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"The concept of law" revisited

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Introduction

On any view, Hart is one of (if not the) leading jurists in Anglo-American legal philosophy this century. His central work, *The Concept of Law*,[1] is prescribed reading in virtually every jurisprudence course around the world. He has also been involved in the most famous debates in Anglo-American legal philosophy: the Hart-Fuller debate on the separation of law from morality;[2] the Hart-Devlin debate on the enforcement of morals;[3] and the Hart-Dworkin debate on judicial discretion[4]—and it ought to be mentioned that it was precisely these debates that forced all three of these jurists to construct their own substantive theories;[5] in this sense, therefore, Hart's influence has travelled far beyond the boundaries of his own (already substantial) work. All this is in addition to his various other works, most of which are now to be found (together with some others cited in the preceding notes) in two volumes of essays.[6] As might be expected, the literature generated by both Hart's works as well as perceptive critiques has been enormous[7]—and continues to be so, for the foundations he has laid are so basic as to touch on virtually every aspect of the Anglo-American jurisprudential landscape. Indeed, even the radical scholars who eschew a positivist (indeed, any theoretical) approach towards

* I am very grateful to my colleague, Associate Professor Tan Keng Feng, for his perceptive comments and suggestions. I remain solely responsible, however, for all errors and infelicities in language.

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[1] (1961).

[2] See generally Hart "Positivism and the separation of law and morals" 1958 *Harvard Law Review* 593; Fuller "Positivism and fidelity to law—a reply to Hart" 1958 *Harvard Law Review* 630; Hart *The Concept of Law* (1961) ch 9; Fuller *The Morality of Law* (rev ed, 1969); and Hart's book review of the lastmentioned book in 1965 *Harvard Law Review* 1281.

[3] See generally Hart *Law, Liberty and Morality* (1963); Hart *The Morality of the Criminal Law—Two Lectures* (1964) (the second lecture); Devlin *The Enforcement of Morals* (1965); and Hart "Social solidarity and the enforcement of morality" 1967 *The University of Chicago Law Review* 1.

[4] See generally Hart "Problems in the philosophy of law" in Edwards (ed) VI *Encylopedia of Philosophy* (1967) 264–276; Hart "1776–1976: Law in the perspective of philosophy" 1976 *New York University Law Review* 538; Hart "American jurisprudence through English eyes: the nightmare and the noble dream" 1977 *Georgia Law Review* 969; Hart *Essays in Jurisprudence and Philosophy* (1983) 6–7; Hart "Comment" in Gavison (ed) *Issues in Contemporary Legal Philosophy—The Influence of H L A Hart* (1987) 35–42; as well as Dworkin's works: *Taking Rights Seriously* (1978); *A Matter of Principle* (1985) and *Law's Empire* (1986).

[5] See generally the works cited in the preceding three notes.

[6] See *Essays on Bentham* (1982) and *Essays in Jurisprudence and Philosophy* (1983). Reference should also be made to the bibliographies to be found in Hacker & Raz (eds) *Law, Morality and Society—Essays in Honour of H L A Hart* (1977) 309–312 and Bayles *Hart's Legal Philosophy—An Examination* (1992) 294–296.

[7] For monographic studies of Hart's work, see MacCormick *H L A Hart* (1981); Martin *The Legal Philosophy of H L A Hart—A Critical Appraisal* (1987); and Bayles (n 6). Reference may also be made to Bayles 297–312. But *cf* Moles *Definition and Rule in Legal Theory—A Reassessment of H L A Hart and the Positivist Tradition* (1987) who argues that Hart has totally misconceived Austin's legal theory whose own theory suffered from many defects.

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the law[8] must grapple at the threshold with Hartian arguments if their more critical enterprise is to take off the ground at all.

Hart's recent demise was most unfortunate, for it had been generally known that he had been working on a reply to his principal critics. This reply was obviously eagerly awaited by the jurisprudential community, not least because of the characteristic clarity of Hart's thought and language which is so rare in legal philosophy generally; and Hart's untimely passing was felt all the more acutely by all concerned. If I might be permitted to digress somewhat, I use the phrase "all the more" because, above all, Hart was a man of the utmost grace and warmth:[9] a person whose generosity extended to even the present author, then a fledgling jurisprudence teacher in a university several thousand miles distant.

The seemingly gaping void left by Hart's passing has, however, been filled (albeit slightly) with the recent publication of the second edition (in 1994) of *The Concept of Law* (hereafter, "Hart"). As the editors of this edition, Bulloch and Raz, themselves point out, the substantive addition is to be found in the "Postscript"[10] which was, in fact, intended (had Hart finished it) as a new chapter in the book. Unfortunately, however, the "Postscript" contains only the first of the two sections Hart intended to write.[11] Even this first section, we are told, had several versions and the final product as published in the book was the result of much painstaking effort on the part of the editors and a third person.[12] This particular section was, as Hart himself put it, "longer" and "concerned with Dworkin's arguments".[13] Indeed, even this section is apparently incomplete; there are also two versions of the opening argument of the final part dealing with the vexed issue of judicial discretion.[14] The envisaged second section comprised, on the other hand, only handwritten notes and "were too fragmentary and inchoate to be publishable".[15] This is unfortunate since Hart had intended to consider, in this latter section, "the claims of a number of other critics that in my exposition of some of my theses there are not only obscurities and inaccuracies but at certain points actual incoherence and contradiction".[16] Indeed—and with his customary humility as well as generosity—Hart stated that he had to "admit that in more instances than I care to contemplate my critics have been right and I take the opportunity of this Postscript to clarify what is obscure, and to revise what I originally wrote where it is incoherent or contradictory".[17] Unfortunately, however, this section has been lost to us forever.[18]

The purpose of the present essay is to briefly describe as well as analyse the substantive new subject-matter to be found in the "Postscript". The views expressed here must, however, be merely tentative and preliminary in nature,

[8] I have in mind, in particular, the Critical Legal Scholars.
[9] See MacCormick 1993 *Ratio Juris* 337.
[10] Though *cf* n 19.
[11] See the "Editor's Note" vii. And the various drafts were in fact made available by Mrs Jennifer Hart: *ibid*.
[12] See generally *ibid* vii-ix for an account of the editing process.
[13] Hart 236; and see generally n 4, above.
[14] (n 11) viii. These two versions are to be found in Hart 272 and 306–307, respectively, the former comprising one paragraph, the latter two paragraphs.
[15] (n 11) vii.
[16] Hart 239.
[17] *ibid*.
[18] See n 15 above.

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not least because the "Postscript" raises a great many issues that impact on much larger jurisprudential questions which merit a much more extended treatment. It is hoped, however, that the present essay will serve as an initial discussion that would not only sketch out some preliminary views but which would also stimulate more study and debate.

I should, however, mention that some of the ideas to be found in the "Postscript" are also to be found in an earlier Comment by Hart on Dworkin's work;[19] but the main difference is that the "Postscript" is a much longer, as well as more complete and nuanced, rendition of Hart's arguments.

It remains to be observed that although Hart intended what was ultimately published as a reply to Dworkin,[20] the "Postscript" (as already mentioned) does concern much more general critiques about Hart's work itself. For convenience of exposition, I will deal with each of Hart's major new arguments chronologically, although (as we shall see), many of these arguments are actually interrelated in a manner that is the hallmark of Hart's great and perceptive thinking.

