action is not pain resulting from the will of another person, but pleasure or pain from the power of inanimate or irrational bodies, or of the parts of one's own body."[320] Self-government was then not the height of self-directed authenticity but the abandonment of the individual to the demands of one's own sensory organism, its necessary responses to the "inanimate or irrational" sensory environment to which it is subject.[321] Against such a bleak view of the fate of the self-directed individual, Bentham's subordination of liberty to security – his understanding of liberty *as* "a branch of 'Security'"[322] – becomes intelligible.[323]

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[318] John Locke, *An Essay Concerning Human Understanding* II. Xxi. 4.

[319] Long, *Bentham on Liberty*, 24.

[320] UC Ixix. Quoted in Long, 18; and Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986), 166.

[321] Ibid.

[322] Bentham, *Theory of Legislation*, ed. Dumont, trans. Hildreth (London: Routledge and Kegan Paul: 1931), 97.

Bentham's description of the nature of human agency thus negated the political theories of the liberty-minded philosophers in a direct way, by denying the reality of the crucial normative feature they sought to promote. The function of law was the organisation of the hedonistic social environment to secure what people really desired: security, physical comfort, subsistence, and happiness.

From my discussion in chapter two, I think we can see the view of human agency embodied in contemporary rule-based positivism as more closely aligned with that put forth by Locke than with that proposed by Bentham. The crucial difference, stressed by Fuller, is the former's emphasis on the generality of legal rules. Where for Hobbes, Bentham, and Austin, generality is an efficacy requirement for legal rules to function as forms of social imperation, on a rule-based account it belongs to law's essence: the role of the legal system is not to administer the affairs of people but to administer justice among people who conduct their own affairs. Social control does not conflict with freedom where it is achieved by a legal order in which reciprocal rights and duties are adjusted and maintained; as Locke put it, "law, in its true notion, is not so much the limitation *as the direction of a free and intelligent Agent* to his proper interest, and prescribes no farther than is for the general good of those under that law."[324] For Fuller, we saw, this meant that the view of human agency embodied in law itself gives rise to a certain ideal for political organisation, at the same time as it negates other orderings as inappropriate or undesirable. Thus, on his view, merely to enfranchise voters, and even to give them accurate representation, does not in itself establish self-government: an essential corollary to representative government is a particular mode of governing – i.e., the reciprocal mode that operates by appointing representatives to enforce, adjudicate, and revise laws declaring the rights, duties, and privileges of both citizens and the officials themselves – and it is this aspect of self-rule that Bentham's "pure representative democracy" overlooks. The result is that, where on Bentham's view democracy is a

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[323] For Bentham, liberty was an emotive term, the use of which distracted from the fact that it was essentially by restrictions on freedom that happiness is secured. Thus while "[s]ome persons may be surprised to find that 'Liberty' is not ranked among the principle objects of law … a clear idea of liberty will lead us to regard it as a branch of security." Ibid.

[324] Locke, *Two Treatises on Government*, 2.57. Emphasis in original.

means through which people and groups can attain their ends, for Fuller it is itself an end: it is the good society in operation. For only in the give-and-take of a free participatory order, in which peoples' autonomy is recognized and their fate left largely in their own hands, are legal subjects respected as intelligent and responsible agents.[325] By contrast, the negative conception of democracy as pure majority rule does not rest upon a faith in peoples' capacity to manage their own affairs and relations, but posits the need for "some purely arbitrary principle of order"[326] to compensate for their inability to do so. As such, it does not bring us any "closer to the inner essence of things than the will of any particular individual."[327] As I suggested in chapter three, the liberal democratic ideal is then not a new premise in an independent political theory, arrived at through a subsequent consideration of human needs and interests, but arises from what is latent in the rule-based theory itself.

All this is to say that, between Hart and Bentham at least, we do not have a case of Coleman's "meta-principle" in chapter three, where different political theories assign different values to the same facts understood in the same way. Bentham's description of law as different forms and levels of social imperation is incompatible with Hart's liberalism, and Hart's rule-based account is out of sync with Bentham's "purely negative" conception of democracy.[328] Nor, I want to suggest, is this simply an accident, having to do with the specifics of Hart's or Bentham's theories. To borrow a phrase from Taylor, we might see a social theorist's descriptive framework, including the ontology implied or articulated within it, as setting the key "dimensions of variation" by which phenomena can be explained. A given framework not only negates dimensions crucial to other normative theories but also supports one of its own; as Taylor puts it, "the connection

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[325] We should not be misled by what might seem to be Bentham's parallel endorsement of participatory mechanisms for citizens. As Gerald Postema writes, "the aim of these devices, as of his democratic proposals generally, was to maximize accountability of those in power. It was not to increase the level of public participation in community governance. The public plays a passive judgmental and enforcement role, not an active, policy-affecting, participatory role in government." Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), 462.

