Why Law Might Emerge:
Hart's Problematic Fable (2013)

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Why Law Might Emerge: Hart's Problematic Fable

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Chapter V is the 'Eureka!' chapter of *The Concept of Law*.[1] It reveals, in outline, Hart's proposed new 'key to the science of jurisprudence.'[2] By Hart's restrained standards, the chapter moves at a spirited pace. It covers a lot of ground and throws up numerous difficulties, to some of which Hart returns in later chapters but many of which lie where they fall. A vast and excellent critical literature has grown up around them. It would be impossible, within the confines of this essay, to trawl through all of the philosophical riches that chapter V has left in its wake. We need to focus, alas, on just a small part of its vast legacy.

In what follows I will focus on the final eight-page section of the chapter, which Hart calls 'The Elements of Law'.[3] This is where the chapter's title - 'Law as the Union of Primary and Secondary Rules' - crystallises into a thesis. In a legal system, claims Hart, 'primary rules of obligation' are conjoined with 'secondary rules of recognition, change, and adjudication'.[4] My focus here will not be on the thesis itself, tempting though it is to revisit some of its many intricacies and obscurities. My focus will instead be on the argument that Hart runs, in chapter V, to give

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[1] H.L.A. Hart, *The Concept of Law* (Oxford 1961, 2nd ed 1994). Page references below are to the second edition, abbreviated *CL*.

[2] *CL*, 81.

[3] *CL*, 91-9.

[4] *CL*, 98.

the thesis its prima facie plausibility or appeal. I say 'prima facie' because Hart goes on, in chapter VI and beyond, to make arguments for the thesis that are of greater philosophical moment. Nevertheless it is the prima facie argument in chapter V that is the most engaging and the best-known. It has caused a great deal of trouble. I hope to explain and perhaps mitigate some of the trouble.

1. Hart's fable of law's genesis

Hart's prima facie argument uses what Peter Hacker calls the 'genetic-analytic method'.[5] It attempts to alert us to some features that characterize a legal system by having us reflect on how and why such a system, meaning a system with such features, might emerge. It is important to emphasise the 'might'. Hart's story is a fable, an imaginary tale of the birth of a possible legal system. He does not care, and has no reason to care, whether this is how actual legal systems in general emerge, or whether even one legal system has ever so emerged. Nor does he care, or have reason to care, whether the 'pre-legal'[6] conditions that he presents as obtaining at the start of the story, before law emerges, have ever obtained anywhere. As Hacker says:

> [T]his revealing analysis is not a piece of armchair anthropology, but is conceptual analysis. We are asked to envisage a purely notional situation in order to perceive what crucial features characterize our own complex situation, and to understand the structure of the concepts with which we describe it.[7]

[5] P.M.S. Hacker, 'Hart's Philosophy of Law' in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford 1977), 1 at 11.
[6] *CL*, 94.
[7] Hacker, 'Hart's Philosophy of Law', above note 5, 12

Hacker emphasises 'the key notions ... of rules reasons, and justifications' in terms of which Hart would have us understand the 'structure' of the concept of law. But one of the abiding attractions of Hart's book seems to be that it has many more 'key notions' than this, and perhaps none that are its master-keys. *The Concept of Law* might indeed be the exemplar that Peter Strawson has in mind when he commends the reorientation of philosophy from the 'reductive' to the 'connective':

> Let us abandon the notion of perfect simplicity in concepts; let us abandon even the notion that analysis must always be in the direction of greater simplicity. Let us imagine, instead, the model of an elaborate network, a system, of connected items, concepts, such that the function of each item, each concept, could ... be properly understood only by grasping its connections with the others ... . If this becomes our model, then there will be no reason to be worried if, in the process of tracing connections from one point to another of the network, we find ourselves returning to, or passing through, our starting-point.[8]

Locating the idea of law in a network of other ideas (rule, reason, justification, obligation, power, official, practice, habit, sanction, attitude, system, and many more) is one way to understand Hart's 'elucidatory' ambition in *The Concept of Law*.[9] For this purpose, as Hacker says, the 'genetic-analytic method' offers 'great expository advantages'.[10] Most obviously, we can exhibit the conceptual web by weaving it from small beginnings. There may no longer be a master-thread once the web exists. Everything may come to depend, in one way or another, on everything else. But one way to see how the web holds together is to imagine its inception, to look for a possible *first* thread.

[8] P.F. Strawson, *Analysis and Metaphysics* (Oxford 1992), 19.
[9] 'Elucidation' is the word that Hart often uses to describe what he is doing: e.g. *CL*, 17, 123, 202. It is also the name that Strawson gives to his kind of 'connective' analysis: *Analysis and Metaphysics*, above note 8, 19.
[10] Hacker, 'Hart's Philosophy of Law', above note 5, 11.

