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Practice and Theory in *The Concept of Law*

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In order to gain traction on the question 'what is law?', H.L.A Hart suggested in the opening passages of *The Concept of Law*, it was best to ask first what it was that had 'puzzled those who have asked or attempted to answer it'.[1] In coming to see the sources of their philosophical anxieties or confusions, he argued, we would ourselves be better placed to address the central problems of jurisprudence. This therapeutic attitude—a belief that progress was made in philosophy by carefully diagnosing the presuppositions which give rise to people's misunderstandings as opposed to building new theories, themselves fresh sources of anxiety—Hart took from Wittgenstein. One of the things I want to do here is to show how this aspect of his approach has not been adequately recognized.[2]

What issues did Hart consider to have given rise to philosophical confusion about law? There were, he suggested, three 'persistent questions' which lay behind the call for a definition of law.[3] The first concerned the relationship between law and coercion: could a legal system be reduced, as per Hart's caricature of John Austin's theory, to the situation of 'the gunman writ large'? The second question that Hart identified concerned the relationship between law and morals: what explains, for example, their shared vocabulary of rights, duties and

[1] H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press, 2012), 5.

[2] On this aspect of Wittgenstein's thought, see Gordon P. Baker and P.M.S. Hacker, *Wittgenstein: Understanding and Meaning. Part I, Essays* (2nd, extensively rev. edn, Blackwell, 2005), 285–7.

[3] Hart, *The Concept of Law*, 6–13.

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obligations, as well as the way in which the demands of each compete on the same action-directing plane? The third issue underlying the question 'what is law?' was 'a more general one'. Although the assertion that a legal system consisted of rules could 'hardly be doubted', Hart suggested, 'dissatisfaction, confusion, and uncertainty concerning this seemingly unproblematic notion underlies much of the perplexity about the nature of law'.[4]

Hart's exploration of the first question formed the backdrop to the development of his own views. In rejecting Bentham and Austin's command theory of law—on which law was to be identified with the command of the sovereign backed by force—he broke with a long tradition, running from Hobbes through to Holmes, that viewed coercion as a defining feature of law and legal norms. Not every legal rule, Hart argued, consisted in a command—the law does not order individuals to make contracts, nor law-makers to make laws—and not every command the law does make is backed by force, the duties of public institutions being one prominent example.[5] Moreover, sovereignty is itself a legal concept, a property attributed to certain legislative bodies in certain legal systems. So we cannot appeal to that notion when trying to explain the foundations of law in general.[6] Hart's arguments on these points are widely recognized to be decisive.[7]

In contrast with the easy authoritativeness of the early passages of the book, Hart's discussion of rules and rule-following that followed—an understanding of which he believed would provide 'the key to the science of jurisprudence'—have met with far less receptiveness. The prevailing narrative is that Hart set out, in Chapters 3 and 4 of *The Concept of Law*, to develop a theory of rules known as the 'practice theory of rules' which would form the basis of his response to Bentham and Austin as well as his positive understanding of law. According to this interpretation, Hart argued that rules were either to be identified with social practices of a

[4] Ibid., 8.

[5] Ibid, 27–35. Although see Frederick F. Schauer, *The Force of Law* (Harvard University Press, 2015) for discussion of the continuing philosophical relevance of coercion to our understanding of law.

[6] Hart, *The Concept of Law*, 61–78.

[7] Although cf. Robert Ladenson, 'In Defense of a Hobbesian Conception of Law', *Philosophy & Public Affairs* 9, 134.

certain kind or else were said to follow from the existence of such practices; to have a rule is to engage in a practice.[8] But our duties, Hart's detractors noted, can outstrip our practices—as is true, for example, of our obligations to future generations—and our reason-giving social practices need not amount to rule-giving practices. Consider in this regard the general tendency to stand back from the edge of the curb before crossing a busy road. We have a practice of so doing, but no rule. Because social practices are neither necessary nor sufficient for the existence of rules and, at any rate, should not be identified with them so, it was suggested, Hart's understanding ought to be rejected. For his more radical critics, most notably Ronald Dworkin, the rejection of the practice theory was enough to entail the rejection of almost everything else Hart has to say about the nature of law; legal discourse was not, *pace* Hart, an affair of rules.[9] For his weaker critics, those who still wanted to hold on to what Hart would go on to say about the structural dimensions of law—his discussion of rule-following not only forming the key aspect of his response to Austin, but also a prelude to his claim that a legal system consisted in 'the union of primary and secondary rules'[10]—a new theory of the nature of rules was required. So in Joseph Raz's work we find an analysis of rules, not as practices, but as reasons for action and in Scott Shapiro's recent writing an attempt to understand legal rules on the model of social planning.[11] The aim, in each case, being to replace the foundations whilst keeping the house intact.

[8] The list of those who attribute to Hart a thesis of this kind is long. See, most importantly, Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1978), 48–64; Joseph Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press, 1990) 50–3; Scott Shapiro, *Legality* (Belknap Press of Harvard University Press, 2011), 95–6; and Leslie Green, 'Introduction' in *The Concept of Law* (3rd edn, Oxford University Press, 2012), xxi (although cf Green's earlier reticence in Leslie Green, 'The Concept of Law Revisited', *Michigan Law Review* 94, 1687, 1693–4).

[9] So Dworkin says, for example, 'the positivist picture of law as a system of rules has exercised tenacious hold on our imagination, perhaps through its very simplicity. If we shake ourselves loose from this model of rules, we may be able to build a model truer to the complexity and sophistication of our own practices.' See Dworkin, *Taking Rights Seriously*, 45 and, more generally, ch. 4.

[10] Primary rules being those addressed to the law's subjects and secondary rules identifying, allowing for the modification of and prescribe mechanisms for adjudicating disputes about the system's primary rules.

[11] See, Raz, *Practical Reason and Norms*, 9–10 and 58–84 and Shapiro, *Legality*, 154–92.

In this piece I set out to show that Hart never could have been committed to the practice theory, inconsistent as it is with large swathes of what he has to say about law, and that a better understanding of what he was doing in the relevant sections of *The Concept of Law* survives the arguments of his critics.[12] In short I will argue that Hart set out in the relevant passages no theory of rules—no theory of rules in general, and no theory of social rules in particular—and that what has been taken by his critics to consist in a description of a set of necessary and sufficient conditions for their existence is no such thing. Where his critics find such a theory I will argue that we should instead see a series of reminders designed primarily to distance us from a mistaken picture of legal authority. Hart's innovation in *The Concept of Law* was in the way he understood law to involve a confluence of rules together forming a system, not in his understanding of what rules are.

An important preliminary issue is why any of this matters. *The Concept of Law* remains, of course, enormously influential and so questions around its interpretation have intrinsic interest. Beyond this, however, the quick dispatch of what Hart has to say about rules has formed an important prelude to the development of the theories of a number of his most important detractors. Recognizing that Hart did not go wrong in the way that they suggest opens up space for reconsidering both the merits of his wider approach as well as whether their departures from his own understanding are either warranted or necessary. Finally, the temptation to read into Hart's writing a theory of social rules sits well with the contemporary disposition to understand *The Concept of Law* as an exercise in analysis. That is, to view Hart's diagnostic aim in the book to be the provision of an understanding of the concepts essential to law in terms of the necessary and sufficient conditions for their application. This, I think, is a modern-day straitjacket into which his thinking does not neatly fit.

In the first section I lay out the practice theory. The second section marshals evidence of the theory's inconsistency with central aspects of

[12] For a different argument aiming to cast doubt on the attribution of the practice theory to Hart see Kevin Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy', *Law and Philosophy* 33, 689.

