HART AND THE CONCEPTS OF LAW

Ronald Dworkin[*]

Replying to Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)).

Professor Frederick Schauer's review of Professor Nicola Lacey's recent biography of H.L.A. Hart[1] ignores the personal issues in Hart's life on which other reviewers have focused to offer some highly interesting comments on the state of jurisprudence in Anglophone law schools. He suggests, first, that though Hart benefited the subject by making it more philosophical, one unfortunate consequence of that shift is the impoverishment of the empirical side of jurisprudence; second, that jurisprudence since Hart has been dominated by adjudication, in which he had little interest, at the expense of Hart's most important insight; and, third, that an important difference exists between the normative arguments that Hart's earliest arguments deployed and the purely descriptive and analytic arguments he later came to favor.

I. PHILOSOPHY AND THE SOCIAL SCIENCES

Professor Schauer tells the following story: Before Hart published his most influential book, *The Concept of Law*, jurisprudence courses were often taught by non-philosophers (like Arthur Goodhart, Hart's predecessor in the Chair of Jurisprudence at Oxford, and Lon Fuller, who taught jurisprudence for many years at Harvard). They wrote and taught with a lawyer's sense of craft and common sense. Hart changed that tradition by bringing to legal theory the techniques of ordinary language philosophy which then dominated philosophy at Oxford and by carefully avoiding any empirical issues that his theories might have been thought to raise. In consequence, Schauer thinks, later legal theorists have thrown themselves into abstract philosophy and neglected empirical research and the ordinary facts of legal life.

Schauer exaggerates the extent to which most courses in jurisprudence have become courses in technical philosophy and also the extent to which Hart is responsible for such philosophical character as the

[*] Frank H. Sommers Professor of Law, New York University Law School and Jeremy Bentham Professor of Law, University College, London.

[1] Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)).

subject now has. It is true that a few professors of jurisprudence in English-speaking law faculties confine themselves to analytical issues of the kind that Hart took up in *The Concept of Law*. But it hardly follows that "Hart's effort to make jurisprudence into a philosophical field has succeeded far beyond what he reasonably could have expected"[2] or that he "at times unintentionally" drove "historical jurisprudence, economic jurisprudence, and many others" out of the subject.[3]

Contemporary jurisprudence courses differ wildly in content. Students may encounter political science, legal history, economic analysis, critical political theory, social anthropology or any of many other disciplines that can illuminate law. There is no single subject, technique or canon. While philosophy is certainly prominent, the ordinary language philosophy that Hart practiced appears less often than political and moral philosophy and technical philosophy of language — techniques which supplanted Hart's style even during his Oxford days, and in which he regretted his lack of training. Moreover, empirical social science is thoroughly represented not only in jurisprudence classes but throughout the legal curriculum. Economic analysis now dominates the teaching of private law as well as much public law; constitutional law has increasingly become a forum for both political science and political history, and sociology and psychology are at the center of much criminal law research. Any absence of social science from legal theory can hardly be the consequence of Hart's choosing, more than four decades ago, to write about particular issues that he thought were conceptual, not empirical.[4]

II. Adjudication and the Theory of Law

Hart's *The Concept of Law* is now read, Schauer says, as a theory about how judges should decide cases. But that reading, Schauer thinks, is seriously mistaken: the book is full of rich if unsystematic insights about the character of law but it is not a treatise on adjudication. Schauer says that it "would be difficult to overestimate" my own responsibility for that misreading.[5] I used Hart's book as a foil for my

---

[2] *Id.* at 862.

[3] *Id.* at 868–69.

[4] Schauer cites, as an example of Hart's disinterest in practical matters, Hart's statement that he was trying to understand the perspective not of Oliver Wendell Holmes's "bad man," who cares only about whether he will be punished, but of the "puzzled man," who wants to know what the law really is. *Id.* at 872. Schauer thinks that Hart's focus would be odd if research revealed that most people are like the "bad" rather than the "puzzled" man. *Id.* But since Hart's subject was how we are to decide what the law permits or requires, which he thought a conceptual matter, he of course imagined people for whom that question is important. No results of empirical research about the number of such people could jeopardize that focus.