Yet Hart also has a more specific reason for choosing the 'genetic-analytic method' to set up his thesis in chapter V. As revealed in his discussion of rulers Rex I and Rex II in chapter IV,[11] there is a large metaphysical problem about law, a problem about the very possibility of law, which can reasonably be presented as a problem of genesis or poïesis. If law is made by human beings, then those human beings need to be somehow accredited as the ones who are qualified to do the law-making. Accrediting them as law-makers seems to be itself a job for the law and the law alone. Each law-maker is accredited by some law, which, ex hypothesi, must have been created by an already accredited law-maker, who must have been accredited by a further law, which must have been created by a further, already accredited law-maker, and so on until we reach constitutional law, where we find the accreditations for the top tier of law-makers. Or do we? Why stop there? There must surely be some human beings accredited as the ones qualified to make the constitution, and thus some even more ultimate law which accredits them to do so. And so it goes on. Each time we think we have reached the ultimate law accrediting the top tier of officials, we are faced with the thought that there must be some even more ultimate law accrediting an even higher tier of officials, or else the officials before us are unaccredited.

Although this problem is not strictly speaking one about how law came into being – it is strictly speaking a problem about the identification of *currently ultimate* laws rather than *historically first* laws – it can be vividly represented in genetic terms. That is how Scott Shapiro represents it in recent work when he calls it a 'chicken-egg' problem.[12] It is also how Hart represents the problem in his chapter V fable. He is using the 'genetic-analytic method' not only for its wider expository advantages, but also for

[11] Especially *CL*, 58-66.
[12] Shapiro, *Legality* (Cambridge, Mass. 2011), 39ff.

the specific expository advantages it affords in foregrounding this metaphysical problem about law. How is law possible? How can it ever conceivably get off the ground?

The final pages of chapter V do not spell out Hart's solution to this problem. That comes only in chapter VI. But the solution is already more than hinted at in his fable, so we are well-prepared for it when it comes. The solution will be found in the realm of custom, in the realm of rules that are made by their use over time and across a certain population.[13] In chapter VI it will turn out that the relevant custom, the one that endows a legal system with an ultimate 'rule of recognition' by which its highest tier of officials are accredited, is a custom of the same officials that it (the custom) accredits as officials, or at any rate of some of them. But from where we stand right now, all of that still lies ahead. In chapter V it is foreshadowed by Hart's tale of an imaginary world in which there are, at the outset, *only* customary rules. They are what he calls 'primary rules of obligation'. In time, 'secondary' rules emerge 'specify[ing] the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.'[14] At this later stage custom cannot but annoint some people as proto-officials. They are the ones charged with

[13] Hart does not use the word 'custom' in telling his chapter V fable 'because it often implies that the ... rules are very old and supported with less social pressure than other rules,' implications that he wants to avoid. *CL*, 91.

[14] *CL*, 94. Hart's use of the labels 'primary rule' and 'secondary rule' is notoriously tricky. At the beginning of chapter V one has the impression that primary rules are obligation-imposing, whereas secondary rules are power-conferring (*CL*, 81). By the end of the chapter, however, it emerges that the contrast Hart has in mind must be more complex. All power-conferring rules are secondary rules, but not all secondary rules are power-conferring. The class of secondary rules also includes those obligation-imposing rules that share with all power-conferring rules the property that they regulate the operation of other rules. Hart's improved characterisation of a secondary rule is at *CL*, 94. A secondary rule, he says, is a rule 'about' other rules.

doing the conclusive ascertaining, introducing, eliminating and so on. By their own customs of ascertainment, introduction, elimination, and so on, an emerging officialdom presides over what is by now beginning to take shape as a *system* of rules – giving us, says Hart, 'the heart of a legal system.'[15] In what sense a system? The rules no longer form 'just a discrete unconnected set'.[16] Mechanisms exist for identifying and using the rules of the set, themselves regulated, reflexively, by rules of the set.[17]

Hart brings all of this alive in his fable by telling us not only how, but also why, it takes place. How could he tell it as a story without filling in the whys as well as the hows? He portrays a population struggling with certain 'defects' that afflict their use of primary rules unsystematized by secondary rules. We are led to imagine the world that they inhabit getting more populous and more socially complicated. Under these conditions the primary rules become increasingly hard to ascertain (the problem of uncertainty) and increasingly in need of updating to deal with changing conditions of life (the problem of stasis). Increasingly they also give rise to wasteful struggles over their alleged violation and its consequences (the problem of inefficiency). Secondary rules of recognition emerge to tackle the uncertainty, rules of change to deal with the stasis, and rules of adjudication to mitigate the inefficiency. Hart emphasises that these three types of secondary rules interdepend in numerous ways, so that their social functions cannot be quite so neatly segmented as this summary suggests.[18] Nevertheless, secondary rules of all three types come into being, perhaps one by one. And they come into being for one and the same reason: because, in the changing conditions portrayed in the fable, regulation by primary rules

