
HART'S POSTHUMOUS REPLY

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INTRODUCTION

Professor Hart left, at his death, an unfinished manuscript of a Postscript which he had intended for a new edition of his best-known and most influential book, *The Concept of Law*. (In the last edition of that book, printed in 1972, he said that he hoped "on some future occasion" to add to the book "a detailed discussion" of various criticisms of the book that had been written over many years.) The Postscript was meant to contain two parts, the longer first part of which was to be a response to my own arguments directed to his work, and the second, shorter, part a discussion of other criticisms, and of revisions he thought might be necessary in the light of the criticisms he accepted. At his death, only the first part had been written, and this has now been published in a new edition of the book.¹

I do not know how long before his death he ceased working on the manuscript, or how far he thought the part that he had written complete. It must, I think, be read as a draft, bearing in mind that the author might well have wanted to change or rewrite parts of it. But even as it stands, it reminds us of Hart's own comment about his predecessor as Professor of Jurisprudence, Arthur Goodhart, who was, Hart said, wrong clearly even when he was clearly wrong.² That compliment is more distinctly true of Hart than of any other philosopher I have known. And it is characteristic of all his work that his descriptions of my own views are not only scrupulously fair and for the most part very accurate, but that they are often presented with a concision and clarity that I have never myself achieved for them.

We cannot be sure, as I said, that Hart would have published the first part of the Postscript in its present form had he been able to complete the whole. I believe I should nevertheless answer the very de-

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¹ H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) [hereinafter CL].

² Hart took the phrase from Henry James, whom he described as the greatest writer of America, Professor Goodhart's country.

tailed arguments and criticisms of my work in the draft he left, even though, for the first time, I must write without the fear and pleasure of hearing his judgment. Hart's Postscript is divided into sections and sub-sections, and, in the interests of clarity though at the price of some minor repetition, I have arranged this response in the same way, so that I can comment on each section in turn. I also use the present tense to describe what Hart now "says," in order to distinguish the Postscript from earlier work.

I. THE NATURE OF LEGAL THEORY

In this first section, Hart turns immediately to the most profound disagreement between us, which is about the status of theoretical descriptions of intellectual domains. He was concerned only about the status of legal theory, but the issues he raises in this section have much more general application. They are central, I now believe, to the whole question of how far philosophical studies of some domains, including morality and art and science as well as law, can be Archimedean with respect to those domains; how far, I mean, they can regard themselves as *about* but not *of* them.

Much recent skepticism and reductionism, particularly but not only about morality, has purported to be Archimedean in that way. Philosophers who say that moral judgments are only the expression of a particular emotion, or only proposals for conventions, for example, take themselves not to be making internal, skeptical moral judgments, as someone does who says that heroes are subject to no moral constraints, but to be describing (or re-describing) morality from the outside. That is a crucial methodological claim because, if sound, it allows these philosophers to exempt their own opinions from their characterizations of the domain these opinions are about: a philosopher can say that morality is only emotion without conceding that that very statement is itself only the expression of an emotion. My own view, which I have argued elsewhere,³ is that Archimedean philosophy is impossible so far as it purports to challenge or qualify or even to re-state judgments internal to the domain it studies. The only argument that can provide a reason for endorsing or abandoning or qualifying a legal judgment is a legal argument, and that holds for morality and art and science as well.

In *Law's Empire* I argued (as I would put it now but, because I had no more general theory in mind, didn't then) that legal theory cannot be Archimedean with respect to law: that describing law is doing law, so that, to the extent and in the way that ordinary legal reasoning is normative, legal theory must be normative, too. Though I said very

³ [Since published as Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 88–89 (1996).]

little about Hart's work in that book (I had written extensively about his views in the other materials he cites) I said that his own understanding of his work as descriptive (or, as I put it then, semantic) was therefore unfortunate. A jurisprudential theory like his, I said, would be better understood as itself internal to law: as interpretive of legal practice in a general and abstract way but interpretive in the same sense, and embodying the same evaluative dimension, as ordinary legal argument.

Hart was unpersuaded. He thought, as he says in this section, that there is a place for both descriptive and interpretive or evaluative jurisprudence, that his work counted as the first and mine the second, and that there was therefore no conflict between them.⁴ It is important to see that he is not challenging, at this point in his argument, my view that legal practice is interpretive, that is, that lawyers who make claims about the content of law of their country or state are interpreting legal history and practice rather than merely describing it.⁵ The discussion between us, at this point, is about the connection between legal theory and practice: whether it follows from the fact, if true, that legal practice is interpretive that his kind of jurisprudence must be interpretive too. I summed up my view about that concession in a phrase to which Hart particularly objects: I said that jurisprudence is only the abstract part of legal argument, and is "silent prologue" to any argument any lawyer makes. If, contrary to my view, legal practice were descriptive — if lawyers' judgments about what the law requires in some particular case were best understood as themselves only descriptions of history — then I would be wrong both

⁴ In a conference in Jerusalem, Hart and others pressed me to concede that some studies of law that might be thought jurisprudential in character are indeed descriptive, at least to the extent any social science can be. I agreed, and that is the concession to which he now refers. How many lawyers per person are there in Japan? Why are there so many fewer than in America? Does this explanation account for other ways in which legal practice and the structure of the profession differs in the two countries? How, more generally, are these particular social facts affected by a society's broader culture? It is questions of this character that I had in mind when I conceded — I didn't think it much of a concession — that some questions that might be thought jurisprudential were descriptive. I said, however, that these essentially sociological questions are very different from the kinds of questions that make up the agenda of classical legal philosophy, and that Hart took up, for example, in *The Concept of Law*. See CL, *supra* note 1. These latter questions, I said, were questions about the "sense" of propositions of law, and called for interpretive rather than descriptive theory. That is the claim, of course, that Hart challenges in the first section. [Dworkin here refers to a conference held in Jerusalem in March 1984, the proceedings of which have since been published. See ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY (Ruth Gavison ed., 1987). Dworkin's contribution to the collection, *Legal Theory and the Problem of Sense*, appears alongside comments by Hart and Professor Ruth Gavison.]

⁵ He says, on page 241, that he is "not concerned to dispute [my] elaboration of these interpretive ideas," CL, *supra* note 1, at 241, though he adds, in a note, that some writers, while accepting my interpretive account of legal practice, "deny that legal theory can be interpretive," *id.* at 241 n.15.

about law and about jurisprudence, but not about the link between them.

Hart insists that his kind of jurisprudence is merely descriptive: it describes, he says, a social institution that takes many forms but has common features he aims to identify. "This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure, though many misunderstandings and obscuring myths, calling for clarification, have clustered round it."⁶ Hart's purpose, he says, is to pick out that general form and — through analyses of the nature of rules of different kinds, of the difference between an internal and an external point of view, and of the idea of legal validity — to dissipate those misunderstandings and myths. Certainly some "general" accounts of legal phenomena across lands and ages would plainly be descriptive in the sense Hart has in mind. Consider this claim: in any nation that has achieved clear military supremacy over the rest of the world, powerful people, who are regarded by the bulk of the population as having the authority to make such claims and decisions, have claimed and exercised authority to execute at least some of the people who have been declared, by processes these powerful people deem appropriate, to have killed someone else. Though this is a statement about legal practice, it does not, I agree, involve legal interpretation.⁷ It is, in the sense Hart had in mind, descriptive rather than normative, and so far as jurisprudence consists in making statements of that form, my claim that jurisprudence is necessarily interpretive in the sense I described was indeed mistaken and "imperialist[ic]."⁸

But now notice that what might seem a desirable simplification of the statement I just conceded was descriptive would make all the difference: it would turn it into a statement that I *would* insist involved legal interpretation. Suppose the statement read, "The legal systems of all militarily dominant nations have provided capital punishment for murder." *This* statement makes a claim not about what a variety of people have thought and said and done, but about what *law* did and does authorize, and that is different. It is conceivable, for example, that though the officials of a particular legal system all assumed, in good faith, that on the best understanding their law authorized capital punishment for murder, they were all *wrong* in that belief. I myself take that view, in fact, of the situation in many states of the United

⁶ [*Id.* at 239–40.]

⁷ Since it is a claim about what people have said and thought, it does involve interpretation of other sorts, but Hart does not mean to deny that jurisprudence must be interpretive in any sense. He denies that it must be interpretive in the sense I define, which includes a level of normative judgment that, he would insist, linguistic or attitudinal interpretation does not.

⁸ [CL, *supra* note 1, at 243.]

States now. I think that no American state's law, properly understood, actually authorizes capital punishment because such punishment is unconstitutional under the Eighth Amendment of the United States Constitution, in spite of the fact that the Supreme Court, which once did take the same view, has since changed its mind and said that capital punishment, in some circumstances, is validly authorized by state law after all.

If a jurisprudential scholar were to say that the law of several American states now permits capital punishment, then (unless he meant only to say that almost everyone *treats* the law as authorizing capital punishment) he is taking sides in a legal argument. He declares that the majority interpretation of the Eighth Amendment is right, and mine wrong, and if, as I think, these competing interpretations each takes a position about which understanding of that Amendment best fits and justifies our constitutional text and tradition, so does his view.