[5] *Id.* at 877.

own views about adjudication and in that way persuaded a generation of legal philosophers to take up a question that is understandably of great concern to lawyers in America, where adjudication plays an important part in politics, but that was not important to Hart. My error was not in attributing an inadequate theory of adjudication to him, but in supposing that he had any substantial theory of adjudication at all. As a result of my contagious error, the genuinely important aspects of Hart's argument — in particular his remarkable insight that law is a system comprising primary rules, which impose rights and obligations, and secondary rules, which designate which primary rules are valid and empower officials to change these — have been unjustly neglected, so much so that it cannot be said that his substantive theories have had "lasting significance."[6]

This highly provocative account is nevertheless mistaken, for a revealing and important reason.[7] Like many other contemporary legal positivists, Schauer distinguishes between theories of adjudication — how judges should decide cases — and theories of the very nature of law which, he supposes, is a different matter.[8] He fails to notice, however, an important ambiguity in the idea of a theory of law, the baleful consequences of which I explore in a new book, *Justice in Robes*, and can only partially summarize here.[9]

We must take care to distinguish two questions, both of which might be described as questions about the nature of law. The first is sociological: what makes a particular structure of governance a legal system rather than some other form of social control, such as morality,

---

[6] *Id.* at 853.

[7] My other quarrels with this part of Schauer's argument are much less important. For instance, his discussion of the geographical range of legal theories and his characterization of the limited scope of my own claims, *see id.* at 860 n.23, is too crude a treatment of a complex subject. *See* RONALD DWORKIN, JUSTICE IN ROBES (forthcoming Apr. 2006) (manuscript at ch. 8, on file with the Harvard Law School Library) [hereinafter DWORKIN, JUSTICE IN ROBES]. His comments about the distinction I made long ago between principles and rules, *see* Schauer, *supra* note 1, at 873 n.69, are also mistaken. As he suggests, that distinction does not play any important role in my early or later arguments critical of legal positivism; these arguments would not be affected if the distinction were, as he says, spurious. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 71–72 (1977). But I did not say that rules are "precise" while principles are "vague." Rules containing words like "reasonable" are hardly precise, and principles are as likely to be abstract as vague. *See id.* chs. 2–3. He is also wrong in offering, as a counterexample to what I say about the brittleness of rules, that police officers may overlook speeding violations in emergencies. A policeman's decision not to enforce a rule is very different from a decision that the rule has no legal force in the circumstances.

[8] Among the other scholars Schauer cites who insist on that distinction is Professor Joseph Raz. *See* Schauer, *supra* note 1, at 876 n.81; *see also* DWORKIN, JUSTICE IN ROBES, *supra* note 7 (manuscript at ch. 8) (discussing Raz's elision of sociological and doctrinal issues). Schauer does say that a theory of law is perhaps defective unless it is joined to a theory of adjudication, *see* Schauer, *supra* note 1, at 860–61 & n.24, but his argument depends on supposing a difference between the two kinds of theories.

[9] *See supra* note 7.

religion, force, or terror? The second is doctrinal: what makes a statement of what the law of some jurisdiction requires or permits true? The two questions are interconnected but their differences are of capital importance. The sociological question has neither much practical nor much philosophical interest. The doctrinal question, on the contrary, is a question of enormous practical and considerable philosophical significance. The sociological question has very little to do with adjudication; the doctrinal question, if not answered skeptically, has everything to do with it. Schauer thinks that Hart's book is an answer to the sociological question. "To read *The Concept of Law*," he says, "is to encounter a[n] . . . account of many of the characteristics of legal systems and legal rules that help to differentiate law from other mechanisms of social control and other determinants of human behavior."[10] That explains why he thinks that the book is only marginally concerned with adjudication. In fact, however, Hart offered interconnected answers to both the sociological and the doctrinal questions, and his answer to the latter is more original and much more important.

The sociological question uses what we might call the sociological concept of law: it refers to law as a kind of social institution. That concept is vague: it has no precise or settled boundaries in ordinary language. We agree that Massachusetts has a legal system but we disagree about whether to call customary commercial practices enforced only by commercial sanctions a form of legal regulation or whether to call a frozen set of rules with no legislative or enforcement mechanisms a legal system. These are verbal not substantive disagreements. Social scientists, of course, need more precise definitions of law for their research and therefore stipulate what they believe to be illuminating definitions for that purpose. It would be a mistake, however, to treat these definitions as attempts to excavate the very concept of law in the sociological sense or to capture the essence of legal systems and structures. Legal systems are not natural kinds, like bismuth and centipedes, that have essences. They are social kinds: to suppose that law has an essence is as much a mistake as supposing that marriage or community has an essence. Some legal theorists have made that mistake, however, debating abstract questions such as whether a wicked regime constitutes a legal system and whether international "law" is really law. We can speak either way on all these issues, properly saying, for example, either that Nazi Germany had law though it was very bad law or that because its law was so bad it was not really law at all. Nothing turns on which way we speak so long as we make