Hart's philosophy of law, in particular his insistence on the distinction between the validity and efficacy of legal rules. In section three I revisit the passages of the book from which the practice theory is ostensibly culled and suggest an alternative. Rather than setting out a theory of rules I argue that Hart was here seeking to distinguish the situation of a group acting on the basis of a behavioural regularity and following a rule. For these purposes his remarks serve their purpose. Finally, in section four, I consider some of the methodological implications of Hart's style of argument and what it says about the importance or not of conceptual analysis in legal philosophy.

The Practice Theory

As Kevin Toh has recently noted, the attribution to Hart of the practice theory most likely begins with Dworkin.[13] In his widely influential 'Social Rules and Legal Theory', Dworkin suggests that Hart believes that 'social rules exist when the practice-conditions for such rules are met'.[14] Taking his cue from Hart's discussion of the nature and continuity of legal authority—the analysis of which Hart says depends upon 'a general social practice' involving 'acceptance of a rule'—Dworkin sets out what he understands to be Hart's criteria for the existence of such rules.[15] These are: (i) a regular although not necessarily uniform practice of behaving in a certain way in the community of rule-followers; (ii) reference to 'the rule' as explanation of this behaviour; and (iii) criticism of non-conformity on the part of recalcitrant members of the community on the basis of the same. The first condition Dworkin takes from Hart's discussion of the relationship 'between social rules and habits', and the second and third he understands as manifestations of what Hart describes as the 'internal aspect of rules', the 'critical reflective attitude' essential to rule-following behaviour.[16] Dworkin then attributes

[13] For Toh's useful account of the genesis of the practice theory see ibid., 691–3.

[14] Dworkin, *Taking Rights Seriously*, 49 reprinting Ronald M. Dworkin, 'Social Rules and Legal Theory', *The Yale Law Journal* 81, 855. References to the former.

[15] Hart, *The Concept of Law*, 55 and see 55–7.

[16] Ibid., 57.

this theory to Hart as explanation of his doctrine of the rule of recognition—the claim that in every legal system there exists a rule which determines the sources of law that judges are under a duty to apply:

> Hart…believes that in each legal system the practice-conditions are met, by the behavior of judges, for a social rule that imposes a duty to identify and apply certain standards as law. If, in a particular community, these officials (a) regularly apply the rules laid down by the legislature in reaching their decisions, (b) justify this practice by appeal to 'the rule' that judges must follow the legislature, and (c) censure any official who does not follow that rule, then, on Hart's theory, this community can be said to have a social rule that judges must follow the legislature.[17]

In this way the practice theory is taken to specify both the existence conditions for social rules as well as the circumstances in which we might attribute a rule with a particular content to a given social group.

Dworkin's interpretation is taken up by Raz in *Practical Reason and Norms* where he attributes to Hart essentially the same thesis whilst expanding the basis of its application. Whereas for Dworkin the practice theory is a theory of social rules in particular, for Raz it is a theory of rules in general. Practices, on Raz's interpretation, may be social, personal or institutional, with the analysis of social rules being modified to fit the other two categories. Personal practices substantiate rules of thumb, and other individual rules and principles: 'a personal rule is referred to whenever we say John, or Ralph, or Judy acts on the rule'.[18] Institutional rules, of which legal rules form a sub-class, are social rules, the deviation from which is designed to be censured by social institutions. They are 'social rules [that] exist only where there are institutions designed to ensure conformity to them'.[19] In each case the practice, personal, social or institutional, underwrites the existence of the rule.

[17] Dworkin, *Taking Rights Seriously*, 50. Notice that the analysis appears on its face to be circular, in that it appeals to the notion of a rule in explaining the existence of rules.

[18] Ibid., 52. [19] Raz, *Practical Reason and Norms*, 53.

On both Dworkin's and Raz's readings rules depend upon practices but are not to be identified with them; the practice *constitutes* the rule.[20] More recently Scott Shapiro has attributed to Hart a stronger version of the theory: that rules in some sense *are* practices. On Shapiro's understanding Hart claims that 'social practices generate rules because these rules are *nothing but* social practices'.[21] Shapiro takes this reduction to be the lynchpin of Hart's response to the problem of the origins of legal authority: that we need law to create legal institutions, but legal institutions to create law. Hart solves the problem, Shapiro suggests, by denying the former claim: 'to create a social rule, those involved need not be authorities; rather, they need only engage in a social practice'.[22] In turn, we construct authority out of the behavioural regularity because 'the behavioural regularity is itself a rule'.[23] This solution collapses, Shapiro suggests, because it involves a category mistake (a mistake of the form that the number 12 is a cowardly number). Rules are abstract objects and practices, he claims, 'are … events' so 'one cannot be reduced to the other'.[24]

The practice theory, on either weaker or stronger versions, is an easy attribution to Hart. It allows for rules to play a major part in social life, both in the law and beyond, to form 'the key to the science of jurisprudence' as well as to explain myriad other social structures.[25] Just so long as the relevant practices exist, then so will the rules. But also, and perhaps more importantly, the theory 'allows for all possible justifications of rules'.[26] Because the existence of a rule is a matter of behaviour and

[20] Although Raz explicitly attributes to Hart the view that rules *are* practices, the better view, based upon his understanding of the theory and his criticism of it, is that the existence of rules follows from the existence of practices that have the described structure. This, I think, is the only way to make sense of Raz's criticism of the practice theory on the ground that practices which fit Hart's conditions need not give rise to rules but may instead only evidence widely accepted reasons. See ibid., 55–6.

[21] Shapiro, *Legality*, 95. [22] Ibid., 95.

[23] Ibid., 95. It is not clear why Shapiro considers this identity claim to be a facet of a response of this kind to the problem of the origins of authority. Even if rules are not strictly speaking the same thing as practices, if one is able to create a rule by engaging in a practice, then, *mutatis mutandis* and subject to appropriate conceptual constraints, one can make oneself an authority by so doing.

[24] Ibid., 103. It is not obvious to me that such an assimilation will always involve a mistake of this type. Kinds of social practice are, after all, abstract objects in the same sense as rules are, and the act of following a rule is in the same ontological category as the act of engaging in a practice.

[25] Hart, *The Concept of Law*, 81.

[26] Raz, *Practical Reason and Norms*, 53.

attitude it can be supported by any kind of reason. What matters is mutual endorsement of the rule, not why the rule is endorsed or whether it should be. All of this fits Hart's positivism, his belief that the existence of law is a matter of artifice and its content a matter of social fact.

Beyond the practice theory's consistency with Hart's substantive commitments it might also be thought to fit well with his philosophical temperament and disposition. Although in the final analysis Hart distanced himself from many of Bentham's jurisprudential doctrines, he deeply admired the latter's anti-metaphysical attitude and belief in the importance of demystifying the law.[27] Indeed, there might be thought to be a natural parallel between Bentham's reductive definition of legal obligation—as threat backed by force—and the practice theory's assimilation of the concept of a rule with social attitudes and actions. In each case the relevant concept is defined in naturalistic terms and situated within the world of fact; obligations are constellations of power and demand, rules constellations of behaviour and attitude.[28]

Contemporaneously too the influence of Gilbert Ryle—from whose *The Concept of Mind* Hart adapted the name of his book—might be thought to loom large.[29] Ryle's project in *The Concept of Mind* had been to dispel the philosophical confusion engendered by the famous 'mind-body problem', according to which the mind was either to be identified with the brain or else had to be conceptualized as a Cartesian spirit floating free of the latter. Both of these options, Ryle rightly thought, were unacceptable. An individual can lose their mind but not their brain, and so the one is not the same as the other. But equally to posit the mind as a distinct entity and cause of our physical behaviours involves the theorist in a form of ontological overreach. Ryle sought to avoid the first of these errors by defining the mental in terms of the capacities of the individual—a capacity being an attribute, not an object—and the second by understanding these capacities in largely behavioural terms. And just as Ryle aimed to avoid allusions to the ghost

[27] See H.L.A. Hart, *Essays on Bentham: Studies In Jurisprudence And Political Theory* (Clarendon Press, 1982) ch. 1.