Now consider, with that distinction in mind, Hart's main claims in *The Concept of Law*. He is not content with sociological reports about the propositional attitudes of actors in the legal process. He offers a theory, as he says, about the "structure" of all legal systems, and that means that he makes claims about what, in each case, the law is or does or means. The most important statement he makes — the statement most of my discussions of his view have centered on — is that each legal system contains a fundamental rule of recognition, which has the fundamental authority it does in virtue of the fact that almost all the officials *accept* it as fundamental, and which identifies the conditions any other rule must meet in order to be a valid legal rule. Now we might, it is true, take this strong claim to be a descriptive account of the attitudes of a variety of people over history. We could distinguish two versions of the descriptive claim we might take it to make.

The first takes Hart to be describing the jurisprudential beliefs of other people. We might then rewrite his claim somewhat as follows. "In all of what we take to be standard cases of legal systems, now and over history, at least the officials and in most cases the public at large as well, have believed that they should recognize as law all and only what was so identified by a master rule which they all accepted as convention, that is, because others so accepted it." But this is preposterous. Hart's theory was original when he published it, not old hat: he was not simply setting out what everyone already knew. Not many judges thought what he said before he said it; I dare say that many judges do not think it now, even many of those who have read his book. The second descriptive restatement is more modest, because it focuses not only on what people have thought but on what they have done. "In all of what we take to be standard cases of legal systems, now and over history, at least the officials, and in most cases the public at large as well, have recognized as law all but only what we can now see was identified by a master rule which they all accepted as

convention, that is, because others so accepted it.” But though this is more modest, it is almost equally transparently false. Hart declares that many people have been confused about law, and made inaccurate claims of law out of this confusion. He concedes, later in this Postscript, that even contemporary non-philosophical lawyers and judges make claims that the law is or is not a certain way when no rule of recognition validates their claims, and when it is more accurate to say, as he does, that there is no law on the matter either way, so that judges deciding a case in the area must exercise a “discretion” to make new law.

It is much more natural to understand Hart’s claim about a rule of recognition in either of two other ways. We might understand it, first, as an abstract substantive legal claim — like the claim about the law authorizing capital punishment, but much more ambitious — said to hold true in every legal system there ever was. On this view, Hart would be agreeing with any lawyer in any such system who claimed, as a substantive claim about his own legal system, that all valid rules were valid in virtue of a fundamental master rule. Perhaps no lawyer ever did make such a claim before Hart did (just as few lawyers now make the claims I do about capital punishment) but Hart would be arguing, in effect, that any lawyer who had made that claim would have been right, as a matter of law. Second, we might understand Hart’s claim about a rule of recognition as his general and abstract interpretation, in exactly the sense he claims it is *not* an interpretation, of all legal systems that ever existed. These two ways of understanding the claim are, of course, identical in my view. Since I think that ordinary legal reasoning is interpretive, I think that his views are best understood both as ordinary, internal legal claims, though very abstract ones, and as an interpretation (again, a very abstract one) of legal practice.

That is exactly what Hart disputes. So we must consider what alternative account he might give of his claim about rules of recognition. I just described one possibility: that his claim is one of descriptive linguistic or psychological history. But that, as I said, would make the claim transparently false, and we should look for other possibilities. We might take him, first, to have made a semantic claim: that it belongs to the very *meaning* of the term “law” that valid law is law created or developed in accordance with the conditions laid down in a master rule accepted by the bulk of officials, and that lawyers who make claims of law inconsistent with that characterization are making a conceptual mistake. In *Law’s Empire* I suggested that he did think of his theory as semantic in something like that way, and argued that it could not succeed so understood. In this Postscript, however, he vehemently denies that he ever regarded his account of law as a semantic one, and though I defend my suggestion below, it would plainly be wrong now to suppose that his claims about the rule of recognition

should not be understood as substantive claims of law because he meant them as semantic claims.

Now consider another, more complex, possibility: that Hart believed that legal systems form what philosophers call a "natural kind."⁹ Kings and goldsmiths and peasants have for a long time had theories about what gold is. But they might all have been mistaken, and many of them no doubt have been and continue to be. Chemists can say what gold is: it is a metal having a certain atomic structure. Everything that has that structure is gold, whatever it looks like. Nothing that does not is gold, no matter what it looks like. This is not a semantic discovery: it was not reached by asking what criteria people actually use for deciding whether to call something gold. It is a chemical discovery, and the claim that gold has the atomic structure it does is a descriptive discovery of chemistry.

We might imagine an argument that treats law like gold. According to that argument, we can discover that the thing or phenomenon whose existence causally accounts for people having the concept of law in fact has a certain structure — the structure Hart described — even though few people have recognized that structure, and even though many people, for that reason, have made mistakes in their claims about it, as people have been tricked by fools' gold. But this explanation is incomplete, because it does not yet explain the character of the central discovery it claims: that law, whatever people think, has the structure Hart described. It cannot be an anthropological or psychological or sociological claim because it is not, as we noticed, just a claim about what people do or think or say. It goes beyond this: it is a claim such that people can be mistaken, in virtue of its truth, about law, just as people can be mistaken in thinking that fools' gold is gold. But of course Hart's discovery cannot be a discovery of physical chemistry either. It can only be a discovery of *law*, which is to say a discovery about what the law of a vast number of particular legal systems actually is. So even if we accepted the analogy between Hart's jurisprudence and a chemist's discovery about a natural kind, this analogy would not show us how Hart's claims could be seen as different from ordinary legal claims, so that the former could be descriptive while the latter are interpretive.

This point shows, moreover, why the analogy is misconceived in principle: the fact that law's character is revealed by interpretation rather than scientific, or natural, investigation is a signal that law is not a natural kind. We can generalize that claim to cover social institutions generally. Plainly there is no physical or social or psychological

⁹ SAUL A. KRIPKE, NAMING AND NECESSITY 121, 127 (1980); Hilary Putnam, *The Meaning of "Meaning,"* 7 MINN. STUD. PHIL. SCI. 131, 152 (1975).

fact that fixes the nature of marriage, for example. Suppose it is true that there has never been a society in which homosexual unions of any kind have been recognized as marriages. It would not follow that it is of the essence of marriage, as a social institution, that it be heterosexual. Any claim that this is part of the essence of marriage — that a union of homosexuals, whatever else it might be, cannot be a marriage — is an interpretive claim, and must be assessed in that way.

Hart suggests that I am guilty of a simple confusion in supposing that because legal argument is interpretive, legal theory of his kind must also be interpretive. He says that my argument supposes that “no adequate account” of the “internal perspective” of “an insider or participant” in a legal system “can be provided by a descriptive theory whose viewpoint is not that of a participant but that of an external observer.”¹⁰ But I don’t assume that. On the contrary, as I have said, I conceded that an account of the “internal perspective” can be descriptive if it takes the form of a description of propositional attitudes toward the law: if it describes nothing more, that is, than what human beings have thought or think. So I do not deny that a legal theorist can “describe” a judge’s “acceptance” of a particular rule without the theorist himself “accepting” it. But when a theorist says, not that the judge does or does not accept a particular rule, but that the law contains or validates that rule, the theorist does more than describe someone else’s attitude. He *accepts* a rule himself, in the particular sense of confirming that it really is a rule of the system in question, and that plainly goes beyond just describing other people’s attitudes.

Hart closes this section by remarking that though my concession, that not all that might be thought to be jurisprudence is interpretive, is “welcome,” the caution I attached to this concession, that questions about the “sense” or meaning of legal propositions are interpretive, is mysterious.¹¹ He says, rightly, that “even if the judges and lawyers of all the legal systems of which the general and descriptive legal theorist had to take account themselves did in fact settle questions of meaning in this interpretive and partly evaluative way,” it would be a “serious error” to think that the theorist, in reporting that they settled such questions through interpretation, was himself interpreting and evaluating rather than describing.¹² Maybe some legal philosophers do think it important merely to describe how some or most or all lawyers and judges approach questions about what particular legal propositions mean. That is why I conceded that some of what could count as jurisprudence is merely descriptive. But, once again, that kind of de-

¹⁰ CL, *supra* note 1, at 242.

¹¹ See *id.* at 243; *supra* note 4.

¹² [CL, *supra* note 1, at 244.]

scription falls far short of what a legal theorist does when he offers to say what some legal proposition *does* mean. Then he must himself assign meaning to some legal proposition, and that is (I would have thought plainly) a matter of first-order interpretation, not mere description of what other people think.

In fact the claim that a given proposition of law — “the law is that *p*” — *means* something or other is ambiguous. Such a claim would generally be understood, by lawyers, as a claim about what that proposition’s more concrete legal consequences would be if it were true. In that sense, saying what people think a proposition of law means and saying what it does mean are obviously very different. It is one thing to ask what judges think the proposition that they must enforce statutes in accordance with the intention of the legislature means they should actually do in particular cases. It is quite another to ask what it does mean they should do. A theorist merely reporting, in a general but still descriptive way, what American lawyers and judges think it means would have to identify a great number of views, some of which are very different from others. His account would have to be statistical in character, stating how many judges incline toward one theory of legislative interpretation, how many to another, and how many seem confused and inconsistent about the matter. A theorist who set out to say what the proposition that judges should defer to legislative intention really *does* mean would have, on the contrary, to agree with one party of lawyers and disagree with others. He would be taking sides, and his argument would have to be on the same plane as theirs. If their arguments are interpretive, then his must be, too.