The Hartian enterprise

In this (initial) part of the "Postscript",[21] Hart is at pains to point out that his aim in *The Concept of Law* is "to provide a theory of what law is which is both general and descriptive".[22] There is, in other words, an eschewing of any normative (and, consequently, evaluative) approach; in Hart's further words: "My account is *descriptive* in that it is morally neutral and has no justificatory aims . . ." [23] This approach is, of course, entirely consistent with Hart's positivist approach towards the law and legal systems. In contrast is the Dworkinian enterprise (now centring on interpretation[24]) which Hart argues is "partly evaluative".[25]

Quite apart from the distinction Hart draws between his theory on the one hand and Dworkin's on the other, it should be noted that the present (Hartian) emphasis on the *descriptive* nature of his jurisprudential enterprise is of the utmost significance. This is due, in part, to Hart's emphasis on the internal point of view and the corresponding perception that one had an obligation (as opposed to "being obliged", which imported the Austinian "gunman approach" so trenchantly criticised by Hart[26]). This distinction is also important in other respects—for example (and as we shall see below), with regard to the positivist distinction made between law and morality. Returning to the internal point of view and, in particular, to the related concept of obligation, it should be noted that the emphasis on having an obligation, subjected Hart to the possible objection that morality as well as extralegal factors and considerations

[19] Gavison (n 4) principally in relation to Hart's concept of a descriptive jurisprudence (see the discussion below). It should also be mentioned that there are very brief references with regard to some of these ideas in Hart's "Introduction" to his *Essays in Jurisprudence and Philosophy* (1983) which will be noted wherever appropriate.
[20] (n 13).
[21] entitled "The nature of legal theory".
[22] Hart 239.
[23] *ibid* 240 (emphasis in the original text). See also Gavison (n 4) especially 36–39.
[24] See especially his book *Law's Empire* (1986).
[25] Hart 240.
[26] in chs 2–4 of the *Concept of Law*. But see Moles (n 7).

would be introduced by the "backdoor", so to speak, notwithstanding its voluntary nature (as opposed to the involuntary and coercive nature of Austinian doctrine); the conceptual positivist distinction between law and morality would consequently be undermined. However, Hart has now, with limpid clarity, argued that he is only concerned with *describing* the various components of a legal system, *including* the internal point of view; there need *not*, in other words, be any *endorsement* by him as such of any morality necessarily embraced by the actual participant in the legal process itself.[27] But this explanation raises yet another point on the internal point of view which is central to Hartian theory—to which we must now turn our attention.

Before proceeding to consider the Hartian internal point of view, however, some possible problems with Hart's concept of a descriptive jurisprudence should be mentioned. The abstract concept of description itself is relatively uncontroversial. Problems, however, arise with the application of that concept: in particular, how is the external observer (here, the jurist concerned) to describe what is happening without introducing his own (at least implicit) evaluation which would stem, in part at least, from his own values as well as prejudices? Description, it is submitted, would necessarily entail interpretation which, in turn, would involve (unless one adopts a Dworkinian tack) evaluation as well. Ideally, of course, the jurist in question should attempt his or her level best to explicitly set out any personal value premises so that the reader would be able to take them into account when reading their (here, descriptive) work.[28] It is suggested, however, that the practice would be quite different, especially with regard to subconscious biases and prejudices. The problem, simply put, is that a human (and not merely mechanical) effort is involved in the process of description. The assumption, also, is that there are no such things as "brute facts", objectively "out there", as it were, in the world, waiting to be described by an external observer[29]—although, as I have sought to argue elsewhere, there would still be a need for a "theoretical framework".[30] Indeed, we will encounter the analogue of this particular problem when we later deal with the issue of judicial discretion. Although the present writer perceives a problem, much more research, discussion and debate is necessary, if nothing else because there are still some who argue that the jurist can distance himself or herself from the object of his or her study via (as one writer puts it) a

[27] See also Hart 243. A compromise solution is advocated by Mayes "The internal aspect of law: rethinking Hart's contribution to legal positivism" 1989 *Social Theory and Practice* 231 where it is argued that the internal point of view should be linked to Hart's concept of the minimum content of natural law. *Quaere* whether Hart's concept of the minimum content of natural law itself involves morality. Hart's argument is that such a concept would still be compatible with great iniquity at least insofar as the extension of protections under such a concept is concerned (see Hart 201 and Mayes 255 n 9). It should in fact be noted that the descriptive nature of Hart's enterprise—the very argument considered now—eschews any necessary connection between law and morality.

[28] See eg Myrdal *Objectivity in Social Research* (1969). See also Kronman (n 31).

[29] See eg Anscombe "On brute facts" 1957–8 *Analysis* 69 and Hamlyn *The Theory of Knowledge* (1970) 136–142. See also especially Jackson "The concept of fact" in Leith & Ingram (eds) *The Jurisprudence of Orthodoxy: Queen's University Essays on H L A Hart* (1988) 69–77. And in the historical context, compare the views of Elton *The Practice of History* (1967) ch II and Carr *What is History?* (1961) ch I. But *cf* Hart 244.

[30] See *Toward Critique and Reconstruction. Roberto Unger on Law, Passion and Politics* (1993) 62–63. See also Moles (n 7) ch 6.

"combination of empathy and detachment".[31] Indeed, at a later point in the "Postscript", Hart himself re-emphasises that description can and ought to be separate from interpretation and evaluation.[32] However,this view, with respect, ignores the arguments just made to the effect that such a distinction will be very difficult (often impossible) to maintain in practice.

The internal point of view—a change in its interpretation[33]

In order to sustain his descriptive thesis as briefly considered in the preceding section of the instant essay, Hart had necessarily to concede that it was possible to *describe* (from an *external* point of view) what participants in the legal system observed were perceiving from an *internal* point of view. That this was a possibility was, however, nowhere to be found in the first edition of *The Concept of Law*: although Hart did, many years later, concede the possibility, acknowledging the selfsame point made by critics such as MacCormick.[34] It is, however, in the present "Postscript" that we find a confirmation of the point itself[35] where Hart was effecting, in substance, a "blending" of the internal and external points of view in the context of his refutation of Dworkin's claim that legal theory had to be viewed solely from the perspective of the internal participant of the legal system in question. Hart is, as we have already seen, arguing, instead, that "a non-participant external observer" can nevertheless describe "the ways in which participants view the law from such an internal point of view";[36] as he further puts it:

> "It is true that for this purpose [describing the participants' acceptance of law without himself sharing in that acceptance] the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the insider's internal point of view or in any other way to surrender his descriptive stance."[37]

We have already seen (at the end of the preceding section of this essay) that

[31] Kronman *Max Weber* (1983) especially 16–17, 21–22. For a radically different approach supporting the argument from interpretation just tendered in the main text above, see Fish *Is There a Text in This Class?* (1980) and, by the same author, *Doing What Comes Naturally—Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989), as well as Jackson (n 29) especially 79. See further Edgeworth "Legal positivism and the philosophy of language: a critique of H L A Hart's 'Descriptive Sociology' " 1986 *Legal Studies* 115 and Moles (n 7) especially 192–193.

[32] Hart 244; in particular, he states thus: "Description may still be description, even when what is described is an evaluation." *Quaere* whether Kelsen would be able to better rely on the distinction between description and prescription since his theory does not require external observance of what is, in the final analysis, sociological facts as such: see generally his *Pure Theory of Law* (trans Knight, 1967). But on Hart's alleged failure to give a sociological content to his work, see Moles (n 7) above, especially 215–217, Martin (n 7) 27–28 and Bayles (n 6), above 18–19.

[33] It should be noted that a discussion of this issue is still contained in the first substantive part of the "Postscript" (n 21) but is, for convenience of exposition, discussed separately here.

[34] *Essays on Bentham* (1982) 154–155, *Essays in Jurisprudence and Philosophy* (1983) especially 14 and Gavison (n 4) 39. See also MacCormick *Legal Reasoning and Legal Theory* (1978) 63–64, 139–140, cited by the editors in the "Postscript": Hart 243 n 19. See also MacCormick (n 7) especially 37–40, 43.

[35] Hart 242–243.