[15] *CL*, 98.
[16] *CL*, 95.
[17] Cf *CL*, 95: once there is a rule o recogition
[18] *CL*, 96-7.

alone 'must prove defective'.[19] The secondary rules between them 'provide a remedy for each defect'[20] and in doing so take us by stages 'from the pre-legal into the legal world.'[21]

It is thanks to this narratively inevitable excursus into the 'why?' question that Hart's philosophical woes stack up. Here is the first woe, as expressed by Nicola Lacey:

> The fable of secondary rules of recognition, adjudication and change as emerging to 'cure the defects' of a system composed exclusively of primary rules carries, it has been argued, an implicit evaluation of other sorts of ... order ... as less advanced or civilized.[22]

Why is this a problem for Hart? Mainly because it conflicts with his own conception of his project in *The Concept of Law*. Here is his own (later) summary of what he was trying to do in the book:

> My account ... is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.[23]

Yet the chapter V fable does seem precisely to commend law as a step forward for 'primitive communities',[24] and it does so precisely by commending, if not on moral grounds then at any rate on 'other' grounds, certain 'forms and structures' that 'appear in [Hart's] general account of law'. As John Finnis explains:

[19] *CL*, 92.
[20] *CL*, 94.
[21] *CL*, 94.
[22] Nicola Lacey, 'H.L.A. Hart's Rule of Law: The Limits of Philosophy in Historical Perspective', *Quaderni Fiorentini* 36 (2007), 1203 at 1209.
[23] *CL*, 240 (in the posthumously published Postscript).
[24] *CL*, 91.

> [In chapter V] Hart argued that law should be understood as, centrally, a union of primary with secondary rules. … The latter are, he said, to remedy the defects of a set-up in which rules of the primary kind were unaccompanied by rules conferring powers to change them and adjudicate about their application - rules which although logically secondary are so important to a society that their introduction 'is a step forward' comparable to 'the invention of the wheel.' Talk about valuable amenities and steps forward cannot reasonably be described as normatively inert[25] [i.e. as not commending the amenities and steps].[26]

Doesn't it follow, as Finnis joins many others in pressing, that Hart fails in his attempt to provide a value-neutral explanation of law's nature? Isn't his an ideological venture after all, a defence of law as an answer to certain social ills? Some say that things are even worse than that. His is ideological propaganda dressed up, in a classic hegemonic move, as dispassionate reporting of some ineluctable truths.[27] Hart pretends that he is remaining aloof from the question of law's desirability when in fact he is stealthily marketing law as 'a Good and Necessary Thing'.[28]

Perhaps this most cynical of criticisms could be repelled by insisting that Hart attests to law's value, such as it is, only as a side-effect of explaining law's nature. He does not provide 'a

[25] Finnis, 'Law and What I should Truly Decide', *American Journal of Jurisprudence* 48 (2003), 107 at 120. Finnis's mention of 'valuable amenities' is intended to echo Hart's talk of 'huge and distinct amenities' (*CL*, 41).

[26] I have added the words in square brackets because 'normatively inert' is a technical expression that Finnis is borrowing from my 'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence* 46 (2001), 199 at 203. I hope my parenthetical does justice to what Finnis takes the expression to mean.

[27] See e.g. Malcolm Wood, 'Rule, Rules and Law' in Philip Leith and Peter Ingram (eds), *The Jurisprudence of Orthodoxy* (London 1988), 27 at 30-1; Brendan Edgeworth, 'H. L. A. Hart, Legal Positivism and Post-war British Labourism', *University of Western Australia Law Review* 19 (1989), 275; Peter Fitzpatrick, *The Mythology of Modern Law* (London 1992), ch 6; Roger Cotterrell, *The Politics of Jurisprudence* (2nd ed, London 2003), 94-5.

[28] A.W. B. Simpson, *Reflections on* The Concept of Law (Oxford 2011), 181.

general account of law' that is tailored, in some sinister way, to establishing law's value. He provides a general account of law free of such tailoring, thanks to which the value of law is incidentally brought out. Law, it turns out, has value; but Hart's account of its nature, its distinguishing features, does not depend on its having that value. That is clearly a possible way for someone's thought about law, or indeed about anything, to unfold. But it seems unlikely to be the way that Hart's thought unfolds in *The Concept of Law*. For Hart goes beyond the mere repudiation of justificatory aims. He also writes that 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.'[29] This is a claim, not about his own aims as an author, but about law itself. Those who idealise law by presenting it as a thing of value, even of just one value among many, get their 'general account of law' wrong.