Sometimes, however, particularly in discussions of legal philosophy, an argument about what a proposition of law means is an argument about its truth conditions. We ask what it means to say that something is the law expecting to be told what grounds would support or fully justify a claim of that kind. But lawyers and judges also disagree about that question. As a kind of shorthand, we might say that some would give it a broadly positivistic and others a broadly non-positivistic answer. Hart does not simply report this difference of opinion, or describe the various permutations of the different versions of each type of view. He offers his own theory of legal validity: he offers a positivistic account, that is, not of what propositions of law, in general, are thought to mean, but of what they do mean. If so, then under whatever assumption he makes about the kind of reasoning lawyers and judges engage in when confronting that issue, he is doing what they do.

II. THE NATURE OF LEGAL POSITIVISM

A. *Positivism as a Semantic Theory*

Hart says that nothing in his work justifies my attributing to him, in *Law's Empire*, what I called a "semantic" theory of law. I would now write the paragraphs of that book that he has in mind differently: I would describe the theories I called semantic as Archimedean instead. But it might be helpful nevertheless for me to explain again what I meant, and why I thought the classification important, because I still think (though perhaps with inexcusable stubbornness) that what I said was both fair and illuminating.

I must begin by reminding you of an ambiguity in the word "law." We use the word in two ways.¹³ In one, "law" refers, generically, to a type of social institution: it refers to all legal systems in spite of the fact that, as Hart made plain, these differ very much from one another. In the second, "law" is used *within* legal practice to refer to true or valid propositions of law within a particular legal system. We say it is "law" or "the law" in X, for example, that two witnesses are needed for a will, or that school boards are liable for damage resulting from schoolyard brawls when teacher supervision is negligent. In *Law's Empire*, I tried to make plain, from the very start of the book, that I was talking about law in the second sense: I said I was discussing the question of what makes a proposition of law true when it is true, of what lawyers who disagree about the truth of propositions of law are really disagreeing about, and so forth. (I often used "law" instead of "propositions of law," but I believe it was clear that I was then using "law" in the second sense I just distinguished, not to refer to legal systems in general but to "law" of a particular jurisdiction.) My suggestion that Hart's theory of law is a "semantic" theory was therefore directed to his answer to the questions about propositions of law that I just listed.

I defined semantic theories of law as follows: "Semantic theories suppose that lawyers and judges use mainly the same criteria (though these are hidden and unrecognized) in deciding when propositions of law are true or false; they suppose that lawyers actually agree about the grounds of law."¹⁴ I said that some semantic theories are drafted as explicit definitions of sentences of the form "The law is that *p*" — Austin's theory, for example, declared that such sentences were synonymous with sentences of the form "The sovereign has commanded *p*." But I added that other semantic theories (I had Hart's in mind) instead

¹³ See RONALD DWORKIN, *A Reply to Critics*, in *TAKING RIGHTS SERIOUSLY* 291, 350–53 (1978) [hereinafter TRS].

¹⁴ RONALD DWORKIN, *LAW'S EMPIRE* 33 (1986) [hereinafter LE].

set out to describe “the ‘use’ of legal concepts, by which they meant, in our vocabulary, the circumstances in which propositions of law are regarded by all competent lawyers as true or as false.”¹⁵ I thought Hart’s theory a semantic theory under that definition because I thought he aimed to describe how lawyers use propositions of law, and to do this by setting out the truth conditions for such propositions that lawyers mainly follow, even though they sometimes, either out of confusion or the need to appease a public that expects certainty or for some other reason, do not.

In a footnote in *Law’s Empire*, I acknowledged that some positivist theories (again, I had Hart in mind) identify themselves as describing law as a “social phenomenon” in the manner of descriptive sociology.¹⁶ But I said that they are nevertheless still semantic theories, in the sense I had defined, because they describe legal practice in a particular way that other disciplines, including sociology, do not. Positivist legal theories, I said, describe legal phenomena by explaining the truth-conditions of the propositions of law that are so central to legal practice. In his Postscript, Hart says that my remarks confused the meaning of “law” with the meaning of propositions of law. He says, “[E]ven if the meaning of such propositions of law was determined by definitions or by their truth-conditions this does not lead to the conclusion that the very meaning of the word ‘law’ makes law depend on certain specific criteria.”¹⁷

But in his book he seemed to say the opposite. He said that the presence of a rule of recognition accepted by officials, and obedience by the general public to other rules made valid by that rule of recognition, are “necessary and sufficient for the existence of a legal system”¹⁸ and that “[t]he assertion that a legal system exists is therefore a Janus-faced statement looking” toward the satisfaction of these two necessary and sufficient conditions.¹⁹ That is the language of semantics, and it does seem to declare that in every true legal system lawyers use the same criteria or truth conditions for identifying true propositions of law in that system. They identify the rule of recognition of the jurisdiction, and follow the standards it sets out. In one of the two senses of meaning I just set out — the sense in which giving the meaning of a proposition of law consists in giving its truth conditions — these neces-

¹⁵ *Id.* at 32.

¹⁶ In the preface to *The Concept of Law*, Hart says that “[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology.” CL, *supra* note 1, at v.

¹⁷ *Id.* at 247.

¹⁸ *Id.* at 116.

¹⁹ *Id.* at 117.

sary and sufficient conditions do give the meaning of propositions of law.

It might now be said, however, that, in spite of the language about “necessary and sufficient conditions,” Hart never intended a semantic claim of this kind, that he did not intend to go beyond the claim that in *fact*, as a contingent matter, a rule of recognition is to be found in every case of a standard legal system, and lawyers always and everywhere accept the truth conditions it specifies. He does suggest some such view in his reference to the distinction between concept and conception in his Postscript. He might mean, according to this interpretation of his views, that though “it is the law that” is a concept that admits of competing conceptions, only one — the positivist conception he describes — has ever in fact been embraced by many lawyers.²⁰ On this view, if in the unlikely event that any lawyer were to use radically different criteria for identifying what *he* called propositions of law — if he were to claim that the law of a community is necessarily the will of God, whatever other test the bulk of lawyers and judges unite in accepting and using — then he would be making no conceptual error, or using words in a wrong or even an eccentric way, but just disagreeing substantively, the way someone who thinks that in some circumstances genocide is just would not be misusing words but just taking an untenable moral position.

But this is a strikingly implausible reading of the main contentions of *The Concept of Law*. Hart does not undertake even a semblance of the research that would seem to be necessary if he were to make so radically non-conceptual a claim as the claim that, just as it happens, all lawyers in standard legal systems — in ancient China, for example, as well as in contemporary Polynesia — have embraced only one out of countless available conceptions of what makes propositions of law true when they are. And he admits, as I said, that some very distinguished lawyers — legal philosophers that include Harvard Law School professors like Lon Fuller and Supreme Court Justices like Oliver Wendell Holmes — at least claimed to use very different “truth conditions” for valid law. Some thought that propositions of law are only a category of moral propositions, and others that such propositions are only predictions of what judges will do. Hart does not accept these as simply substantive disagreements: he treats them as *confusions*. Theories that make law a branch of morality, for example, are said to “confuse one kind of obligatory conduct with another.”²¹ He called his book “*the*” concept of law, and he aimed to show that these

²⁰ [Here, Dworkin intended to include a short discussion of pages 159 to 164 of *The Concept of Law*, a passage in which Hart refers to the possibility of competing conceptions of justice. *See id.* at 159–64.]

²¹ *Id.* at 8.

philosophers made *conceptual* mistakes: they misunderstood what law really is because they misunderstood the concepts in which his own account of law was framed.

His analytic strategy, announced in his preface and elaborated in the first few pages of the book, is to demonstrate their mistakes — to show how “law” is different from both “morality” and “prediction” — through discussing issues that, as he says, “may well be said to be about the meanings of words.”²² These include, for example, the issue of “how the statement that a rule is a valid rule of law differs from a prediction of the behaviour of officials.”²³ The point of such exercises is said to be that we may use “a sharpened awareness of words to sharpen our perception of the phenomena.”²⁴

All this leaves me still, even after Hart’s earnest complaints, unable to abandon the following understanding of his argument. He begins with the assumption that all his readers know perfectly well how to identify standard cases of legal systems. But they fall into confusion or error in answering certain philosophical questions about such legal systems, including the question of how what lawyers do, in identifying true propositions of law, differs from what political scientists might do in predicting judicial decisions or moralists might do in deciding how a particular case ought morally to be resolved. This confusion can be dispelled by focusing on our shared *criteria* for making these different kinds of claims or decisions — by focusing, that is, on what our practice reveals that we regard as “necessary and sufficient” conditions for deciding what law is, and how those differ from the criteria we use for other kinds of judgments. The process includes, for example, focusing on the difference between what we mean by “having a habit” and “following a rule.” Through a series of steps of that kind we can come to understand the more general difference between what it means to say the law is that *p* and what it means to predict that judges will say it is. This is a semantic enterprise in the broad sense I defined.²⁵

I said more than this, however. I offered an account of the *motive* that I believe induced legal positivists to offer their semantic theories. I tried to explain why they insisted that lawyers share exclusive criteria for identifying law, and that when these shared criteria run out, so does law. That is an initially odd view to defend because, so far from

²² *Id.* at v.

²³ *Id.*

²⁴ *Id.* (quoting Professor J.L. Austin).