[36] *ibid* 242. *Contra* Jackson (n 29) especially 67 who argues that there is no indication that such an approach is factual; this view must, however, now be read in the light of Hart's present approach.

[37] Hart 242 (emphasis in the original text). See also *ibid* 243, 244. Though cf Martin (n 7) 25–27 who advocates an approach that *transcends* both the internal as well as external points of view.

there was, amongst other things, the—at least possible—problem of the external observer's own values and prejudices influencing his description, often at a subconscious level. At this juncture, too, it should perhaps also be mentioned that actual *practice* of ascertaining and then describing the internal point of view of the observed also entails possible problems from the perspective of the observed himself. Crudely put, how would the external observer be able to accurately record what is essentially a state of mind (*ie* acceptance) on the part of the observed? This brings into play, of course, other (more particular) issues such as those centring on sociological method, in particular, with regard to data collection. Also of possible significance are questions that can only be resolved by recourse to psychology. All these issues (and more) are obviously outside the more modest scope of the present essay and will require not only more research and thought but also interdisciplinary research; indeed, this lastmentioned point, although containing great potential for exciting scholarly discourse, itself raises a great many problems of its own.[38]

The nature of legal positivism

This is the second substantive part of the "Postscript", and it is a refutation of what Hart perceives to be Dworkin's mischaracterisation of legal positivism—at least as the former practises it.

i Hart's refutation of Dworkin's allegation of the "semantic sting"

Hart argues, first, that he does not adopt (as Dworkin suggests) a dogmatic as well as uncontroversial version of the concept of "law", *ie* that the *meaning* of "law" is fixed; indeed, Hart argues that Dworkin "confuses the *meaning* of a concept with the criteria for its *application*".[39] But what, then, about Hart's argument to the effect that a *concept* could have a constant meaning: would this not fall prey to Dworkin's critique centring on the "semantic sting"?[40] In this regard, we should note Hart's further distinction between the meaning of "law" and the meaning of *propositions* of law.[41] Hart argues here that even if the meaning of *propositions* of law were to be determined in a definitional fashion, this would *not* entail the meaning of "*law*" being put into a definitional strait-jacket and thus suffering from a consequent "semantic sting".[42] Whilst this is undoubtedly true, one might query whether Hart is, with respect, actually meeting Dworkin's challenge head-on. It is the present writer's view that Hart's earlier focus on *application* is a more persuasive point, *ie* that whilst a particular legal proposition can have a fixed meaning, problems of uncertainty only arise in the *application* of that legal proposition. But this, unfortu-

[38] See eg Phang "Legal theory in the law school curriculum—myth, reality, and the Singapore context" 1991 *Connecticut Journal of International Law* 345 354–355. Insofar as the sphere of psychology is concerned, it is suggested that much more expertise and attendant analysis are required than, say, the references to be found in Scandinavian Realism which itself suffers from an inability to grapple with important normative issues (for a good overview of Scandinavian Realism, see Freeman, *Lloyd's Introduction to Jurisprudence* (1994) ch 9).

[39] Hart 246 (emphasis in the original text). Hart interestingly refers to Dworkin's use of essentially contested concepts which will be discussed below. *Cf* also *ibid* 258–259.

[40] See Dworkin *Law's Empire* (1986) 45.

[41] Hart 247.

[42] *ibid*. *Cf* also Hart "Definition and theory in jurisprudence" 1954 *Law Quarterly Review* 37; but *cf* Edgeworth (n 31).

nately, takes us into further "definitional waters" and, possibly, into intractable semantic as well as circular difficulties: for could it not be argued that the meaning of the legal proposition concerned is really premised not just on the definition or meaning one initially attributes to it but, rather, also on its function(s); or, to put it another way, a legal proposition is also defined by reference to the function(s) it performs.[43] The *practical* difficulty with this point, however, is that it would render all efforts at arriving at a threshold point insofar as legal propositions are concerned intractable. The present writer would suggest that although Dworkin does have a point when he attributes a "semantic sting" to Hartian (as well as other forms of) positivist theory, adoption of a positivist stance (in attributing fixed meanings to particular legal propositions) can nevertheless be justified on a *pragmatic* level: although I would venture to suggest that such fixed meanings ought (contrary to what the positivists would probably argue) only be *contingent* points of departure, which meanings hitherto attributed could change (even radically) once the court concerned moves into the sphere of *application*. The point just made is very similar to what appears, at present at least, to be a more "popular" general justification for positivistic theory, *viz* an argument from *pragmatism*: a point which we will be considering in more detail below when discussing Hart's views on law and morality.

Another point of dissatisfaction by Hart with Dworkin's critique centres on the latter's characterisation of his theory as dealing with "plain facts". Hart points out that even his ultimate criterion of validity (*viz* the rule of recognition) could incorporate not only criteria of pedigree but also "principles of justice or substantive moral values".[44] And, here again, Hart is relying on the distinction between descriptive and normative jurisprudence—a point which we considered earlier. It bears repeating, however, that this distinction is not (as we have also earlier seen) by any means free from difficulties.

ii Hart's refutation of Dworkin's "re-characterisation" of positivism

Hart objects to Dworkin's Re-characterisation of his Positivist theory on the primary ground that this is effected via interpretivism. Such an approach, Hart argues, by claiming "to identify the point or purpose of law" which in the Dworkinian view is to justify coercion,[45] is totally at variance with his (Hart's) theory which is simply intended to provide "guides to human conduct and standards of criticism of such conduct".[46] Such an eschewing of coercion is interesting, although less than convincing. It cannot, with respect, be denied that if coercion is defined in a very broad sense as encompassing the exercise

[43] Cf the concept of fact scepticism practised by some American Realists: see eg Frank "Cardozo and the upper-court myth" 1948 *Law and Contemporary Problems* 369. See also Gibbs "Definitions of law and empirical questions" 1968 *Law and Society Review* 429 who argues that questions about the subject matter of law can only be answered by empirical analysis as opposed to mere conceptual analysis centring on definitions. Empirical research is not, of course, that problem-free a process either: see eg n 38 above, insofar as problems associated with interdisciplinary research are concerned.

[44] Hart 247. See also *ibid* 250 258.

[45] *ibid* 248. See also Dworkin *Law's Empire* (1986) 117.

[46] Hart 249. Hart also later observes thus: "But the certainty and knowledge in advance of the requirements of the law which the rule of recognition will bring is not only of importance where coercion is in issue: it is equally crucial for the intelligent exercise of legal powers . . . and generally for the intelligent planning of private and public life." (Hart 250).

of power (including economic power[47]), all law (even in the private sphere) necessarily involves the exercise of coercion of one form or another. What makes "law" what it is or (putting it more elegantly) what gives law legitimacy (especially in the eyes of the public) are the various *justifications*, amongst which Dworkin's theory is one contender. It is, however, understandable why Hart adopted the position he did for, after all, the burden of much of the early part of *The Concept of Law* was devoted to a detailed critique of Austinian command theory, the quintessential example of a coercive theory of law.[48] What Dworkin does, however, is quite different from the position adopted by Austin: he (Dworkin) is interested in *moral* justification of the exercise of coercion in the legal context. And herein lies another answer for Hart's refusal to adopt the Dworkinian characterisation of his positivism: to have adopted it would have been to have conceded that law (as an exercise of coercive force or power) could and, indeed, had to be justified on objective *moral* grounds.[49] This does not, of course, conclude the issue, for the further (and crucial) question is whether there is indeed a *necessary* connection between law and morality, the rejection of which is of course the hallmark of positivist legal theory—a question that is dealt with further both by Hart and the present writer below.