[28] Although, as I will note later, this analogy ignores the important ways in which Hart broke from Bentham's reductivism.

[29] Gilbert Ryle, *The Concept of Mind* (Hutchinson, 1949).

in the machine by tying the analysis of the mental explicitly to behaviour, so Hart might be understood to have intended to avoid a similar mistake by conceiving of rules not as mental objects but as patterns of attitude and action.

In the next section I want to explain why Hart cannot have been committed to the practice theory and why he believed that law in particular allows for a distinction between questions concerning the existence of rules and their being practiced. To get to this argument, though, I need first to set out and explore one of the most well-known criticisms of the theory: that it provides no explanation of 'normative' or 'moral' rules.

Criticizing the Practice Theory

Understood as a *general* account of rules, Dworkin suggests, the practice theory must be mistaken. Our moral duties, he notes, will often run contrary to both the content and spirit of our existing social practices and dispositions. The vegetarian, for example, can cogently claim that others have duties to avoid intentional killing even in a society of meat eaters: 'a vegetarian might say… that we have no right to kill animals for food because of the fundamental moral rule that it is always wrong to take life'.[30] Dworkin's argument is that the vegetarian's claim is intelligible to us not as the elliptical suggestion that members of their society should adopt a rule against eating meat, that the society should 'rearrange its [practices] so that [no-one] ever has the right to take life', but as the assertion that 'as things stand, no one ever does have that right'.[31] And to this example we might add more: it is plausible that the vast majority of us fail now in our duties to future generations, and in our obligations to the global poor.[32] Claims of this type, Dworkin suggests, involve

[30] Dworkin, *Taking Rights Seriously*, 52.

[31] Ibid., 53. Raz replicates Dworkin's criticism using the example of promising: 'Many believe that it is a rule that promises ought to be kept.' But one might think this, he suggests, even 'if one is not, and has never been, a member of a community which practised the rule'. Raz, *Practical Reason and Norms*, 53–4.

[32] For an important argument about the latter issue see Peter Singer, 'Famine, Affluence, and Morality', *Philosophy & Public Affairs* 1, 229.

'assertion[s] of…normative rule' that cannot be explained by reference to social practices.[33]

Is this, then, a reason to reject the practice theory? Looking at the argument it is hard to shake the thought that there is something wrong with it. To claim that there is good moral reason, even a duty, to avoid meat is not yet to assert that there exists *a rule* so requiring. To be sure, the vegetarian will claim such a rule for themselves and it will be accompanied by a concomitant personal practice—this being what makes them a vegetarian—but when they assert duties on the part of others this cannot be what they mean. Members of the society in question certainly do not *accept* such a rule, hence the vegetarian's protestations, and it is hard to make sense of the claim that 'the rule' against taking animal life applies to them other than as an elliptical way of asserting that they have strong moral reason to avoid eating meat.

The truth is that Dworkin's argument involves a sleight of hand, an illicit move between what Derek Parfit calls normativity in the rule-implying sense and normativity in the reason-implying sense.[34] Normative language (the language of ought, must, should etc.), Parfit noticed, ranges over these two domains. When I say to someone that they ought only move their bishop diagonally in a game of chess, for example, or that they should pluralize words ending in a consonant and the letter 'y' by dropping the 'y' and adding 'ies', I invoke rules as justification, the rules of the game in the first case and the rules of language in the second. By way of contrast, when I say to a friend that they ought to think more about the concerns of others or about their own long-term future in deciding how to act, I invoke reasons, not rules, as the basis of my proposal, moral reasons in the first case and reasons of prudence in the second.[35] Normativity in the rule-involving sense is volitional; we can

[33] Dworkin, *Taking Rights Seriously*, 52. Indeed, the urgency of such claims comes in large part from the fact that they stand in opposition to our established patterns of behaviour.

[34] Derek Parfit, *On What Matters* (Oxford University Press, 2011), 144–5.

[35] To this it might be objected that most moral theories make rules, in one sense of that term, the basis of all ethical judgement; Kant's categorical imperative, for example, or the maximizing principle at the heart of utilitarianism. But the sense in which we might think of the categorial imperative as a rule is quite different from the way in which games or languages are made up of rules. Principles of the former kind are best understood as attempts to explain rather than ground the reasons that we have, so a complete explanation of what someone ought to do, morally speaking, can be made without reference to them. Normativity in the rule-implying sense, by way of contrast, invokes rules as the grounds of practical judgement.

create new such requirements 'by introducing, or getting some people to accept, some rule'.[36] By contrast, normativity in the reason-involving sense is not; we are subject to but do not in anything other than a 'limited and superficial way' create the reasons that apply to us.[37]

It is obvious that claims about the reasons that people have need not presuppose on their part a pattern of behaviour that accords with such reasons.[38] Indeed, the most common contexts in which we make such assertions are precisely those in which others have failed to meet the requirements of reason as we see them; that they haven't considered the interests of their family when deciding on a possible career move, for example, or their own long-term health when going back to smoking. How, then, to understand the vegetarian's claim? The obvious answer is as the assertion that those in their society have strong moral reason to avoid eating meat, not that there exists a rule applicable to them requiring the same.[39] In this way, then, the defender of the practice theory might suggest, assertions of moral duty and social rule may come apart, with corresponding practices still being necessary for the latter.[40]

[36] Parfit, *On What Matters*, 144. [37] Ibid., 144.

[38] So Toh is wrong to hold that the best response to Dworkin's argument is to grant that 'statements of obligation or right normally or usually involve presuppositions' of social rules but that such presuppositions may be displaced by the speaker. The assertion of moral duty involves no such presupposition in the first place. Indeed, it does not even presuppose that there *should* exist a social rule with this content. The vegetarian might well be satisfied if members of their society recognize and act on the reasons they have for not eating meat even if they do not go so far as to adopt a rule against so doing. See Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy', 720 and more generally 715–20.

[39] Parfit's distinction helps to explain why to modern ears talk of 'moral rules' seems inapposite as a description of the vegetarian's claim. That such patterns of speech were popular at the time when socialized views of morality—views which treat the normativity of reason as reducible, ultimately, to the normativity of social rules or conventions—were in ascendance is no coincidence. For discussion of whether Hart was committed to a socialized view of morality see Leslie Green, 'The Morality In Law' in Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing, 2013).

[40] Hart muddied the water on this issue by building his general understanding of obligation out of his understanding of rules, such that a necessary condition for an individual having an obligation—be that legal, moral or otherwise—is that they are subject to a rule requiring the same. See, in particular, his argument at pp. 85–6: 'the statement that someone has or is under an obligation does seem to imply the existence of a rule'. Here, it strikes me, Hart does precisely the opposite of what he aimed to do. Whilst intending to 'understand the general idea of obligation as a necessary preliminary to understanding it in its legal form', he took a condition of someone having a legal obligation—that there exists a rule requiring the action in question—and applied it, mistakenly, to the concept of obligation in general. See Hart, *The Concept of Law*, 86–9.