²⁵ I am not alone in regarding Hart’s argument as a semantic one: see Nicos Stavropoulos’s book [since published as NICOS STAVROPOULOS, *OBJECTIVITY IN LAW* (1996)]. Stavropoulos argues that every philosophical theory of law is semantic, and that I should have said that Hart’s theory is based on a *criterial* semantics, while other theories, including mine, reject criterial semantics for semantics of another form.

its being the case that all lawyers seem to accept such exclusive criteria, it seems that almost none do. Lawyers in the United Kingdom may agree that what Parliament says is law, but since they disagree about how to decide *what* Parliament has said, they do not share the same criteria to the degree that would be needed to explain why they agree or disagree in particular cases. The agreement over a form of words — what Parliament decides is law — masks very significant disagreement. Nor do lawyers appear to accept that when the shared criteria do not pick out a single answer to a question about what the law is, there is no right answer but only the need for a piece of judicial legislation. As I said, lawyers and judges, in their different roles and ways, constantly claim that some proposition of the form “the law is that *p*” is true even when they know that this proposition is controversial and is not established by any set of criteria all lawyers share.

So the question arises why Hart, or any other legal philosopher, would offer a theory of law that even *seems* inconsistent with these apparent facts about judicial practice. I suggested, in passages that Hart also criticizes in this section of the Postscript, an answer: I said that positivists are victims of what I called the “semantic sting.”²⁶ They think that some substantial level of agreement about the criteria for valid law is necessary in order that lawyers be able genuinely to disagree about what the law is. Hart insists that he does not hold that view, and that I had no reason for ascribing it to him. Once again, the issue is a complex and philosophically important one, and I should have said much more about it than I did.

Many philosophers have pointed out that genuine disagreement presupposes a certain situation: roughly, that the supposed disputants mean the same thing when they utter the sentence that one says is true and the other false. Suppose two people, who are standing together before a desk with a pamphlet of some ten pages lying on it, disagree about the truth of the sentence, “There is a book on this desk.” We suspect that they do not mean the same thing by the word “book,” and that their apparent disagreement is illusory. Suppose we press them further, by asking each how he would identify a book; one says that anything consisting of more than two pages of writing bound together in some way is a book, and the other that a book must be printed rather than typed or handwritten and that it must be large — over, for example, fifty pages. Now we are confident that the disagreement is illusory. People who disagree so radically about the criteria for identifying an instance of a supposedly shared concept actually do not share that concept. They use the same words, but they have different concepts in mind.

²⁶ [LE, *supra* note 14, at 45.]

It is not, however, always easy to decide whether two people mean the same thing by what they say and disagree about whether it is true, or don't mean the same thing and so are not actually disagreeing. Nor is it easy, as recent philosophical discussion makes plain, to show that there is even in principle a sharp distinction between the two cases. (Wittgenstein, for example, said that there is no sharp line but only a continuum between an error in calculation and a different mode of calculating.) But making sense of our intellectual life requires that we have at least some way of distinguishing genuine from illusory disagreement, even if in some cases we will be puzzled about which is which or how to draw the line. It is important to see, however, that our ways of drawing the distinction are not always the same, but vary with the concepts in question. With respect to some concepts — the concept of a book, for example — the fulcrum of disagreement is a matter of shared criteria for identification. If people disagree sharply enough about the criteria for identifying instances — if one supposes that a few scraps of paper stapled together is a book — then their disagreement is not a genuine, substantive one, but just verbal. They mean something different by “book.” The same test of shared criteria seems to work for mathematics. If someone who says he is “adding” always multiplies instead, we do not really disagree with him when he denies that five plus five is ten and insists it is twenty-five. He is just using “add” and “plus” to mean what we mean by “multiply” and “times.”

But in the case of concepts of a different sort, genuine disagreement is possible even if people do disagree radically about criteria for identification. Natural kinds, which I discussed briefly earlier, provide an example. Suppose you and I disagree about whether some unstriped animal we encounter is a tiger: I say it can't be because it doesn't have stripes, and you say that though most tigers have stripes by no means all do. We use very different criteria for identifying tigers, because if the animal is otherwise the right shape, I rely on the stripe test and you don't. But our disagreement might nevertheless be genuine because the reference of “tiger,” for both of us, is fixed by the fact that tigers form a natural kind.²⁷ There is, in nature, a particular animal, with a particular biological or physical constitution, and we both mean to refer to that animal. We only disagree about whether *it* always has stripes. We could disagree even more radically — I could think that a tiger is a member of the family of dogs rather than the family of cats — and still be disagreeing about the same thing so long as I meant to be talking about the animal that is in fact the tiger.

²⁷ See KRIPKE, *supra* note 9, at 119; Putnam, *supra* note 9, at 132–33.

Some kinds of disagreements are not amenable, however, to either of these tests. Moral concepts, for example. People can disagree sharply about the criteria for identifying just institutions, and still be disagreeing about the same thing: *justice*. You think, perhaps, that an institution is always just if it maximizes utility over the long run, and I deny this. We may then disagree about whether, for example, it could ever be just to tax the poor at higher rates than the rich. The fact that we disagree about the character of justice as well as instances of injustice does not show that the latter disagreement is only verbal: on the contrary, it shows that it is profound. My own view is that genuine disagreement is preserved in such cases because moral concepts are *interpretive*: the fulcrum of disagreement lies in a shared set of paradigms and a shared understanding that application of the concept in question is to be governed by the best interpretation, in the sense described above, of those paradigms.

So we have at least three types of explanation of the fulcra of disagreement in various cases: shared criteria, natural kinds, and interpretive concepts. Now consider cases in which lawyers disagree about the truth of sentences of the form, "It is the law of *X* that *p*." When is this kind of apparent disagreement genuine? When is it only illusory because they do not, on inspection, mean the same thing by the expression "it is the law that"? In my view, legal disagreement, like moral disagreement, is interpretive; I accept what might be called, I suppose, an interpretive semantics for law.²⁸ But though Hart accepted that view of legal argument for purposes of discussion in the last section, he and other positivists in fact reject it, because legal interpretation, in the sense I have described, has an evaluative dimension, and positivists want to maintain a stricter separation between legal and evaluative reasoning than an interpretive semantics for law would permit them. Nor could they plausibly or even intelligibly claim that legal argument is argument about the character of a natural kind. Even if we were to regard legal *systems* as in some way forming, or as in some way analogous to, a natural kind — even if we could make sense, that is, of the idea of a *social* kind — we could not take that view about a particular jurisdiction's law of, say, wills or negligence. If two lawyers disagree about whether, according to the law of their jurisdiction, two witnesses are needed for a valid will, or whether someone injured in a school room brawl has a valid claim against the school board, it would not be plausible to suppose that they are disagreeing about the properties of something whose identity and essential nature is in some way fixed in the physical world.

²⁸ See STAVROPOULOS, *supra* note 25, at 125–36, 160–62.

The fact that Hart rejected interpretive semantics for law was therefore part of my reasons for assuming he accepted a criterial semantics. I was also struck by the obvious fact that his theory of law is tailor-made for that kind of semantics. The idea that lawyers all share the same basic criterion for law, which directs them to the more particular criteria set out in the local rule of recognition, provides both a firm explanation of a paradigm case in which legal disagreement is plainly genuine — when lawyers disagree about whether those criteria are in fact satisfied in some particular instance — and also a firm account of when they are *not* really disagreeing, but only appear to be so. They are not really disagreeing about what the law is, but only offering alternate recommendations about what it should be, when the shared criteria fail because the case falls within what Hart calls the “open texture” of a legal rule,²⁹ or when there is no applicable legal rule at all.

Since, as I said, the latter of these claims is contrary to what most lawyers say and think — they think disagreement is genuine even in what I called “hard” cases when disagreement is illusory on the Hart test — some motive must be found to explain why Hart and other positivists embrace it. I found it tempting to suppose that they accepted, however implicitly or instinctively, the view that the fulcrum of legal disagreement lies in a criterial semantics: that is, that agreement is genuine only when lawyers are using roughly the same criteria for determining the truth or falsity of propositions of law. I found that tempting because it explained their otherwise bizarre account of legal argument so well.

In his Postscript, as I said, Hart insists that I am wrong, and suggests that I should have realized that his remarks about justice — he said that people who accept that justice is a matter of treating like cases alike nevertheless disagree about when cases are alike — signalled that he did not believe that shared criteria are necessary to genuine disagreement. But that feature of moral concepts is explicable, as I said, only on an interpretive view of moral reasoning and disagreement, and even in the Postscript Hart continues to reject an interpretive semantics for law. So my discussion of this point must end in a kind of mystery. If I am wrong that Hart was a victim of the semantic sting, as he insists I am, then what can his motive have been for endorsing so counterintuitive an account of legal disagreement, one which sharply curtails our natural sense of which disagreements are genuine? And if he did not adopt a criterial semantics for legal concepts, what *did* he think is the fulcrum of legal disagreement?

²⁹ [CL, *supra* note 1, at 124.]

Hart complains, finally, that I misrepresent his theory in another way: by insisting that he holds a “plain fact” theory of law which requires not only that lawyers share criteria for identifying valid law but that these criteria must appeal only to historical events, like the decision of particular statesmen to enact statutes containing particular words. He says that this ignores his explicit acknowledgment that in some legal systems the law incorporates morals by reference: that in the United States, for example, the Constitution incorporates concepts of “due process” and “cruel punishment” which require lawyers to engage in moral reasoning as well as historical investigation. I have elsewhere recognized and discussed this feature of Hart’s theory,³⁰ but I no doubt should have mentioned it in my very brief discussion of his theory in *Law’s Empire* as well. My omission did not misrepresent his theory, however, for reasons I describe in the discussion of “soft positivism” below.