Of related interest is Hart's objection to Dworkin's criticism of "soft positivism" which permits the introduction of extra-legal considerations. Hart's objection is simple and is related to the issue of judicial discretion which we discuss towards the end of the present essay: that is that a "margin of uncertainty" in the penumbral areas is inevitable and it is at this point that the judge concerned would be allowed recourse to extra-legal materials.[50] Certainty, Hart points out, is not a supremely overriding factor and, indeed, a "margin of uncertainty" should be "welcomed".[51] However, he also points to Dworkin's further objection to his allowance (in such penumbral areas) of discretion to be utilised by the judges concerned in arriving at their respective decisions. This particular point really centres (as just alluded to) on the broader (and related) issue of judicial discretion, and we shall thus return to this particular objection towards the end of the present essay. It will suffice for the moment to note Hart's argument to the effect that whether or not there are objective moral values in the law should remain an open question.[52]

But what, then, of Hart's argument to the effect that even if coercion is relevant, it cannot represent the *general* point of law as a whole, the primary purpose of the law being to provide guidance instead?[53] Such an approach, it

[47] See eg Hale "Coercion and distribution in a supposedly non-coercive state" 1923 *Political Science Quarterly* 470.

[48] Also included was a critique of Kelsen's theory, although this was not the main subject of critique as such. *Contra* Moles (n 7).

[49] As Hart himself observes: "The justification of coercion to which the rule of recognition contributes . . . cannot be represented as its general point or purpose, still less can it be represented as the general point or purpose of the law as a whole. Nothing in my theory suggests it can" (Hart 250). And, at a later point in the "Postscript", Hart reasserts his positivistic stance thus: "I still think legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open . . . the general question of whether they have what Dworkin calls 'objective standing' " (Hart 253–254).

[50] See generally Hart 251–252.

[51] *ibid* 252.

[52] *ibid* 254. See also n 49, above (second quotation).

[53] Hart 249–250. See also n 46 and 49, above.

may be observed, is once again symptomatic of a *pragmatic* approach towards the law. The present writer would argue that whilst a *practical* aim of the law is to provide precisely the guidance Hart refers to, the *broader underlying theme* centres on what Dworkin has termed the *justification* of coercion. And the Hartian rule of recognition is, unfortunately, unable to supply such justification (as Hart is at pains to point out) simply because it seeks to maintain a conceptual distinction between law on the one hand and morality on the other. We shall also return to this point below.

The nature of rules

This is the third substantive part of the "Postscript". It is now fairly common jurisprudential knowledge that Dworkin views rules as merely applying in an "all-or-nothing" fashion, that is that conflicts between rules are theoretically untenable, and further views Hart's theory as being mistaken inasmuch as it did not take into account principles as part of the law (which, unlike rules, have their respective dimensions of weight and thus can conflict).[54]

In (again) characteristic fashion, however, Hart has readily and graciously conceded what he has perceived to be a cogent critique on Dworkin's part; he (Hart) admits that he had ignored "the important difference between a consensus of *convention* manifested in a group's conventional rules and a consensus of independent *conviction* manifested in the concurrent practices of a group".[55] However, Hart nevertheless maintains that his focus on "a consensus of convention" is still useful insofar as it pertains to rules which are adhered to by the group for the same (and not merely independent but concurrent) reasons, which rules would include the rule of recognition.[56] Further, Hart adheres to his view that (contrary to what Dworkin argues) the ascertainment of such a consensus need not necessarily entail morally good grounds and might, in fact, entail the exact converse.[57] This, it is submitted, is entirely consistent with Hart's distinction between description and prescription[58] that we have considered earlier, although it bears repeating (yet again) that there are (at the very least) possible problems with this distinction. Indeed, insofar as Hart is concerned, acceptance of rules may be due to a variety of reasons and the persons concerned need not necessarily accept the rules in question because *they* believe that there are good moral grounds for conforming to them.[59]

[54] See generally Dworkin "The model of rules I" in *Taking Rights Seriously* (1978) ch 2.
[55] Hart 255 (emphasis in the original text). See also *ibid* 266–267.
[56] *ibid* 256. See also *ibid* 266–267: "Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial consensus".
[57] *ibid* 256–257.
[58] See also *ibid* 258 and n 44, above.
[59] "For some rules may be accepted simply out of deference to tradition or the wish to identify with others or in the belief that society knows best what is to the advantage of individuals"—*ibid* 257. This view, it should be observed, is entirely consistent with Hart's concession (see Hart especially 114–117) to the effect that not everyone in a complex society need accept the primary rules from an internal point of view, thus leaving open the motivation of fear which, in turn, allows the Austinian command theory to regain some ground—a concession that is, of course, practically realistic, if nothing else.

More interesting, perhaps, is Hart's analysis of the Dworkinian distinction between rules and principles already mentioned at the outset of this section.[60] Interestingly again, Hart concedes that he had

> "said far too little in [*The Concept of Law*] about the topic of adjudication and legal reasoning and, in particular, about arguments from what my critics call legal principles. I now agree that it is a defect of this book that principles are touched upon only in passing."[61]

More interestingly, perhaps, are his views on the distinction itself: first, that it is

> "a matter of *degree*: principles are, relatively to rules, broad, general, or unspecific, in the sense that often what would be regarded as a number of distinct rules can be exhibited as *the exemplifications or instantiations of a single principle*".[62]

The second point Hart makes with regard to this distinction is

> "that principles because they refer more or less explicitly to some purpose, goal, entitlement, or value, are regarded from some point of view as desirable to maintain, or to adhere to, and so *not only* as providing an explanation or rationale of the rules which exemplify them, but as at least contributing to their *justification*".[63]

It is, however, with regard to the third point made that Hart expresses disagreement with Dworkin, and this pertains to the "all-or-nothing" nature of rules and (what Hart has termed) the "non-conclusive character" of principles that we referred to earlier.[64] In particular, Hart sees no reason why *rules* cannot conflict with each other. Indeed, he points to Dworkin's use of *Riggs v Palmer*[65] as illustrating a situation where a principle conflicted with a (statutory) rule; as Hart put it in a passage that merits substantial quotation:

> "This is an example of a principle winning in competition with a rule, but the existence of such competition surely shows that rules do not have an all-or-nothing character, since they are liable to be brought into such conflict with principles which may outweigh them. Even if we describe such cases . . . not as conflicts between rules and principles, but as a conflict between the principle *explaining and justifying* the rule under consideration and some other principle, the sharp contrast between all-or-nothing rules and non-conclusive principles disappears; for on this view a rule will fail to determine a result in a case to which it is applicable according to its terms if its *justifying* principle is outweighed by another."[66]

Hart argues that the difficulties as embodied in the preceding quotation would be resolved if the distinction between rules and principles is viewed as "a matter of degree".[67]

It is suggested that Hart's argument (principally as embodied in the quotation just set out above) is extremely persuasive. Indeed, Hart has postulated a linkage between rules and principles that Dworkin never made clear, *ie* that principles (as broader propositions) underlie as well as justify rules which are more specific in nature.[68] Indeed, it is precisely this linkage that gives bite to Hart's critique of the "all-or-nothing" nature attributed by Dworkin to

[60] (n 54).
[61] Hart 259. See also *ibid* 263.
[62] *ibid* 260 (emphasis added).
[63] *ibid* (emphasis added). Hart refers to these two points as referring to "breadth" and "desirability", respectively: *ibid.*
[64] (n 54).
[65] 115 NY 506, 22 NE 188 (1889).
[66] Hart 262 (emphasis added).
[67] *ibid*; also n 62, above. Hart does, however, admit that "a reasonable contrast" can be made between "near-conclusive rules" and "generally non-conclusive principles"—*ibid* 263.
[68] (n 66).