[326] Fuller, *The Law in Quest of Itself* (The Lawbook Exchange, Ltd., 1966), 109.

[327] Ibid.

[328] Ibid., 121. Here Fuller is referring to Austin, rather than Bentham's, conception of democracy, but the point is the same: in both instances, a certain conception of human agency leads to a conception of democracy on which power rests ultimately on the acquiescence of the governed.

between factual base and valuation is built-in, as it were, to the conceptual structure."[329] This is because, by contrast to Coleman's view on which a conception of human nature is added at the moment of evaluation to yield a value judgment, on the view I have put forth the description of a human practice cannot help but contain some, at least implicit, conception of human beings, their purposes, wants, and needs. Thus it is not the case that one can adopt a social scientific framework and then neatly bracket or resist the value judgments implied by it. It would be strange, for example, for one to adopt the rule-based account of law but to reject (without qualification) autonomy as a good – to suggest, e.g., that people ought not to be allowed to exercise agency in their lives. To do so intelligibly will involve either overriding the value (e.g., individual autonomy must be balanced with equality, and must sometimes give way to it) or else undermining it (e.g., by arguing that it is essentially by restrictions on freedom that happiness is secured). In the former case, there is the recognition that a difficult choice must be made between two desirables, or the understanding that the pursuit of one value will be attended by risks or disvalues not initially taken into account. Where the putative good is left intact, the impact on the explanatory framework is minimal. In the latter case, however, the very fact of qualification alters the explanatory framework of the theory, i.e., it removes autonomy from the register of goods we can attain. This, we saw, is the kind of qualification offered by Bentham's account: the descriptive theory undermines the value in a direct way, by denying it the properties by which we judged it good – self-government does not really contribute to happiness, human development, etc. Moreover, since social control does not fundamentally change the human condition, the putative evil (coercion) is denied its status as disvalue as well, for the role of law is not to free people from control but rather to subject them to the right kinds of it. The point is that, even if nothing logically compels our acceptance of these values, to reject them will require special qualification in order to be intelligible; it is not simply a matter of replacing one set of human needs with another. Rather, the adoption of a different set of interests disturbs the original framework: it says that freedom is not what we took it to be, because human nature is not

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[329] Taylor, "Neutrality in Political Science," 75-6.

what we took it to be. As Taylor sums up, "a given dimension of variation will usually determine for itself how we are to judge of good and bad, because of its relation to obvious human wants and needs.[330]

4.6. Neutrality in Jurisprudence

Taylor acknowledges that this argument goes against the well-entrenched doctrine above, according to which questions of value are always independent of questions of fact – the view that, as Andrei Marmor puts it, "[a]n account of the values which make sense of legal practice does not commit one to forming any particular evaluative views about them."[331] My goal in this chapter was to suggest that there is more that is controversial in this position than the simple contention that there is no deductively valid inference from *Is* to *Ought*; the fact that we cannot find relations of entailment between descriptive and evaluative statements does not mean that no rational relationship holds at all. As I argued above, for the view to be that detached statements about values are always possible, the stronger claim must be that judgments of good and bad are always first-personal, i.e., that they are always expressions of partiality on the part of some individual. Hart, at least at times, was unshy in his adoption of this view and his acceptance of where it leads us:

> …the question, "What should I do in these circumstances" is essentially "first-personal" and not a mere derivative of and replaceable by "What should anyone do in these circumstances?" For the "I" of practical deliberation that stands back from my desires and reflects upon them is still the "I" that has those desires, and unless I am already committed to the motivations of an impartial morality, reflective deliberation will not lead me to it.[332]

Here in his review of Bernard Williams' book *Ethics and the Limits of Philosophy*, Hart openly endorses Williams' internalism about reasons.[333] But he elsewhere insisted upon

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[330] Taylor, "Neutrality in Political Science," 73.

[331] Marmor, *Interpretation and Legal Theory*, 42.