B. Positivism as an Interpretive Theory

Hart devotes several paragraphs of the Postscript to commenting on my reconstruction of legal positivism, in *Law’s Empire*, as an explicitly interpretive theory, which I called “conventionalism.” He is anxious to insist that his own version of positivism could not be reconstructed that way. If this means that he would never have presented it that way, or that his own views of the nature of legal theory would militate against it in that form, then I accept this; indeed I never thought otherwise. I meant that the main claims of a positivist theory of law like his, and in particular the central claim of such theories that law is exhausted by standards meeting the tests specified in a rule of recognition accepted by all officials, could be presented as an interpretation of legal practice, in the sense I had defined, and that these claims would be more persuasive if they were presented in that interpretive way. I was careful to say that conventionalism was not meant to match any of the theories I had earlier described, and to acknowledge that no defender of any of those theories might endorse the interpretive form I was constructing.³¹

Hart’s main argument that a view like his could not be presented as an interpretive theory begins — and I believe in substance ends — in his statement that “whereas Dworkin’s interpretive legal theory in all its forms rests on the presupposition that the point or purpose of law and legal practice is to justify coercion, it certainly is not and nev-

³⁰ See Ronald Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORIN AND CONTEMPORARY JURISPRUDENCE 247, 249 (Marshall Cohen ed., 1984).

³¹ LE, *supra* note 14, at 94–95.

er has been my view that the law has this as its point or purpose.”³² But this is inconclusive for two reasons. First, the fact that Hart did not believe that law has the stated (or indeed any) point or purpose does not mean that his account of law could not be offered, in a more persuasive form, by someone who did believe this. Second, I did not claim, as Hart’s statement suggests I did, that the practice of law has only one point or purpose.³³ I said, to summarize a complex point roughly, that theories about when propositions of law should be taken to be true could usefully be seen as assuming that “the most abstract and fundamental” point of law was to “guide and constrain” the government’s use of force against citizens, which hardly denies that legal institutions and practices can serve other ends as well.³⁴ (I added, moreover, that “[n]either jurisprudence nor my own arguments later in this book depend on finding an abstract description [of law’s most fundamental purpose or point] of that sort.”³⁵) When I came to discuss the appeal of conventionalism, I put the matter a little less abstractly: I said that interpretive theories of law must each answer the question of why past political decisions justify present coercion. I doubt that Hart would want to deny that an interpretive theory, which aims to justify as well as fit legal practice, must address that issue as a central question. I then said that conventionalism offered an attractive answer: law, as understood on conventional lines, helps to justify coercion by limiting its occasions to those when past political decisions have given “fair warning by making the occasions of coercion depend on plain facts available to all rather than on fresh judgments of political morality, which different judges might make differently.”³⁶ That interpretive argument does say more for positivism, I think, than any descriptive or semantic arguments can, even if, as I believe, the interpretive argument is not in the end persuasive.

C. *Soft Positivism*

Hart’s discussion of the merits of what he now calls his “soft positivism” centers on his statement, which he fears I ignored, that a rule of recognition might incorporate moral standards, as he says the United States Constitution does, so that the identification of law by lawyers and judges who accepted that rule of recognition would involve moral reasoning. He concedes that in such cases the positivist’s concern “to provide reliable public standards of conduct which can be

³² CL, *supra* note 1, at 248 (footnote omitted).

³³ See Ronald Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L.J. 640 (1965).

³⁴ LE, *supra* note 14, at 93.

³⁵ *Id.*

³⁶ *Id.* at 117.

identified with certainty as matters of plain fact without dependence on controversial moral arguments” is not well served.³⁷ But he believes that I have exaggerated the uncertainty that incorporating moral tests in the rules of recognition would produce, and also “the degree of certainty which a consistent positivist must attribute to a body of legal standards.”³⁸ His discussion is interesting, but it greatly understates the problem that I believe actual legal practice poses for legal positivism, because the problems I had in mind, in rejecting legal positivism on grounds of fit, go far beyond such explicit incorporation by reference. (These problems are discussed most fully in Chapter Four of *Law's Empire*, under the heading “soft conventionalism,” which Hart does not mention, not in my reply to authors who offered versions of “soft positivism,” which he does discuss³⁹).

Consider Hart's own example: he says that the United States Constitution incorporates moral standards by reference, so that lawyers and judges must engage in moral reasoning in order to decide (on the assumption that there is objective moral truth) what the law really is or (on the opposite assumption) how judicial discretion should be exercised. He says this because he thinks that some clauses in the Constitution, including the Due Process Clause of the Fourteenth Amendment, impose moral conditions on valid law. But of course that statement of the legal force of those clauses is wildly controversial. I believe it, and have tried to defend it, but it is stoutly denied by others, and in particular by those who claim that the Constitution incorporates *not* certain moral standards, but only the opinions about those moral standards that were dominant among the politicians who enacted the clauses in question, which is of course a very different matter. So Hart's difficulty is not the small one (which, as I said, would cause minimal damage to his theory⁴⁰) that in America a convention of opinion holds that certain moral standards are relevant to certain determinations of law, but the much greater difficulty that in America no convention decides *whether* moral standards are relevant.

He encounters the same difficulty in applying his views to legal systems that are not organized around a written constitution. In Britain, as I said, lawyers and officials accept that what Parliament enacts is law. But they disagree considerably about the correct canons of statutory interpretation, which means that they very often disagree about what Parliament has enacted. Someone who maintains, as Hart does, that nevertheless there is a fundamental conventional standard for law in Britain must respond to this fact in one of two ways. First, he may

³⁷ [CL, *supra* note 1, at 251.]

³⁸ *Id.*

³⁹ [See LE, *supra* note 14, at 124–29.]

⁴⁰ See Dworkin, *supra* note 30, at 249.

say that the rule of recognition is incomplete: it does not pick out anything as law when opinion among lawyers is divided about the correct tests to use to decide what Parliament has enacted. Second, he may say that there is another, perhaps more basic, convention than the convention about Parliament. This is the convention that what Parliament has decided is to be identified by applying the *right* tests of statutory interpretation — which could only mean the tests for determining statutory interpretation that are appropriate according to the best theory of political morality.

He would have to make the same choice, with even more dramatic consequences, in dealing with the constitutional situation I just described in America. He might say, first, that since there is no agreement about what the Due Process Clause means, or even whether it deploys a moral or an historical standard, there is no convention about what that clause does require, so that every occasion of its exercise is an occasion of discretion whether or not there is objective moral truth. But since the Due Process Clause applies, potentially, to almost every part of federal and state legislation, it would follow that there is actually almost no law in the United States. Or he might say that there is another, more basic, convention, which declares that what the Constitution means is fixed by applying the right standards of political morality to that question: a convention that declares, in other words, that the Constitution is to be interpreted as it ought to be interpreted.

The first choice in each of these pairs seems out of the question, and Hart's treatment of explicit incorporation of morality suggests he did not want to make that choice. But the second choice is "soft" positivism with a vengeance. I do not mean that the level of uncertainty that would be recognized by introducing such further "conventions" would be unacceptable — that is, after all, exactly the level of uncertainty that legal practice now tolerates. But rather that it would be absurd to suggest that a theory that accepted such "conventions" as the convention that the law should be interpreted according to the best standards of interpretation, whatever these are, could any longer, with a straight face, be called a positivistic theory. Controversial moral issues would then penetrate legal argument not only when historical decisions explicitly stipulated that they should — a solution that Hart thinks is compatible with a general positivistic picture of law — but on almost every occasion. That is why, as I said in *Law's Empire*, "soft" conventionalism, which in effect takes the second way out of the dilemma standard legal practice poses to legal positivism, collapses into an interpretive theory of the kind I defend but Hart opposed.⁴¹

⁴¹ LE, *supra* note 14, at 128.

III. THE NATURE OF RULES

A. *The Practice Theory of Rules*

Hart's discussion under this heading raises mainly two general issues. He is critical, first, of my assertion that the existence of a normative, as distinct from a social, rule requires what I called, when I introduced the distinction, a normative state of affairs. He thinks this claim is "much too strong," because some communities have wicked social rules, like rules forbidding members of a country club from inviting Jewish guests. Once again we see, in this disagreement, a manifestation of the general issue I identified at the outset of this paper. For I understand Hart to be claiming here, as generally about legal theory, that there is an Archimedean perspective from which statements can be made about the rules that exist in a particular community that are neutral in a way that similar statements, made by participants within that community, are not.

In the discussion Hart has in mind, in *Taking Rights Seriously*, I was considering a theory he now says he has partly abandoned: a theory about when duties are imposed by conventional social practices. I said that we should distinguish between two claims an external, Archimedean observer of a community might make, both of which can be made by the (ambiguous) statement that a particular community "has a conventional rule that" Jews are to be excluded from country clubs. That might mean, first, that the members of that community accept a duty to behave in that way, and do so in virtue of a convention, that is, in virtue of the fact that others do so. Or it might mean, second, that members of that community have a duty to behave in that way in virtue of their conventions. (Notice the similarity between the distinction between those two statements and the distinction I emphasized, in the first section of the discussion, between the statement that people in a particular community think their law authorizes capital punishment and the statement that the law in that community does authorize capital punishment.) My point was that an external observer, as Hart describes him, can indeed, without committing himself to any moral position, assert propositions of the first type, but cannot, without any such commitment, make assertions of the second kind. He cannot say *neutrally* what duties actually exist for people of a given community in virtue of their conventions, because that is a judgment of the same kind they make. Since in their mouths such a claim would be normative; it follows that it would be normative in the mouth of an external observer as well. He would then be making a claim internal to a normative system rather than an observation from an independent, Archimedean perspective.