rules.[69] However, it equally well follows, therefore, that should this linkage be rejected, Hart's critique would correspondingly lose its persuasiveness. It is suggested that whilst the linkage is extremely attractive, there must necessarily be a *significant difference* between Hart's conception of a "principle" and Dworkin's conception of a "principle". This is due to the fact that Dworkin envisages *objective* moral standards to be embedded within principles—which, in turn, explains why litigants have rights to win which cannot be tampered with by the judge via "illicit" law-making. It is suggested that Hart cannot be subscribing to the same conception (of a "principle") simply because to do so would be to simultaneously undermine the positivist thesis to which he adheres. Since Hart concedes that principles underlie and justify rules, we must assume that principles (in the absence of any express opinion to the contrary) are, like rules, also part of the law. However—and in order to maintain his positivist thesis—Hart cannot allow for a *necessary* connection between principles on the one hand and morality on the other. But it is precisely such a *necessary* connection that exists insofar as Dworkinian principles are concerned; hence, the *objective* morality contained within the (Dworkinian) principles themselves. However, this does not, nevertheless, explain the true nature of the Hartian "principle" and, indeed, the only explanation provided by Hart is simply that principles (in the sense he uses the term) are but broader versions of rules, that is that it is, in the final analysis, all "a matter of degree".[70]

Yet another interpretation (centring on the nature of a Hartian "principle") would run along the following lines: that it is of no moment to Hart whether or not principles in his theory embody objective morality, since he is only concerned to *describe* what is going on.[71] Again, however, all the problems we mentioned previously relating to the distinction between description and prescription would come into play, and the reader is referred to the analysis already made in this regard.

A further problem for Dworkin with regard to the linkage claimed by Hart between rules and principles is this: if principles do in fact underlie and justify rules, then, having regard to Dworkin's argument that principles can conflict, why can rules (which are but more specific instances of principles) not also conflict? This would constitute yet another reason why Dworkin would reject Hart's proposed linkage. But that leaves us with yet another important question: what, then, in the *Dworkinian* context, *is* the precise linkage between rules on the one hand and principles on the other? If Dworkin is unable to furnish us with a description of the linkage, his distinction and (more importantly) proposition to the effect that rules apply in an "all-or-nothing" fashion must perforce simply be a bare assertion, without more. If, on the other hand, Dworkin accepts Hart's proposed linkage (as being, essentially, a relationship of *degree*), he would, as we have seen, face intractable problems

[69] (n 54).

[70] (n 62) and (n 67), above. And see Hart *Essays on Bentham* (1982) especially 149 where the moral *objectivity* of Dworkin's theory is referred to.

[71] There is support for this interpretation in the very stance various positivists take toward morality which, simply put, is that morality *is* relevant to law, although there is no *necessary* connection between law and morality as such. Hence, individuals are free to either obey or disobey law on moral grounds, but that would not mean that the law concerned thereby ceases to be law. See also Hart 254 where Hart leaves open "the question of the objective standing of moral judgments".

of a different nature: he would, first, have to accept a (Hartian) conception of principle that was divorced from objective morality and, secondly, concede that as principles can conflict, so also can rules.

It should, at this juncture, be noted that the present writer perceives the *crux* of disagreement between Hart and Dworkin in this particular context to lie not so much in the detailed arguments pertaining to terminology that we have hitherto considered, but, rather, in the issue as to whether there are, indeed, *objective moral standards* embodied in the law, thus establishing a *necessary* connection between these moral standards and the law itself. Dworkin obviously believes this to be the case whereas Hart (as a positivist) believes otherwise. And, as I shall attempt to argue towards the end of this essay, this very crucial issue is also at the heart of the debate between these two jurists on the nature of judicial discretion.

On a more specific level, Hart considers (in the fourth part of the "Postscript") the rule of recognition in the context of principles and, in particular, Dworkin's argument to the effect that the rule of recognition has to be abandoned since it cannot be utilised to identify principles which Dworkin argues are, in fact, part of the law. However, once again, the crux of the matter is as stated in the preceding paragraph: principles, in the sense Dworkin talks about, cannot possibly be encompassed within a Hartian rule of recognition simply because the rule of recognition excludes, in accordance with positivist tenets, any *necessary* connection with objective moral standards, although Hart does (as we shall see) allow for, *inter alia*, moral standards to be encompassed within the rule of recognition itself; Dworkinian principles, on the other hand, are inextricably tied to objective moral content. In addition, Hart raises two further points in the "Postscript": first, that legal principles *can* be identified by their pedigree and, secondly, that the rule of recognition can, in fact, provide criteria other than pedigree. The second point is related to a point already considered at length throughout the present essay: the distinction between descriptive and prescriptive jurisprudence. The first point is also persuasive and, indeed, gains much support if the proposition (considered earlier) to the effect that principles underlie and justify rules is accepted; in such a situation, there would be at least *indirect* identification of the relevant principles since the rules based upon them are clearly the subject of identification via the rule of recognition. However—and this is an important point—Hart is prepared to concede "that there are many legal principles that cannot be so captured [within the pedigree criteria contained in the rule of recognition] because they are too numerous, too fleeting, or too liable to change or modification, or have no feature which would permit their identification as principles of law by reference to any other test than that of belonging to that coherent scheme of principles which both best fits the institutional history and practices of the system and best justifies them".[72] But would this concession not undermine Hart's positivism, since if, as is implied, such principles do constitute part of the law, they would be identified by reference to *objective* moral content—which, as we have seen, is wholly anathema to the positivist enterprise? Hart recognises this problem and his response is relatively straightforward. As we have just seen in this very paragraph, since Hart claims that his jurisprudential enterprise is descriptive in nature, there is nothing preventing

[72] Hart 265.

the rule of recognition encompassing criteria that in fact have moral content, although there would be no necessary connection (and consequent endorsement) of this moral content as such.[73] Indeed, Hart goes a step further, and argues that

> "a rule of recognition is necessary if legal principles are to be identified by [Dworkinian criteria] . . . This is so because the *starting-point* for the identification of any legal principle to be brought to light by Dworkin's interpretive test is *some specific area of the settled law* which the principle fits and helps to justify."[74]

In other words, before Dworkin's interpretive test can be invoked, the "settled law" will have to be identified, and this can only be effected by way of the rule of recognition. Indeed and as Hart pertinently points out—Dworkin himself refers to "preinterpretive law" which, presumably, corresponds to Hart's concept of the "settled law" — although the terminology utilised by each is different.[75]

Law and morality

This is the fifth substantive part of the "Postscript", but the reader would have noticed by now that this relationship between law and morality has already been referred to at many points throughout the course of this essay. This is not in the least surprising, since virtually all the substantive points canvassed in the "Postscript" are intimately connected with each other.

Returning to the relationship between law on the one hand and morality on the other, one should immediately note the distinction (again referred to at various points throughout this essay) between description and prescription. In this part, however, Hart gives more specific reasons why a conceptual separation should be effected between law and morality; in a passage that merits quotation in full, Hart observes thus:

> "[L]egal rights and duties are the point at which the law with its coercive resources respectively protects individual freedom and restricts it or confers on individuals or denies to them the power to avail themselves of the law's coercive machinery. So *whether the laws are morally good or bad, just or unjust, rights and duties demand attention as focal points in the operations of the law which are of supreme importance to human beings and independently of moral merits of the law.*"[76]

The argument as embodied in the preceding quotation is not unlike arguments advanced recently by jurists.[77] However, it is respectfully submitted that such an argument encompasses but a very minimalist as well as literalist approach toward the law; more to the point, perhaps, is the fact that such a vision of the law is simply pragmatic in a functional sense but does not aid our understanding as to what underlies the law. One obvious and knockdown answer to such a criticism would be that the law may not, in fact, have any