[332] Hart, "Who Can Tell Right From Wrong?," *New York Review of Books* (17 July, 1986), 50

[333] Williams describes the internalist as someone who holds that statements of the form 'A has a reason to φ' "imply, very roughly, that A has some motive which will be served or furthered by his φ-ing, and if this turns out not to be so the sentence is false;" whereas, according to the externalist, "there is no such condition, and the reason-sentence will not be falsified by the absence of an appropriate motive." Bernard

the independence of his theory of law from any such claims; in the Postscript to *The Concept of Law*, for example, he maintained that "legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open the general question of whether they have…'objective standing'."[334] My suggestion is that a certain view of the nature of normative reasons for action is required to maintain the neutrality thesis, at least in the looser form I have given it here, i.e., as the idea that facts can never serve as *grounds* for a normative conclusion. This is because, where moral judgments are considered (at least sometimes) to have "objective standing," there is nothing queer or suspect in the idea that an *Is* statement might contribute to the truth of an *Ought* statement. Finnis gives the following example:

> The fact that it is raining is in itself no reason to carry an umbrella, no reason at all, even in conjunction with the fact that without an umbrella I'll get wet. But facts like these can play their part in the reason, the warranted conclusion that I should [had better] carry an umbrella) which gets its directive or normative element from some practical, evaluative premise such as: it's bad for one's health to get wet, or: it's bad for one's ability to think and function to get uncomfortably wet and cold. *By virtue only of that* or some similar truth (as one supposes) about good and bad, the plain fact that an umbrella can prevent these evils by keeping me dry can contribute to the normative conclusion that I have reason to, or ought to, carry an umbrella.[335]

Note that on Finnis' view there is no question of an *Ought* being *deduced* from an *Is*. What lends rationality to the normative conclusion is the (pre-existing) intelligible good, or "intrinsic advantage,"[336] (i.e., health) in virtue of which the action is performed. So while there is nothing to prevent one from rejecting the judgment about what one ought to do, that decision will be less rational, less immediately intelligible, than the one on which it is accepted.

Leiter's analogy above, I have suggested, speaks to the opposite (i.e., reasons internalist) view. His "practical question" – "Ought one to be a city dweller, or a

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Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981), 101.
[334] Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), 254.
[335] Finnis,
[336] Finnis,

suburbanite, or a farm inhabitant?" – is one on which there can seemingly be no answer apart from the first-personal one: whether I ought to live in a city is not replaceable by the question of whether anyone else ought to do so, because the answer does not depend on anybody else's desires but my own. For Finnis, what gets overlooked on this account is a further condition on intelligibility that is always at least in the background of our understanding. There is "the goal which we imagine and which engages our feelings," but there is also "the intelligible benefit which appeals to our rationality by promising to instantiate, either immediately or instrumentally, some basic human good."[337] The familiarity of these goods means that they can often remain implicit in our explanation of human action, but where they are fully absent the explanatory demand will not be have been met; for the action will not have been made intelligible to us. To use Leiter's analogy, the concept of a city is an example of an intelligible good that is instrumental but not basic – intelligibly good for its relation to obvious human wants and needs. One's preference for dense populations of people is a good reason for moving to a city, but it is only intelligibly good because it contributes to such intelligible goods as sociability and friendship;[338] if one simply liked being surrounded large crowds of people, full stop, we would likely find something unintelligible or even disordered about this.

The point here is that there must be some criteria of distinction between cases in which one with a perverse or neurotic or simply arbitrary attachment to *X* does all same things that a person who judges *X* good (or instrumentally good) does. As Finnis notes, "[t]he idiom in which 'reason' refers to purposes – 'the reason he did that,' equivalent to 'his purpose in doing that' – fails to mark this distinction;"[339] it does not mark a contrast between choices of competing desires and choices that reflect deep judgments of worth. On Finnis' view, however, this is a contrast that goes to the heart of what it is to be a human agent: to neglect it is not only "inattentive to the variety of the kinds of reasons

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[337] Finnis, "Legal Reasoning as Practical Reason," *Reason in Action: Collected Essays* (Oxford: Oxford University Press, 2011), 212.

[338] One's preference for small town life might be made intelligible by reference to the same basic good, i.e., the strong social ties and sense of community and reciprocal obligation that smaller communities make possible.

[339] Finnis, "Legal Reasoning as Practical Reason," 212.

there are," but "equally inattentive to the central human reality of the human will as one's capacity to respond to, be motivated by, the intelligible goods one understands, including goods understood as good for their own sake and not only as means to something else, goods identified in their basic reasons for action, reasons accessible to everyone able to deliberate and choose."[340] What makes human agents *moral* agents – what gives them their normative orientation in the world, makes certain courses of action optional or required or off-limits to them – is precisely this ability to form overarching evaluations, evaluations that give us a sense of certain goods as unimpeachable by mere desires.