But the problem (if it is one) exists as much in law—a domain of rules *par excellence*—as it does in morality. To assert that the law requires people to pay their taxes or to avoid jaywalking, for example, does not presuppose that these things are generally done within the relevant community. Indeed, it is quite easy to conceive of legal rules which meet none of the conditions of the practice theory. We can well imagine a society in which tax evasion is not only practised but celebrated, and in which reference to the rules of taxation is made only with the intention of undermining them. The problem with treating a situation of this kind as an objection to Hart's understanding of rules, however, is that he himself provided us with the tools with which to understand it.[41]

As a means of introducing the structural features of a legal system, Hart distinguishes what he calls a society of 'primary rules of obligation' (more colloquially, a society of custom) from one ruled by law.[42] The mark of the former kind of society is that its 'only means of social control is that general attitude of the group towards its own standards of behaviour', whether it approves or disapproves of certain sexual practices for example.[43] In such a society, Hart suggests, although there may exist a distinction 'between those who accept the rules and those who reject the rules…the latter cannot be more than a minority'.[44] The reason for this is definitional: that particular rules are generally accepted within the community is what makes them rules of the community.[45]

All of this changes when we have law. Law is an institutionalized form of order created at a distance from those that it governs. To the question 'what is the law around here?' we do not point to the practices of the community but to chains of authority stretching back to the legal system's ultimate rule or rules.[46] Once we have law:

[41] This fact is acknowledged implicitly by Dworkin and explicitly by Shapiro in their confining of the practice theory to the explanation of 'social rules'—a term of art taken from Hart that excludes ordinary legal rules from its reach. Hart's use of that term is discussed in footnote 90. See Dworkin, *Taking Rights Seriously*, 48–51; and Shapiro, *Legality*, 95.

[42] Hart, *The Concept of Law*, 91–9. [43] Ibid., 91. [44] Ibid., 92.

[45] As Hart says, in such a situation, 'since there are no [institutions], the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be [such] rules.' Ibid., 117.

[46] Ibid., 94–5.

> the statement that a rule exists may…no longer be what it was in the simple case of customary rules—[a] statement of the fact that a certain mode of behaviour was generally accepted as a standard in practice. It may now be [a] statement applying an accepted but unstated rule of recognition and meaning (roughly) no more than 'valid given the system's criteria of validity'.[47]

Is this by-law valid? Yes, because it is made in accordance with the procedure specified in the relevant empowering statute. Is the empowering statute itself lawful? Yes, because it is duly passed by Parliament.[48] Validity, so understood, is a property of rules—it is a matter of their being appropriately placed in a system of authority—and not of our responses to them, for example whether we approve or disapprove of them, obey or disobey them.[49] This opens up space for the existence of legal rules the requirements of which are not honoured but rebuffed, or whose mandates fall only on deaf ears. All of this stands in sharp contrast with the practice theory.

But was Hart not keen to stress law's social foundation and the way in which it developed out of the 'complex practices' of communities that have such institutions?[50] He was, in two principal ways, neither of which qualify the more basic point about the relative autonomy of legal rules from the practices of the community. First, Hart suggested, a legal system's most foundational rule—the rule determining what counts as a valid source of law in the relevant jurisdiction, its rule of recognition—was, of its nature, a practiced rule. Consider again the example from the previous paragraph. If we were to ask about the validity, not of the by-law or the statute, but of the rule that what Parliament passes is law we would be, Hart suggests, 'brought to a stop':

> for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other

[47] Ibid., 110. [48] The example is Hart's. See ibid., 107.

[49] It is clear that Kelsen's influence and in particular his mantra that 'validity is the mode of existence of norms' hangs over all of this. See Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange, 1999), 30.

[50] Hart, *The Concept of Law*, 55.

> rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.[51]

But if validity is not the mode of existence of a rule of this kind, then what is? Hart's answer here *is* practice based. A particular rule is the rule of recognition of a given community because accepted by its officials, most crucially its courts.[52] The rule forms the 'unstated background' to the activities of judges—for example, in applying statutes, and treating them as trumps over rules of the common law.[53] To the question 'what is the test for law around here?' we point, Hart argued, to the rule actually used by the courts. Such a rule is not a generalization or idealization drawn from their practice but a foundational feature of it. It is a condition of the intelligibility of their role—theirs is not a game of 'scorer's discretion' but of adjudication in accordance with social standards[54]—and of the unity of the legal system. So Hart did believe that the rule of recognition was, by its nature, a practised rule. Judges use it to both guide and justify their behaviour, and to criticize outliers. He believed this, however, not because it is in the nature of rules to be practised, but because it is in the nature of institutional rules of this kind to be practised.[55] Dworkin, then, was right to apply the criteria he associates with the practice theory to Hart's explanation of judicial duty, only wrong in his explanation of why.[56]

What is the second sense in which Hart considered law to depend upon practice? A legal system is not a hypothetical set of norms but an

[51] Ibid., 107.

[52] What makes a particular group of individuals the officials of a given community? Hart's answer to this question has to do with the second way in which law depends on practice: that the system of norms identified by their practices is efficacious. This issue is discussed further below.

[53] Hart, *The Concept of Law*, 102–3. [54] Ibid., 146.

[55] As was often the case, John Gardner put the point best: The rule of recognition exists, he suggests, 'only in virtue of its being practised by some norm-population. That is not an existence condition for a rule, but it is… an existence-condition for a social rule.' See John Gardner, 'Law as a Leap of Faith as Others See It', *Law and Philosophy* 33, 813, 818.

[56] Might it not be suggested that this is all that is meant by the attribution to Hart of the practice theory? If so, the theory becomes nothing more than a footnote to Hart's doctrine of recognition, a feature of his work accepted by many critics of the practice theory and rejected on independent grounds by others. For endorsement of the doctrine see Raz, *Practical Reason and Norms*, 146–8. For its rejection see Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press, 1986), ch. 1.

existent system of social control. As such its rules must be generally *efficacious*.[57] Although, Hart suggested, 'there is no necessary connection between the validity of any particular rule and its efficacy', a legal system as a whole can only be taken to exist if its rules are for the most part obeyed.[58] So whilst individual legal norms may fall by the wayside—jaywalking might be widely practised, or tax evasion celebrated—the requirements of the system as a whole cannot. Efficacy marks the 'essential…"end product"' of law and the second of the 'two minimum conditions' that Hart thought 'necessary and sufficient for the existence of a legal system'.[59]

It should be clear that neither of these facets brings law into the scope of the practice theory. Efficacy codes conforming behaviour as a general though not uniform property of the system, whereas the practice theory codes it as a general though not uniform property of individual rules. In this way the requirement of efficacy can tolerate what the practice theory cannot: rules of law which are widely ignored or disregarded, aspects of the system that are treated not with respect but contempt by those to whom they are intended to apply. Moreover, the practice of recognition, as a condition on the existence of law, is an elite practice. It is a custom of law-applying institutions which need not be shared with the broader community. Although it is possible, Hart suggests, to imagine 'a simple society where knowledge and understanding of the sources of law are widely diffused',

> To insist that this state of affairs…always or usually exists in a complex modern state would be to insist on a fiction. Here surely the reality of the situation is that a great proportion of ordinary citizens—perhaps a majority—have no general conception of the legal structure or of its criteria of validity. The law which [they obey] is something which [they know] of only as 'the law'.[60]

In this way Hart saw that law involves the continuing possibility of mass alienation from the sources and origins of its authority, a possibility

[57] See Hart, *The Concept of Law*, 103–4, 112–13.