[73] See also *ibid* 204, 265–266.
[74] *ibid* 266 (emphasis added).
[75] See generally *ibid* 266–267. *Contra* Fish (n 31).
[76] ibid 269 (emphasis added).
[77] See generally Honore "The dependence of morality on law" 1993 *Oxford Journal of Legal Studies* 1 and MacCormick "The concept of law and 'The Concept of Law' " 1994 *Oxford Journal of Legal Studies* 1. Interestingly, both were Hart lectures delivered at Oxford University. Reference may also be made to Schauer "Formalism" 1988 *The Yale Law Journal* 509 and, by the same author, *Playing by the Rules—A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (1991), as well as Weinrib "Legal formalism: on the immanent rationality of law" 1988 *The Yale Law Journal* 949.

further basis other than to perform this very minimal function—*inter alia*, to resolve disputes at hand. Such an answer is equally obviously possible. But is it plausible? Such an argument would be plausible at best within a purely legal community: a point that is both circular as well as unrealistic. The reality would entail an acknowledgment that law operates within contexts that are a complex interaction of a myriad of extra-legal elements. More specifically and to the point—and viewing the issue through the lenses of those whom the law is to serve, *viz* the people—how does one justify the *legitimacy* of the law? A functional and pragmatic answer such as that advanced by the positivists raises the further question: why should litigants *accept* the law, instead of settlement via some different (even radical) mode? Why can we not posit some *moral* justification for the present system of law? We arrive, at this point, at what I perceive to be the nub of the issue: in the absence of some theological or other non-rational (not irrational) argument, it is impossible to posit an *objective* basis for morality premised on *logic or rationality*. I think that the positivists recognise this difficulty and precisely because the basis for law is perceived by them to have to rest on logical or rational grounds, there is a consequent eschewing of morality and a concomitant conceptual separation effected between law on the one hand and morality on the other. This approach is, indeed, by no means outmoded; on the contrary, it is, apparently at least, the preferred conception of law operative in Anglo-American common law systems today—at least in societies which do not have strong indigenous (and non-Western) value systems. Such a philosophical approach has often been crudely labelled as "liberalism": an environment where subjectivity and relativity reigns and, indeed, is inevitable. So strongly entrenched in the philosophical realm is the idea that individuals should be free to pursue their own preferences that many philosophers have posited what is basically (and not unlike positivism) a *procedural* approach towards the law; or, to use another term, the idea of a "framework" which, in most cases, comprises mere ground rules that prevent individuals from waging a Hobbesian war of all against all in their respective quests in life. It is, in the present writer's view at least, remarkable how widespread the idea of a "framework" is, for one can discern the broad concept in operation even in the work of philosophers whose theories are otherwise deeply at variance with each other. Contrast, for example, the work of Rawls[78] with that of Nozick.[79] The question—too broad and important to be dealt with in the detail it deserves—that arises is whether the idea of a "framework" merely pushes the inquiry back a stage further: *ie* that there is really no way to posit a neutral or objective "framework" from a logical or rational point of view, unless, of course, one has recourse to theological or other non-rational arguments. Unfortunately, in an age of secularism where rationality and logic are extolled, the latter approach has not met with much success. Indeed, one might (at least plausibly) add that a theological or some other form of non-rational argument may (by their very natures) not even be feasibly canvassed (at least for the most part) in writing.

[78] See generally *A Theory of Justice* (1971); perhaps even more germane to our present discussion, see *Political Liberalism* (1993) which collects together many of Rawls's articles that have re-emphasised the idea of the "framework".

[79] See *Anarchy, State, and Utopia* (1974) especially pt III. Reference may also be made, apart from Rawls's and Nozick's work, to Finnis *Natural Law and Natural Rights* (1980) especially 154–156.

What is the upshot of the discussion in the preceding paragraph? I have sought to argue that positivism is too thin a theory of law, and that it is still at least reasonable to ask that law be justified on moral grounds. As we have seen, however, this may be too tall a jurisprudential order, especially when attempted solely or even mainly through logic and rationality. However, I hope to have at least raised the possible weaknesses in the positivist separation of law from morality—in particular, why positivism can, at best, provide only a beginning for our inquiry into the nature and functions of law; it can, by no means, be the last word on the subject.

On a slightly different (albeit related) topic, Hart pertinently points to Dworkin's concession that there may be legal systems that are so wicked or evil that no morally acceptable interpretation is possible.[80] He also deals, however, with Dworkin's recourse to "preinterpretive law" as a basis for classifying evil law, that is that evil legal systems are law in only a "preinterpretive" sense. Hart's basic argument here is that Dworkin's distinction between "interpretive" and "preinterpretive" law "concedes rather than weakens the positivist's case".[81] More specifically, Hart argues that his jurisprudential enterprise is purely *descriptive* in character—an argument that has figured prominently throughout the "Postscript" and, consequently, this essay; and Dworkin, by his concession insofar as "preinterpretive" law is concerned, has not managed to detract from this descriptive enterprise at all, his arguments only biting, as it were, on a claim to a prescriptive or evaluative jurisprudence: which is wholly outside the purview of the Hartian enterprise. Once again, however, the distinction between description and prescription is subject to the various possible problems canvassed towards the beginning of the present essay.

Finally, Hart also points to yet another concession by Dworkin with regard to the recognition of "prima-facie moral force" for "special" rights even within a generally wicked system.[82]

Judicial discretion

This is the sixth (and final) substantive part of the "Postscript" and (arguably at least) the most important.[83] It is unfortunate, therefore, that it is incomplete and, indeed, has (as we earlier saw) two versions of the opening argument.[84] I shall first set out Hart's views before proceeding to briefly comment on them.

i Hart's Views:

Hart still maintains that judges can, indeed must, in a limited number of cases (where "no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete"[85]), resort to "*filling the gaps* by exercising

[80] Hart 270, citing *Law's Empire* (1986) 78–79. And see generally Bayles (n 6) 185–189.
[81] Hart 271. See also Hart *Essays on Bentham* (1982) 150–153.
[82] Hart 271–272. See also Hart *Essays on Bentham* (1982) 150–153.
[83] Hart refers to this topic as engendering the "sharpest direct conflict" between their respective works: Hart 272.
[84] (n 14). The entire substantive argument of this part (in the main text) comprises, in fact, only some four and a half pages.
[85] Hart 272. These are "cases left *partly unregulated* by the law": *ibid* 273 (emphasis added). Hart also refers to these (as Dworkin does in ch 4 of *Taking Rights Seriously* (1978) especially 81: "when no settled rule disposes of the case") as "hard cases": Hart 273, 274, 275, 276.

a *limited* law-*creating discretion*".[86] However, Hart points out that such law-making is *different* from actual law-making by the *legislature*; in his words (which merit an extensive quotation):

> "[N]ot only are the judge's powers subject to many constraints *narrowing his choice* from which a legislature may be quite free, but since the judge's powers are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes. So his powers are *interstitial* as well as subject to many substantive constraints. None the less there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers. But he must not do this arbitrarily: that is he must always have some general reasons justifying his decision and he must act as a conscientious legislator would by deciding according to his own beliefs and values. But if he satisfies these conditions he is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."[87]

Hart thus disagrees with Dworkin's adjudicative theory where judges "discover and enforce existing law", speaking "as if the law were a gapless system of entitlements in which a solution for every case awaits [their] discovery, not [their] invention".[88] In this regard, Hart points out, in particular, that "it is important to distinguish the ritual language used by judges and lawyers in deciding cases in their courts from their more reflective general statements about the judicial process".[89] Indeed, the individual judges cited by Hart have expressed just such latter views in their extrajudicial capacities.[90] However, Hart reiterates the point made in the preceding quotation that judges, in hard cases, proceed "by analogy so as to ensure that the new law they make, though it *is* new law, is in accordance with *principles or underpinning reasons* recognized as already having a footing in the existing law".[91] In other words, they do not "just push away their law books and start to legislate without further guidance from the law"; instead, they