Hart wants to make the distinction I do, but in a different way: he wants, I think, to distinguish between social or conventional duties

and moral ones. But the idea of a “social” or “conventional” duty only perpetuates the ambiguity I just described. Hart imagines someone in a community accepting a social convention he knows to be bad, out of deference to tradition; Hart cites the case to support two claims: that an external observer may describe social duties without endorsing them morally, and that even a participant may accept such duties in the same way. But the participant he imagines does not just take a view of the social facts of his community; he also takes a view (in the odd language I used and Hart quotes) of the “normative state of affairs.”⁴² He believes that the convention, though a bad one, nevertheless gives him at least *a* reason, even if not necessarily an overriding one, for behaving in the way it commands. So that is what an external observer must mean if he, too, says that the rule imposes a social duty, unless he means only that people in the community think it does.

Hart’s second point in this section ties the discussion back to our disagreement about rules of recognition. I, of course, deny that there exist any conventional social rules “as important and as little controversial as a legal system’s basic rule of recognition.”⁴³ On my view, there is no fully shared rule of recognition at all: the supposed convention, that the American Constitution is the supreme law of the land or that Parliament is the supreme lawgiver in Britain, can only be described as conventionally accepted if we ignore the fact that what those abstract formulations mean to some lawyers, as guides to identifying true, concrete propositions of law, is very different from what they mean to others. Hart denies, here, that the “function of the rule [of recognition]” is “to determine completely the legal result in particular cases, so that any legal issue arising in any case could simply be solved by mere appeal to the criteria or tests provided by the rule.”⁴⁴ It is rather, he says, “to determine only the general conditions which correct legal decisions must satisfy in modern systems of law.”⁴⁵ This is, I believe, a much weaker description of the rule of recognition than anything to be found in *The Concept of Law*. But it may not be weak enough to satisfy the actual legal practices of “modern systems of law.”

Did Judge Learned Hand and Justices William Brennan and William Rehnquist all agree on the “general conditions” a law must satisfy if it is to meet the test of the due process and equal protection clauses? They did only if those conditions are specified in *extremely* abstract terms. It would not be enough to describe them, as Hart suggests it might be toward the end of this section, by setting out “sub-

⁴² [CL, *supra* note 1, at 256–57 (quoting RONALD DWORKIN, *The Model of Rules II*, in TRS, *supra* note 13, at 51).]

⁴³ [*Id.* at 258.]

⁴⁴ [*Id.*]

⁴⁵ *Id.*

stantive moral values or principles"⁴⁶ which they agree are decisive even though they disagree how these should be applied in particular cases. For Hand thought that the Bill of Rights had next to no legal force, and Rehnquist does not accept that judges should enforce its clauses by setting out moral values or principles and deciding whether these apply. Both Hand and Rehnquist might very well agree with Brennan about what is just and fair and still disagree about whether some statute is invalid because unconstitutional. We could only describe "general conditions" on which these judges would agree, I think, if we made our description as abstract as something like this: "A law is not valid unless it meets the tests imposed by the Constitution, interpreted in the right way to interpret it."

But even *this* might not be abstract enough. For there is a dispute among American constitutional lawyers, sometimes (misleadingly, I think) described as the dispute about whether America has, in addition to its written constitution, an "unwritten" one which consists of moral principles not captured in the explicit constitutional text.⁴⁷ If Justices of the Supreme Court (or law school professors) disagree about that issue, they do not share even the weak convention that the Constitution's text, properly understood, is the ultimate test of law. There has been, in fact, a parallel dispute among British lawyers in recent years about whether and how far the European Convention on Human Rights, to which Britain is a party, now forms part of domestic British law.⁴⁸ Some lawyers think that a statute is invalid, under domestic British law administered by British judges, if it offends, for example, Article 10 of the European Convention, which protects freedom of speech and expression. That view has received some judicial support.⁴⁹ But other lawyers — and so far a majority of judges — think the contrary: that the Convention, while binding on the nation, does not form part of the "general conditions" of validity of its law, so that citizens who believe British law violates Article 10 must pursue their rights under the Convention in the European Court of Human Rights in Strasbourg.⁵⁰

So Hart's picture of law, as fixed by a conventional rule of recognition, cannot be sustained even for Anglo-American legal systems, ex-

⁴⁶ [*Id.*]

⁴⁷ See generally Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

⁴⁸ See Anthony Lester, *English Judges as Law Makers*, 1993 PUB. L. 269, 287–90; Anthony Lester, *International Human Rights Law and the British Constitution*, 28 ISR. L. REV. 3 (1994).

⁴⁹ See LESLIE SCARMAN, THE HAMLIN LECTURES: ENGLISH LAW — THE NEW DIMENSION 10–21 (1974); see also *A-G v. Guardian Newspapers (Spycatcher)* [1987] 1 WLR 1248 (HL).

⁵⁰ [The controversy to which Dworkin refers has been superseded by the passage into law of the Human Rights Act 1998, c. 42 (U.K.).]

cept by making the convention so abstract that it becomes: law must be identified by the right tests for identifying law. And then there is no longer any point to calling that a *convention*. For each judge surely accepts that requirement as an independent duty attached to his office: he thinks he should identify law by the appropriate standards, whatever these are, not because other judges think this — perhaps many of them *don't* — but because that is his job. It seems better not to try to save legal positivism through epicycles — by making it “soft,” or by speaking of “general conditions” rather than concrete tests — but to abandon it altogether in favor of a view of law that recognizes that though lawyers accept overlapping paradigms of law, they disagree even about the most fundamental conditions of law, because they interpret the shared legal tradition somewhat differently, and that they do so largely in virtue of more general differences in their views about political morality.

B. Rules and Principles

In this section, Hart begins his discussion of this now antique distinction. He says, first, that he “see[s] no reason to accept” my claim that while some legal standards, which I called “rules,” apply in an all-or-nothing way, others (“principles”) influence decisions in virtue of their varying weight, and so may be overridden on some, or even many, occasions without losing their force.⁵¹ He disputes this distinction by suggesting that rules, too, may survive being overridden, and cites an article by Raz making that point. (Hart also cites an article by Waluchow.⁵²) I replied to Raz long ago,⁵³ and since Hart does not comment on my reply in his Postscript there is no point in my repeating my arguments here.

But Hart also adds a new charge: that my arguments are not only wrong but incoherent, because my own examples showed that “rules do not have an all-or-nothing character, since they are liable to be brought into . . . conflict with principles which may outweigh them.”⁵⁴ But I said that the all-or-nothing character of rules consisted in the fact that they do not survive such conflicts, as principles often survive conflicts which they lose, unchanged. My point was that in the normal operation of the institution of precedent, any standard regarded as a rule is changed, with respect to its future effect, by a judicial decision which refuses to enforce the rule in its standing terms. My argument,

⁵¹ [CL, *supra* note 1, at 261.]

⁵² *Id.* at 262 (citing Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 832–34 (1972); then citing W.J. Waluchow, *Herculean Positivism*, 5 OXFORD J. LEGAL STUD. 187, 189–92 (1985)).

⁵³ See DWORKIN, *supra* note 42, at 69–80.

⁵⁴ [CL, *supra* note 1, at 262.]

in fact, made that feature of rules part of their — perhaps largely stipulative — *definition*. If a standard does not behave in that way, it is not a rule. I was not trying to reveal some formerly unnoticed feature of an established category of legal standard — that what we independently identify as a rule in fact has an all-or-nothing character — but rather to point out that some legal standards — principles — do *not* have the stipulated feature. I thought it important, for reasons canvassed in the next section, to identify such other kinds of standards, and defined a rule as I did for that purpose.

But Hart's point here might be that I am incoherent in claiming that there are *any* rules meeting my definition. Unfortunately, the single example he chooses to show my incoherence wholly fails to do so. I did offer, as examples of rules, various of the components of an ordinary statute of wills: that a will is invalid if it is not signed by two witnesses, for example. None of these rules was overridden, in New York, by the decision in *Riggs v. Palmer*⁵⁵ that Hart mentions, which held that a murderer could not inherit under his victim's will, even though the will made him a beneficiary and the will met all the formal tests specified in the statute.⁵⁶ For of course nothing in that decision contradicted the rule that a will is invalid if it is not so signed. Hart may mean that, before *Riggs v. Palmer*, it was a rule in New York that a will *is* valid if it meets all the formal tests specified in the statute, which of course is a very different rule. But if such a rule existed, it of course did not survive *Riggs*. No trained New York lawyer thought, after that case had been decided, that it remained a rule that a will is valid, and must be enforced according to its terms, if the tests specified in the statute of wills at the time the case was decided are met. If there was any such rule before, it was extinguished, instantly, by the Court of Appeals's decision.

IV. PRINCIPLES AND THE RULE OF RECOGNITION

A. *Pedigree and Interpretation*

Hart says that my "preoccupation" with constructive interpretation has led me into two errors I do not in fact make.⁵⁷ The first is that legal principles cannot be introduced into the law by statutory means, or by a series of judicial decisions. But, as Hart notes, I myself said that the American Constitution sets out various principles. The second is that a rule of recognition, as he understands it, can only provide crite-

⁵⁵ 22 N.E. 188 (N.Y. 1889).