This proposal only adds to Hart's woes where his chapter V fable is concerned. How can he avoid the claim that, in the fable, he is himself idealising law, and so, by his own lights, getting his general account of law wrong? Is it open to Hart, perhaps, to deny that the 'certain' values that his fable associates with law are moral ones, or at any rate that they add up to 'moral demands' of the kind that, as he puts it, laws need not 'reproduce or satisfy'?

Perhaps. The values ascribed to law in the chapter V fable seem to be, or at any rate to include, what are sometimes known as 'rule of law' or 'legality' values. In particular there is the value of certainty that is apparently embraced when Hart parades the rule of recognition as a rule for the mitigation of uncertainty (as establishing 'the proper way of disposing of doubts as to the existence of the rule').[30] There is also the value of finality that is apparently embraced, albeit in the name of efficiency, when Hart advertises the rule of adjudication as a way of curtailing dispute as

[29] *CL*, 185-6.
[30] *CL*, 95, emphasis removed.

to the application of the rules (as remedying the 'serious defect' which is 'the lack of official agencies to determine authoritatively the fact of violation of the rules').[31] Hart may well be reluctant to call such values 'moral' ones, or to think of them as making 'moral demands'. He has repeated and compound difficulties with the word 'moral' and its cognates.[32] Yet he has no apparent difficulty in referring to 'the requirements of justice which lawyers term principles of legality.'[33] And he agrees, it seems, that justice 'constitutes one segment of morality.'[34] So his chapter V fable does seem to commit him to embracing, as a 'necessary truth', that laws (or legal systems) automatically satisfy certain moral demands, namely at least some of the demands of justice that go to make up the ideal of the rule of law.

This is a very uncomfortable conclusion for Hart to reach, another woe heaped upon his woes. He famously resists Lon Fuller's arguments to the effect that, necessarily, a legal system substantially lives up to the ideal of the rule of law - or, putting it the other way round, that something that does not substantially live up to the ideal of the rule of law is not a legal system.[35] Yet in his fable in chapter V Hart appears to favour something like the Fullerian view. He appears to say that merely acquiring the three types of secondary rules by which to manage one's primary rules of obligation is both (a) necessary to acquire a legal system and (b) sufficient to meet certain (although not all) demands of the ideal of the rule of law. From which it follows - does it not? - that Fuller is on the right track: no legal system exists without the

[31] *CL*, 93-4.
[32] I documented some of them in 'Hart on Legality, Justice, and Morality', *Jurisprudence* 1 (2010), 253 at 261-5, a modified version of which now appears as chapter 9 of my *Law as a Leap of Faith* (Oxford 2012)
[33] *CL*, 207.
[34] *CL*, 167.
[35] Fuller, *The Morality of Law* (revised ed, New Haven 1969), 33-94.

rule of law. Can this possibly be Hart's position? Does his fable leave him any space to avoid it?

The philosophical stakes here are high. Ronald Dworkin insists on reading Hart's 'general account of law' in *The Concept of Law* as an interpretation (he calls it a 'conventionalist' interpretation) of the ideal of legality.[36] Hart resists this reading, not because he dislikes the conventionalist interpretation of the ideal of legality, but because he denies that he is interpreting the ideal of legality at all.[37] But if what Hart thinks of as his 'general account of law' is actually a commendation of law, and if the features in virtue of which law is commended are classic 'legality' features, such as certainty and finality, then how is the Dworkinian reading to be resisted? How, to unpack a point that Hart makes in chapter IX, can we continue to distinguish between *lex, Gesetz, legge, loi* (law) and *ius, Recht, diritto, droit* (law that has something going for it *qua* law)?[38] If the chapter V fable is taken as most readers naturally take it, law according to Hart always has something going for it *qua* law, and the distinction between his project as he sees it, and his project as Dworkin sees it, seems to ebb away. What can Hart say to maintain the difference between the two?

[36] Dworkin, 'Hart's Postscript and the Character of Political Philosophy', *Oxford Journal of Legal Studies* 24 (2004), 1 at 28, summarising a position staked out at length in *Law's Empire* (Cambridge, Mass. 2006). The 'conventionalist' position is explained in chapter 4 of *Law's Empire* and associated with Hart at 429 n 3. This note in turn refers back to a passage in 'A Reply by Ronald Dworkin', in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London 1984), at 255, where Dworkin relied on Hart's chapter V fable to assert 'the political basis of positivism'.

[37] *CL*, 248-50 (in the Postscript).