> "[v]ery often . . . 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".[92]

However, Hart argues that "though this procedure certainly defers, it does not eliminate the moment for judicial law-making, since in any hard case different *principles* supporting competing analogies may present themselves and the judge will often have to choose between them, relying, like a conscientious legislator, on his sense of what is best and not on any already established order of priorities prescribed for him by law. *Only if* for all such cases there was *always* to be found in the *existing* law some *unique set* of higher-order principles assigning relative weights or priorities to such competing lower-order princi-

[86] Hart 272 (emphasis added).
[87] *ibid* 273 (emphasis in the original text).
[88] *ibid* 274.
[89] *ibid*.
[90] No specific speeches are cited, although one may have regard to, eg, Reid "The judge as law maker" 1972 *Journal of the Society of Public Teachers of Law* 22 and Mackay of Clashfern "Can judges change the law?" 1987 *Proceedings of the British Academy* 285. Indeed, Reid is specifically cited by Hart; the other judges cited include Oliver Wendell Holmes; Cardozo; Macmillan and Radcliffe: see Hart 274.
[91] Hart 274 (emphasis added).
[92] *ibid* 274.

ples, would the moment for judicial law-making be not merely deferred but eliminated."[93]

Hart also deals with the twin objections by Dworkin to judicial law-making centring on democracy and fairness, respectively. Briefly put, the first argues that since judges are unelected officials, it is undemocratic for them to involve themselves in judicial law-making. Hart argues that this is "a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as a reference to the legislature".[94] He adds that "the price may seem small if judges are constrained in the exercise of these powers" [95]—a point already dealt with in the preceding paragraphs. Hart also advances a second argument against Dworkin's argument from democracy: he observes that "the delegation of limited legislative powers to the executive is a familiar feature of modern democracies and such delegation to the judiciary seems a no greater menace to democracy".[96]

Dworkin's (second) objection from fairness may be simply stated: judicial law-making is unfair and unjust because the judge would be indulging in retrospective law-making in a context where (according to Dworkin) the existing law is, as it were, fixed and where, therefore, a particular litigant already has a right to win. Hart's answer to this is brief and, indeed, comprises the last words in the "Postscript", so that we cannot be sure that he would not have elaborated upon this argument had he had the opportunity to do so:

> "This objection, however, even if it has force against a court's retrospective change or overruling of clearly established law, seems quite irrelevant in hard cases since these are cases which the law has left incompletely regulated and where there is no known state of clear established law to justify expectations."[97]

Finally, we turn briefly to the alternative opening argument to this part of the "Postscript".[98] In this version, it is interesting to note Hart's explicit characterisation of Dworkin's theory as centring on "a single 'right answer' ".[99] More interesting, perhaps, is Hart's argument that

> "Dworkin's later introduction of interpretive ideas into his legal theory and his claim that all propositions of law are 'interpretive' in the special sense which he has given to this expression . . . has . . . brought the *substance* of this position *very close to my own in recognizing that courts in fact have and frequently exercise a law-creating discretion*."[100]

There appeared, in Hart's view, to have "[a]rguably" been "a great difference" between his and Dworkin's theories prior to the introduction of such interpretive ideas by Dworkin inasmuch as the latter's theory was "associated with the idea that the judge's role in deciding cases was to *discern* and *enforce existing law*".[101] However, Hart views Dworkin's latest (interpretive) theory as *discarding* this old view.[102]

[93] *ibid* 275 (emphasis added). See also his observations in *Essays in Jurisprudence and Philosophy* (1983) 7.
[94] Hart 275.
[95] *ibid*.
[96] *ibid*. See also Bayles (n 6) 176.
[97] Hart 276.
[98] *ibid* 306–307. And see n 14, above.
[99] Although Guest is at pains to refute this characterisation in his monographic study of Dworkin's work: see *Ronald Dworkin* (1992) 137–138.
[100] Hart 307 (emphasis added).
[101] *ibid* (emphasis in the original text).
[102] *ibid*; although the text ends abruptly, this is the plain reading of the remaining text.

ii Comments

A preliminary observation on the two different opening arguments to this part of the "Postscript" (on judicial discretion) may be apposite.[103] The first version, it is suggested, really deals with Dworkin's earlier work.[104] The second version may have been intended to have had the same effect, but differs from the first in this one important respect: this second version clearly refers, albeit briefly, to Dworkin's *later* work,[105] thus giving us a glimpse at what the *completed* part *might have looked like*, since the present part is not only relatively short[106] but also clearly does not tackle Dworkin's later interpretive thesis.

I have ventured to suggest elsewhere that Dworkin had in fact misconstrued the entire thrust of Hart's argument in the first instance.[107] Dworkin had, amongst other things, completely ignored an extremely important part of the original edition of *The Concept of Law*[108] which actually made Hart's views with regard to judicial discretion much more constrained than Dworkin would have had us believe. Hart's views in the present "Postscript" merely confirm this argument, for he constantly stresses the constrained and interstitial nature of judicial law-making. Whether or not this is itself a viable thesis is yet another issue that we will briefly discuss. However, this does not detract from the argument just made to the effect that Dworkin had originally misconstrued Hart's views.

Of the greatest interest and significance (to the present writer at least) is Hart's reference to Dworkin's utilisation of the idea of essentially contested concepts.[109] Unfortunately, however, the salient references in the "Postscript" do not occur in the present part (of the "Postscript") itself.[110] It should, however, be noted (in turn) that at least the second reference[111] *does* in fact refer to the topic of judicial discretion, although occurring in another part of the "Postscript".[112] What is this idea and how does this idea apply in the Dworkinian context? The following quotation, taken from an earlier article by the present writer, may be helpful:

> "To put it in a nutshell, Gallie's insight, as applied by Dworkin, focuses upon . . . the argument pertaining to 'essentially contested concepts' where the controversy is not about the concept itself (here, the law or the specific legal conundrum in question) but, rather, about different *conceptions of that concept*. The thrust of Dworkin's argument, therefore, when faced with the critique that judges do in fact exercise discretion because of different personal convictions and preferences and that there is thus no uniquely correct answer for a given legal conundrum, is simply that just because judges may (and even do) disagree about the correct answer to a legal problem (ie, they have different conceptions of the same concept) does not necessarily entail the

[103] n 14, 84, 98 above.
[104] As embodied within *Taking Rights Seriously* (1978), especially ch 2 and 4 thereof.
[105] Principally as embodied within *Law's Empire* (1986).
[106] (n 84).
[107] See "Jurisprudential oaks from mythical acorns: the Hart-Dworkin debate revisited" 1990 *Ratio Juris* 385 387–390.
[108] *The Concept of Law* 200; now see Hart 204–205.
[109] Apparently first mooted by Gallie: see "Essentially contested concepts" 1956 *Proceedings of the Aristotelian Society* 167.
[110] See Hart 246 252–253. Cf also Hart *Essays on Bentham* (1982) 148.
[111] Hart 252–253. It should, however, be noted that the actual phrase "essentially contested concepts" is not used, but it is submitted that the *substance* of the views expressed here was at least premised on the idea of essentially contested concepts, as to which, see the main text immediately following.
[112] Dealing with "The Nature of Legal Positivism": see generally the discussion above.

conclusion that there is no 'one right answer' to the problem at hand. In other words, although there may be controversy as to what the 'one right answer' is as manifested in the various competing or contesting conceptions, there is *nevertheless* one uniquely correct answer to any given legal conundrum."[113]

I have sought to argue, in the same article, that, whilst Dworkin's use of Gallie's insight is extremely ingenious, it does not persuade, in the final analysis—and will not repeat those arguments here.[114] But what is of the utmost significance for our present purposes is the fact that very few writers have actually recognised the fundamental and pivotal role that the idea of essentially contested concepts plays in Dworkinian legal theory.[115] Hart's references, therefore, to this idea should, it is suggested, draw the attention of Dworkin's various critics to the importance of this idea. Much, it is submitted, still needs to be done with regard to the entire concept of objectivity. In this regard, it is suggested that what is really required is collaboration amongst lawyers and philosophers alike, for the former tend to ignore problems generated by the "subjective-objective" dichotomy whilst the latter's writings are far too technical and abstract to provide any real guidance, at least on the level of legal argumentation and understanding.