---

[10] Schauer, *supra* note 1, at 880.

plain what further point we wish to make in speaking that way.[11] So the issue as traditionally posed has neither practical consequence nor philosophical interest.[12]

The practical importance of the doctrinal question, on the other hand, is obvious. Judges and other political officials justify decisions of great consequence by citing propositions of law — say, that a certain act constitutes a breach of contract or that the president has authority to detain suspected terrorists without trial. It obviously matters very much whether any such proposition is true, and therefore what test should be used in determining its truth. The philosophical depth and interest of the question are also apparent, I hope. Are propositions of law even candidates for truth or falsity? If so, what makes them true? Are propositions of law, in the end, only social facts about the behavior of political officials? Are they only reports, that is, of what officials have done in the past? Or can the truth of a proposition of law also depend, at least sometimes, on the truth of moral principles or claims? If so when and in what way? These questions about law are targeted formulations of much more general issues in moral and political philosophy, metaethics, the philosophy of language, and the theory of truth and they cannot be adequately considered without taking up positions, self-consciously or not, about those larger philosophical issues.

Schauer says that I have myself concentrated on the question of how judges should decide cases. He must mean that I have concentrated on the doctrinal question about the nature of law, which I have. His description is not misleading.[13] Courtrooms symbolize the practical importance of the doctrinal question and I have often used judicial decisions both as empirical data for and illustrations of my doctrinal claims. (I have, however, tried to make clear that many people other than judges must worry about the doctrinal question. The question is

---

[11] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 7 (manuscript at introduction); *see also* RONALD DWORKIN, LAW'S EMPIRE 104–08 (1986).

[12] On rare occasions the choice might seem important but this is because the choice raises moral not conceptual issues. If the courts of a post-revolution nation try the officials of the former government, those courts might suppose that it matters whether those officials acted as sanctioned by a legal system not because a legal system has an essence but because the fairness of punishment in that situation depends, among other things, on whether people are morally entitled to rely on immunities provided by a nakedly unjust system of governance. In other special contexts — when it must be decided whether contracts entered into under an earlier political regime are binding later, for instance — the question whether the earlier regime's edicts counted as law also depends on background moral issues, but different ones. It would make perfect sense to suppose that the officials of a prior tyranny have no immunity but that contracts made under that tyranny are valid.

[13] Except, perhaps, when he says that I have explored "the interplay between legal and non-legal sources" in adjudication. Schauer, *supra* note 1, at 878. I do not know what distinction between "legal" and "non-legal" he has in mind here. Perhaps it is the issue I call "taxonomic," and suggest is of no importance, in DWORKIN, JUSTICE IN ROBES, *supra* note 7 (manuscript at introduction, ch. 8).

crucial for a law student taking an examination, for example, or for a congressman deciding how to vote on legislation or for a conscientious president deciding how to act in secret.) But Schauer's way of describing my work does reveal why he has misread Hart's book so seriously: he has wrongly concluded that because Hart does not much discuss how judges decide cases he does not have a theory of the doctrinal concept of law.

Hart found the key to the nature of law in his claim that law is a union of primary and secondary rules. That structure does not distinguish legal systems from other institutions — organized sports, for instance. Nor is it conceptually or linguistically improper to call some sets of practices that lack that structure, as might the enforced customs of a primitive society, "legal systems." But Hart was right to think that the combination of first-order standards imposing duties and second-order standards regulating the creation and identification of those first-order rules is a central feature of paradigmatic legal systems. His emphasis on this structure was not itself remarkably original. Wesley Newcomb Hohfeld's 1919 book *Fundamental Legal Conceptions* laid out the important logical distinctions on which Hart's account rested,[14] and many other earlier legal philosophers — including, most notably, Hans Kelsen — also stressed the importance of the systematic organization of a legal system.[15] Hart's distinctive contribution was his claim that in paradigmatic legal systems the most fundamental secondary rule or set of rules — the complex standard for identifying which other secondary and primary rules count as law — has that force only through convention. He said that the "rule of recognition," as he called this fundamental set of secondary standards, is certified for that role by social practice alone.[16]

Hart's argument for that distinctive claim depended hugely on his mistaken conviction that social practice is the source of *all* obligation, moral as well as legal. (He later acknowledged that this was indeed a mistake.[17]) But it is crucial for the present point to see that Hart's claim, correct or mistaken, is as much a doctrinal as a sociological claim; it is as much an answer to the second question I distinguished as to the first. He insisted that no proposition of law is true — or, in the language he preferred, "valid" — unless a rule making it true has been created or identified in the manner stipulated by a social convention accepted by at least the bulk of legal officials of the pertinent community. His discussion of the connection between convention and

---

[14] WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919).