[38] *CL*, 208.

2. Some possible ways out

Hart has a number of possible ways to extricate himself from this mess without abandoning the 'genetic-analytic method' of his fable. I am going to list four of them. They are not rivals. They all free up some space between the mere acquisition of a legal system and the achievement of legality, or (in other words) between *lex* and *ius* as I just defined them. Together, indeed, they free up a great deal of space. Yet, as we will see, they are not all equally comforting in their other implications.

(i) Change of narrative perspective. It is necessary for Hart's fable to do its genetic-analytic work that some people in the 'pre-legal' civilization he describes should regard or experience their existing arrangements as defective. It is not necessary that they should be right to do so; maybe there are no such defects. It is also necessary that some people in the pre-legal civilization should think of the emergence of secondary rules (of recognition, change, and adjudication) as a possible remedy for the perceived defects. But again it is not necessary that they should be right; maybe these rules offer no help. To make his fable do its genetic-analytic work, Hart does not need to show that the development of a legal system is a *defensible* response to circumstances. He only needs to show that it is an *intelligible* response, that some people in the pre-legal world could conceivably come to think they have a problem to which the changes that Hart describes could conceivably be entertained as a possible solution. Hart could have pointed out at the end of the fable that, quite possibly, disappointment awaits. The new secondary rules do not end up giving people what they had hoped for, viz. mitigation of uncertainty, stasis, and inefficiency. But for better or for worse they do give them law.

(ii) Law is only the first step. Hart appears to say that the emergence of the secondary rules is both (a) necessary to acquire a legal

system and (b) sufficient to meet certain demands of the ideal of the rule of law. But perhaps that is not what he is *trying* to say. Perhaps he is only trying to say that the emergence of the secondary rules in question is (a) necessary to acquire a legal system and (b') *necessary* to meet certain demands of the ideal of the rule of law. That would be an untroubling conjunction for Hart to embrace. On any plausible view, including Hart's, one can live under the rule of law only by having law. The first step is to acquire a legal system. The second is to make the legal system one has acquired conform to the ideal of the rule of law. Possibly Hart intended to leave open whether the inhabitants of his fable actually managed to get the rule of law advantages that they sought (greater certainty, less stasis, more efficiency). The point was merely that these were the advantages they sought, the ones they were after. When asked 'Why have a legal system?' they answer: 'In order to get the rule of law.' When asked: 'Did you get it?' they might well reply: 'We're still working on it. We have the secondary rules; we have a legal system. Now we need to work away at the secondary rules, hone them in certain ways, so as to secure the advertised advantages of legality.' If this is the true moral of Hart's fable then he is in no danger of violating the other precepts of his project. He has no need to deny (and indeed freely asserts[39]) that there is value in living under the rule of law. At most, to keep faith with the other precepts of his project, he has to deny that one gets that value automatically by having a legal system. This move grants him that denial.[40]

(iii) Sometimes, not always, valuable. Hart could also say this. He could point out that anything at all can be valuable in the right circumstances. Betraying one's comrades can sometimes put an

[39] Consider especially his 'Legal Responsibility and Excuses' (first published in the same year as *CL*) in *Punishment and Responsibility* (Oxford 1968), 43-50.
[40] He makes the denial later, at *CL*, 207: for the rule of law to prevail, legal systems and legal rules must 'satisfy certain [obviously, additional] conditions'.

end to one's torture. Murdering a witness can sometimes keep one safely out of gaol. Aquiring a legal system, likewise, can occasionally get a population out of deep water. Admitting this doesn't make Hart an enthusiast for law any more than admitting the occasional advantages of betrayal or murder would make him an enthusiast for betrayal or murder. When people 'seek to justify or commend [law] on moral or other grounds' they are usually looking for something less circumstantial than this. They are looking for a relatively general case for having law. This, Hart could say, is not what he is providing in chapter V. He is merely providing some reasons for having law in the narrow set of decidedly unfortunate, and imaginary, social circumstances that are specified in his fable – those in which (alas!) law becomes necessary because of (regrettable) changes in, say, population and social complexity. That is consistent with his saying that in many or even most other circumstances law is nothing but a curse or a burden or an evil. It is also consistent with his refusing to say anything general about the value of law.