In addition to his references to the idea of essentially contested concepts, Hart also repeatedly refers to Dworkin's two dimensions of fit and substance.[116] This reference is less significant because these ideas are to be found referred to *in extenso* in Dworkin's later work. However, because these two dimensions are so underplayed in his earlier work and even in some of his later work,[117] Hart's references are to be welcomed and, indeed, would have become even more significant (as has been submitted is the case with his references to the idea of essentially contested concepts) had Dworkin not referred to the two dimensions in full-blown form in his very latest work on adjudication.[118]

What, then, of Hart's own conception of limited or interstitial law-making? It is suggested that there are at least a couple of broad problems. First, Hart's conception does not provide us with any substantive criteria. Indeed, the basic thrust of Hart's argument appears to be that there are no real objective criteria but that this is permissible because such instances would be rare, occurring only in "hard cases".[119] This leads to a second (and related) problem: what if "hard cases" are not really as rare as Hart makes them out to be? To be sure, there are a great many instances where it could be argued that the legal situation in question is an "easy" one,[120] but what if "hard cases" in the penumbra occurred with a certain degree of regularity? Certainly—and at the other end of the spectrum—Critical Legal Scholars would argue that virtually every case is "hard" inasmuch as they would inevitably involve subjective political value choices on the part of the judges concerned. If, indeed, the "hard case" is more

[113] (n 107) 393–394 (emphasis in the original text). But cf Guest (n 99).
[114] (n 107) 394–395.
[115] Though see Perry "Contested concepts and hard cases" 1977 *Ethics* 20.
[116] See Hart 253, 263, 268, 269, 271. See also Hart *Essays on Bentham* (1982) 147–148.
[117] As to the latter, see *A Matter of Principle* (1985) 407–408, n 5; the significance is that the two dimensions of fit and substance are discussed only in an endnote, rather than in the main text itself.
[118] *Viz Law's Empire* (1986).
[119] (n 85).
[120] But *cf* the problem of application, as to which, see the discussion above.

the rule than the exception, how then are we to account for the *legitimacy* of law, especially in the eyes of the public? Much more research obviously needs to be done. It is interesting to note, in this regard, that Dworkin has apparently dispensed with the distinction between "hard" and "easy" cases in his latest work, his theory applying to "easy" cases as well.[121] This is not surprising since Dworkin advocates a *general theory* that ought therefore to be applicable across-the-board. However, it is suggested that it is precisely because Dworkin relies on an *objective* conception of law that he is able to dispense with the distinction. As we have just seen, Hart's approach is quite different, since he does not premise his views with regard to judicial discretion on an holistic objective theory; indeed, the cases which merit the exercise of judicial discretion must, in his view, be rare, occurring in truly "hard cases", although (as we have also just seen) this view might be overly optimistic. As just mentioned, much more research and analysis is required, and it is further suggested that insofar as the important concept of legitimacy is concerned, *interdisciplinary* studies are necessary; in particular, recourse must be had to psychology. As already mentioned, however, there are many potential problems in interdisciplinary research, although there would appear to be no other feasible way forward.[122]

Turning to Hart's treatment of the twin objections, Dworkin raises (with regard to judicial law-making) from democracy and fairness, it is submitted that Hart's arguments do not, with respect, really meet the objections concerned. This is, perhaps, not surprising since they occur in the very last portion of the "Postscript" and could possibly have been further elaborated upon had Hart been alive to undertake the task. Nevertheless, Hart's reply to the argument that judicial law-making is undemocratic since judges are not elected officials, whilst practical, can only hold good if "hard cases" are truly rare. This, as we have just seen, may in fact be a problem. Hart's reply to Dworkin's argument from fairness, which has already been quoted,[123] is also too broad. The persuasiveness of his reply depends on whether we accept Dworkin's arguments to begin with. Crucial to his reply is the assumption that there is no objective basis to decide "hard cases". I would think that this is correct, but there is, unfortunately, no knockdown argument as such that may be prayed in aid to combat (in the main) Dworkin's reliance on the idea of essentially contested concepts.[124]

It is clear, however (and turning to the second version of the opening argument of this part of the "Postscript" on judicial discretion), that Hart believes his position to be the same as Dworkin's, especially after the publication of the latter's latest work.[125] I have ventured to suggest elsewhere that this was in fact the case right at the outset of Dworkin's critique of Hart advanced many years ago.[126] Again, whether Hart is correct in perceiving this convergence between his and Dworkin's (latest) views depends on whether or not interpretation is premised on an objective basis in law. And this brings us back full circle: in particular, to the idea of essentially contested concepts.

[121] *Law's Empire* (1986) 266 354.
[122] (n 38).
[123] (n 97).
[124] *Cf* Phang (n 107) 394–395.
[125] Principally *Law's Empire* (1986). And see nn 100–102 and the accompanying main text.
[126] (n 107) especially 396–397.

Conclusion

The "Postscript" in this second edition of *The Concept of Law* has a bitter-sweet ring to it. To the extent that it could have been made more complete, we are that much the poorer. To the extent, however, that it raises new arguments and issues, it is (as would be expected) a substantive contribution to Anglo-American jurisprudence. Opinions will undoubtedly vary but, for what it is worth, the present writer would venture to suggest that one of the main arguments that requires much more thought and analysis is Hart's claim to a descriptive jurisprudence.[127] This particular argument is vital to many of the various areas of dispute with Dworkin that Hart considers: in particular, the conceptual separation of law from morality. Welcome, also, is Hart's confirmation of changes in views, in particular, with regard to the nature of the internal point of view. His more specific critiques (for example, of Dworkin's conception of rules) are also effected in characteristically perceptive and incisive fashion, utilising, in the main, the method of linguistic and analytical philosophy for which he has become justly famous. However, a great many questions remain to be answered: in particular, the precise nature of limited or interstitial law-making advocated by Hart himself. But—and to end on a more personal note—it was a sheer delight to peruse, once again, profound ideas set out so simply, yet eloquently, by a true master of his craft.

SAMEVATTING

THE CONCEPT OF LAW WEER IN OËNSKOU GENEEM

Die bekende regsteoretikus, Hart, is in 1993 oorlede. Tot en met sy afsterwe het hy aan 'n nuwe hoofstuk van 'n tweede uitgawe van sy bekende publikasie, *The Concept of Law* (1961) gewerk. Na sy dood is die tweede uitgawe redaksioneel versorg en is dít wat van die nuwe hoofstuk voltooi was, as 'n "Postscript" tot die oorspronklike *Concept* gevoeg. In hierdie bydrae word inleidend kommentaar gelewer op die belangrikste vraagstukke wat Hart in die "Postscript", by wyse van 'n antwoord op sy kritici en dan veral Dworkin, aanraak. Hierdie vraagstuk sluit in die "internal point of view", die aard van (Hart se) regspositiwisme, die aard van en verhouding tussen reëls en beginsels van die reg in die regsprekende proses, die verhouding tussen reg en moraal en die rol van diskresie in die regsprekende proses. Die skrywer meen dat die sukses van Hart se antwoorde op sy kritici grootliks afhang van die leser se oordeel oor Hart se aanspraak dat sy regsleer bloot *beskrywend* van aard is.

[127] Though Hart did refer to this prior to the "Postscript" (n 19).