[15] *See* Schauer, *supra* note 1, at 870 n.63.

[16] H.L.A. HART, THE CONCEPT OF LAW 110 (2d ed. 1994).

[17] *Id.* at 255.

validity is hardly cursory: on the contrary it is the whole point of his complex argument about primary and secondary rules. It is therefore a serious misunderstanding to say that Hart has no genuine theory of adjudication. His theory of validity, the heart of his book, *is* a theory of adjudication.[18]

It is not the whole of a theory of adjudication, of course, in part because (at least according to some legal philosophers, including Hart) judges sometimes confront cases in which no true proposition of law requires a decision either way and they must then find some other way to decide. Nor is my own account of the truth conditions of propositions of law the whole of a theory of adjudication because I allow that, in extreme cases, judges should ignore true propositions of law. But Hart's account, like my own, is certainly the core of a theory of adjudication not only because he assumed that most legal issues are controlled by valid legal rules but also because his theory purported to identify those cases in which the issues are not so controlled. Some statements of the sociological concept of law — particularly those developed by social scientists to facilitate research or insights into legal practice — have very few implications for adjudication. Indeed, these are often most useful because they do not have such implications. But the distinction between a theory of law and a theory of adjudication is useless in Hart's case because his analysis of the sociological concept includes an analysis of the doctrinal one. The master convention he imagined is a convention not just about what should be called valid law but also about how legal officials should act. Schauer also says that Hart was not particularly concerned to defend legal positivism in *The Concept of Law*; Hart, he says, did not even use the word "positivism" for 176 pages of his book.[19] But Hart's theory of validity is plainly a positivist answer to the doctrinal question and it seems irrelevant how often he used the word as a name for that answer.

In a draft of a long Postscript to *The Concept of Law* that he had been working on and constantly revising for many years at the end of his life (it was published posthumously in a second edition of the book) Hart did say that I had misunderstood him in some respects and also that his and my projects were too different to suppose that we were in conflict about anything important.[20] I am not persuaded that Hart would have wanted the draft to be published: Professor Lacey refers to it as a "tragedy" and notes that "scholars are divided in their view of whether it enhances Herbert's reputation."[21] In any case, nothing in

---

[18] For a more detailed account of the connection between doctrinal and adjudicative theories, see DWORKIN, JUSTICE IN ROBES, *supra* note 7 (manuscript at introduction).

[19] *See* Schauer, *supra* note 1, at 876.

[20] HART, *supra* note 16, at 241, 246.

[21] LACEY, *supra* note 1, at 353.

the Postscript supports Schauer's claim that I attributed to Hart an adjudicative theory he did not hold. Hart said that I misunderstood him in thinking that his arguments about the concept of law were grounded in an ordinary language analysis of the circumstances in which lawyers recognize rules of law as valid and his disciples have frequently echoed that charge (though in my view without supporting it).[22] Schauer seems to agree with me, however, as have other legal philosophers, that Hart's original 1961 arguments were indeed drawn from the linguistic philosophy then popular in Oxford and that his Postscript disavowal was a change of heart.[23] In any case this controversy does not bear on the question of whether Hart embraced the theory of adjudication that I criticized.

Hart also said in his Postscript that our projects were different and could not conflict because he aimed only to describe how lawyers reason about law whereas I offer a normative account of legal reasoning. I explain elsewhere why the Postscript's description of his earlier ambitions must be mistaken: he had earlier taken a stand not on what most lawyers take legal validity to be, which is an empirical question, but on what legal validity really is, and that is exactly the normative question I also confronted.[24] Lacey tells us, moreover, that Hart arrived at this position only as a last resort, which he referred to in his notes as a "new approach," after many years of assuming that our views were in conflict and struggling to find an adequate way to respond to my criticism.[25] (Indeed, according to Lacey, Hart had expressed "considerable anxiety about the implications of [my] views for the arguments of *The Concept of Law*" as early as 1955, six years before that book was published.[26]) She adds that his ultimate no-conflict solution "is superficially attractive but ultimately not entirely satisfactory."[27]

---

[22] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 7 (manuscript at ch. 7).