(iv) Some legality, but not much. It is also open to Hart, perhaps most simply, to say that the mere fact of having a legal system gives one a little taste of the ideal of legality, or as he himself puts it a 'germ, at least, of justice',[41] but with a long way still to go before one fully, or even substantially, lives up to the ideal. The ideal of the rule of law demands, for example, that adjudicative bodies make their particular rulings on the basis of general rules. Not all rules are general to the extent, or in the respects, that make them conform adequately to this demand. Some people think, for example, that in order to conform adequately to this demand, the rule cannot pick on one person ('Jones must eat three meals a day'). It must apply more generally, meaning to an

[41] *CL*, 206.

indefinite class of persons.[42] Nevertheless all rules including this one have a certain generality – this one applies to all days and all meals – in the absence of which they are not rules at all. All legal systems include rules, so all exhibit a certain measure of fidelity to the demand for generality. The point is merely that this can leave them falling a long way short of complying with the ideal of the rule of law, and in particular (Hart could reasonably argue) a long way shorter than Fuller or Dworkin would allow.

3. Is Hart a 'legal positivist'?

All of these ways out of his chapter V woes are open to Hart, and it is by no means clear which he takes and when. It is undeniable, however, that some of his remarks point to his favouring route (iv). Consider, for example, this remark in chapter IX, in which the fable from chapter V is recalled:

> [T]he step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that simpler regime of primary rules could not.[43]

This shows that route (iv) is not an answer to all of Hart's woes. It certainly allows him to resist the idea that law is justified or commendable. It may be unjustified or damnable because its 'solid gains' are eclipsed, in some circumstances, by the oppression that it enables. But this still leaves Hart in trouble with respect to his remark, quoted above, that 'it is in no sense a

[42] See e.g F. A. Hayek, *The Road to Serfdom* (London 1944), 62.
[43] *CL*, 202.

necessary truth that laws reproduce or satisfy certain demands of morality.'[44] If law necessarily comports to some modest extent with the demands of the rule of law, and if the demands of the rule of law are demands of justice (and Hart, as we saw, agrees that they are), then law is necessarily to some modest extent just. It is then going much too far to say that it is *in no sense* a necessary truth that laws satisfy certain demands of morality. In some sense they do. In the sense in which demands of justice are moral demands, and in the sense in which minimal satisfaction is a kind of satisfaction, legal systems necessarily satisfy certain demands of morality. They are minimally moral. How is Hart to get away from that?

The answer may be that he doesn't want to. I presented the claim that 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality' as Hart's own claim. But on closer inspection it is offered by Hart, not as his own thesis, but as his working definition of the distinctive thesis of 'Legal Positivism'.[45] That he himself endorses the thesis is a conclusion drawn from his generally sympathetic mentions of legal positivism, which lead one to think that he regards it as his own creed. But maybe he does not, or not without reservation. Maybe his sympathy for it has its limits.

As Hart points out, the distinctive thesis of legal positivism has often been formulated a lot less cautiously, as the claim that there is 'there is no necessary connection between law and morals or [between] law as it is and law as it ought to be.'[46] Even in his earlier debate with Fuller, in which is sometimes thought

[44] *CL*, 185-6, quoted above in text at note 29.

[45] 'Here we shall take Legal Positivism to mean the simple contention that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.' *CL*, 185-6.

[46] *CL* 302 n, reproducing Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (1958), 593 at 601 n 25.

to have stood by this thesis, Hart rejected it.[47] In *The Concept of Law* Hart rejects it many times over. By now he has come to see how many possible necessary connections between law and morality there might be, and how few are worth denying.[48] One might well think, for example, that law necessarily calls for moral scrutiny. Or that law necessarily uses moral concepts. Or that law necessarily confronts moral problems. By the time of *The Concept of Law* Hart has come to think that 'Legal Positivism' is a broader church that does not exclude those who think these modest thoughts. It does not even exclude those philosophical anarchists who think that law is necessarily *immoral*. It only excludes those who think that there is some sense in which laws necessarily 'reproduce or satisfy certain demands of morality.'

Does it thereby exclude Hart himself? On the very same page on which Hart gives this more cautious characterisation of the legal positivist thesis, he nevertheless agrees that it 'may in some sense be true' that 'a legal system *must* exhibit some specific conformity with morality or justice.'[49] Surely he is knowingly distancing himself, with these words, from what he regards as the creed of the 'Legal Positivists'. In the process he signs up to a yet more cautious thesis, namely a thesis about *legal validity*. '[I]t does not follow,' he continues, 'that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.'[50] This thesis allows that there may be some necessary moral value in laws or legal systems. It only rules out one possible explanation of that value. One possible explanation for the value of law, such as it is, is that nothing qualifies as a law in any legal system – nothing is legally

[47] 'Positivism and the Separation of Law and Morals', above note 46, 624.
[48] Indeed at *CL*, 207, Hart observes that 'few legal theorists classed as positivists would have been concerned to deny the forms of connection between law and morals discussed under the last five headings'.
[49] *CL*, 185 (emphasis in original).
[50] *CL*, 185.

valid – except by virtue of some value that it exhibits. This explanation is what Hart sets himself against. To state his thesis very crudely: perhaps some things are valuable because they are law, but it does not follow (as a general truth about law)[51] that they are law because, even partly because, they are valuable.