⁵⁶ [*Id.* at 191.]

⁵⁷ [CL, *supra* note 1, at 264.]

ria of “pedigree.”⁵⁸ But, as I have already said, I have always acknowledged that he thought a rule of recognition might set out moral criteria. He says that recognizing these “errors” should lead me to accept a more “modest” version of the claim that the existence of principles is inconsistent with a rule of recognition than I first advanced.⁵⁹ But my claim was always that modest: I argued, in the early essay Hart cites, not that *no* principles could be established by legislation or other explicit means, but that many of the principles to which judges appeal had not been. I said that a positivist “must be able to deploy some test that all (and only) the principles that do count as law meet.”⁶⁰

Though my original claim was in that way modest, it is still a claim positivism must meet, because if a positivist accepts that even some of what he regards as principles of law cannot be seen to be validated by a rule of recognition, his theory must be radically modified. Hart’s first response is one that I would not have predicted. He says that if all the judges of some jurisdiction explicitly accepted my own views on adjudication, which required them to identify principles of law by interpreting legal history in an evaluative way, then this doctrine would count as the rule of recognition of that jurisdiction, and satisfy his tests for a positive legal system, in spite of the fact that *all* law would then partly depend on moral judgments that different judges might make differently. This view seems flatly inconsistent with his statement, later in this Postscript, that “[a]ccording to my theory, the existence and content of the law can be identified by reference to the social sources of the law (e.g. legislation, judicial decisions, social customs) without reference to morality except where the law *thus identified* has itself incorporated moral criteria for the identification of the law.”⁶¹ I believe this to be a correct restatement of the view set out in *The Concept of Law*, and in Hart’s other writings in the past. In any case, however, if my view of adjudication might count as a rule of recognition were it accepted by all judges, then so might the even more abstract doctrine I described a moment ago, that judges should decide cases in what is the right way to do so, which doctrine almost all judges presumably *do* accept.⁶² I doubt Hart would have been willing to accept that as an actual rule of recognition, which adds to my surprise that he is willing to accept my interpretive account of law as providing a potential one.

Of course, as Hart recognizes, I do not claim that all judges accept my view about adjudication as an explicit convention. On the con-

⁵⁸ [*Id.*]

⁵⁹ *Id.* at 265.

⁶⁰ RONALD DWORKIN, *The Model of Rules I*, in TRS, *supra* note 13, at 40.

⁶¹ CL, *supra* note 1, at 269 (emphasis added).

⁶² See my reply to Coleman in Dworkin, *supra* note 30, at 253.

trary, I offer it as the best interpretation of their practice: it both fits the kinds of arguments they make better than rival interpretations or descriptions, and better justifies their use of such arguments. I also believe that a great many judges, on reflection, would come to agree, though this is perhaps unwarranted optimism. But *no* judge could possibly accept my view as a social convention.

Hart makes a more important claim in the next part of the section. He says that my own description of the interpretive method of identifying legal principles concedes — indeed employs — the idea that there is, in each legal system, a fundamental rule of recognition of the kind Hart identified. I say that the interpretive method cannot work, in any given legal system, unless lawyers “share at least roughly”⁶³ a sense of what I called legal “paradigms,” that is, of what law is taken to be settled, and, he adds, that is not possible unless they agree on a fundamental test for settled law.

But his argument seems to me fallacious on several grounds. First, it obviously would not follow from the fact that lawyers did share a fundamental test for identifying “settled” law, if they did, that this test functioned for them as *exclusive*: that they also used it as a conclusive test of what was *not* valid law. (Though a rule of recognition, for Hart, may be complex, it must, taken together, be exclusive in just that sense.) On the contrary, on my argument, which Hart here adopts for the sake of showing its inconsistency, this cannot be so, for each lawyer uses his interpretation of the settled cases to generate principles that identify law that is not settled, but is rather controversial because other lawyers interpret settled law differently and so generate different principles.

Second, as I emphasized in *Law's Empire*, paradigms that almost all lawyers recognize shift over time: what is unquestioned in one decade may become controversial in the next and settled the other way in a third.⁶⁴ These changes plainly do not occur because something so conventional and so fundamental to a legal system as a supposed rule of recognition can change so quickly, but because of shifting senses in the profession, having nothing to do with conventions, about the best interpretation of some relevant part of legal history. Third, as I also emphasized, even when paradigms are stable, this is rarely because all lawyers regard the law as settled in the same way for the same reason, but in virtue of what John Rawls has called, in a very different context, an overlapping consensus of opinions each of which is based in a somewhat different source. This is conspicuously true about the example of paradigms Hart cites here: legislative supremacy. All lawyers

⁶³ [LE, *supra* note 14, at 67.]

⁶⁴ *Id.* at 89–90.

may accept that what a legislature decides is, in principle, law. But they accept this on grounds that vary to some degree from one lawyer to another and that reflect their differing political assumptions and instincts. These differences become evident when lawyers disagree about controversial cases because their differing assumptions about why legislation is central to law generate different theories of statutory interpretation, or different conceptions of how constitutional constraints on legislation should be understood. The same differences are submerged, but not erased, when lawyers agree about what is unquestionably law. They agree on “settled” law not because they all accept an overarching set of conventional reasons why legislation is ordinarily paramount, but because their divergent reasons for accepting that it is overlap in these large areas of agreement.

Of course, Hart continues to dispute that my interpretive picture of adjudication is accurate. He repeats that it “seems quite clear” to him that there is a fundamental conventional rule of recognition in Britain and America.⁶⁵ I have now several times repeated my reasons for thinking that he is quite plainly wrong in that view. But his present point is the *ad hominem* one that there must be such a conventional rule of recognition even according to my own understanding of the matter — that my “explanation of the judicial identification of the sources of law is substantially the same as” his.⁶⁶ In this claim he fails.

The most important part of this section may lie, however, in what Hart does not say there. As I said, if he is to answer the argument I made in my initial discussion of rules and principles, he must show why it is plausible to think that all the principles judges regard themselves as bound to take into account are identified as such by the jurisdiction’s rule of recognition. In the opening part of this section, he declares that there is no reason why a rule of recognition cannot identify processes of legislation that will embrace principles, as I define these, as well as rules. As I said, I agree. But more is needed: it must be shown that all the principles judges in all legal systems cite in that spirit (including those principles that are, as frequently happens, formulated and cited for the first time in some judicial decision) are in fact endorsed directly or indirectly by such a rule of recognition. He does not attempt to show that in this Postscript, in spite of its comprehensive character, and in spite of his expressed regret that he did not say enough about the issue in his book. Instead he ends only by declaring the question as one to be considered. (This is, however, one of the many occasions throughout the Postscript when it is important to remember that it was an uncompleted work.)

⁶⁵ [CL, *supra* note 1, at 267.]

⁶⁶ *Id.*

V. LAW AND MORALITY

In these sections, Hart returns to what I called, in *Law's Empire*, a “jurisprudential chestnut”: the relationship between law and morals.⁶⁷ The topic is no longer as hardy as it once was, and this is, I think, because it has become better recognized that the issue is, as I argued in that book, a verbal one in one of the less interesting senses of that description. Hart here misunderstands the argument I meant to make, however, and the issue was sufficiently important to him that I should restate my claims now. I said that for semantic theories of law, which suppose that lawyers share a set of what Hart called “necessary and sufficient” tests for identifying when sentences of the form “It is the law in X that *p*” are true, the question whether any such sentences are true when X is taken to be Nazi Germany is an important one. If the answer is “no,” then such shared conditions must include moral criteria at the most abstract level (as semantic natural law theories, if there ever were any, would maintain they do), and if the answer is “yes,” then such conditions do not include, at least at that level, such moral conditions.

I argued that the issue is less important, or perhaps a different issue, when we switch from semantic theories to interpretive ones, in which legal theorists are not simply describing the behavior of officials and other participants from the outside but trying to answer, in a general way, exactly the same questions that the officials and other participants themselves dispute — when theorists, in other words, undertake to say what counts as law not *according* to some group but *for* them. As I emphasized earlier, any theorist’s account of what law is *for* them has an evaluative dimension, because it involves an interpretation even if the particular legal issue in question is an “easy” one because the right answer to the interpretive question is obvious.⁶⁸ It is my own view that taking what I called the interpretive attitude toward much Nazi legislation and legal practice yields the conclusion that these were not valid parts of any legal structure. It is worth noticing that several judges in South Africa, before the regime of apartheid ended, took the same view about parts of that country’s legislative structure, even though South Africa did not then have any explicit constitutional provisions to which they could appeal.⁶⁹

Nevertheless, I said, we can understand someone who says that though the statutes and official practices of Nazi Germany were non-

⁶⁷ LE, *supra* note 14, at 108.

⁶⁸ See the discussion about the nature of the distinction between easy and hard cases in *Law's Empire*, *id.* at 354.