[58] For criticism of Hart's account of the efficacy of legal systems see Thomas Adams, 'The Efficacy Condition', *Legal Theory* 25, 225.

[59] Hart, *The Concept of Law*, 116.

[60] Ibid., 114.

ruled out in a society of custom and also, importantly, by the practice theory of rules.[61]

Faced with evidence of this kind Hart's savvier critics have attempted to modify or play down aspects of the theory such that it remains plausible to attribute to him as an explanation of the nature of rules. A thought of this kind lies behind, for example, Raz's distinction between social and personal rules on the one hand, and institutional rules on the other. Whilst social rules are supported by communal practices and personal rules by individual practices in a way that brings together norm-object and norm-practitioner ('these are our rules', 'this is my rule'), a pattern of this kind need not hold for institutional rules, including legal rules. Such rules exist, on Raz's interpretation of Hart, not as the practices of those to whom they apply, but as the practices of the 'institutions designed to ensure conformity to the rules or to deal with deviations from them'.[62] The idea being that in the society of tax evaders the practice theory has purchase because the relevant rules, even though resolutely not the practices of the law's subjects, remain the practices of the courts. Law, on this suggestion, makes possible a gap between the situation of rule-subject and rule-enforcer, not between rule and practice.

The plausibility of this interpretation is encouraged by a particular conception of Hart's doctrine of recognition. Because the rule of recognition is, by virtue of its nature, a practised rule, and because it imposes on judges a duty to apply the law that it identifies, so, it might be suggested, Hart's understanding guarantees the application of this more refined version of the practice theory to legal rules.[63] Consider that a given society's rule of recognition identifies directives issued by its legislative assembly as its ultimate source of law. Does it not follow that such rules will inevitably form the basis of the practices of the courts,

[61] Ibid., 117. For discussion see Jeremy Waldron, 'All We Like Sheep', *Canadian Journal of Law & Jurisprudence* 12, 169; and Leslie Green, 'Positivism and the Inseparability of Law and Morals', *New York University Law Review* 83, 1035, 1052–4.

[62] Raz, *Practical Reason and Norms*, 52. Similarly, Leslie Green suggests that, according to the practice theory the 'behavioural regularity' associated with a particular rule may, 'depending on the rule', involve 'conforming to what [the rule] requires, or applying it to others'. See Green, 'Introduction', xxi.

[63] Although Hart did not describe the rule of recognition in duty-imposing terms, this a clear implication of his account. See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press, 1980), 198–9.

justifications for their rulings and reason to criticize outliers for their failure to apply such standards?

There are, I think, two major problems with this proposal as a way of attempting to save the practice theory. The first is that it is inconsistent with the notion of validity as Hart understood it. Recall that for Hart validity is a formal property of some rule—it is a matter of it being identified in accordance with the system's rule of recognition. By way of contrast, whether a rule is practised (used, enforced, etc.) is a matter of our response to it. These two can come apart. A statute is valid the moment it is on the books, but it might not be applied by the courts until sometime after this fact. The modified practice theory has it that the rule cannot be said to 'exist' until it features as a premise in a judicial decision designed to apply that rule. But although such a conclusion might appeal to the cruder realists amongst us, it is wrong. Legal norms are justifications for (as opposed to merely the output of) judicial decisions and this includes the first decision applying the norm.[64]

The second problem with the argument has to do with the way in which it assumes that the rule of recognition ensures that the norms that it identifies will count amongst the practices of the community of officials. No doubt, the defender of this view might suggest, there can be individual deviations from the requirements of the rule of recognition—errant or anarchist judges departing from the demands of duty in particular cases—but this cannot be true of the community of officials. Because we identify the rule of recognition by reference to their practices, any widespread deviation from prior practices of law identification, for example the refusal to countenance the ordinances of a particular law-making body as binding going forward, will result in a new recognition rule, not a body of law that exists but which is not practised. There are, however, several ways in which this simple picture might come undone consistent with the basic truth that the rule of recognition is of necessity practised by the system's officials.

[64] For Hart's criticism of legal realism see Hart, *The Concept of Law*, 136–41. For discussion of whether Hart was here working with a caricature, or the reality of the views of the realists see Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007), ch. 2; and Leslie Green, 'Positivism, Realism, and Sources of Law' in P. Mindus and T. Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press, 2019).

For a start the capacity to competently apply such a rule does not entail the proficient understanding and use of the rules identified by it. That a court recognizes its duty to apply a statute mandating increased sentences for those who 'use' firearms in the commission of drug offences, for example, does not mean that they will apply that statute correctly in circumstances where a gun is traded for cocaine.[65] This fact is compounded by the doctrine of precedent, under which the mistakes of senior courts can become the practices of the entire community of officials. In this way legal rules that ought to feature dispositively in the decisions of judges become mangled under layers of authoritative misinterpretation.

More foundationally, that the rule of recognition is the legal system's most basic rule does not entail that it will feature as the overriding consideration of judges in all circumstances. The sporadically errant vegetarian, for example, remains a vegetarian just so long as they recognize their late-night lapses for what they are: as breaches of the standards to which they remain committed. So too the courts might depart from the requirements of judicial duty—for example, by baulking in the face of legislation that disfavours their political allies—without yet transforming the constitution. Just so long as they remain committed as a general matter to the rule identifying the legislature as authority and understand, perhaps only privately, their deviation for what it is—as a departure from legal duty for the sake of personal political convenience—the rule survives its breach.[66] This is all consistent with the rule of recognition being a rule that is, of necessity, practised by the system's officials, but it opens up space for the existence of norms that do not feature in their practices even though, legally speaking, they ought to.

This is both a substantive and methodological point. One reason why Hart's doctrine might be thought to close off the possibility of a rule accepted by a group whose collective behaviours nonetheless diverge from its requirements, is if it is read as a piece with modern accounts of

[65] See *Smith v United States* 508 US 223 (1993).

[66] Hart put the minimal existence condition on the rule of recognition as follows: such standards exist if 'most of the judges of the time [adhere] to them, for their existence at any given time consists simply in the acceptance and use of them as standards of correct adjudication'. Hart, *The Concept of Law*, 145.

rule-following which assimilate the content of a given rule with the dispositions of those who accept it.[67] But whilst Hart was keen to stress that we identify the rule of recognition by looking to the practices of officials, he did not believe that the rule was *constituted* by their behaviour. The rule of recognition of a given society is the rule that its courts actually accept and take a 'critical reflective attitude' towards. From this, of course, certain dispositions will follow, but the latter stand in an evidentiary as opposed to constitutive relation with the former.[68]

So Hart did not believe that rules 'are *nothing but* social practices'[69] or that rules 'are made up of practice'.[70] He believed that certain rules, most importantly recognition rules and the standards of customary societies, were, of their nature, practised. But Hart also recognized that there existed social standards that need not be, including legal rules. Perhaps he believed that no rule could exist unless it bore *some relation* to the practices of individuals or communities, no rule which has not been sanctioned by personal or communal practices.[71] We cannot, I think, answer this question but it is, at any rate, not what people mean when they attribute to Hart the practice theory of rules.

All of this leaves us with a mystery. Why is it that so many of those who came after Hart—both his critics and admirers—believe that he endorsed a claim that was so clearly inconsistent with central aspects of his understanding of law? To understand this question, as well as to get clear on Hart's actual commitments, we need to return to the passages of *The Concept of Law* from which the practice theory was ostensibly culled.

[67] For discussion and criticism of dispositional accounts see Paul A. Boghossian, 'The Rule-Following Considerations', *Mind* 98, 507, 527–40.