I have elsewhere suggested, following Joseph Raz, that we should think of this thesis, and this thesis alone, as the distinctive thesis of legal positivism, thereby rehabilitating Hart as a torchbearer of that tradition.[52] But this was not the role, I think, that Hart envisaged for himself. From the start he saw himself as a sympathetic critic of the tradition, defending elements of truth in its thesis while resisting some associated excesses. That is perhaps one reason why he did not go to great lengths, or indeed to any lengths at all, to craft his chapter V fable in such a way as to avoid the implication that acquiring a legal system is acquiring something valuable. He could have helped himself to options (i), (ii) or (iii) on our list of escape routes. They would have taken him to total safety. What he said was largely consistent, however, with route (iv). That was not because he was trying to defend the thesis in (iv), which endows law with a minimal but necessary moral value. As he later said, he had no 'justificatory aims'; he did not 'seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law'.[53] Nevertheless he sought to make space for the view that

[51] These parenthetical words are needed because Hart was what has since come to be known as an 'inclusive' or 'soft' legal positivist who thought that a particular legal system might have evaluative criteria for legal validity set by the system itself. He merely resisted the view that all legal systems by their nature have such evaluative criteria. See *CL*, 204, and, for more explicit later confirmation of his view, *CL*, 250 (in the Postscript).

[52] See my 'Legal Positivism: 5½ Myths', above note 26. I was mainly clarifying some implications of the 'sources thesis' advanced by Joseph Raz in his 'Legal Positivism and the Sources of Law' in Raz, *The Authority of Law* (Oxford 1979), 37.

[53] *CL*, 240, quoted above in text at note 23.

law by its nature has some 'moral or other' value. In doing so he was mainly trying to show that taking this view is compatible with holding that there are (or at any rate need be)[54] no moral (or otherwise evaluative) criteria of legal validity.

4. Hart v Fuller, Hart v Dworkin

Where does this leave Hart in his long debates with Fuller and Dworkin? Is it in either case a phony war?

Hart and Fuller certainly confused each other a great deal in their famous debates, and often spoke at cross-purposes. Some of the differences between them concerning the nature of law are routinely exaggerated, including by them.[55] Nevertheless there are differences. To Hart's way of thinking, Fuller overeggs the value of law, and in two ways: first, by overstating the extent to which law necessarily lives up to the ideal of the rule of law; and secondly, by being overoptimistic about the extent to which other kinds of moral upstandingness must go hand-in-hand with living up to the ideal of the rule of law. Yet Hart does not attack, and sometimes seems to support, Fuller's thesis that law by its nature exhibits some value in the rule-of-law dimensions of certainty, generality, and so on. Doesn't that put them on the same side so far as the *big* issue that was supposed to divide them is concerned? Doesn't it put them on the same side in the debate about the truth of 'Legal Positivism', with capital letters?

Not quite. When I introduced Fuller's position a few pages ago I characterized him as saying that 'necessarily, a legal system substantially lives up to the ideal of the rule of law - or, putting it the other way round, that something that does not substantially

[54] Again the parenthetical qualification is needed to accommodate Hart's leaning towards 'soft positivism': see previous note.

[55] See my discussion in 'The Supposed Formality of the Rule of Law' in *Law as a Leap of Faith*, above note 32.

live up to the ideal of the rule of law is not a legal system.' We can now see that it really matters which way round one puts Fuller's position. The *umgekehrt* reformulation carries an undertone or subtext that the other does not, namely that what qualifies as law so qualifies partly *because* of its value. It is possible to hold this view without going on to embrace the view that there are always moral (or otherwise evaluative) criteria of legal validity, and hence without coming into conflict with what Hart says in chapter V. Imaginably, there are moral criteria for something to qualify as a legal system, even though legal systems need not set moral criteria for identifying the legal norms that belong to them. It is not clear whether Fuller embraced this two-level thesis. In fact, it is not clear which of several possible theses Fuller embraced in this neighbourhood. All we can say is that, inasmuch as Fuller thought that there are evaluative criteria for legal validity supplied by his 'internal morality of law', that drives a major wedge between him and Hart. Hart can accommodate the idea that what is legally valid is, for that reason, valuable in some respect. But he cannot accommodate the converse idea that what is valuable in that respect is for that reason—even if only partly for that reason—legally valid. Or at any rate, he cannot accommodate the idea, which he attributes rightly or wrongly to Fuller, that this is a necessary truth about legal validity.