⁶⁹ DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (1991).

strously wicked, they were still law. Indeed, the flexibility of our language allows us to interpret him in various ways. We might understand him as saying, in effect, that the officials and the bulk of the population treated the statutes and practices in question as law: that it was law *according* to them. Or he might mean, I said, that these laws were, after all, laws *for* them as well as according to them. That might be the sensible thing to say, I said, about the ordinary law of contract in Nazi Germany. It might also be said, sensible or not, by someone who thought that in spite of a statute's wickedness, Nazi judges had at least a *prima facie* institutional duty, flowing from their role, to enforce it. Whether a particular speaker means to say only that some particular rule or statute was law according to the citizens of Nazi Germany, or also that it was law for them, is a question of interpreting *him*, of course. But in this discussion I will assume that he means the former, because Hart now says that my accepting the possibility of such a characterization involves a great concession to positivism.

He calls attention to the way in which, in *Law's Empire*, I described the meaning we would assign to what our speaker said if we understood him that way: I said we would be taking him to be describing Nazi law in the "preinterpretive" sense.⁷⁰ Hart says that here I concede one of the central issues between us because my use of that phrase "does little more than convey the message that while [Dworkin] insists that in a descriptive jurisprudence the law may be identified without reference to morality, things are otherwise for a justificatory interpretive jurisprudence."⁷¹ But this misunderstands my use of the word "preinterpretive," for it treats the statement that something is law in the preinterpretive sense as conceding that it is a type of genuine law, and that is as much a mistake as supposing that someone who is a hero only in a Pickwickian sense must therefore be a genuine hero.

In my account, what an interpreter picks out as settled law, at what I called the preinterpretive stage of his reflection, is at best *prima facie* law. I made plain that even if an interpreter accepts that some rule is settled, and thus must be treated as part of his interpretive data at that stage, he might conclude, at what I called the later postinterpretive stage, that it is not good law after all. That is exactly what the speaker we are now imagining has concluded. So when he says that Nazi law was law in spite of its wickedness, and we understand him not to be suggesting that any Nazi official had even a *prima facie* institutional duty to treat it as law, we must understand him as saying only that it was treated as settled in Nazi Germany: that it was, to repeat, law according to them though not for them. So my description, which

⁷⁰ [LE, *supra* note 14, at 104.]

⁷¹ [CL, *supra* note 1, at 271.]

Hart supposes embodies a crucial concession, was only meant to suggest that, just as we can understand someone who says that there is a rule in some circles that Jews not be invited to the country club to mean only that people think there is such a rule, so we can understand at least some people who say that there was law in Nazi Germany in a parallel way. Still, though my use of “preinterpretive” in the passage Hart has in mind did not carry the implication he attached to it, others have also supposed that it did, and that I have now embraced the idea that there is at least a sense of law that matches the claims of legal positivism.⁷² I therefore wish that I had used a different phrase, as I might easily have done.⁷³

VI. JUDICIAL DISCRETION

Hart begins this important last section of his Postscript by repeating replies positivists have made in the past to my arguments against their use of the idea of judicial discretion. In *Law's Empire*, I said that *ex post facto* legislation affecting people's rights and duties is undesirable. I said this not in order to demonstrate that a legal arrangement that gave a prominent place to judicial discretion would be wickedly unjust, but only to provide one reason why an interpretation of our own system which did not have that consequence would be superior, on the dimension of justification, to one that did. Nor do I accept that the only reason for rejecting *ex post facto* legislation is that most people's confident expectations should not be defeated. Citizens should be encouraged, according to what I called a “Protestant” view of the law, to rely on their own understanding of which interpretation of the law is best, cautioned by a realization that officials may disagree with them at a later, litigative moment. It is unfortunate when people who make their decisions in that way do find that officials disagree. But it would be worse, I believe, if they were to be told that their plans were to be undermined because, though officials agree with their judgment that the law, when they acted, did not penalize what they did, those officials had since decided to change the law and apply it retroactively to them.

Hart acknowledges that, on the surface, judicial speech and behavior seem very unlike the positivist's description of a two-stage procedure of first identifying the law and then legislating to fill whatever

⁷² See Joseph Raz, *Dworkin: A New Link in the Chain*, 74 CALIF. L. REV. 1103, 1109 (1986) (reviewing RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985)).

⁷³ Throughout his discussion of law and morality, Hart states or implies that I have substantially changed my views on these matters, in a way that brings our views closer together. I do not think this suggestion is sufficiently important for me to contest it here, but I suppose I should say, for the record, that I do not agree.

gaps in the law have been revealed. But he asks: how seriously is that surface to be taken? He makes the familiar point that judges speak and act as they do because that is what the public expects. But he does not explain why the public, so long after positivism first explained what law is really like, still expects this. Does he have any reason to think that judges are *dissembling*?⁷⁴ If so, why wouldn't it be better for them to explain to the public that they are only legislating interstitially, and that any compromise of democracy is a desirable price to pay for the benefits of their doing so? Or does he agree with Jerome Frank that judges hide even from themselves the truth about what they are doing, because they act in the grip of an unconscious need for certainty? My own view, it is perhaps unnecessary to repeat, is that an interpretation that avoids these issues, and describes legal practice in a way that better fits the attitudes and rhetoric of ordinary lawyers and judges, and the public expectations that define their roles, is superior for that reason.

The principal interest of this section of the Postscript, however, lies in Hart's very interesting partial restatement of his own doctrine of judicial discretion. His prior thesis, which he summarizes here as the view "that in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete,"⁷⁵ makes a perfect fit with the view I attributed to him in my first article on the subject, which makes law only a collection of all-or-nothing rules, each of which is valid in virtue of finding a pedigree in the basic rule of recognition. If law is only what such rules provide, then there must be myriad cases in which no law applies, for such rules cannot cover all situations. So that picture of law and Hart's stated doctrine of judicial discretion make a natural combination.

But in this Postscript he now says that he regrets not having said more explicitly that law also contains more general principles of broad application that provide justifications for more restricted rules.⁷⁶ He also now says, as we noticed, that he accepts that a rule of recognition

⁷⁴ Hart cites a list of famous judges who, he says, have insisted that judges have a legislative role. But he has in mind the jurisprudential reflections of these judges, not their actual practice. And he includes, among them, Oliver Wendell Holmes, who features in *The Concept of Law* as a brilliant judge who was, however, the victim of a deep confusion when he came to write philosophically about what he himself did as a judge. I think, moreover, that the account of Cardozo as a positivist who conceded judicial legislation is too hasty. See Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993). I do not know enough about the jurisprudential writings of the British judges to comment about the cogency of their reasons for claiming, as Hart says they did, legislative power.

⁷⁵ CL, *supra* note 1, at 272.

⁷⁶ *Id.* at 259.

may certify such principles in a very general way: that it might declare, for example, that the law contains whatever principles supply the best justification for the set of rules it also certifies by pedigree. It is suddenly unclear, therefore, whether Hart can maintain the same arguments he formerly deployed to defend his doctrine that in every legal system the law must be indeterminate in part, or, indeed, why he wants to retain that doctrine.

He seems to go a considerable way toward abandoning it in the following passage. Speaking of hard cases, when “the explicit law is silent” he says he agrees with me that judges “do not just push away their law books.”⁷⁷ “Very often,” he says, “in deciding such cases, they cite some general principle or some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case.”⁷⁸ So far, that sounds very much like my own account of how judges decide hard cases, which denies that judges have “strong” discretion in deciding them. Hart apparently agrees that it does, and he goes so far as to say that the “procedure certainly defers” the “moment [of] . . . law-making.”⁷⁹ But, he declares, it does not eliminate that moment, because though the procedure may identify which principles count as legal principles, it does not fix the *weight* that should be attached to each principle, and so cannot determine which should be regarded as outweighing and so overriding the other when, as will often happen, two principles compete. It cannot fix the weight of principles, he says, unless some “unique set of higher-order principles assigning relative weights” could be found.⁸⁰

That seems baffling. A judge or lawyer who thinks that some set of principles together justifies or “exemplifies” a particular “area” of law will *already*, just in making that judgment, have assigned rough weights to the principles that make up the set. Since any given set of principles will justify very different legal rules, depending on what rough relative weights they are assigned, the claim that a particular set justifies a particular area of law presupposes such an assignment. If Hart were right that we cannot suppose some principles more important than others unless we can identify a separate “higher-order” principle ranking all principles in advance, which of course we cannot, then the process of identifying certain principles as embodied in a set of past decisions could never even begin.

Luckily, it is only a dogma that ranking is impossible without a complete higher-order schedule of rankings: we rank all manner of

⁷⁷ [*Id.* at 274.]

⁷⁸ [*Id.*]

⁷⁹ [*Id.* at 275.]

⁸⁰ [*Id.*]

things — from students to virtues — without one. Did Hart think, however, that judges would need to *agree* on rankings, which they could only do in virtue of a higher-order schedule they all accepted, because principles cannot be valid legal principles unless they are uncontroversial and accepted by everyone? But he has already denied this: he has insisted, for example, in this Postscript, that the fact that a rule of recognition incorporates moral general principles does not mean that it does not fix determinate law, even if judges disagree radically about which more concrete rules are valid or invalid in consequence. Or would he, if he had puzzled more about these issues, have given principles a much more prominent place in his account of adjudication, and discretion a correspondingly reduced place?

These are exciting questions, because they suggest that in this perhaps unfinished manuscript Hart had begun to work out a substantial modification of his version of positivism, along the lines that I believe were just the right ones for him to pursue. If so, it is terribly sad that we will never have what he would then have produced. For it would have been as fruitful an inspiration, for those who disagreed with him as well as those who agreed, as *The Concept of Law* was for us all a third of a century ago.