[68] See Hart, *The Concept of Law* 56–7, 102–3.

[69] Shapiro, *Legality*, 95.

[70] Green, 'Introduction', xii.

[71] It is worth noting that Gardner takes a thesis of this kind to be the defining feature of legal positivism, and therefore a fundamental truth about legal rules: 'What should a "legal positivist" ' believe if not that laws are *posited*? And this, roughly, is what [legal positivism] says of laws. It says, to be more exact, that in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it.' See John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012), 20.

Dethroning the Sovereign

Hart's target in the opening sections of *The Concept of Law* was a picture of authority which owes itself originally to Hobbes, but which found representation as a systematic legal philosophy in the works of Jeremy Bentham and John Austin. The central idea in this theory is that of sovereignty. For Hobbes the sovereign—a body with unlimited, effective, centralized authority—was a condition not only of law, but also of morality. On the Hobbesian view both the authority of the state and the moral duties of individuals depend, ultimately, upon the rational requirements of self-interest. We submit to the sovereign to save ourselves from the risks associated with the state of nature, our obligations towards each other being a downstream consequence of this initial, selfish, act of submission. What I owe you is that which the sovereign deems me to owe you. That I ought to obey the sovereign follows from the fact that I have good reason to avoid the alternative, a lawless and dangerous world without authority.[72]

Bentham dispensed with Hobbes' ethical theory but he accepted as essentially correct his account of authority. In this way what had been, for Hobbes, a normative claim about the institutional arrangement we should all rationally want, became, for Bentham, and later Austin, an identifying mark of law and legal institutions: as the command of the sovereign. But how did these theorists understand sovereignty as an analytic category? The sovereign was the body that a given population habitually obeyed, but which was itself disposed to obey no other:

> The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters.—1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain

[72] See, for discussion, Thomas Nagel, 'Hobbes's Concept of Obligation', *The Philosophical Review* 68, 68.

> body of individuals, is *not* in a habit of obedience to a determinate human superior.[73]

It is in response to this conception of legal authority that Hart introduces his discussion of rule-following.

Consider a simple society in which Rex I has authority. Upon Rex I's death, Rex II succeeds to the throne (or, as per an example closer to our modern experience, one legislative assembly is replaced by another after an election). Such transitions are common enough but they are impossible to explain on the theory of authority outlined above. We know before the transition, and before any habit of obedience can be established with reference to the other, who is to follow Rex: rules of succession determine Rex II's claim. Moreover, Rex II has authority from the moment of taking office. But because there does not yet exist an established habit of obedience to Rex II, the theory of sovereignty has the consequence that 'we shall not be able to say of Rex II's first order, as we could have said of Rex I's last order, that it was given by one who was sovereign and was therefore law'.[74] To explain these facts, Hart suggested, 'we need a new set of elements, out of which no account can be given in terms of habits of obedience':[75]

> If there is to be this right and this presumption at the moment of succession there must, during the reign of the earlier legislator, have been somewhere in the society a general social practice more complex than any that can be described in terms of habits of obedience: there must have been the acceptance of the rule under which the new legislator is entitled to succeed.[76]

We know already how this story ends: the rules that bestow authority on the office held by Rex I and then Rex II form (part of) the society's rule of recognition, the rule that determines the sources of law for the community in question. This establishes sovereignty as a contingent feature

[73] John Austin, *The Province of Jurisprudence Determined; and, The Uses of The Study of Jurisprudence* (Hackett Publishing, 1998), 193–4.
[74] Hart, *The Concept of Law*, 53. [75] Ibid., 54. [76] Ibid., 55.

of certain legal systems—a downstream function of recognition rules with a certain structure—and not a foundational feature of law in general.[77] The important point for now, however, is not Hart's solution but how he got there.

Having set out the problems faced by this conception of authority, Hart went on to clarify the scope of his inquiry: 'What is this more complex practice? What', he asked, 'is the *acceptance* of a rule?'.[78] Several lines later he asks a distinct, albeit related, question: 'What is *the difference between* saying of a group that they have [a] habit…and saying that it is the rule with them that' they do something?[79] Now it is clear why these issues—'what does it mean to accept a rule?' and 'how does this acceptance differ from habitual behaviour?'—are the salient ones for the sake of the dialectic in which Hart is involved. How are we to understand the nature and continuity of legislative authority? Not, *contra* Bentham and Austin, by looking to habits and dispositions of the community of subjects (important as they are for establishing the efficacy of the legal system) but by pointing to rules accepted by the system's law-applying institutions.

Hart's analysis begins, then, by setting out a key 'point of similarity' between the phenomena that he believes is central to these questions and the alternative implied by the theory of sovereignty, between 'social rules [i.e. rules accepted by some social group] and habits'.[80] Both where a rule requiring certain behaviour is accepted by a group, and where the group habitually behaves in a particular way 'the behaviour in question…must be general though not necessarily invariable'.[81] In this way what is taken on the practice theory to be a necessary condition for the *existence* of a rule becomes, much more plausibly, a condition on the *acceptance* of a rule. To follow a rule I must use it to guide my conduct; in this way there is a non-trivial connection between rule-acceptance and behavioural regularity.

Hart then goes on to set out 'three salient differences' between the situation in which a group accepts a rule and where they engage in behaviour instinctively. Where the group behaves as a matter of habit 'it

[77] On which see ibid., 66–78.
[78] Ibid., 55. Emphasis added.
[79] Ibid., 55. Emphasis added.
[80] Ibid., 55.
[81] Ibid., 55.

is enough that their behaviour in fact converges'.[82] However, when they accept a rule, 'deviations must generally [be] regarded as lapses or faults open to criticism'.[83] Second, the fact of deviation must itself be 'accepted as *good reason*' for the criticism: the rule must function as a critical standard for the group.[84] Lastly, and as a way of making clear that 'which is implicit in what has already been said', 'at least some must look upon the behaviour in question as a general standard to be followed by the group as a whole'.[85] This final aspect Hart christens 'the internal aspect of rules' but he might, less confusingly, have described it as the attitude necessary for us to say of the population in question that they accept a given rule.[86]

So it is both obvious from what material Dworkin and those who followed him fashioned the criteria associated with the practice theory but also why we should not attribute this theory to Hart.[87] Hart was trying to explain what it was for a group to accept a rule, or perhaps how such acceptance differs from behavioural regularity, but not what a rule is.[88]

[82] Ibid., 55. [83] Ibid., 55. [84] Ibid., 55. [85] Ibid., 56. [86] Ibid., 56–7.

[87] This conclusion might be thought to be thrown off by Hart's comments in the posthumously published postscript to *The Concept of Law* where he essentially accepts Dworkin's characterization of his work:

> At various points in this book I draw attention to the distinction between internal and external statements of law and between internal and external aspects of law. To explain these distinctions and their importance I started…by examining…the simpler case…of the custom-type rules of any social group large or small…The account I have given of these has become known as 'the practice theory' of rules because it treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called 'acceptance'.

See ibid., 254–5. I think that here, as with elsewhere in the postscript, Hart took Dworkin's bait and allowed the latter's framing of his own ideas to obstruct his original intention in the relevant passages in a way that is conducive to their criticism. The question, at any rate, is not whether Hart the man came to conceive of himself as having advanced the practice theory, but whether the relevant passages of *The Concept of Law* contain such a theory. For insightful discussion of Dworkin's influence on Hart's understanding of his own ideas in the postscript see Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?', *Oxford Journal of Legal Studies* 27, 373.