Hart's disagreements with Dworkin range more widely. Some are more radical. At his most radical, Dworkin denies the intelligibility of the Hart-Fuller debate. He does not think it *makes sense* to ask whether some system qualifies as a legal system, or some norm qualifies as a norm of that system, even though it fails to exhibit the value of legality. He writes:

> [I]t would be nonsense to suppose that though the law, properly understood, grants [P] a right to recovery, the value of legality argues against it. Or that though the law, properly understood, denies [P] a

right to recovery, legality would nevertheless be served by making [D] pay.[56]

This passage explains why Dworkin cannot but read Hart's 'general account of law' as an interpretation of the ideal of the rule of law. There is no conceptual space for anything else. It is not merely, as Hart might be willing to grant to Fuller, that law is necessarily a bringer of minimal clarity, openness, generality, etc. and in that respect valuable. Nor is it merely, as Fuller might argue, that what is law is law only because it brings such value. It is that there is nothing but such value to discuss. The idea of law is simply the idea of whatever exhibits the value of legality. Being legal in the sense of being legally valid just is being legal in the sense of living up to the ideal of the rule of law. So the only work for a philosopher of law is the interpretation of that ideal.

Nothing in Hart's fable, or indeed in *The Concept of Law* more generally, even in its posthumous Postscript, suggests any kind of *rapprochement* with this radical claim about law, or the reductive view of legal philosophy that underlies it. Hart rightly resists it at every turn. He insists that, even though law may have value, the question of law's value remains an open one so far as his 'general account of law' is concerned. What he means, I think, is that one may understand what counts as law and identify instances of it without necessarily invoking or presupposing law's value. One may be an anarchist who thinks that law has no redeeming value, and yet agree with Hart's explanation of what law is. Hart's chapter V fable, even read so as to allow for what I called a 'route (iv)' escape from its woes, does not militate against this possibility. At most it goes to show that neither Hart nor the inhabitants of his 'primitive community' are anarchists.

That comes as no surprise. Hart was openly not an anarchist. He was openly a believer in the ideal of the rule of law, which he

[56] Dworkin, 'Hart's Postscript', above note 36, at 25.

defended with vigour elsewhere.[57] The inhabitants of his 'primitive community' think, in this respect, much as he does. That is why they opt for, or maybe we should say drift into, having law. And Hart makes that perfectly clear. It does not follow, of course, that regarding what they drift into as law, or endorsing Hart's explanation of what makes it law (roughly: 'the union of primary and secondary rules'), commits one to sharing Hart's or any other positive judgment on its value.

5. The fable in its place

As I said, the fable that occupies Hart at the climactic end of chapter V is not the whole of the chapter. Before it there comes Hart's discussion of the nature of obligation. In spite of its pace, and its feast of ideas, this discussion is unsatisfactory. The ideas do not work out. Hart is in a muddle.[58] Very little of his analysis of obligation (beyond the agreement that an analysis of obligation is needed) has survived into the thinking of Hart's successors. More generally, in *The Concept of Law*, Hart did not get very far in his attempts to understand what makes norms into norms, or rules into rules. His idea that such things have an 'internal aspect' gestures towards important truths but constantly pulls him and his readers in various competing directions. Hart's thinking on this point is fertile, but mainly because of the various ways in which it primed later writers to react against it and move off in their own directions. Hart's revolutionary positive contributions to our understanding of the nature of law lie mainly on two other fronts: first, in his grasp of how various kinds of norms (duty-imposing and power-conferring, primary and secondary, general and particular) interact to constitute legal systems;

[57] Especially in *Punishment and Responsibility*, above note 39.

[58] And he knows it: see the notebook entry quoted by Nicola Lacey in *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford 2004), 228.

second, in his realisation that a legal system is (in a sense) a creature of custom. Although these thoughts gradually take shape through the earlier chapters of *The Concept of Law*, it is in the famous chapter V fable that they are explosively combined for the first time to reveal what Hart plausibly parades as 'the heart of a legal system'. Tony Honoré, who was Hart's collaborator on other work in the years when *The Concept of Law* was being written, reports[59] that Hart was in a state of some commotion when he came up with the idea of law as a 'union of primary and secondary rules'. 'I've got it!', he exclaimed to Honoré on return from the absence during which chapter V was drafted. Hart's excitement, as I said, comes across in the chapter itself. The last few pages, in particular, contain such highly reactive elements that much of the remainder of the book has to be devoted to post-explosion rebuilding work, often from the ground up. Not only that, but much of the philosophy of law in the 50 years since has been devoted to dealing with the fallout. Nothing in the way law is theorised has been the same afterwards. It is an authentic 'Eureka!' moment in the history of ideas.

[59] In conversation.