Thus, even if we agree with the non-naturalist that there is a relationship between "good" and expressing partiality to something – by commending, expressing approval, etc. – this does not mean that this exhausts the grounds of its predication. As Finnis writes,

> No doubt we cannot detach the meaning of "good" and "well-being" from the notion of "taking an interest in"; for we cannot detach the notion of good from the notion of what it is intelligent to take an interest in (favour, promote…). But what is *in my interests* is certainly not sufficient to be determined by asking what I *happen* to *take an interest in* (desire, aim for…). The decisive question always is what it is *intelligent* to take an interest in. There are no "interests" (desires…) that are immune from that question. Accordingly, there is no reason to assume that the answer to that question is provided by desires (even "standard desires") or feelings, or by reference to "the fact that some people do care about such things." So there is no reason to deny the objectivity – i.e. the intelligibility and reasonableness and *truth …* – of statements about what constitutes someone's well-being (and is *therefore* in his interests).[341]

Finnis' point here is that claims to objectivity in ethics do not require us to posit states of affairs whose goodness has nothing to do with the interests or concerns of people. Judgments of good and bad would clearly be of no use to a race of beings who were really indifferent to the various goings-on of the world. The claim is rather than that the emotive aspect of a value judgment – understood as one's pro- or con-attitude toward

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[340] Finnis, "Bernard Williams on Truth's Values," *Reasons for Action: Collected Essays* (Oxford: Oxford University Press, 2011), 100-101.
[341] Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1986), 63.

some neutral fact – is not sufficient for its intelligibility. On Finnis' view, which is also Taylor's, the meaning of "good" is not simply evaluative but also descriptive: there are real criteria for its application, related to the proper ends of human activity. A judgment that *X* is good is thus both a truth and, by that fact, a prescription; where the prescriptive claim is rejected, we saw, countervailing considerations must be put forth to restore intelligibility to the judgment. Thus, by contrast to the descriptivist view on which there is no relation between the identification of the values associated with legal practice and our committed moral or political views, on this account the identification of those values has already gone some way toward showing the practice good.

Between Hart and Finnis, then, what we have are two competing claims about human agency and its conditions. It is not that Hart is the metaphysically frugal one, with Finnis the spendthrift: both are substantive views of the nature of practical reason that are fundamentally in conflict with one another. What we should take away from Finnis' account, I think, is not his specific catalogue of the basic goods, but the view of personhood it puts forth. On his view, to be accountable to certain objective standards of good and bad, to owe these reasons to others, is part of what it is to be a person at all. As Alistair MacIntyre puts it, an action (as opposed, e.g, to the movements of objects or bodies) is "something for which someone is accountable, about which it is always appropriate to ask the agent for an intelligible account."[342] Though it would be beyond the scope of this thesis to fully defend it here, I think that this is right: while it is true, as Hart notes, that we will have nothing to say to someone who rejects the demands of practical reason – who ignores, e.g., the "motivations of an impartial morality" – such a person will hardly be recognizable as human.[343] To call such demands contingent is thus just as misleading as to call them necessary: we cannot reject them without also forfeiting some of our claim to intelligent agency, because to recognize and to act on them is partly constitutive of what it is to be a human agent at all.

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[342] Alistair MacIntyre, *After Virtue* (New York: Bloomsbury Academic, 2011), 243.

[343] A sociopath is a characteristic weak evaluator – a person without any substantive value commitments, whose every decision is simply the sum total of his desires. This is importantly different from a strong evaluator who simply has wrong or misguided evaluations.

Thus, while Finnis and Hart agree that the aim of social science is to render activity intelligible – i.e., to identify reasons for action and not causes – they disagree as to the conditions of intelligibility. Where on the instrumental view we come to identify the ends of people by observing the direction of their action, for Finnis it is something like the reverse: our understanding of action works backward from our grasp of the intelligible ends to which human activity (*qua* human activity) is necessarily directed. Finnis can then agree with the descriptivist that there is always a logical gap between a theoretical "is" statement and a practical judgment about what one "ought" to be do, while nevertheless maintaining that there is a relationship between the two; this is because, in the case of human activity at least, our understanding of the former is derivative of our understanding of the latter:

> …while nature is metaphysically (ontological) fundamental, knowledge of a thing's nature is epistemically derivative: an animate thing's nature is understood by understanding its capacities, its capacities by understanding its activities, and its activities by understanding the objects of those activities. In the case of the human being the 'objects' which must be understood … are the basic goods which are the objects of one's will, i.e., are the basic reasons for acting and give reason for everything which one can intelligently take an interest in choosing.[344]

Finnis' point is not that we can never understand bad or misguided behaviour, but that we understand it from the get-go as bad or misguided; the evaluative judgment is not something we add to a neutral fact upon observing the emotional reaction it has brought up in us. In real life, there may be more than one way to characterise or evaluate an action, i.e., a valuation may be underdetermined by the facts. But this does not mean that a statement of fact can go no way toward committing us to certain value positions, that the value judgment could just as well have taken any form whatever.