[88] It is true that Hart is not as careful with his language as he might have been. He asks, at one point for example, 'how does a habit differ from a rule?' and this might incline one to believe that the concept of a rule is his real object of analysis in these passages. For the reasons specified above dialectical considerations militate against this being the best interpretation of his remarks. See Hart, *The Concept of Law*, 55. For a similar argument see Green, 'The Concept of Law Revisited', 1693–4 citing coercion based and behaviourist accounts of rule-following as Hart's targets.

These are no doubt related questions—rules are, of their nature, the kinds of things which can be accepted, so, for example, there can be no unknowable rules, no rules the meaning of which cannot be grasped—but they remain importantly distinct. Indeed, once we have the issue of acceptance on the table we already have a further question: what are rules such that they might form the object of acceptance?[89] Hart did not try to answer that question, but it is understandable why he has been interpreted as so doing.[90]

A better understanding of the diagnostic aim of the relevant passages in *The Concept of Law* also helps to contextualize another of the more well-known criticisms of the practice theory. Whilst Dworkin attacked the theory for being under-inclusive, a further criticism, that originates

[89] That Hart did not in *The Concept of Law* outline a theory of rules does not, of course, mean that he was in any way sceptical about their existence. Much of his positive contribution to jurisprudence involves showing how rules function both in the foundation of legal systems ('law as a union of primary and secondary rules') and in legal reasoning, for example, through his exploration and rejection of various forms of rule-scepticism. All of this makes it hard to understand Toh's suggestion that Hart is wrongly attributed with the practice theory, not because his remarks on rule-following do not amount to a theory of rules, but because his theory need not 'posit' the existence of rules at all. Understanding Hart properly, Toh suggests:

> we can come to see that there is no need to posit rules in our metaphysics. What we need to acknowledge or countenance in our metaphysics are not rules themselves, but instead people's acceptances of rules . . . . Not positing rules, we would not have to worry about their metaphysical status, or about our epistemic and semantic accesses to them. What motivate people's conduct, we can explain, are not strictly speaking rules that people cognize, but instead the psychological attitudes of accepting those rules, and those psychological attitudes could be explained fully without positing rules themselves.

This interpretation seems not only to involve a form of vicious circularity (if there is such a thing as the acceptance of rules then there had better be rules to accept) but also to take us very far from Hart's insistence that 'the statement that a legal system consists . . . of rules could hardly be doubted'. His question was not whether, but in what way, this was it true. See, for Toh's argument, Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy', 701–3. For Hart's initial sketch of the problems and difficulties thrown up by the obvious truism that law is an affair of rules see Hart, *The Concept of Law* , 8–13.

[90] Part of the confusion, it must be said, stems from Hart's use of the phrase 'social rule' as a term of art. Hart understood social rules as a particular type of rule, namely those which must be accepted by a given population in order to fulfil their social role (the rule of recognition is such a rule, as are other customary norms including the rules of natural languages). This makes acceptance an existence condition of rules of this type, not because acceptance is a deep or metaphysically important feature of rules—indeed, as we have noticed, many kinds of rule are not social rules in Hart's sense—but because some norms can only fulfil their social function if accepted. So we could perhaps say that Hart had a practice theory of the acceptance of rules. But this is closer to a truism than it is a controversial theory of rules or thesis in jurisprudence. See Hart, *The Concept of Law*, 55 for the definition of social rules and cf. the postscript at ibid., 255.

with Geoffrey Warnock, has it that the theory fails in the opposite direction, by coding behaviour that does not involve rules as such.[91] Consider the following two cases: the practice of crossing busy intersections only when the 'WALK' sign is illuminated and that of stepping back from the curb when large vehicles pass by. In both situations there will exist a general pattern of behaviour, criticism of non-conformity and justification of such criticism by reference to the behaviour in question. Despite this, we should only say that there exists a rule in the first type of case. That we step back from the curb as heavier traffic passes is not because there exists a rule so requiring but because, 'quite independently of any rules, it is something which there is nearly always good reason…to do'.[92] In this way, it is suggested, the practice theory fails to distinguish 'between practiced rules and accepted reasons'.[93]

Is this a good objection to Hart's account, properly understood? Plausibly, I think, it misses its target. Hart understood rule-following behaviour as behaviour that makes reference 'to a general standard' and the practice of responding to reasons does not fit easily with this constraint.[94] Our responses to reasons are highly context sensitive—whether and how far I should move back from the curb, for example, depending on the size and speed of the vehicle going past—whereas action by reference to rules is not: 'WALK' or 'DON'T WALK'. Reasons condition behaviour in fine-grained ways, whereas the standards that we fashion to control social life inherit our limitations and failings of foresight as well as the imprecision of the language that we use to craft them (Fred Schauer's suggestion that proscriptive rules incorporate 'descriptive generalizations', and are hence both over and under-inclusive, although strictly speaking incorrect, helps to remind us of this fact).[95]

[91] See G. J. Warnock, *The Object of Morality* (Methuen, 1971), 45–6 and Raz, *Practical Reason and Norms*, 55–6 for application of Warnock's argument to the practice theory.

[92] Warnock, *The Object of Morality*, 46. Warnock's original example involves cricket but the structure is the same.

[93] Raz, *Practical Reason and Norms*, 55.

[94] Hart, *The Concept of Law*, 56–7.

[95] See Frederick F. Schauer, *Playing by the Rules* (Clarendon Press, 1991), ch. 2. Schauer's analysis goes wrong because proscriptions do not contain descriptions. The rule 'no food in the library' does not incorporate a description of anything. What it does do though is make use of general concepts—food, libraries—for which there will be borderline and contestable cases of their application.

Even setting aside worries of this kind, however, the answer might be thought to depend on what Hart was aiming to do. If we take the criteria described above as an answer to the question 'what is acceptance of a rule?' then Warnock's objection may seem apposite; the account appears not to differentiate rule-following from acting on the basis of a widely accepted reason. If, however, Hart was only aiming to answer the narrower of the two questions that he posed, namely 'how does the habitual behaviour of a group differ from its acceptance of a rule?' then the argument could be seen less as a criticism and more as an invitation to say more. To distinguish rule-following from habitual behaviour is not yet to distinguish rule-following from the acceptance of reasons, and we will need to engage in further clarification to do the latter. What matters, in other words, is whether Hart should be taken in these passages to be specifying the necessary and sufficient conditions for acceptance of a rule—in which case the counterexample might appear to undermine the explanation—or only a series of conditions, sufficient to show us that no account of that behaviour 'can be given in terms of habits of obedience to general orders'.[96] An understanding of the dialectic in which Hart was engaged should, I think, incline us towards the latter interpretation, but temptation towards the former is encouraged by a widespread assumption about the philosophical methodology employed in *The Concept of Law*. It is to this that I turn in the final section.