[23] As Schauer notes:

> Like his philosophical colleagues of the time, he examined ordinary usage closely for the distinctions it embodied and rigorously analyzed and defined the terms used to mark legal concepts. . . . [Hart's] claim of doing descriptive sociology most likely refers to the empirical dimensions of ordinary language philosophy, in which perceptive observation of the distinctions embedded in language enables the observer to draw conclusions about nonlinguistic phenomena.

Schauer, *supra* note 1, at 859–60.

[24] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 7 (manuscript at ch. 6).

[25] LACEY, *supra* note 1, at 351.

[26] *Id.* at 185–86.

[27] *Id.* at 351.

III. CAN A DOCTRINAL THEORY BE ONLY DESCRIPTIVE?

One troubling consequence of the no-conflict claim that Hart introduced late in his reworkings of the Postscript draft, as Lacey notes, is that

> in focusing his argument on the representation of his own theory as entirely descriptive, he was turning his back on an insight which had been powerfully defended in his own early work — though one which had rather dropped out of sight in his later writings. This was the argument . . . that there was a strong moral case for espousing the inclusive positivist conception of law according to which even morally unappealing standards may count as fully valid legal rules.[28]

Schauer agrees that Hart radically changed his position in switching from his defense of legal positivism in his 1957 debate with Fuller, which rested finally on normative instrumental and moral claims, to his later position, most uncompromisingly stated in the Postscript, that his arguments for a positivist answer to the doctrinal question were only matters of description. Schauer adds that in his view "Hart got it right the first time around."[29] I agree.

One of the most important methodological disputes in contemporary legal philosophy recapitulates that disagreement between the early and later Hart. Can an adequate answer to the crucial doctrinal question, about the truth conditions of propositions of law, be only a description of what other people think or do? Or must it be grounded in the theorist's own moral or political convictions? I have argued for the second view. I suggested how legal positivism could be defended in that second way in *Law's Empire*,[30] and I elaborate that defense of positivism in *Justice in Robes*.[31] I am therefore cheered that so many of the most prominent contemporary legal philosophers also take the second view. Professor Jeremy Waldron, in his excellent account of what he calls "ethical" positivism, lists several prominent positivists who accept that positivism must be defended as a moral theory, including Professors Gerald Postema, Tom Campbell, and Neil MacCormick.[32] We might add to that list Professor Liam Murphy[33] and

---

[28] *Id.*

[29] Schauer, *supra* note 1, at 864 n.34.

[30] *See* DWORKIN, *supra* note 11, ch. 4.

[31] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 7 (manuscript at ch. 6).

[32] *See* Jeremy Waldron, *Normative (or Ethical) Positivism*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 410 (Jules L. Coleman ed., 2001). Waldron's designation of MacCormick as a positivist is now no longer appropriate. *See* NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW 1 (2005).

[33] *See* Liam Murphy, *The Political Question of the Concept of Law*, *in* HART'S POSTSCRIPT, *supra* note 32, at 371.

Schauer[34] himself. Prominent non-positivists who insist that their own theories of law are normative include Professors David Dyzenhaus[35] and Stephen Perry.[36] For all these philosophers, political philosophy rather than Hart's ordinary language philosophy is central to the analysis and understanding of the doctrinal concept of law.

---

[34] *See* Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005).

[35] *See* David Dyzenhaus, *Positivism's Stagnant Research Programme*, 20 OXFORD J. LEGAL STUD. 703, 715 (2000); David Dyzenhaus, *The Legitimacy of the Rule of Law* (N.Y.U. Sch. of Law Colloquium in Legal, Pol., & Soc. Phil., 2005), *available at* http://www.law.nyu.edu/clppt/program2005/readings/legallegit2.pdf.

[36] *See* Stephen Perry, *Associative Obligations and the Obligation To Obey the Law*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN (Scott Hershovitz ed., forthcoming Aug. 2006) (on file with the Harvard Law School Library); Stephen R. Perry, *Hart's Methodological Positivism*, *in* HART'S POSTSCRIPT, *supra* note 32, at 311.