4.7. Conclusion

By way of concluding, we might note that Fuller and Finnis do not (or at least, need not) dismiss outright the possibility that one might offer a morally neutral description of human practices that is independent of the intelligible benefit they offer to

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[344] Finnis, *Reason in Action*, 204.

human life. Rather, the claim is that the richer and more informative the explanation, the greater the overlap between the descriptive question ("Is it a legal system?") and the evaluative one ("Is it a good legal system?").[345] Thus, while one might well narrowly confine oneself to defining law in non-evaluative terms (e.g., as requiring certain formal features in a certain relationship with one another), it needs to be asked whether this is the most fruitful way to go about explaining human projects.[346] My contribution to this debate is to suggest, or at least make clearer, a reason why it becomes so difficult to distinguish fact from valuation where our subject matter is people in action. A rich description of law shades into what we take to be a good instance of it because any theory of human practices necessarily puts forth a view of what human beings are like, of their capacities and thus their potentialities as the kinds of beings they are. Hart, in his description of the minimum content of natural law, explicitly enters into his analysis certain reliable failings or weaknesses of human nature; but the human condition is one of both vulnerability and promise. Thus, while Hart's theory contains an account of law at its most basic or minimal, Fuller's richer view of human beings offers a vision of legal order in its aspirational or ideal form. With Fuller, I think that there is no good descriptive reason why a theory of law should include an account of the former but not the latter, of the basic but not the richer purposes of human beings "constituted as [they] are."[347]

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[345] In Fuller's example, if we were confronted with a collection of mechanical parts and were to ask of it, "Is it a steam engine?" and, "Is it a good steam engine?" these two questions would "overlap mightily." Fuller, *The Law in Quest of Itself*, 11-12. Quoted in Fuller, "A Rejoinder to Professor Nagel," 89.

[346] In Fuller's more pointed phrasing, "what earthly purpose could it serve unless it be to support 'in principle' a philosophic position taken in advance and now confronted with an embarrassing example?". Fuller, "A Rejoinder to Professor Nagel," 89-90.

[347] Hart, *CL*, 195.

Conclusion

It is where contemporary positivism bumps up against rival theories that its metaphysical foundations are most visible. An overarching aim of this thesis was thus to bring to the surface the deeper commitments of Hartian positivism in its various engagements with rival accounts of the nature of law. In chapter one, I argued that a description of law and legal obligation reflects deeper theoretical commitments about the nature of human agency. In particular, against Bentham's reductive analysis of legal normativity, Hart's anti-reductionism can also be seen to contain an implicit ontology: a view of human beings as active, free, and responsible. In chapter two, I argued that we should see Fuller's anti-positivism as drawing out the implications of this shift in ontology. This meant showing that the institutions which shape and define our lives contain an implicit acknowledgement of certain goods, having to do with the kinds of beings we are. In chapters three and four, I argued that these goods act as the basis upon which certain normative theories of the public good gain credence; the ideal of the democratic nation-state, for example, is dependent upon a certain view of the appropriate roles and capacities of human agents. Finally, I argued that these arguments can help us achieve a more nuanced view of the role of values in legal theory, one that does not oversimplify the normative argument into an illicit (and easily avoided) slide from fact to value.

My hope in writing this dissertation was to help bring new life to certain well-worn jurisprudential questions about the nature of law and its relation to morality, by showing that what might seem to be simple analytical disputes incorporate deep assumptions about human nature. These assumptions straddle ambiguously the boundary between the fact and value, such that an explanation of law in terms of them will shade into the normative or ideal. I have argued that the normative argument does not depend on there being an absolute or determinate relation between description and evaluation; nor, I think, has any normative legal theorist believed there to be such a relation. The

links between the descriptive and the normative elements of a jurisprudential theory are not fully deductive. Rather, what we take to be the possible content of a political ideal is constrained or partly determined by our view of human nature, which also constrains or partly determines the content of our descriptive theory. In that case, I suggested, there is no good reason for clinging to the absolute neutrality of legal theory; indeed, as we saw on Coleman's analysis, positivism becomes more and more strained as it attempts to absorb Fuller's substantive insights about the relation of law to moral values without also taking on his methodology – without understanding the way in which social institutions are themselves ends. This understanding of a grounded connection between the real and ideal, between means and end, disrupts the whole framework of fact and value under which the descriptive theorist labours, inviting the values that define institutions into the realm of rational consideration. So while legal theory loses what seems more and more to be a laboured, antecedent commitment to value neutrality, it gains at once a richer descriptive life and new powers of criticism for challenging assumptions about how we ought to live.

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