Investigation and Analysis in *The Concept of Law*

Hart's work is an undoubted product of its time. Indeed, it self-consciously wears its philosophical influences on its sleeve. Not only does *The Concept of Law* take its name from Ryle's most famous work in ordinary language analysis, but Hart quotes approvingly in the preface from J.L. Austin, that in philosophy we may use 'a sharpened awareness of words to sharpen our perception of the phenomena'.[97] In this way, Hart suggested, although he would throughout the book raise 'questions which may well be said to be about the meanings of words'—questions,

[96] Hart, *The Concept of Law*, 54. [97] Ibid., vi.

for example, about 'how "being obliged" differs from "having an obligation"' and 'what is meant by the assertion that a social group observes a rule and how this differs from and resembles the assertion that its members habitually do certain things'—these were not *simply* questions about the meaning of words:

> Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated.[98]

In the background to all of this is the profound influence of Wittgenstein, in particular the latter's belief that philosophical problems were ultimately conceptual problems and that conceptual problems, in turn, were problems about language.[99]

We are a long way now from the heyday of ordinary language philosophy.[100] The subtleties and differences between the views of its practitioners have largely been erased in the popular imagination in favour of a caricature of their work which functions more as a kicking ball than a serious and worked-out conception of philosophical method. This is the picture of philosophy as 'conceptual analysis'.[101] On this model the aim of philosophy is understood to involve the development of theories that consist in the specification of the necessary and sufficient conditions for the application of philosophically important concepts as they appear in ordinary language. On such a view the central task for epistemology, for example, would involve determining the necessary and sufficient conditions for the application of the concept of knowledge,

[98] Ibid., vi.

[99] See, on the early and important influence of Wittgenstein on Hart's thought, Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004) at 140.

[100] Although some believe that general jurisprudence has not travelled far enough. See, in particular, Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, 131–5.

[101] Although the model does appear to have at least one paid up practitioner. See Colin McGinn, *Truth By Analysis: Games, Names, and Philosophy* (Oxford University Press, 2012).

elicited through the use of thought experiments designed to track our ordinary use of that concept ('Is knowledge justified true belief?' 'No, for the reasons that Gettier provided').[102] It is a model of philosophy by way of long lists.

It is clear, I think, how a picture of this kind makes easy the attribution of the practice theory to Hart. First, his argument in the relevant passages is conceived of as a theory of the pertinent organizing concept, in this case the concept of a rule. Second, that theory is understood to involve the specification of the necessary and sufficient conditions for the application of the concept. In this way Hart's discussion of rule-following becomes Hart's analysis of the concept of a rule, vulnerable to Dworkin's argument about the vegetarian and Warnock's example involving widely accepted reasons, not rules.

But Hart and his contemporaries had a more capacious understanding of the conceptual method than this. Many, for example, were against systematic theory building as a model of good philosophical practice, taking from Wittgenstein the imprimatur that 'the work of the philosopher consists' not in the development of general theories but 'in marshalling recollections for a particular purpose'.[103] Such an injunction makes sense, of course, if we consider the aim of philosophy not to be innovation or discovery but the resolution of confusions thrown up by misunderstandings of our own concepts (in Hart's translation, ask not 'what is law?' but 'what it is about law that has puzzled those who have asked or attempted to answer [that question]').[104] Now it is true that Hart did not stick rigidly to this precept and that some of the most important and controversial claims in *The Concept of Law*—that law consists in the union of primary and secondary rules, for example, or

[102] See Edmund Gettier, 'Is Justified True Belief Knowledge', *Analysis* 23, 121.

[103] Ludwig Wittgenstein, *Philosophical Investigations* (Rev. 4th edn, Wiley-Blackwell, 2009), 56.

[104] Hart, *The Concept of Law*, 5. This shows how Hart's attitude towards theory differed from Bentham's. Hart believed that Bentham's revisionist analysis of legal terms, designed to pull off the mask of legal language and reveal the reality of law underneath, resulted ultimately in misrepresentation. Legal concepts have no meaning outside of the context of their use and so Bentham's attempt to understand them in ways which self-consciously 'outstretch[ed] common usage' was, Hart thought, distorting, not clarifying. For Hart's criticisms of Bentham see, for example, Hart, *Essays on Bentham: Studies In Jurisprudence and Political Theory*, 127–39.

that no human legal system could fail to meet certain basic demands of morality—look very much like the kind of theory building that Wittgenstein cautioned against.[105] But the important point for now is that Hart, like Ryle before him,[106] is most often misread by those who wish to find in every aspect of his work a far-reaching program of this kind.

Connected to this point is a further one: that conceptual investigation, as Hart and his contemporaries understood it, should not be reduced to the provision of analyses, where these are understood to involve the specification of the necessary and sufficient conditions for the application of given concepts.[107] For one, such an approach places us in constant danger of simplifying for the sake of completeness, thereby disregarding important truths about how we use concepts.[108] Importantly too conceptual insight can be gained in a range of ways. We may, for example, wish only to distinguish one concept from another, as Hart was plausibly trying to do with the concepts of rule-following and habitual behaviour. For this purpose we need to identify some but not all of the criteria associated with the concept in question—necessary, but not

[105] It is important to recognize that the relevant Wittgenstinian edict does not countenance against theory as such, only theory which removes concepts from the ordinary contexts of their use, thus detaching philosophical problems from the means of their resolution. See Wittgenstein, *Philosophical Investigations*, 51–5.

[106] For example, Ryle's supposed behaviourism depends upon the attribution to him of the controversial and far reaching claim that mental processes in some sense *are* behaviours. But Ryle was not a behaviourist in anything other than the trivial sense that our practices reveal us all to be: to comprehend the mental lives of others we look to behaviours not because mental processes *are* behaviours but because the latter are our only means of understanding the former.

[107] Although Hart did make one such claim for his work: that there were 'two minimum conditions necessary and sufficient for the existence of a legal system':

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

See Hart, *The Concept of Law*, 116.

[108] Indeed, the descriptive austerity required for the specification of the necessary and sufficient conditions for the application of even the most uncomplicated of concepts will often have us overlooking important facets of their use. This is why, for example, the standard analysis of the term 'bachelor' as 'unmarried man' runs into trouble in the case of the pope, who people will not describe as a bachelor despite his fitting the definition. The problem stems from the fact that the analysis overlooks the criterion of romantic availability implicit in the fact that, alongside the pope, we also will not describe long-term cohabiters as bachelors.

necessary and sufficient conditions for its application. Moreover, conceptual understanding can come as much from noticing what cannot be said about concepts as by noticing what can. When, for example, Ryle pointed out that we cannot lose our brains but that we can lose our minds, he reminded us of a fundamental difference between these two concepts without providing an analysis of either.[109]

Finally, that the notion of philosophical understanding which Hart embraced is broader than that implied by the model of analysis has important consequences for how we might understand the continuing importance of his work. For one, that not every aspect of his argument counts as an analysis means that not every aspect of it fails for not being an analysis; what is not put forward as a theory of the nature of rules should not be judged by the standards of such a theory.[110] Moreover, that Hart's conception of the function of rules in social life might in places be incomplete is not yet a reason to abandon what he has to say in favour of some alternative (in the same vein: that knowledge is *not just* true justified belief does not mean that it is not *at least* true justified belief). Understanding Hart's project on its own terms gives us reason to pause and consider whether, and if so what, more needs be said in order to establish the foundational role of social rules to the nature of law and legal theory.

Conclusion

In this article I have attempted to marry aspects of Hart's jurisprudence with his more general philosophical outlook. Recognizing that the misconceptions of his critics range across these two domains helps to diagnose a central misunderstanding of his work known as the practice

[109] Hart did something similar with the confusions of the more extreme of the realists, by showing how legal rules could not function as the predictions of judicial decisions. See Hart, *The Concept of Law*, 136–41.

[110] There is also the further question of what standards a comprehensive 'theory' of rules should or even could answer to. Here too the aim for completeness is likely to throw up more in the way of distortion and confusion than illumination. I thank Les Green for suggesting this point to me.

theory of rules. The aim of my argument, however, has not only been to suggest that we might understand Hart better by considering his work in the spirit of the time at which he wrote, but also that recovery of this spirit may benefit us today as we continue to engage in the same task to which he was committed; understanding the place and importance of law and legal institutions in our shared practices and conceptual schemes.[111]

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